

## CONTEMPORARY PRIVATE MILITARY FIRMS UNDER INTERNATIONAL LAW: AN UNREGULATED ‘GOLD RUSH’

### ABSTRACT

A great deal of genuine alarm has been generated by the lack of oversight of private military firms (PMFs) and their ever-increasing role in the prosecution of war. As Iraq demonstrates, there are numerous issues pertaining to the operations of, contracting with, and rules governing the operation of PMFs. PMF activities span a number of fields ranging from military training to logistics, they bid for overseas military assistance contracts with the knowledge of their respective governments, and occasionally execute the foreign policy aims of their governments. This article has as its central aim an exploration of the thorny legal issues raised by the commodification of force. At the heart of the argument is the reality that PMFs maintain the ability to inflict violence on a scale previously reserved to sovereign nations and the real potential to violate humanitarian norms. Yet, they are largely inadequately regulated under existing domestic and international frameworks and thus bear hazy legal liability and sanction.

### I INTRODUCTION

A century ago, sociologist Max Weber, identified the State as that entity which ‘successfully upholds a claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order’.<sup>1</sup> Two general reasons supported Weber’s assertion. On one hand, the rise and maturity of the modern nation-state and its nationalistic credo of patriotic armed forces as a symbol of national security and governmental authority in defending its territory and citizenry. On the other hand, the nature of military skill and its underpinnings — the management and deployment of violence. As Montgomery Sapone notes: ‘The predominant cultural view, reflected in legal and ideological prohibitions, is

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<sup>1</sup> Max Weber, *The Theory of Social and Economic Organization* 154 (A R Henderson & Talcott Parsons trans. 1947) 141 (emphasis original). [Translation of *Wirtschaft and Gesellschaft* Part I.]

that military skill should not be bought and sold, that it should not be conceived of or treated as a commodity. It is viewed as “non-commodifiable”.<sup>2</sup>

Interestingly though the reality past and present is that ‘[as] long as humanity has waged war, there have been mercenaries.’<sup>3</sup> In essence the monopolisation of force by the State has never been absolute. States have not been averse to incorporating or capturing the ‘violence of privateers — a form of violence external to the State — and selectively sanction[ing] it when profitable’ or expedient.<sup>4</sup> In past centuries, States relied on private organisations with their own military power to undertake foreign ventures. These included founding colonies, which States themselves lacked the revenue to finance or to assist State pursuit of hegemonic ambitions. The State’s monopolisation of force is a rather recent phenomenon. Despite the State’s right to hold a monopoly on the use of force, there is nothing natural about this arrangement. ‘Until the mid-nineteenth century, military knowledge and labour were an alienable commodity in an international market. Sovereignty bore little or no relation to the control of organized violence’.<sup>5</sup>

In the twentieth century the mercenary was vilified and outlawed primarily owing to a new kind of soldier of fortune — the independent mercenaries, commonly referred to as ‘wild geese’, or ‘les affreux’ (the dreaded ones).<sup>6</sup> They plied their trade predominantly in post-colonial Africa rising into prominence during the turbulence of decolonisation and its aftermath in Africa. They presented significant threats to many fledgling newly independent African States. As Juan Carlos Zarate, an assistant US Secretary of the Treasury notes, ‘these independent mercenaries, hired outside the constraints of the twentieth century nation-state system and seemingly motivated solely by pecuniary interests, were seen as a shocking anachronism’.<sup>7</sup>

The soldiers of fortune who infested Africa in the 1960s and 1970s were generally individual adventurers without corporate backing, who sought excitement as well as money in troubled corners of the earth.<sup>8</sup> Despite previous acceptance of the commodification of mercenary violence, this new breed was seen as illegitimate when contrasted with ‘appropriate’ State violence since they perpetrated violence

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<sup>2</sup> Montgomery Sapone, ‘Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence’ (1999) 30 *Californian Western International Law Journal* 1, 5.

<sup>3</sup> Juan Carlos Zarate, ‘The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder’ (1998) 34 *Stanford Journal of International Law* 75, 82.

<sup>4</sup> Sapone, above n 2, 12.

<sup>5</sup> *Ibid* 10.

<sup>6</sup> Zarate, above n 3, 87.

<sup>7</sup> *Ibid*.

<sup>8</sup> Christopher Wrigley, *The Privatisation of Violence: New Mercenaries and the State* (1999), Campaign Against Arms Trade, <<http://www.caat.org.uk/publications/government/mercenaries-1999.php>> at 7 March 2006.

for cash.<sup>9</sup> The new breed of mercenary was an abhorrent participant in the international military marketplace since the State had moved away from a commodification of violence. They consisted of motley collections of self-seekers operating outside the State system. Like their predecessors, the nature of the soldier-for-hire was the same; they appeared where there had been a breakdown of internal order as a source of instant military force and expertise.<sup>10</sup>

In contradistinction to the new breed that sprung up in the 1960s, contemporary Private Military Firms (PMFs) do not fit the ‘conventional image of private security services as being sold mainly by (local) gang leaders, mafias, or war lords and by (foreign) individuals or mercenaries’.<sup>11</sup> Although in form resembling their antecedents, PMFs have developed a *modus operandi* compatible with the needs and strictures of the post-Cold War, State-based international system leading to both implicit and explicit legitimacy. First, they are serious players, recognised within international business circles and markets. Second, their legitimacy is bolstered by strong personal and professional links to the governments and militaries of their respective home States.<sup>12</sup>

Clearly, the issues raised by the ascendance of contemporary PMFs would be suitable for a book length treatment. This article has as its aim a succinct exploration of the thorny legal issues raised by the commodification of force. It discusses the nature of the contemporary PMF, noting that it bears vestiges of yester year’s mercenaries. It then grapples with their uncertain status under international law despite the fact that they potentially pose problems for State authority and the direct control of States over the use of force. At the heart of the argument is the reality that PMFs maintain the ability to inflict violence on a scale previously reserved to sovereign nations and potential to violate humanitarian norms. Yet, they are largely inadequately regulated under existing domestic and international frameworks.

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<sup>9</sup> Herbert M Howe, ‘Global Order and the Privatization of Security’ (1998) 22 *Fletcher Forum of World Affairs* 1, 4.

<sup>10</sup> Zarate, above n 3, 82.

<sup>11</sup> Anna Leander, *The Commodification of Violence, Private Military Companies, and African States* (2002) Sandline International, [http://www.sandline.com/hotlinks/Leander\\_03-02.pdf](http://www.sandline.com/hotlinks/Leander_03-02.pdf) at 7 March 2006).

<sup>12</sup> As Juan Carlos Zarate notes: ‘They often work for their home-State governments and contract with foreign States, usually training national militaries. Some of these companies form parts of larger corporations with extensive economic interests. Most SCs [Security Companies] have enjoyed enormous success and growth in [the past] decade.’ Zarate, above n 3, 76.

## II TROUBLE IS THEIR BUSINESS: CONTEMPORARY PRIVATE MILITARY FIRMS

Some of the most striking images from the invasion of Iraq in 2003 widely circulated in the Western media were of charred torsos suspended by a cable from a suspension bridge in the March 2004 attack in Fallujah.<sup>13</sup> The photos show a flaming SUV and a small but elated crowd, some of whom are striking the torsos. One of the photos shows a torso completely charred, with the arms and lower legs cut off, being attacked by men with sticks.<sup>14</sup> It is not an attractive sight.

It was immediately reported that the torso and bodies were actually four employees of a USA private military contractor.<sup>15</sup> The dead were employees of Blackwater Security Consulting, of Moyock, North Carolina. Allegedly, the contractor was providing security for a food convoy. It is not clear to whom the food was being delivered, or why it was necessary to have a two-part security detail, nor yet why a private company with unmarked vehicles was providing the security. Blackwater has as its company vision, posted on its website: ‘To support security and peace, and freedom and democracy everywhere’.<sup>16</sup>

The incident above is but the tip of an iceberg of a wider range of incidents around the globe<sup>17</sup> that raise a host of complex legal issues. These issues range from the legitimacy of economic motives in war, to potential culpability of contractor’s employees for war crimes in an international forum, to the proper purpose of corporations and directors’ liabilities and to the constitutionality of the use of force by non-government actors. This is in light of the fact that rights and duties that exist between the military and its contractors constitute an uncertain, legal grey zone. The fundamental problem is that command and control so essential for military operations in a theatre of conflict is muddled and unclear with regard to private military personnel. As the debacle unfolding in Iraq demonstrates, often, local military commanders are unaware of the daily actions of firms in their zones of responsibility. As one former Special Forces veteran said of the role of PMFs in Iraq: ‘The military really can’t tell you [the PMFs] how to do your job — they can

<sup>13</sup> Russ Kick, images: Iraqi Mob Desecrates Americans’ Bodies (2004) The Memory Hole <[http://www.thememoryhole.org/war/fallujah\\_31mar04/](http://www.thememoryhole.org/war/fallujah_31mar04/)> at 7 March 2006.

<sup>14</sup> Uncut AP Television Report (2004) The Memory Hole <[http://www.thememoryhole.org/war/fallujah\\_31mar04\\_uncut.wmv](http://www.thememoryhole.org/war/fallujah_31mar04_uncut.wmv)> at 7 March 2006. A video of some parts of the event show the vehicle to have been a white SUV with no military markings.

<sup>15</sup> Sewell Chan, ‘US Civilians Mutilated in Iraq Attack: 4 Die in Ambush; 5 Soldiers Killed By Roadside Blast’, *Washington Post Foreign Service*, 1 April 2004; A01.

<sup>16</sup> Blackwater USA, <<http://blackwaterusa.com/about/missionstatement.asp>> at 7 March 2006.

<sup>17</sup> See David Kassebaum, ‘A Question of Facts – The Legal Use of Private Security Firms in Bosnia’ (2000) 38 *Columbia Journal of Transnational Law* 581; Zarate, above n 3, 75.

advise you, but they really have no control over you'.<sup>18</sup> These consequent problems have been identified by military jurists themselves. They are concerned that 'by ignoring the well-thought-out doctrine on civilians' role in warfare, contractors now operate in a legal no man's land, beyond established boundaries of military or international law'.<sup>19</sup> The reality of the fact is that since contractors do not fall under within the formal military hierarchy, they are generally self-policing entities.

It is not surprising then, that a great deal of genuine alarm has been generated by the lack of oversight of PMFs and their ever-increasing role in the prosecution of war. As Iraq demonstrates, there are numerous issues pertaining to the operations of, contracting with, and rules governing the operation of PMFs. This is more so since their largely unregulated activities span a number of fields ranging from police, paramilitary, and military training to logistics and protection of installations and officials. In sum, mercenary soldiers now often act as 'trainers' and 'advisors' to armies that have contracted for their martial services, bid for overseas military assistance contracts with the knowledge of their respective governments, and occasionally execute the foreign policy aims of their governments.

The emergence of private military firms (PMFs) and their formidable financial and military capabilities does not fit into the paradigm of the State as an entity bearing monopoly over military force. Commenting on the decentralization of State control over the use of force, Montgomery Sapone notes:

This change in military relationship between States and private entities suggests that some States no longer exert explicit control over military technology or manpower. Military skill is becoming increasingly privatized and commodified.<sup>20</sup>

The dangers of the privatisation of force and concerns regarding the dangers of excessive and arbitrary uses of force have finally materialised at a large and well-publicised scale in the Iraq war where PMFs are heavily engaged in a wide range of operations from transport of supplies to interrogation of prisoners. The central claim that private punishment, policing, and military corporations violate human rights more often than public punishment, policing, and military institutions<sup>21</sup> is finding practical manifestation in the various scandals that engulf the military operation in Iraq. This is symptomatic of earlier controversies elsewhere involving PMFs.<sup>22</sup>

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<sup>18</sup> Cited in P W Singer, 'Outsourcing The War With More Private Contractors Dying and Disappearing In Iraq, Some Begin to Question The Rules of Engagement', *Autonomo Centrum* <[http://www.autonomoocentrum.nl/nieuwe\\_oorlog/privat2.htm](http://www.autonomoocentrum.nl/nieuwe_oorlog/privat2.htm)> at 7 March 2006.

<sup>19</sup> *Ibid.*

<sup>20</sup> Sapone, above n 2, 19–20.

<sup>21</sup> Clifford J Rosky, 'Force, Inc.: The Privatization of Punishment, Policing, And Military Force in Liberal States' (2004) 36 *Connecticut Law Review* 879, 943.

<sup>22</sup> See, eg, Kassebaum, above n 17; Zarate, above n 3, 75.

Concerns about PMFs, ‘like concern about mercenaries, pirates, and terrorists, stems from the inherent violence of their profession combined with a lack of control over and accountability for their actions’.<sup>23</sup> Matters are not helped by the fact that governments use of PMFs is rarely transparent and in most cases is deliberately opaque, deniable and veiled from public and parliamentary view. Like the soldiers of fortune of yester years, the basis of PMF operations calls into question their legality.<sup>24</sup> Firstly, to the extent that such law can be identified, it provides little guidance regarding the services PMFs provide, whether training or actual combat.<sup>25</sup> Secondly, despite a multitude of declarations and resolutions by the UN and several anti-mercenary conventions, State practice does not give rise to an absolute international norm banning the use of mercenaries. Lastly, States have been lax in promulgating and enforcing municipal laws that restrict their citizens’ ability to serve as mercenaries. Indeed in a grant of limited legitimacy States have not been averse to hiring mercenaries or to contracting foreigners to achieve their political and military needs. Professor Howe, a leading Cambridge scholar notes:

Private companies offer many significant military advantages. A private force can start up and deploy faster than multinational, and perhaps national, forces. Additionally, it probably will have a clearer chain of command and is not subject to the changing political desires or fears of the contributing nations. It will not suffer the national vs. supra-national tensions that plague multinational forces. It may have more readily compatible military equipment training and common language, and possibly greater experience of working together than do ad hoc multinational forces.<sup>26</sup>

PMFs may be seen, in many ways, as a recycled form of past mercenary organisations. However unlike past mercenary organisations, they present a disturbing and frightening phenomenon in view of their immense financial, military and political clout.<sup>27</sup> The activities of PMFs, the ‘clients’ they serve and their global insider connections provide an alarming look into the *realpolitik* of the emerging new world order. A 2002 UK government report<sup>28</sup> on PMFs noted that

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<sup>23</sup> Zarate, above n 3, 77.

<sup>24</sup> Ibid 78.

<sup>25</sup> Ibid.

<sup>26</sup> Howe, above n 9, 7

<sup>27</sup> As Kenneth Kurtz, the CEO of the Steele Foundation notes: ‘While most people have not heard of this industry, it’s a \$100 billion- per-year business ... But it has virtually no laws, oversight or any public understanding of how to deal with it.’ Quoted in Robert Collier, *Iraq: Global Security Firms Fill in as Private Armies*, (2004) War Profiteers <<http://www.warprofiteers.com/article.php?id=11263>> at 7 March 2006.

<sup>28</sup> In 2002, the United Kingdom’s Foreign and Commonwealth Office published a report that examines the scope of PMF military services and the potential utility that PMFs offer to states and international organisations. United Kingdom Foreign and Commonwealth Office (2002) *Private Military Companies: Options for Regulation*, London: The Stationary Office.

most services they provide fall within the areas of military advice,<sup>29</sup> training<sup>30</sup> and logistic support.<sup>31</sup> The report further notes that PMF services encompass vital military functions and caution that some likely fall within the ambit of combat operations owing to the fact that ‘[t]he distinction between combat and non-combat operations is often artificial’.<sup>32</sup>

The rapid privatisation of force and commodification of violence is readily apparent in Iraq where PMFs account for a large share of the military personnel. This is partly to fill the gap in personnel generated by the Bush administration’s failure to enlist serious assistance from the United Nations or its NATO allies. There are presently ‘15,000 private personnel carrying out mission-critical military roles’.<sup>33</sup> Indeed, there are more private military contractors on the ground in Iraq than troops from any one American ally, including Britain (a major partner in the military misadventure). This has led Peter W Singer, a leading scholar and analyst of PMFs to observe that ‘it is more a “coalition of the billing” than of the “willing”’.<sup>34</sup>

Observers believe that the dramatic growth in private security challenges the international State system’s 300 year control over military might. PMFs now stand in a position to eventually threaten global order with military force that is less accountable and controllable than State militaries.<sup>35</sup> There is little doubt that the privatisation of force affects the role of the State in the regulation of violence and hence one of the basic features of statehood. The failure to have direct regulation of violence means that the State’s monopoly over military force is fragmented. In turn the foundations of its authority are of necessity shaken as established private firms increasingly shoulder military responsibilities that once belonged to the State. More to the point for this Article, the multi-billion dollar question is whether this new trend and growth in global security falls within the ambit of national and international law, and if so whether adequate regulatory and accountability mechanisms exist? It is to this matter that the Article now turns.

### III PMFS UNDER NATIONAL LAW: UNLOVED, BUT IN WITH A CHANCE

The close relationship between private military companies and Western governments and their foreign policy is a matter of concern. Often, PMFs are a primary vehicle through which States utilise the covert violence of private actors to

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<sup>29</sup> Ibid [10].

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid [11].

<sup>33</sup> Peter W Singer, ‘Warriors for Hire in Iraq’ (2004) The Brookings Institution <<http://www.brook.edu/views/articles/fellows/singer20040415.htm>> at 7 March 2006.

<sup>34</sup> Ibid.

<sup>35</sup> Howe, above n 9, 7.

pursue foreign policy objectives. While PMFs are companies and therefore apparently private entities, disconnected from the State, they have become a type of State agent — tied to their home State by tacit or licensed approval for their activities and enlisted as contractors for the employing country.

Zarate notes that State responsibility for the actions of PMFs seems to flow in two directions: responsibility of the home State which tolerates and ‘exports’ these companies’ services, and responsibility of the contracting State which contracts and directs the activities of the PMF.<sup>36</sup> The authors of this article concur with this position in light of the fact that there are sufficient connections between PMFs and States to allow liability to flow both to the home and contracting States. These include personnel connections, their use for foreign policy operations, their close participation in military operations, personal and professional relationships between PMF executives and various governmental officials as well as state-managed systems of oversight, licensing and control.

Governments appear to think of PMFs in terms, not of suppression, but of regulation. Thus for example UK Baroness Symons, Minister of State in charge of, among other responsibilities, International Security told the House of Lords in 1998 that the UK government was examining a number of options for national domestic regulation of PMFs operating out of the United Kingdom.<sup>37</sup> The UK position is readily apparent in various initiatives by Western governments in which the bulk of the PMFs are incorporated. In the few countries where legislation or guidelines have been passed in relation to PMFs, they do not seek to make such enterprises illegal; rather they impose conditions relating to specific approval from designated government bodies before any operation is embarked upon.

Some governments have used PMFs to work for legitimate foreign governments and use the services of such companies as a bargaining chip in negotiations with these governments.<sup>38</sup> Zarate notes that the attractiveness of PMFs as a foreign policy instrument has to do with the reality that

[s]ince these are private companies, countries which recommend or export them arguably can disavow any connection to SCs’ [Security Companies referred to as PMFs in this article] activities. Potentially, this allows exporting governments to use SCs as political pawns to affect the internal affairs of a country or region while retaining their official neutrality in such conflicts.<sup>39</sup>

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<sup>36</sup> Zarate, above n 3, 92.

<sup>37</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 30 June 1998, vol 591 col WA65 (Baroness Symons).

<sup>38</sup> Zarate, above n 3, 113.

<sup>39</sup> *Ibid* 77. For instance In February 1992, the Department of State hired Virginia-based Military Professional Resources, Inc. (MPRI) ‘for its logistics management capabilities to provide humanitarian-relief supplies and equipment to the “Newly Independent States” of the former Soviet Union’: at 105.



Propounding this observation further, Zarate captures the expedience of this arrangement thus:

The contracting country can use and dispose of these services readily without concern for the company's political ambitions or for political favours which may need to be repaid. This "clean hands" approach to foreign policy appears dangerous to those who see transparent nation-state accountability as essential to controlling human rights violations and the type and quality of military activity throughout the world.<sup>40</sup>

The validity of Zarate's observation is readily apparent when one considers the report of the Legg inquiry. The inquiry was set up by the UK Foreign Secretary in response to parliamentary and public criticism over the role of the British Foreign Office in sanctioning the intervention of a PMF in Sierra Leone in the publicised and sensational arms-to-Africa saga.<sup>41</sup> The Legg Report mildly rebuked Peter Penfold, the British ambassador to the country, whose complicity in a deal sanctioning a PMF to intervene in Sierra Leone was beyond dispute. The report suggested in a nonchalant manner that he was not 'sufficiently conscious of public and political unease about mercenaries'.<sup>42</sup> It went on to clear other officials by describing their role/activities in ambiguous non-critical language.<sup>43</sup> In addition, the Legg Report treated 'private military companies' simply as commercial organisations which 'are entitled to carry on their business within the law and, for that purpose, to have the access and support which Departments are there to provide to British citizens and companies'.<sup>44</sup>

In sum, the Legg Report contained rebukes of a mild nature couched in feeble diplomatic language. The worrying matter is that this mild language was not unintentional, the reality is that: 'Even as governments debate how to hold [PMFs] accountable, these hired guns are rapidly becoming indispensable to national militaries, private corporations, and nongovernmental groups across the globe'.<sup>45</sup> In a statement that reveals the utility of PMFs, Professor Debra Avant a political science and international affairs expert at the George Washington University notes that:

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<sup>40</sup> Ibid 78.

<sup>41</sup> See, eg, BBC News, 'Arms-to-Africa: 'Minister knew of Customs Probe' (1998), BBC, <[http://news.bbc.co.uk/1/hi/uk\\_politics/109702.stm](http://news.bbc.co.uk/1/hi/uk_politics/109702.stm)> at 7 March 2006; Nick Assinder, 'Arms-to-Africa Row Escalates' (1998), BBC, <[http://news.bbc.co.uk/1/hi/uk\\_politics/120000.stm](http://news.bbc.co.uk/1/hi/uk_politics/120000.stm)> at 7 March 2006.

<sup>42</sup> Sir Thomas Legg and Sir Robin Ibbs, (1998) *Report of the Sierra Leone Arms Investigation* (London: The Stationery Office) 41 ('*The Legg Report*').

<sup>43</sup> Ibid 107.

<sup>44</sup> Ibid 115.

<sup>45</sup> Deborah Avant, 'Think Again: Mercenaries' (2004) <<http://www.foreignpolicy.com/story/files/story2577.php>> at 7 March 2006.

The use of contractors to avoid governmental accountability is...worrisome. In the United States, for instance, the executive branch hires contractors. Although the US Congress approves the military budget, its access to information about contracts is often limited. The president can use this advantage to evade restrictions on U.S. actions, effectively limiting congressional checks on foreign policy.<sup>46</sup>

Thus PMFs are often used as a low-cost foreign policy tool. This allows governments (especially in the West) to implement controversial or unsavoury aspects of their sovereign policy which are best kept at arms' length.<sup>47</sup> These firms' low profile has the distinct advantage of helping avoid unwelcome publicity when things go wrong in covert and semi-covert operations around the world.<sup>48</sup> As Professor Avant notes:

By calling on firms that have entire fleets of giant Russian cargo planes and hundreds of soldiers of fortune ready to parachute anywhere, leaders in Washington and other Western capitals now have the freedom to intervene abroad and pay little domestic political price.<sup>49</sup>

The ambiguity with which governments treat PMFs obscures their questionable legitimacy. This ambiguity allows PMFs to lay claim to being public benefactors, serving only recognised governments, bringing peace and order where there is anarchy and violence thus creating the basic conditions for development. For example, one leading PMF, Blackwater Security Consulting notes on its website that it provides a new generation of capability, skills, and people to solve the spectrum of needs in the world of security.<sup>50</sup> Yet another, CACI International — at the centre of the prisoner abuse scandal at Abu Ghraib Prison in Iraq — notes that its solutions lead the transformation of defence and intelligence, assure homeland security, enhance decision-making and help government to work smarter, faster and more responsively.<sup>51</sup>

Within the national arena, while States are wary of PMFs, they nevertheless recognise their utility. The reluctance of governments to put in place adequate domestic safeguards leads us to turn to international law to discover whether any proper regulatory regimes exist. The next part of the article focuses on the status of PMFs under international law by undertaking a tour de horizon of relevant international instruments. It seeks to show that 'contrary to common belief, a total ban on mercenaries does not exist in international law'.<sup>52</sup> This means that the

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<sup>46</sup>

Ibid.

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See, eg, *ibid*; Collier, above n 27.

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See, eg, *ibid*; Collier, above n 27.

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Collier, above n 27.

<sup>50</sup>

Blackwater USA, <<http://blackwaterusa.com/securityconsulting/>> at 8 March 2006.

<sup>51</sup>

CACI International, <<http://www.caci.com/about/profile.shtml>> at 8 March 2006.

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P W Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law' (2004) 42 *Columbia Journal of Transnational Law* 521, 531.

existing international framework, just like the domestic one, does not adequately deal with the full variety of private military actors.<sup>53</sup> The analysis will show that international law fails to address contemporary PMFs, with relevant provisions proving ineffectual in anchoring PMFs within the cradle of mercenarism, despite these firms having features of mercenarism.

#### IV PMFs UNDER INTERNATIONAL LAW: A LEAKY LEGAL FRAMEWORK

##### A *General Assembly Resolutions*

The initiatives to ban mercenaries were not solely driven by the General Assembly, but also by the UN Security Council. Various resolutions by the Council sought to ban the recruitment, use, and training of mercenaries aimed at destabilising national liberation movements.<sup>54</sup> However in light of the fact that Council resolutions were all highly particularised to specific incidents, the Article chooses to dwell on General Assembly resolutions. Admittedly, some of the Assembly's resolutions show the same weakness as Council resolutions — particularisation to specific incidents. However, a number of them were of a more general nature paving the way for argument that the Assembly's numerous resolutions on the matter as well as its broader constituency, unlike the Security Council evidences emerging *opinio juris*.

General Assembly formal activities in relation to mercenarism date back to 1968. In Resolution 2395, condemning Portugal's failure to grant independence to the territories under its domination,<sup>55</sup> the Assembly appealed to all States:

...to take all measures to prevent the recruitment or training in their territories of any persons as mercenaries for the colonial war being waged in the Territories under Portuguese domination and for violations of the territorial integrity and sovereignty of the independent African States.<sup>56</sup>

In the same year, the General Assembly made its first general foray into the regulation of mercenary activities in post-colonial regimes through the adoption and passage of Resolution 2465 — the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>57</sup> In paragraph 8 of the resolution, the Assembly declared that

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<sup>53</sup> Ibid.

<sup>54</sup> Zarate, above n 3, 90.

<sup>55</sup> *Question of Territories under Portuguese Administration*. GA Res 2395, UN GAOR, 23<sup>rd</sup> sess, 1730<sup>th</sup> plen mtg, [8], UN Doc A/7352 (1968).

<sup>56</sup> Ibid 9.

<sup>57</sup> *Implementation of the Declaration on the Granting of Independence to Colonial Countries and People*. GA Res 2465, UN GAOR, 23<sup>rd</sup> sess, 1751<sup>st</sup> plen mtg, UN Doc A/L.560/Rev 1, A/L.561 and Add.1, A/L.563 (1968).

the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and that the mercenaries themselves are outlaws, and calls upon the Governments of all countries to enact legislation declaring the recruitment, financing and training of mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries.<sup>58</sup>

Subsequently, the General Assembly reiterated its position on the question of mercenaries in Resolution 2548.<sup>59</sup> In that resolution the General Assembly reaffirmed that: ‘the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and that the mercenaries themselves are outlaws’.<sup>60</sup> The resolution went on to exhort Governments of all countries to enact legislation that would declare ‘the recruitment, financing and training of mercenaries in their territory to be a punishable offence, and prohibiting their nationals from serving as mercenaries...’.<sup>61</sup>

In 1970, the General Assembly passed a resolution recognising the legitimate right of ‘colonial peoples and peoples under alien domination’ to use ‘all the necessary means at their disposal’<sup>62</sup> to achieve their objectives, declaring that using mercenaries against national liberation movements was a criminal act. In the same year, the General Assembly indirectly addressed the matter when it adopted the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>63</sup> In this declaration, the UN stated that: ‘Every State has the duty to refrain from organizing or encouraging the organization of ... mercenaries, for incursion into the territory of another State.’<sup>64</sup> Also in 1970, the Assembly directly addressed the matter in Resolution 2708, which was passed specifically to implement the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>65</sup> The resolution largely echoed the sentiments in previous resolutions that criminalised mercenary activity and urged the passage of domestic legislation to this effect. Equally, Resolution 2727 (see note below) of December 14, 1970,

<sup>58</sup> Ibid [8].

<sup>59</sup> *Implementation of the Declaration on the Granting of Independence to Colonial Countries and People*. GA Res 2548, UN GAOR, 24<sup>th</sup> sess, 1829<sup>th</sup> mtg., UN Doc A/L.581 and Add.1 and 2 (1969).

<sup>60</sup> Ibid [7].

<sup>61</sup> Ibid.

<sup>62</sup> *Implementation of the Declaration on the Granting of Independence to Colonial Countries and People*. GA Res 2708 (XXVI) UN GAOR, 25<sup>th</sup> sess, 1929<sup>th</sup> plen mtg, UN Doc A/L.621 and Add.1 and 2, A/L.622 (1970).

<sup>63</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*. GA Res 2625, UN GAOR, 25<sup>th</sup> sess, 1883<sup>rd</sup> plen mtg, UN Doc A/8082 (1970).

<sup>64</sup> Ibid.

<sup>65</sup> *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, above n 63.

emphasised what had become a familiar chorus — using mercenaries against national liberation movements was a criminal act.<sup>66</sup>

In late 1973, the General Assembly returned to the theme of regulating mercenary activities in post-colonial regimes with the passage of Resolution 3103.<sup>67</sup> The resolution entitled *Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes*, noted that:

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 the mercenaries should accordingly be punished as criminals.<sup>68</sup>

In 1979, the General Assembly took a decisive step in the outlawing and control of mercenaries.<sup>69</sup> In Resolution 34/140 it decided to consider the drafting of an international convention to outlaw mercenarism in all its manifestations.<sup>70</sup> The Assembly at that time stipulated that ‘mercenarism is a threat to international peace and security and, like murder, piracy and genocide, is a universal crime’.<sup>71</sup> In addition to commencing the drafting process of the International Convention, which got underway in the early 1980s, the United Nations continued to issue a series of resolutions addressing mercenarism.<sup>72</sup> In these resolutions, the United Nations

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<sup>66</sup> GA Res 2727, UN GAOR, 25<sup>th</sup> sess, 1921<sup>st</sup> mtg, UN Doc, A/Res/2727 (XXV) (1970).

<sup>67</sup> *Basic Principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes*. GA Res 3103, UN GAOR, 28<sup>th</sup> sess, 2179<sup>th</sup> plen mtg, UN Doc A/9412 (1973).

<sup>68</sup> Ibid [5].

<sup>69</sup> *Drafting of an international convention against activities of mercenaries*. GA Res 34/140, UN GAOR, 34<sup>th</sup> sess, 104<sup>th</sup> plen mtg, UN Doc A/34/L.58 and Add.1 (1979).

<sup>70</sup> It was this initiative which led to the adoption of a convention in 1989—*International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, GA Res A/Res/44/34, UN GAOR, 44<sup>th</sup> sess, 72<sup>nd</sup> plen mtg, UN Doc A/Res/44/34. (1989) (‘Convention on Mercenaries’).

<sup>71</sup> Ibid.

<sup>72</sup> See SC Res 496, UN SCOR, 2314<sup>th</sup> mtg, UN Doc S/Res/496 (1981); *Protection and security of small States*, GA Res 51, UN GAOR, 44<sup>th</sup> sess, 78<sup>th</sup> plen mtg, UN Doc A/Res/44/51 (1989) (referring to the 1988 attempted invasion of Maldives); *Protection and security of small States*, GA Res 31, UN GAOR, 49<sup>th</sup> sess, 83<sup>rd</sup> plen mtg, UN Doc A/Res/49/31 (1995) (emphasising the vulnerability of small states to the external threat of mercenaries and ‘[c]ondemning all such acts of aggression’); *Thirtieth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 33, UN GAOR, 45<sup>th</sup> sess, 44<sup>th</sup> mtg P 17, UN Doc A/Res/45/33 (1990); *Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights*, GA Res 79, UN GAOR, 44<sup>th</sup> sess, 78<sup>th</sup> plen mtg [34], UN Doc A/Res/44/79 (1989) (interposing the term ‘mercenaries’ with ‘armed terrorists’); The General Assembly

continued to emphasise that the activities of mercenaries are contrary to the fundamental principles of international law, such as ‘non-interference in the internal affairs of States’ and ‘territorial integrity and independence’.<sup>73</sup> The resolutions further explicitly condemn mercenarism, and like their predecessors emphasised the criminality of the activity, placing an obligation on individual States to enact the necessary domestic legislation.

The multitude of General Assembly resolutions and their repeated appeals for governments to restrict the supply and demand for mercenaries is evidence that States have obligations under international law to both criminalise and punish mercenaries. However, in the often frustrating and politically-driven law making process in the international system, matters are not as clear-cut as this. A number of factors militate against the argument that the resolutions posit legal obligations. To begin with, many of the General Assembly resolutions addressed particular conflicts. The General Assembly resolutions are broader in scope than established customary international norms. Coupled with this is the reality that ‘under the UN Charter, the General Assembly has no authority to enact, alter, or terminate rules of international law’.<sup>74</sup> Finally,

[G]eneral Assembly resolutions do not necessarily constitute international law. Instead, resolutions from the General Assembly ...may only represent the crystallization of customary international law or evidence of State practice and *opinio juris*.<sup>75</sup>

Overall and especially in relation to contemporary PMFs, the narrow focus of General Assembly resolutions outlawing mercenarism is significant. Despite mercenarism dominating the UN agenda as evidenced by a multitude of resolutions, the importance of the issue is singularly tied to the context of national self-determination. The initiatives focus largely on the relationship between mercenary activities and the stifling of the right to self-determination. This necessarily means that contemporary PMFs operating internationally and outside the specific context of wars of national liberation fall outside the limits of General Assembly initiatives. The importance of a clearer legal definition of mercenaries and context of operations thus remains an open question.

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condemned the continued recruitment and use of mercenaries ‘for the purpose of destabilizing and overthrowing the Governments of African States and of other developing States and fighting against the national liberation movements of peoples struggling for the exercise of their right to self-determination’. *Use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination*, GA Res 89, UN GAOR, 46<sup>th</sup> sess, 74<sup>th</sup> plen mtg, UN Doc A/Res/46/89 (1991).

<sup>73</sup> *Resolution on the use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination* GA Res 89, UN GAOR, 46<sup>th</sup> sess, 74<sup>th</sup> plen mtg, UN Doc A/Res/46/89 (1991).

<sup>74</sup> Zarate, above n 3, 77, 133.

<sup>75</sup> Ibid.

## B *Specialised Mercenary Conventions*

### I *Regional Instruments*

In 1971, the Assembly of Heads of State and Government of the Organisation of African Unity Convention (OAU) declared that mercenaries represented a threat to the ‘independence, sovereignty, territorial integrity and the harmonious development of Member States of the OAU’ and condemned the use of mercenaries as inimical to the sovereignty of member States.<sup>76</sup> The following year, the process of drafting of the Convention for the Elimination of Mercenaries in Africa commenced. This initiative resulted five years later in the signing of the Organisation of African Unity Convention for the Elimination of Mercenaries in Africa.<sup>77</sup> The Convention directly codifies a ban on mercenaries.<sup>78</sup> Article 1 of the convention states:

[A] ‘mercenary’ is classified as anyone who, not a national of the state against which his actions are directed, is employed, enrolls or links himself willingly to a person, group or organization whose aim is:

- (a) to overthrow by force of arms or by any other means the government of that Member State of the Organization of African Unity;
- (b) to undermine the independence, territorial integrity or normal working of the institutions of the said State;
- (c) to block by any means the activities of any liberation movement recognized by the Organization of African Unity.<sup>79</sup>

As the Special Rapporteur on mercenarism noted in 1988,<sup>80</sup> this was the first instrument of international criminal law applicable in the territory of the States Party to the Convention and to all persons covered by its provisions. It was also notable because it imposed well-defined obligations on each of the parties and stressed the need to adopt appropriate measures in each State’s domestic criminal law. The Convention was intended to control the use of mercenaries by insurgent groups and coup-makers. Under the Convention, mercenarism was confined to acts committed by States or individual actors who have the ‘aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State...’<sup>81</sup>

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<sup>76</sup> See *OAU Declaration on the Activities of Mercenaries in Africa*, reprinted in Robert E Cesner, Jr & John H Brant, ‘Law of the Mercenary: An International Dilemma’ (1976–77) 6 *Capital University Law Review* 339, 365–66.

<sup>77</sup> *Convention for the Elimination of Mercenaries in Africa*, opened for signature 3 July 1977, OAU Doc CM/433/Rev L, Annex 1 (entered into force 22 April 1985), Organisation of African Unity.

<sup>78</sup> See Paul Mourning, ‘Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries’ (1981–82) 22 *Virginia Journal of International Law* 589, 600–01.

<sup>79</sup> *Convention for the Elimination of Mercenaries in Africa*, above n 77.

<sup>80</sup> UN ESCOR, 44<sup>th</sup> sess, 12 UN Doc E/CN.4/1988/14 (1988).

<sup>81</sup> *Convention for the Elimination of Mercenaries in Africa*, above n 77, art 1, § 2.

The Convention had two significant weaknesses. Firstly, it did not prohibit States from hiring mercenaries. It defined mercenaries only as those men who sold their services to a ‘person, group or organisation’ engaged in insurgency against a State. Article I defined mercenaries as any non-nationals employed by a person, group or organisation whose aim is: (a) to overthrow by force of arms or by any other means the government of the Member State of the Organisation of African Unity; (b) to undermine the independence, territorial integrity or normal working of the institutions of the said State; (c) to block by any means the activities of any liberation movement recognised by the Organisation of African Unity.<sup>82</sup>

It only prohibits governments from hiring mercenaries to suppress movements of national liberation, but does not proscribe the hiring of mercenaries by legitimate governments.<sup>83</sup> The hypocrisy of this position, despite the reality that mercenarism is a pernicious problem in Africa, is answered in part by Montgomery Sapone’s observation that: ‘By permitting their own use of mercenaries, while controlling circulation among non-State actors, States established a pool of legitimate purchasers of military manpower’.<sup>84</sup> This was based in part on the desperate weakness of many African States, whose security forces were and still are often either ineffectual or oppressive or both, and the appeal of the military companies, both to African politicians and to Western businesses and governments.<sup>85</sup> The net result is that highly professional, well-organised and well-equipped soldiers of fortune with the capacity to crush insurrections and get mineral exports going were seen as a useful tool of the State (allowing States to continue to monopolise the market for alienable military skills) but disapproved of in as far as non-state entities would seek to make use of them.<sup>86</sup>

The second significant weakness to the Convention is its status as a source of international law regarding mercenarism. Its regional character which localises and particularises the problem to post-colonial Africa soldiers of fortune serves in part in its being viewed as a regional convention addressing regional issues. This denies it playing a more significant role in creating added impetus in international circles towards criminalising and punishing mercenarism.

## 2 *International Instruments*

In 1989, after seven long years of delicate negotiations and drafting, the International Convention against the Recruitment, Use, Financing and Training of

<sup>82</sup> *Convention for the Elimination of Mercenaries in Africa*, above n 77.

<sup>83</sup> Zarate, above n 3, 77, 127.

<sup>84</sup> Sapone, above n 2, 36–7.

<sup>85</sup> See generally Christopher Wrigley, *The Privatisation of Violence: New Mercenaries and the State (1999)*, Campaign Against Arms Trade, <<http://www.caat.org.uk/publications/government/mercenaries-1999.php>> at 10 March 2006.

<sup>86</sup> *Convention for the Elimination of Mercenaries in Africa*, above n 77, Annex II Rev. 3.



Mercenaries was adopted by the UN. It was the first convention of international scope against mercenarism.<sup>87</sup> The Convention defines a mercenary in Article 1 as any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) Is not a member of the armed forces of a party to the conflict; and
- (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.<sup>88</sup>

The Convention establishes an expansive definition of a mercenary.<sup>89</sup> Coming at the end of a long unbroken series of General Assembly resolutions stretching back into the 1960s, it also appears to crystallise the customary international law regarding mercenaries.<sup>90</sup> The Convention promotes the punishment of mercenaries themselves<sup>91</sup> as well as those who promote or organise mercenary activities.<sup>92</sup> Significantly, States' responsibilities go beyond merely recruiting, using, financing, or training mercenaries to include duties to prevent offences under the Convention and notify of the UN or affected States parties to establish jurisdiction over the Convention's offences. In addition, the Convention obligates States to apprehend suspects, to extradite suspects under certain circumstances and, in cases where the State does not extradite the suspect, to 'submit the case to its proper authorities for the purpose of prosecution'.<sup>93</sup> The Convention, if followed by States, will help guarantee the right of peoples to self-determination and ensure a certain stability to lawfully constituted governments. As the Special Rapporteur in his 1991 report noted:

The formulation of broader, more comprehensive and more precise international regulations updated to take account of the forms which mercenarism has assumed in recent years with the aim of overthrowing Governments and undermining the constitutional order or territorial integrity

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<sup>87</sup> *Convention on Mercenaries*, above n 70.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*, arts 2, 3.

<sup>90</sup> Zarate, above n 3, 77, 79.

<sup>91</sup> *Report of the Ad Hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, UN GAOR, 42<sup>nd</sup> sess, Supp No 43, UN Doc A/42/43 (1987).

<sup>92</sup> The aims of the Convention are expressed in its preamble. *Convention on Mercenaries*, above n 70.

<sup>93</sup> *Convention on Mercenaries*, above n 70, arts. 6, 8, 9, 10, 12, 15

of States highlights the importance of this new multilateral instrument and the necessity and desirability of its prompt entry into force.<sup>94</sup>

However, the anti-mercenary conventions (both regional and international) discussed above have three primary weaknesses. Firstly, despite their emphasis on punishment of mercenaries the criminal jurisdiction granted to States is very restrictive falling within the traditional nationality or territoriality link.<sup>95</sup> Article 9 of the Convention on Mercenaries, which outlines the jurisdiction of States over the crime of mercenarism, stipulates that a State shall have jurisdiction when the offence is committed in its territory (or on board a ship or aircraft registered in that State) and when the offence is committed by any of its nationals. Unfortunately this linkage, even if it can be established, is impractical in so far as States themselves are complicit in the activities of mercenaries. In any case, the bulk of the activities of the PMFs is extra-territorial and thus effectively places the burden of prosecution on the local government which often has only rudimentary or seriously compromised administrative and criminal justice structures.

Secondly, the primary definition under the UN Mercenary Convention would exclude State actors sent by their home State (a third party, neutral State) if they were ‘on official duty as a member of [the sending State’s] armed forces’.<sup>96</sup> In this regard, Todd S Milliard, a Judge Advocate with the US Army, notes that:

In addition to covering service members, this exclusion would likely extend to military technical advisors who were government employees or government-sanctioned contractors of the sending State. The secondary definition would exclude State actors sent by their home State, provided they were on “official duty”.<sup>97</sup>

Therefore, this exclusion would cover any sending-State government employee or government-sanctioned contractor, whether or not considered a member of the sending State’s armed forces, in addition to the sending-State’s actual service members. Thus, a PMF acting on sending-State instructions or sometimes sanctioned by the sending-State is legally acceptable.

Thirdly, the anti-mercenary conventions address the use of mercenaries almost exclusively in so far as it is a means of violating human rights and impeding the exercise of the right of peoples to self-determination by the post-colonial Africa breed of mercenary. The recent emergence and proliferation of dozens of PMFs offering services focused more on recognised governments than on rebels have

<sup>94</sup> See UN ESCOR Commission for Human Rights, 47<sup>th</sup> sess, Agenda Item 9, 35 UN Doc E/CN.4/1991/14 (1990).

<sup>95</sup> See *OAU Declaration on the Activities of Mercenaries in Africa*, reprinted in R E Cesner Jr & J H Brant, above n 76.

<sup>96</sup> *Convention on Mercenaries*, above n 70, art 1(1) (e).

<sup>97</sup> Todd S Milliard, ‘Overcoming Post-Colonial Myopia: A Call To Recognize And Regulate Private Military Companies’ (2003) 176 *Military Law Review* 1, 71.

displaced the ‘gangs of misfit professional soldiers’ and as a result they manage to effectively fall through the cracks of the various anti-mercenary conventions even though they some mercenary traits.

### C *The Law of Armed Conflict*

#### 1 *Hague Conventions*

The Hague Conventions of 1907 represent the first international effort aimed at regulating mercenary activities. The Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (‘Hague V’)<sup>98</sup> aspires to ‘lay down more clearly the rights and duties of neutral Powers [toward belligerents] in case of war on land’,<sup>99</sup> thereby codifying customary international law to the satisfaction of the States’ plenipotentiaries attending the drafting conference. Article 4 of Hague V provides: ‘Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents’.<sup>100</sup> Article 6 continues: ‘The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents’.<sup>101</sup>

Article 4 is based on the doctrine of State responsibility under customary international law. This doctrine holds that a State is normally responsible for those illegalities which it has originated.<sup>102</sup> However a State does not bear responsibility for acts injurious to another State committed by private individuals when the illegal deeds do not proceed from the command, authorisation, or culpable negligence of the government.<sup>103</sup> One may thus conclude that under Article 4, a neutral State must allow neither mercenary expeditions to be formed nor mercenary recruiting to take place on its territory.<sup>104</sup> Similarly one sees strong echoes of State responsibility in Article 6. When one considers that the concept provides that if the State neglects the duties imposed by vicarious responsibility it incurs original liability for the private acts and is guilty of an international delinquency. However no State bears absolute responsibility for international illegalities committed by individuals acting on its territory.<sup>105</sup> In the same vein, Article 6 limits the State’s regulatory obligation placing no duty on it ‘to prevent individuals — whether its citizens or another

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<sup>98</sup> *Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention V)*, opened for signature 18 October 1907, 36 Stat. 2310–31, Preamble (entered into force 26 January 1910).

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid* art 4.

<sup>101</sup> *Ibid* art 6.

<sup>102</sup> I L Oppenheim in H Lauterpacht (ed), *International Law* (8<sup>th</sup> ed, 1955) 337–8, 365.

<sup>103</sup> *Ibid.*

<sup>104</sup> Milliard, above n 97, 21.

<sup>105</sup> Oppenheim, above n 102.

State's citizens — from crossing its borders to serve as mercenaries for a belligerent'.<sup>106</sup>

It is evident that the provisions of Hague Convention V have a fuzzy quality to them. Though a neutral State must prevent domestic mercenary recruitment or staging activities under Hague V, it is not required to outlaw the mercenary per se. In this way, '[t]he individual mercenary himself was only indirectly affected [through Hague V], by means of the implementation by a State of its obligations as a neutral'.<sup>107</sup> The end result is that in spite of the fact that the Hague V recognises mercenarism as a problem, it neither criminalises the activity nor sets out any substantive obligations on the part of the States other than an exhortation not to assist or participate in the process of assembling such outfits.

## 2 *Additional Protocol I*

The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ('Additional Protocol I'), provides the international community's seminal definition of mercenaries.<sup>108</sup> In Additional Protocol I, a mercenary is defined as any person who:

- (a) is specifically 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.<sup>109</sup>

Article 47 of Additional Protocol I removed the protection of combatant or prisoner of war status from mercenaries and provides a definition of a mercenary.<sup>110</sup> Other than simply depriving mercenaries of the status as participants in armed conflict,

<sup>106</sup> Milliard, above n 97, 21.

<sup>107</sup> See Françoise Hampson, 'Mercenaries: Diagnosis before Prescription' (1991) 3 *Netherlands Yearbook of International Law* 1, 7.

<sup>108</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, June 8, 1977, 1125 UNTS 3 ('Additional Protocol I'), art 47 (defining mercenaries and denying them prisoner of war status).

<sup>109</sup> *Additional Protocol I*, art 49.

<sup>110</sup> *Ibid*, art 47 (defining mercenaries and denying them prisoner of war status).

and protections afforded to other combatants, the provision does not seek in any way to regulate the international military market, or restrict consumption to certain categories of consumers.<sup>111</sup> Those who object to PMFs claim that they fall under Additional Protocol I's Article 47 definition of mercenaries noting that:

The employees of SCs (what does this stand for?) are foreign military soldiers specially recruited abroad and paid in excess of what the military personnel of the contracting State are paid; they engage in fighting; and they are not sent on official duty of the armed forces of another State.<sup>112</sup>

From a substantive perspective three significant hurdles arise under Article 47. To begin with, David Kassebaum observes that '[t]his definition of a mercenary is cumulative; all requirements must be met before a person can be labelled a mercenary. Unfortunately, from a law-enforcement viewpoint, the requirements lack specificity'.<sup>113</sup> Secondly, paragraph 2 of Article 47 imposes criteria as to a mercenary's motivation<sup>114</sup> and relative compensation.<sup>115</sup> As the UK Report of the Committee of Privy Counsellors Appointed to Inquire into Mercenarism noted over three decades ago, these elements are extremely difficult to prove, thus limiting a State's legal basis to deprive mercenaries of lawful combatant and prisoner of war status.<sup>116</sup> The report went on to note that the international definition of 'mercenary' based on the motivation of the combatant was not viable, as it is difficult to determine exact motivation in the legal realm. The report concluded that the flawed definitions meant that 'to serve as a mercenary is not an offence under international law'.<sup>117</sup> This opinion remains unchanged. As recently as 2002, in considering Article 47's mercenary definition in its entirety, the United Kingdom's Foreign and Commonwealth Office concluded that '[a] number of governments including the British Government regard this definition as unworkable for practical purposes'.<sup>118</sup>

Secondly, active combatant status is also required under Article 47. Section 2 requires that mercenaries take direct part in the hostilities<sup>119</sup> and 'excludes mere advisers by requiring that to be a mercenary, one must in fact take a direct part in

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<sup>111</sup> Sapone, above n 2, 37.

<sup>112</sup> See *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, submitted by Mr. Enrique Bernales Ballesteros, Special Rapporteur, pursuant to Commission Resolution 1995/5 and Commission Decision 1996/113, UN ESCOR, 53<sup>rd</sup> sess, Agenda Item 7, p 89, UN Doc E/CN.4/1997/24 (1997).

<sup>113</sup> Kassebaum, above n 17, 589.

<sup>114</sup> *Additional Protocol I*, above n 108, art. 47(2) (c), cl. 1.

<sup>115</sup> *Ibid* art 47(2) (c), cl. 2.

<sup>116</sup> *Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries* (1976) ('*The Diplock Report*') [7].

<sup>117</sup> *Ibid* [10].

<sup>118</sup> UK Green Paper, above n 29 [6].

<sup>119</sup> *Additional Protocol I*, above n 108, art 47(2) (b) states that a mercenary is any person who 'does, in fact, take a direct part in hostilities [.]'

hostilities, that is, become a combatant, albeit an illegitimate one'.<sup>120</sup> It is clear under the law of armed conflict that experts who do not take direct part in combat are regarded as civilians under international law.<sup>121</sup> Thus at first glance, PMFs in general appear to fall outside the conjunctive definition of Article 47 since they tend to restrict their activities to training government troops only. But even this is questionable considered in the light of some of their operations. Advances in remote-operated weaponry capabilities make it difficult to identify which combatants are taking 'direct' part in the hostilities.<sup>122</sup> The most dramatic example of the leaky legal regime regarding the nature of classifying combat status of PMF employees is offered by the experience in Colombia. Numerous PMFs are working under contracts with the Colombian government, the United States Department of Defence, and the United States Department of State. They make up roughly twenty percent of the American military personnel working in Columbia. Their operations include flying Blackhawk attack helicopters and manning surveillance aircraft to assist Colombian security forces in the ongoing military campaign against drug cartels and Marxist guerrilla rebels. These actions — which are essential to the military operations — can only be classed as of a combat nature.<sup>123</sup> Yet, the contracts under which these private military security personnel operate hold them out as auxiliary to the American military personnel, ie, persons accompanying the military but with no combat role.

Article 47 (1) (f) of Additional Protocol I also identifies a mercenary as a person who 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.<sup>124</sup> In view of the complicity of States in the use of PMFs, it can be argued that a PMF, which receives authorization from its home State to operate abroad (through a licensing process or more informally), is 'sent by a State which is not a party to the conflict on official duty' and that the PMF represents a member of that State's armed forces.<sup>125</sup> The contractual nature of the services provided also provide ample basis for characterising employees of PMFs as civilian contractors, although not regarded as a member of the military force in the field, they are assimilated.<sup>126</sup> This implies that PMFs can be regarded as

<sup>120</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 4<sup>th</sup> sess, Vol XV, [25] 454, Doc CDDH/407/Rev.1 (1977).

<sup>121</sup> See Yves Sandoz et al (eds), *International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 579.

<sup>122</sup> Sapone, above n 2, 39.

<sup>123</sup> See, eg, Major Michael E Guillory, 'Civilianizing the Force: Is the United States Crossing the Rubicon?' (2001) 51 *Air Force Law Review* 11, 111–12 (citing Juan O. Tamayo, 'Privatizing War: US Civilians Taking Risks in Colombia Drug Mission', *Wilmington Morning Star*, Feb 26, 2001, at A1).

<sup>124</sup> *Additional Protocol I*, above n 108, art 49.

<sup>125</sup> *Ibid* art 47, § 1(f).

<sup>126</sup> See Major Brian H Brady, 'Notice Provisions for U.S. Citizen Contractor Employees Serving with the Armed Forces of the United States in the Field: Time to Reflect

contractors of their home States or of their employing States. In either case, PMFs would be tied to State actors and would fall outside the definition of a mercenary in this aspect as well.

In sum, Additional Protocol I does not prohibit the use of mercenaries by States or other entities. Part of the weakness of the Protocol is owing to the fact that it singled out a particular kind of mercenary, the soldier of fortune who emerged in the 1960s to wreak havoc in Africa. The provisions were specifically tailored to address this problem. They were branded as criminals, regardless of who employed them or on whose behalf they fought. Even beyond the provisions dealing with mercenarism under the law of armed conflict, it is clear that PMFs are not mercenaries, particularly because State accountability is the key to distinguishing mercenaries from other combatants. PMFs are tied to States in various unofficial ways.<sup>127</sup>

#### IV CONCLUSION

The reality is that existing international law neither regulates nor forbids the activities of mercenaries, but rather proposes a definition and specifies their legal status only under certain conditions. As Enrique Ballesteros, the UN-appointed expert on the subject, acknowledged several years ago, defining mercenaries is extremely difficult, if not outright impossible, and certainly of no assistance in dealing with the PMF industry.<sup>128</sup>

There are two fundamental problems, each of which presently undermines any effective national regulation of PMFs. The first issue derives from the organisational form of military firms. Being service-orientated businesses that operate on the global level with small infrastructures, PMFs have the ability to transform in order to circumvent legislation or escape prosecution. They may do this through a variety of devices including taking on a new corporate structure or name whenever they are legally challenged. The second problem with national regulation results from the often extraterritorial nature of their activities and hence possible enforcement. This is manifest in Professor Avant's observation that:

The Coalition Provisional Authority (CPA), the US-led entity charged with governing Iraq through June 2004, stipulated that contractors [were] subject to the laws of their parent country, not Iraqi law. *Even US legislation created to address this issue (the Military Extraterritorial Jurisdiction Act of 2000) lacks specifics* and entrusts the US Secretary of Defence with initiating

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Their Assimilated Status in Government Contracts' (1995) 147 *Military Law Review* 1, 2.

<sup>127</sup> Zarate, above n 3, 124–5.

<sup>128</sup> *Report on the Question of the use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, UN ESCOR, 53<sup>rd</sup> sess, Agenda Item 7, 85–86, UN Doc E/CN.4/1997/24 (1997).

prosecutions. *Countries that opposed the war may have a particularly hard time prosecuting contractors for crimes committed in Iraq.* That is especially true of countries such as South Africa that claim contractors from their country are exporting services without the government's permission.<sup>129</sup>

Fundamentally, the real risk of gross misbehaviour by PMFs is not their operations in their home States — predominantly Western countries — but rather in the execution of contracts they have in weak or failing States. Local authorities in such areas often have neither the power nor the wherewithal to challenge these firms. As Singer notes: 'The vast majority of domestic laws and ordinances across the globe either ignore the phenomenon of private military actors...or fall well short of any ability to define or regulate the industry'.<sup>130</sup>

The failure of domestic law to establish the exact legal status of privatised military firms effectively defers the problems to the international level. But in this arena, once again the weaknesses of domestic legal regimes are mirrored. As noted in Part III of the article above, the ambiguous status of PMFs under international law means that the anti-mercenary convention regime neither defines nor regulates them.<sup>131</sup> In the words of Singer:

... the privatized military industry lies outside the full domain of all of these existing [international] legal regimes. The various loose formulations of exactly who is a mercenary, as well as the absence of any real mechanism for curtailing mercenary activities, creates difficulties for anyone attempting to curtail PMF activity by use of international law.<sup>132</sup>

In sum, PMFs, as presently constituted, do not fall within the definition of mercenaries and their activities are not prohibited by recognised international norms. The prohibitions against mercenaries are not devised to deal with security corporations employed by recognised regimes. These restrictions are also not meant to supersede a sovereign State's right to employ foreign personnel to restore order or to provide security within their country. As Louise Doswald-Beck writes:

Multinational or other industries who use such companies ought to be accountable in some way for their behaviour; yet these clients are neither states nor parties to an internal armed conflict in any traditional sense of the word. The security companies concerned are in principle bound by the law of the state in which they function; in reality this will not have much effect if they actually engage in hostilities.<sup>133</sup>

<sup>129</sup> Avant, above n 45 [Emphasis added].

<sup>130</sup> Singer, above n 53, 536–7.

<sup>131</sup> Ibid 535.

<sup>132</sup> Ibid 532.

<sup>133</sup> Louise Doswald-Beck, 'Implementation of International Humanitarian Law in Future Wars' (1999) 52 *Navy War College Review*, available at <<http://www.nwc.navy.mil/press/Review/1999/winter/art2-w99.htm>> at 10 March 2006.



With proper international enforcement norms lacking and weak ineffective domestic sanction private security companies pose a threat to global security. This is primarily because they are not governed by adequate accountability regimes and thus face no clear or effective legal liability, sanction and punishment for human rights breaches.<sup>134</sup>

The authors aver that international regulation is necessary. With the increased intervention of some States in the affairs of other States and the ever growing calls upon the world community to involve itself in the troubles of failing States and an industry willing to answer the call to provide private military violence, the need for both national and international regulation is reaching a new level of urgency.

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<sup>134</sup> Avant, above n 45.