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Private Military Contractors in
Iraq -
Legal Status
and
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Summary

In March 2003, the United States' armed forces and their allies invaded Iraq. Today, more than three years later, those armed forces are still there. An extended military operation like this requires a massive amount of soldiers. To be able to provide adequate security and fulfill all the jobs required to maintain the armed forces in Iraq, the United States' government and its' subdivisions, have hired private military firms (PMFs) to assist the overstretched US' military. PMFs are private business entities that provide governments with all the core functions of what is traditionally considered military work. Even though, in many situations, the work of the PMFs is indistinguishable from the work of the armed forces, at the end of the day the PMFs are private business entities and thus fall outside the military chain of command and oversight. Private military contractors providing military functions in occupied territory, without actually being members of the armed forces, seem to blur the distinction between combatants and civilians. For a State to obtain a clear distinction between those two categories, is essential for the well being- and security of society and humanity.

As the privatized military industry stands today, it is completely unregulated. No restrictions seem to exist concerning who can work for the firms or for whom the firms can work. Since the contracts between the USA and the PMFs are protected by proprietary law, those contracts are not open to public scrutiny. Private military contractors are immune from prosecution in Iraq. Donald Rumsfeld has stated that the regulation, oversight and punishment of contractors is solely up to the firms themselves. So far, no contractors have been punished for crimes committed in Iraq. Considering that the occupation has went on for more than three years and over thirty thousand contractors are providing military work in Iraq, the fact that no contractors have been punished for crimes is rather astounding. According to IHL, private military contractors (PMCs) do not meet the criteria for obtaining the legal status of combatants. Hence, they are not allowed to participate in combat. Since PMCs are not combatants, they are civilians.

The 1949 Geneva Conventions permits the use of civilian contractors in a civil police role in occupied territory. Such civilian contractors may be authorized to use force when absolutely necessary, to defend persons or property, or in self defence. Given the fluid nature of the current situation in Iraq, it may sometimes be difficult to discern whether private contractors are performing law enforcement duties or are engaged in actual combat. If their activities amount to combat, they become lawful targets of attack during the time they take part in hostilities and could become prosecuted for their hostile acts.

The private military industry has emerged explosively in the last decade. This new accessibility to contract military functions to private lawful

entities has changed the providing of international security and the way of waging war, forever.

Using private actors in the military, carrying out mission critical roles, can be very harmful if it is not clearly regulated. Who will be responsible for the acts of these private entities? Can a State (in this case the United States of America) use private actors in a war or occupied territory, doing the exact same job as the military, and not be held responsible for those acts? In my opinion, the answer to that question is no. To be able to attribute the conduct of the PMCs to the USA, first one has to determine the legal status of the contractors, and then go on to the question of attribution. My study shows that the USA (or any other State that recruits PMFs) are internationally responsible for the conduct of those contractors. To let private actors act in war or occupied territory, uncontrolled and without the ability to attribute their acts to the State, would be very harmful to the international society.

Preface

I would like to thank my supervisor, Ulf Linderfalk, for his skillfull help and advice throughout the long journey of writing this essay.

I would also like to thank my parents, Lena Möller and Jan Brzoza. Without the two of you, nothing ever would have been possible. You are forever in my heart.

Abbreviations

AC	Appeals Chamber
API	The 1977 Additional Protocol I to the Geneva Conventions
CPA	Coalition Provisional Authority
DOD	Department of Defense
GA	General Assembly
GCs	The 1949 Geneva Conventions I-IV
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
PMC	Private Military Contractor
PMF	Private Military Firm
POW	Prisoner of War
UCLA	Unilaterally Controlled Latino Assets
UN	United Nations
UNRIAA	United Nations Reports of International Arbitral Awards

1 Introduction

1.1 Subject and purpose

The purpose of the essay is to answer the following two questions:

What is the legal status under international humanitarian law (IHL) of the private military contractors assisting the United States' armed forces in Iraq? Is the conduct of those contractors attributable to the United States under international law?

The field of study in my essay is twofold, international humanitarian law and international contemporary law. IHL is applicable to the current situation in Iraq since Operation Iraqi Freedom started out as an armed conflict in the meaning of common article 2 of the 1949 Geneva Conventions I-IV (GCs) and the United States is the occupying power.¹ The answer to the question of attributability is dependent on the legal status of the PMCs. Therefore it is necessary to include a study of IHL in the essay.

The conduct of the armed forces of a State is attributable to that State under international law. Military work and the waging of war are traditionally considered to be public matters, *only* public matters, not private matters. With the explosive evolution of the private military industry, the ways of waging war have changed. New possibilities have opened up to States. Now States can buy military services from private legitimate corporate firms. In Iraq, the PMFs are carrying out all the same tasks as the United States' armed forces, but without being legally incorporated into those armed bands. Despite the fact that PMFs are providing governments with functions that are traditionally considered official functions, at the end of the day, the firms are still *private* entities.

The basic assumption in the law of State attribution is that the conduct of private persons or entities is not attributable to the State. However, if a real link can be established between the private actor and the State, that State might be responsible for those acts. Cases like that occur when a person or group of persons are acting on the instructions of, or under the direction or control of a State in carrying out the conduct. Also, when a private actor is exercising elements of governmental authority (is carrying out intrinsic State functions), because of an internal law that provides the actor with that authority, those acts become attributable to the State under international law. Both of the situations mentioned above are inherently very complex, and will be dealt with thoroughly in chapters 4 and 6.

¹ See common article 2 to the 1949 Geneva Conventions, I-IV.

1.2 Method and Materials

My intention with the essay is to determine the legal status of the PMFs and then go on to exploring the State responsibility for the State that hires the firms, in this case the USA. That has led me to use a part descriptive, part analytical method. I start off by providing the reader with an introduction of the privatized military industry. Some basic knowledge of the industry is required for the essay to make sense. The material on the facts on the private military industry that I have used is collected mainly from articles and legal doctrine. Singer's book "Corporate Warriors" and his articles have been of much use to me in trying to understand the structure and work of the PMFs.

For the purpose of the investigation of State attribution, I have used the ILC Draft on State Responsibility as a point of departure. Reference will also be made to judicial decisions and legal doctrine on the subject of State attribution.

1.3 Organisation and delimitations

Chapter 2 contains a basic introduction of the privatized military industry. My aim with the chapter is to provide the reader with the fundamental knowledge required for the purpose of the essay.

Moving on to chapter 3 - here I define the legal status of the private military contractors. Regarding terminology, both the firms and the individual contractors are covered by the the term "private military contractors" (PMCs). The terms "private military contractors" and "private military firms" are used interchangeably. In my opinion, the conduct of the PMCs *is* attributable to the USA. However, the ways of attributing that conduct to the State will vary depending on the legal status of the PMCs. Because of that it is necessary to include the study of IHL and the legal status of the PMCs *before* determining on the question of attribution, that will be dealt with in chapter 4. The status of the PMCs can be regarded as a preliminary question to that of attribution

Chapter 4 is constructed in the same way as the rest of the chapters; it starts with a presentation of the subject of the chapter (in this specific chapter, attribution) before applying those facts on the subject of the essay. This chapter is at the core of the essay, exploring attribution of conduct of private actors to the State. Attribution to the USA because of the conduct of the PMCs is governed by articles 4, 5 and 8 of the ILC Draft on State Responsibility. Hence, chapter 4 starts with a presentation of those articles, and the applicability of the articles on the phenomenon of PMCs. At the end of the chapter I give short concluding remarks, that will be further elaborated on in chapter 6.

Chapter 5 is intended to function as a “support chapter” to the conclusions that I have reached in chapter 4, that the conduct of the PMCs is attributable to the USA, that is. The chapter presents instances where the conduct of private actors has been attributable to the State under international law.

In chapter 6, I summarize the conclusions that I have reached. Also, I present to the reader, some problems that are very commonly related to the use of PMCs. In my opinion, a presentation of those problems might give a more thorough understanding of the controversiality of the use of PMCs. The focus in my essay on the PMFs in Iraq. The reason for that is simply because the use of PMFs has reached its’ peak with the war on Iraq. Never before has the reliance on private contractors been as extensive. The story of the war on Iraq can simply not be told without the mentioning of the PMFs.

My study is limited to IHL and international contemporary law only. I will not investigate domestic legislation or domestic judicial decisions. I concentrate on *lex lata* and will not make any specualtions or propositions on *lex ferenda*.

2 The private military industry – an introduction

To be able to understand the complexity and the problems that come with the use of PMFs, first one has to attain some basic knowledge about the industry and how it works. The debate on PMFs has reached its' peak with the war on Iraq. Iraq is the largest commitment ever for the private military industry.² More than 60 firms employ approximately thirty thousand contractors in Iraq.³ That makes the private contractors the second largest contingent in country, right after the US' armed forces itself.

Outsourcing military functions is controversial. The military is associated with war. War is associated with violence, weapons, death and destruction. For centuries, the international community has tried to prevent war, working for peaceful settlements of disputes. The waging of war must be controlled to the largest extend possible. That is probably why public security and the military is one of the cornerstones of what is considered State functions. Soldiers seemingly fight for a good cause, they fight for their nation, their home and familiy. However, the incentives of private military firms are different. A private military firm is a corporation and the incentive of a corporation is to make money, to gain profit. In the eyes of the public that is not quite as honorable as fighting for your nation the way a "real" soldier does. A bad stigma has become attached to the private military contractors, seemingly scourging of the misery of war, making business of tragedies.

My aim with this chapter (and essay) is to provide the reader with an as objective as possible account of how the industry works, how it has emerged and what services the firms provide to the governments that recruit them.

2.1 The Privatized Military Firm

A private military firms is a business organizaition that trade in professional services intricately linked to warfare. PMFs are corporate bodies that specialize in the provision of military skills, including combat operations, strategic planning, intelligence, risk assesement, operational support, training and technical support.⁴ By the very fact of their function, they brake down what have long been considered traditional responsibilities of government. That is, PMFs are private businesses that deliver to consumers

² See article by Singer, Peter, W., "*The Private Military Industry and Iraq: What have we learned and where to next?*", p. 4, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, November 2004.

³ Ibid.

⁴ Singer, Peter,W., *Corporate Warrirors – The Rise of the Privatized Military Industry*, p. 8, Cornell University Press, Ithaca and London, 2003.

a wide spectrum of military and security services, once generally assumed to be exclusively inside the public realm.

Hiring private persons to fight battles and armed conflicts is as old as history itself.⁵ These persons are traditionally known as mercenaries. Mercenaries are private persons that take part in hostilities for the profit of private economic gain. As opposed to mercenaries, PMFs are private, legal, lawful entities that can offer a wider range of services to consumers, and are generally hired by governments. With the rise of the private military industry, clients can now access services and capabilities that extend across the entire spectrum of what was once known as State monopolized activities, simply by paying a sum of money.

The private military industry emerged at the start of the 1990s, driven by three dynamics. These three dynamics are the end of the Cold War, transformation in the nature of warfare that blurred the distinctions between soldiers and civilians and a general trend towards privatization and outsourcing of governmental functions.⁶ When the Cold War between the USA and the Soviet Union ended, professional armies around the world downsized. At the same time, increasing global instability created a demand for more troops. Warfare in the developing world also became messier, more chaotic and less professional. Meanwhile, advanced militaries grew increasingly reliant on the off-the-shelf commercial technology, often maintained and operated by private firms.⁷

The PMFs that emerged out of these dynamics are not all alike, nor do they offer the same services. The private military industry is generally divided into three basic sectors. These three sectors are

Military Provider Firms (also known as Private Security Firms) that offer tactical military assistance, including actual combat services, to their clients.

Military Consulting Firms that employ retired officers to provide strategic planning and military training, and

Military Support Firms that provide logistics, intelligence and maintenance services to armed forces, allowing the latter's soldiers to concentrate on combat and reducing their government's need to recruit more troops or call up more reserves.⁸

All of the categories of firms are present in Iraq. The terms private military firms and private military contractors cover all of the firms mentioned above. I will now go on to presenting the tasks and duties of the PMFs.

⁵ See for example article by Coleman, James, R., "Constraining Modern Mercenarism", p. 1493, 55 *Hastings Law Journal*, June 2004

⁶ Singer, Peter, W., "Outsourcing War", p. 120, *Foreign Affairs*, Volume 84, Number 2, March/April 2005.

⁷ *Ibid.*

⁸ *Ibid.*, ps. 120-121.

2.2 Tasks and duties of Private Military Firms in Iraq

As already mentioned, Iraq is the largest US military commitment in more than a generation. It is also the largest commitment ever for the private military industry. Estimates on the number of private contractors in Iraq range from twenty- to thirty thousand. These figures do not include the thousands of nonmilitary personnel who support Operation Iraqi Freedom from outside the country.⁹

Mission critical roles are supposed to be kept within the military. However, the contractors in Iraq carry out a range of mission critical jobs. For instance, they maintain loaded weapons systems like the B-2 stealth bomber and the Apache helicopter and help operate combat systems and defence systems on board numerous US Navy ships. Other roles in Iraq include security sector reform- and training activities for local forces, a key task that would be essential to any ultimately successful withdraw for the coalition. They also provide most of the combat service support like feeding troops and maintaining billeting facilities.¹⁰ Training programs for the post-Saddam army, post-Saddam paramilitary force and post-Saddam national police, all involved private military firms to some extent. Private military contractors have interrogated prisoners of war and other detainees, as well as protecting employees and facilities of the US government, other governments and private companies. In May 2004, Secretary of Defense Rumsfeld asserted that private contractors in Iraq “provide only defensive services”.¹¹ However, many of the activities that the contractors perform, are indistinguishable from military operations. Hence, it is safe to say that the firms carry out all the same duties as the armed forces, without actually being members thereof .

The firms also provide a range of tactical military roles on the ground, supplementing the currently overstretched coalition forces. An estimated 6000 of the private contractors carry out armed roles.¹² Those roles are usually described as “security”, but since they are carrying out military jobs in occupied territory facing military threats and carrying weapons, these contractors are a far cry from “regular” security guards strolling the malls in the United States.

⁹ Schmitt, Michael, N., “*Humanitarian Law and Direct Participation in Hostilities by Private Contractors and Civilian Employees*”, p. 511, Chicago Journal of International Law, Winter 2005.

¹⁰ Ibid.

¹¹ See Letter from Donald H. Rumsfeld, Secretary of Defense, to The Honorable Ike Skelton, May 4, 2004, available online at http://www.house.gov/skelton/5-4-04_Rumsfeld_letter_on_contractors.pdf, last visited at 060501.

¹² Singer, “*The Private Military Industry and Iraq...*”, p. 6.

Thus, the firms and their employees have been essential to the overall effort in Iraq. They have filled a gap in troop strength and a variety of roles that US' forces would prefer not to carry out.

Even though the focus in this essay is on the private military firms in Iraq, I consider it important to stress that the industry and its clientele are not just an American phenomenon. The private military industry is a global industry. For example, many of the new Eastern members of the EU received PMF training as they transitioned from Warsaw Pact to NATO techniques. According to Singer, even Sweden has contracted with PMFs, hiring MPRI to teach some of the lessons of the Gulf War to the senior military leaders in the country.¹³ Also, peacekeepers in Afghanistan, are said to be reliant on contracted air transport from a Ukrainian firm that flies former Soviet jets.

To create a sense of how significant the PMFs have become to the United States military in Iraq, it is worth mentioning the amount that just one firm will make from the war. The American based firm Halliburton's contract with the US government will ultimately be worth around 13 billion dollars. That is 2,5 times what it cost the US government to fight the 1991 Persian Gulf War.

The private military industry has evolved explosively and unfortunately, the legal side has not been able to keep pace with the evolution of the industry. As international law stands today, there are no existing legal regimes that regulate the industry. It is unclear which authorities are to investigate, prosecute and punish crimes committed by PMFs and their employees. The military has established legal structures, but the status of contractors in a warzone is murky. The problem with the legal grey area that seem to surround the industry, and the lack of clarity regarding the legal status of the contractors under IHL, leads us right into the next chapter, namely that of defining the legal status of the PMCs.

¹³ Singer, "*The Private Military Industry and Iraq...*", p. 3.

3 Legal Status under International Humanitarian Law

When trying to limit the effects and suffering of armed conflict, IHL shares many of the principles of human rights law. However, IHL differs from human rights law in the requirement to interface with “military necessity”. At the heart of military necessity is the goal of the submission of the enemy at the earliest stage possible, with the least possible expenditure of personnel and resources. That justifies the use of force, not prohibited by international law.¹⁴ In balancing between the the protection of human rights and IHL, the requirement to distinguish between those who can participate in armed conflict, combatants, and those who are to be protected, civilians, is fundamental. If the line between combatants and civilians is not sharp, the ability of IHL to regulate the conduct of hostilities can be adversely impacted. This could be a major threat to the security of civilians and society as a whole. The ability of the armed forces of a State to plan and conduct their operations and to defend the State, as well as the capacity of the State or the international community to hold the armed forces accountable for failure, is significantly dependent upon the clarity and relevance of the distinction principle. Therefore, it is of utmost interest and importance to define the status of PMCs under IHL. Also, as I have already mentioned several times, the way of attributing the conduct of the contractors to the USA will vary depending on their legal status. So, in this chapter, I will elaborate upon the definitions of who is a combatant and who is a civilian and apply those definitions on the private military contractors. I also include a discussion on the relationship between private military contractors and mercenarism.

3.1 Private Military Contractors as Combatants

For a private military contractor to hold the status of combatant under IHL, the contractor has to be a member of the armed forces of the USA.¹⁵ 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.¹⁶ Only combatants (including paramilitary groups that

¹⁴ See article by Watkin, Colonel K.W., “*Combatants, Unprivileged Belligerents and Conflicts in the 21st Century*”, Harvard Program on Humanitarian Policy and Conflict Reserarch, p. 2.

¹⁵Article 43.2, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Vicitims of International Armed Conflicts (Protocol I), 8 June 1977, hereinafter referred to as the 1977 AP I.

¹⁶ 1977 AP I, art. 43.1.

come under military command) have the right to directly participate in hostilities.¹⁷ Combatants also enjoy the unique status of being prisoners of war if captured.¹⁸ Combatants have to meet certain specified criteria like carrying their arms openly, distinguish themselves from civilians and obey the laws of war.¹⁹ The definition of “armed forces” requires a measure of organisation, a responsible command, and an internal disciplinary system designed notably to ensure compliance with the laws of armed conflict.²⁰

Private military contractors would not fall within the definition of combatants, for a number of reasons. First of all, private military contractors are not members of the armed forces of the USA. PMCs are private individuals, employed on a contractual basis, to work for the private military firms that have signed contracts with the official organs of the USA. Neither are contractors “under a command responsible” to the USA for the conduct of its subordinates in the meaning of article 43.1 AP I. For this criteria to be met (“being under a command responsible”), the USA would have to formally incorporate the PMCs into its’ armed forces by adopting domestic legislation that places the PMCs under the command of the State’s armed forces.²¹ According to article 43.3 AP I, when a State incorporates paramilitary or law enforcement agencies into its armed forces, that State is required to notify the other parties to the conflict that it has done so. This notification requirement implies an obligation on the State to formally incorporate such groups into its armed forces. Hence, it would not seem logical that by merely hiring a PMF, that PMF would meet the criteria of being part of the State’s armed forces.²²

Even though many private contractors perform functions indistinguishable from those performed by military units, the contractors coexist *alongside* and not *within* the armed forces, and are thereby distinguishable on that fact alone.²³ The private contractors also lack the required internal disciplinary system designed to ensure compliance with IHL.²⁴ PMFs are business entities and governed by economics, not by the laws of war. Private military contractors have a contractual relationship with the government that hires them. If a State wished to formally draw individual contractors into their armed forces, they could easily already have done so. Hence, the private contractors do not hold the status of combatants in the meaning of the 1977 AP I article 43.

¹⁷ AP I, art. 43.2.

¹⁸ Ibid, art. 44.1.

¹⁹ Ibid, art. 44.3 and GC III, art. 4A(2).

²⁰ Kalshoven and Zegveld, Constraints on the waging of war – an introduction to International Humanitarian Law, p. 87, International Committee of the Red Cross, Geneva, March 2001, 3rd edition.

²¹ See report from expert meeting on private military contractors: “Status and State Responsibility for their actions”, convened at International Conference Centre, Geneva 29-30 August 2005, p. 14, available online at http://www.ucihr.org/communication/Private_Military_Companies_report.pdf, last checked at May 19, 2006.

²² Ibid

²³ Schmitt, p. 525.

²⁴ AP I, art. 43.1

Neither does article 4A(1) GC III “militias or volunteer corps forming part of such armed forces” offer an alternative route for the PMC to membership in the armed forces. For article 4A(1) to be applicable, the contractors would (obviously) again have to form part of the armed forces. It is most unlikely that private contractors that have signed contracts with the American government would ever qualify for combatant status under article 4A(1). To do so they would have to individually enlist to the military or be formally incorporated as a group.²⁵ Additionally, the requirements inferred from article 4A(2) would act as a further bar to characterization as members of the armed forces, and thereby combatants.²⁶

3.2 Private Military Contractors as Civilians

Since the PMCs do not hold the status of combatants, they must be civilians under IHL. The legal definition of a civilian is “a person who does not belong to one of the categories of persons referred to in Article 4(A)(1)(2)(3) and (6) of the Third Convention and in Article 43 of this Protocol.”²⁷ In other words, a civilian is any person who does not belong to the category of combatants.²⁸ As opposed to combatants, civilians enjoy immunity from attack, and are entitled to protection except for during such time as they directly participate in hostilities.²⁹ Civilians participating in hostilities do not enjoy POW status and may be tried and punished for their unlawful activities.³⁰ So if and when contractors participate in combat, without the former notification of incorporation to the armed forces, they are participating as civilians. Civilians participating in combat are labelled “unlawful combatants”.³¹

²⁵ Schmitt, p. 526.

²⁶ The requirements referred to in article 4A(2) GC III are a) being commanded by a person responsible for his subordinates b) having a fixed distinctive sign recognizable at a distance c) carrying arms openly d) conducting their operations in accordance with the laws and customs of war

²⁷ AP I, art. 50.1. The “third convention” referred to is GC III

²⁸ Kalshoven and Zegveld, “Constraints on the waging of war – an introduction to International Humanitarian Law” p. 98, International Committee of the Red Cross, Geneva, March 2001, 3rd edition.

²⁹ 1977 AP I, art. 51.3.

³⁰ Kalshoven and Zegveld, p. 99.

³¹ See for instance Singer, “*Privatized Military Firms and International Law*”, p. 533, Schmitt, p. 519 or Watkin, Colonel K.W., “*Combatants, Unprivileged Belligerents and Conflicts in the 21st Century*”, Harvard Program on Humanitarian Policy and Conflict Research, p. 5, available online at <http://www.ihlreserach.org/ihl/pdfs/Session2.pdf>, or Dworkin, Anthony, “*Security Contractors in Iraq: Armed Guards of Private Soldiers*”, Crimes of War Project, April 2004, available online at <http://www.crimesofwar.org/onnews/news-security.html>, last checked at 060504.

3.2.1 Civilians accompanying the armed forces

However, another category of civilians exist, that has to be explored for the purpose of this essay. That category of civilians can be found in article 4A(4) of GC III. According to that article, persons accompanying the armed forces without actually being members thereof (such as civilian members of aircraft crews, war correspondents and supply contractors), have the right to enjoy POW status if captured by enemies.

The rationale behind article 4A(4) GC III is that the law prior to the 1949 Geneva Conventions had already recognized that there are persons who accompany the armed forces without being members thereof, and who require legal protection if they are captured.³² Such persons, including “contractors” and “sutlers”, were granted POW status in the earlier 1929 Geneva Conventions and the Hague Regulations of 1899 and 1907.³³ Article 4A(4) GC III reads as follows

Persons who accompany the armed forces without actually being members thereof, such as civilian members of 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. (are entited to POW-status, see article 4A, GC III, author’s remark).

Hence, for contractors to be “persons accompanying the armed forces without being members thereof” they have to be provided with the required identity card and some kind of nexus has to exist between the contractors and the armed forces.³⁴ Contractors under this legal definition must refrain from direct participation in hostilities, as such contractors are also clearly civilians. In order for members of a PMF to fall within article 4A(4), one must be able to describe them as “persons who accompany the armed forces”. Whether or not this means that members of the armed forces must be physically present where the PMF is operating, is not clear. However, they must at least be providing some sort of service to the armed forces as opposed to merely performing a contract for the State. If all the requirements of article 4A(4) are met, PMCs can be seen as persons accompanying the armed forces, in the meaning of that article.

3.3 Private Military Contractors as Mercenaries

When studying the private military industry I quickly realized that it is almost impossible to read even one article about the industry without the

³² See Report for Expert Meeting on Private Military Contractors, p. 15.

³³ Ibid at p. 16.

³⁴ Ibid.

discussion of mercenaries popping up. In doctrine, the debate on the relationship between mercenarism and private military firms is a hot topic. Some scholars say that PMCs are nothing but modern de facto mercenaries, since they seem to participate in armed conflicts without being incorporated to the armed forces of the State, and take part in such conflict seemingly for the profit of private gain, just like traditional mercenaries.

For civilians engaing in hostile activities, the 1977 Additional Protocol I sets out the criteria for who is a mercenary, and specifically denies such persons the right to prisoner of war status.³⁵ In chapter 3.3.1 and 3.3.2 I will further elaborate upon the definition of mercenary and the relationship between private military contractors and mercenarism (if there is any).

3.3.1 The 1977 Additional Protocol I article 47

Mercenaries are persons who are not members of the armed forces of a party to the conflict, but nevertheless participate in combat for personal gain.³⁶ Such persons may be authorized to fight by a party to the conflict, but their alligance to that party is conditioned on monetary payment rather than obedience and loyalty.

Mercenaries were first explicitly defined under international law by the 1977 Additional Protocols to the Geneva Convention which provides the following definition of mercenary³⁷

A mercenary is any person who:

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

The definition of who is a mercenary according to AP I 1977 is narrowly defined. For a person to fall withing this legal description all six criteria

³⁵AP I, art. 47.

³⁶ See for instance Elsea, Jennifer, *“Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*, CRS Report for Congress, May 28, 2004, available online at http://www.opencrs.com/rpts/RL32419_20040526.pdf, last checked at 060504.

³⁷ AP I, art. 47.2

have to be met. The international community, in the 1980's, condemned mercenarism and wanted a convention that was less strict than AP I and that would be better fitted for society as it had developed. So, after years of drafting, the United Nations in 1989 adopted the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (the "Convention against Mercenaries").

3.3.2 General Assembly Resolution 44/34

General Assembly Resolution 44/34 is generally referred to as the 1989 Convention against Mercenaries.

Article 1 of the Convention states that 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 rank and function in the armed forces of that party;
- (d) Is neither a national of a party to the conflict nor a resident of a 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.³⁸

The 1989 Convention against Mercenaries incorporates a definition of mercenaries virtually identical to that of the 1977 Additional Protocol I, and also adds the following

2. A mercenary is also any person who, in any other situation:

- (a) Is specially recruited locally or abroad for the pupose of participating in a concerted act of violence aimed at
 - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

³⁸ UN GA Res. 44/34, International Convention against the Recruitment, Use, Financing and Training of Mercenaries, United Nations General Assembly, 72 plenary, December 4 1989, art. 1, hereinafter referred to as 1989 Convention against Mercenaries

- (ii) Undermining the territorial integrity of a State;
- (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
- (c) Is neither a national nor a resident of the State against which such act is directed;
- (d) Has not been sent by a State on official duty; and
- (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.³⁹

Like article 47 of the 1977 AP I, the 1989 Convention concentrates exclusively on individual actors, and is not at all aimed at companies or groups. However, the definition of the term mercenary was vigorously disputed among the drafters of the 1989 Convention against Mercenaries, as was also the case with the drafting of the 1977 Additional Protocol I.⁴⁰ The bias in favor of characterising mercenaries in individual rather than corporate terms is manifest particularly clearly in the Convention's drafting process. An early proposed draft specifically provided that the prohibitions on numerous actions having to do with mercenarism, including inter alia, enlisting, training, or promoting mercenaries, would be applicable to groups or associations.⁴¹ Yet, this specification of "groups" was almost immediately replaced by the more limited word "person", thereby excluding corporations from liability under the 1989 Convention against Mercenaries.⁴²

It might be that the corporate structure of the PMFs excludes the firms from being defined as mercenary firms. However, if we take a look at the individual contractors, it would also be very difficult to label them mercenaries. First of all, as is already mentioned, to be a mercenary in the legal sense, *all* criteria required have to be met. Not all contractors participate in hostilities. To prove that the PMCs have actually been "specially recruited in order to fight in an armed conflict" is not easy as well. Also, the exact meaning of the term "direct participation in hostilities" is eagerly disputed and by no means crystal clear, and not all PMCs participate in combat. The fact that the person is motivated by private economic gain, the "cash nexus", is also very difficult to actually prove. It

³⁹ 1989 Convention against Mercenaries, art. 1

⁴⁰ Coleman, James R., "Constraining Modern Mercenarism", *Hastings Law Journal*, June 2004

⁴¹ Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 40th Sess., No. 43, UN Doc A/40/43 (1987) (draft of Article 3, paras. a and c.

⁴² Ballesteros, Enrique Bernales, *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*, UN Commission on Human Rights, 58th Session, Supp. No. 118, UN Doc A/58/115 (2003).

might be difficult to determine that an individual is not primarily motivated by ideological considerations or a sense of adventure. Paragraph (d), stating that “is neither a national of a party to the conflict nor a resident of a territory controlled by a party to the conflict” excludes all American nationals who work for the firms from being labelled mercenaries.

Hence, the conclusion that can be drawn from this chapter is that private military contractors are neither combatants nor mercenaries in a legal sense. They are civilians, or in some instances, persons accompanying the armed forces in the meaning of article 4A(4) GC III. Due to the fact that they are civilians, they will be labelled “unlawful combatants” when their conduct amounts to participation in combat. Now, after I have defined the legal status of the private military contractors, I will go on to the question of attribution of their conduct to the USA under international law.

4 State Responsibility

Every internationally wrongful act of a State entails the international responsibility of that State.⁴³ That is the basis of the law of State responsibility as stated in the ILC Draft. (The ILC Draft is not a legally binding convention under international law. It is however opined to reflect customary international law.) Two criteria have to be met for the State to incur responsibility. Those two criteria are to be found in article 2 of the Draft. First, the conduct (consisting of an act or omission) has to be attributable to the State under international law. Second, the act or omission has to constitute a breach of an international obligation of that State.⁴⁴ Hence, when dealing with the rules of State responsibility, one is dealing with second order issues; the procedural and other consequences flowing from a breach of a substantive rule of international law.⁴⁵ I will focus on the first of the two criteria; the attribution of conduct to the State (of private actors), for the purpose of this essay.

Since the State is a legal person, an abstraction, it must by its very construction be represented by natural persons who act for it, either in the form of organs or as individual agents.⁴⁶ The doctrine of attributability depends on the link that exists between the State and the person or persons actually committing the unlawful act or omission.⁴⁷ Hence, my task in this essay, regarding the question of State responsibility, will be to show that such a link exists between the PMCs and the official authorities of the USA that have signed the contracts with the contractors.

4.1 Attributability of private acts

The fact that makes the question of State attribution difficult in the case of PMFs is that the firms are *private* entities. As a general principle, the conduct of private persons or entities is not attributable to the State under international law.⁴⁸ That establishes a cleavage between public and private

⁴³ Draft articles on Responsibility of States for Internationally wrongful acts adopted by the International Law Commission at its fifty-third session 2001, art. 1 (hereinafter referred to as ILC Draft on State Responsibility or the Draft).

⁴⁴ Ibid, art. 2.

⁴⁵ Shaw, p. 541.

⁴⁶ Lysén, Göran, "State Responsibility and International Liability of States for Lawful Acts: A Discussion of Principles", p. 82, Iustus Förlag AB, Uppsala, 1997.

⁴⁷ Shaw, Malcolm N., International Law, p. 548, 4th Ed., Cambridge University Press, 1997, reprinted (twice) 2002.

⁴⁸ Commentary by the International Law Commission to the ICL Draft on State Responsibility, at its fifty-third session, 2001, art. 8, para. 1, available online at <http://www.un.org/ilc/session/53/53sess.htm.state>, last checked at 060501.

acts.⁴⁹ It would be both complicated and undesirable if the State would be responsible for all the acts of its citizens or entities within its jurisdiction. Imposing on the State absolute liability for the conduct of all private actors within its jurisdiction would encourage a great amount of control by the State.⁵⁰ That is a possibility we should probably consider with care. However, in some instances, a relationship might exist between the State and the private actor (natural or legal person), making the actor a de facto agent of the State. When the actor is an agent of the State, attribution of those acts to the State is allowed.

In my opinion, the private military contractors assisting the armed forces of the USA in Iraq *are* de facto agents of the State. Hence, their conduct should be attributed to the USA under international law. I have reached that conclusion by studying legal doctrine, judicial decisions and international customary law. In this chapter I will, step by step, give further details about the law of State attribution and then go on to applying the facts to the private military industry.

According to Lillich and Magraw, there are three existing rationales that underlie the rules of attribution. Those three rationales are first; the search for agency, second; encouragement of control by the State of actors de facto exercising governmental authority and third; encouragement of lawful behaviour through support of the continuity of responsibility.⁵¹ I have excluded the third rationale from further examination for the purpose of this essay since it deals with conduct of insurrectional movements. My main focus will be on the first rationale, the search for agency. However, reference will also be made to the second rationale, encouragement of control by the State of actors exercising governmental authority.

4.2 The First Rationale – the Search for Agency

The primary principle inherent in the rules of attribution is the search for agency. When searching for agency, one searches for a link between the actor and the State whereby the actor may be said to have acted for, or at the direction of the State.⁵² Two tests exist for establishing that link, namely the de jure test and the de facto test.

⁴⁹ Lillich and Magraw, “The Iran-US Claims Tribunal: Its contribution to the law of state responsibility” p. 128, Transnational Publishers Inc., Irvington-on-Hudson, New York, 1998.

⁵⁰ Ibid, at p. 127.

⁵¹ Ibid at page 128.

⁵² Ibid, at p. 129.

4.2.1 The De Jure Test

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. In other words, a “legal link” exists between the actor and the State. The de jure test can be said to be illustrated in articles 4 and 5 of the ILC Draft on State Responsibility. Due to that fact, I will now give a short presentation of each of those articles.

4.2.1.1 ILC Draft article 4

Article 4 of the Draft deals with the conduct of organs of the State and reads as follows

“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 organization of the State, and whatever its character as an organ of the central government 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.”

Article 4 is a point of departure when dealing with attribution of conduct to a State.⁵³ It defines the core cases of attribution and it is a starting point for other cases in that, for example, the conduct of private actors is attributable to a State when it has been authorized by an organ of that State. Examples of what is considered de jure organs of the State is the government itself, the policeforce, the armed forces of that State or diplomats representing the State abroad.

For PMCs to be included in this category (“organs of the State” in the meaning of article 4), they would have to be considered and defined as included in the armed forces of the United States, in other words, they would have to hold the legal status of combatants. With reference to chapter 3.1, private military contractors are not combatants in a legal sense. Hence, the conduct of the PMCs can not be attributed to the USA under article 4 of the ILC Draft.

However, the attribution of conduct under the de jure test does not end here. The next article that can be said to illustrate the de jure test is article 5 of ILC Draft.

⁵³ Commentary to the ILC Draft, art. 4 para. 2.

4.2.1.2 ILC Draft article 5

Article 5 of the Draft deals with the conduct of bodies that are not State organs under article 4 but which are nevertheless authorized, by internal law, to exercise governmental authority. The article reads as follows:

“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 that State to exercise elements of the 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.”

Article 5 takes account of para-statal entities that exercise elements of governmental authority in place of State organs.⁵⁴ It also covers situations where former State corporations have been privatized but retain certain public or regulatory functions.⁵⁵ Instances where this may occur is, for instance, when private companies (such as PMFs) have been contracted to act as prison guards and, in that capacity, may exercise public powers like powers of detention and discipline. Another example is when private or State owned airlines may have delegated to them certain powers in relation to immigration control and quarantine.⁵⁶ Anything related to policing, prisons and judicial administration as well as the armed forces is included in this category.

Even though the phenomenon of private military firms is fairly modern, the principle embodied in article 5 has been recognized for a long period of time.⁵⁷ As early as 1939 (at the League of Nations Conference for the Codification of International Law) the support from governments for the attribution to the State of conduct of autonomous bodies exercising public functions was strong.⁵⁸ For example, the German government held that

“when, by delegation of powers, bodies act in a public capacity, e.g., police an area... the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies”.⁵⁹

The justification for making conduct of para-statal entities imputable to the State under international law is the fact that the State has conferred on the entity in question the exercise of certain elements of the governmental authority.⁶⁰

⁵⁴ Commentary to the ILC Draft, art. 5 para. 2.

⁵⁵ Ibid.

⁵⁶ Ibid, art. 5, para. 1.

⁵⁷ Ibid, art. 5, para. 4.

⁵⁸ Ibid.

⁵⁹ 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.), p. 90.

⁶⁰ Ibid, art. 5 para. 5.

For attribution under article 5 to be possible, it is not sufficient that the PMF is merely performing a function which entails governmental authority. The PMF must also have been empowered by the law of the State to carry out that specific function.⁶¹ That is, a PMF can not merely arrive in Iraq after issued contract with the government of the USA for its' conduct to be attributed to the State under this article. There must be an explicit law empowering the PMF to undertake the function. If such a law exists, the conduct of the specific PMF will be attributable to the United States. During the expert meeting on private military contractors in Geneva, August 2005, the experts discussed how specific the law required under article 5 had to be. One expert argued that the State needed not enact a particular law empowering each PMF to carry out governmental authority. Rather, he argued that, where the law of the State empowers a specific State organ to delegate its' powers to a PMF, and that State organ contracts with the PMF, the requirement is met.⁶²

4.2.2 The De Facto Test

The second test in the search for agency is the de facto test. The de facto test attributes acts to the State because the actor, although not de jure part of the State, in fact acted on behalf of the State.⁶³ In this case, a “factual link” exists between the actor and the State. This test can be said to be illustrated in article 8 of the ILC Draft on State Responsibility.

4.2.2.1 ILC Draft article 8

Article 8 reads as follows

“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 persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

In my opinion, the PMCs are acting on the instructions of the United States, and so the United States should be held responsible for those acts, if the contractors breach the law. I will first give further details about the meaning and applicability of article 8 and then go on to explaining why I consider the conduct of the PMCs to be covered by the article.

Article 8 deals with two different circumstances under which the conduct of private persons or entities become attributable to the State. The first situation is when the person or group of persons are acting on the instructions of the State. The second situation is when the private actors are acting under the direction or control of the State. Whether the conduct will

⁶¹ Commentary to the ILC Draft, art. 5, para. 7.

⁶² See “Report from expert meeting on PMCs...”, p. 20.

⁶³ Lillich and Magraw, p. 128.

give rise to State responsibility under this article depends on the existence of a real link between the actor and the State.⁶⁴

When the conduct is authorized by the State it does not matter whether the persons engaging in the conduct are private actors or whether their conduct involves “governmental activity”.⁶⁵ When acting on the instructions of the State, the conduct *is* attributable to that State under international law.⁶⁶ Most commonly cases of that kind arise where State organs supplement their own action by recruiting or instigating private persons or groups of persons who act as “auxiliaries” while remaining outside the official structure of the State.⁶⁷

Imputability because of conduct that has been directed or controlled by the State is more complex in nature than imputability because of instructed behaviour. Only if the State directed or controlled the specific operation and the conduct complained of was an integral part of that operation can the conduct be attributable to the State under this article.⁶⁸

Both Nicaragua⁶⁹ case and Tadic’⁷⁰ case dealt with the question of the degree of control required for the conduct to give rise to international State responsibility. However, the ICJ and the ICTY Appeals Chamber did not reach the same conclusions. In Nicaragua, the question was whether the conduct of the *contras* was attributable to the USA so as to hold the State generally responsible for all the acts of the *contras*. The ICJ held that in order for the USA to be responsible for all acts of the *contras*, it “had to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”.⁷¹ A general situation of dependence and support for the *contras* was not sufficient to attribute the conduct to the State. Thus, a high degree of control was required by the ICJ in Nicaragua.

In Tadic’, the Appeals Chamber disapproved of the ICJ’s approach in Nicaragua regarding the degree of control required. The Appeals Chamber reached the conclusion that “overall control” was enough to attribute the acts of private persons to the State. In any event, it is a matter for appreciation in each case, whether particular conduct was or was not carried out under the control of a State.⁷² A more thorough examination of Nicaragua and Tadic’ cases will be done in chapter 5 *infra*.

⁶⁴ Commentary to the ILC Draft on State Responsibility, art. 8, para. 1.

⁶⁵ *Ibid*, art. 8, para. 2.

⁶⁶ See for instance *Zafiro* case, *UNRIAA*, vol. VI, p. 160 (1925); *Stephens* case, *UNRIAA*, vol. IV, p. 265 (1927) at p. 267.

⁶⁷ Commentary to the ILC Draft, art. 8, para. 2.

⁶⁸ *Ibid*, art. 8, para. 3.

⁶⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J Reports 1986, p. 14.

⁷⁰ Case IT-94-1, *Prosecutor v. Tadic’*, (1999) *I.L.M.*, vol. 38, p. 1518

⁷¹ Nicaragua, para. 115.

⁷² Commentary to the ILC Draft, art. 8 para. 5.

Article 8 makes it clear that a State becomes responsible for the acts of private individuals or entities if it has in fact authorized, directed or controlled the conduct complained of. Each case will depend on its' own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of.⁷³ The terms “instructions”, “direction” and “control” are disjunctive, meaning that it is sufficient to establish either one of them for the conduct to be attributed to the State.⁷⁴ The instructions, direction or control must however relate to the conduct that has amounted to the breach of an international obligation.⁷⁵ The phrase “person or group of persons” is intended to cover both natural and legal persons, such as a private entity or corporation.⁷⁶

In my opinion, the PMCs can clearly be regarded as “auxiliaries remaining outside the official structure of the State” in the meaning of article 8. The private military contractors do not meet the legal criteria of being combatants. They are employees of private legal entities, providing military assistance to the United States’ armed forces, in other words, they are auxiliaries. Numerous legal decisions exist that have deemed military or paramilitary groups, not holding the status of State officials, as being agents of the State, thereby invoking the international responsibility of that State. To show further support of my opinion that PMCs are State agents under article 8 of the Draft, I will present some of those legal decision in the following chapter, chapter 5.

⁷³ Commentary to the ILC Draft, art. 8, para. 7.

⁷⁴ Ibid.

⁷⁵ Ibid, art. 8, para. 8.

⁷⁶ Ibid, art. 8, para. 9.

5 Legal Decisions

Even though the privatized military industry is a fairly new phenomenon, the participation of private military or paramilitary groups in conflicts is not. Numerous legal decisions exist to prove this. In the legal decisions that I will present in this chapter, the conduct of military or paramilitary groups have been attributed to the State under international law. These judicial decisions show 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.⁷⁷

The rules concerning State attribution of acts performed by private individuals are not based on rigid and uniform criteria. Therefore, the judgement of when a private individual or entity can be seen as a de facto State agent (illustrating the first rationale) has to be made on a case by case basis. I will start by giving a short summary of each and every one of the decisions and present the conclusions that can be drawn from the decisions in chapter 6.

5.1 Acting on the instructions of the State

5.1.1 Stephens Case

In Stephens Case⁷⁸ a claim was put forward by the USA on behalf of Charles S. Stephens and Bowman Stephens (American nationals). Their brother, Edward C. Stephens, was killed in Mexico in 1924 by a shot fired by a member of some Mexican Guards or auxiliary military forces. The USA claimed that the State of Mexico was responsible for the unlawful killing by the guard.⁷⁹

Due to the revolution of Adolfo de la Huerta, nearly all Mexican troops had been withdrawn from the State of Chihuahua (where the killing of Stephens took place). The troops were used further down south in Mexico to quell the insurrections.⁸⁰ Because of that, a sort of informal municipal guards organization, “Defensas Sociales”, had sprung up, partly to defend peaceful citizens, partly to take field against the rebellion if necessary.

⁷⁷ See Tadic', para. 117.

⁷⁸ Stephens Case, UNRIIAA, vol. IV, p. 265 (1927).

⁷⁹ Ibid at p. 265, para. 1.

⁸⁰ Ibid at p. 267, para. 4.

The United States – Mexico Claims Commission had to decide whether the acts of the private guards could be attributed to the State of Mexico. The Claims Commission observed that

“It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were “acting for” Mexico or for its’ political subdivisions”.⁸¹

The guard (Valenzuela) who shot Stephens, was on duty with two other men, under a sergeant. They were acting apparently under the “General Ordinance for the army” of June 15, 1987, which obligated all individuals who were halted by sentries 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 Valenzuela fired with fatal result.⁸²

The Claims Commission concluded that the responsibility of Mexico for acts of private guards in cases like the present one, in the presence and under the order of a superior, is not doubtful. Taking account of the conditions existing in Chihuahua at the time, Valenzuela must be considered as or assimilated to a soldier.⁸³ On that basis, the Claims Commission held that, an act of a person who was part of these groups of guards employed as auxiliaries, engaged Mexico’s responsibility on the same basis as the acts of members of the regular armed forces, thereby holding the State of Mexico responsible for the unlawful killing of Stephens. In this case the Commission did not enquire as to whether or not specific instructions had been issued concerning the killing of Stephens.

5.1.2 Zafiro Case

In Zafiro Case⁸⁴ the US – Great Britain Claims Commission found that the conduct of the crew of a United States merchant vessel was attributable to the USA and engaged the international responsibility of the State. The reason for the award is that it had been established that the vessel, although private, was in fact acting as a supply ship for US-naval operations. Its’ captain and crew were for this purpose under the command of a US-naval officer.

⁸¹ Stephens case , p. 267, para. 4.

⁸² Ibid at p. 267, para. 5.

⁸³ Ibid at p. 267, para. 7.

⁸⁴ Zafiro Case, U.N.R.I.A.A., vol. VI, p. 160 (1925)

5.2 Acting under the direction or control of the State

5.2.1 Nicaragua Case

The issue brought before the ICJ in the Nicaragua case was whether the USA because of its financing, organising, training, equipping and planning of the operations of the *contras*, was responsible for the acts committed by those rebels. The court held that a high degree of control was necessary for this to be the case.

In Nicaragua case, the Court distinguishes between three categories of individuals in determining who can induce international responsibility upon the United States in the circumstances of the case.⁸⁵ The first of these three groups are individuals who have the status of officials; members of the government administration or armed forces of the United States. These individuals undisputedly induce responsibility to the State for acts in breach of international obligations.

The second category (that could induce responsibility to the USA through its' conduct) was the UCLAs (Unilaterally Controlled Latino Assets); individuals not having the status of US officials, but who were paid by and acting on the instructions of US military or intelligence personnel. The ICJ held that the acts of the UCLAs were in fact attributable to the USA since the UCLAs were being paid by-, acted under the supervision of- and given specific instructions by American agents or officials or because agents of the United States had "participated in the planning, direction, support and execution" of specific operations (such as the blowing up of underwater oil pipelines, attacks on oil- and storage facilities, etc).⁸⁶

The third category for the ICJ to examine whether their acts could induce responsibility upon the US was the *contras*. It was mainly with regard to the *contras* that the Court asked itself on what conditions individuals without the status of State officials could induce the international responsibility of the USA as having acted as *de facto* State agents. This is also where the Court developed the doctrine of "effective control". The ICJ did not equate the acts of the *contras* to the acts of the United States, thereby not holding the latter responsible for all the acts of the *contras*. The Court concluded that

"despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf"... For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved

⁸⁵ Nicaragua Case, para. 75.

⁸⁶ Ibid, paras. 75-86.

that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”⁸⁷

Thus, in the eyes of the IJC, a general situation of dependence and support would not be sufficient to justify attribution of the conduct of the *contras* to the United States. It would be necessary to prove that the United States had specifically directed or enforced the perpetration of those acts, issuing specific instructions concerning the violations of IHL which they had allegedly perpetrated.

5.2.2 Tadic’ Case

In Tadic’⁸⁸ case, the Appeals Chamber did not agree with the standpoint that the ICJ had taken in Nicaragua concerning the issue of control of private actors and State attribution. The issue brought before the ICTY Appeals Chamber was to determine whether the connection between the Bosnian Serb armed forces and the FRY was such as to render the FRY responsible for the acts of the Bosnian forces.

The question in both cases (Nicaragua and Tadic’) is the same, that is, on what conditions, under international law, may an individual or a group of individuals be held to act as de facto organs of a State, thereby rendering the international responsibility of that State. Since IHL does not contain legal criteria regarding imputability specific to that body of law, reliance must be had upon the criteria established by general rules on State responsibility.⁸⁹

In Tadic’, the AC does not find the “effective control” test enunciated by the ICJ in the Nicaragua to be persuasive on two grounds. First, the AC does not find the Nicaragua test to be in consonant with the logic of the Law of State Responsibility.⁹⁰ Second, the AC finds the Nicaragua test to be in variance with judicial decisions and State practice.⁹¹ The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. The degree of control may however vary according to the different circumstances of each case.⁹² The AC in Tadic’ holds that for acts of unorganised groups of individuals to be attributed to the State, it would be necessary to prove that the State exercised some measure of authority over that group of individuals and that specific instructions had been given to them concerning the performance of the acts at issue or that the State ex post facto publicly endorsed those acts.⁹³

⁸⁷ Nicaragua, paras. 109 and 115.

⁸⁸ Prosecutor vs. Tadic’, (1999), I.L.M., vol. 38, p.1518, para.117

⁸⁹ Ibid at para. 105.

⁹⁰ Ibid at para. 116 ff.

⁹¹ Ibid, para. 124 ff.

⁹² Ibid, para. 117.

⁹³ Ibid, para. 118.

Then the Appeals Chamber goes on to distinguish the situation of individuals acting on behalf of a State without specific instructions from that of individuals making up an organized and hierarchially structured group, such as a military unit or armed bands of irregular rebels.⁹⁴ For the attribution to a State of acts of the latter group it is, in the eyes of the AC, sufficient that the group as a whole be under the *overall control* of the State. An organized group differs from an individual in that it the group normally engages in a series of activities. If it is under the overall control of a State, specific instructions are not required.⁹⁵ The control required by international law may be deemed to exist when a State has a role in organising, coordinating or planning the military actions of the military group.⁹⁶

5.2.3 Yeager Case

The next case that I will present, Yeager case⁹⁷, deals with the problem of the degree of State control necessary for the purpose of attribution of conduct to the State, but it also illustrates attribution of conduct under the second rationale.⁹⁸ Although separate, the second rationale for attribution may be viewed as closely related to the first rationale if it is seen as, in essence, an evidentiary rule allowing the first rationale to be effective.⁹⁹ In other words, since it is always more difficult to establish a *de facto* rather than a *de jure* principal-agent relationship, it will be assumed that the fact that the State does not attempt to control actors exercising elements of governmental authority, establishes a relationship which, if not formally one of agency, is one in which the actor, in the State's view, acts on behalf of the State.¹⁰⁰

The award was given by the Iran-United States Claims Tribunal in 1987. Kenneth P. Yeager was an American national who in February 1979 was forced by Revolutionary Guards in Iran to leave the country. The primary question of the case was whether the alleged conduct of the Revolutionary Guards was attributable to the Republic of Iran.

Many of Ayatollah Khomeini's supporters were organized in local revolutionary committees, so called Komitehs or Revolutionary Guards. These groups of guards often emerged from the neighbourhood committees formed in the immediate aftermath of the revolution in Iran. The Revolutionary Guards made arrests, confiscated property and took people to prison. They paralleled the military. While there were complaints about a lack of discipline among the numerous Guards, Ayatollah Khomeini generally stood behind them, and the Guards in general were loyal to

⁹⁴ Ibid, para. 120.

⁹⁵ Ibid, para 122.

⁹⁶ Ibid, para. 137.

⁹⁷ Yeager v. Islamic Republic of Iran (1987), 17 Iran – USCTR 92, p. 92.

⁹⁸ See Lillich and Magraw, p. 142.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

him.¹⁰¹ 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 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 attributability of acts 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. Then the Tribunal goes on stating that “it is generally accepted in international law that a State is also responsible for acts of persons, if it is established that those persons were in fact acting on behalf of the State”.¹⁰² The Tribunal found the record to provide sufficient evidence to establish a presumption that the Revolutionary Guards were in fact acting on behalf of Iran.¹⁰³

The Tribunal found that the government of Iran must have had knowledge about the activities of the Revolutionary Guards, and since Iran could not establish sufficient evidence that they were unaware of the fact that the Revolutionary Guards were exercising elements of governmental authority, or that the government could not control them, the Tribunal deemed the activities of the Revolutionary Guards attributable to Iran.¹⁰⁴ Iran could not under international law on the one hand tolerate the exercise of governmental authority by Revolutionary Komithes or Guards and at the same time deny responsibility for wrongful acts committed by them. On the basis of the evidence in the case therefore the Tribunal found that the acts of the Revolutionary Guards who forced Kenneth Yeager to leave the country were attributable to the State of Iran.

Now I have presented all my material; the introduction to the world of private military contractors, a survey of their legal status and a study on the attributability of their conduct to the State that hires them. I have also presented some judicial decisions that support the standpoint that the conduct of the PMCs is attributable to the USA, mainly because of article 8 of the ILC Draft. All that is left to be done now is a conclusion of all of those facts. That conclusion will be provided in the following chapter, chapter 6.

¹⁰¹ Yeager at p. 102.

¹⁰² Ibid at p. 103, para. 42.

¹⁰³ Ibid at p. 103-104, paras. 42-43.

¹⁰⁴ Ibid, p.104-105, paras. 43-45.

6 Concluding remarks

To make matters as clear as possible to the reader, I will start this chapter by answering the two questions that was asked in the introduction of this essay, namely those of the legal status of the contractors and if their conduct is attributable to the USA. The answers that I give here are short and will be elaborated upon in detail in this chapter, but these short answers are good to keep in mind when reading the rest of the chapter.

PMCs are civilians. They are not State organs, and therefore their conduct will not be attributable to the USA under article 4 of the ILC Draft. When they are performing intrinsic State functions (like carrying out military work), their conduct is attributable to the USA under article 5 of the Draft, if an internal law exists that provides the PMC with the authority to carry out such functions. Also, when the PMCs meet the criteria of GC III, article 4A(4), their conduct seem to be attributable under article 5 of the Draft. Under circumstances where the conduct of the PMCs is attributable to the State under article 5, *ultra vires* acts do not prevent attribution.¹⁰⁵

When it can not be established that an internal law exists that provides the PMC with governmental authority, or when the conduct that the PMCs carry out is not governmental in the meaning of article 5, their conduct still becomes attributable to the State, but this time under article 8 of the Draft. Since the contractors are civilians and act on the instructions of the USA (the contracts concluded between the USA and the PMFs are to be seen as “instructions”), their conduct is attributable to the USA under article 8 of the ILC Draft on State Responsibility. Concerning *ultra vires* acts and article 8, if the conduct is carried out under the effective control of the State, the conduct will be attributable to the State even if certain instructions may have been ignored.¹⁰⁶ When the State do not exercise direction or control over the PMC, but merely have given certain instructions, the State does not, in general, become responsible for acts that contravene the instructions given.¹⁰⁷ Now, I will elaborate upon these answers and summarize the conclusions that I have reached.

6.1 The private military industry in Iraq summarized

Thousands of contractors are working in Iraq for the United States, carrying out different kinds of work. Some of them are working only in a support capacity, while others are carrying out tasks that are clearly intrinsic State functions and should be kept withing the public sphere. Despite the fact that

¹⁰⁵ See Commentary to the ILC Draft on State Responsibility, art. 7, para. 9.

¹⁰⁶ Ibid, art. 8, para. 8.

¹⁰⁷ Ibid.

a lot of the tasks are clearly governmental activities the contractors are not combatants in a legal sense. PMCs are not members of the armed forces in the meaning of article 43 AP I, which also excludes them from being “militias or volunteer corps” in the meaning of GC III article 4A(1) since that category requires that they form part of the armed forces. Also, the requirements of article 4A(2) do not seem to be met by the PMCs, especially that of having a fixed distinctive sign, carrying arms openly or that of conducting their operations in accordance with the laws and customs of war.¹⁰⁸

My study also shows that PMCs are not mercenaries in the meaning of article 47 AP I or in the meaning of the 1989 UN Convention against mercenaries. Some authors say that the corporate structure of the firms stands as a bar from being included in the category of mercenaries. That is however not the only obstacle. To acquire mercenary status, all the criteria in the articles have to be met. My study shows that the PMCs do not meet all the requirements for being mercenaries or “mercenary firms” as some refer to them.¹⁰⁹

PMCs are civilians or in some instances civilians accompanying the armed forces in the meaning of article 4A(4) GC III.¹¹⁰ As civilians, they must refrain from taking part in hostilities. For such time as they do participate in hostilities, they are legal targets of attack and can be punished for their crimes as unlawful combatants. If the PMCs receive the identity card required in article 4A(4) GC III and work in a close proximity to the armed forces, they fall into this category. However, merely performing a contract for the State does not meet the requirement for the purpose of article 4A(4). GC III emphasizes civilians operating in a support capacity only, fulfilling non-lethal functions.¹¹¹

Since PMCs are not combatants nor have the status of any other State organ, their conduct can not be attributed to the USA under article 4 of the ILC Draft. Their conduct can however be attributed to the USA under article 5 of the ILC Draft under certain circumstances. When the PMC is exercising governmental authority, and is provided with an internal law to do so, the conduct is imputable to the USA under article 5. Anything related to policing, prisons, judicial administration and the armed forces is considered State functions (or intrinsic State functions) and covered by the article. Virtually anything associated with the conduct of hostilities must be a

¹⁰⁸ GC III, art. 4A(2b, c and d).

¹⁰⁹ See for instance article by Garmon, Tina, “*Domesticating International Corporate Responsibility: Holding Private Military Firms accountable under the Alien Tort Claims Act*”, p. 330, 11 Tulane Journal of International and Comparative Law, 2003

¹¹⁰ See for instance Report from expert meeting... or Human Rights Watch, “*Q & A: Private Military Contractors and the Law*” available online at <http://hrw.org/english/docs/2004/05/05/iraq8547.htm>, last checked at 060504.

¹¹¹ See for instance article by Sherman, Adam, “*Forward unto the digital breach: Exploring the legal status of tomorrow’s high-tech warriors*”, p. 335, 5 Chicago Journal of International Law, 2004.

function the exercise of which requires governmental authority.¹¹² Consequently, when a State privatizes these functions and contracts with a PMC to carry them out, the conduct of the PMC is attributable under article 5, if the State organ has the right to contract that governmental authority to the PMC, because of an internal law. The State need not enact a particular law empowering each PMC to undertake functions which entail governmental authority, for this requirement to be met. Where the law of the State empowers a specific governmental authority to delegate powers to a PMC, the requirement of article 5 is met.¹¹³

If a PMC can be included in the category of persons accompanying the armed forces without being part thereof (GC III, art. 4A(4)) 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 also seem to be met. Since the contracts between the PMCs and organs of the USA are protected by proprietary law, they are not open to scrutiny, which makes it hard to assess whether the contracts meet all the criteria required in article 5 of the Draft.

If the PMCs do not meet the criteria of article 5 of the Draft (or rather, if those criteria can not be determined with certainty) their conduct is still attributable to the USA, this time under article 8 of the Draft. Private military contractors are in fact auxiliaries acting on the instructions of the State. For instance, if a PMC is contracted to guard an oilfield in Iraq, the group is acting “on the instructions of” the State, making the conduct attributable to that State.¹¹⁴ For conduct to amount to “acting on the instructions of the State” in the meaning of article 8, a real link has to be established between the actor and the State. The issued contracts between the USA and the private military firms must be seen as constituting such a link since the contracts spells out the type of work that the State wants the specific PMC to carry out in Iraq.

In judicial decisions, the conduct of auxiliary forces or para-military groups have been attributed to the State. For instance, in *Stephens Case*, the acts of the private guards (“Defensas Sociales”) became attributable to the State of Mexico since the guard that shot Stephens must have been seen as “acting for the State of Mexico”. Also, in the *Zafiro case*, the conduct of private actors became attributable to the State because the actors were acting on the instigation of the State.

The same can be said about *Yeager Case*, where the conduct of the Revolutionary Guards was attributed to Iran, even before they were officially recognized. In *Yeager*, the Tribunal made reference to article 9 of the ILC Draft (former article 8b) when attributing the conduct of the Guards to Iran. However, from what can be read in the *Case*, the Tribunal also made reference to article 8 (former article 8a) of the Draft when attributing the

¹¹² See “Report from expert meeting on PMCs...”, p. 19.

¹¹³ *Ibid*, p. 20.

¹¹⁴ *Ibid*.

conduct of the Guards to the State. The Revolutionary Guards were, in the eyes of the Tribunal, seen as de facto agents of the State and as such their conduct became attributable to Iran, since Iran could not show that they were not aware of the actions of the Guards and failed to prove that they could not control the Guards.¹¹⁵ In Yeager, the Tribunal also makes reference to, and underline the importance of, the second rationale (encouragement of control by the State of actors exercising elements of governmental authority). The second rationale can be viewed as an evidentiary rule allowing the first rationale to be efficient. The second rationale prevents States from on the one hand accepting private actors to carry out governmental activity and on the other hand disassociate themselves from those actors when they breach the law.

The standard for attributing conduct to the State because that State exercises control of the actor in the meaning of article 8 of the Draft was set high in Nicaragua Case. In Tadic', the AC did not approve of the high requirement of control that was set out in Nicaragua. The AC in Tadic' held that the degree of control should be determined on a case by case study. The AC also stressed that the terms instructions, direction and control are independent of each other. The idea of control implies that the State is in a position of being able to exercise some level of operational control over the group.¹¹⁶ However, since my study shows that the PMCs are acting on the instructions of the USA, an investigation of whether direction or control is at hand, is not required.

In sum, the legal decisions that I have included in the essay shows support for the opinion that PMCs can be seen as acting on the instructions of the State, making the USA internationally responsible for those acts.

6.2 Some concerns regarding the use of private military contractors

No matter how efficient or skilled the PMFs and their employees might be, the use of private contractors is not uncomplicated. As has already been brought to the reader's attention, the incentives of private companies to turn profit might not always be in line with the public good. The armed forces of a State is under the scrutiny of the public eye, and are regulated by the laws of war, military controls and structures and are the responsibility of the government. A soldier that breaches the law will be court martialled. The same can not be said for the private firms or their employees. Private military contractors lie outside the military chain of command. They can not be court martialled. A private contractor can always refuse to carry out a job if it seems to dangerous or if it is not profitable enough. The private contractor is only bound by his contract and can at any time leave the PMF

¹¹⁵ Yeager, p. 103, para. 42.

¹¹⁶ See Report from expert meeting on PMCs..., p. 20.

that he works for and start working for another PMF that offers a more lucrative contract. Once a soldier has enlisted to be in the army, he or she retains no choice over what jobs to take or at what price and can not leave the army whenever he or she pleases to do so. The private military contractors exist within the business world and even though they carry out military jobs, they are just employees of a corporation and not soldiers. Like the individual contractor, the private company retains the choice over what contracts to take and when to depart operations because it seems to be dangerous relative to the rewards. During spring 2004, several firms delayed, suspended or ended operations because they found those operations too dangerous. That reality places great stress on the already overstretched armed forces.

The extensive use of contractors in public military roles raises a series of longterm questions for the military itself. Soldiers tend to have ambivalent feelings towards the PMFs. On the one hand they are grateful and appreciate the assistance that they get from the PMFs in Iraq. However, soldiers can make a lot more money working for a private firm than what they make in the regular armed forces. Soldiers can make up to ten times more working for a private firm. Also, as already mentioned, soldiers would enjoy greater freedom working for a PMF since they can control who they work for, at what price and they can decide to not do the job if it seems to be dangerous without the risk of being court martialed. Altogether, this can result in a “brain-drain” of the military and hurt the military’s retention of talented soldiers. The PMF industry is directly competitive with the military as it draws employees from the military and fills military roles, thus diminishing the importance of the regular armed forces of the State.¹¹⁷

It seems to be of immediate concern to the global society whether the US’ obligation to respect and preserve human rights and IHL is undermined by the extensive use of contractors in Iraq. Employment of the contractors indicates a lack of transparency in the US contracting system as the names of the contractors are kept confidential and it disconnects the public from the oversight and regulation that 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 PMFs, a nation can circumvent congressional limits on the size and scope of the nation’s military involvement. By privatizing parts of the US mission in Iraq, the Bush administration has dramatically lowered its political price for the war. Without the use of private contractors the United States would have had to either deploy more of its’ own troops or persuade other countries to extend their commitment. No nation wants to see their soldiers returning home in bodybags. The more soldiers that get killed in an armed conflict, the higher the pressure on the government to withdraw its’ forces. With the use of PMFs that problem is avoided. Contractor casualties

¹¹⁷All of the text on problems that come with the use of PMCs is cited from Singers article “*The Private Military Industry and Iraq: What have we learned and where to next?*”

are not enlisted on public rolls and are, rarely mentioned in the media.¹¹⁸ On the other hand, there is also a lot of advantages with the hiring of PMCs. When the PMCs can lift a load of the military, they are of great help to the military and the nation that they are contracted to serve.

Before taking part in hostilities, the contractors should be incorporated into the armed forces of the USA. If not, they are considered illegal combatants, just as the detainees at Guantanamo Bay, and might end up in similar prisons, without the legal rights of a POW. Then it is up to the enemy to determine their status. That is probably the last thing that the USA, or any other State for that matter, wants to see happening to its' citizens. If the private military industry becomes regulated, dissolving all the questionmarks that seem to surround the industry, private military contractors can be of great support to nations world wide.

¹¹⁸ See articles by Singer, "Outsourcing War" and "The Private Military Industry and Iraq" where Singer takes up different problems that stems from the extensive use of private military contractors.

Bibliography

Ballesteros, Enrique Bernales, *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*, UN Commission on Human Rights, 58th Session, Supp. No. 118, UN Doc A/58/115 (2003).

Beyani Chakola and Lilly, Damian “*Regulating Private Military Companies –options for the UK Government*”, International Alert, August 2001, or, Singer, Peter W., in *War, Profits, and the Vacuum of Law...*”, where Peter states that the existing legal regimes on who is a mercenary is vague and outdated and in principle useless when it comes to constraining mercenary activity.

Coleman, James, R., “*Constraining Modern Mercenarism*”, 55 Hastings Law Journal, June 2004

Dworkin, Anthony, “*Security Contractors in Iraq: Armed Guards or Private Soldiers?*”, Crimes of War Project, April 2004, available online at <http://www.crimesofwar.org/onnews/news-security.html>, last checked at 060504

Elsea, Jennifer, “*Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*”, CRS Report for Congress, May 28, 2004, available online at http://www.opencrs.com/rpts/RL32419_20040526.pdf, last checked at 060504

Garmon, Tina, “*Domesticating International Corporate Responsibility: Holding Private Military Firms accountable under the Alien Torts Claim Act*”, 11 Tuland Journal of International and Comparative Law, Spring 2003

Human Rights Watch, “*Q&A: Private Military Contractors and the Law*”, 2003, available online at <http://hrw.org/english/docs/2004/05/05/iraq8547.htm> ,last checked at 060504.

Kalshoven, Frits and Zegvald, Liesbeth, *Constraints on the waging of war – an introduction to International Humanitarian Law*, International Committee of the Red Cross, Geneva, March 2001, 3rd edition

Lillich and Magraw, *The Iran-US Claims Tribunal: Its contribution to the law of State Responsibility*, p. 128, Transnational Publishers Inc., 1998, Irvington-on-Hudson, New York

Lysén, Göran, *State Responsibility and International Liability of States for Lawful Acts: A Discussion of Principles*, Iustus Förlag AB, Uppsala 1997.

Report from expert meeting on private military contractors: *Status and State Responsibility*, organised by The University Centre for International

Humanitarian Law, Geneva, Convened at International Conference Centre
Geneve, 29-30 August 2005

Schmitt, Michael N., "*Humanitarian Law and direct participation in hostilities by private contractors or civilian employees*", Chicago Journal of International Law, Volume 6 Number 5 Winter 2005

Shaw, Malcolm N., International Law, Fourth Edition, Cambridge University Press, 1997, reprinted (twice) 2002.

Sherman, Adam, "*Forward unto the digital breach: Exploring the legal status of tomorrow's high tech warriors*", Chicago Journal of International Law, Volume 5 Number 1, p.338, Summer 2004

Singer, Peter, W., Corporate Warriors – The Rise of the Privatized Military Industry, Cornell University Press, 2003, Ithaca and London

Singer, Peter W., "*Outsourcing War*", Foreign Affairs, March/April 2005, Volume 84, Number 2

Singer, Peter W. "*The Private Military Industry and Iraq: What have we learned and where to next?*", The Geneva Centre for the Democratic Control of Armed Forces (DCAF), Policy Paper, Geneva, November 2004,

Singer, Peter W., "*War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*", Columbia Journal of Transnational Law, January, 2004

Watkin, K. W. Colonel, "*Combatants, unprivileged belligerents and conflicts in the 21st century*", Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, January 27-29, 2003.

Table of Cases

Case IT-94-1, Prosecutor v. Tadic', (1999) I.L.M., vol.38, p.1518, the The award was given by the ICTY Appeals Chamber, July 15, 1999.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, I.C.J. Reports 1986. The decision on the merits was given by the International Court of Justice, June 27, 1986.

Stephens, UNRIAA, vol. IV, p. 265 (1927), at p. 267. The award was given by the United States – Mexico Claims Commission, July 15, 1927.

Yeager v. Islamic Republic of Iran (1987) 17 Iran-U.S.C.T.R. 92. The award was given by the Iran- United States Claims Tribunal, November 2, 1987.

Zafiro case, UNRIAA., vol. VI, p. 160 (1925). The award is an arbitral award between Great Britain and the United States and was given November 13, 1925.