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Regulating Law or Being Regulated by the Law?
An Analysis of Private Military Security Companies under the Regime of
International Humanitarian Law

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Summary

The international legal system has weathered sweeping changes during last decades as new actors have appeared in international system. Private Military Security Companies (PMSCs) are one example of the most prominent shifts occurred in the context of laws of war with International Humanitarian Law (IHL) being part of it. Traditionally IHL has been recognized as a body of law regulating the relationships between states or organized armed groups that shared some hierarchical, territorial and administrative characteristics of states. Holding such characteristics made these public actors distinctive from the private actors and drew a line between public and private. However, the improvement of the transnational trade and furtherance of globalization, together with the economic and political climate after the Cold War brought about an idea of outsourcing some activities previously undertaken exclusively by states. In such a context, new actors have raised and operated within international realm that blurred the said traditional line between public and private and brought up doubts on how these new actors could be addressed by IHL. I have evaluated the actual capacity of IHL in accommodating PMSCs. In doing so, I have uncovered a dilemma within IHL when it comes to address the PMSCs. Further, I suggest that this dilemma informs us of what I call a broader self-challenge within the regime of IL; a self-challenge to perceive statehood and to configure the public and private. I suggest that the normalization of the existence and operation of PMSCs discloses a shift in international legal rhetoric when it comes to accommodate non-state actors

and it can be translated as a call to go beyond state-centrism as well as a dilution of the state and rhetoric of sovereignty.

Preface

I wish to express my appreciation and gratitude to Matilda Arvidsson for supervising my thesis. This work would have never been possible without your invaluable guidance.

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Abbreviations

IHL	International Humanitarian Law
IL	International Law
PMC	Private Military Company
PMS	Private Security Company
PMSC	Private Military Security Company
DPH	Direct Participation in Hostilities
EO	Executive Outcomes
UNITA	National Union for the Total Independence of Angola
UN	United Nations
RUF	Revolutionary United Front
CPA	Coalition Provisional Authority
MPRI	Military Professional Resources Incorporated
USAID	U.S. Agency for International Development
LOGCAP	Logistics Civil Augmentation Program
NPR	National Performance Review (NPR)
NPRG	National Partnership for Reinventing Government
FAIR	US Federal Activities Inventory Reform Act
QDR	Quadrennial Defense Review
RMA	Revolution in Military Affairs
IHR	International Human Rights Law
GC	Geneva Conventions
AP	Additional Protocol
CIL	Customary International Law

IAC	International Armed Conflict
NIAC	Non-International Armed Conflict
POW	Prisoner of War
OAU	Organization of African Unity
MCA	Military Commissions Act
ICRC	International Committee of Red Cross
HC	Hague Convention of 1907
OMB	Office of Management and Budget
DOD	Department of Defense

1. Theory, Methodology, Research Questions and Delimitation

1.1. Theory:

It was in the Treaty of Westphalia (1648) that the idea of sovereignty was turned into a doctrine of statehood and law for the first time. Sovereignty was introduced as a “centralized power that exercised its lawmaking and law-enforcing authority within a certain territory”¹. Based on a Weberian understanding of the modern state, under IL, statehood was defined as “a human community that (successfully) claims the *monopoly of the legitimate use of physical force* within a given territory”². This image constitutes the basis of the so-called realist perspective in international relations³. According to the realist notion, statehood was relied on as the foundation of IL and states became the primary actors in the international system⁴. While originally, statehood was deemed as the material condition of certain political entities deciding to interact with each other through certain ways of IL, statehood is now a term defined by IL through particular criteria and can be conferred to particular entities satisfying those criteria⁵. Nonetheless, once an entity has achieved legal personality as a state, it becomes, in the realist notion of it, the primary unit of authority under IL; states have the power to determine what may or may not be included in/excluded from IL.

¹ Hans Morgenthau (1973: 306), Cited by Kyle M Ballard, “The Privatization of Military Affairs: A Historical Look into the Evolution of the Private Military Industry”, in, Jäger, Thomas. & Kümmel, Gerhard. (ed.), *Private military and security companies: chances, problems, pitfalls and prospects*, 1. Aufl., VS Verlag für Sozialwissenschaften, Wiesbaden, 2007, p. 38

² Ibid.

³ Ibid.

⁴ Colin Warbrick, *States and Recognition in International Law*, in Evans, Malcolm David (red.), *International law*, 2. ed., Oxford University Press, Oxford, 2010. p. 218.

⁵ Ibid.

Therefore, following this state-centrist logic, even where IL is dealing with something other than states, that is because of the intention of the states using IL is to establish other rules to bring about certain changes⁶; One such change is the acknowledgement of the legitimate and legal character of certain non-state actors under IL – PMSCs being one such example. Following this realist notion in realm of laws of the war, IHL is traditionally recognized as a body of law regulating the relationships between states or organized armed groups that shared some hierarchical, territorial and administrative characteristics of states. Holding such characteristics made these public actors distinctive from the private actors and drew a line between public and private. However, the improvement of the transnational trade and furtherance of globalization, together with the economic and political climate after the Cold War brought about an idea of outsourcing some activities that had been previously undertaken exclusively by states. In such a context, PMSCs have raised and blurred the said traditional line between public and private and brought up doubts on how these new actors could be addressed by IL. This is because PMSCs are at odds with the said Weberian understanding of statehood within the realist model of international politics. By running a global market trading in armed force, PMSCs challenge the core exclusive authority of state that is the exercise of the legitimate physical force and control over the territory. PMSCs' inconsistency with the Westphalian system of sovereignty and statehood in IL is explained by considering a chain of premises; a) if one of the essential factors for defining state as a person of IL is the fact that the state should

⁶ Ibid.

posses government⁷ and b) if the principal criteria for recognition of government is ultimately “effectiveness” of power within the state⁸ and c) if “governmental effectiveness understood as its power to assert a monopoly over the exercise of legitimate physical violence within the territory”⁹, then widespread use of PMSCs appear to challenge the governmental effectiveness and therefore, to jeopardize the ascendancy of the nation state.¹⁰

1.2. Methodology, Research Questions and Outlines:

Based on the above-mentioned theoretical framework, my thesis breaks down into three questions; the first, what PMSC is? the second, how PMSC is understood under IHL? and the third, what the existence of PMSCs means to IL as a system and what is the broader implication of the appearance and operation of PMSCs within IL?

I have approached the first question as if I am discovering mere "facts". I have applied an interdisciplinary method to provide a holistic understanding of the subject. To do so, I have looked into economic, political and historical context from which PMSCs raised. (Section 2)

⁷ Article 1 of the Montevideo Convention on the Rights and Duties of States 1933 provides that “ The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.”

⁸ Matthew Craven, “Statehood, Self-Determination, And Recognition”, in Evans, Malcolm David (red.), *International law*, 3. ed., Oxford University Press, Oxford, 2010, p. 224.

⁹ Ibid.

¹⁰ Martha Minow, “Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy”, in, *Boston College Law Review*, Vol. 46, Issue 5, 2005, p. 1026.

Further, addressing the second and third question while referring to the already discussed facts, I have put forward my legal analyses. The legal analyses emphasises on investigating the phenomenon of PMSC within the regime of IHL, as it is defined within the realist notion of IL. (Section 3)

Having in mind the Weberian definition of statehood, I have been doubtful in my analyses whether IHL -as a system traditionally regulating violence between states and/or organized armed groups that shared many of the territorial, administrative and “public” characteristics of states- have actual capacity to accommodate PMSCs. I have tired to show this state of hesitance by pointing out challenges and difficulties in regard to status determination of PMSCs' employee (Section 4) and defining their relation to the state actors within IHL (Section 5). Finally, I have tired to uncover how presence of PMSCs informs a new understanding of relationship between public and private within IHL, and more generally within the IL, which does not follow the traditional standards. (Section 6)

After all, I have concluded that although it is possible to extend the rules of IHL to accommodate PMSCs, it will stretch the skin of IL so thin that it might eventually break. I have also concluded that certain changes in the *jus in bello* to accommodate PMSCs may inform of broader hidden shifts in configuring the relationship between the public and private realms in international society. This is an indication of what I call a self-challenge within the regime of IL when it comes to deal with non-state actors. I suggest that this self-challenge emanates from a gradual transition from the conventional Westphalian understanding of the state to submission of IL to an alternative understanding of the state; an alternative understanding of the

state which allows more space for participation and involvement of non-state actors within international law. I take the example of PMSCs and put it in contrast to the case of mercenaries to show that how the normalization of the existence and operation of PMSCs discloses a shift in international legal rhetoric when it comes to accommodate non-state actors. This shift can be translated as a call to go beyond state-centrism as well as a dilution of the state and rhetoric of sovereignty. When states recognize private actors, such as in the case of PMSCs, as capable of legitimately entering into contracts with states and international organizations, the very same states which benefits from arguing a state-centrism provide a basis from which non-state actors within IL benefits; it serves to promote non-state actors' potentials, as subjects of IL, beyond state centrism.

The research is generally based on deskwork. Literature review and document analysis constitute the dominant source of data collection. In order to address the topic phenomena the paper contains large sources of academic writings and scholars' publications in the realm of international law, politics of international law, international relations, economics and international political economic.

1.3. Delimitation:

The phenomena of PMSCs can be investigated from various entangles as the presence of these new actors have tied scholarships in economic, international relations, international political economy, globalization and international law. Indeed, one of the challenges in writing this thesis was to maintain coherency while taking an interdisciplinary approach to understand

PMSCs in a holistic manner. Only in the context of international law, the phenomena of PMSCs can be investigated under different regimes such as international humanitarian law, international human rights law and international criminal law. Nonetheless, while I have tried to uphold a wide perspective to understand the fact of PMSCs, what I have highlighted in my analysis has been the discourse of international law, and more specifically, an inquiry to the orientation of IHL towards the raise and operation of PMSCs and their employees.

2. Private Military Security Companies (PMSCs) as New Actors in International Law (IL):

2.1. What are the PMSCs?

One of the most prominent shifts occurred in the history of modern warfare has been the emergence of private companies forming a globalized and multi-dimensional industry which trades over military-security related services¹¹. Composed of a complex division of labour, the private military-security industry has appeared to be present in most conflict regions which occurred over the last two decades, from conflicts in Angola, Croatia, Ethiopia- Eritrea, Sierra Leone to more recent wars in Iraq and Afghanistan.

¹¹ Aaron Ettinger, "Neoliberalism and the Rise of the Private Military Industry", *International Journal*, Vol. 66, Issue 3, Summer 2011, p. 746

Just in Iraq, the enormous reliance on private contractors to undertake core military tasks led *The Economist* to call it the “first privatized war”¹². Such wide-spread use of private military security companies (hereafter PMSCs) can depict a clear horizon concerning how significant the role of private contractors is in adjusting the power equivalences in modern conflicts¹³.

To provide a concrete example indicating how decisive these private entities have been in conflict regions¹⁴, one can refer to Executive Outcomes (hereafter EO), a South African-based company which was established in 1998 and staffed by the former personnel of South African Defence Force¹⁵. EO was contracted in Angola (1993) and Sierra Leone (1995) to contribute to bring the internal conflicts to the end, stabilize the region and restore the governments¹⁶.

In Angola, EO’s mission was assisting the Angolan government to confront a rebel army called National Union for the Total Independence of Angola (UNITA) by training the government soldiers from September 1993 until January 1996.¹⁷ As a result of EO’s contribution, coinciding with the UN imposing international arms sanctions against UNITA¹⁸, the Angolan

¹² *Military Industrial Complexities*, ECONOMIST, Mar. 29, 2003, at 56, mentioned at P.W. Singer, Essay, War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law, *Columbian Journal of Transnational Law* (2004), p. 523.

¹³ *Ibid.*, p.522

¹⁴ Christopher Kinsey, “Challenging international law: a dilemma of private security companies”, *Conflict, Security & Development* (2005), p.270

¹⁵ David Shearer, outsourcing war, *Foreign Policy*, No. 112 (Autumn, 1998), p. 73

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ It refers to International sanctions imposed against UNITA on September 1993, following United Nations Security Council resolution 864 to condemn the deteriorating political, military and humanitarian situation in Angola. Available at: http://www.hm-treasury.gov.uk/d/unscr_864_150993.pdf

government was able to push UNITA into significant defeats¹⁹ and eventually forced it to come to the negotiating table²⁰.

Similarly, in Sierra Leone, in 1995, EO was contracted by the Sierra Leonean government to work with local civilian militia which, in turn, empowered the Sierra Leonean government to take the control over the Revolutionary United Front (RUF). The RUF was a rebel army founded by Foday Sankoh²¹, inspired by the National Patriotic Front of Liberia and its success to overthrow the Liberian government²².

More recent examples of PMSCs shifting the history of modern warfare can be found in the US-led wars in Iraq and Afghanistan. In these examples the warfare turned to be strikingly dependent upon private sector to the extent that a wide range of activities were handled by PMSCs: from housing and communication services to logistical support, intelligence gathering and weaponry maintenance²³. To indicate how these wars contributed to a rapid expansion of the PMSC industry, one may consider the many companies operating in Iraq during and after the armed conflict, starting from 2003, such as Blackwaters – guarding officials and installations, supporting Coalition Forces and training Iraqi Army and Police – Triple Canopy – providing security in Iraq and guarding Coalition Provisional Authority

¹⁹ Shearer, supra note 15.

²⁰ Kinsey, supra note 14.

²¹ Foday Saybana Sankoh was the founder and leader of the Revolutionary United Front who entered Sierra Leone in 1991 to launch a terror campaign within its territory. He was indicted on 7 March 2003 on 17 counts of crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law. However, the indictment formally withdrew on December 2003 due to his death in custody of natural causes. , Prosecutor vs. Foday Saybana Sankoh, Special Court of Sierra Leone, available at: <http://www.sc-sl.org/CASES/FodaySankoh/tabid/187/Default.aspx>

²² Shearer, supra note 15.

²³ Singer, supra note 12, pp. 522-523

(CPA), – Vinnell – working with, inter alia, MPRI and SAIC as subcontractors to train new Iraqi army during 2003 – Dyncorp – training Iraqi and Afghan Armies²⁴ – Aegis Defence Services – coordinating private security operations for US government in Iraq since mid-2004 – Kellogg, Brown & Root – providing various supportive and logistic services essential for deployment and maintenance of US forces in Iraq)²⁵ – and Titan Corp. and CACI International Inc. – translators and interrogation specialists at Abu-Ghraib Prison in Iraq.²⁶

Indeed, having regarded the enormous reliance on private contractors in Iraq and Afghanistan, by 2004 United States appeared to be the biggest client of private military-security industry²⁷. According to the findings of *the Commission on Wartime Contracting in Iraq and Afghanistan* report, a US bipartisan congressional commission, it has been estimated that more than 260,000 contractors were employed to support Defence, State and U.S. Agency for International Development (USAID) operations during the wars in Iraq and Afghanistan, as of March 2010²⁸. These operations include traditional military operation as well as civil society support operations of a

²⁴ Cusumano, Eugenio. "Outsourcing Military Training: The Role of Security Networks in Foreign Military Assistance" *Paper presented at the annual meeting of the International Studies Association Annual Conference "Global Governance: Political Authority in Transition"*, Le Centre Sheraton Montreal Hotel, MONTREAL, QUEBEC, CANADA, March 2011, p. 16.

²⁵ Ortiz, Carlos, "The Private Military Company: An Entity at the Center of Overlapping Spheres of Commercial Activity and Responsibility", Jäger, Thomas. & Kümmel, Gerhard. (ed.), *Private military and security companies: chances, problems, pitfalls and prospects*, 1. Aufl., VS Verlag für Sozialwissenschaften, Wiesbaden, 2007, page 56-57.

²⁶ Imke-Ilse Drews, "Private Military Companies: The New Mercenaries? An International Law Analysis", in, Jäger, Thomas. & Kümmel, Gerhard. (ed.), *Private military and security companies: chances, problems, pitfalls and prospects*, 1. Aufl., VS Verlag für Sozialwissenschaften, Wiesbaden, 2007, pp. 338-339.

²⁷ Singer, supra note 12, p. 521.

²⁸ *Transforming Wartime Contracting; Controlling costs, reducing risks*, Final report to Congress Findings and recommendations for legislative and policy changes by the Commission on Wartime Contracting in Iraq and Afghanistan, p. 18-20, Available at: http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf

purely civilian nature. Though it is difficult to trace the accurate numbers in regard to the volumes of contracts or their respective contracting values, taking into account such estimated basis alone would make it evident that private sector has achieved a deep, wide and unprecedented presence within the US²⁹. The unprecedented feature of private sector presence in US military becomes clear once one compares the ratio of PMSC involved in the so called Gulf War (1991) to the ratio of the same in the Iraq and Afghanistan wars; while in Gulf War the estimated ratio was one PMSC contractor to every fiftieth uniformed US soldier, during wars in Iraq and Afghanistan the ratio had changed to one or two PMSC contractors to each uniformed US soldier³⁰. This is indeed a remarkable expansion of PMSC presence taking place during only little more than ten years.

The growth of the private military-security industry has sparked efforts to address the phenomenon within different academic disciplines³¹.

Yet, despite increasingly public as well as scholarly debates about PMSCs and their significant presence in the zones of conflict in recent years, there is still ambiguity on the nature of such entities; there is no consensus on the very premises concerning what constitutes a PMSC.³² The causes of this state of non-consensus can be understood as twofold. First, the state of secrecy and lack of transparency surrounding activities of the PMSCs makes it difficult to conduct a clear analysis based on a coherent set of data and

²⁹ Caroline Holmqvist, "Private Security Companies: The Case for Regulation", Stockholm International Peace Research Institute (SIPRI) Policy Paper No. 9, January 2005, p. 24.

³⁰ Singer, *supra* note 12, p. 523.

³¹ For example, "Thomson 1994; Arnold 1998; Zarate 1998; Cilliers and Mason 1999; Musah and Fayemi 2000; Nossal 2001; Mandel 2002; Singer 2003; Avant 2005; Leander 2005; Kinsey 2006; Percy 2007; Abrahamsen and Williams 2011"

³² Ortiz, *supra* note 25, at pp. 56-57.

evidences. Secondly, it is difficult to reach an agreement on how to define the PMSCs because these companies vary in different aspects including their “market, capitalization, number of personnel, firm history, corporate interrelationship, employee experience and characteristics, and even the geographic location of their home base and operational zones.”³³ This state of dispersal within a single industry has led scholars to present different categorizations of PMSCs³⁴.

One common categorization is based on distinction between “private military companies” (PMCs) and “private security companies” (PSCs). Accordingly, while PMCs are designed to provide offensive services, PSCs are formed to offer defensive functions. This categorization which has also been referred to as “active versus passive”, however, could be problematic. The problem would mostly emanate from the fact that there is no clear line between offensive and defensive acts. Making such a distinction depends more on the context and circumstances surrounding the act rather than the intrinsic nature of the conduct. As an example in this regard, one can refer to the so called “Blackwater incident” in April 2004³⁵. Although the initial mandate for Blackwater’s contractors was to merely provide security for the US-led Coalition Provisional Authority (CPA) in Najaf, Iraq, Blackwater contractors engaged in one of the most violent battles in Iraq; they sent

³³ Singer, P. W., “Corporate warriors: the rise of the privatized military industry”, Updated ed., Cornell University Press, Ithaca, N.Y., 2008, p. 88

³⁴ Hansen, Joseph C., “Rethinking the Regulation of Private Military Security Companies Under International Humanitarian Law”, *Fordham International Law Journal*, Forthcoming, (July 2011), p.3., Available at SSRN: <http://ssrn.com/abstract=1895546>

³⁵ Daphné Richemond-Barak, *Private Military Contractors and Combatancy Status Under International Humanitarian Law, Complementing IHL: Exploring the Need for Additional Norms To Govern Contemporary Conflict Situations*, paper presented at International Conference, Jerusalem, June 1-3 2008, p. 4

helicopters to fight against insurgents who attacked the CPA and they picked up a wounded US Marine soldier – something that included ammunition drops³⁶. These actions by Blackwater contractors amount, under IHL, to active participation in combat situations. The “Blackwater incident” indicates that what is considered offensive under certain circumstances easily can be interpreted as defensive under other circumstance and what is deemed to be a security function can turn into form a military act when the demands of the situation change.

Moreover, when it comes to application of the laws of war there is no distinction between offensive and defensive acts since they both contain an act of violence³⁷. This issue will be discussed in more detail later in section 4 of this thesis.

Another effort to define and categorize different PMSCs, known as “tip of the spear”, has been stipulated by Singer. According to this categorization, a distinction between the armed forces shall be based on their location in the battle space “in terms of level of impact, training, prestige, and so on”³⁸. Having such basis in mind, three kinds of PMSCs can be recognized: *military provider firms* that focus on tactical environment providing services at front line of the battle space like actual fighting, direct commanding of force and control of field units³⁹, *military consultant firms* that provide advisory and training services along side with strategic, operational and organizational analysis which is mostly necessary to efficiency of armed

³⁶ Holmqvist, supra note 29.

³⁷ Article 49.1 of Protocol I defines “attacks” broadly to include “acts of violence against the adversary, whether in offence or in defence.”

³⁸ Singer, supra note 33.

³⁹ Ibid.

forces⁴⁰, and *military support firms* that provide supplementary services “non-lethal” support such as logistic supports, technical supports and transportation⁴¹.

Yet, this categorization is not empty of flaws on two accounts. First, the reality of most companies would not support such clear edged categorizations. Secondly, what has been presupposed in such categorization is the assumption that there is a direct correlation between proximity of the firm and its strategic impact, something which might not be true in all cases. For example, the strategic impact of instructing soldiers might be the same, if not more, as engagement in actual combat.⁴²

To avoid the problems of the categorizations presented above, I have adopted a cumulative approach to define PMSCs. Therefore, with an intention to indicate diversity within a unified kind of industry, in this thesis I refer to a certain terminology which is called “PMSC services spectrum”⁴³. The PMSC service spectrum is defined as a continuum including so-called “private armies⁴⁴” at one end and specialized non-military tasks, such as providing medical attention in conflict environments or undertaking

⁴⁰ For example Levdan, Vinnell, and MPRI

⁴¹ Singer, supra note 33.

⁴² Holmqvist, supra note 29, p. 5.

⁴³ Ortiz, supra note 25.

⁴⁴ By “private armies” the intention is to generally refer to those PMCSs which provide services that are commonly undertaken by armed forces or at least by the assistances of armed forces. As examples, companies can be mentioned which are able “to deploy a force in an attempt to end a rebellion or restore a government to power, as the defunct Sandline International (Sandline) was contracted to do in Papua New Guinea and contributed to in Sierra Leone; to raise and maintain a degree of internal stability in conflict regions, as Executive Outcomes (EO), while active, succeeded in doing for some time in Angola and Sierra Leone; to upgrade to Western standards the military and security apparatuses of some states, as Military Professional Resources Incorporated (MPRI) accomplished in the Balkans; or to coordinate country-wide private security operations, as Aegis Defence Services (Aegis) has been doing for the United States (US) government in Iraq since mid-2004, Kellogg, Brown & Root (KBR); wide-ranging supportive and logistic services essential for deployment and maintenance of US forces in conflict regions, such as the Balkans in the 1990s and Iraq”, Ibid.

transportation in the zones of hostility, on the other end. Thus, the services provided by PMSCs can be materialized both through the engagement in actual fighting as line units or direct control of the field units, on one hand, and delivering expert military training⁴⁵ and other services such as logistics support, risk assessment, and intelligence gathering on the other hand. Therefore, instead of looking into different categories, PMSCs are being considered as constituting a continuum with two extreme ends as were just described while most PMSCs are mobile between those two ends. Nonetheless, it is important to note that the most recent attempts carried out to define PMSCs in two new documents, namely “Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict”⁴⁶ (hereafter the Montreux Document) and the “Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies”⁴⁷ (hereafter the Draft Convention), slightly but strikingly deviates from the above mentioned definition, which I use in this thesis, by avoiding to include the engagement in actual combat operations within the definition of PMSCs. Following a functional criteria approach, the Montreux Document has defined PMSCs as

⁴⁵ Singer, supra note 33, p. 92.

⁴⁶ “Montreux Document” is the product of a joint initiative launched in January 2006 by the Government of Switzerland and the International Committee of the Red Cross in an attempt to regulate PMSCs. The document consists of two parts. In first part, 27 core international obligations of states, PMSCs and their employees have been addressed. Further, in the second part, the document has contained 73 good practices for states in order to provide administrative and legislative guidance to governments in complying with those obligations. The document is available at the *Journal of Conflict & Security Law, Oxford University* (2009), Vol. 13 No. 3, 451–475

⁴⁷ “The Draft Convention” is consolidation of efforts taken to establish a more efficient regime to regulate PMSCs which was presented by the United Nations Working Group on Use of Mercenaries as a Means of Violating and Impeding the Exercise of Rights of Peoples to Self-Determination (“the Working Group”) to the 15th session of the Human Rights Council in Geneva held in July 2010.

“private business entities that provide military and/or security services, irrespective of how they describe themselves”⁴⁸. Military and security services are further defined as to include “armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel”⁴⁹. However, what has been contentiously left untouched within the ambit of the definition is the issue of involvement of PMSCs in actual combat, what I previously mentioned as PMSCs functioning as “private armies”. Although, paragraph 26 of the Montreux Document recognizes the possibility for PMSCs’ personnel to be “incorporated into regular armed forces of a state” or to be qualified as “persons accompanying the armed forces” in terms of article 4A (4), there is no distinction in this regard between PMSCs and ordinary civilians⁵⁰.

The definition provided in Draft Convention is not much far from what has been included in the Montreux Document. Accordingly, a PMSC is defined in the Draft Convention as a legally established corporation providing military/security services, on a compensatory basis and through association

⁴⁸ Montreux Document, supra note 46, p. 453.

⁴⁹ Ibid.

⁵⁰ Indeed, the Montreux Document, though not explicitly, creates this impression that PMSCs conducting combat operations, other than what comes within the narrow limits of para. 26, could be qualified as taking direct participation in hostilities. Following this impression, considering that direct participation in hostilities is what could possibly fit within “civilian category” of IHL, the document concluded in para 26(b) that PMSCs’ personnel are protected as civilians under IHL. Reaching to such a conclusion, nonetheless, is not confident regarding the actual differences between civilians, as they are conventionally understood under the regime of IHL, and PMSCs. The status of PMSCs under the regime of IHL will be discussed further in Part 3. B. I. See Laurence Juma, “Privatisation, human rights and security: Reflections on the Draft International Convention on Regulation, Oversight and Monitoring of Private Military and Security Companies”, *Law, Democracy & Development*, Vol. 15 (2011), p. 9.

of physical persons and legal entities which have a special authorization (license)⁵¹.

Although the Draft Convention has tried to present a wider understanding of the role of PMSCs by addressing each of military services and security services in distinct sub-articles⁵², it shares the contentious aspect of definition with the Montreux Document, namely, to avoid mentioning “combat operation” while enlisting the examples of military services carried out by PMSCs. According to Article 2(b), (c) of the Montreux Document, “Military services refer to specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, military training and logistics, and material and technical support to armed forces, and other related activities”. Further, “Security services refer to armed guarding or protection of buildings, installations, property and people, police training, material and technical support to police forces, elaboration and implementation of informational security measures and other related activities.”

However, the examples provided in the articles mentioned above do not constitute exhausting lists since although both documents call upon states not to contract out particular services which “could cause PMSC personnel to become involved in direct participation in hostilities”⁵³, the Montreux Document and Draft Convention both, ultimately, put it in the discretion of

⁵¹ Art. 2, (a) and (b)

⁵² Laurence Juma, “Privatisation, human rights and security: Reflections on the Draft International Convention on Regulation, Oversight and Monitoring of Private Military and Security Companies”, *Law, Democracy & Development*, Vol. 15 (2011), p. 10.

⁵³ Part II para 1. Montreux Document

states to determine what services may or may not be contracted out to PMSCs⁵⁴.

The open-ended definitions found in the Montreaux Document and the Draft Convention have made me more confident to rely on the “PMSC services spectrum” terminology and cumulatively define PMSCs as legally established multinational commercial enterprises offering services that, although vary from supplementary and housing services to weaponry maintenance and military support, generally fall within the security-military domain and “involve the potential to exercise force in a systematic way and by military means and/or the transfer or enhancement of that potential to clients”⁵⁵.

Finally, it should be noted that in order to analyze the activities of PMSCs one has to go beyond the internal structure of these companies and take into account the important role of sub-contractors in putting the plan and policy of these companies into practice. The issue of sub-contracting will be elaborated later in this thesis. However, for now it suffices to mention that considerable amount of complexities surrounding the “dilemma” of PMSCs, particularly the difficulties with transparency, accountability and responsibility that will be discussed later, emanates from the practice of sub-contracting within PMS industry.

⁵⁴ Part II para 1. Montreaux Document

⁵⁵ Ortiz, *supra* note 25, p. 60

2.2. A Historical and Political Context: How did PMSCs come into existence?

In order to provide context for the discussions to follow, this section considers the rise of PMSCs. The rise of PMSCs is should be understood within the neoliberal market framework, taking into account the international integration caused by globalization and conditioning of the modern state by the political economic practices of neo-liberalism.⁵⁶

2.2.1. Neo-liberalism:

By the mid 1980's and in the wake of globalization, in the aftermath of the attempts undertaken for raising the state efficiency, a neo-liberalist⁵⁷ wave of reform commenced in the arena of public management. It is difficult to find a unified definition of neo-liberalism since there is no agreement amongst the authoritative sources of the theory⁵⁸. However, for the purpose of this thesis, neo-liberalism can be defined as “a theory in political economic practices that proposes that human well- being can be best advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterised by strong private property rights, free markets, and free trade.⁵⁹” Relying on economism and marketism, as achieved by means of privatization, liberalization and deregulation,

⁵⁶ Ettinger, supra note 11, p. 745.

⁵⁷ For discussion of the relationship between neo-liberalism and the state, see Lee S and McBride S “Introduction” in Lee S and McBride S (eds) *Neo-Liberalism, State Power and Global Governance in the Twenty First Century* (2007).

⁵⁸ Friedrich Hayek, Milton Friedman, David Harvey and Noam Chomsky

⁵⁹ David Harvey, *A short History of Neo-liberalism*, Oxford University Press, Oxford, 2005, p. 2.

economic neo-liberalism then justifies the expansion of markets and the promotion of competition and formalism as opposed to the protectionism of the state and other bureaucratic agencies⁶⁰. Particularly, though not exclusively, within the US, neo-liberalism facilitated the creation of powerful private commercial entities driven by the objective of making profit⁶¹. In acquiescence with such climate, states have increasingly accepted the involvement of private companies in providing services which had been previously managed through the states' monopoly of power.⁶² Particularly in the context of armed conflict, such ideas of privatization and free trade promoted the desire to outsource the states' military and security functions to some private companies. The effect of such military neo-liberalism is, as I have pointed out above, most evident in the case of the US as exemplified in wars in Iraq and Afghanistan. In these wars, for the first time in the modern war history, PMSCs undertook a wide range of activities including core tasks such as combat support and weaponry maintenance⁶³. Thus, in order to understand the context from which PMSCs have risen, it is appropriate to explore the transformative interactions within the US policy which led to outsourcing governmental activities in general, together with tracing the peculiar effects of the ideology of neo-liberal economic on the US' security governance.⁶⁴ This has eventually led to an enormous reliance

⁶⁰ Juma, *supra* note 52, p. 4.

⁶¹ *Ibid.*

⁶² Ortiz, *supra* note 25, p. 56.

⁶³ Shearer, *supra* note 15. Also, Singer, *supra* note 12, pp. 522-523.

⁶⁴ Ettinger, *supra* note 11.

on private contractors within the US military structure⁶⁵ and sneaked into the international level through the globalization.

2.2.2. Privatization:

The Placement of neo-liberal ideology within the security policy in the US dates back to the post Cold War era which coincided with growing concerns on how bureaucratic features of the federal government decreased efficiency and caused waste and unmanageability to procure goods and services⁶⁶. Having a big government⁶⁷ was recognized as the cause of such inefficiency symptoms and the cure was already found to be applying neo-liberalism as an organizing policy principle⁶⁸.

Along with such a climate, the Logistics Civil Augmentation Program (LOGCAP) was designed in 1985, as the first explicit administrative initiations to place private contractors within the US military structure⁶⁹. The LOGCAP is a document that contains concepts, procedures and policies prescribing adequate use of private contractors to augment the US army force in “wartime conditions”⁷⁰. This would be possible once military units focus on core operation activities and leave non-core tasks to private contractors. However, the LOGCAP has defined the “wartime conditions”

⁶⁵ Singer, supra note 12, pp. 522-523

⁶⁶ CRS Report for Congress (June 2005), Defense Outsourcing: The Office of Management and Budget’s (OMB) Circular A-76 Policy, p. 1.

⁶⁷ “In the 1980s, the Reagan Administration emphasized the view that big government was inefficient, wasteful and unmanageable.” Ibid., p. 2.

⁶⁸ CRS Report for Congress, supra note 66, p. 1.

⁶⁹ Ettinger, supra note 11, p. 749.

⁷⁰ Department of the Army (1985), "Logistics Civil Augmentation Program (LOGCAP)", Army Regulation 700-137, 2-1-d, available at <http://www.aschq.army.mil/gc/files/AR700-137.pdf>

quite broad as to include a wide range of situations from “heightened international tensions or states of military readiness through periods of armed conflict up to and including a congressionally declared state of war.”⁷¹

The call for bringing reforms was furthered by the Clinton Administration’s National Performance Review (NPR), today under the name National Partnership for Reinventing Government (NPRG)⁷². The NPR/NPRG provides a scheme for redesigning of the federal government. The scheme contains transformation of the current government to the one that “works better and costs less”⁷³. To operationalize the plan, initially, then Vice President Al Gore led a task force to investigate how to make “tangible improvements” in regard to the government’s services to the public. The outcome was a report called *report of the National Performance Review, From Red Tape to Results: Creating a Government that Works Better & Costs Less* (hereinafter Report)⁷⁴. The report provided 384 major recommendations and together with 38 accompanying reports, 1,250 specific actions were envisaged to save \$108 billions over a five year period by reducing the number of overhead positions, in areas such as management, procurement, financial management, etc⁷⁵. Further, the idea of reducing government costs derived to enactment of the US Federal

⁷¹ Ibid.

⁷² CRS Report for Congress, supra note 66, p. 2.

⁷³ Office of the Vice President. *Serving the American Public: Best Practices in Downsizing, Bench-marking Study Report*. Report of the NPR. Washington 1997, p.36, Remarks by President Clinton Announcing the Initiative to Streamline Government, March 3 1993, Available at: <http://govinfo.library.unt.edu/npr/library/speeches/030393.html>

⁷⁴ Available at <http://govinfo.library.unt.edu/npr/whoweare/historypart1.html>

⁷⁵ Ibid.

Activities Inventory Reform Act (FAIR) in 1998. Accordingly, federal executive agencies were required to firstly conduct inquiries to identify so-called “inherently governmental” activities, distinguish them from those activities which can be undertaken by private section and then conduct managed competitions between federal executive agencies and private sections to see who can perform the activities at best⁷⁶.

The idea of outsourcing government activities accelerated during the George W. Bush Administration (2001-2009)⁷⁷. Following the same idea of reducing government’s function to those activities that it should and could do best, the Bush Administration introduced “The President’s Management Agenda” in 2001⁷⁸. The Agenda set three principles as guidelines for reforming the government. Accordingly, the government was required to be “citizen-centred” as opposed to bureaucracy-centring, “result-oriented” and “market-based”⁷⁹. Later on in the Agenda and in line with the “market-based” principle, competitive outsourcing was identified as one management initiative designed to increase governmental efficiency.⁸⁰

Such an ascendancy of the neo-liberal economy ideology at the policy-making level was encouraged by a growing US private sector lobbying for contracting activities previously preserved exclusively within the public

⁷⁶ Federal Activities Inventory Reform Act (FAIR) of 1998, available at: http://www.whitehouse.gov/omb/procurement_fairact

⁷⁷ Ettinger, supra note 11, p. 749.

⁷⁸ Available at: <http://www.cfo.doe.gov/budget/03budget/content/appendix/mgmt.pdf>

⁷⁹“U.S. OMB. *The President’s Management Agenda for FY2002* (Washington: OMB, 2001), p. 4, Available at: <http://www.cfo.doe.gov/budget/03budget/content/appendix/mgmt.pdf>

⁸⁰ Ibid. p. 4.

domain⁸¹. The harmony of such an orchestra gave rise to the projection of the concept of outsourcing the federal government's activities within the US⁸².

Following the kind of neo-liberal ideology explained above, outsourcing within the US is defined as referring to any decision made by the government in order to “purchase goods and services from sources outside of the affected government agency”⁸³ and was seen as a mechanism to enhance governmental effectiveness by reducing its scope, size and expenditures⁸⁴. Privatization is one result which, *inter alia*⁸⁵, occurs when the government decides to outsource certain goods and services which were previously provided by the government itself⁸⁶. In regard to outsourcing of the military activities, such a climate has paved the way for extending the use of private contractors in war zones⁸⁷.

2.2.3. Global War on Terrorism:

Particularly during the so-called Global War on Terrorism, following on the 9/11 attacks in 2001, the rising concern for confronting with the so-called

⁸¹ CRS Report for Congress, supra note 66, p. 2.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Outsourcing may occur as in result of applying different business decisions made by the government. “The options are the following business decisions: (1) selling the government assets and/or operational capabilities, and (2) creating inter-service agreements, voucher arrangements, franchises, or government corporations.” Ibid.

⁸⁶ Ibid.

⁸⁷ In this regard, the report of OMB Circular A-76 can provide an overview. The report provides information on the impact of FAIR Act of 1998, within the Department of Defense (DOD) commercial activities, in order to see whether recurring commercial activities should be transferred to performance by the private sector, or performed by federal government employees.

“new war”⁸⁸ along with the neo-liberal cost-efficient horizon, has given popularity to the idea of outsourcing the military and security services by the US. When referring to the “new war”, the term “new” is used to establish a distinction between traditional models of warfare which represents the Western stereotype about what waging war is on one hand, and on the other hand, what sounds unconventional to such a western perspective. Accordingly, while the “traditional” model of warfare has been described as “a contest between national armies in uniform trained and disciplined to fight to protect the national interests of a state”⁸⁹, the “new war”, instead, emerges as being carried out by non-state actors such as rebel groups, militias, criminal gangs, terrorist groups and mercenaries⁹⁰. For these “new war” actors, the goals of the war are less concerned with the national or sovereign’s interests, but rather “about identity or greed politics”⁹¹.

Such politics, in turn, might be achieved through gaining ethnic priority or economic advantage over the other ethnic or social groups rather than through territorial gain⁹². Thus, contrary to the traditional picture of war, this “new war” would more appear as a local problem which should be handed to the local police to be solved⁹³. This is at least how the majority of scholarly literature understands the “new war”.⁹⁴

⁸⁸ Kinsey, supra note 14, p. 275.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ For a critical view on such racialisation of the “new war”, see Orford 2007.

Furthermore, while traditional warfare is described as rational movements governed by set of rules known as the Laws of War – of which IHL is a part – the methods of the new war are perceived to be incapable of respecting the restraint in warfare⁹⁵ including acts such as “murder, rape, intimidation, looting and brutality”, “along with the use of child soldiers and the total disregard for non-combatant status”⁹⁶.

Confronted with this type of “uncivilized” violence, after 9/11/2001 attack, the US adopted, *inter alia*, the Quadrennial Defense Review of 30 September, 2001, (QDR) to set out the US approach toward this type of “new war”. Accordingly, the QDR lists seven strategic principles to enforce its defence policy on Global War on Terrorism, three of which hints upon the role of the private sector: (a) the focus on risk management, (b) the development of a capabilities-based approach, and (c) the transformation of the US military and defence establishment.⁹⁷ The necessity for application of these principles emanates from the assumption that the challenges are constantly changing. Applying this assumption in regard to the risk management, one has to adequately understand future risks and be able to respond pre-emptively rather than merely relying on the earlier threat-based approaches according to which the focus is on available intelligence about a particular and identifiable adversary⁹⁸. This function of responding at short

⁹⁵ Kinsey, *supra* note 14, p. 275.

⁹⁶ *Ibid.*

⁹⁷ US Department of Defense, *Quadrennial Defense Review Report (QDR)*, 30 Sep. 2001, Available at:

<http://www.defenselink.mil/pubs/qdr2001.pdf>

⁹⁸ Holmqvist, *supra* note 29, p. 35-36.

notice and with little institutional preparation is what assumed to be best performed by the private sector⁹⁹.

Similarly, the capabilities-based approach leaves behind the earlier questions, such as which actor (state or non-state) might pose the threat or at which place a confrontation would occur. Rather, the capabilities-approach focuses on how the adversary might fight¹⁰⁰. Further, a capabilities-approach demands a change in armed forces' missions which would adjust to features of the "new war", namely "surprise, deception and asymmetric warfare"¹⁰¹. That need for the transformation of the US military and defence establishment demanded a revolution in military affairs (RMA)¹⁰². However, large amounts of money were needed to restructure the military and develop new technologies. To fund the RMA, the US could choose either to reduce its global engagement or to rely on the private sector shouldering basic tasks and financial costs. Considering the security climate after 9/11 attack, the Bush Administration chose the second option. Consequently, by letting the private sector take charge of many basic tasks as well as the responsibility to invest for development of technologies and expertise, the US was able to save money and to free uniformed military to perform critical military skills¹⁰³. Therefore, relying on PMSCs sounds as extremely cost-efficient for US¹⁰⁴. However, beyond the monetary benefits, the use of the PMSCs in military-security domain has been compelling to the US also because it lessens the risk of being held responsible for probable

⁹⁹ Ibid., p. 36.

¹⁰⁰ Ibid. See also, Ballard, supra note 1.

¹⁰¹ QDR, supra note 97, p.14.

¹⁰² Secretary Rumsfeld (2002: 67), cited by Ballard, supra note 1, p. 47.

¹⁰³ Holmqvist, supra note 29. p. 36. Also, Ballard, ,supra note 1, p. 5.

¹⁰⁴ Juma, Privatisation, supra note 52, p. 5.

violations of international humanitarian law (IHL) and international human rights law (IHR) while pursuing the national security goals¹⁰⁵.

3. Private Faces of Organized Violence; Comparing the Case of PMSCs to Mercenaries

IHL is a body of law that applies to the situations of armed conflict. The laws of war – the larger and more encompassing notion of international law during armed conflict – has a long history, as old as the war itself. However, it was not until the nineteenth century that rules and principles of war were codified and shaped a written regime of law which was internationally applicable¹⁰⁶. Many of these new codifications had a particular purpose to “humanize” warfare. What constitutes the legal sources of IHL includes the set of rules and regulations embodied in particular in Hague Conventions, Geneva Conventions I-IV (GC) and the Additional Protocol I-II (AP I-II)¹⁰⁷, as well as customary international law (CIL)¹⁰⁸. In addition, there are other conventions and agreements serving as legal sources referring to specific

¹⁰⁵ Ibid.

¹⁰⁶ Christopher Greenwood, Historical Development and Legal Basis, at Dieter Fleck, *The Handbook of International Humanitarian Law*, 2nd Ed. Oxford University Press, 2008, p. 15

¹⁰⁷ ICRC has conducted an enormous study on customary international humanitarian law. See Henckaerts, Jean-Marie. & Doswald-Beck, Louise. (red.), *Customary international humanitarian law Vol. 1, Rules*, Cambridge University Press, Cambridge, 2005

¹⁰⁸ For example, St Petersburg Declaration of 11 December 1868 Renouncing the use, in Times of War, of Explosive Projectiles under 400 grammes Weight, Hague Declaration of 29 July 1899 Concerning Expanding Bullets, so-called “dum-dum bullets”, Geneva Protocol of 17 June 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, etc. Greenwood, *supra* note 106, pp. 27-34.

issues of warfare and the protection of legal assets during armed conflicts¹⁰⁹. IHL applies to the situation of armed conflict, including both international armed conflict (IAC) and non-international armed conflict (NIAC). IAC, also including cases of partial or total military occupation¹¹⁰, exists when one state uses armed forces against another state¹¹¹. NIAC, on the other hand, is defined as “a confrontation between the existing governmental authority and groups of persons subordinate to this authority or between different groups none of which acts on behalf of the government, which is carried out by force of arms within national territory and reaches the magnitude of an armed confrontation or civil war.”¹¹²

Considering this brief introduction, it can be said that the IHL is traditionally conceived as a system regulating violence between states and/or organized armed groups that shared many of the territorial, administrative and “public” characteristics of states. Then, when it comes to PMSCs, the question would be how IHL will accommodate this private face of organized violence. However, dealing with private organized violence is not without precedent in IHL. The most obvious example is the case of mercenaries and the question is what the final orientation of IHL was towards mercenaries. Relying on the conceptual heritage in IHL left from the European Code of Honour, soldiers fighting for money were dishonoured against the one who fought for the glory of God or defending

¹⁰⁹ Knut Ipsen, *Combatants and Non-Combatant*, at Dieter Fleck, *The Handbook of International Humanitarian Law*, 2nd Ed. Oxford University Press, 2008, p. 79.

¹¹⁰ Common Article 2, para. 2 Common to the GCs.

¹¹¹ Christopher Greenwood, *Scope of Application of Humanitarian Law*, at Dieter Fleck, *The Handbook of International Humanitarian Law*, 2nd Ed. Oxford University Press, 2008, p. 46.

¹¹² *Ibid.*, p. 54.

the honour of defenceless¹¹³. Based on such conceptual heritage, PMSCs have been called the new mercenaries by some critics. Accordingly, the plain image of being paid to fight has directed these critics to depict PMSCs in the same frame as the mercenaries and to suggest that these private entities should be considered as mercenary companies – as if the notion of the mercenary has just reappeared in a new garment¹¹⁴.

Against such a background, PMSCs have tried to avoid being labelled as mercenary industries. Instead, they have tried to build their identities based on their differences from the outlawed mercenaries, something that will be discussed latter on in this thesis¹¹⁵. Such efforts by PMSCs, concomitant with the ascendancy of the neo-liberalism and its advocacy for a free market, in particular in the US as explained above, have been rather successful; they have helped produced an image of the PMSCs as legally established companies.¹¹⁶

What will be investigated in the following is the status of PMSCs in relation to mercenaries; in what ways are they similar and in which sense do they differ, how creditable is the logic of assimilation or differentiation between PMSCs and mercenaries? And finally, what this comparison means to IL? In doing this, it is essential to have an introductory note on what is considered as *Mercenarism*.

¹¹³ To read more on this see; Robert A, Nye, *Masculinity and Male Codes of Honor in Modern France*, University of California Press, 1993. Paul, Robinson, *Military honor and conduct of war: from ancient Greece to Iraq*, Routledge, 2006.

¹¹⁴ Liu ,Hin-Yan, “Leashing the Corporate Dogs of War: The Legal Implications of the Modern Private Military Company”, *Journal of conflict and security law*, Oxford University Press, 2009, p. 143. Also, Hansen, supra note 34, p.16. See, in general, Montgomery Sapone, “Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence”, *California Western International Law Journal*, Vol. 30, Issue 1, (1999).

¹¹⁵ Juma, supra note 52, p. 8.

¹¹⁶ Ortiz, supra note 25, p. 60

3.1. Definition of Mercenaries

One of the problems in IL in regard to addressing mercenaries is the difficulty in providing an appropriate definition of the latter. Nonetheless, the issue of involvement of private non-state actors in armed conflicts have been slightly touched upon by the international laws of war in the modern state system.

The earliest codified international laws of war in the modern state system were the Hague Conventions that hinge upon a distinction between the private actions of individuals and what could influence interstate relations¹¹⁷. Accordingly, the 1907 Hague Convention on Neutral Powers and Persons in case of War on Land¹¹⁸ contains certain legal standards for neutral parties and persons in cases of war. However, when it comes to the participation of nationals of neutral states in hostilities there is, according to the Convention, no obligation imposed on the Member States to restrict their nationals from being hired by belligerents¹¹⁹. Fighting for foreign states would just cause nationals to lose their status as “Neutral” and be treated in the same way as the belligerents’ own forces¹²⁰.

However, further involvement of mercenaries in the fights against several nascent state regimes in Africa, together with their confrontation with the

¹¹⁷ Singer, *supra* note 12, p. 526.

¹¹⁸ Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V), Oct. 18, 1907, *available at* http://avalon.law.yale.edu/20th_century/hague05.asp

¹¹⁹ *Ibid.*, Art. 6.

¹²⁰ *Ibid.*, Art. 17.

UN in the course of UN Operation in Congo, 1960–1964,¹²¹ alerted the UN to adopt certain anti-mercenary measures, *inter alia*, the 1970 Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations (1970 Friendly Declaration). Accordingly, by condemning the practice of the use of mercenaries against movements for national liberation and independence, the 1970 Friendly Declaration called upon states to take measures for preventing the recruitment, financing and training of mercenaries in their territories and to prohibit their nationals from serving as mercenaries. However, the 1970 Declaration placed the burden of enforcement exclusively on the states. Considering that the states appeared often as unwilling, unable, or just uninterested in taking such measures, the Declaration were not very successful in confronting with mercenaries¹²².

The legal efforts to confront private military actors furthered by adaptation of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.

3.1.1. The Definition of the Protocol Additional to the Geneva Conventions:

In its Article 47, the Protocol prohibits the member states to grant mercenaries the right to be a combatant, and consequently the status and

¹²¹ Ibid.

¹²² Ibid.

privileges of a prisoner of war (POW). Further on, the Article defines mercenaries as including any person who;

- (a) Is specially recruited locally or abroad to fight in an armed conflict;
- (b) Does, in fact, take part in the hostilities;
- (c) Is motivated to take part in hostilities essentially by the desire for private gain;
- (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;
- (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.”

Yet, rigid restrictions set in the definition defeats the application of the Protocol I in the enforcement phase. The most problematic issue which causes such inefficiency is the required intent or motivation for the identification of mercenaries. First, it overlooks so-called “confessional mercenaries” who have religious intentions but also are economically compensated for their fights¹²³. Moreover, relying on intent to raise criminal responsibility makes the convention unworkable; intent simply is too difficult, if not impossible, to prove. The intent requirement concerned has the key importance for identifying a person’s criminal status but there is no objective way to assert that the intent in a particular case is exclusively private gain – the one accused for being a mercenary can always claim that he/she had been pursuing other goals than a private gain. That difficulty to

¹²³ Singer, *supra* note 12, p. 531

secure evidences aggravates when it comes to extraterritorial jurisdiction over nationals, especially in situation of armed conflict.¹²⁴

Meanwhile, the general movement of condemning mercenaries has been pursued on a regional level – one of the most important of regional efforts at criminalization is the “Convention for the Elimination of Mercenarism in Africa” passed by the Organization of African Unity (OAU) in 1972.

3.1.2. The Definition of the OAU Convention:

Article 1 of the Convention defines mercenaries by referring to the purpose of their employment. Accordingly, a mercenary is defined to include everyone, not national of the state against which the action is directed, who is hired to overthrow or undermine the independence, territorial integrity of normal working of one of the OAU Member States or OAU-recognized liberation movements¹²⁵. Further, in Article 2, a more strict position is taken against mercenaries by considering the acts of mercenaries to constitute crimes against the peace and security of Africa and punishable as such¹²⁶. Despite such an aggressive position the ban against mercenaries is not absolute under the Convention. Rather, *mercenarism* is still allowed if the actor serves purposes other than what is set in Article 1, as far as his/her

¹²⁴ Kinsey , supra note 14, p. 278.

¹²⁵ “Under the present Convention a 'mercenary' is classified as anyone who, not a national of the state against which his actions are directed, is employed, enrolls or links himself willingly to a person, group or organization whose aim is: (a) to overthrow by force of arms or by any other means the government of that Member State of the Organization of African Unity; (b) to undermine the independence, territorial integrity or normal working of the institutions of the said State; (c) to block by any means the activities of any liberation movement recognized by the Organization of African Unity.”

¹²⁶ Art. 2.

action does not hurt the existence, maintenance or stability of one of governments or liberation movements endorsed by the OAU¹²⁷. Hanging the criminality of the act upon the purpose of the actor is a direct result of a political bias pursued by the OAU, namely the intention to protect the Member States or its recognized movements rather than confronting mercenaries in general. Consequently, the Convention allows African governments to hire non-nationals, as long as they are used to defend the governments from “dissident groups within their own borders”. However, the use of mercenaries is forbidden once they turn to act against rebel groups which are endorsed by the OAU¹²⁸. For example, as Singer points out, “the South African government, which was outside the OAU at the time, was legally prohibited from hiring foreigners to fight against Nelson Mandela’s African National Congress (ANC), a liberation movement that the OAU supported”¹²⁹. Finally, the lack of a real enforcement mechanism has rendered the Convention ineffective.

Along with such regional efforts to combat mercenaries, the UN established the International Convention against the Recruitment, Use, Financing and Training of Mercenaries in 1989, pursuing a way to tackle the problems of previous documents.

3.1.3. The Definition of the 1989 UN Convention:

¹²⁷ Referring to the Zarate’s interpretation of Article 1, Juan Carlos Zarate, “The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Order”, *Stanford Journal of International Law*, Volume 34, Issue 1, (1998), p. 128.

¹²⁸ Singer, *supra* note 12, p. 529.

¹²⁹ *Ibid.*

Article 1 and 2 of the Convention defines mercenaries as any person who:

“(a) Is specially recruited locally or abroad in order to fight in an armed conflict;

(b) 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 functions in the armed forces of that party;

(c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(d) Is not a member of the armed forces of a party to the conflict; and

(e) 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.”

Also, the title of mercenary includes any person who qualifies the same requirements in any other situation that aims at overthrowing a government or undermining the constitutional order or territorial integrity of a state.

Considering this definition, the Convention provides a more inclusive definition of mercenaries than the one set forth in Protocol I. Accordingly, the recruitment, use, financing and training of mercenaries are declared as offensive in the 1989 Convention. Yet, the Convention was not successful in solving the legal confusion surrounding the definition of mercenaries.¹³⁰

Still, the requirements set out in the articles of the Convention are extremely difficult to be proved. Further, such restricted requirements narrow the

¹³⁰ Ibid., p. 532

scope of the definition in a way that leaves hardly any room for applicability of the Convention¹³¹. Moreover, instead of emphasizing the nature of the act to identify the offence of *mercenarism*, criminal status is still hinged upon the intention of the actor; this brings about the same challenges in regard to the workability of definition as with Protocol I, already discussed above. Further, in regard to judicial competence, states have jurisdictions to deal with the crime of *mercenarism* under the Convention only if it is committed within the boundaries of a state or by a national of a state¹³². Finally, since the Convention does not provide any monitoring mechanism for its provisions, the enforcement of the Convention is still remained to the will, capability and interest of the individual member states¹³³.

3.2. Do PMSCs Differ from Mercenaries?

Considering the ambiguities arising from the legal regulations discussed above, it is not surprising that PMSCs resort to precisely this ambiguity in order to establish arguments through which the PMSCs distinguish themselves from the outlawed mercenaries. To assess whether PMSCs can be actually recognized as mercenaries one has to return to the constitutive elements in the definition of mercenaries and evaluate to what extent the PMSCs fit within the said definition. To do so, I will look into the most recent definition set forth in the 1989 International Convention against the

¹³¹ Ibid., p. 531

¹³² Kinsey, *supra* note 14, p. 284.

¹³³ Ibid.

Recruitment, Use, Financing and Training of Mercenaries and evaluate its applicability to the case of PMSCs.

As in respect to the first requirement of Article 1 of the 1989 Convention, a difficulty rises while asserting the requirement of being “specially recruited locally or abroad in order to fight in an armed conflict¹³⁴” to the case of PMSCs. This holds a two-edge concern. The first concern is the fact that it would rarely occur that the PMSCs’ contract is tied to one specific armed conflict or a definite region.¹³⁵ Rather, most PMSCs’ employees are recruited on a multiple task basis, for a period of time, to provide demanded services without being tied to any specific conflict or conflict area¹³⁶. Secondly, it does not often happen that a PMSC is being contracted with a specific purpose to fight. Instead, PMSCs undertake quite different range of activities, as I have expanded on above, including what may be inherently military in nature as well as technical and logistical supports, military consultancy and military training programs.

As in regard to the second requirement, i.e. of being motivated by private gain, it has been argued that unlike mercenaries who are driven by individual profit, PMSCs are registered corporate entities, built on permanent business structures, which have assets and hold legal personality. Thus, what is received by PMSCs’ personals is business profit – rather than individual profit – which can be gained by following the companies’

¹³⁴ Article 1 (a) of UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries in 1989

¹³⁵ Hansen, *supra* note 34.

¹³⁶ For example EO used this approach and consequently was excluded from the scope of the definition by employing retired soldiers to fight in Angola and then moving them to Sierra Leone. – See Shearer, *supra* note 15, pp.39–55.

practices and policies¹³⁷. Accordingly, the structures of PMSCs are settled in order to make PMSCs' employees responsible to their superiors, bind the superiors by the content of the contracts and make the company superiors – and not the employees – liable before the clients, and not in relation to IL. With such structures, the PMSCs are said to be distinguished from mercenaries¹³⁸.

Further, concerning both the requirement of nationality and the relation with the state armed forces¹³⁹, one obstacle for applying the definition to the case of PMSCs is that while mercenaries are defined to be foreign individuals not belonging to the armed forces of a Party to the conflict, PMSCs' employees can be integrated into the armed forces of the states involved in the conflict. To mention an example, one can refer to the Sandline International in its contract with Papua New Guinea in 1997. Through that contract, Sandline was mandated to help the government to confront a rebel group. However, to avoid being labelled as mercenaries, the government deputized them under the title of “special constables” even though they were considered as foreigners¹⁴⁰. Yet, to avoid being labelled as mercenaries, it is also likely that PMSCs' employees will be granted the citizenship¹⁴¹. This is often the case in respect to weaker states which are dependent upon the help of PMSCs to bring about stability in the conflict region.

¹³⁷ Kinsey, *supra* note 14, p. 282.

¹³⁸ *Ibid.* Also, Singer, *supra* note 12, p. 532.

¹³⁹ Article 1(c), (d), (e) of UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries in 1989

¹⁴⁰ Kinsey, *supra* note 14, p. 283.

¹⁴¹ *Ibid.*

3.3. Conclusion; The Implication of Differentiation from Mercenaries

The arguments, which were already mentioned, to distance PMSCs from the illegitimate mercenaries, not only inform us to consider PMSCs independently as a new face of organized private violence but also, it unmasks a developmental process in which states and international community have changed their orientation towards organization of private violence. Taking into account the neo-liberal context of IL, that was explained earlier, from which PMSCs have raised, one can see how states and international community showed flexibility to accommodate this new face of organized private violence as legitimate and normal whereas it was not the case in regard to the similar entity of mercenaries. Otherwise, one could even say that whole these differentiations with mercenaries do not necessarily imply the legitimacy of PMSCs. The fact is that the difficulties mentioned above are not exclusive to the case of PMSCs. Therefore, they do not provide sufficient grounds for distinguishing PMSCs from the mercenaries. If there are challenges to accommodate PMSCs within the definition provided in the documents explained above, it is not necessarily an indicator of their distinction from very similar entities of mercenaries. Rather, it should be considered as the shortcomings of such a definition and the problem of loose (legal) formulations of who a mercenary is. As is discussed earlier, these shortcomings have rendered the different

conventions and declarations unworkable even in regard to the mercenaries themselves¹⁴².

4. PMSCs and Status Determination Dilemma under the IHL

4.1. Overview:

One important categorization which IHL, along with the general laws of war emphasises, it is the very fundamental principle of a distinction between combatants and civilians, as well as between military objectives and civilian objectives¹⁴³. This key distinction determines the international legal status of the two categories of people and objects. In the event of an IAC, these statuses indicate the *primary status* of the persons or properties which in turn, determines the protection afforded to them as well as legal consequences of their conducts¹⁴⁴. Accordingly, military force can be legitimately directed against combatants and military objects whereas civilians and civilian objects are protected from being lawfully military targeted.¹⁴⁵ Being recognized as a combatant, the person is granted with particular rights and entitlements which are called the “combatant’s privileges”. These privileges include the licence to conduct hostilities¹⁴⁶,

¹⁴² Singer, *supra* note 12, p. 532.

¹⁴³ Ipsen, *supra* note 109, p. 79.

¹⁴⁴ *Ibid.*

¹⁴⁵ Article 48, 49, para.1, 51, para. 2 and 6, 53, 54 para. 4, 55 para. 2, 56 para. 4 AP I.

¹⁴⁶ Article 3 Hague Regulations.; Article 43, para. 2 AP I.

enjoying immunity from prosecution under domestic law for such actions – as far as these acts are in compliance with IHL,¹⁴⁷ as well as a right to be rewarded POW status and protection under the third Geneva Convention if or when captured by the adversary¹⁴⁸.

A civilian, on the other hand, is prohibited from direct participation in hostilities (DPH) – or else she/he loses the right to protection against the effect of the hostilities for the duration of each specific act¹⁴⁹. Also, if she/he acts in a conduct of hostility like killing an adversary soldier, she/he can be prosecuted for the crime of murder as defined under domestic law¹⁵⁰. Contrary to the combatants, when captured, civilians are not entitled to POW status¹⁵¹ although they enjoy other protections while in detention¹⁵² and may be granted the same treatment as POWs by the detaining power¹⁵³.

In regard to NIAC in general, the source of reference is the common Article 3 GC I-IV, which provides a minimum protection standard for the victims of conflicts, and AP II wherein those standards are elaborated¹⁵⁴. Apart from the treaty sources already mentioned here, laws and regulations on NIACs are nourished by a growing body of customary law. According to these customary principles, defined by the International Committee of the Red Cross in its large project on customary IHL¹⁵⁵, most of the standards and

¹⁴⁷ One may note Article 44, para 2 AP I according to which while combatants are obliged to act in compliance with laws on war, the violation of these laws shall not deprive the combatant from his right to be a combatant.

¹⁴⁸ Article 3, sentence 2 Hague Regulations, Art. 44 para. 1 AP I.

¹⁴⁹ Article 51, para. 3 AP I, Article 13, para 3 AP II.

¹⁵⁰ Hans-Peter Gasser, Protection of the Civilian Population, at Dieter Fleck, *The Handbook of International Humanitarian Law*, 2nd Ed. Oxford University Press, 2008, p. 262.

¹⁵¹ Article 4 and 5 GC III.

¹⁵² Article 45, 75 AP I, Article 5 GC IV.

¹⁵³ Gasser, *supra* note 150, p. 262.

¹⁵⁴ Greenwood, *supra* note 106, p. 55

¹⁵⁵ Henckaerts & Doswald-Beck, *supra* note 107

fundamental protections provided in the GC's and AP I-II for civilians are applicable also in the situation of a NIAC¹⁵⁶. Accordingly, during IACs as well as NIACs civilians should be distinguished from persons involved in the conflict as DPHs or combatants. Following such a distinction, the armed forces of the state, as well as any other non-state party involved in a NIAC, shall not direct military attacks or other acts of violence against civilians¹⁵⁷.

Thus, there are three main reasons that make it essential to determine if PMSCs' employees shall be considered as combatants or civilians. The first reason is to know if they can take direct participation in hostilities – DPH – without therefore losing a status whereby they are protected. The second reason, which derives from the first, is to see whether they may be prosecuted for acts of hostilities. Finally, status determination under IHL of PMSCs' employees is important to the adversary since the status under IHL informs the adversary whether to consider PMSCs' employees as lawful target and attack them lawfully or not.

Civilians are not defined separately under IHL. However, since the civilians/combatants categories are mutually exclusive, civilians are defined negatively. Therefore, all individuals who cannot be considered as combatants¹⁵⁸ and all objects which cannot fit within the definition of military objects provided by IHL must be recognized as civilians or

¹⁵⁶ Christian Schaller, *Private Security and Military Companies under the International Law of Armed Conflict*, at *Private Military Security Companies*, 2007, p. 357

¹⁵⁷ Common Art. 3 GC I-IV, and Articles 4 and 13 AP II

¹⁵⁸ Article 50, para. 1 AP I

civilian¹⁵⁹. Therefore, I have to start the evaluation by investigating whether PMSCs' employees can be labelled as combatants.

4.2. Status Determination of PMSCs' Employees under IHL

4.2.1. PMSCs as Combatants?

According to GC I-IV and the AP I-II, combatant status can be considered either as state of *de jure* or *de facto* combatant. The question then breaks down into two questions: a) if PMSCs' employees can be considered as *de jure* combatants through being integrated into the states' armed forces under Article 4A(1) of the GC III or Article 43(3) AP I, and b) if they can be recognized as *de facto* combatants by meeting the conditions for being a militia set forth in Article 4A(2) GCIII or Article 43(1) and (2) AP I¹⁶⁰.

¹⁵⁹ It is worth mentioning that there have been efforts undertaken to establish a third category under the IHL such as quasi-combatant or unlawful combatant. However, such efforts have not received enough supports in literature.

¹⁶⁰ Katja Weigelt & Frank Marker, "Who is Responsible? The Use of PMCs in Armed Conflict and International Law", at Jäger, Thomas. & Kümmel, Gerhard. (red.), Private military and security companies: chances, problems, pitfalls and prospects, 1. Aufl., VS Verlag für Sozialwissenschaften, Wiesbaden, 2007, p. 381- Article 4(A) 2 defines armed forces as; "Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war". Article 43(1) AP I defines the armed forces as consisted of "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."

In regard to the first case, the integration within the armed forces of a state party to the conflict depends upon the decision of the concerned state¹⁶¹. In regard to the formal integration of the individuals into the armed forces, although integration is possible, it would rarely, if ever, happen to the case of PMSCs' employees since it would be against the initiatory purpose of outsourcing military-security services. As it has been showed earlier in this thesis, contracting PMSCs provides the state with a "flexible instrument to handle new technologies and tasks" while keeping financial and political costs low¹⁶². On the contrary, the integration of PMSCs into the national army would undo such advantages¹⁶³. Such integration is even more unlikely when it comes to the sub-contractors.

Apart from these strategic, political and financial concerns, the challenge remains in regard to the matter of recruitment. It is questionable if a mere contract between a state and a PMSC can be qualified as formal integration of PMSCs' employees into the armed forces. If a state wished to formally incorporate PMSCs' employees into its armed forces, it could readily do so. However, the mere fact that no formal recruitment has occurred would rule this possibility out¹⁶⁴. Also here, the confusion rises when one deals with the practice of sub-contracting. It is unlikely that contractual relationship

¹⁶¹ Article 43(3) AP I read: "Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict". Implied from Article 4(1) GC III, *de facto* combatants are recognized as "Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces". Also see, Lindsey Cameron, "Private military companies: their status under international humanitarian law and its impact on their regulation", *International Review of the Red Cross*, Volume 88, No. 863, September 2006, p. 583

¹⁶² Weigelt & Marker, *supra* note 160.

¹⁶³ *I bid.*

¹⁶⁴ Michael N. Schmitt, "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees", *Chicago Journal of International Law*, 2004-2005, p. 524.

between the state and the PMSC can expand enough to embrace multi-layer sub-contractors. Indeed, if all PMSC's employees and their sub-contracted employees were integrated into the armed forces of the state, these employees would be regarded as equal to the national armed forces and there would be no more confusion – neither in respect to their status nor their rights and responsibilities¹⁶⁵. However, as it has been said earlier, integration into the armed forces of the state is exactly the opposite of the whole point of privatization¹⁶⁶.

Returning to the alternative of a *de facto* combatant status, the question is whether PMSCs' employees can be qualified as combatants on account of their acts and by meeting the conditions set forth in Article 4A(2) GC III or Article 43 AP I. It should be first noted that there is a crucial difference between Article 4A(2) GC III and Art. 43 AP I which might bring different consequences once applying to the case of PMSCs. Accordingly, while in the GC III “armed forces” are being divided to “militias forming part of the armed forces,” on the one hand, and “other militias...and volunteer corps” on the other, in Article 43 AP I, such distinction has been abandoned and replaced by general reference to “armed forces”. The aim of this revision is said to remove the necessity to refer to a State's domestic law in order to determine who is a member of the armed forces and who is not¹⁶⁷. Therefore, assuming that the other requirements of Article 43 are fulfilled, the Article was intended to include all groups which have some sort of

¹⁶⁵ Weigelt & Marker, *supra* note 160, p. 382.

¹⁶⁶ Cameron, *supra* note 161, p. 583

¹⁶⁷ Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions, Organised by the University Centre for International Humanitarian Law, Geneva, International Conference Centre, Geneva (29-30 August 2005), p. 10.

factual link to the regular armed forces into the definition of “armed forces”¹⁶⁸. This interpretation is in line with the functional approach taken by Article 43(1), being that, whether a group is part of the “armed forces” depends primarily on whether the group is fighting on behalf a party to the conflict¹⁶⁹.

Moreover, Article 43(1) provides a lower threshold by requiring that the group be “under a command responsible” to a Party to the conflict, whereas Article 4A(2) requires that the group can be described as “belonging to a Party to the conflict.” The consequence is that it is more likely that a PMSC constitutes a State’s “armed forces” within the definition set forth under Article 43(1) AP I.¹⁷⁰ Therefore, depending on which Article being applied, there might be different responses to whether PMSCs and their employees can be considered as *de facto* combatants or not. Applying Article 43(1) AP I to the case of PMSCs, Katja Weigelt & Frank Marker, for example, consider PMSCs’ employees as *de facto* combatants. They argue that PMSCs not only constitute armed units which are acting on behalf of the state due to their contractual relationship, PMSCs also have a command responsibility to the state for the conducts of their subordinates through the contract. Therefore, PMSCs can be said to be generally subject to some form of supervisory direction analogous to command¹⁷¹.

¹⁶⁸ Michael Bothe, Karl Josef Partsch and Waldmar A. Solf, *New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Addition*

¹⁶⁸ Michael Bothe, Karl Josef Partsch and Waldmar A. Solf, *New Rules al to the Geneva Conventions of 1949*, Martinus Nijhoff, Publishers, The Hague, 1982, p. 234. Also, Expert Meeting, *supra* note 167

¹⁶⁹ Expert Meeting, *supra* note 167

¹⁷⁰ *Ibid.*, pp. 10-11.

¹⁷¹ Schmitt, *supra* note 164 p. 529.

This position has been, nonetheless, criticized by saying that PMCs would probably not fulfill the requirement of being under a responsible command of the state party to the conflict. Critics have pointed out to the present inability of many States to subject members of a PMC to their criminal jurisdiction as an indicator which precludes application of Article 43(1) AP I to the case of PMSCs¹⁷².

As in regard to the requirement of organizational structure and internal disciplinary system, Weigelt & Marker believe PMSCs enjoy at least a minimum of internal organizational structure and discipline, considering the fact that many employees of PMSCs are former military staff. Finally Weigelt & Marker argue that most PMSCs have their own codes of conducts which expectedly commit their employees to the rules and principles of IHL. In regard to this last condition, namely acting in accordance with the laws and customs of war, Weigelt & Marker add that it is essential to consider the systematic conduct and policy of the company as a whole rather than weighting incidental misconduct of individual employees¹⁷³.

On the other hand, following the definition provided under the GC III, Lindsey Cameron concludes that PMSCs' employees cannot be granted combatant status under Article 4A(2) by pointing out two issues. First, she raises doubt over the applicability of the opening paragraph which requires

¹⁷² Expert Meeting, *supra* note 167, pp. 9-10. As an example in this regard, one expert referred to the 1956 UK legislation according to which UK is competent to try civilians who commit offences abroad, and moreover, to try those civilians in theatre. However, the expert continued, this jurisdiction is limited to those who are directly employed by Her Majesty's Government. Consequently, it has been said that members of a PMC would not generally be under the jurisdiction of the British Government and thus not "under a command responsible" to the UK.

¹⁷³ Weigelt & Marker, *supra* note 160, pp. 382-383

that the militia (PMSCs in the present case) must “*belong*” to a Party of the conflict. This, again, brings up the entire challenge of asserting such “belonging” relationship to the state. Cameron explains this challenge of “independence from the armed forces yet belonging to a party to the conflict.” She clarifies: “those PMCs that most probably “belong” to the US (in that they carry out services directly for the US forces) lack the independence necessary to be considered a separate militia, but remain outside the actual armed forces. Those PMCs that enjoy greater independence by virtue of the fact that they may be subcontracted by a reconstruction agency, on the other hand, are less likely to “belong” to a party to the conflict.”¹⁷⁴ Further, Cameron notes that the four requirements must *all* be met by the group as a whole. This suspends the applicability of the Article to the PMSCs’ employees upon a “company-by-company analysis”. As in regard to Iraq, there are many companies operating that act differently; some of them wear uniform while some others do not. Even those who wear uniform and look very much like the Article 4A(2) forces are in fact civilians. These ambiguous situations make it difficult to follow the IHL rules¹⁷⁵. Nonetheless, IHL regulations, as the laws governing the situation of war, need to be straightforward. Otherwise, if the laws were confusing, combatants would not reasonably be able to follow the rules. As Cameron elaborates, “if it is virtually impossible for opposing forces to know which PMC employees are accurately perceived as having combatant status (and therefore as legitimate military objectives), and which PMC employees are civilians and possibly even protected persons (the shooting of

¹⁷⁴ Cameron, *supra* note 161, p. 585. See also, Schmitt, *supra* note 164, p. 529

¹⁷⁵ *Ibid.*, p. 585.

whom could constitute a grave breach of the Geneva Conventions), the resulting confusion could discourage any attempt to comply with humanitarian law.”¹⁷⁶

Finally, by resorting to a teleological interpretation of Article 4A(2), Cameron maintains that a categorization of PMSCs’ employees as combatants and consequently granting them with the rights of POWs, is at odds with the very historical purpose of the Article. Accordingly, the historical justification for adaptation of Article 4A(2) was to allow partisans in the Second World War to have the POW status.¹⁷⁷ However, to make an equation between those partisans and the current actors in armed conflicts, one shall take into account the “resistance” role of those militias. This, in turn, makes examples such as “the remnants of defeated armed forces or groups seeking to liberate an occupied territory” appear suitable to be equalized with those partisans, rather than PMSCs¹⁷⁸.

To summarise, it is unlikely that PMSCs’ employees become qualified as combatants. Therefore, considering the very binary categorization of combatants and civilians under IHL, the question is whether PMSCs’ employees are or can be considered as civilians.

4.2.2. PMSCs as Civilians?

Recognition of PMSCs’ employees as holding civilian status has enjoyed support among states. This is implied by the two recent documents; a) the

¹⁷⁶ Ibid., pp. 584-585.

¹⁷⁷ Ibid., p. 586- Also Jean Pictet, *The Geneva Conventions of 1949: Commentary III Geneva Convention*, ICRC, Geneva, 1952, pp. 52ff.

¹⁷⁸ Cameron, *supra* note 161, p. 586.

Montreux Document, produced by the ICRC in conjunction with seventeen governments, and b) the Draft Convention, adopted by the UN Working Group. In both documents the position favoured is to grant the PMSCs' employees status as civilians. There might be just a slight difference implied from the language used by each document. In the Montreux Document, PMSCs' employees are *presumptively* considered as civilians, which means that they are protected as civilians unless they fit one of three exceptions: a) being incorporated into the regular armed forces of a State, b) being members of organised armed forces, groups or units under a command responsible to the State, or c) they otherwise lose their protections as determined by international humanitarian law, such as taking a DPH¹⁷⁹. Nonetheless, though the UN Working Group has not stipulated the status of PMSCs under IHL within the Draft Convention, it has implicitly gone a bit further in favouring the civilian status by *effectively* prohibiting PMSCs' employees from taking a DPH.¹⁸⁰

Yet, the recent position to count PMSCs' employees in the civilian category is not out of critics either. It is true that presuming PMSCs' employees or at least vast majority of them, as civilians honours a general IHL presumption of favouring the civilian status in case of doubt¹⁸¹. However, such presumption is over-inclusive in a sense that it fails to address those services which involve military operations. Although this status determination seems consistent with the way that PMSCs' and their employees are defined in both the Montreux Document and the Draft Convention, this would not

¹⁷⁹ Montreux Document, 26 (b). Also, Hansen, *supra* note 34, pp. 12-13.

¹⁸⁰ Draft Convention Article 9-10. Also, Hansen, *supra* note 34, p. 13.

¹⁸¹ Article 50 AP I

reflect the whole truth of PMSCs since, as is mentioned earlier in this thesis, some PMSCs' and their employees are, indeed, contracted to perform combat operations¹⁸². Apart from that, presuming PMSCs' employees as civilians, also, hinges upon the concept of direct participation in hostilities (DPH) which brings certain difficulties when applied to the case of PMSCs' employees. This issue will be under scrutiny in the following.

4.3. Applying the Criterion of Direct Participation in Hostilities (DPH) to Determine the Status of PMSCs Employees

In order to examine workability of the test of DPH to the case of PMSC's employees, it is necessary to briefly introduce the concept of DPH under IHL. Therefore, I dedicated the following part to briefly explain the concept of DPH and the practical challenges of using such a concept.

4.3.1. The Concept of DPH and Its Workability in the Case of PMSCs' Employees

As has been discussed earlier in this thesis, status determination brings entitlement and determines for the other party to the conflict how to act towards other actors. However, in regard to the PMSCs, conditioning the status determination to the test of DPH makes it completely ambiguous and impractical in the situation of an armed conflict. This is because the meaning and scope of direct participation, whether in international or non-

¹⁸² See under part 2.1. of this thesis- Also, Hansen, *supra* note 34, p. 2.

international armed conflict, is highly ambiguous. There are disagreements on what constitutes DPH at all.

Since there is no uniform and clear definition, whether a civilian is taking a DPH has remained a question of the fact which shall be examined in a case-by-case basis¹⁸³. Relying on a functional approach criteria, the ICRC has produced a ninety pages long Interpretative Guidance on the Notion of DPH¹⁸⁴. In an attempt to clarify what constitutes DPH, the ICRC Interpretative Guidance has provided ten recommendations to determine DPH. However, one may note that the ambiguity and disputability of the notion of DPH is evident from the long instruction explaining how to apply such recommendations. The Guidance consists of three elements which should be satisfied cumulatively in order to qualify an action constituting DPH; a) threshold of harm, b) direct causation and c) belligerent nexus.¹⁸⁵ As for the first element, activities are considered as DPH when they “adversely affect the military operations or military capacity of an adversary” as a primarily criterion, or “directly inflict death, injury or destruction on persons or objects” as the alternative standard.¹⁸⁶ According to the second element, there should be a direct causal link between such act

¹⁸³ ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, June 2009 (prepared by Nils Melzer) [hereinafter Interpretive Guidance], Section B, p. 41, available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>. Also, Jean- Marie Henckaerts, Study on Customary International Humanitarian Law: A contribution to the understanding and respect for the rule of law in armed conflict, International Review of Red Cross, Volume 87, No. 857, March 2005, p. 190.

¹⁸⁴ Melzer, supra note 183

¹⁸⁵ Ibid., These elements have been discussed further by Melzer, Nils at “Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities”

¹⁸⁶ Ibid.

and the harm likely to result from it within the hostility.¹⁸⁷ Finally, it is required that such conduct is specifically designed to cause the harm “in support of a party to an armed conflict and to the detriment of another”¹⁸⁸. In applying the last criterion, it is of utmost importance to consider the “one causal step” approach to distinguish a “direct” link from the “indirect” one.¹⁸⁹ In addition, to assert a belligerent nexus, it is not enough to be only “objectively likely” to directly cause the required threshold of harm, but the act must also be “specifically designed” to do so.¹⁹⁰

Applying the concept of DPH to the case of PMSCs’ employees poses particular challenges that are the direct result of the fact that PMSCs provide increasingly diverse array of functions; functions which, as I have stated before, vary from catering and transportation to combat.

In an attempt to reduce the abstractedness of the concept of DPH in the context of PMSCs, the ICRC Interpretative Guidance has attempted to provide concrete examples. For example, the Guidance distinguishes “between the defence of military personnel and other military objectives against enemy attacks (direct participation in hostilities) and the protection of those same persons and objects against crime or violence unrelated to the hostilities (law enforcement/defence of self or others).¹⁹¹” Also, the Guidance lists examples of acts which shall not be qualified as DPH, such as collection of intelligence of a non-tactical nature or purchasing,

¹⁸⁷ Ibid., p. 865.

¹⁸⁸ Ibid., pp. 872-873.

¹⁸⁹ Ibid., p. 867.

¹⁹⁰ Ibid., p. 873.

¹⁹¹ Ibid. p. 38.

smuggling, manufacturing, or maintaining weapons and equipment outside specific military operations¹⁹².

Similarly, the Montreux Document entails some examples illustrating what constitutes direct participation within the context of PMSCs' operations and what falls outside of DPH. For example, guarding military bases against attacks from the enemy party, gathering tactical military intelligence, and operating weapons systems in a combat operation shall be recognized as DPH¹⁹³ whereas equipment maintenance, logistic services, guarding diplomatic missions or other civilian sites, or catering would not constitute DPH¹⁹⁴.

Yet, these neat clear cuts provided by ICRC Interpretative Guidance and the Montreux Document would appear less accurate in practice. This is because the thin lines between direct participation and indirect participation in hostilities would break down by the change of the circumstances. For example, in regard to the example of the collecting intelligence the question remains where the line between tactical and non-tactical intelligence should be drawn¹⁹⁵. Instead, taking a DPH should be examined on a case-by-case basis taking into consideration the nature of the operation together with the status of the individuals or the capacities within which they operate¹⁹⁶.

The other problem with applying the concept of DPH to the case of PMSCs and their employees is posed by the lack of distinction between offensive and defensive attacks under IHL. Accordingly, Article 49.1 of Protocol I

¹⁹² Ibid. p. 35.

¹⁹³ Montreux Document, supra note 46, Statement 25, p. 37.

¹⁹⁴ Ibid., p. 39

¹⁹⁵ Hansen, supra note 34, p 18.

¹⁹⁶ Cameron, supra note 161, pp. 589-590.

defines “attacks” broadly to include “acts of violence against the adversary, whether in offence or in defence.” This negligence about the fact that IHL is neutral in regard the purpose of the attack nullifies arguments seeking to exclude acts of violence taken place in defence from the acts that constitute DPH¹⁹⁷. Therefore, given the fact that fighting to attack and fighting to defend are insignificant distinctions within IHL, distinguishing affirmative participations of PMSCs’ employees in hostilities from the harmful conducts undertaken following their defensive engagements does not contribute to unlock the problems of applying the notion of DPH¹⁹⁸.

Further, the workability of the notion of DPH in the case of PMSCs and their employees might appear difficult due to the fact that there is no set list of lawful targets. Rather, objects can become lawful targets according to their nature, location, purpose or use¹⁹⁹. Then, the question would remain, for example, as to whether a PMSC’s employee guarding a civilian building would continue to have the same status despite the fact that the building suddenly becomes a lawful target without the PMSC’s employee being aware of the change; would he or she be a civilian unlawfully participating in hostilities then? Or vice versa, what if the object ceases to be used for military purposes and he or she still continues to guard it? Does he or she then cease to take DPH? Further, how can an adversary be reasonably expected to identify such a change in status and take it into account?²⁰⁰

Yet another difficulty in regard to the concept of DPH is the temporal problem. The earliest example of the temporal challenge is the on/off duty

¹⁹⁷ Ibid. p. 589.

¹⁹⁸ Ibid.

¹⁹⁹ Article 52 AP I

²⁰⁰ Cameron, *supra* note 161, p. 590.

contractors guarding military infrastructures; while the on duty contractors may be recognized as taking DPH, that is not the case in regard to the off duty contractors. This situation causes a problem known as the “revolving door”. This refers to the fact that the person’s status and consequently, his or her rights and responsibilities switch in a regular basis by the end of his or her working shift²⁰¹. Therefore, considering the example of intelligence gathering once again, it is unclear if the temporal variable is decisive or not; What if that intelligence was not tactically useful initially but became tactically useful later?

Therefore, what is problematic in regard to application of the concept of DPH to the case of PMSCs and their employees is tied to the indeterminacies which starts from the very “general nature of the activity (e.g., what kind of intelligence gathering? Guarding what kind of building?), to the specific circumstances of any given instance (e.g., on duty or off? specific combat operation or not?).”²⁰²

Yet, the challenges in regard to the workability of the concept of DPH, becomes more complicated once one notes the correlations between the political decision of the state party to the conflict and the interpretation

²⁰¹ Melzer, supra note 183, pp. 70-71, Available at:

<http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>,

“According to treaty and customary IHL applicable in international and non-international armed conflict, civilians enjoy protection against direct attack “unless and for such time” as they take a direct part in hostilities. Civilians directly participating in hostilities do not cease to be part of the civilian population, but their protection against direct attack is temporarily suspended. The phrase “unless and for such time” clarifies that such suspension of protection lasts exactly as long as the corresponding civilian engagement in direct participation in hostilities. This necessarily entails that civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities (so-called “revolving door” of civilian protection).”, Arts 51 [3] AP I; 13 [3] AP II ; *Customary IHL*, above N 7, Vol. I, Rule 6. The customary nature of this rule was affirmed also in ICTY, *Prosecutor v. Blaskic*, Case No. IT -95-14-A, Judgment of 29 July 2004, para 157.”

²⁰² Hansen, supra note 34, p.19.

which the state would apply. This is a question of who should make the evaluation in each single case. In absence of a uniform understanding of DPH, different states may adopt different interpretations of the term. In the following, I am touching upon the example of US in approaching the concept of DPH. I will finally, conclude how indeterminacy and instability of the concept of DPH makes it improper to be tied to status determination of PMSCs' employees.

4.3.2. US Interpretation of DPH and Its Implications for the Status of PMSCs' Employees

Unlike the ICRC's functional approach, the US have persuaded a membership approach which hinges upon a broader interpretation of DPH in line with its counterterrorism operations.

A broad interpretation of DPH prevented the Reagan administration from ratifying AP I since it would grant too much protection to irregular forces and would, consequently, make it more difficult to lawfully target some organized terrorist armed groups²⁰³. This logic, later in regard to ratifying

²⁰³ Eric Christensen, The Dilemma of Direct Participation in Hostilities, *Journal of Transnational Law and Policy*, Vol. 19.2, Spring 2010, p. 290- Also see Message From the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of the August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, S. Treaty Doc, No. 100-2, at IV (1987) (hereinafter Transmitting Message), available at http://www.loc.gov/r/frd/Military_Law/pdf/protocol-II-100-2.pdf :

“[one] provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves...The repudiation of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors...United States should not ratify Protocol I, thereby reaffirming its support for traditional humanitarian law, and its opposition to the politicization of that law by groups that employ terrorist practices”

AP II, led the US government to declare its broader interpretation of the protocol²⁰⁴.

Following the September 11th attack of 2001, and the introduction of Global War on the Terrorism, the Bush administration introduced a new category of “unlawful enemy combatant” within the traditional binary categorization of combatant and civilian under the laws of war. Explaining this new category is essential to understand the US interpretative approach concerning DPH. The Military Commissions Act of 2006 (MCA) defined “unlawful enemy combatant” in part as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al-Qaeda, or associated forces).²⁰⁵” This new category not only allowed the US to lawfully target members of qualified organized armed groups without granting them the rights and privileges of POW’s when captured, but also served the US as a conceptual instrument to broaden the scope of DPH further. Therefore, individuals who would otherwise be considered as non-combatants in case of a war against the US,

²⁰⁴ Letter of Submittal from Secretary of State George P. Schultz to the President, *in* Transmitting Message, *Ibid.*, at VII–VIII: “The final text of Protocol I did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal (VII) VIII conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area. We are therefore recommending that U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts), which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence).”

²⁰⁵ Military Commissions Act of 2006, Section 3, 948A: Definitions, available at: <http://news.lp.findlaw.com/cnn/docs/terrorism/mca2006.pdf>

such as financiers, propagandists, or accountants, are recognized as unlawful enemy combatants and left with the least protections: the same as a civilian who takes DPH²⁰⁶.

The Obama Administration, in its Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, has followed the same broad interpretation²⁰⁷. This broad interpretation favours an "affirmative disengagement approach" according to which known members of an armed group can be targeted at any time, and it is the civilians' own responsibility to demonstrate their affirmative disengagement from an armed group.²⁰⁸ Thus, although the Obama Administration has abandoned using the terminology of "unlawful enemy combatant", the Obama Administration still maintains a broad interpretation of "being a member of an armed group". This includes persons "substantially supporting" or "in association with" the terrorist groups. However, it has not been clarified how "substantial support" should be interpreted.²⁰⁹ This loose language, in turn, has made the government develop its own interpretation of DPH by shifting the standard of directly participating in the hostilities to the standard of "directly supporting hostilities"²¹⁰.

²⁰⁶ Christensen, supra note 203, p. 291.

²⁰⁷ Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 8, *In re Guantanamo Bay Detainee Litigation*, No. 08-442 (TFH) (D.D.C. 2009), available at <http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf>

²⁰⁸ Christensen, supra note 203, p. 291.

²⁰⁹ Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, supra note 206, p. 2-.Also, Christensen, supra note 203, p. 292.

²¹⁰ Ibid.

The whole of these ambiguities add to the initial difficulties in respect to the workability of the concept of DPH.

4.4. Conclusion:

To conclude, confusion surrounding the placement of PMSCs and their employees within the binary distinction of civilian and combatant under IHL has made scholars resort to the concept of DPH as an instrument to determine the status of these companies and their employees under IHL. However, as I tried to show earlier, disagreements about what constitute DPH and the difficulties surrounding the whole concept of DPH makes it unworkable to apply the concept to the case of PMSCs. Suspending status determination upon such indeterminacies would be inconsistent with the doctrine and purpose of IHL as to provide straight forward rules which can be reasonably expected to be followed in the complex situation of armed conflict. These difficulties, in turn, indicate how uncomfortable it is to place PMSCs and their employees within the binary distinction of civilian and combatant under IHL. This can be one indication of a challenge of adapting IHL to understand a new form of privately organized violence and to accommodate this private face of organized violence within the system of public territorial state, recognized and constituted by IL²¹¹. This challenge also informs a dilemma of IHL to provide a new and more complex understanding of the relationship between public and private that can bring

²¹¹ James Cockayne, "The reorganization of legitimate violence: military entrepreneurs and the private face of international humanitarian law", *International Review of Red Cross*, Vol. 88, No. 863, September 2006, pp.459, 460.

broader implications for IL as a whole. To shed light on the relationship between PMSCs and States, I will investigate the state responsibility in regard to the wrongful acts committed by the PMSCs' employees and sub-contractors in the following section.

5. PMSCs and Their Relations to State Actors, The Challenge of Attribution:

5.1. Overview to the Discourse of State Responsibility; An Inquiry to the 2001 Draft Articles on Responsibility of States for Internationally Wrongful:

States are responsible for their breaches of their obligations under IL. The responsibility of states in this regard is derived from guidelines incorporated in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles) developed by the International Law Commission, adopted in 2001²¹². Accordingly, states are responsible for a wrongful act if a) the act constitutes a breach of an international obligation, and b) if it is attributable to the state²¹³. Although proving the mere fact of occurrence of a breach of an international obligation has its own challenges, what appears peculiar in respect to the case of PMSCs is to attribute the

²¹² Draft Articles on Responsibility of States for Internationally Wrongful Acts, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

²¹³ Art. 2, Draft Articles

conduct of a private enterprise to the State. In this sense, Article 4 of the Draft Articles addresses the responsibility of the state for the conduct of its organs. According to Art. 4:

- “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 5 follows to raise state responsibility in regard to the conduct of persons or entities exercising elements of governmental authority, providing that:

“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.”

What is implied from the above Articles is that, considering the link between a normal soldier and the state, the probability that state holds responsibility for the conduct of a soldier is much more than cases wherein

the wrongful act is committed by the PMSCs' employees and sub-contractors. Presuming that the occurrence of the wrongful act has been already proved, it would suffice to show that the person in question was indeed a soldier of that state in order to raise the issue of state responsibility²¹⁴. Moreover, reading Art. 4, 5 and 7 of the Draft Articles in conjunction with customary international law expressed in Article 3 of the fourth Hague Convention of 1907 (HC IV), and Article 91 of Additional Protocol I, it would not even make any difference whether the soldier exceeded his or her authority, contravened instructions or even did not act in his or her capacity as a soldier.²¹⁵

However, applying the rule set forth in Art. 4 and 5 of the Draft Articles in the case of PMSCs' employees and their sub-contractors has appeared more complicated. Unlike the normal soldiers, in order to attribute the acts committed by PMSCs' employees to the state, one needs to conduct a more complex factual inquiry²¹⁶. This is because PMSCs and their employees are per se private entities supposedly acting independent from state. Of course such state of independency differs from one PMSC to another, depending on the nature of their functions. For example, PMSCs' employees who perform as interrogators seem to be closely bound to the state. Thanks to such close bound it would be more probable for a state to become responsible for the acts of these PMSCs' employees²¹⁷. On the other hand, when it comes to

²¹⁴ Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005 [2005] ICJ Rep 168, at para. 213, available at:

<http://www.icj-cij.org/docket/files/116/10455.pdf>

²¹⁵ *Ibid.*, para. 214.

²¹⁶ Hoppe, Carsten, Passing the Buck: State Responsibility for Private Military Companies, *European Journal of International Law*; Nov2008, Vol. 19 Issue 5, p 991.

²¹⁷ *Ibid.*

sub-contractors, attributing a responsibility to states appears more difficult because of the sub-contractors' distance and independence from states. This was the case in respect to the abuses taken place at the Abu-Ghraib prison. Accordingly, while misconducts were traced to civilian contractors acting as interpreters and interrogators, both the state actor and the concerned PMSCs could distance themselves from responsibility by asserting that those individuals were actually working for a sub-contractor and the conduct of employees of a sub-contractor could not be attributed to the state in question²¹⁸.

Apart from sub-contractors, PMSCs providing other services, such as personal security, enjoy more independence from states in operating their plans. The relationship between the state and PMSCs' contracted by them is a kind of coordination rather than subordination²¹⁹. Therefore, it can be concluded that in order to raise state responsibility for misconducts committed by a majority of the PMSCs' employees under the Draft Articles, there should be additional factual links, when compared to what needs to be proven in regards to the conduct of regular soldiers. In regard to the application of the Article 4, the factual link would contribute to establish of the attribution link by considering PMSCs' employees as *de facto* organs of the government²²⁰. Further, PMSCs contracted by the state to exercise an element of governmental authority, namely security and military functions, and PMSCs licensed by the state to operate such services could be subjected to Art. 5 of the Draft Articles. To apply Article 5 it has to be proved that the

²¹⁸ Minow, *supra* note 10.

²¹⁹ Hoppe, *supra* note 216.

²²⁰ Hoppe, *supra* note 216, p 991.

conduct happened, it was empowered by law, and additionally that the person acted in the governmental capacity.

Yet, even if such additional factual link was asserted, applying Article 4 and 5 in conjunction with Art. 7 would restrict state responsibility only to those situations wherein the person concerned acted in the governmental capacity and only in those particular instances²²¹. This, in turn, opens up a gap in regard to the responsibility of state for the off-duty conducts of a PMSCs' employee.

Finally, the conduct of PMSCs' employees can be attributed to the state under Art. 8 of the Draft Articles. Article 8 refers to situations when the perpetrator acts on the instruction of, or under the direction or control of a state. Yet, the state would not hold unqualified responsibility under this provision, which means that the responsibility may rise only if the conduct was committed in compliance with the orders given by the State. Put it in other words, conduct contrary to orders or beyond the control of the state excludes state responsibility. However, this is not the case most of the times because a) the independency of private contractors in planning and operation often leaves little room for states to exercise adequate physical control over them, especially in regard to mobile services, and b) the lack of clarity in the rules of engagement and the confidential nature of such arrangements would make it difficult to prove the conduct was committed in compliance with the orders given by the State, even if the violation was actually put on the agenda by the State itself²²².

²²¹ Ibid. pp. 991-992.

²²² Hoppe, *supra* note 216, p. 992. Also see, Cf. Lehnardt, "Private Military Companies and State Responsibility", *in*, Chesterman, Simon. & Lehnardt, Chia. (red.), *From mercenaries*

Thus, unless state actors incorporate PMSCs' employees into their own armed forces, or PMSCs' employees would be considered as exercising elements of governmental authority, the possibility to raise state responsibility for the acts committed by PMSCs are much more narrow comparing to that of the regular soldiers²²³. To conclude, the responsibility gap remains in regard to both the off-duty conduct of PMSC's employees and the acts performed *ultra vires*²²⁴. To overcome such a difficulty in regard to the employees' conducts, it has been suggested that more emphasize should be put on the positive obligation of states under IHL²²⁵. The positive obligations of state are addressed as the general duty to "ensure respect"²²⁶ for IHL. Following the obligation to "ensure respect", states are required to undertake due diligence in fulfilling general duties to vet, train, instruct, and report, and possibly to prevent known ongoing violations in all kinds of armed conflicts (both IAC and NIAC)²²⁷. In respect to IACs other specific regulations might subject the state to further due diligence obligations, in addition to the general duties. For example, Article 27 of GC IV, containing basic guarantees for the protection of civilians, could cover the case of PMSC's employees in a sense that states would have the obligation to exercise due diligence and adequately protect the civilians, no

to market: the rise and regulation of private military companies, Oxford University Press, Oxford, 2007, p. 139.

²²³ Hoppe, supra note 216, p. 992.

²²⁴ Ibid., p. 1012.

²²⁵ Ibid., p. 992. Also, Rule 144 Customary Rule of IHL, in, Henckaerts, & Doswald-Beck, supra note 107, "Ensuring Respect for International Humanitarian Law Erga Omnes: *States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.*"

²²⁶ Article 1 GC IV- Article 1(4) AP I (known as common Article 1)

²²⁷ Hoppe, supra note 216, p. 1012.

matter if the violator is a regular soldier or PMSC employee performing either on-duty or off-duty²²⁸.

Similarly, the protection provided to POWs by Article 12 GC III imposes the ultimate responsibility on the Detaining Power in regard to the treatment given to POWs.²²⁹ Moreover, leaving PMSCs employees in charge of POW-camps with no military oversight would be considered as a violation of IHL by the state.²³⁰

In regard to occupations, states may be held responsible for the conduct of PMSCs' and their employees providing coercive services, even if they are acting off-duty, provided that the contracting state fails to ensure respect for the its obligations under IHL in its supervision of PMSCs' employees.²³¹

In NIACs, establishing the attribution appears to be more difficult since no specific article goes beyond the rules of attribution. Therefore, states may be responsible only in regard to a general duty to vet, train, instruct, and report, and possibly to prevent known on going violations in NIACs.²³²

Nonetheless, there is no consensus on the nature and scope of this responsibility to "ensure respect" for IHL. There have been doubts whether

²²⁸ "Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault..."

²²⁹ "Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them"

²³⁰ Art. 39 GC III states: "[e]very prisoner of war camp shall be put under the *immediate authority* of a responsible commissioned officer belonging to the *regular* armed forces"

²³¹ Article 43 of the Hague Regulations. Also, see Hoppe, *supra* note 216, p. 994.

²³² Hoppe, *supra* note 216, p. 994.

a State could incur international responsibility under IHL for a failure to exercise due diligence at all²³³.

5.2. The Question of State Responsibility for the Acts Conducted by PMSCs' Employees: Looking for Alternative Limbs for the Attribution Test

5.2.1. The Montreux Document:

For further attempts to discover the relationship between states and PMSCs, the Montreux Document can serve as a guideline mapping state responsibility. The Montreux Document is the result of a joint initiative by the government of Switzerland and the International Committee of the Red Cross launched in early 2006. The Document is not a new convention and it is not binding by itself. Rather, it recalls existing legal obligations of states, PMSCs and their employees operating in situations of armed conflict²³⁴. The Montreux Document contains 73 good practices to guide state how to comply with their obligations through a series of legislative and administrative measures. Montreaux Document recognizes three kinds of states, namely; contracting states (countries that hire PMSCs), territorial states (countries on whose territory PMSCs operate) and home states (countries in which PMSCs are based). Responsibility would assign to any or all of these states if they fail their legal obligation to oversee and control the conduct of PMSCs and their employees. Accordingly, states are required

²³³ See Expert Meeting on Private Military Contractors, *supra* note 167, p. 42.

²³⁴ Montreux Document, *supra* note 46, p. 453.

to exercise due diligence to ensure that IHL is respected. This could be realized, for example, through establishing transparent licensing regimes so that only reputable companies would be allowed in armed conflict environments. Moreover, states are advised to maintain a proper staff vetting procedure, to educate employees on IHL and HRL and to set up standard operating procedures and clear rules of engagement that comply with the law. This is how states could control the internal disciplines and procedures of PMSCs.

According to Montreux Document, contracting PMSCs to perform certain activities would not release the contracting state from their obligation under IL.²³⁵ Montreux Document also prohibits contracting out tasks that are explicitly assigned to a State agent or authority under the regime of IHL; such as “exercising the power of the responsible officer over prisoner of war camps or places of internment of civilians in accordance with the Geneva Conventions.”²³⁶ As the Montreux Document, further, emphasizes on positive obligation to ensure respect for IHL, it requires states to adopt appropriate legislative, judiciary and administrative means in order to ensure the respect for IHL by PMSCs²³⁷.

Nonetheless, Montreaux Document still follows the traditional rule of customary international law that I discussed earlier to attribute the conduct of PMSCs’ employees to state and raise the state responsibility²³⁸.

²³⁵ Montreux Document, Art. 1

²³⁶ Ibid., Art. 2

²³⁷ Ibid., Art. 3-6

²³⁸ Ibid., Art. 7 “Although entering into contractual relations does not in itself engage the responsibility of Contracting States, the latter are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are: a) incorporated by the

To overcome this challenge of attribution, the Draft Convention has appeared more innovative in its orientation toward the relationship between states and PMSCs and state responsibility for misconducts of PMSCs' employees as it will no longer be necessary to prove "attribution" or "subordination". This innovative framework is discussed in the following.

5.2.2. Draft Convention:

As a response to the regulatory gap mentioned earlier in this thesis, the Draft Convention was adopted to fill the "important gaps ... in national and international legal regimes applicable to private military and security companies".²³⁹

To explore the state responsibility regarding the activities of PMSCs and their employees, the Draft Convention considers four categories of states, namely the contracting states, states of operation, home states and third states²⁴⁰. Although the responsibility is accordingly assigned to these categorisations, most aspects of responsibility under the Draft Convention overlap. The Draft Convention, further, provides a framework through which state responsibility, at least in regard to certain acts of PMSCs and their employees would not necessarily depend upon satisfying the traditional

State into their regular armed forces in accordance with its domestic legislation; b) members of organized armed forces, groups or units under a command responsible to the State; c) empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorized by law or regulation to carry out functions normally conducted by organs of the State); or d) in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor's conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct)."

²³⁹ Preamble, para 21.

²⁴⁰ Art 2 (j-m).

rules of “attribution” or “subordination” under international law. According to Article 4(1), states will still bear responsibility “for military and security activities of PMSCs registered or operating in their jurisdiction, whether or not these entities are contracted by the state”. Moreover, under Article 5 (1) and 7, states are required to take measures to ensure that PMSCs respect and observe human rights and that their conduct is consistent with IHL. This framework brings significant implications for both state actors and PMSCs and how they relate to each others. For example, one can consider the AEGIS Defence Services Ltd, a British company that secretly relocated its offices to Basel, Switzerland, in October 2010.²⁴¹ The company is owned by Tim Spencer, the man behind the infamous Sandline operations in Sierra Leone at the height of the civil war in that country. AEGIS has been able to attract contracts from the US government for services in Afghanistan and Iraq while it is also extending its network to Africa. However, just for the purposes of our analysis, if Switzerland were a state party to the Draft Convention it would have to license and register the company under its domestic regime and also bear responsibility for the military and security activity of AEGIS all over the world. This alone would have acted as an important detriment for Switzerland to allow rouge companies such as AEGIS to operate within its territory²⁴².

Positive obligations of the state in regard to conduct of PMSCs also reach the point that states are required to establish jurisdiction over criminal

²⁴¹ Dacey J, “Swiss fired up over arrival of mercenary firm”, (*Swiss.info.ch*) available at: http://www.swissinfo.ch/eng/business/Swiss_fired_up_over_%20arrival_of_mercenary_firm.html?cid=22482084

²⁴² Juma, *supra* note 52, p.14.

conducts committed by PMSCs and their employees²⁴³ and take measures necessary for investigation, prosecution and punishment of violations of the Draft Convention²⁴⁴.

Besides establishing these general obligations, the Draft Convention distinguishes the “inherent” state functions as functions, which cannot be

²⁴³ Art. 21 “Establishment of jurisdiction: 1. Each State party shall take such measures as may be necessary to establish its jurisdiction through its domestic law over the offences set out in article 19 when:

- (a) The offence is committed in the territory of that State;
- (b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed; or
- (c) The offence is committed by a national of that State

2. A State party may also establish its jurisdiction over any of the offences set out in article 19

when:

- (a) The offence is committed against a national of that State; or (b) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State;

3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.

4. Upon ratifying, accepting, approving or acceding to this Convention, each State party shall notify the Secretary-General of the United Nations of the measures it has taken with respect to the establishment of jurisdiction under this article. Should any subsequent change take place, the State party concerned shall immediately notify the Secretary-General of the change.

5. Each State party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set out in this Article in cases where the alleged offender is present in its territory and it does not extradite such person to any of the States parties which have established their jurisdiction in accordance with paragraphs 1 or 2 of this Article.

6. Each State party which establishes jurisdiction under subparagraphs 1(b) and paragraphs 2 or 4 of this Article shall make the offences set out in this Article punishable by the same penalties which would apply when they are committed in its own territory.

7. This Convention does not exclude the exercise of any criminal jurisdiction established by a State party in accordance with its national law and its international obligations.

²⁴⁴ Art. 23: “Obligations related to prosecution: 1. Each State party shall take such measures as are necessary to investigate, prosecute and punish violations of the present Convention, and to ensure effective remedies to victims. 2. Each State party, in the interests of justice, shall take such measures as necessary to ensure that no immunity agreement from prosecution for PMSCs and their personnel for violations of international human rights law and international humanitarian law is enforced.

3. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 19 is found shall in the cases contemplated in article 21, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

4. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 21, paragraph 1(c), the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 21.

5. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 19 shall be guaranteed fair treatment at all stages of the proceedings.”

delegated and the state maintains direct responsibility for them, from other type of services²⁴⁵. Following this logic, states are demanded to ensure such distinction is respected by contractors or through agreements that they enter into with PMSCs and that the PMSCs' employees respect the law²⁴⁶. Specifically in regard to the use of force, States are required to take measures to prohibit PMSCs's employees from taking DPH or other acts that may result in overthrowing governments, changing internationally recognised borders, violating the sovereignty of states or any part thereof and explicitly targeting civilians²⁴⁷. Considering that the Draft Convention

²⁴⁵ Art. 2(i) "Inherently State functions: are functions which are consistent with the principle of the State monopoly on the legitimate use of force and that a State cannot outsource or delegate to PMSCs under any circumstances. Among such functions are direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees and other functions that a State Party considers to be inherently State functions."

²⁴⁶ Art 7 and 17. Article 17 reads as "State obligations vis-à-vis the PMSCs and their personnel:

1. Each State party shall ensure that all PMSCs registered or operating on its territory complies with fundamental international labour standards.
2. Each State party shall ensure that personnel of PMSCs are professionally trained to respect relevant international human rights law and international humanitarian law.
3. Each State party shall ensure that PMSC personnel are required to be professionally trained and vetted according to the applicable international standards, in particular regarding the use of specific equipment and firearms. Such training and vetting shall be conducted in accordance with the procedure defined by the legislation of the State Party in whose territory the private military and/or security company is registered under the domestic law and under international standards on the use of force and firearms in the course of military or security activities.
4. Each State party shall ensure that personnel of PMSCs strictly adhere to relevant norms of international human rights law and international humanitarian law, including through prompt investigation, prosecution and punishment of violations of human rights and humanitarian law.
5. Each State party shall ensure that the personnel of PMSCs providing military and security services in the territory of a foreign country undertake to respect the sovereignty and laws of the country of operations, to refrain from any actions inconsistent with the principle not to interfere with the domestic affairs of the country of operations, to refrain from intervening in the political process or in the conflicts in its territory, and to take all necessary measures to avoid harm to the citizens, damage to the environmental and industrial infrastructure, and to objects of historical and cultural importance."

²⁴⁷ Article 8 of the Draft Convention reads as;

- "1. Each State party shall take such legislative, administrative and other measures as may be necessary to prohibit and make illegal the direct participation of PMSCs and their

does not provide any definition for DPH, one has to refer to general definition of DPH under IHL which was discussed earlier.

In order to give effect to these obligations, the Draft Convention has designed three pillars which include “legislative intervention, institution-building and a procedural framework” through which state can exercise adequate monitoring and oversight over the conducts of PMSCs²⁴⁸.

The framework provided by the Draft Convention is certainly a significant effort to regulate PMSCs and, therefore, to close the regulatory gaps that would let states pick and choose which international regimes to abide by when dealing with PMSCs²⁴⁹. Nonetheless, it is still not very enlightening in

personnel in hostilities, terrorist acts and military actions aimed at, or which States have grounds for suspecting would result in:

- (a) The overthrow of a Government (including regime change by force) or undermining of the constitutional order, or the legal, economic and financial bases of the State;
- (b) The coercive change of internationally acknowledged borders of the State;
- (c) The violation of sovereignty, or support of foreign occupation of a part or the whole territory of State;
- (d) Explicitly targeting civilians or causing disproportionate harm, including but not restricted to:
 - (i) Assaults on the life and security of civilians;
 - (ii) The coercive removal or displacement of people from areas of permanent or habitual residence;
 - (iii) Limits to the freedom of movement of civilians; and
 - (iv) Restriction in access to resources and means of livelihood, including but not limited to water, food, land, livestock, shelter, and access to sacred sites and places of worship.

2. Each State party shall ensure that the activities of PMSCs and their personnel do not cause or exacerbate inter- or intra-State warfare or conflict;

3. Each State party shall ensure that PMSCs and their personnel do not provide training that could facilitate its clients’ direct participation in hostilities, terrorist acts or military actions, when these actions are aimed at the results defined in article 8.1.”

²⁴⁸ Juma, *supra* note 52, p 20

²⁴⁹ However, the success of the Draft Convention is yet to be explored. The concern toward the prospect of the Draft Convention is because some powerful states such as USA and UK –that are also source states for using PMSCs- have questioned the necessity for making such Convention. They have provided five arguments for their opposition. Firstly, they hold that the current international mechanisms, such as the Montreux Document, provide sufficient grounds for regulation. So, they argue that what is at stake is how to implement the existing laws rather than making a new law. Secondly, they refer to the significant disagreement on key concepts included under the Draft Convention, for example what shall constitute the “inherent” government function. Thirdly, they questioned whether the Working Group had over-stepped its mandate which was limited to merely investigating mercenary activity and assisting member states in eliminating the threat. Fourthly, it is argued that the licensing procedure suggested by the Draft Convention will be costly for

understanding the status of PMSCs and their employees in relation to the state actor and in placing them within the broader framework of IHL and IL.

5.3. Conclusion:

Talking of legal challenges made by PMSCs and their employees to application of the IL and IHL, one has to look into the issue of state responsibility for the acts conducted by PMSCs' employees. This is mostly a question of attribution through which I was trying to see the relationship between PMSCs and their employees with state actors. To answer this question, I walked through the relevant laws on responsibility of state under IL. Considering the 2001 Draft Articles, I indicated that unless state actors incorporate PMSCs' employees into their own armed forces, or contractors would be considered as exercising elements of governmental authority, the possibility to raise state responsibility for the acts committed by PMSCs are much narrower comparing to that of the regular soldiers²⁵⁰. The responsibility gap, therefore, remains in regard to both the off-duty conduct of contractors and the acts performed *ultra vires*.

To fulfil the responsibility gap, it is suggested that to put more emphasizes on positive obligations of state under IHL. I discussed this positive obligation as general duty to "ensure respect"²⁵¹ for IHL in both IACs and NIACs.

some state. Finally, it is said that more consultations would be necessary before coming up with an international treaty of such kind.

²⁵⁰ Hoppe, supra note 216, p. 992

²⁵¹ Article 1 GC IV- Article 1(4) AP I (known as common Article 1)

With the similar purpose of finding the links between PMSCs and their employees and the state actors, I made an inquiry to more recent efforts to regulate PMSCs, namely Montreux Document and the Draft Convention. I tried to uncover how these documents have established more elaborated grounds for considering state responsibility for the misconducts of PMSCs employees. As I indicated, the both documents mostly develop on the positive responsibility of state actors to ensure respect for IHL.

Disregarding the difficulties of enforcing such positive obligations, these initiatives of course are valuable efforts to fill the regulatory gap under IHL and IL in regard to the activities of PMSCs. However, none of these documents helps to understand the status of PMSCs and their employees in relation to the state actor and within the broader context of IL. Considering this chapter together with the previous one, I conclude that confusion regarding the issue of attribution raises as we cannot be sure how to define the status of PMSCs and their employees in relation to the states. PMSCs are private actors undertaking what has been in the preserve of public actors within the state-centric system of IL for a long time. This confusion shakes our understanding of how to imagine public and private and how to define their relationship under IL. To uncover this oddness, I dedicated the last chapter of this thesis to investigate challenges to state-centrism and sovereignty made by organization of private violence in the form of PMSCs.

6. PMSCs, Challenges to State-centric Paradigm and Its Broader Implications for IL

6.1. Overview:

When considering PMSCs in the context of IL it seems that the existence of these companies is at odds with the very principle of IL, namely state-centrism and sovereignty. This challenge can be investigated on two accounts: a) in respect to weak states, by which I mean the states that fail to provide physical security for their own citizens by establishing functioning law and order institutions, and b) in respect to efficient states, by which I refer to states that have functional law and order institutions and are generally capable of enforcing a coercive monopoly on force while adhering to democratic standards.²⁵² In respect to the weak states, PMSCs challenge the ascendancy of the nation state by undertaking “military and security-related expertise which [at least previously] were considered the preserve of the state, i.e., services that only the state, through its armed forces and law enforcement and intelligence agencies, could legally and legitimately provide”²⁵³. Further, in regard to efficient states, the lack of transparency, oversight and accountability over the exercise of use of force would be problematic.

6.2.Challenges to the Weak State:

²⁵² Holmqvist, *supra* note 29, p. 11, 23.

²⁵³ Ortiz, Carlos, *supra* note 25, p. 56.

The use of private sector in provision of security and military services within a territory is generally and initially considered as symptomatic weakness of the territorial state. This appears as a public demonstration of incapacity of the state since if states were able to establish efficient institutions as well as legal and practical infrastructures to provide stability and physical security for their own citizens they would not resort to external actors to fulfil such tasks.²⁵⁴ However, contracting out the tasks preserved in the governmental domain to be undertaken by PMSCs may not provide a solution to state incapacity. But also, it may eventually endanger the state sovereignty by “establishment of parallel of “shadow” structures of power and authority”²⁵⁵. That would especially be the case when PMSCs are used by external actors in order to bring stability and security into the conflict region. In that case, there is the risk of marginalizing of the weak state since one of the most important sources of authority, namely use of physical force, would be placed in disposal of outsiders which would eventually push the state farther from its political content in both national and international context²⁵⁶.

Furthermore, the use of PMSCs poses challenge to the conventional understanding of the governmental effectiveness in the weak state by departing from equal distribution of the security-military services to all citizens as public goods. This means that security-military functions appear to be commoditized in free market which consequently, causes the security

²⁵⁴ Holmqvist, *supra* note 29, p. 12.

²⁵⁵ *Ibid.*

²⁵⁶ *Ibid.*, p. 21

becomes conditioned on the individuals' affordability and access to financial resources²⁵⁷.

In another word, the very core tasks of government which was conventionally defined as the protection of citizens by monopolized use of physical force and at the same time was considered to form the basic requirement for an entity to be recognized as the state can now be bought and sold independently of the state and on a free, open and competitive market. Considering the fact that the weak state lacks adequate legal infrastructure and institutional capacity to apply effective control over such private transactions either²⁵⁸, the state of weakness and inefficiency would be then perpetuated by commodifying the military-security tasks and the occasional use of force.

6.3.Challenges to the Efficient State:

As it was mentioned earlier, although the challenges made to the said conventional concept of statehood and sovereignty seems more evident in respect to the weak state, it would still remain present in regard to the efficient state as well. From the stand point of the efficient state what makes flaw in the test of the "effective government" is the lack of control and adequate oversight over the military-security tasks which are contracted out to the PMSCs. This is more evident in cases wherein PMSCs are being hired to operate abroad. The issue of oversight and supervision appears more

²⁵⁷ Ibid., pp. 14-15

²⁵⁸ Ibid., pp. 14-15

problematic to apply in situation of sub-contracting; especially wherein the involvement of network of sub-contracting makes a fusion.

Although there are guidelines and rules of engagements regarding military-security tasks shouldered by PMSCs, the subjectivity of interpretation, insufficiency of details and shortcomings in updating those guidelines might cause some divergence from the initially envisaged stipulations²⁵⁹.

In addition, the peculiar challenge of conducting control over what PMSCs do is associated with the insecure environment wherein the companies mostly operate²⁶⁰. The high insecurity and instability surrounding the conflict regions open the floor for the “situational-demanded acts” of PMSCs’ employees to happen more frequently²⁶¹. Such situational-demanded acts are currently being normalized through what is called the private military-security “mission creep”²⁶² which refers to the expansion of the project beyond its original goals. To see concrete examples of the lack of control in this context, one may consider the case of Iraq war and companies operating in there. For example, the US private security company DynCorp was hired by the State Department to provide 1000 advisers to contribute organizing Iraqi law enforcement and criminal justice systems²⁶³. However, later it was revealed that four DynCorp employees were involved in raids conducted by Iraqi police to the home and offices of former exile leader Ahmed Chalabi. In those incidents, it was revealed that despite an initial restriction on wearing arms, concerned employees were not only armed

²⁵⁹ Ibid., pp. 8-10.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Ibid., p. 25.

²⁶³ Holmqvist, supra note 25, p. 25. Merle, R., ‘DynCorp took part in Chalabi raid’, *Washington Post*, 4 June 2004, p. A17.

equipped, but also were effectively directing the raids. This manifested how the employees went beyond their official mandate due to lack of oversight.²⁶⁴

Also, to provide an example associated with the fusion caused by the practice of sub-contracting one may refer to the case of abuses taken place at Abu Ghraib prison. According to an internal Army report, the involvement of civilian interpreters and interrogators contracted by CACI International and Titan Corp. can be traced in those incidents along side with the military forces. The report concludes that these employees were either directly or indirectly responsible for abuses taken place at Abu Ghraib prison. However, confusion made by layers of sub-contracts helped both companies to distance themselves from those individuals. Accordingly, CACI asserted that “the individuals in question were no longer employees”²⁶⁵ and Titan claimed that the individuals involved in those incidents were actually working for a sub-contractor²⁶⁶. In both these cases, the climate of secrecy and lack of transparency make it difficult to understand what is really going on within the company. This, consequently, would bring challenges regarding supervision and oversight which means there would be no efficient way to follow if the PMSC is performing as it was originally agreed or not. Considering the enormous reliance upon the private contractors in conflict regions like Iraq and Afghanistan, losing the track of effective control over the outsourced military-security tasks may threaten the performance of the state in furthering its goals and policies. For

²⁶⁴ Holmqvist, *supra* note 29, pp. 25-26.

²⁶⁵ Minow, *supra* note 10, pp. 993-994

²⁶⁶ *Ibid.*

example, if PMSCs mandating to provide soldiers with supportive services in conflict zones give up the mandate or malfunction, the efficiency and security of the state's own armed forces would be put in jeopardy²⁶⁷. Apart from that, to refer to another example one may consider cases where the prospect of lack of oversight upon what is going on within the PMS industry would result in the depletion of state resource in market conditions²⁶⁸. This would happen when the state has inadequate control over salaries or other employment conditions followed in the private sector to be able compete to absorb or maintain highly trained individuals at state service which may eventually confront the state with a "brain drain" in this field²⁶⁹.

6.4. PMSCs, the Private Face of Organized Violence, and the Implications for IL

Going through the previous section, it seems that the idea of sovereignty and state-centrism has been challenged by the rise of PMSCs being allowed to carry out traditional state tasks, without a state responsibility being firmly established in relation to these activities²⁷⁰. This, in turn, seems to force IL to confront with a dilemma in addressing a number of issues raised by the existence and expansion of PMSCs. More specifically in regard to the laws of war, such inconsistency, in addition to ambiguous character of these

²⁶⁷ Ibid., p. 1011

²⁶⁸ Holmqvist, *supra* note 29, p. 31.

²⁶⁹ Ibid., p. 32. "Concerns about a 'brain drain' of special operations forces as recruits begin to desert to private companies have been voiced by members of the US congressional House Armed Services Subcommittee on Terrorism, who warned that the US military may be losing covert forces faster than they can be replaced."

²⁷⁰ Minow, *supra* note 10, p. 1026.

PMSCs, has caused difficulties as to how to determine the status of PMSCs and their employees under IHL and how to define their relationships to states. IHL aims to identify persons as either combatants or as civilians, and consequently distribute responsibilities and protection according to the category the person in question falls into. This is of course an artificial binary categorization construed by law. PMSCs and their personnel have made this fundamental binary categorization of civilian-combatant to appear uncomfortably artificial.

This self-challenge may emanate from a gradual transition from the conventional understanding of the state, as explained above, to a submission of IL to an alternative understanding of the state; an alternative understanding of the state which does not match the state-centric paradigm of IL, as the realist model of international politics advocates for. What the self-challenge really consists of is that despite such inconsistency with the paradigm of state-centrism, efforts have been taken to accommodate PMSCs and their employees within the taxonomy of IHL before revising the underlying assumptions of statehood and sovereignty under IL. If private actors like PMSCs are going to be logically accommodated within the IL, one should admit that the conception of the state has evolved in a sense that allows private actors to enter into contracts with state-actors to perform tasks that were previously considered as core requirements for governmental effectiveness. States as the primary unit of authority under IL, as well as the dominant actors using IL as instrument for its own interests, have called upon PMSCs as non-state actors to undertake the core tasks of states. This, therefore, can be translated as a call to go beyond state-centrism as well as a

dilution of the state and rhetoric of sovereignty. When states recognize private actors, such as in the case of PMSCs, as capable of legitimately entering into contracts with states and international organizations, the very same states which benefits from arguing a state-centrism provide a basis from which non-state actors within IL benefits.

7. Concluding Words:

The international legal system has weathered sweeping changes over the last decades, for new participants have emerged. I have concentrated on the case of Private Military Security Companies (PMSCs) in my thesis to explain the rise of PMSCs as a new phenomenon and evaluate the conceptual and practical capacity of IHL in accommodating these new non-state actors. I have also tried to uncover how IHL -as a system traditionally regulating violence between states and/or organized armed groups that shared many of the territorial, administrative and “public” characteristics of states- deals with this new, private face of organized violence²⁷¹. I have indicated that although it is possible to extend the rules of IHL to accommodate PMSCs, it will stretch the skin of IL so thin that it might eventually break. I have tried to indicate some of these challenges by touching upon the difficulties about status determination and accountability when it comes to the case of PMSCs and their employees. I have showed that although there are conceptual legal

²⁷¹ Cockayne, *supra* note 211, p. 460.

answers to these difficulties, they are often not easy to discern – particularly for military commanders and other combatants who confront severe time and expertise constraints. These practical difficulties might ultimately risk the very principles of IHL- like distinction- to collapse²⁷².

Going through that path, what I would suggest as basis for further research is that certain changes in the *jus in bello* to accommodate PMSCs may inform of broader hidden shifts in configuring the relationship between the public and private realms in international society²⁷³. Considering PMSCs and the way that states have treated them in international politics may help us to “re-imagine the real” and to reconsider dominant conceptual paradigms (of statehood, legitimacy, balance of power between public and private authority in international society and humanitarianism).²⁷⁴ Such further researches would be more impressionistic of course; the same as an impressionist sketch, such research would be an attempt to depict a sense of the whole instead of depicting the details. However, such oversight seems to be necessary to indicate the evolution of dominant conceptual paradigms within IL, especially when it comes to non-state actors and their legal personality under IL and its broader implications for IL.

²⁷² Ibid., p. 484.

²⁷³ Ibid., p. 460.

²⁷⁴ Ibid., p. 461.

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