

UNDER INTERNATIONAL LAW, WHAT IS THE LEGAL STATUS OF PRIVATE MILITARY CONTRACTORS DURING MILITARY OCCUPATION AND UNDER UNITED NATIONS PEACE KEEPING OPERATIONS?



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A THESIS PRESENTED IN PARTIAL COMPLETION OF THE REQUIREMENTS OF  
The Certificate-of-Training in United Nations Peace Support Operations



Peace Operations Training Institute®

# ***Under International law, what is the legal status of Private Military Contractors during military occupation and under United Nations Peace Keeping Operations?***

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# ***Under International law, what is the legal status of Private Military Contractors during military occupation and under United Nations Peace Keeping Operations?***

## ***Introduction***

Over the past few decades, the phenomenon in growth of Private Military Companies has been on an unprecedented scale. The concerns as to the role and status of these companies, but more importantly the employees whom we classify as Contractors, are at the forefront of the debate. In this essay, I will be firstly identifying these companies, then defining their employees, and how under current International human rights law and humanitarian law, although there are provisions regarding civilians and mercenaries, their status is difficult and unaccounted for on an international level. Thereafter, I will examine the National legislation of the United States of America, the United Kingdom and South Africa to see what leadership they have taken in providing and developing provisions for these deemed-secondary international actors.<sup>1</sup> This essay however, will namely be examined from the perspective of recent atrocities that have occurred, and the extended question of whether any of these acts will be held accounted for and what if any resolution can be found under International law development. Moreover the discussion of Private Military Companies would be discussed in context of Iraq. The debate of the accountability of the role of these Contractors through these Private Military Companies is still new, and hence the floor is open to much academic interest. Below are the areas of discussion:

## ***What are Private Military Companies?***

The definition of Private Military Companies (PMC) can be defined as business providers of professional services that are intricately linked to warfare.<sup>2</sup> In essence PMCs provide a range of services and activities<sup>3</sup> which range from operational advice, to training, to logistical support, to intelligence to gathering and supply of personnel.<sup>4</sup> Currently, it is Governments that continue to decide the size and distribution of contracts to PMCs<sup>5</sup> and very often they work closely within government policies.<sup>6</sup>

It must be said from the outset that there are debates on the definitional differences of Private Security Companies (PSC) and Private Military Companies(PMC), however we could contend that Private Military Companies (PMC) are the one of interest and controversy, without definition in international law.<sup>7</sup>

From a historical perspective the development of PMCs can be attributed to three main factors<sup>8</sup>: Firstly, it developed through the end of the Cold War, where the displacement and disbandment of ex-military personnel from Central and Eastern Europe personnel had no other revenue, and saw a

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<sup>1</sup> The Power to Construct International Security: On the significance of the Emergence of Private Military Companies, Millennium Journal of International Studies 33, 3. 2005: pg 806

<sup>2</sup> Singer, Peter. The Private Military Industry and Iraq: What have we learned and where to next? DCAF: Geneva, 2004. p.g1

<sup>3</sup> Walker, C and Whyte, D. Contracting Out War? Private Military Companies, Law and Regulation in the United Kingdom. International and Comparative Law Quarterly. 2005.54(3):651-690; paras 10,11.

<sup>4</sup> *ibid.* p.g 652

<sup>5</sup> Millennium, *op cit.*, pg. 807

<sup>6</sup> Kevin O'Brien, PMCs, Myths and Mercenaries: The Debate on Private Military Companies, Royal United Services Institute for Defence Studies 145, no. 1 2000: 59-64

<sup>7</sup> House of Commons Foreign Affairs Committee, Private Military Companies (2001-2 HC 922) paras 31-3

<sup>8</sup> <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/singer.html>

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gap in the private sector of the field of security, that is market security; Secondly the downsize of smaller national military armies and transformation in the nature of warfare<sup>9</sup>; and Thirdly, the surplus of weaponry in the market. The activities stretch far across the globe, namely to unstable states including Afghanistan, Angola, the Democratic Republic of the Congo and the Republic of Congo, Ethiopia and Eritrea, Iraq, Kashmir, Liberia, Sierra Leone and the former Yugoslav states.<sup>10</sup> The characterization of 'failed states' as identified through a capitalistic definition, argues that there is no longer governmental control, where the national economy is poor, and vulnerable to Western market protectionism, enforced privatization and unstable commodity prices.<sup>11</sup>

There are currently thousands of PMCs registered, and they include Control Risks; DynCorp; Executive Outcomes (disbanded in 1999); Kellogg, Brown & Root; Military Professional Resources, Inc (MPRI); and Vinnel corp, essentially from the United States, United Kingdom and South Africa.<sup>12</sup> It is an industry that gains \$100 billion worth of revenue a year and geographically operates in over 50 different countries.<sup>13</sup>

### ***Who are Private Military Contractors?***

One common characteristic of most Private Military Contractors is that they are 'Ex'-military personnel. The value of being an 'Ex' cannot be underestimated as emphasized in Singers' work. Due to the ambivalent status of these contractors, the image of mercenary is common and is often discredited as 'soldiers of fortune' or 'dogs of war.'<sup>14</sup> The **backgrounds** of Private Military Contractors vary, from what is considered 'clean' back grounds to rather difficult ones -South African apartheid soldier. As there is no standard procedure of recruitment, there leaves genuine grounds for concern regarding their previous work.<sup>15</sup> The historical records of these individuals are often not thoroughly searched, and often the 'standard' or criteria is simply based on the 'Ex' value. Although they are valued for their previous training and recruitment processes however, this may not always be the case. Typically, very often they are lured into the private market, due to more attractive pay and high demand. Having said that, many are also drawn from the most elite military forces, such as from Britain's SAS and U.S Special forces.

### ***The Trend?***

The trend of seeing PMCs operating in and throughout Governmental support is not new. In the context of United Kingdom there has been examples of, for instance, private sector guards employed contractually to provide security alongside the Ministry of Defense Police<sup>16</sup> or privatization of the Royal Ordnance Factories<sup>17</sup> and the Royal Dockyards<sup>18</sup>.

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<sup>9</sup> Singer, Peter. 2004. The Private Military Industry and Iraq: op. cit. p.g 2-

<sup>10</sup> Walker, C and Whyte, D. *ibid.* p.g 653

<sup>11</sup> Abrahamsen, R. *Disciplining Democracy: development discourse and good governance in Africa*. Zed London, 2000

<sup>12</sup> For a thorough list of companies and websites see Appendix A

<sup>13</sup> <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/singer.html>

<sup>14</sup> Mockler, A. *The New Mercenaries* Sidgwick and Jackson London, 1985; House of Commons Foreign Affairs Committee, *Private Military Companies* (2001-2 HC 922) para 12

<sup>15</sup> <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/singer.html>

<sup>16</sup> L.Johnston, 'An unseen Force' (1993) 3 *Policing and Society* 23.

<sup>17</sup> Ministry of Defence: *Sale of Royal Ordnance plc* (1987-8 HC 162)

<sup>18</sup> Ministry of Defence : *Sales of the Royal Dockyards* (1997-8 HC 748)

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It has been argued that the Private Military Companies have penetrated Western warfare so deeply that they are now the second biggest contributor to coalition forces in Iraq after the Pentagon and that the US military would struggle to wage war without it. This is directly related to the downsizing of military forces, and having greater flexibility of having PMCs' performing the tasks.<sup>19</sup> The other argument is that it is cost saving, however there are doubts where it is really the case and there is currently no empirical research to back this argument.

According to the Guardian, there are at least seven unknown British PMCs currently operating on behalf of the occupying coalition forces<sup>20</sup> and it is estimated that over 60 companies employing more than 20,000 private personnel carrying out military functions in Iraq.<sup>21</sup> By September 2004, private military contractors had estimated 150 killed in Iraq, and more than 700 are thought to be wounded, which exceeds the number of the rest of the coalition combined and higher than any single U.S Army division.<sup>22</sup> And for the further co-ordination of these PMCs, *Aegis Defence Services*<sup>23</sup> was appointed the role by Iraqi authorizes in May 2004. Certain levels of tragedy are difficult to access but it was estimated that in the month of September 2004, 20 to 30 private contractors carrying out both armed and unarmed duties have been killed in Iraq<sup>24</sup>, including the four American employees of *Blackwater USA Corporation* killed in Falluja in April 2004.<sup>25</sup> We refer that during the invasion contractors served in important roles including maintaining and loading weapons on sophisticated weapons like the B-2 stealth bomber and the Apache helicopter, and even helped operate combat systems like the Patriot missile batteries in the Army and the Aegis defense system on board numerous U.S Navy ships.<sup>26</sup>

Their role had increasing significance in continuing occupation. *Halliburton's KBR* division, being the largest has currently been provided the mission to deal with logistics under the *LOGCAP* contract, and in 2003, the firm charged the U.S government \$4.3 billion for the work undertaken in Iraq. An estimated cost for 2004 is \$1.7 billion and it is estimated that over the Iraq contracts would be worth as much as \$13 billion.<sup>27</sup> Other roles that *Halliburton* will play include a range of security sector reform and training activities for local forces. The companies range from *Vinnell* and *MPRI* and they provide tactical military roles on the ground. It is estimated 6000 of the private contractors carry out armed roles, and three primary services include, firstly, protection of key installations and facilities, ranging from corporate enclaves and CPA facilities to the 'Green Zone' in Baghdad; Secondly, protection for key leaders and individuals, guarded for instance by a Blackwater team and thirdly, convoy escort, a particularly dangerous task, as roadside ambushes have become the insurgents' primary mode of attack.<sup>28</sup> Like wise there are certain abuses alleged conducted by Private Military Contractors, with the most prominent being human right abuses conducted on Abu Ghraib prisoners<sup>29</sup>.

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<sup>19</sup> <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/schooner.html>

<sup>20</sup> The Guardian, 10 Dec 2003 1.

<sup>21</sup> Singer, Peter. 2004. op. cit. p.g 4

<sup>22</sup> *ibid.* p.g 4

<sup>23</sup> The Daily Telegraph 29 May 2004 2.

<sup>24</sup> Bennis,P. The IPS Iraq Task Force, Paying the Price: the mounting costs of the Iraq War, Institute for Policy Studies Washington, USA. 2004.

<sup>25</sup> Contracting War out? op. cit. p.g 654

<sup>26</sup> Singer, Peter. op cit. p.g 4 &5

<sup>27</sup> *ibid* p.g 5

<sup>28</sup> *ibid.* p.g 8

<sup>29</sup> Independent Panel to Review DoD Detention Operations Final Report. Department of Defense Washington 2004, 69; Investigation of Intelligence Activities at Abu Ghraib, Report, Department of Defense Washintgon 2004, 47. In additional, David Passaro, contracted to the CIA, has been charged with assault in connection with the killing of a detainee at a US Army camp in Afghanistan: Financial Times 18<sup>th</sup> June 2004 9 .

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### ***Under International human rights law***

In fact it is unclear exactly what law applies to the military and security industry.<sup>30</sup> The issues include no clarity about the exact relationship between governments and the private military.<sup>31</sup> Under current international law, there are different arguments favoring and refusing regulation of PMCs. The United Nations General Assembly has repeatedly recorded its opposition to some of the activities of PMCs' namely the use of mercenaries and particularly when they are a threat to security and an obstacle to the enjoyment of human rights by peoples.<sup>32</sup>

Even though the United Nations has in regular use, PMCs by some of its agencies, the UN General Council has signaled its persistent concern by the appointment in 1987 of a Special Rapporteur on the use of mercenaries as a means of impeding the exercise of the rights of peoples to self-determination.<sup>33</sup> Enrico Ballesteros, the UN Special Rapporteur on Mercenaries has argued that 'The participation of mercenaries in armed conflicts....always hampers the enjoyment of the human rights of those on whom their presence is inflicted.'<sup>34</sup> This is particularly reflected in the situation in Africa where the General Assembly has given raise of concern, seeing rapid growth of markets in small arms and rise in the use of all weaponry.<sup>35</sup>

Apart from the impact of international human rights law on PMCs themselves, human rights law imposes obligations on states to control PMCs, and under international law, it is the responsibility of States to bring under control conflict and terrorism, whether State-directed or not.<sup>36</sup> Moreover the International Courts of Justice has clearly stated that a State will breach the international law principle of non-intervention against another nation 'by organizing or encouraging the organization of irregular forces...for incursion into the territory of another State'.<sup>37</sup>

State responsibility for PMC actions depends on the nuances within the level of State Responsibility, ranging from direct sponsorship to a negative duty not to support, or even a positive duty to investigate, prosecute and punish, as defined by the relevant instrument.<sup>38</sup>

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<sup>30</sup> Schreier, F and Caparini, M. *Privatizing Security: Law, Practice and Governance of Private Military and Security Companies*, 2005. Occasional paper, no 6.DCAP, Geneva. p.g56

<sup>31</sup> *ibid.* p.g 56

<sup>32</sup> A/RES/56/232 of 26 Feb. 2002.

<sup>33</sup> <http://www.unhchr.ch/html/menu2/7/b/mmer.htm>

<sup>34</sup> Report of the Special Rapporteur on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (E/CN.4/1999/11, Jan 1999, UNHCHR, Geneva, 1999) para 101.

<sup>35</sup> K. O'Brien. *Military –advisory groups and African Security*. 5 *International Peacekeeping* 78.1998.

<sup>36</sup> United Nations General Assembly Resolutions 40/61 of 9 Dec. 1985; 49/60 of 9 Dec 1994.

<sup>37</sup> *Nicaragua v US* [1986] ICJ 14 at 18.

<sup>38</sup> E.g Article 1 of the UN Convention against torture and Other, Cruel, Inhuman or Degrading Treatment or Punishment (UN Doc A/39/51 (1984)) States that responsibility for torture arises 'when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other persons acting in an official capacity.' Under common Article 1 of the Geneva Conventions, High Contracting Parties undertake to respect and to ensure respect for the Conventions in all circumstances.

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### ***Under International Humanitarian law***

The difficulty in applying international humanitarian law depends on precisely what the legal status of PMCs are. International humanitarian law is reflected in the four 1949 Geneva Conventions with the two accompanying 1977 Geneva Protocols, which makes fine distinctions between rights, privileges and immunities of combatants and non-combatants in armed conflict.<sup>39</sup> Due to the blurring distinction between combatants and non-combatants, numerous issues are raised for the operation of the Geneva Conventions and Protocols on an international law level. We shall examine therefore, contracts in combatant and prisoner of war status under Geneva third Convention relative to the Treatment of Prisoners of War 1949 (Geneva III)<sup>40</sup> and the First Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Geneva Protocol I).<sup>41</sup> Moreover, much of the International law framework is overseen by the United Nations and bodies like the International Committee for the Red Cross (ICRC).<sup>42</sup>

### ***The Status of Civilians in Armed Conflicts***

If employees are able to bring themselves under the definitions of these instruments, then they would be 'safe' from criminalization, and there would also be protection for killings and acts of destruction.<sup>43</sup> The Geneva Conventions and Protocols grant numerous protections for civilians, for instance in Geneva III, a prisoner of war status is granted if they accompany regular armed forces but do not engage in combat.<sup>44</sup> Those that are outside that category are deemed as non-combatants and have no special privileges.<sup>45</sup> If a civilian does not satisfy pre-conditions or criteria in order to be considered then we shall consider the Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949, Geneva IV.<sup>46</sup>

Protocol I clarifies that 'armed forces' include 'all organized armed forces, groups and units which are under a command of responsibility' (Article 43(I)). Moreover, stating that members of 'armed forces' having 'the right to participate directly in hostilities' (Article 43 (2)). As combatants they are entitled to combatant immunity and are not subject to criminal prosecution.

Moreover, under the ICRC Commentary to Article 43, it is observed that 'all members of the armed forces are combatants and only members of the armed forces are combatants,' dispersing the idea of 'quasi combatants' and invalidity of the idea of 'part-time status, a semi-civilian, a semi-military status' where by a soldier of night and peaceful citizen by day. Disappears.<sup>47</sup> One may argue that under Protocol I, attempts are made to clarify persons in a conflict zone as either combatants or non-

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<sup>39</sup> Legal Opinion on the Status of Non-Combatants And Contractors Under International Humanitarian Law and Australian Law, [www.aspi.org.au/pdf/ASPIlegalopinion\\_contractors.pdf](http://www.aspi.org.au/pdf/ASPIlegalopinion_contractors.pdf). p.g 1

<sup>40</sup> 75 UNTS 135

<sup>41</sup> 1125 UNTS 3. see. E. Kwakwa, 'The Current Status of Mercenaries in the Law of Armed Conflict' (1990) 14 Hastings Int'l & Comp L Rev 67 at 88-9

<sup>42</sup> Legal Opinion .op. cit. p.g 2

<sup>43</sup> Contracting Out War? op. cit. p.g 674

<sup>44</sup> 'Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services... .' Geneva III

<sup>45</sup> Contracting Out War? op. cit. p.g. 675

<sup>46</sup> 75 UNTS 287. In addition, there is a fundamental guarantee to humane treatment under Protocol I, Art 75.

<sup>47</sup> ICRC Commentary 515 , Legal Opinion op. cit. p.g 2

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combats, where by there is no third category of ‘quasi-combatants.’ However, the situation may not be as clear cut as that and disregards the reality in practice, where Private Military Contractors are put in the front line yet operating civilian roles concurrently. In fact the difficulty does lie in the interchangeable roles of Private Military Contractors and the complexity lies in accessing when these roles come into play.

### ***Armed Civilians and their status under International Law***

Armed civilians create issues for the application of the Geneva Conventions and Protocols. In an international armed conflict they could be classified as either one of four categories. Firstly, as non-combatants accompanying armed forces entitled to certain immunities if taken as POWs under Geneva III (Article 4) provided they are only armed under self-defense; Secondly, as privileged combatants who take up arms spontaneous to resist invading forces, respecting the laws and customs of war, are entitled to immunities if taken as POWs under Geneva III (Article 4) ( Also Protocol I, article 44); Thirdly, as non-privileged combatants who meet neither of the exceptions noted above and accordingly will not be entitled to POW status if captured nor any combatant immunity and fourthly, as a mercenary who has no right to be a combatant or a POW (Protocol I, Article 47).<sup>48</sup>

Civilians that accompany an armed force will in most circumstances be entitled to claim protection under Geneva III Article 4, however the difficulty arises when the civilian contractors are not regularly attached to the military forces who are armed other than for purposes of personal self defence and who participate in some aspect of armed conflict.<sup>49</sup> There is concern that as they are armed and are in a conflict zone there is the risk that they will be classified as mercenaries and thereby having no privileges under International humanitarian law. However an important distinction is for the purposes of Protocol I, Article 47 whether such persons have been ‘specially recruited locally or abroad in order to fight in an armed conflict. It seems that this provision would exclude many categories of civilian contractors other than those specifically contracted to provide security services who will carry light arms.<sup>50</sup> The difficulty arises as to whether recruitment to ‘fight’ in an armed conflict and recruitment to provide security of a defense nature in an armed conflict. The distinctions are hard to make.

Secondly, it has to be an internal conflict with two states rather than an international conflict. Hence once these conditions are satisfied then mercenaries utilized by one of the state parties could be eligible as a ‘militia’ form part of the armed forces of the State (Article 4(A) (1)).<sup>51</sup> Other State-Contracted PMC personnel might fall within Article 4(A)(4) as accompanying the armed forces.

The situation would be different if PMC employees are sponsored by a state party in enemy occupied territories acting for a resistance group which might be covered by Article 4(A (2))<sup>52</sup>,

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<sup>48</sup> ICRC Commentary 515 p.g 3

<sup>49</sup> Ibid. p.g 3

<sup>50</sup> Ibid. p.g 3

<sup>51</sup> Van Deventer, HW. Mercenaries at Geneva. 70 American Journal of International Law 811, 1976

<sup>52</sup> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) That of carrying arms openly;



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covering the whole category as members other than the militia or volunteer corps, carrying arms openly, being commanded and conducting operations in accordance with the laws and customs of war.

It is contended however, that Private Military Contracts are not considered 'lawful combatants' under the Geneva III Convention, as they do not wear regular uniforms or answer to a military command hierarchy. These armed contractors do not fit the legal definition of mercenaries because that definition request that they work for a foreign government in a war zone in which their own country is not part of the fight. And armed contractors wearing quasi-military outfits and body armour blur these distinctions, making it harder for the enemy to play the rules of law.<sup>53</sup>

Under non-international armed conflicts, it is clear that civilian contractors who participate directly in hostilities do not enjoy the protections under Part IV of Protocol II (Article 13), however they are still entitled to fundamental guarantees of human treatment.<sup>54</sup> It can also be argued that civilians who are armed other than for purposes of self-defence in certain non-international armed conflicts may be considered as terrorists, or mercenaries and are therefore subjected under international legal regimes.

### ***Protections enjoyed by Civilian Contractors and National obligations***

The Geneva Conventions and Protocols clarify the obligations of States to protect civilians under international and non-international armed conflict. The obligations of State military forces towards civilians in conflict zones are less clear under International law.<sup>55</sup>

Under Protocol I, Article 58 provides that parties to the conflict shall to the maximum extent feasible, a. Without prejudice to Article 49 of the Fourth Convention, endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;<sup>56</sup> c. Take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

The limitation with this provision is that Article 58 was intended to address the obligations of a State Party in its own territory towards its own nations, or in the case of territory under its control towards the civilian population. We need to question **whether** the terminology of Article 58 is broad enough to extend to situations where civilians accompany military forces ~~are~~ within conflict zones.

The terms of 'maximum extent feasible' in Article 58 is significant and suggests that elements of military necessity can be factored in when decisions are taken regarding the extent of the protection **that** civilians should be afforded. It is suggested that perhaps a complete withdrawal of certain individual civilians who are considered essential to the military effort may not be required in all instances.<sup>57</sup>

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(d) That of conducting their operations in accordance with the laws and customs of war

<sup>53</sup> Schreier, F. & Caparini, op cit.p.g 57

<sup>54</sup> Legal Opinion op cit. p.g 3

<sup>55</sup> Ibid. p.g 4

<sup>56</sup> Geneva IV, Article 49 prohibits individual or mass forcible transfers of protected persons (civilians)

<sup>57</sup> ICRC Commentary 693

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The ICRC commentary also suggests that the obligation to remove civilians arises ‘where the risk of attack is the greatest’.<sup>58</sup> An issue arises as to whether it includes ‘preparation’ for hostilities, such as civilian contractors conducting aircraft maintenance. It would seem that certain categories of civilians engaged in the support of military forces would still enjoy the protection of Protocol II but others would have an uncertain status. It is noted that the ICRC Commentary contends that ‘in case of doubt regarding the status of an individual, he is presumed to be a civilian’.<sup>59</sup>

It seems that Geneva Protocol I gives greater flexibility, and it is applicable not only in the situation described in Article 2 of Geneva II but also under Article 1(4) of Geneva Protocol 1 to ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in exercise of their right of self-determination.’<sup>60</sup>

The resolution is qualified under article 1(4) to three contexts and is interpreted narrow to avoid ‘encouraging secessionist movements within existing states.’<sup>61</sup> Another problem is also the level of intensity that is required for the establishment of an ‘armed conflict’ which requires more than ‘civil disturbance.’<sup>62</sup> The circumstances in which Article 1(4) apply are detailed in the UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations and cooperation amongst States in Accordance with the Charter of United Nations (the Friendly Relations Resolution).<sup>63</sup>

### ***Direct Hostilities***

In order for Geneva Protocol 1 to apply under Article 43, the combatants must be 1. Under the conduct of its subordinates, 2. Be members of armed forces and have right to participate and 3. Have the right to participate in direct hostilities.

Much of the controversy lies in the less explicit nature of the status of PMC support staff, particularly for those assigned to the front line. In the first instance, the status of ‘A civilian is any person who does not belong to one of the categories of persons referred to in Article 4a (1) (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. And it is noted that in case of doubt under Article 4(A) (4) they are presumed civilian. Under Article 44(2) humanitarian standards are accorded to them to include compliance with the rules of international law applicable in armed conflict<sup>64</sup>, moreover under Article 51(2) they shall not be subject to attack or terror. Further, Article 3(1) provides for persons taking no active part in hostilities to be treated ‘humanely’, with the specific activities being expressly prohibited such as violence and inhumane treatment.’<sup>65</sup>

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<sup>58</sup> ICRC *ibid*, 694

<sup>59</sup> ICRC *Op. cit.* 1453

<sup>60</sup> *Contracting Out War?* *op. cit.* p.g 676

<sup>61</sup> Mallinson, WT and Mallinson, SV. The juridical status of privileged combatants under the Geneva Protocol of 1977 concerning international conflicts. 42 *Law & Contemporary Problems* 4 at 16, 1978.

<sup>62</sup> See Rogers, APV. Armed forces and the development of the law of war. 21 *Review de droit Penal Militaire* 201 at 203, 1982.

<sup>63</sup> GA Res 2625

<sup>64</sup> While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

- (a) <sup>65</sup> Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

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Under Article 51(3) ‘Civilians shall enjoy the protection [against dangers arising from military operation], unless and for such time as they take a direct part in hostilities.’ However it is arguable whether Private Military Contractors would fall under this proviso by simply carrying weapons.. The difficulty lies with PMC that participate in direct hostilities and whose purpose is intended to cause actual harm to opposing forces.<sup>66</sup>

Direct participation in hostilities by civilians renders them loss of immunity during the time of such participation, and when captured are liable for prosecution under domestic law of the detaining state.<sup>67</sup> The certain criteria needs to be satisfied first; the employees of a company cannot be regarded as recruited ‘specially’ for a particular conflict, in line with the Geneva Convention.<sup>68</sup> Secondly, those that provide non-combat services fulfill roles supporting, rather than taking a ‘direct part in the hostilities’ (Article 47 (2)(b)), are not covered.<sup>69</sup> Thirdly, Article 47(2) (c) insists upon private gain as the motivation for mercenaries, as opposed to other reasons such as political or religious beliefs. However, there is difficulty in separating the political and moral ideals<sup>70</sup> where ‘any definition of mercenaries which required proof positive of motivation would...either be unworkable or...haphazard.’<sup>71</sup> Fourthly, it is relatively easy to evade the conditions in Article 47(2) (d) and (f), that a mercenary, ‘is neither a national of a party to the conflict or resident of territory controlled by a party to the conflict...and ... [is not] on official duty as a member of its armed forces.’

In balancing the opposing interests of ‘direct’ hostilities, the Commentary on Additional Protocol 1 asserts that the behavior of civilians must constitute a direct and immediate military threat to the adversary for said action to be deemed ‘direct participation in hostilities’.<sup>72</sup> This definition has however been challenged by academics and to a certain extent, by state practice, has tried to enlarge the notion, for instance that direct participation not only includes activities involving the delivery of violence, but also acts aimed at protecting personnel, infrastructure or material. It has even been suggested that the determination of direct participation rests on the appreciation of the value-added [element] brought to the war effort by a civilian post as compared to a purely military activity.<sup>73</sup> A further difficulty is as to the precise nature as to when the hostility starts and ends,<sup>74</sup> adds a further burden in defining such direct participation. ICRC Commentary suggests that this phrase ‘implies that there is a sufficient causal relationship between the act of participation and its immediate

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- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

<sup>66</sup> ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Nijhoff Geneva 1987) para 1944.

<sup>67</sup> Schreier, F. & Caparini, op cit.p.g. 57

<sup>68</sup> Clever, G. Subcontracting military power. 33 Crime, Law and Social Change 131 at 133, 2000; Shearer, D. Private Armies And Military Intervention, Adelphi Paper 316, International Institute for Strategic Studies, London, 1998 at 17-18

<sup>69</sup> M-F Major ‘Mercenaries and international law.’ 22 Georgia Journal of International and Comparative Law 103, 1992. at 111.

<sup>70</sup> (Diplock) Report of the Committee of Privy counselors appointed to inquire into the recruitment of mercenaries (Cmnd 6569 London 1976)

<sup>71</sup> Diplock report para 7

<sup>72</sup> Schreier, F. & Caparini, op cit.p.g57

<sup>73</sup> .ibid. 57 & 58

<sup>74</sup> ibid p.g 58

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consequences.<sup>75</sup> And should a Private Military Contractor be deemed as a mercenary then under Article 47(1) they shall not have the right to be a combatant or a prisoner of war.<sup>76</sup>

Although there are two possible solutions to establish a link to safeguard the position of the Private Military Contractor. The first, being conferred national by host state on PMC employees<sup>77</sup> or by establishing an ambiguous link to the host country's armed forces,<sup>78</sup> it is highly unlikely and questionable. Moreover, there is danger that since Article 47 does not specify a time frame for enlisting for duty, that these mercenaries may enlist in the armed forces of the host State for the duration of the conflict.<sup>79</sup> Moreover, Article 47 targets individual mercenaries, and not corporations, hence the state does not condemn private military services and this unregulated market, in essence means that the Geneva Convention can not be enforced upon them, and they do not directly infringe any article.<sup>80</sup>

### ***Operation of the Geneva Conventions and Protocols in Conflict Transition Zones***

Issues that arise under the Geneva Conventions and Protocols are to their operation in conflict transition zones which are moving from international armed conflict to a non-international armed conflict.<sup>81</sup> It is clear that the principal protections and obligations of the Geneva Conventions apply to international armed conflict between two or more States.<sup>82</sup> In addition, Geneva Protocol extends to include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation' which it could be argued extends to the situation which has existed in Iraq since July 2004 give the significant presence of active US and UK military forces.<sup>83</sup>

The Geneva Convention rules affect only national government authorities or sizeable, organized and sustained insurgency forces which are clearly recognized and capable of acting in accordance with international humanitarian law, and even in this cases, the effect is often by concession'.<sup>84</sup> However Common Article 3 of the Geneva Conventions also creates relevant minimum obligations. Areas which are conflict transition zones moving from non-international armed conflict to eventual peaceful existence following cessation of hostilities and restoration of law and order will remain subject to the Geneva Conventions. In particular military forces bound by the Conventions

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<sup>75</sup> ICRC Commentary 1453

<sup>76</sup> 2) 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 the 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 of official duty as a member of its armed forces.

<sup>77</sup> such as the case of two of Executive Outcomes/ Sandline helicopter pilots in Sierra Leone

<sup>78</sup> for example, in Sand line's contract with Papua New Guinea, the PMC force were designed as 'Special Constables.' G Ebbeck 'Mercenaries and the 'Sandline Affair' (1998) 113 Australian Defence Force Journal 5 at 17. But the International Court of Justice has indicated it will look beyond the legalistic position in regard to nationality and require a genuine link to the nation to be established: Nottebohm (Liechtenstein Guatemala) 1995 ICJ Reports. 4

<sup>79</sup> Contracting Out War? op. cit. p.g 679

<sup>80</sup> ibid p.g. 680

<sup>81</sup> Legal Opinion op cit. pg 5

<sup>82</sup> e.g GC I, Art 2; GC II, Art 2

<sup>83</sup> Op cit, pg 5

<sup>84</sup> Hoffman, MH. Emerging combatants, war crimes and the future of international humanitarian law. 34 Crime, Law & Social Change 99, 2000. at 104.

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operating in such zones will be subject to: Respecting that taking no active part in the hostilities be treated humanely in Common Article 3 and relevant national forces' laws dealing with discipline and conduct.<sup>85</sup>

Some would argue that therefore, forces currently operating in Iraq at a minimum are subject to the operation of Common Article 3 of the Geneva Conventions, relevant special agreements operating in Iraq adopted by the Coalition Provisional Authority and/or the interim Iraqi Government that apply to the Multinational Force authorized under relevant UN Security Council Resolutions, and their own relevant national laws which follow those forces whosoever they operate. Furthermore, Geneva Protocol II applies to non-international armed forces which takes place in territory of a party between the armed forces and other armed forces Art1.(1), whilst Protocol II creates general obligations for humane treatment for persons not taking part in the conflict including the wounded and sick.

The current Multinational Force is required under UN Security Council Resolutions 1511 and 1546 to act consistently with international humanitarian law, and this obligation extends to all relevant provisions and applied by relevant municipal law either in Iraq or directly upon members of the multinational force by their respective laws.<sup>86</sup> Currently in Iraq, the Coalition Provisional Authority Order Number 17 (27 June 2004) was adopted to apply to the Multinational Force established under UN Security Council Resolution 1511 and 1546, which makes express reference to the application of Iraqi law, and seeks to address issues of jurisdiction. The elements include firstly, that certain civilians attached to the Multinational Force are subject to the exclusive jurisdiction of their Sending States and immune from Iraqi legal process; Secondly, that the Sending States of Multinational Force Personnel have exclusive right to exercise criminal and disciplinary jurisdiction over those persons whilst in Iraq and thirdly, those Contractors including non-Iraqi legal entities or individuals supplying goods or services in Iraq under contract are immune from Iraqi legal process with respect to acts performed under the terms and conditions of their contract. In the CPA Order, although it clearly provides order to compliance, there is no enforcement mechanism. One could state therefore is that private contractors are immune from Iraqi law, other than specific orders and measures which seek to regulate certain activities.

### ***Development in the United States of America***

Currently there are well over 200 contractor personnel that have been killed in the battle area in Iraq.<sup>87</sup> Licensed contractors with the US government reported sign agreements that provide them with immunity from prosecution under Iraq law. It is probably consistent with US powers as an occupying power under The Hague Regulation of 1907 and the Geneva Conventions.<sup>88</sup>

A serious problem is the lack of formal rules for Private Military Contractors to follow. In Iraq much attention is paid to the collaboration of force, to avoid disastrous consequences, hence if a soldier breaks the rules, then he may be disciplined. However, PMC employees are not subject to the same rules of as those of the military. Some of the military contractors who perform security functions such as *Black Water Security Consulting*, have included use-of-force rules built into their

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<sup>85</sup> Legal Opinion, op cit. pg. 5

<sup>86</sup> Legal Opinion pg. 6

<sup>87</sup> <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/schooner.html>

<sup>88</sup> Schreier, F. & Caparini, op cit.p.g 59



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contracts and ~~have are~~ trained their personnel, however it is noted that the design does not match the levels of force desired by US commanders on the ground.<sup>89</sup>

The American Uniform Code of Military Justice<sup>90</sup> provides that ‘in time of war, persons serving with or accompanying an armed force in the field’ may be tried by military court. But, there has been little precedent for military trials of civilian contractors.<sup>91</sup> The US Justice Department now has jurisdiction to prosecute military contractors working for the Department of Defence (DoD) for actions overseas under the Military Extraterritorial Jurisdiction Act,<sup>92</sup> however the act has not been fully implemented, and moreover, the DoD may decline to do so due to restricted resources. Even though the US army has found that 36% of the proven abuse incidences involved the US army, with six civilian contractors in particular that were culpable in the abuse, not one of them has been indicted, prosecuted or punished.<sup>93</sup> It seems a chilling message and the US cannot avoid its international obligations to ensure that prisoners are treated properly by hiring contractors. The inability to hold contractors accountable ~~is are~~ a grave concern of the Coalition Provisional Authority (CPA) that will not be subject to Iraqi criminal processes, yet there is still no clear mandate for American jurisdiction.<sup>94</sup>

### ***Development in the United Kingdom***

In the midst of such activity, the UK government has over the past three years, [been] seeking some solution or regulatory proposal arguable at controlling the activities of Paces.<sup>95</sup> The UK has taken a brave position to consider the possibility of regulation and accountability of PMCs however the impreciseness of the document is of concern, and how would that be compatible with international law ?

The UK is the ~~private~~ **forefront** running of privatization in Europe, **specifically** the ‘Private Finance Initiatives’, **calculated to** transform the public and private sectors. It is announced as the MoD's first choice [of] method for funding new capital projects<sup>96</sup> It can be seen that PFI programs are increasingly more and more military in nature, particularly with logistics and training, hence as a consequence private support operations have increasingly moved towards the front line, so much so that the Sponsored Reserve concept, incorporated into British law in the Reserve Forces Act (Part

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<sup>89</sup> *ibid.* p.g 59 this may change, according to proposed DoD regulations, where military commanders in places such as Iraq and Afghanistan will be given broader new powers over contractors including ability to arm them.

<sup>90</sup> U.S Code Title 10 Armed Forces, General Military Law, Part II Personnel, Chapter 47 Uniform Code of Military Justice, General Provisions, Section 802, Article 2.

<sup>91</sup> Schreier, F. & Caparini, M. *op cit.* p.g 60

<sup>92</sup> The US Senate has closed the criminal jurisdiction gap by passage of Bill 768: The Military and Extraterritorial Jurisdiction Act. It 1. extends the jurisdiction of the UCMJ during a declared contingency to DoD civilians and contractor employees. and 2. It extends US Federal Criminal Legal jurisdiction over said individuals plus former members of the armed forces while they re overseas accompanying the armed forces. Full text is at [www.feds.com/basic\\_svc/public\\_law/106-523.htm](http://www.feds.com/basic_svc/public_law/106-523.htm). However, the Act only applies to civilian contractors working directly for DoD on US military facilities, not for contractors working for other US agencies or US nations working overseas for a foreign government or organization.

<sup>93</sup> Schreier, F. & Caparini, *op cit.* p.g 60

<sup>94</sup> *ibid.* p.g 60

<sup>95</sup> Foreign Office, Private Military Companies: Options for Regulation (2001-2 HC 577); House of Commons Foreign Affairs Committee, Private Military Companies (2001-2 HC 922)

<sup>96</sup> The British MoD has signed over 30 Private Finance initiatives with a value of over 1.4 billion pounds by 2002 and was considering more than 90 new projects with an estimated value of 6 billion. see ‘Public Private Partnerships in the MoD: MoD’s approach to the Private Finance Initiate’. at [www.mod.uk/business/pfi/intro.htm](http://www.mod.uk/business/pfi/intro.htm)

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V)<sup>97</sup>. Through this, it is envisaged that PMCs provide services in conflict situations by enrolling parts of their workforces as voluntary Sponsored Reserves, thereby challenging the line between armed forces operating in battle space and the employees of PMCs who will not become directly exposed to military conflicts.

Such movement towards the front line has meant **greater** UK MoD reliance on PMC services, and PFIs with their long term commitments between 10 and 40 years, **and** places a heavy burden on the design and management of public private contracts, with constant renegotiations.

### ***Development in South Africa***

South Africa has the clearest position on the regulation of Private Military Companies and their supply of military assistance services abroad.<sup>98</sup> In 1998 the South African Regulation of Foreign Military Assistance Act (FMA)<sup>99</sup> was put into place and **it is** a most ambitious national legislation dealing with mercenaries, PMCs and PSCs. The aim was to regulate foreign military assistance, defined as including: ‘advice and training; personnel, financial, logistical, intelligence and operational support; personnel recruitment; medical or paramedical services; or procurement of equipment.’ In having extraterritorial application, the Act punishes those who do not abide by it, and by addressing issues of mercenaries and PMCs, aims to deal with the previous controversy of the activities of South Africa’s PMCs like *Executive outcomes*.<sup>100</sup>

The Act applies to citizens and permanent residents of South Africa, and any foreign citizen who contravenes this provision within their borders. The act strictly forbids mercenary activity including ‘direct participation as a combatant in armed conflict for private gain’ and any PMC based in South Africa needs government authorization for each contract it signs whether the operation is local or overseas.<sup>101</sup> The sentencing can result to no more than ten years and a fine of no more than 1 million **Rand**, for nations or foreign residences in South Africa who participate in military missions outside of South African territory without authorization by the state. Such restrictions imposed on PMCs ensures **that** they are properly regulated, and by extension, also regulation of the supply of arms and other armed related materials through the National Conventional Arms Control Committee (NCACC). It may be questionable whether the body is independent, but nevertheless, they have the power to refuse or grant a license, with decisions made based on principles of international and human rights law.<sup>102</sup>

The Act is applied in armed conflict and the recipient of the service must be a party to the conflict, otherwise it would not be applicable. A general difficulty today is how to ensure enforcement. **For** instance, it has been argued that the FMA criteria has been considered vague and subjective, and is restrictive when juxtaposed with the Constitution. The Iraq conflict demonstrated the difficulty in enforcing new regulations. **For** instance, the South African Meteoric Tactical Solution currently

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<sup>97</sup> HMSO, Reserve Forces Act, 1996, at [www.hmso.gov.uk/acts/acts1996/1996014.htm](http://www.hmso.gov.uk/acts/acts1996/1996014.htm). PMC employees will become reservist members of the armed forces and will receive training accordingly. When serving with the armed forces, they are subject to the Service Discipline Acts and Service Regulations. Sponsored Reserve employers have no right to appeal against a call out. Like other reserve forces, the maximum call-out period is 9 months but might be extended with the agreement of the reservist and the employer.

<sup>98</sup> Schreier, F and Caparini M. *ibid* P.g 107

<sup>99</sup> Republic of South Africa, Regulation of Foreign Military Assistance Bill, Bill 54D-97(GG), 1997, at [www.gov.za/gazette/bills/1997/b54-97.pdf](http://www.gov.za/gazette/bills/1997/b54-97.pdf)

<sup>100</sup> Schreier, F and Caparini M. *ibid* p.g 107

<sup>101</sup> *ibid*

<sup>102</sup> *ibid*

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provides protection services in Iraq and trains new Iraqi police and security forces. Moreover, Erinys, a joint UK-South Africa Company, has received a large contract to protect Iraq's oil industry, yet neither company has gained approval from the NCACC. Due to lack of reasons and will, South Africa seems unable to further monitor or enforce its legislation.<sup>103</sup>

It is a demanding legislation that requires the government to approve each contract and through this control, the Security Industry Regulation Bill 2001<sup>104</sup> has given boost to the South Africa's domestic private security industry. One may question whether this increases the standards of professionalism, transparency, and accountability in the industry.

### ***Other Instruments***

The 1989, International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries was aimed as a means to address issues of violating human rights and impeding the rights of self-determination. The report drew attention to the gaps, which we find today need much filling as with the status of PMCs. Furthermore, neither the statute of the International Criminal Tribunal for Former Yugoslavia and the International Criminal Tribunal for Rwanda or the International Criminal court deals with mercenaries under their jurisdiction. Another instrument is the 1991 International law Commission 'Draft Code of Crimes against the Peace and Security of Mankind', in which Article 23 states that one does not need to take part in hostilities in order to fall under that article. Activities need only satisfy financing, recruiting or use or training to fall under the provision.<sup>105</sup>

### ***Conclusion***

There are many unresolved issues relating to Private Military Companies due to the very nature of their underlying work. Much is considered as wholly internal matters, not reaching the level of international law, and also in current international humanitarian law, it seems that the exclusion of mercenaries under Article 47 of Protocol I sits uneasily with more general policy of encouraging compliance with the spirit of international humanitarian law.<sup>106</sup> Other resolved issues include the specific obligations of private contracts working abroad. For instance, they are not obligated to take orders, or to follow military codes of conduct, since they are bound by contract and not oath.<sup>107</sup> Furthermore it is unclear who, how, when, where and which authorities are to investigate, prosecute and positionally punish crimes committed by PMCs or their employees.<sup>108</sup>

We could argue that individual contractors are civilians and thus not part of the military chain of command; hence it is difficult to answer how a business organization can be held accountable. As International law is yet to define the status of private military and security contractors, and other than the untested International Criminal court, lacks the actual means to enforce itself without the

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<sup>103</sup> Singer, Peter. 2004. The Private Military Industry and Iraq: What have we learned and where to next? p.g 13

<sup>104</sup> Republic of South Africa, Security Industry Regulation Bill. B12-2001. ISBN 0 621 29742 9

<sup>105</sup> Green, J. Crimes Under International Law commission Draft Code. War Crimes in International law, 1996, pg. 19, 35

<sup>106</sup> E. Kwakwa op cit. at 69; G Ebbeck 'Mercenaries and the 'Sandline Affair' (1998) 113 Australian Defence Force Journal 5 at 9, 18.

<sup>107</sup> Schreier, F. & Caparini, op cit. DCAF, Geneva.p.g 58

<sup>108</sup> Schreier, F. & Caparini, ibid. p.g 59



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state.<sup>109</sup> This ~~which~~ defers the problem to the state level, where the individual's crimes would fall under national's jurisdiction.<sup>110</sup>

Hypothetically speaking, if the demand for Private Military contractors increased and the boom of Private Military Companies increases, then inevitably, the need for international regulation will come into play. There is a tension, in which there is fear of over reliance of the private sector so to render the public military unable to fight on a capacity level, and fear for lacking well trained soldiers.<sup>111</sup> The very fact that currently there are layers of contracts and subcontractors between the employee and the company, renders it untraceable or very difficult to trace. Currently for instance, the US government has refused to expenditure or investment in the required amount of time of contract management resources.<sup>112</sup> There is no monitoring of these contracts, and in terms of protection, the current army has no resources to protect them.

Action must be taken on the issue of legal accountability; since the mere lack of classification can not render them free from criminal charges. The loopholes must be filled with development of new laws to deal with the jurisdictional dilemmas that have arisen. It is necessary for the firms, and the employees to investigate, prosecute and punish the wrongdoings.<sup>113</sup> Being in an international arena, the proposals could range from updating the international anti-mercenary laws to creating a UN body that deals with and regulates Paces. It will however take time, and planning, involving each state involved in the industry, to develop and amend its laws.<sup>114</sup> It may be the case that firms may lobby against such regulation; however for actual crimes that have been committed, it cannot be left ignored.

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<sup>109</sup> *ibid.*

<sup>110</sup> Singer, Peter. 2004. *op.cit.* p.g 12

<sup>111</sup> <http://www.pbs.org/wgbh/pages/frontline/shows/warriors/interviews/schooner.html>

<sup>112</sup> *Ibid.*

<sup>113</sup> Singer, Peter. 2004. *op cit.* p.g 21

<sup>114</sup> *ibid*

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### **Acknowledgements**

Dr. Paul Medhurst  
Prof. Genugten