



PRIV-WAR Report – Canada

National Reports Series 03/09

Beyond the Law?
The Regulation of Canadian Private Military and Security Companies
Operating Abroad

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PRIV-WAR

Regulating privatisation of “war”: the role of the EU in assuring the compliance
with international humanitarian law and human rights

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Table of Contents

I-INTRODUCTION	3
II-CANADA AS A HOME STATE.....	5
1. THE CANADIAN PRIVATE MILITARY AND SECURITY INDUSTRY.....	5
1.1 CANADIAN PMSCS OFFERING ARMED SERVICES	5
1.2 CANADIAN PMSCS OFFERING LOGISTICAL SERVICES.....	6
1.3 CANADIAN CITIZENS AS PMSC EMPLOYEES	7
2. EXISTING REGULATORY AND LEGISLATIVE MEASURES	7
2.1 FOREIGN ENLISTMENT ACT	7
2.2 EXPORT CONTROL OF ARMS AND CERTAIN TECHNOLOGY AND SPECIAL ECONOMIC MEASURES	8
2.3 INCREASE FINANCIAL BENEFITS TO CURB APPEAL OF PRIVATE SECTOR TO CANADIAN FORCES MEMBERS	10
2.4. CRIMINAL LAW.....	11
2.4.1. CRIMINAL LAW AND CORPORATIONS:.....	11
2.4.2. SOURCES OF CRIMINAL LAW:	13
2.5. CIVIL LAW	15
2.5.1. GENERAL REMARKS ON CIVIL LIABILITY	15
2.5.2. JURISDICTION	15
2.5.3. PIERCING THE CORPORATE VEIL	17
2.5.4. CHOICE OF LAW ISSUES	17
2.5.5. <i>FORUM NON CONVENIENS</i>	17
III – CANADA AS A CONTRACTING STATE	19
1. INTRODUCTION	19
1.1. DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE.....	19
1.2. THE CANADIAN FORCES	20
2. ACCOUNTABILITY	22
2.1. CANADIAN FORCES APPROACH TO CONTRACTING WITH PMSC	22
2.2. STATUS OF FORCES AGREEMENTS AND IMMUNITIES.....	24
2.3. THE CODE OF SERVICE DISCIPLINE	25
2.4. CONTRACT MANAGEMENT	27
3. CANADA’S CIVIL LIABILITY	28
CONCLUSION	32

I-INTRODUCTION

The private military and security sector has expanded rapidly over the past decade¹ and there is every reason to expect this trend to continue. Western militaries are increasingly dependent on them when deploying abroad and demands from the private sector and humanitarian organizations operating in high-risk zones are unlikely to diminish

Allegations, sometimes substantiated, of abuses have resulted in widespread calls for international regulation of a sector that seems outside the control of traditional state-based accountability mechanisms.² PMSCs frequently operate in jurisdictions where governance is weak and the rule of law inconsistent. The home states of companies and security personnel appear reluctant to regulate their activities abroad, in part for fear that companies will move their headquarters to more accommodating jurisdictions. And where states are the contractors themselves, they may be disinclined to act at the same time as effective regulators.

This paper was commissioned as part of a larger research project on “regulating the privatization of war” led by the European University Institute.³ It seeks to describe the existing state of Canadian legislation, regulation and policy relevant to PMSCs operating outside of Canada. It focuses both on Canadian PMSCs and Canadian nationals working for PMSCs (Canada as the home state) and PMSCs hired by the government of Canada (Canada as the contracting state).⁴

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¹ Peter W. Singer, “War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law” (2004) 2 *Columbia Journal of Transnational Law* 521.

² James Cockayne & Emily Speers Mears, *Private Military and Security Companies: A Framework for Regulation*, (International Peace Institute, 2009), on line: International Peace Institute <http://www.ipinst.org/asset/file/428/PMSC_EPub.pdf>.

³ See online: PRIV-WAR <<http://priv-war.eu/>>.

⁴ When it comes to the operation of PMSCs in Canada, all aspects of Canadian law applicable to the conduct of private individuals and corporations operating in Canada also apply to PMSCs. No private companies are actively involved in “military” operations per se on Canadian soil, except for companies involved in the field of logistics and training, and/or in the production and distribution of military equipment, those activities raising no particular concerns from a human rights perspective. Moreover, the Private Security and Investigation Industry activities in Canada is regulated provincially, each of the ten

PMSCs are understood as including private business entities providing military and/or security services including: guarding and protection of persons and objects, whether armed or not; maintenance and operation of weapons systems; prisoner detention; advice to or training of local forces and security personnel; demining; and services in the field of logistics and personnel support such as catering, transport, maintenance and construction.

Canada does not have legislation designed to regulate either the services provided by Canadian PMSCs operating outside of Canada or the conduct of Canadian citizens working for foreign PMSCs. There are however a number of general legislative and regulatory provisions that may affect aspects of the activities performed by Canadian PMSCs. Similarly, Canada does not have legislation governing the contracting of PMSC by the Canadian government itself, though policies exist and are being further developed.

Canada is not a party to the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*,⁵ nor has Canada been substantively engaged with the Human Rights Council's *Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination*. Canada has however been an active participant in the intergovernmental initiative launched in 2006 by the Swiss Government and the International Committee

provinces and one of the three territories having their own legislation and regulations governing that industry. Those laws and regulations set the framework and conditions governing the provision of services in the field of investigation, guarding, protection of persons, property or premises, transport of valuable goods, security consulting, electronic security systems, and locksmith work. These provincial (and territorial) regimes establish licensing regimes for individuals and business entities providing those services.

Alberta: *Private Investigators and Security Guards Act*, R.S.A. 2000, c. P-23.

British-Columbia: *Security Services Act*, SBC 2007, c. 30.

Manitoba: *Private Investigators and Security Guards Act*, C.C.S.M., c. P-132.

New-Brunswick: *Private Investigators and Security Services Act*, R.S.N.B. 1973, c. P-16.

Newfoundland and Labrador: *Private Investigation and Security Services Act*, R.S.N.L. 1990, c. P-24.

Nova-Scotia: *Private Investigators and Private Guards Act*, R.S.N.S. 1989, c. 356.

Ontario: *Private Security and Investigative Services Act*, 2005, S.O. 2005, c. 34.

Prince Edward Island: *Private Investigators and Security Guards Act*, R.S.P.E.I. 1988, c. P-20.

Québec: *Private Security Act*, R.S.Q., c. S-3.5, *An Act respecting detective or security agencies*, R.S.Q., c. A-8.

Saskatchewan: *Private Investigators and Security Guards Act*, 1997, S.S. 1997, c. P-26.01.

Yukon: *Private Investigators and Security Guards Act*, R.S.Y. 2002, c. 175.

⁵ United Nations Treaty Series, 4 December 1989, 2163 at 75. As of 29 January 2009, only 32 States were parties to the convention.

of the Red Cross aimed at promoting respect for international humanitarian law (IHL) and human rights law (HRL) by PMSCs operating in situations of armed conflict.⁶ In this context, Canada supports efforts to ensure PMSCs and their personnel understand, respect and act in a manner consistent with international law, and considers that the articulation of non-legally binding standards, developed with the participation of states and non-state actors, are an important and pragmatic step forward in that direction.

II-CANADA AS A HOME STATE

1. The Canadian Private Military and Security Industry

Canada is not among the leading contributors to the global private military and security industry. It however is home to a number of PMSCs and Canadian citizens are represented within the wider PMSC sector.

1.1 Canadian PMSCs offering armed services

Some Canadian PMSCs offer armed services and related consultancy. One of those PMSCs is Garda World Security Corporation.⁷ The company, traded at the Toronto Stock Exchange (2007 annual revenue \$683 million), employs over 50,000 people globally and its services include physical security, cash handling and investigations.

GardaWorld,⁸ a 100% subsidiary of the Canadian Garda World Security Corporation, has offices around the world and offers services such as intelligence, convoy or static object protection, training for hostile environments, crisis response and management in what the company calls “high-risk markets”. GardaWorld in May 2007 claimed to have 1,800 security PMSC employees in Iraq and in Afghanistan.⁹ At that time, for example, they were providing security for the British High Commission in Baghdad.¹⁰

⁶ *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict*, Government of Switzerland and International Committee of the Red Cross, Montreux 17 September 2008, annexed to Letter dated 2 October 2008 from the Permanent Representative of Switzerland to the UN addressed to the Secretary General, U.N. Doc. A/63/467-S/2008/636, on line: United Nations <http://www.un.org/ga/search/view_doc.asp?symbol=A/63/467>.

⁷ Headquartered in Montreal, on line: <<http://www.gardaglobal.com/>>. All internet links contained in this document were last visited 17 February 2009.

⁸ Headquartered in Virginia, USA, on line: <<http://www.garda-world.com/>>.

⁹ Mary Lamey. “Garda has 1,800 workers in war zones”, *The Gazette* (15 May 2007), on line: <<http://www.canada.com/montrealgazette/news/business/story.html?id=28cd7d7e-9d92-435e-9001-960e21d467c8>>.

¹⁰ Jon Swain, “Snatched without a shot”, *The Sunday Times* (3 June 2007), on line: <<http://www.timesonline.co.uk/tol/news/world/iraq/article1875657.ece>>.

Another Canadian company, Tundra Strategic Security Solutions, offers similar services including physical security and executive protection, sniper training, explosive entry, maritime operations, risk assessments and analysis.¹¹ The company, recently hired by *The Globe And Mail* newspaper to undertake a security analysis of the situation in Afghanistan,¹² claims that it has “consultants in Iraq and Afghanistan and can begin any consulting services in those countries within 24 hours.”¹³ Another Canadian company Globe Risk Holdings offers a range of services including risk assessments, regional analysis and crisis intervention services¹⁴.

1.2 Canadian PMSCs offering logistical services

Canadian PMSCs also offer logistical services and provide equipment. The US-Canadian company SNC-Lavalin PAE Inc.¹⁵ from 2002 to 2006 received \$252 million from the Canadian government for providing logistics for the Canadian mission in Afghanistan under the “Canadian Forces Contractor Augmentation Program” (CANCAP).¹⁶ Skylink Aviation¹⁷ offers a range of aviation-related services from charter flights (personnel and cargo, helicopters and fixed-wing aircrafts), aircraft maintenance and project management. The company has worked for the United Nations, the World Food Programme, a range of commercial clients, NATO forces and as well as the Canadian Forces. ATCO Frontec¹⁸ offers construction and management of installations such as military camps and bases, airfields, maintenance of technical equipment and general logistics services. Clients include Canada’s Department of National Defence, United States Air Force, NATO and the United Nations.

¹¹ Headquartered in Toronto, on line: <<http://tundra-security.com/>>.

¹² Graeme Smith, “Taliban turning to more 'complex' attacks”, *The Globe and Mail* (26 January 2009), on line: <<http://www.theglobeandmail.com/servlet/story/RTGAM.20090126.wafghan26/BNSStory/Afghanistan/>>.

¹³ Services, on line: <<http://tundra-security.com/services.html>>.

¹⁴ Globe Risk Holdings (GRH) headquartered in Toronto, on line: <<http://www.globerisk.com/>>. Lisa Rimli and Dr. Susanne Schmeidl, “Private Security Companies and Local Populations. An exploratory study of Afghanistan and Angola”, *swisspeace*, November 2007, GRH is indicated as being active in Afghanistan, on line: <www.swisspeace.ch/typo3/fileadmin/user_upload/pdf/PSC.pdf>.

¹⁵ Headquartered in Montreal, on line: <www.snclavalinpae.com/>.

¹⁶ David Perry, “PMSC employees in Kandahar, Eh? Canada’s ‘Real’ Commitment To Afghanistan”, *Journal of Military and Strategic Studies*, Summer 2007, Vol. 9, Issue 4: p. 7, on line: <<http://www.jmss.org/2007/2007summer/articles/perry.pdf>>. Department of National Defense. “Evaluation of the Canadian Forces PMSC employee Augmentation Program (CANCAP)”, June 2006, page iii/vi, on line: <http://www.forces.gc.ca/crs/pdfs/ncap_e.pdf>.

¹⁷ Headquartered in Toronto, on line: <www.skylinkaviation.com>.

¹⁸ Headquartered in Calgary, on line: <www.atcofrontec.com>.

1.3 Canadian Citizens as PMSC employees

An unknown number of Canadian citizens work or have worked for PMSCs operating abroad. There is no requirement for those individuals to declare that activity or to obtain any specific license or permit from Canadian authorities. It has been reported that: “Records previously released under the Access to Information law have shown that Joint Task Force 2¹⁹ officers are concerned the unit is losing personnel to private military firms. Former JTF2 have found work as guns-for-hire with companies in Africa and Iraq.”²⁰ Canadian nationals have been killed²¹ in conflict zones and there have been cases of misconduct. For example, the US military ordered a court-martial for Alaa “Alex” Mohammad Ali, a PMSC employee holding Iraqi and Canadian citizenship. While working as an Army interpreter in Iraq, he is accused of stabbing another PMSC employee four times on an army base in Iraq.²²

2. Existing Regulatory and Legislative Measures

2.1 Foreign Enlistment Act²³

The only Canadian law addressing the issue of private participation of Canadian citizens in conflicts outside Canada is the *Foreign Enlistment Act*²⁴. The Act, adopted in place of a previous British statute,²⁵ was designed to “*curb participation*” in the Spanish civil war²⁶. Under this legislation, a Canadian citizen may be prosecuted if he/she: “voluntarily accepts or agrees to accept any commission or engagement in the armed forces of any foreign state at war with any friendly foreign state”, irrespective of where the accused is present.²⁷ Similarly, it is also an offence to induce: “any other person to

¹⁹ A Canadian Forces Special Operations “responsible for a broad range of missions, which could include counter-terrorism operations and armed assistance to other government departments”, Joint Task Force 2, on line: <<http://www.jtf2.forces.gc.ca>>.

²⁰ David Pugliese. “Pay Raises to keep JTF2 from joining merc firms”, *Ottawa Citizen*, 26 August 2006. Jeremy Looe. “Top Canadian sniper quits in frustration, might become mercenary”, *Edmonton Sun* (21 August 2005), on line: <<http://www.freerepublic.com/focus/f-news/1468026/posts>>.

²¹ USA Today, “Briton, Canadian killed in northern Iraq”, (28 March 2004), on line: <http://www.usatoday.com/news/world/iraq/2004-03-28-iraq_x.htm>.

²² Los Angeles Times, “Court-martial ordered for Iraq Civilian Contractor”, (12 May 2008), on line: <<http://articles.latimes.com/2008/may/12/world/fg-contractor12>>.

²³ R.S., 1985, c. F-28.

²⁴ Revised since, notably in 1985 and 1996.

²⁵ *The Foreign Enlistment Act 1870* (U.K.), 33 & 34 Vict., c. 90.

²⁶ Aleisha Stevens, *Preventing and Prosecuting a Canadian Abu Ghraib: Legislating the Canadian Private Military Industry* (MA Research Essay, Carleton University Norman Paterson School of International Affairs, 2007) [unpublished] at 79.

²⁷ FEA, art.3.

accept or agree to accept any commission or engagement in any such armed forces”.²⁸ As seems to be the case with the United Kingdom²⁹, no prosecution has ever been launched in Canada under this Act.³⁰ The Act, clearly not designed to apply to private companies, has also been criticized as “embarrassingly unenforceable”³¹.

2.2 Export Control of Arms and Certain Technology and Special Economic Measures

While Canada does not regulate the export of military and security services, it does control the export of goods that could be associated with those services. The *Export and Import Permits Act*³² (EIPA) regulates both the type of goods exported and their destination. Provisions under the EIPA regime cover a range of arms and dual-use goods and technologies³³ that could be relevant for PMSCs, including munitions, weapons, nuclear materials, and other “strategic” goods (for example global navigation satellite systems receiving equipment, goods related to spacecraft).³⁴ The process to obtain a permit under the EIPA is set out in the *Export Permits Regulations*³⁵ with the process being overseen by the Export Control Division with the Department of Foreign Affairs. In cases where exports are prohibited, the country is listed in the *Area Control List*³⁶.

²⁸ *Ibid.*

²⁹ United Kingdom Foreign and Commonwealth Office, "Private Military Companies: Options for Regulation 2001-2." at 40.

³⁰ There has been the case of *In the Matter of Francis Martin*, [1864] O.J. No. 320, where a Canadian citizen was arrested, but not charged, for enlisting individuals in Canada for participation in the American civil war. His arrest was made pursuant to a warrant issued by a mayor under the authority of the Imperial *Foreign Enlistment Act* 9 Geo. II., c. 30. He was freed on the grounds that this “Statute was confined in its operation to Great Britain and Ireland, that if ever in force in Canada, it has since been repealed by the Imperial Act of 59 Geo., III., c. 69, which is not in force in Canada, and that whether in force or not, the warrant under which defendant was in custody, was illegal, because it charged no offence with certainty, because the persons alleged to have been enlisted, were not shewn (sic) to be subjects of Her Majesty and because, for all that appeared, the prisoner had a license from Her Majesty to enlist persons to serve a foreign power.”

³¹ Furthermore, this kind of legislation has been considered to be “embarrassingly unenforceable”, see S.P. Mackenzie, "The Foreign Enlistment Act and the Spanish Civil War, 1936–1939," *Twentieth Century British History* 10, no. 1 (1999) in Aleisha Stevens, *supra* note 26.

³² R.S., 1985, c. E-19.

³³ The EIPA incorporates the provisions of the *The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies*, on line: <<http://www.wassenaar.org>>.

³⁴ S.O.R./89-202.

³⁵ S.O.R./97-204.

³⁶ S.O.R./81-543, on line: Department of Justice Canada <<http://laws.justice.gc.ca/en/E-19/SOR-81-543/>>.

The *Special Economic Measures Act*³⁷ (SEMA) can be used both to restrict the export of goods to designated foreign states and also to limit a range of other activities including commercial dealings with those states and/or their nationals who do not ordinarily reside in Canada, the “exportation, sale, supply or shipment” of any goods to those states of their nationals, the landing of Canadian-registered aircraft in those countries and the provision of financial services.³⁸ SEMA may be invoked “for the purpose of implementing a decision, resolution or recommendation of an international organization of states or association of states, of which Canada is a member, that calls on its members to take economic measures against a foreign state”, or in cases where the Canadian government is “of the opinion that a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis”.³⁹

Outright prohibitions on exports are uncommon. Only two countries are currently listed in the *Area Control List*⁴⁰: Myanmar (since 1997) and Belarus (since 2006). In each case, violation of human rights by repressive regimes were identified as the primary reason for restricting trade with these countries. In the case of Myanmar, further restrictions were put in place through a specific regulation made under SEMA (*Economic Measures (Burma) Regulations*)⁴¹ aimed at prohibiting or restricting the export of goods and the provision of financial services to that country.⁴² Although not listed in the *Area Control List*, sanctions have also been imposed on Zimbabwe where the *Special Economic Measures (Zimbabwe) Regulations*⁴³ prohibits the export of arms and related material to that country, as well as prohibiting the provision of "technical or financial assistance, technical or financial services or brokerage or other services related to the supply, sale, transfer, manufacture or use of arms and related materials".

³⁷ 1992, c. 17.

³⁸ SEMA s.4(2).

³⁹ SEMA, s.4(1).

⁴⁰ S.O.R./81-543, on line: Department of Justice Canada <<http://laws.justice.gc.ca/en/E-19/SOR-81-543/>>.

⁴¹ S.O.R./2007-285.

⁴² The accompanying *Special Economic Measures (Burma) Permit Authorization Order*, S.O.R./2007-286, authorizes the Minister of Foreign Affairs to "issue to any person in Canada or any Canadian outside Canada a permit to carry out a specified activity or transaction, or any class of activity or transaction that is restricted or prohibited pursuant" to the regulations.

⁴³ S.O.R./2008-248.

The *United Nations Act*⁴⁴ is another statute which could regulate the export of military and security services by Canadian PMSC to certain countries. This act enables the Canada to make regulations to give effect to its obligations where the Security Council acts under Chapter VII of the UN Charter. Those regulations generally apply to Canadian individuals and corporations inside or outside Canada and often prohibit the supply of arms and military technical assistance to particular countries or organizations.⁴⁵

2.3 Increase Financial Benefits to curb Appeal of Private Sector to Canadian Forces members

Although there is no regulation of Canadian citizens working for either Canadian or foreign PMSCs, the departure of Canadian special forces to the private sector has been noted. In 2005, the Canadian Forces increased financial benefits for members of the special forces known as JTF 2. The maximum allowances, in addition to a member's regular pay, amount to over \$27,000 per year⁴⁶ for the most experienced "special operations assaulters".⁴⁷ Officially, the allowance: "compensates for hardships (e.g. conditions at work, conditions while off-duty, health service support, home communications and stress appraisal) and risks (e.g. loss of life) associated with JTF2

⁴⁴ R.S., 1985, c. U-2.

⁴⁵ For example the *United Nations Al-Qaida and Taliban Regulations* (SOR/99-444), *inter alia*, prevent the supply, sale, and transfer of arms and technical assistance to the Taliban, Usama bin Laden and his associates, and the members of the Al-Qaida organization. Similarly, regulations concerning Côte d'Ivoire (the *United Nations Côte d'Ivoire Regulations*, SOR/2005-127), the Democratic Republic of the Congo (*United Nations Democratic Republic of the Congo Regulations*, SOR/2004-222 and *Regulations Amending the United Nations Democratic Republic of the Congo Regulations*, SOR/2005-306), Liberia: *United Nations Liberia Regulations*, SOR/2001-261, *Regulations Amending the United Nations Liberia Regulations*, SOR 2004-153 and *Regulations Amending the United Nations Liberia Regulations and the Regulations Implementing the United Nations Resolution on Lebanon*, SOR/2009-23), Sudan (*United Nations Sudan Regulations*, SOR/2004-197 and *Regulations Amending the United Nations Sudan Regulations*, SOR 2005-122) and Lebanon (*Regulations Implementing the United Nations Resolution on Lebanon*, SOR/2007-204 and *Regulations Amending the United Nations Liberia Regulations and the Regulations Implementing the United Nations Resolution on Lebanon*, SOR/2009-23) all include provisions prohibiting the export of arms and related material to any person in those countries and the provision of technical assistance related to the provision, manufacture, maintenance or use of arms and related material. In the case of the Democratic Republic of the Congo and Côte d'Ivoire, the regulations include a prohibition on the provision to any person of "technical assistance related to military activities". For the complete list of countries subject to sanctions by Canada, see on line: Foreign Affairs and International Trade Canada <<http://www.international.gc.ca/sanctions/sema-lmes.aspx?lang=eng>>.

⁴⁶ Canadian Forces' Compensation and Benefits Instructions 205.385 – Joint Task Force Two Allowance, on line:<http://www.dnd.ca/dgcb/cbi/pdf/CBI_205_Sec_2.pdf>.

⁴⁷ Those members specifically trained to conduct: "a wide variety of Special Operations and counter-terrorism tasks such as hostage rescue operations, special operations patrols, surveillance, offensive actions, and close personal protection.", Joint Task Force 2, on line: <<http://www.jtf2.forces.gc.ca>>.

employment”.⁴⁸ Implicitly, the increase in financial benefits was aimed at improving retention of skilled members within the Forces.⁴⁹ The lure of the private sector was specifically noted by the chairman of the Senate’s national security and defence committee as one of the factors leading to early retirement.⁵⁰

2.4. Criminal Law

2.4.1. Criminal Law and Corporations:

Canadian criminal law is applicable to both natural and legal persons. The code specifically employs the terms “‘every one’, ‘person’, ‘owner’, and similar expressions” to describe those liable for criminal offenses.⁵¹ Corporations therefore are included within the definition of “person” within the Criminal Code of Canada⁵² and can be prosecuted for criminal misconduct.

Corporate offences that require the prosecution to prove fault — other than negligence⁵³ — use the identity doctrine to determine if such fault occurred. This doctrine⁵⁴ merges the individuals that were in charge (e.g. board of directors, the managing director, the manager or anyone else given the governing executive authority of the corporation), with the conduct attributed to the corporation. The directing mind must act within the sector (functional, geographic or even the entire company) of the corporate operation assigned to him/her. Liability can arise regardless of a formal delegation, awareness of the board of directors or even express prohibition. The limits on this doctrine however are clear: “the identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to

⁴⁸ Department of National Defence, Backgrounder, BG-06.006, “Joint Task Force 2 (JTF2) – Allowance Policy Review” (13 March 2006), on line <<http://www.forces.gc.ca/site/news-nouvelles/view-news-afficher-nouvelles-eng.asp?id=1872>>.

⁴⁹ *Id.*, “A key difference between the military and other professional organizations, however, is that the military cannot go outside to find suitably qualified candidates for positions above the entry level. (...)The unique needs of the military imply that pay and other benefits should be designed and applied in a manner that encourages leadership, loyalty and commitment, given career horizons that can span 35 years. They must also support, in a cost-effective way, the Forces' goals for attracting, retaining and motivating the numbers and kinds of people required.”

⁵⁰ *Id.* “Senator Colin Kenny (...) said the allowance improvements are directly related to the fact that JTF2 has been losing highly-skilled personnel to the private sector.”

⁵¹ s. 2.

⁵² R.S. 1985, c-46.

⁵³ s. 22 (2).

⁵⁴ Established in *R. v. Canadian Dredge & Dock Co.* [1985] 1 S.C.R. 662 (S.C.C.)

him/her; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company.”⁵⁵

A corporation can be found guilty of offences based on negligence including the offence of criminal negligence causing death and causing harm⁵⁶. The corporation can be found guilty if a directing mind had been a party to the offence and the prosecution shows that the directing mind departs “markedly from the standard of care that, in the circumstances could reasonably be expected to prevent a representative of the corporation from being a party to the offence”.⁵⁷

The Criminal Code provides for various forms of accomplice liability including aiding and abetting and conspiracy. “Aiding” means “to assist or help the actor.”⁵⁸ According to s.21.1 of the Criminal Code, “every one is a party to an offense who ... (b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing.” Abetting means “to encourage or set on”, making an abettor “an instigator or setter on, one who promotes or procures a crime to be committed.”⁵⁹ The offense has both an *actus reus* and *mens rea* element.⁶⁰ The Criminal Code also criminalizes certain acts of conspiracy. For example, it is an offense to conspire “with anyone to commit murder or to cause another person to be murdered, whether in Canada or not ...”.⁶¹ The nucleus of conspiracy is an “agreement to perform an illegal act or to achieve a result by illegal means”.⁶² Conspiracy occurs when there is “an intention to agree, the completion of an agreement, and a common design”.⁶³

⁵⁵ Fafo and International Peace Academy, *Canada – Survey Questions & Responses, A comparative Survey of Private Sector Liability for Grave Violations of International Law in National Jurisdictions* (2004) 2, on line: <http://www.fafo.no/liabilities/Canada%20survey%20standardized%20Nov%202004.pdf>.

⁵⁶ s. 220 and s. 221.

⁵⁷ s. 22 (1).

⁵⁸ *R. v. Greyeyes*, [1997] 2 S.C.R. 825 at 837 (S.C.C.), per Cory J.

⁵⁹ See, e.g., *R. v. Salajko*, [1970] 1 O.R. 824 at 826 (Ont. C.A.).

⁶⁰ Fafo and International Peace Academy, *supra* note 55 at 3.

⁶¹ s. 465 (1)(a).

⁶² *R. v. Douglas*, [1991] 1 S.C.R. 301 at 316 (S.C.C.).

⁶³ *United States v. Dynar*, [1997] 2 S.C.R. 462 at 500 (S.C.C.).

2.4.2. Sources of Criminal Law:

a) *The Criminal Code of Canada*

The basis for jurisdiction in the Criminal Code is the principle of territorial jurisdiction.⁶⁴ According to the Criminal Code “no person shall be convicted [...] of an offence committed outside Canada”. Thus the act is not applicable to acts or omissions committed entirely outside Canadian borders.

Acts that occur outside Canadian borders, but have a “real and substantial link” to the Canadian jurisdiction may be prosecuted domestically.⁶⁵ Though the precise meaning has not been clarified in a court of law, “one reasonable interpretation is that there is a continuity of the acts that constitute the crime from one state to Canada ... or that there is harm in Canada”.⁶⁶ For example, if the management of a PMSC headquartered in Canada endorsed an aggressive approach to providing protection for persons under its care and this resulted in the unwarranted killing of individuals in the theatre of operations, it is conceivable that criminal prosecution could follow in Canada.

There are a limited but growing number of exceptions in the Criminal Code to the general rule of territorial jurisdiction. The nationality principle establishes jurisdiction by virtue of the perpetrator or victim being Canadian and is used to combat crimes of international concern including treason,⁶⁷ international terrorist offences⁶⁸, crimes against internationally protected persons and UN personnel⁶⁹ and certain sexual offences taking place outside Canada.⁷⁰ Should acts or omissions be directed against internationally protected persons representing Canada or members of their family or should Canadians be hijacked abroad, Canada asserts jurisdiction by virtue of the victim being Canadian.⁷¹

⁶⁴ s. 6 (2).

⁶⁵ See, e.g., *R. v. Libman*, [1985] 2 S.C.R. 178 (S.C.C.).

⁶⁶ Fafo and International Peace Academy, *supra* note 55 at 6.

⁶⁷ s. 46 (3).

⁶⁸ s. 7 (3.75) on “terrorist activity” and s. 83.92 on “financing terrorism”.

⁶⁹ s. 7 (3) and 7 (3.71).

⁷⁰ s.7 (4.1).

⁷¹ s. 7 (3) (d) (i) and (iii), s. 7 (3.1) (e).

*b) Crimes against Humanity and War Crimes Act (CAHWCA)*⁷²

This act provides for the prosecution of any person present in Canada for any codified offence – genocide, crimes against humanity, war crimes, and breach of responsibility by military commanders and civilian superiors – regardless of where that offence occurred.⁷³ The act provides Canada with an expanded extra-territorial jurisdiction over person to have committed one of the mentioned acts if

“(a) at the time the offence is alleged to have been committed, (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity, (ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state, (iii) the victim of the alleged offence was a Canadian citizen, or (iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or

(b) after the time the offence is alleged to have been committed, the person is present in Canada.”⁷⁴

According to the act every “person who conspires or attempts to commit, is an accessory after the fact in relation to, or counsels in relation to, an offence referred to in subsection (1) is guilty of an indictable offence.”⁷⁵ According to the Act, “Unless otherwise provided, words and expressions used in this Act have the same meaning as in the Criminal Code.”⁷⁶ The definition of person in the Criminal Code is therefore applicable and corporations could be held liable under the CAHWCA.

Procedurally, it is important to note that under the CAHWCA according to s. 9 (3) no “proceedings for an offence under any of sections 4 to 7 of this Act (...) may be commenced without the personal consent in writing of the Attorney General (...)” Sections 4 to 7 amongst other things list the crimes of genocide, crimes against humanity and war crimes. Thus although the scope of the Act is broad, its practical application is likely to be much more limited.

⁷² 2000, c. 24, on line: Department of Justice <<http://laws.justice.gc.ca/en/C-45.9/>>.

⁷³ On line: Department of Justice Canada: Canada’s Crimes Against Humanity and War Crimes Program, <<http://www.justice.gc.ca/eng/pi/wc-cg/rlf-rcl.html>>.

⁷⁴ s. 8.

⁷⁵ ss. 4 (1.1) and 6 (1.1).

⁷⁶ s. 2 (2).

2.5. Civil Law

2.5.1. General Remarks on Civil Liability

Canada is a federal jurisdiction with ten provinces: nine are common law jurisdictions while Quebec – due to its French roots and legal traditions – is a civil law jurisdiction.

There is no explicit provision in Canadian law for individuals suffering harm outside of Canada to seek legal redress through the Canadian courts.⁷⁷ The parliamentary Standing Committee on Foreign Affairs and International Trade of the House of Commons highlighted this gap in considering potential misconduct by Canadian resources companies operating abroad when it stated “...that Canada does not yet have laws to ensure that the activities of Canadian mining companies in developing countries conform to human rights standards, including the rights of workers and of indigenous peoples”.⁷⁸

2.5.2. Jurisdiction

The Supreme Court of Canada has defined a civil standard of “real and substantial connection” to establish jurisdiction in a Canadian court.⁷⁹ This connection may be established “between the subject-matter of the action and the territory where the action is brought”, “between the jurisdiction and the wrongdoing”, “between the damages suffered and the jurisdiction”, “between the defendant and the forum province”, “with the transaction or the parties”, and “with the action”.⁸⁰ The phrasing of the civil law test is similar to the criminal law language, however the civil law test of "real and substantial" is less well developed and defined. It arises as a concern most frequently when the defendant is serve ex juris," or outside of the jurisdiction.⁸¹

⁷⁷ Grégoire Webber, “Canada” in *Obstacles to justice and redress for victims of corporate human rights abuse – Comparative submission prepared for John Ruggie UN Secretary-General’s Special Representative on Business and Human Rights* (Oxford: Oxford Pro Bono Publico, 2008) 35 at 36, on line: <<http://www.law.ox.ac.uk/opbp>> and Craig Forcese, *Memorandum: Response to PDAC Opinion on Extraterritorial Regulation* (Memorandum prepared for the Canadian Network on Corporate Accountability in the National Roundtables on Corporate Social Responsibility, 2006) at 2.

⁷⁸ Canada, Standing Committee on Foreign Affairs and International Trade, *Mining in Developing Countries and Corporate Social Responsibility*, 38th Parl. 1st sess., 14th Report, (22 June 2005), at 4, on line: <http://www2.parl.gc.ca/committeebusiness/ReportsResponses.aspx?Cmte=FAAE&Language=E&Mode=1&Parl=38&Ses=1>.

⁷⁹ *Tolofson v. Jensen* 146 [1994] 3 S.C.R. 1022 at 1049, 77 O.A.C. 81 at 108.

⁸⁰ *Morguard Investments v. De Savoye* [1990] 3 SCR 1077.

⁸¹ Craig Forcese, *supra* note 77, at para 95.

Two Canadian provinces, Ontario and Quebec, have established rules that provide for jurisdiction in extra-contractual obligations (civil law) or tort (common law). According to the governing rule in Quebec,⁸² jurisdiction is grounded where the defendant has his domicile or his residence in Quebec; the defendant is a legal person, is not domiciled in Quebec but has an establishment in Quebec, and the dispute relates to its activities in Quebec; a fault was committed in Quebec; damage was suffered in Quebec; an injurious act occurred in Quebec; or the defendant submits to its jurisdiction.⁸³ The Supreme Court of Canada accepted the relevant provisions of the *Civil Code of Quebec* (C.C.Q.) as consistent with the requirement of a real and substantial connection.⁸⁴

In Ontario, Rule 17.02 of the Ontario Rules of Civil Procedure provides for service of a defendant outside of the province of Ontario on the basis, *inter alia*, (a) of a tort committed in Ontario and (b) of damage sustained in Ontario arising from a tort wherever committed. The Ontario Court of Appeal has found that service is only a preliminary ground for jurisdiction, and does not “by itself confer jurisdiction” on an Ontario court.⁸⁵ In addition to service, a court must establish that it has a ‘real and substantial connection’ to the dispute.

With regards to contractual disputes on the other hand, the connections between a contract and a forum are primarily legal, not territorial. The law of the provinces of Quebec and provide that a court’s jurisdiction may be established if one of the obligations of the contract must be performed in the jurisdiction of the court.⁸⁶

Quebec and Ontario law provide for exceptional grounds of jurisdiction. Under Quebec law, even if there are no grounds for jurisdiction of a Quebec court, it may hear the dispute if there is a ‘sufficient connection with Quebec’ and where ‘proceedings cannot possibly be instituted outside Québec or where the institution of such proceedings outside Québec cannot reasonably be required’.⁸⁷ In Ontario, should a service of a defendant outside Ontario not satisfy the established statutory ground, leave may be granted by the court, relying on the same grounds as are relevant under Quebec law.⁸⁸

⁸² Civil Code of Quebec (‘C.C.Q.’) art. 3148.

⁸³ Grégoire Webber, *supra* note 73 at 38.

⁸⁴ *Spar Aerospace Ltd v. American Mobile Satellite* [2002] 4 SCR 205.

⁸⁵ *Muscutt v. Courcelles* (2002) 60 OR (3d) 320 (Ont CA).

⁸⁶ See C.C.Q. art 3148 and Ontario Rules of Court, rule 17.02.

⁸⁷ C.C.Q. art. 3136.

⁸⁸ Ontario Rules of Civil Procedure rule 17.03.

2.5.3. Piercing the Corporate Veil

Unless a corporate subsidiary is under the complete control of its parent corporation and is nothing more than a conduit used by that parent corporation to avoid liability, such subsidiary, even when wholly owned, will not be an *alter ego* of its parent company.⁸⁹ However, Quebec and Ontario law provide for rules to pierce the corporate veil. For example, in Quebec in no case may “a legal person set up juridical personality against a person in good faith if it is set up to dissemble fraud, abuse of right, or contravention of a rule of public order”.⁹⁰

2.5.4. Choice of Law Issues

The choice of law with regards to tort (common law) and extra-contractual obligations (civil law) is generally determined by the law of the country where the injurious act occurred.⁹¹ La Forest J., writing for a majority of the Supreme Court of Canada, revisited the traditional common law rules for choice of law and reaffirmed the *lex loci delicti* as the applicable principle in *Tolofson v. Jensen*⁹².

Contractual matters will be governed by the law of the country with which the contract has the “closest connection”, unless there is a valid choice of law clause.⁹³ According to the Supreme Court of Canada, further factors determining the connection are the national character of a corporation and the place where its principal place of business is situated.⁹⁴

2.5.5. *Forum Non Conveniens*

Even where it is legally possible to assert jurisdiction, provinces may decline to do so on the basis of *forum non conveniens*. The Supreme Court of Canada summarized the test as follows: “... the court must determine whether there is another forum that is clearly more appropriate...[W]here there is no one forum that is the most appropriate,

⁸⁹ *Transamerica Life Insurance Company of Canada v. Canada Life Assurance Company* (1995) 46 CPC (3d) 110 (Ontario Court General Division).

⁹⁰ C.C.Q. art 317.

⁹¹ C.C.Q. art 3126.

⁹² *Tolofson v. Jensen*, *supra* note 92.

⁹³ *Imperial Live Assurance v. Colmenares* [1967] SCR 442; C.C.Q. art 3112.

⁹⁴ *Imperial Live Assurance v. Colmenares*, *ibid.* at 443.

the domestic forum wins out by default and refuses a stay, provided it is an appropriate forum.”⁹⁵

The test was applied in the case *Recherches Internationales Québec v. Cambior*.⁹⁶ A Quebec-based mining firm, Cambior, was the single largest shareholder of a Guyanese firm in Guyana which a toxic tailings spill was attributed to. The plaintiffs in the case were a class of 23,000 Guyanese said to have been affected by the spill. Relying on the provisions of the *Civil Code of Quebec*,⁹⁷ the Superior Court found that the Quebec domicile of Cambior Inc. was sufficient to establish the court’s jurisdiction. The court also concluded that the courts of Guyana were competent to hear the case and thus on grounds of *forum non conveniens* declined to exercise jurisdiction because “...neither the victims nor their action has any real connection with Quebec. The mine is located in Guyana. That is where the spill occurred. That is where the victims reside. That is where they suffered damage. But that is not all. The law which will determine the rights and obligations of the victims and of Cambior is the law of Guyana. And the elements of proof upon which a court will base its judgment are located primarily in Guyana. This includes witnesses to the disaster and the losses which the victims suffered. It also includes the voluminous documentary evidence relevant to the spill and its consequences.”⁹⁸

The court noted that “Guyana’s judicial system would provide the victims with a fair and impartial hearing”, rejecting the claim that “the administration of justice is in such a state of disarray that it would constitute an injustice to the victims to have their case litigated in Guyana”.⁹⁹ Nevertheless, Forcese concluded that “while the hurdles are not insubstantial, there is reason to conclude that foreign plaintiffs suing a Canadian corporation, served *in juris* in Canada for abuses stemming from overseas militarized commerce might well succeed in persuading a Canadian court that it has jurisdiction

⁹⁵ *Amchem Products Inc. v. British Columbia* (W.C.B.), [1993] 1 S.C.R. 897 at 931, 102 D.L.R. (4th) 96 at 119.

⁹⁶ *Recherches Internationales Québec v. Cambior*, 164 [1998] Q.J. No. 2554 (Que. S.C.), (QL), (14 August 1998), Montreal 500-06-000034-971 J.E.L./1998-0728.

⁹⁷ C.C.Q. arts 3134, 3138.

⁹⁸ *Recherches Internationales Québec v. Cambior*, *supra* note 96 at 9.

⁹⁹ *Recherches Internationales Québec v. Cambior*, *ibid.* at 12; More details on the question of Forum Non Conveniens in this case, see Craig Forcese, *supra* note 77 at para 97 – 108.

simpliciter and, owing to circumstances overseas inhospitable to a fair trial, that the forum non conveniens analysis favours Canada.”¹⁰⁰

III – CANADA AS A CONTRACTING STATE

1. Introduction

Both the Department of Foreign Affairs and International Trade (DFAIT) and the Canadian Forces (CF) contract PMSCs for the provision of services in support of their operations outside Canada.

1.1. Department of Foreign Affairs and International Trade

Security at a number of specific Canadian foreign missions (Embassies and High Commissions) is in part provided by the Canadian Forces Military Police. Currently, the Military Police Security Service (formerly known as Military Security Guards Unit) employs over 100 personnel at the unit’s headquarters and in 47 Canadian Embassies, High Commissions, or Consulates around the world.¹⁰¹

The Department of Foreign Affairs devotes additional resources to contract for local security services where required. According to the 2007-2008 Public Accounts of Canada, DFAIT spent approximately \$35 million on protection services including approximately \$15.6 million to pay over 40 private businesses for services outside Canada.¹⁰² This is comparable to the expenses of 2006-2007.¹⁰³ In most cases the hiring of such security services appears to be routine, through contracting Saladin to provide security for the Embassy in Kabul has attracted some attention.¹⁰⁴

¹⁰⁰ Craig Forcese, *ibid.* at para 97 and, for more details on *Forum Non Conveniens*, para 109.

¹⁰¹ Department of National Defence, Backgrounder , BG – 09.011, “The Canadian Forces Military Police Group” (17 March 2009), on line:<<http://www.forces.gc.ca/site/news-nouvelles/view-news-afficher-nouvelles-eng.asp?id=2921>> and Canadian Forces Provost Marshall, *Annual Report 2006-07*, on line: National Defence and Canadian Forces <<http://www.vcds.forces.gc.ca/cfpm-gpfc/apm-agp/ar-ra/2006-2007/rep-rap-2006-2007-eng.asp#pco-opc>>.

¹⁰² On line: Treasury Board Secretariat <<http://www.tpsgc-pwgsc.gc.ca/recgen/pdf/41.pdf>>.

¹⁰³ It was reported that for the period of 2006-2007 the budget for protection services was \$29.9 million out of which \$15 million went to private security contractors, see Alec Castonguay, “Ottawa emploie des mercenaires en Afghanistan”, *Le Devoir*, 24 October 2007, on line: <<http://www.ledevoir.com/2007/10/24/161709.html#>>.

¹⁰⁴ See Castonguay, *ibid.*, and Benjamin Perrin, “Guns for Hire – With Canadian taxpayer dollars”, Security Privatization: Challenges and Opportunities, (2008) 6 *Human Security Bulletin*, The Canadian Consortium on Human Security 5.

The selection, hiring and monitoring of companies providing civilian security guards to protect diplomatic and consular facilities and personnel remains the responsibility of each individual mission. PMSCs hired by DFAIT are companies operating under the laws of the host nation and remain entirely subject to their laws.

1.2. The Canadian Forces

The Canadian Forces are increasingly relying on private contractors to perform functions traditionally undertaken by military personnel.¹⁰⁵ Among the early shifts in this direction was the Contractor Support Project initiated in 2000 to provide logistical support for the Canadian Contingent Stabilization Force in Bosnia.¹⁰⁶

This program was replaced by the Canadian Forces Contractor Augmentation Program (CANCAP) formally implemented in 2002 and provides a wide range of support services.¹⁰⁷ The CANCAP contract was initially awarded to ATCO Frontec in Bosnia and eventually transferred to the Canadian company SNC-Lavalin PAE Inc.¹⁰⁸ The program currently provides support to the Canadian forces in Afghanistan.¹⁰⁹

Additionally, since approximately 2005 the Canadian Forces have begun using contractors for the provision of security services. Reportedly: “Private-security contractors employed by the military are primarily used for ‘perimeter security’, not to conduct ‘offensive operations’. An Afghan company detailed to the Provincial Reconstruction Team site in Kandahar City secures the perimeter, protects convoys of

¹⁰⁵ David Perry, “The Privatization of the Canadian Military: Afghanistan, Canada First and Beyond,” *International Journal*, vol. 64, no. 3 (forthcoming 2009).

¹⁰⁶ Department of National Defence, Backgrounder , BG-04.010, “Canadian Forces Contractor Augmentation Program” (14 July 2004), on line:<<http://www.forces.gc.ca/site/news-nouvelles/view-news-afficher-nouvelles-eng.asp?id=1409>>.

¹⁰⁷ *Ibid.*, Services provided by CANCAP can include any or all of the following: Administration and Management, Food Services, Materiel Management and Distribution, Communication and Information Systems, Land Equipment Maintenance, Health Services, Transportation, Accommodation and Support, Construction Engineering Services, Power Supply and Distribution, Water Supply and Distribution, Waste Management, Facilities Operations and Management, Roads and Grounds, Fire Services, Geomatics Support, Environmental Management and Ammunition Support.

¹⁰⁸ Department of National Defence, “Transfer of Contracted Support in Bosnia-Herzegovina to Occur this September”, News Release (28 August 2003), on line:< <http://www.forces.gc.ca/site/news-nouvelles/view-news-afficher-nouvelles-eng.asp?id=1179>>.

¹⁰⁹ Shane Gifford, “The armed private military company and the Canadian Forces: The next step in contractor support?” (2008) 11 *Canadian Army Journal* 78 at 88, “A partnering of firms SNC Lavalin and PAE (...) supported (...) the deployment of the CF into Kabul, Afghanistan during OPERATION ATHENA. The shift of the CF to Kandahar in 2005 saw the contingent relying on in-place US contracted support because of the security situation. This has changed with the US drawdown in Kandahar, and CANCAP has been employed to support the CF again, although the security situation could hardly be described as a low-risk theatre”. US contractors have also provided support to the CF in Afghanistan.

Canadian personnel and provides a 'security cordon' when an incident occurs, such as the explosion of a roadside bomb."¹¹⁰

The costs for protection services for the Canadian Forces for operations abroad are not captured under the post "protection services" in the public accounts for the Department of National Defence as these reflect only costs for security in Canada and the United States. However, in keeping with the Treasury Board's Contracting Policy,¹¹¹ the CF must publish the security contracts into which it has entered over \$10,000. Although names of particular contractors were identified in the past,¹¹² the CF have now changed their practice and do not disclose such information.¹¹³ Based on information previously disclosed, the CF has contracted for security services with local Afghan and well as foreign service-providers, including Blue Hackle and Hart Security.¹¹⁴

In 2008, the government of Canada determined that the mission in Afghanistan required medium-lift helicopter capacity and advanced Unmanned Aerial Vehicles (UAVs).¹¹⁵ The CF therefore entered into a \$36 million one-year contract with the Toronto-based Sky Link for chartered commercial helicopters (Russian-made Mi-8) for use in Afghanistan "for resupply missions and potentially for specific troop transport." Flights

¹¹⁰ Andrew Mayeda & Mike Blanchfield, "Security worker had apartheid past; Firm protects Canadian Forces in Afghanistan", *National Post* (2 December 2007), 1, on line: <<http://www.nationalpost.com/news/world/afghanistan/story.html?id=139690>>.

¹¹¹ On line: Treasury Board Secretariat <http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/Contracting/siglist-eng.asp>.

¹¹² Andrew Mayeda & Mike Blanchfield, "Military hires former Afghan fighters as security guards", *CanWest News Services* (22 November 2007), on line: <<http://www2.canada.com/topics/news/features/businessofwar/story.html?id=c6581dc2-9afd-4a03-8a05-b5dec6d56c81&k=2940>>.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, "In January, the Defence Department awarded a \$168,150 contract to a vendor identified as "General Gulalai" to provide security guards at an undisclosed forward operating base. Government records obtained by CanWest News Service under Access to Information also reveal the use of private security services in Afghanistan's urban centres. For instance, an undisclosed contractor was paid \$236,926.92 to protect Canada's Strategic Advisory Team, which supports the Karzai government in Kabul. The Defence Department also paid an unnamed contractor \$25,632 to provide protection and "defensive supplies" for Afghan New Year's celebrations. Another former warlord, Col. Haji Toorjan, has been hired to provide security at Camp Nathan Smith, home of the provincial reconstruction team in Kandahar City. Toorjan's militia force of roughly 60 Afghan fighters has guarded the base and even guided Canadian soldiers on patrols. Toorjan is believed to be allied with former Kandahar governor Gul Agha Sherzai, according to Nasrullah Duranni, regional manager of the Afghanistan Investment Support Agency. However, no vendor by the name of "Toorjan" is found in publicly available contract records."

¹¹⁵ Public Works and Government Services Canada, Press Release, "Government of Canada invests in equipment for the Canadian Forces" (7 August 2008), on line: < <http://www.tpsgc-pwgsc.gc.ca/medias-media/af-fa/2008-08-07-eng.html> >.

under this contract began in November of 2008.¹¹⁶ The Canadian government has also leased UAV services for an estimated \$95 million for two years from the Canadian company MacDonald Dettwiler and Associates. That contract was awarded on a competitive procurement basis through Project NOCTUA.¹¹⁷ The UAVs are used to provide: “critically important intelligence, surveillance and reconnaissance information directly to commanders and front line soldiers in real time”.¹¹⁸ The contract includes maintenance services in theatre.¹¹⁹ Flights began 1 January 2009.¹²⁰ The Canadian government also leases smaller tactical UAVs from Boeing for use in Afghanistan.¹²¹

2. Accountability

2.1. Canadian Forces Approach to Contracting with PMSC

As a general rule, the sole fact of entering into a contractual relation with PMSCs would not make the actions of those PMSCs attributable to the State. Nevertheless, the actions of PMSCs hired by Canada may in some circumstances engage its responsibility under international law. Subject to the application of the principle of State immunity, Canada could in some circumstances conceivably also be liable for those actions in terms of civil liability. While these responsibilities and liabilities could be engaged through any contracting of the private sector, the risks are obviously much higher for businesses linked to combat operations or engaged in the potential use of armed force.

The Canadian Forces approach to dealing with its private contractors has been *ad hoc* and focused on practical considerations such as pre-deployment training, medical coverage and discipline which are specified in the contract. These contractual practices have led to the development of a draft directive concerning contractors employed by the CF on operations outside Canada. The language used in that draft suggests that it is

¹¹⁶ Department of National Defence, Backgrounder , BG – 08.016 , “Strengthening the Canadian Forces and Canadian Sovereignty”(7 August 2008), on line: <<http://www.forces.gc.ca/site/news-nouvelles/view-news-afficher-nouvelles-eng.asp?id=2719>> and “Canadians to use civilian helicopters in Afghanistan”, *The Canadian Press* (17 November 2008), on line: <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20081117/afghan_choppers_081117?hub=Canada>.

¹¹⁷ Public Works and Government Services Canada, *supra* note 115.

¹¹⁸ MacDonald, Dettwiler and Associates Ltd, Press Release, “MDA's surveillance service operation begins in Afghanistan” (26 January 2009), on line:<<http://www.mdacorporation.com/corporate/news/>>.

¹¹⁹ Business Access Canada, Letter of interest, on line: <http://www.merx.com/English/Supplier_Menu.Asp?WCE=Show&TAB=1&PORTAL=MERX&State=7&id=PW-%24%24BB-213-16693&FED_ONLY=0&hcode=D8aKKgzlEEi4sBH0JQeJQQ%3D%3D>.

¹²⁰ MacDonald, Dettwiler and Associates Ltd, *supra* note 118.

¹²¹ Department of National Defence, *supra* note 116.

applicable to contractors deploying with the CF (i.e. contractors employed under CANCAP) rather than to local contractors or contractors coming from a third location. The draft is not tailored to address contractors involved in services beyond logistical support, such as the provision of security for military facilities in combat zones or the performance of surveillance and reconnaissance in direct support to military operations.

An overarching directive to govern the selection, use, monitoring and supervision of contractors providing security services is currently under development. In the meantime, some common standards are already being applied. For example, contracts with security providers in Afghanistan contain clauses limiting the use of force to self-defence in accordance with generally accepted international standards,¹²² providing that security personnel will wear distinctive uniforms and establishing the authority of the CF to inspect weapons to ensure compliance with Canada's international obligations. Contracts clearly state that the contractors will be subject to the laws of Afghanistan. Furthermore, CF contracts with security providers currently include provisions concerning their responsibility for indemnifying individuals and the possibility for the CF to withhold sums owed to the contractor to effect payment directly to wronged party in cases where the contractor does not comply with its obligation to compensate them.

The contracting process begins with a statement of work and a detailed operational analysis. Companies which submit bids must have a valid licence issued by the Afghan Ministry of the Interior and have been vetted by Canadian military intelligence. Bids are assessed and scored by three designated CF members against criteria including operational and legal considerations. The final scores are provided to a management office which issue the contract to the successful company. The work of the security providers is conducted under the supervision of on-site CF personnel responsible to the officer commanding the facility where the services are performed. It is the Canadian Forces' approach that any allegation of wrongdoing involving private contractors providing such services to the Canadian Forces would be investigated and referred to the appropriate authorities for action.

¹²²For example, the UN *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, UN Doc A/Conf 144/28/Rev 1 at 112 (1990), on line: Office of the High Commissioner for Human Rights <http://www.unhcr.ch/html/menu3/b/h_comp43.htm >.

2.2. Status of Forces Agreements and Immunities

With the exception of international armed conflict or military operations sanctioned by the UN Security Council, the deployment of military forces in another country requires that country's consent. When a State consents to having foreign troops on its soil, that presence is normally authorized through a status of forces agreement (SOFA) that would typically address issues such as entry and exit procedures, criminal and civil jurisdiction, claims procedures, carrying of weapons, use of force, wearing of uniforms, taxes and duties, driving licenses, vehicle registration, local procurement, postal services and communication. Absent internationally recognized immunities or any agreement to the contrary, individuals present in a country remains subject to that country's national law.

Whenever the CF deploys, Canada always considers the issue of criminal and civil jurisdiction. In order to avoid undue interference with its operations, the CF will normally endeavour to retain primary criminal jurisdiction over its personnel. This can be achieved either through direct negotiations with the host State¹²³ or in the context of a collective agreement, applicable to multiple nations operating in a given country, such as the SOFA for troops present in the former Yugoslavia¹²⁴ and those participating in the International Security Assistance Force (ISAF) in Afghanistan.¹²⁵ When a host nation waives its jurisdiction over foreign nationals, it is usually done so with the understanding that there would be no vacuum leading to immunity, since the sending State would exercise that jurisdiction. Those agreements concerning jurisdiction could extend to civilians working for the military forces of the sending State, including contractors, but normally not to nationals of the host State.

¹²³For example, the *Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan*, 18 December 2005 and *Arrangements Regarding the Status of Canadian Personnel in Afghanistan*, 18 December 2005. Cited in *Amnesty International Canada v. Canada (Attorney General)*, [2008] FC 336 at para 47.

¹²⁴ The agreements contained in *Appendix B to Annex IA of the General Framework Agreement for Peace in Bosnia and Herzegovina*, 21 November 1995; *Agreement Between the Republic of Bosnia and Herzegovina and the North Atlantic Treaty Organisation (NATO) Concerning the Status of NATO and its Personnel*, 21 & 23 November 1995; *Agreement Between the Republic of Croatia and the North Atlantic Treaty Organisation (NATO) Concerning the Status of NATO and its Personnel*; *Agreement Between the Federal Republic of Yugoslavia and the North Atlantic Treaty Organisation (NATO) Concerning Transit Arrangements for Peace Plan Operations*, 21 & 23 November 1995, on line: The Avalon Project <http://avalon.law.yale.edu/20th_century/day09.asp>.

¹²⁵ *Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan ('Interim Administration')*, 4 January 2001, on line: <<http://www.operations.mod.uk/isafmta.pdf>>.

2.3. The Code of Service Discipline

In some circumstances, PMSCs providing services to the Canadian Forces could be provided with immunity from local laws through a SOFA. In most cases, however, these individuals would be subject to Canadian criminal jurisdiction for their actions through the military Code of Service Discipline (CSD), which is the condition under which immunity would normally be granted.

The CSD is part of the *National Defense Act*¹²⁶ (NDA). According to s. 60 of the NDA: “a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place” is subject to the CSD. For the purpose of this provision, someone accompanies the Canadian Forces when if or she:

- “(a) participates with that unit or other element in the carrying out of any of its movements, manoeuvres, duties in aid of the civil power, duties in a disaster or warlike operations;
- (b) is accommodated or provided with rations at the person’s own expense or otherwise by that unit or other element in any country or at any place designated by the Governor in Council;
- (...)
- (d) is embarked on a vessel or aircraft of that unit or other element.”¹²⁷

Individuals not otherwise subject to the CSD could also be subject to it “while serving with the Canadian Forces under an engagement with the Minister whereby the person agreed to be subject to that Code”.¹²⁸ According to those provisions of the NDA, jurisdiction of the CSD over individuals is independent of their nationality. Although the CSD is not explicitly limited to physical persons, it would seem unlikely that these provisions would be applicable to companies.

An individual subject to the CSD could be tried by court martial either by judge alone in a standing court martial¹²⁹ or before a panel of 5 individuals in a general court

¹²⁶ NDA s.60(1)(f).

¹²⁷ NDA s.61(1).

¹²⁸ NDA s.60(1)(j).

¹²⁹ NDA s.174.

martial.¹³⁰ Under the Canadian military justice system, decisions of a court martial can be appealed to the Court Martial Appeal Court (CMAC), a court composed of a mix of civilian judges from the Federal Court, the Federal Court of Appeal and judges of a superior court of criminal jurisdiction.¹³¹ The decisions of the CMAC are subject to appeal to the Supreme Court of Canada.¹³²

The CSD includes a series of “typically” military offences¹³³ including mutiny,¹³⁴ disobedience to a lawful command,¹³⁵ absence without leave,¹³⁶ and other offences having a civilian equivalent including detaining someone unnecessarily,¹³⁷ stealing¹³⁸ and failing to attend as a witness before a tribunal.¹³⁹ Additionally the CSD incorporates all offences punishable under Canadian federal statute including the Criminal Code and the CAHWCA.¹⁴⁰ Furthermore, the SCD provides that the laws of a foreign country where individuals are serving may also be enforceable through Canadian military courts.¹⁴¹

Since 1974,¹⁴² civilians tried by court martial since have been either former military members charged with for offences alleged to have been committed while they were in the service¹⁴³ or dependants of CF members accompanying them on foreign postings¹⁴⁴.

¹³⁰ NDA s. 167(1).

¹³¹ NDA s. 234.

¹³² NDA s.245.

¹³³ NDA from ss. 73 to 129.

¹³⁴ NDA ss.79 to 81.

¹³⁵ NDA s.83.

¹³⁶ NDA s.90.

¹³⁷ NDA s.99.

¹³⁸ NDA s.114.

¹³⁹ NDA s.118(2)(a).

¹⁴⁰ NDA s.130(1) provides that: “An act or omission

(a) that takes place in Canada and is punishable under Part VII, the *Criminal Code* or any other Act of Parliament, or

(b) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the *Criminal Code* or any other Act of Parliament,

is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).”

¹⁴¹ NDA s.132(1) provides that: “An act or omission that takes place outside Canada and would, under the law applicable in the place where the act or omission occurred, be an offence if committed by a person subject to that law is an offence under this Division, and every person who is found guilty thereof is liable to suffer punishment as provided in subsection (2).”

¹⁴² Database of the Directorate of Military Justice, Policy and Research within the Office of the Judge Advocate General.

¹⁴³ NDA s.60(2).

¹⁴⁴ NDA s.61(1)(c).

In the latter cases, the charges have typically been offences under “civilian” law such as driving while impaired by alcohol. No civilian contractors have been tried by service tribunals for offences committed in an operational theatre.

The NDA does not specifically limit the applicability of certain offences to civilians subject to the CSD, but the question of whether all offences included in the CSD would apply is not settled. For example, while it is clear that civilians could logically not commit the offences such as abusing their subordinates or fraudulently enrolling, they could potentially be found guilty of doing violence to a person bringing materiel to the CF¹⁴⁵ or of spying for the enemy?¹⁴⁶ The NDA suggests that some typically military offences such as improperly destroying or damaging any property without orders from the person’s superior officer¹⁴⁷ or insubordinate behaviour¹⁴⁸ could be committed by individuals accompanying the forces.¹⁴⁹

2.4. Contract Management

Both CF and DFAIT are bound by Treasury Board’s Contracting Policy¹⁵⁰ relating to contracting and financial accountability. According to that policy: “Government contracting shall be conducted in a manner that will stand the test of public scrutiny in matters of prudence and probity, facilitate access, encourage competition, and reflect fairness in the spending of public funds and ensure the pre-eminence of operational requirements”.¹⁵¹

The Policy, provides that “all departments and agencies awarding contracts and/or amendments, are required to submit an annual report to the Treasury Board Secretariat on all contracting activities”¹⁵² and that: “Contracting authorities should manage and

¹⁴⁵ NDA s.77(a).

¹⁴⁶ NDA s.78.

¹⁴⁷ NDA s.77(d)

¹⁴⁸ NDA s.85.

¹⁴⁹ Such individuals “shall, for the purposes of preparation, practice or execution of any plan, arrangement or manoeuvre for the defence or evacuation of any area in the event of attack, be under the command of the commanding officer of the unit or other element of the Canadian Forces that the person is accompanying or with which the person is serving or is in attendance and, for those purposes, the commanding officer shall be deemed to be a superior officer of the person”. NDA s.65(1). This provision does not require such individuals to “bear arms or to participate in any active operations against the enemy” NDA s.65(2).

¹⁵⁰ On line: Treasury Board Secretariat <http://www.tbs-sct.gc.ca/pubs_pol/dcgpubs/Contracting/siglist-eng.asp>.

¹⁵¹ *Ibid.* para 2.

¹⁵² *Ibid.* para 5.1.2.

administer their contracts in a manner that ensures that they are successfully executed in accordance with the agreed terms of time, cost and performance”.¹⁵³

The Department of National Defence’s Administrative Order and Directive (DAOD) 3004-0 on contracting states that: “all personnel conducting contracting activities on behalf of the Minister of National Defence (MND) to be appropriately trained/qualified”.¹⁵⁴

DAOD 3004-1 on Procedural Overview provides that: “It is essential that contracting authorities take responsibility for their contracts and not assume everything will work out on its own (i.e., avoid the tendency to let contractors "do their thing" once the contract is in place). It is important for contracting authorities to monitor the contract to ensure the avoidance of additional costs, unnecessary delays, or negative impacts on other projects or activities, and to ensure that the Crown is getting what it is paying for and that the Crown's obligations to the contractor are also being met.”¹⁵⁵ In spite of the existence of these procedures, a review of the CANCAP by DND’s Chief Review Services in 2006 suggested that there is much room for improvement in the monitoring of contracts in the theatre of operations.¹⁵⁶

3. Canada’s civil liability

Pursuant to the principle of State immunity, under normal circumstances the Canadian government could not be sued in a foreign court for the actions of its officials. Although interpretations of the principle of State immunity vary, it is unlikely that the conduct of private actors, would be attributable to Canada.¹⁵⁷

¹⁵³ *Ibid.* para 12.1.1.

¹⁵⁴ Assistant Deputy Minister (Financial and Corporate Services), on line: National Defence and the Canadian Forces <http://www.admfincs-smafinms.forces.gc.ca/admfincs/subjects/daod/3004/0_e.asp>.

¹⁵⁵ *Ibid.*, on line: <http://www.admfincs-smafinms.forces.gc.ca/admfincs/subjects/daod/3004/2_e.asp>.

¹⁵⁶ Mike Blanchfield, “Cdn. contractor in Afghanistan cited for deficiencies”, *Ottawa Citizen* (3 June 2008), on line: <<http://www2.canada.com/ottawacitizen/news/story.html?id=f3f358cc-5e47-4d5d-8d18-74d0d5ae4c6f>> : “In Canada, there has been comparatively little supervision of the growing reliance on civilian contractors. The latest auditor general's report showed that civilian employees supporting the mission in Kandahar tripled between November 2006 and July 2007 to 266 from 95. SNC-PAE began operations in support of Canada's mission to Kandahar in the summer of 2006. One of the few analyses done on the CANCAP program was published shortly before SNC-PAE's return to the war-zone by the Forces' Chief of Review Services and raised questions about how the lucrative contracts were administered. It cited confusion and lack of experience among military personnel in overseeing this sort of contract work, noting that the Forces lacked senior officers with experience auditing an invoice or conducting quality control.”

¹⁵⁷ See Aleisha Stevens, *supra* note 26, at 80.

SOFAs and other agreements may exclude the possibility of recourse to tribunals to settle damage claims. In such instances, Canada's approach has been to establish claims settlement processes according to internal directives¹⁵⁸ in line with the government-wide Treasury Board policy.¹⁵⁹ *Ex gratia* payments have been made in instances where civil liability is excluded by agreement, but where there is nevertheless a desire to compensate.

In terms of civil actions against the Canadian government in Canadian courts, the principle is that:

“The Crown in right of Canada is liable in tort solely because the Crown's immunity from suit at common law has been abolished by statute, now known as the *Crown Liability and Proceedings Act*.¹⁶⁰ Liability is imposed on the Crown under two heads: (i) vicarious liability for torts committed by Crown servants in the course of their employment; and (ii) direct liability for torts attaching to the ownership, occupation, possession or control of Crown property.”¹⁶¹

Canadian law however is not settled on whether a foreign national could sue the Canadian government for acts committed abroad. Three cases are particularly relevant here.

In the first case, an action was brought against Canada by the family of a Somali teen, Shidane Arone.¹⁶² Mr. Arone was tortured to death by CF soldiers in Somalia in 1993. One CF member was convicted of torture and manslaughter while three others were convicted of negligent performance of a military duty.¹⁶³ A fourth man, apparently the instigator, was found unfit to stand trial as a result of brain damage suffered after

¹⁵⁸ DAOD 7004-1, Claims and Ex gratia Procedures, on line: National Defence and Canadian Forces <<http://www.admfincs.forces.gc.ca/dao-doa/7000/7004-1-eng.asp>>.

¹⁵⁹ Policy on Claims and Ex Gratia Payment, on line: Treasury Board Secretariat <<http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?section=text&id=12197>>.

¹⁶⁰ R.S., 1985, c. C-50.

¹⁶¹ Geoffrey S. Lester, “Suing the Federal Crown in Tort: Some Practical Points to Remember”, (2000) 23 *Advocate Quarterly* 444.

¹⁶² *Abukar Arone Rage and Dahabo Omar Samow by their Litigation Guardian Abdullah Godah Barre v. The Attorney General of Canada* (unreported, 6 July 1999, Ontario Superior Court of Justice).

¹⁶³ See Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Final Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia* (Ottawa: Canadian Government Publishing, 1997), vol. 1, Chap. 14, “The Somalia Mission: Post-Deployment – The Courts Martial”, on line: National Defence and Canadian Forces <<http://www.dnd.ca/somalia/vol1/v1c14e.htm>>.

attempting to commit suicide while in custody.¹⁶⁴ The court granted Canada's motion to strike the action on the technical grounds that the action was improperly commenced, failed to disclose a cause of action and was statute-barred in terms of limitations period.¹⁶⁵ Although an appeal was launched, proceedings were never completed.

The second case, *Aleksic v. Canada (Attorney General)*¹⁶⁶, dealt with an action launched against Canada for damages resulting from Canada's participation in the North Atlantic Treaty Organization (NATO) bombing campaign in Yugoslavia in 1999. The claim alleged that "the military action in Yugoslavia was illegal and contrary to international law. Damages were claimed in tort and as a remedy under the Charter. The Charter claims alleged that those who were injured while in Yugoslavia had their right to life, liberty and security of the person violated".¹⁶⁷ On appeal from a decision dismissing Canada's motion to strike, a majority of judges struck out the statement of claim as it: "disclosed no reasonable cause of action. The government action in Yugoslavia was a high policy decision. Therefore, the tort claims in the statement of claim were not justiciable".¹⁶⁸

Amongst its arguments to support the dismissal of the plaintiffs' claims, Canada invoked immunity from suit in tort based on section 8 of the *Crown Liability and Proceedings Act* which provides that: "nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces". In response, the court noted that:

"While the immunity provided by s. 8 is indeed sweeping, it might not cover the fact situation presented by this case. On the facts as pleaded, the actions of Canada against Yugoslavia arguably had nothing to do with the "defence of Canada", although one could say that governments don't participate in wars

¹⁶⁴ Linda Nguyen & David Hutton, "Forces dismiss torture death charges" *Vancouver Sun* (16 September 2008), on line: <<http://www2.canada.com/vancouversun/news/story.html?id=a41681a1-ae24-45db-9404-c1b769f642b1>>.

¹⁶⁵ See John Terry, "Taking *Filartiga* on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad" in Craig Scott, ed., *Torture as Tort* (Portland: Hart Publishing, 2001) 109 at 130-133.

¹⁶⁶ [2002] O.J. No. 2754.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

unless it is necessary, in some indirect way at least, to protect Canada's position in the long run (such as fulfilling our obligations to NATO and remaining under its defensive umbrella). Canada was not in any immediate peril at any time, and the actions were not defensive, but were rather a proactive attempt to influence the policy of the Yugoslavian government concerning Kosovo Albanians. Equally, the actions appear to have had nothing to do with "training, or maintaining the efficiency of the Canadian Forces". On a plain reading of s. 8, it may not cover the fact situation before the court. ¹⁶⁹

This case therefore seems to have left open the possibility of an action against Canada for the conduct of individual Canadian Forces that would constitute gross human rights violations. The prospects for such an action however would need to be read in conjunction with the more recent cases on the applicability of the *Charter* outside Canada.¹⁷⁰

In the third case, the estate of Nasrat Ali Hassan, an Afghan citizen shot dead by CF members in Kandahar, sued Canada in an Ontario Court in 2006.¹⁷¹ Here, CF members had fired their weapons: "when the three-wheeled taxi in which [Mr. Hassan] was riding crossed an Afghan police checkpoint near the Canadian Forces Base south of Kandahar."¹⁷² The lawsuit claimed damages for "assault, negligence, intentional infliction of mental distress, violations of sections 7 and 12 of the Canadian Charter of Rights and Freedoms, and violations of customary and conventional international law"¹⁷³

In response, the Canadian government was arguing that the case should be dismissed because:

- "a. Section 9 of the Crown Liability and Proceeding Act (CLPA) bars the Plaintiffs from proceeding with tort claims against the Crown and Her soldiers;

¹⁶⁹ *Aleksic*, *supra* note 166, para 58.

¹⁷⁰ For example, *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, *Canada (Justice) v. Khadr*, 2008 SCC 28 and *Amnesty International Canada v. Canada (Canadian Forces)*, 2008 FCA 257.

¹⁷¹ *The Estate of Nasrat Ali Hassan v. Her Majesty the Queen in Right of Canada (Minister of National Defence), John Doe and Jane Doe*, Ontario Court of Justice, Court File No.: 06-CV-318619PD1.

¹⁷² "Afghan family disputes Canadian Forces' account of shooting death", *CBC News* (16 March 2006), on line: <<http://www.cbc.ca/world/story/2006/03/16/taxi-afghan-060316.html>>.

¹⁷³ *Ibid.*, Notice of Action of Plaintiff, 26 September 2006.

- b. Section 8 of the CLPA provides that the Crown is not liable for the torts alleged in the Statement of Claim;
- c. Section 270 of the National Defence Act bars claims against the named members of the Canadian Forces;
- d. The tort claims made by the Plaintiffs are not justiciable, and no duty of care is owed to the Plaintiffs by the Defendants;
- e. The Canadian Charter of Rights and Freedoms does not apply extraterritorially in the manner claimed by the Plaintiffs;
- f. Sections 7 and 12 of the Charter cannot be asserted by an estate.”¹⁷⁴

Canada also argued that the action should be dismissed on the ground that the court did not “have jurisdiction to hear tort claims against the Crown that did not arise in the province of Ontario, pursuant to section 21(1) of the CLPA”.¹⁷⁵ The court did not settle any of these issues however as the plaintiffs’ lawyer withdrew from the case and the suit was dismissed by the court 30 days later.

On the basis of these three cases, it remains unclear whether a foreign national can sue the Canadian government for acts committed abroad even for harm committed by members of its armed forces. For contractors, there would be the extra hurdle of establishing that they were in effect agents of the State.¹⁷⁶

Conclusion

Canada’s stake in the global PMSC sector is limited. At the same time, Canadian companies and individuals do provide security services abroad and the Canadian government engages private companies to ensure the security of diplomatic missions and in support of the Canadian forces.

As this paper has demonstrated, there are Canadian laws, regulations and policies relevant to the activities of Canadian private military and security companies operating abroad and to the contracting of these companies by the Canadian government. It is also

¹⁷⁴ *Hassan v. Canada*, Defendants’ Notice of Motion.

¹⁷⁵ *Ibid.*

¹⁷⁶ Especially in light of the fact that according to the Department of National Defence’s Administrative Order and Directive (DAOD)3004-2 on Service Contracts: “Contracting authorities are to avoid any contracting situation that would be contrary to or conflict with the *Public Service Employment Act* (PSEA) and common law principles dealing with master-servant relationships”, Assistant Deputy Minister (Financial and Corporate Services), on line: <http://www.admfincs-smafinms.forces.gc.ca/admfincs/subjects/daod/3004/2_e.asp>

clear that in the majority of cases these mechanisms were not designed, and are not particularly well suited, to regulate PMSCs operating outside of Canada.

International efforts to fill the legal vacuum related to PMSCs are ongoing. The Montreux process has provided useful clarification on the applicability of international humanitarian law standards to private companies operating in situations of armed conflict. And numerous proposals exist for the creation of new international mechanisms to oversee the broader sector.¹⁷⁷ In spite of this activity, it seems unlikely that an effective international regime will be created in the near future. And even if such a regime were to emerge, enforcement will depend heavily on state-based accountability mechanisms including national courts.

Governments have long ago recognized that the export of weapons must be regulated at the national level. By analogy, so too should the export of people who make use of those weapons. The responsibilities of home and contracting governments are becoming ever clearer.¹⁷⁸ Calls for more comprehensive national regulation of this sector are growing as is the list of potential mechanisms through which this could be accomplished. There are inherent risks associated with the provision of security services which may include the use of armed force. For the moment, the opportunity exists to manage these risks proactively, rather than wait for a scandal to underscore the patchwork nature of existing Canadian regulation.

¹⁷⁷ See for example James Cockayne & Emily Speers Mears, *Private Military and Security Companies: A Framework for Regulation*, (International Peace Institute, 2009), on line: International Peace Institute <http://www.ipinst.org/asset/file/428/PMSC_EPub.pdf>.

¹⁷⁸ John Ruggie, “Protect, Respect and Remedy: a Framework for Business and Human Rights”, (April 7, 2008), *Human Rights Council*, A/HRC/8/5, on line: <<http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>>.