Confronting the Janus Face

Private military companies, the anti-mercenary norm and a new direction for international regulation

Lucas Roorda

CONTENTS

Introduction

When most people think of war, the popular perception is that of the standing State army, paid for and maintained by the nation-State. Even insurgency forces and rebel groups, although not the forces of a recognized State, are modelled in this fashion. Soldiers are being perceived as fighting for a single cause, be it defensive or offensive. The notion of the soldier of fortune, fighting only for his wallet, is usually met with repulsion and disgust.[1] Yet it is the soldiers of fortune that are increasing in number and putting their mark on the battlefield. This is the rise of a new concept, a concept that has been in development since the early 1990s; that of the Private Military Company, or PMC.[2]

Although historically a rather new phenomenon, PMCs have become abundant in modern warfare. They are active in over fifty countries, and have often been decisive in determining the outcome of a conflict. These companies handle a wide variety of tasks. Some are limited to purely logistic tasks, such as feeding the army or providing transport. Others move closer to the battlefield by providing training facilities and advice. Another step is taken by companies taking up high-priority security tasks, such as protecting government officials in conflict areas. At the sharp end, PMCs engage in offensive combat.

[1] Percy, Sarah, Mercenaries: the history of the norm in international relations, New York: Oxford University Press, 2007, at 241

[2] They are sometimes called PMFs (Private or Privatized Military Firms), PSCs (Private Security Companies), military service providers and various other, but similar terms. These terms all describe the same brand of company. For the sake of argument, this paper will mostly use the abbreviation PMC. The notable exception in this paper is the difference between PMC and PSC, which will be explained in a later chapter.

Although the market for PMCs has its roots in post-colonial conflicts in Africa, the most lucrative PMC contracts are now being signed by the United States. PMCs are heavily involved in Iraq, providing any or all of the tasks described above. In doing this, the PMC business has been growing explosively. Some of the biggest PMCs are now being bought by multinational corporations such as L-3, Bechtel and Halliburton. At this time, PMCs provide training programs for the Reserve Officer Training Corps[3] as well as the Iraqi police force. Their influence is clearly not limited to the realm of weak or failed States, and keeps extending throughout the modern style of warfare conducted by Western armies. This alone raises several questions regarding US policies concerning its own armed forces. Why is there such a need for a privatized 'second force'?

Even more problematic however, is their status under international law. As mentioned, war has traditionally been the domain of States. The majority of international laws considers war as being fought by State armies. The concept of State liability and the regulation of conduct in times of war have been built upon this notion. PMCs undermine this concept. Their position within the international legal sphere is vague and ambiguous.[4] This becomes problematic considering the volatile areas, both legal and in practice, that these companies operate in. Several PMCs have been accused of humanitarian law violations and war crimes. The type of activities they engage in have the potential, if not the likeliness, for serious human rights abuses. Even when they do not violate the terms of their own contracts, PMCs can be a threat to international legal order. One of the potential hazards of PMC involvement is the breach of international community policies PMCs conduct, when they are acting as proxies for States not willing to openly engage in a conflict situation. Another, more hypothetical option is that other NGOs or private companies employ PMCs in the support of their goals or for protection of their assets. Already, several NGOs have made use of PMCs to protect their activities in conflict areas like Afghanistan and Sudan.

The very existence of PMCs prompts a debate about the legitimacy of their activities. PMCs are not defined or recognized as entities under international law. What is recognized though, is their business: selling military services. Under international law, selling military services for the sole purpose of profit is considered to be mercenarism. Mercenary activity is forbidden

[3] Singer, Peter W. (2004), War, Profits and the Vacuum of Law: Privatized Military Firms and International Law, Columbia Journal of Transnational Law, Vol. 42, at 522
[4] Id., at 523

according to some regulations, and restricted according to others. The problem with this prohibition is the ambivalence of the norm itself, and the lack of enforcement. Due to the extremely restrictive nature of the norm, it hardly applies to even those PMCs who actively engage in armed combat themselves. Furthermore, the norm, when applied in international humanitarian law, does not outright ban mercenaries; it only regulates their combatant status and privileges. These two factors render international anti-mercenary norms virtually ineffective in regulating PMC activity. As a consequence, no current, effective international law exists to regulate the employment and conduct of PMCs.

Additionally, PMCs themselves have undergone development since the beginning of the concept in the late 1980s. They have moved from offensive operations involving armed combat to providing security services in conflict areas. Their contractors have also changed. The PMCs of the mid-1990s were mostly contracted by governments, most notably weak governments in search of reaffirming their position of power. In this regard, PMCs provide similar services to the classic mercenaries that reveled in Africa's post-colonial conflicts. Indeed, some of the major criticisms of PMCs are directed at their similarities to these mercenaries, accusing them of only being the organized incarnation of the same entity. The new PMCs, or PSCs as they're sometimes called, associate with governments and other corporations alike. This makes them even harder to cover in public international law than the early PMCs and mercenaries.

This paper seeks to discuss the position of PMCs in international law and their development over the past two decades. It will analyze the notion of classic mercenarism as opposed to modern PMC activity, and set forward the basic factors that have fuelled the rise of PMCs during the 1990s. This understanding is important to outline the motivating factors behind the anti-mercenary norm and its influence on PMC regulation. After this, the paper will provide a description of the types of conflict PMCs have been involved in, and the new era of war that calls for the versatility PMCs provide. It will then discuss a series of examples of PMC operations in the past, and outline how the business has changed in the nature of its activities. Following this, it will discuss the applicable norms and definitions in international law relating to PMCs and their activities. These norms include Additional Protocol I and II to

Article 49 of the Geneva Convention (1949) and the Convention Against Recruitment, Use, Financing, and Training of Mercenaries (1989). It will explain the shortcomings of these norms in capturing PMC conduct within its definitions.

Furthermore, it will address the problem of what this paper calls the 'Janus face' of PMCs. PMCs provide services that address a legitimate need in international conflicts, as put forward by the third and fourth chapter. This side of PMCs' activities can be regulated by addressing State responsibility. In order to achieve this, the perception of PMCs as 'organized mercenaries', the perspective that has been dominant in anti-mercenary legislation, has to be dropped and replaced by a perspective of PMCs as legitimate actors in international conflict. Only then can the 'second face' of PMCs be addressed: the potential problems they cause by acting in service of other non-State actors, illegitimate governments and repressive regimes, and on their own accord, protecting their own interests.

The central thesis of this paper is as follows. International law should not ban PMCs, but incorporate them into the regime currently reserved for State armies. This follows from the failure of the anti-mercenary norms to address the different problems PMCs and mercenaries pose. The paper will set out some of the challenges faced by a possible new international law regime. It will discuss different directions a possible new body of international law can take in regulating PMC conduct. Furthermore, the paper will try to establish a regime of State responsibility, based upon current ICJ jurisprudence, interpretation of humanitarian law and the Draft Articles of State Responsibility, set forward by the International Law Commission. Concluding, the paper will suggest a framework for a possible PMC Convention, based upon the rules described above.

Classic Mercenaries

This chapter will explore some of the early examples of mercenary use and the recruitment of foreign soldiers, as a contrast to modern-day PMCs. In the light of the anti-mercenary norm and the debate about PMCs, it is hard to believe that a standing nation-State army, comprised of that nation-State's citizens, has not always been the historical standard. In fact, the employment of foreigners has been historically dominant over the employment of citizen armies. That does not mean that mercenary armies were fully morally accepted; as Percy (2007) argues,[5] the widespread use of classic mercenary armies in the Middle Ages is accompanied by the development of the anti-mercenary norm. Moreover, the ambivalence regarding the employment of mercenaries or foreign soldiers is reflected in the ambiguity of that norm.

Mercenaries of Roman times

The earliest examples of mercenary employment are found in ancient Egypt and the Old Testament. Egyptian pharaohs such as Ramses II relied heavily on Nubian soldiers. King David of Israel used mercenaries in his battles against the Philistines. Although mercenaries played a minor role in the Greek polis wars, they recurred as a formidable force in Alexander the Great's war against King Darius of Persia, on both sides of the battlefield.[6] Both Alexander's and Darius' armies reflected their far reaching empire and influence, employing soldiers from all corners of the Mediterranean. Alexander's army included, among others, Cretan archers and Agrianian foot soldiers. During the later stages of the Roman republic and its transformation into an empire, its army of legionnaires changed from a model citizen army to a plurality of ethnicities, with troops from the furthest outskirts of the empire such as Thrace and Gaul. Julius Caesar relied almost entirely on mercenary cavalry in his conquest of Gaul.[7]

---

[5] Percy, *supra* note 1, at 68
[6] Milliard, Maj. Todd S. (2003), Overcoming Post-colonial Myopia: a call to recognize and regulate private military Companies, Military Law Review, vol. 176, at 2
[7] Id.

Mercenary forces clearly have made a significant impact on these battles of ancient times. It is questionable, however, to what amount they belong to the category of 'true mercenaries'. These foreign forces were closely linked to the State, and did not sway in demonstrating their loyalty to a single ruler. Thus, they share little of the criticisms later uttered against the mercenary forces of the middle ages and Renaissance, and significant individuals of the late 20th century.

The Middle Ages and the feudal system

The feudal system of the early Middle Ages provided a new stage for the development of mercenary armies. The practice of hiring bands of warriors to fight next to, or sometimes instead of the king's standing army also drew the first criticisms of the mercenary profession and its consequences.[8] During the twelfth century, it had become common for the nobility to employ an army of mixed origin. These armies included knights, fighting as vassals for their lord or king, but also incorporated mercenaries hired for a specific campaign. There was little distinction between the permanently hired knights, the true mercenaries[9] and allied lords fighting for their share of loot or power. From a modern perspective, it is hard to establish the fighting motives of every group of soldiers. Arguably, even the permanently hired knights and vassals were attracted by the prospect of money and loot as much as the mercenary bands themselves. The feudal system, which relied on both alliances between lords and obligations from lesser vassal knights to their lords and kings made this distinction even fuzzier. In practice, wars in the early middle ages were generally fought by virtue of the nobility's purse.

Two other major examples from the late Middle Ages and renaissance were the Swiss and Italian mercenary practices. Between the thirteenth and sixteenth centuries, Switzerland became a steady resource of mercenaries fighting for other States. This continued, with Swiss bands of soldiers fighting for various other sovereigns, especially the king of France, until an arrangement was made that gathered the Swiss mercenaries under the French crown until 1793. In the case of Switzerland, this practice of mercenarism developed largely from financial need, on an individual as well as a national level. The Swiss State depended on these mercenaries to keep its economy rolling.[10] Similar to the Swiss practice, Italy had become a nation of mercenaries during the 15th and 16th centuries. These mercenaries were not

[8] Percy, *supra* note 1, at 69
[9] These mercenaries could be either foreign or domestic
[10] Percy, *supra* note 1, at 73

employed by foreign powers, but reinforced the city-States that ruled Italy. These city-States rarely had the means to employ a standing citizen army, but their trade revenues allowed for hiring mercenary bands, also known as condottieri,[11] to fight their trade conflicts.

Percy argues that using mercenaries as troops for a single battle served largely practical purposes,[12] and gives two main reasons for this. The first and most important reason is the general weakness of feudal armies, usually conscripted by the local lord among his peasants. Most mercenaries were better trained and had far greater combat experience. This degree of professionalism made it attractive to hire a mercenary army over employing a local feudal army. Secondly, hiring mercenaries put less logistical pressure on the campaign itself. It was far more convenient to hire a mercenary army close to the actual battlefield, than to arrange for transportation and supplies for a feudal army located far away. This was especially true in battles fought between French and English lords, as any battle would require any side to transport its army overseas. Alternately, hiring bands of mercenaries provided a certain degree of flexibility for the sovereign that standing armies sometimes could not provide. The usage of Swiss mercenaries, Italian condottieri and German mercenaries in the Dutch-Spanish 80-years war are examples of this.

However commonplace, the use of mercenaries was generally criticized. Not withstanding their effectiveness in combat, their status as hired troops and their foreign origin made them disliked and set them apart from the rest of the army. As early as the signing of the Magna Carta in 1215, the king was being called upon to abandon or restrict the practice of hiring foreign nationals in their armies.[13] The popular perception was that a soldier should be motivated by loyalty, not by greed.

This notion was largely influenced by the notion of a war motivated by a just cause. At a time where there was, as noted, little distinction between the mercenary's motivation of monetary gain and that of a regular feudal soldier, the notion of just war proved the prime sanctioning regime for *'separating criminals from warriors'.*[14] Mercenaries could only be fighting a just war if sanctioned by the sovereign or the church. Even then, they were regarded as being dishonorable compared to knights, who fought for noble motives instead of the love of war

[11] Milliard, *supra* note 6, at 2
[12] Percy, *supra* note 1, at 70
[13] Id., at 71
[14] Id., at 72

and personal gain. Other critics noted more practical objections to mercenaries. The employment of Swiss soldiers by foreign powers weakened Switzerland's own defensive position, and robbed its military of able-bodied men. In Italy, several condottieri resorted to criminal activity and extortion at a time when peace robbed them of their income.
As nationalism expanded throughout Europe and States became increasingly centralized, these criticisms gained more influence amongst nation-States. After the French revolution, States began to turn away from hired armies and increasingly relied on standing armies comprised of their own citizens.[15] One new form of 'disguised mercenarism' gained ground in that same period: the lending of soldiers to States by other States. An often-cited example is the employment of Hessian troops by the British military in the American Revolutionary war.[16] The Swiss papal guard continues its service to the Vatican to this day. Another form of increased State involvement in the mercenary business has been the recruitment of foreign nationals by a standing army. Examples include the French Foreign Legion and the British Gurkha brigades. Frye links these practices to the Italian condottieri and their recruitment by other States.[17]

The major aspect in which these foreign brigades differ from the condottieri and Free Companies from the late Middle Ages is their loyalty and responsibility to a single State. Both the FFL and the Gurkhas have been employed in various types of conflicts, aligning with both their States and international organizations, such as the United Nations. Indeed, this character bears reminiscence of classic mercenaries. However, as an official part of their States' armies, they abide to the interests and policies of their host States, France and the UK respectively. In this aspect, they differ from the profit-driven condottieri and the classic mercenaries. This category also includes foreign brigades fighting in the Spanish civil war.

Nationalism, the abolishment of mercenaries and activity in Africa

The major revolution in standing State armies was the adoption of a civilian army by Prussia,[18] and its effectiveness in the Franco-German war of 1870.[19] During this period, an army solely comprised of a State's own nationals became the world's standard and the

[15] Id., at 94
[16] Frye, Ellen L. (2006), Private Military Firms in the new world order: how redefining 'mercenary' can tame the 'dogs of war', Fordham Law Review, Vol. 73, at 2615
[17] Id., at 2616
[18] Percy, *supra* note 1, at 132
[19] Milliard, *supra* note 6, at 6

practice of employing mercenaries became rare. The only matter concerning mercenaries was the question of whether their existence would drag neutral countries into conflicts. As a result, a prohibition on mercenary recruitment on national territory was included in the 1907 Hague Convention.[20] It was not until after the Second World War that the problem of mercenaries would resurface in international politics. Mercenaries had played no role of significance during the Second World War. As a result the issue of mercenaries was of only minor concern to international law.

This indifference to mercenarism changed during Africa's decolonization conflicts between the late 1950s and 1970s. Africa had a longstanding tradition of mercenary and foreign forces involvement. The French Foreign Legion had been active in Africa since 1831, maintaining French colonial interests and its sphere of influence. King Louis-Philippe has been famously quoted at the formation of the FFL, saying: '*What difference does it make if a hundred thousand rifles fire in Africa? Europe does not hear them.*'[21]

The period after the Second World War marked a spectacular increase in mercenary activities. These mercenaries were mostly individuals, fighting on different sides in various wars of liberation. Some of them gained legendary notoriety. Frenchman Bob Denard and Irishman 'Mad Mike' Hoare both fought in the Congo on the side of the Katanga secessionist movement and the Tshombe government. Denard would later be a key figure in staging coups in the Comoros Islands in 1975, 1978 and 1995, overthrowing the government of Ahmed Abdallah in favor of former president Ali Soilih, then fighting for Abdallah against Soilih, and finally staging a coup that killed Abdallah in 1989.[22] Similarly, Mike Hoare earned his reputation fighting in the Seychelles and the Angolan civil war. Together with Belgian mercenary Jacques Schramme, these men became known as 'les Affreux'- The Terrible Ones.

Although these individual mercenaries have never been very great in numbers, their actions have had a significant impact on Africa's conflicts and the perception of mercenaries. They fought mostly for beleaguered post-colonial governments against rebel forces, or in the service of former heads of State searching to reinstall themselves to power. Through these activities, they sometimes had a decisive influence on the outcome of the conflict and

[20] Kinsey, Christopher (2005), Challenging international law: a dilemma of private security companies, Conflict, Security & Development, 5:3, at 271
[21] Francis, David J. (1999), Mercenary intervention in Sierra Leone: providing national security or international exploitation?, Third World Quarterly, Vol. 20, No.2, at 320
[22] Francis, *supra* note 21, at 321

contributed significantly to the destabilization of the African region. Moreover, they sometimes acted as proxies for the former colonial powers. Denard's successes in the Comoros Islands can for a large part be attributed to the consent of the French government.[23] Belgian mercenary involvement[24] in the Congo and the Katanga secession movement[25] showed Belgium's reluctance to fully disengage from its former colony and its natural resources.[26]

This recurrence of mercenary activity began to draw a significant amount of international attention. The reactions of the international community were mostly negative. However, no action was taken by the international community until 1968, when Resolution 2465 was adopted by the UN General Assembly.[27] This resolution declared mercenary activity opposed to independence movements in post-colonial regions a criminal act. Connecting the condemnation of mercenary activity to independence movements was also mirrored in the actions taken by the Organisation for African Unity. The OAU perceived mercenary involvement as being a threat to the new policies of self-determination. They acted as agents for the former colonial powers, establishing a neo-colonialist regime opposed to the new African governments and destabilizing the continent.[28] This perspective was formulated into law in the 1977 OAU Convention for the Elimination of Mercenarism in Africa. The Convention was mainly focused on the elimination of mercenarism in support of secessionists or protecting foreign business assets.[29] The OAUs Convention came after a major trial of 13 mercenaries in Angola. All 13 were convicted of the crime of mercenarism, and either sentenced to death or long prison sentences.[30]

The international focus of mercenary activity in wars of independence might lead to the conclusion that mercenarism was generally condemned on the basis of its adverse influence on self-determination. This perception is understandable given the African States' interest in maintaining their sovereignty and territorial integrity. However, apart from the OAU and the

[23] Francis, *supra* note 21, at 321
[24] Belgian mercenaries have even been credited for bringing down UN secretary general Dag Hammarskjold's plane, returning from negotiations with the Katanga secession government.
[25] McIntyre, Angela & Weiss, Tanya, *Weak governments in search of strength*, at 69, in Chesterman, Simon & Lehnardt, Chia (ed.), From mercenaries to market: the rise and regulation of private military companies, New York: Oxford University Press, 2007
[26] Which were for a large part located in the Katanga region. Some have gone as far as labelling Tshombe an agent of Western industry interests.
[27] Organisation of African Unity, Resolution to the Activities of Mercenaries, AHG/Res. 49 (IV) (1977)
[28] McIntyre & Weiss, *supra* note 25, at 68
[29] Percy, *supra* note 1 at 181
[30] Kinsey, *supra* note 20, at 273

different African States, the negative reaction to mercenaries had not so much to do with their impact on stability in Africa, as with the mercenaries' lack of moral scruples, desire for private gain and human rights violations.[31] This is partially reflected in Article 47 of the Additional Protocol I to the Geneva Conventions. Article 47 seeks to condemn mercenaries of all sorts, excepting them from POW status, not just mercenaries fighting against national liberation movements. Indeed, not all mercenaries of the 1960s and 1970s fought against self-determination.[32] Notable exceptions include the Biafran civil war. Although Biafra hired mercenaries to support their war of independence from Nigeria, mercenaries fighting alongside the Biafrans were condemned for their involvement.

By the 1980s, mercenary involvement in Africa faded, but did not disappear fully. Negative international attention towards the individual mercenaries of the 1970s made it unattractive for States to hire them, and the Angola trial demonstrated the consequences for individuals engaging in mercenary activity. Most former mercenaries started to organize themselves into legitimate companies. These corporations had several advantages over the old individual mercenary model. They enjoyed a certain degree of legitimacy, and proved more adaptable than the mercenaries of the 1970s. New types of conflict required the companies to be proficient in a variety of tasks that reached beyond engaging in armed combat. Moreover, the new PSC and PMC employees were better trained and acted more professionally than individual mercenaries.[33] The newly formed PMCs proved surprisingly successful in taking on tasks formerly performed by the individual mercenaries, while at the same time keeping a legitimate face towards the international community.

[31] Francis, *supra* note 21, at 321
[32] Percy, *supra* note 1, at 189
[33] Kinsey, *supra* note 20, at 274

The emergence of a new market

As noted in the previous chapter, PMCs are a relatively new phenomenon. Arguably stemming from the same roots as classic mercenary operatives, their model of enterprise has only just become apparent in international conflict situations. The first companies were founded early in the 1990s, with the first major operations being conducted in 1993. In contrast, PSCs had already been active since the 1970s, though on a much smaller scale.[34] The PMC surge only started to influence the PSC market after 2001, following American involvement in both Afghanistan and Iraq. During that same period, the market for PMCs had already started to decline, with the two most important PMCs disbanding in the early 2000s.[35] The swift emergence of PMCs as important players in international conflict can be explained through a number of historical factors. These factors have stimulated the founding of these corporations and defined the market for their services. Goddard (2001) names four key factors[36] in explaining their quick rise.

First and foremost, the end of the Cold War left a power vacuum that cooled down both Eastern and Western interest in conflict areas. Regional conflicts that used to be of interest to either one of the superpowers with regard to their sphere of influence now became peripheral to national interests. Previous to its dissolution, the Soviet Union had already been pursuing a policy of disengagement in the wake of its defeat in Afghanistan. After the Soviet Union dismantled, the newly born Russian Federation had neither the means nor the political will to engage in regional conflicts. As for the US, the absence of a Soviet threat led to a policy of active disengagement from conflicts in other States and regions. The US found itself unwilling to mingle in those post-colonial conflicts, most of all those spawning in the former Yugoslavia and Africa, while the former Soviet States were simply unable to. PMCs have stepped into this vacuum by providing security services in these conflict areas not made available by the international community. The next chapter will go more detailed into the new type of conflict that formed an important new market for PMCs.

[34] Percy, *supra* note 1, at 206
[35] Executive Outcomes in 1999 and Sandline International in 2004
[36] Major S. Goddard, (2001) , The private military company: A legitimate entry within modern conflict, Fort Leavenworth, Kansas, at 5

On top of the already declining interest in new regional or non-international conflicts, the traumatizing experiences of the United States following its intervention in Somalia made it even more reluctant to intervene in conflicts not of direct threat to the US itself. This reluctance has sometimes been described as the 'Mogadishu factor'. The intervention in Somalia left 18 US soldiers dead after the infamous 'Black Hawk Down' incident. As a result, domestic political support for humanitarian interventions and peacekeeping missions faded. The US became less willing to commit its own military and risk its own soldiers in wars not of vital interest to US national security.

As a result, '*Lacking determined international action in the form of direct intervention from the West ,less powerful and developed nation-States could not guarantee their own security, nor provide for and raise effective national armies against interState wars and internal civil wars'.*[37] This Mogadishu factor is remnant of the influence of public opinion on the Vietnam War. Furthermore, the influence of domestic public and political support for military interventions is explanatory to the political-military decisions made by the US regarding the use of PMCs in various conflict areas. The unwillingness of the American people to risk the lives of their close relatives has proved a steady motor behind employing PMCs for a growing number of tasks in various conflict areas.[38] Nowhere has this development been more apparent then in Iraq, where the number of Blackwater employees beats the number of British soldiers by two to one.[39] This involvement has often led to the critique that PMCs are being used as proxies to execute US foreign policies where the US military is unable or unwilling to do so.

A third development is the downsizing of State militaries following the fall of the Soviet Union. This decline not only affected the disbanded Soviet Union, but the western powers as well. In total, worldwide nation-State armies were reduced by five million in personnel in the period between 1984 and 1992. The US downsized its army by 30 percent. Today, its numbers are around 480,000 soldiers, compared to 780,000 at the time of the first Gulf War.[40] Most major PMCs, such as Blackwater USA,[41] Executive Outcomes and UK-based Sandline, have been founded by former military officers. This downsizing also created a pool of manpower from which the PMC business could draw. Nowadays, the majority of PMC

[37] Id., at 5
[38] Id., at 43
[39] Andrew Stephen, *New Statesman*, 26 april 2004
[40] Cilliers, Jakkie (2002), A role for private military companies in peacekeeping?, Conflict, Security & Development, Vol. 2, No. 3, at 146
[41] Now Blackwater Worldwide, see http://www.blackwaterusa.com

personnel is made up of former military employees. These people provided a well-trained, readily available recruitment basis for starting PMCs.[42] The most exemplary of these is the PMC Military Professional Resources, Inc. (MPRI), a PMC specializing in training and advice. This PMC has made it a policy to strictly employ former military officers.[43]

Apart from this new-found manpower, the new PMCs could also profit from the vast amount of military equipment becoming freely available on the market. A number of former Soviet States rebuilt their economies by selling their old weapon stock, laying a foundation for the firepower of the new PMCs. By acquiring a wide range of weaponry, from combat rifles to transport helicopters and gunships, new PMCs built up resources comparable to several nation-States' military forces.

One last important factor, not specifically mentioned by Goddard, is the fall of the Apartheid regime in South Africa. Though mostly of symbolic significance on an international scale, the end of Apartheid nevertheless gave birth to one of the most notorious PMCs: Executive Outcomes (EO). This company was formed out of a number of former South African special police units, such as the 32nd Reconnaissance Battalion.[44] Members of these police units had been closely related to the Apartheid regime, leaving no place for them in the new government system.

While only being a single company out of a wide variety of new PMCs, EO and its affiliated companies such as Sandline International, have partially shaped the public face of the PMC business. Though EO was officially dissolved in 1999 and its sister company, Sandline, closed its doors in 2004, the company has left its mark on the debates on PMCs.[45] Some of its spin-off companies, such as Saracen, Lifeguard and Aegis Defence Services are still active.[46] It was also EO that first exploited the market of new regional conflicts as a viable market for PMCs, demonstrating a willingness for engaging in armed combat unprecedented and unmatched by other PMCs.

PMCs and the new era of war

---

[42] Avant, Deborah, *The emerging market and problems of regulation*, at 182, in Chesterman, Simon & Lehnardt, Chia (ed.), From mercenaries to market: the rise and regulation of private military companies, New York: Oxford University Press, 2007

[43] Frye, *supra* note 16, at 2621

[44] Singer, P. (2001), Corporate Warriors. The Rise of the Privatized Military Industry and Its Ramifications for International Security, International Security, Vol. 26, No. 3, at 194

[45] Cilliers, *supra* note 40, at 148

[46] Id.

The previous chapter outlined the historical factors that contributed to the growth of PMCs during the 1990s. Before going into specific PMCs, their areas of expertise and some examples of their operations, this chapter will describe the changed character of war and the specific security challenges the international community faces. Describing this situation is necessary to gain insight into the ways PMCs have transformed from mere organized mercenaries at the beginning of the 1990s to vital players in global security services. It also provides the preface to explaining why the anti-mercenary regulations of the 1970s and 1980s are unsuccessful in regulating PMCs. The transformation into this new era of conflict is likely an effect of the wider developments in globalization that have been taking place over the last two decades, coupled with the disengagement policy described in the previous paragraph. PMCs and PSCs are securing a specific role for themselves in this new area of conflict. They offer solutions to the new security challenges and are not hindered by some of the boundaries of sovereignty, territorial integrity and political accountability for State militaries.[47]

These security challenges have culminated in what can be described as a 'new war', as opposed to the traditional way of warfare recognized in international law. Kinsey describes new warfare as follows: *'If traditional warfare can be described as a set of rational moves with a political purpose, and can be dictated by a set of rules known as the Laws of War; 'new wars' are the exact opposite. They are frequently explained as a result of intractable ethnic hatred or a descent into tribal violence, Keen (2000 – pp. 20-21), while acts such as murder rape, intimidation, looting and brutality are a common feature, along with the use of child soldiers and the total disregard for non-combatant status'.*[48]

There is a notable correlation between areas in which this 'new war' has become apparent and the increased visibility of ethnic and/or religious divisions after subsequently decolonization and the end of the Cold War. Both events uncovered a series of rifts artificially covered up by the blanket of either colonialism, communism or anti-communist regimes. Examples are numerous, and include the Great Lake region in Africa,[49] Sierra Leone, Somalia, Angola, the former Yugoslavia and the Caucasus. With the exception of the Caucasus, which is still of

[47] Avant, *supra* note 42, at 182
[48] Kinsey, *supra* note 20, at 275
[49] McIntyre & Weiss, *supra* note 25, at 69

great interest to Russia,[50] all of these regions are peripheral to most current powers' security interests.

Also characteristic for the conflicts arising from the regions are the goals and interests pursued by the actors in these conflicts. Rather than being motivated by the State's interests, most conflicts concern the interests of different sub-State entities within the State, sometimes covering multiple States. In addition, these groups use violence for goals other than political power through territorial gain.[51] Instead they try to establish superiority of a single ethnic group, or fight simply for economic gain. The Balkans are a model theatre for this type of conflict. Although territorial gain and political power were pursued as primary goals, they ranked alongside establishing ethnic identity and superiority of one people within the borders of the State.[52] Wars of this type are mostly regional in nature; thus, they are of little concern to the international community other than for humanitarian reasons. While generally characterized by extreme violence, this type of war rarely threatens the interests of major powers. As a result, even UN-hosted humanitarian missions rarely raise support by major powers, leaving a political-military gap attractive for PMCs.

Following the changing political nature of the new conflicts, the means by which the conflicts are fought changes as well. Contrary to traditional warfare, 'new war' often takes the form of guerrilla warfare and counterinsurgency. On top of the lack of national interests, this makes most nation-State armies extremely reluctant to engage in this type of conflict. Between the Vietnam War and the second Gulf War, the US military was specifically structured to prevent it from engaging in counterinsurgency and as a result, did not have sufficient means to fight this type of war[53] once it found itself forced into it in Iraq.[54] In contrast, PMCs are often well equipped to fight a counter-insurgency. Many PMCs and PSCs employ former special forces operatives, specifically trained for this type of warfare.[55] This is especially attractive for the US military to employ PMCs and PSCs in Iraq, where the initial war rapidly transformed into a counterinsurgency.

---

[50] As proven by the conflicts in Chechnya and Georgia
[51] Kinsey, *supra* note 20, at 275
[52] Which might, for instance, entail the establishment of a 'Greater Serbia'
[53] Singer, *supra* note 44, at 194
[54] Isenberg, David, *A government in search of cover. Private military companies in Iraq*, at 83, in Chesterman, Simon & Lehnardt, Chia (ed.), From mercenaries to market: the rise and regulation of private military companies, New York: Oxford University Press, 2007
[55] Kinsey, *supra* note 20, at 276

Moreover, PMCs are generally adept at performing various military operations other than war (MOOTW).[56] In situations requiring less than full scale armed combat, a PMC can prove to be more agile and easier to deploy than the military. PMCs have the added benefit of deniability;[57] if the operation fails, the private nature of the forces make it easy for government officials to disengage from the operation. This practice is similar to the covert support of mercenaries by western governments in the 1970s, as noted above.

Lastly, many PMCs and PSCs are attracted by the spoils of war. Apart from the political and ethnic traits of the new conflicts, they usually include an important economic factor. This factor can be the cause of the war, such as control over natural resources. Fighting for control over natural resources is in itself not new, but globalization has made it easier to seize and distribute its products. Most visibly, in Africa, weak governments are in a constant struggle to maintain the economic motors under their control. In other areas, sub-State entities such as rebel groups and warlords are engaged in struggles over control of diamond mines and oil wells. In addition, these areas are usually a topic of interest for both NGOs and international organizations.

The presence of natural resources makes it generally very attractive for PMCs and PSCs supplying security services. These services include both protecting the assets themselves, such as Lifeguard's involvement in Sierra Leone demonstrates[58] as well as protecting NGOs in conflict areas. The main attraction for PMCs is that they are often rewarded in concessions in the resources they were hired to protect. This has led to a whole different debate on the influence of PMCs; whether the corporations are only interested in their own shares or the shares of affiliated companies, instead of in legitimate concerns. Some critics accused various PMCs of '*establishing governments that will then make their decision with an eye first on corporate interests, so that instead of a country's citizens, foreign shareholders become the real basis of sovereignty*'.[59]

[56] Goddard, *supra* note 36, at 1
[57] Kinsey, *supra* note 20, at 276
[58] Kinsey, *supra* note 20, at 277
[59] Peter Klerks (1998) in Francis, *supra* note 21, at 323

These three factors – the regional, often ethnically motivated character of conflict, its counterinsurgency traits and the possible revenue – provide the main stage on which PMCs have been active for the past two decades. The next chapter will discuss the variety of services provided by PMCs, give some examples of PMC activity that have spurred the debate on their legality and discuss the changing nature of the business from mainly PMC to almost solely PSC.

The PMC business: one moniker, different tasks

Models

The modern PMC business covers a wide variety of activities. Indeed, the very debate on whether the terms PMC or PSC should be used with regard to these corporations, draws on their primary field of operation. This chapter will explore the different services provided by PMCs. Different models have been developed in an attempt to classify PMCs and PSCs according to their lines of operation. One of the most cited has been Singer's 'Tip of the spear model',[60] classifying PMCs according to the amount of force they employ in their operations. This model does have a significant weakness: it is a static classification, and does not entirely recognize the versatility some PMCs have demonstrated in changing the nature of their corporation. As McIntyre & Weiss point out,[61] the same company can employ only training and supply activities in one area, placing it lower on the scale, but engage in more combat-oriented actions in another. PMCs respond to the demands of the market, changing their dynamics.

A similar problem exists with Percy's division[62] of PMCs in Combat PMCs and Non-combat PMCs. While this division indeed recognizes the difference between PMCs that specialize in offensive combat, such as EO and Sandline, it rounds up the vast majority of the business in the 'non-combat' category. Furthermore, the UK's Foreign and Commonwealth Office report on PMCs cautions, 'the distinction between combat and non-combat operations is often

---

[60] Singer (2001), *supra* note 42, at 200, also incorporated in Singer, Peter, Corporate Warriors: The Rise of the Privatized Military Industry, New York: Cornell University Press, 2003

[61] McIntyre & Weiss, *supra* note 25, at 69

[62] See Percy, Sarah, *Morality and Regulation*, at 13, in , in Chesterman, Simon & Lehnardt, Chia (ed.), From mercenaries to market: the rise and regulation of private military companies, New York: Oxford University Press, 2007

artificial'.[63] Lastly, there's a classification roster offered by Kinsey,[64] placing PMCs[65] along the axes of amount of force used and degree of State sanctioning. This last element is notable, mostly for its absence in the before mentioned definition. This definition, however, suffers from the same flaws, as several PMCs have been contracted by governments, semi-State actors and private entities alike.

Another aspect of classifying PMCs is the overlap between PMC activity and other non-State actors providing military services. The most obvious parallel is of course the classification of PMCs or PMC employees as mercenaries, specifically when they perform combat operations. On the other side of the spectrum, PMCs are often incorporated, or provide services similar to, defense industrial providers. These often large companies generally supply the army with equipment, but also provide the personnel and technical experience required to operate the equipment. In this respect, they share some characteristics with PMCs. So, in order to elaborate on the scope of the PMC business, it is much more useful to outline the various activities undertaken by PMCs.

Activities

The aforementioned UK Green Paper lists six categories that cover most of the scope of PMC activities, and provides examples of PMCs undertaking these activities. These categories are advice (MPRI, Vinnell),[66] training (Blackwater, MPRI, DynCorp, Vinnell),[67] logistical support (DynCorp, Pacific A&E, Brown & Root Services),[68] peace operation monitoring and recruitment (DynCorp),[69] and demining (Minetech, Saracen, ArmorGroup International).[70] One other service that has been rising throughout the industry is private intelligence

[63] United Kingdom Foreign and Commonwealth Office, Private Military Companies: Options for Regulation, HC 577, 2002, at 8 (sub 11)
[64] Kinsey, Christopher, Corporate soldiers and international security : the rise of private military companies, New York: Routledge, 2006
[65] Compared to traditional military service providers, such as the army itself
[66] UK Green Paper, *supra* note 63, at 8, para. 10, listing advice as '*covering anything from advice on restructuring the armed forces, to advice on the purchase of equipment or on operational planning.'*
[67] Id., training the core business of most PMCs. Training covers combat training for a specific operation, as well as general training, such as the mentioned involvement of Blackwater USA in the Reserve Office Training Corps. See further note 2
[68] Id., for instance, delivering humanitarian aid and supplying the army. Arguably, this also includes the operation of remotely controlled airplanes and even spraying defoliant over coca fields in Colombia, as performed by Blackwater Worldwide.
[69] Id., such as taking place in the Balkans during the 1990s
[70] Id., as performed by specialist or affiliated companies

gathering.[71] At first a subsection of logistical support, not specifically addressed in the UK Green Paper, increased reliance of the US government has proved it to be a lucrative activity of its own.[72]

PMCs, however, also actively engage in armed combat. This engagement can come in different forms. Some PMCs, mostly active in the mid-1990s, participated in offensive combat and operational support. Some refer to these corporations as the 'true' PMCs, as opposed to PSCs and other, above mentioned military service providers. They are the most reminiscent of mercenaries, leading to accusations that they are actually the same as individual mercenaries, albeit in organized form.[73] The amount of PMCs actually performing these tasks, however, is limited, as are their operations.[74]

In most analyses, only two PMCs are actually identified in this category: EO and Sandline Ltd. Some of their past operations contain tasks usually associated with State militaries, such as counterinsurgency, restoring a government to power and fighting wars.[75] These firms are usually associated with failed States and weak governments, offering military force where the State could no longer guarantee security for its citizens. Even in this situation, their involvement did not necessarily account for public approval, as Sandline's failed mission in Papua New Guinea shows.[76] In this respect, their operations are relatively peripheral to the wider spectrum of PMC services. Still, since EO made its debut in the international arena through its operations in Angola, these companies have symbolized the 'sharp end' of the PMC business and continue to do so.[77]

The other, less controversial, side of PMCs using force is the private security business. In performing this task, PMCs are often referred to as PSCs, to distinguish them from mercenary-like corporations, such as the abovementioned EO and Sandline. If these companies can be referred to as 'actively' involved in armed combat, PSCs represent

---

[71] Singer, *supra* note 3, at 525
[72] Companies engaging in this activity include MPRI, Custer Battles, Erinys and AirScan, Inc.
[73] Francis, *supra* note 21, at 321
[74] UK Green Paper, *supra* note 63, at 8, para. 9
[75] O'Brien, Kevin A., *What should and should not be regulated?*, at 38, in Chesterman, Simon & Lehnardt, Chia (ed.), From mercenaries to market: the rise and regulation of private military companies, New York: Oxford University Press, 2007
[76] Cockayne, James, *Principal-agent theory and the regulation of PMCs*, at 211, in Chesterman, Simon & Lehnardt, Chia (ed.), From mercenaries to market: the rise and regulation of private military companies, New York: Oxford University Press, 2007
[77] O'Brien, *supra* note 75, at 39

'passive' involvement.[78] These PSCs have grown to some of the largest in the business, such as Blackwater Worldwide, DynCorp, Aegis Defence Services and Lifeguard. Illustrating the close connection to PMCs, the PSC Aegis Defence Services, at the moment the prime defense contractor for the US in Iraq,[79] was established by Ltd. Tim Spicer, founder and former CEO of the controversial Sandline.[80] The line between the two categories, and thus the distinction between PMCs and PSCs is often blurred; not the least because some of these self-proclaimed PSCs provide numerous other tasks listed above, including actions that border 'active' combat involvement. Indeed, as Percy notes,[81] PSCs do provide operational support, including the operation of weapons systems. Furthermore, under international humanitarian law, no distinction exists between 'defensive' combat and 'offensive' combat.[82] In that respect, when a PSC protects a military target, such as a convoy, and responds to an attack, they become combatants. Such is often the case in Iraq, where PSCs perform a wide variety of guarding and security tasks.[83]

With the wide variety of services offered by PMCs and PSCs comes an equally wide clientele. As laid down in chapters three and four, the changing nature of international politics and the new wars of the 21st century have increased the demand for PMCs across the globe. This is reflected in how different services are offered to different clients. As mentioned, these clients first of all include weak States and failed governments.[84] These actors are mostly interested in military services, reaffirming their position of power while lacking a reliable State army. In the past, these operations have included 'active' combat participation. In these areas, the interests of multinational companies are often aligned with the interests of the governments in protecting valuable assets and infrastructure.[85]

As cited above, PMCs often provide security and policing power, while at the same time securing oil wells or diamond mines. Secondly, PMCs, or more often PSCs, have been recruited as 'foreign policy proxies' by Western governments.[86] Chapter three already

---

[78] Id.
[79] Isenberg, *supra* note 54, at 86
[80] Percy, *supra* note 1, at 228
[81] Id., at 225
[82] Doswald-Beck, Louise., *PMCs under international humanitarian law*, at 122, in Chesterman, Simon & Lehnardt, Chia (ed.), From mercenaries to market: the rise and regulation of private military companies, New York: Oxford University Press, 2007
[83] Kinsey, *supra* note 20, at 270
[84] McIntyre & Weiss, *supra* note 25, at 78
[85] Percy, *supra* note 1, at 226
[86] Cilliers, *supra* note 40, at 149

mentioned the influence of public opinion on US foreign policy, leaving the 'dirty work' up to PMCs. Furthermore, where Western State militaries lack the ability to protect NGOs doing their work in conflict areas, PSCs are often hired as a replacement. Even reputable organizations such as CARE and the World Food Programme have employed PSCs for their private security.[87] There has also been talk of PMCs being employed by the UN for peacekeeping missions. Although at first dismissed by former UN Secretary General Annan, the door is still open for the involvement of non-State actors in situations where States are unwilling to pledge material support to UN missions.[88]

PMC impact on international security: three examples

To underline the significance of PMC involvement in conflict situations, this chapter will discuss three prominent examples of PMC involvement in armed conflict. These examples are EO's operations in Sierra Leone in 1994, MPRI's advisory role in the Balkans in 1995 and subsequently Sandline's involvement in arms embargo violations in 1997, and the impact of PSCs like Blackwater, DynCorp and Aegis in Iraq since 2003.

Executive Outcomes

Chapter two described how Africa became a prima theatre for the rise of mercenaries. Although these individuals had almost completely disappeared by 1990, Africa again became the center of attention when it was host to the first major PMC operations. Prominent among these operations is EO's involvement in Sierra Leone. EO was a South-African company, as noted in chapter three, founded by former 32nd Battalion-commander Eeben Barlow.[89] The company was largely made up of veterans of former South African special forces.[90] Before it saw action in Sierra Leone, it had already debuted in Angola's civil war, where a force of only 28 men managed to regain control of the Soyo oilfield for the Sonangol oil company.[91] Later, the company secured a $40 million contract for arming and training Angola's government forces in their war against the UNITA rebel groups. Both of these actions were considered a

[87] Id., at 147
[88] Percy, *supra* note 1, at 223
[89] Percy, *supra* note 1, at 209
[90] McIntyre & Weiss, *supra* note 25, at 70
[91] UK Green Paper, *supra* note 63, at 11 (Box 1)

success, an assertion reinforced by the resurgence of the conflict after EO left the country,[92] supposedly as a result of US pressure.[93]

These two actions marked EO's core operations: combat involvement alongside training and equipment. It also signaled the first criticisms of the company for its mercenary-like traits, as well as its ties to exploitation of natural resources.[94]

EO was hired by the government of Sierra Leone in 1995, at the height of its civil war.[95] This war was led by Corporal Foday Sankoh, leader of the Revolutionary United Front (RUF), supported by Charles Taylor, at that time president of Liberia.[96] Because of the weakness of the government army, the rebels had made significant progress since the war broke out in 1991. At the time EO was contacted, the RUF had advanced to within 20 miles of the capital, Freetown. The military regime, led by Colonel Valentine Strasser, had already hired the PSC Gurkha Security Guards, Ltd. (GSG), only to see it withdraw after its leader was killed by the rebels.[97] Contrary to GSG's approach of restricting itself to training government forces, EO participated in combat directly. In addition to its training program, it developed a separate battalion the same way it had operated in Angola. Its impact was immediate and decisive. EO deployed a modern strike force using sophisticated artillery equipment and aerial support, combined with a superior training,[98] which resulted in driving the RUF forces back to the Kangari Hills.

After its $35 million contract was renewed in 1996, EO launched a large offensive against the RUF's major bases and secured most of Sierra Leone's diamond mines. By 1996, the situation had stabilized to a degree that elections could be held,[99] which were won by Ahmed Tejan Kabbah. As part of a peace agreement with the RUF, EO was withdrawn from the conflict.[100] Without their support, Kabbah's government fell in 1997 to an RUF coup d'état.

---

[92] Percy, *supra* note 1, at 210
[93] UK Green Paper, *supra* note 63, at 11 (Box 1), although Singer (2003) remarks that this pressure might result from a desire to involve US PMC MPRI in the conflict, rather than from concerns about mercenary involvement
[94] Francis, *supra* note 21, at 323
[95] Id., at 324
[96] Percy, *supra* note 1, at 210
[97] Francis, *supra* note 21, at 326
[98] McIntyre & Weiss, *supra* note 25, at 72
[99] Percy, *supra* note 1, at 210
[100] UK Green Paper, *supra* note 63, at 12 (Box 2)

EO's successes in Angola and Sierra Leone point to a couple of problems associated with PMCs. As U.N. Special Rapporteur,[101] Enrique Bernales Ballesteros noted, "EO rivaled a function traditionally assigned to the State, namely, security… including the organization of the armed forces".[102] Indeed, EO's method of operations strongly resemble the mercenary activity of the 1970s, actively engaging in combat and forming a separate combat entity from the government army. As a result, international pressure mounted on Sierra Leone to remove EO from its payroll,[103] eventually leading to the termination of the contract. It also shows the strong reliance of weak governments on external security forces in securing their power and legitimacy. As mentioned in chapter four, PMCs thrive on low-intensity regional conflicts that lack any international community interest, thus depriving the belligerent States of military assistance. There was little international support for Strasser's government, leaving EO as a last resort.

Furthermore, EO's operations also show the effectiveness of a highly-trained force in a fragmented conflict and the overreliance of weak governments on private actors. Such was also the case in 1997, when Kabbah's exiled government tried to reinstate itself to power by hiring Sandline.[104] Sandline sparked an international controversy and embarrassed the British government when it violated a UN arms embargo by supplying Kabbah's forces with arms and manpower in preparation of a counter-coup. Although Sandline argued that its actions were consistent with the goal of the arms embargo itself,[105] it put the British government under intense scrutiny after it was discovered that Sandline's actions had the cover blessing of the British foreign office.[106]

Another controversy that surrounded EO's mission even more than its mercenary links, were the means of payment Sierra Leone used to fulfill its $35 million contract obligations. EO was paid largely in diamond mines concessions,[107] diamond mines being an important driving factor for the Sierra Leone economy and the primary cause of the conflict. Of course, a strong argument can be made for the assumption that this was the only feasible method of payment

[101] In full: UN Special Rapporteur on the use of mercenaries as a means of impeding the right of the people to self-determination
[102] Frye, *supra* note 16, at 2621
[103] Percy, *supra* note 1, at 216
[104] Id., at 211
[105] To reinstall a democratically elected government in Sierra Leone by depriving the military regime of support
[106] Francis, *supra* note 21, at 328
[107] Id., at 331

considering the government's budget and State of power.[108] However, EO's links[109] to diamond trade company Branch Heritage, Ltd. have raised several questions behind the company's real motive and loyalty to its client. It must be noted that those links were vigorously denied by EO founder Eeben Barlow.[110] The concern is that, rather than being occupied with legitimate security services, PMCs like EO are as much a threat to internal self-determination by largely protecting Western assets as the traditional mercenaries were,[111]

MPRI in Croatia

The impact of PMCs on conflicts does not even have to come from armed combat involvement, as MPRI's advisory role in the Balkan wars of the mid-1990s shows. MPRI (Military Professional Resources, Incorporated) is an American company founded in 1989.[112] It is one of the more versatile PMCs, offering services in a number of areas.[113] Its core activity is training and evaluation of operations.[114] Its training programs include skills such as airborne operations, counterinsurgency, joint operations, intelligence, leadership development, special operations, recruiting, surface warfare and weapons control, among others.[115] As mentioned, MPRI employs mostly former US military personnel, currently supporting a 12,000 man strong employment base.[116] This recruiting pool, according to Singer, brings to bear '*A greater amount of experience and expertise than almost any standing force can delegate on its own'.*[117] Indeed, all of MPRI's contracts are with governments and licensed by the US government,[118] itself a prime client of the corporation. MPRI has thus assisted governments such as Bosnia, Colombia and Senegal in training and equipping their armies for various operations.

One of MPRI's more controversial operations, also one that attracted the most international attention, was its involvement in Croatia in 1995. In the wake of the disintegration of the Balkans, the Croatian army had suffered a series of defeats at the hands of the Serbian

[108] McIntyre & Weiss, *supra* note 25., at 71
[109] Or, as some argue, subordinate relationship
[110] Percy, *supra* note 1, at 213 and McIntyre & Weiss, *supra* note 25, at 73
[111] Francis, *supra* note 21, at 330, quoting Bernales Ballesteros
[112] Kinsey, *supra* note 20, at 272
[113] UK Green Paper, *supra* note 63, at 13 (Box 3)
[114] Id.
[115] Milliard, *supra* note 6, at 13, see also MPRI homepage for a more inclusive list, *available at* http://www.mpri.com/main/prodservices.html
[116] Singer, *supra* note 44, at 201
[117] Id.
[118] Goddard, *supra* note 36, at 42

military. Large portions of Croatian territory were occupied by either the Serbian army or the Bosnian Muslims. In desperate need of assistance, Croatia turned to the US. The UN Arms Embargo of 1991 prohibited both States and private entities from selling arms or providing operational assistance to any of the Balkan States, including Croatia. Because strengthening Croatia as a counterbalance to the Serbian forces was both a US and NATO interest, an alternative route was found in involving MPRI. Indeed, NATO labeled Croatia a possible suitable candidate for NATO's Partnership for Peace program[119] The company received a license from the US State Department to conduct operations in Croatia.[120] Its mission in the region was started as a 'Democracy Transition Training Programme' (DTAP), and was set up as a classroom training exercise aimed at improving the Croatian army's capabilities and leadership qualities.[121] This way, the training program did not violate the arms embargo, its terms extending to actual operational support, planning and assistance.

Notwithstanding the limitations of the program, it achieved a remarkable amount of success when the Croatian army launched 'Operation Storm', barely four months of the arrival of the MPRI team. The offensive was aimed against the Serbian-occupied Krajina region. With international observers watching, the Croatian army overran the Serbian army, showing a degree if sophistication in its operations that showed 'striking similarities' to Western-style military planning. This stunning progress became even more amazing considering that MPRI had only sent a fourteen-man team and officially limited itself to classroom instructions in 'civil-military relationships'.

Not surprisingly, suspicions fell on MPRI of actually planning and directing the operation.[122] Some accusations even stretched to MPRI personnel accompanying the Croats in combat, though this was not supported by any evidence.[123] MPRI stressed that it had limited its mission to its official description and did not have any active involvement in Operation Storm itself. Moreover, the operation has also become notorious for severe human rights abuses committed in the course of the operation, including the forced displacement of close to 200,000 ethnic Serbs living in the region. The mission commander is currently standing trial

[119] UK Green Paper, *supra* note 63, at 13 (Box 3)
[120] Milliard, *supra* note 6, at 42
[121] Id., at 14
[122] Frye, *supra* note 16, at 2622
[123] Percy, *supra* note 1, at 226

at the ICTY for war crimes. However, this stain on the operation did not prevent MPRI from being awarded a contract with the Bosnian forces in 1998.[124]

MPRI's mission in Croatia exposes two other fundamental issues relating to PMC involvement. Even though the company did not involve itself in actually planning the operation, its training still had a major impact on the outcome of the conflict. Without even actively engaging in combat or even carrying arms, MPRI supports strength and expertise that rival most Western State armies. The danger of this strength, on the other hand, is reflected by the severe criticisms of the outcome of its training. Although most of training programs did not end in human rights abuses and humanitarian law violations, one can question the degree of control and responsibility MPRI and its licenser, the US Department of State, have resulting from their actions. Furthermore, it illustrates more than any other PMC the implications of PMCs being used as 'foreign policy proxies'. MPRI was only put in place after the US found itself limited by the UN arms embargo. The links between the company and the US government are strong, and one can question the line that separates the two.[125] As an MPRI spokesman mentioned, 'we certainly don't determine foreign policy, but we can be a part of the US government in executing its foreign policy'.[126]

Blackwater, DynCorp and Aegis in Iraq

The examples cited above would suggest that the majority of PMCs are hired by weak or failed States, supporting governments in maintaining their position of power vis-à-vis insurgents or another government. Indeed, weak States do provide the main stage for PMC activity, as explained in chapters four and five. However, no other State makes use of PMCs more than the US, most notably in Iraq. Although most contemporary studies on mercenaries and PMCs have been focusing on more traditional mercenary activity, such as conducted by EO and Sandline, the surge of PMCs and PSCs in Iraq has accounted for the largest increase in PMC activity in fifteen years.[127] Some argue that the activities in Iraq have to be seen in the context of the demise of PMCs[128] and their replacement by PSCs.[129] Others place these

[124] UK Green Paper, *supra* note 63, at 13 (Box 3)
[125] Frye, *supra* note 16, at 2621
[126] Goddard, *supra* note 36, at 42
[127] Isenberg, David, *A government in search of cover: Private military companies in Iraq,* at 83, in Chesterman, Simon & Lehnardt, Chia (ed.), From mercenaries to market: the rise and regulation of private military companies, New York: Oxford University Press, 2007
[128] Such as Executive Outcomes
[129] Percy, *supra* note 1, at 225

corporations in the same category as other PMCs, although offering a different type of service than other, more offensive combat-oriented PMCs.[130] Regardless, PMC activity in Iraq has its own problematic aspects.

Private contractors were first used by the US military in the Vietnam War, to assist in the nation-building efforts of South-Vietnam.[131] They played an important role in the first Gulf War, assisting in operating various weapons systems, with private contractor to military personnel ratio estimates varying from one to a hundred, to one to fifty.[132] However, the recent war in Iraq has increased their number dramatically. Their numbers are generally estimated as being 15,000 to 20,000,[133] with some even mentioning 100,000[134] PMC employees. This led *The Economist* to dub the Iraq conflict "the first privatised war".[135] PMCs in Iraq provide training,[136] intelligence gathering and participate in the maintenance and operation of weapon systems and technology, such as laid out in the previous chapter. However, the most important role played by PMCs in Iraq is that of private security. PMCs in Iraq provide security for civilian officials (most notably, the US special envoy in Iraq, L. Paul Bremer, was provided security by Blackwater USA),[137] non-military sites and non-military convoys.[138] As such, the PMCs are the second largest contributor to security in Iraq, surpassing the British army.[139]

[130] Singer, *supra* note 3, at 522, see also O'Brien's distinction between active and passive PMCs, O'Brien, *supra* note 75, at 39
[131] Isenberg, *supra* note 54, at 82
[132] Respectively Singer (2004) and Isenberg (2007)
[133] Frye, *supra* note 16, at 2609
[134] Percy, *supra* note 1, at 225
[135] *Military Industrial Complexities*, The Economist, Mar. 29, 2003, at 56
[136] See chapter five
[137] Frye, *supra* note 16, at 2610
[138] Isenberg, *supra* note 54, at 84
[139] Kinsey, *supra* note 20, at 270

The PMC rise in Iraq demonstrates a new turn the business is taking, away from the combat operations that were overshadowed by their mercenary character. It also shows the direction US defense policy is taking with regard to PMCs. The US had already begun to privatize certain sectors of government services, including military services. Indeed, the previous example of MPRI, along with intelligence gathering[140] and Clinton's 'Plan Columbia'[141] involving DynCorp, are prominent examples. However, PMC involvement has taken a huge leap since the start of the Iraq conflict. The main reason for this is that the US military and its political leadership underestimated the number of troops needed to provide minimum security and stability in Iraq.[142] Iraq was, and still is, the site of a massive, country-wide reconstruction that is attempting to reform it into a viable democracy. This reconstruction is being undertaken by a large amount of civilian contractors. At the same time, the Iraqi security sector and police force is being reformed. Already, these are tasks partially covered by PMCs.[143]

All of these activities require a degree of security in order to provide safe working areas. The United States had not anticipated the intensity of the insurgency that followed the invasion, nor was it prepared for its consequences in terms of the amount of troops needed to combat this insurgency.[144] This resulted in a manpower gap that was filled by PMCs. As was already pointed out in chapters three and four, while the US military lacks both the incentive and the means to fill this counterinsurgency gap, PMCs are eager to step in.

The privatization of the security sector in Iraq has presented both the US government, the Coalition Provisional Authority (CPA) and the subsequent Iraqi government with some problems. As much as the PMCs and PSCs fulfill a much needed task, there have been several instances of PMCs shooting civilians and operating outside of their mandate. Before the war had even started, DynCorp had already been under scrutiny when some of its employees were caught in sex trafficking and rape.[145] This PMC now holds a $250 million contract for training the Iraqi police.[146] PMC employees also participated in the Abu Ghraib interrogations, possibly in the torture and abuse that made headlines in 2004.[147] The two most controversial

[140] Singer, *supra* note 44, at 196
[141] Goddard, *supra* note 36, at 11
[142] Isenberg, *supra* note 54, at 83
[143] Such as the training of the Iraqi police force by DynCorp, see Singer, *supra* note 3, at 525
[144] Isenberg, *supra* note 54, at 84
[145] Singer, *supra* note 3, at 525
[146] Id.
[147] Isenberg, *supra* note 54, at 87

incidents, however, involved the now infamous PMC Blackwater USA, until 2007 the largest PMC operating in Iraq. The first incident, also known as the Fallujah incident, involved four Blackwater employees being ambushed and killed in Fallujah, Iraq.[148] The military retaliated, besieging Fallujah in order to extract the rebels responsible for the incident, claiming the Blackwater employees had to be considered civilians.[149] Other reports, however, pointed to the threatening behavior of Blackwater employees all over Iraq. This was related to the second incident, in which a Blackwater convoy killed 17 Iraqi civilians, reportedly unprovoked.[150] This last incident illustrated the various controversies surrounding Blackwater, and supporting the label of PMCs as 'trigger-happy cowboys'. As a result, the Iraqi government revoked Blackwater's license to operate in Iraq.

Other than revoking its license, however, the Iraqi government did not have any power to impose sanctions against Blackwater or its employees. Ex CPA order 17, the last order to be signed by Bremer, meant that the Iraqi government did not have any jurisdiction over criminal acts committed by PMC employees, effective until the moment the multinational force withdraws from Iraq.[151] All contractors were immune from the Iraqi legal process when acting under terms of their contract.[152] Order 17 furthermore attributed jurisdiction to the legal authorities of the PMCs' home countries. In the case of Blackwater, this makes them subject to the Military Extraterritorial Jurisdiction Act (MEJA).[153] Only one case has yet been filed under the MEJA, and as it was unrelated to PMC misconduct, it seems as if PMCs in Iraq operate in a legal vacuum.[154] Although recent indictments were filed against five Blackwater employees relating to the 2007 shootings, it has yet to be seen if US jurisdiction over the incident is accepted.[155]

Ironically, one measure taken by the US government to address the issues described above was to hire another PMC, Aegis Security Services, to coordinate activities between the

[148] *Bodies mutilated in Iraq attack,* BBC News, March 13, 2004, *available at* http://news.bbc.co.uk/2/hi/middle_east/3585765.stm
[149] *Battles rage in the centre of Falluja*, BBC News, November 10, 2004, *available at* http://news.bbc.co.uk/2/hi/middle_east/3998049.stm
[150] *Iraq battle was self-defence, security firm says*, CNN, September 18, 2007, *available at* http://www.cnn.com/2007/WORLD/meast/09/17/iraq.main/index.html
[151] CPA Order No. 17, *available at* http://www.cpa-iraq.org/regulations/20030626_20030626_CPANOTICE_Foreign_Mission_Cir.html.pdf
[152] Isenberg, *supra* note 54, at 85
[153] 18 U.S.C. § 3261, 14 Stat 2488 (24 November 2000)
[154] Isenberg, *supra* note 54, at 92
[155] Del Quentin Wilber, *Blackwater Guards Indicted In Deadly Baghdad Shooting*, The Washington Post, December 6, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/12/05/AR2008120500309.html?hpid=moreheadlines

different PMCs employed in Iraq.[156] Aegis was founded by Tim Spicer, former CEO of Sandline Ltd., a company which itself had its share of criticisms and controversy.[157] Altogether, the plurality of PMCs operating in Iraq and the problems deriving from it demonstrate the pitfalls of PMC involvement even when contracted by a strong government. Furthermore, the continuing legal and political battle between the Iraqi government, the CPA and the US government shows the inadequacy of solely State regulation of PMCs, leaving loopholes in legislation and enforcement.

PMC to PSC: a transition in violence?

The above cited examples have demonstrated the various ways in which PMCs can make an impact on modern conflicts. As noted, this largely depends on the circumstances of the market and the dynamics of a specific conflict. PMCs such as Blackwater, MPRI and EO each explore a separate section of the international conflict arena, subsequently placing themselves in a different spectrum of violence. Indeed, the problems and criticisms associated with these PMCs all relate to the degree of violence and direct combat participation employed by the corporations.[158] In this spectrum, EO and Sandline demonstrate the extreme end of the PMC spectrum; direct participation in offensive combat. These PMCs, and to a lesser degree, MPRI, formed the face of the industry in the mid-1990s, building their reputation on their willingness to perform offensive combat. As Tim Spicer noted in 1999, relating to Sandline's willingness to accompany his client in combat operations: "*of course we will. I use the analogy of a boat builder. If I built a boat and you paid for it and said to me: "OK, let's go for a test run," and I refused, you would be very dubious about that vessel*".[159]

Both Sandline and EO are now defunct, partially because of mounting international pressure against these mercenary types of PMCs. As Sandline stated at its closure: "*The general lack of governmental support for Private Military Companies willing to help end armed conflicts in places like Africa, in the absence of effective international intervention, is the reason for this decision. Without such support the ability of Sandline to make a positive difference in countries where there is widespread brutality and genocidal behaviour is materially*

[156] Percy, *supra* note 1, at 224 and Isenberg, *supra* note 54, at 86
[157] Percy, *supra* note 1, at 225
[158] O'Brien, *supra* note 75, at 38
[159] Spicer (1999), quoted in Percy, *supra* note 1, at 227

diminished.".[160] With Sandline's demise, there is no company currently willing and ready to conduct operational support in offensive combat.[161]

The question is therefore whether PMCs have to be assessed as combat-driven as EO and Sandline were. The UK Green Paper discusses this specifically with regard to EO.[162] EO might have been a one-off phenomenon, sparked by the violent changes that shook Africa at the beginning of the 1990s. They were formed under circumstances that will most likely not be repeated.[163] They both drew from a pool of highly-trained, readily available recruits incomparable to most other PMCs. Furthermore, the successes of EO and Sandline were limited, both in a geographical and political sense.[164] They were only active in Africa, working for weak States still struggling in the wake of post-colonialism and the formation of ethnic identity. As a result, their reputation suffered under the influence of the anti-mercenary norm that was the driving force behind the 1989 UN Mercenary Convention and the previous GA resolutions. Percy strongly argues that these PMCs were an aberration, hardly representative of the PMC business in general.[165] She further mentions the change from the domination of the business by these combat-oriented PMCs to an industry represented by PSCs, engaging only in defensive combat if armed at all.[166]

This paper contests that this distinction, signified by the change in operations, is redundant. Indeed, after the dissolution of Sandline, no PMC offered operational support as part of their services. However, as mentioned before, PMCs have shown to be able to change their dynamics according to the circumstances. Most PMCs still possess the capabilities to engage in offensive action, if not similar operations, such as EO and Sandline. Although most PMCs try to avoid engaging in armed combat or at least limit their rules of engagement to defensive action, the Blackwater example shows that this line is blurred. As Doswald-Beck rightfully mentions,[167] international humanitarian law does not distinguish between offensive and defensive combat, and armed security can easily be drawn into combat operations if required by the circumstances.

---

[160] http://www.sandline.com
[161] O'Brien, *supra* note 75, at 39
[162] UK Green Paper, *supra* note 63, at 12
[163] Id.
[164] Percy, *supra* note 1, at 217
[165] Id., at 218
[166] UK Green Paper, *supra* note 63, at 12
[167] Doswald-Beck, *supra* note 82, at 122

This becomes all the more important as PMCs become disengaged from the government and sign contracts with other private entities. Moreover, several PMCs could easily develop the combat capabilities needed to make an impact similar to EO.[168] Blackwater stated in 2006 that it had the resources and willingness to intervene in Darfur.[169] The conclusion is therefore that in order to discuss the legal provisions relating to PMCs and subsequently the required integration of the legal framework argued by this paper, it is important to keep in mind the broader combat abilities of PMCs, rather than starkly distinguishing between PMCs and PSCs.

Legal instruments applying to mercenaries

There is no current international treaty or customary norm[170] that directly mentions or regulates PMC conduct. While the previous chapter described various instances of PMC activity that bore close resemblances to mercenary operations, there are no international provisions that can be directly applied to PMCs. Furthermore, what regulation exists regarding mercenary activity has been ineffective in applying its norms both to individual mercenaries and PMCs alike. This chapter will discuss the history of these mercenary provisions and analyze their shortcomings. It will also describe the problems of applying these norms to PMCs, as a preface to discussing what international norms can be drafted or derived from current legislation. The specific provisions that will be discussed are the 1907 Hague Conventions,[171] the 1949 Geneva Convention III,[172] the UN Charter,[173] Resolutions

[168] O'Brien, *supra* note 75, at 39
[169] Percy, *supra* note 1, at 231, see Washington Times, *Private firms eye Darfur*, October 1, 2006, *available at* http://www.washingtontimes.com/news/2006/oct/01/20061001-114438-5654r/
[170] Although some argue that the widespread practice of employing PMCs around the globe and the comments made relating to the application of anti-mercenary rules to PMCs amount to a customary norm condoning PMCs
[171] Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War On Land, (1907), 205 CTS 299; 1 Bevans 654, *available at* http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/85e344e491c102e5c125641e003934b7?OpenDocument (hereafter: Hague V)
[172] Geneva Convention relative to the Treatment of Prisoners of War (1949), 75 UNTS 135, *available at* http://www.unhchr.ch/html/menu3/b/91.htm
[173] Charter of the United Nations (1945), 59 Stat. 1031; TS 993; 3 Bevans 1153, *available at* http://www.un.org/aboutun/charter/

2131[174] and 2465,[175] Article 47 of Additional Protocol I[176] and the UN Mercenary Convention.[177]

The 1907 Hague Convention (V)

The Hague Conventions are a landmark in developing international law of war. They also present the first modern international regulations regarding mercenary conduct. This regulation is found in the fifth Hague Convention of 1907, the Convention regulating the rights and duties of neutral entities. The Hague Conventions represented a codification of customary international law.[178] Article 4 and Article 6 of Hague V both contain provisions that cover mercenary activity. Article 4 reads: "Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents." From this provision it follows that recruitment of mercenaries is not allowed on the terrain of neutral States. It does not outlaw mercenary activity per se; it only limits the recruitment potentials to belligerents. The rationale behind this is that recruitment of soldiers on the sovereign territory of neutral States might endanger the neutrality of that State, drawing it into a conflict via the backdoor.

Article 4, however, is limited only to the recruitment of mercenaries on a States' territory. Following Article 6, there is no duty for a State to prevent individuals, whether it concerns the State's own nationals or foreign nationals, from crossing its borders to serve as mercenaries for a belligerent.[179] Furthermore, Hague V did not impose a duty upon States to ban their own nationals from working as mercenaries or criminalizing mercenary activity in general.[180] Following customary law, the individual's actions had to be distinguished from the State's actions and treated accordingly in international law of war. Thus, the individual who chose to rent himself out as a mercenary to a belligerent State was treated the same as any soldier

[174] G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (1965)
[175] G.A. Res. 2465, U.N. GAOR, 23rd Sess., Supp. No. 18, U.N. Doc. A/7218 (1968)
[176] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), 1125 UNTS 3, *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079?OpenDocument
[177] International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989), A/RES/44/34, *available at* http://www2.ohchr.org/english/law/mercenaries.htm
[178] Van der Wolf, R. & Van der Wolf, W.J. (ed.), Laws of War and International Law; vol. 1, Nijmegen: Wolf Legal Publishers, 2004, at 88
[179] Article 6 provides: "The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents." (Hague V, *supra* note 57)
[180] Singer, *supra* note 3, at 526

serving that State,[181] had not committed an international crime and did not trigger any consequences for his home State. The only restriction was that these individuals could no longer claim the neutrality protections of their home State. The fifth Hague Convention shows the general attitude towards mercenaries; who were not seen as a threat per se[182] and were subject to the same regime as ordinary soldiers.

The 1949 Geneva Conventions

The perception that mercenaries enjoyed the same protection as any other soldier, as stated in the 1907 Hague Conventions is further reflected by the 1949 Geneva Conventions. Although there is no specific provision dealing with mercenary activity, this silence may lead to the conclusion that the drafters did not consider mercenaries a specific problem. Indeed, Article 4 attributes Prisoner of War (POW) status to "(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces,"[183] if "fallen into the power of the enemy."[184] This definition may include mercenaries fighting alongside the armed forces of a State.[185] In any case, the Geneva Conventions did not criminalize being a mercenary. It did, however, put an obligation on the State parties to hold combatants accountable for grave breaches of the Conventions, regardless of their nationality or alignment.[186] This provision can also be read as to incorporate mercenaries into the same regime as the regular armed forces, similar to the 1907 Hague Conventions.

The UN Charter and General Assembly resolutions

With regard to the changing nature of the perception of mercenaries, the UN Charter and the following General Assembly resolutions play a vital role. The UN Charter, drafted in 1945, attaches a significant weight to State sovereignty and the collective balance of international peace and security. Similarly to the Hague Conventions, the UN Charter contains several provisions underlining and strengthening that goal. One of these provisions is Article 2(4), stating that all member States shall "refrain from the threat or the use of force against the

[181] Doswald-Beck, *supra* note 82, at 119
[182] And were therefore not explicitly criminalized
[183] Relying on the third category of article 4, PMCs and mercenaries can be classified as 'militias'. See for further explanation, Doswald-Beck, *supra* note 82, at 118
[184] Article 4, Geneva Convention III, *supra* note 58
[185] Milliard, *supra* note 6, at 22
[186] Articles 49-50, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 75 U.N.T.S. 31, *available at* http://www.unhchr.ch/html/menu3/b/q_genev1.htm

territorial integrity or political independence of another State, or in any other manner inconsistent with the purposes of the United Nations."[187] This Article is commonly read as the prohibition of 'aggression' or 'intervention'.

The charter does make an exception for cases of self-defense or collective security initiatives sanctioned by the UN Security Council.[188] In the early 1960s, the UN read this Article as a prohibition for former colonial powers to enlist the help of mercenaries to oppress national resistance movements and protect their own foreign policy interests.[189] This explanation followed the surge of individual mercenaries in Africa's wars of independence and self-determination, as discussed in chapter two.

This reading of Article 2(4) was further strengthened by the adoption of Resolution 2131, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. Among its clauses, it states:

> "Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State or interfere in civil strife in another State."[190]

Though unanimously adopted by the General Assembly, this resolution offered little clarification on the specific policies toward mercenaries due to its broad language and lack of concrete sanctions. Mercenaries are not explicitly mentioned, although some scholars argue that 'armed activities' also cover mercenaries.[191] It also left the determination of the prohibited activities and enforcement up to the member States.

Mercenaries were not criminalized until Resolution 2465,[192] the Declaration on the Granting of Independence to Colonial Countries and Peoples. The Resolution states:

> "The practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and … mercenaries themselves are

[187] UN Charter, article 2 (4), *supra* note 59
[188] Milliard, *supra* note 6, at 23
[189] Kinsey, *supra* note 20, at 273
[190] G.A. Res. 2131, *supra* note 87
[191] Milliard, *supra* note 6, at 24
[192] G.A. Res. 2465, *supra* note 68

> outlaws … [;] Governments of all countries [should] enact legislation declaring the recruitment, financing and training of mercenaries in their territory to be a punishable offence and [should prohibit] their nationals from serving as mercenaries."[193]

Clearly, the Resolution displays particularly strong language in condemning mercenary activity. It was also the first attempt at criminalizing mercenaries, although somewhat limited by the context of wars of national liberation. With a closer look, the weak foundations of the resolution began to show through its high-strung language. General Assembly resolutions are not binding law; they serve as an expression of the will of the General Assembly, ideally they provide evidence of State practice. One might hope that continuing support for a principle stated in these resolutions may lead to customary international law. In this respect, Resolution 2465 is a mere aspiration at best. The voter record shows that the resolution was adopted with fifty-three votes in favor, eight votes against and forty-three abstentions.[194] That amounts for just over half of the General Assembly, and thus hardly reflects customary law.

As emphasized in an earlier chapter, the reinforced anti-mercenary norm was largely a product of the increased political awareness of mercenary involvement in wars of liberation.[195] Resolution 2465 and some of its follow-up resolutions, such as Resolution 2625, Resolution 3103 and Resolution 3314 reflected this. Although all these resolutions all (partially) concerned mercenary activity, they were mutually ambiguous in resolving the mercenary problem.[196] Resolution 3103,[197] for instance, provided a contrast to Resolution 2465 in declaring that, instead of outlawing mercenaries, they "should be punished as criminals,"[198] effectively declaring them unprivileged combatants.

Resolution 3103 was drafted in a similar setting to Resolution 2465. This contrasted with Resolution 3314, which, although it defined sending mercenaries as acts of aggression, did not criminalize mercenary activity outside of wars of liberation. Taking into account the non-binding character of General Assembly resolutions, together they form a better reflection of international customary law than solely the criminalization of Resolution 2465. Being a

[193] Id., para 8, in Milliard, *supra* note 6, at 25
[194] Id., in Milliard, *supra* note 6, at 26
[195] Percy, *supra* note 1, at 183
[196] Frye, *supra* note 16, at 2627
[197] Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Régimes
[198] G.A. Res. 3103, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A.9030 (1973), in Milliard, *supra* note 6, at 29

mercenary was not a criminal activity, but as mercenaries were unprivileged combatants, they should lose their POW status.

Article 47 of Protocol I to the Geneva Conventions

Following the initiative by the General Assembly in the aforementioned resolutions, the deprivation of POW status was incorporated in Additional Protocol I to the Geneva Conventions.[199] In addition, the protocol tries to define 'mercenaries', in order to make the provision enforceable. Article 47 of the Protocol sets forth the following criteria, which have to be met consecutively:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) Is specially recruited locally or abroad to fight in an armed conflict;
(b) Does, in fact, take a direct part in the hostilities;
(c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) Is not a member of the armed forces of a Party to the conflict
(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.[200]

Article 47 is problematic in a number of ways. Firstly, although it is in line with the foregoing General Assembly resolutions, it takes a specific position contrary to customary international law that had been dominant until the second half of the twentieth century. Contrary to the provisions of the 1907 Hague Conventions and 1949 Geneva Conventions, it denies mercenaries the right to privileged combatant status, therefore going back to medieval law

[199] Protocol I, *supra* note 64
[200] Id., at 47

denouncing mercenaries. As was the case with the General Assembly resolutions, Article 47 was the product of the international community's reaction towards developments in Africa.[201]

On the other hand, contrary to Resolution 2465, statements made during the development of Article 47 demonstrate an unwillingness to derive mercenaries of all protections.[202] It does, however, leave open the possibility for domestic criminal prosecution by denying the protecting given by POW status[203]. The idea behind this was that denying POW status would discourage people from working as mercenaries, as it would expose them to criminal liability.

That goal, however, was thwarted by the second problem posed by Article 47: the narrowness of the definition. This definition was posed as a compromise between several States, in order to exclude foreign forces or soldiers sent by other States from its definition, such as the French Foreign Legion or the Gurkhas. These soldiers were excluded through provision (f). It also tried to exclude foreign volunteers, such as the International Brigades in the Spanish Civil War,[204] through provision (c). As a result, the definition has become so exclusive that it has proved unworkable. The crux of that problem lies within provision (c); the motivation of personal gain. Indeed, although many domestic criminal provisions incorporate a motive in defining a criminal act, Article 47 tries to use motivation to establish status.[205]

Moreover, proving personal gain as a primary motive for combat activity is extremely hard. The Article tries to solve this problem by adding the criteria that the pay must be significantly more than that of a regular soldier. However, this does leave open the possibility for a mercenary to argue other primary motives, especially due to a lack of objective standards. A mercenary like Bob Denard might have argued that his anti-communist beliefs were the prime motivations for his actions, thus placing him outside the scope of this Article.

---

[201] Milliard, *supra* note 6, at 38
[202] Henckaerts, Jean-Marie & Doswald-Beck, Louise, Customary International Humanitarian Law, vol 1.: Rules, at 393-394, New York : Cambridge University Press, 2005
[203] Milliard, *supra* note 6, at 41
[204] Kinsey, *supra* note 20, at 278
[205] Singer, *supra* note 3, at 529

As Percy argues,[206] using motivation as a criteria for distinguishing fighters is inconsistent with international humanitarian law, and undermines the idea that humanitarian law is universally applicable. Finally, the Article provides a number of other 'escape hatches'. Mercenaries can be incorporated into the armed forces of the belligerent State, thus not meeting criteria (e). Additionally, acquiring citizenship of the State will exclude any combatants from the definition. Considering that mercenaries were frequently hired by governments, this door is left wide open. As US Ambassador Aldrich commented regarding the limitations of the definition: *"Certainly, there have been persons in recent conflicts, particularly in Africa, who might qualify as mercenaries under the Article 47 text, but it would not seem difficult in the future for any party to a conflict to avoid its impact, most easily by making the persons involved members of its armed forces."*[207]

The 1989 UN Mercenary Convention[208]

Despite of the flaws in Article 47's mercenary definition, similar wordings were used in the 1989 UN Convention against the Recruitment, Use, Financing and Training of Mercenaries. This convention was designed not only to deprive mercenaries of POW status, but to explicitly criminalize their existence, making mercenarism a punishable offence under international law. The Convention tried to address some of the problems of Article 47 by somewhat widening its scope, defining a mercenary 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.

[206] Percy, *supra* note 1, at 178
[207] Aldrich, George H. (1981), New life for Laws of War, American Journal of International Law, vol. 75, at 776
[208] International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989), A/RES/44/34

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

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at :

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State;

or

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national nor a resident of the State against which such an act is directed;

(d) Has not been sent by a State on official duty; and

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

In this definition, the Convention tried to encapsulate both the criteria of Article 47, the provisions of the UN resolutions and parts of the definition of the OAU Mercenary Convention. The primary definition is similar to the definition of Article 47, listing most of its consecutive criteria. The Convention widens the scope, based on Article 47, by extending it to all armed conflicts,[209] and removing the criteria of non-citizenship. The second definition mirrors the definition of the 1977 OAU Convention,[210] specifically in reflecting the post-colonial context of mercenarism.

One notable exception is that, while the OAU Convention makes it a crime for individuals to engage in mercenary activity, the UN Mercenary Convention is aimed at prohibiting States from using, recruiting or supporting mercenaries. It does, however, impose criminal liability for those who recruit, finance or train mercenaries, mercenaries that directly participate in combat, any attempts to the aforementioned crimes and accomplices to these crimes.

[209] Milliard, *supra* note 6, at 58
[210] OAU Mercenary Convention (1977), *supra* note 1977, art. 1(1)

Because of its definition, the UN Mercenary Convention experiences the same problems as Article 47 of Protocol I. The definition, though widened, is still extremely narrow, to the point where it is as unworkable as Article 47. This has given rise to the common perception that "any mercenary that does fall under the definition deserves to be shot – along with his lawyer."[211] The Convention also lacks any monitoring or enforcement mechanism, leaving these tasks to the States themselves.[212] It also denies a State that has suffered damages as a consequence of mercenary activity supported by another State.[213] Due to these loopholes in the Convention, it is no wonder that its most prominent problem is the lack of international support.[214] The Convention only came into force in 2001, more than a decade after it was drafted, when Costa Rica became the 22nd State party. At this moment, there are only 32 State parties, with 17 ratifications.[215]

None of the major powers have signed the Convention. Instead, the list of ratifying States contains several States that heavily made use of mercenaries or are hosts to mercenary groups. This group of States includes Angola, Nigeria, Ukraine, Congo-Brazzaville and Zaire, some of whom even hired mercenaries or PMCs after signing and ratifying the Convention.[216] Singer therefore draws the conclusion that this list of States, combined with the fact that no one has ever been prosecuted under the Convention's provisions, brands the Convention 'anti-customary law';[217] or, *jus cogens* contrary to the treaty itself.

The failure of the anti-mercenary norm regarding PMCs

One of the main reasons for the failure of the UN Mercenary Convention and the lack of support thereof was its timing. The Convention was drafted at a time when individual mercenaries that were the prime target of the regulations had already receded in number and impact. Instead, the market had become increasingly dominated by the new corporate form of mercenary, the PMC.[218] The manifold problems that the Convention presented in covering the traditional individual mercenaries are all the more present in trying to apply these norms to

[211] Singer, *supra* note 3, at 531 (rephrased)
[212] Id.
[213] Kinsey, *supra* note 20, at 284
[214] Frye, *supra* note 16, at 2631
[215] Multilateral Treaties Deposited with the Secretary-Gerneal – Treaty I- XVIII – 6, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=367&chapter=18&lang=en
[216] Milliard, *supra* note 6, at 65
[217] Singer, *supra* note 3, at 531
[218] Id.

PMCs. From this perspective, the previous chapter underlines the statement that the previous international mercenary norms have lost their meaning completely. The intended subjects of these regulations no longer exist in practice, and have been replaced by far more agile actors that are not affected by these regulations. This chapter will explore why PMCs are legally distinguished from mercenaries from the perspective of the aforementioned regulations.

As Singer notes, PMCs currently lie beyond the domain of the current treaty regimes.[219] Even the PMCs that remind most of the individual mercenaries, such as EO, do not meet the criteria of both the UN Convention and Article 47. Of course, the first problem relates to the motive of private gain. Indeed, the PMC employee can be characterized as being profit-driven. In that respect, however, he is not so different from many regular soldiers fighting in State armies. What sets the PMC employee apart from the individual is that he is paid a salary;[220] he is not paid based on his combat performance, nor is he (arguably) paid more than a regular soldier.[221] Furthermore, it is hard to argue that every PMC employee is mainly profit-driven. Companies such as Blackwater Worldwide, Aegis Defence Services and DynCorp, all being contracted solely by the United States, could easily be motivated primarily by patriotism.

A second problem lies within requirement (a) of both provisions. PMC employees are usually not recruited for a specific conflict; they are employed for longer periods of time, providing services in various conflict areas. The PMCs themselves often serve multiple clients, sometimes at the same time, sometimes consecutively.[222] This puts PMCs like EO and Sandline, arguably the most closely related to prohibited mercenaries, outside the scope of the Articles. EO, for example, first fought in Angola and later in Sierra Leone. They can also point to their statutes, mentioning goals of the company that go beyond a specific conflict. Even if a PMC would meet this criteria, there is a debate as to whether they constitute a member of a State's armed forces. Like the regular soldier, the PMC is liable to its superiors, though not by loyalty or by military law, but through a formal contract.[223] Also, a State employing PMCs could choose to incorporate it into its regular armed forces.[224] The PMC

[219] Singer, *supra* note 3, at 532
[220] Kinsey, *supra* note 20, at 282
[221] This could be a problem, as for instance Blackwater Worldwide sparked a controversy over the payment of their employees, supposedly more than twice that of the average G.I. while performing similar tasks. See http://www.cnn.com/2004/WORLD/meast/04/01/iraq.contractor/
[222] Kinsey, *supra* note 20, at 282 and Singer, *supra* note 3, at 532. Also, see chapter 4 for various operations.
[223] Singer, *supra* note 3, at 532
[224] Doswald-Beck, *supra* note 82, at 123

Sandline Ltd. reached such an agreement with the government of Papua New Guinea prior to the termination of its contract in 1997.[225]

Additionally, both the Convention and Article 47 fail to recognize the variety of services offered by PMCs. Some PMCs indeed "take a direct part in the hostilities".[226] As argued in chapter seven, international law does not distinguish between 'offensive' and 'defensive' operations.[227] This is more complicated for firms that only provide training or advice, such as MPRI. Although inherently military in nature, their operations would not fall within the scope of the definition. Lastly, international custom presents strong arguments against incorporating PMCs into the same regime as mercenaries. Indeed, the language used by the international community, most notably in the UN resolutions, is strong and the norms are stringent, but practice shows a contrary development. As mentioned, PMCs are present in over 50 countries,[228] often in the services of governments. They have surpassed the puritanical anti-mercenary norm[229] and proceeded into the area of legitimate actors in combat. Furthermore, no State has showed willingness for prosecuting PMC employees under mercenary legislation, either international or domestic.

[225] UK Green Paper, *supra* note 63, at 7
[226] Article 47 (b) of Additional Protocol I, *supra* note 63
[227] Doswald-Beck, *supra* note 82, at 122
[228] Singer, *supra* note 44, at 189
[229] Percy, *supra* note 1, at 220

Fragmented legislation: the 'Janus face of PMCs'

In effect, there currently is no coherent international regime legislating PMC conduct,[230] while PMC business is still on the rise. The increasingly puritanical character of the anti-mercenary norm has led to an overstretch of the international community's ability to regulate the problem through legislation, falling short on keeping track with the developments of the business. As argued above, international anti-mercenary legislation fails in capturing even the PMCs that actively engage in offensive combat. At the same time, as argued in chapter six, the PMC business has changed. This change, from a more offensive, mercenary-like character to an increased focus on the security business shows that although the anti-mercenary norm has been ineffective in the legal arena, its underlying sentiments did influence PMCs in the political arena.[231]

Contrary to the arguments made by some scholars, perceiving PMCs as uncontrollable cowboys,[232] the business is still viable for international legislation. This legislation only has to recognize the true nature of the market and the role PMCs play. As will be argued later on, both existing and draft rules on State liability present an opportunity to further channel the surge of PMCs and PSCs. However, this framework of rules is still fragmented, and leaves a host of other problems related to what several authors call the 'privatization of violence',[233] most notably the use of PMCs by other private actors. This set of problems does require further legislation, and the integration of existing norms in a single PMC regime. Thus, PMCs present the international community with what will here be called a 'Janus face': two sides of a coin, indispensable but to be approached differently.

The visible face: State contractors

To illustrate the recurring problems of mercenary and PMC legislation, it is important to highlight the three main arguments used against the employment of both PMCs and mercenaries. Firstly, PMCs and other 'fighters for hire' challenge the historic norm that fighting, and specifically killing must be connected with a cause. As mercenaries, PMC employees defy that notion by (supposedly) fighting for money. This argument has been

[230] Singer, *supra* note 3, at 534
[231] Percy, *supra* note 1, at 225. See further chapter 4 and the Sandline Ltd./Aegis example
[232] Percy, *supra* note 69, at 11
[233] For instance, Singer (2004), *supra* note 3, Goddard (2001), *supra* note 36 and Frye (2003), *supra* note 16

historically rooted in the criticisms of mercenaries outlined in chapter two, and re-emphasized by the UN mercenary resolutions and 1989 UN Mercenary Convention. This argument can be summarized as the 'moral argument': private violence is inherently morally wrong.[234]

As Milliard describes, it is important to resist the strong rhetoric behind this argument, as it proves an important hurdle in effectively legislating the PMC business.[235] PMC regulation must rely on the acceptance that PMCs provide legitimate services required in modern conflict, and that the privatization of force is an irreversible development.[236] Furthermore, resisting PMCs in general has proved to be futile,[237] as shown in the previous chapter. Decades of strong rhetoric and the equation of mercenaries to psychopaths and war criminals have only led to a moot set of regulations. One has to conclude that, although it is important to be mindful of the international community's distaste of using PMCs for combat operations,[238] this knee-jerk argument has to be rejected.

The second argument for PMC regulation is more viable. Unregulated PMCs threaten to take away State control and democratic legitimacy of the use of force, as violence used to be the monopoly of the State.[239] This problem has become apparent through the failure of legislation based on the second argument. Indeed, as both MPRI and EO demonstrate, PMCs can have a significant but sometimes undesired effect on a conflict. PMC operations can, in some cases, contradict international community policies, such as the 'Sandline affair' shows.[240] Moreover, this argument also relates to the use of PMCs as 'foreign policy by proxy', protecting State interests without the proper State control and responsibility.

A third aspect is the impunity of PMC employees for war crimes and other abuses. There is no conclusive proof that PMC employees are more prone to violate international humanitarian law,[241] and there are arguments to the contrary. PMCs might indeed be far more disciplined than some State armies.[242] PMCs often have a far higher degree of training than the States they are hired to assist, making it even *less* likely for human rights abuses to occur.[243] The

[234] Frye, *supra* note 16, at 2653, see also UK Green Paper, *supra* note 63, at 19
[235] Milliard, *supra* note 6, at 76
[236] UK Green Paper, *supra* note 63, at 4 (foreword by Jack Straw)
[237] Locutus of Borg, *Star Trek: The Next Generation, The best of both worlds I*, original air date July 1, 1990
[238] See chapter 6
[239] UK Green Paper, *supra* note 63, at 15
[240] O'Brien, *supra* note 75, at 30
[241] UK Green Paper, *supra* note 63, at 17
[242] Id.
[243] Percy, *supra* note 1, at 219

relative degree of impunity described in chapter six, however, makes a strong case for more State control over PMCs. As PMCs perform the same tasks as the military they are subject to the same risks, but without the proper degree of State responsibility.

These two arguments and related sub arguments present the first face of PMCs. This is the face of PMCs providing former military services. They answer to a legitimate call by both weak governments in search of control[244] and stronger States, influenced by economic and political incentives to privatize certain tasks. Regardless of the practical problems this privatization imposes,[245] this aspect of PMCs exists as a legitimate actor in modern conflict. The puritanical anti-mercenary norm has made it hard to impose a coherent legislation regime in fear of condoning mercenary activity. A new interpretation of State responsibility and subsequently, the perception of PMCs as de facto State actors can at least partially resolve the problems associated with this 'face'. The next chapter will make some suggestions for such a regime, drawing upon both conventional and customary rules for State accountability and International Court of Justice (ICJ) jurisprudence.

The hidden face: privatized violence

The third argument, and thus the second face, is far more difficult to counter and has been largely unrecognized in most PMC literature. Most major PMCs pride themselves with only being contracted by legitimate governments and international organizations.[246] Some PMCs go one step further, offering their services to other private actors. In this area, States have not only lost their monopoly to utilize violence, but also to authorize it. This problem is most apparent in the PSC business. Already in Iraq, most contracts for providing personal and structural security are not signed between PSCs and government actors, but between PSCs and private entities under license from the Iraqi government.[247] Another example is Lifeguard's contract in Sierra Leone, providing security for diamond mines.[248] This contract was not signed by the government but by DiamondWorks,[249] the company exploiting the mines. In this area, PMCs and PSCs are being driven away from government control and

[244] UK Green Paper, *supra* note 63, at 14 (sub 34)
[245] Such as efficiency and costliness, which this paper considers problems that have to be resolved in the domestic political arena
[246] See for instance http://www.mpri.com
[247] Isenberg, *supra* note
[248] McIntyre & Weiss, *supra* note 25, at 73
[249] Now Koidu Holdings

more into market economics. Most PMCs and PSCs in Iraq only limit themselves to site protection, not shifting the strategic landscape like government-contracted PMCs sometimes do.[250] Nonetheless, that leaves the problem of the legitimacy of the violence used, whether in an offensive or defensive fashion. Furthermore, the question remains how adequate State regulations can cover an international organization or NGO when one of these organizations hires a PMC in support of their goals. Milliard, for instance, argues that in hindsight, a PMC might have been used to intervene in the Rwanda genocide.[251] As noble as this might seem, one can only imagine the consequences of an organization like Amnesty International contracting a PMC like EO to perform this task.

Private entities contracting PMCs are a further reminder of the dubious alliances between the mercenaries of the 1970s and former colonial assets, such as the exploitation of minerals in Katanga. Indeed, some authors compare the PMC business of the 1990s to the internal exploitation of Africa during the 1970s, reviving the argument of the use of mercenaries as an instrument of neo-colonialism.[252] The same argument goes for the use of a PMC by an illegitimate or racist government in repression of other forces; as PMCs are profit-driven, they do not necessarily have concern for human rights abuses.

By not addressing the responsibility of States for PMC conduct, current legislation has avoided the matter of PMCs being employed for the wrong purposes. Most mercenary legislation has been wrongly focused on the employment of mercenaries and PMCs themselves, subsequently criminalizing mercenary activity to ban private actors from the battlefield. Privatization is not so much the main problem, as is the employment of these private actors in an uncontrolled setting: the Janus face. The final two chapters will therefore examine different proposals for a new system of regulations, and their applications with regard to this two-faced nature of the PMC business.

[250] O'Brien, *supra* note 75, at 38
[251] Milliard, *supra* note 6, at 18
[252] Francis, *supra* note 21, at 1

New regimes: the shortcomings of other proposals

Already, there have been a number of systems that have proposed different mechanisms for regulation. The UK Green Paper discusses some of these proposals,[253] listing a ban on military activity abroad, a ban on recruitment for military activity abroad,[254] a licensing regime for military services,[255] registration and notification,[256] a general license per company and self-regulation. For the same reasons discussed in the previous chapter, the first two proposals are both unpractical and out of line with international practice. The last option, self-regulation by the business, has been discussed in a variety of articles. It draws upon the idea that market economics makes it unattractive for PMCs to engage in internationally denounced acts, in fear of loss of profit. As Nic van der Bergh, former Chief Executive of EO noted, "*The fastest thing that would get us out of the business is human rights violations*".[257] One can also point to the dissolution of Sandline through lack of demand, that lack stemming from international dismay of mercenary activities.

However, there are two main reasons why this argument is flawed. Free market economics are designed to deal with price, supply and demand. It is not equipped to provide regulation for specific acts, or as Singer says, "*The public good and the private good are not always perfectly aligned"*.[258] In the volatile conflict areas PMCs operate in, this is a risk not worth being taken. Furthermore, PMCs are businesses, interested in make money over establishing a good name. Even though some PMCs have less than admirable reputations, there is a demand for their services, as the EO example points out. Quoting Frye, "*When the goal is profit, as it must be for any business, it is possible that profit may be privileged over people*".[259] Following the same logic, mere notification and registration does not suffice either.

Frye herself tries to encapsulate the worst PMC excesses by proposing an amended version of the mercenary definition. According to her thesis, amending the mercenary definition would root out the PMCs engaging in offensive combat. This is necessary, because the mark of these PMCs on the business continues to hinder a proper debate on regulation.[260] She also does not

[253] UK Green Paper, *supra* note 63, at 22-26
[254] Similar to the 1907 Hague Convention (V)
[255] Such a regime is already in place in the US, as will be discussed later
[256] A 'licensing regime light', requiring only notice beforehand, not approval
[257] UK Green Paper, *supra* note 63, at 17
[258] Singer, *supra* note 3, at 543
[259] Frye, *supra* note 16, at 2650
[260] Id., at 2656

support a total ban on PMCs, arguing that the anti-mercenary norm notwithstanding, use of force has never been fully monopolized by States[261] and therefore State support for a ban would be lacking.[262] However, her solution does not recognize the changed nature of the PMC business as outlined in the previous chapter. Although her definition of mercenaries is definitely more inclusive than that of Article 47 and the UN Mercenary Convention, it falls short on covering the full extent of PMC conduct, leaving open the matter of PMCs not directly engaging in conflict and arguably not reaching private security services.[263]

Following chapters five and six, one could argue that it is possible for a new PMC to emerge and re-enter the service arena that EO and Sandline once operated in, or that an established company could broadens its operations similar to the Blackwater proposal regarding Darfur. Still, redefining mercenaries would not close the loophole of incorporation into a State army or acting under auspices of a State. Moreover, if there is one thing the lack of support for current anti-mercenary legislation shows, it is that there is little to no international will to criminalize mercenaries, especially in broad terms.

Lastly, Kinsey argues that since international law has failed in regulating PMCs, lacking State support for changing existing provisions, effective regulation can only come on a national level.[264] Kinsey recognizes that few States already have national legislation regarding PMCs,[265] and these existing regimes are problematic on their own account. However, due to the lack of international political will to legislate the subject, the prospects for a new international convention on PMCs are bleak.[266] The problem with Kinsey's domestic law based regulations is the transnational nature of the PMC business combined with the limited reach of national law and conflicting State interests. Starting with the last point, the same political forces that slow international agreement on PMCs and mercenaries are present on a national scale. Without an international regime sanctioning State actions, there is little State interest in regulating the subject. This is all the more problematic as PMCs and PSCs act as agents of the State or execute State policies.[267] Furthermore, regulation solely based on national legislation would develop an inconsistent patchwork of rules, criminalizing PMCs in

[261] Id., at 2656
[262] Id., at 2659
[263] As these would not meet the criteria of 'acts independent of any legal obligation, *regulation, or order* by the State of which he is a citizen or subject', Frye, *supra* note 16, at 2658 (emphasis added)
[264] Kinsey, *supra* note 20, at 291
[265] Namely the United States and South-Africa
[266] Kinsey, *supra* note 20, at 291
[267] Goddard, *supra* note 36, at 42

one area and condoning them in another. Because PMCs represent a transnational development, it is logical for it to be regulated in an international forum. This also relates to the limited reach of national law. State sovereignty prevents enforcement of national law on companies located outside the aggrieved State.[268] Although Kinsey notices this problem, he does not provide any mechanisms to resolve it.[269]

A matter of attribution: State responsibility

As argued in the previous chapter, regulation of PMC conduct can only take place on an international scale. Such regulation has to be built upon a consistent regime of State responsibility. To avoid the pitfalls of the UN Mercenary Convention, it is vital to look at the current regime of attribution of private actions to the State. The attribution of private conduct to the State is a vital first step in determining the specific responsibility a State has vis-à-vis that private actor and international law. As this chapter will describe, this is currently a patchwork of rules, built upon a number of ICJ decisions and norms still in development. This chapter will also look at the draft Articles of State Responsibility of the International Law Commission (ILC),[270] and how they can be incorporated into a new PMC regulation regime. These Articles are considered a codification of customary law, and although they lack binding status, they do give insight into the prospects for attributing PMC conduct to the State. Once a regime for proper attribution of PMC or other private conduct to a State has been established, this chapter will go into the obligations this puts upon the State in terms of regulating and sanctioning PMCs, such as prosecution for misconduct and compliance with international humanitarian law.

[268] Singer, *supra* note 3, at 536
[269] Kinsey, *supra* note 20, at 287
[270] Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, ILC Yearbook (2001), 53rd Sess., U.N. GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 (2001) (hereafter: Draft Articles)

De jure control and State authority: Articles 5 and 7

One of the principal differences between how individual mercenaries operated and how PMCs usually operate, is the existence of a formal contract between a State and a PMC. In this way, PMC conduct is openly sanctioned and to a certain degree controlled by the State.[271] The first question that needs to be asked is whether PMCs can, under certain circumstances, be considered organs of the State. Of course, conduct of State organs is generally, but not always, held to be State conduct.[272] A State organ is defined as an entity operating within the structure of the State, or being part of an organization of the State.[273] In this form, an entity is subject to the internal or administrative law of the State.[274] Already, private corporations with separate legal personalities are generally not covered by this definition.

In some cases, PMCs have become incorporated into State organs, therefore falling in this category. Such was the case with Sandline's involvement in Papua New Guinea, as described in chapter five.[275] Sandline employees were incorporated into the Papua New Guinea military as 'special constables'. By avoiding the definition of the mercenary convention, States actually make themselves liable for the conduct of PMCs. The Sandline example is nevertheless unique, so attribution through Article 4 is generally not applicable to PMCs.

Notwithstanding the separate legal personality of PMCs, they can indeed perform government tasks pursuant to a contract. Examples reach from the supply of State armies to EO's involvement in Sierra Leone. The exercise of State functions by private entities is indeed addressed by the ILC in its Articles. The rationale behind this is that States cannot simply evade responsibility by transferring its public functions over to a private entity.[276] With regard to PMCs, some instances have shown exactly this practice happening, most notably MPRI's involvement in the Balkans. The problematic aspect of this rule is its vagueness. Its codified version, Article 5 of the Draft Articles, defines two elements: the conduct has to be

[271] Lehnardt, Chia, *Private military companies and State responsibility,* at 139, in Chesterman, Simon & Lehnardt, Chia (ed.), From mercenaries to market: the rise and regulation of private military companies, New York: Oxford University Press, 2007
[272] Report of the International Law Commission on the Work of its Fifty-Third Session, Chapter IV, at 41, ILC Yearbook (2001), Vol. II, part two, U.N. GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 (2001), hereafter ILC Report
[273] Report of the International Law Commission on the Work of its Fiftieth Session, Chapter VII, State Responsibility 1998 ILC, 50th Session, UN Doc. A/53/10, *available at* http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1998_v2_p2_e.pdf
[274] Draft Articles, *supra* note 270
[275] UK Green Paper, *supra* note 63, at 7, see also chapter five
[276] Lehnardt, *supra* note 271, at 144

'empowered by the law of that State' and it has to exercise 'elements of government authority'.[277] Regarding the criteria of State law, does this require enactment of specific public law or is a contractual basis under exercise of governmental discretion sufficient?

The ILC itself tries to clarify by referring to the internal accountability between the State and its contractor. Lehnardt illustrates the problematic aspects of this by giving the following example. If a PMC is contracted for prisoner interrogation and is not held accountable for any abuses committed in that discourse, that misconduct would also not be attributed to the State pursuant to the latter explanation of Article 5.[278] This would not only surpass the goal of Article 5, but also provide an incentive for the State *not* to sanction PMC activity.

The other element, 'governmental authority', is equally vague. The commentaries state that this could vary between societies, based upon historical practice and traditions,[279] using broad terms as 'key governmental functions'. As shown above, providing military services and security has become increasingly privatized, questioning the supposed public nature of these activities. PMCs are at the forefront of this development,[280] so a precise definition of this concept is vital. The commentaries give a lead insofar that they enumerate some specific functions commonly regarded as government tasks. Among these are law enforcement or police powers, combat, interrogation and detention, and expropriation and enforcement of immigration policies. This list, which is by all means not exhaustive, indeed encompasses some key PMC activities. A similar criterion was applied in the Maffezini arbitration case,[281] attributing the actions undertaken by the SODIGA corporation to Spain as state action. The court stated that SODIGA worked pursuant to Spanish economic policy, labeling its functions 'by their very nature typically governmental tasks, not usually carried out by private entities, and therefore, cannot normally be considered to have a commercial nature'.[282] This decision is consistent with the decisions of the Iran-United States Claim Tribunal in *Rankin v Iran* and *Yeager v Iran.*[283]

[277] Draft Articles, *supra* note 270, at 26
[278] Lehnardt, *supra* note 271, at 145
[279] ILC report, *supra* note 272, at 43
[280] As also referred to as the new customary law, see chapter seven
[281] *Emilio Agustin Maffezini v Kingdom of Spain* (Decision on objections of jurisdiction), (2000) 16 ICSID Review 212 (Case No. ARB/97/7)
[282] Id., at para. 86
[283] Lehnardt, *supra* note 271, at 146

A plausible interpretation of Article 5 would therefore be that the aim of this Article is primary to cover 'core government functions', delegated under the law empowering government agencies to do so. In that case, PMC contracts pursuant to the power of the government to outsource certain tasks fall under 'empowerment by the laws of state'. Indeed, the cases cited above lay down a framework for where PMCs would indeed perform key government functions. As seen above in the examples, several PMCs indeed execute policies. The most extreme example is of course EO in Sierra Leone, where combat lies at the core of State authority. Similarly, where PSCs like Blackwater guard US government personnel or military sites, they fall within this definition. Even more clear is the employment of PMCs in detention centers like Abu Ghraib, as *Rankin v Iran* points to detention as being a core government function.

It also has to be emphasized that, following Article 7 of the Draft Articles, that where a private actor acting under Article 5 steps outside of its mandate or capacity, or blatantly violates its instructions, this conduct can be attributed to the State regardless.[284] As the commentaries state, "*The State cannot take refuge behind the notion that, according to the provisions of its internal law or instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form*".[285]

A more difficult situation for Article 5 and thus *de jure* attribution is found in MPRI's involvement in Croatia. An Article 5 test would have no problems placing MPRI under Croatian government control. MPRI was acting under contract with the Croatian authorities, performing acts normally reserved for the national military and acting in pursuance of goals associated with Croatian policy. The more interesting question, however, is whether MPRI's conduct could be attributed to the United States. Considering the factual circumstances, MPRI also acted in compliance with, if not as an agent of, US foreign policy, as argued in chapter six. It is nevertheless questionable whether the distribution of a license by the US State Department suffices in meeting the criterion of the conduct being empowered by the law of the State.

[284] Draft Articles, Article 7, *supra* note 242
[285] ILC Report (2001), *supra* note 270

De facto control: Article 8

In cases like that of MPRI, attribution through *de jure* control is surpassed by *de facto* control. Article 8 of the Draft Articles deals with this issue, stating that an action can be considered an act of the State if the person or group is "*acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*".[286] The Article puts forward two circumstances whereby lack of a contract or any other official ties to the State, PMC conduct can be attributed to the State: if the PMC carries out instructions of the State, or acts under direction or control. According to the commentaries, instructions have to be read as direct and specific instructions.[287] The rationale for this is that in the absence of a formal relationship, *de facto* have to be strong and clear-cut to meet the same standard. Of course, in some circumstances, PMC instructions are indeed as clear as demanded by Article 8. Arguably, the US instructing MPRI on how to execute its Croatian contract in order to further US foreign policy might indeed fall under this criterion.

Attribution through direction or control is more ambiguous. Several tests have been developed in jurisprudence to establish *de facto* state control, and no single definition has yet been accepted. The commentaries suggest that the Article was largely put into place to prevent states from 'incidentally' recruiting private actors, such as PMCs; indeed, using PMCs as proxies.[288] The question of what degree of control amounts to state responsibility is needed for State responsibility is in any case not answered.

One of the cases in which this matter is discussed is the ICJ's *Nicaragua* case.[289] Confronted with the question of whether the United States' support of the contra rebels gave rise to State accountability, the court answered negatively. The US had indeed supported and funded the rebels, but lacked the 'effective control' over the rebels needed to label it State conduct. This 'effective control' test mandated that, although the rebels were dependent on US funding,[290] the US did not direct or control the specific operations.[291]

[286] Draft Articles, Article 8, *supra* note 242
[287] ILC Report (2001), *supra* note 270, at 47
[288] Lehnardt, *supra* note 271, at 149
[289] ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Judgment (Merits), 27 June 1986 (Nicaragua)
[290] Lehnardt, *supra* note 271, at 149
[291] Nicaragua, *supra* note 287, para. 189

The Court noted that "*even the general control of the respondent State with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State"*.[292] If this reasoning is applied to PMCs, they indeed do not meet the 'effective control' test. It is very rare that a State, as seen above, does not contract a PMC directly, but does control its operations to the degree demanded by the ICJ. Especially when licensing systems, the primary mechanism for control in these situations, lack strict enforcement,[293] the links between the States' directions and actual PMC conduct becomes weak.

Another test exists, albeit not in the context of State responsibility. In the case of *Prosecutor v Tadic*[294] before the ICTY, the Appeals Chamber developed a separate test of 'overall control'. The Trials Chamber in *Tadic* had already dealt with this question, imposing a regime similarly restrictive to that of the ICJ. The Appeals Chamber overturned this decision, noting that in dealing with an organized, hierarchical group, it was sufficient for a State to have "*overall control over the group, not only by equipping and financing, but also by coordinating or helping in the general planning of its military activity*".[295] The Court hereby referred to the ECHR decision in *Loizidou v Turkey,*[296] which stated that detailed control over every specific operation is not required, as long as there is a degree of general control. Using this test, PMCs would indeed fall under State control, arguably even when only operating under a licensing system as opposed to a direct contract.

Tadic is nevertheless problematic in its application vis-à-vis the *Nicaragua* case. A first objection raised in the commentaries,[297] that the ICTY did not specifically deal with State responsibility can easily be rejected. Firstly, the Court expressly stated that it dealt with the same body of law as *Nicaragua*. Secondly, it stresses that conditions for State responsibility must be the same regardless of the setting. On the other hand, the ICJ affirmed its narrow reading by affirming the *Nicaragua* test in several cases, rejecting the ICTY's broader application.[298] Lehnardt raises an argument that speaks in favor of the ICTY decision, pointing

[292] Id.
[293] Cockayne, *supra* note 76, at 206
[294] ICTY, *The Prosecutor v. Dusko Tadic* (ICTY Appeals Chamber), Case No IT-94-1-A, 15 July 1999 (Tadic)
[295] Tadic, para. 131
[296] ECHR, *Loizidou v. Turkey* (Merits), Judgment of 18 December 1996 (Loizidou v Turkey)
[297] ICJ Report, *supra* note 270, at 48
[298] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment (Merits), 26 February 2007 (Bosnia and Herzegovina v

out in the *Nicaragua* case, the supposedly hiring State was not the State where the conduct occurred. As a consequence, a stricter test must be applied than when the conduct occurred on the territory of the presumed responsible State.[299] Reflecting back on the PMC issue, the question arises as to which test would be preferable regarding PSC conduct in Iraq. American PMCs and PSCs conduct their operations on Iraqi sovereign territory, but the US arguably has effective control over that territory pursuant to its responsibilities as an occupying power. Invoking *Loizidou v Turkey* would mean that the less strict test of *Tadic* has to be applied.

In short, choosing between these two regimes and incorporating them into a cohesive body of PMC regulations would mean a political choice. Exporting States like the United States would likely prefer a stricter regime as applied in *Nicaragua*, as the employment of PMCs for foreign policy purposes is to their benefit. Receiving States like Iraq would probably be in favor of the *Tadic* test, as it places an obligation on the exporting State to strictly control their PMCs, as will be discussed in the last chapter. Furthermore, State responsibility pursuant to Article 8 does not encompass PMC conduct outside of its mandate or contract, as worded by Article 7. Article 8's *de facto* responsibility could therefore be viewed as a last resort measure, a broadly defined 'safety net' measure. The last question on state attribution relates to a situation where there is no effective State control, either through lack of power or a lack of political will.

Attribution without State action: Article 9 and due diligence

The above two Articles deal with situations where there is a State capable of exercising authority over private actors. As discussed in chapter four, PMCs and PSCs have a tendency for working in volatile areas where a State has lost its power to provide security, and is about to lose its legitimacy. In these cases, "*in the absence or default of the official authorities*",[300] private action may be attributed to the State through Article 9 of the Draft Articles.[301] These cases are, by their nature, exceptional. At present, only Somalia and Afghanistan have suffered a breakdown of governmental structure to the degree described in the Article 9 Commentaries.[302] As Afghanistan is arguably controlled by its provisional government with the support of NATO forces, only Somalia is susceptible to the private action meant in the

Serbia and Montenegro)
[299] Lehnardt, *supra* note 271, at 151
[300] Draft Articles, *supra* note 270, at 26
[301] Id.
[302] ILC report, *supra* note 272, at 49

Article 9 definitions. Due to the profit-driven nature of PMCs, it is highly unlikely that any will exercise governmental authority in areas like Somalia, unless contracted by a sub-state entity. Few PMCs, most notably EO and Sandline, have demonstrated this willingness.[303] As argued in chapter seven however, the dynamic nature of PMCs demands that this possibility should not be dismissed. In these cases, the PMC would become the effective authority.

A last situation in which a State has not acted does not concern a State that is not able to act, but a State that did not take the necessary countermeasures to prevent misconduct of private actors. This does not attribute the conduct to the State, but gives rise to State responsibility under international law for damages suffered.[304] Lehnardt[305] construes this reasoning along the lines of the *Corfu Channel* case.[306] In this case, the ICJ found that regardless of who actually laid the mines, the Albanian government had made no attempts to de-mine the channel and prevent the disaster[307] and that these omissions invoked State responsibility on the side of Albania.[308] This notion is also known as 'due diligence'; the obligation to prevent or respond to violations of international law.

This obligation is a reminder of the responsibilities of an occupying power to "*take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country*".[309]Additionally, Article 1 of the Geneva Conventions calls upon states to "*undertake to respect and to ensure respect for the present Convention in all circumstances*".[310] The ICJ has already interpreted these provisions to encompass State responsibility for the conduct of non-state actors when the State acts as an occupying power in a certain area. It found that Uganda, in its role as occupier in the Ituri region of the Democratic Republic of Congo had an obligation to stop militias in the area from violating international humanitarian law.[311] Similar decisions had already been made by the ECHR concerning the responsibility of Turkey as an

---

[303] Referring to Sandline's arms trade with the exiled Sierra Leone government, also known as the 'Sandline affair', Francis, *supra* note 21*,* at 328. See also chapter six, under *Executive Outcomes*
[304] Lehnardt, *supra* note 271, at 153
[305] Id.
[306] ICJ, *The Corfu Channel case (United Kingdom v Albania)*, Judgment (Merits), 9 April 1949 (Corfu)
[307] Id.
[308] Id.
[309] Convention (IV) Respecting the Laws and Customs of War on Land (1907), 187 CTS 227; 1 Bevans 631 (Hague IV), article 43 *available at* http://www1.umn.edu/humanrts/instree/1907c.htm
[310] Article 1, Geneva I, *supra* note 185
[311] Lehnardt, *supra* note 271, at 153, quoting ICJ, *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, 9 December 2005 (DRC v Uganda)

occupying power in Cyprus.[312] In these cases, State responsibility does not arise from the actual conduct by the private actor, but from the omission to prevent or respond to violations of humanitarian law by that conduct.

Due diligence provides a backdrop for ensuring State responsibility for humanitarian law violations. Even when PMCs are not directly contracted by the State or exercising functions pursuant to State interests, a minimum State responsibility should guarantee compliance with the most basic norms in international humanitarian law. The prime example of an area in which the importance of due diligence becomes apparent is Iraq. Where PMCs are not contracted and managed by the State but hired by other private actors for specific security tasks, it is still the responsibility of the United States as an occupying power to ensure that these private contractors do not kill civilians.[313]

Due diligence exists next to the prime mechanisms of attributing private acts to the State. These two mechanisms do address the Janus face described in chapter eight. The last question therefore is how this patchwork of decisions and partially customary rules can be incorporated into a single PMC regulation treaty, and what obligations this should impose upon States in terms of regulation and possible prosecution.

An integrated regime: what responsibilities?

The chapters above strongly argue for a coherent international regime to align State regulation mechanisms. As international law generally lacks the enforcement mechanisms for its provisions, this paper agrees with Singer and Milliard that the enforcement of regulations is best left up to states.[314] However, no national regime can exist without the means to hold the State itself accountable for its failure in enforcing these regulations. Moreover, this regime has to be consistent to avoid the fragmented, interest-driven regulation currently in place. Lastly, such a regime would have to provide backup measures for when State regulation fails. The final chapter will try to briefly address these issues, focusing on the areas of State legislation and prosecution.

---

[312] *Loizidou v Turkey*, *supra* note 296and ECHR, *Cyprus v Turkey* (Merits), Judgment of 10 May 2001 (Cyprus v Turkey)
[313] See reports on Blackwater shootings in Iraq, *supra* notes 150 and 155
[314] Singer, *supra* note 3, at 546

In discussing the provisions needed to form a cohesive international regime, this chapter will take a hypothetical PMC convention as starting point. Such a convention would have to first have to define military services. As the US has already enacted a licensing regime for various military services,[315] this definition would be feasible.[316] Furthermore, an international regime would fail by outlawing certain services, specifically combat operations. International practice has proven it to be unfeasible to ban such activities, and for reasons described above, PMCs can indeed provide legitimate combat support to prevent humanitarian crises.

The UK Green Paper cited in this paper proposes several options for PMC regulation.[317] For policy reasons, it does not attempt to advocate a single solution. However, from the wording of the conclusion, the Paper clearly expresses a favorable opinion towards a licensing system similar to that which has been in place in the US. Indeed, a licensing system would also hold several advantages from an international perspective. As discussed above, licenses provide two ways of establishing State control over a PMC; as evidence for the existence of ties with the State itself, and as an expression of due diligence with respect to the PMC's conduct. Working under a license provides stronger ties than just only a contract. Additionally, it provides a second guarantee for establishing state control; in a case such as that of MPRI in Croatia, the circumstances surrounding the distribution of its license by the US State Department prove proper control is in the hands of the United States rather than Croatia.

[315] Including those perceived most problematic in this paper, combat operations, private security and planning
[316] Milliard's suggested Draft Convention indeed contains a definition of military services not unlike the definition by the State Department for purpose of licensing
[317] UK Green Paper, *supra* note 63, at 22

Any PMC convention could therefore require the existence of a State license for a PMC to be a legitimate entity. A similar regime already exists for pre-approved companies that provide non-military services for the UN. There are strong motivations for this, both on the side of the States and the business itself.[318] Firstly, it would overturn the previously mentioned knee-jerk anti-mercenary notion applied to PMCs, and legitimize the States' use of private force. As there is still a strong need for PMCs and PSCs,[319] a turn away from the puritanical anti-mercenary norm is much desired. The PMC business would also profit from a licensing regime, pulling them out of the mercenary shadow and opening up a new register of possible clients. A licensing regime would also legitimize the contracts between PMCs and other private entities.

International control of a licensing regime would be as vital as the licensing regime itself. The gravest concern regarding PMCs is not the privatization of violence itself, but the covert involvement of PMCs in extracting natural resources, supporting oppressive regimes and humanitarian law violations. Therefore, international oversight of PMC licensing and compliance by States is key to ensuring the usage of PMCs for better reasons. As Milliard argues, when some States enforce strict regulations while others do not, there is a strong incentive for PMCs, as for any corporation, to move their base of operations to where there are no restraints.[320]

A hypothetical convention should therefore incorporate provisions stating that military services can only be provided by a State that has enacted legislation pursuant to the Convention. Milliard further argues for a regime that would only allow for the employment of PMCs in areas where the exporting as well as the receiving state have signed the Convention.[321] This would however rule out the use of PMCs in peacekeeping, where it can be expected that peacekeeping missions take place in failed states that have either not signed the Convention, or where the signatory government has lost its legitimacy. In the latter situation, the binding effect of the former government's ratification would be questionable.

[318] Singer, *supra* note 3, at 545-546
[319] See chapters five and nine
[320] Milliard, *supra* note 6, at 84
[321] Id., at 82

This does raise the problem of covert intervention by one State on another State's sovereign territory: the foreign policy proxy problem. Any international convention should therefore contain provisions pursuant to the current regime of State responsibility, as outlined in the previous chapter, detailing the relationship between State action and private action. Ideally, such a provision would contain language similar to the following:

(a) For the purpose of this Convention, conduct by any entity falling within the scope of this Convention, providing military services as described in [the applicable article], shall be presumed conduct of the State to which that entity is a contract party;
(b) This presumption shall be exercised without prejudice to any relevant facts or circumstances;
(c) In any other case, such conduct shall be presumed to be conduct of the State of which the entity is a license holder;
(d) This article does not exclude any State responsibility established in accordance with any law or State practice.

Inserting a 'presumption' instead of a 'holding' should give any respondent State leeway to support its case for not being the primary responsible actor with facts and circumstances of the case.[322] Also, this provision would express the norms laid down in Hague V;[323] countering the threat of mercenaries, PMCs and other private actors being used to undermine the neutrality of a third State. It would also force PMC host States to be mindful of the various contracts PMCs sign with other private entities and the substantive provisions in these contracts. Moreover, it incorporates the broader *Tadic* test by presuming State control over a licensed PMC.[324]

[322] So that the debate on effective control can take place before the ICJ, see Lehnardt, *supra* note 271, at 156
[323] Article 4, Hague V, *supra* note 170
[324] ILC report, *supra* note 272, at 42

The substantive consequences of State responsibility

If a State-PMC relationship gives rise to State responsibility, the next question has to be what obligations that responsibility imposes on the State. The previous chapter already outlined some obligations under due diligence. This chapter will now turn to specific obligations of the State under humanitarian law: the obligation to educate and train, and the obligation to prosecute any violations. The first obligation already exists for educating and training the military in international humanitarian law (IHL).[325] As PMCs start to take over more and more army services and fall under State responsibility in a similar fashion, it is logical that PMC employment requires the same amount of training. The hypothetical Convention described above could incorporate provisions requiring a certain standard of IHL training and education as a condition to obtaining a license.[326]

International humanitarian law

Even without the presumption that States bear an equal responsibility for PMC conduct as they do for the armed forces, there are several provisions within the Geneva Conventions that relate to the education in IHL for non-members of the armed forces. For instance, Article 144 (2) of the Fourth Convention states that "*Any civilian, military or other authorities, who in time of war assume responsibilities in respect of protected persons, must possess the text of the Convention and be specially instructed as to its provisions*".[327] Considering the tasks undertaken by PMCs and PSCs with respect to guarding civilian officials or infrastructure, this provision indeed applies directly to PSCs. Other instances in which this provision would take effect is the employment of PMC employees as prison guards or on policing duty.

Moreover, when PMCs engage in offensive combat, they are subject to the same provisions as the armed forces.[328] These provisions encourage States to make PMCs subject to the same degree of training and legal assistance they provide their armed forces, in order to avoid international liability. As the *DRC v Uganda* case shows, the ICJ has already taken the step to hold a government accountable for failing to contain rebel groups acting separately from the

[325] Doswald-Beck, *supra* note 82, at 132
[326] Milliard, *supra* note 6, at 84
[327] Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva IV), article 144(2), 75 UNTS 287, *available at* http://www2.ohchr.org/english/law/civilianpersons.htm
[328] See for instance Hague IV, article 1, *supra* note 308

State. With regard to the United States' responsibility for PSC conduct in Iraq, the same accountability would likely apply.

Criminal prosecution

The second important obligation that is placed upon the State is that of effectively prosecuting misconduct, human rights abuses and humanitarian law violations. Due diligence requires States to have an answer for humanitarian law violations, in order to avoid international liability. Chapter six did however describe some legal problems the US encounters in prosecuting PMC employees. DynCorp employees who engaged in human trafficking and sexual slavery did not face any legal consequences other than being laid off.[329] Now, with the PSC business still increasing, the matter of competent jurisdictions willing and able to prosecute these offenders becomes all the more pressing. While the Blackwater case has already proven to be difficult, the matter has yet to present which State is competent to prosecute crimes committed pursuant to a private contract between two private entities. Even with the revived application of the MEJA in the Blackwater case,[330] this question is still wide open.

There are two recourses to address this issue. Firstly, any PMC Convention has to address the matter of jurisdiction over PMC employees. It can mandate the establishment of personal jurisdiction and call upon States to prosecute misconduct under this provision. It also needs to provide possible remedies for a violation of such provisions. In that way, aggrieved States that see perpetrators of criminal acts going unpunished through immunity provisions of the exporting State obtain legal measures to either enforce compliance, or receive compensation.

This provision would for instance cover the problem the Iraqi government faced with Order 17's immunity regime,[331] while the US did not fully use its own legal tools to hold the individuals accountable. Enacting the provision would require the US to close the gaps in the MEJA, while forcing other countries to impose national legislation to be compliant with the Convention. Furthermore, the Convention might include a rule providing an extradition basis

[329] Krahmann, Elke, *Transitional states in search of support: Private military companies and security sector reform*, at 104, in Chesterman, Simon & Lehnardt, Chia (ed.), From mercenaries to market: the rise and regulation of private military companies, New York: Oxford University Press, 2007
[330] Andrew Gilmore, *DOJ indicts five Blackwater guards: reports*, Jurist, December 6, 2008, *available at* http://jurist.law.pitt.edu/paperchase/2008/12/doj-indicts-five-blackwater-guards.php
[331] CPA Order No. 17, *supra* note 150, see chapter five under *Blackwater, DynCorp and Aegis in Iraq*

for crimes committed in the discourse of providing military services. These provisions have already been found in the UN Drug Convention[332] and the UN Mercenary Convention.[333]

Because PMCs and PSCs often operate in areas with little governmental control, there is a fair risk that, although the appropriate provisions are in place, States do not have the means to enforce their criminal statutes. In some areas, PMCs are the very police force that is supposed to provide the enforcement itself. In these cases, a broader interpretation of jurisdiction can be applied. Adding to the licensing regime and State responsibility, the Convention could include provisions that would expand jurisdiction to the licensing State, rather than the contracting State. In the case of humanitarian law violations, this issue is already partially addressed by the establishment of universal jurisdiction for these crimes. In some instances, these violations may even trigger the complementary jurisdiction of the ICC.[334] The ICC's power is nevertheless severely limited. Both the most important exporting State, the United States, and the most important receiving State, Iraq, are not signatories to the Rome statute. It is furthermore doubtful whether incidental PMC misconduct would meet the gravity threshold of Article 17(b).

Solving the problem of impunity is the last and most vital step in drafting a comprehensive body of PMC regulation. As argued above, the primary problem for the business is the image of unaccountable, trigger-happy guns for hire. As long as this image is still grounded in fact, there can be no acceptance and thus effective regulation on an international scale. This leaves PMCs and PSCs in a gray area of law, and exposes the exporting as well as the receiving States to the international responsibility discussed in chapter nine. It is especially the latter aspect that should provide States with the incentive to legislate and regulate the business, incorporating provisions of State responsibility, mandating proper IHL training, education and legal assistance, and enact watertight provisions of criminal law.

---

[332] UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, U.N. Doc. E/CONF.82/15; 28 ILM 493 (1989), *available at* http://www.unodc.org/pdf/convention_1988_en.pdf
[333] UN Mercenary Convention, *supra* note 176, art. 15
[334] Rome Statute of the International Criminal Court, art. 17, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90, *available at* http://www1.umn.edu/humanrts/instree/Rome_Statute_ICC/Rome_ICC_toc.html

Conclusion

PMCs are here to stay. They have established themselves as a legitimate and vital actor in modern conflicts. Although their operations remain controversial, there is still an increasing need for a versatile and dynamic force capable of performing virtually every security service needed on the global market. They provide their military capacities to States, international institutions, NGOs and even individuals. One might even go as far as claiming that PMCs provide the key to keeping modern humanitarian missions and NGO work running, providing security in unstable environments.

PMCs indeed share an important trait with earlier mercenaries. No matter how strong national and international norms denounce their business, practical assessments of advantages and disadvantages of mercenary employment generally trump moral arguments. Indeed, the signing of the Magna Carta and the call to exile all mercenaries from the King's lands did not signal an end to the mercenary business; rather, it heralded the beginning. In a similar way, the strong anti-mercenary norm worded in Article 47 of Protocol I, the UN G.A. Resolutions and of course the UN 1989 Mercenary Convention all but ended the mercenary business. No more than 5 years after the latter Convention was drafted, EO conducted the most effective mercenary operation of the 20th century. If there's anything international anti-mercenary legislation has accomplished, it is freeing the mercenary business from the constraints inherent to individual operations. By forcing an organizational structure upon the industry, anti-mercenary legislation has been a contributor, more than a mitigating factor to PMCs.

The first conclusion must therefore be that PMCs have to be accepted as legitimate actors, serving a global market. The knee-jerk, puritanical argument that fighting for private gain is necessarily bad and fighting for a State is necessarily good has to be rejected and eliminated from the debate, if there is to be a constructive and coherent regulation of the subject. Within modern warfare, the fading interest of larger powers in small conflicts, increasing regional violence and the importance of MOOTW provide the ideal environment for PMCs. They may even prove a better, more adaptable solution to some of these problems than the slow acting international community. A well established, licensed PMC might be a more reliable force than an army conscripted of former rebel groups, supporting higher standards of training and education.

That does not mean to say that PMCs are a freebee for States in covertly executing foreign policy where international constraints limit them from overtly doing so. States have to realize that contracting PMCs to provide certain services does not lift their responsibility for the consequences of these actions. This is certainly the case where PMCs work as State agents, providing core government tasks such as security, detention, planning and even operational support. There also needs to be a clear definition of the responsibility of States when it comes to ensuring compliance with international humanitarian law, a standard of due diligence. This is all the more true as PMCs work in volatile conflict areas, performing tasks prone to escalate in human rights abuses and humanitarian law violations. Moreover, jurisdiction over acts committed by PMCs has to be extended to both the exporting and receiving State. There can be no lawful regulation of PMCs if they obtain immunity for their acts.

The final conclusion is therefore that in adequately confronting the Janus face described in the introduction, international legislation needs to take into account the advantages as well as the disadvantages of employing PMCs. Earlier legislation has failed in only addressing the disadvantages, without properly defining the actual problems of military privatization. Mercenaries and PMCs are not inherently bad; they are instruments in the hands of their contracting party. As is the case with any instrument, it is the degree of control and the purpose of employing that instrument that determines its value, as well as its hazards.

Bibliography

International instruments

Convention (IV) Respecting the Laws and Customs of War on Land (1907), 187 CTS 227; 1 Bevans

Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War On Land, (1907), 205 CTS 299; 1 Bevans 654

Geneva Convention relative to the Treatment of Prisoners of War (1949), 75 UNTS 135

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 75 U.N.T.S. 31

Charter of the United Nations (1945), 59 Stat. 1031; TS 993; 3 Bevans 1153

G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (1965)

G.A. Res. 2465, U.N. GAOR, 23rd Sess., Supp. No. 18, U.N. Doc. A/7218 (1968)

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), 1125 UNTS 3

International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989), A/RES/44/34

Rome Statute of the International Criminal Court, art. 17, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90

National instruments

US Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3261, 14 Stat 2488 (24 November 2000)

South Africa, Regulation of Foreign Military Assistance Act 1998, *available at* http://www.info.gov.za/gazette/acts/1998/a15-98.pdf

Case law

ICJ, *The Corfu Channel case (United Kingdom v Albania)*, Judgment (Merits), 9 April 1949

ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Judgment (Merits), 27 June 1986

ICJ, *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Judgment, 9 December 2005

ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment (Merits), 26 February 2007 (Bosnia and Herzegovina v Serbia and Montenegro)

ICTY, *The Prosecutor v. Dusko Tadic* (ICTY Appeals Chamber), Case No IT-94-1-A, 15 July 1999

ECHR, *Loizidou v. Turkey* (Merits), Judgment of 18 December 1996

ECHR, *Cyprus v Turkey* (Merits), Judgment of 10 May 2001 (Cyprus v Turkey)

Articles

Goddard, Major S. (2001) , The private military company: A legitimate entry within modern conflict, Fort Leavenworth, Kansas

Frye, Ellen L. (2006), Private Military Firms in the new world order: how redefining 'mercenary' can tame the 'dogs of war', Fordham Law Review, Vol. 73, p. 2607 - 2664

Kinsey, Christopher (2005), Challenging international law: a dilemma of private security companies, Conflict, Security & Development, 5:3, p. 269 - 293

Cilliers, Jakkie (2002), A role for private military companies in peacekeeping?,Conflict, Security & Development, 2:3, p. 145 - 151

Francis, David J. (1999), Mercenary intervention in Sierra Leone: providing national security or international exploitation?, Third World Quarterly, Vol. 20, No.2, p. 319 – 338

Milliard, Maj. Todd S. (2003), Overcoming Post-colonial Myopia: a call to recognize and regulate private military Companies, Military Law Review, vol. 176, p. 1 - 95

Singer, Peter W. (2004), War, Profits and the Vacuum of Law: Privatized Military Firms and International Law, Columbia Journal of Transnational Law, Vol. 42, p. 521-549

Singer, P. (2001), Corporate Warriors. The Rise of the Privatized Military Industry and Its Ramifications for International Security, International Security, Vol. 26, No. 3

Aldrich, George H. (1981), New life for Laws of War, American Journal of International Law, vol. 75

Books

Percy, Sarah, Mercenaries: the history of the norm in international relations, New York: Oxford University Press, 2007

Chesterman, Simon & Lehnardt, Chia (ed.), From mercenaries to market: the rise and regulation of private military companies, New York: Oxford University Press, 2007

Stoker, Donald (ed.) Military advising and assistance : from mercenaries to privatization, 1815-2007, New York: Routledge, 2008

Kinsey, Christopher, Corporate soldiers and international security : the rise of private military companies, New York: Routledge, 2006

Gutman, Roy & Rieff, David & Dworkin, Anthony (ed.), Crimes of war : what the public should know, New York, W.W. Norton & Co., 2007

Van der Wolf, R. & Van der Wolf, W.J. (ed.), Laws of War and International Law; vol. 1, Nijmegen: Wolf Legal Publishers, 2004

Jean-Marie & Doswald-Beck, Louise, Customary International Humanitarian Law, vol 1.: Rules, at 393-394, New York : Cambridge University Press, 2005

Additional

Report of the Ad Hoc Committee of the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, New York: United Nations, 1983

United Kingdom Foreign and Commonwealth Office, Private Military Companies: Options for Regulation, HC 577, 2002

W. Hays Parks (2005), Evolution of policy and law concerning the role of civilians and civilian contractors accompanying the armed forces, summary of Power Point presentation at Third Meeting of Experts on "direct participation in hostilities", Geneva, October 25, 2005

Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, ILC Yearbook (2001), 53rd Sess., U.N. GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 (2001) (hereafter: Draft Articles)

Report of the International Law Commission on the Work of its Fifty-Third Session, Chapter IV, at 41, ILC Yearbook (2001), Vol. II, part two, U.N. GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 (2001), hereafter ILC Report

Report of the International Law Commission on the Work of its Fiftieth Session, Chapter VII, State Responsibility 1998 ILC, 50th Session, UN Doc. A/53/10, *available at* http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1998_v2_p2_e.pdf