

MERCENARIES OF THE XXIST CENTURY: THE STATUS OF PRIVATE MILITARY COMPANIES

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This paper aims to analyze some of the long-term implications of the new forms of conflict towards the rule of law, the rules of warfare, taking into account several factors such as: the legal status of non-state actors, the complexity of the relationships in conflict areas, the legitimacy and liability under the rules of the humanitarian law. This paper suggests that the symbiotic relationship that exists between private military companies and the parties involved in a conflict goes beyond the contractual obligations and into the rules of the humanitarian law.

Keywords: *private military companies (PMCs); mercenaries; combatants; liability.*

This paper aims to explore the new actors engaged in armed conflicts, taking into account the current transformations of geo-political relations. The facets of violence in the 21st century are constantly evolving, leaving behind the coding process conducted by the international society. The doctrine specialized in the geopolitical field clearly distinguishes between the terms used to describe these events, making a clear terminological delineation between "new" and "old wars". "Old wars" took place in a centralized and national world, based on state hierarchy. The impact of globalization has moved these geopolitical coordinates of states and led to the emergence of new types of conflicts, and the war on terror is a "new" war. In the 90s, conflict prevention was perceived essentially as a political-military activity designed to stop the war between states. Nowadays, the conflict prevention approach has changed its dynamics, because security threats are also

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changing, and this was also demonstrated by the event of 11th September 2001. Within this dimension, states have confirmed a series of principles and objectives for their involvement in the theaters of military operations, with implications for the regulated actors and behaviors.

This study tries to focus on the private military companies (PMCs) configuring the political and military dimension and the security risks arising from political or military threats; the risks approach is rooted in the failure to comply with the obligations specific to conflicts, human rights and nontraditional threats against states. The arguments and conclusions on private military companies presented within this paper are consistent with the dominant position of authors such as Christopher Kinsey, Hannah Tonkin and Sarah Percy.

New actors in carrying out conflicts: private military companies

Addressing security threats in a comprehensive and effective way represents a challenge in that it is necessary to move from identifying *ad hoc* solutions to a legal regulation based on a new “culture of security”, limited to the principles of international law. As part of this comprehensive approach, the private actors engaged in military operations are a modern adaptation of the need for defense, of *justitiae executio*. The new semantics of the notion of armed conflict requires the conjunction of legal regulations and customary law, in order to meet the realities of the modern world, where the armed forces of a state are engaged in several operations and contract the security services provided by legal persons.

Although increasingly contested by several participating countries¹, the effectiveness of humanitarian law faced with the new wars represents the cornerstone of this study, namely the recent issues regarding the ambiguous status of private military companies and how the International Society is aware of the legal gaps related to their liability and obligation to comply with the Geneva Conventions².

The author Peter Singer, in his book *Corporate Warriors: The Rise of the Privatized Military Industry*, establishes three general categories of PMCs:

1. Companies providing military force called “private security companies”, which provide military and tactical assistance to its customers,

¹ Dawn L. Rothe & Jeffrey Ian Ross. *Private Military Contractors, Crime, and the Terrain of Unaccountability*, Justice Quarterly, 2010, 27:4, 593-617.

² *The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War. See full text in ARDU – Dreptul internațional umanitar al conflictelor armate*, Documente, Șansa Publishing House, Bucharest, 1993, pp. 145-278.

including the accompaniment to the frontline. Examples include Blackwater, Executive Outcomes (EO), Sandline, and Logo Logistics.

2. Companies providing consultancy, recruiting experienced officers, providing expertise for the customers' training and strategy in security (i.e. Blackwater).

3. Companies providing military assistance, with contracts of billions of dollars, for providing logistic services, for gathering confidential information. In this category the author includes companies like Halliburton, DynCorp, CACI, and Titan³.

Within this analysis, we aim at understanding the historical and legal background essential to the analysis of the international obligations of the parties involved in an armed conflict. Private military companies are motivated by profit, and, throughout history, they have been a constant presence in the configuration of conflicts. The term private military company (PMC) is sometimes synonymous with the term mercenary, and they are almost as old as war itself, being a central component of wars until the mid nineteenth century⁴. Throughout history, due to their involvement in conflicts, the mercenaries' public perception has been a negative one. Mercenaries are neither soldiers forced to fight by a decree of mobilization, nor are they driven by worthy goals such as the desire to protect their country; they are ready to risk their lives for money. The modern industry of private military and security services shows that, currently, this phenomenon reaches an unprecedented magnitude, but shares some characteristics with their medieval counterpart. PMCs have been the source of scandals in the world press, due to their involvement in the Iraq operations theater and also to the amounts made available to them by the United States Department of Defense⁵. Once with the increase in international corporate operations through foreign investment, these types of military activities have gained an international dimension. However, the role of international capital markets is to make states and corporations to support each other, although the military power transfer to another subject than the State may indicate only a government's weakness in ensuring the security of its citizens.

³ Peter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, New York, 2003, p. 2.

⁴ Antonio Cassese, "Mercenaries" in Bernhardt R. (ed.), *Encyclopedia of Public International Law*, Instalment 1-7, North-Holland Publishing Company, Amsterdam, New York, Oxford, 1981-1984, pp. 255-257.

⁵ William M. Solis, *Warfighter Support: A Cost Comparison of Using State Department Employees Versus Contractors for Security Services In Iraq*. Washington, DC: U.S. Govt. Accountability Office, 2010. accessed March 2013
<http://permanent.access.gpo.gov/LPS122326/LPS122326/www.gao.gov/new.items/d10266r.pdf>

The liability of private military companies

Like any other business entities, Private Military Companies (PMCs) are driven by the same decision makers: profit, economic activity and the creation of clientage⁶. Private military forces and private logistics support teams amplify the dilemma of a new category of combatants because of the loopholes in the original concept. The need for clear rules of the statute of private military companies is given by the risk involved by the security and protection tactical activities when they overlap an armed conflict. At the limit of "lawful or unlawful combatants", PMCs involve minimal supervision, a lack of transparency and they are not subject to the law of war. Without some form of control, they are free to take action as they deem appropriate in the space in which they operate. It is often unclear how, when, where, and what are the authorities responsible for the investigation, prosecution and punishment of such offenses. Unlike soldiers, who are liable under jus bellum and who can be held accountable under the military justice wherever they are, the entrepreneurs have no clear legal status, determined by the international law. Although there are two documents that restrict the activities of mercenaries, the Additional Protocol I to the Geneva Conventions of 1977 and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1985, it is necessary to determine whether they are also applicable to private military corporations or to their employees. The Additional Protocol I is essentially meant to discourage mercenary activities by withdrawing them the status of war prisoner, but it does not criminalize criminal behavior⁷.

Next, we are going to analyze the conditions set out in Article 47 of the Additional Protocol I of 1977 in order to define mercenaries. According to this document, the term "mercenary" extends to any person who:

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

This condition excludes the volunteers who choose long term military service or who offer their military service in a foreign army, or as a result of individual enrollments (the French Legion) or on the basis of an agreement concluded by the national authorities with the state in whose army they serve (e.g. the Swiss Guards providing military service to the Vatican State). PMCs meet this criterion, using skilled human resources from the former Soviet states, or recruiting retired personnel.

(b) does, in fact, take a direct part in the hostilities;

⁶ Kinsey, Christopher. *The Transformation of War: The Rise of Private Contractors*. Abu Dhabi: Emirates Center for Strategic Studies and Research, 2009.

⁷ Article 47 of the Additional Protocol I provides that: "a mercenary has no right to the status of combatant or war prisoner".

Only a combatant⁸ and, more precisely, a combatant who takes part in the hostilities, can be considered a mercenary, as defined by Article 47. Therefore, this condition excludes foreign advisers and those who provide military technical expertise, even when their presence is motivated by financial gain. The increasingly advanced technological nature of modern weapons requires the presence of specialists, either for training the military personnel or for weapons proper maintenance. As long as these experts do not directly participate in hostilities, they are neither combatants nor mercenaries, being qualified as civilians not involved in combat. In this case, we note that even the PMCs have to provide only tactical services, but daily realities constantly redefine the object of their activity. If one party undertakes such an agent to provide security for its employees or for the facilities in the area that they serve, from the contract analysis it will be revealed that the PMC was not particularly hired in order to participate in the hostilities, although it can be drawn into the existent conflict by its mere presence. In addition, a conflicting party can hire a PMC in order to provide security services in a dangerous place, which will also involve its participation in "the armed conflict".

(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;

Among the arguments used in this article, we believe that the reason for which the mercenary engages in combat is crucial to his/her categorization. Unlike a volunteer who is driven by a noble ideal, the mercenary will provide services to the highest bidder, motivated by material gain. A party's lawful or unlawful cause is not taken into account when choosing one side or another. Nowadays it is imperative that a mercenary be better paid than the combatants in regular forces, the establishing criteria being *in concreto* correlated with the qualified purpose, namely with the imbalance between the effort made and the reward obtained, similar to the unjust enrichment.

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

In the case of private companies, the socio-legal relationship with the state is not imperative, the psychological agreement, namely the express agreement to join the organization, the internalization of the organization's goal, being at the basis of the relationship between the company and its employees.

⁸ Combatants are defined under Article 4.A (2) of the Geneva Convention III as members of the regular forces, members of the army, militia or volunteer corps meeting the following conditions: they are commanded by a person responsible for his/her subordinates; they have a fixed sign recognizable at a distance; they carry arms openly; in their operations, they comply with the laws and customs of war.

(e) is not a member of the armed forces of a Party to the conflict; and
 (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces”⁹.

By analyzing the provisions of Article 47, we conclude that PMCs could come in sections (a) and (b) if there would be made a broader interpretation of the notion of direct participation in the conflict. PMCs are less likely to fall into section (c) due to the difficulties in determining their purpose, in an era when the private interest outweighs the public one. PMCs could fall relatively easily in other sections, such as (d), which provides that the mercenary must have a different nationality. But article 47 imposes the obligation to fulfill all clauses simultaneously. In order to meet the issue raised by the categorization of PMCs under the humanitarian law, in 2005, the UN Human Rights Committee established a working group to monitor the compliance with the Convention which prohibits the recruitment, use, financing and training of mercenaries¹⁰. The definition given by the Convention resumed the provisions of Article 47, adding that *the mercenary is specially recruited locally or abroad in order to participate in a concerted act of violence aimed at overthrowing a government or at undermining the constitutional order of a state or at undermining the integrity a territorial state*¹¹.

A new regulation in this area should explicitly require PMCs to adhere to the rules of warfare. In addition, future regulations should require that PMCs can assist under an agreement only the governments recognized by the international society or the movements internationally accepted as legitimate. Only the association with a legitimate and democratic state actor marks PMC activities as legitimate and provides a behavior in accordance with the rules of carrying out a conflict. In order to prevent them from becoming proxy to states for carrying out a war beyond the existing rules, it is necessary to determine how the contractors mandates the PMC in order to meet the scope of the agreement. Thus, critics believe that “the most appropriate means to consider private military forces liable are to make the government of origin liable for their activities”¹².

⁹ Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Geneva: International Committee of the Red Cross, 1987, pp. 571-580

¹⁰ UN General Assembly, *Drafting of an international convention against the recruitment, use, financing and training of mercenaries*, available at: <http://www.unhcr.org/refworld/docid/3b00f1ac17.html> [accessed 31 March 2013]

¹¹ *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, 4 December 1989, UNGA Res. A/RES/44/34

¹² *Expert Meeting on Private Military Companies: Status and State Responsibility for their Actions*, Geneva, 29–30 August 2005, p.10, available at http://www.geneva-academy.ch/docs/expert-meetings/2005/2rapport_compagnies_privees.pdf

However, there are obstacles in the application of humanitarian law to private military corporations. Many private military corporations were involved in criminal activities during armed conflicts, acting as “dogs of war”¹³. Without liability, they were able to commit crimes and to support conflicts through their assistance provided to the rebels, as was the case in the Balkans, Sierra Leone, Liberia and Congo. For example, EO Company was a major provider of services during the apartheid regime in South Africa and has developed a partnership with big transnational corporations and with the local mining sector.

The role of governments in protecting these transnational corporations which commit international crimes is clearly to use paramilitary forces in order to commit abuses taking advantage of their lack of liability and protecting their image when the private military forces are accused of criminal activities. Another dimension is the explanation of the PMC behavior and the prevalence of the risk of involving themselves in abusive, violent acts, contrary to the customary law. A possible explanation is given by the very existence of impunity, knowing that while the military personnel is considered individually liable under the criminal law, corporations remain abstract subjects that are not liable under the law. Traditionally, the doctrine of command distinguishes between military and civilian superiors. In the context of the international armed conflict involving several states, it is well established that the principle of superior liability for ordering or committing offenses, for failure to prevent or punish crimes, does not apply only to military leaders, but also to the leaders of civilian groups. The entrepreneurs are civilians and, therefore, they are not part of the military hierarchy, although there is an observed hierarchy and managers can control the licit or illicit activities of their employees, acting in order to stop them. The criminal court in the former Yugoslavia and Rwanda does not distinguish between military and civilian leaders¹⁴. Article 7, paragraph (1) or Article 6 paragraph (1) of the Statute refers to “persons” who commit serious breaches of the

¹³ Benedict Sheehy, Jackson Nyamuya Maogoto and Virginia Newell, *Legal Control of the Private Military Corporation*, Basingstoke [England]: Palgrave MacMillan, 2009.

¹⁴ In the Akayesu case, although the civil defendant acted as a proxy of the anti-Tutsi policy, authorized by the government, wearing military uniform and arms openly during the events of Rwanda, 1994, the Court ruled that: Thus it is clear from the above that the laws of war must apply equally to civilians as to combatants in the conventional sense. Further, the Chamber notes, in light of the above dicta, that the accused was not, at the time of the events in question, a mere civilian but a bourgmestre (state official). The Chamber therefore concludes that, if so established factually, the accused could fall in the class of individuals who may be held responsible for serious violations of international humanitarian law, in particular serious violations of Common Article 3 and Additional Protocol II.

Geneva Conventions, being the bearers of state authority or acting as proxies of the government. These tools apply equally to military and civilian leaders of lawful or unlawful combatants; as such, it is considered that liability implies that they must be considered as international legal entities¹⁵.

Some theorists have tried to explain this phenomenon by extending criminological theories, so it is considered that PMCs are more prone to illegal activities because of the impact had by the profits of those companies on the capitalist economic order. Another explanation may be given by Sutherland's theory of *differential associations*¹⁶. By joining a violent, disorganized environment, the members of military forces face an environment favorable to crime. In the absence of clear rules and of internalized discipline (according to the regular armed forces model) the members of private or security companies are more likely to react beyond the reasonable limits of the use of force in case of an attack. Their reaction to the situation in the field is questionable and it is also multi-faceted. Sutherland shows that crime is more pronounced during conflicts because there is an exposure of typically law-abiding individuals to phenomena requiring a rapid response. Here we must take into account that they are civilians coming from a protected environment and get into a theater of war completely different from a cultural point of view. Such a complex heterogeneous area increases the number of contacts with violent patterns of behavior and the position of authority involved by this activity predisposes to abuses. Thus, Sutherland argues that, when the frequency rate of acts increases, it may lead to an epidemic due to the augmentation of criminal patterns of behavior made available to non-criminals.

Normally, civilian crimes fall into the jurisdiction of the country in which they are committed. But private military corporations typically operate in illegitimate or weak countries, or under the protection of governments which take action in order to stop their investigation. Therefore, prosecuting crimes at the local level can be difficult, operating at the limit of self-defense, unpredictability and specific risk. Moreover, while some countries have laws regulating private military corporations, often lack the means to implement them (e.g. South Africa), others provide legal behavior, but they are incomplete or contain significant loopholes, while others create laws to intentionally incompletely regulate the activities of PMCs, so as not to lose the alliance with some profitable companies¹⁷.

¹⁵ Sarah V. Percy, *Regulating the Private Security Industry*. Milton Park, Abingdon, Oxon: Routledge for the International Institute for Strategic Studies, 2006.

¹⁶ Dawn L. Rothe & Jeffrey Ian Ross, *op.cit.*, p. 611.

¹⁷ There are also cases where the local prosecution is intentionally blocked. For example, in Iraq, Paul Bremer, head of the provisional government, took measures in order to ensure

In *Military Advising and Assistance: From Mercenaries to Privatization*, Donald Stoker states that especially the military operations in Iraq require a clear status because this conflict has no real borders, and the scope of the agreement cannot be divided into defensive or offensive acts. It is also noted that the Iraqi population does not differentiate between PMCs and the American soldiers, and the rebels consider them legitimate targets precisely because they assimilate them to the combatants¹⁸. We believe that, given the international dimension of services and the framework within which they operate, PMCs must comply with *jus cogens*, being held not only to respect their contractual obligations, but also to comply with the customary law when they engage in conflict areas. Due to the general purpose of protection, of the international humanitarian legal instruments, the delimitation of the categories of people bound under the provisions of Article 3 should not be too limited. The Rules of the Geneva Conventions and the Additional Protocols shall apply, therefore, normally, to the natural persons of armed forces under the military command of one of the warring parties, or to the persons who were legitimately mandated, and it is expected, either by their status, to represent the state, or because *de facto* they act as proxies in order to support or fulfill the war efforts. The objective of this approach would be to apply the provisions of humanitarian law in a way that best suits the purpose of basic protection.

Conclusions

We conclude stressing that the international relations have undergone a metamorphosis under the action of the events since 2001¹⁹. The world has changed since September 2001, as the instruments consecrated especially by the UN international community to promote the commitments for the observance of peace. Many of the rules until then were overthrown in the name of the security of the international society. Such an example is the emergence of non-combatants in the theaters of military operations that may be wrongly qualified as state agents of regular armed forces, because they

immunity from the Iraqi prosecution for private contractors and for other agencies working under the auspices of other government agencies and special forces; under Memorandum no. 17, foreign contractors were granted immunity from the Iraqi law. See Coalition Provisional Authority Memorandum Number 17:) The primary role of PSC is deterrence. No PSC or PSC employee may conduct any law enforcement functions.

<http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/cpamemo.pdf>

¹⁸ Donald J. Stoker, *Military Advising and Assistance: From Mercenaries to Privatization, 1815-2007*. London: Routledge, 2008.

¹⁹ Benjamin Perrin, *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*. Vancouver: UBC Press, 2012.

have similar features, they wear a uniform and carry arms openly. As we have seen, their conduct raises human rights issues, and a relevant solution is the obligation to take measures by which the states contracting military services implement a set of minimum standards for the compliance with the humanitarian law. Under the circumstances of the uncertainty operating in the development of modern conflicts, the conflicting parties begin to be shrouded by fog and indeterminacy. Thus, the customary law must show its continuous praetorian vocation and determine the nature of these non-state actors through the extensive assessment of their level of involvement in acts that are similar to hostilities. Not incidentally, the customary law is crucial to the development of humanitarian law; we believe that, as non-state agencies are bound by Article 3 common to the Geneva Conventions²⁰, the private military companies, which benefit from the same resources, must also comply with the rules of warfare *ad seem*.

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²⁰ "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely (...); the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for (...)"

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