INVOLVEMENT OF THE UNITED STATES CIVILIAN CONTRACTORS IN THE WAR ON TERROR: THE PRIVATIZATION OF WAR AND THE INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW REGIME

A dissertation submitted in the partial fulfillment of the requirements of the MASTER OF LAWS
(LL.M International Human Rights Law, Faculty of Shariah & Law)
International Islamic University, Islamabad

Prepared by:
Bushra Khan
REG# 24-FSL/LLM(HRL)/F09
& Law

Supervised by:
Muhammad Mushtaq Ahmed
Assistant Professor, Faculty of Shariah

Diary No 357 Dated 10/10/12
Department of Shariah & Islamic Law
International Islamic University

INTERNATIONAL ISLAMIC UNIVERSITY,
ISLAMABAD
2012

Accession No. 10895

MS
344.097
BUI

1. Humanities ; Law

2. Arts ; Law

بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِيْمِ

Acceptance

By the Viva Voce Committee

Title of Thesis:Involvement of The United States Civilian Contractors In The War on Terror: The Privatization of War and The International Human Rights and Humanitarian Law Regime

Name of Student: Bushra Khan

Registration #: 24-SF/LLM(HRL)/F09

This Dissertation is accepted by the Faculty of Shariah& Law, International Islamic University, Islamabad, in partial fulfillment of the requirements of the degree of LL.M in International Human Rights Law.

Viva Voce Committee

1. Mhammad Mushtaq Ahmed
   Assistant Professor,
   Faculty of Shariah&Law,
   IIUI.

2. Internal Examiner
   Muhammad Munir
   Associate Professor,
   Faculty of Shariah& Law,
   IIUI.

3. External Examiner
   Muhammad Ayub Bhatti
   Pakistan Telecommunication Authority

Bushra Khan

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Abstract

Private Military and Security Companies are a phenomenon that has received much attention in the War on Terror. The PMSC's that have been contracted various military and security related tasks by the US have not only been the forerunners in the list of the violators of Humanitarian and Human Rights Law but have also been successful in evading prosecution in respect of the same.

The 'grey area' argument is erroneous since the absence of legal rules does not denote the absence of legal principles also. Even if it is asserted that the law does not address private contractors, they do not escape the fold the principles underlying International Humanitarian and Human Rights Law. The legal regime established by IHL rests on the cardinal principles of dichotomy and integrality. Thus, since there can be no third category of persons, PMSC's would either be labeled as civilians or combatants and thereafter be subjected to the provisions of law relevant to the said classes of persons. Moreover, the principle of integrality rules out the possibility of legal vacuums altogether. In case of human rights obligations, since they become embodied into domestic laws PMSC's are required to abide by them. Also the duty of enforcing IHRL is vested with the state which must ensure that private contractors under its jurisdiction or control do not contravene it. The outlawed actions of the private contractors do not entail responsibility for them alone but may also trigger responsibility of the state and their superiors. This depends of a variety of factors such as, functioning in the capacity of agents of state, being incorporated into the army, acting as *de facto* organs of state, endorsement of their actions by the state etc.

The controversial incidents occurring at the hands of or against PMSC's have evidenced the inaction of the host and sending states in the matter. This inaction, in respect of host

states has been caused by laws acting as a bar to their jurisdiction, while inaction on part of sending state owes mainly to lack of political willingness, lack of proper infrastructure and funds for carrying out necessary investigations.

Nevertheless, the existing laws, though fragmentary, do cover most if not all of the PMSC's rendering services to the United States. Adoption of a new purposive set of laws specifically aimed at addressing PMSC's appears to be the most effective solution. Moreover, host state laws can also be successfully employed to prosecute and punish the violations of the law by PMSC's.

DEDICATION

This work is dedicated to my wonderful parents.

Bushra Khan.

Acknowledgements

When I started this rather long journey of writing my LL.M dissertation, I knew my laziness would cause me some trouble, but never did I imagine it would become as problem some as it did. The reason why I state this prior to expressing my gratitude to all those who helped me make it through is to emphasize that their help support and presence, was indeed pivotal.

The first words of acknowledgment are without a doubt due to the Almighty who gave me the perseverance to keep going. Alhamdulillah! I thank my parents for their support, love and prayers which have always remained with me. My brother Haroon and sisters Nuzhat, Zeenat and Ayesha, who bore with me through the final days of my thesis, thank you for understanding.

This work wouldn't have been possible without the encouragement of my supervisor, teacher and guide, Mr. Muhammad Mushtaq Ahmad, thank you Sir. I also, thank Dr. Muhammad Munir, his words of wisdom, his guidance and this help with regard to accessing various resource materials, Mr. Ahmad Khalid for his help with resource materials and drafting of my synopsis.

I would also want to especially thank Neelam Jehan Khan and Sana Jadoon for their continuing help and support. Lastly, I also owe a thank you to Usman Farrokh for motivating me to timely complete of this thesis.

1. INTRODUCTION

Reliance on private entrepreneurs during armed conflicts is hardly a new phenomenon. However, the increasing involvement of PMSC's in armed conflict situations over the past decade has not only given rise to legal concerns as to the status and accountability of all stake holders of this "privatized" war but also calls out for developing a system aimed at regulating the same.

1.1 Significance of the Research

The notion of a nation state as we know it today, which extends to the "raising, maintaining, and using military forces" developed post the treaty of Westphalia.[1] In this context Hans Morgenthau asserted that sovereignty meant a "centralized power that exercised its lawmaking and law-enforcing authority within a certain territory".[2] In the estimation of Max Weber it was a "human community that successfully claims the monopoly of the legitimate use of physical force within a given territory".[3]

While every state possesses the inherent right of resorting to force for the purpose of quelling opposition posed by belligerents within its own territory, use of force by one state against another, is subject to restrictions[4] enshrined in the UN Charter. This study however

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[1] David, Isenberg, *Shadow Force: Private Security Contractors in Iraq* (USA: Praeger Security International, 2009), 1.

[2] "Fixing Identity, Fabricating Space: Sovereignty and Territoriality after the Cold War", Timothy W. Luke, accessed February 29, 2012 < http://www.cddc.vt.edu/tim/tims/Tim382.htm >.

[3] Kyle, M. Ballard, The Privatization of Military Affairs: A Historical Look into the Evolution of the Private Military Industry, in, *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects*, eds. Thomas Jager, Gerhard Kummel (Netherlands: VS Verlag, 2007), 37.

[4] Article 2(4) of the UN charter states that. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

is not concerned with dwelling upon the questions of legality of the use of force rather it focuses more on the law applicable during armed conflict.

The law of war or International Humanitarian Law is a complex set of rules placing restrictions on the use of violence in wartime with a view to limit the effects of war. It is based on a set of fundamental principles[5] which have been considered as being "elementary considerations of humanity by the International Court of Justice in the Corfu Channel case and fundamental general principles of humanitarian law in the Case concerning Military and Paramilitary Activities in and against Nicaragua". They are binding under all circumstances and no derogation is ever permissible.

In principle, the persons protected by International Humanitarian Law (IHL) are broadly divided into two classes i.e. Civilians and Prisoners of war.[6] Nevertheless, it has been attempted time and again to create such wholly fictional and novel categories of persons which seemingly do not fall under the previously stated categories and are thereby considered as not being covered by the law. In short, they are argued as being the grey areas of the law.

This idea, of there being a vacuum in the law finds itself embodied in the notions of private military and security companies (PMSC's). As stated earlier, the phenomenon of PMSC's isn't recent in its origin. What is noteworthy however is that the practice of engaging PMSC's which was previously associated with candid mercenary[7] activity, has of late taken the shape of professional companies which openly market their services. Traditionally

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[5] Hans-Peter Gasser, *International humanitarian law and the protection of war victims,* available at, <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JM93> accessed August 6, 2010.

[6] IHL, being the corpus of law applicable during armed conflict, protects persons not or no longer taking part in hostilities. Such persons cannot be made the object of attack.

[7] Conway H. Hinderson, *Understanding International Law* (Singapore: Wiley-Blackwell, 2010), 50.

speaking, there exist differences between private military and private security companies. However, with regard to international Humanitarian law, the limit between these concepts is not as clearly delineated as might appear.[8]

The term PMSC has been intentionally coined so as to cover all companies regardless of the form of service, whether military or security being provided by them.[9]

The criterion distinguishing civilians from combatants is found in article 4 of the III rd Geneva Convention. By laying down requisite criteria for conferral of Prisoner of war status, the article by exclusion recognizes all persons not fulfilling the same, as being civilians i.e. persons who do not take part in hostilities. The same can be extended to the personnel of PMSC's in so far as they should be considered civilians "till such time that they take direct participation in hostilities" and thereby lose protection. This sounds simple enough, but only in theory. The factual reality of the matter is that, the members of PMSC's deployed in conflict regions often find themselves in the midst of an armed confrontation.[10] Furthermore, certain acts which these private companies are expressly warranted to carry out may be considered as direct participation in hostilities. This raises a number of questions regarding the fundamental distinction between civilians and combatants that lies at the core of International Humanitarian Law. It will be possible to move forth, only after the status of such persons is cleared.

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[8] Emauela Chiara Gillard, Business Goes to War: Private Military/Security Companies and International Humanitarian Law", *International Review of the Red Cross* 763 (2006): 527-528.

[9] Ibid. The author futher argues that, "it is not the label given to a particular party that determines its responsibilities but rather it is the nature of the activities they undertake".

[10] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities, available at:* <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0990/$File/ICRC_002_0990.PDF> accessed August 3, 2010.

This seldom trodden path then takes a turn into grimmer realms, in so far as the regulation of PMSC's remains the biggest question mark. To say that international law provides no answers as to the rights and obligations of the PMSC's and of the states would not be free from error. However, there, "exist problems of implementation due to the unwillingness or inability of the states to and other parties to uphold the rules in practice".[11] The crevasses in implementation of the existing laws have been obviated on numerous occasions. The engagement of PMSC's in conflict ridden zones is bound to lead to instances of IHL violations by or in respect of these private contractors.[12] Thus, the proposed study is an endeavor to ascertain the laws regulating PMSC's in a manner which leaves no room for doubt.

In the aftermath of the war on terrorism and the increased involvement of private military and security contractors in Iraq and Afghanistan, there have been efforts undertaken in the international arena to address the situation. Notable among the initiatives taken towards regulating PMSC's, thus far, is the "Montreux Document"[13] of 2008. This document, though a step in the right direction, doesn't however create any legal obligations.

Although a lot has been said and written about PMSC's, their status, rights and obligations under international law yet, in totality, this literature provides mainly theoretical answers to the controversial issue pertaining to the actions of PMSC's. Despite their rather revolting record, the PMSC's are turning into a force to be reckoned with. They continue to

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[11] "Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law", Alexandre Faite, accessed August 3, 2010 <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/pmc-article-310804?opendocument>.

[12] Jeremy Schahill, *Blackwater: The rise of the World's Most Powerful Mercenary Army* (New York: Nation Books, 2007), 8.

[13] "It is the product of an initiative launched cooperatively by the Government of Switzerland and the International Committee of the Red Cross."

flex their wings in the conflict ridden Iraq and Afghanistan, and their oft denied presence and covert activities in the volatile Pakistani backdrop are also areas which deserve attention.

Therefore, this research, will venture into providing workable solutions for the tribulations surrounding the PMSC's while analyzing cautiously their activities in Iraq, Afghanistan and as of late, Pakistan.

Furthermore, the literature available, speaks only of the situation from the perspective of International Humanitarian Law. Though discussion on the prospects of applicability of International Human rights Law to PMSC's is not a novel concept in itself, discussions on this issue have surprisingly been scant and insufficient.

2. EVOLUTION OF THE IDEA OF PRIVATE MILITARY CONTRACTORS

This part of the research casts a glance at the evolution of private military and security contractors over the years and addresses the controversies surrounding the status accorded to the same under International Law.

2.1 The Dawn, Demise and Rebirth of Military Privatization

The plague of private military entrepreneurship has recurred. It wouldn't be without fault to assert that, military entrepreneurship and privatization of war are phenomenons that have taken the world by surprise. The widespread general assumption that warfare falls exclusively into the domain of a "state" is not free from error. An analysis of the pages of history evidences varying trends as regards the involvement of private contractors. Whether in the form of "Mercenaries, soldiers of fortune, and private armies" their existence runs simultaneous to that of war itself.[14]

Before the conclusion of the Peace of Westphalia[15] of 1648, the practice of renting out armies was not uncommon.[16] The treaty however, was instrumental in bringing about the downfall of the flourishing industry of private contractors of war, but thrusting matters of military and security into the exclusive domain of the state.[17] Though discussions on the

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[14] "Individuals, communities, societies or states that were unable to secure territory, property, or engage in war, resorted to the practice of hiring soldiers and armed contingents" See: Fred Schreier and Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies* (Geneva: Geneva Centre for Democratic Control of Armed Forces, 2005), 13.

[15] Available at: <http://avalon.law.yale.edu/17th_century/westphal.asp> (last accessed, 20-12-10).

[16] The prime example of which was Wallenstein's militia with a strength of 120,000 soldiers. See: Benedict Sheehy, Jackson Maogoto, Virginia Newell, *Legal Control of the Private Military Corporation* (United Kingdom: Palgrave Macmillan, 2009), 11.

[17] *Ibid.*

notions of PMF's considerably gained momentum in the aftermath of the 9-11 and the Global War on terror, PMF's are a phenomenon whose existence can be traced back to the post world war II setting.[18] Today, history seems to be repeating itself as things have taken a turn back to post Westphalian setting, with the functions pertaining to military and security shifting from the hold of the state to the clutches of the private contractors.[19]

With reference to the global war on terror, the private contractors operating in Iraq who by 2010 were approximately 30,000 in all have spurred a lot of debate among the various stakeholders of the nature of their involvement in situations of armed conflict.[20]

Although private contractors had been involved in the WoT since the beginning, they came into the international limelight by 2004 owing to two incidents i.e. the brutal murder of Blackwater contractors in Fallujah and the torture and detainee abuse at Abu Ghraib.[21] Once the activities of the private contractors came under the scrutiny of the international community, the serious problems associate with their participation in armed conflict situations also came to light.

2.2 Applicability of IHL

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[18] Schreier and Caparini, *Privatising Security*, 13.

[19] *Ibid*, the author further points out that "The recent wars in Bosnia, Sierra Leone, Kosovo, Afghanistan, and Iraq were all fought with help of civilian contractors. They are similarly key players in the aftermath of the war in Iraq – in the securing of peace and the reconstitution or reform of state security institutions."

[20] Lindsey Cameron, "New standards for and by private military companies?", in *Non state actors as standard setters*, ed. Anne Peters et al (New York: Cambridge University Press, 2009), 113.

[21] *Ibid, 114-115.*

Hans-Peter Gasser[22] defined International Humanitarian Law as:

> "The whole of the international conventional or customary rules, which are specifically intended to regulate humanitarian problems arising directly from either international or non-international armed conflicts, and which restrict, for humanitarian reasons, the right of parties to the conflict to use means and methods of warfare of their choice and to protect people and objects affected by the conflict."[23]

This theoretical definition specifies the situations covered by IHL. Thus whenever and wherever there arises a situation of armed conflict, IHL comes into operation. It must be borne in mind that the services of private military contractors are called for in an environment of armed conflict whether international or internal. Their presence in such a situation often puts them face to face with those protected by IHL[24] and therefore, calls for an assessment of the status of such persons under humanitarian law. It necessarily follows that, members of PMC's operating in conflict areas are subject to and bound by the principles of IHL.

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[22] "Following law studies at the University of Zurich and Harvard Law School, he worked as Deputy Secretary-General of the Swiss Science Council. He joined the ICRC in 1970 and was posted for two years in the Middle East, first as a delegate and then as deputy head of delegation. In 1977 he was appointed head of the ICRC's Legal Division and from 1983 to 1995 was senior legal advisor to the ICRC, responsible in particular for promoting ratification of the 1977 Protocols additional to the Geneva Conventions. Alongside his professional duties, he has published various articles and given lectures at numerous universities. His exposé entitled International Humanitarian Law: An Introduction, which has been translated into several languages, has given countless students and practitioners their first insight into this branch of law." Available at < http://www.icrc.org/eng/resources/documents/misc/57jmc.htm > accessed February 26, 2012.

[23] Gasser, Hans-Peter, *International Humanitarian Law - An introduction, in: HAUG (Hans), Humanity for all* (Geneva: Henry Dunant Institute, 1993) 509.

[24] Gillard, "Business Goes to War", 527.

Nevertheless, the position of the PMC's and their personnel is not straightforward.[25] It is often stated on various forums that PMC's do not have any status under International law. If the reports appearing in the media as the operations being carried out by the PMSC's are to be believed, then it would mean that PMSC's operate in a legal vacuum.[26] This assertion however is misleading since non-state actors are bound by IHL during an armed conflict if they are parties to the conflict. Consequently, "the private companies may not be, but their employees as individuals, depending on their particular roles, are more likely to fall under IHL rules."[27]

2.3 Private Military and Security Companies; Mercenaries with a New Name?

The most fundamental mistake make with reference to private military and security companies (PMSC's) is to equate them with mercenaries. This section, by highlighting the difference between the two concludes that private contractors though similar to mercenaries in some aspects, but in all are a distinct category of persons.

2.3.1 The Common Misconception

[25] David Isenberg argues that "trying to apply IHL to private contractors is often extremely difficult; according to him it is fitting a square PMC into a round IHL" for further details see; <http://civiliancontractors.wordpress.com/2010/05/07/can-pmcs-find-their-ihl-groove/> accessed February 29, 2012.

[26] Emauela Chiara Gillard, "Business Goes to War", 527-528.

[27] *ICRC, Contemporary challenges to IHL – Privatization of war: overview.* See online at: <http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/privatization-war/overview-privatization.htm> (last accessed 18-12-10).

"It is a nation's hiring of people other than their own countrymen to pick up their weapons to fight on their behalf".[28] This is a general definition of mercenarism given by, David Isenberg[29] in his book Shadow Force.

The term mercenary has to a large extent suffered great misuse. "Whenever an armed opposition movement arises against a particular cause, the adversary is immediately defined as a mercenary".[30] A discussion on the term mercenary at this point seems rather apt, since more often than not; PMSC's are referred to as mercenaries.

In a strictly legal sense, the term mercenary is construed narrowly under IHL owing to which a large chunk of the members of various PMC's, if not all, would continue to remain outside its fold.

2.3.2 The Legal Definition of Mercenary

The interchangeable use of the terms mercenary and PMSC's, call out for the former to be elucidated in the light of IHL. In common parlance, a mercenary is a person who "serves merely for wages" and/or a soldier who is hired into a foreign service.[31] The Oxford

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[28] David, Isenberg, *Shadow Force: Private Security Contractors in Iraq* (USA: Praeger Security International, 2009), 5.

[29] "David Isenberg is the author of the book *Shadow Force: Private Security Contractors in Iraq*. His blog is The PMSC Observer. He wrote the "Dogs of War" weekly column for UPI from 2008 to 2009. During 2009 he ran the Norwegian Initiative on Small Arms Transfers project at the International Peace Research Institute, Oslo. In 2011 he testified before Congress on labor trafficking by a KBR subcontractor. His affiliations include the Straus Military Reform Project, Cato Institute, and the Independent Institute. He is a US Navy veteran." Available at < http://www.huffingtonpost.com/david-isenberg > accessed February 26, 2012.

[30] Article 47, 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, Commentary available at < http://www.icrc.org/ihl.nsf/COM/470-750057?OpenDocument > (last accessed 22-12-10).

[31] Cameron, New standards for and by private military companies?, 123-124.

Essential Dictionary of the US Military defines mercenary simply as "a professional soldier hired to serve in a foreign army".[32]

Nonetheless, lawyers and governments seeking to regulate these companies must look to the legal meaning of the term.[33] The Additional Protocol I to the Geneva Conventions in Article 47[34] provides six criteria which must be cumulatively present in order for any person to qualify as a mercenary. It has been argued by commentators on IHL time and again, that the conditions set forth in the article are so stringent in nature[35] that the notion of mercenary has become practically fictional.

In addition to the afore stated article, there exist two specific conventions on mercenaries i.e. the "1977 Organization of African Unity Convention for the Elimination of Mercenarism in Africa"[36] and the "1989 United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries"[37]. The object of both

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[32] A recent definition happens to be, "mercenaries are individuals who fight for financial gain in foreign wars; they are primarily used by armed groups and occasionally by governments" see: Schreier and Caparini, *Privatizing Security*, 15.

[33] Lindsey Cameron, "Private Military Companies: their Status under International Humanitarian Law and Its Impact on Their Regulation", *International Review of the Red Cross* 763 (2006):577.

[34] Article 47 of the Additional Protocol I to the Geneva Conventions of 1949 states, "Mercenaries: 1. A mercenary shall not have the right to be a combatant or a prisoner of war. 2. A mercenary is any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces."

[35] Cameron, New Standards for and By Private Military Companies, 125.

[36] Available online at: <http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention_on_Mercenaries.pdf> (last accessed, 19-12-10).

[37] Available at: < http://www.un.org/documents/ga/res/44/a44r034.htm > (last accessed 19-12-10).

conventions is to, "prohibit the use of mercenaries and to criminalize both recourse to mercenaries and participation in hostilities as a mercenary".[38]

On the other hand, being a mercenary is not considered as amounting to a violation of IHL, thus in other words there is no distinct IHL crime of "mercenarism".[39] Since IHL tackles the issue from a different angle, its focus is directed towards the status to be accorded to such persons upon capture, instead of placing any kind of ban on their use or declaring their activities outlawed.[40]

A United Nations Commission on Human Rights (UNCHR) working group on the use of mercenaries, established in 2005, concluded that some private security companies operating in zones of armed conflict are engaging in "new forms of mercenarism."[41] It went on to draft the "International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies"[42] which affirms the view PMC's despite possessing characteristics associated with mercenarism are indeed separate and distinct from them, and call out for regulation.

2.3.3 Factors Distinguishing PMC's From Mercenaries

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[38] Emauela Chiara Gillard, "Business Goes to War: Private Military/Security Companies and International Humanitarian Law", *International Review of the Red Cross* 763 (2006): 560-561.

[39] Cameroon, "*New Standards For and By Private Military Companies*", 126.

[40] Ibid.

[41] Private Security Contractors in Iraq and Afghanistan: Legal Issues, Congressional Research Service, available at: < http://www.fas.org/sgp/crs/natsec/R40991.pdf > (last accessed, 24-12-10).

[42] Available at: < http://mgimo.ru/files/121626/draft.pdf > (last accessed, 24-12-10).

The term private military company (PMC) does not exist within any current international legislation or convention.[43] Thus at present, there is no standard definition[44] of the term PMC which may serve the purpose of a yardstick against which the various private military contractors must be considered in order to qualify as PMC's. The nearest comparable term is that of mercenary, which is defined in Article 47 of the 1977 Protocol 1 Additional to the Geneva Conventions of 1949.[45] In this respect, "the key conceptual distinction lies in PMCs' resort to legitimate force: on whose behalf is that resort undertaken, and is it undertaken for the state, a public good, or for private gain?"[46]

2.3.3.1 The Objective Test of Distinction

For PMSC's to be considered mercenaries, the test is simple. If they fulfill the criteria laid down in AP I or the relevant conventions, they would be considered mercenaries. However, as stated earlier, these conditions are notoriously difficult to fulfill. In order to grasp the crux of the matter, it is essential to disambiguate PMSC's in the following manner so that they may be tested against the threshold of article 47.

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[43] PMC has been defined as "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, command and control, communications, and intelligence functions), and/or military equipment, to legitimate domestic and foreign entities" See: Schreier and Caparini, *Privatizing Security*, 18.

[44] *Ibid.*

[45] Major S. Goddard, "The Private Military Company: A Legitimate International Entity within Modern Conflict" (Master diss., Fort Leavenworth Kansas, 2001).

[46] Christopher Kinsey, *Corporate Soldiers and International Security: The rise of Private Military Companies.* (USA: Routledge Press, 2006), 8.

First and foremost, if the members of the PMSC's are incorporated into the armed forces of the state party to the conflict,[47] it would render article 47 of the protocol inapplicable owing to the non-compliance with condition (e) of sub article 2.

Furthermore, in order to qualify as a mercenary, condition (a) of the stated article requires that the person directly participates in hostilities. In the case of PMC's however, the services being provided would seldom be considered as amounting to direct participation in hostilities. Even in those cases where they do, the use of force is unlikely to have been expressly envisaged at the time of hiring, as required in condition (a).[48] It has been seen that hostile acts undertaken by the personnel of PMSC's are usually in reaction to changing realities on the ground.

Lastly, the nationality condition of Article 47 requires that the person in question, "is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict." However, in the contemporary conflicts of today, where PMSC's are most active, they employ persons who are usually nationals of states party to the conflict. Furthermore, by discriminating on the basis of nationality alone, this requirement seems to be rather arbitrary in nature.[49] This research however, isn't concerned with analyzing the discriminatory nature of the nationality requirement of a mercenary.

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[47] Gillard, Business Goes to War, 568.

[48] Ibid, 567. An Example with reference to Iraq would be if two members of the same PMSC, one Iraqi and the other Nepali are employed to carry out identical duties, then owing to the operation of the nationality requirement, the Nepali contractor might end up being labeled a mercenary.

[49] Ibid, 568.

The focus of all the said instruments relevant to mercenaries, in on natural personality as opposed to legal personality, "therefore it is the employees of PMCs/PSCs who must fulfill the conditions and not the companies."[50]

To sum it up, though the members forming part of a PMC may be confused with mercenaries because of being *"motivated to take part in the hostilities essentially by the desire for private gain..."*[51] yet, a closer look at them shows that they, more often than not, are unable to meet all six of the prescribed conditions and hence fail to qualify as mercenaries.

2.3.3.2 The Subjective Test of Distinction

From a subjective standpoint there exist quite a few reasons owing to which states are unwilling to equate PMC's with mercenaries. The reasons are practical, political or economic. The basic argument is that, PMCs differ from mercenaries since they are hired by governments and corporations, ostensibly to provide military and security services.[52] Mercenaries however, are hired by non-state armed groups, aiming to undermine the constitutional order of states.[53]

Secondly, it is asserted that basic aim behind defining a mercenary was twofold, i.e. identification and deterrence, the catch however is that, it is only with regard to individual actors. However, much has changed since the term mercenary was defined. Today, private military entrepreneurship has devolved from the individual unto corporations. Thus, owing

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[50] Ibid.

[51] Article 47 of the Additional Protocol I to the Geneva Conventions of 1949, text available at: < http://www.icrc.org/ihl.nsf/WebART/470-750057?OpenDocument > (last accessed, 24-12-10).

[52] Schreier and Caparini, *Privatizing Security*, 20.

[53] *Ibid.*

to the corporate packaging of PMC's states are unable or unwilling to make direct comparisons between the individual mercenary and the corporate PMC.[54]

Partly for economic reasons, but often also for their language ability or knowledge of local conditions, culture, and customs, many western PMCs also hire host country nationals. [55] Moreover a second reason is that the hallmark of a mercenary, "combat for sale" is not a hallmark shared by majority of PMC's.[56] They argue that their employment can be a stabilizing influence for legitimate foreign governments and not the destabilizing influence that is widely connected with the traditional mercenary paradigm.[57]

A third reason is that the refined marketing, sophisticated lobbying, and professional business practices of modern PMCs lend them credibility and encourages states to treat them differently from mercenaries.[58] Lastly, economic rationalism and the trend toward policies that seek to increase efficiency in the public sector through the introduction of private sector competition are also relevant.[59]

2.3.4 Consequences of the Distinction

To say that the private military contractors of today are different from the mercenaries of the yester years would mean that they are not to be governed by the rules pertaining to the latter. Thus, the customary rule that mercenaries do not have the right to combatant or

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[54] Sheehy, Maogoto and Newell, *Legal Control of the Private Military Corporation*, 29.

[55] Schreier and Caparini, *Privatizing Security*, 21.

[56] Sheehy, Maogoto and Newell, *Legal Control of the Private Military Corporation*, 29.

[57] Goddard, The Private Military Company.

[58] Sheehy, Maogoto and Newell, *Legal Control of the Private Military Corporation*, 29.

[59] *Ibid*, 30.

prisoner-of-war status applies only to those persons fulfilling the conditions set forth in the definition of a mercenary in Article 47 of Additional Protocol I.

Mercenaries are not entitled to POW status and thus cannot claim it as a matter of right. States are free to grant prisoner-of-war status to a mercenary or withhold it, but the mercenary has no right to claim such status as a defense against prosecution.[60] Thus the distinguishing PMCs. from mercenaries leads to the conclusion that the rights and duties IHL enjoins upon PMCs from mercenaries vary from those granted to mercenaries. Mercenaries do not have the right to participate in hostilities and thus are liable to be prosecuted for having taken up arms.

The legal situation of members of PMSC's may vary from case to case. They may in certain cases have the status of combatants and consequently POW (if captured) and be repository of civilian status in others. Their prosecution for participation in hostilities may only take place in the latter case and even then, being civilians, they enjoy a broader spectrum of protection as compared to mercenaries.

The need to distinguish between mercenaries and personnel of PMC's is therefore extremely essential since IHL grants them rights over and above those conferred upon mercenaries and conversely also imposes more obligations upon them.

Finally, concluding that members forming part of PMCs hardly ever qualify as mercenaries, would undoubtedly give way to questions pertaining to their status under IHL, i.e. whether they are to be considered combatants or civilians.

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[60] Jean M. Henckaerts and Louise D. Beck, eds., *Customary International Humanitarian Law Volume I: Rules* (New York: Cambridge University Press, 2005), 394. "As the UN Secretary-General reported in 1988, Iran claimed to have captured nationals from other countries whom it alleged were mercenaries, but it asserted that, rather than punish them, it chose to treat them like other prisoners of war".

2.4 Divide between Civilians and Combatants

In international humanitarian law, individuals are accorded a range of "protections" from the effects of hostilities. Individuals accorded such "protections" are called "protected persons" within the specified limits of protection given them by international humanitarian law.[61] They fall into several distinct categories. The earliest international treaties on regulation of war sought to protect combatants as opposed to civilians.[62]

According to the Crimes of war project, "In 1949, the four Geneva Conventions enunciated the first comprehensive set of rules protecting combatants and noncombatants in international armed conflicts".[63]

The principle of distinction, which forms part of customary IHL binds the parties to the conflict to distinguish civilians from combatants allowing attacks to be directed only against the latter.[64]

2.4.1 Entitlement to POW Status

Combatants have the right to directly participate in hostilities, the flip side of which being that become legitimate targets of attack during military operations.[65] The logical result of this

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[61] 'A combatant in simplest terms is a member of an armed force a person who takes an active part in hostilities, who can kill, and who, in turn, is a lawful military target. A combatant can acquire the status of a protected person under a number of circumstances for example, if captured or wounded'. See: "Protected Persons" Crimes of war project, available at: < http://www.crimesofwar.org/thebook/protected-persons.html > (last accessed, 18-12-10).

[62] Ibid.

[63] Ibid.

[64] Henckaerts, *Customary International Humanitarian Law*, 3.

right of combat is that they may not be prosecuted for acts committed as a part of their military activities.

However, the combatants who, though, cannot be punished for having taken up arms, may nevertheless be detained during the conflict so that they may be prevented from taking part in the hostilities. Upon capture by the enemy; combatants are accorded the status of Prisoner of War.[66]

The principal category of those accorded POW status is, the regular members of the armed forces of a state party to the conflict. By extension and under certain circumstances, IHL confers the status of combatant and POW to other persons who fight for state party to an IAC, even if they are not members of the armed forces.

Members of a *levee en masse*[67] are also considered combatants and POW. These members will be considered combatants if they fulfill the following three cumulative conditions, the first two requiring that they respect the laws and customs of war and carry arms openly and the last requirement, which is both time and situation dependent, declaring that a levee en masse is possible only on a non-occupied territory.

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[65] The Lieber code in Article 57 states, "So soon as a man is armed by a sovereign government and takes the soldiers oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offences" Available at: <http://www.icrc.org/ihl.nsf/WebART/110-20057?OpenDocument > (last accessed, 21-12-10).

[66] A.P. de Heney, trans., *III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: ICRC, 1960), 44-73.

[67] "*levée en masse*" Crimes of War Project, available at: < http://www.crimesofwar.org/thebook/levee-en-masse.html> (last accessed: 17-12-10) . "The term *levée en masse*, which first became an international legal term at the Brussels Conference in 1874, must be distinguished under the laws of war from an insurrection by a people against its own national government. The levée en masse is defined as taking place against foreign troops either invading or occupying a country, restricting the definition to one involving national self-defense. It refers especially to situations in which the populace spontaneously takes up what weapons it has and, without having time to organize, resists the invasion."

In certain cases, persons who accompany the armed forces without actually being members thereof may benefit from POW treatment without there being a conferral of POW status.

Finally, IHL distinguishes two more particular categories. The first is that of a spy[68], who may certainly be a civilian and at the same time, may also be a member of the armed forces. In the latter case, a spy loses the benefit of POW status when certain cumulative conditions are met.[69] The second category is that of Mercenary. As discussed at an earlier stage of this chapter, mercenaries are not considered combatants and are consequently not entitled to POW status.

2.4.2 Civilian Status

[68] Additional Protocol I to the 1949 Geneva Conventions defines Spy in the following manner, "Spies- 1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy. 2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces. 3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage. 4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs." Available at: <http://www.icrc.org/ihl.nsf/WebART/470-750056?OpenDocument > (last accessed: 06-01-11).

[69] Henckaerts, *Customary International Humanitarian Law*, 390.

During World War II, and in many of the conflicts since, civilians have been the main victims of armed conflict.[70] The response of the international community took the shape of the IVth Geneva Convention adopted in 1949. The "civilians' convention" recognized the changing nature of warfare and established legal protection for any person not belonging to armed forces or armed groups.[71] The protection also included civilian property. Such protection was later reinforced with the adoption of the Additional Protocols to the Geneva Convention in 1977.

In its judgment in the *Blaskic case*[72] in 2000, the International Criminal Tribunal for the Former Yugoslavia defined civilians as "persons who are not, or no longer, members of the armed forces".[73]

The fourth Geneva Convention does not have as its aim the protection of the civilian population against the effects of hostilities, but rather uniquely against arbitrary or malicious behavior by an enemy occupying power. IHL provides that civilians under the power of enemy forces must be treated humanely in all circumstances, without any adverse distinction.[74] Article 4 of the convention states that "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of

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[70] "Civilians protected under international humanitarian law", ICRC, available at: <http://www.icrc.org/eng/war-and-law/protected-persons/civilians/overview-civilians-protected.htm> (last accessed 06-12-10).

[71] *Ibid.*

[72] "The Prosecutor v. Tihomir Blaskic", ICTY, Judgment available at:
< http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf > (last accessed: 07-12-11).

[73] Henckaerts, *Customary International Humanitarian Law*, 18.

[74] They must be protected against all forms of violence and degrading treatment, including murder and torture. Moreover, in case of prosecution, they are entitled to a fair trial affording all essential judicial guarantees.

a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

The expression in the hands of the enemy does not only mean a situation of direct control, such as that exercised by a party to the conflict over an individual physically placed "in its hands". The simple fact that an individual is on the territory of a party to the conflict or on occupied territory implies that he or she is' "in the hands" of the authorities of this Party or occupying Power.[75]

The equation is simple, since civilians do not take part in hostilities, they must not become the object of attack. This protection enjoyed by civilians nevertheless, is conditional and not absolute. In other words, the immunity afforded to individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts.[76] It must however be noted that, this waiver of protection operates only until such time that the particular individual participates directly in hostilities, neither before nor afterwards. If the civilian is captured while being engaged in a hostile act[77], the situation will then be governed by Article 45[78] of the Additional Protocol I (Protection of persons who have taken part in hostilities).

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75 A.P. de Heney, trans., *IV Relative to the Protection of Civilian Persons in Time of War.* (Geneva: ICRC, 1960),

76 The ICRC commentary of theAdditional Protocol I states that "Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities." Available at < http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument > accessed February 26, 2012.

77 *Ibid.*

78 Article 45 "1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this

2.4.3 The Need of the Distinction and its Repercussions

The principle of distinction between civilians and combatants was first set forth in the St. Petersburg Declaration, which states that "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy".[79]

The essence of the matter lies in the fact that it is lawful to direct attacks towards persons qualifying as combatants but it remains prohibited to make protected persons the object of attack. In other words, while it remains prohibited to attack civilians and persons hors de combat, combatants remain legitimate objects of attack. Thus, determination of status in this regard becomes a very delicate issue since an erroneous conclusion may inevitably result in a violation of the law.

In the *Kassem case*[80] in 1969, Israel's Military Court at Ramallah recognized the immunity of civilians from direct attack as one of the basic rules of international humanitarian law.[81]

The principle of distinction was invoked by many states[82] in their pleadings before the ICJ during the Nuclear Weapons Case.[83] In all the idea of distinction and protection of protected persons is deep rooted as far as IAC's are concerned.[84]

Protocol until such time as his status has been determined by a competent tribunal." Available at < http://www.icrc.org/ihl.nsf/WebART/470-750055?OpenDocument > accessed February 26, 2012.

79 *Ibid.*

80 Elihu Lauterpacht, ed., International Law Reports (Cambridge: Grotius Publications Limited, 1971), 470-483.

81 Henckaerts, *Customary International Humanitarian Law*, 4.

82 Ecuador, Egypt, India, Japan, Netherlands, New Zealand, Solomon Islands, Sweden, United Kingdom and United States.

Coming to the case of NIAC's the situation becomes slightly different. Since the idea of combatant does not exist in the arena of NIAC's the issue of combatant status does not arise. No one is given the right to take up arms and engage in hostilities against the government. It must nevertheless be noted that article 13(2) of AP II prohibits making the civilian population as such, as well as individual civilians, the object of attack.[85] In addition, this rule is included in other instruments pertaining also to non-international armed conflicts.[86]

The decisions of various international courts and tribunals also make it evidently clear that the obligation to distinguish between civilians and combatants is customary in both IAC and NIAC.[87]

2.4.4 Neither Civilian nor Combatant: Grey Areas of the Law?

In the WoT abuses of the law by PMSC's have to a large extent remained unchecked owing to the argument that they fall into neither of the conventional categories of civilian or combatant. Thus, they are argued as being a grey area yet to addressed by the law.

2.4.4.1 The Unlawful Combatant; an Attempt to Fit a Square Peg into a Round Hole

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[83] Ibid, 5. 'In its advisory opinion in the *Nuclear Weapons case*, the Court stated that the principle of distinction was one of the "cardinal principles" of international humanitarian law and one of the "intransgressible principles of international customary law".'

[84] "Protected Persons" Crimes of War Project, available at: < http://www.crimesofwar.org/thebook/protected-persons.html > (last accessed, 18-12-10).

[85] Henckaerts, *Customary International Humanitarian Law, 5.*

[86] Henckaerts, *Customary International Humanitarian Law, 5.*

[87] Ibid. Jurispridence of the International Courts and Tribunals, especially the Nuclear Weapons Advisory Opinion, Tadic, Kupreskic advocate such an approach.

The idea that there are only two categories of persons in armed conflict has faced definitional challenges. Terms such as 'illegal combatants, unprivileged combatants" and "unlawful combatants" have been around for as long as there have been laws governing the conduct of hostilities.[88]

While the discussion on the legal situation of unlawful combatants[89] is not new, it has nevertheless become the subject of intensive debate in the aftermath of the US-led military campaign in Afghanistan.[90] The US, whilst staging this global war on terror, reverted to the rather controversial term it had introduced in *Ex parte Quirin*[91], namely the "Unlawful Combatant". The argument was simple, those who engaged in hostilities in contravention of the provisions of the third Geneva Convention, were not entitled to POW status. However things started taking an exceptionally creative turn with the unveiling of the term, unlawful combatant. The implication was that those who didn't fit the mold of combatants yet directly participated in hostilities were not to be considered civilians who had lost protection. Such, were the outlawed combatants, who were to be tossed into a right-less state with the inception of this legal limbo. The premise of the argument was the famous catch phrase of

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[88] René Värk, "The Status and Protection of Unlawful Combatants", *Juridica International Law Review* 10 (2005): 193.

[89] For detailed study on the issue of unlawful combatants see: Sadia Tabassum, "The Problem of Unlawful Combatants: A Hard Case for International Humanitarian Law and International Human Rights Law" (Master diss., International Islamic University, Islamabad 2010).

[90] Knutt Dorman, "The Legal Situation of "Unlawful/Unprivileged Combatants"", *International Review of the Red Cross* 85 (2003): 41.

[91] "By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful", *Exparte Qurin*, 317 U.S. 1 (1942), Available at: < http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/quirin.html > (last accessed: 09-01-20011).

there being a "vacuum or gaps in the law". The matter though admittedly thorny was not insurmountable.

According to Ingrid Detter[92], the "illegal" or "unlawful" combatants lie somewhere in between the two extremes (combatants and civilians). It is this type of excluded person that is of most interest in relation to terrorists.[93] Thus, it is alleged that they are not entitled to either the status of POW or of civilians. They constitute an autonomous category of persons, who are excluded from international protection or covered by some minimal humanitarian standard.[94] This assertion however blatantly disregards long standing principles of IHL, contained in the Geneva Conventions (that have come to be regarded as forming part of customary international humanitarian law) that have been recognized in the jurisprudence of various international courts and tribunals. The ICTY for instance, in its *Celebici Judgment*[95] stated that:

> "If an individual is not entitled to the protections of the Third Convention as a prisoner of war (or of the First or Second Conventions) he or she necessarily falls within the ambit of Convention IV, provided that its article 4 requirements are satisfied...every person in enemy hands must have some status under international law: he is either a prisoner of war and, as

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[92] D.Phil., Oxon; J.D., Stockholm; former Fellow of Lady Margaret Hall and of St. Antony's College, Oxford; emeritus Lindhagen Professor of International Law at the University of Stockholm; Barrister-at-Law, 4–5 Gray's Inn Square, London.

[93] Ingrid Detter, "The Law of War and Illegal Combatants", *The George Washington Law Review* 75 (2007): 1064.

[94] Veronika Bilkova, "Talking about Unlawful Combatants? A Short and Concise Assessment of a Long and Multifaceted Debate", *Central European Journal of International and Security Studies* 3 (2009): 29.

[95] *Prosecutor v. Delalic, Mucic, Delic, and Landzo,* Available at: < http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf > (last accessed, 06-01-2011).

such, covered by the Third Convention, a civilian covered by the Fourth Convention... There is no intermediate status; nobody in enemy hands can be outside the law".[96]

2.4.4.2. The Position of IHL; Structured on the Principles of Dichotomy and Integrality

The principle of distinction between combatants and civilians lies at the heart of IHL. The idea of unlawful combatants however, poses a treacherous challenge to this distinction. It seeks to add yet another category of persons into the IHL regime and, consequently, jeopardizes the balance this regime has been traditionally based on.[97]

No source of IHL or public international law contains explicit references to unlawful combatants (or any equivalent term).[98] However any situation in which concerns as to status are voiced, it becomes essential to recall the principles of dichotomy and integrality. Dichotomy reaffirms the dual categorization of persons in armed conflict and Integrality follows that every person is covered by the law. In simple words no one is to be thrown into a legal black hole. These principles highlight the very reason behind the development of IHL i.e. to alleviate the sufferings of humanity in times of armed conflict.

In a situation of armed conflict there can only be two classes of persons, those who have the right to participate in hostilities and those who don't. Theoretically it seems very simple. In practical sense however, classification based on this dichotomy faces several challenges. Additional Protocol I, with regard only to international armed conflicts, resolves the issue of

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[96] Ibid.

[97] Bilkova, "Talking about Unlawful Combatants?", 38.

[98] *Ibid.*

doubt as to status by stating, "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian".[99]

As far as non-international armed conflicts are concerned, the situation requires more clarity since the issue of what must be done in cases of doubts as to status, remains unclear.[100]

2.4.4.3. A Conclusion Based on 'Principles'[101]

In reality, issues pertaining to status are not as simple as they sound in theoretical discussions pertaining to them. What is clear and concrete however, is that irrespective of the magnitude of confusion, there exist only two categories of protected persons. The law does not warrant, nor does it invest anyone with the discretion to create a third category. Thus conclusions as to status must always be based on the legal principles contained in IHL which have their own legal history as opposed to purely discretionary inventions based on convenience.

Furthermore the war on terror has by no means created a situation which requires the laws of was which have painstakingly developed over the past century to be superseded. Also arguing that the term of unlawful combatant has always existed within the strata of IHL is preposterous. It could not have done so, because of two main factors. The first consists of the plurality of meanings with which the term 'unlawful combatants' has been used over the

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[99] Henckaerts, *Customary International Humanitarian Law*, 23-24.

[100] Ibid, 24.

[101] According to Ronald Dworkin, "there is in all cases, a structure of legal principles that stands behind and informs the applicable rules. The only difference, then, between a hard case and a simple case is that in the latter, the relationship between applicable principles and relevant rules is seen by the deciding court and by the interpreters of the court's decision as clear and unproblematic." for details see: Roger Cotterrell, *The Politics of Jurisprudence A Critical introduction to Legal Philosophy Second Edition* (London: Butterworths, 1989), 165.

past years.[102] Even the two principal states promoting the term, the US and Israel, do not share the same understanding of who an unlawful combatant is.[103] Since any rule of customary law needs to be based on uniform practice, the lack of uniform definition is a clear sign of the absence of any new rule

2.5 PMSC's, a Hard Case?

Legal positivism provides a theory of hard cases, that when a particular case cannot be brought under a clear rule of law, then the judge has, a 'discretion' to decide it either way.[104] However, even in hard cases, it remains the judge's duty to discover what the law is and not to himself invent the law and apply it retrospectively.[105]

Ronald Dworkin[106] argues that the law if properly interpreted will give an answer. Thus, contrary to H.L.A Hart (1907-1992), he maintains that even in unclear cases there is always one correct decision, one right answer.[107] The difference between a hard case and a simple

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[102] Bilkova, "Talking about Unlawful Combatants?", 42.

[103] Ibid.

[104] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 81.

[105] *Ibid.*

[106] "Ronal Dworkin, Professor of Philosophy and Frank Henry Sommer Professor of Law. He received BA degrees from both Harvard College and Oxford University, and an LLB from Harvard Law School and clerked for Judge Learned Hand. He was associated with a law firm in New York (Sullivan and Cromwell) and was a professor of law at Yale University Law School from 1962-1969. He has been Professor of Jurisprudence at Oxford and Fellow of University College since 1969. He has a joint appointment at Oxford and at NYU where he is a professor both in the Law School and the Philosophy Department. He is a Fellow of the British Academy and a member of the American Academy of Arts and Sciences. Professor Dworkin is the author of many articles in philosophical and legal journals as well as articles on legal and political topics in the New York Review of Books". Available at < http://as.nyu.edu/object/ronalddworkin.html > accessed February 29, 2012.

[107] Ronald Dworkin, "No Right Answer?," in *Law, Morality and Society Essays in Honor of H.L.A. Hart*, ed. P.M.S. Hacker and J. Raz (Oxford: Clanderon Press, 1977), 58-84.

case is that in the latter, the relationship between applicable principles and relevant rules is seen by the deciding court and by the interpreters of the court's decision as clear and unproblematic.[108] In simple words even a hard case does not warrant exercise of absolute discretion on part of the judge. He must not decide a case in a legal vacuum but on the basis of existing rules which express, and, at the same time, are informed by, underlying principles.[109] In simple words, a judge's decision in unclear cases is characteristically determined, and should be, entirely by principles specifying rights and entitlements.[110] Principles consequently are, "a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality".

This purely jurisprudential debate is of immense relevance in the case of PMC's. When the law seems silent on a legal issue it is jurisprudence which provides the answer. Thus, even if IHL does not explicitly make any mention of private military companies, it does not imply that the same are not encompassed by its principles. The evolution of PMCs has blurred the distinction between professional armed forces personnel who conduct their duties in accordance to a formal allegiance to a nation and contractors who exercise a moral responsibility but work for profit,[111] makes it a hard case, where determination of their status requires exercise of discretion. This may, in turn, lead to two possibilities, one based on what Dworkin considers the exercise of 'weak discretion' and the other on 'strong discretion'. The adoption of various distinct approaches towards PMC's and their legal status is clearly

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[108] Cotterrell, *The Politics of Jurisprudence*, 165.

[109] *Ibid.*

[110] "Dworkin and Hart on "The Law": A Polanyian Reconsideration", Ira H. Peak, Jr., available at: < http://www.missouriwestern.edu/orgs/polanyi/TAD%20WEB%20ARCHIVE/TAD18-2/TAD18-2-fnl-pg22-32-pdf.pdf > (last accessed: 03-01-2010)

[111] Goddard, The Private Military Company.

illustrative of both. Both signify the distinct tools which stand behind and guide the judge in each case, weak discretion signifies creative judgment in the application of legal doctrine, whether rules or principles[112] while strong discretion would mean that which is based on policies and hence, legally uncontrolled. What is noteworthy however, is that a conclusion rooted in principles always remains constant while a decision based on policy varies in accordance with diverse the factors which shape the policy.

Private Military Contractors when seen in this light are illustrative of both approaches and obviate the glaring flaws inherent in decisions based on policy. For example, concluding that the Taliban were unlawful combatants because they acted in complete disregard of the laws of war was a decision based on policy and hence when the issue of PMC's and their status arose, the policy took a shift. When a decision is based on principles, the law is applied uniformly unto all and in all circumstances, however where policy intervenes, the law then discriminates. Thus, concluding that the personnel of PMC's fall in neither of the traditional categories of persons and form a third independent category is what Dworkin calls, "the problem of the creative judge".

The principles of IHL with regard to the status of all persons, not just PMC's are that of Integrality and Dichotomy. The former eliminates the notion of "status less" persons while the later reinforces the classification of persons as either civilians or combatants.

It would be correct to conclude that private military entrepreneurs do not pose any challenge whatsoever to the classification of persons under IHL. Furthermore the preceding discussions also evidence that there exist no gaps in the corpus of IHL when it comes to the status of members forming part of PMC's. Thus issues pertaining to the their status should

[112] Cotterrell, *The Politics of Jurisprudence*, 165.

always be judged against the requirements for entitlement to POW status, contained on article 4 of the IIIrd G.C failing to meet which, would mean that those persons qualify as civilians. The combat question however, remains important because if PMC personnel take direct part in hostilities, this has consequences for their rights and protection.

2.6 Applicability of IHRL

Although situations of armed conflict are regulated by IHL, the scope of IHRL is not diminished. Though the applicability of IHRL is minute, it still sets out certain fundamental principles which must be adhered to at all times.

2.6.1 Interplay Between, International Humanitarian Law, International Human Rights Law and International Criminal Law

It must be said at the outset that, criminal law, humanitarian law and human rights law are overlapping, not coterminous.[113] Equating the three regimes with each other would be erroneous. Until the 90's regulation of armed conflict was considered as falling exclusively into the domain of IHL. Since then however, the significance of IHRL in situations of armed conflict has increased manifold. The general acceptance nevertheless, was that both IHL and IHRL were relevant only in the regulation of NIAC. The notion that both could

[113] Robert Cryer, "The Interplay of Human Rights and Humanitarian Law: The Approach of the ICTY", *Journal of Conflict & Security Law* 14 (2010): 513.

also be applicable during an international armed conflict was only emerging towards doctrinal consolidation.[114]

It was in 1995 that the European Court of Human Rights delved into the possibility extraterritorial application of IHRL in the situation of an IAC. Thus, in *Loizidou v. Turkey*[115] the Court came to the conclusion that:

> "Bearing in mind the object and purpose of the Convention, the responsibilities of a Contracting Party may also arise when as a consequence of military action—whether lawful or unlawful—it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set forth in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."[116]

This way the court established human rights obligations of states under the ECHR even in cases of military occupation.

Then in 1996, the first authoritative ruling on the general nature of the relationship between the IHL and IHRL in an international armed conflict was enunciated by the ICJ in the Nuclear Weapons advisory opinion[117] where it was stated:

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[114] Iain Scobbie, "Principle or Pragmatics? The Relationship between Human Rights Law and the Law of Armed Conflict" *Journal of Conflict & Security Law* 14 (2010): 451.

[115] Available at: < http://www.mfa.gov.cy/mfa/properties/occupiedarea_properties.nsf/loiz_main.txt > (last accessed 04-01-2011).

[116] Iain Scobbie, "Principle or Pragmatics?", 451.

[117] Ibid 451-452.

"The protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities".[118]

As of late, discussions upon the interrelationship IHL and IHRL also include in them the discipline of International Criminal Law. The International Law Commission's final report on the Impact of Human Rights Law on General International Law therefore stated that:

"International human rights law, in the sense of the present report, includes not merely human rights law *stricto sensu*, but any international norm capable of conferring rights and duties directly on individuals regardless of nationality, including under international humanitarian law and international criminal law".[119]

This purpose of this prelude was to effectively conclude that members of PMC's along with IHL are obliged under IHRL as well.

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[118] Bertrand G. Ramcharan, *Human Rights Protection in the Field* (Leiden: Martinus Nijhoff Publishers, 2006), 3.

[119] Robert Cryer, "The Interplay of Human Rights and Humanitarian Law", 513.

2.6.2 IHRL Obligations of PMC's

Considering the applicability of IHL to PMC activity, a cursory glance would suggest the application of HRL is superfluous due to the *lex specialis* status of the former.[120] This assertion however is incorrect since IHL applies only cases of protracted armed conflict; even when there is a protracted armed conflict; governments deny the existence of a conflict.[121] Furthermore the human rights framework allows for a wider range of accountability mechanisms.[122]

However applicability of IHRL to private entities and individual actors is not as straight forward as it may seem. There exist many hurdles in the way of making non-state actors bound by human rights norms. First and foremost is the traditional approach that states are the sole subjects of international law. This acts as an obstacle in the way of extending international obligations to private entities and individuals. Nevertheless the constant evolution of HRL is gradually eroding this presumption, and liability of transnational corporations for breaches is evolving.[123]

Secondly, a huge chunk of human rights obligations is rendered inoperable in times of armed conflict by virtue of the derogation provisions present in almost all human rights

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[120] Hin-Yan Liu, "Leashing the Corporate Dogs of War: The Legal Implications of the Modern Private Military Company", *Journal of Conflict & Security Law* 15 (2010): 162.

[121] Andrew Clapham, "Human Rights Obligations of Non-State Actors in Conflict Situations", *International Review of the Red Cross 863* (2006): 491.

[122] Ibid, 503.

[123] Hin-Yan Liu, "Leashing the Corporate Dogs of War", 162.

instruments.[124] This has a significant bearing in the obligations of PMC's since their services are usually called for in conflict ridden areas.

The final HRL weakness considered here is the notion of extraterritoriality, which severely limits the application of regional HRL instruments but is pertinent due to the transnational operational nature of the PMC.[125] The extension of the principle of extraterritoriality to PMSC's though very rare, has the prospect of turning into an effective tool for PMSC regulation and accountability. Also, 'states may be liable for contractor activity to the extent that they can be considered state agents, which will factor heavily into the possibilities of extraterritorial HRL liability for PMC exporting states.'[126]

For the purpose of obtaining clarity on the issues pertaining to regulation of PMSC's, "The Swiss initiative on private military and security companies culminated in the adoption of the Montreux document." What is of significance about the Montreux Document is that it gives expression to the consensus that IHL and IHRL has a bearing on PMSC's.[127] Further, the Montreux Document underscores the notion that there is no legal vacuum for their activities during armed conflict and obliges PMSC's to comply with both IHL and IHRL.[128]

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[124] For example, 'in time of public emergency which threatens the life of the nation' Article 4(1) of the ICCPR.

[125] Hin-Yan Liu, "Leashing the Corporate Dogs of War", 163.

[126] Ibid.

[127] "Addressing the use of private security and military companies at the international level", Institute for Security Studies, available at: < http://idl-bnc.idrc.ca/dspace/bitstream/10625/41432/1/129208.pdf > (last accessed: 10-01-2011)

[128] Ibid.

2.7 Conclusion

Finally it would be correct to assert that PMC's are repository of a status under IHL which entitles them to a range of rights and also, liabilities. Regardless of the plethora of arguments to the contrary, giving PMC's the label of grey area and hence declaring them to be supra law entities is deluding. Persons belonging to PMC's are neither mercenaries[129] nor are they status less persons to whom the law does not apply. They can be classified as civilians or combatants depending on the nature of their activities and compliance with the requirements of IHL for entitlement to either status. Also, the longstanding belief that regulation of armed conflict fell exclusively in the domain of IHL has also changed, owing to the rapid developments in IHRL and the emergence of the relatively new discipline of International Criminal Law. Thus, not only states but also individuals have come to be recognized as subjects of both regimes.

The "Geneva Centre for the Democratic Control of Armed Forces (DCAF)" in its Occasional Paper no. 6 sums up the current situation of the law in respect of private contractors in the following manner

> "What remains surprising however is that in today's world of regulations where even what food we may eat is subject to strict regulation and monitoring by public authorities, PMC's, the role of which is exceeding vital for both domestic and international security, remains largely unregulated." [130]

[129] Except in certain exceptional circumstances illustrated earlier.

[130] Schreier and Caparini, *Privatizing Security, 3.*

3. THE CHANGING NOTION OF STATE RESPONSIBILITY

It is the peculiar nature of international law combined with principle of the sovereignty of states and the notion of all states being equal which form the fundamental principle of state responsibility in International Law.[131] Thus, whenever a state is found to have breached its obligations under International Law, it is required to make reparation. Traditionally, whenever there is a breach of international law by a state official[132], then the whole collectivity to which he belongs, incurs liability.[133]

3.1 The Evolving Approach Towards State Responsibility

According to Oppenheim, the notion that a state, owing to its sovereignty bears no legal responsibility is correct only with respect to certain acts which it may commit in respect of its own subjects and under its municipal law.[134] However, recognizing the notion of state responsibility for fulfillment of international obligations, he states that such responsibility is legal in nature despite the fact that no formal court exists for its establishment.[135]

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[131] Malcolm N. Shaw, *International Law Fifth Edition* (Cambridge: Cambridge University Press, 2003), 694.

[132] The notion of state responsibility being in a process of continuous change, now, not only extends to perpetrations made by state officials, but also encompasses, in certain cases acts committed by private individuals of the state if they are determined to have been acting as "agents of state".

[133] The perpetrator may be prosecuted under the municipal laws of the state to which he belongs. In the international arena, however, the entire state is responsible for remedying the actions of its subject. For details see: Antonio Cassese, *International Law* (New York: Oxford University Press, 2001), 182.

[134] Sir Robert Jennings and Sir Arthur Watts eds., Oppenheim's International Law (India: Preason Education 1996), 242-243.

[135] Ibid, 243.

The traditional law on state responsibility comprised of a set of customary rules which evolved over time.[136] Over the years, international law has experienced an evolutionary growth which has led to, among other things, rules on state responsibility to attain a more formal expression. The developments in the fields of human rights, recognition of subjects of international law other than states, the emergence of International Criminal Law and the adoption of numerous treaties and conventions outlawing certain categories of conduct have changed the face of state responsibility under International law.

International law now distinguishes between two kinds of accountability namely, ordinary and aggravated.[137] The former can be considered as being private in nature since it entails responsibility of a state in respect of acts which are in contravention of their mutual or reciprocal interests while the latter is accountability for breaches of customary obligations *erga omnes.*[138]

3.2 General Principles of State Responsibility

The International Law Commission's Draft Articles on state responsibility[139], while embarking upon the origin, content, forms and degrees of international responsibility, determine the grounds and circumstances on and under which, a state is to be considered to have transgressed the laws of the international legal order. It moves on to a discussion on

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[136] Cassese, International Law, 182.

[137] Ibid, 185.

[138] Ibid.

[139] "Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries 2001" available at < http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf > Accessed November 11, 2011.

attributability i.e. attributing a particular conduct to a state, and whether the said conduct amounts to a breach of International Law or not.[140]

3.3Imputing Conduct to a State

Article I of the ILC's Draft Articles pertaining to "Responsibility of State for Its Internationally Wrongful Acts" states, "Every internationally wrongful act of a State entails the international responsibility of that State".

Thus, international law dictates that every state is entitled to the protection of its rights and the fulfillment of certain essential obligations owed to it by the international community.[141] Whenever these rights are violated or these obligations not complied with, the state doing so is rendered answerable for it. Nevertheless, what is imperative is for triggering state responsibility is for the said conduct to be imputable to the state.

3.3.1 Conduct of Organs of State

If we go about it theoretically, the conduct of all legal persons, who happen to be nationals of a particular state, is capable of being imputed to the state regardless of whether they qualify as officials of state or not.[142] The position of international Law however, is that a state will be held responsible for the conduct of its organs or anyone acting on behalf of

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[140] Shabtai Rossene, *The ILC's Draft Articles on State Responsibility* (Dordrecht: Martinus Nijhoff Publishers, 1991), 56.

[141] James Crawford, The International Law Commission's Articles on State Responsibility Introduction, Text and Commentaries (Cambridge: Cambridge University Press, 2002), 77

[142] "Such an approach nevertheless, is looked down upon in international law, the reason being to preserve the autonomous nature of private individuals acting on their own accord without any involvement by a public official" Ibid, 91.

those organs i.e. agents.[143] This doctrine finds its basis in the link between the state, which happens to be a legal fiction incapable of action and the official committing an internationally wrongful act on behalf of the state.

Furthermore the liability of the state exits only if the actions of its officials are imputable to it.[144] The question of imputability[145] is a tricky one, especially in cases where the officials act in excess or in disregard of their authority. Article 4 of the ILC articles provides that

> "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State."[146]

Moreover, the responsibility of the state does not extent only to acts of its officials which have been authorized by it or where the official acts within his official capacity. It has been established that the liability of a state is invoked even where its officials have acted beyond the scope of their authority. Jurisprudence of the international courts and tribunals illustrates that in cases where the officials act with apparent authority or abuse the powers or authority

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[143] Ibid.

[144] Akehurst, 258

[145] "Imputability is the legal fiction which assimilates the actions or omissions of state officials to the state itself and which renders the state liable for damage resulting to the property or person of an alien". Shaw, International, 701.

[146] "Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries 2001" available at < http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf > Accessed November 11, 2011.

they have been equipped with, by the state, then the state incurs responsibility even if the actions were unauthorized.[147] Article of the ILC's Draft articles on state responsibility is also reflective of the same as it states,

> "The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."[148]

The *Caire Case*, concerned an officer and two soldiers under Mexican control, who shot a French national who had failed to give them $ US 5000 in gold, in consequence of which, Mexico was held responsible.[149] The purpose of such an imposition of an absolute liability upon a state in respect of the acts performed by its officials is to ensure that it exhibits proper control over its organs.

3.3.2 Conduct of Private Individuals

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[147] The Inter American Court of Human Rights In Youman's Claim stated that, "We do not consider that the participation of the soldiers in the murder at Angangueo can be regarded as acts of soldiers committed in their private capacity when it is clear that at the time of the commission of these acts the men were on duty under the immediate supervision and in the presence of a commanding officer." For further details see: Monica Feria Tinta, The Landmark Rulings of the Inter-American Court of Human Rights on the Rights of Child (Leiden: Martinus Nijhoff Publishers 2008), 88.

[148] "Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries 2001" available at < http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf > Accessed November 11, 2011.

[149] Cassese, International Law, 188.

As stated earlier and as a matter of principle, private individuals, essentially speaking, by their actions, do not trigger state responsibility. However, in certain exceptional circumstances, the conduct of private individuals is such that it is capable of being imputed to the state. This happens when they either act on behalf of the state or exercise authority which belongs essentially to the government and the circumstances justify assumption of such authority.[150]

Moreover, unauthorized actions on part of private individuals (which if undertaken by public officials would be attributable to it) may be imputed to a state if accompanied by any act or omission on part of the state amounting to an endorsement of the same.[151] In other words, a state may be held responsible for acts of private individuals of it fails to exercise such control as is required to prevent them from committing those acts. The prime example of which happens to be the *Zafiro Case* where America was held responsible for acts of the civilian crew of a naval ship, owing to the failure of its naval officers in preventing them.[152]

3.4 Individual Responsibility vs. State Responsibility

Although both state and individual criminal responsibility exist in respect of breaches of International Law, in essence however, both are quite dissimilar.

While state responsibility is in respect of the individuals either acting on behalf of or as officials of the state, no such requirement is needed for invoking individual criminal

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[150] Akehurst , 259

[151] "i.e. encouragement, failure to prevent, lack of due diligence, failure to punish, denial of justice, ratifying the act e.t.c ", Ibid.

[152] Shaw, International Law, 704.

responsibility.[153] Secondly, both forms of liability differ from each other with regard to the purpose which they are meant to serve. The idea of state responsibility takes a reparative as opposed to a punitive approach, wherein, the purpose is to halt the wrongful act and make good the damage or loss caused by it.[154] The notion of individual criminal responsibility however, adopting a punitive approach, is directed at punishing the wrongdoer either at the municipal or at the international level through courts and tribunals formed for that purpose.[155]

Just because both forms of liability are different from each other by no means suggests that they operate in exclusion of each other. Both may exist simultaneously. A state may be responsible for reparation of loss caused by its individuals to another state and at the same time bring the perpetrators of the same to justice.[156]

In respect of private contractors rendering services in combat zones, the notion of individual criminal responsibility is more meaningful as compared to state responsibility. Due their civilian status, it is often a cumbersome task to tie the conduct of the private contractors to the state thereby rendering the state responsible under international law. The only instance where a state may incur liability for the outlawed acts of a civilian under international law is when it endorses or fails to prevent the same. It will be argued at a later stage of this chapter that PMSC's neither qualify as officials or agents of state, nor do they

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[153] Cassese, International Law, 271.

[154] Ibid.

[155] Ibid.

[156] Cases involving commission of War Crimes, Crimes against Humanity and Genocide, essentially give rise to dual responsibility. Both states and individuals may incur liability for having committed the same. This has been affirmed both, by the jurisprudence of national and international courts and also by customary law. For further reading see, Beatrice I. Bonafè, The Relationship Between State and Individual Responsibility for International Crimes (Leiden: Martinus Nijhoff Publishers, 2009) 27-30.

exercise authority which essentially belongs to the government[157] thus the only way to hold a state responsible for their conduct is by proving the failure of the state in preventing it. This is not always possible whereas holding the private contractors individually liable for their conduct and also the companies which hire them under the notion of superior and command responsibility.

The principle of superior and command responsibility under IHL has proved vital for ensuring compliance with the law. Since this principle renders superiors responsible for the conduct of their subordinates, it encourages them to act vigilantly and ensure that the persons under their command so not contravene the law.[158] Under this principle, the superior management of PMSC's may be held responsible for the conduct of their subordinates.

3.5 State Responsibility for International Crimes

The concept of International Criminal Responsibility gained much attention after the world wars. Such liability could be attributed to all possible subjects of international law including states, individuals, governments and organizations.[159] The deliberations pertaining to this form of responsibility resulted in three systems for holding the perpetrators liable i.e.

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[157] Except in certain circumstances, i.e. interrogators of CACI at the abu ghraib prison.

[158] Chia Lehnardt, "Individual Liability of Private Military Personnel under International Criminal Law", *The European Journal of International Law* 19(2008), 1024.

[159] Nina H. B. Jorgensen, The Responsibility of States for International Crimes (New York: Oxford University Press, 2003), 4.

exclusive state responsibility, exclusive individual responsibility and lastly cumulative responsibility of both.[160]

The idea of imputing international criminal responsibility to a state rests upon two assumptions, i.e. the state had the opportunity to prevent the crime, and that the prospect of liability for international crimes acts as a deterrent.[161]

Nevertheless, making states responsible for commission of international crimes is a notion that has been on the receiving end of a considerable amount of criticism. The prime argument against it seems to be the fact that criminal law essentially deals with the individual who commits the crime and imposes the sanction upon the individual. In this regard, Sir Robert Phillimore[162] in his "Commentaries upon International Law" states that:

> "To speak of inflicting punishment upon a state is to mistake both the principles of criminal jurisprudence and the nature of *legal* personality of the corporation. Criminal Law is concerned with a *natural* person; a being of thought, feeling and will. A *legal* person is not, strictly speaking, a being of these attributes, though, through the mediums of representation and of government, the will of certain individuals is considered as the will of the corporation; but only for certain purposes. There must be *individual* will to found the jurisdiction of criminal law. Will by *representation* cannot found that jurisdiction."[163]

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[160] Ibid.

[161] M. Cheriff Bassiouni, International Criminal Law: Sources, Subjects and Contents (), 64.

[162] "Sir Robert Joseph Phillimore (1810-1885), 1st Baronet of the Privy Council and judge of the High Court of Justice, England".

[163] Jorgensen, The Responsibility of States for International, 73-74.

This perhaps, was the factor which caused the ILC to abandon its position on the same. The notion of criminal responsibility of states had been contemplated by the ILC since 1976[164] but the text which was finally approved in 2001, is devoid of any such concept.

Those who argue in favor of imputability of international crimes to states are of the view that while making determinations as to international law, drawing analogies with municipal legal systems can be misleading.[165] They fortify their claim by asserting that international law in its nature is neither civil nor penal, it is simply international. To them a separate system of accountability must exist to render states responsible for grave acts, for example breach of a bilateral trade agreement and genocide both are international wrongs however it is impossible to compare and equate both with each other.[166] The concerns of this group may be answered by stating that although the ILC articles and the ICC statute make no mention of criminal responsibility of states, it not mean that all kinds of international wrongs have been made to stand at the same footing. Under the notion of aggravated state responsibility, breaches of preemptory norms and violation of obligations *erga omnes* have been separated from the ordinary breaches of international law.

3.6 PMC's Capable of Triggering State Responsibility?

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[164] Draft article 19 (2) which does not form part of the approved ILC draft articles on State Responsibility 2001 read as follows "An internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime".

[165] Alain Pellet, "Can a State Commit a Crime? Definitely, Yes!", The European Journal of International Law Vol. 10(1999): 433.

[166] Ibid, 434.

The general concept of state responsibility, with specific reference to the ILC articles on State Responsibility has been discussed in the preceding portion of this chapter. The question that remains unanswered however is whether states may be held accountable for the conduct of PMC's hired by them. The issue of attributing to a state, the conduct of its soldiers, is quite straightforward since they belong to an "entity empowered to exercise elements of the governmental authority". PMC's on the contrary, do not present such a forthright situation. There is no denying the fact that there exists a regulatory gap which states exploit in order to evade liability under international law, for conduct of private contractors hired by them.[167] It must not however, be concluded that this gap is incapable of being filled. This section argues how positive obligations under both IHL and IHRL can help fill this regulatory gap.

3.6.1 Agents of State?

Article 8 of the ILC draft articles on State Responsibility states that

> "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct."[168]

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[167] Carsten Hoppe, "Passing the Buck: State Responsibility for Private Military Companies" *The European Journal of International* Law Vol. 19(2008): 989.

[168] Available at < http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf > accessed January 22, 2012.

The first situation is very straightforward and uncontroversial. It is the second proposition which has been the center of much debate and discussion seeking to determine the degree of control requisite for its operation.[169] Moreover the commentary to the article states that

> "Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighboring countries, or who are instructed to carry out particular missions abroad."[170]

A reading of the portion of the ILC commentary cited above, may lead one to conclude that members of PMSC's by acting as auxiliaries and thereby supplementing the actions of state organs, qualify as *de facto* organs of the state. This conclusion however, is erroneous. The factor ultimately responsible for determining whether private individuals (including PMSC's) qualify the test of agency envisaged by Article 8 is whether the state was involved in the whole matter to the extent of issuing directions or exhibiting control over the conduct.[171]

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[169] Shaw, International Law, 704.

[170] Available at < http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf > accessed January 22, 2012.

[171] Ibid, 'Such conduct will be attributable to a state only if it directed or controlled the specific operation and the conduct complained of was an integral part of the operation'.

It is obvious that ILC has placed its reliance upon the ICJ judgment in the *Nicaragua* case wherein it was determined that the conduct of the *contras* could not be attributed to the USA. With a view to determine the question of imputability of conduct of private individuals to the state, the ICJ devised the famous 'Effective Control Test'. Thus, applying this test, the court was of the view that in order for the violations of IHL committed by the contras, to be attributable to the USA, it was essential to show that they had committed the said violations in accordance with specific instructions issued by the USA.[172] According to Cassese[173] the factors establishing effective control of a State were, "whether (i)they were paid or financed by a state, (ii) their action had been coordinated and supervised by that state, and (iii) the state had issued specific instructions concerning each of their unlawful action".[174]

In *Tadic* however, the ICTY while departing from *Nicaragua*, devised the three tiered "Overall Control Test"

> "First, whether single individuals or militarily unorganized groups act under specific instructions or subsequent approval of the state. Second, in the case armed groups or militarily organized groups, whether they are under the overall control of a state (without necessarily this State issuing instructions concerning each specific action). Third, whether individuals actually behave as State officials within the structure of a state."[175]

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[172] Cassese, International Law, 190.

[173] Antonio Cassese (1937-2011), distinguished jurist of public international law and first president of the International Criminal Tribunal for the former Yugoslavia.

[174] Cassese, International Law, 190.

[175] Ibid.

To sum it up, even if personnel of PMSC's providing combat services would fail the test of Nicaragua, they may still be considered as agents of state under the overall control test of Tadic. This however only holds good for those contractors who may be considered armed or militarily organized groups. The Larger chunk of PMSC's engaged in provision of security related services cannot be considered as agents, and consequently attribute liability to the state, since they remain outside the purview of both tests.

3.6.2 Regulatory Gap between Soldier and Contractor

There is no denying the fact that members of PMC's like soldiers of a state, are capable of acting in a manner which is not in conformity with the norms of IHL and IHRL. However, there is a huge difference in the effect (with regard to state responsibility) that both actions may produce.

In situations where a person belonging to the army is found guilty of violating the law, showing that such person was a soldier is sufficient for holding a state responsible for his actions.[176] In the cases concerning abuse of the law by private contractors hired by a state, various questions pertaining to imputability of the said actions to the state come into play. It would thus be essential to show that the private contractors either acted "on behalf of the state" or were exercising "authority which belongs essentially to the government". Rendering combat services or performing detention and interrogation functions for a state, essentially belong to the latter and will be attributable to the state hiring such services.[177] As far as

[176] Hoppe, "Passing the Buck", 990-991.

[177] Ibid, 992.

provision of guarding and protection services is concerned, attribution to a state becomes a difficult task and rests on determining whether wrongful acts of such contractors were accompanied by any "act or omission on part of the state amounting to an endorsement of the same".

3.7 Positive Obligations of States under IHL and IHRL

Though imputability may be a tough issue when it comes to PMC's, it does not by any means however, follow that states have no responsibility towards regulating their conduct. The apparent gaps which exist with respect to regulation of PMC's can be covered by having recourse to the positive obligations which both IHL and IHRL impose upon the states.

3.7.1 Duty to Respect and Ensure Respect[178]

With respect to acts contrary to IHL, committed by private contractors the states required to act with due diligence and not only prevent such conduct but also put to task the perpetrators of the same.[179] This duty of ensuring respect towards the norms of IHL has been fortified by virtue of Common Article 1 to the GC's, which imposes the twofold duty of respecting and ensuring respect of the conventions. Moreover, "respect" for the conventions signifies that "the State is under an obligation to do everything it can to ensure that the rules in question are respected by its organs as well as by all others under its

[178] Common Article 1 to the Geneva Conventions of 1949.

[179] Marco Sassòli, "State Responsibility for Violations of International Humanitarian Law," *International Review of the Red* Cross 84 (2002): 411.

jurisdiction".[180] Furthermore, this article, according to the ICJ in the Nicaragua, is a "general principle of humanitarian law" and its application extends to both international and non-international armed conflicts.[181]

Lastly, all states are under the obligation to prosecute all persons guilty of having committed war crimes, regardless of whether the wrongdoers are combatants or civilians. The ICTR Appeals Chamber in *Akayesu* affirmed this in the following manner

> "International humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of common Article 3 under the pretext that they did not belong to a specific category."[182]

As regards the responsibility of states for prosecuting war crimes by PMC's, what is essential is for there to be a connection between the acts of the latter to the armed conflict.[183] This link is considered to exist between the criminal conduct in question and the armed conflict when the perpetrators are connected with a party to the conflict.[184]

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[180] Laurence Boisson de Chazournes and Luigi Condorelli, "Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests" *International Review of the Red Cross* 837 (2000) < http://www.icrc.org/eng/resources/documents/misc/57jqcp.htm > accessed: February 5, 2012.

[181] Sassòli, "State Responsibility", 421.

[182] Chia Lehnardt, "Individual Liability", 1018.

[183] Francesco Francioni and Natalino Ronzitti, War by Contract: Human Rights, Humanitarian Law, and Private Contractors (New York: Oxford University Press, 2011), 431.

[184] Ibid, The authors are of the view that bearing this in mind, the link between the acts of the PMSC's and the party to the conflict outsourcing functions to it, is not difficult to establish.

3.7.2 The General Duty to Bring Perpetrators of Human Rights to Justice

The Human Rights Committee (HRC) has on numerous occasions reiterated the duty of states to put to task all such persons who have been guilty of violation of human rights. In Mnanga v. Zaire, a case pertaining to torture, arbitrary detention and inhuman treatment, the HRC held that the state is duty bound to investigate into the matter and punish the persons responsible. [185]

Although generally the HRC leaves it up to the states to decide the body of law (civil or criminal) under which the state must try the wrongdoer, there have nevertheless been instances where the committee has expressly requested states to extend criminal penalties to the perpetrators. [186]

3.7.3 Application of Human Rights Obligations in Situations of Armed Conflict and the Extra-territoriality

It is common knowledge that in times of armed conflict, the scope of IHRL shrinks considerably since IHL comes in to regulate the situation. Nevertheless, even in conflict situations, the IHRL, as diminutive as it may be, still remains in force.

Generally speaking, a state is responsible for carrying out its human rights obligations within its own territory by virtue of the fact that it happens to be under the state's exclusive control. Therefore, when we talk of armed conflicts not international in nature, the

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[185] Anja Seibert-Fohr, Prosecuting Serious Human Rights Violations (New York: Oxford University Press, 2009), 11-12.

[186] Ibid, 12, in the words of the committee, "State party to the covenant is under an obligation to take effective measures to ensure that...criminal proceedings are initiated seeking the prompt prosecution and conviction of the persons responsible".

discussion on applicability of human rights law remains relatively simple. However, when the debate makes a turn towards IAC, the issue in need of being addressed is the extent to which states are required to adhere to their IHRL obligations when operating beyond their own territory.[187]

The HRC subscribes to the view that states are under an obligation to abide by the ICCPR not only within their own territory but also in respect of individuals within their power or effective control.[188] This stance of the HRC is clearly depictive of its extraterritorial approach towards human rights obligations under the ICCPR.

The ICJ, for most, has been an advocate of territoriality of human rights and extents their extraterritorial application only to cases where the state exercises jurisdiction, i.e. occupied territories (e.g. The *Wall* advisory opinion).[189]

The various regional systems developed for the implementation of human rights also deserve attention. The approach of the Inter American Court of Human Rights attaches more importance to control exercised by a state over a person as opposed to territory.[190] According to it

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[187] Hoppe, "Passing the Buck", 995.

[188] Human Rights Committee, General Comment no. 31, 'States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.' Available at < http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement > accessed January 7, 2012.

[189] Hoppe, "Passing the Buck", 996.

[190] Ibid.

"The term 'jurisdiction' in the sense of Article 1(1) is [not] limited to or merely coextensive with national territory. Rather, the Commission is of the view that a state party to the American Convention may be responsible under certain circumstances for the acts and omissions of its agents which produce effects or are undertaken outside that state's territory."[191]

The practice of the European Court of Human Rights (ECtHR) also seems to have evolved over time. Beginning from the rather broad interpretation of Article 1 of the ECHR in *Loizidou v. Turkey*, to the restrictive approach in *Bankovic* the ECtHR has reaffirmed the extraterritorial nature of human rights obligations under the ECHR in *Issa v. Turkey*.[192]

With regard to the Conduct of PMSC's thus, it would be apt to conclude that it must be regulated in accordance with the human rights obligations of the hiring state provided that they are within the authority and control of the said state or its authorized agents.[193]

3.7.4 ICCPR: Duty to Prevent

The ICCPR is seen by many as an effective tool against serious human rights violations, owing to its universal nature and the broad spectrum of civil and political rights that it encompasses.[194] The covenant primarily stresses prevention of human rights violations and

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192 Hoppe, "Passing the Buck", 996.

193 Ibid, 997.

194 Seibert-Fohr, Prosecuting Serious Human Rights Violations, 11.

obliges states to protect the rights guaranteed therein, it nevertheless also provides for situations where a violation of those rights has already taken place.[195]

The most important rights conferred by the covenant which are also considered as being non-derogable, are the right to life (and protection from arbitrary deprivation of life) and protection against torture, cruel, inhuman or degrading treatment or punishment. This bears a lot of significance with relevance to the conduct of private contractors. The various events involving the abuse of IHL and IHRL by various PMSC's in Afghanistan and Iraq, as detailed in the previous chapter make it evidently clear that there has been a repeated pattern of a complete disregard of these non-derogable rights. In this regard, the HRC has made it clear that the positive obligations with respect to the right to life and prohibition of torture enshrined in the ICCPR extend even "to the conduct of private contractors not attributable to the state".[196] The HRC is of the view that states party to the covenant

> "It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity."[197]

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[195] Ibid. The covenant obliges states to hold the offenders responsible. In other words, under the ICCPR, states are under an obligation to prosecute all such persons who have violated it.

[196] Hoppe, "Passing the Buck", 998.

[197] Human Rights Committee, General Comment no. 20, available at < http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument > accessed, January 29, 2012.

Lastly, every state party to the covenant is under a duty to amend their laws and practices in order to combat recurring abuse of the convention.[198] This particular requirement bears a lot of significance with respect to the activities of PMSC's in Iraq and Afghanistan where repeated violations have gone unchecked by the hiring states.[199]

3.8 Developing Accountability Mechanisms

The first step towards discharging liability whether state or individual, in respect of an internationally wrongful act, it is indispensible to first determine the body of law which outlaws such conduct. This inevitably brings into play the various principles pertaining to the issue of jurisdiction i.e. which state shall extend it laws to the act in question. While discussion state responsibility for extraterritorial application of human rights obligations earlier in this chapter, the duty of states to extend their laws to territories where they exercise control has been discussed at length. The issue that bears more importance here is that of the liability of private contractors whose criminal conduct though fails to attract state responsibility but nevertheless renders them liable under the notion of individual criminal responsibility. The approach of international criminal law, as evidenced by the statute of the ICC is based on the notion of complementarity. The proper forum for prosecuting private contractors for war crimes and also breaches of IHRL would thus inevitably be the domestic courts of either the hiring or host state.[200]

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[198] Hoppe, "Passing the Buck", 999.

[199] Ibid, 999-1000.

[200] Lehnardt, "Individual Liability", 1030

There have been various initiatives taken at the international level with a view to develop standards for regulation of private contractors at the international level. In this regard, the Human Rights Commission in 2005 created a working group to address the issue of PMSC's. Its Task additionally was to, 'prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities'.[201]

The Montreux Document, is also a commendable contribution of the international community under the auspices of the ICRC, highlighting the various rules and good practices with respect to PMSC's, that have been" derived from IHL and IHRL" and which both the hiring and host states are encouraged to adopt.

At the domestic level, the uncertainty surrounding holding PMSC's accountable for war crimes and human rights violations seems to be more of a problem related to enforcement of the law as opposed to its applicability.[202] The events unfolding in Iraq and Afghanistan have evidenced the insufficiency in the law enforcement mechanisms of both hiring and host states owing to which holding private contractors accountable has remained an insurmountable task.[203]

3.8.1 Mechanisms for Ensuring Compliance at the National Level

[201] Lindsey Cameron, "Private Military Companies: their Status under International Humanitarian Law and Its Impact on Their Regulation", *International Review of the Red Cross* 763 (2006): 596.

[202] Lehnardt, "Individual Liability", 1016. The Author also rightly points out that the in many instances private contractors have remained untouched even if adequate legislation for holding them responsible is in place. It therefore evidences the unwillingness of national authorities to prosecute them.

[203] Ibid, 1031-1032.

It is imperative to put into place an effective system for regulating the conduct of PMCs. This obligation of regulating PMSC's rests primarily with the states. The companies hiring the services of private contractors also are responsible for maintaining and effective system of checks and balances. This portion details the responsibilities of both PMSC's and States with respect to regulating the conduct of the members of the former. An effective regulatory system would require necessary legislative changes in order to ensure that the civilian contractors guilty or violating the law, like their counterparts in the military and security forces of the state, are brought to justice. "In short, regulation can be interpreted as the formal mechanisms of control which are established in order to guide conduct and to ensure the universal application of the law. The assumption is that greater regulation can lead to enhanced accountability".[204]

Another very practical and simple proposition, with regard to regulation of PMSC's is to incorporate them into the armed forces of the state and subject them to similar laws hence quelling all controversies surrounding their legal status an laws applicable to them.[205]

3.8.1.1 Transparency

The first and foremost step towards ensuring prevention of outlawed activities by the PMSC's, the state organs making use of their services must bear the responsibility of ensuring that they conduct their operations transparently. This perhaps, qualifies as the most effective means of ensuring that PMSC's are prevented from violating IHL and IHRL. It therefore entails setting out a formal code of conduct which the PMSC's would be required

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[204] Fred Schreier and Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies* (Geneva: Geneva Centre for Democratic Control of Armed Forces, 2005), 5.

[205] Cameron, "Private Military Companies", 596.

to adhere to at all times. Moreover, the state must also define the penalties it would extend to them in case of non-compliance. Another suggestion in this regard is to toughen the licensing procedures of such companies.[206]

3.8.1.2 Oversight

Failure on part of the PMSC's in maintaining an adequate system of oversight is perhaps one of the major cause which has led to belief among the contractors that they operate within a culture of impunity. Bearing in mind their obligations to respect and ensure respect of IHL under article 1 of the G.C's and the duty to prevent violations of human rights under the ICCPR, state must also look into whether the private contractors are repository of the requisite training in the areas of IHL and IHRL. Moreover, the responsibility of the state organs outsourcing their functions to the private contractors must primarily remain responsible for the ensuring that personnel of the PMSC's conduct their functions in accordance with the law. Another method of maintaining effective oversight would be to develop an effective reporting system requiring the PMSC's to submit comprehensive periodic reports to the state organ to whom it is answerable.[207]

3.8.1.3 Investigation

The experiences in Iraq and Afghanistan have proved that investigation is the key component in holding private contractor responsible for outlawed conduct. Absence of responsible authorities for conducting investigations into the violations of the law by PMSC's has been one of the major factors causing setbacks to the prospects of their

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[206] Ibid, 597.

[207] "Private Security Contractors at War: Ending the Culture of Impunity", Human Rights First, available at < http://www.humanrightsfirst.org/wp-content/uploads/pdf/08115-usls-psc-final.pdf > accessed November 1, 2011.

prosecution within the US Courts as evidenced in the *Passaro* case. In this respect it has been often advocated to introduce within the PMSC setup investigation mechanisms on similar footing as within the armed forces of the hiring state. This way whenever there is an alleged breach of the law the persons in charge of investigation would be able to collect all evidence and prepare their reports without any delay.[208]

3.8.1.4 Prosecution

Absence of the fear of facing prosecution for committing breaches of the law is the factor which has led PMSC's to function with the belief that they are capable of getting away with anything. Thus the most essential tool required to tame these unruly contractors is undoubtedly, litigation.[209] 'It could indeed be argued that, faced with the threat of public and private law litigation in relation to PMC abuses, PMCs will increasingly set up their own corporate social responsibility and accountability mechanisms.'[210]

Thus, the prospect of being tried before a court of law will serve as a catalyst in disciplining PMSC's.[211] Moreover, the forum of such prosecution must always be the judicial system of the host state. The experience of the WoT with reference to the United States has shown that the hiring state often suffers from a lack of political motivation combined with the absence of necessary resources to put PMSC's to task. However, owing to the fact of functioning within conflict zones, there is the possibility of the presence of a fragile system

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[208] Waiting for the experts to arrive from the hiring state and then conducting the investigation would result in waste of time and also loss of valuable evidence.

[209] Cedric Ryngaert, "Litigating Abuses Committed by Private Military Companies", The European Journal of International Law 19 (2008): 1037.

[210] Ibid.

[211] Ibid.

of justice within the host state or even its absence altogether.[212] There may also be case, where PMSC's, like under order 17 of the CPA in Iraq, are rendered immune from jurisdiction of the host state. In such cases the duty of prosecution must inevitably devolve unto the home state.

3.9 Self-Generating Regulatory Mechanisms

Another option advocated for the regulation of PMSC's is that of allowing them to develop their own codes of conduct.[213] Nevertheless this proposition has not received much encouragement due to two factors namely, whether voluntary measures would effectively fill the existing accountability gap and the absence of any effective and binding enforcement mechanism of the same.[214]

Another factor which has caused the development of opposing views regarding self-regulation is the fear in respect of the increasing power of PMSC's and consequendy the decrease of governmental control over their activities.[215]

What is envisaged under the notion of self-regulation is that the various PMSC's must join hands and together, for their own distinct regulatory body.[216] This concept however, is deeply flawed since a regulatory body which does not come under the jurisdiction of any particular state to which the private contractors belong, is incapable of being equipped with

[212] Ibid.

[213] Christopher Kinsey, Corporate Soldiers and International Security (Oxon: Routledge, 2006), 148.

[214] Ibid.

[215] Benedict Sheehy, Jackson Maogoto, and Virginia Newell, Legal Control of the Private Military Corporations (New York: Palgrave Macmillan, 2009), 112.

[216] Kinsey, Corporate Soldiers, 148.

the tools of preventing and punishing abuses of the law. Moreover, self-regulation cannot be considered a plausible solution given the present reputation enjoyed by the PMSC's which casts a shadow of doubt over their willingness to hold their members guilty of violating the law, responsible. PMSC's should not be allowed to develop any such system of self-regulation because firstly, the larger the group, the more difficult regulation becomes and secondly, unless and until there is willingness to prevent and prosecute breaches of the law, the entire activity is rendered futile.[217]

Lastly, owing to the nature of the activities being carried out by the private military and security industry, their lack of proper reporting systems, oversight, and dubious investigation systems render them a weak candidate for self-regulation.[218]

3.10 Obligations of States in Respect of Private Contractors

As regards the responsibility of states, with respect to the conduct of the private contractors hired by them, there exists a regulatory gap which the states exploit in order to evade responsibility under international law.[219]

As settled earlier, both IHL and IHRL are applicable to the personnel of PMSC's and consequently, states may incur responsibility for their unlawful conduct. This may either be due to attribution of such outlawed act or omission to a state agent or owed to a failure to perform any positive obligation triggered by such conduct.

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[217] Sheehy, Maogoto, and Newell, Legal Control of the Private Military Corporations, 113-114.

[218] Ibid, 114.

[219] Carsten Hoppe, "Passing the Buck: State Responsibility for Private Military Companies", *The European Journal of International Law 19* (2008): 989.

3.11 Rights and Obligations of Private Contractors

It has been shown that the members of PMSC's qualify as subjects of international law and are thus capable of being attributed rights and obligations under international law. There exists no factor precluding the responsibility of these private contractors for violations of both IHL and IHRL.

Whenever the law accords legal personality, it also confers certain rights and obligations upon that person. Thus, if in the context of IHL, if a certain class of persons is to be considered as repository of civilian status, it necessarily entails that they are entitled to all the protection afforded to them by IHL and refrain from indulging into acts which may result in removal of such protection. Andrew Clapham[220] summarizes this argument in the following manner

> "As long as we admit that individuals have rights and duties under customary international human rights law and international humanitarian law, we have to admit that legal persons

[220] 'Andrew Clapham is a Professor of Public International Law at the Graduate Institute of International Studies in Geneva and the Director of the new Geneva Academy of International Humanitarian Law and Human Rights. His current research relates to the role of non-state actors in international law and related questions in human rights and humanitarian law. He has worked as Special Adviser on Corporate Responsibility to High Commissioner for Human Rights Mary Robinson and Adviser on International Humanitarian Law to Sergio Vieira de Mello, Special Representative to the UN Secretary-General in Iraq.' Available at < http://untreaty.un.org/cod/avl/pdf/ls/Clapham_bio.pdf > accessed February 28, 2012.

also have the necessary international legal personality to enjoy some of these rights and conversely be prosecuted or held accountable for violations of their international duties."[221]

Thus, since PMSC's have benefitted by the attribution of civilian status, in so far as enjoying immunity from attack and all other benefits available to civilians under IHL, they must also be ready to face prosecution in cases where they take direct part in hostilities. Moreover, with respect to human rights, they must act in accordance with the human rights obligations of both host and hiring states. Furthermore, bearing in mind the Fallujah massacre, private contractors must at all times be adequately equipped and prepared, which the companies employing them, should be bound to ensure.

3.12 Conclusions

Whether they qualify as agents of state or not, it has been shown that a state nevertheless, in one way or the other, may be held responsible for the outlawed acts of private contractors hired by it. In cases where the actions of such persons are not attributable to the state, it nevertheless has certain positive obligations under international law which require it to prevent such actions and also punish their commission.

The existence of the law regulating the conduct of PMSC's cannot be disputed. A state must prosecute all violations of IHL and IHRL by private contractors within their territory

[221] Nigel D. White and Sorcha MacLeod, "EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility," *European Journal of International Law* 19 (2008): 970.

or within territory which happens to be under its exclusive control. Lack of willingness on part of states has (and will continue to, if it persists) lead to the perception that PMSC's are a supra law entity to whom the law is incapable of being applied. States must do away with the impunity which the PMSC's have come to enjoy so that it may ensure compliance with and respect for the law. Moreover, the states bearing in mind the principles of superior and command responsibility must also ensure that the superior management of the PMSC's is also punished for its failure to exercise effective control over its subordinates and put in place measures aimed at preventing violation of the law by the same.

Lastly, learning from their experiences of the past states should put into place comprehensive regulatory mechanisms and commit themselves to prosecuting and punishing the offenders if they wish to fulfill their obligations under international law.

4. INVOLVEMENT OF PMC's IN CONFLICTS OF THE 21st CENTURY; WAR ON TERROR AND LESSONS LEARNT

In their existence, as stated earlier, the private contractors predate the 21st century. Nevertheless, the focus in this chapter will be on the activities of the PMC's in the contemporary armed conflicts of the 21st century which has undoubtedly marked the comeback of these private contractors. This chapter focuses on the functioning of PMC's the context of the WoT and controversies spurred by their presence. The emphasis to a large extent will be on the contractors hired by the United States, since it happens to be the home state of majority of the PMC personnel.

4.1 From Fallujah to Nisoor Square; The Anatomy of PMC Activity in Iraq or, Iraq, A Failure to Investigate and Prosecute?

Although it was claimed that recruitment of private security contractors in Iraq was only to ensure civilian security, the actual experience tells a different tale. The general conception is that 'the manner in which private security companies protect their clients' activities is primarily based on military philosophy'.[222]Singer[223] has also made note of the fact that

[222]Kjell Bjork and Richard Jones,"Overcoming Dilemmas Created by the 21st Century Mercenaries: conceptualising the use of private security companies in Iraq", *Third World Quarterly* 26:2005, 782.

[223] "Peter Warren Singer is Senior Fellow and Director of the 21st Century Defense Initiative at the Brookings Institution. He is the youngest scholar named Senior Fellow in Brookings's 90-year history.." See < http://www.pwsinger.com/biography.html> accessed February 27, 2012.

"...PMCs have been involved in some of the most controversial aspects of war...Yet none of them have ever been prosecuted, convicted or imprisoned..."

4.2 The Induction of PMC's in Iraq

The US led war on Iraq witnessed involvement of scores of civilian contractors performing functions that belong principally to soldiers. It was argued by the department of Defence that the deteriorating situation in Iraq was impeding the process of reconstruction therefore obtaining the services of private security contractors for the protection of reconstruction and various NGO activities was imperative.

4.3 PMC Statistics

The number of armed private contractors functioning in Iraq by December 2010 was approximately 30,000 which belong to the 100 companies that were licensed by the Iraqi government and extent services to both government and private clients.[224] Moreover, the private companies functioning in Iraq have within the past few years shifted from catering to the US government towards the private sector.[225]

4.4 Questionable Use of Force

[224]"The Department of Defense's Use of PrivateSecurity Contractors in Afghanistan and Iraq: Background, Analysis, and Options for Congress", Congressional Research Service, available at <http://www.fas.org/sgp/crs/natsec/R40835.pdf> accessed February 24, 2012.
[225] Ibid.

Abuse of authority and use of force by the private contractors first came to light on the 16th of September 2007 when members of the infamous Blackwater Worldwide while running an armed convoy through Baghdad were alleged to have killed 17 and wounded 24 civilians without any justification.[226] This incident which took place in Nisoor Square, Baghdad, brought much needed attention to the role being played by PMSC's within Iraq.

There have even been reported events where US Marines had to detain private contractors for "repeatedly firing weapons at civilians and Marines, erratic driving, and possession of illegal weapons," and were thus a "direct threat to Marine personnel."[227]

Bearing in mind the fact that these persons work in situations that are extremely volatile, it becomes all the more important to determine standards within which they must operate the liability that may be incurred due to non-conformity to the same.

The absence of the prospects of criminal investigation and sentencing are quite literally a license for abuses. The existing legal framework for prosecution of civilian military contractors within the US, though imperfect, is nevertheless capable of serving its purpose. It is primarily the responsibility of the US government to ensure through its Federal Agencies (e.g DoD, DoJ) an effective system of checks and balances upon these private contractors. The reason being that if the US deploys these persons, even in conflicts not

[226] "Private Security Contractors at War: Ending the Culture of Impunity", Human Rights First, available at < http://www.humanrightsfirst.org/wp-content/uploads/pdf/08115-usls-psc-final.pdf > accessed November 1, 2011.

[227] "Examples of Violent Crimes and Abuses by US Contractors", Human Rights First, available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Examples_of_Contractor_Abuses.pdf> accessed February 22, 2012.

taking place within its own territory; it must bear the responsibility of ensuring their compliance with the laws of war.[228]

4.5 Notable Instances Involving PMC Personnel

The number of innocent civilians who have fallen prey to the illegitimate actions perpetrated by the private contractors on numerous occasions is not small. This research however, will dig into only a few of the most notable instances which brought the much controversial PMC's to light and ignited a heavy debate on the legitimacy of their actions and the prospect of prosecuting them.

4.5.1 Fallujah Massacre

The massacre at Fallujah, made it evidently clear that lacking oversight and monitoring mechanisms, not only put people not taking part in hostilities at risk, but also prove fatal to the contractors themselves in situations where they work in proximity to the combat zones.

The ambush of a convoy and brutal murder of 4 Blackwater personnel in Fallujah on March 21, 2004[229] made it starkly clear that an effective regulation regime was needed in order to ensure that such events never recur. It came to light three years after the incident that the convoy ambushed was one of the two ordered to travel through Fallujah without a

[228] Ibid.

[229] Tal Samuel-Azran, Al-Jazeera and US war coverage (New York: Peter Lang Publishing, 2010), 86.

map.[230] An investigation initiated by the Congress revealed that Blackwater had in fact been warned against the security risks of travelling through Fallujah and had also failed to equip its contracts even with the most essential of supplies such as maps.[231]

4.5.1.1 Helvenston et al. v. Blackwater Security

In January 2005, the survivors of the Blackwatwer contractors who were murdered in Fallujah filed a suit against the company for its failure to adequately prepare and equip the deceased contractors for the job.[232] Moreover the investigation by the Congress fortified their claim since it declared that on the said day, Blackwater was "unprepared and disorderly".[233]

In December 2007, Blackwater counter sued claiming that the suit in respect of the wrongful death of the contractors was a violation of their contract, along with requesting for taking the matter into arbitration.[234] Then in January 2011, the lawsuit was dismissed on account of the failure on part of both parties to pay for the costs incurred in the arbitration that had been ordered by the District Court.[235]

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[230]David Isenberg, *Shadow Force: Private Security Contractors in Iraq* (Wesport: Greenwood Publishing Group, 2009), 54. The other convoy that had received similar instructions decided to ignore the orders of travelling through Fallujah and reached its destination safely by adopting an alternate route.

[231] Ibid.

[232]Mike Baker, "Blackwater Deaths Suit Tossed After Six Years," *The Washington Post, January 26, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/25/AR2011012507031.html> accessed February 24, 2012.*

[233]Ibid.

[234] The attorneys for Blackwater claimed that arbitration was essential "in order to safeguard both (Blackwater's) own confidential information as well as sensitive information implicating the interest of the United States at war", see Mike Baker, "Iraq Security Contractor Countersues", *The Washington Post, January 17, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/19/AR2007011901673.html> accessed February 24, 2012.*

[235]Baker, "Blackwater Deadhs Suit.

Finally, in January, 2012, the case concluded on a settlement between both parties which has been kept confidential.[236]

4.5.2 The Scandal at Abu Ghraib

The most notable instance alongside the Nisoor Square killings, which highlights the complete disregard of the law on part of private contractors, is that of the detainee abuse at the Abu Ghraib Prison.The horrendous incidents that took place at Abu Ghraib spurred controversy and initiated a much needed debate over the intelligence and interrogation services being provided by the PMSC's.

At Abu Ghraib, more than half of the interrogators had been employees of CACI while the interpreters aiding the US army in carrying out its operations at Abu Ghraib belonged to TITAN.[237] After the Abuses came to light, several investigations were conducted. One of the reports of these investigations, famously known as the "Fay Report"[238] indicated that private contractors had been involved in 10 of the 44 instances of detainee abuse.[239] The report while summarizing the incidents at the prison facility states that, "Several types of detainee abuse were identified in this investigation: physical and sexual abuse; improper use of military working dogs; humiliating and degrading treatments; and improper use of

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[236]Emery P. Dalesio, "Blackwater Suit Ends 7 Years After Fallujah Deaths,"

[237] Steven L. Schooner, "Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined Outsourced Government", *Stanford Law and Policy Review Volume 549 no.16 (2005)*, 7.

[238] "Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade MG George R. Fay" available at <https://docs.google.com/viewer?a=v&q=cache:fNLlR3rcRJQJ:news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf+fay+report&hl=en&gl=pk&pid=bl&srcid=ADGEESgSSh36xOGYWkoGRvi2gxnDl47tSEd3xxZKzhVOtKlnh2ALd6lSLnZr6CcEtwpqHun57wM1tN6c9Gzd4NJK6ieuzIUOflwSaXQ1BnocKPfCZMpeRGVS3rcX1T8wKlMWoZY_jvZ7&sig=AHIEtbRpmK2eZPuXLTg6Ih3iYLnA8nq6vw> accessed November 3, 2011.

[239] "Private Security Contractors at War: Ending the Culture of Impunity".

isolation". The Taguba Report on the other hand concluded that investigation techniques employed by the investigators (both military personnel and private contractors) included

> "Breaking chemical lights and pouring phosphoric liquid on detainees; pouring cold water on detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape...and using military working dogs to frighten and intimidate detainees with threats of attack and in one instance, actually biting a detainee."[240]

What the Abu Ghraib detainee abuse also evidences is the discrepancy in extending the application of the law by the US authorities, equally to both military personnel and private contractors. As much as twelve members belonging to the US military have been implicated in the incident and convicted for having contravened the law and surprisingly, not a single charge has been laid against the private contractors for having committed similar acts.[241]

This inaction on part of the US authorities, especially the Department of Justice has created a deeply flawed perception that PMSC's are a supra law entity whose personnel enjoy impunity from prosecution. The victims of the abuse however, did file civil suits against CACI and TITAN and the employees of both companies involved in the incident. However, the fate of these suits proved to be as grim as the Abu Ghraib incident itself.

4.5.2.1 Saleh et.al v. Titan et.al

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[240]Deven R. Desai, "Have Your Cake and Eat it Too: A Proposal for a Layered Approach to Regulating Private Military Companies", University of San Francisco Law Review Volume 39 No.825, 843.

[241] Simon Chesterman and Angelina Fisher eds., Private Security, Public Order: The Outsourcing of Public Services and it Limits (New York: Oxford University Press, 2009), available at <http://books.google.com.pk/books?id=LoNqcxIX51EC&pg=PA192&dq=Saleh,+et+al.+v.+Titan+Corp.+et+al&hl=en&ei=S3gTvL7NJGBhQfw6NjzBA&sa=X&oi=book_result&ct=result&resnum=6&ved=0CEkQ6AEwBQ#v=onepage&q&f=false> accessed November 6, 2011.

Saleh v Titan involved an action brought in 2004, against Titan and other DoD contractors involved in the Abu Ghraib atrocities.[242] It was alleged that the private contractors were guilty of having committed violations of customary international law which included "torture, cruel, inhuman and degrading treatment, crimes against humanity and war crimes".[243]

In its 2-1 decision, majority opinion of the court of appeals relied on the earlier Supreme Court decision in *Boyle v United Technologies Corp.*, wherein the court arrived at the conclusion that, "the liability of independent contractors performing work for the federal government...is an area of uniquely federal interest".[244] Consequently, the court subscribed to the opinion that state law is displaced where "a significant conflict exists between an identifiable federal policy or interest and the [operation] of state law would frustrate specific objectives of the federal legislation".[245]

Judge Garland, however, differing from the conclusion arrived at by the majority in his dissenting opinion, stated that

> "Boyle has never been applied to protect a contractor from liability resulting from the contractor's violation of federal law and policy. And there is no dispute that the conduct alleged, if true, violated both. Hence, these cases are not "within the area where the policy of

[242]See: "Saleh et al v. Titan et al", Center for Constitutional Rights < http://ccrjustice.org/ourcases/current-cases/saleh-v-titan > accessed November, 7 2011.
[243] Alice de Jonge, Transnational Corporations and International Law (Cheltenham: Edward Elgar Publishing Limited, 2011), 102.
[244] "Saleh et al v. Titan et al", Decision of the Court of Appeals for the District of Colombia, available at <https://docs.google.com/gview?url=http://docs.justia.com/cases/federal/appellate-courts/cadc/08-7008/08-7008-1205678-2011-03-24.pdf?1301254704&chrome=true> accessed November, 11 2011.
[245] Ibid.

the 'discretionary function' would be frustrated," and they present no "significant conflict" with federal interests. Preemption is therefore not justified under Boyle."[246]

Consequently, the plaintiffs petitioned to the Court of Appeals for the District of Colombia for an *en banc* rehearing, which in January 2010 was denied, leading the plaintiffs to file a *certiorari* petition at the US Supreme Court.[247] However, in June 2011, the Supreme Court ended the case by refusing the plaintiffs petition.[248]

4.5.3 Killings at Nisoor Square

The events that unfolded on at Nisoor Square on the 16th of September 2007[249] caused the development of a sense on alarm within the international community, with respect to the nature of activities which various private contractors were carrying out in Iraq.

According to reports, the incident claimed the lives of 17 Iraqi Citizens while wounding at least 18.[250] It was claimed by Blackwater personnel that they were ambushed by insurgents while escorting a convoy through Baghdad. The version put forth by the Iraqi officials however, tells a different tale. The Ministry of Interior, Iraq, claimed that blackwater had fired an unprovoked barrage[251] and consequently, it made an announcement whereby the Iraqi government revoked Blackwater's operating license and undertook to prosecute those

[246]Ibid.
[247]"Saleh et al v. Titan et al", Center for Constitutional Rights.
[248] Ibid.
[249]For a detailed account see, Jeremy Scahill, *Blackwater: The Rise of the World's Most Powerful Mercenary Army* (London: Serpent's Tail, 2007), 3-49.
[250]"Private Security Contractors at War: Ending the Culture of Impunity".
[251] Isenberg, *Shadow Force*, 79.

responsible. According to the US military reports from the scene, it was reiterated that the blackwater guards had indeed opened fire without any provocation.[252] Furthermore, a congressional memorandum characterized the company's use of force as "frequent and extensive, resulting in significant casualties and property damage".[253]

The reality of the matter remains that Iraqi government had no contract with blackwater in the first place, thus there was nothing to revoke. Secondly, owing to the operation of Order 17 of the Coalition Provisional Authority (CPA), the personnel of blackwater involved in the killing stood immune from prosecution in the Iraqi courts.

4.5.3.1 Estate of Hamoud Saed Abtan, et al. v. Prince, et al.

This case was brought by the families of those killed and by the persons who were injured during the Nisoor Square incident against Blackwater and its founder, Erik Prince. Charges were brought against them under the Alien Tort Statute and included War Crimes and Summary Executions.[254] It was also alleged that Blackwater had violated state, federal and international law, and "created and fostered a culture of lawlessness amongst its employees, encouraging them to act in the company's financial interests at the expense of innocent human life."[255] Nevertheless, like is majority of the litigations against blackwater personnel, the case concluded on a settlement reached between the parties on January 6, 2020.[256]

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[252] Ibid.

[253] Steven C. Ford and Morten G. Ender eds., The Routeledge Handbook of War and Society (New York: Routledge, 2011)

[254] Albert Ruben, The People's Lawyer (New York: Monthly Review Press, 2011) Accessed October 19, <http://books.google.com.pk/books?id=hklwbeVWCzMC&pg=PA143&dq=Abtan,+et+al.+v.+Prince,+et+al.&hl=en&ei=WX2eTq9K8yOiAfh2o2zCQ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CCsQ6AEwAA#v=onepage&q=Abtan%2C%20et%20al.%20v.%20Prince%2C%20et%20al.&f=false>

[255] Isenberg, Shadow Force, 85.

[256] "Abtan, et al. v. Prince, et al," Centre for Constitutional Rights, < http://ccrjustice.org/ourcases/current-cases/abtan-et-al-v-blackwater-usa-et-al > accessed February 27, 2012.

4.6 Privatization of Warfare; The Afghan Experience

Though not as catastrophic as Iraq the presence of PMSC's in Afghanistan hasn't been without its share of controversies. Being lesser in number as compared to Iraq private contractors operating in Afghanistan haven't caused as much calamity as their counterparts in Iraq.

According to an agreement of 2002 between the US and transitional Afghan government the status of members of the US military and DoD personnel is, "equivalent to that accorded to the administrative and technical staff of the U.S. Embassy under the Vienna Convention on Diplomatic Relations of 1961".[257]

Thus, the only option available for prosecuting PMSC's operating in Afghanistan is to sue them before the US courts. Two such prominent legal actions brought against private contractors before the US courts have been analyzed below.

4.6.1 David Passaro's Conviction

Of the numerous instances involving civilian deaths at the hands of civilian contractors, the case of David Passaro is the most eminent. This case stands apart from any other since it happens to be the only instance of any private contractor being indicted before a US Federal

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[257] "Accordingly, covered U.S. personnel are immune from criminal prosecution by Afghan authorities, and are immune from civil and administrative jurisdiction except with respect to acts performed outside the course of their duties" see: "Private Security Contractors in Iraq and Afghanistan: Legal Issues", Congressional Research Service, available at <http://books.google.com.pk/books?id=mcAH9UoVgwYC&printsec=frontcover&dq=Private+Security+Contractors+in+Iraq+and+Afghanistan:+Legal+Issues+2010&hl=en&sa=X&ei=SMJHT_jCF9GVOpnz2f4N&ved=0CC8Q6AEwAA#v=onepage&q=Private%20Security%20Contractors%20in%20Iraq%20and%20Afghanistan%3A%20Legal%20Issues%202010&f=false> accessed February 24, 2012.

Court[258] for causing the death of a civilian. It was in 2003 that Abdul Wali, a farmer was repeatedly tortured while being interrogated in connection with an attack that had taken place against a US military base at Asadabad, Afghanistan.

Abdul Wali died two days after he was repeatedly kicked and struck with a metal flashlight while being interrogated by David Passaro, who at the time was working on contract as an interrogator for the CIA.[259] He was convicted[260] by the North Carolina Federal District Court on 17th August, 2006 under the 2001 Patriot Act[261]. Section 804 of Tide VIII of the Act provides a route which may be taken for prosecuting civilians at the hands of whom grave breaches have been committed. The text of Section 804 is as follows

> "With respect to offenses committed by or against a national of the United States as that term is used in section 101 of the Immigration and Nationality Act—"(A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and "(B) residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities."[262]

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[258] United States v. David F. Passaro

[259] Researcher CQ, *Issues in Terrorism and Homeland Security: Selections from CQ Researcher*(California: SAGE Publications, 2010) accessed August 8, 2011,<http://books.google.com.pk/books?id=H1tEhDmgaZIC&pg=PA361&dq=david+passaro&hl=en&ei=YhSMTumjJsbPQe28p33AQ&sa=X&oi=book_result&ct=result&resnum=5&ved=0CEMQ6AEwBA#v=onepage&q=david%20passaro&f=false>

[260] The Conviction however was only on counts of Felony and Misdemeanor Assault owing to the insufficiency of evidence linking the beatings to the death of Abdul Wali.

[261] Available at <http://www.law.cornell.edu/uscode/text/18/7> accessed February 25, 2012.

[262] Ibid.

Even the ICTR, by stating that, "the laws of war must equally apply to civilians and to combatants in the traditional sense"[263]in *Akayesu* made it evidently clear that in times of armed conflict civilians don't stand immune from prosecution in respect of the breaches of the law of war committed by them.

This jurisdiction however, has been exercised only once, against David Passaro. Nevertheless, the conviction, despite being the lone precedent for putting a private contractor to trial remains a leap in the correct direction. It has without a doubt paved the way for possible future actions against the private contractors engaged alongside the US in Iraq.[264]

4.6.2 US v. Drotleff and Cannon

This case revolved around an incident where two contractors belonging to Blackwater, were tried for firing at and killing two civilians. Charges were brought against the two contractors Drotleff and Cannon under the MEJA which resulted in them being convicted for the involuntary manslaughter of one of the civilians.[265]

4.7 Dealing under the table; Private Contractors Make Their Way to Pakistan

[263]Michael N. Schmitt and Jelena Pejic, eds., International Law and Armed Conflict: Exploring the Faultlines : Essays in Honour of Yoram Dinstein (Leiden: Martinus Nijhoff Publishers,2007), 389.
[264] Michael N. Schmitt and JelenaPejic, eds., *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein*(Leiden: Martinus Nijhoff Publishers,2007), 389.
[265]"Examples of Violent Crimes and Abuses by US Contractors".

Though Pakistan denies "politically" that there isn't a situation of armed conflict within the country, it is impossible to turn a blind eye towards the fact that there is a state of war in Pakistan.

According to reports[266], "members of an elite division of Blackwater are at the center of a secret program in which they plan targeted assassinations of suspected Taliban and Al Qaeda operatives and other sensitive action inside and outside Pakistan".[267] However the Blackwater personnel have been conducting their work undercover as aid workers. Thus, nobody even gives them a second thought. If these reports are true, then the Blackwater employees may be engaged in war crimes and other human rights abuses including arbitrary deprivation of life.

It is not only Blackwater which is involved in conducting intelligence operations in Pakistan through its private contractors; events of the recent past have made public the involvement of also CIA contractors in similar operations throughout the country. The Raymond Davis incident bears testament to the presence of these contractors and also to the impunity they enjoy even in respect of the most serious human rights abuses. Moreover, according to a report appearing in the New York Times the Shamsi base situated in Pakistan, was being used by the C.I.A. for operating drones.[268]

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[266] Appearing in *The Nation* during November 2009.

[267] Jeremy Scahill, "The Secret US War in Pakistan" *The Nation* November 23, 2009, available at <http://www.thenation.com/article/secret-us-war-pakistan> accessed February 24, 2012. The report also states, "The Blackwater operatives also assist in gathering intelligence and help direct a secret US military drone bombing campaign that runs parallel to the well-documented CIA predator strikes, according to a well-placed source within the US military intelligence apparatus."

[268] James Risen And Mark Mazzetti, "C.I.A. Said to Use Outsiders to Put Bombs on Drones," The New York Times, August 20, 2009, available at <http://www.nytimes.com/2009/08/21/us/21intel.html> accessed February 24, 2012.

The question as to the responsibility of such acts however, remains a tricky one. There is no doubt as to the liability of the private contractors, the question is whether it would be the American authorities which would be held responsible for the commission of such acts under the principle of 'superior and command responsibility or will it be the Pakistani Government, for allowing such operations within its territory? This answer to a large extent depends upon Pakistan's secret "Joint Special Operations Command" contracts with the CIA.[269]

4.7.1 Raymond Davis Case

The case concerning Raymond Davis is the prime example of the cover contractor operations being carried out in Pakistan. Moreover, the incident also illustrates the support which the US government is willing to extend to such private contractors, where even the president of the USA falsely asserted that Raymond was a diplomat.

The events that unfolded at Qurtaba Chowk, Lahore, on January 25, 2011 reaffirm the bleak tale of contractor abuse of the law and impunity in respect of the same.

Davis, a "US Consulate Employee", on January 25, 2011, shot two Pakistani men, claiming to have done so in self-defense, while another innocent man was crushed to death by his colleagues from the US Consulate, who had come to his rescue.[270] After the incident,

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[269] See: Jeremy Scahill, "The Secret US War in Pakistan" The Nation November 23, 2009, available at < http://www.thenation.com/article/secret-us-war-pakistan > accessed February 24, 2012.

[270] Asif Chaudhry,"US official guns down two motorcyclists in Lahore," *Dawn News*, January 28, 2011, available at <http://www.dawn.com/2011/01/28/us-official-guns-down-two-motorcyclists-in-lahore.html> accessed February 16, 2012.

there was much speculation over the status of Davis. The US government adamantly asserted that Davis was a US diplomat and hence entitled too immunity under the Vienna Convention.[271] These assertions, nevertheless, were outright rejected by the officials on the Pakistani side who suggested that he had been involved in clandestine operations within Pakistan.[272]In the meanwhile, reports associating Davis with a Florida based security firm having possible connections with the CIA also started floating within the US.[273]

On the 21st of February 2011, almost a month after the shootings, the New York Times reported that Raymond Davis was, 'part of a covert, CIA led team collecting intelligence and conducting surveillance on militant groups deep inside the country, according to American government officials'.[274]

In what seemed to be a step in the right direction, Raymond Davis was kept under custody and brought to face trial before the Lahore High Court, Pakistan. Nevertheless, after being indicted for murder, he was almost immediately pardoned by the victims' families in

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[271] President Obama, while calling upon the Pakistani authorities for his release, referred to him as "our diplomat", see: Greg Miller "U.S. officials: Raymond Davis, accused in Pakistan shootings, worked for CIA," *The Washington Post*, February 22, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/21/AR2011022102801.html> accessed February 16, 2011.

[272] According to a Police officer "His phone records clearly show he was in contact with Lashkar-e-Jhangvi, for what reason we can only speculate," and Hamid Gul stated that, "This is a classic intelligence technique – to get inside the head of the enemy," see: Rob Crilly, "Detained US official 'in telephone contact with Islamic terror group'," The Telegraph, February 10, 2011, available at <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/8316286/Detained-US-official-in-telephone-contact-with-Islamic-terror-group.html> accessed February 17, 2012.

[273]Chaudhry, "US official guns down two motorcyclists in Lahore."

[274] "The New York Times had agreed to temporarily withhold information about Mr. Davis's ties to the agency at the request of the Obama administration, which argued that disclosure of his specific job would put his life at risk. Several foreign news organizations have disclosed some aspects of Mr. Davis's work with the C.I.A." See, Mark Mazzetti et.al, "American Held in Pakistan Worked With C.I.A," *The New York Times*, February 21, 2011, available at <http://www.nytimes.com/2011/02/22/world/asia/22pakistan.html> accessed February 16, 2012.

exchange of blood money, released and immediately flown out of Pakistan.[275] Such a hasty conclusion of the proceedings against Davis, leads to assumption that his release was more a result of the Pakistani authorities buckling under US Pressure as opposed to that of a fair trial. It was outcome of negotiations between officials of both states extending over a couple of weeks and consequent pressure exerted upon the courts and the families of the victims by the authorities within Pakistan.[276]

The manner in which the Raymond Davis case was handled was tragic. Being the first case concerning private contractors to come to the forefront in Pakistan, it should have been settled in such a manner that it could serve as a deterrent to all those involved in similar activities within the country. Coercing the victims' families to pardon Davis and accept blood money wasn't the only thing wrong with the way the case was handled. The fact that he was not tried on counts of possessing an unlicensed weapon and espionage.

4.8 Regulating Activities of PMC's, The Law Applicable

PMSC's must be put to task for the crimes that they commit, not merely to do justice to those affected but to instill in the perpetrators, a renewed respect for the law thereby enabling them to retain the support of citizens in both the hiring and host state.[277]

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[275] "CIA Man Free After 'Blood Money' Payment," *Al Jazeera*, March 14, 2011, available at <http://www.aljazeera.com/news/asia/2011/03/201131612161627978.html> accessed February 17, 2012.

[276] Carlotta Gall and Mark Mazzetti, "Hushed Deal Frees C.I.A. Contractor in Pakistan," The New York Times, March 16, 2011, available at: <http://www.nytimes.com/2011/03/17/world/asia/17pakistan.html> accessed February 17, 2012.

[277] Katherin J. Chapman, "The Untouchables: Private Military Contractors' Criminal Accountability under the UCMJ" *Vanderbilt Law Review Volume 63, No.4* 2010.

In this regard, the various laws that may be considered as being binding on the private contractors are; International Law, Iraqi Law, US Law (both Civil and/or Military).[278]The operation of the host nation (Iraqi) law until recently had been impeded by operation of Article 17 of the CPA. However, since the Status of Forces Agreement (SoFA) of 2009, the immunity previously enjoyed by the private contractors has been waived. As Far as the applicability of the hiring state (US) law is concerned, it again is divided into two tiers; US Civilian and US Military law, meaning the Uniform Code of Military Justice and Military Extraterritorial Jurisdiction Act respectively.[279]

As regards the applicability of the US laws to the PMSC's operating in Iraq, the first issue in need of being settled is to see whether it possesses the requisite jurisdiction over the criminal activities of the persons in question. The question of jurisdiction over PMSC's operating outside the territory of the United States is further complicated by the fact that being civilians operating beyond the territory of the hiring state, they would ordinarily be subject to prosecution in the host state.[280] The prospects of prosecution by the host state however, were nullified owing to the operation of Order 17 of the CPA. Moreover, the events that took place at the Abu Ghraib Prison during 2003 highlighted the inadequacy of the US legislation pertaining to extraterritorial Criminal Jurisdiction.[281]

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[278] Michael Hurst, "After Blackwater: A Mission Focused Jurisdictional Regime for Private Military Contractors during Contingency Operations", *George Washington Law Review 2008: Volume 76, No.5*, 1309. Michael Hurst poses a rather fundamental question in his discussion on the regime/regimes of law applicable to the PMC's by stating that, "when public duties shift to private companies, what legal regime is best suited to retain administrative control?"

[279] Ibid.

[280] Hannah Tonkin, *State Control Over Private Military and Security Companies in Armed Conflict* (New York: Cambridge University Press, 2011), 223.

[281] Ibid.

4.8.1 US Laws

There exists an array of US laws to which private contractors may be subjected. Nevertheless, the legal framework currently in place provides a piecemeal approach towards the problem since it is founded upon a patchwork of federal statutes.[282]

4.8.1.1 Uniform Code of Military Justice

In the American legal system, debate on the issue of subjecting civilians to military prosecution is not recent in its origin. The Uniform Code of Military Justice (UCMJ), which subjects civilians to military jurisdiction, was enacted in 1950. However, the authority of prosecuting civilians under laws designed exclusively for the military may be traced back to the American Articles of War of 1775 and 1916.[283]

Article XXXII of the former provided "all suttlers and [retainers] to a camp, and all persons whatsoever, serving with the continental army in the field, though not enlisted soldiers, are to be subject to the articles, rules and regulations of the continental army...".[284]

Thus, the aforementioned civilians were not only bound to follow the rules and disciplinary codes of the military, but could also be subjected to military trials for violation of the code.[285] This form of exceptional jurisdiction was very narrowly construed by the US courts in so far as it was held to apply to those "serving with the army...in the field",

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[282]"Private Security Contractors at War: Ending the Culture of Impunity".
[283]Chapman, "The Untouchables", 1056.
[284] David L. Snyder, "Civilian Military Contractors on Trial: The Case for Upholding the Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice" *Texas International Law Journal Volume 44, No. 65*, 75.
[285]Ibid, 76.

signifying a certain degree of military involvement of the civilians on the battlefield.[286] The reluctance on part of the US courts in subjecting civilians to military jurisdiction was owed to the combined effect of Article II and V of the US Constitution.

Article II declares Court Martials as being instrumentalities of the executive as opposed to the judiciary while Article V secures the right of a civilian to be tried on "presentment or indictment of a grand jury in cases involving capital or other infamous crimes".[287]

When the United States Congress enacted the UCMJ in 1950, the long standing practice of subjecting civilians accompanying military forces to the jurisdiction of the latter was reaffirmed. As stated earlier, as far as civilians were concerned, the UCMJ applied to their actions only during "times of war". Nevertheless, the Court of Military Appeals, while deciding the Averette Case in 1970, construed the term war to mean one that has been declared by the congress.[288]

Since the UCMJ underwent significant jurisdictional expansion during 2007, it has, to some extent, turned into an effective tool for prosecuting private contractors.[289] The jurisdictional statute of the UCMJ has been modified so as to include "Persons accompanying US forces in times of declared wars or a contingency operation".[290]

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[286] Ibid, 76-77.
[287] Ibid, 75.
[288] Chapman, "The Untouchables", 1057.
[289] Chapman, "The Untouchables", 1053.
[290] Initially the jurisdiction extended to the said persons only in times of a "declared war", which meant only those wars which has been declared by the congress. Since the Congress has made no such declaration over almost the past six decades, the UCMJ remained without any effect over the PMSC's operating in Iraq. For details, see Chapman, "The Untouchables", 1053.

Thus, the UCMJ, in its present form, is perceived as having expanded the legal framework specifically designed for those who, by becoming a part of the armed forces, expressly relinquish their rights under the constitution.[291]

Since no case has been brought under the UCMJ Post amendment, its constitutionality is yet to be determined. However, it is explicitly clear that the prospect of civilians being subjected to military jurisdiction has serious constitutional and human rights concerns attached to it.

4.8.1.2 Military Extraterritorial Jurisdiction Act

Another important legislation within the United States of America, which extends the jurisdiction of US courts to the conduct of civilians in the context of armed conflict, is the Military Extraterritorial Jurisdiction Act (MEJA).

Under the MEJA, the federal jurisdiction of the US Courts over crimes committed by civilians and ex-army personnel (who ceased to remain a part of the military before a military trial could commence) is established.[292] However, there was one caveat; the jurisdiction of the MEJA, in its original form, extended only to civilians who were, "employed by the armed forces".

In the Aftermath of the Abu Ghraib incident, the insufficiency of the MEJA in its existing form was realized and consequently expanded to encompass contractors under the employment of all government agencies.[293] Nevertheless, this expansion was not

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[291]Franz von Benda-Beckmann, Keebet von Benda-Beckmann and Julia M. Eckert eds., *Rules of Law and Laws of Ruling: On the Governance of Law*, (Surrey: Ashgate Publishing Limited, 2009), 77.

[292] Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010), 89.

[293]RianneLetschert and Jan Van Dijk eds., The New Faces of Victimhood: Globalization, Transnational Crimes and Victim Rights, available at

unconditional either. The scope of the MEJA was expanded only to the extent of including contractors employed by the federal agencies who were supporting the Department of Defense's mission.[294] Another problem associated with it was the terminology in which the amendment was worded. It has been argued that the vague phrasing of the same, instead of clarifying matters, makes them murkier by leaving questions as to the interpretation of the terms "mission" and "supporting" unanswered.[295]Tying the conduct of private contractors to the mission of the DoD is a task which the DoJ considers "extremely challenging and resource-intensive dependent upon highly specific facts and circumstances...has proven difficult to apply."[296]

Another shortcoming of the Act remains that it cannot be extended to persons who are nationals of, or reside in the host nation[297] such persons however, may be prosecuted under the laws of the host nation.

In respect of the PMSC's the MEJA has been used on a handful of occasions. The congressional report of 2008 accounts that up until April 2008, a total of twelve persons had faced charges under the MEJA.[298] In December the same year, the first case involving

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<http://books.google.com.pk/books?id=KqTFcAYX2cQC&pg=PA271&dq=MEJA+private+contractors&hl=en&sa=X&ei=tDMyT_bpO4HrrQfwkaGLBA&ved=0CFAQ6AEwBg#v=onepage&q=MEJA%20private%20contractors&f=false>, 271, accessed February 08, 2011.

[294] Ibid.

[295] Andrew Alexandria, Deane Peter-Baker and Mariana Caparini eds., Private Military and Security Companies: Ethics, Policies and Civil-Military Relations (Oxon: Routledge, 2008), 180

[296]"The Case for Civilian Extraterritorial Jurisdiction Act (CEJA): Why U.S. Needs to Clarify U.S. Criminal Jurisdiction over U.S. Contractors Fielded Abroad," Human Rights First, available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/CEJA-Fact-Sheet.pdf> accessed February 12, 2012.

[297]Tonkin, State Control over Private Military and Security Companies, 224.

[298] Congressional report

exercise of the amended jurisdiction, whereby five employees of Blackwater were charged in connection with the killing of Iraqi civilians at Nisour Square.[299]

Nevertheless, the events that occurred before the nisour square incident, have to a large extent, gone unnoticed. The reluctance of the US government to prosecute abuse of the law by PMSC personnel is evidenced by the fact that up until the Nisour incident, only two cases pertaining to PMSC's, involving offence unrelated to the armed conflict, were prosecuted.[300]

According to a report which appeared in the New York Times

> "Under the law adopted in 2000, only two criminal cases have originated in Iraq, the experts said, one involving a contractor accused of possessing child pornography and another accused of attempted rape. In the attempted rape case, both the reported victim and the accused were Americans."[301]

Thus, even though there exists a workable set of laws to try most, if not all, of the private contractors working for the various federal agencies supporting the Department of defense's mission, the unwillingness of the US government to "expend resources on complex cases that originate thousands of miles away"[302] is more of a matter related to policy than to the applicability of the law.

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[299] Ibid.
[300]Snyder, "Civilian Military Contractors on Trial", 68
[301]Mitchell McNaylor,"Mind the "Gap": Private Military Companies and the Rule of Law",*Yale Journal of International Affairs* 5:2010,47.
[302]Snyder, "Civilian Military Contractors on Trial", 68.

4.8.1.3 Patriot Act 2001

In an effort to close the legal loopholes hindering the prosecution of private contractors by US courts, the Patriot Act of 2001 was enacted, which resulted in an expansion of the Special and Maritime Jurisdiction of the US.[303]

The Patriot Act thus, invests jurisdiction with the US courts in respect of, 'any crime committed by a US citizen, or against a US citizen anywhere US forces are operating'.[304]

The trial and subsequent conviction of David Passaro (discussed below) also took place under the provisions of this Act.

1.5.1.4 Civilian Extraterritorial Jurisdiction Act 2011

As stated above, the MEJA, in its amended form, has brought a large number of contractors within its reach. However, the problem of accountability still persists in respect of those contractors employed by other agencies such as the State Department and the US Agency for International Development (USAID).[305]

In order to settle questions revolving around contractor accountability under US law, a draft bill[306] of the Civilian Extraterritorial Jurisdiction Act (CEJA) in both the senate and House of Representatives of the US Congress during 2010. The purpose of the proposed

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[303]Francesco Francioni and NatalinoRonzitti, War by Contract: Human Rights, Humanitarian Law, and Private Contractors (New York: Oxford University Press, 2011), 459.
[304] Isenberg, Shadow Force, 145.
[305] "Closing a Legal Loophole Around Private Contractor Accountability," International Corporate Accountability Roundtable, available at: <http://accountabilityroundtable.org/analysis-and-updates/closing-a-legal-loophole-around-private-contractor-accountability/> accessed February 12, 2012.
[306] Text of the Draft Bill available at <http://www.govtrack.us/congress/billtext.xpd?bill=h112-2136> accessed February 23, 2012.

legislation was to extend the jurisdiction of the US courts over civilian contractors, hence, putting an end to all the ambiguity surrounding the issue of jurisdiction.[307]

In contrast to the MEJA, it would be applicable to all persons, 'employed by or accompanying any department or agency of the United States'.[308] Senator Patrick Leahy, who initiated the draft bill in the senate, stated that

> "Now, more than ever, Congress must make sure that our criminal laws reach serious misconduct by American Government employees and contractors wherever they act...The Civilian Extraterritorial Jurisdiction Act accomplishes that goal by allowing United States contractors and employees working overseas who commit serious crimes to be tried and sentenced under U.S. law."[309]

Both the Department of Justice and the State Department have also solicited their support for the passage of CEJA. According to a letter from the Department of Justice to Senator Leahy, CEJA would "close significant gaps in the law that hamper our ability to investigate

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[307] Tonkin, State Control over Private Military and Security Companies, 224.

[308] Ibid.

[309] Leahy went on to state, "The United States has dramatically more Government employees and contractors working overseas than ever before, but the legal framework governing them is unclear and outdated...As the military mission in Iraq winds down and as the draw down in Afghanistan that the President announced last night begins, fewer and fewer of the thousands of Americans who stay on in these countries will be covered by current law. The Civilian Extraterritorial Jurisdiction Act will fill this gap." See: "Senate Judiciary Committee Reports Leahy-Authored Civilian Extraterritorial Jurisdiction Act", June 23, 2011, available at <http://www.leahy.senate.gov/press/press_releases/release/?id=c769b4ca-4c2f-4d9c-a493-72ff207cb023> accessed February 12, 2012.

and prosecute criminal conduct committed by U.S. Government personnel and contractors who operate abroad".[310]

The adoption of CEJA would lead to a twofold advantage. It would not only clarify the criminal jurisdiction of the US courts, but also lead to an increased and effective system of oversight over private contractors.[311] Supporting the Mission of the DoD, which is an essential requirement for private contractors to come within the fold of the MEJA would be done away with by adoption of the CEJA and thus make the issue of jurisdiction over private contractors absolutely clear. The second advantage of adopting CEJA as stated in the Human Rights First, Fact sheet would be that

> "CEJA would establish Investigative Task Forces for Contractor and Employee Oversight. These units would investigate allegations of criminal offenses committed by contractors when deployed abroad. These units would provide the Justice Department the manpower resources to increase oversight and accountability over contractors fielded abroad. The legislation also would require the Attorney General to submit annual reports to Congress on the number of prosecutions carried out, including the nature of the offenses and any dispositions reached, during the previous year."[312]

4.8.1.5 Alien Tort Claims Act

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[310] Copy of the Letter available at <http://webcache.googleusercontent.com/search?q=cache:http://www.justice.gov/ola/views-letters/112/100711-ltr-re-s1145-civilian-extraterritorial-jurisdiction-act.pdf> accessed February 12, 2012.
[311] "The Case for Civilian Extraterritorial Jurisdiction Act (CEJA)," Human Rights First.
[312] Ibid.

Owing to their attire of a corporation donned by the PMSC's bringing claims against them under tort and contract also remains a possibility. It is however, possible for PMSC's incorporated in Pakistan to incur liability for the tortious acts of their foreign subsidiaries, provided, the duty of care is established.[313] The case of Saleh v. TITAN et.al, is a prime example of the same. It has been argued that a suit under tort law is a better option as compared to criminal Law since it is easier to prove.[314] However, relevant case law evidences that such suits more often than not end in settlements outside the court[315] owing to numerous procedural obstacles.

4.8.2 Iraqi Penal Code

Before January 2009, private contractors functioning in Iraq had been subject to the laws put in place Coalition Provisional Authority (CPA), which were later adopted by the Iraqi government.[316] Order 17 of the CPA grants these contractors immunity from Iraqi jurisdiction.[317]

The premise for such immunity being the fragile system of justice in place in Iraq which in the estimation of the framers of order 17 was incapable of guaranteeing internationally accepted principles of Fair Trial and Due Process.[318] The order allows for the waiver of immunity by the sending state, in practice however, the US, which happens to be the sending state in majority of the cases concerning the contractors, has never waived this immunity.[319]

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[313]Cedric Ryngaert, "Litigating Abuses Committed by Private Military Companies", The European Journal of International Law 19 (2008): 1039.
[314]Ibid, 1053.
[315] Ibid.
[316]"Private Security Contractors at War: Ending the Culture of Impunity".
[317]Alexandria, Peter-Baker and Caparini eds., Private Military and Security Companies, 172.
[318] Ibid.
[319] Ibid.

As of January 2009, private contractors working in Iraq are subject to the Status of Forces Agreement (SOFA) which does not grant them any form of immunity from Iraqi jurisdiction.[320] It invests with the Iraqi authorities "the primary right to exercise jurisdiction over United States contractors and United States contractor employees."[321] This undoubtedly is a very positive development towards prosecuting human rights and humanitarian law abuses by private contractors, as it clearly subjects them to the Iraqi legal system and does away with impunity formerly enjoyed by them.

4.9 Flagrant Violations of IHL and IHRL, Violators Brought to Justice?

Ideally the dramatic increase in the contracting of military and security tasks to private firms, should have led to the formulation of a specialized system for their regulation. The reality however, tells a different tale. Not only has there been a failure to regulate the activities of PMSC personnel but also their disregard for IHL and IHRL has gone unnoticed.

Legal developments that have taken place within the US and Iraq offer some hope of improvement in the situation. The way has been paved in Iraq to hold private contractors accountable for their outlawed actions, however, it is yet to be seen if the US follows suit by adopting the CEJA. Moreover, the convictions that have come about in the Passaro and Cannon cases are valuable precedents which must be upheld and applied in similar cases by the US in order to ensure that abuses of the law do not go unnoticed.

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[320] Francioni and Ronzitti, War by Contract, 457.
[321] Ibid.

4.10 Conclusions

The infamous incidents marring the credit of private contractors in Iraq, Afghanistan and Pakistan that have been highlighted in this chapter make it clear that these contractors pose a grave problem which must be effectively addressed. The Abu Ghraib, Nisour Square and Raymond Davis, are all incidents which might have not occurred if the contractors believed that they would have to face prosecution in case they violate any law.

The problem exists not in respect of the existence of relevant legislation; rather it has more to do with the willingness of the host and sending state to implement these legal provisions. Though the contractors and states both are subject to the general provisions of International Law, specific legislation such as the CEJA, which would settle the matter unambiguously would be more than welcome.

CONCLUSIONS AND RECOMMENDATIONS

Private military and security companies are not to be considered supra law entities. It has been shown that such private contractors are addressed not only by domestic laws, but being subjects of international law, are also bound by Humanitarian and Human Rights Law. The assertion of them being a 'grey area' and thus functioning in a 'legal vacuum is but a myth. Furthermore, private contractors especially in the case of the United States are not to be confused with mercenaries.

As Far as their status under IHL is concerned, the dichotomous regime accords them the status of civilians by exclusion. In other words, since they do not fulfill the requirements of combatants, they automatically fall within the category of civilians. The United States must accept this fact, and thus ensure that all private contractors under its employment do engage in services which would amount to taking active part in hostilities. Since their civilian status does not give them the right to engage in hostilities, the US government must take notice of and prosecute all contractors responsible for violation the law by having done so. It is the responsibility of the US under common Article 1 of the Geneva Conventions, to respect the provisions of the convention, a task which can be carried out by ensuring that everyone within the control of the US complies with the said provisions. Upon failure to do so, the US authorities and organs may incur liability in consonance with the notions of superior and state responsibility.

Moreover, the private contractors and the states that hire them are also bound by the International Human Rights Law standards. By directly conferring rights upon individuals, international human rights law obliges states and individuals to respect those rights. A state is bound to ensure compliance with human rights law within its jurisdiction. It has been argued that the concept of territoriality of jurisdiction in case of human rights has been

replaced with the more practical concept of extraterritoriality of human rights obligations. Thus, in all instances where private contractors function under the control of the state, they are bound by its human rights obligations and the state itself is under the obligation to ensure compliance with the same. In this regard it is suggested that in order to uphold their human rights obligations in both letter and spirit states, in line with the recent jurisprudence of the international courts and tribunals (i.e. ECHR) must accord the notion of extraterritoriality of human rights obligations a wider interpretation as opposed to the restrictive one propounded by the ICJ in Nicaragua. Again, default on part of the state and its officials will trigger state and superior responsibility.

Despite the fact that private contractors operating in the theatre of armed conflict are encompassed by the general principles of IHL, the adoption of a specific convention to regulate these private contractors would be an advisable solution to the problem. The need for adoption of a specific convention by no means signifies that the contractors are not covered by IHL it only aims at affording more clarity to laws applicable to the same. The prime example in this case would be the recent adoption of the Convention on Cluster Munitions. Although cluster bombs were outlawed by customary IHL owing to the fact of them being indiscriminate weapons, however in order to outlaw their use in an explicit manner, a specific convention had to be adopted. The adoption of a similar convention for regulation PMSC's thus, seems a plausible solution.

As far as the current set of US laws pertaining to prosecution of private contractors is concerned, resort the UCMJ appears to be futile owing to the serious human rights implications of subjecting civilians to military jurisdiction. It would only be an effective prosecution tool against those contractors who are made a part of the armed forces;

however, those who haven't would continue to enjoy the constitutional guarantee of "presentment or indictment of a grand jury in cases involving capital or other infamous crimes".[322]

The MEJA in its amended form also encompasses a considerable number of private contractors working for the US. Despite the ambiguity that exists in respect of the terminology used the MEJA in *United States v. Drotleff and Cannon* proved to be an effective tool in the prosecution of two Blackwater contractors for causing the death of a civilian in Afghanistan. However, in practice the DoJ which is responsible for bringing about prosecutions under the MEJA considers the impediment of determining whether the private contractors were in fact supporting the mission of the DoD, very difficult to overcome.[323]

The Third relevant legislation, The Patriot Act of 2001, which provides for the extraterritorial jurisdiction of the United States, is again limited in its scope as it can be exercised only in cases where the offence has been committed at a place which, under Section 804 of Title VIII of the Act, qualifies as US territory.

Finally, the CEJA, which is yet to be passed by the US congress, by far qualifies as the most genuine attempt of the US legislators to put private contractors to task. If approved by the Senate and House of Representatives the CEJA alone will accomplish what the UCMJ, MEJA and Patriot Act have failed to. By bringing all civilian contractors within its fold, the CEJA will silence all questions as to jurisdiction. Moreover, another factor which sets CEJA

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[322] David L. Snyder, "Civilian Military Contractors on Trial: The Case for Upholding the Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice" *Texas International Law Journal Volume 44, No. 65*, 75.

[323] "The Case for Civilian Extraterritorial Jurisdiction Act (CEJA): Why U.S. Needs to Clarify U.S. Criminal Jurisdiction over U.S. Contractors Fielded Abroad," Human Rights First, available at < http://www.humanrightsfirst.org/wp-content/uploads/pdf/CEJA-Fact-Sheet.pdf > accessed February 12, 2012.

apart from the other legislations is the implementation mechanism which has been devised within it. Thus, it is recommended that the US congress be swift in the adoption of this act and develop a reliable system of check and balance on the civilian contractors.

Furthermore, the DoJ must initiate more prosecutions of private contractors under the MEJA and Patriot Act, on the same lines as *Passaro* and *Drotleff and Cannon*, in order to ensure that the promising precedents laid down therein do not go down in the pages of history as lone precedents.

In this regard, the role of the host nations also deserves attention. For the abuses of the law committed by PMSC's during the WoT the host states are equally blameworthy. The host states are also responsible for the said acts since they allow them to take place within their territory. They must not assume the role of silent spectators but rather take all steps necessary for ensuring prosecution of the perpetrators under their respective justice systems or under that of the sending state. The initiative taken by the Iraqi government in the form of SOFA in 2009 is commendable. The fear of prosecution under Iraqi Law will undoubtedly ensure that the private contractors act in conformity with the law. Similarly the prosecution of Raymond Davis by the Pakistani Courts for the murder of two Pakistani's sends a clear message to all private contractors operation within Pakistani territory that they are not immune from the country's jurisdiction. Nevertheless, when the host states have finally put their foot down and put an end to contractor immunity from host state jurisdiction, they must carry out meaningful prosecutions and not defeat the purpose of the entire activity by buckling under international pressure, as illustrated in the Raymond Davis incident.

The most effective solution for regulation of the private military and security industry and thus ensuring compliance with the law would be to develop new effective and strengthen the existing legislation in respect of the same. Regulation of private contractors under domestic laws would do away with the endless debates on the applicability of international law to private individuals and of jurisdiction. Developing a legal regime on the lines of the Montreux Document would not only ensure that the outlawed activities of private contractors do not go unchecked but also that such activities are minimized. The domestic legislation of the sending and receiving states of the private contractors (in the context of the WoT i.e. United States, Iraq, Afghanistan and Pakistan) provides for an approach which can be considered reactionary. That is to say that, legislations such and the MEJA, CEJA (if adopted) and penal codes of the host states only provide for situations where the violation has already taken place. There exist no laws and enforcement mechanisms for prevention of such violations. Thus, domestic laws that define a proper system of examining the credentials of the private contractors before obtaining their services, relevant training schemes, and monitoring mechanisms, would be instrumental in shrinking the ratio of abuses of the law by private contractors.

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