

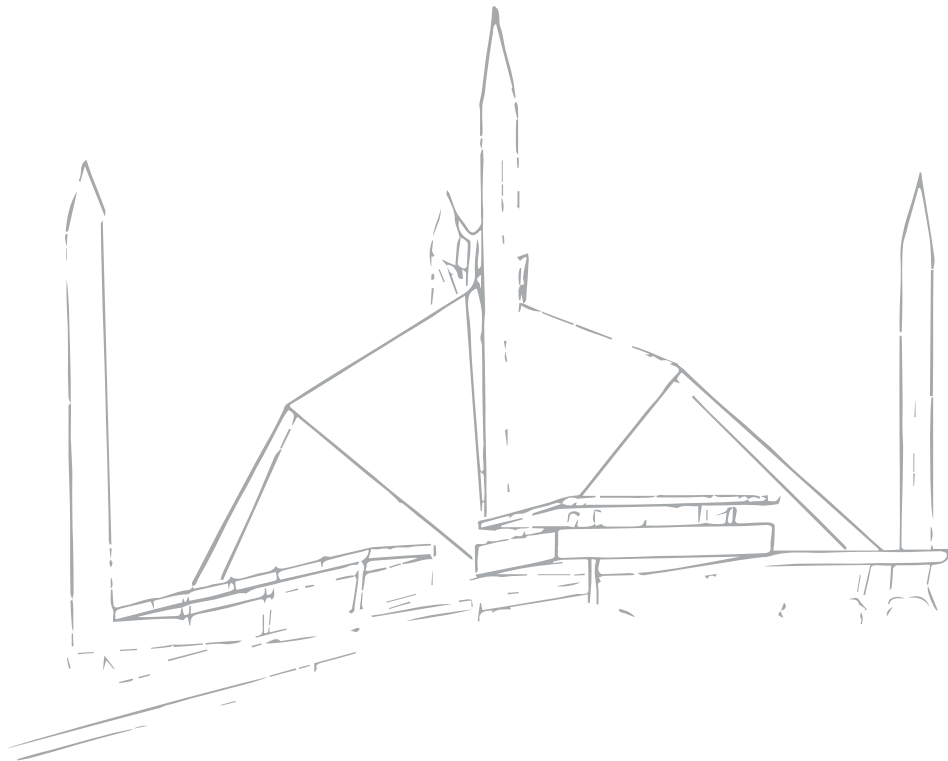


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Private Military Companies: A Challenge to Modern Warfare

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Abstract

Means and methods of warfare trace back their origin with that of humanity. Over the centuries, these methods evolved into different regulations, laws and customs which prescribe means and methods to conduct hostilities while putting certain restrictions in this regard. One such method which remained involved in the evolution of means and methods of warfare is use of mercenaries. Primary goal of their employment was to conduct hostilities in return for monetary gain. Modern shape of mercenaries is Private Military Companies (PMCs). In present era, development in warfare has enabled one individual to kill millions and that too within no time. Armies have been regularized, but even their purpose remained unaccomplished, hence, PMCs have been created to accomplish the tasks which were costing more for regular armies. Need of the time was fulfilled but these PMCs were left unattended. No laws and regulations were properly framed to control their activities. Backed by monetary gains, they consider themselves above any law and the same has posed another challenge for IHL. After going through the codified law on IHL, it is observed that no provision of IHL has specifically defined the term "Private Military Company". The term "Mercenary" has been defined in Article 47 of the 1977 Protocol 1 Additional to the Geneva Conventions of 1949 (AP I). Some legal experts argue that since the purpose of mercenaries and private military contractors is the same, therefore, the legal regime which is applicable to mercenaries should also be extended to PMCs and contractors. Others say that even then the purpose would not be achieved. Therefore, despite of extensive legislation in IHL, the legal environment, wherein the PMCs are currently operating is called a "legal vacuum". This paper analyses the existence, legal status and rights and obligations of these PMCs.

Keywords: Private Military Companies, Geneva Conventions, IHL, Additional Protocols.

1. Introduction

Concept of private contractors is not new and is traced back in ancient history. For instance, Greeks and Nubians fought for the

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Egyptians in the Late Bronze Age. Moreover, mercenaries took Jerusalem from the Roman Empire during the Sixth Crusade and Britain hired Hessian forces during the American Revolution. Singer says that the terms of 'freelance' and 'companies' emerged during middle ages to denote hired soldiers. However, their recruitment was not regularized until the 19th century when states began to hire their services for hostile actions and maintain their regular armies for protection of their national interests.¹

Prior to World War II (WWII), weaponries were used on *ad hoc* basis and by following 'just in time' model, but after WW II, large scale armaments were created and that too on permanent basis. Later conflicts between USA and USSR engaged the whole World in continuous combat instead of temporary conflicts. Armaments were being developed by private sector. Eisenhower² in 1961, apprehending unwanted results, warned that this kind of development would lead to a deadliest end. He was aware of the fact that private companies and firms, one day, would be able to control the fate of nations and humanity would be required to govern their deployment. Approximately after 50 years of Eisenhower's statement, Private Military Companies (PMCs) including Blackwater (now renamed Xe), Aegis Defence Services, DynCorp, and Military Professional Resources Inc. (MPRI) entered into contracts with several organizations including sovereign powers such as US Department of Defence and the British Ministry of Defence. Some of them offer complementary services including negotiations, advisory and intelligence services. PMCs have become a major industry, at times armed with

¹ Joel AC Baum and Anita M McGahan Rotman, "Outsourcing War: The Evolution of the Private Military Industry after the Cold War, School of Management", University of Toronto, Toronto, February 20, 2009 rev. October 5, 2009, available at: http://chaire-eppp.org/files_chaire/10_14_2009_TCE_paper.pdf, last accessed on 29-03-2019.

² Dwight David Eisenhower (October 14, 1890 – March 28, 1969) was an American army general and statesman who served as the 34th president of the United States from 1953 to 1961. During World War II, he was a five-star general in the United States Army and served as supreme commander of the Allied Expeditionary Forces in Europe. He was responsible for planning and supervising the invasion of North Africa in Operation Torch in 1942–43 and the successful invasion of France and Germany in 1944–45 from the Western Front.

helicopters and jet fighters. Role of PMCs in 21st century has been changed. In March 2004, after ambush and killing of four employees of Blackwater in Fallujah, USA responded by escalating Baghdad offensive. Moreover, the Iraq Reconstruction Corporation (IRC) was made a governing body for allocating sovereign and military funds for rebuilding the country. Thus, statement of Eisenhower was proved and fate of the nations was given into the hands of PMCs.³

Now PMCs operate in over 50 countries of every continent except Antarctica. According to the surveys of 2009, commercial market of PMCs exceeded \$165 billion.⁴ After Cold War, regular armies were reduced and more reliance was placed on PMCs. USA reduced troops from 2.1 million to 1.4 million; the former U.S.S.R. decreased them from 5,227,000 to 977,000 in 2001; France from 547,000 to 295,000; Germany from 469,000 to 284,000; Italy from 389,600 to 200,000; the Netherlands from 102,600 to 53,000; Hungary from 64,000 to 33,000; and neutral Sweden from 64,500 to 34,00.⁵ Growth in PMCs was significantly witnessed after USA invasion of Iraq and Afghanistan in the beginning of 21st century.⁶

One of the reasons of their significant growth, among others was that the tasks assigned to the regular armies remained unaccomplished, therefore, PMCs were deployed in order to assist the armies. The function of the PMCs was twofold, *one* they help the security agencies by providing important espionage, and *second*, they act in aid of military.⁷ Previously, the concept of

³ Baum and Rotman, "Outsourcing War".

⁴ Melissa Morrison, "Understanding the Emergence of Private Security Companies & Variance in Security Contracting", February 23, 2015, available at:

https://ruor.uottawa.ca/bitstream/10393/32751/1/Morrison_Melissa_2015_researchpaper.pdf, last accessed on 29-03-2019.

⁵ Morris, Erika, "Private Warfare: History of the Increasing Dependency on Private Military Corporations and Implications" (2009). Undergraduate Honors Theses. Paper 3, available at: <https://digitalcommons.usu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1005&context=honors>, last accessed on 29-03-2019

⁶ "Interview with Andrew Bearpark", International Review of the Red Cross, 88 (2006), no; 863, 449.

⁷ Ibid.

PMCs was known as 'commercially organized violence' and the commercial organizers of violence played a key role to persuade state's machinery to legalize PMCs in various parts of the World.⁸

From the last 15 years, functions in the field earlier performed by military and security agencies have been carried out by PMCs. Previously, the roles assigned to PMCs were only to the extent of logistic support, however, with the passage of time military functions performed by conventional armies are also performed by these companies. PMCs provide better and swift aid to the states at lower economic and political costs.⁹ These functions include the security of personnel and military assets, staffing over check points, training and advising, maintenance of weapons, interrogation of suspects, collection of intelligence and participation in combat operations. Reference to these functions indicates that currently PMCs are performing all functions which were earlier performed by militaries. This drastic change in the functions of PMCs was not noticed until the USA invasion of Iraq in 2003. It was only then, when PMCs called the attention of international community towards their peculiar features. However, one may conclude that the rapid growth of PMCs is also causing number of problems for the reason that PMCs, unlike the conventional armies, are motivated by monetary gain instead of any national or ideological interest.¹⁰ For the said purpose, it seems necessary to ascertain their status and compare them with private contractors.

⁸ James Cockayne, "The global reorganization of legitimate violence: military entrepreneurs and the private face of international humanitarian law", *International Review of the Red Cross*, 88 (2006), No: 863, 462-63.

⁹ Desai, Deven R., "Have Your Cake and Eat it Too: A Proposal for a Layered Approach to Regulating Private Military Companies", (March 28, 2006). *University of San Francisco Law Review*, Vol. 39, No. 4, p. 825, 2005; TJSJL Legal Studies Research Paper No. 893857. Available at SSRN: <https://ssrn.com/abstract=893857>, last accessed on 30-10-2018.

¹⁰ Emanuela-Chiara Gillard, "Business goes to war: private military/security companies and international humanitarian law", *International Review of the Red Cross*, 88 (2006), no; 863, 527-532.

2. Status of PMCs and Private Contractors

No provision of International Humanitarian Law (IHL) specifically defines the term “Private Military Company”. However, the term “mercenary” has been defined in Article 47 of Additional Protocol of 1977 (API) (discussed later). One of the reasons, why international law has ignored such an important aspect to define PMCs is that it primarily focuses on states.¹¹ However, as discussed above, a synonym word “mercenary” is used in various international law instruments and for ascertaining the status of PMCs, it is appropriate to discuss the legal status of mercenaries. Tracing back the history of IHL, the early conventions on IHL such as the Hague Conventions have not addressed the issue of PMCs nor have mentioned the word “mercenary”. However, Hague Convention V mentions the “mercenary activity” implicitly.¹² It’s Article 4 provides that “Corps of combatants are not to be formed, nor are recruiting agencies to be opened, on the territory of a neutral state to assist belligerents in an armed conflict”. Furthermore, it’s Article 5 imposes obligation on all the neutral states to ensure that the acts referred in Article 4 *supra* do not take place in the territory of a neutral state. Article 17 of the same convention also provides that an individual who assists belligerent by taking up arms openly, cannot avail the protection provided to neutral states, but it has been provided therein that such individual is entitled to the protection provided to a national of a belligerent state.¹³

After the Hague Conventions, the main international law instruments of IHL are Geneva Conventions of 1949 (GCs) and their Additional Protocols of 1977 (APs). PMCs and mercenaries

¹¹ Chesterman, Simon and Lehnardt, Chia, “From Mercenaries to Market: The Rise and Regulation of Private Military Companies (Introduction)”, Oxford University Press, 2007; NYU Law School, Public Law Research Paper No. 07-09. Available at: SSRN: <https://ssrn.com/abstract=985837>, last accessed on 07-07-2018.

¹² Katherine Fallah, “Corporate actors: the legal status of mercenaries in armed conflict”, *International Review of the Red Cross*, 88 (2006), no: 863, 606-07.

¹³ Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907), entered into force on January 26, 1910.

have not been mentioned in the GCs. The first international law instrument directly dealing with mercenaries is API.¹⁴ Article 47 of API is the main provision which defines and describes the rights and duties of mercenaries in the following manner:-

Article 47 – 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.¹⁵

The definition mentioned above seems to be exhaustive but the main problem is that API deals with international armed conflict (IAC) and fewer states have ratified it, hence, its provisions are not binding on all the states. However, International Committee of the Red Cross (ICRC), on the basis of consistent state practice, considers Article 47 as part of customary international law, hence, considers it binding on every state irrespective of its ratification. Therefore, this provision is binding on all the states irrespective of the fact, whether the same is ratified by them or not.

¹⁴ Ibid.

¹⁵ Article 47 of Additional Protocol-I of 1977 to Geneva Conventions of 1949.

The provision of Article 47 *supra* was first proposed by the Nigerian delegation participating in the Diplomatic Conference of 1976 and the same was later on adopted in 1977. The text proposed in 1976 was different from the current text of the provision and was adopted with the consensus. However, it was further clarified that adoption of the same with consensus does not mean that all the states were agreed upon the text rather it was an outcome of compromise for the reason that the provision has specifically ousted the mercenaries from the protection afforded to the combatants and giving them status of POWs in the hands of adversaries. Another reason is that Article 47 was adopted to appease African Nations, which stipulated six conditions (mentioned in Article 47(2) a-f *supra*) to meet the minimum standard for a mercenary and practically existence of all six conditions at one time was not possible. Therefore, the purpose of introducing the Article in this form was deliberate with the intention to make its scope narrow.¹⁶

After AP I, International Convention against the Recruitment, Use, Financing and Training of Mercenaries, of 4 December 1989 has also defined the term and stipulated the rights and duties of mercenaries. Article 1 of this convention defines the term mercenary containing only small difference from that of API, in the following words:

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

¹⁶ Fallah, "Corporate actors: the legal status of mercenaries in armed conflict", 606-07.

2. A mercenary is also any person who, in any other situation:
- (a) Is specifically recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - (i) Undermining the territorial integrity of a State;
 - (ii) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
 - (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
 - (c) Is neither a national or a resident of the State against which such an act is directed;
 - (d) Has not been sent by a State on official duty; and
 - (e) Is not a member of the armed forces of the State on whose territory the act is undertaken".¹⁷

The preceding provision relating to mercenaries gives a broader definition as certain acts not falling within the definition of mercenaries as provided under Article 47 *supra*, have been declared the acts of mercenaries in accordance with this definition. After going through the abovementioned provisions, we can say that the term is though defined but there is no adverse legislation to the mercenaries, rather the existence of the mercenary activities has been recognized in this protocol and attempts have been made to define and codify the definition and status of mercenaries in the context of IHL.¹⁸

With regard to PMCs, as discussed earlier, no binding provision of IHL deals with the legal status of PMCs. The Montreux Document of 17 September 2008 is the first document of international law which applies to PMCs while they are operating in an armed conflict, but the document itself states that it is not

¹⁷ Majors S. Goddard, Maj. Ra Inf, "The Private Military Company: A Legitimate International Entity within Modern Conflict, A thesis presented to the Faculty of the U.S. Army Command and General Staff College in partial fulfilment of the requirements for the degree of, Master of Military Art and Science (General Studies)", (Kansas : Fort Leavenworth, 2001), "<http://www.globalsecurity.org/military/library/report/2001/pmc-legitimate-entity.pdf>", last accessed on 05-09-2010.

¹⁸ Ella Landau-Tasser, "Non-Combatants in Muslim Legal Thought", Centre of Islam, Democracy, and the Future of La Landau-Tasser, (Hudson Institute, 2006.), available at: <http://www.currenttrends.org/docLib/20061226_NoncombatantsFinal.pdf>, (last accessed on August 27, 2010).

binding.¹⁹ On the other hand, only a few states adopted some regulations specifying the parameters of the functions of PMCs, in order to permit them operate inside and outside their territory. For instance, South Africa's, Regulation of Foreign Military Assistance Act, 1998 was adopted on the subject. Preamble of the Act describes that it is "to regulate the rendering of foreign military assistance by South African juristic persons, citizens, persons permanently resident within the Republic and foreign citizens rendering such assistance from within the borders of the Republic; and to provide for matters connected therewith".²⁰ Recent examples of drafting regulations on the issue also include "Sierra Leone's National Security and Central Intelligence Act of 4 July 2002, the Coalition Provisional Authority's (CPA) Memorandum No. 17 of 26 June 2004 on Registration Requirements for Private Security Companies and the Kurdistan Regional Government's guidelines on Private Security Company Requirements for Iraqi Kurdistan dated 7 December 2005". The Governments of Iraq and Afghanistan are in the process of drafting specific regulations on the issue.²¹ However, such efforts to regulate PMCs are on national level. Since the Montreux Document itself says that it is not a legally binding document, therefore, one may argue that PMCs have no legal status under international law.

From the foregoing discussion, it is also observed that the term "Private Military Company" has neither been defined in IHL nor is there any binding law or regulation to deal with the issue. Moreover, PMC contractors do not wear uniform which is a pre-

¹⁹ "The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict", Geneva, Switzerland: International Committee of the Red Cross, 2009), available at: <https://www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/montreux-document.html>, last accessed on 18-09-2018.

²⁰ "Regulation of Foreign Military Assistance Act. 1998", available at <https://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/SouthAfrica6.pdf>, last accessed on 02-04-2019.

²¹ Michael Cottier, "Elements for contracting and regulating private security and military companies", *International Review of the Red Cross*, 88 (2006), no: 863, 641-45.

requisite for combatant status. They are rarely subjected to command of military personnel and generally do not keep themselves within the military discipline as regular armed forces are required to follow in obedience with the laws and customs of war.²² Therefore, one of the arguments is that PMCs have no status under international law rather their very existence is unlawful. Proponents of this theory argue that PMCs and their staff have no international obligations to comply with. On the other hand, some legal experts have argued that this idea is misleading. International law and particularly, IHL might not determine the status of PMCs, as it is not the scope of IHL, but it imposes rights and obligations on all the persons taking direct part in hostilities and the employees of PMCs fall under the same category. They further contend that in absence of any specific legislation, customary international law would be applicable. However, the main problem is to determine the status of the members of PMCs. They can either be declared combatants or non-combatants. If they are declared combatants, they can be targeted as a lawful target and will have right to participate in hostilities and if fall in the hands of adversary, will be entitled to the status of Prisoners of War (POWs). On the other hand, if they are declared civilians, they are not legitimate target and therefore, being civilians they have no right to take direct part in hostilities and if they do so, they can be targeted but will be “unlawful combatants” or “unprivileged belligerents” and being so, if they are captured, will not be entitled to the status of POWs.²³ Therefore, it can be held that legal status of PMCs is not clear in IHL.

Keeping in the view the vague status of PMCs, certain questions can be raised: as to whether their very existence is lawful; If their status is valid, how to regulate their functions and the methods of their operations under international law; and, If they are unlawful, how to prevent them to operate and how to compel states promoting PMCs to discard the practice of PMCs?

²² David Isenberg, “Are PMCs POWs”?, United Press International, (August 1, 2008). Available at: <http://www.cato.org/pub_display.php?pub_id=9580> (last accessed on June 25, 2010).

²³ Chiara, 527-532.

As a general principle, while addressing these questions, it is said that as no one falls outside law, therefore, these PMCs need to be regulated by international law, otherwise it will remain a tool in the hands of corporate empire to influence international politics, as these PMCs allegedly violate state sovereignty and lack accountability.

International Committee of the Red Cross (ICRC) is engaged in the work on this issue. After GCs and APs, ICRC has raised number of concerns and pointed out areas where the law of armed conflict (LOAC) needs to be evolved.²⁴ Legal vacuum related to PMCs is also under consideration and in order to resolve the same, it has been suggested that the acts of these corporations should be focused instead of their identity.²⁵

Andrew Clapham says that in accordance with political debates on the issue of PMCs, mercenaries and non-state actors at UN and OAU, it has been suggested by contemporary experts of IHL that in order to determine the status of PMCs, two main approaches can be adopted. The *first* one is to label them mercenaries, and consequently declare them illegal and illegitimate combatants, while the *second* approach is to fix state responsibility in the context of PMCs. The second approach was addressed for the first time by the UN Human Rights Council, which was mandated to monitor the effects of “private companies offering military assistance on the enjoyment of human rights” and on the other hand, its mandate is to “prepare draft international principles that encourage respect for human rights on the part of those companies in their activities”.²⁶ “Working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination” was established by the Council in 2005 in

²⁴ Jensen, Eric Talbot, “The Future of the Law of Armed Conflict: Ostriches, Butterflies, and Nanobots”, 35 Michigan Journal of International Law 253 (2014). Available at: SSRN: <https://ssrn.com/abstract=2237509>, last accessed on 11-07-2018.

²⁵ Chesterman, Simon and Lehnardt, Chia, “From Mercenaries to Market: (Introduction).

²⁶ Andrew Clapham, “Human rights obligations of non-state actors in conflict situations, International Review of the Red Cross”, 88 (2006), no: 863, 513-19.

pursuance to Commission on Human Rights resolution 2005/02. Working group was mandated to prepare recommendations with regard to the standards in order to fill existing gaps; to curtail human rights violations; to seek opinions from governments, intergovernmental and non-governmental organizations; to monitor mercenaries and their activities; to study causes and sources of PMCs and their activities, and to monitor them.²⁷ In its 2006 report, working group agreed that PMCs should apply draft norms on the responsibility of transnational corporations with regard to human rights approved by the “UN Sub-Commission on the Promotion and Protection of Human Rights in 2003”. Working group also agreed to establish a complaint mechanism against PMCs. However, these decisions of the working group could not help the ‘Council’ to adopt and implement them on PMCs due to lack of cooperation.²⁸

Moreover, whilst adopting the second approach, it becomes difficult to fix the responsibility for the reason that it is not clear as to whether the responsibility in IHL can be extended beyond states. It also becomes difficult to ascertain as to whether PMCs can be held liable for IHL violations. This aspect of PMCs has not been addressed at international level, however, it was addressed at domestic level by the USA Federal Court.²⁹ In a case against “Talisman Energy Inc.”, it was held that corporations are also under obligation to abide by and protect the norms of international law.³⁰ On the issue of human rights abuses committed by the company in Sudan, Judge Schwartz concluded:

²⁷ Office of the United Nations High Commissioner for Human Rights, “Human Rights Council main report and annex ‘Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council’”, available at <https://www2.ohchr.org/english/issues/mercenaries/>, last accessed on 09-04-2019.

²⁸ Clapham, p. 513-19.

²⁹ Ibid.

³⁰ The Presbyterian Church Of Sudan, et al. v. Talisman Energy, Inc. And Republic of The Sudan, Court of Appeal for the Second Circuit, United States of America, Judgment dated, 2 October 2009, available at <http://www.internationalcrimesdatabase.org/Case/43/Presbyterian-Church-Of-Sudan-v-Talisman-Energy/>, last accessed on 10-07-2018.

“[S]ubstantial international and United States precedent indicates that corporations may also be held liable under international law, at least for gross human rights violations. Extensive Second Circuit precedent further indicates that actions under the ATCA [Alien Tort Claims Act] against corporate defendants for such substantial violations of international law, including jus cogens violations, are the norm rather than the exception.”³¹

The verdict indicates that acts of corporations though not entail responsibility for each and every violation of IHL or Human Rights Law (HRL) but at least make them responsible for gross violations of settled principles of international law. However, only substantial violations have been made accountable and it is also left uncertain what comes in the definition of substantial violations.

Contrary to the efforts to ban PMCs, or at least regulate their operation by law, the number of PMC personnel has been increased in the forces of different countries and especially the developed countries. It is evident that they have been employed for multiple objects, sometimes for combat operation, and at times for negotiations, advisory, logistic support and intelligence services. For instance, USA has employed PMC personnel for its operations in Iraq and they are between 15,000 to 20,000, in number and this number is 15 percent of the total US forces in Iraq, which is 130,000 soldiers.³² However, the main point is that these private contractors have no accountability to the US military and they are free to carry out their operations. On the other hand, international organizations have also started employment of private military contractors, for instance, the use of these private military soldiers by NATO forces was witnessed in Balkans. Moreover, almost all the intergovernmental organizations and NGO's including UN have employed such private military soldiers to provide them security and support. However, the ratio of private military soldiers as compared with the regular armed

³¹Ibid.

³² Peter Benicsák, “Advantages And Disadvantages Of Private Military Companies”, Available at: <https://www.unob.cz/eam/Documents/Archiv/EaM_1_2012/BENIC_SÁK.pdf> (last accessed on April 20, 2018).

forces is less which amounts to almost 10 per cent of the total forces.³³

Notwithstanding its pros and cons, the demand for private military services is increasing day by day; and one of the main reasons is that the expenditure occurring in conducting operations by PMCs is much less than that of regular armed forces and most important cases are those in which a government along with or without its regular armed forces employs a PMC to help them in an armed conflict. For instance, PMCs were hired by USA to carry out its operations in Iraq and the governments of Sierra Leone and Angola have also deployed PMCs in their conflicts.³⁴ However, it is also a fact that the PMC's employed by USA have been exempted from accountability so there are some important issues of human rights, sovereignty and accountability and for the said purpose, it is necessary to determine the rights and duties of PMCs.³⁵

One of the reasons for lack of certainty in this regard is that LOAC is primarily based upon state practice and everything comes out of the agreements executed between states. Accordingly, bodies other than states are not considered to become parties to such agreements amounting to international treaties.³⁶ Issue of PMCs is also addressed by a group of experts by the "University Centre for International Humanitarian law" and UK has also published its Green Paper titled "Private Military Companies: Options for Regulation" while addressing the issue, proposes various measures including direct ban on PMCs and formulating specific regulations on the issue.³⁷

³³ Tasserou.

³⁴ Michael Scheimer, "Separating Private Military Companies From Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support the Reflects Customary International Law", *American University International Law Review* Volume 24, Issue 3, Article 6 (2009), available at: <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1097&context=auilr>, last accessed on 29-09-2018.

³⁵ *Ibid.*

³⁶ Talbot, "The Future of the Law of Armed Conflict".

³⁷ *The Presbyterian Church Of Sudan, et al. v. Talisman Energy, Inc.*

3. Legal Regime Applicable on PMCs

Various contemporary scholars on IHL have opined that since the object of mercenaries and PMCs is the same and they operate to earn money, hence, the legal regime applicable on mercenaries should also be extended to PMCs. However, according to other group of scholars, there is a big difference between a contractor and a mercenary. PMCs are not considered mercenaries due to number of reasons. One of the reasons is that the definition of mercenary under Article 47 of AP I is drafted so narrowly that it does not include PMCs. Efforts were made by ICRC and the TMC Asser Institute to clarify the notion of direct participation in hostilities and while dealing with the issue of PMCs, it was observed that there is lack of clarification in the GCs and their accompanying protocols about the function and status of PMC employees. It was also observed that a number of fundamental questions regarding their status have been left unanswered. For instance, it is not clear as to whether force can be used during an armed conflict by PMCs? Whether they become legitimate targets and can be criminally prosecuted for their alleged war crimes and hostile actions? All these questions do not find any answer in GCs and APs.³⁸ It is also said that the key barriers to deal with the issue are not legal rather are political.³⁹ Declaring the contractors as combatants and imposing obligation on them to abide by the laws of armed conflict can result in immunity from prosecution and gives them POW status in the hands of adversaries. According to a few legal experts, this is the best solution and would clarify the rights and obligations of the contractors in the battlefield. Legal experts of the Foreign Affairs Committee for the Session 2001-02 suggested that these companies have the potential and ability to

³⁸ "Ninth Report of the foreign affairs committee, Private Military Companies", Session 2001-2002, Response of the secretary of state for foreign and commonwealth affairs, available at: <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmcaff/922/92203.htm> (last accessed on September 5, 2010).

³⁹ Chesterman Simon, "Leashing the Dogs of War: The Rise of Private Military and Security Companies", (September 1, 2008). Carnegie Reporter, Vol. 5, No. 1, pp. 36-45, Fall 2008; NYU Law School, Public Law Research Paper No. 08-24. Available at: SSRN: <https://ssrn.com/abstract=1162526>, last accessed on 29-09-2018.