

## Dogs of War Redux? Private Military Contractors and the 'New Mercenarism'

by

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### 1. *New kid on the Block or an Old Dog who's Learned New Tricks?*

It is somewhat surprising to discover that the term 'private military company' has been part of the lexicon only since 1995<sup>2)</sup> given that today the provision of military and security services by the private sector to both public and private clients is a multi-billion dollar industry,<sup>3)</sup> that has managed to integrate itself into the military-industrial complex to such an extent that some states are becoming dependant on its services to the point that they would be unable to wage war and keep the peace without its help.<sup>4)</sup> But if the private military and security industry has experienced enormous growth over the past 12 years,<sup>5)</sup> and is in some respects a new type of business,<sup>6)</sup> its roots lie at least partly in one of the world's oldest professions, namely, mercenarism.

The term 'private military company'<sup>7)</sup> was allegedly dreamed up by the men behind Executive Outcomes (Anthony Buckingham<sup>8)</sup> and Simon Mann<sup>9)</sup>) and Sandline Interna-

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<sup>2)</sup> The term private military company (PMC) was first used in the media in November 1995 when Agence France Press referred to the capture in northern Angola of four soldiers working for the private military company Executive Outcomes by UNITA forces. Duncan Campbell, 'Marketing the new 'dogs of war'', Making a Killing: The business of war, An investigation by the Center for Public Integrity, 1 May 2005, <<http://www.publicintegrity.org/bow/report.aspx?aid=149>>. See also Fred Rosen, *Contract Warriors: How Mercenaries Changed History and the War on Terror* (New York, Alpha Books 2005) p. 1.

<sup>3)</sup> Global revenue for the industry was estimated at \$100 billion in 2003. Deborah D. Avant, *The Market for Force: the Consequences of Privatizing Security* (Cambridge, Cambridge University Press 2005) p. 8.

<sup>4)</sup> It has been observed that: 'The private sector is so embedded in combat, occupation and peace-keeping duties that the phenomenon may have reached the point of no return: the US military would struggle to wage war without it.' Ian Traynor, 'The privatisation of war', *The Guardian*, 10 December 2003, <<http://www.guardian.co.uk/international/story/0,3604,1103566,00.html>>.

<sup>5)</sup> See P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, Cornell University Press 2003) pp. 45-47; David Isenberg, *Soldiers of Fortune Ltd.: A Profile of Today's Private Sector Corporate Mercenary Firms* (Washington, D.C., Center for Defense Information Monograph, November 1997); David Shearer, 'Outsourcing War', *Foreign Policy*, No. 112 (Autumn, 1998) pp. 68-81; Al J. Venter, *War Dogs: Fighting Other People's War – The Modern Mercenary in Combat* (Philadelphia, Casemate 2006) p. 574.

<sup>6)</sup> Singer has argued that: 'Although certain parallels exist between the past private military organizations and even present-day mercenaries, the current wave of PMFs (see fn. 6) has some fundamental differences. In the wake of globalization and the end of the Cold War, the private military market has expanded in a way not seen since the 1700s. It has also been relegitimated to an extent, or, at least opened back up to allow a nearly public trade.' *Ibid.*, p. 40.

<sup>7)</sup> Some commentators use other appellations for the same phenomenon. Singer, for example, refers to 'private military firms' or PMFs. See *ibid.*, pp. 8 et seq. Avant prefers 'private security firms'. *Supra* n. 3, pp. 1 et seq.

<sup>8)</sup> See Campbell, *supra* n. 2.

<sup>9)</sup> Mann hit the headlines for all the wrong reasons in 2004 when he, along with Mark Thatcher, the son of the former British Prime Minister Margaret Thatcher, was accused of leading a coup attempt against the government of Equatorial Guinea. He was tried in Zimbabwe and sentenced to seven years' imprisonment for attempting to buy arms to be used in the coup attempt. See 'Zimbabwe jails UK 'coup plotter'', BBC News, 10 September 2004, <<http://news.bbc.co.uk/2/hi/africa/3643250.stm>>; 'Soldier of fortune', *The Guardian*, 19 May 2004, <<http://www.guardian.co.uk/equatorialguinea/story/0,,1291577,00.html>>.

tional (Buckingham, Mann and Tim Spicer, with the latter serving as Chief Executive), two of the first PMCs on the scene and among the most notorious, as they provided direct combat support services to ailing governments.<sup>10</sup>) Both firms – which had strong links to each other<sup>11</sup>) – claimed that what distinguished them from mercenaries of yore was the fact that they worked only for the ‘good guys’, meaning democratically elected governments and not rebels seeking to destabilise states.<sup>12</sup>) As such, the companies positioned themselves as part of the answer to maintaining international peace and security; not a threat to it.

Executive Outcomes was dissolved on 1 January 1999 when South Africa introduced the 1998 Regulation of Foreign Military Assistance Act.<sup>13</sup>) Sandline closed its doors on 16 April 2004. A notice on its website reads:

‘The general lack of governmental support for Private Military Companies willing to help end armed conflicts in places like Africa, in the absence of effective international intervention, is the reason for this decision. Without such support the ability of Sandline to make a positive difference in countries where there is widespread brutality and genocidal behaviour is materially diminished.’<sup>14</sup>)

Leaving aside the disingenuousness of this explanation for the reason why the company folded, Sandline, or rather, Tim Spicer, was correct in recognising that, despite the burnishing of the business’s image and its integration into the military industrial complex, states or the United Nations Security Council are not yet ready to take the next step and let private military companies intervene in third states, where they are not willing to, in order to stop genocide, crimes against humanity, war crimes and other serious international crimes being committed.

It may well transpire, however, that Executive Outcomes and Sandline were merely ahead of their time. Mann, Buckingham and Spicer may yet live to see the day that PMCs are seen as a viable substitute for states’ armed forces in humanitarian interventions.<sup>15</sup>) Today, some people,<sup>16</sup>)

<sup>10</sup>) For example, Executive Outcomes in Angola and Sierra Leone and Sandline in Sierra Leone and Papua New Guinea, etc. See Venter, *supra* n. 5, part III; Ken Silverstein, *Private Warriors* (New York, Verso 2000) p. 164; Avant, *supra* n. 2, pp. 81-98.

<sup>11</sup>) Mann and Buckingham, along with Spicer, set up Sandline in 1995 when Executive Outcomes began to attract too much negative publicity for its work in Africa. See ‘Soldier of fortune’, *The Guardian*, 19 May 2004, <<http://www.guardian.co.uk/equatorialguinea/story/0,,1291577,00.html>>; ‘Profile: Simon Mann’, 10 September 2004, <[http://news.bbc.co.uk/2/hi/uk\\_news/3916465.stm](http://news.bbc.co.uk/2/hi/uk_news/3916465.stm)>; Duncan Campbell, ‘Marketing the new ‘dogs of war’, Making a Killing: The business of war, An investigation by the Center for Public Integrity, 1 May 2005, <<http://www.publicintegrity.org/bow/report.aspx?aid=149>>.

<sup>12</sup>) Rosen, *supra* n. 2, p. 29; Silverstein, *supra* n. 9, p. 162.

<sup>13</sup>) Although Executive Outcomes folded, the company was reconstituted as NDF, with all the major personnel of Executive Outcomes serving on the board of the NDF, which also took over EO’s premises. See ‘Guns for hire again’, *Africa Confidential*, 23rd November 2001.

<sup>14</sup>) <<http://www.sandline.com/>>.

<sup>15</sup>) The forward to a Green Paper published by the UK’s Foreign and Commonwealth Office stated: ‘A strong and reputable private military sector might have a role in enabling the UN to respond more rapidly and more effectively in crises. The cost of employing private military companies for certain functions in UN operations could be much lower than that of national armed forces.’ Forward by the Secretary of State for Foreign and Commonwealth Affairs, HC 577 Private Military Companies: Options for Regulation 2001-02, Foreign and Commonwealth Office, 12 February 2002, <<http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf>>, p. 4.

<sup>16</sup>) Brian Urquhart, the founding father of UN peacekeeping, called on Australian television for PMCs to be used for international humanitarian interventions. ‘Dogs of war’, *Lateline*, 18 May 2000, <[www.abc.net.au/lateline/archives/s128621.htm](http://www.abc.net.au/lateline/archives/s128621.htm)>.

both outside and within the industry,<sup>17)</sup> are calling for them to be given a bigger role to intervene in situations where western states do not want to commit their own forces and local states and regional and international peacekeeping forces may not be available or acceptable. Some people, however, feel that, rather than moving towards an expanded role, the international community's policy towards PMCs and individual contractors should go in the opposite direction and expand the international legal definition of mercenaries to explicitly include private contractors and PMCs.<sup>18</sup>

While states or international organisations may still remain unwilling to send privately hired guns to militarily intervene to halt acts of brutality in far off places, they are increasingly willing to use private contractors – both their own nationals and non-nationals – to enable them to fight their own wars,<sup>19)</sup> to train their own and client states' military personnel and to take part in overseas military operations that do not involve peace restoration and peace building but only peacekeeping and reconstruction.<sup>20)</sup> But despite the fact that they rely on huge and growing numbers of private contractors, few states are willing to admit that contractors operate at the tip of the spear, performing the functions traditionally associated with combatants.<sup>21)</sup> Instead, states often refer to contractors as 'force multipliers', providing the logistical and other forms of support that enable a relatively smaller number of combatants (that is, members of the armed forces) than would otherwise be necessary to wage war.<sup>22)</sup> A lack of willingness to admit that a growing number of states are prepared to delegate their supposed monopoly on violence to private actors does not, however, disguise the fact that while most contractors are not explicitly hired by states to fulfil combatant functions,<sup>23)</sup> once they operate in a combat zone, contractors are placed in a position where

<sup>17)</sup> See Robert Greenwald's interview with Doug Brooks, President of the International Peace Operations Association, <[http://iraqforsale.org/doug\\_brooks.php](http://iraqforsale.org/doug_brooks.php)>; Rebecca Ulam Weiner, 'Peace Corp. As the International Community dithers over Darfur, private military companies say they've got what it takes to stop the carnage, if only someone would hire them,' *The Boston Globe*, 23 April 2006, <[http://www.boston.com/news/globe/ideas/articles/2006/04/23/peace\\_corp/](http://www.boston.com/news/globe/ideas/articles/2006/04/23/peace_corp/)>; Frank Langfitt, 'Private Military Firm Pitches Its Services in Darfur', National Public Radio, 31 March 2007, <<http://www.npr.org/templates/story/story.php?storyId=5433902>>; Christian Bourge, 'Mercenary as Future Peacekeeper?', UPI, 26 August 2003, <<http://www.commondreams.org/headlines03/0826-06.htm>>.

<sup>18)</sup> See James R. Coleman, 'Constraining modern mercenaries', *55 Hastings Law Journal* (2004) p. 1493.

<sup>19)</sup> Such as in Iraq and Afghanistan. For an analysis of the use of private military contractors in Iraq see Avril McDonald, 'Ghosts in the machine: Some legal Issues concerning the use of military contractors by the US in the Iraqi test bed', in *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein*, Michael N. Schmitt and Jelena Pejić, eds. (The Hague, Martinus Nijhoff Publishers/Brill Academic 2007). For a discussion of the use of private contractors in Afghanistan, Iraq and elsewhere, including in the context of the 'global war on terror', see Robert Young Pelton, *Licensed to Kill: Hired Guns in the War on Terror* (New York, Crown Publishers 2006).

<sup>20)</sup> See Singer, *supra* n. 5, p. 11-17.

<sup>21)</sup> See Lisa I. Turner and Lynn G. Norton, 'Civilians at the tip of the spear - Department of Defense total force team', *Air Force Law Review*, Spring, 2001, p. 1.

<sup>22)</sup> See Contractors on the Battlefield, Field Manual No. 3-100.21, Headquarters Department of the Army Washington, DC, 3 January 2003, <<https://atiam.train.army.mil/soldierPortal/atia/adlsc/view/public/9609-1/fm/3-100.21/toc.htm>>; David W. Reeve, Contractors in British Logistics Support, *Army Logistician*, May-June 2001, <<http://www.almc.army.mil/ALOG/issues/MayJun01/MS639.htm>>.

<sup>23)</sup> According to Avant: 'Though few contracts promise participation in ground combat, PSCs offer three broad categories of external security support: operational support, military advice and training, and logistical support. ... A small number of contracts have stipulated services at the very tip of the spear that most closely resemble "core" military competencies – armed operational support on the battlefield.' *Supra* n. 3, pp. 16-17.

at least some of them will be functionally required to take a direct part in hostilities,<sup>24</sup>) sometimes without even being aware of it. Other contractors, while not necessarily taking a direct part in hostilities, are playing a high profile role in operations conducted in the context of the so-called ‘war on terror’, either in Iraq, Afghanistan or other, non-conflict, zones. These roles, which sometimes place them in a position of seniority vis-à-vis military personnel, include interrogation and other forms of intelligence gathering. These functions have implications not only for the legal status of contractors (they might be considered as spies) but with respect to their accountability. As is well known, a significant problem with regard to contractors is the fact that, because they are not generally considered as lawful combatants, they fall outside of the military chain of command and military law, although in the US, at least, there have been recent positive steps in that direction.<sup>25</sup>)

### *1.1. Spicing up Contracting in Iraq*

In the meantime, Tim Spicer has managed to rehabilitate his own image, several times,<sup>26</sup>) to the extent that in 2004 his new private military company, London-based Aegis Defence Services, Ltd.:<sup>27</sup>)

‘won the contract for security on all major Iraqi government projects, following the handover of the Americans to the provisional Iraqi government on June 20, 2004. By that time, Spicer was already hard at work on his three-year £280 million (\$510 million) contract awarded by the Project Management Office of the CPA [Coalition Provisional Authority] on May 25.’<sup>28</sup>)

The entrusting of Tim Spicer with responsibility for the Iraqi government’s security, including the coordination of all other PMCs operating in Iraq, illustrates the extent to which this private military contractor has managed to reinvent himself and win new friends in

<sup>24</sup>) See Michael N. Schmitt, ‘Humanitarian law and direct participation in hostilities by private contractors or civilian employees’, 5 *Chicago Journal of International Law* (Winter 2004) p. 511.

<sup>25</sup>) By the 2007 Defense Budget, the Uniform Code of Military Justice has been amended to apply in all cases of declared war or contingency operation. Previously, it only applies to declared wars, a rarity these days. This will enable contractors operating during contingency operations to be held accountable under the UCMJ. See Peter Singer, ‘The law catches up to private militaries, embeds’, *Defensetech.org*, 3 January 2007, <<http://www.defensetech.org/archives/003123.html>>.

<sup>26</sup>) See Andrew Ackerman, ‘Tim Spicer’s World’, *The Nation*, 29 December 2004, <<http://www.thenation.com/doc/20050110/ackerman>>; Robert Baer, ‘The Business of War: Iraq’s Mercenary King’, *Vanity Fair*, April 2007, <<http://www.vanityfair.com/politics/features/2007/04/spicer200704?currentPage=1>>.

<sup>27</sup>) Its website describes Aegis as ‘a London based, privately owned, British security and risk management company with overseas offices in Afghanistan, Bahrain, Iraq, Kenya, Nepal and the USA. We have substantial experience and a world-wide client-base, including governments, international agencies and the multinational corporate sector. We are a registered and active UN contractor, a major security provider to the US government and security advisor to the Lloyds Joint War Risk Committee.’ <<http://www.aegisworld.com/>>.

<sup>28</sup>) Rosen, *supra* n. 2, p. 2. Aegis’s website describes its Founder and CEO, Tim Spicer as ‘the visionary behind Aegis’s strategic development. Following a twenty year career in the Army, he has personally had a broad exposure to the wider industry sector and has refined the focus of Aegis from lessons learned over 10 years. In 1999 he set up his own private security consultancy which ultimately led to the establishment of Aegis Defence Services Ltd in 2002 alongside three co-founding partners. Since that date he has overseen the rapid growth of the company, and the breadth and quality of its range of services. In addition to Aegis’s generic expansion and growth, he led and won the \$300m prime US Government tender in 2004 to provide core reconstruction security support services in Iraq. This contract was the largest ever US government contract awarded to a UK company in this sector.’ *Ibid*.

high places. When news of the contract became public, it was reported that ‘not only did the Pentagon have no idea who Spicer was when they gave his company a huge contract, they didn’t seem to care when challenged about it’.<sup>29)</sup> However, many commentators expressed disquiet that a person with Spicer’s background could be given such a large and important contract.<sup>30)</sup>

The reason for the disquiet is that, despite his attempts to rebrand himself and his disavowal and stated dislike of the term mercenary,<sup>31)</sup> Spicer is still widely derided as one.<sup>32)</sup> The rebranding has been bought by those who have an interest in buying it, including the US DoD, but it has not been entirely successful. Some commentators pointed to the fact that Spicer has broken international law in the past through his mercenary activities, including involvement in a coup attempt in Equatorial Guinea and by breaking international arms embargos.<sup>33)</sup>

But despite derision of PMCs as mercenary outfits and the fact that some contractors could legally be considered as mercenaries, the private military and security industry is laughing all the way to the bank. Today, the plethora of services provided by private military and security companies are availed of by a rapidly growing number of states, international organisations, businesses, humanitarian organisations and a host of other clients. They work out of impressive corporate headquarters, not grimy backrooms, and some trade on the stock exchange<sup>34)</sup> and are part of Fortune 500 companies.<sup>35)</sup> If they are mercenaries in suits, then the suits are often as not bespoke ones.

It seems clear that the private military and security industry is here to stay<sup>36)</sup> and that the roles filled by private military and security contractors will only expand as states’ militaries continue to downsize at the same time as their military commitments grow. Contractors, as states grow increasingly dependant on them, are more likely to be regarded as cogs rather than dogs of war.

This paper attempts to explore just a single aspect of the subject of contracting which does, however, go to the heart to the question of the extent to which states’ loss of control

<sup>29)</sup> See Ackerman, *supra* n. 26.

<sup>30)</sup> See David Rennie, ‘US protest on Spicer’s £160m Iraq contract’, *The Telegraph*, 9 August 2004, <<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2004/08/10/wirq210.xml&sSheet=news/2004/08/10/ixnewstop.html>>; Ray O’Hanlon, ‘Spicer contract gets U.S. nod’, *The Irish Echo*, 28 March-3 April 2007, <<http://www.irishecho.com/newspaper/story.cfm?id=15301>>; Charles M. Sennott, Security firm’s \$293m deal under scrutiny, *The Boston Globe*, 22 June 2004, <[http://www.boston.com/news/world/articles/2004/06/22/security\\_firms\\_293m\\_deal\\_under\\_scrutiny/](http://www.boston.com/news/world/articles/2004/06/22/security_firms_293m_deal_under_scrutiny/)>.

<sup>31)</sup> In 2006, Spicer was reported as saying, ‘It’s a pejorative term... Mercenaries are bad.’ Stephen Armstrong, ‘The enforcer’, *The Guardian*, 20 May 2006, <<http://www.guardian.co.uk/comment/story/0,,1779307,00.html>>.

<sup>32)</sup> See Ackerman, *supra* n. 26.

<sup>33)</sup> Antony Barnett and Martin Bright, ‘Foreign Office quizzed Tim Spicer over coup plot’, *The Observer*, 5 December 2004, <<http://www.guardian.co.uk/equatorialguinea/story/0,,1366945,00.html>>; Report of the Sierra Leone Arms Investigation, Foreign and Commonwealth Office, 27 July 1998, <<http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029395708>>.

<sup>34)</sup> Avant, *supra* n. 3, p. 8.

<sup>35)</sup> According to Singer, *supra* n. 5, p. vii.

<sup>36)</sup> The second Special Rapporteur of the Commission on Human Rights on use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination, Ms. Shaista Shameem, stated in an interview that: ‘[A]lthough we’d like to see [mercenary] activity lessened, we know that the reality is that there’s huge money involved in this sort of thing and we’re not likely to see it dissipating in the near future’, Nic Maclellan, Fiji: Human Rights Activist Appointed as UN expert, *Pacific Beat*, ABC Online (Australia), 6 August 2004, <<http://www.abc.net.au/ra/pacbeat/stories/s1170422.htm>>.

over military force entails a loss of statehood, and that is the question of the extent to which private military contractors can be considered as mercenaries.

If some contractors are legally mercenaries – or, if not, should be, as some would argue – but have become a central part of states' military wherewithal, then it seems only a matter of time before the pressure to redefine a mercenary so as to decisively exclude contractors will begin to mount. The question whether the current definition of a mercenary is adequate in light of the phenomenon of contracting, or is even redundant, will have to be considered. But until any changes are made to the law to exclude contractors from the definition of mercenaries – something which will require a rebranding exercise on a much larger scale than we have so far seen and that will require the active participation of states and international organisations – it remains important to consider which contractors would currently be considered as mercenaries, as important consequences result from attribution of this status.

Most people have a visceral reaction against mercenaries and see them by definition as merciless opportunists.<sup>37)</sup> The mercenary in recent history is a villain. But the vilification of the mercenary has been a direct response to the rise and consolidation of the state as the basic political unit. Before that, the mercenary had a long, sometimes glorious but frequently inglorious history. Just as today, before the rise of citizen and professional armies, the mercenary was an indispensable part of the waging of war by the precursors of states. This relationship of mutual dependence afforded both advantages and significant disadvantages, which may again become apparent, if perhaps in different forms, as the relationship of PMCs and contractors to states comes to bear increasing similarity to that of pre-Westphalian times.

## 2. *A Whirlwind through Mercenarism in History*

### 2.1. *Pre-Westphalia*

Mercenaries have been on the scene since the earliest days of warfare. According to Singer:

‘The earliest records of warfare include numerous mentions of outside fighters being employed to fight for ancient rulers. The first official historic reference is of mercenaries who served in the army of King Shulgi of Ur (ca. 2094-2047 B.C.E.). The battle of Kadesh (1294-B.C.E.) is the first great battle in history of which we have any detailed account. In this fight, where the Egyptians fought the Hittites, the army of Pharaoh Ramses II included units of hired Numidians.’<sup>38)</sup>

Mercenaries were a staple part of the armies of the Greek city states and the Carthaginian, Roman and Byzantine empires.<sup>39)</sup> In Europe during the middle ages, ‘hired soldiers were an integral part of any medieval army’.<sup>40)</sup> They particularly thrived in the period following the end of feudalism, with the emergence of the *condotta* system in Italy.

<sup>37)</sup> A UK FCO report on PMCs defined mercenaries as: “soldiers of fortune’, occasionally misguided adventurers, often disreputable thugs, ready to enlist for any cause or power ready to pay them.’ *Supra* n. 15, p. 7.

<sup>38)</sup> Singer, *supra* n. 5, p. 20. See also Bill Fawcett, ed., *Merces: True Stories of Mercenaries in Action* (New York, Avon Book 1999) for an historical overview of the role of mercenaries in historical battles.

<sup>39)</sup> Singer, *ibid.*, p. 21-22.

<sup>40)</sup> *Ibid.*, p. 22.

‘This arrangement, by which military services were contracted out to private units, initially was driven by business guilds that saw it as reasonable and economic to avoid mobilizing all of society and keep the most efficient citizens (themselves) from the waste of warfare. The recourse to hired units was also supported by the nobility, who feared the power of an armed populace and thus preferred mercenaries.’<sup>41)</sup>

The rise of so-called ‘Free Companies’ during the Hundred Years War (1337-1453) paved the way for the emergence of the *condottieri* in Italy during the Fourteenth Century.<sup>42)</sup>

The citizens of some states showed a particular talent for mercenarism. In the fourteenth and fifteenth centuries, Switzerland – today seen as the very embodiment of neutrality – was a major exporter of mercenaries. Indeed, their particular contribution to tactical warfare, in the form of the Swiss pike square, ‘ended the dominance of the mounted knight on the European battlefield’.<sup>43)</sup> This legacy remains intact as ‘the Swiss Guards to the Vatican, formed in 1505, is the longest-existing mercenary unit in history and still protects the pope today.’<sup>44)</sup> Another country whose nationals made a particularly significant contribution to fighting other peoples’ causes during the latter part of the Middle Ages is Ireland, whose ‘Wild Geese’ and earlier mercenaries fought for armies around the world.<sup>45)</sup> As Singer points out, ‘the monopoly of the state over violence is the exception in world history, not the rule’.<sup>46)</sup>

## 2.2. Post-Westphalia

The turning of the screw as far the delegitimatization of mercenarism is concerned began with the Treaty of Westphalia of 1648,<sup>47)</sup> ending the ruinous Thirty Years War, which paved the way for the rise of the nation state as the predominant geopolitical entity. As Hampson notes:

‘The eighteenth and nineteenth centuries saw the gradual change to conscript and standing armies and a consequent reduction in the significance of mercenaries serving with the armed forces of a State. Whilst, therefore, the significance of his contribution in wars was reduced, a man who wished to make his living fighting could still do so.’<sup>48)</sup>

The hallmark of the state was considered to be that it could provide for its own security, by means of a standing citizen or professional army.<sup>49)</sup> With the rise of nationalism, a problem that mercenarism posed *vis-à-vis* the nation state, that was in the period following Westphalia to lead to its eventual disappearance as an accepted means of waging war, was its challenge to the principle of neutrality. According to Hampson:

<sup>41)</sup> Ibid.

<sup>42)</sup> Eugene B. Smith, ‘The New Condottieri and US Policy: The Privatization of Conflict and Its Implications’, *Parameters* (Winter 2002-03) p. 104.

<sup>43)</sup> Singer, *supra* n. 5, p. 26.

<sup>44)</sup> Michael Lee Lanning, *Mercenaries* (New York, Ballantine Books 2005) p. 52.

<sup>45)</sup> Ibid., pp. 64-77.

<sup>46)</sup> *Supra* n. 5, p. 19.

<sup>47)</sup> Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies, 24 October 1648, <<http://www.yale.edu/lawweb/avalon/westphal.htm>>.

<sup>48)</sup> Françoise J. Hampson, ‘Mercenaries: Diagnosis before Proscription’, XXII *Netherlands Yearbook of International Law* (1991) pp. 3 at 6-7.

<sup>49)</sup> See Singer, *supra* n. 5, pp. 29-32.

‘While mercenary participation in wars was accepted, it was seen as posing a potential problem for the State in which he was recruited under neutrality law. The mercenary had two legal personae; he was an individual soldier but also within the jurisdiction of a State, neutral in relation to the conflict. ... By the early twentieth century a clear distinction was being drawn between the acts of individuals enlisting with foreign troops and the attitude shown by a State in allowing the organisation of mercenaries within its territory. This found expression at the Hague Conference which led to the adoption of the 1907 Hague Convention regarding the rights and Duties of Neutral Powers and Persons in Case of War on Land. ... The mercenary, then, was not committing an unlawful act by taking part in a conflict but his home State might, in certain circumstances, have breached its obligations as a neutral.’<sup>50)</sup>

### 2.3. *The Mercenary in Modern Times: International Legal Regulation*

In modern times, the mercenary has been vilified as a ‘dog of war’;<sup>51)</sup> an unscrupulous opportunist driven by a lust for murderous adventure and financial reward, who is potentially a threat to the peace and security of states.<sup>52)</sup>

However, it is clear that, far from having disappeared, mercenaries remained active in twentieth century conflicts, particularly in Africa.<sup>53)</sup>

It was only in 1977 with Additional Protocol I to the Geneva Conventions that states moved to address mercenarism in treaty law. While Article 47 of Additional Protocol I does not criminalize mercenarism, it provides that mercenaries have no right to combatant or to prisoner of war status. That does not exclude states from recognizing such status in some cases.<sup>54)</sup>

Subsequently, in 1989, an International Convention was adopted which criminalised direct participation in hostilities as a mercenary and the recruitment, use, financing and training of mercenaries.<sup>55)</sup>

The rationale behind the criminalisation of mercenarism in the 1989 Convention seems somewhat arcane in light of the way that the business of providing private military assistance to beleaguered clients, especially states, has evolved. Early UN Security Council<sup>56)</sup> and General Assembly resolutions<sup>57)</sup> condemned the use of mercenaries by national liberation movements to overthrow governments and by governments against national liberation movements. Mercenarism was regarded as something to condemn and put a stop to, as it was seen as a destabilising, repressive and rapacious force. As the Commentary to Article 47 of Additional Protocol I notes:

<sup>50)</sup> Hampson, *supra* n. 48, pp. 3 at 7.

<sup>51)</sup> Most famously in Frederick Forsyth’s *The Dogs of War* (New York, Random House 1981).

<sup>52)</sup> General Assembly resolution 39/84 of 1984 recognised that ‘the activities of mercenaries are contrary to fundamental principles of international law, such as non-interference in the internal affairs of States, territorial integrity and independence, and seriously impede the process of self-determination of peoples struggling against colonialism, racism and apartheid and all forms of foreign domination. Bearing in mind the pernicious impact that the activities of mercenaries have on international peace and security . . . .’ See also the preamble to the 1989 Mercenaries Convention.

<sup>53)</sup> For a comprehensive overview see Venter, *supra* n. 5.

<sup>54)</sup> Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva, International Committee of the Red Cross 1987), p. 575, para. 1795.

<sup>55)</sup> International Convention against the Recruitment, Use, Financing and Training of Mercenaries, RES/44/34, 4 December 1989. It entered into force on 20 October 2001.

<sup>56)</sup> See SC resolution 405 of 16 April 1977.

<sup>57)</sup> See 1968 General Assembly resolutions 2465 (XXIII) of 20 December 1968, 2548 (XXIV) of 11 December 1969, 2708 (XXV) of 14 December 1970, 3103 (XXVIII) of 12 December 1973 and 33/24 of 8 December 1978.

‘In general, humanitarian law endeavours to extend the protection of the Third Convention to new categories of combatants or to new situations, and not to refuse this protection, as is evident from Articles 43 (*Armed forces*), 44 (*Combatants and prisoners of war*) and 45 (*Protection of persons who have taken part in hostilities*) of the Protocol. The provision under consideration here goes the other way because of the shameful character of mercenary activity.’<sup>58)</sup>

Can mercenarism still be considered as a shameful activity? Or is the concept of mercenarism, and the idea behind it, now redundant, at least *vis-à-vis* those private military contractors who might qualify as mercenaries? In light of the phenomenon of military contracting, can we now speak of good and bad mercenaries and, if so, shouldn’t the law reflect that distinction?

### 3. *Distinguishing between Different Types of Contractors*

We can distinguish between various different types of private military and security contractors based on what they do and the environment they operate in. Variables are whether the contractor is operating in a situation of peace or armed conflict, and if the latter, which type; the function(s) performed by the contractor; the entity for which he performs it; the activities the contractor actually engages in; the extent of his integration into armed forces; his nationality, *inter alia*. Private military and security contractors cannot be considered as a group for the purpose of determination of their legal status, given these variables. Even two contractors working for the same private military company could have differing legal statuses depending on what they do and where they do it. This will make regulating the private military and security industry at the international level in particular an extremely challenging task.

#### 3.1. *What Do Private Military Contractors Actually Do?*

Private military contractors fulfil a wide range of functions. According to one commentator: ‘Globally, the private sector offers the full range of military services from combat infantrymen to strategic consultancy.’<sup>59)</sup>

Many military services clearly do not involve contractor individuals in direct participation in hostilities. These include providing security for civilian objects; developing and maintaining weapons systems; interrogation at prisons;<sup>60)</sup> driving, except where the vehicle is a military objective by virtue of its use; translation, interpretation and linguistics;<sup>61)</sup> training armies and police;<sup>62)</sup> maintenance of military supply chains and guarding military convoys; computer and technological support; procurement; catering; and other logistics functions;<sup>63)</sup> and so forth.<sup>64)</sup> However, some of the activities engaged in by contractors either do or may involve their direct participation in hostilities, including guarding military

<sup>58)</sup> *Supra* n. 54, p. 574, para. 1794.

<sup>59)</sup> Venter, *supra* n. 5, p. 585.

<sup>60)</sup> See The Inspector General, US Army, ‘Detainee Operations Inspection,’ report dated 21 July 2004, Annex E, p. E-106 (Taguba Report); AR 15-6 Investigation of the Abu Ghraib detention facility and 205th military intelligence brigade (u) Major General George R. Fay Investigating Officer, 25 August 2004 (Fay Report).

<sup>61)</sup> Isenberg, *supra* n. 5.

<sup>62)</sup> See Avant, *supra* n. 3, at p. 18.

<sup>63)</sup> See Craig A. Simonds, ‘The role of civilians during the first Gulf War: Operation Desert Storm foreshadowed today’s reliance on civilian logistics on the battlefield’, *Army Logistician*, Jan-Feb. 2004; ‘Contract support for Operation Enduring Freedom’, *Army Logistician*, March-April 2003.

<sup>64)</sup> See Schmitt, *supra* n. 24, pp. 511 at 512-513.

objectives (such as within and outside the Green Zone in Baghdad);<sup>65</sup>) force protection;<sup>66</sup>) rescue operations for US forces;<sup>67</sup>) combat and combat service support;<sup>68</sup>) operating weapons systems,<sup>69</sup>) including remotely controlled drones;<sup>70</sup>) and some types of intelligence gathering,<sup>71</sup>) *inter alia*.

#### 4. *The Status of Military Contractor Personnel under International Humanitarian Law*

It should be noted that, regardless of whether or not he takes a direct part in hostilities – an act that has implications for his legal protection – a private military contractor individual operating in a combat zone is bound to respect international humanitarian law and derives rights from that body of law.<sup>72</sup>) Moreover, not only individual contractors but states that hire them have a duty to respect international humanitarian law. The state's duty includes the responsibility both to respect and enforce respect for the law.<sup>73</sup>) It cannot avoid this responsibility simply by outsourcing. Certainly, the view of the ICRC is that states have to ensure respect for IHL by all persons whom they contract.<sup>74</sup>)

In practice, while states gladly take advantage of the services offered by contractors, they tend to disavow responsibility for them, either when contractors commit violations of the law or are themselves the victims of violations.<sup>75</sup>) The contractor is regarded as a mere instrument that can be used to carry out essential tasks in what has so far been almost a legal vacuum, a fact that is highly convenient for both the contractors and their clients.

<sup>65</sup>) Dana Priest, 'Private guards repel attack on U.S. headquarters', *The Washington Post*, 6 April 2006, p. A01.

<sup>66</sup>) An advertisement for PMCs to fill a contract of up to \$100,000 to guard the Green Zone in Baghdad stated: 'The current projected threat and recent history of attacks against Coalition Forces, and thinly stretched military force, requires a commercial security force that is dedicated to provide Force Protection Security'. David Barstow, 'Security companies: Shadow soldiers in Iraq', *The New York Times*, 19 April 2004.

<sup>67</sup>) When the US headquarters in Najaf was attacked by Iraqi insurgents in April 2004, private contractors working for Blackwater Security repelled the attackers and rescued a US marine who had been wounded. Priest, *supra* n. 65.

<sup>68</sup>) See P.W. Singer, 'Outsourcing the war: With more private contractors dying and disappearing in Iraq, some begin to question the rules of engagement', Salon, 16 April 2004, <<http://www.salon.com>>.

<sup>69</sup>) Isenberg, *supra* n. 5.

<sup>70</sup>) 'When America launched its invasion in March, the battleships in the Gulf were manned by US navy personnel. But alongside them sat civilians from four companies operating some of the world's most sophisticated weapons systems. When the unmanned Predator drones, the Global Hawks, and the B-2 stealth bombers went into action, their weapons systems, too, were operated and maintained by non-military personnel working for private companies.' Traynor, *supra* n. 4; Phillip van Niekerk, 'Making a killing: the business of war', The Center for Public Integrity, Washington, D.C., 1 May 2005, <<http://www.publicintegrity.org/bow/report.aspx?aid=147>>.

<sup>71</sup>) See Jonathan Werve, 'Contractors write the rules: Army policy governing use of contractors omits intelligence restrictions', Windfalls of War, The Center for Public Integrity, 1 May 2005, <<http://www.publicintegrity.org/wow/report.aspx?aid=334>>.

<sup>72</sup>) See 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 people to self-determination, E/CN.4/2006/11, 23 December 2005, para. 12.

<sup>73</sup>) Article 2 Additional Protocol I.

<sup>74</sup>) See 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 people to self-determination, E/CN.4/2006/11, 23 December 2005, para. 15.

<sup>75</sup>) According to Singer, in December 2006, the US Department of Justice 'reported to Congress that it has sat on over 20 investigations of suspected contractor crimes without action in the last year'. *Supra* n. 25.

It is the fact that contractors who take a direct part in hostilities are mere instruments that the state uses to its advantage without taking any responsibility for them or expecting any allegiance from them beyond that specified in the contract that makes them mercenary in type if not always as a matter of strict legal interpretation.

#### 4.1. *International Armed Conflict*

Although nowhere in the law of armed conflict does it specifically state that contractor individuals are civilians, it is clear that the law of armed conflict does not consider them to be combatants. Article 13 of the Hague Regulations provides:

‘Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers and contractors, who fall into the enemy’s hands and whom the latter thinks expedient to detain, are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying.’

Article 4(A)(4) of the Third Geneva Convention gives as an example of persons who accompany the armed forces without being members thereof ‘supply contractors’.

If they are not members of the armed forces in relation to an international armed conflict, then they cannot be combatants, at least lawful ones, but must be civilians, as international humanitarian law recognises as lawful combatants only members of the armed forces of a State Party to an international armed conflict.<sup>76)</sup> According to the ICRC: ‘Unless they form part of the armed forces of a state, the staff of PMCs/PSCs are civilians. As such, they must not be targeted.’<sup>77)</sup>

Almost exceptionally for civilians, contractors who accompany the armed forces are entitled to POW status ‘provided that they received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model’.<sup>78)</sup> Since supply contractors are presumed to be civilians, and civilians enjoy the presumption of protected status, which is contingent on their refraining from taking a direct part in hostilities, it seems reasonable to assume that the presumption, at least in the law, is that supply contractors will not take a direct part in hostilities. It is not clear if those who do take a direct part in hostilities during international armed conflict lose their POW status, provided that they had complied with the principle of distinction.

Of course, not all contractors accompany the armed forces. Many of those who are hired by the US in Iraq, for example, are not considered to be contractors accompanying the armed forces. In addition, many contractors work for non-state actors. Such contractors would perforce be civilians, as there is usually no question of them being members of armed forces.

<sup>76)</sup> According to Article 43(2) of Additional Protocol I: ‘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.’ Para. 1 provides that: ‘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.’

<sup>77)</sup> ‘Privatisation of War. The outsourcing of military tasks’, ICRC, 23 May 2006, <<http://www.icrc.org/web/eng/siteeng0.nsf/html/privatisation-war-230506>>.

<sup>78)</sup> Article 4(A)(4) Third Geneva Convention.

The presumption that all contractor individuals who work in situations to which IHL applies are civilians is shared by the entities that use them, including states. Even where they are closely integrated into the armed forces, they are not considered as members thereof, but as civilians hired through the intermediary of a PMC to work on their behalf, to accompany the armed forces.<sup>79)</sup>

#### 4.2. *Non-international Armed Conflict*

The law applicable in non-international armed conflict makes no reference to contractors. It does not recognise the combatant's privilege, so no question of POW status will arise, although members of a state's armed forces can be considered as combatants for the purposes of the conduct of hostilities.<sup>80)</sup>

As in the case of international armed conflicts, contractors working for states during non-international armed conflicts are not considered as members of the armed forces but as civilians. If they take a direct part in hostilities, they will obviously lose their protection from attack, arguably in the same way as during an international armed conflict.

There are also several possible scenarios in which contractors working on behalf of non-state actors during a non-international armed conflict could potentially be considered as unlawful combatants.

Contractors working for non-state armed groups who are integrated into those forces and taking a direct part in hostilities could potentially, if the facts supported it in a particular case, be considered as members of armed groups and thus as unlawful combatants for the purposes of the conduct of hostilities. This would mean that they would lose their protection from attack on a continuous basis, until they made a positive sign of withdrawal from the group, which could be the end of the contract.

Alternatively, fighting contractors could be considered as a separate party to a non-international armed conflict where they are organised into their own armed group, and thus as unlawful combatants, while not enjoying the combatant's privilege.

Alternatively, some contractors might be civilians taking a direct part in hostilities, either on an occasional or ongoing basis. The former would only be targetable for so long as they were participating. The latter might be assimilated with members of armed groups so far as their loss of protection from attack is concerned. In neither case would the contractor be entitled to POW status, although he would certainly be entitled to humane treatment under common Article 3 of the Geneva Conventions and Additional Protocol II, in the situations where it applies.

<sup>79)</sup> According to US Army Field Manual 3-100.21: 'Contractors are considered to be civilians authorized to accompany the force in the field and, as such, generally cannot be the object of intentional attack. However, they may lose that protection if used in direct support of military operations. Furthermore, contractors may be at risk of collateral injury when they are in close proximity to a lawful target. Therefore, commanders should consider these factors when determining the nature and extent of contractor use, so as not to put them in a position that jeopardizes their status.' Section 4-49. At Section 1-21: 'Contractors and their employees are not combatants, but civilians "authorized" to accompany the force in the field. Authorization to accompany the force is demonstrated by the possession of a DD Form 489 (Geneva Conventions Identity Card for Persons who Accompany the Armed Forces). This status must not be jeopardized by the ways in which they provide contracted support.' Contractors on the Battlefield, Field Manual No. 3-100.21, Headquarters Department of the Army, Washington, DC, 3 January 2003, <<https://atiam.train.army.mil/soldierPortal/atia/adlsc/view/public/9609-1/fm/3-100.21/toc.htm>.

<sup>80)</sup> The ICRC's Customary Law Study notes that: 'For the purposes of the principle of distinction... members of States armed forces may be considered combatants in both international and non-international armed conflicts ...' Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume 1: Rules (Cambridge, Cambridge University Press 2005) p. 11.

### 5. *Mercenarism and Contractors Taking a Direct Part in Hostilities*

The use of the term ‘mercenary’ to refer to private military and security contractors in general is incorrect and misleading given that the majority of contractors lack an essential element of the definition of mercenary, at least as regards Additional Protocol I: their direct participation in hostilities. Most contractors are hired not for combat roles but to provide security and other services and most never take a direct part in hostilities. If they engage in fighting at all, it is normally in self-defence. Many contractors are not deployed to situations of armed conflict but provide security and other services in post-conflict and other situations. Unless they are at least operating in a situation of armed conflict and are taking a direct part in hostilities, most private military and security contractors cannot therefore be considered as mercenaries.

The question, then, is which contractors are members of the residual group which can be considered as mercenaries under both Article 47 and the Mercenaries Convention. Not to underestimate the problem, the figures regarding contractors in Iraq, to take just one example – if the most significant – seem to be on an ever upward curve. The numbers, which were initially estimated as in the region of 15-25,000 have, in recent months, mushroomed – following the first census – to upwards of 100,000, becoming an army almost of the size to compete with the US’s own army – if such an institution can still be conceived of as really existing or considered anymore as an entity that retains any separate personality, given that it has been so infiltrated by the private sector.<sup>81)</sup>

#### 5.1 *Article 47 of Additional Protocol I*

Article 47 of Additional Protocol I (Mercenaries) provides as follows:

1. ‘A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
  - (a) Is specially recruited locally or abroad 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.’

The requirements of the definition of mercenary are cumulative. An obvious stumbling block in relation to a situation such as Iraq – a laboratory concerning the use of contractors by states and non-state actors in conflict zones – would be paragraph 2(d), which would automatically exclude

<sup>81)</sup> ‘There are about 100,000 government contractors operating in Iraq, not counting subcontractors, a total that is approaching the size of the U.S. military force there, according to the military’s first census of the growing population of civilians operating in the battlefield. The survey finding, which includes Americans, Iraqis and third-party nationals hired by companies operating under U.S. government contracts, is significantly higher and wider in scope than the Pentagon’s only previous estimate, which said there were 25,000 security contractors in the country.’ Renae Merle, ‘Census Counts 100,000 Contractors in Iraq: Civilian Number, Duties Are Issues’, *The Washington Post*, 5 December 2006, <<http://www.washingtonpost.com/wp-dyn/content/article/2006/12/04/AR2006120401311.html>>.

from the definition of mercenary those contractors hired by the US who are of US nationality and also those of Iraqi nationality, while not excluding all other contractors.<sup>82)</sup> This seems unfair, especially considering that one can argue that, to an even greater extent than non-nationals, US nationals have a financial incentive to become contractors, given that they earn far more than most non-nationals.<sup>83)</sup>

The application of Article 47 to contractors might be limited by paragraph 2(a)'s requirement that a mercenary is a person who is specifically recruited in order to fight in an armed conflict.<sup>84)</sup> Most contracts between PMCs and their state clients do not provide that the individual contractor is recruited specifically in order to fight. However, even if not stipulated in the contract, where a contractor is hired to fulfill a job where he is functionally required to take a direct part in hostilities, e.g., the operator of a weapons system, then arguably he could be considered to be recruited specifically to take a direct part in hostilities as a civilian under Article 47(2)(a), even if it is not specified in the contract.

The difficulty is not with those contractors who are recruited specifically to engage in an action which clearly involves direct participation, but those who do not appear to be hired in order to take a direct part in hostilities but in fact do so by virtue of the fact that they are, for example, guarding a military objective. It might appear more tenuous to argue that they are engaged specifically to fight where they are only guarding, yet guarding puts them in the position of being a voluntary human shield who is trying to deny the enemy a military advantage, and thus, of itself, can be considered as direct participation, even if the guard never actually uses force in offence or defence.

As mercenaries can be hired either locally or abroad, the definition would cover contractors hired anywhere in the world.

Under Article 47(2)(b), unless a contractor actually does take a direct part in hostilities, he cannot be considered as a mercenary.

Without question, most contractors would fulfill the requirements of subparagraph (c). It is the fact that the work is extremely well paid which motivates many contractors to put their lives on the line in danger zones like Iraq. The parties to conflicts pay contractors enormous salaries.<sup>85)</sup>

<sup>82)</sup> The individual contractors employed by PMCs to work for the US and UK governments in places like Iraq represent many countries, including the US, the UK, Australia, South Africa, Algeria, Israel, Fiji, El Salvador, Ukraine, Nepal and Iraq. Peter Brownfeld, 'Military contractors shoulder heavy burden in Iraq', Fox News, 18 April 2004, <http://www.foxnews.com/story/0,2933,117239,00.html>; Danna Harman, 'Firms tap Latin Americans for Iraq', *The Christian Science Monitor*, 3 March 2005; David Isenberg, 'Corporate Mercenaries', Part 1: 'Profit comes at a price', Asia Times online, 19 May 2004, [http://www.atimes.com/atimes/Middle\\_East/FE19Ak01.html](http://www.atimes.com/atimes/Middle_East/FE19Ak01.html); 'Private military companies paying big bucks for elite soldiers in Iraq', World Tribune.com, [http://216.26.163.62/2004/me\\_iraq\\_10\\_15.html](http://216.26.163.62/2004/me_iraq_10_15.html).

<sup>83)</sup> It is interesting to note that not all contractors are equal when it comes to earnings. While US and European nationals attain the highest wages, nationals of developing countries, such as El Salvador, receive considerably less (from \$1,200 to \$5,000 per month). Danna Harman, 'Firms tap Latin Americans for Iraq', *The Christian Science Monitor*, 3 March 2005. See also Ian Wilson, 'Private security firms call for more firepower in combat zone: Coalition Forces do little to help as bodyguards protecting foreign workers are targeted by deadly insurgents', *The Guardian*, 17 April 2004.

<sup>84)</sup> According to Schmitt: 'The contract firms in Iraq would not qualify for mercenary status. By Article 47.2(a) of Protocol I, mercenaries are "specially recruited . . . to fight in an armed conflict," that is, direct participation is their express purpose.' *Supra* n. 24, p. 528, n. 70.

<sup>85)</sup> US and other western contractor personnel are highly paid, with annual salaries at \$100,000 or more and some employees taking home \$1,000 a day for short-term projects, far in excess of what military personnel earn. Peter Brownfeld, 'Military contractors shoulder heavy burden in Iraq', Fox News, 18 April 2004, <http://www.foxnews.com/story/0,2933,117239,00.html>; 'Private military companies paying big bucks for elite soldiers in Iraq', World Tribune.com, 15 October 2004, [http://www.worldtribune.com/worldtribune/WTARC/2004/me\\_iraq\\_10\\_15.html](http://www.worldtribune.com/worldtribune/WTARC/2004/me_iraq_10_15.html); Robert Baer, 'The Business of War: Iraq's Mercenary King', *Vanity Fair*, April 2007, <http://www.vanityfair.com/politics/features/2007/04/spicer200704?currentPage=1>;

The lure of earning as contractors way in excess of that on offer to military personnel of equivalent rank,<sup>86)</sup> and perhaps also the fact that as contractors they face less risk, is naturally provoking many members of armed forces to resign and sign up for the same work as contractors.<sup>87)</sup> For contractors who were formally military personnel and who resign only to later sign up for a similar job in a private capacity, it surely should not be too difficult to prove the profit motive.

On the other hand, the requirement of financial gain as an element of motivation involves IHL in taking a moral position, which is at odds with its purpose of protection. There is no reason per se why choosing to fight for the private sector is any less moral a choice than fighting for the state. If it is the fact of the larger paychecks which causes some people to fight as contractors rather than as the armed forces of a state, it is not that different in moral terms than choosing to work for the private rather than the public sector in any profession, unless one considers that it is the fact of potential killing on behalf of the state that legitimates killing from the moral, rather than the legal, perspective. Nationalism, the fact that killing is state sanctioned, is the legal and moral and morally justifiable (from the personal and public perspective) basis of licensed killing. But there is no reason why this should be the case. We only accept it as being legitimate because, when it comes to war, we are prepared to accept as heroic acts what we would find abhorrent and murderous when carried out in peacetime, or when committed by individuals who fight for purely selfish reasons during war.

Paragraph (2)(d) has the potential to create an unfair distinction between contractors who do exactly the same things, for the same reasons, based solely on their nationality. It seems inequitable that contractors working in places like Afghanistan and Iraq, who are nationals of the USA or residents of Iraq, and who are engaged in direct participation, could not be considered as mercenaries, whereas non-nationals of the US who are doing the same things for the same reasons and for a lot less money could be. Either none or all of these contractors should be considered as mercenaries. But there should be no distinction based on nationality where that is materially irrelevant. Considering only some contractors as mercenaries on the basis of their nationality would make even less sense if they were to be used by an international organization or states to fulfill a peace-building or peacekeeping function which they would rather not do themselves. In this case, the fact of a contractor having a different nationality than the client does not pose any possible challenge to the principle of neutrality.

Where non-nationals serve as an integral part of a state's armed forces, they are not considered as mercenaries. Countries that today still employ units made up of non-nationals and whose origins are mercenary in character include France's Foreign Legion<sup>88)</sup> and Britain's Royal Nepalese Gurkas.<sup>89)</sup>

<sup>86)</sup> According to the *Economist*: 'A young SAS trooper earns about £3,500 a month: on the 'circuit', as soldiers call the private world, he could get \$16,000. Why would he not?', *The Economist*, 22 October 2005.

<sup>87)</sup> David Barstow, 'Security companies: Shadow soldiers in Iraq', *The New York Times*, 19 April 2004; 'Private military companies paying big bucks for elite soldiers in Iraq', World Tribune.com, <[http://216.26.163.62/2004/me\\_iraq\\_10\\_15.html](http://216.26.163.62/2004/me_iraq_10_15.html)>; 'The Baghdad Boom', *The Economist*, 25 March 2004; Jonathan Franklin, 'US contractors hire guards for Iraq in Chile', *The Guardian*, 5 March 2004; David Morgan, 'CIA faces spy shortage as staffers go private', Reuters, 30 September 2005; James Wither, Expeditionary Forces for Post Modern Europe: Will European Military Weakness Provide An Opportunity for the new Condottieri? Conflict Studies Research Centre, January 2005, <[www.defac.ac.uk/colleges/csrc/document-listings/special/05\(04\)-JW.doc](http://www.defac.ac.uk/colleges/csrc/document-listings/special/05(04)-JW.doc)>.

<sup>88)</sup> See Michael Lee Lanning, *Mercenaries* (New York, Ballantine Books 2005) pp. 87-101.

<sup>89)</sup> *Ibid.*, pp. 102-111.

As a requirement of the mercenary definition under subparagraph (e) is that the person is not a member of the armed forces of a Party to the conflict, the obvious way for a state to avoid non-national contractors working on their behalf who may be taking a direct part in hostilities being considered as mercenaries would be to integrate them into the armed forces, at least for the duration of their contract.

Finally, subparagraph (f) would not pose any problem as contractors, not being considered as members of armed forces, are not sent by non-state parties to conflicts on official duty as members of their armed forces.

### 5.2 *The Mercenaries Convention*

Article 1 of the 1989 Mercenaries Convention provides as follows:

‘For the purposes of the present Convention,

1. 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.
2. A mercenary is also any person who, in any other situation:
  - (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
    - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
    - (ii) Undermining the territorial integrity of a State;
  - (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
  - (c) Is neither a national nor a resident of the State against which such an act is directed;
  - (d) Has not been sent by a State on official duty; and
  - (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.’

As far as paragraph (1) is concerned, given the similarities with Article 47 of Additional Protocol I, most of the comments made in relation to that are relevant here as well. The main point of divergence is the omission in the Mercenaries Convention of a requirement that the person actually take a direct part in hostilities. This omission is open to several interpretations. The fact that it was specifically excluded, whereas the other parts of Article 47 were included, indicates a deliberate omission and thus it can be argued that there is no requirement of direct participation. On the other hand, it can be argued that a requirement of direct participation in hostilities is implicit if the person has been specifically recruited to fight. If a contractor is specifically recruited to fight and subsequently failed to, he would at least be in breach of his contract. The aim is surely to prohibit not only recruitment to

fight but actual participation by individuals in other peoples' and states' conflicts. It would be more effective for Article 1 to have removed the requirement of explicit recruitment to fight and left the requirement of direct participation if the aim is to stop mercenarism. If we consider that there is no requirement of direct participation, then the result will be that the Article 1 definition could cover many more contractors than Article 47.

The view that the Mercenaries Convention is broader than Article 47 and does not require direct participation seems, however, inescapably supported by its Article 3, which makes direct participation by mercenaries, as defined in Article 1, an offence under the Convention. This indicates that participation in hostilities is an act in which a mercenary can engage it, albeit a criminal one, and not an element of the definition of mercenarism. This means that the threshold for finding someone, such as a contractor, to be a mercenary is lower under the Mercenary Convention than Additional Protocol I.

### 6. Conclusions

It seems that under the definition of mercenary in Article 47 of Additional Protocol I and Article 1 of the Mercenaries Convention at least some contractors could potentially be considered as mercenaries. States could most obviously try to avoid this by insisting that the contracts make no mention of recruitment to fight. But where a contractor is plainly recruited to do a job that involves direct participation in hostilities, it would be disingenuous to maintain that he has not been recruited to fight simply because the contract deliberately omits to specify it. Adopting an overly technical or only *de jure* rather than a *de facto* approach to interpretation of deliberate recruitment to fight would give states and other clients of PMCs a loophole through which they could drive a bus and would create a distinction between different types of mercenaries (those whom states find useful vs. those perceived as a threat to peace and security) that is essentially political rather than strictly legal.

Instead, whether or not a contractor has been deliberately recruited in order to fight should be determined by looking at the nature of the work for which the individual has been hired, and whether that involves or might involve direct participation in hostilities.

If states wish to avoid contractors qualifying as mercenaries, a better solution might be to reconsider and possibly amend at some future date both Article 47 and the Mercenaries Convention. It has already been pointed out by another commentator that it can seriously be questioned whether a law of war treaty, as is Additional Protocol I if not the Mercenaries Convention, is the right instrument through which to regulate the use of mercenaries.<sup>90)</sup>

A reading of recruitment to hire in Article 47(2)(a) of Additional Protocol I and Article 1(a) of the Mercenaries Convention that looks not at the terms of the contract but the work that the contractor is actually hired to do would mean that more contractors would potentially be captured by the definition of mercenary. There are policy and political reasons why this might be considered by some interested parties as undesirable, especially given that it is at odds with the trends towards greater reliance on contractors. This writer can only agree with Kritsiosis that the normative approach indicated in Article 47 is in any event 'not shared by those states who today recruit mercenaries en masse, for what some may regard as perfectly legitimate or appreciable reasons'.<sup>91)</sup>

Even if recruitment to hire was given an ingenuous interpretation, states could of course

<sup>90)</sup> See Dino Kritsiosis, 'Mercenaries and the privatization of warfare', 22 *Fletcher Forum of World Affairs* (Fall 1998) pp. 11 at 15-17 for a critique of Article 47.

<sup>91)</sup> *Ibid.*, p. 20.

avoid hiring mercenaries by hiring only nationals and residents of occupied states as contractors. The non-nationality requirement, along with the profit motive, have long been considered as defining characteristics of a mercenary. This made sense back in the days when mercenaries were considered by definition to represent only their own private and not any public interests. But these elements of the mercenary definition are less decisive when applied to contractors. Even if contractors are mainly motivated by the prospect of financial gain, or are to some extent thrill-seekers, the use of contractors today has a public function unseen since the pre-Westphalian use of mercenaries.

Arguably, those contractors who may take a direct part in hostilities on behalf of states are fulfilling a public function to a greater extent than those who do not, given that the use of force by a state in the context of military operations, whether executed either by persons who are members of the armed forces or private contractors, is considered to be the exclusive privilege of states. It is for this very reason that the use of contractors to fulfil military roles that involve direct participation in hostilities is the cause of such controversy. A situation where those contractors who fulfil an obviously public function on behalf of a state risk qualification as mercenaries, whereas those in positions of less onerous responsibility do not, is hardly satisfactory. A situation wherein states and international organisations denounce mercenaries and mercenarism as a menace to states' and international peace and security while being their biggest customers is not sustainable.

States need to make clear what is the essential legal difference between a mercenary and a private military contractor, especially one who takes a direct part in hostilities. To the extent that the latter is a mercenary, it will have to be debated whether this is a desirable status to accord to private military contractors whom states and other clients rely on. As it is, the distinction, such as it is, seems to be based, not on the characteristics of the individual or what he or she does but the legitimacy of the client and his cause. Such a distinction might have a sound moral foundation, and could indeed be a workable basis for differentiating between good and bad mercenaries in any future legislative attempts, but, in the meantime, it does not constitute a legal basis for any such differentiation.

The apparent absence in the Mercenaries Convention of any requirement of direct participation in hostilities as an element of the definition of a mercenary means that it could potentially capture a great many private military contractors. Of course, that's the theory; in reality, none of the states active in theatres such as Iraq or Afghanistan are parties to the Mercenaries Convention, and arguably it does not constitute customary international law.

Given that there is so much reliance on contractors, it is clearly desirable that the status and position of individual contractors, not to mention PMCs, under international law, including international humanitarian and human rights law, be clarified and regularised so that states do not risk breaching their international legal obligations by hiring them to do certain kinds of jobs. These include obligations regarding the use of mercenaries under conventional and customary international law.

Contractors themselves would benefit from certainty regarding their status under international law, as they may risk being considered as mercenaries under international law. Even where they are not, contractors who take a direct part in hostilities are currently in an invidious legal position as they lose their protection from attack without gaining the privileges of combatancy. It is inequitable that states should be able to gain the benefits of the direct participation by a contractor in such an essential state function as war fighting while withholding from them the right to fight where they are put in a position of taking a direct part in hostilities.

As private military contracting is a transnational industry, regulation should occur at the

international, as well as the national, levels.

States will be able to have it both ways with respect to private military contracting only for so long. Until now, states have managed to have their cake and eat it: the benefits of outsourcing, while avoiding any of the responsibilities. That is slowly beginning to change, but the necessary debate at the highest levels on the rights and wrongs of the delegation of such an essential responsibility of the state as war-fighting to the private sector, and the question of the implications of private military contracting for the definition of a mercenary, is long overdue. It will require deconstruction of the meaning of mercenarism in light of the embedding of the private sector in military operations to an extent unseen since pre-Westphalian times.

If at least some of today's private military contractors are Oakley-wearing war dogs, albeit supposed Dr. Jekylls, but toting better kit and drawing far higher salaries than their Mr. Hyde Janus twins, then it seems high time that states either take responsibility for them or concede that the Wild Geese are back with a vengeance, with all the consequences for geopolitics that implies.

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