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# A profitable War Strategy

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# Sammanfattning

En i mitt tycke intressant utveckling inom krigsföring under det senaste årtiondet är uppkomsten av global handel i militär service. Aktörerna inom denna sortens militära industri kallas privata säkerhetsföretag eller militära företag. Det finns mindre konsultfirmor, samt transnationella företag som hyr ut fullständiga krigsstrategier. Personalen består ofta av pensionerade militära generaler. Idag återfinns företag av detta slag i många länder runt om världen och utgör en viss påverkan i ett antal konflikter.

Deras aktiviteter varierar ifrån att bygga flyktingläger, tillgodose staters beväpnade styrkors behov av mat och husrum, till att underhålla och använda sofistikerade vapensystem. Användandet av privata militära aktörer istället för staters egna militära kapacitet, har resulterat i kostnadseffektivisering och möjligheten till snabb assistans, samt en hög koncentration av kunnig personal i de privata företagen. Den växande privata militära industrin har även bidragit till att kränkningar av mänskliga rättigheter i vissa fall kunnat åtgärdas snabbare, med hjälp av privata aktörer, än vad hade varit möjligt med hjälp av en stats militära styrkor. I situationer när andra inte agerar snabbt nog, kan privata militära företag agera som ett komplement till statssystemet.

Framförallt är dock privata militära företag vinstdrivande firmor och vissa av dem har begått allvarliga kränkningar av den internationella rätten under utförandet av sina uppdrag. Det förekommer också att illegitima aktörer som diktaturer, rebellstyrkor, terroristgrupper och knarkkarteller hyr in privata säkerhetsföretag för utförandet av vissa uppgifter. De privata militära företagens agerande har i vissa fall inneburit att inhemska spänningar, militärkupper och uppror brutit ut. Antagligen beror detta bland annat på de stora summor med pengar som är inblandade. Enligt min åsikt har därför varje uppdrag möjligheten att bli utfört, oavsett om operationen innebär att mänskliga rättigheter eller andra internationella normer kränks, så länge den erbjudna summan för uppdraget är tillräckligt stor. Detta är omoraliskt i mitt tycke. Kränkningar av mänskliga rättigheter borde inte kunna förhandlas bort.

Ett av de centrala problemen inom detta rättsområde är det faktum att det rättsliga och lagstiftande området runt den privata militära industrin är vag och otydlig. Lagen har inte utvecklats i samma takt som den privata militära industrin. Privata militära företag är privata firmor som säljer militära tjänster. Dessa tjänster har tidigare varit statliga och kategoriserats som en del av en stats officiella kapacitet. Under den internationella rätten kategoriseras de som säljer liknande tjänster som legosoldater och ofta ses dessa som olagliga eller förbjudna aktörer.

Privata militära företag är inte tillräckligt lagstiftade. Särskilt inte på de områden som rör vilka arbetsuppgifter de får utföra, vilka regler som är

tillämpliga för dem, vem som är ansvarig för deras agerande, samt hur de ska vara skyddade i konflikter och krigssituationer. Alla dessa problemställningar måste lösas.

Min examensuppsats är ett försök att undersöka privata militära aktörers juridiska status, utreda huruvida deras agerande är hänförligt till den stat som hyrt den privata aktörens tjänster, samt diskutera på vilket sätt den privata militära industrin kan förbättras för att det internationella samhället ska kunna ta till vara på de fördelar som den privata militära industrin erbjuder.

# Summary

The emergence of a global trade in hired military services is an interesting development in warfare during the last decade. The entities within this industry are referred to as private security companies and private military companies. Hereafter known as PSC's and PMC's. PSC's are mostly hired by multinational companies, governments, humanitarian agencies and individuals in order to provide defensive services. PMC's provide services of a more offensive character, often to governments. These two terms can be used interchangeably for the description of private companies with a security or military character. PSC's and PMC's can be small consulting firms as well as transnational corporations that lease out a complete strategy in war situations. Such companies' personnel is often comprised of retired generals. These firms are present in many countries around the world and are determinative actors in a number of conflicts.

PSC's and PMC's activities range from building refugee camps, feeding and housing the armed forces of a State, to maintaining and using sophisticated weapon systems. The usage of PMC's has resulted in cost-effective ways of dealing with conflict-situations. Their fast assistance and knowledgeable personnel have helped in some situations where human rights, has been endangered. In cases when others do not react fast enough, they complement the nation-State system.

Above all, PMC's are profit-driven companies and some of these firms have committed severe abuses in the course of their operations. They are in some cases even employed by illegitimate structures such as dictatorships, rebel armies, terrorist groups and drug cartels. Their activities have in some cases lead to the rise of internal tension inside States and to military coups and mutinies. These problems results, from among other factors, from the large amounts of money that are involved within this industry. My opinion is therefore that every operation will have the possibility to be carried out by a contractor; no matter if the operation involves violations of human rights or other international norms, presumed that the price tag is of sufficient size. This is in my opinion unmoral. Violations of human rights should never be able to be negotiated.

The ultimate dilemma is that the legal and regulatory issues surrounding the private military industry, PMI, are unclear and vague. Simple said, the law has not developed in the same pace as the PMI has. PMC's are private firms selling military services, which in the past have been categorized as part of the official capacity of a State. Under international law, individuals that sell these kinds of services, are categorized as mercenaries and generally thought of as prohibited.

PMC's are not regulated enough. Especially in terms of what activities they may carry out, what rules that apply to them, who has responsibility for

PMC's conduct and how they should be protected on the battlefield. These are all dilemmas that need to be solved.

My thesis attempts to investigate the legal status of PMC's, examine whether or not their conduct is attributable to the State that hires them and discuss how the industry can be improved, so that the international society can take advantage of the benefits of the PMI.



# Abbreviations

AP I	Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the protection of Victims of International Armed Conflicts of 8 June, 1977
AP I Commentary	Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949
B.C.E.	Before Common Era
B&R	Brown & Root
DoD	Department of Defence
EO	Executive Outcomes
GA	General Assembly
GC	Geneva Convention
GC III	Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949
GC III Commentary	The Geneva Conventions of 12 August 1949 Commentary III Geneva Convention Relative to the Treatment of Prisoners of War
IAC	International Armed Conflict
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
ILC Commentary	The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries
ILC-Draft	International Law Commission's Articles on State Responsibility

I.L.M	International Legal Materials
MEJA	Military Extraterritorial Jurisdiction Act
MPRI	Military Professional Resources International
NATO	North Atlantic Treaty Organisation
OAU	Organization of the African Union
PCIJ	Permanent Court of International Justice
PMC	Private Military Company or Contractor
PMI	Private Military Industry
POW	Prisoner of War
PSC	Private Security Company or Contractor
RIAA	Reports of International Arbitral Awards
RUF	Revolutionary United Front
U.N.	United Nations
U.N.T.S.	United Nations Treaty Series
U.S.	United States
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties

# 1 Introduction

## 1.1 Subject and Purpose

One standard conception in international law is that the State is the only sovereign actor. States have sovereign rights and responsibilities, *ipso facto ab initio*, automatically from the first time it exists.<sup>1</sup> Within these rights and duties, lies among other responsibilities, security.<sup>2</sup> The growth of privatized, profit-driven security and military companies involved in professional services linked to warfare, challenges in reality the perception of the State as the sovereign protector of security for its citizens. Legally, the State is still the sovereign protector of security for its nationals. In the modern nation-State, the State has monopoly on the legitimate means of violence such as sanctioning, control and use of force.<sup>3</sup> The State provides for this through taxation. This takes place in the public sector of the society. In the private sector, which private military and security companies fit into, consumers purchase goods and services in an open market by payment of their own funds. There are a number of differences between these two sectors. For example, the sources of funding, the nature of the relationship between the user and the distributor and the employment status of the deliverers.<sup>4</sup> The separation between private and public and what the government's role should include has been a subject of discussion for a long time. In the outsourcing of governmental institutions, governments have shifted traditional public areas, into the private, due to costs, quality, efficiency, or due to a changed view of where governmental duties may be carried out. The outsourcing of healthcare, transport, police, prisons and other originally governmental functions have basically simplified the privatization of defense-related tasks. Instead of supplying for all military services themselves, governments sometimes now hire private actors to carry out tasks that traditionally were governmental responsibilities.<sup>5</sup>

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<sup>1</sup> U., Linderfalk, (ed.), *Folkrätten i ett nötskal*, Narayana Press, Denmark, (2006), p. 15.

<sup>2</sup> R., Nair, 'Confronting the Violence Committed by Armed opposition Groups', Vol. 1, *Yale Human Rights & Development Law Journal*, (1999), p. 2, available at: URL ([http://islandia.law.yale.edu/yhrdlj/pdf/Vol%201/Ravi\\_Nair\\_YHRDLJ.pdf](http://islandia.law.yale.edu/yhrdlj/pdf/Vol%201/Ravi_Nair_YHRDLJ.pdf)), last visited on 18 December 2007, at 11.30.

<sup>3</sup> C., Holmqvist, 'Private Security Companies The Case for Regulation', Policy Paper No. 9, *Stockholm International Peace Research Institute*, (2005), p. 1, which in turn refers to M., Weber, (ed.), and T., Parsons, *The Theory of Social and Economic Organization*, Free Press, New York, (1964), p. 154.

<sup>4</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, Cornell University Press, Ithaca and London, (2003), p. 7, which in turn refers to J., Cilliers, 'Book review: Sean Dorney, The Sandline Affair-Politics and Mercenaries and the Bourgainville crisis.', No. 1, *African Security Review* 9, (February 2000).

<sup>5</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 7-8, which in turn refers to D., Brooks, and H., Solomon, 'From the Editor's Desk', *Conflict Trends* 6, (2000), available at: URL (<http://www.accord.org.za/publications/ct6/issue6.htm>), last visited on 18 December 2007, at 10.30 and D., Brooks, 'Messias or Mercenaries?', No. 4, *International Peacekeeping* 7, (2000), pp. 129-144.

Around the world there is a large number of PSC's and PMC's operating on a continuous basis in order to provide protection of assets, individuals and property in relatively peaceful States. In South Africa for instance, private security guards outnumber the police force with its 2800 PSC's. Other countries with a large number of PSC's are Colombia, Tajikistan and Russia. Experts argue that these countries are cases where the economic interest in an insecure environment has translated into the growth of the private security sector. Scholars argue that a high number of PMC-employees involved within a State, indicates the presence of a government that is failing to provide physical security for its citizens. But what I am interested in are not all of these companies and not all their involvement either, but the tip of an iceberg, namely those companies that have direct involvement in violent armed conflicts or are just on the border to such engagement. When weak States rely on PMC's to a large extent, they face the possibility of getting even weaker. The extensive reliance on PSC's creates a false image of security in the short term. Proper assessment of countries security needs therefore falls short. This leads to that legitimate State institutions are not developed and perhaps forced to be closed down when not needed.<sup>6</sup>

This is an area within the international society which has grown rapidly during the last decade and the legal structure has in my point of view, not progressed in the same pace. The real dilemma of the private military industry is therefore, according to me, that the individuals employed within it are not sufficiently protected, at the same time as they can violate international law without actually being held responsible.

The purpose of this essay is to investigate the legal status of PMC-employees and whether their activities in case of violation can be attributed to the State. A question connected to this, which I will also investigate is whether the State can hire a PMC without taking responsibility for the hired corporations conduct. In order to do a proper investigation of these concerns I need to view how the phenomenon of PMC's has developed through time as well as examining relevant articles of international law.

My hypothesis and assumption is that I will with legal argumentation find enough correlation between PMC's and States, so that States are liable for actions undertaken by the PMC's that they hire.

## **1.2 Method and Materials**

Throughout my thesis, I have used both descriptive and analytical methods.

The information presented in my thesis derives from a number of sources, such as articles of international laws, conventions and articles drafted by the International Law Commission. As a compliment to such sources, I have

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<sup>6</sup> C., Holmqvist, *Private Security Companies The Case for Regulation*, (2005), pp. 11-13.

made use of the commentaries to the same articles in law. I have also searched for information, in legal doctrine, in articles of prominent authors, at expert meetings on the subject and on the internet.

In my legal investigations of significant articles of law, I have used applicable articles, appropriate commentaries and legal doctrine in order to carry out appropriate analysis. Prominent authors on the PMI have been of importance to my examination. The author that I have made use of the most is Peter W. Singer. He is a world leading experts on changes in the 21<sup>st</sup> century warfare and has written quite a few articles on the subject. I have chosen to view him as an expert on the field of the PMI, but I try to be critical when I believe necessary. The University Centre for International Humanitarian Law in Geneva, which conducted an Expert Meeting on “Private Military Contractors: Status and State Responsibility for their Actions”,<sup>7</sup> in 2005 is another of my most used sources. On this meeting, a wide range of experts sat down and discussed a variety of questions and dilemmas concerning PMC’s. I have used their discussions as a reference at many times and their work has been of value to me in my own thesis.

In my analysis of PMC’s legal status and the attribution of their conduct to States, I have used the Commentary to Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, hereafter named GC III Commentary,<sup>8</sup> written by the International Committee of the Red Cross. I have also used the International Law Commissions Commentary on the ILC-Draft articles on State Responsibility,<sup>9</sup> and the Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 of June 1977.<sup>10</sup> These three commentaries have been of good assistance in terms of evaluating certain terms and their contents.

In the section about State responsibility when the State practices control over the private agent, legal decisions have been helpful in the examination of what the requisites ‘instruction’, ‘direction’ and ‘control’ in article 8 of

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<sup>7</sup> L., Doswald-Beck, *et al*, ‘Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions’, *The University Centre for International Humanitarian Law*, Geneva, (29-30 August 2005), available at: URL ([http://www.adhgeneve.ch/evenements/pdf/colloques/2005/2parrort\\_compagnes\\_privées.pdf](http://www.adhgeneve.ch/evenements/pdf/colloques/2005/2parrort_compagnes_privées.pdf)), last visited on 16 January 2008, at 10:16. Hereafter referred to as Geneva Expert Meeting.

<sup>8</sup> J.S., Pictet, (ed.), *The Geneva Conventions of 12 August 1949 Commentary III Geneva Convention Relative to the Treatment of Prisoners of War*, International Committee of the Red Cross, Geneva, Switzerland, (1960). Hereafter GC III Commentary.

<sup>9</sup> J., Crawford, (ed.), *The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, (2002), available at: URL

([http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)), last visited on 20 December 2007, at 09.46. Hereafter called the ILC Commentary.

<sup>10</sup> H-P., Gasser, *et al*, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva, (1987). Hereafter called AP I Commentary.

the Draft articles on Responsibility of States for Internationally wrongful acts stands for.<sup>11</sup>

I have also emphasised certain facts by analysing the subject and purpose of a number of articles where I have found it necessary or where it has worked as a compliment to proofs and have helped my investigation forward.

The internet sources I have used are many to the numbers. As a first step the search engine Westlaw, which I have access to through the Faculty of Law, in Lund, has been of good support. Through this search engine, I have found valuable articles in journals and yearbooks. With the use of internet, I have also found Non-Governmental Organization's homepages such as the Human Rights Watch, which has drawn my attention to certain cases and situations where PMC's have been present. I have also had the possibility of looking closer at some PMC's through their homepages. This has given me a fraction of insight in how PMC's view themselves. This has been accommodating in my critique of the industry.

### **1.3 Delimitations**

In my thesis, I have forced myself to draw generalising conclusions and to limit myself to certain topics. Generalisations of the PMI have served as a purpose to illustrate the features of PMC's. Sometimes generalisations are beneficial to the thesis and at other times they are perhaps less appropriate, but nevertheless they have been necessary. The cutting down of the number of questions investigated has resulted in that some interesting subjects have due to time-consumption or investigational difficulties not been examined. The centre of attention of the thesis is PMC's conduct in violent armed conflicts. Therefore, I have limited my investigation to such situations.

I have not limited my thesis to a certain region or to a specific State. To the best of my abilities, the thesis investigates the possibility to attribute PMC's conduct to States in a general sense. In order to exemplify how the industry of PMC's work I have used the conflict between Iraq and USA and examples of American PMC's to illustrate different questions that arise in the private world of corporations. This does however not indicate that the investigation of State responsibility is only attributable to USA. It is my purpose that this investigation is applicable to all States and their widespread usage of PMC's.

In my investigation of sections of law, I have not had time nor space to analyse according to the Vienna Convention on Law of Treaties, VCLT. It had perhaps been preferable to include a section of investigation and analysing according to the VCLT on each of the articles that I have dealt

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<sup>11</sup> Article 8 of International Law Commission, *Draft articles on Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its fifty-third session, (2001), adopted by General Assembly resolution 56/83 on 12 December 2001. Hereafter referred to as the ILC-Draft.

with. On the other hand, at the beginning of this essay I made the evaluation that analysing sections of law according to VCLT might not be beneficial to this subject and therefore VCLT was abandoned.

In the area of mercenarism, which I investigate and analyse in my essay, there are three conventions which include the concept of mercenaries. One of them is the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),<sup>12</sup> hereafter AP I, which defines a mercenary. The other conventions use almost exactly the same definition of a mercenary. I have therefore analysed the definition of a mercenary according to AP I and not investigated all three conventions on the same subject.

Due to investigational difficulties, I have not dedicated my time to domestic legislation or domestic judicial decisions.

One thing I had not time to investigate is State responsibility when the PMC that the State has hired subcontracts. This would have been interesting to find out since it is common with sub-contracting in the PMI. Even if I have my speculations of the outcome of this topic, due to certain side-investigation done during my thesis, I have no legal answer to the question.

In the investigational part of the thesis, I concentrate on *de lege lata* and in my critique, future propositions and conclusion I will bring in elements of *de lege feranda*.

## 1.4 Organization

In order for the essay to be easily read and the conclusions to be interpreted without difficulty, each chapter where I have found it sufficient have an introduction at the beginning and concluding remarks at the end.

The shortest chapter of them all, chapter two, defines the three terms private security company, private military company and the phrase mercenary. These terms are used many times in my thesis and therefore needs to be explained.

In chapter three, I describe the history of PMC's in order for the reader to comprehend from where the PMI has derived. This is of importance in order to understand what factors and main features that have developed the industry into what it is today. The main factors that have led to the growth of PMC's are presented in a separate section. In chapter two the reader can also find an introduction to the heavy use of PMC's in Iraq and what problems they face in that conflict in terms of the PMI. The last feature of

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<sup>12</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted at Geneva, 8 June 1977, 1125 U.N.T.S., (3-608). Hereafter referred to as AP I.

chapter two is a brief discussion on three well known PSC's or PMC's with different tasks.

The next question of interest is the legal status of PMC's. This is dealt with in chapter four. Here, I try to categorize individuals into groups of civilians, combatants and mercenaries. This is sufficient in order to limit the suffering of the different actors in International Armed Conflicts, IAC, as well as defining the status of PMC-employees in order to find out whether their activities are attributable to States or not. In order to manage this I view the central definitions of civilian, combatant and mercenary separate and examine if private companies of security or military character fit into any of these categories.

In chapter five, I investigate whether there is any possibility of State responsibility to arise from the conduct of State-hired PMC's. This chapter is linked to the conclusions drawn in chapter four, since the outcome of State liability is based on the legal status of individuals, which I investigate in chapter four. In the investigation of attribution to States, I have examined some of the articles drafted by the ILC. Their Draft-articles on State Responsibility is not a convention, but the articles I examine and analyse are part of international customary law, therefore I have found them applicable to all States. I examine articles 4, 5 and 8 of the ILC-Draft quite thoroughly, in the quest of finding the article that illustrates that State liability for PMC's violations exists in the most preeminent manner.

The beginning of the end of my thesis, starts with chapter six. Here I try to illustrate the critique that can be given to the PMI today. I also make an effort in emphasising what can be done in the near future in order to help the industry forward. This section was one of the challenges in terms of trying to make an evaluation of what is credible to take place in the future and what is possible to develop and what is not.

Finally, chapter seven consists of a conclusion of the thesis. I discuss the conclusions that can be drawn from each and every chapter of the thesis, and what answer these conclusions bring forward all together. I illustrate the line of argument that is necessary in order for a State to be responsible for the conduct of a PMC that they have hired. This section answers the questions I stated in the first chapter under subject and purpose and concludes the investigation of PMC's attribution to the States that hires them.



## 2 Definitions

Three terms are frequently used within the topic of private contractors at war. In order to distinguish the different actors that one can see on the international arena, it seems vital to define them. This is needed, so that one does not hesitate on what a certain term means and stands for. The following terms are difficult to define. I have chosen a rather wide definition, so that I would not exclude too much from its applicability.<sup>13</sup>

### 2.1 Private Security Companies

PSC's are corporate entities providing defensive services to protect individuals and property, frequently used by multinational companies in the extractive sector, governments, humanitarian agencies and individuals in situations of conflict or instability.<sup>14</sup>

### 2.2 Private Military Companies

PMC's are "corporate entities providing offensive services designed to have a military impact in a given situation that are generally contracted by governments".<sup>15</sup>

### 2.3 Mercenaries

Mercenaries are "individuals who fight for financial gain in foreign conflicts that are primarily used by non-State armed groups and more occasionally by governments".<sup>16</sup> A more detailed definition is found in AP I article 47(2), which is presented and investigated in chapter 4.3.

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<sup>13</sup> S., Makki, *et al*, 'Private Military Companies and the Proliferation of Small Arms: Regulating the Actors', *International Alert*, (2001), p. 4, available at: URL ([http://www.smallarmssurvey.org/files/portal/issueareas/security/security\\_pdf/2001\\_Makki\\_et\\_al.pdf](http://www.smallarmssurvey.org/files/portal/issueareas/security/security_pdf/2001_Makki_et_al.pdf)), last visited on 18 December 2007, at 17.54.

<sup>14</sup> S., Makki, *et al*, 'Private Military Companies and the Proliferation of Small Arms: Regulating the Actors', (2001), p. 4.

<sup>15</sup> S., Makki, *et al*, 'Private Military Companies and the Proliferation of Small Arms: Regulating the Actors', (2001), p. 4.

<sup>16</sup> S., Makki, *et al*, 'Private Military Companies and the Proliferation of Small Arms: Regulating the Actors', (2001), p. 4.

# 3 The Private Military Industry

## 3.1 History of Private Military Companies

Not seldom do we idealize war. It seems that we believe that only public militaries are fighting in war for the common cause. History shows that private profit-entities often are participants in war and not at all a new phenomenon. The State as a single legitimate actor in violence is an exception more than a rule. To hire non-citizens in order to fight a battle is as old as war itself. Most past empires have contracted foreign troops in one way or another.<sup>17</sup> But it is only in the twentieth century that mercenarism has been unlawful.<sup>18</sup> Ten years ago a common perception was that military firms provided logistic, laundry and cafeteria service. When it came to military and armed services mercenaries were used. This perception was never utterly correct. Today these two areas have merged together and exploded into PMC's and PSC's.<sup>19</sup> The difference between past contractors and today's PMC's is according to some scholars that PMC's today represent a new group of organized corporate mercenaries that responds to the increasing need of advanced military force and expertise in conflicts. Countries send PSC's and PMC's as means to influence a conflict in which they claim to be neutral. In order to understand the emergence of PMC's of today and how modern states respond to the industry, it is imperative to view the historical context in which the phenomenon has arisen, namely the evolution of mercenaries.<sup>20</sup>

The use of mercenaries can be traced as far as to the ancient empires and regimes. Trained soldiers were a premium resource, and foreign units were valued for the expertise they added to the army. The first record of mercenaries in an army was in 2094-2047 B.C.E., when King Shulgi of Ur had such. Most ancient Greek armies were built up by foreign specialists, mercenaries, and not by their own citizens. For example in 401 B.C.E., Xenophon had a unit called the Ten Thousand unit, which were foreigners

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<sup>17</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 19.

<sup>18</sup> J. C., Zarate, 'The Emergence of a New Dog of War', Vol. 34, *Stanford Journal of International Law*, (1998), pp. 81-82.

<sup>19</sup> J., Vail, 'The Private Law of War', *Energy Intelligence*, (2006), p. 1, available at: URL (<http://www.jeffvail.net/privatelawofwar.pdf>), last visited on 18 December 2007, at 16.05 and L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', Conference on Non-State Actors as Standard Setters: The Erosion of the Public-Private Divide, *Basel Institute on Governance*, Basel, Switzerland, (February 8-9 2007), pp. 1-2, available at: URL (<http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Cameron.pdf>), last visited on 20 December 2007, at 16.52.

<sup>20</sup> J. C., Zarate, 'The Emergence of a New Dog of War', (1998), pp. 81-82 and E., Krahnmann, 'Private Firms and the New Security Governance', paper prepared for the *International Studies Association*, 43<sup>rd</sup> Annual Convention, (23-27 March 2002), p. 3, available at: URL (<http://www.sandline.com/hotlinks/krahnmann.html>), last visited on 18 December 2007, at 13.14.

hired to fight for Greek in the Persian civil war. Their adventure was the source for one of the first novels in history. As their employer was killed they had to fight their way back across Asia Minor without payment.<sup>21</sup>

In the First Punic War, the Carthaginian Empire was depending on mercenary-forces. Mercenaries were not paid properly and therefore abandoned the battle in what came to be called the Mercenary War, since the Carthaginians had to hire another foreign mercenary-troop in order to conquer the rebels. The Carthaginians also experienced the greatness of mercenary-troops. In the Second Punic War, another foreign troop was hired, the Hannibal's army. These expert soldiers dominated the Roman citizen-army until Rome took Carthage's silver mines in Spain, and it was impossible to maintain a hired army due to financial objects.<sup>22</sup>

The fall of the Roman Empire was followed by the Dark Ages for Western Europe. The new world had no governance to speak about and feudalism with obligated military service arose. Hired soldiers were an integral part of a medieval army, but a smaller part than before. The hired units hired themselves to the highest bidder and were often experts on weapons which required long training.<sup>23</sup>

In the Middle Ages the Kings and Lords were forced to hire mercenaries, since their knights only were obliged to work for 40 days per year and could not be forced to fight abroad. This system developed a custom of mercenaries being hired whenever they were needed.<sup>24</sup>

As the thirteenth century was about to begin people started to gain money and lots of trading companies arose. In this atmosphere the *condotta* system blossomed. This contract of military services leased to private units began as an economical business, in which the most skilled foreigners were used in the military, in order to keep themselves, the natives, outside war-situations. This was supported by the nobility which feared the power of an armed population and rather had foreign mercenaries fighting their battles.<sup>25</sup> During the Hundred Years War period, between 1337 and 1453, the absence of centralized control created an optimal atmosphere for private soldiers. Many soldiers were hired on an individual basis as freelancers, but when they lost employment, they had no money left and had no alternative carrier to turn to, most of them formed companies. These were formations of individuals that travelled together in the search for work. In order to finance their travelling they blackmailed villages and towns. The *condottas*-contract

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<sup>21</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 20-21.

<sup>22</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 21.

<sup>23</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 22.

<sup>24</sup> J. C., Zarate, 'The Emergence of a New Dog of War', (1998), pp. 81-82.

<sup>25</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 22, which refers to P., Contamine, *War in the Middle Ages*, Basil Blackwell, New York, (1984), p. 158.

between the employer and the employed unit became quite detailed. It included length of service, what they should carry out, their pay and how many that were contracted. During this period mercenaries were not loyal to their home country, or to the employer, but to their unit. They worked simply to raise money, and did so often by taking prisoners that generated ransoms.<sup>26</sup>

Later, in the seventeenth- and eighteenth centuries, European States such as France, Britain and Scotland began to hire soldiers and sailors from all different regions, to serve in their armed forces. The Swiss companies such as Uri, Unterwald and Schwyz were known for supplying military forces to France. The Dutch used mercenary troops themselves, but provided them to others as well. They were known for the creation of the Scots Brigade which was a legion completely composed of foreign mercenaries.<sup>27</sup> War had become the biggest industry in Europe and military capacity and wealth went hand in hand. New for this period was that military entrepreneurs arose. They were individuals with good economy that recruited and equipped military units with their own finances, and then hired them out to the one in need of them. Louis de Geer was one of them. He was an Amsterdam capitalist which provided among other countries, the Swedish government with a navy.<sup>28</sup>

It was not until the end of the Thirty Years War that the system of hiring foreign soldiers changed.<sup>29</sup> In the Peace of Westphalia in 1648 the State and its sovereignty became center of attention, instead of the Empire which had been the midpoint for a long period. The modern international system was introduced and was composed by sovereign States with exclusive authority within its territorial boundaries.<sup>30</sup> The Thirty Years War was the last war which was fought mainly with hired units. After that point official armies with soldiers loyal to the nation became more and more usual, until mercenarism was almost faced out.<sup>31</sup> Citizens were perceived as representatives of their home-State and the State therefore did not want its citizens to enlist in another country's military.<sup>32</sup> States even forbade their citizens to engage in any other army than the national one, through neutrality laws. Nation-States began to monopolize the authority to organize force abroad and accept their responsibility for violence within their

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<sup>26</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 23-24.

<sup>27</sup> J. C., Zarate, 'The Emergence of a New Dog of War', (1998), pp. 84-86.

<sup>28</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 28.

<sup>29</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 29.

<sup>30</sup> S. D., Krasner, 'Compromising Westphalia', Vol. 20, No. 3, *International Security*, (Winter 1995-1996), p. 115, available at: URL (<http://links.jstor.org/sici?sici=0162-2889%28199524%2F199624%2920%3A3%3C115%3ACW%3E2.0.CO%3B2-Y>), last visited on 18 December 2007, at 13.40.

<sup>31</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 29.

<sup>32</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 31.

jurisdiction. Mercenaries were no longer seen as independent agents but as parties lending their expertise to a political cause.<sup>33</sup>

During the twentieth century a popular strategy grew forward, namely that States started to contract individual foreigners, on an individual basis, without the consent of the sending State for a specific conflict, so called *soldiers of fortune*.<sup>34</sup> Often such individuals were more interested in the adventure than of the result they were supposed to strive at in the long run. The use of mercenaries in certain regions became a symbol of the hindering of self-determination of States which led to an even more critical view of mercenaries and private actors in warfare.<sup>35</sup>

When mercenarism appeared in Africa, the phenomenon was viewed as anachronism in the nation-State system and thought of as a threat to the independence and right to self determination of African States.<sup>36</sup> In Africa, mercenaries have been used numerous times in weak States during the 1960's and forward. The United Nations has responded by sending U.N.-troops to fight mercenaries and by passing several resolutions against the recruitment, use and support of mercenary troops when they acted against newly independent countries, or to suppress national liberation movements. The Organization of African Unity also made an effort to eliminate the phenomenon of mercenaries by calling on all States to outlaw the recruitment and use of mercenaries through declarations.<sup>37</sup>

In most cases in African conflicts, where mercenaries have been present, an economic interest such as mining or oil has been at stake. Therefore, there have been opportunities of material gain for mercenaries. Mercenaries have been decisive participants in conflicts and acted as tools for colonial powers that have economic interests in countries within conflict-regions.<sup>38</sup>

The use of mercenaries is not dominating any longer but it is present around the world. The United Arab Emirates for example rely on foreign soldiers from Oman, Yemen, Jordan, Pakistan and Great Britain. The French government has foreigners in their elite-force, the Foreign Legion. The British and Indian governments rely on the Gurkha regiments which include individuals from Nepal.<sup>39</sup>

### 3.1.1 Developmental Factors

As of today there are a number of factors which have helped the private military industry to develop into the large number of PMC's that exists. The

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<sup>33</sup> J.C., Zarate, 'The Emergence of a New Dog of War', (1998), p. 85.

<sup>34</sup> J.C., Zarate, 'The Emergence of a New Dog of War', (1998), p. 86.

<sup>35</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 37.

<sup>36</sup> J. C., Zarate, 'The Emergence of a New Dog of War', (1998), p. 86.

<sup>37</sup> J. C., Zarate, 'The Emergence of a New Dog of War', (1998), pp. 86-87.

<sup>38</sup> J. C., Zarate, 'The Emergence of a New Dog of War', (1998), pp. 88-89.

<sup>39</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 38.

rise of non-State actors in violence is one. It is no longer true that only States engage in war. The global security paradigm has led to the emergence of new conflict groups which are not of State-character. Nowadays it is sometimes hard to differ between civilian, soldier, guerilla, terrorist or criminal. In order to pose a threat, not many individuals are needed. New formations of non-State actors have opened up the market in terms of supply and demand of PMC's.<sup>40</sup>

The outbreak of many violent conflicts in the Third World combined with the non-willingness to intervene and the global downsizing of national militaries, have also pushed the need of PMC's further.<sup>41</sup> Superpowers and former colonial States willingness to intervene has declined during the last two decades, since many of today's conflict zones do not fit into their strategic plan. In history such States were interested in developing regions and regarded the periphery as a strategic battleground in helping a client State and therefore they often intervened.<sup>42</sup> Today European and North American powers have decreased their help and support. Therefore some fragile regimes cannot rely on financial and military support from these governments. Most States today do not even engage in international peacekeeping operations unless they have an immediate security or financial interest in the conflict, because it is economically destructive to engage in a conflict which does not render any financial or power-related gain for the State. Due to limited governmental economic resources cost-effective PMC's are rather used than national forces, for purposes of national security.<sup>43</sup>

Not only States have changed their engagement, so have U.N.-operations. The structure of the U.N. Security Council, with the superpowers in charge has led to that a vast number of conflicts which are not of interest for Western States, such as Liberia has gained little interest, while the Bosnian conflict have received more. Therefore, where security is needed and the U.N. or any State cannot supply the demand, the private military firm, PMF, can fill such security-gaps.<sup>44</sup>

The downsizing of national armies happens at about the same time as when more and more small and large conflicts break out.<sup>45</sup> Also, when national militaries and the U.N. decrease its engagement in numbers and fails to engage in situations, someone has to fill the hole. So it seems rather natural

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<sup>40</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 51-52.

<sup>41</sup> C., Holmqvist, 'Private Security Companies The Case for Regulation', (2005), p. 2.

<sup>42</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 58.

<sup>43</sup> J. C., Zarate, 'The Emergence of a New Dog of War', (1998), p. 90 and E., Krahmman, 'Private Firms and the New Security Governance', (2002), pp. 3 and 6.

<sup>44</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 59.

<sup>45</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 53.

that when large numbers of former military personnel look for work,<sup>46</sup> and are willing to sell themselves, they engage in PMC's.<sup>47</sup> With these facts it is not hard to understand that PMC's have grown rapidly in numbers during the last decade, according to me.

The growth of the industry varies according to the specific security contexts. In failing States the consumers have turned to the private sector due to the lack of a functioning public sector security. In many such cases there was not much to privatize. In wealthy States on the other hand, private actors have been a supplement to the functioning State-institutions.<sup>48</sup>

Military downsizing has also led to the surplus of arms stocks, which can easily come into the hands of any private actor. The foundation of States is still true, but States have lost some control over primary means of warfare, like arms. States have the legal possibility to regulate the PMI, but has failed to do so many times. Private conflict groups can nowadays pose greater threats than States. This is beneficial to PMC's which have the same possibility of building up and developing their force capacity as any other private entities have.<sup>49</sup>

As long as there will be wars of any kind there will be a need for military expertise and skilled labor. This area must be understood in a certain historical context and from the view that States have interests in other countries. States can benefit from the use of private actors, may it be mercenaries or PMC's, instead of using the labor that can be found within the nation. The gain is both financial and organizational.<sup>50</sup> It is in this environment that private military and security companies have developed and without that background I suppose that mercenaries and PMC's cannot be fully understood.

### 3.2 Private Military Contractors in Iraq

The main issue within this area is that there is a gap in accountability and oversight of criminal misconduct by PSC's and PMC's in international and sometimes in national law. In July 2007 there were an estimated number of 180 000 contractors operating in Iraq.<sup>51</sup> It is therefore not surprisingly that

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<sup>46</sup> C., Holmqvist, 'Private Security Companies The Case for Regulation', (2005), p. 2.

<sup>47</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 53.

<sup>48</sup> C., Holmqvist, 'Private Security Companies The Case for Regulation', (2005), p. 3, which refers to E., Krahnemann, 'The Privatization of Security Governance: Developments, Problems, Solutions', 1/2003, Arbeitspapiere zur Internationalen Politik und Aussenpolitik, *Lehrstuhl Internationale Politik, University of Cologne*, (2003), pp. 13 and 17, available at: URL (<http://www.politik.uni-koeln.de/jaeger/downloads/aipa0103.pdf>), last visited on 18 December 2007, at 14.16.

<sup>49</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 53-55.

<sup>50</sup> J. C., Zarate, 'The Emergence of a New Dog of War', (1998), p. 90 and E., Krahnemann, 'Private Firms and the New Security Governance', (23-27 March 2002), pp. 3 and 6.

<sup>51</sup> C., Holmqvist, 'Private Security Companies The Case for Regulation', (2005), p. 24.

The Economist named the Iraq War “the first privatized war”.<sup>52</sup> About 30 000 of these were well-armed.<sup>53</sup> Some of them use key weapon systems such as M-1 tanks, Apache helicopters and B-2 stealth bombers.<sup>54</sup> The fact that only estimations of the number of contractors involved in Iraq can be made, and that no exact figure can be found, is a good indicator of the lack of control and oversight.<sup>55</sup>

In Iraq the legal sphere around private contractors is complicated. In June 2004, an agreement, the Coalition Provisional Authority Order 17 was revised and imposed by the United States. In this agreement all non-Iraqi private contractors operating in Iraq have local criminal immunity in Iraq and thus cannot be prosecuted in Iraqi courts. This means that Iraq lack jurisdiction to prosecute any members of private contractors under Iraqi law.<sup>56</sup>

Such an agreement could be well-functioning, if the U.S. effectively accepted their responsibility to investigate and prosecute criminal conduct, conducted on Iraq soil, by American PMC-employees, in the U.S. But the U.S. government has failed arguably in at least some instances to investigate circumstances, find justice and hold members of PMC’s accountable when they are guilty of criminal conduct. Of the several thousand reports that have been filed against PSC’s in Iraq, not many have been completed in terms of criminal prosecution. This illustrates the lack of accountability that is present in the industry. One report that has come to our attention was in October 2005 when there was video proof of PSC’s firing at unarmed civilian cars outside of Bagdad. To this incident no legal consequences followed according to the Non-Governmental Organization, Human Rights Watch.<sup>57</sup>

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<sup>52</sup> J. Vail, ‘The Private Law of War’, (2006), p. 1, which in turn cites the newspaper article Military Industrial Complexities, The Economist, (29 March 2003), p. 56.

<sup>53</sup> K. Lanigan, Director of the Law and Security Program, Human Right First and J. Daskal, Senior Counterterrorism Counsel, Human Rights Watch, *Letter to US Representative David Price in Support of Accountability for US Contractors in Iraq and Afghanistan*, 2 October 2007, available at: URL (<http://hrw.org/english/docs/2007/10/02/usint17007.txt.htm>), last visited on 18 December 2007, at 14.41 and *Q&A: Private Military Contractors and the Law*, available at: URL (<http://hrw.org/english/docs/2004/05/05/iraq8547.htm>), last visited on 18 December 2007, at 14.44.

<sup>54</sup> C., Holmqvist, ‘Private Security Companies The Case for Regulation’, (2005), p. 24 and P. W., Singer, ‘Outsourcing war’, *Foreign Affairs*, Brookings Institution, ( 1 March, 2005), p. 2, available at: URL ([http://www.brookings.edu/articles/2005/0301usdepartmentofdefense\\_singer.aspx](http://www.brookings.edu/articles/2005/0301usdepartmentofdefense_singer.aspx)), last visited on 20 December 2007, at 15.20.

<sup>55</sup> K. Lanigan and J. Daskal, *Letter to US Representative David Price in Support of Accountability for US Contractors in Iraq and Afghanistan*, and *Private Military Contractors and the Law*, (2 October 2007).

<sup>56</sup> K. Lanigan and J. Daskal, *Letter to US Representative David Price in Support of Accountability for US Contractors in Iraq and Afghanistan and Private Military Contractors and the Law*, (2 October 2007).

<sup>57</sup> K. Lanigan and J. Daskal, *Letter to US Representative David Price in Support of Accountability for US Contractors in Iraq and Afghanistan*, (2 October 2007).



Another probably even more well known example, is Blackwater USA which on the 16<sup>th</sup> of September this year came under scrutiny when employees of the company were involved in a shooting conflict, which led to 11 killed Iraqi civilians. When the Iraq Ministry of the Interior tried to withdraw Blackwater's license to operate in Iraq, it was discovered that the company did not have a license. The U.S. Federal Bureau of Investigation, the Department of Defense, DoD, and the State Department have promised inquiries and the sending of an investigation team to Iraq.<sup>58</sup> Whether this is due to exposure in media and if the investigation will lead anywhere is hard to know. But as I interpret the situation and the atmosphere as that there is a general reluctance to investigate and prosecute, which can be illustrated by the number of allegedly human rights violations that have been filed against PMC's and which have not led to investigation or prosecution. If strong States with a developed criminal justice system like the USA do not take action, one can ask how any other State can be required to take action against alleged criminal conduct.

Blackwater has been present in Iraq since the early days of occupation. They have engaged in firefights and about 30 of its employees have been killed during their operations. They receive high salaries to act in the name of the American people in Iraq. Still, no effective oversight of Blackwater's activities and conduct has been introduced. None of their alleged conduct against Iraqis has been prosecuted for. If Iraqi civilians have been killed by Blackwater USA, someone must be held liable for these actions. Is it only the responsibility of the individuals committing the killings, the responsibility of Blackwater as a company, or can the U.S. State Department be held responsible since they hired them and allowed them to operate heavily-armed inside Iraq?<sup>59</sup> The possibility of attributing PMC's activities to States will be investigated further in chapter 5.

The way in which the Iraq agreement with the U.S. is constructed, and the U.S. federal laws are built up with reluctance of investigation and unwillingness to prosecute private contractors, leads to a loophole for private contractors. This allows contractors in Iraq to commit crimes with impunity. If the U.S. should continue to fail investigating and prosecuting PMC-employees, then the Iraqi government is obliged to take necessary steps in order to fulfill its international obligations as a State, namely to remedy the criminal actions. Because, even if a State has the sovereign right to hand out immunity, it also has the responsibility to protect its citizens.<sup>60</sup> This also actually applies to an occupying power as well.<sup>61</sup>

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<sup>58</sup> K. Lanigan and J. Daskal, *Letter to US Representative David Price in Support of Accountability for US Contractors in Iraq and Afghanistan*, (2 October 2007).

<sup>59</sup> J. Scahill, American investigative journalist, 'Blackwater: Hired Guns above the Law', (21 September 2007), available at: URL (<http://www.thenation.com/doc/20071008/scahill0921>), last visited on 18 December 2007, at 14.52.

<sup>60</sup> *Q&A: Private Military Contractors and the Law*.

<sup>61</sup> M. N., Shaw, *International Law*, 5<sup>th</sup> edition, Cambridge University Press, Cambridge, (2003), pp. 424-429 and U., Linderfalk, (ed.), *Folkrätten I ett nötskal*, (2006), p.171.

International law is generally not involved so long as the State carries out its obligations correctly. But in some cases States have agreed to carry out certain obligations in a certain way, which is often the case within the areas of International Humanitarian Law, IHL, and international criminal law. States undertake certain obligations, like the prohibition of a crime or conduct, and to punish these crimes and conducts through their national legal system.<sup>62</sup> The State is responsible for conducts of State organs, persons or entities exercising elements of governmental authority and for actions taken by persons acting on the instructions of, or under the direction or control of the State.<sup>63</sup> As PMC's sometimes carries out human rights violations, it is therefore natural to investigate whether their actions can result in State responsibility, in my opinion.

Even if the privatization of governmental functions has saved a lot of money there is great concern raised about the PMC's responsibility to human rights and what it means when a commercial actor set up its own rules and don't have frames to act within. Fundamental human rights principles cannot be sacrificed in order for economical gain.<sup>64</sup> It is therefore of great importance to see whether or not PMC's, as private actors of warfare, is an alternative to the supposed military monopoly of States.<sup>65</sup>

Cases of alleged criminal conducts by private contractors raises questions of culpability of human rights violations, legality, legitimacy, transparency, accountability and difficulties in regulation. In international law, States have responsibility to provide effective legal remedies for individuals that have suffered from violations of their fundamental rights within their jurisdiction. This means that States are responsible to investigate and prosecute serious human rights violations of the laws of war, no matter whether a private person or a governmental official has conducted the violation.<sup>66</sup>

### **3.3 Well known Private Military Companies and their Activities**

In the wake of globalization, the market of PMC's has expanded and the corporatization of military service seems inevitable. Today's PMC's are well structured companies with the foremost goal of financial gain. Many PMC's have ties to other firms outside their industry. Like Vinnell, which began as a construction company, building the Los Angeles freeway and the Dodger Stadium. The firm has since then, moved forward into the military service field. Today, Vinnell provide tactical advisory and support to the

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<sup>62</sup> C. de., Rover, *To Serve and To Protect Human Rights and Humanitarian Law for Police and Security Forces*, International Committee of the Red Cross, Geneva, (1998), p. 40.

<sup>63</sup> ILC-Draft, articles 4, 5 and 8.

<sup>64</sup> L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 1 and J., Vail, 'The Private Law of War', (2006), p. 3.

<sup>65</sup> P.W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 169.

<sup>66</sup> *Q&A: Private Military Contractors and the Law*.

Saudi Regime. The firm was part of a broader multinational corporation, namely Braddock Dunn & McDonald,<sup>67</sup> and was sold on to Northrop Grumman in 2002.<sup>68</sup> Some scholars are of the opinion that PMC's are not at all private companies driven by financial gain, but that most of them are public entities, so called *front companies*, driven by political motivations. Such companies have been present before, as for example during the 1960's when the Central Intelligence Agency set up Air America, Civil Air Transport, Intermountain, Air Asia and Southern Air Transport. Perhaps some of today's PMC's are *front companies*. It is probable that most are not, since many PMC's today are public entities owned by financial institutions and individual stockholders, bringing transparency and oversight into the corporation, something that *front companies* of the past have not stood for. The wide variety of clients that PMC's take on also illustrate that the center of attention is not only strategic, but perhaps foremost the difference in military capacity.<sup>69</sup>

One can differ between mercenaries and PMC's by saying that the last category provides support and logistics, while mercenaries participate in combat operations. The majority of the private contractors that are in Iraq today are cooks, truck drivers, construction workers, maintenance technicians, laundry operators or deals with mine-countermeasures and humanitarian operations.<sup>70</sup> This is at least what I have believed so far. Behind the frame of PMC's there seems to be a different industry. The industry where PMC's provide logistical support to military operations and where PMC's are involved in controversial combat support. The boundary between mercenaries and some of the PMC's is perhaps diminishing and this can be illustrated by the following examples.

It is difficult to define what PSC's and PMC's do for a living since, it differs from unit to unit. The corporate bodies of PSC's and PMC's namely specialize in the provision of military skills, combat operations, strategic planning, intelligence, risk assessment, operational support, training and technical skills.<sup>71</sup> Therefore a range of examples will point in the direction of what their possible tasks might be in a conflict. This is dealt with in the following chapter.

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<sup>67</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 40 and 47.

<sup>68</sup> Homepage of the company Northrup Grumman, available at: URL (<http://www.northropgrumman.com>), last visited on 7 January 2008, at 15.35.

<sup>69</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 48. For more information on front companies see C., Robbins, *Air America: The Story of the CIA's Secret Airlines*, G.P. Putnam's Sons, New York, (1979).

<sup>70</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 82 and J., Vail, 'The Private Law of War', (2006), p. 4.

<sup>71</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 8.

One way of classifying PMC's is into three different categories of military actors. These are military provider-, consultant- or supporter- firms.<sup>72</sup>

### 3.3.1 The Military Provider Company: Executive Outcomes

After the apartheid regime was broken down in South Africa, most of the units from that time dissolved. Thousands of veterans from the South African Defense Force and South African Police were out of job.<sup>73</sup> Most of them were also in need of cash and therefore became the basis for Executive Outcomes, EO, pool of employees. Almost no one asked to join the force declined the offer.<sup>74</sup> For each operation individuals were chosen from this crowd. EO also selectively recruited former members of feared special units like the 32<sup>nd</sup> Battalion, the Reconnaissance Commandos and the paramilitary Koevoet force. These were forces which were used by the apartheid regime to destabilize neighboring countries and to prevent opposition internally. Even if EO claimed to only work for legitimate governments and not for rough regimes, it is rather evident that EO have openly engaged in battles and introduced modern weaponry and tactics with devastating effects in civil wars.<sup>75</sup> EO offered a range of military services. Among those strategic and tactical military advisory services, sophisticated military training packages on land, sea and air warfare, peacekeeping services, advise to armed forces on what weapons to select for a certain operation and paramilitary services can be found.<sup>76</sup> EO was linked with a structure of multinational holdings and in order to cover up the exact involvement of allied firms and their operations, they created a facade of being a legitimate firm that only worked for legitimate entities.<sup>77</sup>

One of their more well known operations took place in Sierra Leone during the 1990's. This is an illustrative example of how different private and public agendas might be. The post-colonial regime of Sierra Leone was led by Siaka Stevens who took advantage of the wealth in the country individually, leaving the population in a poor society. He weakened the military so that it would not threaten him. His consistent awful treatment of the State resulted in underdevelopment, corrupt governance and civil war. The Revolutionary United Front, RUF, was a collection of individuals

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<sup>72</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 91.

<sup>73</sup> J., Vail, 'The Private Law of War', (2006), p. 5 and J. C., Zarate, 'The Emergence of a New Dog of War', (1998), pp. 91-93.

<sup>74</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 102.

<sup>75</sup> J., Vail, 'The Private Law of War', (2006), p. 5 and J. C., Zarate, 'The Emergence of a New Dog of War', (1998), pp. 91-93.

<sup>76</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 104 and 275. These footnotes, refers to the private military company Executive Outcomes corporate webpage. The site is no longer available but maintained on archives listed in the appendix of P. W., Singers book.

<sup>77</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 102.

which opposed Stevens rule,<sup>78</sup> and arose in 1991 as a violent rebellion group.<sup>79</sup> As RUF's command was taken over by Sankoh, a former military corporal, their military strategy became horrendous.<sup>80</sup> This was the start of one of the most vicious civil wars in history. Without a defined political agenda RUF admittedly targeted civilians with murder, rape, torture and the use of children as soldiers to carry out their attacks, in order to illustrate their power. In the middle of the 1990's an atmosphere of anarchy had arose and roadside ambushes, nighttime massacres of villages and machete mutilations were common. The government was out of control and had lost control over their financial sources in terms of the diamond mines and the agricultural trade to the rebels.<sup>81</sup> After the government had failed in striking out the RUF, due to poorly trained soldiers, the EO which already operated within the country was hired by the government to push back and defeat RUF forces and regain lost areas. This was not afforded by the government in terms of money, but an owner of a mining company saw the opportunity and paid partially for the operation in exchange of future diamond mining.<sup>82</sup>

Their operation looked optimistic and successful in a short-term evaluation.<sup>83</sup> RUF was quickly defeated and a peace-agreement was written. The international community was critical of EO's conducts and EO left the area before the contract was over. The security in Sierra Leone was worsened and 95 days after EO departure, a coup began with mass killings and chaos. It was not until a rebuilt Sierra Leonean military, incursions by the Guinean army and a revitalized U.N. force came together that the RUF-rebels were driven away.<sup>84</sup> EO received mass-criticism for their conduct in Sierra Leone, with greater violence than necessary. Their links to the apartheid era was never completely blown away. This led to that EO was not hired by States and companies anymore. One of their competitors with a better reputation could be hired by their clients instead. Due to heavy criticism and less business-opportunities EO closed down. Since the close down of EO in 1999 their employees have been incorporated in new provider firms with the same connections as EO had. So, instead of closing down completely, EO simply devolved its activities. As P.W. Singer puts it "The end result is that although Executive Outcomes technically closed, in another sense it simply globalized".<sup>85 86</sup>

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<sup>78</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 117-118.

<sup>79</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 4.

<sup>80</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 117-118.

<sup>81</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 4.

<sup>82</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 110-115.

<sup>83</sup> C. Holmqvist, 'Private Security Companies The Case for Regulation', (2005), pp. 11-13 and 15.

<sup>84</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 110-115.

<sup>85</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 118.

The Special Rapporteur of the U.N. Commission on Human Rights on the effects of the use of mercenaries, talks of PSC's in the Sierra Leone situation as "an illusion of stability, but left untouched substantive problems that could never be affected by a service company".<sup>87</sup>

There seems to be a difference in the way public and private actors conducted their operation in Sierra Leone. EO came with a short-term solution of regaining financially important areas for Sierra Leone. Something which may be of great importance, but in my opinion there was not one single achievement that had to be made but a number of things that had to be fulfilled. The public response on the other hand included international political efforts, diplomatic efforts and long-term development aid.<sup>88</sup> One has to keep in mind that EO has conducted public military operations around the world and has acquired positive and negative feedback for their actions. In the same operation EO can meet different people with different opinions. In Sierra Leone EO received criticism in terms of being told that they were a mercenary army which was constituted by racist killers, at the same time as they were praised by humanitarian groups.<sup>89</sup>

EO is one of the companies that have been accused of being a mercenary company. One usually differentiates between PMC's and mercenaries by saying that mercenaries take part in direct combat. It seems that EO has perhaps done just that. The classification of entities is difficult. Even high positioned expertise on the area seems to have different opinions of what constitutes mercenaries and when the boundary to PMC's has been crossed. Some are of the idea that EO is a troop of mercenaries, while others claim them to be a PMC. What they all agree upon is that EO is the most controversial security company on the international market that has existed so far.<sup>90</sup>

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<sup>86</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 117-118.

<sup>87</sup> C. Holmqvist, 'Private Security Companies The Case for Regulation', (2005), p. 13 and E. B., Ballesteros, Special Rapporteur, Commission on Human Rights, *The rights of Peoples to self-determination and its application to Peoples under Colonial or Alien Domination or Foreign Occupation: Report 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, submitted by Mr. Enrique Bernales Ballesteros (Peru), Special Rapporteur pursuant to Commission resolution 1998/6*, Fifty-fifth session, item 5 of the provisional agenda, (E/CN.4/1999/11), (13 January 1999).

<sup>88</sup> C., Holmqvist, 'Private Security Companies The Case for Regulation', (2005), pp. 12-13.

<sup>89</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 101-110.

<sup>90</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 102 and 104 and J. C. Zararte, 'The Emergence of a New Dog of War', (1998), p. 92.

### 3.3.2 The Military Consultant Company: Military Professional Resources International

Military Professional Resources International, MPRI, is a PMC from Virginia, United States of America.<sup>91</sup> They specialize in doctrinal development, restructuring defense ministries, military instruction and training on weapon-systems, evaluations and assessments, advanced war-gaming, simulations, research, military leadership seminars and analysis.<sup>92</sup> Their employees are drawn from the highest levels of former U.S. military personnel, which offers clients strategic expertise and close connections to U.S. policy. It also means that the company has close ties to the home government. This is helpful in terms of that MPRI receives useful information and business recommendations from the government. It gives MPRI an advantage over corporate rivals and sometimes contracts are established through referrals from U.S. officials. This is beneficial for the State too, which can rely on the company since its former employees are now employed in the company it contracts. The seniority of rank within the military is illustrated by the hierarchy in the firm. This relationship is obviously beneficial for these two parties, but the advantage of privatizing military in terms of competition, seems to disappear. Some scholars argue that it is reasonable to argue that these close ties illustrates that MPRI is indeed a private extension of the U.S. military.<sup>93</sup>

MPRI is often contracted by the American governmental institution Department of Defense, DoD.<sup>94</sup> But, MPRI sell their services to other governments and commercial employers as well. Among a long row of operations they were hired by the U.S. government to assist the Croatian military in defeating Serbian military forces. MPRI helped Croatia to acquire secret radar technology from Russia. Often MPRI sign a contract with a foreign government for services such as military and technical training, force modernization and force-expansion programs because the foreign government feel that MPRI represent a private channel through which to gain U.S. military expertise, in situations where conventional U.S. military assistance programs are not politically or tactical appropriate. It can be questioned whether MPRI is merely a quasi-official U.S. military agency whose support can represent tactical support by the American government.<sup>95</sup> This can be illustrated by the following operation of which MPRI was part of.

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<sup>91</sup> J., Vail, 'The Private Law of War', (2006), p. 4.

<sup>92</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 122 and J., Vail, 'The Private Law of War', (2006), p. 4.

<sup>93</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 119-121.

<sup>94</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 134.

<sup>95</sup> J., Vail, 'The Private Law of War', (2006), p. 4 and J. C., Zarate, 'The Emergence of a New Dog of War', (1998), pp. 102, 103 and 106-108.

MPRI was hired by the U.S. military in the Bosnian Federation where they were asked to supply arms and train the Bosnian military forces. *An equip and train program*. The forces in the Bosnian Federation were to be military taught and equipped to equalize the perceived disadvantage against the Serbs. The U.S. demanded the Bosnian Federation to pass a Federation defense Law and comply with the Dayton Accords, which meant they had to expel all foreign mercenaries, trainers or volunteers and to cut military and intelligence ties to Iran in order for USA to permit arms shipments and MPRI to commence its training. Since USA was concerned with the influence of the Balkans and had interest in the Bosnian Federation and some of the officials at Pentagon thought that a direct involvement by the U.S. military would endanger the U.S. troops, hiring MPRI as a private company for tasks normally done by American military was strictly a political and military strategy.<sup>96</sup>

MPRI, like many other PMC's have self-regulations, which suggest that they promise to always act ethically, with professionalism, according to the values that are part of the foundation of USA, make quality control in each operation and to act according to governmental laws, policies and licenses.<sup>97</sup>

### 3.3.3 The Military Support Firm: Brown & Root

Companies like Brown & Root, B&R, are often not thought of as PMC's, since their actions are of less *mercenary* character. Therefore they are not included in reports about the private military industry.<sup>98</sup> B&R does just as MPRI, recruit their employees from recently retired military officers and wherever one can find the U.S. military, one can find B&R. B&R is part of a greater holding, namely the Halliburton corporation, a global construction and energy service company. Just as MPRI, B&R owe some of its success to the political world and to its connections within it.<sup>99</sup>

In early 1995 B&R became involved in the Balkans conflict with a beginning in *Operation Deny Flight*. B&R provided support services to the U.S. troops, which with planes patrolled the no-flight zones in Bosnia. Later in the same conflict the company received a contract on \$546 million to provide logistical support for the mission. Among other operations in which they have been involved is the war in Kosovo. This time NATO was responsible for air operations that U.S. troops in fact were mandated to carry out. B&R supported U.S. troops, but also built and operated Kosovo-Albanian refugee camps, since aid groups such as the Red Cross were not prepared on the humanitarian crisis. Even if B&R is not performing right on the battlefield, their services, in terms of food, sleep, vehicles and weapon

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<sup>96</sup> J. C., Zarate, 'The Emergence of a New Dog of War', (1998), pp. 102 -108.

<sup>97</sup> Homepage of MPRI, *Corporate Philosophy of the MPRI*, available at: URL (<http://www.mpri.com/main/philosophy.html>), last visited on 18 December 2007, at 17.39.

<sup>98</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 97.

<sup>99</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 136.



systems are crucial to the U.S. military since the PMC can manage them rapidly and with great expertise.<sup>100</sup>

### **3.4 Concluding Remarks on the Private Military Industry**

Poor countries are unable to defend themselves and their population against guerilla wars or disaffected members of society since they lack the financial resources, military preparedness and military expertise. Therefore they are unable to create a strong well-trained standing military. PMC's provide military expertise in a time when governments do not have the political will, strategic plan or the economic resources to enter civil wars on behalf of recognized regimes. Therefore PMC's can legitimize their activities and operations.<sup>101</sup>

It is questionable if security companies operate in a quasi-official manner, even if their home States would deny the private companies actions. They work officially with recognized States in order to professionalize militaries and restore semblance of public order. They are constrained by their employing States in terms of legal obligations, reporting requirements and also depend on the good graces of their home States and the general opinion of them. That general opinion is made up by individuals' point of views, the market force, the media and the opinion of the international community. All these factors require PMC's to maintain a professional reputation respectful of human rights and of their limited mandates.<sup>102</sup>

The insecure environment in Iraq has resulted in PSC's and PMC's engaging in more dangerous situations than initially thought. This is often not a problem for such companies since they are modern and flexible companies that are demanded to meet certain situational demands. Mandates initially given to PSC's soon become outdated and insufficient. Often PSC's decide themselves what actions are required in order to fulfill their contractual obligation and mission. An agreement must from the start be clear in terms of mandate and scope of action. There must be limits on what kind of methods that are acceptable, and which are not. It should also be clear what parts are mission-critical activities in which the State or international authorities needs to have direct control.<sup>103</sup>

In my point of view information on PMC's are two-fold. One side consists of the PMC's themselves which believe that their work is only positive. The other side belongs to the critics of the private military industry. They are as far as I have found very critical towards the fact that States use PMC's to

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<sup>100</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 144- 146.

<sup>101</sup> J. C., Zarate, 'The Emergence of a New Dog of War', (1998), p. 113.

<sup>102</sup> J. C., Zarate, 'The Emergence of a New Dog of War', (1998), pp. 112-113.

<sup>103</sup> C., Holmqvist, 'Private Security Companies The Case for Regulation', (2005), pp. 25-26.

succeed with their agenda. For me it seems that the usage of PMC's is not simply positive or negative. I have already brought up some negative factors of the industry, but there exists positive sides as well. Some of these are that PMC's do not always engage in illegitimate operations, but help in situations where it is necessary to intervene. Since States and the U.N. do not engage very often anymore, it is necessary for PMC's to do their job, even if it is purely with the motive of financial gain. They are often quickly set up and knowledgeable which helps in the intervention of humanitarian disasters or in the education of mine-eliminators for example. PMC's are also cost-effective meaning that not only rich entities can provide security to their people or business. This could both be positive and negative, since the more money you have the better your security can be and you can hire a company to do almost whatever you want for a great sum of money, but entities which has not had the possibility of setting of a secure environment, now have that possibility.

## 4 PMC-employees Legal Status under International Humanitarian Law

Since alleged crimes committed by PMC's often are not investigated, prosecuted nor taken responsibility for, it seems vital to look juridical on who is responsible for PMC's human rights violations.<sup>104</sup>

The importance to categorize individuals into groups of civilians, combatants and mercenaries lies within the limiting of the effects and suffering that armed conflicts can result in. IHL differs from the sector of human rights law in its demand to interface with military necessity. The center of military necessity is the goal of the submission of the enemy at the earliest possible moment with the least possible expenditure of personnel and resources, which justifies the use of force not prohibited by international law. The balancing of military necessity and humanity is challenging and in balancing these two concepts the requirement to distinguish between those who can participate in armed conflict and those who are to be protected from its dangers is perhaps its most fundamental principle.<sup>105</sup>

Under the Geneva Conventions, which enjoy universal adherence, every individual must be categorized as either a combatant or a civilian. The parties to a conflict must differ between the civilian population and combatants, since attacks<sup>106</sup> may only be directed towards combatants and not against civilians. This *rule of distinction* is vital and of such importance that numerous military manuals stipulated the significance of a distinction. One such is the Swedish IHL Manual that identifies article 48 in the AP I as a principle of distinction and a rule in customary law. To direct attacks against civilians in an armed conflict is in many national legislations an offend toward the national legislation. This and more supports that the rule of distinction, is also a rule in international customary law.<sup>107</sup>

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<sup>104</sup> J., Vail, 'The Private Law of War', (2006), p. 1.

<sup>105</sup> C. K. W., Watkin, 'Combatants, Unprivileged Belligerents and Conflicts in the 21<sup>st</sup> Century', background paper, *International Humanitarian Law Research Initiative*, Harvard Program on Humanitarian Policy and Conflict Research, (2003), p. 2, available at: URL (<http://www.ihlresearch.org/ihl/pdfs/Session2.pdf>), last visited on 19 December 2007, at 09.30.

<sup>106</sup> AP I, article 49, definition of *attacks* in this context: "acts of violence against the adversary, whether in offence or in defence".

<sup>107</sup> AP I, articles 48, 51(2) and 52(2) and L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9, 2007), p. 5 and J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, International Committee of the Red Cross, Cambridge University Press, Cambridge, (2005), pp. 3-6.

The historical background of the categorisation of combatants and civilians dates back to 1965 when the XXth International Conference of the Red Cross adopted a resolution. They believed that governments and other authorities with a responsibility for their own actions in armed conflicts, needed to spare civilians. Therefore, governments and other authorities needed to act milder towards civilians, than was necessary toward persons taking direct part in hostilities. In order to differentiate between these two categories one needed to define the both. This was made in articles 48 and 50 of the AP I. Since civilians are defined as persons, that do not belong to the categories of armed forces, the concept of armed forces is also in need of interpretation.<sup>108</sup> The phrase armed forces will be explained and interpreted in chapter 4.1.1.

The historical purpose of the combatant status was to allow for the partisans in WW II to have a prisoner of war status, POW-status, when captured. The resistance role of militias was also supposed to grant POW-status. The combatant status is supposed to make room for resistance movements, in order to enable those fighting against a more powerful oppressor and to provide them with an incentive to comply with IHL. If they do comply, they will be protected under IHL, for as long as they respect the threshold requirements. This indicates perhaps that combatant status granted to PSC-employees hired by an occupying power undermines the aim of the convention. Thirty years later when mercenaries were defined it aimed among other incentives to remove the combatant status from private forces. It is perhaps possible to give the employees of PMC's combatant status, but if one were to interpret the meaning and the purpose of the law it might be rather inappropriate to use the combatant provision in the context of modern PMC's.<sup>109</sup>

## 4.1 Combatants

Combatant, indicate a person who does not enjoy the protection against attacks. A protection all civilians acquire.<sup>110</sup> The combatant privilege indicates that only combatants may lawfully participate directly or actively in hostilities. Combatants are thereby immune to prosecution for lawful acts of war, but may be prosecuted for violations of human rights and IHL. They are also the only persons, which legally can be targeted and killed with impunity by the opposing rivalry. If they are captured and have been able to distinguish themselves from civilians in a hostile conflict situation, they have the right to be prisoners of war. Having the POW-status includes some general rights,<sup>111</sup> such as humane treatment, sufficient food, proper clothing,

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<sup>108</sup> AP I Commentary, p. 509.

<sup>109</sup> L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 5.

<sup>110</sup> J-M., Henckaerts (ed). and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), p. 3.

<sup>111</sup> AP I, articles 43(2), 44(1) and 44(4) and L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (2007), p. 3.

proper medical care and sanitary conditions, provisions for religious activity, and protections regarding labor.<sup>112</sup>

Even if individuals have the potential of being considered combatants in both international armed conflicts and non-international ones, it is only in international armed conflicts that combatants acquire the combatant status. It is therefore obvious that the distinguishing between civilian and combatant is even more important in IAC's.<sup>113</sup>

Sections of law that are interesting within this chapter are, the already mentioned Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 of June 1977, and the Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

In order for employees of a PMC to hold the status of combatants under IHL, the PMC need to constitute "members of the armed forces" according to article 43(2) of the AP I<sup>114</sup>, "members of the armed forces", or "members of militias or volunteer corps" under article 4A(1) of GC III, or "members of other militias and members of other volunteer corps" according to article 4A(2) GC III.<sup>115</sup>

#### **4.1.1 Article 43: Combatants as Members of the Armed Forces**

Article 43(1) of the AP I reads as follows:

"Article 43-Armed forces

1. The armed forces of a Party to a conflict consists of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict".

The armed forces of a State, "consists of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates". In order to be counted as armed forces, the

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<sup>112</sup> Article 4(B)(2) in *Convention (III) relative to the Treatment of Prisoners of War*, adopted at Geneva, 12 August 1949, 76 U.N.T.S.. Hereafter called GC III.

<sup>113</sup> J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), p. 11.

<sup>114</sup> AP I, article 43(2) and J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), p. 12.

<sup>115</sup> L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 3.

entity also needs to be “subject to an internal disciplinary system”.<sup>116</sup> In order for a PMC to receive the combatant-status in accordance to article 43, it needs to live up to these demands.

Article 43 was drafted in order to provide clearer rules, as to what groups could and should be considered as the State’s armed forces. While article 4A of GC III, differentiate between other militias and volunteer corps, article 43 of the AP I define all groups as armed forces, as long as they reach the requirements of art 43(1). The purpose of this was that during the drafting of AP I several developing countries pointed out that some countries did not have regular armed forces, but had to rely on guerrilla troops. The rules and status of armed forces should therefore be applicable to them as well. Another intention of the drafting committee, was to write the article in a way that avoids the necessity of domestic law to indicate the determination of who is a member of a State’s armed forces, and who is not. All entities that have a factual link to the regular armed forces of a State should be categorized as the armed forces of that State.<sup>117</sup>

#### **4.1.1.1 Prerequisites of article 43(1)**

Article 43(1) of the AP I, has reduced the four conditions in the GC III, article 4A(2), to two main prerequisites. The first minimum requirement for being part of the armed forces of a State is that the armed forces of a party, needs to be “under a command responsible to that Party for the conduct of its subordinates”. The second requirement is to be “subject to an internal disciplinary system”, according to article 43 of the AP I. If a PMC fulfil these two requirements, it will be viewed as part of a State’s armed forces and more importantly receive the POW-status if captured.

In order for a PMC to be categorised as part of a State’s armed forces, the PMC needs to be part of the official capacity of a State.<sup>118</sup> That requirement is reached, by belonging to the organized armed forces of a State, which is a Party in the conflict. The exact opposite, if the armed force you belong to is not a party in the conflict there is no need of discussing whether the PMC is a member of the armed forces or not.<sup>119</sup> The term *organized* is of flexible character and vary in degrees. In order to be viewed as organized in a battle one need to fight in a collective character. In order for a PMC to be viewed as organized, its actions need to be conducted under proper control and with corresponding preparation or training. Units in the armed forces are structured and have a hierarchy. With no exception, all individuals in these units are subordinate to a command which is responsible for its members actions, in the operations. That command is in its turn responsible to one of the parties to the conflict.<sup>120</sup> Therefore, I argue that in order for PMC’s to be viewed as organized, they probably need to fulfil the structure and hierarchy

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<sup>116</sup> AP I, article 43(1).

<sup>117</sup> Geneva Expert Meeting, p. 12.

<sup>118</sup> L., Cameron, ‘International Humanitarian Law and the Regulation of Private Military Companies’, (February 8-9 2007), p. 3.

<sup>119</sup> AP I, article 43(1) and Geneva Expert Meeting, p. 12.

<sup>120</sup> AP I Commentary, p. 512.

too. All three companies I have accounted for, EO, MPRI and Brown & Root are companies, which derive their employees either from unemployed skilled veterans from the South African Defense Force and South African Police or from the highest retired U.S. military officers. The employees of these companies, even if not employed in the South African army or U.S. military anymore, still have an enormously strong connection to the South African- and U.S. military, its structural hierarchy and subordination to the commander. I find it probable that these individuals have been chosen by the PMC's since they are professional, aware of and able to act according to the structure and organization of a military unit and to a certain extent represent their former employer, the government they worked for. In my opinion companies like, EO, MPRI and Brown & Root and those that are organized similarly, ought to be viewed as *organized*. This does however not indicate that they directly qualify as part of the armed forces. There are more requisites that need to be considered and one has to view every single company singularly. One cannot make generalizations in the concern of whether PMC's belong to the armed forces or not. Such determination must be conducted on a case by case basis.

#### **4.1.1.1.1 Under a Command Responsible**

For a PMC to be under command, implies not only that it has to belong to a party to the conflict and to exercise elements of governmental authority, but also that it has been brought into the military chain of command of the State's regular armed forces.<sup>121</sup> Some experts argue that in order for a PMC to meet the requirement of being "under a command responsible to that Party",<sup>122</sup> the party needs to formally incorporate the PMC, into its armed forces, as well as inform the other parties to the conflict about the incorporation. This indicates that it is not sufficient for the State to simply sign a commercial contract with the PMC.<sup>123</sup> A commercial contract to incorporate a person or a PMC into the armed forces of a party is therefore probably not enough,<sup>124</sup> and only individuals which are drafted, are incorporated into the armed forces.<sup>125</sup>

The incorporation of paramilitary, or armed law enforcement agencies into the armed forces is usually printed in a formal act, such as an act of parliament.<sup>126</sup> The adoption of domestic legislation, places the PMC under the command of the State's armed forces. According to experts, it is logical that PMC's, which are merely *hired* by a State, are not part of the State's

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<sup>121</sup> Geneva Expert Meeting, pp. 13-14 and J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), pp. 16 and 556-559.

<sup>122</sup> AP I, article 43(3).

<sup>123</sup> AP I, article 43(3) and Geneva Expert Meeting, pp. 12 and 14.

<sup>124</sup> L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 4.

<sup>125</sup> J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), p. 14.

<sup>126</sup> AP I, article 43(3) and J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), p. 17.

armed forces.<sup>127</sup> This is probably true, even if experts at the same time argue that each PMC and its connection with a State needs to be interpreted individually, due to the fact that a factual link between the State and the PMC can differ from one situation to another.<sup>128</sup>

There are authors on the area who reasons that the only fact that differs PMC's from the armed forces of a State, is that PMC's coexist alongside and not within the armed forces. Some experts argue that solely on this fact, PMC's should be distinguished from the armed forces, and thus not capable of acquiring the POW-status that armed forces have.<sup>129</sup>

Experts from the Geneva Expert Meeting agree that, at the time being American PMC's are not incorporated within the U.S. military chain of command, which is supported by the current U.S. field Manual. The manual states that, all their contractors are outside the military chain of command.<sup>130</sup> The same view is supported by experts from the Basel Institute on Governance. They conducted a conference on non-State actors and were of the idea that American PMC's engaged in Iraq, at the moment, do not constitute part of the U.S. armed forces, as intended in article 43(1) AP I.<sup>131</sup> The International Committee of the Red Cross seems to view the dilemma just the same. Even if the experts are correct, one must always remember that States cannot use national law as a way of getting out of their responsibilities under international law.<sup>132</sup>

As far as I know there are no PMC's, which have been incorporated in the armed forces of a State, by domestic legislation. One can argue that it would be adjacent to the subject and purpose of the article, to demand that a PMC is incorporated by national legislation, in order to be viewed as being under a responsible command and thus have the possibility of being categorized as part of the State's armed forces. I find it possible that the demand of being under a responsible command is not really a requirement. In the preparatory work it was clearly stated that the intention of the article is just the opposite, namely to avoid having to make reference to a State's domestic law in order to determine who is a member of a State's armed forces, and who is not. It

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<sup>127</sup> AP I, article 43(3) and Geneva Expert Meeting, p. 14.

<sup>128</sup> L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 4.

<sup>129</sup> M. N., Schmitt, 'Humanitarian Law and direct participation in hostilities by private contractors or civilian employees', Vol. 6, No. 5, *Chicago Journal of International Law*, (Winter 2005), p. 525.

<sup>130</sup> Geneva Expert Meeting, pp. 13-14 and J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), pp. 16 and 556-559.

<sup>131</sup> L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 3.

<sup>132</sup> M., Schmitt, *et al*, Second Expert Meeting, 'Direct Participation in Hostilities under International Humanitarian Law', *Co-organized by the International Committee of the Red Cross and TMC Asser Institute*, Hague, (25-26 October 2004), pp. 11-13, available at: URL ([http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct\\_participation\\_in\\_hostilities\\_2004\\_eng.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2004_eng.pdf)), last visited on 19 December 2007, at 11.35.



was also stated, that it is enough for an entity to have a factual link to the regular armed forces in order to be viewed as part of such.<sup>133</sup> It is my opinion that many times PMC's perform the same functions as those of military units of armed forces. The actual hiring of PMC's by States, could be enough for finding PMC's under their command and part of their armed forces in my view. This would enable them the combatant status.

#### **4.1.1.1.2 Subject to an Internal Disciplinary System**

The requirement of a responsible command, complement the requirement of an internal disciplinary system. This because the commanders and other superiors are criminally responsible for war-crimes committed pursuant to their orders, for crimes they knew about, had reason to know were about to be committed, or for crimes that had already been committed. A disciplinary system is needed in order to take care of such actions.<sup>134</sup>

In my opinion reports of PMC-employees accused of violating the IHL are either shut down, so that the situation do not even come to our attention, ignored, or result in the dismissal of the blamed employee. There is no legal structure which takes care of such situations in order to ensure compliance with IHL.

In order to comply with the demand of "an internal disciplinary system",<sup>135</sup> some experts argue that the State would have to enable itself to exercise jurisdiction over PMC-employees in order to make them "subject to an internal disciplinary system"<sup>136</sup>. I agree to this. Even if it implies the necessity of domestic legislation, it is necessary that PMC's come under the scrutiny of a discipline system. So far, we still have a system which enables States to decide over actors within their jurisdiction. This we need to take advantage from, even in the area of PMC's. Private and public needs to integrate in order for States to regain control, in my opinion.

### **4.1.2 Article 4A(1): Combatants as Members of Militias or Volunteer Corps forming part of such Armed Forces**

Article 4 defines which individuals that are entitled to the POW-status. One incentive of article 4 was that it was supposed to be easy to read and to interpret.<sup>137</sup>

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<sup>133</sup> Geneva Expert Meeting, p. 12.

<sup>134</sup> J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), p. 16.

<sup>135</sup> AP I, article 43(1).

<sup>136</sup> AP I, article 43(1) and Geneva Expert Meeting, p. 14.

<sup>137</sup> GC III, article 4 and GC III Commentary, p. 49.

Article 4A(1) of the GC III reads as follows:

“Article 4.-Prisoners of War

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.”

The Geneva Convention III considers all members of the regular armed forces, may it be the army, militia or volunteer corps, to be combatants. In order for militia and volunteer corps, including organized resistance movements, which do not form part of the armed forces, to be considered combatants and acquire POW-status, they are required to comply with four conditions which are presented in the next chapter. The demand of the four conditions on militia and volunteer corps, but not on armed forces seems to be due to that regular armed forces fulfill these conditions per se.<sup>138</sup>

Sub-paragraph (1) addresses *de jure* combatant status, the formal incorporation into the armed forces by a State, while subparagraph (2) involves combatant status that derives from the nature and actions of a group.

Sub-paragraph (1) includes all military personnel into the armed forces, but also militias and volunteer corps apart from the armed forces. These entities do not have any characteristics that they have to live up to, for purposes of recognition. It is the State’s responsibility to make sure that their members of the armed forces are recognized and distinguishable from members of the enemy armed forces and from civilians.<sup>139</sup>

For article 4A(1) of the GC III, to be applicable, the PMC’s-employees have to be part of a State’s armed forces. This was discussed in chapter 4.1.1, for purposes of article 43 of the AP I. The same interpretation is applicable for this section. In short, one can say that it is not likely that PMC’s and their employees can be categorised as the armed forces of a State. PMC’s that have been contracted by a government, would probably have to be individually enlisted to the military or be formally incorporated as a group, in order to be viewed as part of a State’s armed forces.<sup>140</sup> As far as I am concerned they could perhaps be viewed as being under a responsible

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<sup>138</sup> GC III, article 4A(2) and AP I, article 44(3) and A., Rosas, *The Legal Status of Prisoners of War*, Institute for Human Rights, Åbo Akademi University, Åbo, (2005), p. 326 ff. and J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), p. 15.

<sup>139</sup> GC III Commentary, pp. 51-52.

<sup>140</sup> M. N., Schmitt, ‘Humanitarian Law and direct participation in hostilities by private contractors or civilian employees’, (Winter 2005), pp. 526-527.

command, but never proved to have an internal disciplinary system. Thus, PMC's cannot be categorised as the armed forces of a State.

### **4.1.3 Article 4A(2): Combatants as Members of Other Militias and Members of Other Volunteer Corps**

Article 4A(2) of the GC III reads as follows:

“A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(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, fulfil 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;
- (d) that of conducting their operations in accordance with the laws and customs of war.”

The four conditions apply to those militias and volunteer corps that are not part of the regular armed forces, the partisans.<sup>141</sup> Individuals who belongs to the militias or volunteer corps to a party to a conflict, and fulfils the four cumulative conditions acquire the combatant status, just as members of the armed forces do.<sup>142</sup>

About the four conditions and their applicability on PMC's, the following can be said:

- (a) “that of being commanded by a person responsible for his subordinates”.<sup>143</sup> The determination of whether or not each PMC comply with each one of these demands, is done on a case-by-case basis. One can therefore not draw the same conclusion on all PMC's.<sup>144</sup> It is not required that the PMC is commanded by the regular officers of the armed forces. The person in charge may be a civilian, or of military character. Such leader is then responsible for actions conducted due to his orders, and for conduct, he was unable to prevent. The drafting committee of the article explains

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<sup>141</sup> GC III Commentary, p. 49.

<sup>142</sup> GC III, article 4A(2).

<sup>143</sup> GC III, article 4A(2)a.

<sup>144</sup> Geneva Expert Meeting, p. 12.

that respect for this rule is a sign and guarantee of discipline of volunteer corps and hints toward fulfilment of the other three conditions.<sup>145</sup> Experts reason that PMC's generally are not subject to a responsible command, since private companies are not built up with a commander in the lead.<sup>146</sup> I am of a different view. Some PSC's and PMC's are actually commanded by an individual who is responsible for his subordinates. PMC's, such as EO, MPRI and Brown & Root employ unemployed or retired military personnel and officials, which have worked in a system built up by hierarchy and have themselves acquired a certain rank. I would find it strange but certainly not impossible if this rank is valuable only in the armed forces of a State, but not in the work within PMC's. It is probable that the individual with the highest rank in the U.S. government forces is the one in command in PMC-operations. This is at least what I find likely when it comes to the three PMC's that I have examined a bit closer. It might be so that it is not true for other companies. Even in the three examples of corporations that I have brought up one needs to examine each situation on a case by case basis.

The subject of a responsible command was also discussed in chapter 4.1.1.1.

If my view is correct, that would be a strong incentive of that these three PMC's also live up to the three following demands.

- (b) "that of having a fixed distinctive sign recognizable at a distance".<sup>147</sup> This prerequisite serves to distinguish combatants from civilians.<sup>148</sup> Just as States are responsible to recognize and point out who is a member of their armed forces, so that they are easily recognized and distinguishable as members of armed forces or as civilians, "other militias and members of other volunteer corps"<sup>149</sup> are. There can be no room for doubt.<sup>150</sup> This is of interest to all parties in a conflict.<sup>151</sup>

In every conflict situation, it is of great importance to know who belongs to which party. Often armed forces have a

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<sup>145</sup> GC III Commentary, p. 59.

<sup>146</sup> Geneva Expert Meeting, p. 12.

<sup>147</sup> GC III, article 4A(2)b.

<sup>148</sup> M. N., Schmitt, 'Humanitarian Law and direct participation in hostilities by private contractors or civilian employees', (Winter 2005), p. 526.

<sup>149</sup> GC III, article 4A(2).

<sup>150</sup> GC III Commentary, p. 52.

<sup>151</sup> L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 3.

distinctive uniform. The demand on militias and volunteer corps is less harsh, but still, they need to have a distinctive sign that is recognizable at all times, at a distance. *Distinctive* and *recognizable* refers to a sign that is special for a certain entity and which is used by everyone in this group. The sign may be a certain coat, a shirt, an emblem, a coloured sign worn on the chest, or an armband. When the militias and volunteer corps travel in a vehicle, the vehicle must have the emblem that identifies the group. When individuals are on the field in a conflict, it becomes a question of interpretation, how recognizable the sign needs to be. The commentary drafters are of the opinion that the sign should be able to be recognized at a distance, “not too great to permit a uniform to be recognized”.<sup>152</sup> The inability to recognize which individuals are civilians and which are combatants of the PMC-employees might lead to the fact that rules of the IHL are not followed. This in turn might contribute to an erosion of the principle of distinction and the rules of civilians and combatants.<sup>153</sup>

The Red Cross had a proposal I find interesting. They thought that the nature of the sign, its size and where on the body it was located, should be stated in a conventional text.<sup>154</sup> I have never been present in a battle of war, so I can only imagine how a real conflict situation may look like. I am of the opinion that international law must do all that it can so that civilians are not hurt. Therefore, I believe in the demand of wearing a distinctive sign. In order to make it as easy as possible to differ combatants from civilians, the signs and the appearance of different group’s signs, should be regulated in a convention. In this way, it might be easier for combatants to see who is a combatant and who is a civilian, but also who belongs to who’s armed forces, militias or volunteer corps. Military personnel could with the help of such a catalogue, be better prepared.

MPRI, is one company I know of, which wears uniforms that are both distinctive and recognizable.<sup>155</sup> This is an exception according to scholars on the subject. Experts are of the view that most PMC’s would not comply with this demand. It is very rare that individuals in Iraq can be identified to a certain PMC and even less possible to identify a whole group of individuals as belonging to one

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<sup>152</sup> GC III Commentary, pp. 59-60.

<sup>153</sup> L., Cameron, ‘International Humanitarian Law and the Regulation of Private Military Companies’, (February 8-9 2007), p. 5.

<sup>154</sup> GC III Commentary, pp. 59-60.

<sup>155</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 123.

PMC. Many PMC-employees lack uniform and do not have emblems visualising their belonging either. In many PMC's the employees have different clothing, which disqualifies them from living up to this demand.<sup>156</sup>

- (c) “that of carrying arms openly”.<sup>157</sup> Just as the previous demand, this is one of loyalty to the fighting. Individuals of fighting forces as well as civilians are not supposed to take unfair advantage of his adversaries. An individual should not be able to enter a military post by hiding his weapon, and then by surprise open fire against his enemies. Therefore, arms should be carried so that no confusion can arise to whether an individual carries an arm or not.<sup>158</sup>
- (d) “that of conducting their operations in accordance with the laws and customs of war”.<sup>159</sup> Partisans need to respect the Geneva Conventions, GC's, prohibition of certain weapons like gas for example as well as follow a moral criteria of honour and loyalty, which they expect their enemies to do. They need to wage all war-situations and cannot cause disproportionate violence and suffering in comparison to the military result they want to achieve. As said before, they may not attack civilians or disarmed persons.<sup>160</sup> This demand is hard for any military entity to live up to, may it be governmental or one from the private sphere. States have at many times *accidentally* killed civilians. This essay deals not with the faults of States. PMC's have also violated IHL many times. The situation on September the 16<sup>th</sup>, 2007, in which Blackwater USA was declared to have used power not necessary for the situation, could be an example of conduct that would go against this demand. In this situation, Blackwater-employees killed 11 civilian people, where it was not necessary to use weapons in order to protect themselves. Blackwater argue that they were attacked and therefore took appropriate measure against the violence. The situation as it has been displayed in the media has according to me given the entire industry a worse reputation, than it had before. The way in which this conduct was carried out is not in line with the interest of PMC's. It is in the interest of PMC's to conduct their operations in accordance with IHL, since their reputation is important for them.

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<sup>156</sup> Geneva Expert Meeting, p. 12.

<sup>157</sup> GC III, article 4A(2)c.

<sup>158</sup> GC III Commentary, p. 61.

<sup>159</sup> GC III, article 4A(2)d.

<sup>160</sup> GC III Commentary, p. 61.

In order to decide whether or not PMC's fulfil this demand one has to view the history of each PMC and their history of operations in order to be able to make a fair estimation of whether or not it fulfils the requirement.

These requirements are yet another bar to the characterization of PMC's as members of armed forces, in order to achieve the combatant-status.

Even if some PMC's would be able to fulfil these demands, States hiring them still claim that PMC-employees are not included in their armed forces and cannot receive the combatant status since they are civilians.<sup>161</sup>

#### **4.1.4 Concluding Remarks on Combatants**

Even if the drafting committee did not envision PMC's in 1977, article 43 has not excluded the possibility of including PMC's in the armed forces.<sup>162</sup> It can also be argued that since PMC's are not encountered with by the drafting committee, the status of PMC's should not be dealt with in the convention. Instead, the State should decide the status of PMC-employees. It could also be argued, that in cases where the State do not have armed forces itself, the PMC could easier be considered the armed forces of that State, than in a State which already have armed forces.<sup>163</sup>

If it is true that each State which contracts a PMC could chose what status to give the PMC and its employees, the categorisation of PMC's belongs entirely on the will and internal legal regime of the State in question. If the State decides to incorporate PMC's into their armed forces, the employees would receive combatant privilege.<sup>164</sup>

The different possibilities of being awarded the combatant status is by applicability of article 43 of the AP I, article 4A(1) of the GC III, or article 4A(2) of the GC III. Article 43 demands organisation, command and an internal disciplinary system. The companies I have accounted for would probably be possible to view as organized with legal arguments. When it comes to being under a responsible command, it becomes more difficult. Experts are of the view that almost no PMC's fulfil this demand. It is according to them absolutely necessary for this prerequisite to be fulfilled to be incorporated into the armed forces by national legislation, and only individuals that are individually enlisted are incorporated. This can be criticised by arguments such as that a demand on national legislation is opposite to the purpose of the protocol and that the tasks that PMC's

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<sup>161</sup>L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 4.

<sup>162</sup> Geneva Expert Meeting, p. 13.

<sup>163</sup> Geneva Expert Meeting, p. 13.

<sup>164</sup> L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 3.

perform today has traditionally been performed by the armed forces of a State and therefore should actors performing them today be categorised as part of the armed forces as well. Another argument is that an act of Parliament cannot be of such superior importance that all other facts are deprived any substance. The last requirement of disciplinary system is not present in any PMC's today. According to experts States should step in and supply this demand. One has to fight really hard to squeeze PMC's into the definition of armed forces of a State in article 43, and it might not be possible even then. Even if experts on the area believe that most PMC's and their employees cannot receive the combatant status, they agree that PMC's can in some situations qualify as a State's armed forces under art 43(1). Such PMC-employee may be viewed as a combatant under article 43(2) and enjoy the combatant-status according to art 44(1).<sup>165</sup>

Article 4A(1) of the GC III, can probably not be fulfilled either, on the same ground as above, since it requires the PMC-employees to be able to be categorised as armed forces. Article 4A(2) of the GC III is a possibility for the PMC-employee, in terms of requiring the combatant status. In this article four conditions need to be fulfilled. Some PMC's might actually be able to receive combatant-status by fulfilling these conditions. Most PMC-employees would however not. This is yet another barrier towards the recognition of PMC's as carriers of combatant status. In this article the PMC needs to fulfil four prerequisites, which each and one is a struggle. Few PMC's would fulfil the demands. Since article 4 of the GC III was written as a simple and easy portal paragraph, it is my opinion that it was not supposed to embrace borderline cases.

## 4.2 Civilians

According to IHL individuals must be categorized as either combatants or civilians. Each individual which does not belong to any categories of individuals referred to in articles 4A(1), (2), (3) and (6) of the GC III or article 43 of the AP I is a civilian. This means that all persons that are not combatants are civilians. This is stated in article 50 of the AP I and was further explained and developed in the Commentary to the Geneva Conventions of 1949.<sup>166</sup>

“Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be

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<sup>165</sup> AP I, articles 43(1), 43(2) and 44(1) and Geneva Expert Meeting, pp. 12 and 14.

<sup>166</sup> GC III, articles 4A(1), (2), (3) and (6) and AP I, article 43 and AP I Commentary, p. 514.



outside the law”.<sup>167</sup>

Therefore, if PMC-employees are not combatants they must be civilians.<sup>168</sup>

Civilians that do not take direct part in hostilities are referred to as non-combatants. The non-combatant members of the armed forces should not be confused with civilians accompanying the armed forces since they by definition are not members of the armed forces. As early as 1938, the Assembly of the League of Nations stated that it is illegal to attack civilian populations on intention. After that point and onwards the U.N. Security Council has condemned attacks against civilians in numerous conflicts, including Afghanistan, Angola, Azerbaijan, Burundi, Georgia, Lebanon, Liberia, Rwanda, Sierra Leone, Somalia, Tajikistan, the former Yugoslavia and the territories occupied by Israel. In 1968, the U.N. General Assembly adopted a resolution on the respect for human rights in armed conflicts. In this resolution, which was applicable to all armed conflicts, the principle of distinction could be found. This was once again reaffirmed in a U.N. Security Council resolution in the year 2000.<sup>169</sup>

It is important to distinguish between combatants and civilians in order to protect civilians from the violence in an armed conflict.<sup>170</sup> According to article 51(3) of the AP I civilians enjoy immunity from attack during IAC, “unless and for such time as they take a direct part in hostilities”.<sup>171</sup> As a basic rule, it would be illegal to target civilian PMC-employees and legal to target combatant PMC-employees.<sup>172</sup> Civilians that directly participate lose their protection and may be legally targeted, implicating hurt or killed without consideration to proportionality or precaution in attack.<sup>173</sup> According to a number of experts, such civilians may be prosecuted for

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<sup>167</sup> J.S., Pictet, (ed.), *The Geneva Conventions of 12 August 1949 Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in time of War*, International Committee of the Red Cross, Geneva, Switzerland, (1958), p. 51.

<sup>168</sup> L., Cameron, ‘International Humanitarian Law and the Regulation of Private Military Companies’, (February 8-9 2007), p. 5.

<sup>169</sup> GC III article 4A(4) and J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), pp. 6-7 and 13 and L., Cameron, ‘International Humanitarian Law and the Regulation of Private Military Companies’, (February 8-9 2007), p. 5. For more information on the specific resolutions see UN Security Council, Res. 564, Res. 771, Res. 794, Res. 819, Res. 853, Res. 904, Res. 912, Res. 913, Res. 918, Res. 925, 929 and 935, Res. 950, Res. 978, Res. 993, Res. 998, Res. 1001, Res. 1019, Res. 1041, Res. 1049 and 1072, Res. 1052, Res. 1073, Res. 1076, Res. 1089, Res. 1161, Res. 1173 and 1180, Res. 1181 and Res. 1296.

<sup>170</sup> AP I, article 48 and L., Cameron, ‘International Humanitarian Law and the Regulation of Private Military Companies’, (February 8-9 2007), p. 3.

<sup>171</sup> AP I, article 51(3).

<sup>172</sup> L., Cameron, ‘International Humanitarian Law and the Regulation of Private Military Companies’, (February 8-9 2007), p. 5.

<sup>173</sup> AP I article 51(5)(b). The principle of proportionality; AP I, article 57(2) and the principle of precaution; AP I, article 57(3).

participation as civilians.<sup>174</sup> Civilians that directly participate are unlawful combatants.<sup>175</sup>

## 4.2.1 Civilians taking Direct Part in Hostilities

Civilians are protected against attacks, acts and threats of terror and enjoy this general protection and privilege against dangers that arise from military operations. There is a limitation to the protection given in article 51(1-2) in the AP I, and that is article 51(3) of the same convention. According to that article a civilian that take a direct part in hostilities, loses protection by international law and immunity from attack, and becomes a legitimate target for the time they take direct part in hostilities. The immunity from arrest and prosecution, can nevertheless by no means be lost.<sup>176</sup> The only civilians that can acquire the POW-status, as far as I understand, are civilians accompanying the armed forces, article 4A(4) of the GC III.

Direct participation in hostilities represent acts of war, which by their nature or purpose cause harm to the armed forces personnel and equipment. The immunity is lost during the active participation. When the civilian stop participating, he/she regains the right to protection. At that point and onwards, the same individual is no longer a legitimate target.<sup>177</sup> It should be pointed out that the combatant status is not recognised on demand.<sup>178</sup> The AP I Commentary speaks of activities that for certain, are indirect activities. These are for example the advisement on modern weaponry, choices of personnel for a certain operation, specific training for that personnel and the proper maintenance of weapons. Such involvement would not constitute direct participation.<sup>179</sup>

One evidence of that civilians in article 4A(4), GC III, may not actively participate in hostilities is the reading of the article, according to some experts. The article speaks about persons that are not actually members of the armed forces. That could indicate that the individuals concerned in this paragraph are those not involved with the armed forces core functions, like fighting. Therefore, to retain their POW-status as civilians accompanying the armed forces they may not directly or actively participate in hostilities.<sup>180</sup>

The Inter-American Commission on Human Rights talks about direct participation in hostilities as “acts which by their nature or purpose, are

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<sup>174</sup> L., Cameron, ‘International Humanitarian Law and the Regulation of Private Military Companies’, (February 8-9 2007), p. 6 and Geneva Expert Meeting, p. 16.

<sup>175</sup> AP I, article 51(3).

<sup>176</sup> AP I, articles 51(1), (2) and (3) and J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), p. 21.

<sup>177</sup> AP I Commentary, pp. 618-619.

<sup>178</sup> AP I, article 44(3) and AP I Commentary, p. 516.

<sup>179</sup> AP I Commentary, p. 579.

<sup>180</sup> Geneva Expert Meeting, p. 16.

intended to cause actual harm to enemy personnel and materiel”.<sup>181</sup> The Inter-American Commission was of the opinion that there is a big difference between direct and indirect participation. They argued that indirect activities are activities such as supporting the adverse party’s war or military effort in an indirect manner, like the selling of goods to armed parties, express sympathy for their cause, or fail to act in order to prevent an incursion by an armed party. According to the Commission, it would be acceptable for civilians to participate in such actions without losing protection. This because they do not pose a direct or immediate threat or harm to the adverse party. Rwanda’s national legislation illustrates the belief of direct and indirect participation as quite different. In their legislation, logistical support, such as providing the armed forces in an armed conflict with food, transport munitions, or carry messages, is not direct participation in non-international armed conflicts but in an IAC, such actions mean that civilians lose their civilian status. Rwanda justifies the legislation with that in internal conflicts, civilians are forced to cooperate with the party in power, which is not the case in international conflicts.<sup>182</sup>

So, PMC-employees that are categorized as civilians lose the protection from attacks during the time they directly and actively participate in hostilities. The enemy may then treat them as they treat combatants. They may legally be targeted and killed while they are directly participating. Prosecution and punishment for their participation in hostilities are consequences that come with the loss of protection. So far it might not sound very strange, but if such a civilian in direct participation in hostilities kill someone, they may according to article 68 in the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, be sentenced to death after a trial.<sup>183</sup> The difference is that combatants, the ones that usually engage in war-situations are immune to prosecution of lawful acts of war. This is one of the loopholes within the PMI that needs to be considered in my point of view.

Another idea nowadays is that there is not a huge difference between direct and indirect participation in hostilities. Different tasks of auxiliary services, administrative services, military legal service and others, are tasks that can be carried out as part of direct participation in hostilities. It is not a necessity to fire weapons in order to be directly participating.<sup>184</sup> Direct participation

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<sup>181</sup> J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), p. 22 and J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume II: Practice, Part I*, Cambridge University Press, Cambridge, International Committee of the Red Cross, (2005), Part I, Chapter 1(f), § 811, p. 114.

<sup>182</sup> J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), pp. 22-23 and J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume II: Practice, Part I*, Part I, Chapter 1(f), §811, p. 114.

<sup>183</sup> AP I, article 51(3) and article 68 of the *Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, adopted at Geneva, 12 August 1949*, 75 U.N.T.S., p. 287 and L., Cameron, ‘International Humanitarian Law and the Regulation of Private Military Companies’, (February 8-9 2007), p. 7.

<sup>184</sup> AP I Commentary, p. 515.

in hostilities can include carrying a weapon and perhaps even situations like preparing for combat and the return from combat.<sup>185</sup> This is supported by article 49(1) of the AP I, which states that there is no difference between attacks in offense and those in defence, as far as IHL is concerned. Argumentation of that PMC's only engage in defence is therefore irrelevant. Problems arise for example when PSC-employees in an IAC are contracted as civilians, for example to guard a shopping mall. Imagine such a situation and add that they are being shot at. When the private security guard is attacked, he or she, need to know who the attacker is, in order to legitimately attack the attacker. If the attacker is a common criminal, the guard may defend himself or herself without fear of engaging directly in the hostilities, since the attackers actions probably have no nexus with the armed conflict. If the attacker on the other hand, is part of one of the parties to the armed conflict and the guard defends himself or herself, that would be considered as directly participating in hostilities, and the consequence being loss of protection. This is true even if the employee did not have any intention to involve in an offensive military action against the attacking party. One way in which to go around this dilemma is to not let private actors work at places with a military objective. But as almost anything can become a military objective by its "nature, location, purpose or use" according to article 52 in the AP I, it seems rather unachievable to demand that PMC-employees cannot engage in any such situations if they want their status to remain. If a building full of civilians is guarded by PMC-employees and suddenly is filled with combatants, making it a military objective, and the PMC-employees continues to guard this building, then he or she probably develops into a civilian who illegally directly participate in the hostilities. At that point, the enemy may lawfully target these PMC-employees.<sup>186</sup>

Since there is no definition of what is a military objective, it is impossible to list activities that PMC's need to avoid doing. The main problems with this is according to the Basel Institute on Governance three fold. First, it might lead to erosion of the principle of distinction, meaning that the foundation on which the codification of the laws and customs of war rests is beginning to drain. Secondly, if PMC-employees were to violate IHL, there is no disciplinary structure to take them in which make civilians more vulnerable. Thirdly, the PMC-employees are in a vulnerable position themselves when they directly participate in hostilities, since they may be directly targeted, tried in a court and executed if they have killed an enemy combatant.<sup>187</sup>

What we can be sure of is that according to article 4A(4) of the GC III PMC-employees do not lose their civilian status when they provide food and shelter to the armed forces. Therefore, many of the tasks carried out by PSC's and PMC's are probably not direct participation in hostilities.

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<sup>185</sup> AP I Commentary, pp. 618-619.

<sup>186</sup> L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), pp. 8-9.

<sup>187</sup> L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 10.

Services such as catering, construction, maintenance of bases and other support services would almost certainly not be viewed as direct participation. One problem though, is that PMC-employees are often asked to perform side-duties, duties they were not contracted for. Sometimes logistics personnel are asked to support troops in battles.<sup>188</sup>

## 4.2.2 Persons who Accompany the Armed Forces

Article 4A(4) of the GC III reads as follows:

“(4) 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 responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.”<sup>189</sup>

This paragraph declares that persons who are not part of the armed forces but who accompany them have prisoner-of-war status if they fall into the hands of the enemy, even though they are civilians. In order for this to be true, they need to have “authorization from the armed forces which they accompany”,<sup>190</sup> meaning that they have gotten an identity card, which indicates their authorization as civilians accompanying the armed forces and that they should refrain from directly participating in hostilities.<sup>191</sup> They also need to carry their arms openly and respect the laws and customs of war.<sup>192</sup>

This recognition was not first made in the GC’s from 1949. Already in the 1863 Lieber Code, the Hague Regulations of 1899 and 1907 and in the GC from 1929 contractors were granted POW-status. It was recognized that there are persons who accompany the armed forces in a conflict even if they are not members of those armed forces. These individuals also deserve legal protection if they were to be captured by the enemy.<sup>193</sup>

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<sup>188</sup> L., Cameron, ‘International Humanitarian Law and the Regulation of Private Military Companies’, (February 8-9 2007), p. 9 and P.W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 242. For a good discussion of this issue read A., Leander, *Eroding State Authority? Private Military Companies and the Legitimate Use of Force*, Centro Militare di Studi Strategici, Rubbetino, Rome, (2006), especially p. 138.

<sup>189</sup> GC III, article 4A(4).

<sup>190</sup> GC III, article 4A(4).

<sup>191</sup> L., Cameron, ‘International Humanitarian Law and the Regulation of Private Military Companies’, (February 8-9 2007), p. 6.

<sup>192</sup> J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), p. 18.

<sup>193</sup> Geneva Expert Meeting, pp. 15-16.

The examples of civilian categories that might be applicable to this article is not an exhaustive list. Meaning that this article may be applicable to other categories of civilians that accompany the armed forces. The demand of an identity card is not an indispensable condition. The identity card is comparable to a soldier's uniform and is only a supplementary safeguard, which serves as a proof of the right to POW-status. In case of doubt over an individual's status, the identity card is a proof of the POW-status, even if the enemy in reality has the duty to treat the prisoner according to the GC's, until they have found out the status of the individual.<sup>194</sup>

Some experts argue that even if art 4A(4) of the GC III only refers to supply contractors it could be applicable to all private actors that accompany the armed forces. The same experts argue that there need to be yet another connection between the armed forces and the civilian accompanying the armed forces, than merely a received identity card in order for that individual to receive the POW-status.<sup>195</sup>

If one were to listen to the U.S., it seems that employees of PMC's are civilians rather than combatants. The 2005 U.S. DoD, instructions on "Contractor Personnel Authorized to Accompany the U.S. Armed Forces", state that the employees of PMC's have the status of "civilians accompanying the force".<sup>196</sup> The U.S. argue that article 4A(4), GC III, individuals do not lose their POW-status if they actively participate in hostilities because civilians lose their POW-status if they actively take part in hostilities under article 51(3) of the AP I. That article refers to Part IV, Section I of the AP I, which deals with the "General Protection Against Effects of Hostilities"<sup>197</sup>. The POW-status that this dilemma deals with, concerns Part III, Section II, known as the chapter of "Combatant and Prisoner-of War Status"<sup>198</sup>. Therefore, if 4A(4), GC III, civilians take direct part in hostilities and then are captured, they would according to U.S., not lose their POW-status. So when a State hires a PMC to do tasks that will involve taking direct part in hostilities and gives them the status of civilians under article 4A(4), the individuals are being treated in a doubted manner. Those individuals do not have the POW-status even if they are employed as combatants. An expert from the Geneva Expert Meeting, argues that the U.S. tries to extend the POW-status to a category of individuals that the State hires to fight on its behalf, because it suits the U.S..<sup>199</sup>

All experts on the Geneva Expert Meeting agree upon that when a State hire a PMC to execute tasks that historically has been done by private actors, then the PMC-employees ought to be categorized as 4A(4) individuals and acquire POW-status, as civilians accompanying the armed forces. When a

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<sup>194</sup> GC III, article 5(2) and GC III Commentary, p. 65.

<sup>195</sup> Geneva Expert Meeting, p. 16.

<sup>196</sup> L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February8-9 2007), p. 3.

<sup>197</sup> AP I, Part IV, Section I.

<sup>198</sup> AP I, Part III, Section II.

<sup>199</sup> Geneva Expert Meeting, pp. 16-17.

State hires individuals to fight for them and take direct part in the hostilities, they should not fall within the scope of article 4A(4) of the GC III. Category 4A(4) civilians are not authorized to take direct part in hostilities, but if they were to do so, they would lose their POW-status.<sup>200</sup>

Another position of the status of civilians accompanying the armed forces is that if they accompany the armed forces and at the same time fulfil the four requirements in article 4A(2), they do not lose their POW-status. This means that, if they are not members of other militias nor members of other volunteer corps, they can still achieve the combatant status as civilians if they fulfil the demands of article 4A(2), GC III. Some of the 4A(4) individuals actually need to take direct part in hostilities, like the aircraft crew that is civilian.<sup>201</sup>

One strange feature of this legislation is the fact that members of armed opposition groups can be considered civilians when they do not take direct part in hostilities. This creates a difference between such opposition groups and the ordinary armed forces. The result could be that it is only legal to attack an armed opposition group when they take direct part in hostilities, but it is at all times legal to attack the armed forces of a State. It could be argued that this is strange and that armed opposition groups should be viewed as taking direct part in hostilities at all times or not having the civilian status at any time.<sup>202</sup> Otherwise, they withhold the positive of two spheres and escape the negative consequences in my opinion.

If one is unsecure of the status of PMC-employees, they ought to be characterized as civilians, according to article 50(1) of the AP I.<sup>203</sup> Combatants are responsible to assess situations and individuals actions thoroughly before starting to attack them. It is not legal to attack individuals which status is dubious.<sup>204</sup>

### 4.2.3 Concluding Remarks on Civilians

Every PMC-employee which is not a combatant is a civilian. In order to acquire the civilian immunity PMC-employees cannot take direct part in hostilities. Because if they do, they become legal targets. They may in such situations be prosecuted for crimes of IHL as civilians. PMC-employees are considered to take direct part in hostilities when they have a purpose to cause harm to personnel or equipment of the armed forces, when they carry out their actions. They must not necessarily act with a gun in their hand, but they probably have to conduct tasks most often carried out by the armed

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<sup>200</sup> Geneva Expert Meeting, p. 17.

<sup>201</sup> L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 6 and Geneva Expert Meeting, p. 16.

<sup>202</sup> J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), p. 21.

<sup>203</sup> AP I, article 50(1).

<sup>204</sup> J-M., Henckaerts (ed.) and L., Doswald-Beck (ed.), *Customary International Humanitarian Law, Volume I: Rules*, (2005), p. 24.

forces, in order to be considered acting directly. Therefore, the immunity of civilians is probably achieved by a great deal of PMC-employees. The dilemma concerns those PMC-employees that actually engage directly in hostilities. It is hard to say where to draw the line between direct and indirect activity, since it seems inevitable to not differ between activities. As long as PMC-employees are seen as civilians and engage in operations, which are or may become a military objective and force them to participate directly, it seems that they are themselves responsible for their conduct in a certain situation. They are also responsible to keep out of situations where they might be deprived of their civilian immunity. PMC-employees most likely fit into this group of civilians or civilians accompanying the armed forces, judicially and according to States and experts point of view.

POW-status can also be achieved by civilians accompanying the armed forces. In such cases there has to be a certain connection present between the armed forces and the PMC. This link does however not have to be an identity-card. The problem is that judicially a person participating in hostilities lose its immunity and POW-status and becomes a target and may legally be killed. This is of course a dilemma. That individuals with no protection has to engage in activities beyond their status and contract.

### 4.3 Mercenaries

“Private military companies are nothing but the old poison of vagabond mercenaries in new designer bottles” said the prominent head of Africa Research and Information Bureau, Abdel-Fatau Musah.<sup>205</sup>

As will be seen by the examination on mercenarism in this chapter it can be questioned whether or not PMC’s is an extension of traditional military contractors or if they are a new kind of mercenary, which is protected by the veil of corporate legitimacy, or if PMC’s are very unlike the industry of mercenaries.

There are two treaties that seek to criminalize mercenaries. These two treaties are, the “International Convention against the Recruitment, Use, Financing and Training of Mercenaries”,<sup>206</sup> which was drafted by the U.N. Special Rapporteur on mercenaries, Mr. Enrique Ballestros, hereafter the U.N. Convention on Mercenaries and the “Convention for the Elimination of Mercenarism in Africa”,<sup>207</sup>.

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<sup>205</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 44, which is citing A-F., Musah and K., Fayemi, *Mercenaries: An African Security Dilemma*, Pluto Press, London, (2000).

<sup>206</sup> United Nations General Assembly, *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, UN GA, Res. 44/34, 72<sup>nd</sup> plenary, adopted on 4 December 1989. Hereafter referred to as U.N. Convention on Mercenaries.

<sup>207</sup> Organization of African Unity, *Convention of the OAU for the Elimination of Mercenarism in Africa*, adopted at Libreville, Gabon, 3 July 1977, O.A.U. Doc. CM/433/Rev. L. Annex 1, entered into force 22 April 1985. Hereafter referred to as OAU Convention on Mercenarism.



The purpose of the U.N. Convention on Mercenaries was to legislate beyond the definition of mercenaries, in order to specifically legislate mercenaries by universal law. The same convention has not been ratified by any world leading or First World nation-State governments so far.<sup>208</sup> The U.N. Convention on Mercenaries did not improve the legal situation for PMC's in the international sphere. The convention added a number of vague requisites that all needed to be fulfilled before a person can be categorised as a mercenary.<sup>209</sup> Both the U.N. Convention on Mercenaries and the OAU Convention on Mercenarism uses a definition of a mercenary that is very alike that of article 47 of the AP I. As a consequence of being a mercenary, that individual do not have the possibility of being a combatant, POW, or having POW-status.<sup>210</sup>

Mercenaries are defined by six cumulative criteria's in the AP I. All subparagraphs need to be fulfilled in order to qualify as a mercenary. A failure to satisfy any prerequisite is sufficient in order to prevent that the definition is being met.<sup>211</sup>

Article 47(2) of the AP I reads as follows:

- “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 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.”<sup>212</sup>

The aim with regulating mercenaries is to deprive mercenaries the treatment of prisoner of war and make him or her liable to criminal prosecution. What distinguishes the mercenary from any other international volunteer is the

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<sup>208</sup> S., Goddard, 'The Private Military Company: A Legitimate International Entity within Modern Conflict', *Faculty of the U.S. Army Command and General Staff College*, (2001), pp. 14-16, available at: URL

(<http://www.globalsecurity.org/military/library/report/2001/pmc-legitimate-entity.pdf>), last visited on 19 December 2007, at 15.22.

<sup>209</sup> D., Brooks and H., Solomon, 'Editorial', *Conflict Trends Magazine*, 1/2000, (2000), available at: URL ([http://www.accord.org.za/ct/2000-1/CT%201\\_2000%20editorial.pdf](http://www.accord.org.za/ct/2000-1/CT%201_2000%20editorial.pdf)), last visited on 20 December 2007, at 16.18.

<sup>210</sup> AP I, article 47(1).

<sup>211</sup> AP I Commentary, p. 578.

<sup>212</sup> AP I, article 47(2).

cause and the motive to join the conflict.<sup>213</sup> They are free to leave military service whenever they want and the relationship they have to the conflict in which they fight, is nothing more than as an employee. The aim of the conflict is simply of financial kind for them. What distinguishes mercenaries further is that they operate in loose small groups without a hierarchy and without collective training and that they are not even legally or contractually bound together. Mercenaries can simply put, not offer what PMC's can since mercenaries are quite limited in their capabilities and organization. They are unable in terms of capital and skills to provide complex multi-service operations, such as a mix of logistics, engineering, long-term training and advisory missions. Mercenaries are generally restricted to direct combat support to one customer at a time.<sup>214</sup>

Mercenarism, is not a crime under the GC's and IHL. What happens is that when a mercenary is detained by the enemy he or she lose the POW-status. This puts mercenaries in the same position as civilians that directly or actively participate in hostilities. Just as civilians that directly participate, mercenaries are assured of the fundamental guarantees in article 75 of the AP I. Even if mercenarism is not a crime in IHL it can still be a separate crime in a State's domestic law.<sup>215</sup>

### **4.3.1 The Applicability of Mercenarism on Private Military Company-employees in Articles 47(2) a-f**

- (a) The first paragraph involves individuals that are specially recruited locally or abroad to fight in an armed conflict. PMC-employees that enter service permanent or on a long-termed basis in a foreign army are therefore excluded in this provision, irrespective of whether they join as an individual enlistment or on arrangements made by national authorities. PMC-employees that have been specially recruited, locally or abroad, for the point of fighting for a short period, in a specific armed conflict, are possible mercenaries. This excludes many volunteers that are regular members of the armed forces of a belligerent.<sup>216</sup> Another requirement is to be recruited to fight in an armed conflict. Experts believe that PMC-individuals do not regard themselves as recruited to fight, but merely to guard or provide military training, even if they end up directly participating in hostilities. MPRI for example planned and commanded military operations for Croatia during its war with Serbia. The contract specified that MPRI was

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<sup>213</sup> AP I Commentary, pp. 575 and 578.

<sup>214</sup> P.W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*,(2003), p. 42.

<sup>215</sup> Statute of the International Criminal Court, *Rome Statute of the International Criminal Court*, adopted at Rome, 17 July 1998, 2187 U.N.T.S. 90, entered into force 1 July 2002 and L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 7.

<sup>216</sup> AP I Commentary, pp. 578-579.

to provide training in civil-military relations. Still, some experts thought that MPRI was recruited to fight as meant in article 47(2)a. “Regardless of what the contract specified, none of the members of this PMC really thought they were hired by Croatia to make PowerPoint presentations”.<sup>217</sup> A contract alone is not decisive for determining whether a PMC has been recruited to fight or not. Whenever a PMC is recruited to undertake activities which might involve its members taking a direct part in hostilities, article 47(2)a is fulfilled according to experts on the Geneva Expert Meeting.<sup>218</sup>

- (b) The concern of this sub-paragraph lies in individuals that takes a direct part in the hostilities. Only individuals of the combatant categories can take direct part in hostilities and be defined mercenaries. This excludes a wide range of individuals, namely civilians that do not participate in combat, such as foreign advisers and military technicians. Even if they are motivated by purely financial gain in their advisement of modern weapons and correct training for personnel, they are not mercenaries. For as long as they do not take direct part in hostilities, they are not combatants and certainly not mercenaries.<sup>219</sup>

As I have discussed before there is a discussion going on of whether or not the active participation is really that important. It seems that the commentary to the AP I lay great importance on activity in combat situations. Essentially, it becomes a question of whether or not PMC-employees are recruited to fight. Experts have expressed that in situations where members of PMC’s are recruited to use force defensively they do not constitute individuals that take direct part in hostilities.<sup>220</sup> If direct participation in combat includes more than simply shooting situations, this sub-paragraph could be fulfilled by more than just a few PMC’s. I find it due to discussions in chapters 4.2.1 and 4.2.2 quite probable that something more than merely defensive activities is required in order to fulfil this sub-paragraph.

- (c) The third sub-paragraph deals with the individual who is motivated to take part in hostilities mainly due to the desire of achieving private gain. In fact, the individual is promised material compensation, by a party to the conflict, substantially in excess of that paid to combatants of similar ranks and functions in the armed forces of that party. The Commentary to the AP I describes a volunteer’s motive as noble ideal, while the mercenary is driven by material gain. Therefore PMC-individuals that receive a substantially higher remuneration, therefore satisfies this

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<sup>217</sup> Geneva Expert Meeting, p. 26.

<sup>218</sup> Geneva Expert Meeting, p. 26.

<sup>219</sup> AP I Commentary, p. 579.

<sup>220</sup> Geneva Expert Meeting, pp. 23-24.

prerequisite of being a mercenary. Such interpretation of an individual's financial gain must be compared with individuals of the same standard. Pilots should be compared to pilots and so on.<sup>221</sup> The pay that PMC-employees receive often surpasses the pay that personnel from other comparable positions in official State militaries are paid by two to ten times.<sup>222</sup> Is that enough to be *substantially in excess*? Even if so, it would be hard to prove generous remunerations, since wages given to mercenaries often are paid in their own countries or into a bank account of another country.<sup>223</sup> It would also be difficult to prove that the wages really are that much more generous as to categorise them as substantially in excess. Other experts disagree with this. They mean that the evaluation would be fairly straightforward. One would compare the salary of the individual alleged of mercenarism with another individual with the same tasks and rank. The salary of the member of the PMC, which allegedly is a mercenary would be invariably much higher than the salary of the compared individual. Even PMC-employees themselves say that they are motivated to work for PMC's because of the high pay.<sup>224</sup>

For me, personally, this requirement is an unachievable and unworkable prerequisite. Mercenarism is condemned in AP I and the international community agrees on that mercenaries do not have the same status as combatants or civilians. Even if the U.N. Convention on Mercenaries has not been ratified by very many countries, the U.N. has time after time illustrated their firm position. They argue that employing mercenaries and being a mercenary is a criminal act.<sup>225</sup> I am of the point of view that the law legislating mercenaries needs to be clear and rather easy to use in terms as to prove whether an individual constitute a mercenary or not. This requisite seems hard to prove according to me. Mainly due to that there are no strict limits of how much you can earn without having to be a mercenary. It might also be hard to prove what sum of money an individual receive and that their purpose to participate in a conflict is merely due to private gain.

The truth is that during the drafting of the U.N. Convention on Mercenaries a number of concerns were raised. Among those, it was questioned whether all mercenaries are essentially motivated by immediate material gain or not. Some mercenaries might be driven by ideology. This is somewhat explained by the intention of the protocol which is to differ between selfless international volunteers and mercenaries pursuing their interests. The drafters

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<sup>221</sup> AP I Commentary, p. 579.

<sup>222</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 74 and 199.

<sup>223</sup> AP I Commentary, pp. 579-580.

<sup>224</sup> Geneva Expert Meeting, p. 25.

<sup>225</sup> AP I Commentary, p. 572.

argue that they could not have written the article in any other way.<sup>226</sup>

PMC-employees that earn ten times as much as personnel of the armed forces of a State take a great risk of being accused of being mercenaries in my eyes. The money-factor of mercenarism is probably the most discussed in public. It is easy to connect a great amount of money with the fact that individuals can do almost anything for money. The difficulty is to prove that their object and purpose in the conflict was purely financial.

The U.N. Special Rapporteur on mercenary activity has gone so far as to claim that the only difference between mercenaries and PMC's is that PMC's have States as clients. P. W. Singer argues that such statement is not factual, but rather a normative judgment serving either to eliminate the industry of PMC's, or to let the anti-mercenary laws be applicable to PMC's too. The statement by the U.N. Rapporteur is actually wrong on the facts, since States have hired mercenaries in history and do so even today. Also, PMC's have a far wider clientele than just States. According to Singer the economic drive that both mercenaries and PMC's have in common is not a sign of that they are the same. Just the opposite, these two groups perhaps share only this. There are many critical distinctions that can be made between them. The most important of them is the corporatization of military service according to Singer.<sup>227</sup>

I agree with Singer on this point. Even if a few PMC's and their employees act in a manner similar to mercenaries, most PMC's do not. This is one factor on which the status of mercenaries are decided. There are five other factors as well.

- (d) In this paragraph individuals that are not nationals of a party to the conflict, nor a resident of territories controlled by a party to the conflict, are involved. Individual volunteers that voluntarily engage in combat with their national force that is a party to the conflict are therefore not mercenaries. Normally the enlistment into the armed forces of residents is compulsory. The motive of this article is that foreign residents in the true sense of the word, are not supposed to be categorized as mercenaries, since then it would be common to force POW-individuals to accompany the

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<sup>226</sup> AP I Commentary, p 580.

<sup>227</sup> E. B., Ballesteros, United Nations Special Rapporteur on mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination, United Nations Commission on Human Rights, *Report 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*, 58th Session, Item 7, Supp. No. 118, U.N. Doc. A/58/115, (2003) and P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 45.

armed forces of the enemy power.<sup>228</sup> This would exclude all PMC's, hired by States that are parties to a conflict, from being categorised as mercenaries. As for example, in the Iraqi conflict neither American nor British PMC's can be mercenaries, no matter if their purpose is merely financial, since they are nationals of parties to the conflict.

- (e) Sub-paragraph (e) involves individuals that are not members of the armed forces of a party to the conflict. This prerequisite was necessary since many States enlist foreign individuals in their armed forces regularly. Not all are specially recruited, to take part in a particular conflict, which illustrates the difference between those regularly enlisted and those enlisted as mercenaries.<sup>229</sup> As discussed above, most PMC's cannot be categorized as part of a State's armed forces. Most PMC's and their employees would probably fulfil this prerequisite.

In terms of achieving a total ban of mercenarism, it is my opinion that one should pinpoint their behaviour, the actions and procedures that they perform, more than whether or not they acquire a certain status.

- (f) The sixth group of individuals that cannot be mercenaries are those who have "not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces"<sup>230</sup>. This means that corps of troops, including volunteers, that have been sent by certain States, to certain parts of the world where they are needed to perform certain tasks, are not mercenaries, even if they are generously rewarded, since mercenaries enlist on their own account and not on behalf of a third State.<sup>231</sup> This could probably not cover many of the American PMC's in my opinion. This mainly due to two factors. The first being that most PMC's hired by the U.S. government are according to themselves not incorporated into their armed forces. The second factor is that they are hired to operate in a conflict, which USA is a party to.

### 4.3.2 Concluding Remarks on Mercenaries

Mercenaries separate themselves from other individuals fighting in a war, by their unorganized character and financial cause and motive of joining a conflict. Individuals that fulfill the requirements of a mercenary shall be deprived of POW-status and be liable to criminal prosecution. Sub-paragraphs 47(2)a-f is a barrier which not many individuals get caught by. With demands on, being hired only for shorter periods, taking direct part in hostilities, join due to financial reasons, receive a much larger compensation

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<sup>228</sup> AP I Commentary, pp. 580-581.

<sup>229</sup> AP I Commentary, p. 581.

<sup>230</sup> AP I, article 47(2)f.

<sup>231</sup> AP I Commentary, p. 581.

than other non-mercenaries with alike tasks, not having connections to any of the conflicting parties, in terms of nationality and residency and not being a member of the armed forces of a party to the conflict, it is not strange that most PMC-employees first thought of as mercenaries are actually legally excluded from the definition of a mercenary. PMC's would not be viewed as a new kind of mercenary which is protected by the veil of corporate legitimacy, simply since they do not fulfill the criteria of a mercenary.

It is widely argued by experts that it is rather hard for an individual to get caught by this definition of a mercenary.<sup>232</sup> Some scholars are of the view that the corporate structure of the firms stands as a bar from being included within the category of mercenaries. But as I have illustrated in the investigation of the sub-paragraphs of article 47, there are a number of factors which excludes most PMC's from the definition of a mercenary.<sup>233</sup> Because of the articles narrowness, the definition is not a very helpful tool to the PMC-dilemma.<sup>234</sup>

In my opinion it would be desirable to have a regulation that is universally applicable to all PMC's and their employees. So that they could be defined by the same legal status. This is not possible today. Perhaps a few PMC-contractors could fall into the definition of mercenaries, but what about the others. The definition of mercenaries seems not to be an answer to the dilemma of legal status on PMC-employees.

The U.N. working group on mercenaries was requested, among other things in the Commission on Human Rights Resolution 2005/2, to take into account the new forms of mercenarism that are present today, especially when it comes to "private companies offering military assistance, consultancy and security services".<sup>235</sup> The working group's mandate does not only involve the traditional concept of mercenaries, but also activities of private companies with a military character.<sup>236</sup> Their report from March

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<sup>232</sup> AP I, articles 45 and 75 and GC III, article 5(2) and L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 6.

<sup>233</sup> T., Garmon, 'Domesticating International Corporate Responsibility: Holding Private Military Firms accountable under the Alien Tort Claims Act', Vol. 11, *Tulane Journal of International and Comparative Law*, (2003), p. 330 ff.

<sup>234</sup> L., Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (February 8-9 2007), p. 7.

<sup>235</sup> Office of the High Commissioner for Human Rights, Human Rights Resolution, 2005/2, *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.4/2005/L.10/Add. 5), (7 April 2005), p. 4, paragraph 17, available at: URL

([http://search.ohchr.org/search?q=human+rights+resolutions+%2B2005%2F2&entqr=0&output=xml\\_no\\_dtd&sort=date%3AD%3AL%3Ad1&client=default\\_frontend&ud=1&oe=UTF-8&ie=UTF-8&Entqr=0&proxystylesheet=en\\_frontend&site=default\\_collection](http://search.ohchr.org/search?q=human+rights+resolutions+%2B2005%2F2&entqr=0&output=xml_no_dtd&sort=date%3AD%3AL%3Ad1&client=default_frontend&ud=1&oe=UTF-8&ie=UTF-8&Entqr=0&proxystylesheet=en_frontend&site=default_collection)), last visited on 19 December 2007, at 16.43.

<sup>236</sup> A., Benavides, Chairperson of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, 2<sup>nd</sup> Session of the Human Rights Council, *Statement by Ms. Amada Benavides Chairperson of the Working Group on the use of mercenaries as a means of*

2007 state that there are connections and similarities between mercenaries and PMC's in certain operations.<sup>237</sup> The working group argues that PMC's are not covered by the U.N. Convention on mercenaries from 1989, but that there is a need of regulating the industry in order to make it clear that the State is responsible for PMC's conduct and in order to ensure effective protection of human rights. State responsibility does not mean that PMC's are not responsible for their violations of human rights. On the contrary when it comes to human rights, such obligations apply also to private enterprises according to the working group.<sup>238</sup>

The Commission on Human Rights Resolution 2005/2 states that the Commission on Human Rights is “[a]larmed and concerned about the danger which the activities of mercenaries constitute to peace and security”.<sup>239</sup> The working group on mercenaries have the task to propose new standards and guidelines in order to protect human rights from mercenarism. They are also supposed to monitor mercenaries and mercenary-related activities.<sup>240</sup> In their work for this, it seems like they are skeptical to some PMC's in the world and that they do not support the governmental usage of PMC's in their operations, since they are afraid that PMC's conduct may violate human rights in similar ways to what mercenaries have done. The working group argues that there is a risk that States use PMC's in order to avoid direct legal responsibilities. This is not a desirable behavior by States.<sup>241</sup> I interpret the working group as appalled and condemnatory towards mercenaries and that even if the definition of mercenaries is not applicable on PMC's, they are in certain operations and situations very similar to mercenaries. My interpretation is therefore that since mercenaries effect international peace and security, they should be

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*violating human rights and impeding the exercise of the right of peoples to self-determination*, Geneva, (25 September 2006), pp. 1-2.

<sup>237</sup> J. L., Gómez del Prado, Chairperson-Rapporteur of the Working Group on the use of mercenaries as a means of violating human right and impeding the exercise of the rights of peoples to self-determination, Fourth Session of the Human Rights Council, *Statement by Mr. José Luis Gómez del Prado Chairperson-Rapporteur of the Working Group on the use of mercenaries as a means of violating human right and impeding the exercise of the rights of peoples to self-determination*, Geneva, (21 March 2007), p. 1, available at: URL ([http://www2.ohchr.org/english/issues/mercenaries/docs/statwgm\\_en.pdf](http://www2.ohchr.org/english/issues/mercenaries/docs/statwgm_en.pdf)), last visited on 19 December 2007, at 17.11.

<sup>238</sup> United Nations Working Group on use of Mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination, *UN Working Group on the use of Mercenaries concludes visit to Honduras*, (HR/06/106E), (28 August 2006), p. 1, available at: URL ([http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear\\_en\)/CD0D68E883DF3241C12571D8003734B2?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/CD0D68E883DF3241C12571D8003734B2?OpenDocument)), last visited on 19 December 2007, at 17.08.

<sup>239</sup> Office of the High Commissioner for Human Rights, Human Rights Resolution 2005/2, (2005), p. 1.

<sup>240</sup> Office of the High Commissioner for Human Rights, Human Rights Resolution 2005/2, (2005), pp. 1-3.

<sup>241</sup> J. L., Gómez del Prado, Fourth Session of the Human Rights Council, (2007), p. 1 and United Nations General Assembly, Resolution adopted by the General Assembly, Sixty-first session, *Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, (A/RES/61/151), 81<sup>st</sup> plenary meeting, (19 December 2006).



internationally condemned and so should those PMC's which share the negative effect of mercenaries.

#### **4.4 Concluding Remarks on the Legal Status of Private Military Contractors**

PMC's and their employees are legally neither combatants nor mercenaries. They are civilians, or in some instances, persons accompanying the armed forces in the meaning of article 4A(4) of the GC III. This connotes that they will be labeled *unlawful combatants* when they participate directly in hostilities. The legal status of PMC's and their employees, is of extreme importance and absolutely necessary to define, in order to assess the attribution of PMC's conduct to States under international law. In the following chapter I will consider the possibility of State responsibility to emerge under the International Law Commission's Articles on State Responsibility. Hereafter called the ILC-Draft.

# 5 State Responsibility

When it comes to State responsibility for acts made by a State, in one way or another, the rules of the ILC, becomes central.<sup>242</sup> The ILC is a Commission established by the U.N. General Assembly in 1948. The ILC was one step for the U.N. to fulfil the Charter mandate, “of encouraging the progressive development of international law and its codification”.<sup>243</sup> ILC’s mission was to draw up a work program on 13 different areas within international law. One of them was on State responsibility. The topic of State responsibility is probably one of the most important areas of law undertaken by the ILC. The ILC-articles respond to comments made by governments and others, and reflects the balance of opinion within the ILC and therefore some parts constitute international customary law. The articles are not yet a part of a convention, but they certainly make a significant contribution to the codification and development of international legal rules on State responsibility.<sup>244</sup> The ILC articles I interpret and use in the following sub-chapters are all part of international customary law.<sup>245</sup>

State responsibility is a fundamental principle of international law, which arises from the nature of the international legal system and the doctrines of State sovereignty and equality of States.<sup>246</sup> In order for State responsibility to arise, three factors need to exist. The first being the existence of an international legal obligation, which is in force between two States. The second is that there has to exist a violation of that obligation, which is imputable to the State responsible. Thirdly, the damage must have resulted from the unlawful act of the violation.<sup>247</sup> In the *Chorzów Factory* case,<sup>248</sup> these requirements were made clear by the Permanent Court of International Justice, which stated that:

“it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”<sup>249</sup>

The *Spanish Zone of Morocco* claims<sup>250</sup> clarifies the interaction between responsibility and reparation, which is the natural consequence. Judge Huber said:

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<sup>242</sup> M. N., Shaw, *International Law*, (2003), p. 697.

<sup>243</sup> ILC Commentary, p. 1.

<sup>244</sup> ILC Commentary, pp. 1 and 60.

<sup>245</sup> U., Linderfalk, (ed.), *Folkrätten i ett nötskal*, (2006), p. 94.

<sup>246</sup> M. N., Shaw, *International Law*, (2003), p. 694.

<sup>247</sup> M. N., Shaw, *International Law*, (2003), p. 696.

<sup>248</sup> *Chorzów Factory* case, (Merits), (Germany v. Poland), 13 September 1928, PCIJ, Series A, No. 17, available at: URL ([http://www.icj-cij.org/pcij/serie\\_A/A\\_17/54\\_Usine\\_de\\_Chorzow\\_Fond\\_Arret.pdf](http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf)), last visited on 13 January 2008, at 16.05.

<sup>249</sup> *Chorzów Factory* case, (1928), p. 29.

<sup>250</sup> *Spanish Zone of Morocco* claims, (Spain v. United Kingdom), 29 May 1923, RIAA, Vol. II, pp. 615-742.

“responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make reparation if the obligation in question is not met.”<sup>251</sup>

One can say that State responsibility involves unlawful acts directly committed by the State and directly affecting other States. It could for example be the breach of a treaty, the violation of another States territory or damage to States property.<sup>252</sup>

States are not only responsible for their own conduct but also for the conduct of their organs, since they act in the capacity of the State. This has been recognized in international judicial decisions for a long time. In a Mexico-United States Mixed Claims Commission, namely the *Moses* case<sup>253</sup>, Umpire Lieber said:

“An officer or person in authority represents pro tanto his government, which in an international sense is the aggregate of all officers and men in authority.”<sup>254</sup>

It is widely accepted and a part of customary law, that international responsibility should be incurred by a State as a consequence of a State-organ’s failure to carry out international obligations of the State.<sup>255</sup> This is exactly what articles 1 and 2 of the ILC-Draft state. Article 1 declares that every internationally wrongful act of a State entails responsibility. Every internationally wrongful act of a State entails the international responsibility of that State and because of this gives rise to new international legal relations additional to those that existed before the unlawful act took place.<sup>256</sup> Further, article 2 explains what an internationally wrongful act constitutes. An internationally wrongful act is an act of a State, which is attributable to the State under international law and constitutes a breach of an international obligation to the State.<sup>257</sup>

Whether or not a State is liable for a violation depends on the connection between the State and the person committing the violation or unlawful act. The State does not act itself, but have agents, such as authorized officials and representatives that act on behalf of the State. The State is only

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<sup>251</sup> M. N., Shaw, *International Law*, (2003), p. 696 and the *Spanish Zone of Morocco* claims, (1923), p. 641.

<sup>252</sup> M. N., Shaw, *International Law*, (2003), p. 700.

<sup>253</sup> *Moses* case, (Mexico v. United States), 1871, International Arbitrations, Vol. III, p. 3127.

<sup>254</sup> ILC Commentary, p. 94 and the *Moses* case, (1871), p. 3129.

<sup>255</sup> ILC Commentary, p. 95 and Report issued by the International Court of Justice, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, I.C.J. Reports 1999, (1999), p. 62 and p. 87, paragraph 62 referring to the Draft Articles on State Responsibility, article 6, now embodied in article 4.

<sup>256</sup> ILC Commentary, p. 78.

<sup>257</sup> M. N., Shaw, *International Law*, (2003), p. 697.

responsible for actions committed by its servants, which are attributable and imputable to the State.<sup>258</sup> In chapters 5.2 to 5.5 I will develop whether acts undertaken by PMC's are attributable to the State, but first the theories on strict State responsibility must be dealt with.

## 5.1 The Question of Fault

Within the expertise of State responsibility, there exists contending ideas of whether State responsibility is strict or not. When a violation of international law or a State's obligation takes place, is it then necessary to show intention and fault of the conduct? The two different ideas are named the objective and the subjective responsibility theories.<sup>259</sup> Even if the majority of experts lean towards strict liability, the question of fault, has been interpreted differently in a number of cases. The ILC-articles emphasize that there is not a clear answer to this question and that the question of an objective or subjective approach can vary from one context to another, depending on what the primary obligation is about, which indicates that fault, negligence or due diligence is interpreted on a case-by-case basis.<sup>260</sup> Even if this is not central to my essay, it seems vital to encounter the different kinds of belief and illustrate the difference with some cases.

### 5.1.1 The Objective Responsibility Theory

The objective responsibility theory, which the majority of experts believe in, declares that liability of the State is strict. It emphasizes that irrespective of good or bad faith, once a violation of an obligation between States has been caused by an agent of the State, that State is according to international law responsible to the damage and losses that has been the result of the violation.<sup>261</sup> With this theory, it is not possible to defend an agent by claiming the agent had no intent to violate.

The objective theory is supported by the *Caire* claim,<sup>262</sup> which was dealt with by the French-Mexican Claims Commission. In this case a French citizen had been shot by Mexican soldiers when he failed to supply them with 5000 Mexican dollars. The preceding commissioner, Verzijl, said that Mexico was according to the objective responsibility theory responsible for the injury even in the absence of any fault.<sup>263</sup>

With this theory in mind, States are encouraged to exercise greater control over its various departments and representatives.<sup>264</sup> I therefore interpret that as long as the private contractor is attributable to the State when the violation takes place, there is no need to investigate and prove intent of the

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<sup>258</sup> M. N., Shaw, *International Law*, (2003), p. 701.

<sup>259</sup> M. N., Shaw, *International Law*, (2003), p. 698.

<sup>260</sup> M. N., Shaw, *International Law*, (2003), p. 700 and ILC Commentary, pp. 81-82.

<sup>261</sup> M. N., Shaw, *International Law*, (2003), p. 698.

<sup>262</sup> *Caire* claim, (France v. United Mexican States), 7 June 1929, RIAA Vol. V, p. 516.

<sup>263</sup> M. N., Shaw, *International Law*, (2003), p. 699.

<sup>264</sup> M. N., Shaw, *International Law*, (2003), p. 700.

agent, since the State is responsible for the conduct even without intent with the objective responsibility theory.

This line of argumentation is supported by article 7 of the ILC –Draft on State Responsibility. The article provides that the conduct of an organ or of a person or entity empowered to exercise elements of governmental authority should be considered an act of the State under international law, even if it exceeds its authority or contravenes instructions when it acts in that capacity. This article illustrates an absolute rule of liability and seems to be the correct approach according to Malcolm N. Shaw.<sup>265</sup>

### 5.1.2 The Subjective Responsibility Theory

The subjective responsibility theory states the opposite of the above mentioned theory. In order for States to be responsible for an injury caused by one of its agents, in this case a PMC, there has to be evidence of intentional-dolus or negligent-culpa conduct of the PMC concerned.<sup>266</sup>

The subjective approach was used in the *Home Missionary Society* claim,<sup>267</sup> which was a case between Britain and the United States. It dealt with the local uproar and tumult that was triggered by imposition of hut tax in the protectorate of Sierra Leone. As a result missionaries were killed and society property was damaged. The tribunal dismissed the American claim and emphasized that governments are not responsible for the acts of rebels when the government themselves have not violated an obligation or breach of good faith. This case deals with State responsibility for the acts of rebels and it may be questioned whether or not this case may be used as an analogy for other situations.<sup>268</sup>

This theory can be used in discussions where a State instruct, direct or control the violating conduct of a PMC. If the State has responsibility over the conduct and the PMC went beyond its authorisation, then the question is whether or not State responsibility arise? In such cases one need to see whether the ultra vires acts were incidental to the mission or obviously went beyond it. When a State authorize and give instructions to groups that are not its organs, they assume that the group will carry out their mission within the frames of their authorisation. Where groups have acted under effective control of a State, the conduct is attributable to the State, according to article 8 of the ILC-Draft, even when specific instructions has been ignored.<sup>269</sup> In my opinion, the subjective theory may be useful to prove a States responsibility or non-responsibility.

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<sup>265</sup> M. N., Shaw, *International Law*, (2003), pp. 703-704 and ILC Commentary, pp. 106-107.

<sup>266</sup> M. N., Shaw, *International Law*, (2003), p. 698.

<sup>267</sup> *Home Missionary Society* claim, (United States v. Great Britain), 18 December 1920, RIAA Vol. VI, p. 42.

<sup>268</sup> M. N., Shaw, *International Law*, (2003), p. 699 and *Home Missionary Society* claim, (1920), pp. 42-44.

<sup>269</sup> ILC Commentary, p. 113.

## 5.2 ILC-Draft Article 4

Articles 4 and 5 in the ILC-Draft illustrate the de jure test, which is a test that proves the existence of a legal link between the agent and the State. The de jure test defines acts that are attributable to the State because the law of that State regards the actor as part of the government, or because the actor has been authorized by the State to exercise governmental authority on behalf of that State.

Article 4 in the ILC-articles reads as follows:

“Article 4  
Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.<sup>270</sup>

Article 4, states that according to international law, the conduct of any State organ, shall be considered an act of the State, whether it exercises legislative, executive, judicative or any other function. This is true unconditionally of its character and function of the central government and the organisation of the State. This group of individuals that are attributable to the State includes all individual and collective entities which have the status of State organ in accordance with the internal law of a State and which make up the organisation of the State and acts on its behalf. The final phrase makes it clear that in this categorization of organ, organs of any territorial governmental entity within the State are included, on the same basis as the central governmental organs of that State.<sup>271</sup> The question is therefore whether PMC's can be categorized as State organs. This subject has been somewhat handled in the introduction to chapter five and will be further examined in the following sub-chapter.

### 5.2.1 Private Military Companies as Organs of the State

The conduct of private persons or entities is generally not attributable to the State. In some situations, circumstances may arise that make certain conduct attributable to the State. A specific factual link has to exist between the entity performing the conduct and the State.<sup>272</sup>

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<sup>270</sup> ILC-Draft, article 4.

<sup>271</sup> M. N., Shaw, *International Law*, (2003), pp. 701-702 and ILC Commentary, p. 94.

<sup>272</sup> ILC Commentary, pp. 98-99.

The reference to State organ in article 4, is written in the most general sense. There is no limitation to organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. There is no strict boundary when it comes to the classification, but all organs of government are included no matter the kind of classification, the exercise of functions or degree in the hierarchy. This indicates that there is no definition of which State organs that can commit internationally wrongful acts on behalf of the State, and which that cannot. Any State organ can violate international law and give rise to State obligations.<sup>273</sup> De jure organs of the State is the government itself, the police force, prisons, the armed forces, an individual office holder, a department, a commission or other body exercising public authority.<sup>274</sup> Since the term is one of extension and not limitation it is irrelevant for the purposes of attribution that the conduct of a State organ may be categorised as *commercial* or as *acta iure gestionis*.<sup>275</sup>

When the internal law of the State characterizes an entity as an organ of the State, there is no need for interpretation. The definition of State organ in internal law is not an absolute requisite. The ILC Commentary indicates that the word *includes* proves that a State do not avoid State responsibility for the violations of an entity which in truth act as one of the State's organs by merely denying the entity its status of a State organ under its internal law. In cases where the internal law of a State do not regulate the status of an individual or a group, then practice steps in. If one only were to view the internal law, one might not find the correct meaning of *organ* that is aimed for in article 4 of the ILC-Draft.<sup>276</sup> This is important for the area of PMC's, which in fact carry out operations as if it was a State organ, but nonetheless is not recognized as an organ of the State in the internal law of the State.

Some State agents might take advantage of the State's broad responsibility, in terms of having ulterior motives or abusing the public power. Under such circumstances one should be aware of that only such actions that are taken in the official capacity of the State are attributable to it. In order for an act to be attributable, it has to have connection with the official function and not just be an act of an individual.<sup>277</sup>

Legally it is difficult to see how a PMC could be categorized as a State organ, but if one looks closer at the bond between certain PMC's and the States that contract them, the dilemma of whether PMC's are State agents or not becomes less obvious. PMC's have strong bonds to their home State by contracts or license approval of their actions abroad. When a State approves of a PMC's activities abroad, is that State not supposed to be responsible and be held accountable for the export of these private companies then? In

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<sup>273</sup> ILC Commentary, p. 95.

<sup>274</sup> ILC Commentary, pp. 98-99.

<sup>275</sup> ILC Commentary, pp. 86-90 and 96.

<sup>276</sup> ILC-Draft, article 4(2) and ILC Commentary, p. 98.

<sup>277</sup> ILC Commentary, p. 99.

fact, PMC's are being sent to a certain country in order for the sending State to influence the outcome of a conflict.<sup>278</sup> American PMC's are controlled by their home-State to a certain degree. PMC's that bring in contracts over 50 million dollars need a congressional agreement. Otherwise there is no need for governmental involvement. Once a license has been given the PMC is not overlooked in terms of how they carry out the contract.<sup>279</sup> One U.S. State Department official said "Our job is to protect Americans, not investigate Americans".<sup>280</sup>

On the Geneva Expert Meeting on PMC's in 2005, experts observed that only PMC's characterized as the armed forces, a militia or a volunteer corps of the armed forces in article 4A(1), constitute a State organ in article 4. When such a PMC violates international law in matters of State responsibility, these actions would be attributable to the State of which the PMC is a State organ. Also a PMC that constitutes armed forces according to the broader definition in article 43 of the AP I may constitute an organ of the State within the meaning of article 4.<sup>281</sup>

PMC's can probably not be categorized as combatants, since they are not part of a States armed forces. Therefore they do not form an organ of the State. Even if I personally find it arguable that moral, political and connectional objectives can result in the definition of PMC's as organs of a State, experts argue that States cannot be legally responsible for PMC's violations under article 4. This does however not mean that the de jure test end with article 4. Article 5 of the ILC also illustrates the de jure test.

### 5.3 ILC-Draft article 5

Article 5 in the ILC-articles reads as follows:

“Article 5  
Conducts of persons or entities exercising elements  
of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of the State to exercise elements of governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance”.<sup>282</sup>

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<sup>278</sup> J. C., Zarate, 'The Emergence of a New Dog of War', (1998), pp. 90-91.

<sup>279</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 238-239.

<sup>280</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 239 which cites R., Miller, *The East Indiamen*, Time-Inc., New York, (1980).

<sup>281</sup> Geneva Expert Meeting, p. 15.

<sup>282</sup> ILC-Draft, article 5.



The formulation of article 5 of the ILC-Draft is a reaction towards the development of para-Statal entities and governmental agencies that exercise governmental authority in place of State organs and where former State corporations have been privatized but retain certain public functions. Even if a person or an entity is not an organ of a State under article 4 of the ILC, their actions could and in some cases even should be attributable to the State, according to article 5. This is true, if the person or entity exercises elements of governmental authority, acts in that capacity in the particular instance and is empowered by the law of that State. This article is supposed to cover the situation of privatized corporations, which have public or regulatory functions of the State. PSC's that has been authorized by the State to act as prison guards, private or State-owned airlines, have the possibility to exercise immigration control, or railway companies that have been granted certain police functions are covered by this article.<sup>283</sup>

The term *entity* in article 5 of the ILC-Draft, includes many structures. Not only organs may be empowered by the State to exercise elements of governmental authority. Public corporations, semi-public entities, public agencies of various kinds and private companies can all achieve such functions if they are empowered by the law of the State to exercise such public functions that the State normally exercise and their performance relates to the exercise of governmental authority. Where PMC's are contracted as prison guards, they exercise public powers of detention and discipline, pursuant to a judicial sentence or to prison regulations, meaning that their conduct is attributable to the State in case of violation. In one case before the Iran-United States Claims Tribunal, a company was contracted by a State to identify property for seizure and expropriate it for charitable purposes. The tribunal viewed such actions as actions of governmental authority and the company was at the time under governmental control. The decisive factor is whether or not entities are empowered to exercise specific elements of governmental authority.<sup>284</sup>

Even if it is argued from time to time that para-Statal entities is a new phenomena, the German government embodied such entities attribution to States quite some time ago. The German government asserted that a State may delegate their powers to bodies, so that these entities can act in a public capacity as a police force for example. The State is no more and no less, but just as much, responsible for actions taken by that entity, as it is for its State organs. The German government pointed out that from the spectra of international law it does not matter whether the State carries out police functions itself, or if it hires and entrusts this duty to autonomous bodies.<sup>285</sup>

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<sup>283</sup> M. N., Shaw, *International Law*, (2003), p. 702 and ILC Commentary, pp. 92 and 100.

<sup>284</sup> ILC Commentary, p. 100.

<sup>285</sup> ILC Commentary, p. 101 and League of Nations, Conference for the Codification of International Law, *Bases of Discussion for the Conference drawn up by the Preparatory Committee, Vol. III: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners*, (Doc. C.75.M.69.1929.V.), (1929), p. 90. The German government noted that these remarks would extend to the situation where States hire private contractors to carry out public powers in the name of the sovereign State.

In article 5 there are essentially two prerequisites there are in need of interpretation. The first requirement is that States need to exercise elements of governmental authority over PMC's in order for their conduct to be attributable to the State. The second prerequisite is that PMC's needs to be empowered by the law of the State in order to exercise the governmental authority.<sup>286</sup> Both pre-requisites need to be fulfilled in order for a PMC's violating actions to be attributable to a State. This will be dealt with in the two following subchapters.

### **5.3.1 Governmental Authority**

When it comes to State attribution for the conduct of a PMC, this article is not supposed to describe or identify exactly what is included in the phrase *governmental authority*. What is regarded as governmental depends very much on the situation in focus, the particular society in question and on its history and traditions. Of great importance is the way in which powers are conferred onto an entity, the purpose of the exercise of the power and the extent to which the entity is accountable to the government for their actions and not only the content of the certain power. Therefore, each situation may have different values of interest and one needs to interpret each situation individually. The only conclusion that can be drawn from this pre-requisite is that for PMC's conduct to be attributable to the State, it is not enough that they perform a function which entails governmental authority.<sup>287</sup> Some of the experts from the Geneva Expert Meeting in August 2005 were of the view that this is the article under which they are willing to place PMC's, since military operations are functions which are inherently governmental.<sup>288</sup>

### **5.3.2 Empowered by the Law of the State**

Article 5 do have the limitation that it is only applicable to entities that are empowered by internal law to exercise governmental authority. This distinguishes it from article 8, where an entity acts with instruction, under the direction or control of a State. The internal law is a narrow category in which the State must specifically authorize the conduct as involving the exercise of public authority. It is thus not enough to permit an action as part of a general regulation of the affairs of the community.<sup>289</sup>

Even if the relationship between MPRI and the U.S. government gives rise to elements of governmental authority, given by the State to the contractor, that relationship cannot be seen in U.S. internal law. On an international level, MPRI operates only on contracts approved by the U.S. government.<sup>290</sup> Not even the fact that the U.S. government has to approve and licence PMC's contracts in Iraq, that succeed 50 million dollars, seems to indicate

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<sup>286</sup> Geneva Expert Meeting, p. 18.

<sup>287</sup> ILC Commentary, pp. 100-102.

<sup>288</sup> Geneva Expert Meeting, p. 20.

<sup>289</sup> ILC Commentary, pp. 101-102.

<sup>290</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 122.

that the U.S. empower the contractors to act with governmental authority on behalf of the State. Even if I believe, that States customary behaviour is just as important as what their internal law states, it seems that in this certain pre-requisite it is just the internal law that matters.

My interpretation is that the most important requirement probably is the existence of a sufficient connection between the company and the State. Such a connection could be a signed contract between the two parties. But since contracts between PMC's and State organs often are protected by proprietary law, they are not open to scrutiny. Therefore, it is hard to evaluate whether or not the contracts meet the requirements of article 5 of the ILC-Draft.<sup>291</sup>

There are contending ideas of what kind of empowerment by law that is needed. Some believe that it is not necessary to enact a particular law empowering each PMC to undertake functions which entail governmental authority while others are certain of that an explicit law empowering PMC's to undertake operations is necessary. If a law exists that empowers PMC's in general or on an individual basis, the conduct of the empowered PMC will be attributable to the State.<sup>292</sup>

In cases where a PMC can be included in the category of persons accompanying the armed forces without being part thereof, article 4A(4) of the GC III, and governmental authority has been conferred upon the PMC by an organ of the USA that has the legal right to do so, the criteria of article 5 of the ILC-Draft seem to be met.<sup>293</sup>

## 5.4 ILC-Draft article 8

Article 8 of the ILC illustrates the other applicable test, the de facto test. The de facto test attributes acts to the State because the agent, although not de jure part of the State, in fact acted on behalf of the State. Article 8 stands for the existence of a factual link between the agent and the State and not as in articles 4 and 5, a legal link.

Article 8 of the ILC-articles reads as follows:

“Article 8  
Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of

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<sup>291</sup> Amnesty International, *Private Military Contractors: Questions and Answers*, available at: URL (<http://www.amnestyusa.org/business/pmc/HousePartyToolKit.pdf>), last checked on 17 January 2008, at 16.54.

<sup>292</sup> Geneva Expert Meeting, p. 19-20.

<sup>293</sup> Geneva Expert Meeting, p. 16 ff.

persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”<sup>294</sup>

In general, private persons or groups conducts is not attributable to the State. In some circumstances, State responsibility may arise for such conduct if a specific factual relationship exists between the one who carries out the conduct and the State. Article 8 includes two prerequisites. Number one, the State has to instruct the person or group of individuals to commit an internationally wrongful act, in order for State responsibility to arise. Number two, a separate person or an entity of persons has to act under the direction or control of the State in order for State responsibility to arise. If a person or a group of persons act on instructions of the State, or under the direction or control of the State, such individual’s actions may be attributable to that State. The prerequisites are disjunctive, so any of them is sufficient for attribution.<sup>295</sup>

A real link between the person performing the violation and the State machinery has to exist. There must also be a connection between the State and the conduct that have amounted to the internationally wrongful act. In this article, it does not matter whether the person involved is a private individual or if the conduct is carried out with governmental activity.<sup>296</sup>

This article is mostly applicable to cases where State-organs supplement their own action by recruiting private persons or groups for that matter, to act as *auxiliaries*. Such individuals are still outside the official structure of the State. Often these persons are employed as *auxiliaries* or are sent as *volunteers* to neighbouring countries and are instructed to carry out certain tasks, missions and functions, even though they are not specifically commissioned by the State and not performing as part of the States police or armed forces.<sup>297</sup> Under this article, each case of attribution will depend on its own facts concerning the relationship between the instructions given or the direction and control exercised; and the conduct complained on.<sup>298</sup>

### 5.4.1 On Instructions of the State

The question that arises is whether or not it is necessary that the State instruct the actor to conduct an internationally wrongful act in order for State responsibility to arise. This is according to some experts not needed.<sup>299</sup>

What kind of *instructions* would be attributable and lead to State responsibility? The ideas of experts differ somewhat. Some argue that it is enough with a contract concluded between the State and the PMC carrying out the contract, in order for *instructions* to have emerged. Other experts

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<sup>294</sup> ILC-Draft, article 8.

<sup>295</sup> ILC-Draft, article 8.

<sup>296</sup> ILC Commentary, p. 110.

<sup>297</sup> ILC Commentary, pp. 110 and 113.

<sup>298</sup> ILC Commentary, p. 113.

<sup>299</sup> Geneva Expert Meeting, p. 21.

imply that the contract as such, is not enough. Contracts need to contain rules of engagement for *instructions* to be at hand. A third opinion goes even one bit further. Whether or not instructions are given, is based on the clarity of the contract. For example how obvious the State has regulated what they want and need the contracted to fulfil and in what manner the mission should be carried out by the contracted. If instructions are vague, there is a greater risk that PMC's interpret the instructions themselves and act as they believe suit the situation. That could potentially lead to an internationally wrongful act being committed.<sup>300</sup> One situation in which a PMC act on the instructions of the State is for instance if a PMC is contracted to guard an oilfield. Such activity would amount in State responsibility if any violations were to occur.<sup>301</sup>

As I interpret the rules concerning State responsibility for acts performed by private individuals is that they are not based on rigid and uniform criteria. Therefore, the judgment of when a private individual or entity can be seen as a de facto State agent has to be made on a case by case basis.

A number of cases exist to help us in the legal argumentation. In the legal decisions that I will present, the conduct of military of paramilitary groups have been attributed to the State under international law. These judicial decisions illustrate that when it can be proved that individuals who do not hold the status of State officials, act on behalf of the State, the conduct nevertheless does become attributable to that State. The rationale behind this rule is that States are not allowed to on the one hand act de facto through private actors and on the other hand disassociate themselves from such conduct when the private actors breach international law.<sup>302</sup>

#### **5.4.1.1 The *Zafiro* case**

Even if private individuals are not regarded State officials, so that the State is not responsible for their acts, the State may still be liable for failing to exercise necessary control.<sup>303</sup>

The attribution of State authorized conduct to the State is widely accepted in international jurisprudence. This was the scene in the *Zafiro* case.<sup>304</sup> In this case between Britain and America, where the U.S.-Great Britain Claims Commission held America internationally responsible for the damage caused by a private individual, of the civilian crew, on a merchant naval ship in the Philippines. The reason for the award was that it had been established that the vessel, although private, was in fact acting as a supply ship for U.S.-naval operations. Its captain and crew were for this purpose under the

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<sup>300</sup> Geneva Expert Meeting, pp. 21-22.

<sup>301</sup> Geneva Expert Meeting, p. 19.

<sup>302</sup> *Tadić* case, (Judgement), (The Prosecutor v. Dusko Tadić), 15 July 1999, Case IT-94-1, ICTY, Appeals Chamber, I.L.M., Vol. 38, pp.1518 and 1541.

<sup>303</sup> M. N., Shaw, *International Law*, (2003), p. 704.

<sup>304</sup> *Zafiro* case, (D. Earnshaw and Others (Great Britain) v. United States), 30 November 1925, RIAA, Vol. VI, p. 160.

command of a U.S.-naval officer and the naval officers had not adopted effective preventative measures.<sup>305</sup>

#### 5.4.1.2 The *Stephens* case

In the *Stephens* Case,<sup>306</sup> the claim was put forward by the USA on behalf of Charles S. Stephens and Bowman Stephens which were both American nationals. Their brother, Edward C. Stephens, was killed in Mexico in 1924 by a shot fired by a member of a Mexican Guard company or auxiliary military force. The USA claimed that the State of Mexico was responsible for the unlawful killing carried out by the guard.<sup>307</sup>

Most Mexican federal troops were withdrawn from the State of Chihuahua, where the killing of the American national Stephens took place in the revolution of Adolfo de la Huerta. The troops were used further down south in Mexico to suppress the insurrection. Due to the lack of personnel in the north, an informal municipal guard organization, namely the *defensas sociales* sprung up to defend peaceful citizens and to take field against the rebellion if necessary. The United States – Mexico Claims Commission had to decide whether or not the acts of the private guards could be attributed to the State of Mexico. The Claims Commission observed that it is difficult to determine the status of the guards as an irregular auxiliary of the army since they lacked uniforms and emblems even if they act for Mexico or for its political subdivisions.<sup>308</sup> The guard that shot Stephens was on duty under a sergeant, acting under the “General Ordinance for the army”.<sup>309</sup> This general ordinance text obligated all individuals who were halted by guards to answer and stop. When the guards saw Stephens car come near them, the sergeant gave order to the guards to halt the vehicle. The sergeant did not tell the guards to fire their arms. Nevertheless the guard, Valenzuela, fired at Stephens.<sup>310</sup>

The conditions in Chihuahua at the time were such as that the guard must be considered as a soldier or as having assimilated into one. The conduct of a private guard under the order of a superior was attributable to Mexico which had international responsibility for the shooting of an American national.<sup>311</sup> The Claims Commission made it clear that a State is just as responsible for an act of a private individual who was part of these groups of guards employed as auxiliaries, as acts of members of the regular armed forces. Therefore, Mexico was directly liable for the unlawful killing of Stephens.<sup>312</sup>

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<sup>305</sup> DJ., Harris, *Cases and Materials on International Law*, 6ed, Sweet & Maxwell, London, (2004), p. 514 and *Zafiro* case, (1925), pp. 160-165.

<sup>306</sup> *Stephens* case, (C. S. Stephens and B. Stephens (U.S.A.) v. United Mexican States), 15 July 1927, RIAA, Vol. IV.

<sup>307</sup> *Stephens* case, (1927), pp. 265-267.

<sup>308</sup> *Stephens* case, (1927), p. 267, para. 4.

<sup>309</sup> *Stephens* case, (1927), p. 267, para. 5.

<sup>310</sup> *Stephens* case, (1927), p. 267, para. 5.

<sup>311</sup> *Stephens* case, (1927), p. 267, para. 7.

<sup>312</sup> *Stephens* case, (1927), p. 268, paras. 8-10.

## 5.4.2 Under the Direction or Control of the State

The words “under the direction or control of, that State”,<sup>313</sup> could be interpreted to mean that in order for a PMC-violation to be attributable to the State, the State needs to direct or control the specific operation on which the PMC might have violated one of the States obligations. It could also be interpreted as a less demanding pre-requisite.<sup>314</sup> A couple of cases might demonstrate the difficulty of the paragraph and clarify the context of the terms *direction* and *control*.

### 5.4.2.1 The Nicaragua case or Military and Paramilitary Activities case

In the *Nicaragua* case,<sup>315</sup> the International Court of Justice needed to determine the meaning of *control* and whether or not the USA was responsible for the human rights violations perpetrated by the Nicaraguan Contras rebels. In order to establish State responsibility for the USA, the American government needed to have effective control over the specific operations in which the paramilitary, allegedly had violated human rights norms. It was not enough with general control of the military or paramilitary group. A necessity was therefore to prove that the U.S. had effective control and had specifically directed and enforced the perpetration of the allegedly acts. The U.S. was responsible for the planning, direction and support of the Nicaraguan operatives but did not have specific control over all operations that Contras carried out. Since there was no clear evidence of that the U.S. had actually exercised such a degree of control in all fields, as to say that Contras acted on behalf of the U.S., Contras conduct could not be attributable to the U.S. The court confirmed that a general dependence and support would not be sufficient for the acts to be attributable to the State.<sup>316</sup> The U.S. was held responsible for its own support to the Contras and for certain individual situations where Contras actions were attributable to the U.S. in terms on participation and directions given by the U.S. but U.S. was not responsible in general for Contras violations.<sup>317</sup> The opinions of experts differ. Some agree with the ruling of the *Nicaragua* case and some do not. Some experts even argue that the *Nicaragua* case is interpreted incorrectly. That the ruling does not at all require the State to have effective control over the PMC, in order for State responsibility to emerge when an internationally wrongful act has been committed.<sup>318</sup>

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<sup>313</sup> ILC-Draft, article 8.

<sup>314</sup> M. N., Shaw, *International Law*, (2003), pp. 704-705 and ILC Commentary, p. 110.

<sup>315</sup> *Military and Paramilitary Activities in and against Nicaragua*, (The Republic of Nicaragua v. United States of America), (Merits), 27 June 1986, I.C.J. Reports 392, (1986). Hereafter called the *Nicaragua* case.

<sup>316</sup> M. N., Shaw, *International Law*, (2003), pp. 704 and 1071 and ILC Commentary, pp. 110-111 and the *Nicaragua* case, (1986), pp. 14, 62, 64 and 65, paras. 109 and 115.

<sup>317</sup> *Nicaragua* case, (1986), p. 51, para. 86.

<sup>318</sup> Geneva Expert Meeting, p. 21, experts argue with support from the *Nicaragua* case, (1986), paras. 115, 116 and 216.

### 5.4.2.2 The *Tadić* case

In this case, the Yugoslav War Crimes Tribunal dealt with a case of individual criminal responsibility. If compared to the *Nicaragua* case, the outcome was a more flexible approach towards the degree of control. The tribunal meant that the degree of control vary depending on the factual circumstances. A high threshold is not always necessary and should therefore not be demanded in all cases. This does not exclude that the State still needs to exercise control over the individual or the group. The Appeals Chamber of the *Tadić* case believed that the International Court had gone too far in the *Nicaragua* case. It would not be necessary to have *overall control* that goes further than the financing and equipping of forces. It is thus not necessary for the State to participate in the planning and supervision of the specific military operation in which the allegedly violation occur, for the violation to be attributable to the State. One should view each situation separately and appreciate whether or not a particular conduct is carried out under the control of a State, and could be attributable to it.<sup>319</sup>

### 5.4.2.3 The *Yeager* case

The *Yeager* case<sup>320</sup> encounter the problem of the degree of State control that is necessary for the purpose of attribution of conduct to the State under article 8 of the ILC-Draft. In 1987 the Iran-United States Claims Tribunal brought up a case dealing with the American national Kenneth P. Yeager. He was employed in Iran at the Bell Helicopter International Company, October 1977. Mr Yeager shipped his furniture from USA to Iran and shortly after he arrived, so did his wife and sons.<sup>321</sup> In February 1979 the Revolutionary Guards forced him to leave his house and Iran. The question is whether the alleged conduct of the Revolutionary Guards was attributable to the Republic of Iran.<sup>322</sup>

Before the victory of the revolution in Iran groups of guards emerged from neighborhood committees. These were Ayatollah Khomeini's supporters which organized themselves in local revolutionary committees, so called Komitehs or Revolutionary Guards. They made arrests, confiscated property and took people to prison, serving as local security forces in the aftermath of the revolution. The Komitehs and Ayatollah Khomeini held each other around the back and supported each other's conduct. The guards were loyal to him, while he generally stood behind them.<sup>323</sup> Soon after the victory of the revolution, the Revolutionary Guards were officially recognized by decree in May of 1979. However, when the incident of this case took place, the Guards were *not* officially recognized as acting for the State of Iran. Actually, Iran held that their acts before May 1979 were not attributable to the State. When answering the

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<sup>319</sup> M. N., Shaw, *International Law*, (2003), pp. 704-705 and ILC Commentary, p. 112 and the *Tadić* case, (1999), p. 1546, para. 145.

<sup>320</sup> *Yeager* case, (K. P. Yeager v. Islamic Republic of Iran), 2 November 1987, Iran-United States Claims Tribunal, Case No. 10199, Iran-United States Claims Tribunal Reports, Vol. 17.

<sup>321</sup> *Yeager* case, (1987), p. 93, para. 6.

<sup>322</sup> *Yeager* case, (1987), pp. 94-95, para. 12.

<sup>323</sup> *Yeager* case, (1987), pp. 102-103, paras. 38-40.



question of whether the acts at issue were attributable to Iran under international law, the Tribunal held that there were some doubts concerning if the Revolutionary Guards could be considered de jure organs of the Government since they were not formally recognized during the period relevant to the case. However, the Tribunal stated that State responsibility and attribution to the State is not limited to acts of organs formally recognized under internal law. Otherwise a State could avoid international responsibility merely by invoking the internal law of that State. Generally, it is according to international law also true that States are responsible for individuals conduct, if it is established that such individuals acted on behalf of the State.<sup>324</sup> In this case, the Tribunal found sufficient evidence to establish a presumption that the Revolutionary Guards acted on behalf of Iran.<sup>325</sup> The government of Iran must have had knowledge about the conduct carried out by the guards. This due to the fact that Iran could not establish satisfactory evidence of that they were unaware of that the Revolutionary Guards exercised elements of governmental authority, or that they could not control them. Therefore, the Tribunal reasoned that the activities of the Revolutionary Guards actually were attributable to Iran.<sup>326</sup>

It is not possible under international law for a State to on the one hand tolerate the exercise of governmental authority by individuals, such as the Komithes and at the same time deny responsibility for wrongful acts committed by them. The conduct perpetrated by the guards, in terms of forcing Mr. Yeager to leave Iran in a hurry was in fact attributable to the State of Iran.<sup>327</sup>

The pre-requisites instructions of and under the direction or control of,<sup>328</sup> have quite different meaning. When a State exercises control it is believed that the State is in a position to have operational control over a group, while instructions rather shows that the State gives certain instructions for the PMC to follow, and that the State is not able to exercise any level of control, apart from the instructions. So, a PMC hired by a State to guard an oilfield is on instructions of the State, but not under the direction, since the State is not exercising any level of control after giving certain instructions. The State is usually not around to control the tasks carried out by the PMC.<sup>329</sup>

## 5.5 Concluding Remarks on State Responsibility

Employees of PMC's are from a legal point of view civilians and not combatants with POW-status that follows with being a State organ. Activities carried out by PMC-employees can therefore not be attributed to the State that hires them under article 4 of the ILC Draft. The conduct of such individuals can however be attributed to the State under article 5 of the ILC Draft, if certain circumstances are fulfilled. In cases where the PMC is empowered by an

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<sup>324</sup> *Yeager* case, (1987), p. 103, para.. 42.

<sup>325</sup> *Yeager* case, (1987), pp. 103-104, paras. 42-43.

<sup>326</sup> *Yeager* case, (1987), pp. 104-105, paras. 43-45.

<sup>327</sup> *Yeager* case, (1987), p. 104-105, para. 45.

<sup>328</sup> ILC-Draft, article 8.

<sup>329</sup> Geneva Expert Meeting, p. 20.

internal law to exercise elements of governmental authority, the conduct is attributable to the State under article 5. Governmental authority includes conducts related to policing, prisons, judicial administration and the armed forces. Really any conduct that could be associated with the conduct of hostilities is a function which requires governmental authority. States do not need to empower each PMC separately to undertake functions of governmental authority. What is necessary is an internal law of the State that empowers a specific governmental authority to delegate powers to a PMC. If such a law exists, the requirement of article 5 is met.<sup>330</sup>

In cases when the criteria of article 5 is not met, the conduct of PMC's is still attributable to States according to article 8 of the ILC-Draft. PMC-employees are auxiliaries and their acting is attributable to the State since they act on the instructions of the State.<sup>331</sup> For conduct to amount to attribution to the State, a real link needs to exist between the actor and the State. In the case of the PMI, such a connection is usually a contract. Not all contracts connects the conduct of PMC's with States. It is in all situations, were contracts serves as proofs of connections, necessary that the contract expresses a fair amount of details around the conduct that the PMC is hired for. If a contract explains the terms of the contract, such as the type of work that the PMC is supposed to carry out, what actions that might be in line with the operation and the purpose and limitations of the contract, then the requisite of linkage in article 8 should be fulfilled.

The judicial decisions illustrates that the conduct of auxiliary forces or paramilitary groups have been attributed to States in a number of cases. These cases illustrates support for the opinion that the conduct of PMC's that act on the instructions of the State, or are directed or controlled by the State, is in fact attributable to the State that has contracted them and results in State responsibility for that State.

Two cases deals with the first rationale, that private actors have received instructions from the State in one way or another. In the *Zafiro* case the violator was under the command of a US-naval officer and the naval officers had not adopted effective preventative measures. Therefore, the agents acted on the instigation of the State, and for that the State was held liable for the violation of the civilian crew of the naval ship. In the second case, the *Stephens* case, dealing with the killing of Mr. Stephens, the acts of private guards were attributed to the State of Mexico, due to the fact that the guards responsible for the shooting of Mr. Stephens, acted for Mexico, as the State's extended arm.

The second rationale concerns situations where the State exercises direction or control of the actor. This part of article 8 was met by a high threshold in the *Nicaragua* Case. In this ruling a necessity was that the State had effective control over the specific operation in which the alleged violations had occurred. It was apparently not enough with a general control of the private military group. In order for a State to be responsible for the conduct of a PMC, the State

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<sup>330</sup> Geneva Expert Meeting, pp. 19-20.

<sup>331</sup> Geneva Expert meeting, p. 20.

needs to specifically direct and enforce the perpetration of the violations according to the Nicaragua case. A necessity is to prove that States have effective control in terms of specifically directions and enforcement of the perpetration of PMC's violations, in order for their conduct to be attributable to the State under the demand of control in article 8. In the *Tadić* case on the other hand, the Yugoslav War Crimes Tribunal did not approve of the high requirement of control that was set out in *Nicaragua*. The degree of control should instead be determined on a case by case basis in which the terms instructions, direction and control are independent of each other. According to this ruling the State is in a position of being able to exercise some level of operational control over the group.<sup>332</sup>

In the *Yeager* Case, the conduct of the Revolutionary Guards was attributed to Iran, even before they were officially recognized. They acted as de facto agents of the State, resulting in that their conduct became attributable to Iran, since Iran were not able to show that they were not aware of the actions of the Guards. The Iranian government simply failed to prove that they could not control the Guards.<sup>333</sup> In the eyes of the Tribunal, States should control their actors which exercise elements of governmental authority better. They emphasize that when a State accepts that private actors carry out governmental activity, they no longer have the possibility of disassociate themselves from those actors when they violate the law.

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<sup>332</sup> Geneva Expert Meeting, p. 20.

<sup>333</sup> *Yeager* case, (1987), p. 103, para. 42.

# 6 Critique and Solutions

This chapter demonstrate some of the critique that could be given to the PMI today, and which kinds of future engagements that could be appropriate in order to make the best of the warfare industry.

## 6.1 Critique of Today

The trend of privatization is evident in the world today. Institutions that originally were governmental have turned private. It is therefore not strange that so has happened with societies military structures as well. Private wealth and military capability has been connected before, perhaps that is what is happening now. The actions that PMC's can carry out is a great supplement to State missions in a time when States seems unable to supply for all military services themselves.

It is of importance to encounter the structure of the PMI when one considers the critique of this area and what future solutions that are needed. Modern PMC's are commercial enterprises with a business agenda foremost. Their hierarchically organized and registered business is integrated vertically into the global marketplace. Many are linked with greater financial holdings and conglomerates. This opens up new possibilities such as connections for PMF's and greater financial capital to work with, in their complex corporate financing.

Most critique on this area can be bend so that is illustrates both positive and negative issues of the PMI, but the first is only of negative character. The regulation around PMC's is not sufficient. Contractors could for example potentially be mistaken for combatants because of the activities they are engaged in, their similar appearance to members of the military, and their ability to carry weapons in certain situations. The confusion over their status and their responsibility to carry out certain obligations of a contract in an armed conflict may result in that they are mistaken as combatants when they in fact are civilians. Their status can prohibit them from adequately protecting themselves. The critique is that this area is in fact so modestly regulated that PMC-employees are at a risk of being hurt on purpose.

Another critique is the fact that PMC's has spread and become available on the open market for anyone. The growth has resulted in better prices and more efficient actors within the security sector. States, entities, groups and individuals that did not have the possibility of receiving professional security before, nowadays can purchase such, if they are willing and have the possibility to pay for it. This is illustrated by economically rich but population poor States in the Persian Gulf, which are able to retain levels of power, large military capacity and expertise due to the growth of the PMI.

Some States have become less dependent on supporter States.<sup>334</sup> This is not only positive. A profit-driven system made up by the financial gain of PMC's can result in that the wealthy are favoured. The best protection will be serviced to those who afford it. It is also probable that the more money a PMC receive for an operation, the more questionable missions PMC's are willing to agree with. This could result in that cash poor States cannot sign contracts with PMC's in order to receive help with security issues, simply because they do not have the same financial possibilities. Another scenario is that cash-poor clients such as States or entities of Sierra Leone, Angola and Papua New Guinea pay for PMC's services by *faustian bargains*. The *faustian bargains* is a system in which a party in need of security do not have enough cash to pay for the PMC's services, instead they pay with their natural resources. They simply sell off mineral and oil rights directly or indirectly to the related companies. In Sierra Leone the government bought services from the PMC Sandline worth 10 million dollars. The contract was paid for with long-term diamond concessions worth 200 million dollars. These agreements create long-term losses which the government has no control over. A long-term natural resource is sold off to satisfy short-term exigencies. Such behavior creates generations of debt burdens for the country which sell off resources too cheaply.<sup>335</sup>

Not only States can easier purchase military support. One category of benefiter is international criminal organizations, like the Columbian and Mexican drug cartels. They use the company Spearhead Ltd., for assistance in counterintelligence, electronic warfare and sophisticated weaponry. Another benefiter is the terrorist network. For example Sakina Security Ltd., a British company, which offers military training and weapon instructions to young recruited men who join the radical groups involved in jihads, *holy wars*.<sup>336</sup> I can also see the situation where privatization is not only of beneficial character to terrorist groups. If terrorist groups easier can employ PMC's in their operations, so can probably non-terrorist groups do in the fight against terrorism.

When the military turns private, lost transparency, oversight and control is a fact. This is a serious critique of the industry of the contracting system. Names of contractors are kept confidential and it disconnects the public from oversight and regulation which normally exists when it comes to State functions. No matter how private the firms and their employees might be, they are carrying out official tasks. It is in the interest of the public good that those tasks are carried out by competent and sincere people, and that the State takes full responsibility for those acts if and when something goes wrong. By hiring PMC's, a nation can for example circumvent congressional limits on the size and scope of the nation's military

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<sup>334</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 171, 172, 175 and 177.

<sup>335</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 166-167.

<sup>336</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 181.

involvement. By privatizing parts of States missions abroad, States lower their political price of war immensely. Casualties of PMC's are not enlisted on public rolls and never receive the attention given to ordinary soldiers.

In the official military, supervision by the military's own agencies and by competitive branches of government is part of the deal. There are domestic laws regulating military operations and personnel's activities. In such a system, public opinion, parliamentary scrutiny and international law are also important supervision mechanisms. Both legislative and judiciary measures of control are present as an obvious part of a successful democracy.<sup>337</sup> One can argue that liability under IHL also should apply to employees of PMC's involved in armed conflict. This is however most often only a theoretical proposition. Because a weak government that is dependent on a PMC for its security may be in an unfortunate position to hold it accountable. The accountability of PMC's may therefore depend on the agent hiring them.<sup>338</sup> It is also imperative to remember that when governmental structures become private, the congress loses its responsibility over private agencies.<sup>339</sup> PMC's take advantage of that the industry do not have a proper system of transparency and control, and seems to include that fact into their strategic plan. An example, which illustrates this, is the EO, which in 1999 closed down its agency and opened up under another name in another State, probably due to strict controls of PMC's in one State.<sup>340</sup> The virtual nature of PMC's makes it difficult to find the firm and the individuals responsible for a certain conduct. As companies can dissolve fast and be recreated in another place.

Some PMC's try to argue that their self-regulations supply for a secure environment in their operations and that such regulation indicates a sufficient level of control. The private companies, even if they have certain standards that they claim to live up to, their system do not include any parameter of oversight or supervisory mechanism. This indicates that even if they claim to live up to certain standards, they are under no one's scrutiny than their own. And in my point of view, they are simply too subjective to determine their legality in their own operations.

In some States there is personnel employed to overlook contracts between States and private firms. The problem is that these often are not adequately trained. Another connected problem is the fact that officials in agencies that monitor the industry ends up working for the companies they controlled in their public capacity. PMC-executives also have intimate relations with

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<sup>337</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 214 and 220.

<sup>338</sup> Foreign and Commonwealth Office, House of Commons, *Private Military Companies: Options for Regulation*, The Stationery Office, London, (HC 577,2001-02), (12 February 2002), p. 14, available at: URL ([http://www.sierra-leone.org/PMC\\_GP.pdf](http://www.sierra-leone.org/PMC_GP.pdf)), last visited on 20 December, at 16.42.

<sup>339</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 214 and 220.

<sup>340</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), pp. 75 and 181.

former colleagues which are still inside the military.<sup>341</sup> This might not be only of beneficial character in my opinion.

One dilemma of profit-driven PMC's is the fact that their incentives might not always be in line with the public good. This could result in that they do not always perform to their fullest. The States hiring PMC's may not be able to be present at all times. Nevertheless, States have to rely on the contracted firms good faith and execution of the contract. Sometimes PMC's might have incentives to prolong contracts and in such a case the conflict they operate within might mean that the end of a conflict is delayed. In other situations it might be a too high risk that the PMC do not want to take and therefore the company does not carry out that part of the contract. Such complaints on PMC's are often raised in certain operations of mine clearance. The PMC contracted sometimes only clear main roads and skip the risky rural footpaths since they believe that, it would be a too large risk to take.<sup>342</sup> Another example in which a PMC perhaps did not prioritize the public good and perhaps they should have, when viewed afterwards was in Sierra Leone when EO had secured Freetown from rebels. EO did not follow the rebels into the jungle in order to be sure that they could not fight their way back into the society. Instead they went to recapture the Kono-district in order to open up the diamond industry. This time the commercial interest seems to have influenced the military decision negatively.<sup>343</sup>

The selection of employees in the PMI may be criticized. Perhaps some individuals are not appropriate for war-situations. For example EO recruited former members of the 32<sup>nd</sup> Battalion, the Reconnaissance Commandos and the paramilitary Koevoet force into their company. These are all forces which were used by the apartheid regime to destabilize neighboring countries and to prevent opposition internally. They used rather ruff techniques in their operations and it has been proved afterwards that their success in military strategies resulted in a wide range of human rights violations. Perhaps individuals which has been part of such a discriminating system should not be able to join a PMC. Such argumentation could lead to that a large number of persons which did not violate human rights in past military engagement would be excluded of future engagement in PMC's to. My last critique is the fact that the fast growth of the PMI is probably partially responsible for the large amounts of military weapons that can be found on the international market. Weapons, that practically anyone can get their hands on.<sup>344</sup>

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<sup>341</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 154.

<sup>342</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 157 and United Nations, *Report of the Panel of United Nations Peace Operations*, (A/55/305, S/2000/809), (21 August 2000).

<sup>343</sup> P. W., Singer, *Corporate Warriors The Rise of the Privatized Military Industry*, (2003), p. 158.

<sup>344</sup> S. Makki, *et al*, 'Private Military Companies and the Proliferation of Small Arms: Regulating the Actors', (2001), pp. 5-10.

## 6.2 Future Engagement

A good system of the three parameters legislative, judicative and executive jurisdiction within the military contracting industry would be a real challenge to achieve, even in the best of circumstances. But it is necessary to build a legal system where all difficulties are taken into consideration.

The PMI is huge and needs its own legislation. The regulations today are not sufficient. In my opinion one should not have to squeeze PMC's into a definition, in order for it to be regulated. This is actually such a large industry so that it would be valuable to work out a set of rules that are applicable, not to mercenaries, not to State organs or militias or volunteer corps, but to PMC's and their conduct. Such a legal system would preferably include transparency and oversight, with reporting and overlooking requirements on the commerce, the State, the defense departments and their local equivalents in order to cover all nuances. For this to have a possibility to succeed, governments, the academy, PMC's and Non-Governmental Organizations needs to cooperate.

The regulations I have chosen to investigate in this essay, focus on the direct combat carried out by the PMC. This is a problem as I see it. I find it rather obvious that every PMC should fall under the same basic regulation, no matter what activities they perform during operations. There should exist a number of rules that all PMC's and the agents who hires them need to follow. One of the difficulties today is that even PMC's legal status is difficult to decide upon. A uniform statute would also pose a number of dilemmas. PMC's are not built up the same, do not have the same agenda and do not conduct the same category of operations. This pose a problem if one were to construct a regulation that would fit them all. A possible scenario is that a regulation therefore could be applicable to one PMC, but not to another. A universal legislation can be criticized further. The industry is in fact categorized as part of the private sphere, but indeed it has lots of connections with the public sphere of the State. The privatization of institutions originally governmental also means that the governmental control is if not totally taken away, at least diminished. A future regulation would have to find the lowest common denominator in order to establish a basic international platform to start from. I strongly believe that it is of importance that steps are taken on all levels of decision-making, both on international, national and on the level of self- regulation.

The terms of contracts also needs to be developed, become more specific, include outside standards of achievement as well as measures of effectiveness.

Another, perhaps more realistic measure than the uniform regulation, is what the Red Cross has proposed, namely the formation of an international database over approved PMC's. Such a database could be organized by the U.N. which sanctions businesses violating international law. PMC's that violate human rights are removed from the list. The PMC is punished



economically, due to their inability to control their operation and employees, while the individual violating the law receives a personal punishment.

In an effort to extend U.S. federal criminal jurisdiction on PMC's, the U.S. Congress passed the Military Extraterritorial Jurisdiction Act, MEJA,<sup>345</sup> which was signed into law in November of 2000. The MEJA created a new federal crime for acts committed outside the United States that would have been a felony under federal law if they had been committed in the United States. The problem is that MEJA only applies to individuals employed by, or accompanying the armed forces of the United States. And that MEJA only applied to contractors contracted by the DoD. MEJA was amended later to extend U.S. jurisdiction to contractors of other federal agencies, which in their employment were related to, "supporting the mission of the Department of Defense". One should keep in mind that private contractors can participate in activities that may not be construed as, "supporting the mission of the DoD".<sup>346</sup> Therefore it seems that even with the amendment, MEJA does not cover all PMC.

It is unclear, whether MEJA could be used to prosecute the Blackwater USA's employees that allegedly killed 11 Iraqi civilians in September this year, since they were contracted to provide security for State Department missions and not for DoD. It is my aspiration and expectation that Blackwater USA's conduct will be investigated in law and facts and held liable to criminal prosecution if found guilty of the conduct. Because even if PMC's cause harm in some situations it is not my ambition that they become illegal subjects. PMC's are not only negative but a rather positive phenomena with elements of cost-saving, efficiency and professionalism. If we only could clarify their status and to whom their conduct is attributed so that the lives of individuals not engaged in war could be saved at the same time as PMC-employees would not be exposed to more danger than necessary.

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<sup>345</sup> *Military Extraterritorial Jurisdiction Act of 2000*, Public Law 106-523, signed on 22 November 2000, available at: URL (<http://www.pubklaw.com/hi/pl106-523.pdf>), last checked on 16 January 2008, at 12.05.

<sup>346</sup> J. L., Howard, 'Article Defining support: protection of contractors accompanying the forces and protection from contractors accompanying the forces', Vol., *Public Procurement Law Review*, (2008), pp. 36-54, at pp. 45-50.

# 7 Conclusion

Tasks once considered inherently governmental are being contracted out to private contractors across the world. The outsourcing of governmental institutions has among other things resulted in that PMC's has become increasingly present on the battlefield and play an increasing importance in military operations. At the same time, PMC's are not being adequately protected during their operations in hostile environments. Also, third parties are not being sufficiently protected from the criminal acts of PMC's, because contractors are not at all times held responsible for their conducts.

In this chapter I will present the generalized conclusions that can be drawn from my thesis.

## 7.1 Conclusion of the Thesis

From my examinations of the legal status of PMC-employees I can conclude that different companies and their employees carry out a wide range of work. Some work with support services, while others carry out tasks of obvious intrinsic State functions. Despite the fact that a lot of the tasks are clearly governmental, the PMC-employees are not combatants in a legal sense. PMC's do not fulfill the requirements of article 43 in the AP I and are therefore not members of the armed forces. They are not members of the militias or volunteer corps of article 4A(1) of the GC III either, since that would require that they are able to form part of the armed forces, as is asked for in the article.

Even if I personally find it arguable that some PMC-employees could in fact in some certain circumstances fulfill the demands on "Members of other militias and members of other volunteer corps" in article 4A(2) of the GC III, by fulfilling the four requirements, experts are of the view that it is not possible for most PMC's.

PMC's are not mercenaries in the meaning of article 47 AP I either. Six cumulative requisites have to be fulfilled in order for PMC's to be categorized as mercenaries. The categorization of mercenaries is difficult to get trapped by. There are some scholars that argue that the corporate structure of the firms stands as a bar from being included in the category of mercenaries. I found that a lot of other factors also acted as bars in this article.

PMC's and their employees are civilians and in some cases civilians accompanying the armed forces, in the meaning of article 4A(4) GC III. PMC's categorized as civilians must refrain from taking direct or active part in hostilities. If they do take direct part in hostilities anyway, they become legal targets and may be attacked and punished for their criminal conduct.

Since PMC's are not combatants nor have the status of any other State organ, my legal investigation of whether PMC-employees activities in case of violation can be attributed to the State, illustrates that their conduct cannot be attributed to States under article 4 of the ILC Draft. However, if certain circumstances are fulfilled, their conduct can be attributed to States under articles 5 and 8 of the ILC Draft. In cases where the State have privatized military functions and at the same time through internal law given a State organ the right to delegate governmental authority to PMC's, article 5 is fulfilled. However, this article is probably not applicable to PMC's conduct very often, since States normally do not legislate this in internal law.

Their conduct can also be attributed to States under article 8 of the ILC-Draft. Under this article PMC's are auxiliaries acting on the instructions of the State. The five legal decisions I presented in chapter 5.4, illustrates support for the opinion that PMC's can be viewed as acting on the instructions of the State, or under the direction or control of the State, resulting in State responsibility for PMC's violations of their obligations.

My hypothesis and assumption was that I would find enough correlation between the PMC's and the State, so that the State was liable for actions undertaken by the PMC's that they hire. That premise was somewhat true. In certain situations where the PMC's and their employees are categorized as civilians or civilians accompanying the armed forces of a State, the State can be responsible for their procedures. The answer to the question of whether the State can hire a PMC without taking responsibility for the hired corporations conduct, is that it seems rather easy for a State to evade from attribution since it is the State that decides the status of PMC's. The easiest path to prove that a State is liable for a PMC's conduct is probably to indicate that the State has instructed, directed or controlled a PMC, which has the status of a civilian. In most other circumstances, with a different status and with no article 4, 5 or 8 correlation available, State responsibility for PMC's conduct would not be probable. And even in the best of circumstances this correlation between the State and a PMC would be difficult to prove.

This illustrates that the legal structure of the PMI, in terms of State attribution is so far not sufficient. In the future we will have to consider that PMC's have, because of the privatization and outsourcing, received a more central role in the decision of when and how to use of force. We find them more often active on the battlefield today, than we have ever done before. Their possibilities of reaching equipment and services necessary for military operations have increased. They even have the possibility of choosing which agents they want to be employed by. It seems to me that PMC's are subject to the laws of the market more than to the legal structure of IHL. Even when they perform military tasks they are private companies which fall outside the military chain of command and indeed outside the justice-systems it seems. Legal argumentation within the PMI does not correspond to how

States perform in practice. There is too much politics involved, for legal arguments to take the main position.

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