The Privatization of War and the Problem for Distinction

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Abstract: This paper contends that the uncertain status of employees of private military security companies (PMSCs) in international humanitarian law (IHL) created an accountability gap. A brief history of PMSCs discusses the trends that led to the emergence of these companies and the war on terror as the main contributor to their multiplication. An analysis of the status of PMSC employees by using the instruments of IHL indicates that they have no “set” status. Whether they are civilians or combatants depends on the tasks they undertake and their relationship with the state. Furthermore, the analysis of the Nisoor Square shooting in Baghdad in September 2007 demonstrates that the uncertain status of PMSC employees creates an accountability gap, and breaches of IHL can go unpunished. Moreover, this paper contended that states that hire PMSCs can implement measures so that PMSC employees may be held accountable for wrongdoing.

On September 16 2007, in Baghdad’s Nisoor Square, security personnel working for Blackwater USA, a North Carolina-based private military and/or security company (PMSC), were ambushed by a car bomb while escorting American diplomats. According to Blackwater and American officials, they exchanged fire with an armed group suspected of having planted the car bomb. Iraqi officials deemed it less of an exchange than an indiscriminate shooting into the crowd that killed seventeen civilians and wounded another twenty. Blackwater later justified these actions by claiming its employees were only defending themselves. Frustrated Iraqi officials revoked Blackwater’s license to operate in the country. This and numerous other such incidents bring to the fore legal questions about the use of PMSCs in war. These incidents also indicate that the involvement of PMSCs in conflict zones has outpaced changes in

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international humanitarian law (IHL) and regulatory measures enacted by states to respond to the presence of PMSCs in wars.\textsuperscript{2}

This paper contends that the uncertain status of employees of PMSCs in IHL creates an accountability gap. First, this essay will briefly explore the history of PMSCs, including their rise in the post-Cold War era to their unprecedented presence in Iraq as part of the Global War on Terror (GWOT). Second, this paper will expand upon IHL and the legal principle of distinction, as well as elaborate on the uncertain status of PMSC employees in IHL by using the Nisoor Square shooting as exemplary of private contractors’ unaccountability. Third, this paper will contend that states hiring PMSCs could do more to increase the accountability of these firms.

1. Private Military/Security Companies

The presence of actors who commit acts of violence, or train, organize, and equip foreign forces solely for profit in armed conflict is not a novel development. For example, between the 16\textsuperscript{th} and 19\textsuperscript{th} centuries, European governments commissioned privately-owned ships in the North African coast to attack foreign ships.\textsuperscript{3} During wartime, privately owned vessels were hired to operate as warships, such as the privateers who together comprised half the English fleet opposing the Spanish Armada in 1558.\textsuperscript{4} More contemporarily, mercenaries, both fought and trained, organized, and equipped other actors to fight in conflict zones such as the Congo, Angola, Nigeria, Biafra, and Yemen during the turbulent decolonization period of the 1960s-1970s.\textsuperscript{5}

To use the definition provided by Singer, PMSCs are hierarchically structured, registered businesses that compete openly in the global market.\textsuperscript{6} The most salient difference between such entities and the privateers and mercenaries of the past is the unprecedented corporatization of military and security services that were formerly only legitimately executed by states.\textsuperscript{7} This phenomenon began in earnest in the early 1990s

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concurrent with an expansion of the global arms industry. Whereas before this time, the arms industry was primarily concerned with providing military goods, the private military and/or security sector of the industry also began to provide services.8

Three factors contributed to the rise of PMSCs. The first factor is the end of the Cold War. No longer having to contend and compete with the USSR, Western powers began to reduce their defence budgets. The downsizing of armed forces resulted in a sudden influx of discharged trained military personnel —up to six million personnel that the private military and security industry could absorb.9 At the same time, the massive stockpile of weapons left over from the Cold War flooded the world market and were accessible to PMSCs as well as non-state armed groups.10 Secondly, the post-Cold War era saw increasing demand for private military and security services by states.11 This is partly explained by the increase of intra-state conflict during this period, together with the withdrawal of military and economic support for weaker states by the superpowers. With the ideological battle of the Cold War concluded, states were not prepared to muster the political will and resources to intervene in intra-state conflicts that did not threaten their national security directly, as exemplified by the late and half-hearted international military effort Rwanda in 1994.12 Thus, fragile states which lacked the capacity to quell internal disorder relied heavily on the private sector for military services. Third, in the West, the end of the Cold War was regarded as the validation of the capitalist model over communism, bolstering political support for the privatization and outsourcing of government functions.13 Free-market ideology encouraged governments to be leaner and to outsource from public to private sector forces to realize cost savings, improve on quality, and access new knowledge and technology.14

The case of the PMSC Executive Outcomes neatly exemplifies the confluence of these trends. Eeben Barlow, former officer in the special operations forces of South African Defence Force (SADF), founded Executive Outcomes in 1989.15 Starting in 1993, as apartheid dissolved in South Africa, the company recruited about 2000 highly

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9 Singer, 193.
14 Perlo-Freeman & Sköns, 4.
15 Singer, 2003, 102.
trained combat veterans who had been laid off from the SADF.\textsuperscript{16} Most of these individuals were previously enlisted in the 32\textsuperscript{nd} Battalion, the Parachute Brigade, the Reconnaissance Commandoes, and the Koevoet—a covert operations unit that had been tasked with undermining the governments of Angola and Namibia, as well as the anti-apartheid movement.\textsuperscript{17} As the end of the Cold War saw the withdrawal of Cuban, Soviet, American and South African participation in the Angolan Civil War, Luanda hired Executive Outcomes in 1992 to fight against the National Union for the Total Independence of Angola (UNITA). In May 1995, the company provided its services to Sierra Leone’s government against the Revolutionary United Front. The company provided equipment, training to troops, and participated in combat against the rebel group.\textsuperscript{18}

The GWOT provided the opportunity for PMSCs to proliferate.\textsuperscript{19} As suggested by its name, this conflict has truly been global in scope, notwithstanding prolonged American occupations in Afghanistan and Iraq. Faced with shortfalls in terms of resources, technology, and manpower at the onset of the GWOT, many Western powers turned to the private sector.\textsuperscript{20} In the US, for example, due to cuts to logistic and support personnel, “DOD [the Department of Defense] lost in-house capability and was forced to rely even further on contractor support.”\textsuperscript{21} According to the US Congressional Budget Office, between 2003 and 2007, the US government agencies allotted $85 billion to private contractors, and DOD alone spent $54 billion on contractors in Iraq.\textsuperscript{22} Since the start of both wars to 2011, contractors have cost the US $206 billion.\textsuperscript{23}

\textsuperscript{17} Ibid, 310.
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In combat zones like Iraq and Afghanistan, private companies provide administrative and logistical support, and protect diplomats, officials, military assets.\textsuperscript{24} They also staff checkpoints, train and advise armed security forces, collect and maintain intelligence, and some even participate in combat operations.\textsuperscript{25} Increasingly, employees of PMSCs have been carrying out tasks close to the heart of conflict, “which often puts them in direct contact with persons protected by international humanitarian law.”\textsuperscript{26} The number of private contractors involved in security and/or military-related activities has increased even as the number of troops in Iraq and Afghanistan has decreased. According to reports by the US Deputy Assistant Secretary of Defense, DOD employed a total of 21,695 private security contractors in January of 2013, up from 14,825 in August, 2008.\textsuperscript{27}

2. PMSCs and the Problem of Distinction

The common but misleading assumption about PMSCs is that they do not have a status under IHL, and by extension, neither do their personnel.\textsuperscript{28} PMSCs, as legal persons, do not have status under IHL, but this fact does not provide them or their employees a carte blanche. In effect, PMSC personnel are bound by IHL, like all individuals, “in relation to a conflict—whether or not they are acting on behalf of a government.”\textsuperscript{29} Company personnel do have status, but it is not “set” or permanent. Their status shifts according to their activities in war zones, thereby blurring the distinction between combatant and civilian.\textsuperscript{30} Whether they are combatants or civilians under IHL requires an analysis of their relationship with the state as well as the nature of their activities.\textsuperscript{31} The following subsections will describe IHL and the principle of distinction, and where and how PMSC employees fit in based on whom

\begin{itemize}
\item\textsuperscript{25} Faite, 167.
\item\textsuperscript{26} Gilliard, 527.
\item\textsuperscript{28} Gilliard, 530.
\item\textsuperscript{29} International Committee of the Red Cross, The Montreux Document: On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, (Geneva: 2009) 37.
\item\textsuperscript{31} Faite, 174.
\end{itemize}
they work for and their activities. The last subsection will demonstrate how the blurring of lines between combatant and civilian produces an accountability gap.

2.1. International Humanitarian Law and the Principle of Distinction

International law governs the relations between states. International humanitarian law is the part of international law that aims to mitigate the effects of armed conflicts for humanitarian reasons, and spells out the rights and responsibilities of those in the middle of armed conflict. IHL protects those who are not party or no longer party to hostilities: the sick and wounded, prisoners of war, and civilians. At the core of this body of law are the Geneva Conventions. The First Geneva Convention provides for the humane treatment of the sick and wounded in armed forces, no longer partaking in battle, regardless of the side for which they were fighting. The Third Geneva Convention provides provisions on the treatment of prisoners of war. The Geneva Conventions prior to 1949 did not protect civilians. This was remedied due to the unprecedentedly high civilian death toll in the Second World War, and the Fourth Geneva Convention is specifically concerned with civilians during time of war, their status, and their treatment.

At the heart of the law of armed conflict, then, is the principle of the distinction between combatants and civilians, which is intended to protect the latter as much as possible. Moreover, IHL ascertains who can fight (and kill) in armed conflict without the fear of prosecution, how combatants should conduct themselves and what rights they have as prisoners of war. Articles 48, 51, and 52 of the 1977 Additional Protocol I requires parties to the conflict to distinguish between combatants and civilians, and explicitly prohibit attacks on civilians and civilian objects in the event of an international armed conflict. Furthermore, Part IV of the Additional Protocol II, which relates explicitly to victims of non-international armed conflicts, protects civilians, civilian objects and infrastructure from attack.

2.2. PMSC Personnel as Civilians

There is a general agreement that the employees of private firms are civilians and that they receive the protections afforded to civilians by the Geneva Conventions. Civilians are protected from attack as long as they do not directly participate in hostilities. According to Article 51(3) of the Additional Protocol I, if civilians do participate in hostilities, they are unprivileged belligerents, and they become legitimate

33 De Nevers, 170.
35 De Nevers, 175.
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targets.\textsuperscript{36} The actions of unprivileged belligerents are punishable as criminal acts.\textsuperscript{37} Additional Article 13 of Protocol II also protects civilians in non-international armed conflict as long as they do not directly participate in hostilities.\textsuperscript{38} Furthermore, as defined in the Third Geneva Convention Article 4A(4), civilians accompanying armed forces (CAF)s are not members of armed forces, and they must carry an identity card making this distinction.\textsuperscript{39} As per Article 4A(4), unlike civilians, CAFs can be given POW status, as long as they have not participated in direct hostilities.\textsuperscript{40} If they are judged to have done so, CAFs are not offered the POW rights, although they get minimum standards as per the Fourth Geneva Convention, Article 4(1).\textsuperscript{41}

The question, then, becomes what constitutes direct part in hostilities. The answer is unclear. Direct part in hostilities is generally understood as acts which, by nature or purpose, are intended to harm the enemy or the enemy objects.\textsuperscript{42} But the Geneva Conventions and the Additional Protocols do not elaborate or provide a definition or criteria.\textsuperscript{43} As such, it is instrumental to ask two questions: what are the PMSC employees doing, and who employs them? For example, private contractors serving food, doing repair work, delivering resources, or administering warehouses would not be deemed as direct participants in hostilities. Armed private security guards are also considered civilians, as carrying arms per se does not implicate them in direct hostilities. Yet, if these private contractors are working for DOD instead of US Department of State, the same activities—repair work, administering warehouses or guarding military generals—can be deemed as a supporting the military effort of one of the parties. Arguably, it is the case that, “private contractors involved in transportation of weapons and other military commodities, intelligence, strategic planning or procurement of arms, may lose the protection afforded to civilians,” under IHL and be considered unprivileged belligerents.\textsuperscript{44}

\textbf{2.3. PMSC Personnel as Combatants}

Conversely, as per Article 43(2) of Additional Protocol I, combatants can legitimately take part in hostilities. In other words, combatants have the right to kill in

\textsuperscript{36} ICRC, \textit{Protocols Additional to the Geneva Conventions}, 265.
\textsuperscript{39} Ibid, “War and International Humanitarian Law.”
\textsuperscript{40} Faite, 174.
\textsuperscript{41} Gilliard, 531.
\textsuperscript{43} ICRC, “Civilian ‘Direct Participation in Hostilities’: Overview.”
\textsuperscript{44} Faite, 173.
combat (within limits), without being considered to have committed murder. Combatants are also legitimate targets in hostilities until they are hors de combat. According to Protocol I, Article 41(2), combatants are hors de combat when they are in the power of the adversary, have surrendered, or are sick or wounded. Under IHL, combatant status also carries with it responsibilities with regards to conduct in war. The distinction further allows soldiers taken prisoner during conflict to be considered prisoners of war rather than criminals, as long as they have respected IHL. According to the Article 50(1) of the Additional Protocol I, PMSCs would be considered combatants if they could be considered members of the armed forces of a state or members of other militias or volunteer corps that belong to the state.

To be a member of an armed force, on the other hand, requires more than just being hired by national security institutions. For example, it requires being subject to military discipline and justice and to the military chain of command and control. The logic of employing PMSCs (who then employ their personnel, or who subcontract to other PMSCs) is to reduce the costs and liability for the state. Therefore, states are not likely to incorporate PMSC employees into their armed forces—at least not to such an extent as to qualify them as, “members thereof for the purposes of status determination under international humanitarian law.” In addition, many of the PMSCs operating in Iraq and Afghanistan were hired by other (non-military) state institutions, such as the US Department of State and the UK Department of International Development. International non-governmental organizations and corporations also hire private contractors for security of their personnel and their assets.

Under IHL, militias and volunteer groups, if they function independently but fight alongside the state, are also combatants. It is possible that private contractors similarly fight alongside the state that hired them, while functioning independently. But, crucially, PMSC employees do not belong to any party in the conflict—as per Article 4A(1) of the Third Geneva Convention—because they do not have any allegiance to states that hire them. If they partake in combat, it is for profit. Furthermore, it is unclear whether PMSCs are unlikely to meet all the criteria, spelled

47 Avant, 332.
48 Gillard, 533.
49 Mathieu and Dearden, 8.
50 Nimkar, 7.
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out in Article 4A(2), for combatants in militias and volunteer groups. First, this article requires militia or volunteer group to be commanded by a person responsible for their subordinates. PMSCs may operate under a clear chain of command, and be structured like military organization, as Ridlon argues. But even so, such organizations tend to be hardly as hierarchical as militia forces or armed forces of states, and hierarchies differ from company to company.

The second criterion in Article 4A(2) of the Third Geneva Convention necessitates an insignia or uniform to indicate that one is fighting on behalf of a party. PMSC employees do not always wear uniforms, although some are purported to wear attire that makes them look “tough.” In Iraq, where there was almost a daily exchange of fire between PMSC employees and insurgents during the height of the conflict, PMSC staff were known to circulate in unidentified (no plates, no insignia) cars. Moreover, the local populations do not always distinguish between the private and state actors; for them, a foreign private security guard in civilian clothing would still be associated with the occupying forces. The Montreux Document addresses this and guides states (namely, states that hire PMSCs; states in which PMSCs are incorporated; and states in which PMSCs operate) to ensure that PMSCs are identifiable.

Third, Article 4A(2) of the Third Geneva Convention requires that militias or volunteer groups carry arms openly. PMSC employees usually fulfill this requirement, (especially when they are charged with protecting people or things) usually handling sophisticated weaponry. By the time American troops had left Iraq, the US mission in Baghdad was projected to become the largest American diplomatic operation, and as such it was to be protected by a, “private army consisting of as many as 5000 security contractors who will carry assault weapons and fly armed helicopters.”

The fourth criterion in Article 4A(2) of the Third Geneva Convention requires the abidance of IHL by the group as a whole, if not necessarily by individuals. Multiple individuals working for PMSCs hired by Coalition forces in the GWOT have been implicated in violations of law of armed conflict, such as the case of six employees from CACI International Inc. and Titan, who tortured detainees, and possibly prisoners of

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52 De Nevers, 175.
53 Ridlon, 225.
54 Schmitt, 530.
55 Gomez del Prado.
57 Ridlon, 217.
war, in Abu Ghraib.\textsuperscript{59} Schmitt notes that, overall, companies, “have not engaged in systematic violations that would suggest a disregard for the law.”\textsuperscript{60} Given the provisions of Article 4A(2), only a small minority of PMSCs employed by a state participating in an interstate conflict could be considered combatants.\textsuperscript{61} In sum, when a violation happens, the determination of legal status is as crucial as it is challenging: the status of PMSC employees is determined on a case-by-case basis, depending on what personnel do and for whom.

\textbf{2.4. Accountability Gap: The Shooting in Nisoor Square}

The assessment of the status of PMSC employees above indicates that at times what they have to do according to the law is unclear. But what they are not supposed to do, like shooting indiscriminately into the crowd, is clear. The beginning of this paper described an episode in which Blackwater employees, in the Nisoor Square of Baghdad, came under enemy fire and, in defense, shot indiscriminately into the crowd. This tactic is sometimes known as, “clearing by fire.”\textsuperscript{62} These Blackwater employees can be said to have taken part in direct hostilities illegally, regardless of whether they were defending themselves against the alleged militants.\textsuperscript{63} The Blackwater employees would have become unprivileged belligerents and could have been legitimately targeted by the enemy, depending on the activity they were involved in at the moment. Protecting and escorting legitimate military targets such as high-ranking personnel would have made the Blackwater guards legitimate targets. But in this case, they were protecting diplomats from the US Department of State who retain immunity from attack and therefore had the right to self-defence.\textsuperscript{64} This example illustrates that the status of PMSC employees is ambiguous and not easily determinable due to their complex relationship with the state and their activities. While it is debatable whether they

\textsuperscript{59} Julian Borger, “US military in torture scandal,” \textit{The Guardian} (April 30, 2004), retrieved from http://www.guardian.co.uk/media/2004/apr/30/television.internationalnews. The striking similarity between techniques used on Abu Ghraib prisoners and the techniques outlined in the Torture Memo, it is not a stretch to argue that those being held at the prison were considered “enemy combatant” – an otherwise vague classification employed by the Bush Administration for those suspected to be affiliated with the Talban or al-Qaeda. “Enemy combatant” mixes lawful and unlawful combatants, so that individuals can be held, but without protection from the Geneva Conventions. See William Haynes, “Enemy Combatants,” Council on Foreign Relations (December 12, 2012) retrieved from http://www.cfr.org/international-law/enemy-combatants/p5312; Human Rights Watch, “The Road to Abu Ghraib,” (June 9, 2004), retrieved from http://www.hrw.org/node/12123/section/2.

\textsuperscript{60} Schmitt, 531.

\textsuperscript{61} Gillard, 536.

\textsuperscript{62} Partlow and Pincus.

\textsuperscript{63} It must be noted that the conflict in Iraq, at the time this Blackwater took place, was of a non-international nature, over which the Common Article 3 of the Geneva Conventions and Protocol II preside. The principle of distinction is, however, customary international humanitarian law, applicable to international and non-international nature armed conflict. See Henckaerts and Doswald-Beck, 3-8.

\textsuperscript{64} De Nevers, 180.
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retained their civilian protection in this situation, even as individuals private contractors are subject to IHL. Shooting indiscriminately into a crowd, in which enemy combatants and innocent civilians were indistinguishable, amounts to a war crime: As de Nevers puts it, “the fact that the opponent is hiding among the civilian population does not lessen the legal requirement to avoid civilian casualties as far as possible.”65

In principle, PMSC personnel may be prosecuted by the courts of the states wherein the crime happened; the states from which the victims or the violators belong; or in home state of the PMSC. In practice, however, there have been few, if any, cases of PMSC employees being prosecuted.66 The Nisoor Square episode brings to the fore the accountability gap. After the incident, it was revealed that fourteen of the seventeen dead were indeed civilians (the youngest victim was nine years old).67 Iraq, the host country, could only revoke Blackwater’s license to operate within its borders. The contractors who fired at the crowd were not to be tried for their crimes in Iraqi court due to Coalition Provisional Authority Order 17.68 Order 17 was imposed unilaterally on Iraq in 2004 and explicitly gave PMSC employees immunity from Iraqi law and freedom from prosecution by Iraqi courts.69 Even though the Iraqi authorities later revoked Order 17, they did not attempt to have the contractors extradited.70 Less than a week later, Blackwater was back in Iraq.

At the home-state level, in this case the US, many alternatives are available, but they too have gaps due to the uncertain status of private contractors. The Uniform Code of Military Justice (UCMJ), for example, applies to all members of the armed forces of the US. It has jurisdiction over CAFs as well. This is significant as in 2010, armed contractors in Iraq made up approximately sixteen to twenty-two percent of the Department of Defense’s total armed force in Iraq.71 Notably, these contractors were still considered civilians, as they were not incorporated into the armed forces, as is required by Article 50(1) of the Additional Protocol I. Therefore, the CAF status did apply to the contractors. Still, because jurisdiction over PMSCs is not spelled out, the

65 Ibid, 182.
70 Maurie Schwartz, Congressional Research Service, The Department of Defense’s Use of Private Security Contractors in Iraq and Afghanistan: Background, Analysis, and Options for Congress (Washington, DC: June 22, 2010), 16.
US Congress has been unwilling to use UCMJ for civilians, calling it unconstitutional.\textsuperscript{72} Another crucial piece of legislation is the Military Extrajudicial Jurisdiction Act, (MEJA). It was amended in 2004 after two private contractors (with civilian status, though employed by DOD) tortured detainees and walked free. MEJA now covers all those employed by the American military, including contractors, though it has not yet been used for PMSC employees.\textsuperscript{73} In the case of the Blackwater employees in Nisoor Square in 2007, MEJA does not apply because they were hired by the State Department. Further legislation such as the Special Maritime and Territorial Jurisdiction Statute (SMTJ) and the War Crimes Act and Anti-Torture Statute also leave a gap because they strictly apply to US nationals, whereas PMSCs have been increasingly hiring employees from third party states, such as the use of locals of Iraq or Afghanistan.\textsuperscript{74}

At the international level, all states must search and extradite by universal jurisdiction any individual suspected of having committed “grave breaches” of the Geneva Conventions (\textit{jus cogens}), and for the states that ratified them, breaches of the Protocol I and Protocol II.\textsuperscript{75} Such actions against individuals have been rare. Another international recourse to prosecute individuals for war crimes is the International Criminal Court, but neither the US nor Iraq are party to its establishing document, the Rome Statute.

3. Measures by Hiring States toward Contractor Accountability

This paper has thus far focused on the problem of the ambiguous status of PMSC employees and the problems this ambiguity poses for accountability. Further discussion on accountability will be limited to measures hiring states can take to hold PMSCs accountable. After all, states are primarily responsible for placing PMSC employees in armed conflict and for assigning them quasi-military tasks, in which private contractors can be easily drawn into combat, thereby blurring the distinction between civilians and combatants. International efforts to hold PMSCs accountable, like giving non-state actors combatant status (not just private contractors, but also those who fall into the unlawful combatant category) will not happen in the foreseeable future. While international efforts to place limits states and PMSCs may be thwarted by states, as with the case of the Montreux Document and the UN Draft Convention on Private Military and Security Companies, state-level initiatives could be more forceful and timely.

\textsuperscript{72} Jordan, 319.
\textsuperscript{73} Ibid, 320.
\textsuperscript{74} Schwartz, 9-10.
\textsuperscript{75} Gillard, 542.
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The state-centric approach to increasing accountability is also endorsed by the Montreux Document which reiterates the obligations of states that hire PMSCs (contracting states), states in which PMSCs operate (territorial states), and states in which the PMSCs are incorporated (home states) in IHL and international human rights law.\textsuperscript{76} The Montreux Document makes two important contributions. First, it provides detailed guidelines to such states, though these practices are not legally binding. Second, the Montreux Document brings to light the lacuna in IHL with regards to the state obligations when hiring a contractor.\textsuperscript{77} Under IHL, contracting states are not allowed to delegate activities specifically assigned to states, “such as exercising the power of the responsible officer over prisoner-of-war camps or places of internment of civilians in accordance with the Geneva Conventions.”\textsuperscript{78} All other obligations pertaining to contracting states in Part I of the document are aimed at, “preventing, suppressing, investigating, and prosecuting violations of international humanitarian law and human rights law, and providing remedies.”\textsuperscript{79}

Notwithstanding the political and economic obstacles to implementing these measures states that hire PMSCs can make the most impact. The measures hiring states take can be divided in three temporal categories: the contracting phase, the in-the-field phase, and the post-conduct phase.\textsuperscript{80} During the first phase, the hiring state, being the “primary enabler and gatekeeper,” determines the activities that are privatized, and limits giving those tasks to private contractors that might compromise their civilian protections.\textsuperscript{81} States also decide who can be hired by a screening system that should take into account past allegations of misconduct. Companies are not immune from criticism or reputational damage. By separating those PMSCs whose employees have been implicated in wrongdoing, states will encourage the companies to be stricter in terms respecting international law.

In the field, having outsourced certain state functions does not absolve hiring states of the obligations they hold under IHL.\textsuperscript{82} In effect, a failure by the PMSC to fulfill the obligations of the state under IHL still makes hiring states responsible. States should educate and disseminate knowledge of IHL to the contractors that carry out tasks on their behalf.\textsuperscript{83} It is crucial for states to ensure that the PMSCs they hire respect IHL, either by including it in the contractual obligations for employees or in rules of

\textsuperscript{76} ICRC, \textit{The Montreux Document}, 10.
\textsuperscript{77} Huskey, 205.
\textsuperscript{78} ICRC, \textit{The Montreux Document}, 2.
\textsuperscript{79} Huskey, 205.
\textsuperscript{80} Ibid, 212.
\textsuperscript{81} Ibid, 195.
\textsuperscript{82} Gillard, 549.
\textsuperscript{83} Ibid, 551.
engagement. In the post-conduct phase, there is the potential to eliminate the obstacles to the assignment of responsibility for those who have inflicted harm, for example, through such means as explicitly giving UCMJ jurisdiction over contractors.

4. Conclusion

To conclude, this paper contends that the uncertain status of employees of PMSCs in international humanitarian law (IHL) creates an accountability gap. The end of the Cold War and the ensuing defence budget cuts created a supply of discharged professional military. The demand for military and security services from private actors grew and outsourcing and privatization of some state functions became the trend in advanced countries. At the same time, fragile states were relying heavily on PMSCs to support them. The uncertain legal status of private contractors demonstrates that their activities in war zones blur the civilian/combatant distinction. In such situations, status of private contractors depends on case-by-case analyses, ex post facto, of the tasks they undertake and their relationship with the state. The example of Nisoor Square shooting in Baghdad in September 2007 indicates that the uncertain status of PMSC employees creates an accountability gap so that breaches of IHL go unpunished. Furthermore, because contracting states are responsible for delegating tasks to PMSCs and for placing private civilian personnel in war zones, they are in the best equipped to ensure that PMSCs personnel respect the law. This difference highlights the need to consider who are civilians, and who does the fighting in the context of twenty-first century warfare. Insurgents in Iraq and Afghanistan did not face off with coalition forces on the front, wearing uniforms. If the use of labels like “enemy combatants” is to be avoided, the re-conceptualization of “civilian” and “combatant” is also warranted.

Bibliography


84 Ibid, 553.
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