

Mohamad Ghazi Janaby

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*This book is dedicated to
My parents . . . I pray to God for your
protection,
My country (Iraq) . . . I pray to God for peace
and tranquility to reign,
Those who sacrifice their lives for Iraq . . .
your sacrifices will not be forgotten.*

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List of Abbreviations

Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977
Articles of Association	International Code of Conduct For Private Security Service Providers' Association Articles of Association
CAT	Committee against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social, and Cultural Rights
CPA	Coalition Provisional Authority
D.D.C	United States District Court for the District of Columbia
DCAF	Geneva Centre for the Democratic Control of Armed Forces
Draft PMSC Convention	Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Company
DSL	Datasound Laboratories Ltd
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Geneva Convention I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

Geneva Convention II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
Geneva Convention III	Geneva Convention relative to the Treatment of Prisoners of War 1949
Geneva Convention IV	Geneva Convention relative to the Protection of Civilian Persons in Time of War
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLQ	International & Comparative Law Quarterly
ICoC	International Code of Conduct for Private Security Service Providers
ICoCA	International Code of Conduct for Private Security Service Providers Association
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFOR	NATO's Implementation Force in Bosnia and Herzegovina
IGOs	International Governmental Organisations
IHL	International Humanitarian Law
ILC	International Law Commission
IRRC	International Review of the Red Cross
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
Law, Dem. & Dev	Law, Democracy & Development
MINURCAT	United Nations Mission in the Central African Republic and Chad
Montreux Document	Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict
MPRI	Military Professional Resources Incorporated
MVM Inc	Global Support Services Company
NATO	North Atlantic Treaty Organization
NGOs	Non-international organisations
OAU	Organization for African Union
OAU Mercenary Convention	Convention of the Organisation of African Union for the Elimination of Mercenaries in Africa 1977

OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
PMSCs	Private Military and Security Companies
Rome Statute	Rome Statute of the International Criminal Court
SFOR	NATO's International Stabilization Force in Bosnia and Herzegovina
SOFA	Status of Forces Agreement
UN	United Nations
UN Mercenary Convention	United Nations International Convention against Recruitment, Use, Financing and Training of Mercenaries
UNAMID	African Union—United Nations Hybrid Operation in Darfur
UNCHR	United Nations Commission on Human Rights
UNDSS	United Nations Department of Safety and Security
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNITAF	United Nations Task Force in Somalia
UNOMSIL	United Nations Observer Mission in Sierra Leone
UNOSOM I	United Nations Operation in Somalia I
UNOSOM II	United Nations Operation in Somalia II
UNSC	United Nations Security Council
UNTAC	United Nations Transitional Authority in Cambodia
Working Group on the Use of Mercenaries	United Nations Working Group on Use of Mercenaries as a Means of Violating and Impeding the Exercise of Rights of Peoples to Self-Determination

Chapter 1

Introduction

1.1 The Definition of Private Military and Security Companies

Outsourcing military and security services to the private sector is an emerging trend within international law. The shift to using private military and security companies (PMSCs) in countries such as Iraq and Afghanistan has brought attention to the role these companies may play in fulfilling functions that are normally monopolised by States or international organisations.¹ Clients of these companies include not only States but also IGOs, corporations and NGOs.² In response to the increasing reliance on PMSCs and because there is no international legal instrument that has been adopted to regulate their activities, a variety of definitions and terminologies are used to describe these companies.

In the context of terminology, there are different terms used to designate private entities that provide security or military services. Examples include private security companies, private military firms, private security and military companies, private security industry and private contractors and mercenaries.³ Other labels are added such as private armies, privatised armies, private military corporations or firms, private military contractors, military service providers, non-lethal service providers and corporate security firms.⁴ However, the terms that are used commonly are “private security companies (PSCs)” and “private military companies (PMCs)”.⁵ In this regard, it is believed that there are similarities between PSCs and PMCs in terms of their corporate elements and control structures; both are founded by former

¹Francioni (2008), p. 961.

²Tonkin (2008), p. 779.

³De Nevers (2009), p. 173.

⁴Milliard (2003), p. 1.

⁵Kinsey (2006), p. 16.

soldiers, carry guns and have a tactical approach to their activities.⁶ Kinsey, however, thinks that this view is questionable because every entity has its own characteristics that differentiate them from each other. He attempts to distinguish between these firms according to the kind of activities they provide. For example, the fundamental operations carried out by PSCs relate to crime prevention and public order, while PMC operations have a military nature.⁷ Accordingly, PMCs are defined as corporate entities offering professional services relating to warfare, such as conflict operations, strategic planning, intelligence, risk assessment and training and technical skills.⁸ This definition applies to companies such as L-3-MPRI in the US and Sandline International in the UK.⁹ On the other hand, PSCs are identified as corporate entities offering defensive security services necessary for guarding individuals and properties. Examples include DSL (UK) and Wackenhut (US).¹⁰ In this respect, the main concern is the privatisation of military and security services rather than focusing on the terms “military” and “security”.¹¹ Therefore, the term “private military and security companies” is more appropriate to cover corporations selling military and security services. The term PMSC has been broadly used by international organisations such as the UN and by States such as the UK. This means that it is officially accepted as the primary term within this sector.¹² This term has been used and defined by some international instruments. For example, the Draft Convention on private military and security companies presented by the UN Working Group on the Use of Mercenaries defines a PMSC as a “corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities”.¹³ Similarly, the Montreux document¹⁴ defines the term “PMSCs” as

[P]rivate business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons system; prisoner detention; and advice to or training of local forces and security personnel.¹⁵

⁶ibid 17.

⁷ibid.

⁸Singer (2008), p. 8.

⁹Vaux et al. (2002), p. 15.

¹⁰ibid 7.

¹¹Salzman (2008), p. 858.

¹²Mathieu and Dearden (2007), p. 744.

¹³UN Doc A/HRC/15/25 (2010).

¹⁴On 17 September 2008, 17 States—Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the UK, Ukraine and the US—finalised the so-called Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict; for more information, see [Switzerland Federal Department of Foreign Affairs, ‘Participating States of the Montreux Document’](http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html). <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html>. Accessed 23 June 2015.

¹⁵UN Doc A/63/467–S/2008/636.

The additional issue relating to the concept of PMSCs is their classification. Attempts have been made to divide these entities according to the kind of activities they undertake. Kinsey classifies them in two groups, “active” and “passive”. Companies such as Executive Outcomes, which take part in combat operations or seize territory, are classified as “active”, while companies such as L-3MPRI, which offer unarmed services such as defending territory, training and advice, are considered “passive”.¹⁶ Following on from this analysis, there are three types of private companies. Firstly, there are “private military companies”, which engage in military support and in some cases military operations. Secondly, there are “private combat companies”, which carry out combat operations. Finally, there are “private security companies”, whose activities do not have a military nature but which carry out activities such as guarding buildings and people, maintaining public order and providing security consultations.¹⁷

Similarly, and dependent on the nature of the operations, Krahmann categorises private companies providing military and security services in armed conflicts into three generalised types.¹⁸ The first category is “mercenary firms”, which have an effective role in international and non-international armed conflicts by providing the parties involved in armed conflict with soldiers or indeed actually taking direct part in that conflict. The second category is “private military firms”, which offer services that are not considered to amount to direct participation in armed conflict, such as military training and strategic advice. Krahmann’s third category is “private security firms”, which specialise in supplying military support that includes logistics support, base maintenance functions and transportation. Halliburton represents perhaps the best example of this category.¹⁹

In addition, every company can be further classified into another category. For instance, Singer provides three categories of private military company. The first is “military provider firms”, which specialise in providing actual fighting services at the battle front. Secondly, there are “military consulting firms”, which offer consulting and training services. Singer’s third category includes “military support firms”, which are concerned with providing logistical, technical, supply and support services.²⁰

It appears therefore that there is no definitive method of classifying PMSCs,²¹ especially because some companies try to manipulate their operations to take

¹⁶Kinsey (2006), p. 21.

¹⁷ibid 13.

¹⁸Krahmann (2005), p. 8.

¹⁹Halliburton started in 1919 to specialise in providing products and services to the energy industry. Its activities now cover around 80 countries with more than 60,000 employees. For more information, see [Halliburton](http://www.halliburton.com/en-US/default.page). <http://www.halliburton.com/en-US/default.page>. Accessed 2 June 2015.

²⁰Singer (2008), p. 88. These types of private companies will be analysed in detail in Sect. 2.1.3.1.

²¹ibid 17.

advantage of changing circumstances in different theatres.²² In this regard, although some companies are considered as security entities because their main specialisation provides unarmed services, they may engage in military operations to expand their business. For example, Gurkha Security Services worked in Sierra Leone to supply security services; however, its team engaged in fighting with rebel forces, and some of them were killed.²³

In conclusion, the term “private military and security company” is viewed as most appropriate for this study as it covers all of the activities offered by these private entities. Moreover, it appears that the definition in the Montreux Document may be more acceptable because it sets up general standards to define PMSCs regardless of how these firms describe themselves. These standards generally relate to the kind of tasks that they carry out and whether they constitute military or security-related services. In regard to the classification of PMSCs, no clear method can be used to categorise them as there are a lack of legal international instruments regulating this sector. However, some authors, as mentioned above, categorise them according to the nature of their operations. This work asserts that it is not important how these companies are classified; what is important is the nature and consequences of their involvement in armed conflicts.

1.2 The Historical Emergence of Private Military and Security Companies

All studies concerning the historical emergence of PMSCs try to make a connection between them and mercenaries.²⁴ The reason behind this is in the similarities between them; for example, both employ foreign individuals and sell military services for monetary compensation.²⁵ Accordingly, this section will explore the emergence of PMSCs. It will do so by examining their origins as mercenaries.

Mercenaries have a long history. Numidian mercenaries were used extensively by Ramses II in the Battle of Kadesh in 1294 BC and during the period of King David (1010-973 BC).²⁶ During the time of Alexander the Great, mercenaries constituted one-third of his army that invaded Persia in 334 BC.²⁷ The majority of Caesar’s cavalry in 50 BC was mercenaries, and 600 years later mercenaries were used widely in the Justinian East Roman Army.²⁸ The Mercenary War

²²Kinsey (2006), p. 21.

²³Foreign and Commonwealth Office (2002), p. 9.

²⁴Singer (2008), Gulam (2005), and Ballard (2007).

²⁵The similarity between PMSCs and mercenaries will be critically examined in detail in Sect. 2.1.3.1.

²⁶Milliard (2003), p. 2.

²⁷ibid.

²⁸ibid 2.

happened after the First Punic War (264–341 BC) as a result of non-payment of mercenary's salaries. This reflects the large size of the army hired at that time by the Carthaginian Empire.²⁹ During the Norman conquest, mercenaries were used extensively by the army of Duke William.³⁰

The Roman period witnessed a flourishing mercenary sector. Romans hired soldiers from different areas such as Numidia, the Balearics, Gaul, Iberia and Crete during the Punic War. By the end of the third century, the Roman army was more Germanic than Roman.³¹

The corporate nature of mercenaries can be traced to Harold Hardraade's Norse mercenaries, who offered to fight beside the Byzantine Empire in 1032. They then went on to form the mercenary Varangina Guard.³² However, the first private military organisations were created in Western Europe during the feudal period, when bands of skilled workers rented themselves to the highest bidder.³³ Singer believes that the first emergence of private military companies was a consequence of unemployed former soldiers, on finding themselves without money or a home feeling forced into forming companies (derived from "con pane").³⁴ Their main function was to support and protect their groups, who were travelling together in search of work and to take part in combat. These companies were named "free companies".³⁵ The loyalty of these company employees was to their particular unit, rather than to their country, and they tried to structure themselves provisionally to be ready to face any military forces.³⁶

It seems that these firms were strong. They fought the king of France, who had tried to wipe them out, at the battle of Brignais in 1362. In Italy, many companies were established to provide military services to clients. Examples included the English White Company³⁷ and the Grand Catalan Company.³⁸ These companies were called *condottiere*, which refers to the group of mercenaries who provided the bulk of the armed forces for most Italian cities during the Renaissance period. The term is derived from the Italian word *condotta* (contract), probably referring to the contract that these groups made with different cities or lords. *Condottiere* originally

²⁹This war happened because mercenaries did not earn their salary from their clients. Singer (2008), p. 21.

³⁰Milliard (2003), p. 2.

³¹Singer (2008), p. 21.

³²Milliard (2003), p. 8.

³³Singer (2008), p. 22.

³⁴The word is of a Latin origin, and it indicates the bread received by members, *ibid* 24.

³⁵*ibid*.

³⁶*ibid*.

³⁷This company was commanded by an Englishman, Sir John Hawkwood, and consisted of mercenaries coming from France and England after ending the Hindered Year's War. Caferro (2006), p. 9.

³⁸Singer (2008), p. 25.

came from different places such as the Balkans, Germany and Hungary, but by the end of the fifteenth century most of them were Italians.³⁹

After the feudal era in Europe and between 1300 and 1450, other mercenary free companies were established, especially in England, such as the English Company of the Staple and the Merchant Adventurers. These entities continued in existence until the end of the sixteenth century.⁴⁰ In France, there was an attempt during this period to find an alternative to the free companies by establishing a standing army consisting of companies quartering in different parts of France. These companies absorbed the free companies, and that forced the remaining mercenary companies to go elsewhere, particularly the *condottiere* companies in Italy.⁴¹

The concept of the nation-state that prevailed after the peace of Westphalia in 1648 helped to create national armies. This development did not affect the existence of soldiers for hire, especially private colonial companies that offered their services to protect territories and trade.⁴² In this context, Ortiz believes that PMSCs were founded in Europe during the seventeenth and eighteenth centuries as a response to the proliferation of overseas trade.⁴³ This trade, especially with India, was a very risky enterprise as it was a long journey to travel there and then return, in some cases taking years to complete. This forced merchants to organise themselves as a group in the form of joint-stock enterprises, which enabled them to face risks together. This kind of overseas trading required the consent of the States concerned, with such consent being termed a “charter”. A charter allowed commercial companies to employ their own security forces to accompany them during their risky trading trips. These forces have been described as an embryonic form of PMSCs.⁴⁴

The expansion in the role of private armies caused concern to some sovereigns during the seventeenth century. They tried to avoid this issue by hiring individual mercenaries and integrating them into their own national armies, or they hired an army from another ruler.⁴⁵ By the end of the eighteenth century, hiring individuals or armies as mercenaries was very common.⁴⁶ For example, the German Hessian forces were hired by the British government to fight against those supporting the American Revolution.⁴⁷ Groups of soldiers formed corporate entities and were called “auxiliaries” (*Hilfstruppen*) in an attempt to distinguish them from mercenaries who were enlisted in a foreign army for a sum of money and certain conditions.⁴⁸

³⁹Caferro (2006).

⁴⁰Milliard (2003), p. 8.

⁴¹*ibid.*

⁴²Wallwork (2005).

⁴³Ortiz (2007), p. 11.

⁴⁴*ibid.*

⁴⁵Smith (2003), p. 104.

⁴⁶*ibid.*

⁴⁷Baum and McGahan (2009).

⁴⁸Atwood (1980), p. 1.

The Crimean War witnessed a huge number of mercenaries recruited by European States.⁴⁹ France and Great Britain relied heavily on foreign fighters rather than their formal armed forces during the Crimean War. After it, the German defence model of cadre-conscript preferred not to recruit mercenaries. Instead, it relied on the national army rather than on foreign soldiers.⁵⁰

Moreover, private firms played an important role in naval warfare as their ships were used by States in hostilities. The activities of these vessels were controlled by a commission of war that permitted fighters to use force at sea. These privateers were named “Sea Dogs” such as Francis Drake and Walter Raleigh.⁵¹

The expanding role of organised private armies, especially individuals and *ad hoc* mercenaries, forced States to attempt to curtail their activities during the twentieth century. In this period of time, the privatisation of war shifted from companies to individual ex-soldiers named mercenaries.⁵² These entities particularly affected the post-colonial African regimes.⁵³ For instance, mercenaries emerged as a company with political goals in the Democratic Republic of the Congo (formerly Zaire) after it gained independence in 1960. They were hired either by the central government to quell the rebellions such as the Simba movement in 1966 or by rebels attempting to capitalise on independence such as the attempt of Moise Tshombe to separate the Katanga province.⁵⁴

In some cases, the mercenaries represented a military force fighting the central government. For example, two groups of mercenaries attempted to overthrow the Congo’s government in 1967.⁵⁵ Africa, as an important area of decolonisation, witnessed a significant transition from *ad hoc* irregular mercenary groups, employed in the 1950s and 1960s, to modern Executive Outcome-type companies, particularly in the 1990s.⁵⁶ These companies played a very effective role in combat in States such as Nigeria and Sudan. For this reason, African countries led international efforts to regulate mercenary activities by proposing the introduction of Article 47 of Additional Protocol I 1977 to the Geneva Conventions 1949, the Organisation of African Unity Convention for the Elimination of Mercenaries in Africa 1972 and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989.⁵⁷

The end of the Cold War was another factor that helped to increase PMSC activities as a result of the changing nature of conflicts from international to internal. Moreover, many States adopted plans to reduce their national armed

⁴⁹Taulbee (1998), p. 145.

⁵⁰*ibid.*

⁵¹Smith (2003), p. 106.

⁵²Singer (2008), p. 37.

⁵³Stinnet (2005), p. 214.

⁵⁴Taulbee (1998), p. 146.

⁵⁵*ibid.*

⁵⁶Wallwork (2005), p. 27.

⁵⁷These documents will be explored in Sect. 2.1.1.

forces. For instance, around 12,000 Russian soldiers were demobilised from the former Soviet Union armed forces to work for PMSCs, and British military forces were decreased by one-third after the end the Cold War.⁵⁸ At the same time, this period witnessed a significant increase in defence spending that almost covers the cost of the PMSC contracts, which form an alternative to a large standing army. For example, it is estimated that the cost of contracts with PMSCs increased from US \$900 million to US\$3.9 billion.⁵⁹ This reflects an important tendency of States to rely on PMSCs to carry out governmental tasks in dangerous areas. The clearest example of that is the huge number of PMSCs working in Iraq, Afghanistan, Balkan, Somalia, South Sudan and Cambodia.⁶⁰

1.3 The Scope of the Subject

This study focuses on the legal regime applicable to PMSC personnel in IHL. IHL is defined as the legal rules that apply during armed conflicts and that aim to restrict the methods and means of warfare and to provide protection for those who are not or who are no longer participating in the hostilities.⁶¹ IHL is also known as the law of war, the law of armed conflict or *jus in bello*.⁶² There is another branch of international law dealing with war termed *jus ad bellum*. This concerns the legality of war by identifying when war is or is not legal.⁶³

In terms of setting out the parameters of this study, it is important to emphasise that its scope is IHL or *jus in bello* and does not extend to *jus ad bellum*. Consequently, issues such as the legality of hiring PMSCs by various clients such as States, armed groups and international organisations and the responsibility of these clients for violations committed either by PMSCs or their personnel are not within the scope of this book.

Furthermore, the activities provided by these companies are divided into two types, namely security and/or military services. The UN Draft PMSC Convention prepared by the Working Group on the Use of Mercenaries defines these services as follows:

Military services: refers to specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities;

⁵⁸Foreign and Commonwealth Office (2002).

⁵⁹Morris (2009).

⁶⁰Isenberg (2004).

⁶¹ICRC (2004).

⁶²ibid.

⁶³Thürer (2011), p. 40.

Security services: refers to armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities.⁶⁴

Military services form the core research interest of this work where they are undertaken by PMSCs in the context of international or internal armed conflicts. Security services fall outside the scope of this study because they can include a very wide range of support services supplied by PMSCs in times of peace, as well as war. However, security services may be considered herein if they are provided in the context of an armed conflict.

Furthermore, this work does not aim to create or award a new status to PMSC personnel, but it aims to clarify which, if any, of the legal statuses established under IHL can apply to them. Therefore, the main purpose of this study is to find how IHL can optimally classify PMSC personnel in situations where their engagement in armed conflicts is considered to be a direct participation in hostilities and in situations when such engagement is not so considered. Three possible legal statuses established under IHL will be examined. These are the statuses of “mercenary”, “combatant” and “civilian”. Additionally, this study aims to find out the implications of the application of these statuses for the regulation of PMSCs and their personnel. In other words, this study tries to firstly identify the legal status of PMSC personnel before specifying which rules of international law can be applied to PMSCs and their personnel. To achieve this goal, IHL and international human rights law will be the main legal rules investigated. In addition to the traditional legal rules, this study investigates some international initiatives launched by States and humanitarian organisations to regulate PMSCs. These initiatives are not, however, binding on PMSCs.

It is additionally worth pointing out that this study only critically examines the legal status of PMSC personnel in armed conflicts and not the legal status of the PMSCs themselves. Company law is not the subject herein; IHL does not apply to legal entities. Notwithstanding this, some questions concerning international human rights law applicable to the operations of PMSCs will focus on both the PMSCs and their personnel.

1.4 Methodology

This work uses various research methods to answer its research questions. The main method involves critical analysis of the legal rules established under IHL. Since there has not been an international treaty directly or exclusively referring to PMSCs that would clarify the legal status of their employees, it becomes necessary to rely on the traditional rules. This study adopts an expository approach in order to

⁶⁴[UN Doc A/HRC/WG.10/1/2.](#)