6-1-2004

Forward unto the Digital Breach: Exploring the Legal Status of Tomorrow's High-Tech Warriors

Adam Sherman

Recommended Citation
Available at: http://chicagounbound.uchicago.edu/cjil/vol5/iss1/23

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in Chicago Journal of International Law by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
Forward unto the Digital Breach: Exploring the Legal Status of Tomorrow’s High-Tech Warriors

Adam Sherman

In an air-conditioned compound far removed from the front line, a group of people clothed comfortably in khakis and polo shirts sit intently in front of a large array of computer screens. Half of them sit in consoles that resemble mini-cockpits, with real-time video feeds enabling them to navigate through the skies. Hundreds of miles away, a formation of unmanned aircraft fly into position over an enemy convoy, launching multiple air-to-surface missiles and obliterating the target. None of the people in the room are enlisted personnel for either combatant. Rather, they work for the company that designed the system that allows planes to operate under remote control with great precision. Shortly after the successful attack, the enemy sends a commando unit to raid the compound. The unarmed employees put up no resistance, and all are kidnapped and taken behind enemy lines or to a location under the enemy’s territorial control. Pursuant to the Geneva Convention, the enemy state affords the employees the full protection of the Convention. The enemy state, however, notifies the employees’ government that it does not believe the employees are entitled to POW status and orders a tribunal to resolve the issue.

Such a scenario highlights two seemingly irreversible trends in military affairs, the increasing automation of warfare and greater reliance on civilian contractors to perform essential military functions. The progress of these trends threatens to expose a gray area in international law. Civilian contractors are generally given the same protections as members of the armed forces of the 

---

1 Geneva Convention Relative to the Treatment of Prisoners of War (1949), art 5, 6 UST 3316 (1956) (hereinafter GPW) (providing that “[s]hould any doubt arise as to whether persons . . . belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal”).

2 Id.

3 This scenario draws heavily on the use of unmanned Predator aircraft by the US military in Afghanistan. See, for example, Craig Gordon, Report: Pilotless Aircraft Flawed; Military Leaders Disagree, Call It the Next Generation in Surveillance, Newsday A27 (Nov 1, 2001).
nation they serve. In clarifying the protections offered to such persons, however, the text of the Geneva Conventions suggests that its drafters contemplated civilians operating only in a support capacity: construction, transportation, and other back-area functions designed to facilitate the jobs of soldiers in the field. A 1977 Protocol to the Convention specifically denies POW status to mercenaries—civilians who, among other things, engage in combat for private gain.

While the high-tech warriors of the future will probably not qualify as mercenaries in a technical sense, they may operate outside the support role that civilians integrated into armed forces have recently held and on which international law has based their current legal rights. This Development seeks to clarify the extent of current international law’s uncertainty with respect to a possible future of warfare with civilians engaging in “trigger-pulling” activities. This Development proposes that, for international conflicts at the very least, states should either confine “trigger-pulling” activities to enlisted personnel or integrate such persons to the highest degree possible.

I. THE RUSH TO PRIVATIZE

“While the US army has shrunk by a third since the end of the Cold War, the private military industry has grown rapidly.” During the Gulf War, the ratio of private contractors to soldiers was one to fifty; in Iraq, the ratio is one to ten. The bulk of private contractor activity to this point has been logistical or support tasks, but increasingly the US military has turned to civilians to perform tasks that blur the line between contractor and soldier, such as operating drone aircraft and maintaining tactical systems. After the laser-guided missile entertainment show of the first Gulf War, the US took another technological step forward with the use of unmanned Global Hawk surveillance aircraft in Afghanistan. A companion model aircraft, the Predator, was also deployed, equipped with Hellfire air-to-surface missiles. Despite some technical difficulties with the Predator, military officials have expressed the view that such equipment represents the future of warfare.

4 GPW art 4(A)(4) (cited in note 1).
5 Id.
7 Ian Mather, War Inc on the March to Relieve US Troops, Scotland on Sunday 22 (July 20, 2003).
8 Id.
Technologically sophisticated warfare could potentially erode distinctions between different types of private military firms. A common typology used to differentiate these entities is "the Tip of the Spear."11 Firms implementing military solutions (for example, engaging in combat) rest at the tip, "consulting" firms offering strategy and training in the middle, and support firms offering non-lethal aid and assistance at the base.12 The line between developing or maintaining a remote weapons system, training enlisted personnel to operate such a system, and having civilian technicians simply operate them for the military is a fine one, which risks being muddled as armies increasingly adopt "off-the-shelf technology" from private firms.13

The willingness of the US to employ civilian firms in ways resembling more traditional "mercenaries" also suggests that high-tech warriors might find themselves on the virtual frontline sooner rather than later. In Colombia, the US has employed civilian contractors to fight its war on drugs. It hired DynCorp, a US firm, to operate drug eradication flights over territory controlled by the Revolutionary Armed Forces of Colombia (also known as FARC) guerrillas. It also engaged in a search and rescue operation when a Colombian police helicopter was shot down, for which it employed armed men.14 The US also hired a private security firm to guard Afghan President Hamid Karzai after the contingent of US Special Forces previously assigned to his bodyguard was withdrawn.15 Waging a remote-controlled war may be a particularly attractive option when putting troops on the ground is politically unpopular or costly or when overextension has made sending troops impractical.

II. Civilian Contractors under the Geneva Convention

The Geneva Convention offers explicit protection to "[p]ersons who accompany the armed forces without actually being members thereof."16 This group includes "civilian members of military aircraft crews, war correspondents, supply contractors, [and] members of labour units or of services responsible for

---

12 Id.
15 Mather, War Inc on the March, Scotland on Sunday at 22 (cited in note 7).
16 GPW art 4(A)(4) (cited in note 1).
the welfare of the armed forces.” Although not an exhaustive list, as indicated by the first quoted section, the text of the Convention emphasizes civilians operating in a support capacity, fulfilling non-lethal functions. Indeed, at least one author has suggested that civilian contractors who engage enemy forces may lose their protected status upon capture. If such civilians are not entitled to protected status, they may be subject to criminal prosecution by the capturing state.

For civilians engaging in trigger-pulling activities, the 1977 Protocol to the Geneva Conventions sets out the criteria for who is a mercenary and specifically denies such persons the right to prisoner-of-war status:

A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

The high-tech warriors of the future might not satisfy the technical definition of mercenaries under the 1977 Protocol for a number of reasons. The requirement that mercenaries not be members of a state that is a party to a conflict would likely exclude civilians employed by the US army from being classified as mercenaries (assuming that the US would shy away from using a foreign firm). A number of private military firms, however, operate in countries other than the US: Israel, South Africa, and the UK all boast highly capable companies in the field. In the mid 1990s, Croatia modernized its army with the help of Military Professional Resources Incorporated, an Alexandria, Virginia-

---

17 Id.
19 Id.
21 Id.
22 See generally Singer, *Corporate Warriors* at ch 1 (cited in note 11).
based firm that employs a number of former high-ranking military officials.\textsuperscript{23} While such firms specialize more in military strategy, training, and implementation, it is not unforeseeable that companies that specialize in high-tech warfare may come to offer their services for hire.

A more important reason why high-tech warriors may not technically qualify as mercenaries is the degree to which they are incorporated as members of the armed forces of a combatant nation. Although at least one author has asserted that all government contractor employees hold military status in the field, the level of supervision and protection of contractors in the field suggests that while this assertion may be correct at a superficial level, in practice supervision has not been uniform.\textsuperscript{24} Given that supervision becomes easier in a virtual frontline, in contrast to the chaos prevalent in actual frontlines, the US could require high-tech warriors to work in government facilities, or have them operate their own facilities adjacent to or on military bases. In either case, increasing the proximity of civilians to their military employers and facilitating increased supervision by military authorities would create a high degree of incorporation. Tightly integrating civilians who engage in virtual combat would move them farther away from the 1977 Protocol’s definition of “mercenary” and perhaps reduce the likelihood that they would find themselves in legal limbo upon capture.

\section*{III. FINDING A PLACE FOR THE NINTENDO WARRIORS}

Under current law, it seems that so long as states integrate civilian contractors into their armed forces, they should be entitled to Prisoner of War status. The drafters of the 1977 Protocol apparently contemplated the issue of civilians taking up arms,\textsuperscript{25} but blanket protection for civilians hired to engage in trigger-pulling activity does not appear in the text of the Protocol itself. To ensure the safety of such civilians, the degree of integration into the armed forces should mirror the proximity to the “tip of the spear.” To avoid any confusion, civilians at all levels should be given proper identification and protection. At least as far as the US military is concerned, provision of basic identification and training to civilians being deployed in the field has been fairly

\textsuperscript{23} Id at 5.


\textsuperscript{25} International Committee of the Red Cross, \textit{Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949} at 515 (Martinus Nijhoff 1987) (Yves Sandoz, Christophe Swinarski, and Bruno Zimmerman, eds) (suggesting that any civilian incorporated into an armed organization is a combatant while hostilities are ongoing).
If the wars of the future will be fought in significant part by high-tech civilian warriors, and countries other than the US begin to employ such persons, international compliance with certain minimum levels of protection and identification will become an issue. Civilians require the highest level of integration—perhaps via temporary conscription regulated by contract between the company, its employees, and the state waging war.

History provides an example of full integration. During World War II, the US Navy hired numerous civilian construction companies to complete military projects throughout the Pacific. After the capture of many such persons, the US Navy created the “Fighting Seabees”—Construction Battalions which were fully integrated into the Navy. Although the legal rationale behind such explicit assimilation has been questioned, a form of this solution may be desirable in the event that high-tech warriors become notorious and are singled out as targets by warring nations. Full assimilation, however, runs against the need for flexibility evidenced by the trend toward privatization. Military forces may thus be reluctant to integrate such civilians beyond a temporary basis, even if a lengthy conflict, fought in large part by remote-control, might make such a move practical.

US Army regulations already require use of uniforms by citizen employees when the commanding general in the field determines that it is necessary for their safety. For trigger-pulling civilians, commanders in the field should make generous use of such provisions.

Addressing the current legal status of high-tech warriors will also serve to clarify what a government’s responsibilities to civilian contractors in the field are from the standpoint of supervision and protection. Voluntary refusal to employ high-tech mercenaries for trigger-pulling activities may be another easy option for militaries concerned about the legal status or their ability to protect civilians in zones of conflict. Given that private military firms already bear the burden of training the military to use new technologies, such a solution would actually represent a continuation of current practice and a small halt in the trend toward privatization.

The likelihood that high-tech warriors will be employed in conflicts other than state-against-state warfare makes some of the discussion about their status moot. In an unequal fight, a non-state entity (such as the FARC or remnants of

---

27 Id at 29–31.
28 Id.
the Taliban, to cite recent examples) may not have an incentive to treat enemy soldiers, let alone civilian combatants, humanely. The failure of the US to accord the full protections of the Geneva Conventions to persons captured in Afghanistan and other terrorist suspects, under the view that such persons do not meet the definition of soldiers, could make US-employed civilian trigger-pullers equally susceptible to a re-crafting of their status to deny them adequate treatment. More complete incorporation into the armed forces, then, may not ensure adequate treatment for civilian combatants in the hands of non-state entities. But given the inevitability of state-against-state warfare, the US and other nations employing private contractors would do well to clarify the protected status of private contractors in the near future.