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The status of private military companies under international humanitarian law; towards a new convention

Research dissertation paper presented for the approval of Senate in fulfillment of part of the requirements for the masters in law in approved courses and a minor dissertation paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of masters in law dissertation papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation paper conforms to those regulations.

Caroline Daniels

Contents

An introduction to private military companies

The public-private dichotomy of warfare is crumbling down as governments are voluntarily surrendering one of the essential and defining attributes of statehood: the state's monopoly on the legitimate use of force, leading to the privatization of war and conflicts[1].

Private military companies are business organizations trading in professional services linked to warfare[2]. They are registered corporate bodies with legal personalities that provide military services, including combat operations, strategic planning, intelligence, risk assessment, operational support, training, and technical skills[3]. The private military, a concept largely unknown a decade ago is apparently here to stay. It is an industry with over $100 billion in annual sales, involving highly professional firms, of which some are publicly traded[4].

Private military companies deliver a wide spectrum of services that were once generally assumed to be exclusively inside the public context, thus breaking down what has long been seen as the traditional responsibilities of government[5]. Since the 1990's private military companies have been active in zones of conflict and transition throughout the world[6]. They have been critical players in several conflicts and are often the determinate actor with a strategic impact on both the process and outcome of conflicts[7]. The clients of these private military companies include a variety of actors, ranging from "ruthless dictators, morally depraved rebels and drug cartels" to "legitimate sovereign states,

1 Working group on private military companies, "Private military firms - fact sheet", Geneva, DCAF (2004) at 1-2 available at http://www.dcaf.ch/pfpc/proj_privmilitary.pdf [last consulted January 6, 2010]
2 P.W. Singer, *Corporate warriors: the rise of the privatized military industry*, Cornell University Press, 2004, at 8
3 C. Beyani & D. Lilly, "Regulating private military companies: options for the UK government", International Alert policy paper, at 16 available at http://www.international-alert.org/pdf/reg_pmc.PDF [last consulted January 3, 2010]
4 P.R. Verkuil, *Outsourcing sovereignty: why privatization of government functions threatens democracy and what we can do about it*, Cambridge University Press, 2007, at 26
5 P.W. Singer, *supra* note 2
6 P.W. Singer, *supra* note 2, at 9
7 *Ibid*.

respected multinational corporations, humanitarian NGOs and even western embassies"[8].

The downsizing and modernization of armed forces following the end of the Cold War and the end of apartheid is one of the determining factors leading to the outsourcing of military functions to private military firms[9]. Since then, thousands of arms experts and former soldiers have been thrown on to the employment market and are now selling their services to the highest bidder[10]. Much of this manpower and expertise has been soaked up by the booming private military and security sector[11].

In many areas, the power of private military companies has been used as much in support of state interests as against them[12]. The distinction between public and private functions has become blurred by the expansion of the private military industry, leading to a decreased role of the state in the security sphere[13]. By privatizing the use of force, the state's monopoly on the legitimate use of violence is broken[14]. Because of these evolutions, radical changes in military relationships are emerging[15].

Developed economies mostly turn to the private military sector as a cost-effective way of procuring services[16]. In developing countries however, especially in African war-torn societies, it is often core functions of statehood that are contracted out due to the inability of the state to fulfill such functions[17]. In these cases, states hire private military

8 D. Brooks & H. Solomon, "From the editor's desk", *Conflict Trends* (2000) at 1 available at http://www.accord.org.za/downloads/ct/ct_2000_1.pdf [last consulted January 5, 2010]
9 Working group on private military companies, *supra* note 1
10 K. Silverstein, *Private Warriors*, Verso, London, 2000, p.vii
11Working group on private military companies, *supra* note 1
12 P.W. Singer, *supra* note 2, at 18
13 J.L. Gómez del Prado, "Impact in human rights of private military and security companies' activities", at 1 available at http://www.privatesecurityregulation.net/files/Impact%20in%20Human%20Rights%20of%20Private%20Military%20and%20Security%20Companies'%20Activities.pdf [last consulted January 03, 2010]
14 C. Ortíz, "Regulating private military companies: States and the expanding business of commercial security provision", at 205 available at http://www.privatemilitary.org/publications/ortiz_2004_regulating_private_military_companies.pdf [last consulted January 03, 2010]
15 P.W. Singer, *supra* note 2, at18
16 See Global Security website on mercenaries at http://www.globalsecurity.org/military/world/para/mercenary.htm [last consulted January 03, 2010]
17 J. Cilliers, "Private security in war-torn African states", in: J. Cilliers & P. Mason (eds.), *Peace, profit or plunder? The privatization of security in war-torn African societies*, South Africa, Institute for Security

companies to fill a vacuum that the state cannot fill, rather than to enhance cost-effectiveness[18].

Some of these companies have committed serious abuses in the course of their operations, most of which have gone unpunished. This abuse raises questions as to how international law should apply to these companies, and how victims can find redress under international law[19]. When trying to find an answer to this question it becomes immediately apparent that the legal and regulatory issues surrounding private military companies are by no means clear[20]. Whereas international law, through the international mercenary conventions, seems to outlaw *individuals* selling private military services, it is not at all clear whether the same prohibitions apply to companies selling private military services[21].

In this thesis I will assess the status of private military companies under current international humanitarian law and point out the inadequacies in the current international regulatory framework. Subsequently, I will address different regulatory options and formulate a response to the regulatory gaps left by the international regulatory framework in the form of a new international convention on private military companies.

International humanitarian law is only applicable in situations of armed conflict and does not regulate acts of isolated violence or internal disturbances. Even though situations might arise where a private military company offers services both in and outside situations of conflict, this thesis will be restricted to the regulation of the status of private military companies *in situations of armed conflict*. Evidently, regulating the status of private military companies in armed conflict might also provide clarity about the legal status of these companies in a range of situations that do not surpass the threshold of armed conflict.

Studies, 1999, at 4-5
[18] *Ibid*.
[19] P.W.Singer, "War, profits, and the vacuum of law: privatized military firms and international law", 42 *Colum. J. Transnat'l L.* 521 (2004) at 524
[20] *Ibid*.
[21] *Cfr. infra* Chapter II.4

Chapter I: Categorizing and defining private actors in the military sector

This chapter will discuss different attempts made by various authors to categorize or subdivide actors in the private military sector and point out why these distinctions are problematic. It further seeks to provide for a definition of private military companies that is workable under international humanitarian law. It does so while at the same time recognizing that the purpose of international humanitarian law is to limit the effects of armed conflict by protecting persons who are not, or are no longer, participating in the hostilities and by restricting the means and methods of warfare.

It is clear that private military companies offer services of a sophisticated nature and of a wide range, that there is an apparent wide demand for their services from a host of actors and that their operations are often transnational[22]. However, because of a lack of universally agreed upon definitions, understanding and defining private military is a daunting task[23].

Numerous authors have attempted to subdivide and categorize private actors in the military service sector. One distinction that is often put forward is that between private military companies and private security companies. A **private military company** is defined as a private company offering offensive services, designed to have a military impact on a given situation, and often contracted by governments[24]. **Private security company** refers to companies offering defensive services, intended to protect individuals and property, frequently used by multinational corporations in the extractive sector, humanitarian agencies, and individuals in situations of conflict or instability[25].

[22] K. Pech, "Executive Outcomes – A corporate conquest", in: J. Cilliers & P. Mason (eds.), *Peace, profit or plunder? The privatization of security in war-torn African societies*, South Africa, Institute for Security Studies, 1999, at 83
[23] D. Brooks & H. Solomon, *supra* note 8
[24] C. Holmqvist, "Private security companies: the case for regulation", *SIPRI Policy Paper series* 9 (2005), at 5 available at http://books.sipri.org/product_info?c_product_id=191[last consulted January 5, 2010] ; Working group on private military companies, *supra* note 1, at 1
[25] *Ibid*.

Some scholars add a third category to this, **nonlethal service providers**[26]. These providers engage in activities such as mine clearance, logistics and supplies and risk consulting[27].

Such distinctions are problematic. First, what appears to be defensive may well turn out to have offensive repercussions[28]. Furthermore, in certain conflict zones, without a front line or combat zone, keeping a service defensive is a virtually impossible task and once one allows the private military to enter the battlefield, combat support services can easily devolve into combat services[29]. Second, short-term situational demands as well as business opportunities lead companies to appropriate new tasks with relative speed and ease making the distinction between offensive and defensive irrelevant and misleading[30]. Furthermore, the distinction between offensive and defensive tells us little about the strategic value or impact of a particular task on a conflict[31].

Similarly, some authors distinguish private military companies by their level of activity, differentiating between **active firms** and **passive firms**[32]. This distinction however, is problematic on the same account as the distinction between private security companies and private military companies. Firstly, what is considered passive under one set of circumstances may well be active under another set of circumstances, and secondly, the lines between 'passive' and 'active' are easily blurred as firms seek out new business opportunities.

Interestingly, Tim Spicer, founder of the private military company Sandline, when defining private military companies, precisely departs from the premise that private

[26] See e.g. D. Brooks, "Private firms have a role to play in peace operations in Africa", (2003) available at http://www.globalsecurity.org/military/library/news/2003/10/mil-031022-usia06.htm [last consulted September 22, 2009]
[27] *Ibid*.
[28] C. Holmqvist, "Private military and security companies – an analytical overview", in: ICRC publication, *Proceedings of the Bruges Colloquium: Private military/security companies operating in situations of armed conflict*, ICRC, 2006, at 5
[29] P.R. Verkuil, *supra* note 4, at 27
[30] C. Holmqvist, *supra* note 28
[31] Military or strategic impact can be significant also for services that are carried out in a classroom setting. The training provided by the US company MPRI to the Croatian army in 1995 is often cited in this respect, and arguably had a decisive impact on that conflict. See C. Holmqvist, *supra* note 28, at 13
[32] P.W. Singer, *supra* note 2, at 89

military companies provide more than just passive assistance[33]. Private military companies, Spicer argues,

"… are defined as those organizations which do more than provide passive assistance in areas of conflict. They may provide training and equipment to extend the capabilities of their client's military resources, providing them with the strategic or operational advantage that is necessary to suppress their opposition or, going even further play an active role alongside the client forces, as force multipliers, deploying their own personnel in the field of conflict, but with the strict caveat that they are acting within the chain of command of the client's military hierarchy"[34].

Another distinction that is widely used is that made by Peter W. Singer, who identified three categories into which private military companies fall: military support firms, military consulting firms and military provider firms. Singer structures the industry using a 'Tip of the Spear' metaphor, distinguishing firms by their closeness to the actual fighting (the 'front line')[35].

Military support firms provide their clients with logistics, intelligence, technical support, supply and transportation, thus specializing in secondary tasks that are not part of the overall core mission of the client[36]. Although they do not participate in the execution or planning of combat action, these companies fill functional needs critical to overall combat operations[37]. **Military consulting firms** provide advisory and training services integral to the operation and restructuring of a client's armed forces; they offer strategic, operational and organizational analysis[38]. These firms do not operate on the battlefield itself, even though their presence could possibly reshape the strategic and tactical environment through the re-engineering of a local force[39]. **Military provider firms** focus on the tactical environment and are willing to engage directly in combat

[33] Spicer thus goes far beyond the definition that other private military companies propose, as most of them vehemently argue that they do not participate in combat. See J. Cilliers, *supra* note 17, at 2
[34] T. Spicer, "Private military companies - Independent or regulated?", (1998) available at http://www.sandline.com/white/regulation.doc [last consulted September 21, 2009]
[35] P.W. Singer, *supra* note 2, at 89
[36] P.W. Singer, *supra* note 2, at 97
[37] *Ibid*.
[38] P.W. Singer, *supra* note 2, at 95
[39] *Ibid*.

operations[40]. These firms provide services at the forefront of the battle space and engage in actual fighting[41].

However, Singer himself admits that companies sometimes cross sectors[42]. His attempt to distinguish private military firms according to their closeness to the battlefield is thus exposed to the same kind of critique other classifications endure. Furthermore, by classifying according to major services provided, Singer misses an important distinction for the purposes of international humanitarian law: whether private military companies engage in the use of force and whether they take a direct part in hostilities[43]. While Singer defines military provider firms by their willingness to engage in direct combat operations, it is also very likely that the personnel of a military support firms or a military consulting firm will engage in activities that can be qualified as direct participation in hostilities, especially when these firms come under attack whilst performing their tasks[44].

As will be explained below[45], the concept of direct participation in hostilities plays an important role in establishing the status of private military contractors. Under the Geneva Conventions and the Additional Protocols thereto, private military contractors, when qualified as civilians under international humanitarian law, loose certain protections while they take a direct part in hostilities and might be prosecuted for taking up arms[46].

Any definition of a private military company that blurs the lines as to when companies take a direct part in hostilities or which status attaches to private military contractors can be counterproductive for international humanitarian law[47]. A workable definition thus has to be sufficiently broad to encompass the widest range of military companies

[40] P.W. Singer, *supra* note 2, at 92
[41] *Ibid*.
[42] *Ibid*.
[43] R. Morgan, "Professional military firms under international law", 9 *Chi. J. Int'l L.* 213 (2008) at 216
[44] *Ibid*.
[45] See Chapter II: The status of private military companies under international humanitarian law
[46] See Article 51 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (further: Additional Protocol I)
[47] L.D. Beck, "Private military companies under international humanitarian law", in: C.Simon & C.Lenhardt (eds.), *From mercenaries to market: the rise and regulation of private military companies*, Oxford, Oxford University Press, 2007, at 115

possible. For the purpose of this thesis, whenever the term private military company, private military firm, military company or military firm is used, it will mean the following[48]:

"Private military companies are commercial enterprises that:

- offer services directly involving the exercise of force by military means;
- offer services potentially involving the exercise of force by military means;
- transfer or enhance the potential to exercise force by military means to clients."

When a private military company offers services that clearly encompass direct participation in combat, the military character of the company does not leave much room for doubt. The potential to exercise force can materialize when rendering, for example, a vast array of protective services in climates of instability[49]. It is a potential to exercise force because the presence of a private military company can deter aggressors from considering the use of force as a viable course of action[50]. Transfer or enhancement of the potential to exercise force, on the other hand, occurs when delivering expert military training and other services such as logistics support, risk assessment, and intelligence gathering[51].

[48] Based on a definition proposed by Carlos Ortíz: C. Ortíz, "The private military company: an entity at the center of overlapping spheres of commercial activity and responsibility", in: J.Thomas & K. Gerhard (eds.), *Private Military and Security Companies. Chances, problems, pitfalls and prospects*, Wiesbaden, Vs Verlag, 2007, at 60-61
[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid*.

Chapter II: The status of private military companies under international humanitarian law

1. Introduction

Whereas several hurdles exist in determining the status of private military companies and private military company employees, they do not operate in a legal vacuum. While the companies themselves are mostly unregulated under international humanitarian law, a range of international legal instruments covers the status of their employees. Under the logic of international humanitarian law, private military contractors are either civilians or combatants[52]. However, given the way private military companies conduct their business, the existing rules are not easy to apply, creating a number of "legal grey zones".

On the outset, it is important to note that grave breaches of the Geneva Conventions of 1949 and the Additional Protocols thereto are always punishable, regardless of the identity of the offender[53]. The fact that states often hire private military companies does not preclude contractors from being held accountable for possible abuses. This being said however, due to the structure of these companies and the range of services they offer, they are surrounded by a "legal murkiness" as a result of which abuses have gone largely unpunished.

This chapter will set out to establish which legal instruments regulate the status of

[52] This is made clear by Article 50 of Additional Protocol I. Furthermore, the ICRC commentary on Article 4 of the Third Geneva Convention states that "every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status."

[53] The four Geneva Conventions and Protocol 1 each have a definition of what constitutes grave breaches. See Article 50 of the First Geneva Convention, Article 51 of the Second Geneva Convention, Article 130 of the Third Geneva Convention, Article 147 of the Fourth Geneva Convention and Articles 11 and 85 of Additional Protocol I.

private military companies and their employees and will discuss the consequences that attach to such status. It will also point out where these different legal instruments fail to establish clear criteria for determining such status and where legal uncertainties surrounding such status exist.

2. The Montreux document on private military and security companies

The "Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict"[54] (Montreux document) is the product of an initiative launched by the Swiss government in cooperation with the International Committee of the Red Cross (ICRC). The document was developed in meetings convened in January and November 2006, November 2007, and April and September 2008 with the participation of governmental experts from Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom, Ukraine, and the United States. During the drafting process, several consultations with representatives from civil society and of the private military and security industry took place[55].

As a whole, the Montreux document expresses the consensus that international law, in particular international humanitarian law and human rights law, does have a bearing on private military companies and that there is no legal vacuum for their activities[56]. The document intends to serve as a guide on the legal and practical issues raised by private military and security companies[57]. In so doing, it recalls existing legal obligations of states, private military companies and their personnel[58]. It does not create new

[54] *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict* of 17 September 2008, UN doc. Nr. A/63/476 - S/2008/636
[55] See ICRC website: http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908
[56] See website of the Swiss Federal Department of Foreign Affairs at http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html [last consulted September 23, 2009]
[57] *Ibid*.
[58] Montreux document, *supra* note 54, at preface, para 2

obligations and is itself a legally non-binding document[59].

Even though the Montreux document is a "soft law" document, it still has significant value as it has the potential to be the forerunner to binding hard law. The exact meaning of "soft law" is discussed in legal literature, but most authors seem to agree that the conclusion of non-binding instruments offers a range of advantages, such as greater flexibility, lower sovereignty costs and the availability of these instruments to non-state actors[60]. "Soft law" documents can be the first step in a treaty making process, or they can influence state practice, which will help generate customary norms[61]. Because of this potential, I will discuss the Montreux document rather extensively in this thesis.

The Montreux document consists of two parts. Part one provides a conservative statement of *lex lata* and was drafted relying on traditional international law sources (treaties such as the Geneva Conventions and authoritative interpretations such as the ICRC study on Customary International Law and statements by United Nations (UN) human rights bodies)[62]. It differentiates between contracting states, territorial states and home states and recalls pertinent international legal obligations according to international humanitarian law and human rights law for each of those categories. The document also addresses the question of attribution of private conduct to the state under customary international law. In addition, it devotes sections to the pertinent international legal obligations of all other states, to the duties of private military companies and their personnel, as well as to questions of superior responsibility[63].

Part two of the Montreux document does not state law, but provides a non-exhaustive compendium of illustrative good practices for states discharging their existing legal

[59] Montreux document, *supra* note 54, at preface, para 3
[60] G.C. Shaffer & M.A. Pollack, "Hard vs. soft law: alternatives, complements and antagonists in international governance", *University of Minnesota Legal Studies Research Paper Series* 09-23 at 8 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1426123 [last consulted January 6, 2010]
[61] G.C. Shaffer & M.A. Pollack, *supra* note 60, at 16
[62] J. Cockayne, "Regulating private military and security companies: the content, negotiation, weakness and promise of the Montreux document", 13 *J. Conflict & Security L.* 401 (2008) at 404
[63] See website of the Swiss Federal Department of Foreign Affairs at http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html [last consulted September 23, 2009]

obligations[64]. It was drafted with references to corporate codes of conduct, national legislation, administrative instruments and regional political statements[65]. Part two also differentiates between contracting states, territorial states and home states and proposes a range of good practices for every category. These good practices vary from introducing transparent licensing regimes to ensuring better supervision and accountability so that only private military companies likely to respect international humanitarian law through appropriate training, internal procedures and supervision, can provide services during armed conflict[66].

On the status of private military contractors and the consequences that attach thereto, the document states that[67]:

> "The status of the personnel of private military and security companies is determined by international humanitarian law, on a case by case basis, in particular according to the nature and circumstances of the functions in which they are involved.
>
> If they are civilians under international humanitarian law, the personnel of private military and security companies may not be the object of attack, unless and for such time as they directly participate in hostilities.
>
> The personnel of private military and security companies:
>
> a) Are obliged, regardless of their status, to comply with applicable international humanitarian law;
> b) Are protected as civilians under international humanitarian law, unless they are incorporated into the regular armed forces of a State or are members of organized armed forces, groups or units under a command responsible to the State; or otherwise lose their protection as determined by international humanitarian law;
> c) Are entitled to prisoner of war status in international armed conflict if they are persons accompanying the armed forces meeting the requirements of Article 4A(4) of the Third Geneva Convention;

[64] J. Cockayne, *supra* note 62, at 405
[65] *Ibid*.
[66] See website of the Swiss Federal Department of Foreign Affairs at http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html [last consulted September 23, 2009]
[67] Montreux document, *supra* note 54, at para 23-26

d) To the extent they exercise governmental authority, have to comply with the State's obligations under international human rights law;
e) Are subject to prosecution if they commit conduct recognized as crimes under applicable national or international law."

Hence, the document merely reiterates that the status of private military contractors is determined by international humanitarian law and does not provide greater clarity as to when the personnel of private military companies should qualify either as a combatant or as a civilian. The difficulties in determining status under international humanitarian law and the consequences that attach to being qualified as either a combatant or a civilian are set out below.

There is no doubt that the Montreux document constitutes a very important contribution to the discussion on the activities of private military companies. However, only a limited number of states have endorsed the document, and the document itself stresses that it is not legally binding. It is merely a promotional declaration of intentions and it lacks binding mechanisms[68]. The UN working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination[69] made a detailed study on the Montreux document and notes that it only represents part of the wide spectrum of countries and their approaches[70]. The Working Group considers the document useful in identifying existing obligations of states, private military companies and their personnel under international humanitarian and human rights law, and agrees that the good practices section could prove to be a useful tool for setting out guidelines on private military companies[71]. Whereas it sees the document as a good promotional document on international humanitarian law, the Working Group does

[68] J.L. Gómez del Prado, "Private military and security companies and the UN working group on the use of mercenaries", *13 J. Conflict & Security L.* 429 (2008) at 445
[69] Established in 2005 by resolution 2005/2 of 7 April 2005 by the former UN Commission on human rights, specifically 'to monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights, particularly the rights of peoples to self-determination, and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities'. (Further: Working Group on mercenaries) See: J.LGómez del Prado, *supra* note 68, at 429-430
[70] Report to the 10th session of the Human Rights Council, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination of 2009, A/HRC/10/14, para 43 (Further: Report of the Working Group on mercenaries of 2009)
[71] J.L. Gómez del Prado, *supra* note 68, at 448

find that it has failed to address existing regulatory gaps[72].

The document has, *inter alia*, failed to provide greater clarity on the status of private military contractors under international humanitarian law, thus leaving existing "grey zones" of the law untouched. The document does not address the responsibility of the State with respect to the conduct of private military companies[73], it does not indicate that States should enforce existing laws, nor does it provide for a centralized system that would be responsible for registering of contracts or for licensing of private military companies[74]. Furthermore, the document does not provide sufficient clarity in respect of jurisdictional issues that may come up when prosecuting private military contractors who have committed abuses abroad. In addition, there should be clear acknowledgement of state responsibility to ensure respect for international humanitarian law including obligations regarding prevention, protection, investigation and prosecution and enforcement of appropriate sanctions and remedial measures[75].

3. Civilians or combatants under the Geneva Conventions and the Additional Protocols thereto

a. Introduction

Under the logic of the Geneva Conventions and the Additional Protocols thereto individuals are either qualified as combatants or as civilians[76]. Knowing which status a private military contractor has is essential for a number of reasons[77]. Firstly, opposing

[72] Report of the Working Group on mercenaries of 2009, *supra* note 70, at para 44
[73] Whereas the text references the responsibility of contracting states when acts of a private military company are directly attributable to the state, it does not specify that the state may also have responsibilities in respect of the conduct of a private military company with which it contracts, independent of whether or not the contractual relationship creates any level of state attribution. See Amnesty International public statement on the Montreux Document available at http://www.amnesty.org/en/library/asset/IOR30/010/2008/en/5b351e3e-99de-11dd-bf88-f59215f3db50/ior300102008en.html [last consulted Sept.28, 2009]
[74] Report of the Working Group on mercenaries of 2009, *supra* note 70, at para 44 and 47
[75] See Amnesty International public statement on the Montreux Document available at http://www.amnesty.org/en/library/asset/IOR30/010/2008/en/5b351e3e-99de-11dd-bf88-f59215f3db50/ior300102008en.html [last consulted Sept.28, 2009]
[76] *Cfr. supra* note 52
[77] L. Cameron, "Private military companies: their status under international humanitarian law and its impact on their regulation", 68 *ICRC Review* 863 (2006), at 582

forces must know whether they are legitimate military objectives and whether they can attack them lawfully, as only combatants or civilians who take a direct part in hostilities can lawfully be made the object of attack[78]. Secondly, in order to establish the set of protections they are entitled to upon capture. Combatants enjoy prisoner of war status, whereas civilians enjoy an entirely different set of protections[79]. Thirdly, in order to know whether private military personnel can lawfully participate in hostilities, as this "privilege" belongs to combatants only[80]. And finally, to know whether private military employees who do participate in hostilities may be prosecuted for doing so, as only civilians who take a direct part in hostilities can be prosecuted for taking up arms[81].

There is no straightforward answer as to whether or not members of private military companies fall within one or another category[82]. Any assessment must be pragmatic and look at the functions private military contractors perform, the closeness of these functions to military activities, and the existence of chains of command or affiliations[83].

Furthermore, it is important to recall that the status of "combatant" does not exist in non-international armed conflicts. In a non-international armed conflict, members of armed groups are not combatants and they do not have the right to prisoner-of-war status upon capture. In non-international armed conflict, domestic law rather than international law determines the status of private military contractors, and states could potentially prosecute civilian contractors for taking up arms[84]. Because of this, the protections

[78] See Article 51 of Additional Protocol I

[79] The protections applicable to combatants upon capture are laid down in the Third Geneva Convention on prisoners-of-war, and supplemented by Article 44 and 45 of Additional Protocol I, whereas the protections available to civilians that are captured are throughout the Fourth Geneva Convention and are supplemented by the fundamental guarantees provided for in Article 75 of Additional Protocol I.

[80] This privilege derives from Article 43(2) of Additional Protocol I. See L. Cameron, "International humanitarian law and the regulation of private military companies", *Basel Institute on Governance* at 3 available at http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Cameron.pdf [last consulted January 6, 2010]; K. Dörmann, "The legal situation of unlawful/unpriviliged combatants", 85 *ICRC Review* 849 (2003), at 45

[81] Article 51 (3) of Additional Protocol I indicates this. See L. Cameron, *supra* note 77, at 582

[82] J. Williamson, "Private security companies and private military companies under international humanitarian law", in S. Gumedze (ed.), *Private security in Africa. Manifestation, challenges and regulation*, ISS Monograph Series 139, 2007 at 92 available at: http://www.issafrica.org/index.php?link_id=&slink_id=5218&link_type=13&slink_type=12&tmpl_id=3 [last consulted September 30, 2009]

[83] J. Williamson, *supra* note 82

[84] A. Faite, "Involvement of private contractors in armed conflict: implications under international humanitarian law", 4 *Defence Studies* 2 (2004) at 6. Available at

afforded by international humanitarian law in non-international armed conflict depend primarily on the distinction between those who take a direct part in hostilities and those who do not[85]. The provisions on treatment of captured persons in non-international armed conflicts are far less detailed than those that apply in international conflict as only common Article 3 of the Geneva Conventions and Additional Protocol II provide for basic protections in these types of conflicts[86].

Given the lack of distinction between civilians and combatants in non-international armed conflicts, the next part of this thesis will mainly focus on the status of private military contractors in international armed conflict. Firstly, I set out the conditions under which private military contractors qualify as combatants or as civilians, as well as the legal implications that stem from this qualification. In the section on civilians, I elaborate upon the concept of direct participation. Thus, this section also holds relevance for private military contractors operating in non-international armed conflict. Secondly, I touch upon the special case of civilians accompanying the armed forces. Lastly, I lay out the special case in which private military contractors might qualify as mercenaries.

b. Combatants

Article 4 of the Third Geneva Convention identifies three different categories of persons entitled to prisoner of war status. In identifying those eligible for prisoner of war status, Article 4 lays out the core elements of lawful combatant status[87].

The first category encompasses "Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces". Where private military companies have been formally incorporated in the army, they would surely be covered by this provision[88]. Generally, however, states do not often incorporate private contractors in the army, as the purpose of hiring the services of

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http://www.icrc.org/web/eng/siteeng0.nsf/html/pmc-article-310804 [last consulted October 2, 2009]
[85] *Ibid*.
[86] L.D. Beck, *supra* note 47, at 127
[87] C. Mandernach, "Warriors without law: embracing a spectrum of status for military actors", 7 *Appalachian J.L.* 137 (2007) at 145
[88] L.D. Beck, *supra* note 47, at 118

private military contractors is often precisely to avoid certain responsibilities they bear for members of the armed forces[89]. Nonetheless, it is not inconceivable that private military companies are formally incorporated, as this policy is entirely dependent on the will of the contracting state[90].

A second category, not relevant for our purposes, includes "inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces" (a so-called *levée en masse*)[91].

The third category, which is most relevant for our purposes, is contained in Article 4.A (2) of the Third Geneva Convention and reads as follows:

> "Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
>
> (a) That of being commanded by a person responsible for his subordinates;
> (b) That of having a fixed distinctive sign recognizable at a distance;
> (c) That of carrying arms openly;
> (d) That of conducting their operations in accordance with the laws and customs of war."

Even though Article 4.A (2) confers *per se* combatant status to members of a party's armed forces, all members of the armed forces must respect the above conditions of lawful combat in order to enjoy the protections of international humanitarian law[92]. These four criteria are essential to qualify as a lawful combatant[93].

For private military contractors to qualify as combatants under this third category, a certain link with the state for which they operate is necessary, as Article 4.A(2) of the

[89] *Ibid*.
[90] L. Cameron, *supra* note 77, at 583
[91] Article 4 of the Third Geneva Convention
[92] C. Mandernach, *supra* note 87, at 146
[93] *Ibid*.

Third Geneva Convention requires that they "belong to a party to the conflict"[94]. On this requirement, the ICRC Commentary to the Geneva Conventions states that "It is essential that there should be a *de facto* relationship between the [...] organization and the party [to the conflict], but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting"[95]. Private military companies could thus fall within this category if a *de facto* link exists to the state hiring them. This requirement seems less stringent than the requirement of formal incorporation of in the army[96].

In those cases where Additional Protocol I is applicable[97], Article 43 of the Protocol provides for another definition of armed forces, stating that:

> "1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system, which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict.
>
> 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities."

Contrary to the Third Geneva Convention, Additional Protocol I no longer differentiates between the "regular armed forces" and "other armed groups"[98]. Regardless of the inclusion of "other armed groups" in the definition of combatant, experts are not unanimous on whether members of private military companies would qualify as

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[94] L.D. Beck, *supra* note 47, at 118-119
[95] J. Pictet (ed.), *Commentary to the Geneva Convention relative to the treatment of prisoners of war*, Geneva, ICRC, 1960, at 57
[96] L.D. Beck, *supra* note 47, at 119
[97] At present, 168 States are party to Additional Protocol I and it has thus almost reached universal acceptation. However, a number of States known to use private military companies, or on whose territory private military companies are active, have not yet become party to the Protocol. Notable examples are the United States and Iraq.
[98] L.D. Beck, *supra* note 47, at 120

combatants under Article 43 of Additional Protocol I[99].

The crucial requirement under Article 43 is that the group be "under a command responsible" to a party to the conflict. According to some experts, the present inability of many States to subject members of a private military company to their criminal jurisdiction would preclude the applicability of Article 43[100]. Others submit that in order for a private military company to constitute the "armed forces" of a State, or part of it, under Article 43 the State would formally have to incorporate a private military company into its armed forces by adopting domestic legislation placing the private military company under the command of the State's armed forces[101]. However, in light of the way in which Article 43 sought to broaden and simplify the definition of "armed forces", some experts are in favor of a functional approach and argue that whether a group is part of the "armed forces" depends primarily on whether the group is fighting on behalf a party to the conflict[102]. This suggests that a factual link to the regular armed forces would be sufficient and if a private military company is hired by a belligerent state, it is then acting on behalf of the party to the conflict[103].

In short, it is insufficiently clear when private military contractors qualify as combatants under the Geneva Conventions and the Additional Protocols thereto. It is obvious that they might qualify as such under certain circumstances, but there is a lack of clear guidelines on the matter and experts disagree on the meaning of the current legal instruments regulating combatant status.

c. Civilians

Since every person must be either a combatant or a civilian, according to the logic of international humanitarian law, when private military company employees are not

[99] *Ibid*.
[100] Report of the expert meeting on private military contractors: status and state responsibility for their actions, University Centre for international humanitarian law, Geneva, 2005 at 9 available at http://www.adh-geneve.ch/pdfs/2rapport_compagnies_privees.pdf [last consulted September 30, 2009]
[101] *Ibid*. at 12
[102] *Ibid*. at 10
[103] L.D. Beck, *supra* note 47, at 121

combatants they are civilians[104]. Whereas the Geneva Convention contains no definition of a civilian, Article 50 of Additional Protocol I provides that "a civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian".

At the same time Article 51 Additional Protocol I states that "civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities". Those who do participate in hostilities become legitimate targets and receive only minimum protections[105].

Establishing which activities amount to "taking a direct part in hostilities" is thus essential when determining which protections might apply to private military contractors[106]. However, international humanitarian law treaties do not provide a definition on the activities that constitute direct participation[107]. The ICRC Commentary on Additional Protocol I gives more guidance, where it defines direct participation as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces"[108].

As mentioned above, determining what amounts to direct participation in hostilities is also crucial in non-international armed conflict, as the distinction between combatants and civilians does not exist in these types of conflicts. Thus, as is the case in international armed conflicts, the concept of direct participation is also crucial in non-international armed conflict when determining the protections applicable to private military contractors who are active in these types of conflicts.

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[104] L. Cameron, *supra* note 77, at 587
[105] C. Mandernach, *supra* note 87, at 152
[106] E. Gillard, "Private military/security companies: the status of their staff and their obligations under international humanitarian law and the responsibilities of states in relation to their operations", (2006) at 7 available at http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0071.File.tmp/Presentation%20PMSC%20and%20Int.%20Hum.%20Law.pdf [last consulted September 30, 2009]
[107] E. Gillard, *supra* note 106
[108] Y. Sandoz, C. Swinarski & B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 august 1949*, Martinus Nijhoff Publishers, Geneva, 1987, at 618

A series of expert meetings on direct participation in hostilities under international law revisited the matter[109]. The expert process, conducted by the ICRC from 2003 to 2008, eventually led to an institutional publication by the ICRC providing interpretive guidance on direct participation in hostilities[110].

According to this publication, a specific act must meet the following three cumulative criteria in order to qualify as direct participation in hostilities. Firstly, the act must meet a threshold regarding the harm likely to result from it, meaning it must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack[111]. Secondly, a relationship of direct causation between the act and the expected harm is required[112]. Thirdly, a belligerent nexus must exist between the act and the hostilities conducted, meaning the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another party[113].

The attempts by the ICRC to provide greater clarity on the issue of direct participation are certainly laudable, but the actions of private military contractors will have to be assessed on a case to case basis until states further these efforts and adopt binding rules clarifying which activities amount to direct participation in hostilities. The difficulties surrounding the issue lead to uncertainty as to what set of repercussions civilian private military contractors might expect from their actions in armed conflict, as prosecution is possible for direct participation in the war effort.

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[109] K. Fallah, "Regulating private security contractors in armed conflicts", in S. Gumedze (ed.), *Private security in Africa. Manifestation, challenges and regulation*, ISS Monograph Series 139, 2007 at 92 available at http://www.issafrica.org/index.php?link_id=&slink_id=5218&link_type=13&slink_type=12&tmpl_id=3 [last consulted September 30, 2009]

[110] ICRC publication, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, ICRC, 2009, 91p. available at: http://www.cicr.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf [last consulted January 5, 2010]

[111] *Ibid*. at 46

[112] *Ibid*.

[113] *Ibid*.

d. Civilians accompanying the armed forces

Whereas private military contractors that fall into the civilian category would generally not be entitled to prisoner of war status upon capture, the Third Geneva Convention provides for an exception in Article 4.A (4) where it gives such status to[114]:

> "Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card."

This provision reflects the fact that certain persons exercising "support" functions, even though they are not part of the army, have traditionally accompanied armies[115]. If states employ private military contractors in such a "support" function, without requiring contractors to fight, they will most likely fall under this provision[116]. If, however, private military contractors take a direct part in hostilities they would not be able to benefit from this provision[117].

4. Mercenaries

Private military contractors might be qualified as mercenaries if they fall within the definition thereof. Three different legal instruments provide a definition of mercenary: Article 47 of Additional Protocol I, the *Organization of African Union (OAU) Convention on the Elimination of Mercenarism in Africa* of 1977[118] and the *UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries* of 1989[119].

[114] L.D. Beck, *supra* note 47, at 123
[115] L.D. Beck, *supra* note 47, at 124
[116] *Ibid*.
[117] *Ibid*.
[118] The African Convention on Mercenarism was signed in Libreville on 3 July 1977 and entered into effect on 22 April 1985. Available at: http://www.icrc.org/ihl.nsf/FULL/485?OpenDocument [last consulted October 3, 2009]
[119] Adopted by the General Assembly of the United Nations on 4 December 1989. UN doc. A/RES/44/34

Both of the international conventions on mercenaries aim to prohibit the use of mercenaries and to criminalize both the resort to mercenaries and participation in hostilities as a mercenary[120]. International humanitarian law on the other hand does not outright prohibit the use of mercenaries, nor does it criminalize their activities[121]. However, it does provide a sanction for mercenaries in the case they are captured[122]. Under Additional Protocol I, a mercenary does not have the right to be a combatant or a prisoner of war[123]. Mercenaries get similar treatment as civilians who take a direct part in hostilities. A mercenary who forfeits his right to be a prisoner of war still has the right to certain basic protections of the Fourth Geneva Convention as well as the fundamental guarantees laid down in Article 75 of Additional Protocol I.

Article 47.2 of Additional Protocol I defines a mercenary as any person who:

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

Even though some private contractors may arguably qualify as mercenaries under this definition[124], it is widely accepted that almost every private contractor is able to exclude himself from at least one of the requirements under Additional Protocol I. Given that the requirements are cumulatively applicable, an alleged mercenary could thus easily

[120] E. Gillard, *supra* note 106, at 2
[121] *Ibid*.
[122] *Ibid*.
[123] Article 47.1 of Additional Protocol I
[124] For an overview of the different requirement and the possibility of private contractors to meet with them see Z. Salzman, "Private military contractors and the taint of a mercenary reputation", 40 *N.Y.U. J. Int'l L. & Pol.* 853 (2008)

exclude himself from mercenary status.

Firstly, the requirement that a mercenary has to be specially recruited to fight in an armed conflict could be rebutted in all cases where personnel of private companies are permanent employees[125]. Arguably, they are not recruited specifically to fight in armed conflict, but to serve in another capacity as "an employee of the company". Secondly, the requirement that mercenaries be motivated by financial gain and receive substantially more pay than ordinary soldiers, is also easily avoided. Not all private military contractors receive substantially more pay than ordinary soldiers do, and, in addition, an alleged mercenary could easily claim he or she was not fighting for money but for ideological reasons instead[126]. Thirdly, requiring that a mercenary is a foreign national is also problematic. Nationals of a country may act against their own country in return for payment from a third country or organization[127]. Nationals could thus be hired with the purpose of employing them as mercenaries, but their use as such could be hidden behind their status as nationals[128]. Furthermore, it has been submitted that "it is not at all clear whether the condition of being neither a national of a party to the conflict nor a resident of a territory controlled by a Party to the conflict applies to a private military company's state of incorporation (in which case all its members would be treated as having that nationality) or the nationality of the individual member, or possibly both"[129].

The definition that was adopted in Additional Protocol I was mainly based on the definition that was provided in the *OAU Convention on the Elimination of mercenarism* of 1977, which defines a mercenary as any person who[130]:

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

[125] A. Faite, *supra* note 84, at 4
[126] S. Franklin, "South African and international attempts to regulate mercenaries and private military companies", 17 *Transnat'l L. & Contemp. Probs.* 239 (2008) at 256
[127] Report to the 59th session of the Commission on Human Rights, Report on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination of 2003, E/CN.4/2003/16,
para 25
[128] *Ibid*.
[129] L.D.Beck, *supra* note 47, at 123
[130] Article 1.1 of the Convention of the OAU for the Elimination of Mercenarism in Africa

(b) does in fact take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;
(d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflicts;
(e) is not a member of the armed forces of a party to the conflict; and
(f) is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state."

Even though the OAU convention is applicable in *all* armed conflicts, the convention, due to its regional nature, is only open to African states and only has 30 state parties to it. Furthermore, the convention does not completely forbid the recruitment of mercenaries. Article one only prohibits, governments, or any other groups, from employing mercenaries to defend themselves from those actions carried out by a liberation movement that the OAU recognizes[131].

In 1989, the UN adopted the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*. Under the UN convention, a mercenary is any person who:

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

[131] C. Kinsey, "International law and the control of mercenaries and private military companies", *Culture and Conflicts* (2008) available at: http://www.conflits.org/index11502.html [last consulted October 28, 2009]

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

> "(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence
> aimed at :
>
> (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
> (ii) Undermining the territorial integrity of a State;
>
> (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
> (c) Is neither a national nor a resident of the State against which such an act is directed;
> (d) Has not been sent by a State on official duty; and
> (e) Is not a member of the armed forces of the State on whose territory the act is undertaken."

The UN convention provides two alternate definitions of a mercenary in article one and is thus more widely applicable than Additional Protocol I in the sense that it extends to *all* armed conflicts and other situations in which they undermine a State government. However, the convention has only 32 State Parties to it and thus very limited utility.

Where some of the definitional elements of the conventions differ from Additional Protocol I, an alleged mercenary could still escape falling under the definition[132]. For example, under the conventions there is no requirement to show that the material compensation a mercenary receives is somehow excessive, this section could still be avoided by claiming that factors other than material compensation (such as ideology) are their primary motivation[133].

It follows that the international conventions that address mercenarism are largely ineffective because they do not receive broad support[134]. In addition, the rules are unlikely to become norms under customary international law, as extensive state practice

[132] S. Franklin, *supra* note 126, at 257
[133] M. Scheimer, "Seperating private military companies from illegal mercenaries in international law: proposing and international convention for legitimate military and security support that reflects customary international law", 24 *Am. U. Int'l L. Rev.* 609 (2009) at 630
[134] K. Govern & E. Bales, "Taking shots at private military firms: international law misses its mark (again)", 32 *Fordham Int'l L.J.* 55 (2008) at 95

exists against them[135]. Then again, even if there was broader consensus and even if the conventions represented the will of the international community, the cumulative requirements of the various mercenary definitions lead to virtual inapplicability of these instruments to private military companies[136]. The same applies to the Article 47 of Additional Protocol I. Even though there is significantly more support for the Protocol than for the international conventions regulating mercenarism, it is very unlikely that private military contractors will fall within the definition of mercenary displayed therein.

[135] *Ibid*.
[136] *Ibid*.

Chapter III: The need for a new international convention on private military companies

1. Introduction

As amply illustrated above, international humanitarian law does not provide sufficient guidance on the status of private military companies. Neither the Geneva Conventions and the Additional Protocols thereto, nor the conventions on mercenaries provide a straightforward answer as to what status attaches to private military companies and what consequences attach thereto. The blurred distinction between combatants and civilians leads to a situation where private military contractors often operate in a legal "grey zone" where they are not held accountable for possible abuses.

On one end of the spectrum, there are those who wish to ban private military companies completely. In this chapter, I argue that a ban is both unrealistic and undesirable. On the other hand, there are those who wish to leave the *status quo* of the law and rely completely on the self-regulatory capacity of the industry and accountability under contract. I will show however that neither of these options provides for sufficient guarantees against possible abuses. Some states have put national legislation in place to remedy the lack of regulation on the international level, but due to the transnational character of these companies they can easily evade responsibility by relocating themselves to a state that has no, or less stringent, regulations in place. Consequently, private military companies need regulation on the international level. Whereas some argue in favor of adapting the mercenary conventions, I will argue that a new convention is the best way to regulate these companies.

2. A complete ban of private military companies is both unrealistic and undesirable

Some critics of the provision of military services by private firms have argued that private military companies should be completely banned, and that the provision of military services should be renationalized[137]. However, the worldwide use of private military companies shows that a ban is unrealistic and would "work against the aim of greater transparency and accountability in the private military sector by increasing the likelihood that the industry would be pushed underground"[138]. In addition, those states that already rely on the services of private military companies are not likely to give political support to an international ban of these companies[139]. States that are involved with private military companies, be it as a state of incorporation or as an active user of these companies, are already putting regulations in place rather than outright prohibiting these firms[140]. State practice thus seems to be on the side of the private military firms[141]. Peter W. Singer argues that "the fact that private military companies 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"[142].

Even if a ban of private military companies would be realistic, it is undesirable[143]. Indeed, private military companies are a potentially powerful resource and an efficient government might be better off relying on them[144]. These companies might enhance cost-effectiveness and be more flexible or more efficient than the regular army[145].

In addition, private military companies could make a valuable contribution to international security. Given that private military companies already provide security

[137] C. Holmqvist, *supra* note 24, at 42
[138] *Ibid*.
[139] E. Gaston, "Mercenarism 2.0? The rise of the modern private security industry and its implications for international humanitarian law enforcement", 49 *Harv. Int'l L.J.* 221 (2008) at 241-242
[140] *Ibid*.
[141] P.W. Singer, *supra* note19, at 533
[142] P.W. Singer, *supra* note19, at 533
[143] C. Holmqvist, *supra* note 24, at 42
[144] *Ibid*.
[145] F. Schreier & M. Caparini, "Privatising Security: Law, Practice and Governance of Private Military and Security Companies", *DCAF occasional papers* 6 (2005) at 80 available at http://www.dcaf.ch/_docs/occasional_6.pdf [last consulted January 5, 2010]

and support to international and intergovernmental organizations, some argue that private military companies could improve the quality of UN missions[146]. Governments with capable militaries often show little interest in joining multilateral interventions into conflicts that are not of "political value" to them[147]. This often leads to troops from developing countries engaging in some of the world's most difficult military operations, without having received adequate training or equipment[148]. Contracting out to private military contractors ensures that governments do not have to risk incurring the political costs associated with sending peacekeeping troops into situations that receive little understanding or support domestically[149]. Furthermore, one of the operational challenges that the UN faces is the promptness with which it can deploy troops[150]. Making use of private military contractors could greatly accelerate setting up UN missions.

As I will explain in the next paragraphs, the shift in focus on the matter by the UN Special Rapporteur on the use of mercenaries and the UN Working Group on Mercenaries constitutes further evidence of the fact that the international community is moving away from an outright ban on private military companies.

In 1987, a UN Special Rapporteur of the Commission on Human Rights on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination was established. The role of the Special Rapporteur has been to document instances where mercenaries have been involved or implicated in human rights abuses and bring these instances to the attention of the international community when he reports to the UN General Assembly and the Commission on Human Rights[151]. As states did not adopt the UN convention on Mercenaries until 1989, the UN created the Special Rapporteur primarily to deal with the activities of mercenaries in the absence of any other procedure to deal with this phenomenon. Even though the Special Rapporteur's

[146] *Ibid*. at 81
[147] D. Brooks, "Protecting people: the PMC potential", (2002) at 5 available at http://www.hoosier84.com/0725brookspmcregs.pdf [last consulted January 3, 2010]; See also the Brahimi Report: Report of the Panel on United Nations Peace Operations of 2000, A/55/305 - S/2000/809
[148] *Ibid*.
[149] F. Schreier & M. Caparini, *supra* note 145, at 81
[150] D.M. Malone & J. Cockayne, "United Nations Peace Operations Then and Now", 9 *International Peacekeeping: The Yearbook of International Peace Operations* (2004), at 5 available at http://ssrn.com/abstract=1276123 [last consulted January 3, 2010]
[151] C. Beyani & D. Lilly, *supra* note 3, at 11

focus was the phenomenon of mercenarism, during the last few years of his mandate, the Special Rapporteur included the activities of private military companies in his reports.

A clear shift in focus is noticeable in these reports. Whereas earlier reports put private military companies outright on the same level as mercenaries, in the 2001 report the Special Rapporteur "proposes that the activities of military and security companies should be regulated, limiting their activities in this field to areas that are not inherent to the very existence of States, while not actually prohibiting the existence of such companies. Any law or regulatory mechanism must prohibit the hiring and formation of armed units composed of mercenaries"[152]. Thus, Special Rapporteur no longer puts private military companies and mercenaries on the same level, but rather differentiates the two by saying that states should prohibit the use of mercenaries by private military companies.

The opinion that private military companies cannot be assumed to be mercenaries was later confirmed in UN General Assembly resolution 58/162 of 2004[153], where it "requests all states to exercise the utmost vigilance against any kind of recruitment, training, hiring or financing of mercenaries by private companies offering international military consultancy and security services". UN General Assembly resolutions on mercenaries have since consistently repeated this wording[154].

In 2005, a Working Group on mercenaries replaced the mandate of the Special Rapporteur. The UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination is one of the 39 special procedures of the UN Human rights Council. It was established pursuant to Commission on Human Rights resolution 2005/2[155]. In March 2008, the

[152] Report to the 57th session of the Commission on Human Rights, Report on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination of 2001, E/CN.4/2001/19, para 68

[153] UN General Assembly resolution A/Res/58/162 of 2004 adopted under the agenda item Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, para 5

[154] See e.g. UN General Assembly Resolutions A/Res/59/178, A/Res/61/151, A/Res/62/145 and A/Res/63/164

[155] See website of the Working Group on mercenaries: available at http://www2.ohchr.org/english/issues/mercenaries/index.htm [last consulted October 15, 2009]

Human Rights Council extended the mandate of the Working Group for a period of three years[156]. In paragraph 2 of resolution 7/21, the Human Rights Council requested the Working Group[157]:

> "a) **To elaborate and present concrete proposals on possible complementary and new standards aimed at filling existing gaps**, as well as general guidelines or basic principles encouraging the further protection of human rights, in particular the right of peoples to self-determination, **while facing current and emergent threats posed by mercenaries or mercenary-related activities**;
>
> (b) To seek opinions and contributions from Governments and intergovernmental and non-governmental organizations on questions relating to its mandate;
>
> (c) To monitor mercenaries and mercenary-related activities in all their forms and manifestations in different parts of the world;
>
> (d) To study and identify sources and causes, emerging issues, manifestations and trends regarding mercenaries or mercenary-related activities and their impact on human rights, particularly on the right of peoples to self-determination;
>
> (e) **To monitor and study the effects on the enjoyment of human rights, particularly the right of peoples to self-determination, of the activities of private companies offering military assistance, consultancy and security services on the international market, and to prepare a draft of international basic principles that encourage respect for human rights by those companies in their activities."**

The Working Group believes that the initial step required to regulate the activities of private military companies and their employees is to establish concrete legal standards that would define a juridical framework for their activities[158]. Where resolution 7/21 of the Human Rights Council refers to "gaps that need to be filled", the Working Group is of the opinion that this requires the development of new legal norms[159]. The Working Group opines that new international regulations, most likely in the form of a new international convention are needed to bring private military companies out of the legal

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[156] *Ibid*.
[157] Own emphasis added
[158] Report of the Working Group on mercenaries of 2009, *supra* note 70, para 40
[159] *Ibid*.

"grey zone"[160].

3. Self regulation by the industry and accountability under contract by no means provide sufficient guarantees against abuse

In opposition to those who advocate a complete ban on private military companies are those who wish to let market forces play out and rely on self-regulation by the industry and accountability under contract. However, neither of these options provides sufficient guarantees against abuse by private military contractors, nor will these options lead to greater clarity on the status of private contractors under international law.

Voluntary agreements by the industry result in self-imposed codes of conduct and standards. When carrying out their contracts, private military companies would voluntarily conform to these codes and standards[161]. Clients would then assess conduct and compliance of a company with these self-imposed rules before hiring the company for a certain service[162]. Most likely, the participation of companies in self-regulatory initiatives is part of a public relations strategy, motivated by the wish to display a positive reputation to prospective clients. Furthermore, "peer pressure" within the industry could also lead companies to participate in similar voluntary agreements[163].

The International Peace Operations Association (IPOA) has taken such a self-regulatory initiative. IPOA is a non-profit trade organization created to support the burgeoning private military sector. According to IPOA their mission is to[164]:

> "Promote high operational and ethical standards of firms active in the peace and stability operations industry; to engage in a constructive dialogue and advocacy with policy-makers about the growing and positive contribution of these firms to the enhancement of international peace, development and human security; to provides unique networking and business development opportunities for its member companies; and to inform the concerned public about the activities and role of the industry.

[160] Report of the Working Group on mercenaries of 2009, *supra* note 70, para 49
[161] C. Holmqvist, *supra* note 24, at 46
[162] *Ibid*.
[163] *Ibid*.
[164] See IPOA's website at http://www.ipoaworld.org/eng/aboutipoa.html [last consulted October 15, 2009]

> IPOA is committed to raising the standards of the peace and stability operations industry to ensure sound and ethical professionalism and transparency in the conduct of peacekeeping and post-conflict reconstruction activities.
>
> All member companies subscribe to the IPOA Code of Conduct, which represents a constructive effort towards better regulating private sector operations in conflict and post-conflict environments. It reflects our belief that high standards will both benefit the industry and serve the greater causes of peace, development, and human security."

IPOA's Code of Conduct "seeks to ensure the ethical standards of IPOA member companies operating in conflict and post-conflict environments"[165]. It sets out a range of principles governing the ethics, transparency and accountability of members and reaffirms the applicability of human rights law and international humanitarian law to these companies.

A similar, albeit national, initiative is The British Association of Private Security Companies (BAPSC), which "works to promote the interests and regulate the activities of UK based firms that provide armed defensive security services in countries outside the UK[166]". The BAPSC Charter states[167]:

> "The Members of the Association shall provide such services with high professional skill and expertise whilst recognizing that the countries where they are operating may have inadequate legal frameworks. The Members note that their activities will be enhanced by an active and transparent involvement with International Organizations, governments and private and public bodies that share common interests. They agree to follow all rules of international, humanitarian and human rights law that are applicable as well as all relevant international protocols and conventions and further agree to subscribe to and abide by the ethical codes of practice of the Association".

Even though a range of companies maintain that voluntary codes are a valuable system of oversight, it must be acknowledged that "these practices are often restricted to the national boundaries of developed societies where intense competition, rather than a

[165] English version of the Code of Conduct available at http://www.ipoaworld.org/eng/codeofconduct/87-codecodeofconductv12enghtml.html [last consulted October 15, 2009]
[166] See website of BAPSC at http://www.bapsc.org.uk/ [last consulted October 19, 2009]
[167] *Ibid*.

sense of social obligation, has seen corporations adopting social responsibility ethos to advance their competitive edge in the market"[168]. Leaving companies to self-regulate when they operate in areas affected by armed conflict, and in states with a weak justice system, will not provide adequate guarantees against abuse[169].

Growth and profit remain the main motivating factors for competitive companies. Hence, companies will assess whether they ultimately benefit from establishing a code of conduct, or whether the profit opportunities offered by non-compliance are superior[170]. Companies operating in unregulated marketplaces, affected by conflict, might attach higher market value to non-compliance with these standards[171].

In addition, the only sanction for breach of the voluntary code that is available to a trade association such as IPOA is the removal of the company that is in breach from the association. Unless states or international organizations back up voluntary codes with sanctions, these codes have little value[172]. While companies might proclaim to adhere to the standards contained in a voluntary code, and participate in the drafting process thereof to enhance their public image, without real sanctions "voluntary codes might give the cover of prior untested compliance without any real commitment to punishment if the rules are broken"[173].

Contracts are available as an alternative tool for private military companies, governments and other organizations who seek to prevent military contractor abuse and who seek to clarify the status of these contractors[174]. Contracts can explicitly extend relevant norms to private contractors; they can provide for oversight and enforcement

[168] J. Cilliers & R. Cornwell, "Africa – from the privatization of security to the privatization of war?", in: J. Cilliers & P. Mason (eds.), *Peace, profit or plunder? The privatization of security in war-torn African societies*, South Africa, Institute for Security Studies, 1999, at 237
[169] *Ibid*.
[170] N. Rosemann, " Code of Conduct: Tool for Self-Regulation for Private Military and Security Companies", *DCAF publication* (2008) at 9 available at http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=94661&nav1=5 [last consulted January 2, 2010]
[171] J. Cilliers & R.Cornwell, *supra* note 168; N. Rosemann, *supra* note 170
[172] C. Holmqvist, *supra* note 24, at 47
[173] P.W. Singer, *supra* note 19, at 543
[174] L. Dickinson, "Contract as a tool for regulating PMCs", in: C. Simon & C. Lenhardt (eds.), *From mercenaries to market: the rise and regulation of private military companies*, Oxford, Oxford University Press, 2007, at 218

and can include certain specific terms such as training and accreditation requirements[175].

Whereas contracts are a potentially useful instrument to enhance clarity on legal matters surrounding private military companies, there is no guarantee that a company will comply with the terms of the contract[176]. As is the case with voluntary codes, compliance and enforceability problems arise if one relies solely on contracts to regulate this matter. Whereas reputation might be a motivating factor to comply, firms might choose non-compliance with the contract over compliance, depending on the costs such a decision ensues[177]. In addition, if a contract fails to establish effective oversight and implementation mechanism, the enforcement of these contracts is difficult. Furthermore, it is questionable whether persons who were not a party to the original contract would have the right to sue under the contract[178]. It would be difficult for these contracts to create third party beneficiary rights and in most cases, only one of the contracting parties could enforce the terms of the agreement[179]. Yet, the victims of private military contractor abuse are often third parties who should be able to make private claims[180].

Consequently, both self-regulatory options and accountability under contract provide inadequate protection against private contractor abuse. Neither option provides for the much-needed clarity concerning private contractor status and the consequences attached thereto. Hence, they are not sufficient as "stand-alone" accountability measures. However, both could serve as an avenue of reform accompanying broader reform measures on the international level.

4. National regulations cannot fill the regulatory gap

An inherent problem to domestic regulation is that smaller states might not have the power or the means to face up to these companies[181]. Even if the home state has the

[175] *Ibid*.
[176] C. Holmqvist, *supra* note 24, at 28
[177] *Ibid*.
[178] L. Dickinson, *supra* note 174, at 233
[179] L. Dickinson, *supra* note 174, at 224
[180] *Ibid*.
[181] P.W. Singer, *supra* note 19, at 535

wherewithal, such regulation is always difficult, especially given the extraterritoriality issues that are set out below[182]. Furthermore, as these companies often work in weak or failed states with a feeble justice system, it might be hard to monitor them properly[183].

A number of states, notably South Africa, the United States and the United Kingdom, have domestic regulations in place that regulate private military companies. However, these domestic regulations do not remedy the lack of accountability in the private military sector, as the sector is transnational in nature[184]. Domestic regulation will rarely reach all of a private military company's activities or personnel because these companies often operate abroad or draw personnel from third states[185]. In order for domestic legislation to be effective, the legislation would have to give the state broad extraterritorial jurisdiction[186].

Furthermore, private military companies can relocate themselves in order to circumvent domestic legislation or escape prosecution[187]. Domestic legislation that is too tight forces companies out of the state where they were originally incorporated[188]. An example of this is the private military company Executive Outcomes, originally based in South Africa. After South Africa passed the Regulation of Foreign Military Assistance Act[189], Executive Outcomes went officially out of business and reconfigured itself while altering its *modus operandi*[190]. Even though the South African Act suffered from major enforcement problems, and South Africa later had to introduce new legislation[191] to deal with private military companies, this case illustrates the ability of private military companies to move to a state with less stringent domestic regulations. Such actions may create a "race to the bottom"[192]. It follows that tougher domestic regulation by

[182] *Ibid*.
[183] S. Percy, "Domestic regulation", 46:384 *Adelphi Series* 25 (2006) at 37 available at http://pdfserve.informaworld.com/34909_731566751_769778562.pdf [last consulted January 5, 2010]
[184] *Ibid*.
[185] E. Gaston, *supra* note 139, at 240-241
[186] S. Percy, *supra* note 183, at 37
[187] P.W. Singer, *supra* note 19, at 535
[188] S. Percy, *supra* note 183, at 37
[189] South African Regulation of Foreign Military Assistance Act No. 15 of 1998
[190] K. Pech, *supra* note 22, at 96
[191] The South African Prohibition of Mercenary Activities in Countries of Armed Conflict Act No. 27 of 2006 repeals the repeal the Regulation of Foreign Military Assistance Act No. 15 of 1998
[192] E. Gaston, *supra* note 139, at 240-241

individual states alone is not sufficient.

In addition, even if private military contractors fall within the reach of a country's national legislation, and the private military company does not try to remove itself from this reach, possible enforcement issues are in turn also often of an extraterritorial nature[193]. Unless states make coordinating efforts to ensure enforceability in any country other than the home state, private military companies can easily evade domestic regulations or liability mechanisms being enforced against them[194].

5. Adapting the mercenary conventions is both undesirable and unworkable

Some authors submit that a possible approach to remedy the lack of clarity surrounding private military companies would be for the international community to adapt the international mercenary conventions. However, this approach seems both unworkable, given the limited support that these conventions have obtained, and undesirable, given the specific context for which these conventions were drafted.

Indeed, the contemporary image and concept of mercenarism only came into focus during the process of decolonization[195]. Even so, it was not so much the phenomenon of mercenarism that was condemned, but rather the support that colonial governments received from mercenaries in an attempt to oppose national liberalization struggles[196]. The international community passed most of the regulations, resolutions, and conventions in response to the mercenary activities in Africa immediately following decolonization[197].

[193] P.W. Singer, *supra* note 19, at 539-540
[194] E. Gaston, *supra* note 139, at 240-241
[195] Y. Sandoz, "Private security and international law", in J.Cilliers & P. Mason (eds.), *Peace, profit or plunder? The privatisation of security in war-torn African societies*, South Africa, Institute for Security Studies, 1999, at 203-204
[196] *Ibid*.
[197] E. Frye, "Private military firms in the new world order: how redefining "mercenary" can tame the "dogs of war", 73 *Fordham L. Rev.* 2607 (2005) at 2639

In 1968, the UN General Assembly adopted Resolution 2465 on "the Granting of Independence to Colonial Countries and Peoples"[198], which tried to make the use of mercenaries "against movements for national liberation and independence" a criminal act. In 1973, the UN General Assembly adopted Resolution 3103 on basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes[199], which also aptly illustrates that states addressed the issue of mercenarism mainly in the context of (post-) colonial Africa[200]:

> "The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of colonialism and alien domination is considered to be a criminal act and these mercenaries should accordingly be punished as criminals[201]"

In this same context, the UN Security Council also issued a number of incident-specific resolutions relating to mercenaries[202]. For example, the Security Council condemned Portugal on several occasions for allowing mercenaries to operate from within its colonial holdings[203].

Because of the use of mercenaries in the colonial context, many powerful Western states originally opposed the regulation of mercenarism and very few states took part in the mercenary conventions[204]. Equally because of the period in which these international instruments came into being their definitions are particularly difficult to apply to the majority of private military contractors. The existing regulations specifically address individuals working against national governments or national liberation movements[205].

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[198] Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN General Assembly resolution 2465, U.N. GAOR, 23rd Sess., Supp. No. 18, at 4, U.N. Doc. A/7218 of December 20, 1968 (53 yes-votes, 8 no-votes and 43 abstentions)

[199] Declaration on basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes, UN General Assembly resolution 3103, U.N. GAOR, 28th Sess., Supp. No. 30, at 142, U.N. Doc. A/9030 of December 12, 1973 (53 yes-votes, 13 no-votes and 43 abstentions)

[200] Y. Sandoz, *supra* note 195

[201] Paragraph 5 of the resolution

[202] E. Frye, *supra* note 197, at 2627

[203] *Ibid*.

[204] E. Gaston, *supra* note 139, at 241-242

[205] P.W. Singer, *supra* note 19, at 531-532

Attempts by the Special Rapporteur and the Working Group on mercenaries to adapt the mercenary definition and to obtain universal adherence to the UN mercenary convention have hitherto been unsuccessful. Following two expert meetings on traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, held in Geneva in 2001 and 2002[206], the Special Rapporteur on mercenaries proposed to amend the 1989 UN Convention as follows[207]:

> "For the purposes of the present Convention,
>
> 1. A mercenary is any person who:
>
> (a) Is specially recruited locally or abroad in order to participate in an armed conflict or in any of the crimes set forth in article 3 of this Convention;
> (b) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict or of the country in which the crime is committed. An exception is made for a national of the country affected by the crime, when the national is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him. Nationality obtained fraudulently is excluded;
> (c) Is motivated to participate in an armed conflict by profit or the desire for private gain;
> (d) Does not form part of the regular armed forces or police forces at whose side the person fights or of the State in whose territory the concerted act of violence is perpetrated. Similarly, has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.
>
> 2. A mercenary is also any person who, in any other situation:
>
> (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
>
> (i) Overthrowing a government or otherwise undermining the constitutional, legal,

[206] First expert meeting on traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Geneva, 29 January – 2 February 2001, E/CN.4/2001/18 and Second expert meeting on traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Geneva, 13 May – 17 May 2002, E/CN.4/2003/4

[207] Report to the 60th session of the Commission on Human Rights, Report on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination of 2004, E/CN.4/2004/15, para 47

economic or financial order or the valuable natural resources of a State; or

(ii) Undermining the territorial integrity and basic territorial infrastructure of a State;

(iii) Committing an attack against the life, integrity or security of persons or committing terrorist acts;

(iv) Denying self-determination or maintaining racist regimes or foreign occupation;

(b) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict or of the country in which the crime is committed. An exception is made for a national of the country affected by the crime, when the national is hired to commit the crime in his country of nationality and uses his status as national to conceal the fact that he is being used as a mercenary by the State or organization that hires him. Nationality obtained fraudulently is excluded;

(c) Is motivated to participate in an armed conflict by profit or the desire for private gain;

(d) Does not form part of the regular armed forces or police forces at whose side the person fights or of the State in whose territory the concerted act of violence is perpetrated. Similarly, has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces."

With the amendments, the Special Rapporteur, *inter alia*, sought to clarify the nationality requirement and to prevent those wishing to avoid accountability from abusing this condition[208]. He also sought to simplify the requirement of motive and especially the excessive gain requirement and widen the scope of activity in which mercenaries might be involved in armed conflict, beyond direct fighting[209].

Most notably, the proposed definition did not directly address private military companies. After further discussion on the issue in a third meeting of experts[210] and in the subsequent reports of the Special Rapporteur, the Working Group concluded that a new international convention on the regulation of the private military industry is needed[211]. While the Working Group reiterates that the UN convention remains the only

[208] Third expert meeting on traditional and new forms of mercenary activities as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Geneva, 6 December- 10 December 2004, E/CN.4/2005/23, para 61

[209] *Ibid*.

[210] *Ibid*.

[211] Oral statement by Mr. Alexander Ivanovich Nikitin, President of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Human Rights council 10th session, Geneva, March 6, 2009, at 2 available at: http://209.85.229.132/search?q=cache:FNx1pdY7UkQJ:www2.ohchr.org/english/issues/mercenaries/docs/Statement_Nikitin_HRC10_6Mar09.doc+Oral+statement+by+Mr.+Alexander+Ivanovich+Nikitin,&cd=1&hl=en&ct=clnk&gl=za [last consulted October 18, 2009]

universal instrument dedicated to addressing mercenarism, it also recognizes that many activities performed by private military companies do not easily fall under this definition[212]. Hence, regulating private military companies based on the UN mercenary convention alone is impossible, even after any potential amendment of this convention[213]. The UN should elaborate and adopt a new international legal instrument in the format of a new convention on private military companies[214].

Indeed, given the specific context for which the mercenary conventions were drafted, and the limited participation therein, extending these instruments to include private military companies seems unlikely to be a successful way of regulating these companies. However, the there is still a role to be played by the UN mercenary convention in preventing the use of mercenaries as a means of violating human rights and the rights of peoples to self-determination[215]. As will be set out below, an international convention on private military companies should contain the prohibition for these companies to hire mercenaries. As a result, fine-tuning the definition of what constitutes a mercenary will also indirectly influence the regulation of private military companies.

[212] Report of the Working Group on mercenaries of 2009, *supra* note 70, para 40
[213] *Ibid*., para 73
[214] *Ibid*.
[215] *Ibid*., para 72

Chapter IV: Regulatory options when adopting a new convention on private military companies

1. Introduction

The benefits of addressing the privatization of security at the international level are clear, given the transnational nature of companies themselves, their fields of operation, the identity of clients and the effects of privatization[216]. This chapter will broadly lay out the issues a new international "Convention on Private Military Companies" should, as a minimum, address.

On the outset of this chapter, it is important to note that a number of states elaborated a draft "International Convention on Private Military and Security Companies" (Draft Convention) for the purpose of a two-day regional consultation for the Eastern European Group and Central Asian Region, carried out by the UN Working Group on the use of mercenaries[217]. I will reference the Draft Convention where suitable.

A first element to consider in an attempt to regulate private military companies is to establish which actors should fall under the definition of private military company and therefore which firms need regulation[218]. As set out above, the new convention should contain a broad definition, as limiting the definition might go against the purpose of international humanitarian law. In setting out to define private military companies, the new convention could prescribe a definition similar to the one used in this thesis. For clarity purposes, I will repeat that definition here[219]:

"Private military companies are commercial enterprises that:

[216] C. Holmqvist, *supra* note 24, at 42
[217] Draft International Convention on Private Military and Security Companies, outcome of regional consultations held in Moscow from 16-18 October 2008. Draft available at http://www.unwg.rapn.ru/en/legislation.htm [last consulted November 18, 2009]
[218] P.W. Singer, *supra* note 19, at 542
[219] Based on a definition proposed by Carlos Ortíz: C. Ortíz, *supra* note 48

- offer services directly involving the exercise of force by military means;
- offer services potentially involving the exercise of force by military means;
- transfer or enhance the potential to exercise force by military means to clients."

Over-regulating the matter will deter states from becoming a state party to the convention and will lead private military companies to advocate against the elaboration of regulation at the international level. The convention should therefore contain a minimum of rules that provide a maximum of clarity in those areas that need external legal instruction in the form of an international convention[220].

In this chapter, I argue that a system of international operating licenses should be established which dictates which private military companies can operate legally in the international arena and which companies cannot. The new convention should further include specific provisions requiring respect for humanitarian law and provisions ensuring that possible transgressions by private military companies do not remain without punishment. Further, the convention should include a list of activities that these companies cannot exercise and that remain the sole prerogative of the state. Most importantly, private military companies should be prohibited from taking a direct part in hostilities, unless when they are incorporated in a state's army or when deployed as UN forces. In addition, lack of compliance with these rules should lead to criminal responsibility of both private military contractors and the companies themselves and to possible loss of a company's international operating license.

2. Issues the convention has to address

a. International licensing regime

The previous chapter demonstrates that one of the problems with regulating private military companies at the national level is the creation of a "race to the bottom" whereby private military companies seek to relocate themselves in the state that has the least stringent regulation in place. This problem would not exist to the same extent if the

[220] P.W. Singer, *supra* note 19, at 543

international convention would impose *all* states to introduce a national licensing regime. The Draft Convention proposes a system of national licenses combined with national registration[221]. However, in all likelihood the implementation of such a regime will differ highly from state to state. In light of seeking the greatest possible transparency, it seems that setting up an international licensing system would be the best regulatory option to adopt in the new convention.

Setting up such an international licensing regime will allow distinguishing the legitimate company from the lone mercenary[222]. A body set up under the UN could keep a register of private military companies that conform to agreed standards of operation and thereby "accredit" such companies with a certain degree of legitimacy[223]. For a company to qualify for a license, it should meet a number of basic requirements. These include, but do not have to be restricted to, vetting of private military employee backgrounds and private military company *modus operandi*. The license would allow the company to operate as such, rather than requiring a license for each single contract.

The costs of setting up such a licensing regime have to considered when designing a new convention[224]. Even though this thesis will not discuss the economics in detail, the costs of the licensing regime will influence the type of regime that states are likely to favor, and the success thereof[225]. Some experts argue in favor of a complex, multi-layered licensing system where each individual contract requires a license in addition to the company having a general operating license[226]. However, the more complex the licensing system becomes, the higher the costs that attach to it. If the costs for states to operate such a system are too high, they might be deterred from becoming a state party to the new convention. It therefore seems appropriate to limit the international licensing system to a general license, issued by a body financed in part by state parties and in part

[221] Article 14 and 15 of the Draft Convention on Private Military and Security Companies, *supra* note 217
[222] M. Scheimer, *supra* note 133, at 642
[223] C. Holmqvist, *supra* note 24, at 46
[224] P.W. Singer, *supra* note 19, at 543-544
[225] *Ibid*.
[226] See e.g. UK Green Paper to the House of Commons, "Private military companies: options for regulation", London, Stationery Office, 2002 available at http://www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_privatemilitarycompanies last consulted [last consulted November 17, 2009] and K.A.O'brien, "Private military companies: options for regulation", UK Foreign Office, 2002 available at http://www.ssrnetwork.net/uploaded_files/3541.pdf [last consulted November 17, 2009].

by firms applying for or carrying an international license[227].

After adopting the convention, individual states would still have the option to impose additional national licensing or registration requirements. Whereas the international operating license would be a minimum requirement for the legality of operations of private military companies, requiring national registration for individual contracts, for example, could enhance transparency and could help states in carrying out their other obligations under the convention, such as ensuring that violations of international humanitarian law are not left unpunished.

b. Specific provisions requiring respect for international humanitarian law

Common article one to the Geneva Conventions requires states "to respect and to ensure respect for the present Convention in all circumstances"[228]. As such, the obligation to respect and ensure respect applies to international conflicts and to non-international conflicts. The obligation to respect and to ensure respect for humanitarian law is a two-fold obligation. "To respect" requires a state to do everything in its power to ensure that everyone under its authority respects the rules of international humanitarian law[229]. "To ensure respect" means that states must do everything in their means to ensure that the rules of international humanitarian law are respected by all others, especially by those actively participating in a conflict[230].

It follows that states are *already* under an obligation to ensure that private military companies comply with international humanitarian law. This obligation is apparent when states make use of the services of private military companies, but might not be entirely clear when private military companies merely operate from within the jurisdiction of the state. To ensure respect of common article one to the Geneva Conventions, the new

[227] P.W. Singer, *supra* note 19, at 543-544
[228] This provision was reiterated in Article 1, paragraph 4, of Additional Protocol I.
[229] L. Boisson de Chazournes & L. Condorelli, "Common Article 1 of the Geneva Conventions revisited: Protecting collective interests ", 837 *ICRC Review* 67 (2000) available at http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JQCP [last consulted January 5, 2010]
[230] *Ibid*.

convention should reiterate this obligation for states, particularly in respect to private military companies.

In addition, the convention should specifically require private military companies to adhere to the rules of international humanitarian law. The Draft Convention does provide for such an obligation where it states that[231]:

> "The personnel of private military and security companies providing military and security services in the territory of the foreign state has to observe the norms of international humanitarian law, above all as set out in the Geneva Conventions from August 12, 1949 and in the Additional Protocols from July 8, 1944 and strictly adhere to the norms and standards of ensuring human rights and freedoms."

Furthermore, private military companies should be obliged to provide their personnel with training in international humanitarian law[232]. It would not suffice to rely on earlier training employees might have received in previous careers[233]. Failure to do so could accrue in criminal responsibility of the company and possible loss of a company's international operating license.

c. List of excluded activities

In addition to containing provisions requiring states and private military companies to respect international humanitarian law, the convention should contain a list of activities a private military company cannot, or can under limited circumstances, engage in. The Working Group on mercenaries has suggested that states should agree on a list of activities in the military and security sphere that are non-outsourceable to the private sector and remain a prerogative of the state[234].

Firstly, the convention should contain a prohibition for private military companies to

[231] Article 18.5 of the Draft Convention on Private Military and Security Companies, *supra* note 217
[232] E.C. Gillard, *supra* note 106, at 7
[233] *Ibid*.
[234] Report of the Working Group on mercenaries of 2009, *supra* note 70, para 51

hire mercenaries. As set out above[235], the ongoing attempts to adapt the UN mercenary convention will be important in light of this prohibition. The convention would only allow private military companies to use properly vetted employees who do not qualify as mercenaries. The Working Group on mercenaries has suggested that such a prohibition could be linked to a prohibition for private military companies to participate in overthrowing legitimate governments and political authorities[236]. In addition, the Draft Convention proposes that a provision be included which invites states to consider ratification of the UN mercenary convention[237].

Secondly, private military companies should be prohibited from engaging in activities that amount to direct participation in hostilities, except for when they are either formally incorporated in a state's army or when they are deployed by the UN[238]. I will discuss both of these exceptions in more detail below[239]. In addition, the new convention should specify that the prohibition to take a direct part in hostilities does not amount to a loss of the right of self-defense, which would remain a legitimate exception to the use of force by private military contractors.

The Draft Convention proposes the following provision on "impermissibility of the use of force"[240]:

> "Each State Party shall take such legislative and other measures as may be necessary to prohibit private military and security companies and their personnel to directly participate in armed conflicts of international or non-international character in the territory of any state, in military actions or in terrorist acts aimed at:
> - Overthrow of legitimate governments or undermining in any way of constitutional order, legal, economic, financial bases of the state;
> - Coercive change of internationally acknowledged borders of the state;
> - Violation of sovereignty, support of foreign occupation of a part or the whole territory of state;
> - Encroachment on the life, physical immunity or security of physical persons,

[235] Chapter III .5
[236] Report of the Working Group on mercenaries of 2009, *supra* note 70, para 51
[237] Article 8 of the Draft Convention on Private Military and Security Companies, *supra* note 217
[238] K.A. O'brien, "What should and what should not be regulated?', in: C. Simon & C. Lenhardt (eds.), F*rom mercenaries to market: the rise and regulation of private military companies*, Oxford, Oxford University Press, 2007, at 45
[239] Sub d and e
[240] Article 9 of the Draft Convention on Private Military and Security Companies, *supra* note 217

- Acts of terrorism,
- Establishment of control over the natural resources of the state;
- Coercive extrusion of population from areas of permanent residence."

By the introduction of a provision that prohibits private military companies to take a direct part in hostilities it becomes apparent that private contractors are, in principle, civilians under international humanitarian law. As civilian do not have the so-called "combatant's privilege" they are not allowed to participate in hostilities[241].

Lastly, other activities associated to private military companies, such as illicit arms brokering, could be included in the list of excluded activities. Even though arms brokering activities can be a legitimate part of the international arms trade, some unscrupulous brokers have exploited the current lack of controls to facilitate arms transfers to regions of instability and governments and rebel groups under international arms embargoes[242]. At the UN level, efforts to regulate illicit brokering are currently underway[243]. Any acquisition, import, export or possession of weapons by private military companies should be legitimate. The new convention could make further exclusions with reference to the *United Nations Convention against Transnational Organized Crime*[244] and its relevant protocols, including the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*[245] and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*[246]. Whereas the Draft Convention does refer to the prevention of illicit trafficking in firearms[247], it fails to refer to the UN crime convention or the protocols thereto. To maintain coherence in the international law framework, it

[241] This privilege derives from Article 43(2) of Additional Protocol I. See L. Cameron, *supra* note 80 and K. Dörmann, *supra* note 80
[242] See website of "International action network on small arms" at http://www.iansa.org/issues/arms_brokers.htm [last consulted November 17, 2009]
[243] UN General Assembly Resolution 60/81 of 8 December 2005 led to the establishment of a Group of Governmental Experts that met in three sessions between November 2006 and June 2007. See "Small Arms Survey" website at http://www.smallarmssurvey.org/files/portal/spotlight/brokering/brok.html [last consulted November 17, 2009]
[244] This Convention was adopted by UN General Assembly resolution A/RES/55/25 of 15 November 2000 and currently has 151 State parties to it.
[245] The Protocol was adopted by UN General Assembly resolution A/RES/55/255 of 31 May 2001 and currently has 79 state parties to it.
[246] The Protocol was adopted by UN General Assembly resolution A/RES/55/25 of 15 November 2000 and currently has 135 state parties to it.
[247] Article 11 of the Draft Convention on Private Military and Security Companies, *supra* note 217

might be desirable to include all the fore-mentioned legal instruments in the new convention.

d. Obligation for states to incorporate in the army

The new convention would contain a general prohibition for private military companies to participate in combat, except for when formally incorporated in a state's army. Hence, any state wishing to employ a private military contractor whose employees are likely to engage in combat would integrate those individuals into its armed forces through its normal recruitment procedures[248].

States seem reluctant to incorporate private military contractors in their armies out of concern of consequences if private military contractors commit abuse. However, even without incorporating private contractors into the army, states cannot absolve themselves of their responsibilities by hiring private contractors[249]. States bear responsibility for violations of international humanitarian law that are attributable to them and cannot escape accountability because a private company carries out a given activity[250].

The *Draft Articles on Responsibility of States for Internationally Wrongful Acts* of 2001 reaffirm state responsibility for state organs and agents in the following manner[251]:

> "Article 5. Conduct of persons or entities exercising elements of governmental authority:
> The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

[248] L. Cameron, *supra* note 77, at 596
[249] E.C. Gillard, *supra* note 106, at 8
[250] *Ibid*.
[251] Draft Articles on Responsibility of States for Internationally Wrongful Acts, elaborated by the International Law Commission of the United Nations and submitted to the General Assembly at its 53rd session. UN doc A/56/10 of 30 October 2001. Available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf [last consulted November 19, 2009]

> Article 8. Conduct directed or controlled by a State:
> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct."

Even though the issue of state responsibility is a complex one and falls outside the scope of thesis, it is apparent that states *already* bear responsibility for the actions of private military companies they employ. Hence, introducing a requirement to incorporate these private military contractors in their armies if they wish to deploy them in situations of armed combat is not excessive and will enhance clarity as to the rules of international humanitarian law that are applicable to them. Private military contractors will clearly qualify as combatants in international armed conflicts when states incorporate them in the army. Any act amounting to direct participation in hostilities without having the required incorporation in the army would then be illegal.

Furthermore, even though the status of combatant does not exist in non-international armed conflict, after incorporation into the army, the rules and regulations applicable to these contractors will be the same as those applicable to regular armed forces belonging to a state. This inclusion will facilitate prosecution in cases of abuse, and will enhance overall transparency.

e. The special case of UN use of private military contractors

A second exception to the rule prohibiting private military contractors to engage in combat would be the case where the UN employs private military contractors to form part of one of its missions.

The UN has already made use of private military contractors in an auxiliary role for logistics or security[252]. As already touched upon in the previous chapter[253], the UN could potentially benefit from using private military companies more extensively,

[252] UK Green Paper, *supra* note 226, para 56
[253] Chapter III.2

especially given the difficulties the UN faces in deploying troops. An independent report on UN peacekeeping missions (Brahimi report) indicates that UN missions indeed face a host of problems, ranging from slow deployment to under-equipment of troops and organizational problems[254]. The report indicates that developed economies contribute increasingly fewer troops to UN missions and that developing countries end up sending troops instead. These troops sometimes lack rifles, helmets or transport capability[255]. Furthermore, both troops from developed and developing states might be untrained in peacekeeping missions and the various contingents in an operation are unlikely to have previously cooperated[256].

Before entering into any further detail on the UN use of private military contractors, it is important to lay out broadly the different types of missions that UN troops engage in and the law that is applicable to these troops. The different types of UN missions are commonly known as peace-making operations, peacekeeping operations, peace-building operations and peace-enforcement operations[257]. The boundaries between the various types of operations have become increasingly blurred and the use of force by UN missions might occur in various situations, if authorized by the Security Council[258]. In addition, the extent of the applicability of international humanitarian law to UN troops has been the subject of much debate. For the purpose of this thesis, it is important to point out the following two documents: the *Convention on the Safety of United Nations and Associated Personnel*[259] which reaffirms that UN troops are protected under international humanitarian law, and the *UN Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*[260] which indicates that UN forces should respect international humanitarian law. The principles contained in the

[254] Report of the Panel on United Nations Peace Operations of 2000, UN doc. A/55/305 - S/2000/809, commonly known as the Brahimi Report
[255] Brahimi Report, *supra* note 254, para 108
[256] *Ibid*.
[257] UN Department of peacekeeping operations, United Nations peacekeeping operations – principles & guidelines, NY, UN Secretariat, 2008, at 18
Available at http://peacekeepingresourcehub.unlb.org/Pbps/Library/Capstone_Doctrine_ENG.pdf [last consulted January 5, 2010]
[258] *Ibid*.
[259] *Convention on the Safety of United Nations and Associated Personnel* of 1994 adopted by UN General Assembly resolution A/RES/49/59.
[260] UN Secretary General, *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, 6 August 1999, UN doc. ST/SGB/1999/13.

latter document are reaffirmed in the Brahimi report, and more recently, in a document nicknamed the Capstone Doctrine, which sets out principles and guidelines for UN peacekeeping operations[261]. However, neither the bulletin, nor the Brahimi report or the Capstone Doctrine is a legally enforceable document. Hence, to date no legally binding rule explicitly subjects UN troops to international humanitarian law.

The new convention on private military companies should explicitly provide for the possibility of UN use of private military contractors, both in support functions as well as in combat functions. Where private military contractors participate in a UN mission, they would be entitled to participate in hostilities to the extent that the Security Council authorizes such participation. Private contractors employed by the UN would thus be civilians or combatants under international humanitarian law, depending on the specifications given in the Security Council mandate. If a UN mission is allowed to use lethal force in personal self-defense only, and if the UN forces do not exceed this mandate, all the protections international humanitarian law offers to civilians would apply[262]. In addition to allowing UN use of private military companies, the new convention should unambiguously state that private military contractors employed by the UN are bound by the principles and rules of international humanitarian law.

f. Obligation for states to ensure violations of international law by private military contractors are punished

If private military contractors commit violations of international humanitarian law, these typically take place abroad, which might lead to extraterritorial jurisdiction problems. The exercise of extraterritorial jurisdiction might give rise to sovereignty concerns, as states might risk interfering in another state's domestic affairs[263]. Whereas states can presumably exercise universal jurisdiction over the commission of certain "universal crimes", such as genocide, crimes against humanity, war crimes and torture, the true

[261] UN Department of peacekeeping operations, *supra* note 257
[262] International Criminal Court Pre-trial Chamber, Decision on the prosecutor's application under article 58, in the case of the prosecutor v. Bahr Idriss Abu Garda of 7 May 2009, ICC-02/05-02/09, para 15
[263] C. Ryngaert, "Litigating abuses committed by private military companies", 19 *Eur. J. Int'l L.* 1035 (2008) at 1040

meaning of universal jurisdiction remains controversial[264]. While the Geneva Conventions contain provisions explicitly conferring universal jurisdiction upon states to either prosecute or extradite the presumed perpetrators of grave breaches of the conventions, state practice as to this *aut dedere aut judicare* provision is uneven[265]. Hence, trials for private military company transgressions have rarely taken place.

The International Criminal Court could potentially remedy this lack of of enforcement at the national level. However, thus far the Court has not conducted any investigations into private military contractor misconduct. In addition, the International Criminal Court does not have truly universal jurisdiction[266]. According to Article 12 of the Rome Statute, the Court can only exercise jurisdiction if crimes were committed by: a national of a state party to the statute, on the territory of a state party to the statute, or if a state voluntarily accepts the exercise of jurisdiction by the Court over a certain situation[267].

Some states that use private military companies extensively, notably the United States, are not a party to the Rome statute. Those states not a party to the Statute reject the assertion that the International Criminal Court has jurisdiction over the nationals of non-consenting states[268]. The United Sates for example, has even adopted special legislation shielding Americans from prosecution before the International Criminal Court, which is known as the American Service-members' Protection Act of 2002. Clearly, merely relying on the International Criminal Court to remedy the lack of judicial action at the national level will thus not resolve the lack of enforcement of the laws applicable to private military companies.

The new convention should contain a general *aut dedere aut judicare* provision in the style of the one contained in the Geneva Conventions and in Additional Protocol I[269],

[264] J. Colangelo, "The legal limits of universal jurisdiction", 47 *Va. J. Int'l L.* 149 (2006) at 150-151
[265] C. Ryngaert, *supra* note 263
[266] C.S. Jordan, "Who will guard the guards? The accountability of private military contractors in areas of armed conflict", 35 *New Eng. J. on Crim. & Civ. Confinement* 309 (2009) at 331-332
[267] Article 12 of the Rome Statute of the International Criminal Court of 17 July 1998, U.N. Doc. A/CONF.183/9*
[268] C.S. Jordan, *supra* note 266
[269] Universal jurisdiction clauses can be found in the provisions regarding punishment of grave breaches: Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention, Article 146 of the Fourth Geneva Convention and Article 82 of Additional

that reiterates the obligation of all states to prosecute or extradite private military contractors and companies who have committed abuses of international humanitarian law. The inclusion of such a provision will help ease sovereignty concerns when states exercise extraterritorial jurisdiction[270]. The obligation to extradite or to prosecute should apply whether the alleged perpetrations of international humanitarian law were committed locally or abroad, and regardless of the nationality of the offender or of the company. Hence, the provision would entail true universal jurisdiction. Nonetheless, the convention should contain a provision mitigating this broad assertion of jurisdiction by the introduction of a complementarity principle. The exercise of extraterritorial jurisdiction should remain a "reserve tool" in the fight against impunity of private military contractors, and should only apply where the justice system of the country that was home to the violations is unable or unwilling to do so[271]. After it has been established that the home state is unable or unwilling to prosecute, states having the closest link to the crimes committed should preferentially try offenders over other states.

g. Punishments available to private military companies

Whereas it is clear that private military employees can incur criminal responsibility for their actions, the new convention should extend the possibility to impose criminal sanctions to the companies themselves. Even though criminal law does not exactly apply to corporations as it does to natural persons, hosts of legal systems do allow a corporation to be held criminally liable for crimes that have been committed by its agents[272]. In the case of private military companies, individual actors could incur fines or imprisonment, while the company could be punished financially and loose its international operating license[273]. By introducing a full range of criminal sanctions for both individual actors and companies, the convention would guarantee maximum accountability. As some states might have a different interpretation of the *ne bis in idem*

Protocol I.
[270] C. Ryngaert, *supra* note 263
[271] Human Rights Watch Report, "Universal Jurisdiction in Europe: the state of the art", (2006) at 32 available at http://www.hrw.org/en/reports/2006/06/27/universal-jurisdiction-europe [last accessed January 5, 2010]
[272] C.S. Jordan, *supra* note 266
[273] *Ibid*.

principle in criminal law, the extent to which both company and individual actor could be punished for the same offence would be left to the discretion of member states to the convention.

Conclusion

In this thesis I began from the premise that the private military industry, a relatively new industry, is apparently here to stay. Being a new actor in the international field, the regulatory framework surrounding the private military industry is by no means clear. In this thesis, I specifically assess the status of private military companies under international humanitarian law. Even though these companies do not operate in a legal vacuum, certain legal "grey zones" do exist, as a result of which certain abuses committed by private military companies in the course of their operations have gone unpunished.

Because of such allegations, some argue in favor of a complete ban of private military companies. However, these companies are used worldwide, and an outright ban would be unrealistic. Furthermore, it would be undesirable to ban them completely, as the use of these companies holds promise for both states and other international actors.

Examining the international instruments that are applicable to private military contractors, it becomes clear that these contractors are either combatants or civilians under international humanitarian law. In limited circumstances they might qualify as mercenaries, but it is very unlikely this would be the case, as the legal instruments regulating mercenarism were not drafted with the private military industry in mind.

Though private military companies already have a status under international humanitarian law, the structure and *modus operandi* of these companies creates difficulties for applying existing humanitarian law provisions, which leaves a "legal murkiness" that companies handily exploit. Different regulatory options are advanced by different actors: some wish to ban private military companies, some prefer self-regulation, others would like to fill international regulatory gaps by promulgating national regulations and yet others are in favor of adapting the mercenary conventions to include private military companies. However, these regulatory options do not clarify the status of private military contractors under international humanitarian law nor lead to a

higher punishment rate of private military company abuse, making them unsatisfactory.

I defend the view that given the transnational nature of private military companies, their fields of operation and their clients, establishing a new convention on private military companies would be the best regulatory option. A new convention would clarify the status of private military contractors, and could lead to greater respect of international humanitarian law through the reaffirmation of certain existing obligations as well as through the introduction of new obligations.

A number of states have already endorsed a, albeit non-binding, document on private military companies, which reaffirms existing obligations under international humanitarian law. This document (known as the Montreux document[274]) indicates a willingness of states to engage in negotiations on the subject. Recently, the Working Groups on mercenaries has also come to the conclusion that the development of new international regulations, most likely in the form of a new international convention, are needed to bring private military companies out of the legal "grey zone". The Working Group is now in the process of establishing shared understanding among states about standards for the regulation of the private military industry[275].

The process of consultation and negotiation initiated by the Working Group is certainly a valuable one, and I can only hope that this thesis might contribute to the elaboration of an effective international convention that is widely embraced by the international community[276].

[274] *Cfr. supra* note 54
[275] Report to the 10th session of the Human Rights Council, Report on the regional consultation for the Eastern European Group and Central Asia region on the activities of private military and security companies: regulation and oversight of 2009, A/HRC/10/14/Add.3, para 30
[276] *Ibid*. para 40

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