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PRIVATE MILITARY AND SECURITY COMPANIES AND THEIR PERSONNEL IN THE CONTEXT OF INTERNATIONAL HUMANITARIAN LAW

Master Thesis

Supervisor
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CONTENT

ABBREVIATIONS

AF - Armed forces

AP – Additional Protocol

CIHL - Customary international humanitarian law

DoD - U.S. Department of Defense

EO - Executive Outcomes

GA - General Assembly

GC - Geneva Convention

IAC - International armed conflicts

ICC - International Criminal Court

ICJ - International Court of Justice

ICRC - International Committee of the Red Cross

ICTY - International Criminal Tribunal for the Former Yugoslavia

IHL - International humanitarian law

NGO - Non-Governmental Organization

NIAC - Non-international armed conflict

OAU - Organization of African Unity

PMC - Private military company

PMF - Private military firm

PMSCs - Private military and security companies

POW - Prisoner of War

PSC - Private security company

UN - United Nations

USA/US - United States of America

INTRODUCTION

Warfare, like any other social phenomenon, in the course of time changes its format. Humankind, being of aggressive nature, realized the need to control its martial spirit. Therefore it started regulating means and methods of waging war. Altering leading intentions and motivation, determining status of combatants, granting protection to the civil population, limiting allowable weaponry - all is aimed at making war more "humane".

However, in any evolution there is a cycle, partial recurrence to the initial stage. Warfare is not an exceptional case. Looking back at the history, starting with tribal societies all the way until creation of the national state and mobilization it can be witnessed that wars were mostly waged for marauding incentives. Yet since approximately the second half of the XVIII century most martial clashes were inspired by the national feelings, striving to protect and strengthen the native land[1]. Plenty of historical examples manifestly substantiate such an assumption. The state played central role in declaring, waging and closing wars in their name.

In the end of the XXth century, however, governments start loosing their monopoly over use of an armed force. New players emerge in the scene of national and international armed conflicts (hereinafter IAC). These are private military companies (hereinafter PMCs) and private security companies (hereinafter PSCs). Accordingly, the evolution of the warfare, starting with private nature develops to state-leaded war and again moving in spiral partially returns to the initial stage of the privatization.

Problem statement

Although non-military personnel have become an integral part of military operations, to the prevailing opinion their international legal status is vague and ill-defined as they can not be undoubtedly attributed to none of the categories under current legal codes.

Being a part of private business private military and security companies (hereinafter PMSCs) actions are driven not by idealistic national intentions to protect their country, but by materialistic interests. Looking from legal perspective a collision between the situations *de jure* and *de facto* arises. On the one hand we have Geneva law[2] which prohibits participation in hostilities for private gain

[1] Thomson, J. E. *Mercenaries, Pirates, and Sovereigns– State-Building and Extraterritorial Violence in Early Modern Europe.* Princeton University Press, 1996. – P.7-14. - ISBN 9780691025711.
Žilinskas, J. Vandenio eros nesulaukus // *Verslo klasė*, 2007.09.05 P. 46-50.

[2] Geneva law – in this context Geneva law is regarded as a branch of the international humanitarian law, based on four Geneva Conventions and two Additional Protocols. The prime aim of the Geneva law, as distinct from the Hague law

without being a member of the regular forces of the party to the conflict ("A mercenary shall not have the right to be a combatant or a prisoner of war"[3]). On the other hand, however, we have situation that evidently shows this norm being in death-throes. While the US, Iraq and many other countries are not signatories to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter AP I), international practice shows that states do not follow this provision. Private contractors embroil into controversial incidents, their control and accountability issues causes hot dispute between scholars, policy makers and society.

The problem of defining PMSCs status and role in the international humanitarian law (hereinafter IHL) sharply apprised since the US invasion to Iraq and military operations in Afghanistan. PMSCs increased its significance in the sphere of military operations. This practice is also observable in Europe. According to Peter W. Singer, "Private military companies have operated in more than 50 nations <…> European militaries, which lack the means to transport and support their forces overseas, are now greatly dependent on PMSCs for such functions"[4].

Moreover, international conventions, treaties, agreements relating to IHL does not give forthright and unambiguous answer, defining PMSCs status and capacity in the armed conflicts, although hitherto international community shows intentions to consider such practice as illegal acts of mercenary[5].

Meanwhile, such gaps in regulations lead to uncertain legal situations. Accordingly, United Nations (hereinafter UN) Working Group on the use of mercenaries expressed its concern that "there has been a significant increase in the number of private security companies operating in conflict-ridden areas, <…> the "private security guards" the companies employ are neither civilians nor combatants, <…> they represent a new form of mercenarism, similar to "irregular combatants", itself an unclear concept"[6].

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regulating means and methods of warfare, is to set international legal status and standards for the protection of victims of war - combatants and civilians.

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Art 47

[4] Singer, P. Outsourcing the War // *Foreign Affairs*, 2005, Vol. 84, No. 2. http://www.brookings.edu/articles/2005/0301usdepartmentofdefense_singer.aspx (accessed 2008-03-07)

[5] International Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN GA resolution 44/34 of 4/12/1989), United Nations Treaty Series, Vol. 2163. This convention entered into force on 20 October 2001 and, at the time of writing, had 17 signatories and 32 parties (http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-6&chapter=18&lang=en#Participants accessed 2009/05/01)

[6] Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination // A/62/301, 2007. Online version available at www.ohchr.org/english/issues/mercenaries/index.htm. (accessed 2008-04-07)

However, the review of European international law journals (2003-2009) shows that there are not enough scientific studies on this topic or analysis is very superficial. Moreover, in Lithuanian context there are no legal researches concluded. Several present articles discuss the subject only from political or economical perspectives. Therefore, considering the tendency of growing importance and intensification of PMSCs involvement in hot points of the military conflicts there is both academic and practical need to analyze the question in all its aspects. For the scholar society it is necessary to have a comprehensive survey of the present situation and states attitudes towards the use and practice of private subjects in the area, which traditionally was exclusively attributed to the states competence. Only based on this cognition scientific proposals on how to improve international regulations would be effective and admissible for the governments who model international law. Moreover, it is essential for politicians, members of the armed forces (hereinafter AF) and private contractors to have a true understanding on what is the legal status and capacity of such personnel and what responsibility should be expected for the violation of legal regulation on the subject matter. For the Lithuania's interest it must be conceded that after the collapse of the Soviet Union and restoring independence we had to reorganize basically all spheres of states life. Integration to the open market system and tendency of privatization will sooner or later touch state defense affairs and AF. Although for the time being there are no PMSCs in Lithuania, there is an expeditious need for the proper preparation for the proximate challenge.

The object of the research

The object of this master thesis is current international legal status of the PMSCs and their personnel, based both on the legal regulations and *de facto* qualifications.

The purpose of the research

The central goal is to analyze and estimate essential theoretical and practical aspects of the legal status granted to private participants of the armed conflicts. It also aims to evaluate its relevance to the present international situation by revealing discrepancy between regulations and existing practice.

The main question the research is dedicated to answer is whether present situation and state practice allow to state that PMSCs are legal combatants. Finding answer to this question has a fundamental importance. Recognition of a subject as a legal combatant automatically grants him certain legal status, rights and duties. Only combatants can legally participate in hostilities, can not be punished for such acts and in case of capture by the adversary they are granted protection as Prisoner of War (hereinafter POW).

Tasks of the research

In order to achieve the established purpose of the research thorough and comprehensively, following tasks are determined and accomplished:

- To provide historical overview of the generation and evolution of the PMSCs from mercenaries, preconditions and catalysts of such development;
- To define what is a private military, to survey what are types of PMSCs, essential features and the scope of the competence of each type;
- To compare and accentuate distinctive features of the mercenaries and private military contractors;
- To examine and critically evaluate what is current position of IHL regarding PMSCs and indicate what functions of the private contractors are in contradiction with international regulations;
- To analyze states practice in using private firms in the military operations and for related functions;

The hypothesis of the research

Legal status of PMSCs and their personnel under IHL is insufficiently defined. Accordingly, adequate steps should be taken by international community to modify present conventions to reflect needs of the society and to clarify status of PMSCs and their staff.

Methods of the research

In order to achieve intended tasks various theoretical and empirical methods are invoked in the master thesis.

Theoretical methods of the research:

- Historical method is applied to provide knowledge about the evolution of the privatization of military functions, conditions that governed flourishing of PMSCs.
- Comparative (historical comparative) method is used to demonstrate similarities and bring out differences between mercenaries and modern private contractors.
- Logical methods (generalization, induction, deduction) are invoked to generalize the used literature and to draw inferences.

Empirical methods of the research:

- The main source of the data is document studies (conventions, case law, reports, legal articles etc.).

- Statistical method is employed to demonstrate the scope of PMSCs involvement into past and contemporary armed conflicts.

Sources of the research

The research is based on both primary sources of international law as enumerated in the Statute of the International Court of Justice (hereinafter ICJ) art.38[7], as well as secondary sources, namely scholar articles. Legal evaluation invokes IHL conventions (Geneva and Hague conventions, Additional Protocols) and specific mercenary conventions. "Soft" law instruments, such as Montreux Document, are also scrutinized together with basic principles and customary laws.

The structure of the research

Composition of the master thesis reflects its goals and consists of these sections:

The first part is providing basic characteristics of the private violence in particular of the phenomenon of mercenarism, its historical evolution to the present form of PMSCs and the attitude of the international community towards it.

The second section is analyzing the present situation and tendencies in the development of the phenomenon of the PMSCs, its' types, main features of each type and differences between the scope of their capacities. It is also introducing the factual situation in the involvement of the private soldiers in contemporary armed conflicts.

The third part is dedicated to analyze and qualify PMSCs personnel status under IHL. It also surveys international legal basis regarding mercenaries and gives an evaluation of the dividing line between these two forms of participation in warfare. Moreover, it puts forward proposals up to which extent such participation is legal under the humanitarian laws. Finally, the third part scrutinizes legal status of the PMSCs as corporate entities and states obligations and responsibilities in this regard.

The concluding part is summarizing the findings and delivers proposals of the possible steps to be taken in order to improve the solid understanding of the PMSCs role in the international sphere.

[7] Statute of the International Court of Justice. 1945, UNTS Vol. 993.

1. MERCENARISM AND OTHER FORMS OF THE PRIVATE VIOLENCE

1.1. Historical background

Private warriors are not new players on the international stage. Roots of this phenomenon date back even to the ancient Egypt. Paid soldiers was a wide spread practice in all continents in all times.

The first use of the foreign auxiliaries was recorded in the times of King Shulgi of Ur (ca.2094-2047 B.C.). Pharaoh Ramses II used to employ warriors from Nubia, Syria, Libya and Sardinia for his battles and body guarding[8].

In Europe during the early Classic Era many Greek mercenaries were fighting for the Persian Empire. King of Persia Xerxes I hired Greek corps for the invasion to Greece in the V century B.C. The "Ten Thousand" army of Greek mercenaries were helping Cyrus the Younger to seize the throne of Persia from his brother. Besides, Greek soldiers were fighting on both sides (for the Persian King Darius III on one part and Alexander the Great on the opposite part) during the Battle of the Granicus River (IV century B.C.).

Roman Empire due to political calculations, lack of time to train, shortage of the materials and manpower, in the late period was facing difficulties in forming military units from citizens. Therefore, they started hiring barbarians to serve in their armies[9].

However, the Byzantine Empire is probably the most manifest illustration of how a strong and majestic empire became nearly absolutely dependant on hired foreign warriors and guards. "While the Italians had their Praetorians, the Ottomans their Janissaries, the Tsars their Streltsy and Cossacks, the Byzantines had their Varangians, an elite unit of Vikings who were expected to be ready to suffocate rebellions"[10]. According to historians, as Constantinople became a centre of art, culture and religion, its people lost interest and involvement in the empire defence as it was cast into the shade by political and theological battles. Therefore they had to rely on mercenaries.

In the time of the Renaissance the hired gun could be said to play a major role in the shaping of the country itself. Condottieri, companies of mercenaries hired by Italian city-states in the 14th-15th centuries, were led by a condottiere, a sort of military chief who signed a contract with a particular city-state and was responsible for the fulfillment of the conditions of the agreement[11].

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[8] Singer, P.W. *Corporate Warriors: The Rise of the Privatized Military Industry*. Cornell University Press, 2004. – P.20 – ISBN-978-0801489150. Online version available at http://books.google.lt/books?id=VyIl3fdeadIC (accessed 2009/01/29)
[9] http://www.spiritus-temporis.com/mercenary/mercenaries-in-european-history.html (accessed 2008/05/17)
[10] Lytton, H. C. Blood For Hire: How The War In Iraq Has Reinvented The World's Second Oldest Profession // *Oregon Review of International Law*, 2006.
[11] Percy, S.V. This Gun's for Hire: A New Look at an Old Issue // *International Journal*, 2003, Vol. LVIII, No.4. - P.732.

The typical European army of the XVIIIth century was a multinational force consisting of 25-60 percent of hired foreign warriors. Even an "army with a state", as Prussia was called, relied strongly on hired soldiers since more than a half of the army was mercenaries[12]. Even during the US War of Independence, Britain used about 30,000 Hessian mercenaries. The result of their operations, however, turned to be opposite to the original intentions the British as it only accelerated to declaration of the independence.

The rise of the nation-state and formulation of neutrality doctrine marked a shift from multinational armies to the citizen-army. Emerging nation-states asserted their monopoly not only over the legitimate use of force, but also their citizens' use of force both inside and outside the country. Another significant factor that conditioned the cut off of private troops was its expensiveness. Mercenaries were not motivated to end wars fast as it was their main source of the gaining. Moreover, they were not eager to involve into real battles as it caused menace to their lives. Accordingly they chose more secure but not so effective means of defeating the enemy – blocking or plundering his stock and munitions, emaciating and pushing to surrender. However, financially it was also albatross around their lords' neck. In result they started to cease hiring mercenaries. The last official instance in which a European state raised an army of foreigners was in 1854, when Britain hired 16,500 German, Italian, and Swiss mercenaries to fight in the Crimean War[13].

Finally, the sunset of the mercenary was crowned with the adoption of the AP I to the GC in 1977. Mercenaries were in fact estimated as war criminals. Moreover, the same position was adopted and further developed by the Convention of the Organization of African Unity (hereinafter OAU) for the Elimination of Mercenarism in Africa (hereinafter Libreville convention)[14], and UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989) (hereinafter UN Mercenary Convention).

To sum up, the practice of hiring foreigners and allowing own nationals to join armies of the other states was prevailing in 17th-19th centuries. In this context Switzerland, which never employed external armed units, was an exceptional case. The market of military manpower was notably

[12] Singer, P.W. *Corporate Warriors: The Rise of the Privatized Military Industry*, P.32
[13] Lytton, C. H. *Blood for Hire: How the War in Iraq Has Reinvented the World's Second Oldest Profession.*
[14] Convention of the Organization of African Unity for the Elimination of Mercenarism in Africa, O.A.U. Doc. CM/433/Rev. L. Annex 1 (1972). This convention entered into force on 22 April 1985 and, at the time of writing, had 9 signatories and 29 parties.

internationalized[15]. An impulse to frame such practice in legal regulations occurred only in the late 19th – early 20th centuries.

1.2. The Renaissance of the Private Wars and its Reasons

As we have surveyed, for ages individuals and states that were unable to secure themselves relied on hired private guards and warriors. This practice only began to vanish with the rise of the Westphalian order in 1648 (which ended the Thirty Years war between France and the United Kingdom). The idea of states as providers of security became central and constitutive. Ever since the XVIIIth century, national governments took over the monopoly to use violence and wage war in the name of their people. Citizens fought wars in the name of the state, out of loyalty and patriotism. Profiteers of warfare were condemned as immoral and inglorious.

In the second half of the XXth century the history pendulum swung back - private agents in military conflicts revived. Post-Westphalian warfare culture was challenged by new reality and new world organization. Governments, organizations and even business companies have turned back to the private contractors. They are now so firmly embedded in intervention, peacekeeping, and occupation that this trend has arguably reached the point of no return. PMCs and PSCs, by media, politicians and even some legal scholars referred as mercenaries, specialize in military skills, including combat operations, strategic planning, intelligence collection, operational support, logistics, training, procurement and maintenance of arms and equipment. While most PMSCs serve governments, help democratize foreign security forces, work for the UN, NGOs, others prosper at the other end of the marketplace, working for dictatorships, regimes of failing states, ethnically and religiously motivated armed groups, organized crime, drug cartels, and terrorist-linked groups.

The new challenges brought by the re-emergence of the private subjects calls for better analysis and understanding what factors contributed to this rebirth. Only knowing the roots of the phenomenon it is possible to forecast future processes and development trends. Accordingly, regulatory steps should be taken in consideration of this knowledge.

A complex set of interdependent dynamics stimulated the revitalization of the controversial industry. P. W. Singer, a Senior Fellow at the Brookings Institution, one of the leading experts on changes in XXIst century warfare notes three main factors[16]:

- The end of the Cold War. Since the fall of communism and the end of face-off between the USA and the Soviet Union, professional armies around the world were downsized. After the decades-

[15] Thomson, J. E. *Mercenaries, Pirates, and Sovereigns– State-Building and Extraterritorial Violence in Early Modern Europe,* P.31-32.
[16] Singer, P. W. *Outsourcing the War*

long military buildup it resulted into massive influx of new soldiers and weaponry into the market. German reunification resulted in "essentially a huge yard sale of weaponry, where nearly every weapon in the East German arsenal was sold, most of it to private bidders at cut-rate prices."[17] Relieved access to guns resulted into governments' loss of their monopoly on the means of warfare. Moreover, it enabled variety of private subjects to cut into military affairs causing threats to peace and stability.

At the same time, on the other hand, local disturbances began to skyrocket, especially in Africa, Near East, and Balkans. Global instability reached its peak. The humankind bypassed the Third World War, but got involved into dozen of bloody regional clashes. The demise of superpower competition lowered foreign support to numerous governments. Ethiopia, Liberia, Somalia and Zaire lost significant support when their Cold War patrons withdrew previous aid and the possibility of military intervention[18]. To suppress this surge of instability strong and effective military force was necessary. At this point the demand matched the supply.

- Transformation in the nature of warfare. Even though there are international conventions regulating means and methods of waging wars, the developing world commonly disoblige these rules. One of the essential principles of the traditional war is the distinction between member of the AF and civilian. Each has particular legal status and protection. Developing states, however, fails to follow this main regulation. Armed clashes involve not only insurgents, civilians, but staggeringly increasing number of child soldiers. War becomes asymmetric not only on the main fighting parties (states vs. non-state subjects) aspect, but also means, methods and capabilities of operations – the ultimate in technology, unmanned machinery on the one side and old rifles, minivans adapted to war by attaching gun-machines on the other, AF soldiers, subject to the IHL rules, contra illegal combat groups, reckless of any laws, using child soldiers, illicit weaponry etc.
- General trend towards privatization and outsourcing of governmental functions around the world. On the one hand, some countries' authorities have used denationalization of the state-owned industries as a tool to reanimate and strengthen internal economies and reduce the government's payroll (firstly such a practice was introduced in the Great Britain by the Thatcher administration in 1979 and then rapidly spread among other states intensified also by the International Monetary Fund and World Bank[19]). However, the most evident tiger leap occurred in 1992 when the Pentagon hired private

[17] Singer, P.W. *Corporate Warriors: The Rise of the Privatized Military Industry*, P.54
[18] Howe, H. M. Global Order and Privatization of Security // *Fletcher Forum of World Affairs*, 1998.
[19] Singer, P.W. *opt.cit.*, P.66-67.

security firm Brown & Root to investigate the effectiveness of replacing soldiers in combat zones with private companies to handle support functions, such as cooking and handling supplies[20].

On the other hand, for most people "public" brings associations of second-rate or cheap (especially in such terms as "public schools," "public housing," or "public transportation")[21]. In the context of competition between state provided vs. private services, and having public sector taking dust, many governments gave up for the general trend of privatization. Education, health care, operation of prisons and other former responsibilities of the state moved to the hands of private business. Domestic security was not an exceptional case. The privatization movement was crested in 1998 when the USA Congress enacted the Federal Activities Inventory Reform Act. The Act mandated that every year all government agencies take account of tasks that are not inherently governmental functions and allow private companies to bid on handling these functions[22].

These three factors were the core accelerators of the growth of the privatization of military services. Author would also suggest taking into consideration the following influences:

- Rapid advancement of the private business structures in the field of technologies, inventions and information innovations. Business entities, due to much more loose regulations, are flexible and very susceptive to the pick up of the newest contrivance. “Complex weapons systems maintained by private companies on behalf of the military include: the B-2 Spirit stealth bomber, the F-117 Nighthawk stealth fighter jet, the KC-10 refueling plane, the U-2 reconnaissance aircraft, the M1 Abrams tank, and the TOW missile system. In addition to collecting and analyzing intelligence using remote sensors, civilians also operate the Global Hawk and Predator unmanned aerial vehicles”[23]. National militaries became more and more dependant on civil contractors as most soldiers were lacking competence to maintain and operate this machinery. Instead of outlaying heavy expenses for regular army due training, governments usually take advantage of the “package deals” – contracts which include wide range of training and operation services and initial purchase of weapons system[24].
- The "Somalia Syndrome" – since the huge casualties in the Battle of Mogadishu (The Black Sea Battle) in 1993, a refusal by Western world to intervene into conflicts that do not menace directly their

[20] Price, J., Neff, J. Army Molds Future // *News & Observer*, 2005.
[21] Calaguas, M. Military Privatization: Efficiency or Anarchy? // *Chicago-Kent Journal of International and comparative Law*, 2006.
[22] Mlinarcik, J.T. Private Military Contractors & Justice: a Look at the Industry, Blackwater, & the Fallujah Incident // *Regent Journal of International Law*, 2006.
[23] Schmitt, M. N. Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian employees // *Chicago Journal of International Law*, 2005.
[24] Calaguas, M. *opt.cit.*

national interests became very widely prevalent[25]. Governments made a shift in foreign policy becoming reluctant to use military intervention in Third World conflicts (such as Rwandan Genocide, Bosnia and Herzegovina, Kosovo clashes) and started pulling back their forces from the peacekeeping operations. A void was soon filled with private contractors replacing regular AF. Moreover, such international humanitarian institutions and groups as International Committee of the Red Cross (hereinafter ICRC), fearing human loss (The Red Cross lost more personnel in 1996 than it had lost in its previous 133 year history[26]), also hire private security to protect their personnel from insurgents or bandits attacking relief efforts for the money.

- New forms and players of the war. The demands on the military in the world after the terrorist strike against the US on September 11 of 2001 called for a more flexible and better technologically equipped soldiery. The feeling of insecurity grip not only society generally, but governments, international corporations and NGOs as well. The open niche and burning demand for a better protection was promptly discovered and filled by enterprisers. Moreover, as states' authorities are sometimes lacking support from their societies for the participation in ineffectual fight against this new enemy, they chose to vest certain functions to the private contractors and this way escape political, military and financial costs.
- Ethical downturn. In the face of globalization and new concept of "citizen of the world" societies lost their sense of loyalty to their nation. Patriotism became a relic of the past. With several exceptions majority of the current armed conflicts are determined not by freedom and independence strive, but by much more materialistic motives (political potency, natural recourses, economical benefits). Therefore, modern society is prone to pay for their safety instead of fighting and risking their lives themselves.

To sum up, the rise of the private military industry was determined by the complex interdependent factors. Considering that they are still contributing to the existence of such companies it is most presumptive that private actors on the battlefield are here to stay at least for the nearest future.

1.3. Doctrinal Conception of the Mercenary

In order to understand better bearings between mercenaries and PMSCs, its differences and similarities that lead to common attribution of the latter to the first category, it is needful to analyse both conceptions. This section will provide an overview of the scholarly definitions of the mercenary and evaluate it in the light of the legal determination provided in the conventional treaties.

[25] Howe, H. M. *Global Order and the Privatization of Security.*
[26] Ibid.

Mercenary ("one who works only for hire, "from Latin *mercenarius* - "one who does anything for pay, "from *merces* (gen. *mercedis*) - "pay, reward, wages, "from *merx* (gen. *mercis*) - "wares, merchandise". The adjective is recorded from 1532[27]) - a professional soldier hired to serve in a foreign army; a person primarily concerned with material reward at the expense of ethics[28].

In the literature on the subject, mercenaries are often described as “soldiers for hire”, “dogs of war” or “soldiers of fortune”. Yet what meaning these names are bearing is not clear since there is no ample accord among scholars in regard of scientific definition of the term. Partially the discord is conditioned by the different baselines of fundamental intentions and vague international legal regime that will be discussed further in the thesis. For the scholars who pursue for a rigorous regulation (mainly representing interests of the African and Third World states) as broad as possible definition is likeable. Meanwhile opposite side (Western states, human rights organizations) is conducive to the restrictive approach as the scope of the human rights protection is directly linked to the mentioned definition.

Traditionally, mercenaries have been stamped as non-nationals hired to take direct part in armed conflicts. The primary motive is stressed to be monetary gain rather than loyalty to a state. For this reason they are also called “soldiers of fortune” or “soldiers for hire”. Still even if financial aspect is the sharpest, mercenaries, according to Schreier and Caparini, could also be misguided adventurers, “veterans of a past war or an insurgency looking for whatever new conflict to continue in what they did before: fighting. Thus, what pulls people into the mercenary trade is not necessarily a motivation based entirely on monetary gain, but often the self-awareness that this is the only lifestyle which such an individual can have”[29]. Motivation, besides, can be a blend of financial profit, ideological, religious, nationalistic intentions or even personal characterizations. For instance such was the case of the most infamous mercenaries of the 20th century - Frenchman Bob Denard (real name Gilbert Bourgeaud) and the Irishman Mad Mike Hoare[30]. Their continuous involvement in the Congo between 1960 and 1965 and other African states (Algeria, Benin, Comoros Islands, Guinea and Mozambique) and the atrocities committed by all sides of the conflicts set the tone for the debate on mercenarism in Africa. The activities of these apaches were a form of neo-colonialism driven mainly by the ideological intentions.

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[27] http://www.etymonline.com/index.php?term=market (accessed 2008/05/17)

[28] *The Oxford Essential Dictionary of the U.S. Military*, New York: Oxford University Press, 2001. P.266. - ISBN 0425180697

[29] Schreier, F., Caparini, M. *Privatizing Security: Law, Practice and Governance of Private Military and Security Companies.* – Geneva: Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2005, No 6. - P.16. Online version available at http://www.iss.co.za/dynamic/administration/file_manager/file_links/MONO147CHAP5.PDF?link_id=30&slink_id=6421&link_type=12&slink_type=23&tmpl_id=3 (accessed 2009/04/17)

[30] Schulz, S. The Good, the Bad and the Unregulated: Banning Mercenarism and Regulating Private Security Activity in Africa / *Elimination of Mercenarism in Africa: A Need for a New Continental Approach* / Edited by Gumedze S.. The Institute for Security Studies Monograph Series No 147, 2008. - P. 124-125.

Alike Mad Mike claimed during his trial that he sees South Africa as "the bastion of civilization in an Africa subjected to a total communist onslaught. <…> I see myself in the forefront of this fight (against communism) for our very existence. I see my men as a noble band of patriots motivated by the same desires"[31].

Some authors provide wider understanding of the term "mercenary". L. Nathan suggests characterizing them as "soldiers hired by a foreign government or rebel movement to contribute to the prosecution of armed conflict – whether directly by engaging in hostilities or *indirectly through training, logistics, intelligence or advisory services* – and who do so outside the authority of the government and defense force of their own country"[32]. The latter definition, as we can recognize, represents interests of the African states to solidify the broad understanding of the mercenary in order to warrant their wide regulation. As we will see later when analyzing conventional definitions, it goes far beyond legal approach as it includes not merely direct engagement in hostilities, but also training, logistics, intelligence or advisory services. Meanwhile others go even further in broadening the definition formulated in the Protocol I and expand the notion of the mercenary to cover any "individual or *organization* financed to act for a foreign entity within a *military style* framework, including conduct of military-style operations, without regard for ideals, legal, or moral commitments, and domestic and international law"[33]. Such an extensive determination obviously claims to embrace private security and military personnel and is hardly acceptable in the context of international humanitarian and human rights law.

Despite very various definitions, most scholars agree that definition has two essential components – financial motivation and being an alien, having no national association with any of the parties to the conflict. Center for Humanitarian Dialogue suggests defining mercenaries as "individuals who fight for financial gain in foreign wars; they are primarily used by armed groups and occasionally by governments"[34]. Yet even these two elements can not entirely sustain the critics. Sarah V. Percy proposes the argument, that "using foreign status to define a mercenary is that it is historically inaccurate <…>. Historically, foreign soldiers were common. Further, the notion of nationality narrows the definition of mercenaries to a time period in which the idea of nationhood makes sense, and thereby

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[31] Mockler, A. *The New mercenaries.* London, Sedgwick and Jackson, 1985. - P. 328. - ISBN- 978-0283992964

[32] Gumedze, S. *The Private Security Sector in Africa: The 21st Century's Major Cause for Concern?* // The Institute for Security Studies Occasional Paper 131, 2007.

[33] Goddard, S. *The Private Military Company: A Legitimate International Entity within Modern Conflict*: Master thesis: Faculty of the U.S. Army Command and General Staff College, Fort Leavenworth, 2001. - P. 8.

[34] Small Arms and Human Security Bulletin // Center for Humanitarian Dialogue, Issue 3, 2004, P. 2. Online version available at http://www.hdcentre.org/files/Bul3-English.pdf (accessed 2009/04/20)

excludes many forms of mercenary on the scene prior to the XIXth century"[35]. Author to this thesis, however, would dissent from the suggested reasoning. Law and legal rules are not targeted at regulating retrospective phenomenon, but rather aimed at settling the challenges of the today and tomorrow. Therefore more relevant substantiation should be based on the present situation that is facing the emergence and establishment of the private entities in the military sphere. Globalization conditions that these companies being of transnational profile hires assorted personnel. As specifics of the business requires, locals are highly needed to fulfill certain functions which need peculiar knowledge of the geographical, cultural, linguistic conditions to warrant success of the operations. Accordingly, situations where nationals would be involved in conflicts through the foreign PMSCs are very likely to occur and need to be addressed. Otherwise, following the present approach, two employees performing the same job would be granted distinctly different legal status just because one is national and another one is an alien to the party to the conflict. Such a blemish could be solved by modifying foreign element into external, as S. Percy suggests. This would allow including those nationals who are not personally concerned with the victory of one of the sides.

Anyhow externality itself is also not sufficient to define the mercenary. Motivation is second essential principle to be taken into account. Being a state of mind and one of the components of the *mens rea* it first of all faces the difficulty of proving. Besides it is very much presumptive that person could have a mixed motivation – financial, patriotic, ideological, religious inspirations. Moreover, it is rather unreliable criteria for distinguishing mercenary from the national army troop. Regular soldiers, especially nowadays, are also primarily motivated by the financial gain. Their sweeping transition to the private military structures manifestly validates such proposition. Even the etymology of the word evinces to be so[36]. Therefore definitions based entirely on monetary rewards are inadequate. Such is, for instance, Mocklers, who believes the true mark of a mercenary is a "devotion to war for its own sake. By this, the mercenary can be distinguished from the professional soldier whose mark is generally a devotion to the external trappings of the military profession rather than to the actual fighting"[37].

S. Percy delivers a potential resolution how to bypass this weakness. She introduces criterion of group motivation. It encompasses both elements of the externality and financial objective and gives more clear-cut distinction between the mercenary and regular soldier. In order to qualify a person as

[35] Percy, S.V. *This Gun's for Hire: A New Look at an Old Issue*, P.723.
[36] The term soldier is derived from an Old French word, itself a derivation of Solidarius, Latin for someone who served for pay. Solidare in Latin means "to pay" and Roman soldiers were paid in Solidi. The common origin for the words soldier and payment survives not only in French (soldat and solde) but also in other languages, like Spanish (soldado and soldada) and Dutch (soldaat and soldij).
http://www.spiritus-temporis.com/soldier/etymology.html (accessed 2009/04/04) and Thomson, J. E. (supra note 1, P.26.)
[37] Mockler, A. *The New Mercenaries*. P. 35-36.

mercenary it should be proven that he is lacking group motivation – scilicet that his personal gain motive is unmitigated by an unselfish, group orientated motives[38]. Such an innovation is poorly helping to resolve the limitations of the traditional definition on its own. Therefore it must be supplemented with an additional test of the authoritative control. The leading force that brought international community to the need to regulate independent fighters was the fear that they did not fit in the traditional constraints built into the nation-state system. Under Weber's conception only sovereign state as "human community claims the monopoly of the legitimate use of force within a given territory"[39]. Private warriors challenged this order. While soldiers of the states AF are subject to humanitarian laws, codes of conduct, disciplinary rules and are a part of strictly organized chain of command, mercenaries fall outside any state control mechanisms.

They can freely choose whether to fight or not, how to fight and when to leave the battlefield if he/she feels it's getting too hot there. Having this broad freedom they accordingly have purely individual responsibility for their acts. Another quality that the idea of the group motivation brings is potential to draw the line between the mercenary and employees of PMSCs (see Annex 1. Spectrum of Armed Forces). This will be discussed in detail in the following part while analysing the similarities and differences between these two categories.

Summarizing the review of the different scholar approaches and their critics the mercenary could be defined as an individual who, being external to the conflict and lacking group motivation, is participating directly in the hostile activities of the armed conflict.

[38] Percy, S.V. *This Gun's for Hire: A New Look at an Old Issue*, P.725.
[39] Carmola, K. It's All Contract's Now: Private Military Firms and a Clash of Legal Structure // *Brown* Journal of *World Affairs*, 2006, Vol. XIII, issue I. – P. 162

2. PRIVATE MILITARY AND SECURITY COMPANIES

The present chapter will focus on the private actors operating in the warfare. First of all it will give a brief survey of the industry, concentrate on defining what is covered by the most general term of private contractors, what are scholar propositions for the classification of these entities. Whereupon it will analyse in brief the merits PMSCs suggest for national governments of both sides of conflicts as well as challenges they could or are facing while outsourcing military operations. The exploration conducted in this chapter will provide a better understanding of the industry, factors stimulating its growth and possible trends for the evolution. More important, it will deliver a take-off point for the further evaluation of the legal status of the certain types of private military forces and their employees.

2.1. Swelling Business of the Private Military and Security Services

One of the top headaches of the contemporary IHL is rapidly increasing role of the relatively new player in the battlefield – PMSCs. All troubles start when it comes to the definition of what it is as such term does not exist within any current international legislation or convention. Therefore the concept is framed by legal scholars and is not unanimous. In order to formulate definitions it is first of all instrumental to have a deeper look into the industry and its composition.

The first PMC dates back to 1967, when Sir David Stirling founded WatchGuard International, a company employing former British SAS (Special Air Service) personnel to train militaries overseas[40]. Ever since industry was swelling and today it is one of the fastest growing business branches. For instance, during the first gulf war (1990-1991), one of 50 people on the battlefield was a private contractor. In Bosnia (1992-1995), that ratio was already one to 10[41].

Perhaps no example better illustrates the industry's growing activity than the war in Iraq. It was even by some named the first privatized war[42]. In 2004 there were more than 20,000 US contractors from more than 60 security firms working in Iraq alone, which represents a significant increase from the mere 2,000 that were employed in all overseas conflicts in the year 2000 (to other more recent source, it could be up to 50,000[43]). This makes them effectively the second-largest armed component of

[40] Schreier, F., Caparini, M. *Privatizing Security: Law, Practice and Governance of Private Military and Security Companies*, P.148.
[41] Price, J., Neff, J. *A Private, Driven Man*
[42] Military Industrial Complexities // *Economist*, 2003. – P.56
[43] Unfortunately no exact numbers could be provided since governments are not fain to reveal extent of outsourced military functions and business hide behind the shield of trade secret. In present thesis numbers are being used from: Mlinarcik, J.T. Private Military Contractors & Justice: a Look at the Industry, Blackwater, & the Fallujah Incident // *Regent Journal of International Law*, 2006; Volovoj V. Karas privačiai // *Geopolitika*, 2009 and http://www.unitedpmc.com/companies.htm

the coalition after the US 100,000 troops. Britain, in comparison, has more than 8,000 soldiers in the country[44].

As Singer notes, PMSCs have operated in more than 50 countries, on all continents except Antarctica[45]. Their clients vary from highly military capable governments to poor and unstable counties, from international organizations like UN to disreputable groupings and even individuals. African states rely on private forces in reestablishing internal security and public order, suppressing rebels and riots, European militaries look for a help in transportations, peacekeeping missions deployment and support, Latin America – in the struggle against drug cartels and Southeast Asia – fight against terrorism. International organizations and corporations employ private defense companies for the safeguard of their personnel and shipments, especially of the humanitarian aid.

2.2. Spectrum of the Private Contractors Industry

PMSCs can be classified on various grounds. For our research the most important is regimentation based on the services that they provide. Depending on it a respective legal status would be granted.

Thomas K. Adams suggests dividing private warriors into three categories[46]:

- "traditional" mercenaries
- large commercial companies that provide high-quality tactical, operational, and strategic advice for the structure, training, equipping, and employment of AF.
- groups that are not military in organization or methods, but provides highly specialized services with a military application, for instance personal protection, signal intercept, computer "cracking," secure communications, or technical surveillance.

To our opinion, such a classification firstly goes against the vantage-point chosen and substantiated below that PMSCs generally can not be regarded as mercenaries. Meanwhile Adams' puts them all under the class of mercenaries. Moreover, by simply providing examples of the functions exercised, he does not give a clear attribute that determines an attachment of the particular activity to the particular group.

Not without blemish is also the typology introduced by Singer. He claims that the industry is divided into three basic sectors[47]:

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[44] Squitieri, T. Role of Security Companies Likely to Become More Visible // *USA TODAY*, 2004.
[45] Singer, P. W. The Dogs of War Go Corporate // *The London News Review*, 2004.
[46] Adams, T. K. The New Mercenaries and the Privatization of Conflict // *Parameters*, 1999. P. 104-105.
[47] Singer, P. *Outsourcing the War*.

- military support firms, which provide logistics, intelligence, and maintenance services to AF, allowing the soldiers to concentrate on combat (e.g. Halliburton or Kellogg, Brown & Root). Their activities are totally compatible with the IHL rules;
- military consulting firms, which employ retired officers to provide strategic advice and military training. These companies "do not typically engage in direct combat, although some PSC employees are assigned duties likely to draw fire" [48]; and
- military provider firms, which offer tactical military assistance, including actual combat services (e.g. Executive Outcomes (hereinafter EO) engagement in Sierra Leone in 1993 or Sandline in Papua New Guinea in 1997).

Singer uses the spear analogy to illustrate the structure of the industry: the spike is compared to the PMCs who engage in hostile activities – it is the "sharpest" and lethal part. The opposite part is the military support firms. The body of the spear consists of the consultative firms[49]. But still it is not clear what is the dividing line between activities ascribable to PMCs and attributed to PSCs.

To our opinion, the most solid method to categorize private military industry is setting down clear test of the outcomes of contractors operations instead of enumerating activities of each category. Therefore we suggest using the following regimentation:

- service providers accommodating military forces. These are exclusively daily non-military facilities in no way related or having impact on combat (laundry, cooking, cleaning, post services);
- firms which contribution to the successful military operations is based on indirect causal link. It would cover for instance military training, strategic education, maintenance of the machinery, body guarding, intelligence etc.;
- military personnel directly participating in the hostile activities. The present category, in our eyes, should be interpreted in an expansive manner, because it causes higher risk for the violation of IHL and therefore should be subject to a stricter regulation.

2.3. Definition

In legal literature terms contractors, PMCs, PSCs, private military firms (hereinafter PMFs), and mercenaries, even though covering a wide range of different kinds of people, corporations and activities, are used inconsistently because of the absence of commonly agreed definitions. However, an

[48] Gaston, E. L. Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement // *Harvard International Law Journal*,Vol. 49, No 1, 2008. – P.226
[49] Singer, P.W. *Corporate Warriors: The Rise of the Privatized Military Industry*, P.91-92.

explicit terminology is necessary for several reasons. Primarily, it is a prerequisite for the formulation of legislation. Secondly, every concept carries in itself specific features and based on it a particular status should be granted to a particular group or individual.

Private security as a concept is generally difficult to pin down. First of all such a trouble is conditioned by the broad array of its forms. It is complicated to find essential and common features of all types of the business and put under the single umbrella of clear and unambiguous definition. Secondly, as K. Carmola points out, private contractors "defy categorization within existing state-based notions. They are what one could call "hybrid organizations". We might usefully think of them as having at least three distinct personalities that grapple for supremacy: 1) a profitable multi-national business providing an essential service in a niche market; 2) a humanitarian organization providing human security in danger zones to those who are working to bring peace and stability; and 3) a military force[50]. Even though it is highly arguable if humanitarian profile could be attributed to the PMSFs in general, but it gives the perception over the complexity of the industry.

Some authors chose the way of defining the PMCs by naming its functions. It usually forms cumbersome description. For instance Maj. Goddard provides such a concept of the PMC: "A registered civilian company that specializes in the provision of contract military training (instruction and simulation programs), military support operations (logistic support), operational capabilities (Special Forces advisors and command and control, communications and intelligence functions) and/or military equipment, to legitimate domestic and foreign entities[51]. The definition already provides the basis for the classification of the PMCs. Another, more general concepts were suggested by D. Brooks. To put it in brief, according to him PMCs are "private individuals and companies that provide military services to foreign entities for pay"[52]. Such a definition is inaccurate for few reasons. Firstly, PMC cannot be an individual since it is of a corporate nature. Secondly, it is not mandatory to provide services for the foreign entities. As a broad practice indicates governments rely on national private contractors for supply, training, strategic advice functions. For instance, 1994-2002, the U.S. Department of Defense (hereinafter DoD) entered into over 3,000 contracts with 12 of the 24 U.S.- based firms[53]. More explicit, but again imprecise term, formulated by Brooks, reads as follows: "a legally constituted for-profit

[50] Carmola, K. *It's All Contract's Now: Private Military Firms and a Clash of Legal Structure*, P. 162
[51] Goddard, S. *The Private Military Company: A Legitimate International Entity within Modern Conflict*, P. 8.
[52] Brooks, D. The Business End of Military Intelligence: Private Military Companies // *The Military Intelligence Professional Bulletin*, 1999. - P. 5.
[53] Peterson, L., Niekerk, P. Privatizing Combat - the New World Order // *Center for Public Integrity*, 2002. Online version available at http://www.thirdworldtraveler.com/War_Peace/Privatizing_Combat.html (accessed 2009/04/29)

company that uses onsite facilities and equipment and non-indigenous personnel to directly and substantially support or enhance a client's security capabilities"[54]. Reference to "non-indigenous personnel" is intended to strain unsoundly the concept to the mercenary. In reality companies are hiring locals to use their knowledge of particularities of the environment, which is usually unfamiliar for foreign military personnel.

Singer suggests the term of PMCs to be characterized as "profit driven organizations that trade in professional services intricately linked to warfare"[55]. He considers these private companies as a continuation and new form of durable practice of mercenaries. The difference from individual "dogs of war" is that they are corporate bodies and accordingly can offer a wider range of services.

A quite reasonable and sound is description by C. Ortiz, who defines PMCs as "legally established multinational commercial enterprises offering services that involve the potential to exercise force in a systematic way and by military means and/or the transfer or enhancement of that potential to clients. The potential to exercise force can materialize when rendering, for example, a vast array of protective services in climates of instability. Transfer or enhancement, on the other hand, occurs when delivering expert military training and other services such as logistics support, risk assessment, and intelligence gathering. It is a "potential" to exercise force because the presence of a PMC can deter aggressors from considering the use of force as a viable course of action**"**[56]. The main critics in regard to this definition is that it covers all the broad spectrum of the private contractors without any distinction made for PMCs, PSCs and private supply contractors. Therefore it would be more accurate to name it PMSCs.

Despite the variety of definitions, there is no single world wide accepted concept. As K. Fallah puts it: "<…> the term "private military contractor" is one of art rather than law – no international legal instruments make reference to or define the term"[57]. Accordingly interpretations and misuse of the notion are common. In media a wide scope of companies are shield under the single umbrella of the PMC - starting with firms that provide strategic trainings and supply service all the way to companies that provide purely military capabilities and directly take part in operations that might be qualified as corporate combat actions. The same problem could be descried in above cited definitions. Even though in general such a lumping together is unjustifiable it is very difficult to uphold the distinction between

[54] Brooks, D. *The Business End of Military Intelligence: Private Military Companies*, P. 5.
[55] Singer, P.W. *Corporate Warriors: The Rise of the Privatized Military Industry*, P.186
[56] Ortiz, C. *The Private Military Company: An Entity at the Center of Overlapping Spheres of Commercial Activity and Responsibility* / Private Military and Security Companies. Chances, Problems, Pitfalls and Prospects / Jäger, T., Kümmel, G. editors. – Wiesbaden, 2007. – P. 60-61. ISBN: 978-3-531-14901-6
[57] Fallah, K. Corporate Actors: the Legal Status of Mercenaries in Armed Conflict // *International Review of the Red Cross*, Vol. 88, No.863, 2006. – P.602

PMCs (that provide offensive services) and PSCs (that provide defensive services).[58] The central problem is that drawing a line between offensive and defensive services is invidious. One could easily merge into another one. As plenty of incidents[59] had shown, contractors who were hired to provide supply or maintenance services often faces attacks and accordingly has to use force to protect themselves or the property. Moreover, many companies, especially the large ones, specialize in providing both types of functions. Finally, some jobs of contractors are by themselves disputable whether falling under defensive or offensive category. U.K. Green Paper pointed straightly that "the distinction between combat and non-combat operations is often artificial. The people who fly soldiers and equipment to the battlefield are as much part of the military operation as those who do the shooting. <…> the same applies to those who help with maintenance, training, intelligence, planning and organization – each of these can make a vital contribution to war fighting capability"[60]. Given point of view was, nevertheless, rejected by the House of Commons on the argument "that a workable distinction would be an important element of any regulatory regime in spite of the difficulty of drawing one up"[61].

To sum up, author of the thesis suggests that despite cumbers in finding a precise wording for the definition, it is of essential importance to determine each type of the enterprise players. A possible solution for clearing the obstacle that same entity can have features of both types is to put it under the regulation based on the more controlled type. However, it would only be applicable for the corporate legal persons. Legal status of the individual employees should be based on their factual duties and actions undertaken. It will be in detail discussed in the following chapter.

In this thesis the general term private military and security companies is used when talking about the whole gamut of industry players. Meanwhile when a particular type of service providers is meant, a respective notion is invoked. We suggest the following definitions:

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[58]Walther, P. *The legal status of private contractors under international humanitarian law*: Master thesis: Copenhagen: University of Copenhagen, 2007. – P.6-7

[59] For instance the Blackwater USA incident in Fallujah. In 2004 Blackwater signed a contract to protect Eurest Support Services, a European food company that was feeding U.S. troops. On March 31 four Blackwater USA security contractors were ambushed and killed in Fallujah while escorting an ESS convoy on its way to pick up kitchen equipment. Armed insurgents attacked the SUV's and the contractors at point blank range. The bodies of the contractors and the SUV's were ransacked, looted, and torched. Two of them were dragged through the streets behind cars, strung up, and hung on a bridge over the Euphrates River.

[60] *Private Military Companies: Options for Regulation* // United Kingdom Foreign and Commonwealth Office, London.2002. –P.8 - ISBN 0 10 291415. Online version available at www.fco.gov.uk/Files/kfile/mercenaries,0.pdf (accessed 2009/04/29)

[61] Ninth Report of the Foreign Affairs Committee Private Military Companies // Session 2001–2002, Response of the Secretary of State for Foreign and Commonwealth Affairs. – P.6 - ISBN 0-10-156422-8
Online version available at http://www.fco.gov.uk/resources/en/pdf/7179755/2002_oct_ninth_report (accessed 2009/04/29)

Private Military and Security Company – a private business entity that provides military and/or security services, irrespective of how it describes itself. Military and security services include, in particular, armed guarding and protection of persons and objects; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel[62].

Private Military Company - a legally established commercial enterprise, offering services that involve specialized operational and tactical skills of the personnel and often include combat experience.

Private Security Company - a legally registered company, whose personnel "accompanies the AF without actually being members thereof"[63] and provides specialized services of military nature that enable and render technical and intellectual base for the combat operations without a direct involvement.

Private Supply/Service Company – a legally registered company, whose personnel "accompanies the AF without actually being members thereof"[64] and provides civil supply and maintenance services.

2.4. Challenges of the use of PMSCs

Outsourcing of the military services is highly controversial practice. On the one hand it suggests obvious benefits from the military (innovations, expedition, ability for the AF members to concentrate on their direct functions while PMSCs take care of support services etc.), political (through privatizing parts of their missions governments obviate negative public reactions, they might also prefer foreigners who neither understand nor represent local viewpoints to exercise certain services.), economical points of view. Besides, the replenishment of pluralism itself can increase efficiency.

On the other hand it might cause serious menace. While the most usually raised issues are lack of transparency and accountability, concernment in destabilization, from the IHL perspective the most relevant are questions of the vested interests, control and enforcement mechanisms. Practice indicates that governments tend to employ private companies to implement their national foreign policy goals, which would, if executed by state agents, violate international law principles, treaties or agreements. For instance, in 1995 the American company MPRI trained Croatian forces during their struggle against the Serbians. Such assistance was in violation of UN sanctions against the provision of military aid to the Croatians[65]. The question of the state responsibility for the violations committed by persons under their jurisdiction occurs. It will be discussed more particularly in the third part of the thesis.

[62] Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, Montreux, 2008, A/63/467, S/2008/636. – P.6
[63] Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Art. 4
[64] Ibid.
[65] Calaguas, M. *Military Privatization: Efficiency or Anarchy?*

Lack of enforcement of the responsibility is at the present situation the most severe problem. Even though, as in the following part will be substantiated, international legal regulations in this regard are adequate, in practice difficulties arise when contractors commit misdeeds. In contrast to the troops, who are accountable under military codes wherever they are located, private contractors are subject to the domestic laws of either state that hires them, home state or state in which violation was committed. Yet PMSCs in most cases operate in failed states and prosecuting them locally might be complicated. On the other hand, applicability of the extraterritorial jurisdiction is also possible only in regard of rather a limited number of the most severe crimes. In result, in Iraq for instance, not one private military employee has been punished for a crime, while the dozens of US soldiers have[66]. Moreover, there are no international legal instruments to enforce control of the PMSCs' activities. Even though many PMSCs employ elite, highly trained ex-military service persons whose knowledge of and compliance with IHL may be beyond reproach, these companies, facing high demands for their services, hires individuals whose level of training and skills is poor. In the absence of a clear disciplinary mechanism, the ability of PMSCs to ensure that their employees abide by IHL and human rights law is very doubtful. One of the examinations has revealed that more than 3/4 of the security personnel failed tests of required skills and were unable to demonstrate abilities to arrest intruders or shoot with accuracy[67]. During the Abu Ghraib prisoner-abuse scandal investigators found that approximately 35% of the contract interrogators, hired by the firm CACI, lacked formal military training. In other cases, investigations of PMSCs' personnel serving in Iraq revealed the hiring of a former British soldier who had been jailed for working with Irish terrorists and a former South African soldier who was involved in terrorist activities during the apartheid era[68]. Examples illustrate that lack of control and supervision bears a high potential for the serious violations of the IHL and human rights law. Therefore these issues must be respectively addressed not only through national legislation (since it can be evaded simply by re-establishing in the state which has more beneficial domestic laws), but through international conventional tools.

[66] Singer, P. *Outsourcing the War*.
[67] Minow, M. Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy // *Boston College Law Review*, 2005.
[68] Singer, P. *opt.cit.*

3. LEGAL STATUS OF THE PMSCS AND ITS' PERSONNEL

An estimation of the legal status of PMSCs is very complicated and multilayered. There are two major camps of scholars. The first one is represented by those, who are prone to equate PMSCs personnel with illegal mercenaries. According to them, since international law failed to address the role of the modern form of the private military in legal landscape, they fall into the same category as traditional "dogs of war" and should be deprived of the combatant and POW status. Vast majority of scholars on the opposite side uphold that even though at the present PMSCs are operating within a vacuum of effective regulation and accountability at both the international and domestic levels, a one-size-fits-all approach is unacceptable. However, there is no common assent among this camp in regard what status should be accorded to private contractors. Some take the view that being neither civilians nor combatants they represent a new form of "irregular combatants", itself an unclear concept[69]. Others suggest that "operations conducted by PMSCs are indeed legitimate, but that measurement of legitimacy can only be assessed as being de-facto and amoral"[70]. Finally, to the opinion of the third group IHL is not concerned at all with the lawfulness or legitimacy of PMSCs *per se*. Rather, it regulates the behavior of such companies if they are operating in situations of an armed conflict[71].

The question of legal status is of fundamental importance. It defines rights and obligations of the contractors and grants a certain volume of protection upon capture by the adversary. Present situation demonstrating impunity of employees of private entities in conflict-ridden areas substantiates the obvious need to clear out what is the responsibility of individuals on the one hand and states on the other.

In order to conduct a full-scale and thorough research, it is dispersed into several layers. First of all, an estimation of legal status of an individual employee of the PMSCs is provided. Questions of their rights, duties, privileges and responsibility under IHL are the core of the analysis. Secondly, the status of PMSCs as corporate structures is addressed. Finally, the responsibilities of state (contracting, territorial and home state) are scrutinized. In parallel to these questions proposals on potential improvements are suggested.

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[69] Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, A/62/301, 2007. Online version available at www.ohchr.org/english/issues/mercenaries/index.htm (accessed 2008-04-07)

[70] Goddard, S. C. *The Private Military Company: A Legitimate International Entity within Modern Conflict*, P. 3.

[71] Gillard, E. C. Business Goes to War: Private Military/ Security Companies and International Humanitarian Law // *International Review of the Red Cross*, Vol. 88, No.863, 2006. - P.528

3.1. Legal Status of Individual Private Contractors

It is of essential importance to highlight that under contemporary IHL only PMSCs employees have a certain status. Companies, on the contrary, do not possess international legal status.

3.1.1. Civilians / Combatants

The initial point for the research of PMSCs personnel status should be the essential delineation of whether they are civilians or combatants. The idea of distinction between these two categories is one of the central principles of the IHL. Having a broad acceptance among states it is considered to be a customary international humanitarian rule[72]. Military theorists stresses that such dissociation is necessary. Militaries central role is to die and to kill. Possessing strictly formalized procedures, hierarchy and discipline it has capacity to ensure "legitimate" killing in the name of the state. Morris Janowich already in 1975 foreseen and described the dangers of attempting to merge this distinctly military world with that of the civilian:

> "To achieve the objectives of the democratic elite model, it is necessary to maintain and build on the differentiation between civilian and military roles. The democratic society must accord the professional soldier a position based on his skill and on his special code of honor. <…> The current drift toward the destruction of the differentiation from the civilian cannot produce genuine similarity but runs the risk of creating new forms of hostility and unanticipated militarism"[73].

The answer to a question whether members of the PMSCs staff are combatants or civilians holds practical consequences. If they are civilians, general rule is that they are protected against the dangers arising from military operations and can not be a target of the attack. Reservation to this immunity occurs, however, if they take a direct part in hostilities[74]. In such case civilian is considered to be an unlawful or unprivileged combatant. Accordingly, he/she is subject to the trial for participation in hostilities without being entitled to do so and, if falling into the power of the enemy, would not be entitled to POW status[75].

Meanwhile, the determination of a person as a combatant carries broad scope of privileges and duties. First of all, they are the only ones who have the right to take a direct part in hostilities[76] and who can be an object of attack. Sequentially, they are not personally responsible for the use of armed force

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[72] Henckaerts, J. M., Beck, L. D. *Customary International Humanitarian Law:* Volume 1: Rules. – ICRC and Cambridge University Press, Geneva, 2005. – P. 198, Rule 1-6. - ISBN-978-0521005289

[73] Grace, J. J. The Need to Be More Professional… Whatever That Means // *Naval War College Review*, 1975. Citing Janowitz M. Military Elites and the Study of War // *Journal of Conflict Resolution* 1, No. 1, 1957. – P. 9.

[74] Protocol Additional I, art.53(3) and AP II 13(3).

[75] Dormann, K. The Legal Situation of ''Unlawful/Unprivileged Combatants" // *International Review of the Red Cross*, Vol. 85, No. 849, 2003. - P. 46-47.

[76] Protocol Additional I, art 43(2).

as long as their acts do not amount to the war crimes, genocide or crimes against humanity. In case of capture by the adversary, combatants are to be granted a POW protection[77].

It is relevant to stress that if it happens that a person is captured during participation in hostile acts and it is not clear to which of above categories he belongs there is a particular procedure foreseen in both the GC III art. 5 and Protocol I art. 45 to qualify his status. Until that time, he/she will enjoy the protection under the GC III.

3.1.1.1. Combatant

The first attempt in IHL to establish definition of the belligerent occurred in the Brussels Conference of 1874. It was adapted and codified with modifications in 1907 in the Annex to the Convention (IV) respecting the Laws and Customs of War on Land[78] (hereinafter Hague Convention). Treaty provided a two-level test for determining whether or not a person is a combatant. First of all, if he belonged to the army he automatically was presumed to be a belligerent. Secondly, if individual was a member of the militia or volunteer corps that did not form a part of the regular AF, he had to fulfill four criteria in order to be considered as a belligerent:

1. to be commanded by a person responsible for his subordinates;
2. to have a fixed distinctive emblem recognizable at a distance;
3. to carry arms openly; and
4. to conduct their operations in accordance with the laws and customs of war.

The definition was further extended in GC III art. 4(A-1, 2, 3, 6) and AP I art. 43. GC III in principal deals with the protection to be afforded to POWs. Since, generally speaking, POWs are combatants who fall into the hands of the enemy the definition of who is entitled to POW status implicitly defines who is a combatant[79].

For the purpose of defining legal status of the personnel of PMSCs the most relevant are the first two groups defined in art. 4 (A-1, 2)[80]. They will be in brief assessed further in order to estimate whether private contractors could fall within any of the category.

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[77] Geneva Convention III, art. 4; Protocol Additional I, art. 43, 44.

[78] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[79] Heateon, J. R. Civilians at war: Reexamining the Status of Civilians Accompanying the Armed Forces // *Air Force Law Review*, No 57, 2005. Online version available at http://findarticles.com/p/articles/mi_m6007/is_57/ai_n16520069/?tag=content;col1 (accessed 2009/04/05)

[80] To authors opinion the group of to the inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed unit (participants in a leve´e en masse) (GC III art. 4 (A 6)), is obviously not very relevant in the context of PMSCs since those are organized entities motivated primarily by the financial profit.

3.1.1.1.1. Members of the Armed Forces

"Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces" (GC III, art. 4 (A–1)).

The latter subparagraph addresses *de jure* combatant status – those individuals who are formally incorporated into the AF of the party to the conflict. Usually national laws stipulate who and how can become a member of national AF, but most prevalent requirement is formal incorporation instead of mere factual engagement in the hostilities. Having in mind the tendency of outsourcing military functions by the governments, it is hardly likely that they would tend to incorporate private entities into national forces.

Following the word of the GC III, it should be noted at the beginning that only the staff of PMSCs hired by states could be combatants. Considering that about 80% of the contracts are concluded with entities other than states (NGOs, international organizations, business corporations and individuals), a significant part of the PMSCs personnel is excluded from being considered as combatants[81]. However, K. Ipsen contests such a categorical assumption. According to him, "only a party to a conflict which is a subject of international law can have AF whose members are combatants"[82]. Accordingly, it would also cover recognized liberation and resistance movements if they fulfilled the mentioned requirements[83] and if such a conflict would be considered as international (since there is no combatant status in the NIAC).

According to AP I art. 43 (1) the AF of a state consists of: *"organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates<…>. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce*

The same applies to the members of regular AF who profess allegiance to a government or an authority not recognized by the Detaining Power (GC III art. 4 (A 3)) since private contractors are as a rule stimulated not by the ideological or patriotical loyalty, but by the business intentions.

[81] Gillard, E. C. *Business Goes to War: Private Military/ Security Companies and International Humanitarian Law*, P.532

[82] Ipsen, K. Combatants and Non-combatants / *The handbook of International Humanitarian Law* / Fleck D. editor, Oxford University Press, 2008. – P. 80. – ISBN 978-0-19-923250-5

[83] According to the commentary of the GCs and AP I, common art.2 (3) provides the possibility for their application to a Power which is not a Party to the Conventions, "if the latter accepts and applies the provisions thereof". Some writers consider that the term "Power" can refer to entities that are not States. AP I art.1 (4) has clearly extended its field of application to entities which are not States. If they conform to the requirements of the present article, liberation movements fighting against colonial domination (provided that they make a declaration under art.96 (3), and resistance movements representing a pre-existing subject of international law may be "Parties to the conflict" within the meaning of the Conventions and the Protocol.
Commentary on the Additional Protocols / Edited by Sandoz, Y., Swinarski, C., Zimmerman, B. – ICRC, Geneva, 1987. P.506-507, para. 1661– ISBN 90-247-3460-6.

compliance with the rules of international law applicable in armed conflict". This definition is generally accepted as customary rule[84].

In order for the employees of the PMSCs to qualify as combatants following conditions has to be fulfilled:

PMSC must be an organized armed group

The term "organized" is rather flexible. It basically means that the fighting must have a collective character, be exercised under effective control and in accordance to disciplinary rules. Moreover, it implies a particular hierarchical structure and subordination to a command[85].

As a common practice, PMSCs have a hierarchical architecture. Some of the biggest companies even adapted structures rather similar to the ones of regular armies. Consequently, PMSCs could satisfy the condition to be an organized armed group.

Employees of the PMSC must be under a command responsible to the party to the conflict

The central issue is whether a mere contract is a sufficient tool *per se* to put PMSC under the effective control of the state (state is used as a synonym to the party to the conflict without disaffirming that concept is generally broader). Neither AP I nor the commentary gives the clarification on the question. The negative answer is the most likely[86], since neither the states nor the military commander have direct authority over the employees of PMSCs, as they are not incorporated into the military chain of command.

However, following the principle of the freedom of the contract, company and hiring state could settle in their agreement conditions of control and subordination nexus.

In conclusion it is hardly likely, unless otherwise settled in the contract, that the requirement could be satisfied in regard to PMSCs. Thus it should be examined every time on case-by-case basis.

PMSC must hold an internal disciplinary system to enforce compliance with IHL

Commentary of the art.43(1) of AP I indicates that internal disciplinary system covers both military disciplinary law and military penal law. At this point the difficulties to attribute PMSCs to the AF occur. Companies and their personnel are not subject to the military jurisdiction. Moreover, being a private business structures, firms do not have the capacity to impose legal sanctions, provided the contractual measures, which are usually very limited and ineffective.

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[84] Henckaerts, J. M., Beck, L. D. *Customary International Humanitarian Law*: Volume 1: Rules, P. 198

[85] *Commentary on the Additional Protocols* / Edited by Sandoz, Y., Swinarski, C., Zimmerman, B., P. 511-513, para. 1672. – ISBN 90-247-3460-6.

[86] Such position is supported by fair number of scholars, including Schmitt (supra note 23, P. 525), Gillard (supra note 71, P. 533), Walther (supra note 58, P. 25-26) etc.

The issue could possibly be solved by incorporating into the contract a respective clause, which would subject the personnel of the PMSCs under the military jurisdiction of the AF. A particular regard should be paid to art.86 (concerning the repression of breaches resulting from a failure to act when under a duty to do so) and art.87 (defining the duties of commanders with regard to breaches of IHL).

It is worthy to notice, that if a member of the AF or PMSC conduct an activity violating IHL he/she does not loose the status of combatant (if such was granted) and right to POW status[87]. He/She would still be legally responsible and subject to prosecution. This means that PMSCs are not obliged to guarantee that their personnel will utterly act in compliance with IHL rules, but it must warrant that all measures will be taken to ensure that. Such measures would be for instance legal education of the staff, control system and especially mechanisms to ensure the responsibility for violations. In other words, it is an obligation of action, but not of the result.

To conclude, if personnel of PMSCs are not formally incorporated into national AF under the domestic law, they need to meet the requirements set in the AP I art. 43(1). Namely, being an organized armed group they have to be under the command responsible to the party of the conflict and must hold an internal disciplinary system to enforce compliance with IHL. Whether or not company satisfies the conditions should be decided on case-by-case basis. Helpful, but not constitutive, indicators could be identity cards issued by the authorities of the state or wearing uniforms.

3.1.1.1.2. Members of Other Militias, Volunteer Corps and Organized Resistance Movements

"*Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict* <…>*"* (GC III, art.4 (a-2))

The second subparagraph refers to *de facto* combatants who are not formally incorporated into regular AF, but being structurally independent still fights for the party to the conflict. Historically this provision was aimed to define the status of the partisans during the II World War[88].

To be considered a combatant under this provision an employee of PMSC must pass two stages test. Firstly, the company has to belong to a party to a conflict. Second requirement is to meet four criteria's spelled out in art.4 (A-2)

Belonging to a party of an IAC

[87] *Commentary on the Additional Protocols* / Edited by Sandoz Y., Swinarski C., Zimmerman B. – ICRC, Geneva, 1987. - P. 513-514, para. 1675.
[88] *Commentary of the III GC Relative to the Treatment of Prisoners of War* // Edited by Pictet J. S. – ICRC, Geneva, 1960. - P. 52. – ISBN 2-88145-053-9

Initially the requirement for the group to belong to a party to the conflict was interpreted as demanding manifest, usually written, authorization by the authorities of the state. During the drafting of the provision it was no longer considered obligatory. Commentary of the GC III clarifies that ‘‘*de facto*’’ relationship is sufficient. It could even be expressed in the form of a tacit agreement, as long as operations of the groups in question are such as to indicate evidently for which side they are fighting[89].

Some scholars suggest applying the same test to determine whether contractors are fighting on behalf of a state as the one used in determining the responsibility of states under international law. Accordingly, if contractors exercise governmental authority or act on the instructions or under the direction or control of the state, then they may be seen as acting on behalf of that state[90].

Similar view was expressed by the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia (hereinafter ICTY). In case Prosecutor v. Duško Tadič the Appeals Chamber noticed that “the rationale behind Article 4 was that <…> States should be legally responsible for the conduct of irregular forces they sponsor”[91]. Consequently, referring to the letter and spirit of GCs and in particular the aim of deterring deviations from IHL standards through holding accountable not only those having formal positions of authority but also those who wield *de facto* power, Chamber concluded that “in order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a Party to an IAC and, by the same token, a relationship of dependence and allegiance of these irregulars *vis-à-vis* that Party to the conflict. These then may be regarded as the ingredients of the term “belonging to a Party to the conflict””[92].

IHL does not contain any criteria for establishing when a group of individuals may be regarded as being under the control of a State, that is, as acting as *de facto* State officials. An answer to this question is beyond the scope of this research and could be found in international laws regulating state responsibility[93].

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[89] *Commentary of the III GC Relative to the Treatment of Prisoners of War* // Edited by Pictet J. S., P. 57.

[90] Walther, P. *The legal status of private contractors under international humanitarian law*, P.24

[91] International Tribunal for the Former Yugoslavia, Case No.: IT-94-1-A, *Prosecutor v. Duško Tadič*, 15 July 1999. – P. 38, para.93. Online version available at http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf (accessed 2009/05/07)

[92] Ibid. P. 39, para.94

[93] However, an important provision in this regard is set in art.91 of the AP I (“A Party to the conflict <…> shall be responsible for all acts committed by persons forming part of its AF”). The opinion that even acts of individuals committed in private capacity should be attributed to the state to which AF individual belongs was supported by professor Reuter during the drafting of Articles on State responsibility. He stated, basing his opinion on concepts of *culpa in custodiendo* and *culpa in eligendo*, that: “It was now a principle of codified international law that States were responsible for all acts of their AF”. Professor Ago remarked that even though some members of the International Law Commission affirmed that the State was responsible for all the acts of its AF, it could not provide a basis for the drafting articles of state responsibility. According to him the IVth Hague Convention “made provision for a veritable guarantee covering all damage that might be caused by AF, whether they had acted as organs or as private persons”. (*Yearbook of the International Law Commission:*

Considering the above positions, it should be concluded that a contract between the authorities of the state and PMSC to perform certain military profile functions in favor of that state should be considered as a sufficient proof of such nexus of control and dependence and companies could in principle fulfill the requirement of belonging to a party to a conflict. A question should be also upraised if the companies, hired by the entities other than state to perform function on behalf of it, could also be considered as fulfilling the requirement to belong to the party of the conflict. In this regard commentary's position is that the fighting must be "on behalf of a "Party to the conflict" in the sense of art.2, otherwise the provisions of art.3 relating to non-international conflicts are applicable, since such militias and volunteer corps are not entitled to style themselves a "Party to the conflict". However, to the opinion of the author, the answer should be positive as long as PMSCs are apparently acting in support of that state[94]. An example could be situations where a government contractor or even individual person subcontracts the company in question. Such practice is very broad in Iraq today. In this case it is important to measure, if the activities the subcontractor engages in are integral to contract performance. If they facilitate the objectives of a party to the conflict they should be regarded as qualifying under the requirement to belong to the party to the conflict.

The second step in assessing PMSCs personnel status under the GC III art.4 (A-2) is the fulfillment of the four cumulative conditions. Since PMSCs vary a lot in their structure, methods of management and profile of services, there is no possibility to make generalizing evaluation. Therefore a case-by-case evaluation must be exercised and present thesis only makes passing references to the most important issues in regard to private contractors.

- Being commanded by a person responsible for his subordinates.

Commentary of the article stresses that the leader may be either civilian or military. What is important is that he/she holds responsibility for the actions taken on his/her orders. The purpose of this requirement is to ensure the discipline and compliance with the following conditions and laws within the group[95]. Therefore, PMSCs, which usually have hierarchical structure and methods of control and supervision, would conform to the latter provision.

- Having a fixed distinctive sign recognizable at a distance.

Summary records of the twenty-seventh session. - United Nations, New York, 1976, Vol. I. - P.7, para.5, P.16, para.4). Online version available at http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1975_v1_e.pdf (accessed 2009/05/07)

[94] Opposite position that only companies hired by a state party to an IAC could ever meet this requirement and those hired by or acting on behalf of any other actor operating in a situation of armed conflict would not was expressed by Gillard (supra note 71, P.534)

[95] *Commentary of the III GC Relative to the Treatment of Prisoners of War* / Edited by Pictet J. S., P. 59.

Commentary clears, that a distinctive sign must be worn constantly, in all circumstances. It must be the same for all the members and must be used only by that group. Moreover, the request is also applicable to the vehicles or an engine of war, tanks, airplanes or boats used by the concerned group while performing their functions[96].

This point in practice seems to cause difficulties. There have been plenty of complains in Iraq and Afghanistan that the personnel of PMSCs are extremely difficult to identify. One tickler from the military perspective is that they are usually confused with members of the AF if they wear uniform-like camouflage or with civilians. Besides, since there is no possibility to distinguish between staff of different companies, it is complicated to fill complains in cases of violations done by them[97].

- Carrying arms openly.
- Conducting their operations in accordance with the laws and customs of war.

This requirement must be met by the group as whole, rather than by the individuals. In order for a company to disqualify for combatant status due to non-compliance with IHL a systematic disregard for IHL as a matter of strategy would be required. Sporadic violations by employees do not disqualify the whole PMSC[98].

In resume, personnel of the PMSCs hired directly or indirectly by a party to an IAC to take part in hostilities who satisfy the four above-mentioned conditions could in principle be considered *de facto* combatants under the GC III art.4 (A-2).

In conclusion there are two ways for the staff of PMSCs to obtain status of the combatant. First one is through incorporation into the AF of the party to the conflict (GC III art.4 (A-1) and AP I art.43) – being *de jure* combatant. Such alternative is not very likely in the light of the tendencies of outsourcing military functions.

The other way is through belonging to the party to the conflict (GC III art.4(A-2)) – *de facto* combatant. However, since the majority of contracts are concluded not with states but with multinational companies, NGO's, international organizations or individuals[99], there is a need to interpret the provision of belonging to the party in the broad manner. If PMSCs facilitate the objectives of a party to the conflict their personnel should acquire the combatant status provided they fulfill four cumulative criteria.

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[96] Commentary of the III GC Relative to the Treatment of Prisoners of War / Edited by Pictet J. S. – ICRC, Geneva, 1960. - P. 59. – ISBN 2-88145-053-9

[97] Gillard, E. C. *Business Goes to War: Private Military/ Security Companies and International Humanitarian Law*, P.535

[98] Walther, P. *The legal status of private contractors under international humanitarian law*, P.28

[99] For the scope of use of PMSCs by the entities other than states: Holmqvist C. Private Security Companies: The Case for Regulation // *Stockholm International Peace Research Institute*, SIPRI Policy Paper No. 9, 2005. – P. 7-8, 18.

Anyone who does not fit into the category of combatants as describe above, is a civilian. Their status is scrutinized in the next section. In case of doubt as to the status of a captured person who has participated in hostilities, the GC III art.5(2) requires that a person be treated like a POW pending a decision on his/her status by a competent tribunal.

3.1.1.2. Civilian

As mentioned above, one of the central principles of the IHL is the distinction between the combatant and civilian[100]. The logic is that only two categories of persons exist. Therefore, anyone who does not qualify as a combatant is a civilian. Person could fit under one or the other category, but not under both at the same time. Moreover, such a dichotomy is exhaustive. There is no third or intermediate group[101].

In legal literature analyzing status of the personnel of PMSCs are in favor of labeling them as civilians. However, it is a complex notion itself. It embraces different categories of people with very different legal status (from ordinary civilian population to mercenaries). Accordingly, the present research will scrutinize those categories in turn, starting with the civilians who accompany AF and proceeding with mercenaries, unlawful combatants and regular civilians.

3.1.1.2.1. General Definition and Legal Status of the Civilian

There is a customary definition of the civilian under the IHL. Art. 50(1) of the AP I negatively defines them as all persons who do not belong to the AF (or more precisely to the category of combatants as described in GC III art.4 (A-1, 2, 3, 6) and AP I art.43). There is also a legal presumption that in case of doubt whether a person is a civilian, that person shall be considered to be such[102].

Recognition of the person as civilian is an essential precondition for a protection under IHL against the dangers arising from military operations. Central principle is that they may not be objects of the attack. On the other hand, civilians do not have the right to participate directly in hostilities. An exceptional case is that of a *levée en masse*, when they become combatants. If they nevertheless take direct part in combat, they remain civilians but faces negative outcomes. First of all, such person

[100] Henckaerts, J. M., Beck, L. D. *Customary International Humanitarian Law*: Volume 1: Rules, P.391, Rule 1-6.

[101] There have been proposals by some authors that a category of "unlawful combatants'' forms a third type of legal status under IHL. Such approach was based on the argument that these unprivileged combatants benefit from neither the GC III nor the GC IV, due to the fact that they participated directly in hostilities without being entitled to do so. See: Dormann,, K. The legal situation of ''unlawful/unprivileged combatants" // *International Review of the Red Cross*, Vol. 85, No. 849, 2003. - P. 45-73.

[102] Mulinen, F. *Handbook of the Law of War for Armed Forces.* - Geneva: International Committee of the Red Cross, 1987. – P. 13. – ISBN 2-88145-009-1

becomes lawful target of attacks for as long as he/she does so. Secondly, he/she can face prosecution for such participation.

3.1.1.2.2. Civilians Accompanying the Armed Forces

The present category of individuals is derogation from the general rule that only combatants are entitled to treatment as POW upon capture by the enemy. It was understood that some civilians who work alongside with the AF are under the higher risks and therefore should be guaranteed a higher level of protection.

Art. 4(A-4) of AP I places under this group *''persons who accompany the AF without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the AF, <…>''*. The list of examples enumerated in the provision is non-exhaustive and gives only the guidance in measuring what type of activities could fall under this subparagraph. Same opinion was upheld in the commentary, which clearly stated that the text "could therefore cover other categories of persons or services who might be called upon, in similar conditions, to follow the AF"[103]. Laconic formulation provided little help in drawing the limits of the activities that may be carried out by these civilians. However, this issue is of particular importance in order to determine whether employees of the PMSCs fall under this group.

The margin for the activities under the considered provision is consequential from the principle of distinction. Following this logic, civilians accompanying AF should not include persons carrying out activities with the application of force. Accordingly, PMSCs, which were hired to fight on behalf of the party to the conflict, would be excluded. Meanwhile supply contractors are clearly included. Not so clear would be the status of staff maintaining and operating military machinery and technologies, providing intelligence, strategic support etc. In order to define their situation it is necessary to delineate the perimeter of the concept "direct participation in hostilities". Since the topic is sweeping, highly controversial and falls outside the scope of this thesis, it will not be discussed here in detail[104]. In this context it will only be noted that ICRC, in acknowledging the ambiguity inherent in the notion, noted that:

> "Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire

[103] *Commentary of the III GC Relative to the Treatment of Prisoners of War* / Edited by Pictet J. S., P. 64.
[104] For a more comprehensive analysis see: Schmitt (supra note 21); Parks, W.H. Air War and the Law of War // *Air Force Law Review*, 1990; Summary reports of the Expert Meetings co-organized by the ICRC and the TMC Asser Institute in order to clarify the meaning of "direct participation in hostilities" http://www.icrc.org/web/eng/siteeng0.nsf/html/participation-hostilities-ihl-311205 (accessed 2009/05/09)

> war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly <…>. Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place"[105].

It would seem that "direct" requires a person to be present at the battle field at the time of the fight. Thus contractors in question should be considered as not participating in combat directly and accordingly would fit under the category of civilians accompanying AF.

On the other hand, commentary also defines hostile acts as "acts, which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the AF"[106]. Interpreted in isolation it would mean that very broad list of activities, save a purely supply and fatigue services, could amount to combat. Yet both aspects must be taken into account while qualifying the status of PMSCs personnel. In every individual occurrence such assessment must be based on the profile and results of their activities.

Further question that should be addressed is whether civilian accompanying AF looses his/her right to POW status if he/she gets involved in the combat (such situations are likely in case of the defensive attack). In this regard Meeting of Experts organized by the University Centre for IHL in order to define PMSCs' status and state responsibility for their actions (hereinafter Expert meeting) referred to three prevailing positions. To one opinion civilians who fall under art.4 (A-4) do not forfeit their POW status even if they directly participate in hostilities. The second view is that such civilians would loose their right to POW status and would become unlawful combatants. The last standpoint assumes that the person remains entitled to POW status if he/she satisfies the requirements defined in art.4 (A-2) of the GC III[107].

Expert meeting concluded upholding the second position, stating that "Where such persons do take a direct part in hostilities <…> they must lose their POW status. As civilians, such persons could be prosecuted for their mere participation". Other scholars take alike viewpoint[108]. Author of the thesis shares similar opinion but considers it useful to add an observation on the character of the participation in hostilities. If person involves into an offensive attack, there would be no question about loosing right to POW status. More complicated are situations of the defensive fight when circumstances push to take up arms. Working in close proximity to AF and facing higher risks to be attacked, personnel of PMSCs

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[105] *Commentary on the Additional Protocols* / Edited by Sandoz Y., Swinarski C., Zimmerman B., P. 515-516, para. 1679.
[106] Ibid. P. 618, para.1942.
[107] Report of the Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions / University Centre for International Humanitarian Law, Geneva, 2005. – P. 13-14. Online version available at http://www.adh-geneve.ch/pdfs/2rapport_compagnies_privees.pdf (accessed 2009/05/09)
[108] See: Heaton (below note 128); Walther (supra note 58, P.21-22); Ipsen (supra note 82, P. 137).

can often find themselves in such situations. Consequently, if it can be proven that employee was forced to participate in hostilities in defensive manner, he should retain the entitlement to POW status. L. Cameron suggests that it should be limited only to personal self-defense cases[109].

The two remaining estimations should be rejected since it cannot sustain the critics for blurring the distinction between combatants and civilians and encouraging the latter to participate in hostilities.

The condition that civilians accompanying AF must have "*received authorization from the armed forces which they accompany*" raises the question of what is the form and nature of such authorization and could the contract with PMSC amount to such authorization. Since commentary is silent on the issue, there is an open space for the interpretations. Prevailing opinion is that contract itself is not sufficient for the authorization and more formalized tool is necessary. Yet there were no proposals in this regard. To the opinion of the author, considering the definition of the term authorization[110] there is no reason why official contract could not be a form of authorization, provided it is concluded in accordance with legal requirements and settles comprehensively mutual rights, obligations, functions and responsibility.

Next haziness is the meaning of term "accompanying". It is unclear whether contractors must be physically present at same time and place as AF to fulfil this requirement. And what in this context could be regarded as AF – would it be enough to accompany one soldier while he is performing his service. Meeting of the Experts suggested that "accompany" as a minimum must require that the PMSC concretely provides a service to the AF[111]. A condition that employee of the private company would physically "shadow" members of the AF would not be relevant since technologies allow to exercise most of their functions from the remote distance.

Finally, the question of the effect of the identity card was resolved during the drafting the GC III. The Conference considered that "the capacity in which the person was serving should be a determining factor; the possession of a card is not therefore an indispensable condition of the right to be treated as a POW, but a supplementary safeguard"[112]. In other words, bare holding of the identity card does not have a constitutive power. It only serves as a proof of factual link between the AF and contractor.

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[109] Cameron, L. Private Military Companies: Their Status under International Humanitarian Law and its Impact on their Regulation // *International Review of the Red Cross*, Vol. 88, No.863, 2006. – P.589

[110] Authorization - official empowerment someone to act; a document giving an official instruction or command; official permission or approval; the act of conferring legality or sanction or formal warrant. http://dictionary.law.com/default2.asp?letter=A (accessed 2009/05/09)

[111] Report of the Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions / University Centre for International Humanitarian Law, Geneva, 2005. – P. 14. Online version available at http://www.adh-geneve.ch/pdfs/2rapport_compagnies_privees.pdf (accessed 2009/05/09)

[112] *Commentary of the III GC Relative to the Treatment of Prisoners of War* / Edited by Pictet J. S., P. 64.

On the basis of this analysis, it can be concluded that the staff of PMSCs who provide services not amounting to the direct participation in hostilities would fall within the category of civilians accompanying AF under the GC III art. 4(A-4) on condition they have received the relevant authorization from the state. The matter must be determined in every individual case taking into account the nature and results of the activities carried out. If person fails to abstain from direct participation in hostilities he looses the right to POW status and becomes unlawful combatant. An exception could be situation of defensive attack when contractor is forced to take up arms.

3.1.1.2.3. Mercenary

The reports of unpunished criminal misconduct and human rights abuses involving personnel of the PMSCs have led them to be widely compared with mercenaries. As the ICRC Commentary to the AP I art. 47 affirms, "There are few words which suffer greater misuse these days than the term mercenary"[113]. Such a misuse of the term is common not only among the media, but also in academic and scholar community[114]. Even more regrettably, it was concluded by the UN Working group on the use of mercenaries that "private security companies operating in zones of armed conflict are engaging in new forms of mercenarism"[115]. However, these two categories only from the first impression could be equalized. From the viewpoint of IHL there is no legal ground to put PMSCs and mercenaries on the same shelf. Private security today is far different from that of the past. This sub-section discloses legal requirements for a person to be qualified as a mercenary under AP I and mercenary specific conventions, points differences and possible touch points of the private contractors and traditional soldiers of fortune.

Conventional definition

For the time being there are three international conventions that attempt to provide a definition of a mercenary. These are article 47 of the AP I, Libreville (or the OAU/AU Mercenary) Convention

[113] *Commentary on the Additional Protocols* / Edited by Sandoz Y., Swinarski C., Zimmerman B., P. 575, para. 1801.
[114] For instance Singer regards PMCs as a continuing form of corporate mercenarism (below note 125); C. Fallah also admits that analysis of the law applicable to corporate actors in the IAC commences with an inquiry into the law as it applies to mercenaries (supra note 57, P. 602); Thomas Adams, a political-military strategist, argues that PMCs are indeed mercenaries as they are foreigners hired for their specialized military skills "but who have no special ideological stake in the conflict at hand."(supra note 46, P.31); according to Wairagu, what is known today as "private security" is in effect the logical transformation of traditional mercenary activities into a variety of new forms, with PMCs, which are described as private mercenary contractors, comprising the first group (supra note 30) and others.
[115] The Working Group on the use of mercenaries was established in 2005 by the Commission on Human Rights. Its mandate includes monitoring the impact of the activities of private military and security companies on the enjoyment of human rights.
http://www.unhchr.ch/huricane/huricane.nsf/view01/AC7F341BE422A006C125738B0055C48C?opendocument (accessed 2009/04/15)

and the UN Mercenary Convention. Regrettably, as it is made clear below, these treaties are far from being perfect.

The first attempt in the history to stow the concept of mercenary into the legal frames was the Luanda Draft Convention on the Prevention and Suppression of Mercenaries. It was an outcome of the Luanda Trial[116]. Convention reaffirmed the responsibility of states to prevent their nationals from participating in mercenary activities, and included provisions on state responsibility for the employment or recruitment of mercenaries by government officials. For the time it was adopted, Convention was very advanced in the sense of the defining mercenary. First of all, it designated that the crime can be committed "by the individual, group or association, representatives of state and the State itself"[117]. An inclusion of corporate legal entities and states into the circle of the subjects of the crime was notably progressive, but regrettably it was refused in following international regulations. Secondly, it criminalizes certain actions (organizing, financing, equipping, training, promoting, supporting or employing, enlisting, enrolling etc.) instead of person's status.

On the global scale the first codification of the definition of mercenaries was made in Article 47 of AP I which by some researches is considered customary IHL[118]. It is arguable, however, since the article reflects strong tension between the Western and most of the Third World (especially African) states over the need and coverage of the legal determination. In postcolonial Africa there was distrust towards developed and former parent states willingness to tolerate mercenary activities beyond their borders. As the conception of the mercenary had to be formulated in the context of denial of the POW status and protection ("A mercenary shall not have the right to be a combatant or a POW"[119]), F. Kalshoven and L. Zegveld predicate that "it was notably the group of African states who fought for acceptance of this exception, which in Western eyes goes against the basic idea that the right to be a POW ought not to be dependent on the motives, no matter how objectionable, which prompt someone to take part in hostilities"[120]. Drafters had to find the balance between two blemishes. Too detailed definition could be unable to accommodate rapidly changing circumstances. On the other hand, too general and laconic definition could leave field for inadequate interpretations and abuse.

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[116] Luanda Trial (1976) was held by the Popular Movement for the Liberation of Angola. Thirteen foreigners were tried for the mercenarism. Three Britons and an American have been sentenced to death by firing squad. A further nine men were sentenced to prison terms ranging from 16 to 30 years.

[117] Luanda Draft Convention on the Prevention and Suppression of Mercenaries // International Commission of Inquiry on Mercenaries, Angola, 1976. Art. 1

[118] Walther, P. The legal status of private contractors under international humanitarian law, P.8

[119] Protocol Additional I, Art 47

[120] Kalshoven, F., Zegveld L. *Constraints of the Waging of War: An introduction to International Humanitarian Law* / 3rd edition. – Geneva: International committee of the Red Cross, 2001. – P. 90-91. - ISBN-10: 2881451152

The definition that finally emerged as a consensus in paragraph 2 could largely neutralize potentially destructive outcomes of the paragraph 1 as it made qualification of a person as a mercenary very complicated and dependant on number of conditions. In the result, as G. Best puts it, "anyone who manages to get prosecuted under this definition deserves to be shot – and his lawyer with him"[121]. Therefore, despite broad moral opposition and reprehension, there is no legal ground to state the existence of the outright legal condemnation through IHL of the mercenarism.

Defining who has no right to the combatant or POW status, art. 47 (2) sets six criteria which a person has to meet in order to be considered a mercenary. He must:

- be specially recruited locally or abroad in order to fight in an armed conflict (seems that volunteers, who "enter service on a permanent or long lasting basis in a foreign army, irrespective of whether as a purely individual enlistment (French Foreign Legion) or on arrangement made by national authorities (Swiss Guards of the Vatican, and Nepalese Gurkhas in India and Brunei)"[122] are excluded from this provision);
- take *a direct* part in the hostilities (foreign advisors and military technicians, even if they are motivated by material gain, are excluded. These persons should be considered as civilians under the GC III art. 4 (4, 5) and Protocol I art. 50 and 51 (3) as long as they are not involved directly into the combat activities). As it was be pointed out above in the present thesis, this provision eliminates majority of the PMSCs' personnel from being qualified as mercenaries;
- be motivated to participate in the hostilities essentially by the desire for *private gain* and, in fact, to be 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 AF of *that Party* (probably the most complicated criteria to prove as it touches state of mind of the person and his motivation. Basically this provision is aimed to exclude individuals who are participating in the armed conflicts because of ideological intentions and loyalty to the party of the conflict and covers only "soldiers of fortune". Besides, question is if remuneration, which is not in excess of that paid to the nationals of that Party, excludes this person from being considered as a mercenary);

[121] Singer, P. W. War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law // *Columbia Journal of Transnational Law*, 2004.
[122] Schreier, F., Caparini, M. *Privatizing Security: Law, Practice and Governance of Private Military and Security Companies*, P.148.

- be neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict (the enlistment into the AF of residents, including foreigners, is a common practice in many states[123]);
- can not be a member of the AF of a Party to the conflict (the present provision faced critics for making the definition completely meaningless. The main argument is that it makes grossly easy for states that employ mercenaries to legalize them simply by incorporating into national AF, (as the United Kingdom has done with the Nepalese Gurkhas serving in its army[124]). The distinctive element for deciding whether person is legal member of the army or mercenary, to authors' opinion, could be the intention of the enlistment. If individual is recruited on "regular service" basis, he should be considered as legal combatant. Meanwhile those, hired for a particular armed conflict together with other a) to f) conditions satisfied could be regarded as mercenaries);
- can not be sent by a State which is not a Party to the conflict on official duty as a member of its AF[125].

These criteria must be met all *in corpore* for a person to be described as a mercenary. As it was mentioned already, this requirement makes the convention very complicated to apply. It is very likely that such a course was an intentional result of the compromise between the majority of Western states, which were in favor of approach that criminal liability can only come from the performance of specific acts of war[126], and African states, which were striving for more inclusive definition. They pointed that status alone, the fact that person has chosen to engage in mercenary activities, is in itself criminal act and therefore subject to liability. The middle way was to criminalize status, but to make it complicated to prove in order to prevent human rights abuse.

Another international legal treaty proposing a definition of the mercenary was adopted by the Council of Ministers of the OAU at its 29th session in Libreville in 1977 (entered into force on 22 April

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[123] *Commentary on the Additional Protocols* / Edited by Sandoz Y., Swinarski C., Zimmerman B., - Para. 811.

[124] Heaton J. R. Civilians at war: Reexamining the Status of Civilians Accompanying the Armed Forces // Air Force Law Review, No 57, 2005. Online version available at http://findarticles.com/p/articles/mi_m6007/is_57/ai_n16520069/?tag=content;col1 (accessed 2009/05/01)

[125] Protocol Additional I, art.47(2)

[126] For the Western view on this issue Kinsey refers to summary statements in the Sixth Committee by Mr. Saint Martin (Canada) Mr. DeStroop (Australia)UN's 38th Session GAOR C.6 U.N DocA/C.6/38/SR.23 (1983)Statement by Mr. Font (Spain)UN's 38th Session GAOR C.6 U.N DocA/C.6/38/SR.25 (1983). http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=1A4061X5179Q5.1228924&profile=bib&uri=link=3100006~!687577~!3100001~!3100040&aspect=alpha&menu=search&ri=1&source=~!horizon&term=A%2FC.6%2F38%2FSR.25&index=ZUNSYMA (accessed 2009/04/20)
Kinsey, C. International Law and the Control of Mercenaries and Private Military Companies // *Cultures & Conflicts*, 2008.

1985). Convention was based on previous drafts, presented by a committee of experts of the OAU in 1972 and by an international investigation committee, which was invited to attend the trial of mercenaries in Angola. As the AP I by some delegations of the signatories in the Diplomatic Conference was seen as only the first step which should have pave the path for "for the conclusion of more stringent regional instruments"[127] it was expected to move on with more severe and homologous prohibition of the mercenaries. Yet with slight exception in regard of the payment provision (as distinct from the Protocol I it is not required that mercenary get paid substantially more than members of the regular AF) the OUA Convention basically echoes the wording of the art 47 definition. The progressive novelty, however, is embedded in the second paragraph of the article which condemns the mercenarism as such. The said provision extends the circle of the subjects of the crime as it includes not only individual warriors, but also corporate entities and even states[128].

The most recent universal treaty establishing definition and legal regime for the use of mercenaries is the UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries. During the course of the 35th session of the General Assembly (hereinafter GA) there was a decision made to draft international treaty and it was presented and opened for signature in 1989. In determining what a mercenary is convention is repeating the same requirements as the Protocol I. Yet it is broader in its coverage as it declares recruitment, use, financing and training of mercenaries also to be offences under international law[129].

PMSCs vs. Mercenaries

Legal estimation is primarily based on AP I (regional conventions and UN Mercenary Convention will only be invoked to highlight substantial differences) as the main source of IHL in this regard.

First obstacle to label PMSCs personnel as mercenaries is that they would not fit under the AP I art.47 (2-a). It requires that the recruitment must be for a particular armed conflict. In contrast to mercenaries, PMSCs are permanent formations. They are established for unlimited time. As a rule personnel of these companies are employed on a long-term basis. However, it might be argued that companies are as a rule hired by states only for a particular conflict or period of upheavals. Such argument can be disproved. As it will be demonstrated further in the thesis, PMSCs can not be considered as subjects of the crime of mercenarism. Therefore evaluation must be based on the

[127] *Commentary on the Additional Protocols* / Edited by Sandoz, Y., Swinarski, C., Zimmerman, B., P. 572, para. 1790.
[128] Convention of the Organization of African Unity for the Elimination of Mercenarism in Africa, O.A.U. Doc. CM/433/Rev. L. Annex 1 (1972). Art. 1 (2)
[129] International Convention against the Recruitment, Use, Financing and Training of Mercenaries, Art 1(2).

individual servant employment contact conditions instead of company contract with the state representatives.

Secondly, the provision contained in art.47 (2-b) requiring that mercenaries take a direct part in hostilities would exclude individuals performing functions of training, advising, technical support – basically all staff of PSCs and supply contractors. Moreover, the concept of ‘‘direct participation in hostilities’’ as already pointed above – even though being of particular importance to IHL as it determines the circumstances under which a civilian could lawfully be attacked – is not defined. It causes many difficulties in applying art. 47.

Thirdly, the need to establish a desire for the “material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed AF of that Party”. E. L. Gaston stresses in this regard, that “many PMSCs are former soldiers with extensive service to their countries, and even if they are not actually motivated by a sense of patriotic duty, it may be difficult to prove otherwise”[130]. Worthy to notice is that financial remuneration is paid for the whole package of services directly to the company instead of individual employees. Company administration distributes gaining for equipment, public campaigning, transportation and salaries. Since they are private enterprise they are not obliged to reveal the rates of payment. Therefore it is complicated to make any effective comparison between contract employees and personnel within the AF.

Fourth obstruction in equating PMSCs to mercenaries is its modern corporate business nature. Under the AP I art.47, which is by some considered customary international humanitarian law (hereinafter CIHL)[131], only a natural person could be a mercenary, thus legal entities are left outside the scope of definition. Even though the OAU Convention attempts to expand the responsibility towards corporate bodies and even states, the question arise, how the requirement for a financial motivation could be fulfilled in such case.

There are also sequential differences inherited from the corporate business nature. If old fashion mercenaries were basically *ad hoc* black-market fighters, most of today’s companies demonstrate established character and attributes of competitive global market players with hierarchical organization. Public relations campaigns, lobbying groups, broad network of contacts “with major multinational, especially mineral, companies which provide increased funding, intelligence, and political contacts”[132]. It offers signal advantages in both efficiency and effectiveness of the industry[133]. Companies are

[130] Gaston, E. L. *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, P.233
[131] Henckaerts, J. M., Beck, L. D. *Customary International Humanitarian Law:* Volume 1: Rules, P. 391, Rule 108.
[132] Howe, H. M. *Global Order and Privatization of Security*
[133] Singer, P.W. *Corporate Warriors: The Rise of the Privatized Military Industry*, P.186

subject to general rules of business. They are trading and competing openly on the wide international military market and has to follow the fundamental principle according to which quality of the service you provide equals desirability and success of your business. Moreover, PMSCs offer a much broader spectrum of services to a greater variety of clients.

Fifth point for a consideration is the reservation of AP I art.47 (2-c) that a member of the AF of a party to a conflict cannot also be considered a mercenary. Consequently, a state wishing to use PMSC services can shelter them from being considered as mercenaries simply by incorporating their personnel into its AF. The Papua New Guinea government got through this loophole in 1997, when it contracted Sandline International and termed their employees ''special constables''[134].

Another obligatory specification is that a person should be neither national nor resident to the party of the conflict (AP I art.47 (2-d)). This in effect means that for instance in the case of Iraq or Afghanistan, security contractors who were citizens of either the US or coalition partners would be disqualified under the latter provision. Iraqi (in 2005 there were 15,000 Iraqi security contractors[135]) or Afghan nationals hired by these countries would similarly be disqualified under the provision excepting a resident to a territory controlled by a party to the conflict. Besides, such a requirement could generate situations that would be against the spirit of law. For instance, if company operating in Iraq would hire under exactly the same terms and for the same functions nationals from USA and Lithuania, strictly following the letter of art.47 (2-d) Lithuanian citizen would (provided he/she meets other requirements) be a mercenary, meanwhile American – would not.

Finally, applicability of the AP I to private contractors is limited since it can only be invoked in the case of an IAC. In the context of unstable African continent it makes art.47 actually dormant.

Eventually, one of the most important differences comes from the regulatory aspect of PMSCs. As S. Percy remarks, "the difference between mercenaries and other fighters could therefore be only construed by the degree to which they are under control"[136]. According to her classification, since PMCs and PSCs personnel have higher degree of group motivation and they are subject to an authoritative control (both through the national legal regimes and companies' inner codes of conduct[137]) they take higher positions in the spectrum of AF (see Annex 1)[138].

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[134] Gillard, E. C. *Business Goes to War: Private Military/ Security Companies and International Humanitarian Law*, P.561-562

[135] http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/ (accessed 2009/01/29)

[136] Percy, S.V. *This Gun's for Hire: A New Look at an Old Issue*, P.728.

[137] Most companies, being legally established in a particular country, are subject to its legal regulations regarding registration, licensing and supervision. This state usually has certain tools (and also responsibility for the international community) to control the activities of such enterprises.

The most significant difference between IHL and the mercenary-specific conventions (UN and OAU conventions) is that AP I does not criminalize mercenary activity as such[139], whereas the mercenary conventions do. The only consequence of art.47 of AP I is to deprive an individual fighter of combatant or POW status and make them responsible under national law for merely having participated in hostilities, even if he/she did not violate any rules of IHL. Besides, even though GC III is not applicable, it does not leave them in legal vacuum. Mercenaries are still entitled to the fundamental guarantees. First of all, they are protected by the GC IV as any civilian. In addition, they are in any case (including those individuals who may found themselves falling within the exceptions of GC IV) entitled to guarantees under AP I art.75. Particularly important are provision ensuring due process and fair trial (art.75 (3, 4)).

Relevant question is status of such persons in NIAC. Since there is no POW protection in case of inner conflicts, deprivation of it would not have any effect. To the opinion of author, in NIAC individual who meets all the requirements of the definition of mercenary would be in the same legal situation as civilian, who participated in hostilities without being entitled to, meaning AP II, common art.3 of the GCs, CIHL rules and human rights laws would be applicable. More detailed this status is discussed in the next sub-section.

The mercenary-specific conventions, on the contrary to AP I, spell out more significant consequences for the mercenary in terms of criminal sanctions. Person can be criminally punished for mere being a mercenary, as well as for any other criminal conduct in the course of being a mercenary. Moreover, both instruments require states parties to criminalize these offences under national law and to prosecute or extradite suspected persons.

Another significant difference in comparison to IHL is that both mercenary conventions are silent about the type of conflict to which they apply. Accordingly, they should be considered as covering both IAC and NIAC.

To sum up, IHL and mercenary-specific conventions are complementing each other: while the former is aimed at defining mercenary status and scope of their protection, the latter are designed at criminalizing mercenarism and creating legal basis for the prosecution, extradition and punishment of persons who commit it. Besides, UN Convention explicitly states that it "shall be applied without

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On inner level their activities are coordinated from the superior officers and every member of the staff is subject to the discipline of the company. Moreover, as business units, they are often tied through complex financial arrangements to other firms within as well as beyond their own industry.

[138] Author chose to change the title of the chart, because she considers that "Spectrum of private violence" is not an accurate designation since it includes national armies' soldiers who represent public province.

[139] Art.47 does not even prohibit states from rendering mercenaries POW status. It only provides that they are not entitled to it as a matter of right.

prejudice to <…> the law of AC and IHL, including the provisions relating to the status of combatant or POW"[140].

In conclusion, it is submitted that under contemporary IHL, which requires meeting cumulative conditions under art.47 (2), it is unlikely that contractors will qualify as mercenaries. However, some of them may be present at the lower end of the spectrum of PMCs.

It should be kept in mind that AP I never intended to address modern PMSCs and that their wide use by states indicates that international community consider use of PMSCs legitimate.

3.1.1.2.4. Unlawful combatants

Civilians directly participating in combatant, who do not fall under the group of mercenaries, are generally labeled either "unlawful combatants" or "unprivileged belligerents". Since the term is not conventional, there is no consensus among legal scholars which term better mirrors the status of the person. For instance, Schmitt suggests that "unlawful combatant" is better concept, because it "preserves the distinction between combatants and civilians". Besides, according to him "belligerents" generally refers to states which are party to a conflict, not individuals"[141]. Walther, on the other hand, prefers using "unprivileged combatants" since it is "more accurate than the term "unlawful combatant" which is misleading in the sense that the activities amounting to direct participation in hostilities are not unlawful, but the person is not afforded the combatant privileges"[142]. Author upholds opinion that the latter term is the most accurate since such person is de facto involved in combat activities, but he does not enjoy above discussed distinctive privileges. In present thesis, without going into a deeper discussion, both notions are used interchangeably.

The essential results of direct participation in combat for a civilian are: loss of the immunity from attack for such time as he/she takes a direct part in hostilities (AP I art.51(3)) and criminal responsibility for these actions (AP I art.45(2)). Yet person is not left without protection. First of all, GC IV is applicable as long as art.4 conditions, in particular nationality requirements, are met. A point deserving attention is that art.5 allows limiting the privileges if a Party to the conflict suspects that an individual in question took part in hostilities. The margins of such derogation are restriction of only those rights that, if exercised, would cause danger to the state's security and only for as long as it could cause such danger. Moreover, in any case such person retains the right to human treatment and fair trial. Those civilians, who fall under one of the exceptions of art.4 of GC IV, are entitled to the fundamental protections granted by art.75 of AP I (AP I art.45(3)).

[140] International Convention against the Recruitment, Use, Financing and Training of Mercenaries, art. 16(b).
[141] Schmitt, M. N. *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian employees*
[142] Walther, P. *The legal status of private contractors under international humanitarian law*, P.31.

Finally, in addition to the mentioned articles, anyone who finds himself in the situation of the armed conflict is protected by the "principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience" (AP I art.1(2)). Generally named as Martins Clause[143] this rule was approved in several judicial institutions. ICJ in its advisory opinion in Legality of the threat or use of nuclear weapons case explicitly mentioned it among customary rules and principles of IHL[144].

Unprivileged combatants have no immunity from prosecution: they can be tried for both violations of the IHL and mere participation in combat activities, provided that such acts are criminalized in domestic laws. Grave breaches of the GCs ("willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" GC I art.50 / GC II art.51 / GC III art.130 / GC IV art.147) and of AP I art.85 are considered war crimes (AP I art.85(5)). States have an obligation to enact national legislation, provide effective penal sanctions and take other necessary measures to suppress such crimes. Moreover, in occurrence of grave breach they must search and bring to their own or extradite to other state Party courts persons who allegedly committed/ordered to commit such crimes (universal jurisdiction). Moreover, International Criminal Court (hereinafter ICC) also exercises jurisdiction over war crimes[145].

In resume, if a hiring state authorizes civilian contractors to participate directly in hostilities without incorporating them into the AF or they do so outreaching contractual terms and their actions result in actual harm to enemy personnel or equipment they may become unlawful or unprivileged combatants and loose significant scope of protection[146]. However, every occurrence should be decided on *ad hoc* basis. Such contactors upon capture may be prosecuted under the national laws of the state that is holding them for their mere participation in hostilities.

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[143] Original formulation, introduced by professor von Martens, the Russian delegate at the Hague Peace Conferences in 1899: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."
Ticehurst, R. The Martens Clause and the Laws of Armed Conflict // *International Review of the Red Cross*, No 317, 1997. - P. 125-134

[144] *Legality of the Threat or Use of Nuclear Weapons* // Advisory Opinion, I.C.J. Reports 1996. – P.227, 259. - ISBN 92- 1-070743-5

[145] Rome Statute of the International Criminal Court, Rome, 1998. Art.5(1c),8.

[146] Heateon, J. R. *Civilians at war: Reexamining the Status of Civilians Accompanying the Armed.*

However, since the concept of what constitutes a direct participation in hostilities is fluid and relatively undefined in practice it might be and having in mind notably small numbers of cases against PMSCs employees, most probably already is complicated to apply such responsibility.

3.1.1.2.5. Other Civilians

PMSCs personnel who fit under none of the above analyzed categories, namely who are neither combatants, nor civilians accompanying AF, nor unprivileged combatants or mercenaries, are civilians. Gillard suggests that this is also the status of all employees of PMSCs hired by entities other than states, such as companies, inter-governmental organizations, NGOs or individuals[147]. Besides, she maintains that PMSCs, working for organized armed groups participating in NIAC would be civilians. Author of the thesis does not agree with such proposition in its full extent. The position and arguments on the issue are developed in the next section.

The core aspects of the legal status of civilians are that they can not be objects of the military attacks[148] and are not authorized to take direct part in hostilities. Specifics of the PMSCs employees in comparison to other civilians is that they are hired to perform functions that usually takes place in very close proximity to military objects and AF (supply, catering, laundry, post, nursing services). This puts them at risk of being injured since proportionate incidental damage in the event of attacks is not prohibited.

In regard to the legal status of PMSCs employees who fall under the category of civilians it must be first of all stressed that they are not entitled to POW status. Accordingly, GC III is not applicable for them. Civilians in IAC benefit from the protection of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (hereinafter GC IV). It lays down fundamental standards of treatment, conditions of deprivation of liberty, judicial guarantees in criminal proceedings. In cases when person fall under one of the exceptional categories defined in art.4(1,2)[149] of the GC IV, he/she would still be entitled to the fundamental guarantees based in art.75 of AP I and the customary rules of IHL. Besides, Part II of the convention, which is aimed at providing the civilian population with general protection against certain consequences of war, is applicable to "the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality,

[147] Gillard, E. C. *Business Goes to War: Private Military/ Security Companies and International Humanitarian Law*, P.541
[148] Protocol Additional I, art.51(2,3); art.85(3a)
[149] Geneva Convention IV.
According to art.4(1) all persons who, in situations of IAC or occupation, find themselves in the hands of a party to the conflict or occupying power of which they are not nationals, are protected by the Convention. Persons captured by their own state of nationality are thus not protected. Art. 4(2) also excludes from its protection nationals of a neutral state and of co-belligerent states who are in the territory of a party to the conflict so long as their state of nationality has normal diplomatic relations with the state in whose hands they find themselves.

<…>" (art.13). Even though this provision mitigates the scope of exceptional cases, it suggests little help in the context of PMSCs personnel. Since majority of the employees are not nationals to the party to the conflict, they would still fall out of the scope of GC IV. However, since the commentary states that "the mere fact of a person residing in a territory belonging to or occupied by a party to the conflict, is sufficient to make Part II of the Convention applicable to him"[150] gives opportunity to interpret provision in a broad way to cover contractors, provided they have been residing in party to the conflict long enough to be considered as residents.

Moreover, international human rights law also sets basic principles for the respect and protection of the fundamental human rights of the civilians in IAC.

To sum up, an all-inclusive definition of the civilian covers all PMSCs personnel who do not qualify to combatant.

3.1.2. Status of the PMSCs Personnel in Non-International Armed Conflict

Since private contractors are usually hired by entities other than states, there is a high likelihood that they will have to operate in non-international armed conflict (hereinafter NIAC). Such situations are regulated mainly by the common art.3 of the GCs and by the Protocol Additional (II) to the GC of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (hereinafter AP II). It should be noted that AP II applies only to those situations that are not covered by the art.1 of the AP I and "which take place in the territory of a High Contracting Party between its AF and dissident AF or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol[151]. Mere internal disturbances, riots and sporadic acts of violence are not to be regarded as NIAC.

Significant feature of the law of NIAC is the absence of the combatant status and privileges. While in IAC they are entitled to engage in acts which would otherwise be regarded as crimes and are thus immune from prosecution, non-state fighters in a NIAC may be prosecuted for all hostile acts, including violations of domestic law, irrespective of whether they have violated any norms of

[150] *Commentary of the IV GC Relative to the Protection of Civilian Persons in Time of War* / Edited by Pictet J. S., P. 118-119

[151] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Art. 1.

international law. In addition, they cannot be entitled to POW status, since such status does not exist in the law of NIAC[152].

Experts refer to three different categories of persons in NIACs[153]:

1) fighters, i.e. persons belonging to an organization of a party of a conflict that constitutes its AF;

2) protected civilians, who do not directly take part in combat and

3) civilians who temporarily participate in hostilities.

Since the term "fighter" does not appear in any binding treaty, it was employed by scholars in lieu of "combatant" in order to avoid confusion with the IAC. Fighters include both members of the regular AF fighting on behalf of the government and members of dissident AF or armed groups fighting against the government. It is generally agreed that the criteria for membership in the AF are unlikely to be different in IACs and NIACs[154]. The same test also applies in assessing whether contractors who fight on behalf of an organized armed group in a NIAC could be members of it.

AP II does not define civilians in NIAC. Therefore customary rule that civilians are all persons, who are not members of the AF, is applicable. Moreover, such opinion was adopted by the ICTY in case Prosecutor v. Tihomir Blaškič where trial chamber maintained that civilians are "persons who are not, or no longer, members of the AF"[155].

Civilian population in NIAC is protected against the dangers arising from military operations. They benefit from the protections of common art.3 of the GCs, AP II and the customary rules of IHL. Moreover, international human rights law also guaranties basic standards of the treatment of civilians. Since the main aspects of legal status of civilians were studied in the context of IAC and it is in principle analogical in NIAC, in this section their status will not be repeatedly analyzed.

In case of civilians who temporally participate in hostilities, under art. 13(3) of AP II the loss of protection exist only for such time as they do so. However, this limitation is not confirmed by customary international law. Such an approach, to the opinion of some experts, "would create an imbalance between the government's AF on the one hand and members of armed groups on the other,

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[152] Cerone, J. P. Status of Detainees in Non-International Armed Conflict, and their Protection in the Course of Criminal Proceedings: The Case of Hamdan v. Rumsfeld // *The American Society of International Law*. – Washington DC, 2006, Volume 10, Issue 17.

[153] *The Manual on the Law of Non-International Armed Conflict with Commentary* // Schmitt, M.N., Marshall, G.C., Garraway, C.H.B. – Sanremo: International Institute of Humanitarian Law, 2006. – P. 2-5. Online version available at http://www.michaelschmitt.org/images/Manual%5B1%5D.Final.Brill..pdf (accessed 2009/05/09)

[154] Report of the Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions / University Centre for International Humanitarian Law, Geneva, 2005. – P. 28. Online version available at http://www.adh-geneve.ch/pdfs/2rapport_compagnies_privees.pdf (accessed 2009/05/09)

[155] International Tribunal for the Former Yugoslavia, Case No IT-95-14-T, *Prosecutor v. Blaškič*, 3 March 2000. – P. 60, para.180. Online version available at http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf (accessed 2009/05/10)

inasmuch as the former remain legitimate targets (under international law) throughout the conflict. Moreover, the proposition is impractical to implement on the ground. Ordinary soldiers would be required to make complex and immediate assessments as to whether an individual's participation in hostilities is ongoing, at a time when the facts available are incomplete or unclear"[156]. Author would suggest qualifying legal status of the civilians who temporally participate in hostilities as an analog of the unlawful combatants in context of IAC. Respectively it would mean that they are individually responsible for their acts committed during such participation. Besides, they would also forfeit protection under common art.3(1) of the GCs, as it only covers persons "taking no active part in the hostilities". Still since the moment they lay down arms, the protection of common art. 3 continues.

Some scholars expressed assumptions that in principle PMSCs might even qualify as an independent party to a NIAC if the level of violence reaches the required threshold[157]. The mere fact that personnel of the PMSCs are usually motivated by the financial gain could not prevent companies from qualifying as a party to the conflict since most of the groups are more or less reasoned by the same motives. Moreover, as "party" to a NIAC must at least qualify as an "organized armed group", that is to say, be a group under a responsible command, most PMSCs would fulfill this requirement.

From authors point of view, such situations, even though not impossible, are for the time being unlikely, because as a rule PMSCs are fighting on behalf of one of the parties to the conflict under the terms of the contract. On the other hand, it is very possible that PMSCs could be de *facto* parties to the conflict, meaning that they would operate under the name of one of official party. In particular such cases are possible in "natural resources rich, political stability poor" countries. This question is further elaborated in the following section.

If PMSC would be considered a party to a NIAC under GCs common art.3 and AP II art.1(1) it would have exactly the same obligations as any other non-state party.

3.2 Legal Status of PMSCs

In order to answer the question if PMSCs have legal status under IHL and if yes – what are its features, it is first of all necessary to define generally what entities can be subjects of international law and what are the conditions to be met.

[156] *The Manual on the Law of Non-International Armed Conflict with Commentary* // Schmitt, P. 5.
[157] Third Expert Meeting on the Notion of Direct Participation in Hostilities // International Committee of the Red Cross and the TMC Asser Institute. - Geneva, 2005. – P. 81-82

3.2.1. Subjects of the International Law

Permanent Court of International Justice in Lotus case (1927) stated that "international law governs relations between independent States"[158]. It represented, as Lauterpacht observed, "the orthodox positivist doctrine [which] ha[d] been explicit in the affirmation that only states are subjects of international law"[159]. However, since the ICJ advisory opinion in Reparation for Injuries case it is unanimously accepted that the circle of actors on international arena is broader. Court set the main criteria for an entity to be considered a subject of international law: it must be capable of possessing international rights and duties and must have capacity to maintain its rights by bringing international claims[160] - in other words it must have an international legal personality. It is generally accepted that it contains capacity to have rights and obligations under international law, to make international claims, to be a party to treaties and enjoyment of privileges and immunities from national jurisdictions[161]. In practice, it is only sovereign states and certain international organizations that have all of these capacities to the fullest degree. Yet after the II World War, new actors have emerged besides states. Public international organizations established by states, non-governmental organizations (hereinafter NGOs) created by individuals, multinational corporations and individual human beings are now recognized as possessing some, although limited, international personality.

Legal personality is central at determining subjects of international law. It encompasses such concepts as status, capacity and competence. The status of a particular entity may well be determinative of certain powers and obligations, while capacity will link together the status of a person with particular rights and duties[162].

Brownlie groups three categories of subjects under international law: established legal persons (covering states, political entities legally proximate to states, condominia, international territories, international organizations and others), special types of personality (non-self-governing peoples, national liberation movements, states in *statu nascendi* and others) and controversial candidatures. In context of this latter category he mentions corporations of municipal law, whether private or public, which engage in activities on broader scale than the state under the law of which they were established. Such entities sometimes possess resources greater than some smaller states. They usually make

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[158] The Case of the S.S. *"Lotus"*, Permanent Court of International Justice, PCIJ, Ser. A., No. 10, 1927. – P.14. Online version available at http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/ (accessed 2009/05/10)
[159] Lauterpacht, H. *International Law*, P. 489. Quoted at: Shaw, M. N. *International Law*. – Cambridge: Cambridge University Press, 5th Edition, 2003. –P.177. - ISBN 0 521 82473 7
[160] *Reparation for injuries suffered in the service of the UN* // Advisory opinion, I.C.J. Reports 1949. - P.179.
[161] Brownlie, I. *Principles of Public International Law*. – Oxford University Press, 7th Edition, 2008. – P.57-58. – ISBN 978-0-19-921770-0
[162] Shaw, M. N. *International Law*, P.177.

agreements with foreign governments (such practice is in particular common among PMSCs) what led some scholars to assume that they should be treated on international plane not merely as aliens in the foreign state. In principle, however, private companies do not have international legal personality[163].

3.2.2. Private Companies under International Humanitarian Law

Traditionally, IHL has been conceived as a system regulating violence between states and/or organized armed groups that shared many of the territorial, administrative and ‘‘public’’ characteristics of states[164]. Yet occurrence of the robust private military forces challenged this approach. It led to proposals that, at least in NIAC, PMSCs should be considered as party to the conflict (see sub-section 3.1.2). However, in addition to the above mentioned reasons there are further legal barriers to recognize private business structures as possessing international legal personality.

As a rule PMSCs are national corporate entities, established under and subject to domestic (criminal, taxation, labor, immigration etc.) laws. The first question that must be answered is whether they could be qualified as transnational corporations. Secondly, if the answer is affirmative, current position of the international community in regard of these corporations as subjects of international law will give the answer if PMSCs can be recognized as substantive actors on international plane.

Shaw defines transnational corporations as “private business organizations comprising several legal entities linked together by parent corporations and distinguished by size and multinational spread”[165]. UN Working Group on the Working Methods and Activities of Transnational Corporations suggested that the term refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries - whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively”[166]. Definition is particularly broad[167] and would clearly cover PMSCs. However, in the context of international law, more relevant is the concept suggested by the F. Rigaux. She suggests first of all drawing clear dividing line between terms multinational and transnational corporation. The use of the former adjective, according to her, gives the mistaken impression that the company or enterprise has national status in various different countries. The term “transnational”, on the contrary, refers to a “form of autonomy

[163] Brownlie, I. *Principles of Public International Law*, P.58-67.
[164] Cockayne, J. The global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law // *International Review of the Red Cross*, Vol. 88, No.863, 2006. – P.460
[165] Shaw, M. N. *International Law*, P.177.
[166] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2
[167] The Norms on the Responsibilities were aimed first of all to identify and examine the effects of working methods and activities of transnational corporations on the enjoyment of economic, social and cultural rights and the right to development, as well as civil and political rights. Since the document was addressing human rights issues it intentionally adopted broad concept of transnational corporation in order to ensure that they all observe certain standards and methods of practice.

which corporations with establishments scattered over the territories of several states have been able to acquire in their relations with each one of them"[168]. The notion "corporation" also should be understood in "a relatively limited sense to apply exclusively to entities governed by private law". Meanwhile enterprise is broader concept, which also includes semi-public corporations and cases where it can be assumed that the state (or a state controlled entity) has acquired a significant share of the capital of corporations operating under private law. Even though, in practice, a transnational corporation "is almost always a group of companies, this kind of characteristic has no decisive impact in law. It would be quite possible for a single legal entity – or even a private individual – to manage economic activities in several countries in which there had been set up either agencies or branches with no legal status at all"[169].

Taking into account these features of the transnational corporations it can be concluded that PMSCs fall under this category. The next question is whether such entities could be accepted as subjects of international law. Majority of scholars uphold that they are a "possible candidate for international personality"[170]. Others are more categorical stating that transnational corporations are neither subjects nor quasi-subjects of international law[171]. To the opinion of the author for the time being there is no straight and unanimous answer and the question remains open. In particular case of PMSCs, on the other hand, it is rather clear that such business structures do not possess international legal personality. Several factors buttress up such opinion.

First of all, PMSCs are national subjects. They derive their status from domestic legal system. Moreover, they must respect the local legal regulations of the state in which they operate. Which type of law is applicable to the company in which field is a matter of private international law.

Secondly, the treaty law does not govern the contractual relations between companies and states. They are concluded under the domestic legislation. Practice in this regard is unanimous – there have been no single case that private military corporation would be a party to an international treaty.

Moreover, PMSCs have no immunities and privileges from the state jurisdiction. The question which state (home, contracting or territorial) will have the right to exercise its jurisdiction depends on private international law, but it does not leave private corporate entities in vacuum. In case of the grave breaches of the GCs or APs not only directly concerned states but any other state has right and obligation to search for persons alleged to have committed, or to have ordered to be committed, such

[168] Rigaux, F. *Transnational Corporations / International Law: Achievements and Prospects* / Edited by Benjaoui M. – Paris: UNESCO, Martinus Nijhoff Publishers, 1991. – P. 121-122. - ISBN 9231027166
[169] Rigaux, F. *Transnational Corporations / International Law: Achievements and Prospects,* P. 121-122
[170] Shaw, M. N. *International Law*, P.177.
[171] Rigaux, F. *opt.cit*, P. 129.

grave breaches and bring such persons, regardless of their nationality, before their own courts or hand such persons over for trial to another state or to an international criminal tribunal (universal jurisdiction)[172]. Moreover, in regard to other crimes under international law they also have an obligation to investigate and prosecute, extradite or surrender persons suspected in committing it. Therefore, it can be concluded that PMSCs are covered by territorial, personal or universal jurisdiction and have no immunities under international law.

Second essential dimension that requires attention is the legal capacity of the PMSCs to make international claims. In the Barcelona Traction case ICJ established that "<…> where it is a question of an unlawful act committed against a company representing foreign capital, the general rule of international law authorizes the national State of the company alone to make a claim. <…> States ever more frequently provide for such protection, in both bilateral and multilateral relations, either by means of special instruments or within the framework of wider economic arrangements"[173].

Finally, international personality requires not only above mentioned capacities. Some form of the community acceptance is necessary. Since states are principal subjects formulating international law, their position in this regard is central. There must be an assent to consider PMSCs as possessing international personality. For the time being there have been no indications that such steps could be taken. Besides, taking into account very specific field of activities PMSCs exercise, namely military profile services which were traditionally under the monopoly of state competence, it is highly doubtful.

Even though PMSCs are not subjects of the IHL they do have certain rights and duties. First of all, companies are legal agents subject to the jurisdiction of states. Applicable national law may impose obligations under IHL, which become binding on companies by virtue of its incorporation into domestic legal system. Moreover, acts that amount to violations of IHL as a rule are crimes under national law, and prosecutions may be brought on this basis both against individual employees and, in the states that recognize the criminal responsibility of legal persons, against the companies themselves.

In conclusion, a range of factors needs to be carefully examined before it can be determined whether an entity has international personality and, if so, what rights, duties and competences apply in the particular case. Present situation indicates that PMSCs have no international legal personality. Yet they do have certain rights und obligations under IHL to the extent that it was incorporated into domestic legal regulations.

[172] Montreux Document, P.10
[173] *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium V. Spain)* // Judgment, I.C.J. Reports 1970. - P. 47-49.

3.3. International Legal Obligations of States Relating to PMSCs

The previous section has substantiated that PMSCs are not international legal subjects. Accordingly, they do not have direct obligations under IHL. Still, their activities, especially considering its military character and grave effects it is likely to cause, can not be left unregulated. Legal constrains are twofold. First, PMSCs as corporate entities act through their individual employees. Personnel do have legally defined status and responsibilities. Secondly, states, as primal actors of IHL, have certain rights and obligations in regard of PMSCs. This section is dedicated to review their responsibilities.

3.3.1. Montreux Document

In 2006 Swiss foreign ministry cooperating with ICRC launched the initiative to bring together states for the discussion on how to better regulate private military and security contractors. September 2008 government experts reaffirmed States' obligations regarding PMSCs in war zones by signing "Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict" (hereinafter Montreux document). Two key points of a document agreed by 17 nations[174] are that delegating tasks to a contractor does not relieve a State of its responsibilities, and that governments should not let contractors take part in combat operations.

It must be noted, that Montreux Document is not itself a legally binding instrument and does not create new or affect existing obligations of States under CIHL or under international agreements to which they are parties[175]. However, since it recalls already existing legal commitments of States, PMSCs and their personnel (I Part) it gives expression to the consensus that international law, in particular IHL and human rights law, does have a bearing on PMSCs and that there is no legal vacuum for their activities. Moreover, the document is intended to serve as a guide on practical issues raised by PMSCs. In so doing, it provides States with good practices to promote compliance with IHL and human rights law (II Part). Although the document is addressing states, these recommendations may be of value also for international organizations, NGOs, companies that contract PMSCs, as well as for PMSCs themselves.

3.3.1.1. Obligations of the Contracting States

Contracting States includes not only those that directly contract PMSCs, but also those whose relations are based on subcontracting. First of all, such states have an obligation not to contract PMSCs

[174] Countries that have agreed on the Montreux document: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, Ukraine, the United Kingdom and the USA
[175] Montreux Document, P.5

"to carry out activities that IHL explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over POW camps or places of internment of civilians in accordance with the GC"[176]. Secondly, they must guarantee respect for IHL by PMSCs they contract, through ensuring that companies and their personnel are aware of their obligations and trained accordingly, taking appropriate measures to prevent and suppress any violations. This requires states to enact appropriate regulatory instruments as well as administrative, disciplinary or judicial sanctions for individual persons who commit breaches as well as for PMSCs as legal entities. If such violation occurs, obligations to search for, bring before their own courts persons suspected (regardless of their nationality) or extradite them to the international criminal tribunal or other state court emerges.

The question of attribution of private conduct to the state under customary international law is also addressed. For instance, states are responsible for violations committed by PMSCs or their personnel if they are incorporated into its regular AF or organized AF, groups or units under a command responsible to the State; if they are empowered to exercise elements of governmental authority and acting in that capacity or in fact acting on the instructions of the State or under its direction or control.

3.3.1.2. Obligations of the Territorial States

Territorial States (on whose territory PMSCs operate) also have general obligation to ensure, within their power, respect for IHL by PMSCs operating on their territory. In this regard they should enable education of the personnel of the PMSCs about relevant norms of the IHL and human rights law, to take measures to prevent and suppress violations committed by the staff of private contractors and adopt necessary legislation. In addition, similar obligations as to the contracting states in regard of investigation, prosecution, extradition and punishment apply.

3.3.1.3. Obligations of the Home States

Home States are those which under private international law would be considered as states of nationality of a PMSCs. Namely it would be either country where a PMSC is registered or incorporated or, if the state where company is incorporated is not the one where it has its principal place of management, then the state where the PMSC has its principal place of management.

In addition to the previous mentioned general obligations that bound also territorial and contracting states home states have some specific responsibilities. As a country of nationality it must ensure that PMSCs fulfill certain criteria. First of all, state should establish an authorization system for the provision of military and security services abroad. It could include requirement for an operating

[176] Montreux Document, P.5

license, license for specific services or other forms of authorization. Secondly, effective accountability mechanisms should be created which would guarantee transparent and legitimate activities. Criteria to be taken into account as minimum should include the past conduct of the PMSC and its employees (for instance whether there have been records of involvement into criminal activities, and if so, was it dealt in appropriate legal manner, whether previously authorization was revoked for misconduct etc.), examination if personnel are sufficiently train and educated, whether the PMSC's equipment, in particular weapons, is acquired lawfully and its use is not prohibited by international law and whether internal organization and control mechanisms are effective etc. Finally, home state has to provide monitoring and accountability systems and to impose sanctions for the operating without or in violation of authorization[177]

In conclusion, the Montreux Document is the first international document to describe international law as it applies to the activities of PMSCs whenever these are present in the context of an armed conflict. It also contains a compilation of good practices designed to assist states in implementing their obligations under international law through a series of national measures.

[177] Montreux Document, P.9-10, 23-26.

CONCLUSIONS

1. The hypothesis set in the introduction proved out only partially. Research showed that, in contrast to the initial assumption and prevailing position in the legal literature, legal status of the individual PMSCs employees is sufficiently defined. Depending on the functions that they are contracted to perform and level of incorporation they are falling under one of the two exhaustive categories: they are either civilians or combatants. On the other hand, legal status of the PMSCs as corporate entities is not addressed under IHL at all. It is regulated through the domestic laws.
2. Since the dawn of warfare the use of foreign fighters motivated by private profit has been the norm, not the exception. Only with the emergence of powerful national armies in the last three centuries international community started considering mercenarism as negative and illegal activity.
3. Under current IHL only PMSCs employees have a certain status. Companies, on the contrary, do not possess international legal personality and legal status.
4. Legal status of the PMSCs personnel is based on the principal distinction between the combatant and civilian in the IAC. It is a customary rule that anyone who does not qualify as a combatant is civilian. Person could fit under one or the other category, but not under both at the same time.
5. The determination of a private contractor as a combatant carries broad scope of privileges and duties. Firstly, they are the only ones who have the right to take a direct part in hostilities and who can be legal object of a military attack. Secondly, they are not personally responsible for the use of armed force as long as their acts do not amount to the war crimes, genocide or crimes against humanity. In case of capture by the adversary, combatants are entitled to a POW status.
6. There are two ways for the staff of PMSCs to obtain status of the combatant:
   a) *de jure* combatants must be either formally incorporated into national AF under the domestic law or they must meet the requirements set in the AP I art. 43(1). Namely, being an organized armed group they have to be under the command responsible to the party of the conflict and must hold an internal disciplinary system to enforce compliance with IHL. Whether or not company and its personnel satisfy the conditions should be decided on case-by-case basis. Yet such alternative is not very likely in the light of the tendencies of outsourcing military functions.
   b) staff members of the PMSCs hired directly or indirectly by a party to an IAC to take part in hostilities, provided they satisfy the four conditions under the GC III art.4 (A-2) should be qualified as *de facto* combatants. Since the majority of contracts are concluded with non-state actors (multinational companies, NGO's, international organizations or individuals), there is a

need to interpret the provision of belonging to the party to the conflict in the broad manner. If PMSCs facilitate the objectives of that party their personnel should acquire the combatant status.

7. Anyone who does not fit into the category of combatants is a civilian. General rule is that they are protected against the dangers arising from military operations and can not be a target of the attack. Reservation to this immunity occurs if they take a direct part in hostilities. However, civilian is a complex notion itself. It embraces different categories of people possessing different legal status:
   a) staff members of PMSCs who provide services not amounting to the direct participation in hostilities would fall within the category of *civilians accompanying AF* under the GC III art. 4 (A-4) on condition they have received the relevant authorization from the state (such authorization could be granted in the form of the contract, provided it satisfies criteria's set in national legislation. Since there is no conventional delineation of what actions amount to the direct participation, he matter must be determined in every individual case taking into account the nature and results of the activities carried out. PMSCs employees who fall under this category upon capture are entitled to the POW protection.
   b) prevailing tendency in legal articles to equate personnel of the PMSCs to the corporate *mercenaries* is incorrect. Even though some of them may be present at the lower end of the spectrum of PMCs, under contemporary IHL, which requires meeting cumulative conditions under AP I art.47 (2), it is unlikely that contractors will qualify as mercenaries.
   c) if a hiring state authorizes civilian contractors to participate directly in hostilities without incorporating them into the AF or they do so outreaching contractual terms they become *unlawful or unprivileged combatants*. Consequently they loose significant scope of protection and can be a target of the attack for such time he/she directly in hostilities. Upon capture such contactors may be prosecuted for their mere participation in hostilities. Yet person is not left without protection. First of all, GC IV is applicable as long as art.4 conditions are met. Civilians, who fall under one of the exceptions of art.4 of GC IV, are entitled to the fundamental protections granted by art.75 of AP I (AP I art.45(3)). Finally, anyone who finds himself in the situation of the armed conflict is protected by the "principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience" (AP I art.1(2)) as well as human rights law.
   d) PMSCs personnel who fit under none of the above mentioned categories are civilians. They can not be objects of the military attacks and are not authorized to take direct part in

hostilities. However, proportionate incidental damage in the event of attacks is not prohibited. Generally, they benefit from the GC IV. If person under one of the exceptional categories, he/she would still be entitled to the application of Part II as well as fundamental guarantees based in art.75 of AP I and the customary rules of IHL and human rights law.

8. In NIAC legal status of the PMSCs' employees is defined by the common art.3 of the GCs and by the AP II. There are three categories of persons in NIAC. Fighters (equivalent to the combatant in the context of IAC) cover members of the regular AF fighting on behalf of the government and members of dissident AF or armed groups fighting against the government. Civilians are those individuals who are not members of the AF. They benefit from the protections of common art.3 of the GCs, AP II, customary rules of IHL and human rights instruments. Civilians who temporally participate in hostilities under art. 13(3) of AP II loose protection only for such time as they do so.
9. Montreux Document, being a soft law instrument, does not itself create new obligations for the states. However, its first part codifies rules laid down in the international conventions. Accordingly, states must conform to these provisions to the extent that they are bound by the international treaties to which they are parties. Second part systematizes good practices of the states in regard to PMSCs operations. They should establish licensing systems, ensure civil, administrative and criminal jurisdiction over companies as legal persons as well as their individual employees and institute monitoring mechanisms.

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ANOTACIJA

Milkeraitytė K. Privačios karinės ir saugumo kompanijos bei jų personalas tarptautinės humanitarinės teisės kontekste / Tarptautinės teisės magistro baigiamasis darbas. Vadovas doc.dr. J. Žilinskas. Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, 2008. – 75 p.

Magistro baigiamajame darbe išnagrinėtas privačių karinių ir saugumo kompanijų (PKSK) kaip juridinių asmenų bei jų personalo teisinio statuso reglamentavimas tarptautinėje humanitarinėje teisėje. Pirmoji darbo dalis pateikia samdinystės, kuriai teisinėje literatūroje dažniausiai priskiriama PKSK veikla, charakteristiką, istorinę jos raidą iki šių dienų privačių karinių verslo struktūrų. Antrajame skyriuje analizuojama dabartinė PKSK padėtis bei raidos tendencijos, pagrindiniai jų bruožai, kompetencijos ribos ir privataus sektoriaus įsitraukimo į šiuolaikinius ginkluotus konfliktus mastai. Trečioji darbo dalis skirta PKSK personalo bei pačių kompanijų statuso kvalifikavimui pagal tarptautinę humanitarinę teisę, santykio su samdiniais analizei bei šiuo metu galiojančių tarptautinių konvencijų atitikimo faktinėms situacijoms įvertinimui.

Pagrindiniai žodžiai: privati karinė ir saugumo kompanija, humanitarinė teisė, teisinis statusas, civilis, kombatantas, samdinys.

SANTRAUKA

Milkeraitytė K. Privačios karinės ir saugumo kompanijos bei jų personalas tarptautinės humanitarinės teisės kontekste / Tarptautinės teisės magistro baigiamasis darbas. Vadovas doc.dr. J. Žilinskas. - Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, 2009. – 75 p.

Pasibaigus Šaltajam karui išryškėjusi tendencija valstybėms mažinti savo ginkluotąsias pajėgas ir nuolatiniai kariniai konfliktai nestabiliuose Afrikos, Artimųjų Rytų, Balkanų regionuose sudarė palankias sąlygas atgyti ir sparčiai plėtotis privačių, karines ir saugumo paslaugas teikiančių, kompanijų verslui. Vyraujantis požiūris, kad PKSK-jų darbuotojai atstovauja naują samdinystės formą nėra teisiškai korektiškas ir gali lemti grubius žmogaus teisių pažeidimus. Gausi praktika bei mokslinės literatūros analizė rodo, kad privačių kompanijų darbuotojų teisinis statusas klaidingai ir skirtingai kvalifikuojamas pagal tarptautinę humanitarinę teisę. Viena vertus tai sąlygoja kad kompanijų darbuotojams nesuteikiama jiems priklausanti apsauga. Antra vertus, nesant aiškių tarptautinės PKSK-jų atskaitomybės ir kontrolės mechanizmų, susidaro sąlygos piktnaudžiavimui bei nebaudžiamumui už įvykdytus nusikaltimus.

Šiame magistro baigiamajame darbe siekiama išanalizuoti PKSK-jų ir jų darbuotojų tarptautinį teisinį statusą ginkluotų konfliktų metu ir įvertinti egzistuojančios praktikos atitikimą tarptautinės humanitarinės teisės normoms. Siekiant atlikti išsamų tyrimą, iškelti uždaviniai pateikti istorinę karo privatizacijos apžvalgą, aptarti procesą skatinančius faktorius, apibrėžti, kas yra PKSK, kokie jų tipai ir kiekvieno iš jų kompetencija, išryškinti skiriamuosius privačių karių ir samdinių bruožus bei apžvelgti dabartinę praktiką šioje srityje.

Remiantis pirmine literatūros analize iškelta hipotezė, jog PKSK-jų ir jų personalo statusas tarptautinėje humanitarinėje teisėje yra nepakankamai apibrėžtas ir kad tarptautinė bendruomenė turėtų inicijuoti atitinkamus Ženevos konvencijų bei Papildomų Protokolų papildymus.

Pirmoji darbo dalis pateikia samdinystės reiškinio charakteristiką, jo istorinę raidą iki šiuolaikinės karo paslaugų verslo šakos bei tarptautinės bendruomenės požiūrį į jį.

Karo paslaugų pramonės, jos raidos tendencijų analizei skirta antroji magistrinio darbo dalis. Remiantis dabartinės privačių karių dalyvavimo kariniuose konfliktuose praktikos pavyzdžiais šiame skyriuje taip pat pateikiami siūlymai dėl kompanijų klasifikavimo, nagrinėjamos tokių kompanijų veiklos keliamos grėsmės ir teikiamos galimybės.

Pagrindinėje trečiojoje darbo dalyje išsamiai analizuojamas PKSK-jų darbuotojų tarptautinis teisinis statusas. Laikantis civilių ir karių atskyrimo principo paeiliui nagrinėjamos sąlygos, kurias turi atitikti privačių kompanijų personalo nariai idant būtų priskirti vienai iš šių kategorijų. Taip pat pateikiama jų teisių, pareigų bei suteiktinos apsaugos apžvalga. Šioje dalyje paneigiama literatūroje vyraujanti nuomonė, kad PKSK yra moderni kolektyvinės samdinystės forma. Šiame skyriuje taip pat tiriama kompanijų, kaip juridinių asmenų, bei valstybių (kilmės, samdančiosios bei tos, kurios teritorijoje kompanija veikia) pareigų apimtis bei atsakomybė.

Remiantis atlikta analize, baigiamojoje dalyje formuluojamos išvados. Joje konstatuojama, kad hipotezė pasitvirtino iš dalies. Individualių PKSK-jų darbuotojų teisinis statusas yra pakankamai apibrėžtas, nes, priklausomai nuo jų veiklos pobūdžio bei sutarties su valstybe sąlygų, jie priklauso vienai iš dviejų kategorijų – civiliams arba kombatantams. Kita vertus, kompanijų, kaip juridinių asmenų, statusas yra neapibrėžtas. Jos negali būti laikomos tarptautinės humanitarinės teisės subjektais. Atitinkamai, valstybės turi pareigą nacionaliniais įstatymais reglamentuoti jų veiklą bei užtikrinti kontrolę ir atsakomybę.

SUMMARY

Milkeraitytė K. Private Military and Security Companies and Their Personnel in the Context of International Humanitarian Law / International Law Master Thesis. Supervisor Doc. Dr. J. Žilinskas. Vilnius: Mykolas Romeris University, Law faculty, 2008. – P.75.

The tendency after the end of the Cold war to downsize national armies on the one hand and persistent armed conflicts in unstable African, Near East and Balkan regions on the other created opening conditions for the revival and rapid evolvement of the private business structures that provide military and security services. Prevailing viewpoint that PMSCs and their personnel represent the new form of the mercenary is not correct from the IHL perspective and could lead to serious human rights abuses. Numerous cases and analysis of the scholar literature shows that inaccurate qualification of the PMSCs' employees' status results into deprivation of certain scope of protection from private contractors. Moreover, since there are no accountability and control mechanisms, a high risk for the abuses and impunity for violations of the IHL occurs.

Present master thesis aims to analyze international legal status of the PMSCs and their personnel in the context of armed conflict. It also assesses conformity of the existing practice to the IHL norms. In order to conclude a comprehensive research, author provides historical perspective of the warfare privatization, surveys factors that contributed to the outsourcing of military functions, defines what is PMSC, what are their types and capacity of each type, highlights distinguishing features between mercenaries and private contractors and gives a review of the contemporary practice of their use in the armed conflicts.

Hypothesis that legal status of the PMSCs and their personnel under IHL is insufficiently defined and that international community should take adequate steps to modify present conventions to reflect needs of the present was formulated on the ground of the initial literature review.

The first part of the thesis provides characteristics of the mercenarism and other forms of the private violence, its historical evolution to the modern military services industry and the attitude of the international community towards it.

Present situation and tendencies in the development of the phenomenon of the PMSCs, its' types, main features of each type and differences between the scope of their capacities are addressed in the second section. It is also introducing the factual situation of the involvement of the private soldiers in contemporary armed conflicts and threats and potentialities they suggest.

The third part is dedicated to analyze and qualify PMSCs personnel status under IHL. It also surveys international legal basis regarding mercenaries and gives an evaluation of the dividing line between these two forms of participation in warfare. Moreover, it puts forward proposals up to which extent such participation is legal under the humanitarian laws. Finally, the third part scrutinizes legal status of the PMSCs as corporate entities and states obligations and responsibilities in this regard.

On the basis of the research concluded in the final part conclusions are drawn. It is inferred that the hypothesis proved out only partially. In contrast to the initial assumption and prevailing position in the legal literature, legal status of the individual PMSCs employees is sufficiently defined. Depending on the functions that they are contracted to perform and level of incorporation they are falling under one of the two exhaustive categories: they are either civilians or combatants. On the other hand, legal status of the PMSCs as corporate entities is not addressed under IHL at all. It is regulated through the domestic laws.

ANNEX 1

SPECTRUM OF ARMED FORCES

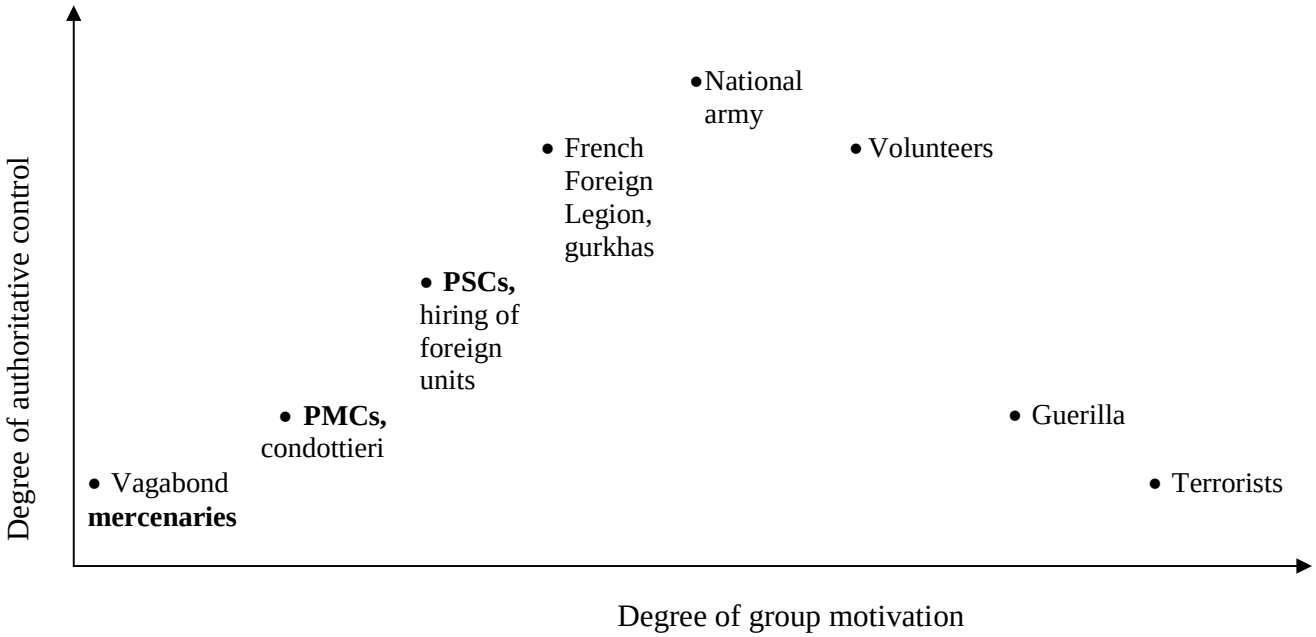

Diagram prepared with reference to Percy S.V. This Gun's for Hire: A New Look at an Old Issue // International Journal, 2003 Autumn Vol. LVIII, No.4, P.730.