In September 2007, employees of a US-based private military and security company named Blackwater Security Consulting were working their way through the crowded Nisour square in downtown Baghdad, clearing the way for a US State Department diplomatic convoy. What happened next is still in dispute. The guards hired by Blackwater say they came under attack and fired back at their attackers in self-defence. Witnesses in the market that day said the Blackwater employees opened fire without provocation and continued to shoot at civilians trying to flee. A few things about the incident are certain, however. When the firing ended, a total of 17 civilians lay dead, and at least 20 more were injured. The Iraqi public was outraged and a major diplomatic rift had been created between the US and the fledgling Iraqi government.

The episode also marked a turning point in the debate over the increased use of private military and security companies (PMSCs) in the prosecution of war. Taken along with the implication of private contractors in the scandal at Abu Ghraib prison in Iraq in 2004 — in which prisoners were subject to various forms of abuse and torture — the Blackwater episode heightened debate about whether basic functions of war should be outsourced to private enterprise. Subsequent legal obstacles to prosecution and obtaining redress for victims further raised the question of whether the rise of PMSCs was creating a growing class of military personnel who were effectively operating outside the standard rules of war. Even many experts didn’t have answers to some fundamental questions: What is the status of private contractors under international humanitarian law (IHL)? Are they combatants, civilians, mercenaries or something entirely new? And what rules are they bound by?

Not above the law

In 2008, a total of 17 states signed a statement that, in essence, answered the above question with a firm “no” — private contractors are not above the law and do not operate in a legal vacuum. Now signed by 42 states and the European Union, the statement (known as the Mon-
The Montreux Document reaffirms that international humanitarian law (IHL) and human rights law do apply to private contractors. States, meanwhile, are obliged to ensure that contractors comply with these laws.

While not trying to legitimate the PMSC industry, or take a position on whether the use of private contractors is good or bad, the Montreux Document takes on questions such as the status of PMSC personnel under the 1949 Geneva Conventions and the ways to ensure individual accountability for misconduct in different jurisdictions. A joint project of the Swiss Federal Department of Foreign Affairs and the ICRC, the Montreux Document encourages states to develop regulations aimed at preventing and prosecuting abuses. It also offers a catalogue of good practices to help governments implement these obligations in the field. The problem is that the regulation is not keeping up with the industry. Many states still do not have sufficient domestic laws, regulations or practices in place to oversee the rapidly changing industry, which has experienced explosive growth in recent decades and is now estimated to be worth more than US$ 100 billion.

**Explosive growth**

How quickly has it grown? After the US invasion and subsequent occupation of Iraq in 2003, it is estimated that more than 100,000 private contractors were employed in functions ranging from guarding convoys to logistics support, intelligence analysis, checkpoint duty, among many other duties. This was a tenfold increase over the previous Iraq war. Meanwhile, in Afghanistan, the number peaked at around 20,000.

Why this growth? In the years leading up to the attacks on New York and Washington DC in September 2001, the US military had been going through a period of downsizing. With two major ground wars launched in Afghanistan and Iraq, US military leaders felt they had to augment their forces. At the time, there was also a trend favouring the privatization of government services, from prisons to hospitals and schools. The trend goes well beyond the US military. “Most people think of PMSCs and they think of Iraq and Afghanistan,” notes Faiza Patel, chair-rapporteur of the United Nations Working Group on the Use of Mercenaries. “But in fact they are used in many spheres. They are used for example to provide security for extractive industries or as part of drug eradication efforts in Latin America.”

Indeed, the vast majority of the work being done by this sector occurs in situations that are not considered areas of armed conflict and are outside the scope of IHL. They are nonetheless often operating in volatile areas with violent crime or civil strife where kidnappings, assassinations and other attacks are a daily risk of doing business. Given the complexities, how should this massive new industry be regulated? In situations of armed conflict, who will ensure that they respect the norms of IHL and who will prosecute contractors if they violate those laws?

The cases of abuse at Abu Ghraib offer an example of the challenges being faced. While there have been numerous prosecutions of low-level military personnel on a variety of charges related to the abuse of detainees, none of the private contractors connected to the Abu Ghraib abuses have been brought to court on criminal charges. In some cases, contractors were also granted immunity from prosecution under Iraqi law. Subsequent civil lawsuits by former detainees under US law, meanwhile, have been blocked or delayed by arguments that the contractors should either enjoy the same immunity from lawsuit as soldiers during combat or that they should be given a “battlefield exemption.” This exemption would allow civil cases to be dismissed on the basis that courts should not second-guess decisions made in detention facilities during the heat of battle.

“Cases of abuse at Abu Ghraib have been going on for many years without even getting to the point of looking at the merits of the case,” notes Katherine Gallagher, a senior lawyer for the Center for Constitutional Rights, based in New York, which has filed lawsuits against two military contractors on behalf of 330 Iraqi detainees held at Abu Ghraib in 2004.

**The challenge of regulation**

Whatever the outcome of cases such as these, the focus of many working in the field today is to prevent future abuses and provide clarity about the rights and duties of private contractors, who are considered as civilians and protected from attack under IHL unless they directly participate in hostilities. (It is worth noting, however, that these protections, and what constitutes “participation in hostilities,” are difficult to broadly define as they depend on the context and the circumstances.) A clear understanding about their status and obligations is critical as contractors often work in extremely volatile situations. In Iraq, numerous PMSC personnel (including from Blackwater) were killed while performing a wide range of duties (both security and non-security related) for the United States government. At the same time, the status of contractors as civilians means they would not have to be treated as prisoners of war if captured and would not have the same immunity from criminal prosecution in civilian courts for acts committed as part of combat operations. Attempts by states to grant immunity from domestic law to private contractors during specific conflicts (as was often the case during the 2003 Iraq war), while at the same time blocking civil or criminal cases on grounds that contractors are effectively acting as soldiers, highlight the need for greater clarity.

The Montreux Document offers guidance to help states sort out complex legal issues. But it is now up to states that have signed the document to follow up, says Marie-Louise Tougas, a legal adviser for the ICRC who specializes on how IHL interacts with private military and security companies. “The challenge now is for states to implement their obligations under IHL in this regard,” says Tougas. “What
we are doing is assisting states in developing the tools to implement the obligations described in the Montreux Document - enacting national legislation, establishing the oversight mechanisms and creating licensing controls.”

**Voluntary enforcement**

But legislative reform takes time and each country will likely take its own approach. For these reasons, some key efforts at reform are happening outside the legal system. A case in point is a recently created International Code of Conduct (ICoC), which is being championed by the Swiss government and many in the industry, that would establish a system by which companies voluntarily agree to be regulated by a multi-sector panel of experts. Governments, meanwhile, are encouraged to consider the company’s standing vis-à-vis this code when they award security contracts. The United Kingdom, which is home to many of the world’s largest private security firms, has already agreed to award contracts only to companies in compliance with the code.

As of August 2012, a total of 464 companies in 60 states had signed up to the ICoC, which was developed by members of industry associations, security experts, legal scholars, governments and corporate leaders. Advocates of the code argue that this type of requirement, which could affect a company’s survival, offers sufficient incentive for companies to maintain high standards in training, carefully vet employees and adhere to principles of IHL and human rights law. The code itself is rooted in IHL and human rights law, says Anne-Marie Buzato of the Geneva Centre for the Democratic Control of Armed Forces, which is spearheading the effort. “The use of force, for example, should not exceed beyond what is strictly necessary — it should be proportionate,” Buzato told a recent gathering of experts at the International Institute of Humanitarian Law in San Remo, Italy. “Contractors should not use firearms against persons unless in self-defence or in defence of others against imminent threat of death or to prevent a serious crime involving grave threat to life.” Some experts in the field are skeptical of what they see as industry “self-regulation” over critical life-and-death matters and they note that some key aspects regarding the code’s enforcement are still unresolved. But Buzato argues the model is more one of ‘co-regulation’ given that experts from government and civil society would be members of panels conducting audits and reviewing compliance with the code.

**A call for a new convention**

For some, the code is at least a positive step while binding laws or agreements are developed. But for others, neither the ICoC nor domestic regulation would be enough to control companies operating in multiple jurisdictions — often in places where investigation of allegations would be challenging at best. What is needed, some argue, is a binding international treaty.

At the United Nations, the Working Group on the Use of Mercenaries is developing a draft convention that would require states to regulate the export of security services much more stringently. Among other measures, the convention would limit the range of activities that governments can outsource to private contractors and require signatory states to develop licensing schemes similar to what is in force regarding the export of weapons. “The idea is to not just regulate the export of arms, but also of armed men and women,” the Working Group’s Faiza Patel told the San Remo gathering. Many countries, says Patel, have stringent laws and licensing schemes for domestic security companies, but lax controls for companies working abroad. “To allow PMSCs to operate [without regulation] in volatile environments with sophisticated firepower, with all the risks to human rights and humanitarian law that such operations entail, seems to me an abdication of basic due diligence,” says Patel. At the moment, however, there is not sufficient support among key states, where many PMSCs are based, for a new international treaty to be adopted.

**A moving target**

One of the key challenges facing all these efforts is that the industry itself is a moving target. In the Autumn 2012 issue of the International Review of the Red Cross, an edition dedicated to exploring ways in which business impact conflict, Sarah Percy of Oxford University writes that while the PMSC industry is evolving quickly to meet new market and political demands, the process of developing international regulations is moving much more slowly. As the ‘gold rush’ of the Iraq and Afghanistan wars has settled down, the industry has already adapted to new markets, namely protection of maritime trade against piracy, protection of humanitarian aid delivery and even delivery of aid itself. To Percy, the current approaches toward regulation are still too much geared towards an older model of PMSCs as mercenary, or as companies providing services in an international armed conflict as in Iraq. “As a result, regulators at all levels have often been stuck in lengthy negotiating processes while the target of their regulation is rapidly changing form,” she argues.

“The private security genie is out of the bottle,” she writes. “At the moment, however, states are largely letting the genie do what it wants and then disciplining it for going too far, rather than setting the parameters for action from the beginning.

“A discussion about the appropriate role of private force might be difficult, and it might need to begin domestically, but it is perhaps the best chance of regulating an industry which is always likely to change faster than regulators can respond,” says Percy.

*Courtesy, Red Cross Red Crescent*