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PRIVATE MILITARY AND SECURITY COMPANY EMPLOYEES:  
ARE THEY THE MERCENARIES OF THE TWENTY-FIRST CENTURY?

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## **Abstract**

This paper investigates whether and in which cases private military and security company employees can be considered mercenaries under international law, in the light of recent practice and academic debate. Firstly, it focuses on the definitions of 'mercenary' laid down in international treaties and explores whether they reflect customary international law. Secondly, this paper reviews the various conditions listed in the afore-mentioned definitions and tries to find out whether and to what degree private military and security company personnel meet them. It argues that none of the said definitions has achieved the status of customary international law and demonstrates that only a very limited number of employees fall within them.



# *Private Military and Security Company Employees: Are They the Mercenaries of the Twenty-first Century?*

MARINA MANCINI\*

## **Introduction**

The private military and security industry is growing exponentially, owing primarily to the dramatic outsourcing of military and security functions by many States. Above all, private military and security companies (hereinafter PMSCs) are increasingly hired to provide a wide range of services in situations of armed conflict. As a consequence, thousands of people, contracted by these companies work alongside armed forces in conflict zones. Since PMSC employees are assigned tasks formerly performed by military personnel, the question arises whether they are a new breed of mercenary. As a matter of fact, the UN Working Group on the use of mercenaries has stated that PMSC personnel represent 'new modalities of mercenarism', in its 2007 Report to the General Assembly.<sup>1</sup>

This essay investigates whether and in which cases PMSC employees can be labelled mercenaries under international law, in the light of recent practice and academic debate. Part 1 focuses on the definitions of mercenary laid down in international treaties and explores whether they reflect customary international law. Part 2 reviews the various conditions enumerated in the afore-mentioned definitions and tries to find out whether and to what degree PMSC personnel meet them.

## **1. Definition of Mercenaries under Current International Law**

### ***A. Treaty Law***

Mercenaries are dealt with in three international treaties, namely the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter Additional Protocol I),<sup>2</sup> the 1977 Organization of African Unity Convention for the Elimination of Mercenarism in Africa (hereinafter OAU Convention),<sup>3</sup> and the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries (hereinafter UN Convention).<sup>4</sup>

Additional Protocol I, which was adopted on 8 June 1977 and entered into force on 7 December 1978, was the very first treaty to tackle the problem of mercenaries. It confines itself to stipulate that mercenaries are not entitled to the status of a combatant or a prisoner of war and to give a definition of them.

Article 47, para. 1, provides that 'a mercenary shall not have the right to be a combatant or a prisoner of war'. As a result, in an international armed conflict, upon being captured by the enemy, mercenaries may be prosecuted and punished under its domestic law both for hostile acts that would have been

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<sup>1</sup> *UN Doc. A/62/301, 24 August 2007, Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, at 20. See also *Oral Statement by Mr. José Luis Gómez del Prado, President of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Rights of Peoples to Self-Determination, Human Rights Council, 7<sup>th</sup> session, Geneva 10 March 2008*, at 6 f., available on the web site of the Working Group, at <<http://www2.ohchr.org/english/issues/mercenaries/index.htm>>.

<sup>2</sup> Additional Protocol I is available on the web site of the ICRC, at <<http://www.cicr.org/ihl>>.

<sup>3</sup> The OAU Convention against mercenarism in Africa is available on the web site of the African Union, at <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>>.

<sup>4</sup> The UN Convention against mercenaries is available on the web site of the United Nations Treaty Collection, at <<http://treaties.un.org/Pages/CTCTreaties.aspx?id=18&subid=A&lang=en>>.

lawful if committed by combatants (for example, for murder if they killed enemy combatants) and for the very simple fact of having participated in the conflict.<sup>5</sup>

Article 47, para. 2, lists six cumulative conditions for a person to be considered a mercenary. It proclaims:

A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

The OAU Convention against mercenarism in Africa, which was adopted on 3 July 1977 and entered into force on 22 April 1985, in Article 1, para. 1, incorporates the definition of mercenary provided by Additional Protocol I, with a slight modification. It does not require that material compensation, promised by or on behalf of a belligerent, be ‘substantially in excess of that promised or paid to combatants of similar ranks and functions’ in its armed forces.

The OAU Convention outlaws mercenary activities in so far as they impede the exercise of the right of African peoples to self-determination or undermine the sovereignty of the African States. Under Article 1, para. 2 (b), anyone who ‘enlists, enrolls or tries to enrol’ in a band of mercenaries, ‘with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State’, commits the crime of mercenarism.<sup>6</sup>

States parties are bound to make mercenarism an offence punishable by the severest penalties (Article 7) and are obliged to prosecute or extradite the alleged offenders who are found in their territory (Article 8). Criminal liability for mercenarism is independent of that for any other offence the mercenary may have committed (Article 4).

In this respect, it is worth noting that, like Additional Protocol I, the OAU Convention does not grant mercenaries the right to be treated as prisoners of war in case of capture, during an international armed conflict. According to Article 3, ‘mercenaries shall not enjoy the status of combatants and shall not be entitled to the prisoners of war status’. Actually, both Additional Protocol I and the OAU Convention do not prohibit States parties from according mercenaries the prisoner-of-war status; they simply stipulate that mercenaries cannot claim it as a defence to prosecution.<sup>7</sup>

The UN Convention against mercenaries, which was adopted by the General Assembly in Resolution no. 44/34 of 4 December 1989 and entered into force on 20 October 2001, has a broader scope of application when compared with the OAU Convention. Firstly, it outlaws mercenary activities, whatever their purpose. Secondly, it aims to eradicate mercenarism throughout the world.

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<sup>5</sup> See de Preux J., ‘Article 47’, in Sandoz Y., Swinarski C., Zimmermann B. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, 571, at 575, para. 1796.

<sup>6</sup> According to Article 1, para. 2, other two sets of actions amount to mercenarism, provided that the same aim directs the perpetrator, who may be an individual, a group, a representative of a State or the State itself. They are: sheltering, organising, financing, training, supporting or employing bands of mercenaries (para. 2 (a)); and allowing these activities to be carried out in any territory under the jurisdiction of the perpetrator or in any place under its control or granting facilities for transit, transport or other operations of the above mentioned bands (para. 2 (c)).

<sup>7</sup> See: de Preux J., ‘Article 47’, *supra* note 5, at 575, para. 1795; Henckaerts J.-M., Doswald-Beck L. (eds.), *Customary International Humanitarian Law, Volume I: Rules*, ICRC, Cambridge, 2005, at 394; Gillard E.-C., ‘Business Goes to War: Private Military / Security Companies and International Humanitarian Law’, 88 *International Review of the Red Cross* 525, at 563-565 (2006).



The UN Convention provides a more elaborate and comprehensive definition than that contained in Additional Protocol I and the OAU Convention. Two categories of persons qualify as mercenaries. The first category, considered in Article 1, para. 1, encompasses those who meet all the conditions set forth in Article 47, para. 2, of Additional Protocol I, except for taking a direct part in the hostilities. The second category, spelt out in Article 1, para. 2, includes

any person who, in any other situation:

- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
  - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
  - (ii) Undermining the territorial integrity of a State;
- (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
- (c) Is neither a national nor a resident of the State against which such an act is directed;
- (d) Has not been sent by a State on official duty; and
- (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

Like mercenaries under the OAU Convention, those envisaged in Article 1, para. 1, are intended to operate in a situation of armed conflict, whether international or non-international.<sup>8</sup> On the contrary, mercenaries contemplated in Article 1, para. 2, are intended to operate outside an armed conflict, in situations of organised violence to bring about a *coup d'état*, a secession or simply to destabilize a country. The conditions they are required to fulfil are an adaptation of the conditions set out in Article 1, para. 1.<sup>9</sup>

The UN Convention makes it an offence both to participate directly in hostilities or in an organised act of violence as a mercenary (Article 3) and to recruit, use, finance or train mercenaries (Article 2). Any attempt to carry out the afore-mentioned activities and complicity therein also constitute offences (Article 4).

States parties must make all these offences 'punishable by appropriate penalties' (Article 5, para. 3). They themselves may not recruit, use, finance or train mercenaries (Article 5, para. 1). In this regard, it is worth remarking that, contrary to the OAU Convention that does not prohibit African States from hiring mercenaries in order to resist rebel groups within their territory, the UN Convention forbids the hire of mercenaries by States for whatever purpose.<sup>10</sup>

Like the OAU Convention, the UN Convention incorporates the principle *aut dedere aut iudicare*: States parties are under an obligation to prosecute the alleged offender who is found in their territory, if they do not extradite him (Article 12).

As regards the treatment of mercenaries captured during an international armed conflict, the UN Convention does not reproduce the rule laid down in Additional Protocol I and the OAU Convention. Article 16 (b) merely states that the UN Convention is to be applied without prejudice to the 'law of armed conflict and international humanitarian law, including the provisions relating to the status of combatant or of prisoner of war'.

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<sup>8</sup> See: *UN Doc. E/CN.4/2001/18, 14 February 2001, Report of the Meeting of Experts on the Traditional and New Forms of Mercenary Activities as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination (Geneva, 29 January-2 February 2001)*, at 8; Gillard E.-C., 'Business Goes to War: Private Military / Security Companies and International Humanitarian Law', *supra* note 7, at 565; Gumezde S., 'Towards the Revision of the 1977 OAU/AU Convention on the Elimination of Mercenarism in Africa', 16.4 *African Security Review* 22, at 24 (2007).

<sup>9</sup> See: *UN Doc. E/CN.4/2001/18, 14 February 2001, supra* note 8, at 8.

<sup>10</sup> See: Zarate J.C., 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder', 34 *Stanford Journal of International Law* 75, at 128 (1998); Singer P.W., 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law', 42 *Columbia Journal of Transnational Law* 521, at 529 (2004); Maogoto J. N., Sheehy B., 'Contemporary Private Military Firms under International Law: an Unregulated 'Gold Rush'', 26 *Adelaide Law Review* 245, at 260 (2005).

## **B. Customary Law**

Both the definitions of mercenary laid down in the OAU Convention and the UN Convention are modelled on that contained in Article 47, para. 2, of Additional Protocol I. They follow the same scheme, listing numerous conditions that must all be met before a person can be labelled a mercenary. As illustrated above, the definition of the OAU Convention is nearly identical to that of Additional Protocol I. It simply does not reproduce the requirement that the material compensation promised to the mercenary be considerably higher than that promised or paid by the belligerent concerned to members of its armed forces having similar ranks and functions. The definition of the UN Convention envisages two categories of mercenaries. The first category must fulfil the very same conditions listed in Article 47, para. 2, of Additional Protocol I, except for that which concerns the direct participation in the hostilities. As for the conditions that must be met by the second category of mercenaries, they are nothing but an adaptation of the foregoing to situations of organised violence not constituting armed conflicts.

According to the ICRC study on customary international humanitarian law, the definition of mercenary contained in Additional Protocol I has now achieved the status of customary law. Rule 108 reads: 'Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial'. The study clarifies that 'State practice establishes this rule as a norm of customary international law applicable in international armed conflicts'.<sup>11</sup> Being part of Rule 108, the definition of mercenary set forth in Additional Protocol I is regarded in itself as part of customary law.

This finding seems somewhat hasty. In the *North Sea Continental Shelf Cases*, the International Court of Justice stressed that, for a conventional rule to become a customary rule, 'an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved'.<sup>12</sup> As regards Article 47, para. 2, of Additional Protocol I, this requirement has not yet been met.

Although it has been in force for nearly thirty-three years, Additional Protocol I has not yet achieved the universal acceptance won by the four Geneva Conventions of 1949. As of 1 September 2010, twenty-four States were not yet parties.<sup>13</sup> Among them, the United States are worth mentioning. In 1987, at the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law, the Deputy Legal Adviser of the Department of State Michael J. Matheson stated the United States position concerning the two Additional Protocols of 1977 and, with regard to Article 47 of Additional Protocol I, affirmed: 'We do not favor the provisions of Article 47 on mercenaries, which among other things introduce political factors that do not belong in international humanitarian law, and do not consider the provisions of Article 47 to be part of current customary law'.<sup>14</sup>

As regards the participation in the OAU Convention and the UN Convention, the situation is much more serious. As of 1 September 2010, only thirty Member States of the African Union (the former

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<sup>11</sup> Henckaerts J.-M., Doswald-Beck L. (eds.), *Customary International Humanitarian Law, Volume I: Rules*, supra note 7, at 391.

<sup>12</sup> *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, 3, at 43.

<sup>13</sup> As of 1 September 2010, 194 States were parties to the Geneva Conventions of 1949; while only 170 were parties to Additional Protocol I. See the list of the States parties to the Geneva Conventions and to Additional Protocol I on the web site of the ICRC, at <<http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>>.

<sup>14</sup> 'Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, Remarks of Michael J. Matheson', 2 *American University Journal of International Law and Policy* 419, at 426 (1987).

Organization of African Unity) had ratified the OAU Convention or acceded to it,<sup>15</sup> while only thirty-two States were parties to the UN Convention. Notably, none of the major world powers are among these.<sup>16</sup>

A close scrutiny of State practice reveals that the definition of mercenary contained in Additional Protocol I has not been as generally adopted by States as it ought to be. It is embodied, subject to some changes, in the legislation of a few States. Both the criminal codes of France and the Russian Federation are noteworthy in this respect.

Article 436-1 of the French Criminal Code, as modified by Law no. 2003-340 of 14 April 2003 relating to the repression of mercenary activities,<sup>17</sup> provides for the punishment by five years' imprisonment and by a fine of 75,000 euros of anyone who fulfils the conditions as set forth in Article 47, para. 1, of Additional Protocol I, other than that of not being a resident of territory controlled by a party to the conflict.<sup>18</sup>

Article 359 of the Russian Criminal Code,<sup>19</sup> which is headed 'Mercenarism', provides for punishments for recruitment, training, financing and use of mercenaries in an armed conflict as well as participation as a mercenary in an armed conflict. A note below the provision clarifies that 'a mercenary shall be deemed to mean a person who acts for the purpose of getting a material reward, and who is not a citizen of the state in whose armed conflict or hostilities he participates, who does not reside on a permanent basis on its territory, and also who is not a person fulfilling official duties'.<sup>20</sup>

Furthermore, a relatively small number of military manuals follow the definition of mercenary provided by Additional Protocol I.<sup>21</sup> Among them, both the Canadian Manual of Law of Armed Conflict at the Operational and Tactical Levels of 2001<sup>22</sup> and the British Manual of the Law of Armed Conflict of 2004<sup>23</sup> deserve mention. They reproduce that definition in Article 319, para. 1, and in

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<sup>15</sup> See the list of the States parties to the OAU Convention on the web site of the African Union at <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>>.

<sup>16</sup> See the list of the States parties to the UN Convention on the web site of the United Nations Treaty Collection, at <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=XVIII-6&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XVIII-6&chapter=18&lang=en)>.

<sup>17</sup> The English version of the French Criminal Code is available on the web site Legifrance, at <<http://195.83.177.9/code/liste.phtml?lang=uk&c=33>>. Law no. 2003-340 is available on the same web site, at <[http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=B5FD82AE323D98C42937BE7A8285219C.tpdjo10v\\_3?cidTexte=JORFTEXT00000602805&categorieLien=id](http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=B5FD82AE323D98C42937BE7A8285219C.tpdjo10v_3?cidTexte=JORFTEXT00000602805&categorieLien=id)>. For a comment on this law, see Capdevielle V., Cherief H., *The Regulation of Private Military and Security Services in France*, at 24-28, available on the web site of the Project PRIV-WAR, at <[http://priv-war.eu/?page\\_id=49](http://priv-war.eu/?page_id=49)>.

<sup>18</sup> See the comment of the Deputy Marc Joulaud on behalf of the Defense Committee of the National Assembly on draft Article 436-1: «Il s'agit là de la reprise pure et simple, même si la forme rédactionnelle peut être plus ramassée, successivement des points a), d), e), f), b) et c) du paragraphe 2 de l'article 47 du protocole I de 1977. La seule différence de fond concerne l'omission de la qualité de 'résident d'un territoire contrôlé par une partie au conflit' mentionnée au paragraphe 2 d) de l'article 47 du protocole. Cette omission est logique: outil de droit international, le protocole se devait de prévoir le cas des résidents d'un territoire contrôlé, ou occupé, par une partie à un conflit, et privés par celle-ci de nationalité. En revanche, le projet de loi ne concerne, par définition, que les activités à l'étranger des nationaux français. L'omission de cette qualité de 'résident' a donc pour seul effet d'interdire à un Français d'exciper de sa résidence habituelle dans un Etat étranger pour prendre part, à titre personnel et sans engagement dans les forces, à des conflits, internes ou extérieurs, impliquant cet Etat» [*Assemblée nationale, Rapport n° 671 enregistré le 5 mars 2003, fait au nom de la Commission de la défense nationale et des forces armées sur le projet de loi, adopté par le Sénat (n° 607), relatif à la répression de l'activité de mercenaire, par M. Marc Joulaud, Député*, at 16, available on the web site of the National Assembly, at <<http://www.assemblee-nationale.fr/12/rapports/r0671.asp>>].

<sup>19</sup> The English version of the Russian Criminal Code is available on the web site Legislationonline at <<http://www.legislationline.org/documents/section/criminal-codes>>.

<sup>20</sup> For a comment on Article 359 of the Russian Criminal Code, see Novicka, *The Regulatory Context of Private Military and Security Services in the Russian Federation*, at 19-21, available on the web site of the Project PRIV-WAR, at <[http://priv-war.eu/?page\\_id=49](http://priv-war.eu/?page_id=49)>.

<sup>21</sup> Henckaerts J.-M., Doswald-Beck L. (eds.), *Customary International Humanitarian Law, Volume I: Rules*, supra note 7, at 393.

<sup>22</sup> Canada National Defence, *Law of Armed Conflict at the Operational and Tactical Levels*, B-GJ-005-104/FP-021, 2001-08-13, available on the web site of the Canada National Defence, at <<http://www.cfd-cdf.forces.gc.ca/sites/page-eng.asp?page=3481>>.

<sup>23</sup> UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford, 2004.

Chapter 4, para. 10.1, respectively. The importance of the incorporation of the Additional Protocol I definition, however, cannot be overestimated, as the British case shows. The Green Paper on 'Private Military Companies: Options for Regulation', published by the Foreign and Commonwealth Office in 2002, stressed that 'a number of governments including the British Government regard this definition as unworkable for practical purposes'.<sup>24</sup>

Finally, there is almost no domestic case-law regarding the definition of mercenary as enshrined in Article 47 of Additional Protocol I.<sup>25</sup>

## 2. Applying Mercenary Requirements to PMSC Employees

As illustrated above, the various conditions enumerated in Article 47, para. 2, of Additional Protocol I, in Article 1, para. 1, of the OAU Convention and in Article 1, paras. 1 and 2, of the UN Convention are cumulative. They must all be met for a PMSC employee to qualify as a mercenary. Hereinafter, each condition will be considered in turn and its fulfilment by PMSC personnel will be assessed.

### A. Recruitment

According to Article 47, para. 2, of Additional Protocol I, Article 1, para. 1, of the OAU Convention and Article 1, para. 1, of the UN Convention, a mercenary must be 'specially recruited locally or abroad in order to fight in an armed conflict'. Under Article 1, para. 2, of the UN Convention, a mercenary must be 'specially recruited locally or abroad for the purpose of participating in a concerted act of violence', which aims at overthrowing the Government of a State or undermining its territorial integrity.<sup>26</sup>

The nature of the employer is not specified. Therefore, the employer may well be a company, that a State has contracted to provide military or security services in an armed conflict zone.<sup>27</sup>

The contracts between the companies and the recruits are not accessible to the public, while the contracts between the companies and the States are sometimes available online.<sup>28</sup> From the latter, one may infer some of the content of the former.

During the Nineties, various Governments hired PMSCs to conduct offensive operations against insurgent movements and regain control of their territory. At least three cases are worth referring to. In 1993, the Angolan Government contracted Executive Outcomes, a South Africa-based company now dissolved, to train the Angolan army and to direct operations against the rebel movement Uniao Nacional para a Independencia Total de Angola (UNITA). Executive Outcomes personnel engaged in combat alongside Angolan troops. Their contribution was fundamental to retaking the major Angolan cities and the most important resource areas.<sup>29</sup>

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<sup>24</sup> Foreign and Commonwealth Office, *HC 577 Private Military Companies: Options for Regulation 2001-2002*, London, February 2002, available on the website of the Foreign Office, at <[www.fco.gov.uk/resources/en/pdf/pdf4/fco\\_pdf\\_privatemilitarycompanies](http://www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_privatemilitarycompanies)>.

<sup>25</sup> See Capdevielle V., Chierief H., *The Regulation of Private Military and Security Services in France*, *supra* note 17, at 31 f.

<sup>26</sup> See *supra* para. 1.A.

<sup>27</sup> Indeed, international organizations, NGOs, transnational corporations and media also hire PMSCs to provide armed protection in unstable regions.

<sup>28</sup> For example, the most valuable contracts concluded by the United States Government with PMSCs for work in Afghanistan and Iraq in the periods 2001-2003 and 2004-2006 are available on the web site of the Center for Public Integrity, respectively, at <<http://projects.publicintegrity.org/wow/resources.aspx?act=resources>> (Project Windfalls of War I) and at <<http://projects.publicintegrity.org/WOWII/database.aspx?act=toponehundredcontracts>> (Project Windfalls of War II).

<sup>29</sup> For a full account of the involvement of Executive Outcomes in the Angolan civil war, see: Zarate J.C., 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder', *supra* note 10, at 94 f.; O'Brien K. A., 'Private Military Companies and African Security 1990-1998', in Musah A.-F., Fayemi J. K. (eds.), *Mercenaries. An African Security Dilemma*, London – Sterling, Virginia, 2000, 43, at 51 f.; Foreign and Commonwealth Office, *HC 577 Private Military Companies: Options for Regulation 2001-2002*, *supra* note 24, at 11; Singer P.W., *Corporate Warriors. The Rise of the Privatized Military Industry*, Ithaca – London, 2003, at 107-110; Percy S., *Mercenaries. The History of a Norm in International Relations*, Oxford, 2007, at 209 f.

In 1995, Executive Outcomes was hired by the Sierra Leone Government to train its troops and to help them defeat the rebels of the Revolutionary United Front (RUF). In a few months, the Executive Outcomes forces succeeded in re-establishing the Government's control over most of the country and pushing the RUF back to the border regions.<sup>30</sup>

In early 1997, the Government of Papua New Guinea entered into a contract with Sandline International, a London-based company now dissolved, to defeat the secessionist movement operating in Bougainville, the Bougainville Revolutionary Army (BRA), and regain control over the island. Under the contract, Sandline would 'provide personnel and related services and equipment to ... conduct offensive operations in Bougainville in conjunction with PNG defence forces to render the BRA military ineffective and repossess the Panguna mine'.<sup>31</sup> It would also train the Papua New Guinea Special Forces in tactical skills specific to this purpose, gather intelligence on the BRA and provide follow-up operational support. Shortly after the arrival of the Sandline personnel in the country, however, the overall commander of the Papua New Guinea defence forces publicly condemned the contract. The ensuing mass protests against the Sandline deployment forced the Government to cancel the contract. As a result, the Sandline staff left the country.<sup>32</sup>

From the content of the contracts that Executive Outcomes and Sandline International concluded with the Governments of Angola and Sierra Leone and the Government of Papua New Guinea respectively, one can deduce that the personnel specially recruited to be deployed in those countries fulfilled the condition of being recruited to fight in an armed conflict.

In the new century, PMSCs have been primarily hired by the Governments of the United States and the United Kingdom and, to a lesser extent, by other Governments to supply a wide variety of armed services in both Afghanistan and Iraq, after the coalition's intervention of 2001 and 2003 respectively. Major PMSCs that are now operating or have operated in Afghanistan and Iraq include: Blackwater, DynCorp International, MPRI, Triple Canopy, EOD Technology, Aegis, ArmorGroup, Control Risks and Erinys.<sup>33</sup>

Most of the armed services provided by the PMSCs in Afghanistan and Iraq relate to security. They include: the protection of fixed or static sites, such as government buildings (static security); the protection of individuals travelling through unsecured areas (security escorts); the protection of convoys travelling in the same areas (convoy security); and full-time protection of high-ranking individuals (personal security details).<sup>34</sup>

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<sup>30</sup> For a full account of the involvement of Executive Outcomes in the Sierra Leone civil war, see: Zarate J.C., 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder', *supra* note 10, at 95-98; Foreign and Commonwealth Office, *HC 577 Private Military Companies: Options for Regulation 2001-2002*, *supra* note 24, at 12; Singer P.W., *Corporate Warriors. The Rise of the Privatized Military Industry*, *supra* note 29, at 110-115; Percy S., *Mercenaries. The History of a Norm in International Relations*, *supra* note 29, at 210 f.

<sup>31</sup> The text of the contract is available on the website of the Australian National University at <<http://coombs.anu.edu.au/SpecialProj/PNG/htmls/Sandline.html>>.

<sup>32</sup> On the engagement of Sandline International by the Government of Papua New Guinea, see: Ebbeck G., 'Mercenaries and the "Sandline Affair"', 133 *Australian Defence Force Journal* 5 (1998); McCormack T., 'The "Sandline Affair": Papua New Guinea Resorts to Mercenarism to End the Bougainville Conflict', 1 *Yearbook of International Humanitarian Law* 292 (1998); Zarate J.C., 'The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder', *supra* note 10, at 98 f.; Singer P.W., *Corporate Warriors. The Rise of the Privatized Military Industry*, *supra* note 29, at 191-196; Percy S., *Mercenaries. The History of a Norm in International Relations*, *supra* note 29, at 211 f.

<sup>33</sup> Blackwater, DynCorp International, MPRI, Triple Canopy and EOD Technology are based in the United States; while Aegis, ArmorGroup, Control Risks and Erinys are based in the United Kingdom. Since 2008 ArmorGroup is part of G4S Risk Management. In 2009 Blackwater changed its name in Xe. Currently, according to the UN Working Group on the use of mercenaries, up to 80% of the PMSCs are registered in the United Kingdom and in the United States. See *UN Doc. A/64/311, 20 August 2009, Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, at 5.

<sup>34</sup> Schwartz M., *The Department of Defense's Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress*, CRS Report for Congress, January 19, 2010, at 2, available at <<http://opencrs.com/document/R40835/2010-01-19>>.

Comprehensive figures on armed security contractors now working in Iraq and Afghanistan are not available. According to the United States Department of Defense, as of September 2009, the number of armed security contractors in its employment in Iraq was 11,162, of which 5% were Americans, 18% were Iraqis and 77% were third-country nationals;<sup>35</sup> while those in Afghanistan numbered 10,712, of which 1% were Americans, 90% were Afghans and 9% were third-country nationals.<sup>36</sup>

The armed security contractors operating in Iraq and Afghanistan are often citizens of developing countries with a military or police background. In many cases, they are recruited by subsidiary companies, that have been tasked with the selection and training of personnel by the PMSC contracting with the Government.<sup>37</sup>

The contract between the company and the recruit specifies the theatre of operations where the recruit shall provide the security service and the period of time for which he shall work, generally a certain number of months. Usually, the hazardous nature of the job is emphasized. For example, the contract signed by the Hondurans recruited in 2005 by Triple Canopy, through a subsidiary, for the protection of fixed facilities in the so-called “Green Zone” of Baghdad stipulated that the recruit would be ‘exposed to great risk and immediate danger and to the many risks associated with a hostile environment, including but not limited to the threats inherent in a war situation’.<sup>38</sup>

According to the UN Working Group on the use of mercenaries, ‘former military personnel and ex-policemen are recruited as “security guards”, but once in low-intensity armed conflicts or post-conflict situations, they become in fact private soldiers militarily armed’.<sup>39</sup> As a matter of fact, armed security contractors often receive *ad hoc* military training before being dispatched to Iraq or Afghanistan.<sup>40</sup> Normally, they are equipped with small arms. As stated by the United States Congressional Budget Office, security contractors working for the Government of the United States in Iraq ‘may use small arms (with a calibre of 7.62 mm or smaller) similar to those used by infantry soldiers’.<sup>41</sup>

In principle, armed security contractors may not participate in offensive operations. The Policy Directives issued by the United States Embassy in Baghdad in May 2008 prohibit the armed security contractors working under a contract for the Department of State and the Agency for International Development to ‘engage in offensive combat operations, alone or in conjunction with U.S., Coalition or host nation forces’ (Directive II, para. B.10).<sup>42</sup> Similarly, the Multi-National Force – Iraq Fragmentary Order 09-109 of March 2009, that applies to armed security contractors working under a contract for the Department of Defense, proclaims that ‘taking a direct or active part in hostilities other

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<sup>35</sup> Id., at 6.

<sup>36</sup> Id., at 9.

<sup>37</sup> See the cases illustrated in the following reports: *UN Doc. A/HRC/4/42/Add.1*, 20 February 2007, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Addendum, Mission to Honduras*, at 7 ff.; *UN Doc. A/HRC/7/7/Add.2*, 4 February 2008, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Addendum, Mission to Peru*, at 6 ff.; *UN Doc. A/HRC/7/7/Add.4*, 4 February 2008, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Addendum, Mission to Chile*, at 8 ff. See also the remarks of the UN Working Group on the use of mercenaries on the practice of subcontracting selection and training tasks in *UN Doc. A/HRC/4/42*, 7 February 2007, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, at 13.

<sup>38</sup> *UN Doc. A/HRC/4/42/Add.1*, 20 February 2007, *supra* note 37, at 10. For other examples, see the following reports: *UN Doc. A/HRC/7/7/Add.2*, 4 February 2008, *supra* note 37, at 11; *UN Doc. A/HRC/7/7/Add.4*, 4 February 2008, *supra* note 37, at 10.

<sup>39</sup> *UN Doc. A/HRC/7/7*, 9 January 2008, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, at 24.

<sup>40</sup> See the cases mentioned in the following reports: *UN Doc. A/HRC/4/42/Add.1*, 20 February 2007, *supra* note 37, at 8, 11; *UN Doc. A/HRC/7/7/Add.2*, 4 February 2008, *supra* note 37, at 7, 10; *UN Doc. A/HRC/7/7/Add.4*, 4 February 2008, *supra* note 37, at 9 ff.

<sup>41</sup> The Congress of the United States – Congressional Budget Office, *Contractors’ Support of U.S. Operations in Iraq*, August 2008, at 19, available on the web site of the Congressional Budget Office, at <<http://www.cbo.gov/ftpdocs/96xx/doc9688/08-12-IraqContractors.pdf>>.

<sup>42</sup> U.S. Embassy Baghdad Iraq, *Policy Directives for Armed Private Security Contractors in Iraq*, May 2008, available on the web site of the Overseas Security Advisory Council of Baghdad, at <<http://baghdad.osac.gov/page.cfm?pageID=5314>>.

than self defense (e.g. engaging in combat actions with hostile forces) is strictly prohibited' (Annex C, para. 3.A).<sup>43</sup>

Although armed security contractors are not recruited to conduct offensive operations, they fulfil the requirement of being recruited to fight in an armed conflict, if they are engaged to protect military objectives (e.g. ammunition trucks or military depots), which as such may be lawfully targeted by the enemy. Evidently, armed reaction to enemy attack constitutes fight. In this regard, it has been correctly stressed that 'the phrase "to fight" under international humanitarian law is not synonymous with an offensive attack'.<sup>44</sup> The nature of the act of violence, offensive or defensive, is irrelevant. What matters is the subject against which it is committed. Only acts of violence against enemy forces constitute "attacks" within the meaning of Article 49, para. 1, of Additional Protocol I. According to this provision, "'attacks" means acts of violence against the adversary, whether in offence or in defence'. Consequently, armed security contractors could not be considered as recruited to fight in an armed conflict if they were hired to protect military objectives against common criminals.<sup>45</sup> However, it is unthinkable that, in a situation of armed conflict, those protecting a military objective may be ordered to react only if the attack comes from common criminals. Besides, it may be very difficult to discern the nature of the aggressor on the spot.<sup>46</sup>

### ***B. Direct Participation in the Hostilities***

Both Article 47, para. 2, of Additional Protocol I and Article 1, para. 1, of the OAU Convention require that mercenaries 'in fact, take a direct part in the hostilities'. On the contrary, neither Article 1, para. 1, nor Article 1, para. 2, of the UN Convention make direct participation in the hostilities or in a concerted act of violence a requirement for a person to qualify as a mercenary.<sup>47</sup>

Though great importance is attached to the notion of direct participation in hostilities in international humanitarian law, no treaty provision clarifies it. In May 2009, the ICRC published interpretive guidance on the notion, consisting of ten recommendations and a commentary.<sup>48</sup> Recommendation IV states that 'the notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict'.<sup>49</sup> The commentary makes it clear that the afore-mentioned notion must be interpreted in the same way in international and non-international armed conflicts.<sup>50</sup>

Recommendation V lists three criteria that must be cumulatively fulfilled for a specific act to amount to direct participation in hostilities. First, the act must reasonably be expected 'to adversely affect the

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<sup>43</sup> *MNF-I Frago 09-109, Overarching Frago for Requirements, Communications, Procedures, Responsibilities for Control, Coordination, Management and Oversight of Armed Contractors / DOD Civilians and Private Security Companies (PSC), March 2009*, available on the web site of the Multi-National Corps Iraq Contractor Operations Cell, at <<https://www.rocops.com/roc2/fragos.aspx>>.

<sup>44</sup> Cameron L., 'Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation', 88 *International Review of the Red Cross* 573, at 581 (2006).

<sup>45</sup> On this point, see: *Report of the Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions*, University Centre for International Humanitarian Law – Geneva, 29-30 August 2005, at 26 f., available on the web site of the Geneva Academy of International Humanitarian Law and Human Rights, at <[http://www.adh-geneva.ch/experts\\_meetings/year.php?year=2005](http://www.adh-geneva.ch/experts_meetings/year.php?year=2005)>; Cameron L., 'Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation', *supra* note 44, at 589 f.; Doswald-Beck L., 'Private Military Companies under International Humanitarian Law', in Chesterman S., Lehnardt C. (eds.), *From Mercenaries to Market. The Rise and Regulation of Private Military Companies*, Oxford, 2007, 115, at 122.

<sup>46</sup> With regard to this, see: *Report of the Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions*, *supra* note 45, at 27; Cameron L., 'Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation', *supra* note 44, at 589 f.

<sup>47</sup> See *supra* para. 1.A.

<sup>48</sup> Melzer N., *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, May 2009, available on the web site of the ICRC, at <<http://www.icrc.it/web/eng/siteeng0.nsf/htmlall/p0990?opendocument>>.

<sup>49</sup> *Id.*, at 16.

<sup>50</sup> *Id.*, at 45.

military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack'.<sup>51</sup> Second, there must be a direct causal relation between the act and the harm likely to result from it or from a coordinated military operation of which it is an integral part.<sup>52</sup> The commentary clarifies that 'direct causation should be understood as meaning that the harm in question must be brought about in one causal step'.<sup>53</sup> The third criterion is the so-called belligerent nexus: 'the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another'.<sup>54</sup>

Recommendation VI makes it clear that the notion of direct participation in hostilities includes preparations for the execution of the act, as well as deployment to and return from the location of execution of the act.<sup>55</sup>

Many acts carried out by PMSC employees are covered by the notion of direct participation in hostilities as specified in the ICRC interpretive guidance. Clearly, taking part in offensive combat operations qualifies as direct participation in hostilities. As illustrated above, usually security contractors may not participate in offensive operations.<sup>56</sup> Some aberrations, however, have been reported. For example, in December 2009, the *New York Times* revealed that security contractors from Blackwater took part in the CIA clandestine raids against individuals suspected of being insurgents in Iraq and Afghanistan. The raids aimed at capturing or killing suspected insurgents. In Iraq, they were carried out almost every night from 2004 to 2006.<sup>57</sup>

Engaging in defensive combat also constitutes direct participation in hostilities. As has been rightly pointed out, 'international humanitarian law does not draw a distinction between offensive or defensive operations'.<sup>58</sup> As a matter of fact, the ICRC interpretive guidance regards 'the defence of military personnel and other military objectives against enemy attacks' as direct participation in hostilities (commentary on recommendation III).<sup>59</sup> Several instances of defensive combat involving security contractors in Iraq and Afghanistan have been reported. As regards Iraq, a well-known episode occurred in Najaf on 4 April 2004. Blackwater employees tasked with the protection of the Coalition Provisional Authority headquarters in Najaf repulsed an attack by hundreds of Shiite militia members. The combat lasted about three and a half hours. Blackwater's helicopters had to resupply the employees with ammunition. In order to repel the attack, thousands of rounds and hundreds of grenades were expended.<sup>60</sup>

Notably, PMSC employees often carry out preparatory measures for the performance of specific hostile acts. As already noted, the ICRC interpretive guidance also regards these measures as constituting direct participation in hostilities. It states as follows: 'If carried out with a view to the execution of a specific hostile act, all of the following would almost certainly constitute preparatory

<sup>51</sup> *Id.*, at 16. On this point, see Pilloud C., Pictet J., 'Article 51', in Sandoz Y., Swinarski C., Zimmermann B. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, 613, at 619, para. 1944.

<sup>52</sup> Melzer N., *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, *supra* note 48, at 16.

<sup>53</sup> *Id.*, at 53.

<sup>54</sup> *Id.*, at 17.

<sup>55</sup> *Id.*, at 17. With regard to this, see Pilloud C., Pictet J., 'Article 51', *supra* note 51, at 618 f., para. 1943.

<sup>56</sup> See *supra* para. 2.A.

<sup>57</sup> Risen J., Mazzetti M., 'Blackwater Guards Tied to Secret C.I.A. Raids', in *The New York Times*, December 11, 2009, at A1, available on the web site of The New York Times, at <<http://www.nytimes.com/2009/12/11/us/politics/11blackwater.html>>.

<sup>58</sup> Gillard E.-C., 'Business Goes to War: Private Military / Security Companies and International Humanitarian Law', *supra* note 7, at 540. See also Cowling M. G., 'Outsourcing and the Military: Implications for International Humanitarian Law', 32 *South African Yearbook of International Law* 312, at 329 (2007).

<sup>59</sup> Melzer N., *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, *supra* note 48, at 38. See also Schmitt M. N., 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees', 5 *Chicago Journal of International Law* 511, at 538 (2004).

<sup>60</sup> Priest D., 'Private Guards Repel Attack on U.S. Headquarters', in *The Washington Post*, April 6, 2004, at A1.



measures amounting to direct participation in hostilities: equipment, instruction, and transport of personnel; gathering of intelligence; and preparation, transport, and positioning of weapons and equipment' (commentary on recommendation VI).<sup>61</sup>

As regards the instruction of military personnel, training provided by the United States-based company MPRI to the Croatian army in 1994-1995 is worth mentioning. Though the contract between the Croatian Government and the American company officially provided only for training in democratic principles and civil-military relations, several military analysts have suggested that MPRI employees trained the Croatian army in tactics as well, in consideration of the stunning offensive, code-named "Operation Storm" that the latter launched against the Croatian Serb forces in the Krajina region in August 1995.<sup>62</sup> To quote Singer, 'prior to MPRI's hire, the type of operation undertaken in "Operation Storm" was beyond the ability of the Croatian army. Even if specific assistance in the offensive was not given, it is extremely possible that MPRI training exercises given to their Croat clients, such as wargaming, were tailored to such a contingency'.<sup>63</sup>

As to gathering of intelligence, many PMSC employees working under a contract for the United States Government have been entrusted with the task of gathering intelligence useful for the United States operations in Iraq. This highly sensitive task is generally performed through the operation of drones, the analysis of satellite data or the interrogation of detainees.<sup>64</sup> The engagement of PMSC personnel for detainee interrogations aroused a lot of controversy, when the abuses of the Iraqi detainees at the Abu Ghraib prison were revealed in 2004. The investigation conducted by the United States Army MG George R. Fay found that three interrogators from CACI International and three linguists from BTG, a division of Titan Corporation, were involved in the abuses.<sup>65</sup> Interestingly, as stated by the United States Congressional Budget Office, PMSC employees also 'analyze intelligence data, which they may transmit in the form of targeting coordinates to unmanned aerial vehicles or other manned or unmanned platforms that fire weapons'.<sup>66</sup>

As regards the positioning of weapons, the role of Blackwater personnel in the CIA covert program for the assassination of Al Qaeda leaders by means of remotely piloted drones is worth recalling. In August 2009, the New York Times revealed the existence of a contract between the CIA and Blackwater, under which the company employees were tasked with assembling and loading Hellfire missiles and 500-pound laser-guided bombs onto Predator aircraft, at the CIA hidden bases in Afghanistan and Pakistan.<sup>67</sup> The contract was cancelled by the CIA in December 2009.<sup>68</sup>

The legitimacy of direct participation of PMSC employees in hostilities is highly debated. The Montreux Document, a text containing rules and good practices on PMSCs, elaborated on the initiative

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<sup>61</sup> Melzer N., *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, *supra* note 48, at 66.

<sup>62</sup> See: Thompson M., Calabresi M., Stiglmayer A., 'Bosnia: Generals for Hire', in *Time*, January 15, 1996, available on the web site of Time, at <<http://www.time.com/time/magazine/article/0,9171,983949-1,00.html>>; Foreign and Commonwealth Office, *HC 577 Private Military Companies: Options for Regulation 2001-2002*, *supra* note 24, at 13; Singer P.W., *Corporate Warriors. The Rise of the Privatized Military Industry*, *supra* note 29, at 125-127.

<sup>63</sup> Singer P.W., *Corporate Warriors. The Rise of the Privatized Military Industry*, *supra* note 29, at 127.

<sup>64</sup> On this point, see: Boldt N., 'Outsourcing War – Private Military Companies and International Humanitarian Law', 47 *German Yearbook of International Law* 502, at 508 f. (2004); Schmitt M. N., 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees', *supra* note 59, at 543 f.

<sup>65</sup> AR 15-6 *Investigation of the Abu Ghraib Detention Facility and 205<sup>th</sup> Military Intelligence Brigade, MG George R. Fay (Investigation Officer)*, 23 August 2004, available on the web site of the Air University, at <<http://www.au.af.mil/au/awc/awcgate/awc-law.htm#investigation>>. See also Merle R., McCarthy E., 'Six Employees from CACI International, Titan Referred for Prosecution', in *The Washington Post*, August 26, 2004, at A18, available on the web site of The Washington Post, at <<http://www.washingtonpost.com/wp-dyn/articles/A33834-2004Aug25.html>>. In 2005 Titan Corporation was acquired by L-3 Communications.

<sup>66</sup> The Congress of the United States – Congressional Budget Office, *Contractors' Support of U.S. Operations in Iraq*, *supra* note 41, at 22.

<sup>67</sup> Risen J., Mazzetti M., 'C.I.A. said to Use Outsiders to Put Bombs on Drones', in *The New York Times*, August 21, 2009, at A1, available on the web site of The New York Times at <<http://www.nytimes.com/2009/08/21/us/21intel.html>>.

<sup>68</sup> Mazzetti M., 'Blackwater Loses a Job for the C.I.A.', in *The New York Times*, December 12, 2009, at A8, available on the web site of The New York Times, at <<http://www.nytimes.com/2009/12/12/us/politics/12blackwater.html>>.

of the ICRC and the Swiss Government with the participation of governmental experts from seventeen countries and adopted on 17 September 2008, simply encourages States, in determining which services may not be contracted out, carried out on their territory or exported, to consider 'whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities' (Part II, paras. 1, 24, 53).<sup>69</sup> By contrast, the Draft of a Possible Convention on Private Military and Security Companies, submitted by the UN Working Group on the use of mercenaries to the Human Rights Council in July 2010, establishes an outright ban on direct participation of PMSC employees in hostilities. It binds parties 'to take such legislative, administrative and other measures as may be necessary to prohibit and make illegal the direct participation of PMSCs and their personnel in hostilities, terrorist acts and military actions' in violation of international law (Article 8).<sup>70</sup>

### C. Motivation

Article 47, para. 2, of Additional Protocol I, Article 1, para. 1, of the OAU Convention and Article 1, para. 1, of the UN Convention all require that a mercenary be 'motivated to take part in the hostilities essentially by the desire for private gain' and that in fact be 'promised, by or on behalf of a Party to the conflict, material compensation'. Article 1, para. 2, of the UN Convention adapts these requirements to concerted acts of violence outside an armed conflict. It only adds the adjective 'significant' to 'private gain' and envisages the possibility of a mercenary being prompted by actual payment, instead of a simple promise, of material compensation.<sup>71</sup>

It is the desire for private gain which is the main element that distinguishes a mercenary from a volunteer. As de Preux correctly stressed, 'in contrast to a volunteer who is moved by a noble ideal, the mercenary is considered to offer his services to the highest bidder, since he is essentially motivated by material gain'.<sup>72</sup>

As for the promise of material compensation, Article 47, para. 2, of Additional Protocol I and Article 1, para. 1, of the UN Convention specify that the mercenary must be promised, by or on behalf of a belligerent, a material compensation substantially higher than that promised or paid to the members of its armed forces having similar rank and function.

When considering PMSC personnel, the desire for private gain appears to be the primary motivation for accepting to do high-risk jobs and, except for local nationals, to be dispatched to countries very far from home. As a matter of fact, the UN Working Group on the use of mercenaries found that many of the PMSC employees interviewed on its field missions were essentially motivated by private gain.<sup>73</sup>

It is to be stressed that usually PMSC employees are paid much more than equivalent members of the armed forces of their home country.<sup>74</sup> The memorandum of the Committee on Oversight and

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<sup>69</sup> *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict*, Montreux, 17 September 2008, available on the web site of the ICRC, at <<http://www.icrc.org/Web/Eng/siteeng0.nsf/html/montreux-document-170908>>. For a comment, see Cockayne J., 'Regulating Private Military and Security Companies: the Content, Negotiation, Weaknesses and Promise of the Montreux Document', 13 *Journal of Conflict and Security Law* 401 (2008).

<sup>70</sup> *UN Doc. A/HRC/15/25*, 2 July 2010, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 21, at 28.

<sup>71</sup> See *supra* para. 1.A.

<sup>72</sup> de Preux J., 'Article 47', *supra* note 5, at 579, para. 1807.

<sup>73</sup> *UN Doc. A/HRC/7/7*, 9 January 2008, *supra* note 39, at 15. See also the following reports: *UN Doc. A/HRC/4/42/Add.1*, 20 February 2007, *supra* note 37, at 16; *UN Doc. A/HRC/7/7/Add.2*, 4 February 2008, *supra* note 37, at 20; *UN Doc. A/HRC/7/7/Add.3*, 8 January 2008, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Addendum, Mission to Fiji*, at 12; *UN Doc. A/HRC/7/7/Add.4*, 4 February 2008, *supra* note 37, at 19.

<sup>74</sup> See: Singer P.W., *Corporate Warriors. The Rise of the Privatized Military Industry*, *supra* note 29, at 77; Boldt N., 'Outsourcing War – Private Military Companies and International Humanitarian Law', *supra* note 64, at 534; *Report of the Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions*, *supra* note 45, at 25; Salzman Z., 'Private Military Contractors and the Taint of a Mercenary Reputation', 40 *New York University Journal of International Law and Politics* 853, at 885 (2008); Scheimer M., 'Separating Private Military Companies from Illegal

Government Reform of the United States House of Representatives of October 1, 2007 on Blackwater is worth mentioning in this regard.<sup>75</sup> It revealed that Blackwater charged the United States Government \$1,222 per day for the services of a protective security specialist in Iraq. This amounted to \$445,891 per year. The Committee compared these costs with the costs of the same services provided by an Army sergeant. According to the memorandum, the salary, housing and subsistence pay of an Army sergeant ranged from \$140 to \$190 per day, depending on his rank and years of service. Consequently, the costs per year ranged from \$51,100 to \$69,350 per year. The Committee concluded that a protective security specialist from Blackwater in Iraq cost the United States Government six to nine times more than an equivalent soldier.<sup>76</sup>

The United States Congressional Budget Office correctly pointed out that the figure of \$1,222 a day represented Blackwater's billing rate, not the amount paid to Blackwater's protective security specialists.<sup>77</sup> It observed that 'the billing rate is greater than an employee's pay because it includes the contractor's indirect costs, overhead, and profit'.<sup>78</sup> There can be no doubt, however, that Blackwater security employees earned considerably more than equivalent military personnel.

According to many sources, the salaries offered by PMSCs are so high in comparison with those paid by the military as to induce a certain number of soldiers in various countries to resign in order to work as PMSC employees.<sup>79</sup>

Interestingly, however, employees of the same PMSC performing the same functions may receive different salaries. In particular, salary scales vary depending on employees' nationality. As reported by the Chairperson of the UN Working Group on the use of mercenaries José Luis Gómez del Prado, PMSCs apply a hierarchical pyramid model to their personnel in Iraq and Afghanistan: 'At the top of the hierarchical pyramid model are the United States employees who are the best paid and have the best facilities. Under the Americans are the "expatriates" (mainly Australians, Canadians, British and South Africans). They receive good salaries but less than the Americans. Under the expatriates are the third-country nationals (Chileans, Fijians, Nepalese, Rumanians, Hondurans, Peruvians, Colombians, Nigerians, Polish etc.). Their salaries vary according to the needs and can fluctuate from USD 1000 to 3000 monthly. At the bottom of the pyramid are the Iraqis or Afghans who are the least paid'.<sup>80</sup>

As for private security contractors working for the United States Government in Iraq, a 2008 report of the Congressional Research Service confirms that 'the highest amounts are paid to highly trained and experienced former military personnel from the United States and British Commonwealth, with lower amounts paid to personnel from developing countries such as Chile and Nepal, and the lowest amounts going to locally hired Iraqis'.<sup>81</sup>

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Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support that Reflects Customary International Law', 24 *American University International Law Review* 609, at 627 (2009).

<sup>75</sup> Committee on Oversight and Government Reform, 'Additional Information about Blackwater USA', Memorandum to the Members of the Committee from the Majority Staff, October 1, 2007, in *Hearing before the Committee on Oversight and Government Reform – House of Representatives – 110<sup>th</sup> Congress, 1<sup>st</sup> Session, October 2, 2007, Blackwater USA, Serial No. 110-89*, at 176, available on the web site of the Committee, at <[http://oversight.house.gov/index.php?option=com\\_content&task=view&id=3912&Itemid=2](http://oversight.house.gov/index.php?option=com_content&task=view&id=3912&Itemid=2)>.

<sup>76</sup> *Id.*, at 189.

<sup>77</sup> The Congress of the United States – Congressional Budget Office, *Contractors' Support of U.S. Operations in Iraq*, *supra* note 41, at 14.

<sup>78</sup> *Ibid.*

<sup>79</sup> See: Singer P.W., *Corporate Warriors. The Rise of the Privatized Military Industry*, *supra* note 29, at 77; Schmitt M. N., 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees', *supra* note 59, at 515; Salzman Z., 'Private Military Contractors and the Taint of a Mercenary Reputation', *supra* note 74, at 885; *UN Doc. A/HRC/7/7/Add.3*, 8 January 2008, *supra* note 73, at 11.

<sup>80</sup> Gomez del Prado J. L., 'Private Military and Security Companies and the UN Working Group on the Use of Mercenaries', 13 *Journal of Conflict and Security Law* 429, at 437 f. (2008).

<sup>81</sup> Elsea J., Schwartz M., Nakamura K. H., *Private Security Contractors in Iraq: Background, Legal Status, and Other Issues*, CRS Report for Congress, Updated August 25, 2008, at 5, available on the web site of the Department of State of the United States, at <<http://fpc.state.gov/c26389.htm>>. See also Schwartz M., *The Department of Defense's Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress*, *supra* note 34, at 3. As for the salaries of Hondurans, Chileans, Peruvians and Fijians working as private security contractors in Afghanistan and Iraq, see

The UN Working Group on the use of mercenaries has denounced the practice of differentiated pay scales applied by PMSCs to employees from different countries as a breach of the right to non-discrimination.<sup>82</sup>

#### **D. Nationality and Residence**

Article 47, para. 2, of Additional Protocol I, Article 1, para. 1, of the OAU Convention and Article 1, para. 1, of the UN Convention all require that a mercenary be ‘neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict’. Article 1, para. 2, of the UN Convention adapts this requirement to concerted acts of violence committed outside an armed conflict. It stipulates that a mercenary must be ‘neither a national nor a resident of the State against which such an act is directed’.

PMSC employees are recruited from all over the world.<sup>83</sup> In developing countries, unemployment and/or underemployment prompt a lot of men to work with PMSCs.<sup>84</sup>

The afore-mentioned requirement has been highly criticized as leading to unwarranted distinctions, when applied to PMSC personnel.<sup>85</sup> The armed conflict between the United States-led coalition and Iraq that started on 19 March 2003 has been cited as an illustrative case. American, British and Australian employees dispatched in Iraq during the conflict as well as Iraqi personnel did not meet the said condition. In fact, they were nationals of a party to the conflict and, following the establishment of the Coalition Provisional Authority, Iraqi employees were also residents of territory controlled by a party to the conflict. By contrast, Honduran, Peruvian, Chilean and the other third-country personnel working in Iraq during the conflict fulfilled the nationality and residence requirement. Therefore, the former could be classified as mercenaries, provided that they met the other conditions set out in Article 47, para. 2, of Additional Protocol I, Article 1, para. 1, of the OAU Convention and Article 1, para. 1, of the UN Convention. On the contrary, the latter could not be considered mercenaries, even if the said conditions were fulfilled.<sup>86</sup>

Furthermore, it has been pointed out that PMSC personnel can easily be granted citizenship by a belligerent so that they fall outside the definition of mercenary.<sup>87</sup>

the following reports: *UN Doc. A/HRC/4/42/Add.1*, 20 February 2007, *supra* note 37, at 10, 12; *UN Doc. A/HRC/7/7/Add.2*, 4 February 2008, *supra* note 37, at 10; *UN Doc. A/HRC/7/7/Add.3*, 8 January 2008, *supra* note 72, at 12 f.; *UN Doc. A/HRC/7/7/Add.4*, 4 February 2008, *supra* note 37, at 9.

<sup>82</sup> *UN Doc. E/CN.4/2006/11/Add. 1*, 3 March 2006, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination on the Resumed First Session (10 to 14 October 2005 and 13 to 17 February 2006), Addendum*, at 10.

<sup>83</sup> See: Salzman Z., ‘Private Military Contractors and the Taint of a Mercenary Reputation’, *supra* note 74, at 884; Scheimer M., ‘Separating Private Military Companies from Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support that Reflects Customary International Law’, *supra* note 74, at 628. As for the nationality of PMSC employees working in Afghanistan and Iraq, see *supra* at 11 f. and 21.

<sup>84</sup> On this point, see the following reports: *UN Doc. A/HRC/7/7*, 9 January 2008, *supra* note 39, at 16; *A/HRC/7/7/Add.2*, 4 February 2008, *supra* note 37, at 13; *UN Doc. A/HRC/7/7/Add.3*, 8 January 2008, *supra* note 73, at 11 f.

<sup>85</sup> See: Gillard E.-C., ‘Business Goes to War: Private Military / Security Companies and International Humanitarian Law’, *supra* note 7, at 569 f.; Cowling M. G., ‘Outsourcing and the Military: Implications for International Humanitarian Law’, *supra* note 58, at 338; Gaston E. L., ‘Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement’, 49 *Harvard International Law Journal* 221, at 233 (2008); Sossai M., ‘Status of Private Military Companies’ Personnel in the Laws of War: the Question of Direct Participation in Hostilities’, 18 *Italian Yearbook of International Law* 89, at 91 (2008).

<sup>86</sup> See: *Report of the Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions*, *supra* note 45, at 25; Cameron L., ‘Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation’, *supra* note 44, at 582; Gillard E.-C., ‘Business Goes to War: Private Military / Security Companies and International Humanitarian Law’, *supra* note 7, at 569; Doswald-Beck L., ‘Private Military Companies under International Humanitarian Law’, *supra* note 45, at 123; Gaston E. L., ‘Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement’, *supra* note 85, at 233.

<sup>87</sup> See: Foreign and Commonwealth Office, *HC 577 Private Military Companies: Options for Regulation 2001-2002*, *supra* note 24, at 7; Boldt N., ‘Outsourcing War – Private Military Companies and International Humanitarian Law’, *supra* note 64, at 534; Singer P.W., ‘War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law’, *supra* note 10,

### ***E. Membership of the Armed Forces***

Article 47, para. 2, of Additional Protocol I, Article 1, para. 1, of the OAU Convention and Article 1, para. 1, of the UN Convention all state that a person can be considered a mercenary only if he is neither a member of the armed forces of a State party to the armed conflict nor a member of the armed forces of a third State, sent by that State on official duty. With regard to concerted acts of violence outside an armed conflict, Article 1, para. 2, of the UN Convention analogously provides that a person can be labelled ‘mercenary’ only if he is not a member of the armed forces of the State on whose territory the act of violence is committed and has not been sent by a State on official duty.<sup>88</sup>

Almost all the PMSC personnel fulfil both these requirements. Indeed, many employees are former military.<sup>89</sup> PMSCs prefer hiring former members of the national militaries so as to minimize the costs of training and evaluation of personnel. As Singer incisively noted, ‘the very name “ex” – ex-Green Beret, ex-Paratrooper, ex-General, and so on – defines the employee base of the private military industry’.<sup>90</sup>

As for the requirement of not being a member of the armed forces of a belligerent State/of the State on whose territory the act of violence is undertaken, States can easily prevent it being met by incorporating PMSC employees into their armed forces. By this simple step, they can prevent the PMSC personnel working for them being considered mercenaries, even if all the other conditions set forth in Additional Protocol I, the OAU Convention and the UN Convention are fulfilled.<sup>91</sup> The contract between the Government of Papua New Guinea and Sandline International of 1997 is worth mentioning as an example.<sup>92</sup> It stipulated that Sandline personnel dispatched to Papua New Guinea were to be enrolled as ‘Special Constables’, but were to hold ‘military ranks commensurate with those they hold within the Sandline command structure’.<sup>93</sup> As members of the Papua New Guinea armed forces, Sandline employees could not have been labelled mercenaries.<sup>94</sup>

### **Conclusion**

The analysis carried out in Part 2 suggests that only a very limited number of PMSC employees fall within the definitions of mercenary laid down in Additional Protocol I, the OAU Convention and the UN Convention. As illustrated in Part 1, these definitions, none of which can be considered part of customary law, list numerous conditions that must be cumulatively met before a person can be labelled mercenary. PMSC personnel who fulfil all but one of the afore-mentioned conditions do not qualify as mercenaries.<sup>95</sup> For example, employees who are recruited to protect military objectives during an international armed conflict, engage in fact in defensive combat to this end and are paid much more than equivalent members of the armed forces of their home country cannot nevertheless be considered mercenaries under Additional Protocol I, if they are nationals of a party to the conflict or residents of territory controlled by a party to the conflict.

The UN Working Group on the use of mercenaries has in fact come to this very conclusion. As regards the so-called “private security guards”, it has affirmed that ‘although their activities have

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at 533; Walker C., Whyte D., ‘Contracting out War?: Private Military Companies, Law and Regulation in the United Kingdom’, 54 *International and Comparative Law Quarterly* 651, at 679 (2005).

<sup>88</sup> See *supra* para. 1.A.

<sup>89</sup> See *supra* paras. 2.A. and 2.C.

<sup>90</sup> Singer P.W., *Corporate Warriors. The Rise of the Privatized Military Industry*, *supra* note 29, at 76.

<sup>91</sup> Gillard E.-C., ‘Business Goes to War: Private Military / Security Companies and International Humanitarian Law’, *supra* note 7, at 561 f.

<sup>92</sup> See *supra* para. 2.A.

<sup>93</sup> See *supra* note 31.

<sup>94</sup> On this point, see: Ebbeck G., ‘Mercenaries and the “Sandline Affair”’, *supra* note 32, at 17; Foreign and Commonwealth Office, *HC 577 Private Military Companies: Options for Regulation 2001-2002*, *supra* note 24, at 7.

<sup>95</sup> See Scheimer M., ‘Separating Private Military Companies from Illegal Mercenaries in International Law: Proposing an International Convention for Legitimate Military and Security Support that Reflects Customary International Law’, *supra* note 74, at 622 f. and 631.

characteristics in common with mercenarism, save in exceptional cases they do not fit the technical definition provided in the International Convention against the Recruitment, Use, Financing and Training of Mercenaries'.<sup>96</sup>

After a thorough study of the PMSC practice and various field missions to States of different geographical areas, the UN Working Group has concluded that many activities undertaken by PMSCs cannot be considered mercenary activities under the existing international treaties.<sup>97</sup> It has found that 'many private military and security companies are operating in a "grey zone", which is not defined at all, or at the very least not clearly defined, by international legal norms'<sup>98</sup> and that 'new international regulations, most likely in the form of a new international convention with an accompanying model law, are needed in order to bring private military and security companies fully out of the legal "grey zone"'.<sup>99</sup> The Draft of a Possible Convention on Private Military and Security Companies, submitted by the UN Working Group on the use of mercenaries to the Human Rights Council in July 2010, aims at satisfying this need.<sup>100</sup>

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<sup>96</sup> UN Doc. A/HRC/7/7/Add.5, 5 March 2008, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Addendum, Latin American and Caribbean Regional Consultation on the Effects of the Activities of Private Military and Security Companies on the Enjoyment of Human Rights: Regulation and Monitoring (17-18 December 2007)*, at 7. See also Gomez del Prado J. L., 'Private Military and Security Companies and the UN Working Group on the Use of Mercenaries', *supra* note 80, at 440.

<sup>97</sup> UN Doc. A/HRC/10/14, 21 January 2009, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, at 10 f.

<sup>98</sup> *Id.*, at 11. See also the following reports: UN Doc. A/HRC/4/42/Add.1, 20 February 2007, *supra* note 37, at 6; UN Doc. A/HRC/7/7/Add.2, 4 February 2008, *supra* note 37, at 6; UN Doc. A/HRC/7/7/Add.3, 8 January 2008, *supra* note 73, at 6.

<sup>99</sup> *Id.*, at 12. See also UN Doc. A/63/325, 25 August 2008, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, at 17 f.

<sup>100</sup> UN Doc. A/HRC/15/25, 2 July 2010, *supra* note 70, at 10 ff. See also UN Doc. A/64/311, 20 August 2009, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, at 8 f.

