

## **‘The rise and rise of Private Military Companies’**

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### **Abstract:**

The rise and rise of Private Military Companies (PMCs) and their impact on the law of armed conflict, particularly International Humanitarian Law (IHL) requires analysis, especially in light of the current situation in Iraq. The repercussions upon IHL, state sovereignty, accountability and the relationship with the Australian Defence Force and the UN are discussed in this paper. Also posited are recommendations on how Australia could manage this growing phenomenon. This article examines the applicability of present international laws and definitions to PMCs, seeking to offer a proposal on how the PMC sector may be brought under some standard of accountability and regulation.

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*“If any one holds his State founded upon mercenary armes, hee shall never be quiet, nor secure: because they are never well-united, ambitious, and without discipline, treacherous, among their friends stout among their enemies cowardly, they have no feare of God, no keep any faith with men, and so long only deferre they the doing of mischiefe, till the enemy comes to assaile thee, and in time of peace thou art dispolyd by them in warre by thy enemies.”*

Machiavelli<sup>1</sup>

### **Introduction:**

Private Military Companies (PMCs) are not a new phenomena. Once upon a time, these modern entities, now cloaked in the veneer of corporate responsibility, had a reputation of causing more trouble than their worth. In recent times, PMCs have been prominent in the media in one form or another: for example, during April 2004, a PMC was reported to have taken part in combat defending the Coalition compound in Najaf - Iraq. The PMC sent in a privately owned helicopter to re-supply the besieged regular military personnel with ammunition and to ferry out a wounded US Marine. This new report is not surprising considering that PMCs comprise ‘the second largest armed contingent on the coalition side’ after the US military. In Iraq, the US military has hired an estimated 15,000 contract employees – about one for every 10 US troops.<sup>2</sup> Also in 2004, a court in Zimbabwe sentenced a British citizen to seven years in prison for attempting to buy guns for an alleged military coup with a PMC in Equatorial Guinea.<sup>3</sup>

One of the problems with a discussion on PMCs is the multitude of terms and concepts and the entailing lack of clarity in defining these entities. This paper will attempt to show how the various international instruments, ie the First Additional Protocol to the Geneva Conventions 1977, the Organisation of African Unity and the UN Convention on Mercenaries have caused a degree of uncertainty on this topic. For example, are PMCs commercial entities applying military skill sets and capabilities or are they security guards, or do they also include private military contractors who provide a range of technical expertise to support increasingly complex weapons systems, such as unmanned aerial vehicles and combat helicopters.<sup>4</sup>

The premier international body, the United Nations has also had problems coming to grips with this phenomenon. For example, at a press conference in 1997 to discuss the civil war in Sierra Leone, Secretary General Kofi Annan took umbrage at the notion that the United Nations would consider working with ‘respectable’ mercenary organizations, arguing that there is no "distinction between respectable mercenaries

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<sup>1</sup> As cited in Terry Jones, *Chaucer's Knight: the Portrait of a Mercenary*, Methuen 1995 p.20.

<sup>2</sup> William Matthews, ‘Shadow Force: Contract employees serve from depot to front line’, *Armed Forces Journal*, May 2004, p.10.

<sup>3</sup> ‘Q&A: Equatorial Guinea coup plot’, *BBC News* 10 September 2004, at <http://news.bbc.co.uk/2/hi/africa/3597450.stm>

<sup>4</sup> Deborah Avant, ‘Mercenaries’, *Foreign Policy* July/August 2004, p.19.

and non-respectable mercenaries."<sup>5</sup> However, the Report of the Panel on United Nations Peace Operations – or the “Brahimi Report” – released in August 2000 listed several ways in which U.N. forces could work together more effectively, one being that military contractors could train them for greater flexibility and capacity.<sup>6</sup>

This divergence of views from the UN itself has revealed serious concerns about PMCs being involved in peacekeeping operations of a military nature as their activities are seen by some to resemble those of mercenaries. This issue is not unique to the UN, as even member States, the International Committee of the Red Cross and Non-Governmental Organisations (NGOs) are being challenged by the rise of PMCs. For states, the notion of public security is being arrogated in a number of situations, with security functions increasingly being privatised. The principal reason for this emerging trend towards the privatisation of security is the inability of many developing war-stricken states to provide security within their borders. In many situations around the world, conflict and other factors has caused the erosion and collapse of state security structures. This in turn has caused challenges for NGO’s as to whether to utilise PMCs in achieving their humanitarian mission and delivering aid and assisting the local communities.<sup>7</sup> This thesis will also examine the relationship between the security and state responsibility.

Why is the issue of PMCs so important? A convergence of actors and influences, including the availability of small arms and prevalence of war entrepreneurs, is leading to an unremitting militarisation of society and destabilising peace efforts worldwide.<sup>8</sup> The emergence of PMCs may be explained by the dominant privatisation ethos in vogue in many developed countries. The rationale for privatisation has been to boost efficiency and reduce costs in public services. Up to now, this ideology has been limited to services such as electricity, telecommunications, and gas, however this trend is starting to encroach on the defence sector.<sup>9</sup> Further, as noted previously, PMCs are beginning to be used in multilateral peacekeeping operations, performing generally benign functions such as logistical and other support services rather than those of a security or military nature.<sup>10</sup> In addition, the trend towards outsourcing to limit costs and manage risks has meant that a number of states have moved towards using PMCs as an alternative.

There have been instances of PMCs acting as ‘force multipliers’ to augment the military capability of one side in a conflict to change the military tide. Proponents of PMCs point to empirical evidence that suggests that the majority of intra-state conflicts have been resolved by force, rather than by negotiations. However, the peace achieved in these instances proved only temporary and relative stability unravelled once the PMCs departed.<sup>11</sup>

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<sup>5</sup>David Shearer, ‘Outsourcing War’, *Foreign Policy*, Fall, 1998, [http://www.findarticles.com/cf\\_0/m1181/1998\\_Fall/56021075/print.jhtml](http://www.findarticles.com/cf_0/m1181/1998_Fall/56021075/print.jhtml), p.1.

<sup>6</sup> Op cit, fn.4, pp.26-28.

<sup>7</sup> Damian Lilly, ‘The privatization of security and peacebuilding: a framework for action’, *International Alert*, September 2000, p.6.

<sup>8</sup> ibid

<sup>9</sup> ibid, p.7.

<sup>10</sup> ibid, p.17.

<sup>11</sup> ibid, p.21.

The involvement of these PMCs in armed conflict has not been without concern. PMCs are reported to have been involved in massacres, executions, looting, and rape during the period of their involvement. It is arguable that because PMCs often lack part of the hierarchical command structure of regular military forces such as the Australian Defence Force (ADF), lack ethnic or cultural connections to the civilian populations, and often have employees who were discharged from prior military service because of disciplinary problems, PMCs may be more likely to engage in systematic human rights abuses and violations of the law of war.<sup>12</sup> This thesis will examine this notion, with a particular emphasis on the ADF and the UN. Finally, this thesis will posit recommendations that the Australian Government may wish to consider regarding the regulation of PMCs, including becoming a party to the UN Convention on Mercenaries.

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<sup>12</sup> Montgomery Sapone, 'Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence', 30 *California Western International Law Journal* 1 Fall, 1999 at 3.

## **Definition of Mercenaries - From Customary International Law to the Mercenary Convention:**

The Oxford English Dictionary defines a mercenary as ‘a professional soldier serving a foreign power’. Undoubtedly, this definition could include many people engaged in legitimate activities, for example Gurkha troops in the British Army, the French Foreign Legion and the Swiss Guard in the Vatican. However, the issue concerning PMCs is influenced not only by law, but also more significantly, by political considerations. This section will provide a broad overview of the relevant law.

From the outset it should be noted that the term ‘private military company’ does not exist within any current international legislation or convention. Generally, there are two other categories of actors associated with the PMCs; namely mercenaries and the private security companies. However, there is often confusion between the meaning of each of these terms. These categories are:

***Mercenaries*** are individual combatants fighting in foreign conflicts for financial gain. Most attention to mercenaries was drawn by their use against national liberation movements during the early post-colonial Africa period, and they are still prevalent today in many conflicts. Hired for their apparent military supremacy, a relatively small mercenary force could pose a serious threat to an emerging newly-independent state.

***Private military companies*** are corporate entities offering a range of military services to clients. It is predominantly governments that use these services to make a military impact on a given conflict. Examples include MPRI from the US and Sandline International from the UK. Services include combat and combat related functions.

***Private security companies*** are similar to private military companies but provide defensive security services to protect individuals and property. Examples include DSL (part of Armour Group) from the UK and Wackenhut from the US. They are used by multinational companies in the mining and resource sector, and by international and humanitarian agencies in conflict and unstable areas.<sup>13</sup> Private security companies are in theory distinct from private military companies in that they are usually unarmed and are concerned with the protection of property and personnel, rather than having a military impact on a conflict in a given situation. However, this is a blurred line as some companies display characteristics of both kinds of companies by being involved in both security and PMC-related activities.<sup>14</sup>

Although outside the scope of this paper, private logistical companies are also a notable growing phenomena. While not involved in combat operations per se, private logistical companies can and do provide combat support functions, such as intelligence gathering, logistical support and supplies. However, this artificial distinction between combat and combat support is spurious at best, as a number of private logistical companies have transgressed the boundaries. Each makes a vital contribution to war fighting capability. For example DynCorp has worked under

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<sup>13</sup> The Politicisation of Humanitarian Action and Staff Security: The Use of Private Security Companies by Humanitarian Agencies - International Workshop Summary Report Tufts University, Boston, Massachusetts, USA - 23/24 April 2001 at <http://famine.tufts.edu/>

<sup>14</sup> Op cit, fn.7, p.14.

contract with the US State Department in providing pilots, trainers and maintenance workers for the drug crop eradication program in Colombia. In February 2002, DynCorp employees flew into a combat zone involving the leftist guerillas to rescue the crew of a downed police helicopter<sup>15</sup>.

The term PMC is used here to encompass both kinds of company, which operate in conflict regions and can demonstrate the use of force more associated with state security forces.<sup>16</sup> The term ‘military’ implies the political objectives of protecting, or establishing, a sovereign state, i.e. an armed force under governmental control or a rebel force that seeks to wrest control from the government. ‘Military’ also connotes an offensive capacity to fight an opposition, attacking in a systematic way, over a sustained period of time, using some combination of weapon systems and tactics for a greater strategic end-state.<sup>17</sup>

The principal difference between PMC and mercenaries is that PMCs, in the majority of cases thus far, have worked for governments. Mercenaries of the post-colonial Africa era on the other hand predominantly worked for non-state armed groups attempting to destabilise governments or national liberation movements.

Unlike mercenary forces, which are generally covert in nature, relying on ad hoc organizational and financial arrangements, PMCs have attempted to be relatively more open in their dealings. PMCs have generally been registered companies that pay taxes and display many indicia of corporations in other industries. However, the use of offshore tax havens and other financial arrangements has meant that PMCs have not always been required, neither have they made efforts, to be transparent about their operations. This lack of transparency has raised questions about the financial arrangements of some companies and concerns about their links with other business activities.

The personnel structure of the companies is another problem area since PMCs usually do not have a fixed set of employees and therefore have to draw upon networks of ex-servicemen or ‘soldiers for hire’ on the international market. This freelance nature manifests in problems such as vetting suitable employees and ensuring that they are not working for less reputable organisations or engaging in more traditional mercenary activities. The UN Special Rapporteur on the use of mercenaries, Enrique Bernales Ballesteros (Peru), concluded in his 1997 report to the UN Commission on Human Rights that PMCs cannot be strictly considered as coming within the legal scope of mercenary activities.<sup>18</sup>

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<sup>15</sup> Nizkor Int. Human Rights Team, ‘Privatization of War: The Question on Individual Responsibility for Waging Warfare through Mercenarism’, 03 May 2001 at <http://www.peace.ca/privatizationofwar.htm> at p.8

<sup>16</sup> Leonard Gaultier, Garine Hovsepian, Ayesha Ramachandran, Ian Wadley and Badr Zerhdoud, ‘The mercenary issue at the UN commission on human rights: the need for a new approach’, *International Alert*, January 2001, <http://www.international-alert.org/pdf/pubsec/unhr.pdf>, p.11.

<sup>17</sup> Tony Vaux, Chris Seiple, Greg Nakano and Koenraad Van Brabant, ‘Humanitarian action and private security companies: Opening the debate’, *International Alert*, p.22.

<sup>18</sup> UN Economic and Social Council, E/CN.4/1997/24 – ‘Report of the Special Rapporteur on the question of the use of mercenaries’ 20 February 1997, <http://www.hri.ca/fortherecord1997/documentation/commission/e-cn4-1997-24.htm>, pp.22-23.

The legal definition of a mercenary is unique to a particular political epoch, post-colonial Africa, and is narrowly drawn, so as to make comparisons problematic. Modern PMCs display a closer resemblance to the private armies used throughout much of military history before the rise of the modern nation state. The use of these traditional mercenaries was criminalised because of the purpose for which they were used.<sup>19</sup>

### **Customary International Law**

State practice determines the development of customary international law. Under customary international law, nations have a duty to prohibit the initiation of hostile expeditions by persons within their territory against other nations. States have a duty to protect the rights of other States within their dominions; they are required to use due diligence to prevent the commission of criminal acts against other States or peoples. Article 4 of the Hague Convention of 1907 on the 'Rights and Duties of Neutral Powers and Persons in War on Land' provides that 'corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral power to assist the belligerents.'<sup>20</sup> Article 6 absolves the neutral power of any responsibility if persons cross the border to offer their services to belligerents. Article 17 (on the loss of neutrality) suggests that the provision could be applicable to mercenaries. However, it should be noted that the illegal act is not mercenarism per se, but the act of violating the sovereignty and territorial integrity of a state. International law concerning mercenaries is therefore closely linked to the concepts of aggression and principles of non-interference.<sup>21</sup> Not only have states been lax in enforcing any of the international and regional regimes against individual mercenaries, but the fact that PMCs operate in over fifty states, often on behalf of governments, suggests a basis for arguing a norm of their legitimacy and a general acceptance of the phenomenon.<sup>22</sup> There seems to be very little evidence to indicate that mercenaries or the use of mercenaries is illegal in customary international law pre the UN.

### **The Geneva Conventions and the UN**

The next major legal regime to deal with mercenaries was set up by the 1949 Geneva Conventions. Its intent was to fashion conditions of fair treatment of prisoners of war (PWs) and establish proper activities in armed conflict. As long as mercenaries were part of a legally defined armed force, they were entitled to PW protection. PW protection provided an important status, as it ascribed special protection and treatment, including immunity from prosecution for normal acts of war.<sup>23</sup>

In response to events in Africa in the 1950s and 1960s, international law sought to bring the practice of mercenarism under greater control. In 1968, the U.N. passed a resolution condemning the use of mercenaries against movements of national liberation. The resolution was later codified in the 1970 'Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States'. The

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<sup>19</sup> Op cit, fn.7, p.13.

<sup>20</sup> Op cit, fn.12 at 41.

<sup>21</sup> Op cit, fn.15, p.26.

<sup>22</sup> P.W. Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law', 2004, 42 *Columbia Journal Of Transnational Law* 521 at 533.

<sup>23</sup> *ibid* at 526.



U.N. declared that every state had the duty to prevent the organization of armed groups for incursion into other countries. The 1970 Declaration represented an important transition in international law, as mercenaries became 'outlaws'. However, it still placed the burden of enforcement exclusively on state regimes, failing to take into account that they were often unwilling, unable, or just uninterested in the task.<sup>24</sup>

### **Additional Protocol 1:**

The 1977 First Additional Protocol to the Geneva Conventions did not legislate against mercenary activity, but rather acknowledged the existence and practice of such persons within warfare and sought to define their legal status and codify their standing within the context of international humanitarian law.<sup>25</sup>

The Additional Protocol contained two principle paragraphs:

Paragraph 1: excluded the mercenary from the category and rights of recognised combatants and prisoners of war.

Paragraph 2: defined the cumulative and concurrent requirements that must be met in order to determine who is a mercenary and who is not.

Article 47 defined a mercenary as someone who:

- (a) is specifically recruited locally or abroad in order to fight in an armed conflict;*
- (b) does, in fact, take direct part in the hostilities;*
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;*
- (d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;*
- (e) is not a member of the armed forces of a party to the conflict; and*
- (f) has not been sent by a state which is not a party to the conflict on official duty as a member of the armed forces. It should be noted that this definition is cumulative, ie a mercenary is defined as someone to whom all of the above apply.*

A number of governments including the UK Government regarded this definition as unworkable for practical purposes. In particular it would be difficult to prove the motivation of someone accused of mercenary activities. Contracts could also be drafted so that those employed under them fell outside the definitions in the Protocol: for example, in its aborted contract with Papua New Guinea (1997), Sandline International's employees were to be termed 'Special Constables' and thus not have been classified as mercenaries since (under (e) above) they would have been members of the armed forces of a party to the conflict. There are also cases of foreign nationals providing military services who have been granted or have applied for local citizenship with the effect that – under (d) above – they could not be described as mercenaries.

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<sup>24</sup> *ibid* at 527.

<sup>25</sup> Scott Goddard, 'The Private Military Company: A legitimate international entity within modern conflict', A thesis presented to the Faculty of the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas 2001, p.32.

As stated Article 47 defines a mercenary as any person who satisfies the cumulative and concurrent requirements. The explanatory remarks within the framework of the Additional Protocol highlight exceptions to the requirements contained within the subparagraphs. These exceptions enable a broader interpretation of the cumulative requirements but also a means with which to legally nullify the applicability of some of the mandatory requirements. These include:

Subparagraph 2(a) excludes volunteers who enter service on a permanent or long-lasting basis in a foreign army, irrespective of whether as a purely individual enlistment (i.e. members of the French Foreign Legion) or on arrangement made by national authorities (i.e. Swiss Guards of the Vatican and Nepalese Gurkhas used by India and the UK). For example, some Islamic Fundamentalists carry out what they believe to be Allah's will by travelling to aid struggling Islamic fighters in different nations, as was the case during the Soviet Union's occupation of Afghanistan.<sup>26</sup>

Subparagraph 2(b) excludes foreign advisors and military technicians even when their presence was motivated by financial gain. This distinction was included to recognise the very technical nature of modern weapons and support systems that may necessitate the presence of such persons for their operation and maintenance. 'As long as these persons do not take any direct part in hostilities, they are neither combatants nor mercenaries, but civilians who do not participate in combat.'<sup>27</sup>

Subparagraph 2(c) is centered on individual remuneration and parity in payment between mercenaries and nation-state combatants. The focus of this condition was directed against the "freelance" mercenary at the individual level. No detail is made against corporate payments that are in turn finalized in individual bank accounts in foreign countries. A number of PMCs, including Sandline and MPRI have exploited the wide parameters of subparagraph 2(c). Financial remuneration from contracted operations was paid by nation-states directly to the PMC. This payment was for the total package provided by the PMC inclusive of all costs associated with manpower, equipment, and resource expenses. Nation-states do not enter into individual contract agreements with the employees of PMCs. Therefore it is very difficult to make any effective and succinct comparison concerning the rates of payment between contract employees and personnel within the armed forces of the host nation.

Subparagraph 2(e) excluded persons who have been formally enlisted into the armed forces of the nation-state that they are contracted to operate within. A growing trend is for PMCs to form joint ventures with local companies, avoiding the effects of this subsection in any one country. Angola, for example, has over 80 security firms, many of them in joint ownership. Companies can also easily disguise their activities by purporting to be security companies performing protection services while actually engaging in more coercive military operations.<sup>28</sup>

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<sup>26</sup> David Isenberg, 'Soldiers of Fortune Ltd.: A Profile of Today's Private Sector Corporate Mercenary Firms', *Center for Defense Information Monograph*, November 1997 <http://www.cdi.org/issues/mercenaries/merc1.html>, p.5.

<sup>27</sup> International Committee of the Red Cross, Commentaries to the Additional Protocols – International Humanitarian Law at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/ffc84b7639b26f93c12563cd00434156?OpenDocument>

<sup>28</sup> Op cit, fn.5, p.9.

The fundamental basis of the Additional Protocol is that all six requirements listed in subparagraphs 2(a) to 2(f) must be satisfied for the definition to be met. A failure to satisfy one requirement is sufficient to prevent the definition being met. Other significant limitations contained within the Additional Protocol include:

The lack of a generally acceptable and operational definition of the concept of mercenaries for application within modern warfare;

The narrow focus on the status of the individual conducting an action, as opposed to a wider focus on the act of direct intervention in armed conflict as a combatant; and

The lack of any fundamental differentiation between PMC conducting military-style operations and traditional freelance style mercenaries.

It seems that the only purpose of the Article 47 definition is to deny such mercenaries the right to claim combatant and PW status in the event of capture, a status which is otherwise presumed under Article 45 of Protocol I. State parties may nevertheless choose to accord mercenaries in their custody PW treatment and are bound by minimal guarantees of humane treatment. In principle, however, Article 47 denies mercenaries the right to claim combatant status. They can consequently be tried as common criminals by the relevant state party, provided the acts committed are criminalised under national legislation. They may even be tried for being mercenaries, but only if there is domestic legislation criminalizing the status of being a mercenary, which would be unusual.<sup>29</sup>

For completeness, it should be noted that Additional Protocol II relating to the protection of victims of non-international armed conflicts made no mention of mercenaries, nor PMCs.<sup>30</sup>

### **Organisation of African Unity<sup>31</sup>**

The mercenary activity of the 1960s led to a backlash by African leaders who saw it as threatening their countries' right to self-determination and new-found sovereignty. Since the UN passed its first resolution condemning the use of mercenaries in 1968, it has repeatedly condemned mercenary activity as an internationally unlawful act which serves to undermine the exercise of the right to self-determination of peoples and the enjoyment of human rights.<sup>32</sup>

The Organization of African Unity (OAU) established the Convention for the Elimination of Mercenarism in Africa. Article 1 of the Convention identified mercenaries directly by referring to the purpose of their employment, specifically if they were hired for the overthrow of governments or OAU-recognized liberation movements. A mercenary was anyone who is not a national of the state against which his actions are directed, is employed, enrolls or links himself willingly to a person, group or organisation whose aim is:

(a) to overthrow by force of arms or by any other means, the government of that Member State of the Organisation of African Unity;

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<sup>29</sup> Op cit, fn.15, p.28.

<sup>30</sup> ibid p.27.

<sup>31</sup> OAU was replaced by African Union on 9 July 2002 - <http://www.mbeni.co.za/oroau.htm>

<sup>32</sup> Op cit, fn.17, p.9.

- (b) to undermine the independence, territorial integrity or normal working institutions of the said State;
- (c) to block by any means the activities of any liberation movement recognised by the Organisation of African Unity.<sup>33</sup>

The Convention declared their actions general crimes against the peace and security of Africa and was thus the most aggressive international codification of the criminality of mercenarism. However, despite this seemingly forceful stance, the OAU Convention did not actually forbid the hire or employment of mercenaries for other purposes. That is, the Convention was drafted to allow African governments to continue to hire non-nationals, as long as they were used to defend themselves from “dissident groups within their own borders,” while disallowing their use against any other rebel groups that the OAU supported.<sup>34</sup>

The OAU Convention does not suffer from all the pitfalls of the UN Mercenary Convention (see below) as it uses a definition of mercenarism which refers to the purpose of a mercenary’s employment as well as features of who a mercenary actually is. However, the challenge for the OAU instrument is deciding what is a legitimate liberation movement or government. Many modern governments were once classified as ‘insurgents’ or ‘terrorists’ while in opposition, among them South Africa's African National Congress. The governments that grew out of these movements are now internationally recognised.<sup>35</sup>

According to Gaultier et al, it appears that some confusion has crept into scholarly comment on this instrument as many authors have mistakenly cited the 1972 draft of the Convention.<sup>36</sup> The 1972 draft did not contain in its definition of mercenary all the elements found in the first paragraph of Article 1 of the adopted text quoted above. This has led to some misleading analysis by those commentators who have relied upon the wrong text. To add to the confusion, a collection of humanitarian law documents have completely omitted paragraph 1 of Article 1 when reproducing the OAU Convention. The adopted OAU Convention, while carefully defining mercenary in Article 1(1), fails to establish any criminal offence directly associated with this definition. What the Convention criminalises instead is the crime of mercenarism defined in paragraph 2 of Article 1. For the purpose of the OAU Convention, the crime of mercenarism is committed when the individual, group, association or state specifically aims at opposing by armed violence a process of self-determination or the stability and territorial integrity of another member state, and, in addition, either enrolls as a mercenary, or supports, employs, or allows bands of mercenaries to develop or operate in any territory under its jurisdiction or control.<sup>37</sup>

The African Union replaced the OAU on 9 July 2002. However, all most Treaties, Conventions, Protocols, Charters have been carried over to this organisation. Swaziland signed the Mercenaries Convention on the 7<sup>th</sup> of December 2004. To date, there have

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<sup>33</sup> House of Commons – UK ‘HC 577 Private Military Companies: Options for Regulation 2001-02’, Foreign and Commonwealth Office, pp.6-7.

<sup>34</sup> Op cit, fn.21, at 528-529.

<sup>35</sup> Op cit, fn.5, p.7.

<sup>36</sup> Op cit, fn.17 p.31.

<sup>37</sup> ibid p.31

been 28 signatures to this Convention out of 53 African states<sup>38</sup>.

### **UN and other international instruments**

In 1987, the UN Commission on Human Rights appointed a Special Rapporteur on the use of mercenaries as a means of violating human rights and impeding the right of peoples to self-determination. In 1989, the UN adopted an ‘*International Convention against the Recruitment, Use, Financing, and Training of Mercenaries*’. The role of the UN Special Rapporteur it is to report to the Commission on Human Rights and General Assembly. The Rapporteur has drawn attention to the numerous gaps and ambiguities in the international instrument and the persistence of, and increase in, mercenary activities. On the issue of PMCs and security companies the way forward is uncertain. According to the Rapporteur there are certain legitimate and acceptable roles for PMCs, acting in accordance with national and international law. However, there are situations in which certain services performed by PMCs and security companies have increased the amount of small arms and other weapons in a region, prolonged or exacerbated conflict or facilitated human rights abuses.

In his recent report the Special Rapporteur noted:

*“...While private companies play an important role in the area of security, there are certain limits that should not be exceeded. They should not participate actively in armed conflicts, nor recruit and hire mercenaries, much less attempt to replace the State in defending national sovereignty, preserving the right of self-determination, protecting external borders or maintaining public order.”*<sup>39</sup>

Of particular concern was the lack of accountability and absence of regulation in the private provision of military and security services. Existing control lacunae are currently being exploited by unscrupulous private actors.<sup>40</sup>

The 1989 release of the Convention could not have been more untimely. This instrument was open for signature just as the private military trade began to transform, from only being made up of individual mercenaries to being dominated by PMCs. Moreover, despite its intent to clarify matters, the 1989 Convention did little to improve the legal confusion over private military actors in the international sphere. A number of commentators found that the Convention, which lacks any monitoring mechanism, merely added a number of vague, almost impossible to prove, requirements that *all* must be met before an individual can be termed a mercenary and few consequences thereafter. In fact, the consensus is that anyone who manages to get prosecuted under “this definition deserves to be shot—and his lawyer with [him].”<sup>41</sup> It

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<sup>38</sup> See African Union home page accessed 21 January 2005 at <http://www.africa-union.org/home/Welcome.htm>

<sup>39</sup> As cited in Sami Makki, Sarah Meek, Abdel-Fatau Musah, Michael Crowley and Damian Lilly, ‘Private Military Companies and the Proliferation of Small Arms: Regulating the Actors’, *International Alert*, [http://www.international-alert.org/pdf/pubsec/Btb\\_brf10.pdf](http://www.international-alert.org/pdf/pubsec/Btb_brf10.pdf), p.6.

<sup>40</sup> *ibid* p.6.

<sup>41</sup> George Best, *Humanity in Warfare: The modern history of International Law of Armed Conflict*, (1983), Methuen and Co., p.383.

was not until September 2001, that the treaty came into force, when Costa Rica became the twenty-second signatory.

Since the establishment of the Special Rapporteur's mandate, the mercenary phenomenon has changed radically to take on new and complex forms of security work which fall outside the existing institutional and legal frameworks for mercenaries. The traditional mercenary has been supplemented by the emergence of PMCs such as Executive Outcomes, Sandline International, and Military Professional Resources Inc. These new manifestations share a common feature with traditional mercenaries in that the use of force has moved outside the exclusive realm of the state into the private sphere. But they also display differences, suggesting that they need to be tackled in new and innovative ways. There is now a plethora of non-state private military groups which pose a common challenge to the state as the principle provider of security and the protector of human rights.<sup>42</sup>

The UN Convention lacks any monitoring machinery and relies instead on the state parties to the Convention to coordinate their enforcement of it. This gap is a serious deficiency within the Convention. Despite the fact that it is larger in scope than Article 47 of Protocol I, the Convention in general contains most, if not all, of the same loopholes. Therefore the same criticisms mentioned above concerning the Article 47 of Protocol I definition can be levelled at the International Convention. In the context of the International Convention, though, such criticism is more pertinent as the loopholes prevent mercenaries, not to mention private military companies, from being caught in the criminal law framework.<sup>43</sup>

Neither the Statutes for the International Criminal Tribunal for former Yugoslavia (ICTY), nor the International Criminal Tribunal for Rwanda (ICTR), nor even the Statute of the International Criminal Court (ICC) include in the crimes under their jurisdiction the crime of being a mercenary or the crime of mercenarism *per se*. The jurisdiction that these tribunals can exercise over individual mercenaries will be for the actual conduct or commission of crimes set forth in the respective statutes and not for the act of being a mercenary. The Special Rapporteur has stated, though, that trials of mercenaries for crimes committed in the conflict are likely to come before the ICTY.<sup>44</sup>

Another noteworthy international instrument is the International Law Commission 1991 'Draft Code of Crimes against the Peace and Security of Mankind'. Article 23 stated that it was not necessary for a person enlisted as mercenary to take active part in the hostilities for which they have been recruited. For the offences under Article 23 to be completed, a State agent or representative has only to recruit, use, finance or train mercenaries as so defined "for activities directed against another State or for the purpose of opposing the legitimate exercise of inalienable right of peoples to self-determination as recognized under international law".<sup>45</sup>

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<sup>42</sup> Op cit, fn.15, p.9.

<sup>43</sup> *ibid* p.30.

<sup>44</sup> *ibid* p.33.

<sup>45</sup> L.C. Green, 'Crimes under the ILC Draft Code', in Yoram Dinstein and Mala Tabory (eds) *War Crimes in International Law* (1996) 19, 35.

### **History of Mercenaries - From the Magna Carta to the Coalition Provisional Authority, Iraq 2004:**

Mercenaries existed in England before the fourteenth century. The earliest written financial contract for military service is dated 1270. According to Terry Jones, the first knights who came across with William the Conqueror were themselves indistinguishable from mercenaries. These mercenaries often performed well and faithfully, but as soon as there was any lull in activities, the hired soldier only too often became more trouble than he was worth. According to Jones, this is why, for instance, Magna Carta in 1215 provided for the expulsion from the realm of 'all alien knights, crossbowmen, serjeants and mercenaries'. Thus, according to Chaucer, the growth of the mercenary soldier represented the general erosion of social values. Instead of obtaining peace, the mercenary was the cause of its effluxion.

Across the English Channel, the early European use of organised mercenaries was in the form of private bodies in the 14th century known variously as Free Companies or Great Companies. These organizations ultimately developed in Italy as *condottieri* (military contractors), who offered their services to the highest bidder. The *condottieri* system maintained fairly permanent companies of armed military.<sup>46</sup> The logic behind the *condottieri* system was simple and unquestionable: war being a barbaric pursuit, the citizens of a rich and flourishing state preferred to hire needy foreigners to fight for them rather than have to interrupt their own rich and profitable lives. This occurred throughout the period of the Renaissance when civilization in Italy was flourishing but Italy itself was divided into a number of rich and cultured states. These states fought their wars against each other not with armies of their own citizens, considered an unthinkable waste of valuable lives – but with armies of mercenaries.<sup>47</sup>

Indeed, modern contractors resemble the military enterprises of the Renaissance. As this autonomous force gathered momentum, the Courts of Europe grew alarmed and realized that they would eventually have to act against this phenomenon.<sup>48</sup> It was the rise of the State as an institution, monopolising violence, and it's the entailing development of its own military and bureaucratic capabilities, that allowed the state to more effectively control the projection of violence from its own territory, and hence control the mercenary issue. This meant not only the state's increased ability to exercise organised violence to suppress non-state violence beyond its borders but the augmentation of its capacity to control the activities of individuals within its borders.<sup>49</sup> This led to the development of the Western tradition of the state, through its monopoly over the legitimate use of force, being responsible for the provision of internal security and defence from external threats.<sup>50</sup>

As a corollary, the term 'mercenary' began to be coloured as a term of derision, with emotive overtones. From the Middle Ages up to the 1980s mercenaries were a recognisable group of fortune hunters associated with particularly vicious actions.

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<sup>46</sup> Eugene Smith, 'The New Condottieri and US Policy: The Privatization of Conflict and Its Implications', *Parameters*, Winter 2002-03, 104 at 105.

<sup>47</sup> Anthony Mockler, *The New Mercenaries*, Sidgwick & Jackson London 1985, p.7.

<sup>48</sup> Op cit, fn.1 pp.13-15.

<sup>49</sup> Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns, State-building and Extraterritorial Violence in Early Modern Europe*, Princeton University Press 1994 p.90.

<sup>50</sup> Op cit, fn.7, p.5.

Their role in Africa was rendered particularly unpalatable to humanitarian agencies and the international community because of the association of many with the apartheid regime in South Africa and other regimes responsible for flagrant violations of human rights.<sup>51</sup>

However, land warfare was not the only medium in which the privatization of conflict was practiced. Privateers on the high seas had a legal standing in international law and were widely used by nations through the 1800s to bolster their maritime forces. These ships were defined as “vessels belonging to private owners, and sailing under a commission of war empowering the person to whom it is granted to carry out all forms of hostility which are permissible at sea by the usages of war.” Privateers were granted their right to wage war through the issue of “letters of marque and reprisal.”<sup>52</sup>

According to Goddard, the end of the Cold War ‘unleashed a surge in interethnic and internecine conflicts’ throughout many parts of the world.<sup>53</sup> The monopoly of force, previously vested in the armed forces of nation-states for the purpose of their own integral defence and security, was now being eroded by commercial entities and specifically for financial profit.<sup>54</sup> The collapse of the Soviet Union triggered depressed economic conditions within the majority of its former client states. As a deliberate measure to obtain foreign currency with which to rebuild their economies, nation-states readily sold former Soviet military assets. This action resulted in the unprecedented availability of sophisticated military equipment and trained personnel to non-aligned Western nations and commercial interests, particularly the versatile fleet of Soviet helicopter transport and gunship aircraft.<sup>55</sup> In addition, UN DPKO peacekeeping missions were the beneficiary of former Soviet expertise<sup>56</sup>.

In a memory of a past age, sovereign nations once more turned to the use of PMCs when they lacked the requisite means to accomplish desired ends. Those organisations represented a convenient way to overcome strategic mismatches. These PMCs provided their utility to client states in a variety of ways, from providing local security and serving as military trainers to actually planning and conducting small-scale military operations.<sup>57</sup> The matter was made worse by the UN peacekeeping efforts falling victim to Western governments’ fears of sustaining casualties, becoming entangled in expanding conflicts, and incurring escalating costs. This led to decrease in the number of personnel in UN operations falling from of 76,000 in 1994 to around 15,000 in 1998, and in 2004 rising to 65,000.<sup>58</sup>

Against this broad canvas, PMCs have shown a willingness to intervene in many of the hostile environments of little strategic interest to the key global powers, while appearing not to suffer the same political constraints as governments in incurring casualties. As opposed to national troops, there is not the same public outcry when

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<sup>51</sup> Op cit, fn.16, p.11.

<sup>52</sup> Op cit, fn.24 at 106.

<sup>53</sup> Op cit, fn.47 at p.3.

<sup>54</sup> Op cit, fn.24, p.3.

<sup>55</sup> *ibid*, p.5.

<sup>56</sup> Correspondence with MAJGEN Tim Ford AO (Ret.) December 2004.

<sup>57</sup> Op cit, fn.47 at 111.

<sup>58</sup> Op cit, fn.5 p.3.



privately contracted military personnel are used because their motivation is essentially financial and not to ensure national security.<sup>59</sup>

For example, a leading US PMC, Blackwater Consulting has a \$35.7m contract to train 10,000 American troops. Blackwater also helped guard the chief administrator in Iraq, Paul Bremer. Another PMC, DynCorp, has contracts worth around \$1 billion and guards the Afghan President, Hamid Karzai. Around a tenth of the total cost of Iraqi reconstruction now goes on security. As the training and weapons-maintenance contracts reveal private firms also play a role in the core operations of the allied military forces themselves.<sup>60</sup>

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<sup>59</sup> Damian Lilly, 'The Privatization of Peacekeeping: Prospects and Realities', *Disarmament Forum – United Nations Institute for Disarmament Research*, No.3, 2000, p.2.

<sup>60</sup> Anon, 'Dangerous Work: Private security firms in Iraq', *The Economist*, 10 April 2004, p.26.

### **How different States have attempted to deal with the situation:**

The drive to regulate PMCs has been most effective when national governments, not foreign governments who contract them, have been affected. This has best been demonstrated by the legislative actions in South Africa and the findings from the UK Legg Inquiry over the controversial role of Sandline in Sierra Leone, known as the 'Arms to Africa Affair.'<sup>61</sup> This section will look at how a number of select States have dealt with PMCs and mercenaries to date.

#### **Australia**

The *Crimes (Foreign Incursions and Recruitment) Act 1978* ('the Act')<sup>62</sup> deals with incursions such as hostile invasions into foreign states by Australian citizens or residents. Among other things, the Act creates the offences of entering a foreign state with intent to engage in a hostile activity in that state, and engaging in a hostile activity in a foreign state.<sup>63</sup> The objective of the activity must be to overthrow the government of the foreign state; engage in armed hostilities; cause death or bodily injury (or fear thereof) to the head of state or a person who holds or performs the duties of public office; or unlawfully destroy or damage any real or personal property belonging to the government of the foreign state.

A person does not commit an offence under subsection 6(1) if he or she was serving 'in any capacity in or with' the armed forces of the government of a foreign state or 'any other armed force in respect of which a declaration by the Minister under subsection 9(2) is in force'<sup>64</sup>. In the Second Reading Speech for the original bill (1978), the then Attorney-General explained the rationale for permitting Australians to serve in foreign armies in the following way:

*"... the legislation will not prevent an Australian from going overseas and enlisting in another country. The Government recognises that occasions will arise where persons will wish to enlist and serve in armed forces of another country because of a deeply-held belief."*<sup>65</sup>

The Act also creates offences of preparing for incursions into foreign states recruiting persons to join organisations engaged in hostile activities against foreign governments; and recruiting persons in Australia to serve in or with an armed force in a foreign state.<sup>66</sup> In addition, the Act prohibits the recruiting, advertising, facilitation, or promotion of the use of mercenaries to serve in the armed forces of another country.<sup>67</sup>

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<sup>61</sup> Op cit, fn.24, p.57.

<sup>62</sup> see [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ciara1978431/](http://www.austlii.edu.au/au/legis/cth/consol_act/ciara1978431/)

<sup>63</sup> Section 6(1)(a) and (b): A person shall not:

(a) enter a foreign State with intent to engage in a hostile activity in that foreign State; or

(b) engage in a hostile activity in a foreign State. Penalty: Imprisonment for 20 years.

<sup>64</sup> Section 6(40): Nothing in this section applies to an act done by a person in the course of, and as part of, the person's service in any capacity in or with:

(a) the armed forces of the government of a foreign State; or

(b) any other armed force in respect of which a declaration by the Minister under [subsection 9\(2\)](#) is in force.

<sup>65</sup> Commonwealth of Australia (Morag Donaldson), 'Anti-terrorism Bill 2004', *Law and Bills Digest Group*, 19 April 2004, p.2.

<sup>66</sup> *ibid*, p.2.

<sup>67</sup> Op cit, fn.12 at 29.

## **New Zealand**

The 2004 *Mercenary Activities (Prohibition) Act* contains the legislative provisions required to implement in New Zealand law the UN Mercenary Convention. This Act is made pursuant to the Convention, in that it criminalises the conduct of persons who recruit, use, finance, or train mercenaries and of those who participate as mercenaries in combat during an armed conflict or in a concerted act of violence. These activities are currently not punishable under New Zealand law.<sup>68</sup> New Zealand acceded to the UN Convention on 22 September 2004 and enacted the Bill into law also in 2004.<sup>69</sup>

The most contentious issue in the Act, which caused concern to the major political parties in New Zealand, was the definition of mercenary. It was noted that the Convention was never intended to cover all types of mercenaries or PMCs, but rather, it provides a narrow definition directed at a small group of so-called 'true' or 'traditional' mercenaries: unaffiliated individuals who are prepared to fight wars, overthrow Governments, or commit certain terrorist acts for money. The definition in clause 5 does not stand alone and has to be read in conjunction with the individual offences. Thus being a mercenary is not in itself an offence; some other conduct is required for criminal liability.

The definition of mercenary follows the definition in the Convention. It contains several cumulative requirements and targets two types of mercenaries: a person who is specifically recruited to take part in an armed conflict, and a person recruited to participate in a concerted act of violence.<sup>70</sup> All offences are punishable by up to 14 years' imprisonment, and New Zealanders will be able to be prosecuted for acts committed overseas.<sup>71</sup> This Act, similar to the UN Convention, does not capture the activities of PMCs, and is limited by the same definitional problems as that Convention.

## **Republic of South Africa**

The South African 'Regulation of Foreign Military Assistance Act' introduced in 1998 attempts to address both mercenary activities and those services provided by private security and military companies. The legislation makes a clear distinction between 'mercenary activity' and the export of 'foreign military assistance'. Mercenary activity is defined to mean "direct participation as a combatant in armed conflict for private gain" and is proscribed under the Act.<sup>72</sup> The definition of 'foreign military assistance' is far broader, including "advice or training; personnel, financial,

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<sup>68</sup> Government of New Zealand, 'Mercenary Activities (Prohibition) Bill', as reported from the *Foreign Affairs, Defence and Trade Committee*, 2004, p.1

<sup>69</sup> Anon, 'Government takes step towards banning mercenaries' *New Zealand Herald* 23 September 2004, at <http://www.nzherald.co.nz/latestnewsstory.cfm?storyID=3594069&thesection=news&thesubsection=general>

<sup>70</sup> Op cit, fn.68, p.3.

<sup>71</sup> Phil Goff, 'Mercenaries Bill passed' 1 July 2004, at <http://www.scoop.co.nz/mason/stories/PA0407/S00045.htm>

<sup>72</sup> Republic of South Africa, Government Gazette, vol. 395 Cape Town, 20 May 1998, No. 18912, 'No. 15 of 1998: Regulation of Foreign Military Assistance Act', at <http://projects.sipri.se/expcon/natexpcon/SAfrica/formilass.htm>

logistical, intelligence or operational support; personnel recruitment; medical or paramedical services; or procurement of equipment” as well as “security services for the protection of individuals involved in armed conflict or their property”.<sup>73</sup> The rendering of foreign military assistance is not proscribed under the Act but instead controlled by a licensing and authorisation procedure under the competence of the National Conventional Arms Control Committee. Approval for a contract is not granted if it contravenes criteria based on international law. The Act includes extraterritorial application and punitive powers for those that do not abide by it. The Act has received criticism, particularly for the definitions it employs, and is thought to be more symbolic than a realistic deterrent, since few companies have applied for a license to operate under its measures.<sup>74</sup>

The definition of a mercenary is problematic on a number of counts:

It is too general as to be open to abuse in its application;

It is inconsistent with the definitions used in international instruments and fails to bring mercenary activities within the scope of the law of armed conflict. Even though these definitions are recognisably weak, great care should be taken not to erode the benchmark established by IHL. It seems to be a contradiction to seek to prohibit mercenaries and yet define them in ways that may legitimise their participation and protection as combatants under the law of armed conflict; and

It does not overcome the pitfall of defining who mercenaries are by their motivation. It is more useful to address the act of mercenarism and the purpose of their use, which is the real concern rather than the fact that they fight for financial gain.<sup>75</sup>

## USA

There are a number of legislative and other instruments that deal with PMCs and related activities in the United States. This is not surprising given the long experience of the US with this matter. For example, the British forces used German Hessians mercenaries against the Americans in the War of Independence. During WW2, a current leading PMC, Brown & Root secured its first military contracts by building hundreds of ships for the US Navy. Brown and Root’s employees accompanied US troops to both Korea and Vietnam, building bases, roads, harbors, etc.<sup>76</sup> Thus, the United States has had a lot of experience in dealing with PMCs.

Under the *1794 Neutrality Act*, U.S. law prohibits only the recruitment of mercenaries within the United States but not the sale of military services. The Act prevented ‘citizens or inhabitants of the US from accepting commissions or enlisting in the service of a foreign state and [served] to prohibit the fitting out and arming of cruisers intended to be employed in the service of a foreign belligerent or the reception of any increased force by such vessels when armed’.<sup>77</sup>

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<sup>73</sup> *ibid*

<sup>74</sup> *Op cit*, fn.5, p.28.

<sup>75</sup> *Op cit*, fn.43, p.31.

<sup>76</sup> Anthony Bianco and Stephanie Frost, ‘Outsourcing War: An inside look at Brown & Root’, *Business Week*, 15 September 2003. In 1963, Brown & Root sold out to oil-services giant Halliburton (becoming Kellogg Brown & Root with the addition of oil-pipe fabricator M.W. Kellogg in 1998). Following the precedent set by Halliburton, KBR emphasized energy projects, exiting the military business altogether after the US withdrew from Vietnam in 1973

<sup>77</sup> *Op cit*, fn.50, p.78.

Another US instrument, the *Uniform Code of Military Justice (UCMJ)* covers transgressions committed by members of the U.S. military, but not any civilians accompanying the force overseas. The *2000 Military Extraterritorial Jurisdiction Act* was created to fill in the gap in the UCMJ, by applying the code to civilians serving in U.S. military operations outside the United States. However, it only applies to civilian contractors working directly for the U.S. Department of Defense on U.S. military facilities, not to contractors working for other U.S. agencies, such as the Central Intelligence Agency, nor to U.S. nationals working overseas for a foreign government or organization.<sup>78</sup>

The *US Arms Export Control Act 1976*, authorises the president to control the export and import of defence articles and services.<sup>79</sup> The law applicable to mercenary activities has fallen under the broad heading of export of military services. These are dealt with in the same way as military exports under the International Traffic in Arms Regulations (ITAR). Monitored by the Department of State's Office of Defence Trade Controls, registered companies must apply for a licence before they enter into a contract with a government or irregular armed group abroad. This application is subjected to an internal process within the Department including those for democracy and human rights. Controversial cases are referred to the Assistant Secretary of State, who makes the final decision.<sup>80</sup>

Whilst this process does place some restrictions on those companies selling military services abroad, it places (whether rightly or wrongly) more emphasis on US foreign policy than the provisions within international law. In addition, there is no formal oversight once a licence has been granted, nor are there provisions to ensure transparency other than contracts in excess of \$50m requiring Congressional notification before being granted. Only in these instances does Congress have the right to demand additional information about the proposed contract.<sup>81</sup> There is a frequent accusation against PMCs that they undoubtedly function as an instrument of government policy, ie the MPRI in the Balkans. The fact that PMCs actions are at least consistent with US Government policy is made plain by the State Department's issue of licences.<sup>82</sup>

With regards to 'battlefield contractors', the definition and roles are detailed within the US military publications Army Regulations (AR) 715-9, *Contractors Accompanying the Force (1999)*; This is the definitive document that delineates between the actions of contractors and PMCs. This regulation states that contractors can perform potentially any function on the battlefield except inherently governmental functions. Inherently governmental functions are defined as those "necessary for the sustainment of combat operations, that are performed under combat conditions or in otherwise uncontrolled situations, and that require direct control by the military

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<sup>78</sup> Op cit, fn.21 at 537.

<sup>79</sup> Op cit, fn.24, p.64.

<sup>80</sup> see P.W. Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law', 2004, 42 *Columbia Journal of Transnational Law* 521 at 538 and Scott Goddard, 'The Private Military Company: A legitimate international entity within modern conflict', A thesis presented to the Faculty of the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas 2001, p.64.

<sup>81</sup> Op cit, fn.7, p.29.

<sup>82</sup> Op cit, fn.31, p.17.

command structure and military training for their proper execution.”<sup>83</sup> The regulation additionally states that the conduct of any or all of these inherently government functions by contractors may violate the non-combatant status afforded to them under the Geneva Conventions.<sup>84</sup>

DynCorp, a leading US PMC, has on recent operations had several of its employees accused of ‘engaging in perverse, illegal and inhumane behaviour [and] purchasing illegal weapons, women, forged passports and [committing] other immoral acts.’ The criticised behaviour included the firm’s Bosnia site supervisor videotaping himself raping two young women. None of these employees were ever criminally prosecuted, in part because of the absence of law applicable to PMCs in Bosnia.<sup>85</sup>

The Army Regulation was considered by the Coalition Provisional Authority (CPA), the U.S.-led entity charged with governing Iraq through to June 2004. The CPA stipulated that contractors operating in Iraq were subject to the laws of their parent company and not Iraqi law. According to the CPA, even U.S. legislation created to address this issue (ie the aforementioned *Military Extraterritorial Jurisdiction Act 2000*) lacked specifics and entrusted the U.S. Secretary of Defense with initiating prosecutions.<sup>86</sup> The problem that has flowed from this lacuna in US law is no more evident than the 2003/2004 Abu Ghraib prison scandal concerning the inhumane treatment, torture and murder of Iraqi detainees and prisoners. A leading PMC employee was among those ‘either directly or indirectly responsible for the abuses at Abu Ghraib’.<sup>87</sup>

## United Kingdom

Although successive governments have deplored the activities of mercenaries, no effective legislation exists to prevent either their recruitment or their participation in conflict. The *1870 Foreign Enlistment Act* makes it an offence for a British subject, without permission from Her Majesty, to enlist in the armed forces of a foreign state at war with another foreign state which is at peace with the UK; or for any person in Her Majesty’s Dominions to recruit any person for such service. The section dealing with ‘expeditions’ was invoked in 1896 against the organisers of a raid on the Transvaal (South Africa) but never formally pursued. It appears that the Director of Public Prosecutions considered prosecution in connection with enlistment for service in the Spanish Civil War but abandoned this because of the practical difficulty of assembling evidence of an activity taking place abroad.<sup>88</sup> However, for many years it has been treated as a dead letter, and it is ‘only by inertia that it remains on the statute book’.<sup>89</sup>

The 1976 Diplock Report was commissioned to study the role of the British mercenaries in Angola. Although the report declared that the prohibition of British

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<sup>83</sup> Op cit, fn.24, p.17.

<sup>84</sup> ibid, p.16.

<sup>85</sup> Op cit, fn.21 at 525.

<sup>86</sup> Deborah Avant, ‘Mercenaries’, *Foreign Policy* July/August 2004, p.24.

<sup>87</sup> Huck Gutman, ‘Soldiers on Hire’, *56 Monthly Review* 2, June 2004, p.16.

<sup>88</sup> Op cit, fn.31, p.20.

<sup>89</sup> Christopher Wrigley, ‘The Privatisation of Violence: New Mercenaries and the State’, March 1999, <http://www.caat.org.uk/information/issues/mercenaries-1999.php>

citizens serving overseas as mercenaries was against individual human rights, the restricted freedom of movement for those wishing to go abroad to serve was justified if in the interest of national security. The most important conclusions drawn were that the United Kingdom could not base its legal stance on the 1870 Act and that a new system of legislation and monitoring was necessary.<sup>90</sup>

After the ‘Arms to Africa’ affair, in 2002 the UK Government produced a consultative paper which set down a number of regulatory options for discussion with regards to PMCs and mercenaries. These have yet to have been progressed since tabled in 2002:

- a ban on military activity abroad;
- a ban on recruitment for military activity abroad;
- a licensing regime for military service on a contract-by-contract basis;
- registration of the UK firm and notification of bids for individual contracts;
- a general license for firms issued to cover listed activities and possible countries of operation; or
- self-regulation, which is effectively what some companies are already doing.<sup>91</sup>

### **Other Countries:**

So what is the state of affairs of the International Convention? To date none of the five permanent members of the UN Security Council – Britain, China, France, Russia and the United States – have ratified the International Convention. In addition, neither have Australia, Canada, India, Japan and Germany ratified, eventhough Germany signed the International Convention in 1990. Among the countries that have signed were Azerbaijan, Cameroon, Georgia, Guinea, Libya, Mali, Togo, Saudi Arabia, Uruguay and Uzbekistan.

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<sup>90</sup> David Simons, ‘Occupation for Hire: Private military Companies and their Role in Iraq’, *RUSI Journal* June 2004, pp.69-71.

<sup>91</sup> Op cit, fn.31, pp.22-26.

## **Discussion - The interaction between PMCs and the National Defence Force:**

### **The State and PMCs**

Some commentators see the existence and activity of PMCs as a threat to national sovereignty. For example in his report to the Commission on Human Rights (January 1999) the UN Rapporteur states:

*'Within the historical structure of the nation State, which is still the basis of international society, it is inadmissible for any State legally to authorise mercenary activities, regardless of the form they take or the objectives they serve. Even where legislation is lacking or deficient, mercenarism is an international crime. Mercenary activity arises in the context of situations that violate the right of peoples to self-determination and the sovereignty of States... Governments are authorised to operate solely under the Constitution and the international treaties to which they are parties. Under no circumstance may they use the power conferred on them to carry out acts that impede the self-determination of peoples, to jeopardise the independence and sovereignty of the State itself or to condone actions that may do severe harm to their citizens' lives and security.'*<sup>92</sup>

Arguably, this position may not consider the right of self-defence principle in Article 51 of the UN Charter.<sup>93</sup>

Implicit in the statement by the UN Rapporteur is that the monopoly on violence remains essential to the notion of a state. 'Good laws and good armies' are the foundation of the state. The idea of a state relying for its security on a foreign force is contrary both to this reasoning and to the concept of citizenship.<sup>94</sup> There seems to be an inherent abhorrence towards those who kill (or help kill) for money. This applies even if the killing is necessary and is done in just cause. The debate on PMCs is conducted as though PMCs are presumed bad and national armies good. It is arguable that some national armies may also be guilty of precisely those abuses with which PMCs are charged. Often they are unaccountable, a danger to stability and frequent violators of human rights.<sup>95</sup>

The relationship between the host government, the PMC, and associated mining and resource companies has also been a source of constant criticism. This relationship has been characterised by a lack of transparency, and corrupt financial arrangements. This serves to underpin the government's illegitimate position and failure to benefit the

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<sup>92</sup> UN Economic and Social Council, E/CN.4/1999/11 – 'Report of the Special Rapporteur on the question of the use of mercenaries' 20 January 1999, [http://www.smallarmssurvey.org/source\\_documents/UN%20Documents/Other%20UN%20Documents/E\\_CN.4\\_1999\\_11.pdf](http://www.smallarmssurvey.org/source_documents/UN%20Documents/Other%20UN%20Documents/E_CN.4_1999_11.pdf), p.14.

<sup>93</sup> *ibid*, p.15. The recent judgement of the International Court of Justice (ICJ) on the *Oil Platforms Case* clarified the necessary elements of self-defence. These are that:  
Country X must show that Country Y was responsible for the original attacks;  
Those attacks were of such a nature as to be qualified as armed attacks within the meaning of Article 51 of the UN Charter, and as understood in customary law;  
The responses must be necessary and proportional to the original attack; and  
The object of the self defence attack must be legitimate military targets.

<sup>94</sup> *Op cit*, fn.91, p.14.

<sup>95</sup> *ibid*, pp.22-23.



polis. Each actor is a beneficiary of the war economy which fuels black markets, entrenches existing economic and power relationships, and fails to address the economic, political and social problems that lie at the heart of many conflicts. There is also the question of whether a country's resources are merely being exploited to the detriment of local communities and to the benefit of international companies. There have been a number of cases in which a PMC has signed a contract with a government to provide security in resource-rich areas of a country in exchange for the mortgaging of the future revenue from natural resources by granting concessions to associated mining and resource companies.<sup>96</sup>

The contestation of the legitimacy of a government has been precisely the reason for the PMCs presence in most cases. It should not be for PMCs to adjudicate on the legitimacy of a potential client. The reluctance of the UN to rule on the legitimacy of governments should not entitle a private entity to substitute itself for the international community and decide whether its activities are lawful or not. A little over fifteen years ago the African National Congress (ANC) of Nelson Mandela was branded a terrorist group by many. A key challenge in helping to prevent conflicts and building sustainable peace is to promote the development of accountable security forces with proper civilian oversight and control.<sup>97</sup>

In addition, when PMCs sell protective capacity to one side, it increases the (perceived) insecurity for the other side. This may lead the other side to arm and partake in a conventional arms race. The result is that the price to pay for security increases steadily and there is an ever-increasing market for PMC services.<sup>98</sup> PMCs also have acted as arms brokering agents for the transfer of weapons into regions of conflict. Lilly suggests that the PMCs involvement in the intricate networks and routes by which weapons enter conflict regions is not well understood and an area that needs further research. The unregulated transfer of weapons into conflict regions can fuel violence and lead to human rights violations.<sup>99</sup> For example, Alex Vines has noted how Executive Outcomes was responsible for introducing indiscriminate weapons, including fuel air explosives into Angola.<sup>100</sup>

In modern armed conflicts, most are fought by hastily recruited militias of tribal chiefs or heads of clans, plus the armed followers of warlords and the like, and not professional armies. Above all, the weapons used in these armed conflicts are cheap and readily available, ie small arms, automatic rifles, anti-personnel mines etc. Larger weapons are rarely utilised and, consist mostly of remnants from the stockpiles of the Cold War.<sup>101</sup>

PMCs have been utilised by governments as discrete entities via with which to prosecute foreign policy. It this linkage to government that has led to the assertion that PMCs have 'quietly taken a central role in the exporting of security, strategy and

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<sup>96</sup> Op cit, fn.7, p.20.

<sup>97</sup> *ibid*, p.22.

<sup>98</sup> Anna Leander, 'The Commodification of Violence, Private Military Companies, and African States', *Copenhagen Peace Research Institute Working Paper*, 2003, at <http://www.copri.dk/publications/Wp/WP%202003/2-2003.pdf> p.10.

<sup>99</sup> *ibid*, p.25.

<sup>100</sup> *ibid*, p.24.

<sup>101</sup> Herfried Munkler, 'The wars of the 21st century', *IRRC* March 2003 Vol.85 No 849, 7 at 15.

training of foreign militaries-it's a tool for foreign policy in a less public way.<sup>102</sup> The rise of PMCs has permitted governments to commit to foreign crises while avoiding the sensitive issue of sustaining troop casualties on operations other than war. The central issue of the acceptance of PMC involvement in such a conflict is the role they play in lessening the requirement for direct intervention by less committed but more capable nation-states. Current domestic law within Australia, the US and the UK also reflect a position that differs to the intent of the Additional Protocol and the UN Convention. The domestic law of these states only prohibits the recruitment of mercenaries and the actual conduct of mercenary activities. Being a mercenary in these countries is in itself not a criminal activity.

Shearer argues that the flaw in this approach is that outright victory, rather than negotiated peace settlements, have concluded the greater part of the twentieth century's internal conflicts.<sup>103</sup> Shearer argues that coercion is often essential to breaking deadlocks and bringing opposing parties to the negotiating table. In this context, military companies can be seen not as part of the problem but as part of the solution - especially for struggling but legitimate governments that lack the resources to field effective fighting forces.<sup>104</sup>

Stopping the violence, however, does not necessarily solve the underlying problems that caused fighting to erupt in the first place. PMCs may be an inadequate means of long-term conflict resolution because they depart a region as vulnerable to disruption and chaos as it was when they arrived. When PMCs leave, repressed or newly formed opposition groups who no longer see a threat revert to violence. Mercenary companies, in effect, become a temporary means of propping up the existing order but do nothing to address underlying causes of unrest and violence.<sup>105</sup> In short, PMCs do not undertake peacebuilding.

PMCs influence the balance between state institutions in ways which are likely to have an eroding effect on the basis of state authority by 'crowding out' state institutions. Indeed, the presence of PMCs relieves the state of the need to build institutions capable of providing security. Instead of investing in costly and politically dangerous armies and police forces, rulers can choose to rely on private companies.<sup>106</sup>

PMCs must therefore be subject to a system of individual and corporate criminal responsibility that measures whether their activities legitimately contribute to public security and law and order.<sup>107</sup> This accountability and regulation may not be possible by those States requesting the services of the PMCs due to a breakdown in law and order and public institutions, the very same reason behind the involvement of PMCs.

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<sup>102</sup> Justin Brown, "The Rise of the Private-Sector Military," as cited in Scott Goddard, 'The Private Military Company: A legitimate international entity within modern conflict', A thesis presented to the Faculty of the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas 2001, p.42.

<sup>103</sup> Op cit, fn.5, p.5.

<sup>104</sup> *ibid*, p.2.

<sup>105</sup> David Isenberg, 'Soldiers of Fortune Ltd.: A Profile of Today's Private Sector Corporate Mercenary Firms', *Center for Defense Information Monograph*, November 1997 <http://www.cdi.org/issues/mercenaries/merc1.html>, p.18.

<sup>106</sup> Op cit, fn.94, p.10.

<sup>107</sup> Op cit, fn.43, p.14.

Thus, the regulation of PMCs may need to be undertaken by supplier states, developed nations and the international community.

### **The Military and PMCs**

The proprietary basis of PMC employment contradicts the fundamental and inherent measure of legitimacy by the actions of a nation's military. The measure of legitimacy afforded to PMCs, according to Goddard, is a de facto and amoral legitimacy. Quite simply, 'PMCs contradict the military ethic of selfless service.'<sup>108</sup> Traditionally, the ultimate symbol of the sovereignty of a nation is its ability to monopolise the means of violence; i.e. raise, train, and sustain the use military forces.<sup>109</sup> The Australian Defence Force, like other military entities, promotes a particular ethical world-view. The 'Defence Mission' is to defend Australia and its national interests'. In fulfilling this mission, the Australian Defence Force (ADF) serves all Australians, and is accountable to the Commonwealth Parliament, on behalf of the Australian people.<sup>110</sup>

This statement displays a number of the fundamental underpinnings of State military ideology. The service that the military ostensibly provides is the defence of the polis. Military ethos reinforces the notion that becoming a member of the defence force, one serves the country selflessly. Military service may be viewed as an aspect of the rights and duties of citizenship. Individual members of the armed forces may be called upon to sacrifice their lives so that the state may continue to exist. The military demands this 'sacrifice of the lives of its members in pursuit of the community's right to self-defence'.<sup>111</sup>

Among uniform members, this ethos of service is unchallenged - every ADF member is imbued to believe that h/she is performing a duty to his/her country. When asked why they serve, few defence members would reply that it is because they enjoy killing or blowing things up. Even should this be the case, the public acknowledgment of this secondary motivation would be clearly inappropriate.<sup>112</sup> PMCs challenge this selfless service by making war a business. PMCs challenge the exclusion of military skills from the marketplace by engaging in the management and deployment of violence for profit. PMCs, most of whom include former soldiers, 'acquire' the military training and education provided by states and practice these acquired skills outside the profession. By practicing their vocation and training outside of the confines of the State military system, PMCs violate the concept of a 'military profession' since their motivation is financial rather than ideological. As an official of Executive Outcomes concedes PMCs and their employees are driven mainly by self-interest. Discipline of PMCs and mercenaries is inherently suspect.<sup>113</sup>

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<sup>108</sup> Bruce Grant, "U.S. Military Expertise for Sale. Consultants as a Tool of Foreign Policy," as cited in Scott Goddard, 'The Private Military Company: A legitimate international entity within modern conflict', A thesis presented to the Faculty of the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas 2001, p.47.

<sup>109</sup> Op cit, fn.101, p.2.

<sup>110</sup> <http://www.defence.gov.au/charters/index.htm>

<sup>111</sup> Op cit, fn.12 at 6.

<sup>112</sup> *ibid* at 6-7.

<sup>113</sup> Laurie Nathan, 'Trust Me I'm a Mercenary: The Lethal Danger of Mercenaries in Africa', Seminar on the 'Privatisation' of Peacekeeping Institute for Security Studies, 20 February 1997 [http://ccrweb.ccr.uct.ac.za/staff\\_papers/laurie\\_merc.html](http://ccrweb.ccr.uct.ac.za/staff_papers/laurie_merc.html)

A 1991 RAND report looking at private provision of professional military education programs in the U.S. found no cost savings. Privatising training may actually undermine the U.S. military's potential for military engagement. When the U.S. government poured funds for training into PMCs rather than into its armed forces, it buoyed private expertise over public expertise. It also altered the career aspiration of military personnel, adding the private sector into consideration and highlighting to the armed force that training was 'not a core task'.<sup>114</sup> Employing PMCs reduces the need to involve both Parliament and the Australian public in foreign policy. Using private contractors may make foreign operations easier in the short run, because politicians do not have to make the case to send 'our boys (and girls)' overseas into harms way.<sup>115</sup>

The other problem is that PMCs might gain access to classified information or defence forces training manuals or equipment. The presence of PMCs in other countries could also cause confusion between their activities and official activities being conducted by Government agencies or the military in those countries.<sup>116</sup>

PMCs often have a weak command structure and disciplinary problems. Unlike State armed forces, where the legitimacy of command rests unquestioningly in its officers, PMCs are often characterised by requiring that commanders prove their strength. The imposition of military discipline within PMCs has generally required violence.<sup>117</sup> The deterrence on wrongdoing – military discipline law – does not really operate. Regular military personnel are subject to courts-martial or international law, but for PMC employees it is not clear what law applies.

Another element of the military ethos requires that the defence force members remain politically neutral, yet loyal to the State and the profession. Politics should not intrude on military decision making; instead political considerations should be determined at the policy-making stage. 'The most effective forces and the most competent officer corps are those which are motivated by ideals rather than by political or ideological aims.' The fundamental nature of military professionalism is not political loyalty, but loyalty to a particular ideology of service – that is service to the State.<sup>118</sup>

### **The UN and PMCs**

In the 1990s, governments and UN agencies increasingly turned to PMCs for security support in humanitarian relief missions. In 1995, the UN High Commission for Refugees (UNHCR) suggested that PMCs should be used to separate the belligerents from people in the Goma camps after the Rwanda genocide. The proposal was rejected by the UN with the understanding that Member States would provide proper military forces for the operation.<sup>119</sup> However, this did not eventuate.

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<sup>114</sup> Deborah Avant, 'Privatizing Military Training', *Foreign Policy in Focus*, Vol. 5, No. 17, June 2000, p.2.

<sup>115</sup> *ibid*

<sup>116</sup> *Op cit*, fn.17, p.9.

<sup>117</sup> *Op cit*, fn.12 at 14.

<sup>118</sup> *ibid* at 8-10.

<sup>119</sup> *Op cit*, fn.16, p.11.

PMCs have been involved in escorts for the transfer of emergency relief to war-affected communities. Armed escorts are used extensively in large logistical operations, such as those run by CARE and World Food Programme. The escorts are usually provided by the host government.<sup>120</sup> The reason behind this is that violence against humanitarian staff has increased dramatically in recent years. Insecurity in places such as Chechnya, Somalia and Colombia has highlighted the security risks to aid workers. In addition, PMCs have also been used for logistical support to UN Peacekeeping Missions. This last point was recognised by the *Brahimi Report of the Expert Panel on UN Peace Support Operations*. This report noted that PMCs were likely to provide technical support in international peacekeeping efforts, but it was unlikely that they would be used to perform military tasks by the UN in any significant capacity.<sup>121</sup>

On a national level, little is understood about the links between local PMCs and state military forces, government officials or even criminal elements of societies. Any of these associations may tarnish the image of aid agencies and, present serious questions about their operations. On a global level, PMCs are part of a wider process of aid becoming more politicised and militarised, which reduces the legitimacy of the goals that is trying to be obtained. PMCs thrive where the state may be weak, in terms of governance. It is also noteworthy that PMCs are most active in countries afflicted by 'resource wars' in which the state is competing with an opposing force over natural resources.<sup>122</sup>

The use of PMCs is also symbolic of aid agencies being among those fortunate enough to be able to buy security. This can be to the detriment of the interests of the majority of society for whom security is a luxury.<sup>123</sup> The fundamental feature of humanitarian operations is precisely their humanitarian character, and this can only be undermined, if it is delivered at gun-point.<sup>124</sup> The use of such companies by humanitarian agencies, whilst not widespread, is a trend that is increasing with little understanding of the implications and limited development of appropriate policy.<sup>125</sup>

If PMC personnel are armed or are from a military background then aid agencies might be perceived as being part of the conflict rather than good humanitarians involved to assist its victims. This challenges the notion of impartiality and neutrality of humanitarian action.<sup>126</sup>

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<sup>120</sup> *ibid*, p.15.

<sup>121</sup> The Politicisation of Humanitarian Action and Staff Security: The Use of Private Security Companies by Humanitarian Agencies - International Workshop Summary Report Tufts University, Boston, Massachusetts, USA - 23/24 April 2001 at <http://famine.tufts.edu/>, p.4.

<sup>122</sup> *ibid*, p.16.

<sup>123</sup> *ibid*, p.18.

<sup>124</sup> Robert Mandel, *Armies without States: The Privatization of Security*, Lynne Rienner Publishers 2002 p.19.

<sup>125</sup> *Op cit*, fn.13

<sup>126</sup> *ibid*

### **Recommendation:**

It is by addressing the economic, political and social factors which cause most armed conflicts that real, long term peace can be established. While the use of force in certain circumstances provides short-term stability, it is just that: short term.<sup>127</sup> Just as the elimination of piracy as a chronic global issue in the 16<sup>th</sup>/17<sup>th</sup> Century resulted not through the use of brute force, but via transformation in domestic and international law, the same solution is required for PMCs. The challenge remains the political will, which until a massive violation related to PMCs occurs, the likelihood of any international entity being willing to take on this complex regulatory function is extremely limited.<sup>128</sup>

The uncertain status of PMCs also factors to the disadvantage of the PMCs employees. The law of war is not just about regulating behaviour during armed conflict, but also about determining status and ensuring that combatants have their rights respected. While they are still mandated to adhere to the customs and rules of war, upon capture, this uncertain status means that PMC employees are at risk of not receiving the IHL guaranteed protection and may even be tried as criminals.<sup>129</sup>

In developing recommendations for the regulation of PMCs it is necessary to consider both the PMCs, as well as the users of PMCs and situations in which they are being used. From an Australian perspective, key priorities include:

- Acceding to the UN Mercenary Convention;
- Assisting in the enforcement of existing international standards relating to the use of mercenaries to prevent non-state armed actors from using mercenaries, volunteers, and other PMC groups should be encouraged;
- Lobbying for an expanded mandate for the Office of the Mercenary Rapporteur to measure the scope, magnitude, and impact of PMCs, mercenary and volunteer involvement in conflicts;
- Encouraging States in regions of conflict that employ PMCs within their security apparatus to consider the adoption of public policies that are geared towards the development of professional and democratically accountable security forces. Australian should support of the security sector reform programmes via expertise in policing, ie the Australian Federal Police, and the military, the ADF; and
- Engender public debate via governments, academia and media outlets in supplier countries of PMCs through appropriate reviews and consultations about the impact of PMCs on conducting foreign policy and the desirability of such individuals and companies operating from their territory.<sup>130</sup>

Australian corporation law should state that with regards to PMCs, any contract entered into between a PMC and a foreign government should stipulate a cash fee and no other benefit. No other business sharing directors or officers of the PMC should be permitted to have any dealings with the foreign government concerned for a set

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<sup>127</sup> Op cit, fn.7, p.21.

<sup>128</sup> Op cit, fn.21 at 547.

<sup>129</sup> ibid at 547.

<sup>130</sup> Op cit, fn.7, p.31.

minimum period. The companies should be made responsible under Australian Corporations' Law for any breaches of human rights or the law of armed conflict that may be committed by their employees.<sup>131</sup>

Some other corporation law specific recommendations include expanding the Australian Securities and Investments Commission's powers to regulate the activities of PMCs. This would entail a considered amendment to the *ASIC Act 2001*. Similar to the current ASIC powers under legislation, these amendments would permit ASIC extensive powers to investigate suspected contravention of the *Corporations Act 2001* on its own initiative. The proposed amendments could also provide ASIC wide information-gathering powers to facilitate its investigation, including powers to inspect books and records.<sup>132</sup> Other amendments could also include providing the courts wide jurisdiction to examine the overseas activities of PMCs, per s.1338A of the *Corporation Act*.

The Australian government could also consider deploying an integrated military-diplomatic team with the PMC to provide overall guidance and monitoring of the existing provisions of IHL. This could also monitor the belligerent parties in upholding the provisions of the Geneva Conventions and providing for mechanisms such as the International Committee of the Red Cross (ICRC) to monitor conflicts for adherence to international law. This would dovetail with the current action of the ICRC as it is preparing to implement a policy to ensure that the humanitarian standards of international law are upheld by private contractors who support world armed forces in areas of conflict.<sup>133</sup> In fact, under Article 90 of Additional Protocol 1, the ICRC could activate the dormant International Humanitarian fact Finding Commission. The Australian government could also ensure that the activities of PMCs are open to UN observers. This would ensure the monitoring of the actions of the PMC in order to provide greater transparency of its actions and thus help allay the concerns of the international community.<sup>134</sup>

In addition, a similar register to the *U.N. Register of Conventional Arms*, which compiles declarations by both importers and exporters of conventional arms, allowing cross-checking, could be created by the United Nations for PMCs. This would contain declarations by the importers, the states or groups employing such firms, and the exporters, the PMCs themselves.<sup>135</sup> This function could be overseen by the Office of the Special Rapporteur.

This is because the Special Rapporteur (SR) already has the systems and expertise in place. Under the original mandate, the SR examines the question of the use of mercenaries as a means of violating human rights and of impeding the exercise of the right of peoples to self-determination. Accordingly, the SR seeks and receives credible and reliable information from Governments, as well as specialised agencies,

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<sup>131</sup> Christopher Wrigley, 'The Privatisation of Violence: New Mercenaries and the State', March 1999, <http://www.caat.org.uk/information/issues/mercenaries-1999.php>

<sup>132</sup> Phillip Lipton and Abe Herzberg, *Understanding Company Law* (12<sup>th</sup> Edition), 2004, Lawbook Company, p.556.

<sup>133</sup> Michael Sirak, 'ICRC calls for contractor accountability in war', *Janes Defence Weekly* 10 May 2004, p.4.

<sup>134</sup> Op cit, fn.43 at 112.

<sup>135</sup> Op cit, fn.101, p.22

and inter-governmental and non-governmental organisations. The SR has developed a conceptual framework for use in analysing existing and potential new forms of mercenary activity. In addition, the SR maintains “regular contacts with States and other sources, including institutions and individuals engaged in research on the subject, to obtain information on actual or potential mercenary activities and relevant national legislation”<sup>136</sup>.

Beyani and Lilly<sup>137</sup> have promulgated a list that could be considered as a charter of proscribed and regulated activities. This simplicity of this list is that it makes it quite clear what is lawful and requires governmental permission, and what is quite clearly unlawful.

The activities from which PMCs should be proscribed are:

1. direct participation in hostilities;
2. use, recruitment, financing and training of mercenaries;
3. activities that could lead to a lethal outcome;
4. assistance to governments that are not internationally recognized, non-state armed actors, or irregular forces;
5. acts that might lead to human rights violations or internal repression;
6. looting, plunder, and other illicit economic activities such as mineral extraction; &
7. unauthorised procurement and brokering of arms.

The kinds of activities that require regulation include:

1. military advice and training;
2. arms procurement;
3. logistical support;
4. security services;
5. intelligence gathering; and
6. crime prevention services.<sup>138</sup>

If the UN decides to engage in dialogue with PMCs, as the use of PMCs remains an option for policymakers, then the Department of Peacekeeping Operations at the United Nations could act as the coordinating body and also as a monitoring agency regarding the activities of PMCs in the field. Accordingly the UN needs to have a clear and coherent policy on PMCs, so that both Member States and UN Agencies are aware of the international consensus, and work with this accordingly.

Other international recommendations would include creating a permanent position for the SR, instead of the period 3-year extensions that is currently the state of affairs. This would create certainty, tenure and the ability to see through long term projects with regards to the control of mercenaries. This would entail greater funding for this position for the development of peace building and conflict management mechanisms. In addition, a review on the International Convention could be undertaken so that states who have been unwilling to accede to this instrument could state their reasons. This would flesh out the salient issues to have obstructed the widespread acceptance of the Convention.

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<sup>136</sup> From the Office of the United Nations High Commissioner for Human Rights website accessed 21 January 2005 at <http://www.ohchr.org/english/issues/mercenaries/>

<sup>137</sup> Op cit, fn.43, p.7.

<sup>138</sup> *ibid*



Finally, the fact that Australia's closet ally, New Zealand, has undertaken domestic legislation with a view to ratifying the UN Mercenary Convention should be impetus for Australia to accede to this instrument. This is not mere Trans Tasman rivalry, but in the interest of humanity.

## **Conclusion:**

According to Goddard, PMCs are not a panacea to all interethnic and internecine conflicts. However, PMCs may represent an additional capability that can be selectively committed throughout the world, to effect and shape an enforced peace settlement within modern conflict.<sup>139</sup> Goddard argues strongly that at the international level, PMCs are lawful only because the existing definitions lack fidelity. PMC actions are being undertaken within a vacuum of effective regulation and accountability at the international and national levels that is decidedly inappropriate for the international realm in the twenty first century.<sup>140</sup>

Australia need not succumb to Machiavelli's dire predictions noted at the start of this paper. Adequate supervision and oversight can be provided for PMCs to mitigate domestic and international concerns. Control and oversight can be maintained by deploying an integrated military-diplomatic team with the PMC and by inviting external observers to monitor adherence by the corporation to international humanitarian law standards. Agreements and contracts can be drafted to ensure they are executed in compliant with international obligations.<sup>141</sup>

State inaction over the issue of PMCs may portend dire consequences for the foundations of state authority. By anchoring control over violence to the private sector and by shifting the relative importance of (state) institutions undermines the long-term authority of the state. This act diminishes the significance of constructing state-controlled armed forces, by linking security and command over resources.<sup>142</sup> Australia can take a proactive step in meeting the challenge of PMCs by implementing and actioning the recommendations posited by this thesis. As succinctly stated by Machiavelli, himself no stranger to the intrigues of politics and the world of mercenaries:

*"The mercenaries and auxiliaries are useless and dangerous, and if anyone supports his state by the arms of mercenaries, he will never stand firm or sure, as they are disunited, ambitious, without discipline, faithless, bold amongst friends, cowardly amongst enemies, they have no fear of God, and keep no faith with men."*

Machiavelli, *The Prince*<sup>143</sup>

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<sup>139</sup> Op cit, fn.24, p.11.

<sup>140</sup> *ibid*, p.iii.

<sup>141</sup> Op cit, fn.43 at 115-116.

<sup>142</sup> Op cit, fn.94, p.12.

<sup>143</sup> As cited in Laurie Nathan, 'Trust Me I'm a Mercenary: The Lethal Danger of Mercenaries in Africa', Seminar on the 'Privatisation' of Peacekeeping Institute for Security Studies, 20 February 1997 [http://ccrweb.ccr.uct.ac.za/staff\\_papers/laurie\\_merc.html](http://ccrweb.ccr.uct.ac.za/staff_papers/laurie_merc.html)

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