The Status of Private Military Companies: When Civilians and Mercenaries Blur

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Introduction

‘When we had need of skilled soldiers to separate fighters from refugees in the Rwandan refugee camps in Goma, I even considered the possibility of engaging a private firm. But the world may not be ready to privatise peace.’ [i]

These are the words of UN Secretary General, Kofi Annan, whose consideration reflects a contemporary reality. While the ‘privatisation of peace’ may not be a worldwide phenomenon, it is undeniable that the private military and security sectors have seen a growth in conflict involvement.[ii] Such increasing involvement fosters various questions of legality. Most ostensibly, do Private Military and Security Companies[iii] have the right to engage in direct conflict? Do they respect International Humanitarian Law [iv] when doing so? Of equal importance is determining the legal status of a PMC/PSC employee. The status of such employees is of significance in conflict areas, as it may determine their privileges upon capture by a party to a conflict. However, for PMC employees, the line between civilian and combatant may not be clear cut.

This essay will explore the legal history of combatant rights, the rise of PMC/PSC’s and the ambiguous status of their employees, focusing on staff members of military and mercenary background. Finally, the essay will consider South Africa’s Regulation of Foreign Military Assistance Act, and to what extent this attempt to curb mercenary and PMC/PSC activity succeeds in bolstering IHL and determining the status of captured persons during conflict.

A Brief History of ‘Unlawful Combatant’ Regulation

Before analysing the history of combatant and civilian rights during conflict, it is important to consider to what extent the term ‘unlawful combatant’ is legally valid. Some critics argue that the term is a vague one not even adequately defined by the rules of international law’s *jus in bello* doctrine, and that the term has only become frequently cited since 11 September 2001 and the rise of the War on Terror.[v] Other critics go further and point out that, heretofore, no international treaty has specifically used or addressed the term. [vi] This lack of legal coverage may mean that the term could be seen as having no legal validity. Nonetheless, the history of international treaties has illustrated “general clause[s] of protection” that
attempt to cover all prospective persons during conflicts.\textsuperscript{vii}

The Hague Treaty of 1899 and its successor, the Hague Convention of 1907, both gave vague references to the necessity of ‘humane treatment’ of captured combatants.\textsuperscript{viii} While ‘unlawful combatants’ were not specifically mentioned, Article 3 of the Annexes of both Treaties stated that the armed forces of parties to a conflict could consist of both combatants and non-combatants.\textsuperscript{ix} Such vague phrasing can be interpreted in various (and contradictory) ways. On the one hand, if armed forces may consist of both combatants and non-combatants, Article 3 of both Treaties may simply admit that armed forces of both parties to a conflict may employ (civilian) individuals for necessary non-combat tasks, such as logistics support.\textsuperscript{x} However, it is also possible that both articles tacitly expressed the right of humane treatment for \textit{de facto} combatants, who participated in direct hostilities in the name of armed forces of a party to a conflict, but whose right to participation may be disputed.

This latter argument was further explored during 1949 debates over the application of Article 5 of the Third Geneva Convention. Discussing protection of persons present in a conflict led to much disagreement over the extent of protection granted by Article 5.\textsuperscript{xi} Of particular note is the recorded debate between a Soviet delegate and one Captain Mouton, representing the Netherlands.\textsuperscript{xii} Present delegates wished to extend the scope of Article 5 to cover not only ‘authorized belligerents’ but “…civilians who had taken up arms to defend their life, their health, their near ones, their livelihood, under an attack which violated the laws and conditions of war”, with the purpose of ensuring that captured civilians “should not be shot after summary judgment but should be treated according to the provisions or at least the humanitarian principles of the [Third Geneva] Convention”.\textsuperscript{xiii}

The concern of such delegates revealed a desire to grant a minimum level of rights to ‘unlawful combatants’ (though the term was not recorded during the Conference).\textsuperscript{xiv} Their concern was starkly contrasted by Captain Mouton, who insisted that a pragmatic approach to determining the status of captured persons was needed. Rather than wait for the formation of a “competent tribunal” to ascertain a combatant’s status, the reality of ongoing conflict would leave the capturing party’s military commander in charge of deciding forthwith whether a \textit{de facto} prisoner is entitled to enjoy Article 3 of the Third Geneva Convention. If not, Mouton argued, the prisoner in question may be “…shot on the spot.”\textsuperscript{xv}

Mouton’s comment was opposed by the Soviet delegate, who counterclaimed that Article 3 of the Third Geneva Convention does not anywhere state that those not fulfilling its criteria may be summarily executed. Further, the delegate went on to explain that “[i]f a person is not recognized as a prisoner of war under…Article 3, such a person would then be a civilian”.\textsuperscript{xvi} This comment was strongly disputed by Mouton, and the exchange itself reveals the nascent stages of ‘unlawful combatant’ rights, and the difficult process of addressing ‘unlawful combatants’ who may not necessarily be civilians but organized militias operating without official authority (or loyalty) to a party of the conflict.\textsuperscript{xvii}

The Third Geneva Convention would be followed decades later by Protocol I.\textsuperscript{xviii} Protocol I’s Article 75 of Fundamental Guarantees would establish a minimum standard of humane treatment for all captured persons not granted “…more favourable treatment under the Conventions or under this Protocol.”\textsuperscript{xix} As with its predecessors, the Article does not mention ‘unlawful combatants’; however, it is interesting to note that the Protocol was created just over a decade before the end of the Cold War and the contemporary rise of PMC/PSC’s and mercenary use.\textsuperscript{xx}

\textbf{The Rise of Private Military Companies and the Use of Mercenaries}

The use of PMC’s and PSC’s saw a great surge after the end of the Cold War.\textsuperscript{xxi} While such companies were (and still are) commonly hired to provide logistical support and advice,\textsuperscript{xxii} there is concern over the prospect that, because of their private nature, company managers and employees are indifferent to
legitimacy, encouraging subsequent lack of respect for the rules of war.  

This lack of respect is well exemplified by the dress code (or lack thereof) of employees in conflict areas within the context of determining their rights as captured persons. Article 4 of the Third Geneva Convention outlines identification of prisoners of war. Among its criteria are the open carrying of arms and the wearing of a distinctly recognizable sign (presumably as part of a uniform).

The complexities of such criteria are compounded by PMC/PSC employees in Iraq and Afghanistan especially, who have been criticized for the use of pseudo-military uniforms. This practice, combined with the open bearing of arms causes understandable confusion as to their combatant status. If captured, it is possible that such employees will be granted privileges not due to them, being mistaken for members of a state’s armed forces. However, a further complication arises when considering that PMC/PSC employees charged with non-military tasks (and thus regarded as civilians) may also wear such uniforms in order to distinguish themselves from employees of other PMC/PSC companies also present. Furthermore, such civilians may feel compelled to carry arms simply for their own protection due to their hazardous working environment. Finally, the condition of wearing a distinctive sign may also be an issue. Critics like Emanuela-Chiara Gillard argue that this condition is least likely to be satisfied, as PMC/PSC employees may not adhere to it. Indeed, perhaps a business attitude of profit before law may encourage such employees to avoid the wearing of a sign precisely to prevent identification and increase chances of violating IHL if it serves company interests. Be this the case, the criteria of Article 4 cease to be clear-cut.

The concern of controlling PMC/PSC’s has often been intertwined with concern over the use of mercenaries. Hence, any form of regulation must take both issues into account. One form of regulation considered by certain critics is for (client) states to incorporate PMC/PSC employees into their own army. Such incorporation should determine affected PMC employees as members of armed forces of a state party to a conflict, granting them clear rights as prisoners of war. However, both Lindsey Cameron (see footnote 29) and Gillard argue that such cases will be rare, as it would defeat the purpose of privatization and increase costs for the state. Further, the United Nations is also attempting to restrict the potential of such practice. Tackling the use of mercenaries as a means to violate human rights, a 2010 working paper by the UN effectively restricts incorporation of PMC members to Home States (i.e. the state where a PMC is effectively managed). Should this working paper become a legal act, it will likely curb the practice of client states incorporating PMC members into their armies. Although the UN’s approach may be well intended in order to discourage the use of mercenaries, it does not address the de facto practice of states hiring PMC/PSC’s to reduce costs and casualties of their own forces. An inability to incorporate PMC members may not only prevent pragmatically clear distinctions between ‘unlawful combatants’ and prisoners of war, but may also undermine a client state’s attempt to ensure greater oversight of a hired company to prevent abuse of IHL.

South African Regulation

South Africa’s attempt to regulate PMC activity is an interesting example given the country’s history. Once again, the post-Cold War period becomes the backdrop for a rise in privatised security and conflict resolution throughout the African Continent. Specifically, South Africa’s attempt to embrace democracy led to the disbanding of various battalions and units. Although offered financial compensation, many such persons, having known nothing but organized conflict, sought employment in the one sector that would welcome their military skills, joining PMC’s (whose clientele often included non-state actors, such as private mining companies). This history, combined with the surge of PMC use (and recruitment of former soldiers by PMC’s themselves), has led the South African government to launch the Regulation of Foreign Military Assistance Act.
Ultimately, the Act seeks to prohibit direct participation in hostilities for private gain. However, the Act’s approach of such a broad feature does not distinguish between mercenaries and Private Military Companies. One can argue that by placing PMC’s and mercenaries in one category through such broad definitions, there can be no distinction between PMC’s as corporations, PMC employees and, more importantly, PMC civilian employees, versus employees who may be engaged in military tasks (including direct conflict) and thus considered mercenaries. Without such distinctions, captured PMC employees may not be given accurate rights as prisoners of war. If assumed to be mercenaries by the capturing party, their rights, even if they are civilians, may be unjustly minimal.

Of more serious note is the Act’s lack of regulation over humanitarian activities. This loophole in the Act may be easily exploited by PMC/PSC’s, who will cite humanitarian activity to maintain a veil of legitimacy. Employees who are engaged in military conflicts but formally regarded as humanitarian workers or assistants (and thus civilians) may lack the necessary accessories required to be identified as a combatant (bar the carrying of arms). While a lack of such accessories should automatically grant them the status of ‘unlawful combatant’, those of physical similarity to the nationals of the state ‘hosting’ a conflict may be mistaken for a ‘native civilian’, which may positively (but unjustly) grant them a prisoner of war status they are not entitled to.

Conclusion

The contemporary rise of PMC use has led various critics to scrutinise the legality of PMC operations, with conflicts in Iraq and the African Continent serving as excellent case studies. South Africa’s transition to democracy has contended with the country’s military history. The result has been the dispersal of South African citizens with military backgrounds, recruited by PMC/PSC’s in areas of conflict such as Iraq. This essay has explored the South African response to this development through the Regulation of Foreign Military Assistance Act and revealed its key weaknesses. In addition, the UN’s own working paper on curbing mercenary activity has been highlighted. What both these forms of regulation seem to lack is a pragmatic approach that does not necessarily attempt to deny the existence of mercenaries and military activities of PMC’s (as South Africa’s Regulation does). Instead, the existence of military activity and employees geared toward such activity should be acknowledged.

Perhaps future forms of regulation should consider how the Doctrine of Superior Responsibility may be used to regulate the activities of PMC/PSC’s, without too great a cost to a hiring state. If the managers of PMC/PSC’s (the business equivalent of a military commander) are strongly subject to the criteria of this doctrine, they may exercise much greater oversight vis-à-vis the activities of their employees and compliance with IHL.

This approach may well be viable, as some critics argue that the phrasing of Article 28 of the Rome Statute of the International Criminal Court allows civilians (i.e. company managers) to be just as culpable for failure to prevent war crimes. Greater oversight may foster greater interest in the rules of war by PMC’s and hence, applying the Doctrine of Superior Responsibility may eventually lead to PMC’s making clear distinctions between civilian and combatant employees so as to ensure any captured persons are granted their full rights.

It is worth mentioning that some critics disagree with the civilian application of the Doctrine of Superior Responsibility, arguing that it can only apply to military commanders and officers. Be this the case, perhaps a compromise is possible. Such a compromise would consist of incorporating only managers of a hired PMC/PSC into the armed forces of the client state. This incorporation would allow managers to be subject to the military laws of the hiring state as military commanders (albeit over ‘civilian PMC/PSC employees) and also subject to the Doctrine of Superior Responsibility without doubt. At the same time,
however, states will still save on costs by not incorporating all employees of a hired PMC/PSC into their armed forces. As a military officer, a manager would be answerable to violations of IHL, provided that the “forces under his or her control” are interpreted as the PMC/PSC staff members of that manager’s company.

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[ii] This reality is confirmed and discussed by various critics, including Emanuela-Chiara Gillard, Legal Advisor in the Legal Division of the International Committee of the Red Cross; and Christopher Spearin, Assistant Professor in the Department of Defense Studies at the Canadian Forces College. Sources: Gillard, Emanuela-Chiara, ‘Business Goes to War: Private Military/Security Companies and International Humanitarian Law’, in International Review of the Red Cross, Vol. 88, No. 863: 525-572, 2006; and

[iii] Henceforth referred to as PMC’s and PSC’s, respectively.

[iv] Henceforth referred to as IHL.


[vii] Ibid, p. 53.

[viii] See Article 3 of both Treaties, which states that “[t]he armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.” Sources: 1899. *Convention (II): with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*. Annex to the Convention: Regulations respecting the laws and customs of war on land #Section I: On belligerents #Chapter I: On the qualifications of belligerents, Article 3; and 1907. *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, Annex to the Convention: Regulations respecting the laws and customs of war on land #Section I: On belligerents, Article 3. Both Treaties available online at: [http://www.icrc.org/ihl.nsf/INTRO?OpenView](http://www.icrc.org/ihl.nsf/INTRO?OpenView) (last visited 9 July 2013).

[ix] Ibid.

[x] This interpretation is based on the (admittedly contemporary) fact that many private firms (consisting of civilian employees) are hired by state armed forces for precisely such purposes. It is therefore conceivable that, historically speaking, armed forces of the early 20th Century may have used civilians for necessary non-combat tasks. The nature of such individuals’ job description would allow them to be viewed as non-combatants. For contemporary arguments on the increasing use of private business employees for logistics of state armed forces, see Anna Leander’s *Eroding State Authority? Private Military Companies and the Legitimate Use of Force*, and the House of Common’s 2002 report, ‘Private Military Companies: Options for Regulation’.

[xi] See comments made by an ICRC delegate on the potential scope of Article (as discussed at the Diplomatic Conference of 1949). For more contemporary views, see critics such as Baxter, Draper and Kalshoven. Source: The Legal Situation, pp. 54-56.

[xii] For a summary and brief analysis of this exchange, see ibid, pp. 55-58.

This prospect is implied by Mouton’s comment that those who do not fall under Article 3 will be deemed “[…]) franc tireuer” (guerillas). Mouton’s belief that such persons should be promptly shot foreshadows the contemporary attitude toward mercenaries, revealed by non-fiction literature with such titles as Mercenaries: The Scourge of the World, published in 1999. Sources: Ibid, and Arnold, Guy. 1999. Mercenaries: The Scourge of the World. Palgrave Macmillan


Various critics such as Alyson J.K. Bailes, Spearin and Leander agree that the decades following the Cold War saw a rise in the use of PMC’s, as Western states (re)discovered privatized methods of waging small-scale wars. At the very least, such critics acknowledge that the post-Cold War period has led to a significant shift in security needs and implementation. Sources: Bailes, Alyson J.K., Krause, Keith, Winkler, Theodor H, Policy Paper No-18: The Shifting Face of Violence, Geneva: Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2007, p. 1; Leander, Anna, Eroding State Authority? Private Military Companies and the Legitimate Use of Force. Rome: Centro Militare di Studi Strategici, 2006, p. 19; Spearin, Challenges of Moulding A Marketplace, p. 3.

Analyzing the contracts of various PMC/PSC’s reveals majority payment for logistics and administrative support. Source: Business Goes to War, p. 526.

Challenges of Moulding a Marketplace, p. 3.


Business Goes to War, p. 535.

Ibid.

It is perhaps for reasons such as this that critics such as Gillard and also Francesco Francioni argue
that prosecution of Private Military Companies has been rare and frustratingly difficult due to legal grey areas and a lack of clarity regarding combatant status. Sources: Business Goes to War, p. 543; Francioni Francesco, Private Military Contractors and International Law: An Introduction, European Journal of International Law, The, 19 (5): 961-964, 2008, p. 963.


[xxx] Ibid.

[xxxi] Ibid; and Business Goes to War, p. 533.


[xxiv] Implementing South Africa's Regulation, pp. 5-6.

[xxv] Ibid, pp. 3 and 16.


[xxvii] Ibid.

[xxviii] ‘[H]umanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict’ are excluded from the scope of the Act’s regulation. Source: Ibid.

[xxix] Ibid. It is, however, worth mentioning that while PMC/PSC’s may exploit this loophole, prosecution of individual employees may occur. As of 2005, only two individuals have been successfully prosecuted, however, with meager financial penalties ranging from 1500-3000 USD. Source: Clarno, Andy, Vally, Salim. 2005. Iraq: The South African Connection. Available online at: http://www.corpwatch.org/article.php?id=12061
[xli] Such accessories may not only include the open carrying of arms or distinctive signs, as indicate in Article 4 of the Third Geneva Convention, but also the wearing of an identification card. Certain identification cards may grant the wearer the right to be armed with single light weapons, while still being regarded as civilians during a conflict. Source: Protocol I, Annex I: Regulations concerning identification. Chapter V: Civil Defence. Article 15 – Identity card.

[xlii] For example, mercenaries are not entitled to prisoner of war rights. However, the definition of ‘mercenary’ excludes nationals of a party to the conflict or residents of territory controlled such a party. See ibid, Article 47 – Mercenaries.

[xliii] Article 28 of the Rome Statute of the International Criminal Court defines Superior Responsibility as a duty held by "[a] military commander or a person effectively acting as a military commander […] [to be] criminally responsible for crimes […] committed by forces under his or her effective command and control, where […] that […] person […] should have known that the forces were committing or about to commit such crimes.” Source: 1998. Rome Statute of the International Criminal Court. Rome: International Criminal Court, p. 19 (emphasis added). Available online at: http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf (last visited 9 July 2013).


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Nicolai Due-Gundersen is a Jordan-based researcher currently associate with the Arab Institute for Security Studies and the Jordanian Interfaith Coexistence Research Center. His work focuses on energy politics of the MENA region with an emphasis on hydrocarbon military security and how MENA states can merge hydrocarbon development with green energy development policies.


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