

# Blackwater: mercenaries and international law

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*The government of Iraq suspended the private security firm Blackwater from operating in the country after some of its employees opened fire on and killed 17 civilians in Baghdad in September 2007. The incident came against the backdrop of a conflict in which between 25,000 and 50,000 mercenaries from several companies, the biggest of which is Blackwater, are employed by the US. These companies operate beyond the reach of international law, with little accountability to either the occupying force or the Iraqi government. This Comment asks should they be illegalised or regulated?*

Shortly after members of the private security firm Blackwater fired on civilians in the Mansur district of Baghdad last September 12, the Iraqi government decided to suspend its licence to operate. According to the government, Blackwater employees have been involved in shootings that have injured or killed almost 20 Iraqi civilians since the beginning of the year. The suspension and possible revocation of licences for this company raises serious concerns for other such firms, as they employ approximately 50,000 staff in Iraq. Any significant change to the status quo would affect the US government, which relies heavily on these forces to reduce official figures for the military deployment in Iraq, and the issue is also a matter of concern for people everywhere because companies like Blackwater operate in a legal grey area where they are not accountable to anybody. It must also be recognised that mercenaries themselves do not have any rights, nor can they claim protection from anyone, even when they are military staff.

The existence of private security companies and their expanding operations highlights the need to review existing international legislation and to examine other options, ranging from illegalisation to regulation.

International Humanitarian Law, mainly comprising the 1949 Geneva Convention, the 1977 Additional Protocols and the Hague Conventions of 1899 and 1907, is still the most effective legal instrument in guaranteeing assistance and protection for the victims of armed conflict. It also limits the use of certain methods of warfare. However, for International Law to be effective and applicable to current situations, it needs to adapt and evolve in the same way that the nature of armed conflicts changes.

This does not mean that the progress made in international law over the last 100 years is not useful in the present day. In fact, the 1949 Geneva Conventions are completely valid in the vast majority of contemporary armed conflicts. However, new actors have appeared whose functions have made international humanitarian law partly obsolete, and among these new actors are private security contractors. The demand for private military security services is increasing and it is one of the fastest growing industries in the world. Soldiers can earn more by selling their

military skills to foreign governments than in their own countries. Their transnational activity is dictated by commercial criteria, not by international law. The lack of specific regulation on the privatisation of security impacts on international security and warrants our attention.

The prevailing thesis, especially among human rights groups, is that private security firms are the mercenaries of the 21st century, providing expedient solutions to social and political problems in contemporary armed conflicts<sup>1</sup>. These groups are opposed to legalising private security contractors and question the use of armed force by non-state actors. They say that the legitimate use of force corresponds solely to the state. Governments should maintain their function as the sole providers of military security services. For the sake of the public interest, states should conserve their monopoly on the legitimate use of armed force.

Fine as these sentiments may be, and they are indeed important, such arguments will not make private security companies go away. Their clients are there - states themselves, rebel groups and even, in certain cases, humanitarian agencies<sup>2</sup>. Their services are in demand and making them illegal will not be effective because they will continue to exist, and their activity will continue to potentially infringe human rights laws. "Prohibition or regulation?" was the question posed in a United Nations information bulletin<sup>3</sup>. From a strictly legal perspective, these companies operate in a grey area. They are not addressed, nor do they have any rights or obligations, under current international humanitarian<sup>4</sup> law. The President of the United Nations Working Group on the Use of Mercenaries as a Means of Violating Human Rights and of Impeding the Exercise of the Right of Peoples to Self-Determination declared that military and private security firms "enjoy an immunity that can easily become impunity, which could lead to some States recruiting these contractors to avoid direct legal responsibility"<sup>5</sup>.

While the number of private security agencies increases globally, legal debates about their status and functions are few and far between. As a result, private security companies operate in an ambiguous and poorly defined area of law<sup>6</sup>. Consequently, if there no laws, or the laws are not clear, they are not complied with. Our goal is to ask if international law regulates the activity of private security companies, in other words to challenge international law and "test" its effectiveness.

## Defining mercenaries

The term "mercenary" has been used to describe individuals who kill for economic gain, troops contracted by one country to work in another country, and private security companies providing military services in their own country. From the historical and social point of view, the fact that the term mercenary has been used to describe different activities does not contribute to clarifying issues. And what is worse, international law does not solve the problem either. International legislation needs to be analysed to see how progress can be made on this issue.

The first set of international laws regulating war situations was the Hague Convention in the early 20th century. The 1907 Hague Convention on Neutral Powers established legal standards applicable to states and neutral persons in cases of war. However, it did not restrict the possibility for nationals of member states to work for hostile states. A national who is contracted by a

<sup>1</sup> Musah, A.F., and Fayemi, J. (eds.), "Mercenaries", Pluto Press, London, 2000, p.14.

<sup>2</sup> In southwest Kosovo, the private military security company Armor Group (United States) operates as the lead agency in the coordination of demining activities. Demining is considered to be a humanitarian operation. In ArmorGroup, <http://www.armor-mine-action.com>

<sup>3</sup> Office of the United Nations High Commissioner for Human Rights, "Repercussions of mercenary operations on the rights of people to free determination", Information bulletin n.28, Geneva, 2002, p.12

<sup>4</sup> Rosemann, N., "The Privatization of Human Rights Violations – Business' Impunity or Corporate Responsibility? The Case of Human Rights Abuses and Torture in Iraq", in *Non-State Actors and International Law*, vol. 5, N. 1, 2005, pp.77-100.

<sup>5</sup> Fourth period of the United Nations Human Rights Council sessions, 21 March 2007, Geneva, p.3

<sup>6</sup> Kinsey, C., "Corporate Soldiers and International Security, The Rise of Private Military Companies", Routledge, London, 2006, pp. 134 and following.

foreign power does not, therefore, commit an international crime and should be treated as a soldier serving in a foreign force. The reluctance to control the activities of individuals in the military field is based on the early 20th century distinction whereby governments and individuals were considered mutually exclusive spheres. This norm gradually disappeared in the following decades when it was acknowledged that the private actions of individuals could have an influence on the relations between states<sup>7</sup>.

The next step in the regulation of private military actors was taken in the 1949 Geneva Convention, especially in the III Geneva Convention on the protection of prisoners of war. Essentially, the aim was to establish relative standards in the treatment of prisoners of war. It was not intended to control or ban the activity of private military forces. The 1949 III Geneva Convention only differentiated two categories: members of the armed forces (combatants) and the civilian population. In so far as mercenaries formed part of the legally defined armed forces, they were entitled to the protection extended to prisoners of war. Article 4 of the 1949 III Geneva Convention includes very different actors in the category of prisoners of war. It does not make a formal distinction between mercenaries and other combatants. As it is very lengthy, we indicate the sections most relevant to our analysis:

“A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions:
  - (a) That of being commanded by a person responsible for his subordinates;
  - (b) That of having a fixed distinctive sign recognisable at a distance;
  - (c) That of carrying arms openly;
  - (d) That of conducting their operations in accordance with the laws and customs of war. {...}
4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorisation from the armed forces which they accompany, who shall provide them for that purpose with an identitycard similar to the annexed model. {...}

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment. {...}”

<sup>7</sup> Singer, P.W., “War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law”, in *Columbia Journal of Transnational Law*, n. 42, 2004, pp.521-549, p.526.

In 1949, an inclusive definition of war prisoners was decided upon. With the aim was of protecting the greatest number of combatants, everybody who participated in an international armed conflict was granted the status of prisoner of war.

After the post-colonial experience, the general perception of mercenaries became more negative. Mercenary groups challenged several newly-formed African states and even the United Nations during the Congo operation (UNOC) from 1960 to 1964. In response to these incidents, international legal controls over mercenary activities were sought. From the 1960s onwards, the United Nations condemned the use of mercenaries against national freedom movements. In the General Assembly's 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States<sup>8</sup> it declared states had the duty to refrain from organising armed groups, including mercenaries, for incursion into the territory of another state. The 1970 Declaration represented a new departure in the international legal framework, and mercenaries became actors outside the law<sup>9</sup>.

Finally, at the level of international humanitarian law, Protocol I of 1977, in the section headed "Combatant and Prisoner of War Status", defines mercenaries as an independent category, different from combatants. Paradoxically, in the paragraph previous to the definition of mercenaries, that is to say, even before being defined, they are denied the status of combatants and prisoner of war. Protocol 1 (Article 47) reads:

"1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. 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."<sup>10</sup>

The immediate reaction to the problem of private security agencies in the context of contemporary armed conflicts is to describe them as modern mercenaries and consider them to be illegal. However, international humanitarian law does not deal with the legality of mercenaries' activities nor does it establish what the responsibilities of a mercenary are. The international legal definition of a mercenary exists only to deprive the mercenary of prisoner-of-war status in the event of being captured<sup>11</sup>. Protocol I of 1977 is limited to defining the criteria an individual should fulfil in order to be considered a mercenary and to deprive him of any legal guarantees.

<sup>8</sup> Resolution 2625 (XXV) of the General Assembly, 24 October 1970.

<sup>9</sup> Singer, P. W., "War, Profits, ...", op. cit., p.527.

<sup>10</sup> Article 47 (2) of the Additional Protocol was adopted by consensus.

<sup>11</sup> Clapham, A., "Human Rights Obligations of Non-State Actors", Oxford University Press, Academy of European Law, European University Institute, 2006, p.299.

Just as international humanitarian law denies mercenaries the status of war prisoner and combatant, mercenaries tend not to respect humanitarian principles in their own war operations<sup>12</sup>. The condition of prisoner of war, that was not applied to the alleged members of Al-Qaeda held in Guantánamo<sup>13</sup>, is fundamental as it guarantees the application of the III 1949 Geneva Convention relative to prisoners of war – the duty to protect the captured person until a competent tribunal determines their status, among other basic rights.

When a person is described as a prisoner of war, the state that holds him cannot act exclusively according to its national laws. It must apply the III 1949 Geneva Convention relative to prisoners of war, whether it has ratified said international treaty or not. If we consider private security contractors to be mercenaries they will not be afforded the protection granted to prisoners of war, according to the III Geneva Convention, in the event of capture.

The application of the legal definition of mercenary to private security companies today is confusing. The definition requires that all the criteria in Article 47 of Protocol 1 are fulfilled. In short, it requires that mercenaries work for a foreign government, participate directly in an armed conflict to which their own state is not a party and that their actions are motivated by personal gain and material compensation. However, as Gómez del Prado, president of the aforementioned Working Group, pointed out: “there is an overlap between ‘traditional’ mercenaries and private security companies”<sup>14</sup>.

The definition that leads to most confusion derives from the requirement that they “take a direct part in the hostilities”, as stated in Article 47 of 1997 Protocol I. The definition of mercenary in international treaties takes as its starting point that the mercenary is “specifically” recruited with the aim of taking part in armed conflict. The question is whether private military agencies are recruited to participate directly in an armed conflict. The services offered by these companies are specifically military as exemplified by the fact that they have been determining actors in conflicts such as those in Angola, Croatia, Ethiopia, Eritrea and Sierra Leone. The debate regarding what conduct constitutes direct participation in hostilities and what conduct cannot be considered direct participation is never-ending. One only needs to examine the number of different seminars, meetings and proposals regarding the issue to conclude that this is one of the most sensitive questions facing contemporary international humanitarian law. In the vast majority of debates concrete hypotheses are discussed and several solutions, often contradictory, are proposed<sup>15</sup>.

During the Diplomatic Conference in which Protocol I was drawn up, some countries opposed the definition of mercenary mentioned above. As Henckaerts and Doswald-Beck explained during the conference for adopting the Additional Protocols in 1977, countries such as Afghanistan, Cameroon, Mauritania, Nigeria and Zaire – mainly African countries - opposed the definition of Protocol I. The Netherlands did not accept the idea of “motivation” and the subsequent ideas in said paragraph<sup>16</sup>.

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<sup>12</sup> E/CN.4/2000/NGO/148, Human Rights Commission, 56th period, 22 March 2000.

<sup>13</sup> Military Commissions Act 2006.

<sup>14</sup> Fourth period of the United Nations Human Rights Council sessions, 21 March 2007, Geneva, p.2

<sup>15</sup> Quéguiner, J.F., “Direct Participation in Hostilities under International Humanitarian Law”, International Humanitarian Law Research Initiative, Program on Humanitarian Policy and Conflict Research, Harvard University, November 2003.

<sup>16</sup> Henckaerts, J.M., and Doswald-Beck, L., “Customary International Humanitarian Law”, vol. I, International Committee of the Red Cross and Cambridge University Press, 2005, p.392.

It is no coincidence that in the same year the Organisation for African Unity adopted the OAU Convention for the Elimination of Mercenarism in Africa, which has been in force since 22 April 1985<sup>17</sup>. This convention is the international treaty that most harshly penalises mercenary activity, because it typifies these actions as crimes against peace and security in Africa. Article 1 states:

“1. 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;

(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) Is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.

Additional Protocol I (to the Geneva Convention) and the African Treaty differ in some respects. In the former, the promise of material compensation should be “substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party”. The African Treaty, on the other hand, only refers to the promise of material compensation, irrespective of whether it is higher than that promised or paid to ranking combatants. There is another substantial difference: the African treaty, after defining what a mercenary is, penalises their activities in the same text. This is not the case in Protocol I of 1977. As a result, the Organisation for African Unity specifies that mercenarism is a crime. In applying the Convention, party states should adopt legal measures to eliminate mercenary activity.

## The International Convention against the Recruitment, Use, Financing and Training of Mercenaries

In 1989, after nine years of debate, the International Convention on the Recruitment, Use, Financing and Training of Mercenaries was approved by the UN. To date, twenty states have ratified it: Azerbaijan, Barbados, Belarus, Cameroon, Costa Rica, Croatia, Cuba, Cyprus, Georgia, Guinea, Italia, Liberia, Libya, Maldives, Mali, Mauritania, Moldavia, New Zealand, Peru, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan. It came into effect 20 October 2001, a decade after its approval. The states that have ratified it are not exactly great powers. This reflects international tensions between developing countries and the West and highlights the latter’s willingness to tolerate mercenaries outside its own borders<sup>18</sup>.

Shortly beforehand, in 1987, the Human Rights Commission had named a Special Rapporteur on the use of mercenaries to examine the negative effects of mercenary activity, gather accurate information from governments and non-governmental organisations and to encourage the ratification of the International Convention.

<sup>17</sup> Organisation for African Unity Treaty on the Elimination of Mercenarism in Africa, July 1977.

<sup>18</sup> Kinsey, C., “Corporate Soldiers and International Security, The Rise of Private Military Companies”, Routledge, London, 2006, p.134 and following.

The Convention defines what actions are considered to be offences and establishes extradition agreements to address treaty violations. It contains a wide-ranging definition of what a mercenary is. It includes the terms of Article 47 of Protocol I and states that "It will also be understood that a 'mercenary' is also 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.

Although the definition detailed in the United Nations treaty is wide-ranging, existing laws do not adequately regulate the many different activities of military and private security companies. The second form of mercenarism included in this convention refers specifically to taking part in a concerted act of violence with the aim of overthrowing a government or undermining the territorial integrity of a state<sup>19</sup>. At present, fulfilling the conditions of this treaty is so complicated that, ironically, it has facilitated the activities of military and private security companies, as they have managed to avoid being held to account. As a result they remain in a sort of legal limbo.

Furthermore, the definitions in international treaties focus on the idea that the individual has been specially recruited to act in a specific armed conflict. However, private security companies recruit employees for long periods, or on the basis of contracts that are not linked to one conflict in particular<sup>20</sup>.

This resistance to controlling the role of mercenaries is reflected in negotiations for approval of the Statute of the International Criminal Court. In the preparatory work for approving the Statute of Rome there was not enough support to introduce the idea that being a mercenary was a war crime<sup>21</sup>. So we currently have the definition of mercenary in Protocol I of 1977 and that of the 1989 International Convention on the Recruitment, Use, Financing and Training of Mercenaries, and that is as far as legal definitions go. Neither of these two international treaties is customary law because the number of signatory states is few and the norms they contain are not generally recognised by the international community.

Nevertheless, several states insist on the need to define an international legal framework relating to mercenaries and to this end, the Human Rights Commission has promoted meetings of experts<sup>22</sup>. Following on from these meetings, suggestions have been made that the definition

<sup>19</sup> Singer, P.W., "War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law", op. cit., p. 531.

<sup>20</sup> An example of a contract of this type (Papua New Guinea - Sandline International) can be found in Singer, P., "Corporate Warriors, The Rise of the Privatized Military Industry", Cornell University Press, Ithaca, London, 2003, pp.245-254.

<sup>21</sup> Proposal by Comoros and Madagascar, UN Doc. A/CONF. 183/C.1/L.46, 3 July 1998.

<sup>22</sup> The Working Group on the Use of Mercenaries as a Means of Violating Human Rights and of Impeding the Exercise of the Right of Peoples to Free Determination was set up in July 2005 according to Resolution 2005/2 of the Human Rights Commission. It took over from the mandate of the Special Rapporteur on the Use of Mercenaries, in effect from 1987 to 2005.

of a mercenary should be widened. The response to this suggestion has been that ways should be found to protect the legitimacy of private security agencies when they are contracted by governments, the United Nations or multinationals. That is to say, a way around criminalisation should be found in order to move onto new forms of regulation and accountability<sup>23</sup>.

## Defining private security companies

The concept of private security companies appeared in international dialogue after the firm Executive Outcomes (EO) from South Africa, was contracted with the mission of occupying the Soyo region in Angola in 1993, This area has petrol reserves and was under UNITA control. The objective was fundamentally strategic. For this reason, it can be said that these companies impact on the security and political context of weak states<sup>24</sup>. As witnessed in a recurring phrase used today, they act as "multiplying forces" responding to a chain of command. Through them the intention is to gain a military advantage. In Spicer's words, "private military companies are the official military transformed into the private sector in a business guise"<sup>25</sup>.

There is some debate regarding the constellation of this type of companies and how to identify them - private military companies and their acronym PMC, private security companies and their acronym PSC. In general terms, the former carry out military functions and the latter exercise police functions. However, it is difficult to maintain this distinction if we observe the variety of services offered by these companies and the increasing overlap between traditional military roles and other functions related to security in contemporary conflicts<sup>26</sup>. There is not a clear definition of when an activity can be defined as "military".

## The national level: dilemmas in state regulation

On an international level, the ideal situation would be that the international community should submit to the recommendations of the UN and the Working Group with the aim of signing an international agreement aimed at regulating the activity of private security agencies. Given that this is not feasible for the moment, and taking into account what is set out in international law, we shall now explore domestic legislation at state level.

The private security market also affects states on a domestic level, as states should control the violence exported from their countries. States, by nature, need to supervise the distribution of their services abroad, including private security services. In fact, this type of service is even more in need of oversight as it involves information on military and operative organisation which could affect the home country.

State legislation does not refer to the activities of private security companies or, if it does, it is inadequate. Moreover, the legislation of states does not coincide in defining mercenaries. Some stress the idea of playing a direct role in conflicts while others make no mention of this factor. The military manuals of Argentina, Australia, Belgium, Canada, France, Holland, New Zealand, Spain and Yugoslavia refer to the definition of Protocol I. However, those of Cameroon, Germany, Kenya and the United Kingdom only refer to the desire for private gain, without specifying that the promise of material compensation should be substantially in excess of that promised or paid to combatants of similar ranks and functions in the official armed forces. Likewise, states of the former Soviet Union such as Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldavia, Russia, Tajikistan, Ukraine and Uzbekistan define mercenaries solely by their desire for private gain without mentioning any other requisites.

<sup>23</sup> On the political debates in the United Nations and the Organisation for African Unity on mercenaries and the adoption of Article 47 of Protocol I see Cassese, A., "Mercenaries: Lawful Combatants or War Criminals?", 40 ZaöRV, 1980, pp.1-30.

<sup>24</sup> Shearer, D., "Private Armies and Military Intervention", in Adelphi Paper 316, 1998, pp.25-26.

<sup>25</sup> Spicer, T., "An Unorthodox Soldier", Mainstream Publishing, London, 1999, p. 165. "PMCs are the official military transformed into the private sector in a business guise".

<sup>26</sup> Avant, D., "The Market for Force. The Consequences of Privatising Security", Cambridge University Press, United Kingdom, 2005, p.1.

We will now examine in more detail the regulations of the United States, given their dominant position in the market. The United States Neutrality Act (1939) prohibited recruiting mercenaries within the United States, but did not deal with the sale of military services. This law was created in response to social circumstances that did not include private security companies as they did not exist at the time.

The Military Extraterritorial Jurisdiction Act (2000) was an attempt to fill this legal void. It is applicable to civilians who serve in the United States Army outside the country. Two essential features of the law are:

1. It is applied solely to crimes committed abroad that carry sentences of a minimum of one year in prison. If we examine penal legislation in the United States, it is very likely that many of the acts committed in Iraq today (assaults, harassment, interrogations in detention centres) do not carry sentences of over a year's imprisonment.
2. The law only refers to companies working directly for the US Department of Defence. It does not contemplate companies working for other US departments, nor companies working for a foreign government. Therefore, if an American company commits an offence abroad, and it is not providing military services to the Defence Department, it may go unpunished as far as the United States is concerned because such situations are not contemplated by domestic or international law. The only alternative would be if the state where the acts happened sued the company<sup>27</sup>. Contracts with the CIA, for example, are exempted from this law.

In 2000, the US Defence Department defended the need for this law adducing that legislation should adapt to the new scenario in Iraq. Two thousand civilian employees had been deployed in Iraqi combat areas and additional legislation was needed in the event of possible crimes. Seven years later, over twenty thousand employees are working for the United States performing functions such as security and interrogation. The Act is limited and does not cover abuses or abusers. In cases where the Military Extraterritorial Jurisdiction Act (2000), is not applicable, penal responsibility is opaque.

South Africa is the only country with legislation that expressly forbids its nationals to sell military training to a foreign country involved in an armed conflict. In 1995 the government approved a law controlling the provision of unauthorised military assistance to any country in conflict. The law was adopted owing to the negative international impact of Executive Outcomes' activities in Angola and Sierra Leone and of other South African companies that operated in Africa. The Regulation of Foreign Military Assistance Act (1998) made South Africa one of the few countries that governs foreign military assistance and illegalises mercenary activity<sup>28</sup>.

Given that the international community's response to regulating the activity of private security companies is limited at the present time, the problem should be approached at an intrastate level. Actions taken at state level have the advantage of not depending on international negotiation, which frequently results in accepting the lowest common denominator and is not very effective. However, in trying to strengthen the domestic legislation of states, three fundamental problems arise, which we will now examine.

The first problem derives from the way military security companies are organised. They are businesses that need little infrastructure and their mission is to provide services globally. With

<sup>27</sup> Singer, P., "War Profit and the Vacuum of Law: Private Military Firms and International Law", *Columbia Journal of Transnational Law*, vol.42, no.2, p.532.

<sup>28</sup> *Republic of South Africa Government Gazette*, no.15, 1998: "Regulation of Foreign Military Assistance Act", 1998.

the aim of avoiding the legislation in one particular county, private security companies can change or relocate.

The second problem regarding national laws pertaining to private security companies stems from that fact that such laws need to be implemented outside the state's territory. Local authorities in failed states have neither the power nor the means to demand responsibility from these companies. They cannot control their own territory, much less the actions of a foreign company operating in it. In fact they may not even want to control them because these companies operate in their favour. As a result, the requisite for responsibility should be extraterritorial, and it should stem from the company's state of origin.

Thirdly, the weakness of domestic law derives from the weakness of international law. Legislation in many states ignores the phenomenon of private companies, while governments defer to international law which, as we have seen, is vague on this subject.

## Is the state responsible?

If we analyse the functions carried out by these companies, they could also be considered state agents<sup>29</sup>. Singer calls them "quasi-state actors" of the international scenario<sup>30</sup>. In that case the general laws on state responsibility would be applicable. According to international law, the state's public responsibility legitimates its coercive power. The question is to what extent the state has control over these companies. Can their conduct be considered state conduct in the context of international human rights law?

Henckaerts and Doswald-Beck compiled and identified the norms of international humanitarian law that can today be considered customary law. Thanks to their extensive work clarifying this area, we can now consult the rules of the Geneva Convention that are customary law. The authors organised these customary laws of international humanitarian legislation into a series of rules. Number 147 states:

"A state is responsible for violations of humanitarian international law which can be attributed to it, including:

- (a) Violations committed by its organs, including its armed forces;
- (b) Violations committed by persons or bodies capacitated by the state to exercise government authority;
- (c) Violations committed by persons or groups acting under the instructions of the state, or under its direction or control; and
- (d) Violations committed by private persons or groups which it acknowledges and adopts as its own conduct.<sup>31</sup>

This rule is recognised as a norm of customary law applicable to violations committed both in international and domestic armed conflicts. Customary law is generally applicable, irrespective of whether the states have submitted to the rule through an international treaty.

However, the Articles on State Responsibility for Internationally Wrongful Acts<sup>32</sup> require that it should involve the conduct of a state organ. The Articles on State Responsibility establish a

<sup>29</sup> Shearer, D., "Outsourcing War", *Foreign Policy*, 1998, pp.68-81.

<sup>30</sup> Singer, P., "Privatized Military Firms...", *op.cit.*, p.532.

<sup>31</sup> Henckaerts, J.M. and Doswald-Beck, L., "Customary International Humanitarian Law", p.530.

<sup>32</sup> Dumberry, P., "New State Responsibility for Internationally Wrongful Acts by an Insurrectional Movement", in *European Journal of International Law*, vol.17, no.3, pp.605-621.

number of general principles to determine conducts that can be attributed to the state in the light of international law. It contains specific rules on the attribution of wrongful acts, always bearing in mind the exercise of public function. Proving the link between military security companies and the state would not be easy.

## General principles of international human rights law and privatisation of the use of force

International human rights law establishes standards and norms that should be implemented firstly at the national level. International human rights law is transposed into constitutional and penal laws that sanction abuses and violations of human rights. Originally human rights came about to regulate the relationship between the state and the persons under its jurisdiction.

However, in addition to the relationship between the individual and the state, the internationalisation of human rights has given shape to the relations between states. Human rights violations can be considered a threat to peace and this bestows on the United Nations Security Council the competence to respond under Chapter VII of the UN Charter. Together with the framework of the Charter, quasi-legal mechanisms have been developed within the framework of international human rights treaties. These treaties – the International Pact on Civil and Political Rights (1966), the Convention on Discrimination against Women (1979), the Convention against Torture (1984) and the Convention on the Rights of the Child (1989) – institute the setting up of special “Committees”. Individuals and groups can denounce human rights violations to these committees. They offer mechanisms for the protection of human rights.

Finally, from the point of view of our analysis the most relevant part of this summary is the following. International human rights law also defines the relations between individuals by obliging them to respect each other. While it is the states that sign and ratify international treaties, they are not the only ones subject to the obligations of international human rights law. Starting with Article 29 of the Universal Declaration of Human Rights, “everyone has duties to the community”.

This responsibility has not yet been formulated or transposed into concrete mechanisms. Nevertheless it has been stressed by the Committee on Economic, Social and Cultural Rights in General Comments 12 (the right to food) and 14 (the right to health), and by the Human Rights Committee in General Comment 31 (on the nature of the general legal obligation imposed on states parties to the covenant)<sup>33</sup>. Likewise, the two additional protocols to the Covenant on the Rights of the Child impose direct obligations on non-state actors relating to child soldiers, child pornography and child exploitation<sup>34</sup>. Behind this idea lies the obligation of non-state actors to respect human rights. The principle that any legal obligation requires the consent of the parties involved has been abandoned in international law<sup>35</sup>. The norms set out in international treaties are accepted by states and are applicable to all subjects contemplated therein, not only the states parties themselves.

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<sup>33</sup> General Comment No.31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, “However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant”, CCPR/C/21/Rev.1/Add.13, 26 May 2004, paragraph 8.

<sup>34</sup> Facultative Protocol to the Convention on the Rights of the Child relating to the Participation of Children in Armed Conflict (2000) and the Facultative Protocol to the Convention on the Rights of the Child relating to the Sale of Children, Child Prostitution and the Utilization of Children in Pornography (2000). See Roseman, N., “The privatization of Human Rights Violations”, op.cit., pp.89-91.

<sup>35</sup> Tomuschat, C., “The Applicability of Human Rights Law to Insurgent Movements”, in Fischer, H., Froissart, U., Heintschel von Heinegg, W., and Raap, C. (eds), “Krisensicherung und Humanitärer Schutz - Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck”, Berliner Wissenschafts-Verlag, Berlin, 2004, pp.573-591, p.586.

## Conclusions: regulation and accountability

The activity of military security companies is a form of mercenarism adapted to new armed conflicts. The time has come to adapt international law to this new situation. The practice of states and even that of international organisations recognises that private security agencies are actors that play a relevant role in international security<sup>36</sup>. They are considered quasi-agents of the state and should be subject to the rights and duties that already exist in over fifty countries.

Private security companies live in a kind of legal anarchy. If the law does not grant some guarantees to mercenaries, their perception will be that they are outside the law, which means that they have no rights and no obligations. A clearly applicable regime does not exist. This can lead to two outcomes; that their activity may go unpunished and that they may be treated as war criminals if they are captured. Transferring security obligations from public authority to private companies is an attempt to avoid responsibility. However, coercive power will be considered legitimate if standards of legality and responsibility are observed.

The international community has accepted that the civilian domain and the military domain should cooperate. At state level the question now is not whether to intervene in humanitarian crises, but rather how, and this entails the responsibility to protect. However, a debate on the relationship between humanitarian action and these companies is still needed. We can observe a significant example in southwest Kosovo, where the private military security company Armor Group (United States) acts as the leader in coordinating demining activities. This activity is considered to be a humanitarian operation<sup>37</sup>. It should also be noted that security as a business does not tackle the causes of violence. Security is sold as a product or service, but not as the result of a social consensus. In fact, these companies can even intensify violence between factions.

We propose making progress in one specific direction, which is the search for new forms of regulation and accountability for private security agencies<sup>38</sup>. Fuelling the perception that these companies are criminal would be misguided. One option is for these companies to submit to a code of conduct. Self-regulation through codes of conduct is an alternative - in fact some private security companies have subscribed to the Code of Conduct of the International Red Cross, but aspects of this are highly controversial and such guidelines could never be legally binding, nor could they be used to sanction companies.

In the context of peace operations in which members of the armed forces and, increasingly, civilian personnel take part, current and future trends will be to stipulate more clearly the relevant duties, rights and even the means of demanding responsibility. Progress made in this direction has been a reaction and a response to human rights violations by the blue helmets during the 1990s. To avoid being shocked at the impunity of private security agencies, it would be better for the international community to provide an efficient legal instrument.

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<sup>36</sup> Kinsey, C., "Corporate Soldiers and International Security, The Rise of Private Military Companies", Routledge, London, 2006, p.4.

<sup>37</sup> ArmorGroup, <http://www.armor-mine-action.com>

<sup>38</sup> Clapham, A., "Human Rights Obligations of Non-State Actors", op. cit., p. 301.

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