

***SOLDIERS TO LEASE.
PRIVATE MILITARY COMPANIES STATUTE IN THE XXI CENTURY***

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Abstract. The changes at the end of the XX have produced measurable effects in the security environment elements' dynamics and composition. Several factors have essentially changed, thereby determining the appearance of the private military and security companies (PMSC). The end of the bipolarity and the beginning of the multipolarity has been one of them. The reductions of the national states armies, as well as an increase in the number of the conflicts, have acted as catalyzers. The technological evolution and the changes in the conflicts' typology have also been determining factors for the appearance and the flourishing of these companies. The PMSC employment in national and international conflicts has significantly increased and could not be ignored, thereby foreseeing the instauration of a new position within the traditional pictures of the security environment actors that the world might not be ready to accept. The article describes this phenomenon and briefly analyzes the main challenges it creates.

Keywords: *private military companies (PMC), international law.*

Introduction.

The emergence and vertiginous development of the private military companies (PMC) represents an important phenomenon accompanying the changes of the security environment dynamics after the 1989. The large spread of this phenomenon, its resemblance to mercenarism, as well as its corporatization, rise legitimate questions and create new challenges that the actual security framework fails to adequately address. Either we consider the legal international framework, which fails in strictly frame the mercenarism, the costs and benefits of using PMCs or the ethics of using this instrument, the answers are ambiguous and useless in defining and regulating the phenomenon. What are the PMCs? Are PMCs mercenary entities or not, from the international law point of view? Which are the benefits of using these entities? Which are the costs of using them? What changes the use of PMCs brings within the security environment? How could the activity of PMCs be regulated? These are only several questions that the existence of these companies generates.

Mercenarism throughout the history.

The mercenarism is a human activity that has joined the mankind from its oldest times. Peter W. Singer, a very honorable author who has treated *in extenso* this subject, has stated that this phenomenon is „as old as war itself¹”. The simplest definition of the mercenary is that of a soldier paid by a foreign country, a soldier fighting for any group or country that hires him². According to this definition, we can find mercenaries fighting for King Shulgi of Ur (2094-2047 b.C.)³. They were also seen fighting for profit in the war

¹ Peter W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, 2003, p. 19

² Merriam-Webster Online Dictionary, at <http://www.merriam-webster.com/dictionary/mercenary>, accessed on 17.09.2014

³ Janice Thomson - *Mercenaries, Pirates and Sovereigns: State Building and Extraterritorial Violence in Early Modern Europe*, Princeton University Press, 1996, p.15

between Ramses II and Hittite king Muwatali in the battle of Kadesh (1274 î.Hr.)⁴. The Greek cities-states have regularly used rented soldiers, be they Cretan slingers, Syracusan hoplites, and Thessalian cavalry⁵. The Roman Empire and its army of citizens have come, to its end, to consist of a mixture of fighters recruited from the occupied territories, with a small roman citizen minority. The Middle Age witnesses the recrudescence of this phenomenon. Practically, the national armies had not been born, the war being waged between leaders using rented troops. Italian Cities were famous at the time for using no less famous “*condottieri*”, while the Suisse Confederation become known for the effectiveness of its four-pikemen formula, which succeeded to eliminate the dominating position of the cavalry on the battlefield. The mercenary had been a rewarding industry, whose decline had started to the middle of the XV century, when king Charles VII of France included the biggest part of the independent mercenaries into a permanent army. This trend has extended through whole Europe, without ending the mercenarism though. In 1453, the fall of Constantinople has been delayed by the courage and efficiency of the 700 mercenaries brought by the Italian Giovanni Giustiniani⁶. Afterwards, after Westphalian treaties signing, commercial private entities have appeared, endowed with the right of bearing wars. Although formally under the trusteeship of their origin states, they have many times independently taken decisions, sometimes contrary to the orders given by the state they belonged to. The best well-known example are the Dutch East India Company and the East India Company, whose activity extended to 1799, respectively 1874. They bear striking resemblance with the actual PMCs. Finally, in the first half of the XX century, the decolonization has been the background on which individual mercenaries fought for their employers or for themselves, against self-determination movements. From these times, the history retained information about “*Les Affreux*”, as well as famous names, as Bob Denard, Mad Mike Hoare and Jacques Schramme⁷.

The middle of the XX century witnesses, also, the beginning of the initiatives for regulating the combatant’s rights. Amongst these initiatives are also elements referring to the mercenaries. These elements form the core of the next chapter.

International Law and mercenaries.

The mercenary definition and its statute are internationally regulated by three norms of the international law. As explained further, the necessary conditions required to be fulfilled by a person in order to be qualified as mercenary are very similar, very difficult to be satisfied and are included in laws which are not ratified by many states; thus, no control mechanisms are in place to be practically implemented. Referring to the ease of denying any charge of

4 Richard Ernest Dupuy Trevor N. Dupuy - The Encyclopedia of Military History from 3500 B.C. to the Present, 2nd Revised Edition, Harper & Row Publishers, 1986, p. 22

5 P. W. Singer - Corporate Warriors: The Rise of the Privatized Military Industry, Cornell University Press, 2003, p. 21, quoting G. T. Griffith – The Mercenaries of the Hellenistic World (Groningen, The Netherlands: Boom’s Boekhuis N.V., 1968), p. 4

6 <http://militaryhistory.about.com/od/battleswars14011600/p/Byzantine-Ottoman-Wars-Fall-Of-Constantinople.htm>, accessed on 20.09.2014

7 Opendo Mbula-Matari Barthélemy – Manuscrit inedit, at <http://www.congoforum.be/fr/congodedetail.asp?subitem=21&id=9254&Congofiche=selected>, accessed on 20.09.2014

mercenary, Geoffrey Best has stated that “any mercenary who cannot exclude himself from this definition deserves to be shot - and his lawyer with him!”⁸

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (further known as Protocol I), adopted in June 8, 1977, at its article 47 stipulates the cumulative conditions to be met by a person in order to be considered mercenary. Thus, 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 forces⁹.

This is the pattern that OAU Convention for the Elimination of Mercenarism in Africa uses. Signed on 3rd July 1977, in Libreville, the Convention (further OAU Convention against mercenarism), the article 1¹⁰ defines almost identically the mercenaries, with a single difference, at its c. point, where the OAU Convention does not make any distinction between the size of private gain when compared with that of equivalent rank armed forces combatants. It is worth mentioning that these conditions are cumulative too.

The United Nations efforts have continued with the adoption, on December 4, 1989 of International Convention against the Recruitment, Use, Financing and Training of Mercenaries (further known as U.N. Convention against mercenaries). This Convention, in its first article¹¹ presents two sets of conditions to be fulfilled in order to be included in the mercenary category. Again, the same pattern used within Protocol I of the Geneva Convention can be observed. The main difference resides in that the condition of directly taking part in hostilities is not present anymore; instead, the field is extended through the condition of recruiting for the purpose of participating in a concerted act of violence which is not necessarily an international armed conflict. Thus, persons participating at overthrowing of Governments or undermining the territorial integrity of a state are labeled as mercenaries.

⁸ Best Geoffrey - *Humanity in Warfare: The Modern History of the International Law of Armed Conflict*, Littlehampton Book Services Ltd, 1980, p. 328, note 83

⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, at

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=9EDC5096D2C036E9C12563CD0051DC30>, accessed on 20.09.2014

¹⁰ OAU Convention for the Elimination of Mercenarism in Africa, at

<https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/485?OpenDocument> accessed on 20.09.2014

¹¹ International Convention against the Recruitment, Use, Financing and Training of Mercenaries, at <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/530>, accessed on 20.09.2014

These legal provisions are not widely applicable. Thus, the Protocol I has been ratified by a number of 174 states, 3 significant states (U.S.A., Pakistan and Iran) only signing it. The O.A.U. Convention against mercenarism is ratified by 30 states only, with 15 African states signing it. Also, the U.N. Convention against mercenaries has been ratified by 33 states and signed by 10 states, with 2 significant exceptions, U.S.A. and U.K., two important players in the private security arena. It is worth mentioning that many countries have included in their national legislations provisions referring the mercenaries and/or mercenarism. These provisions and their level of enforcement is different from a country to another and does not make the object of this paper; they could easily be part of a standalone subject. Therefore, the international law framework is not ineffective but also not generally accepted. In this context it is understandable the proliferation of the private military companies, which had, as important restrictions, only those imposed by the economic contracts they were part of. The financial aspects of their functioning and – on a larger scale – the costs and the benefits of using PMCs make the subject of the next chapter.

Costs and benefits of using PMCs.

The first and the most obvious criterion of costs and benefits analysis is represented by the financial-economic argument. The private military companies are a kind of small standby armies; as a matter of fact, many times they are but military highly specialized personnel databases. These personnel could be summoned in a very short time and the mission tailored preparation is, also, very short, considering the fact that the basic training had been already went through. Therefore, the executives of these companies support the idea that is cheaper to hire the existing available personnel right on time of need than to maintain regular armies. More than that, the hired soldiers are paid only during their employment, being discharged in the end, thereby becoming unemployed. The salary of those employees usually does not include medical insurance or any other financial advantages, in many cases life insurance only being included.

Nevertheless, the costs' and benefits' matter is far from being clarified. The human resources that PMCs employ come, usually, from the state sponsored system, the expenditures related to the training and specialization of these ex-soldiers coming from the public money field. Even though the financial package is not so vast, the net wage of a private contractor, compared with the one of a soldier having the same rank in a state army, is up to nine times bigger¹². This goes further to depletion of the military personnel resource, people migrating to PMCs employment. After completing several tours of duty, these soldiers become unemployed, with the unemployment benefits paid also by the state.

Another argument that stands for PMCs is related to the intrinsic effectiveness of these companies, which are strictly tailored for the profit increase and expenditures minimizing. Though, practical situations have shown that the PMCs are the trouble generating ones, usually in contract details execution or in billing. Thus, the Special Inspector General for Iraq Reconstruction Report has found, in 2007, the overcharging of some services offered

¹² House Committee On Oversight And Government Reform - Hearing on Private Security Contracting In Iraq And Afghanistan, October 2, 2007, at http://www.washingtonpost.com/wp-srv/politics/articles/blackwater_hearing_100207.html, accessed on 20.09. 2014

by KBR, as well as keeping unclear accounting records, with the purpose of increasing the difficulty of auditing¹³. More than that, the economic calculations are hard to be done due to the strategic character of the contracts and the fact that many of them have been granted without bidding, based on the emergency criterion. In the U.S.A. there is a rule stipulating that any contract bigger than 50 million USD need to be validated by the U.S. Congress. In order to avoid this threshold, smaller initial contracts had been granted, followed by subsequent contracts on the same services. This way, the Congress' scrutiny has been avoided, thereby making difficult to evaluate the effectiveness of a contract.

An important benefit of using PMCs is related to the increase political flexibility. In some countries the number of the military personnel involved in conflicts abroad is politically approved, as in the U.S.A., where the Congress is the one that establishes this level. When this threshold cannot be surpassed, the private contractors could be used, through the outsourcing of some military tasks. These contractors can fulfill many military specific activities, without changing the balance of the military personnel involved in operations. More, when the government does not want to publicly involve in a conflict, there is always the possibility to influence it through the use of PMCs, private economic operators lacking the military constraints and restrictions. This was the case of the American Military Professional Resource Inc. (MPRI), whose activity had indirectly led to the signing of the Dayton Peace Accords. The contract that the Croatian government had signed with MPRI in 1994¹⁴, targeting the integration of the new Croat army within the society, through the "Democracy Transition Assistance Program" Course, has been followed in short time by the Operation Storm, which has been successful. Even though one of the MPRI vice-presidents at the time, Lt. Gen. (Ret.) Ed Soyster, declared that MPRI involvement had not included any form of direct military assistance (as forbidden by U.N Resolution 731/1991¹⁵), Bosnia has conditioned its participation in peace talks by an agreement with the same company for similar services. However, it is generally admitted that the Croatian military performance in Operation Storm has determined the Serbs to negotiate and finally sign the Dayton Peace Accords. The American government desired to keep a neutral position into this matter and not to engage its military buildup. Thus, it seems that an economic contract has changed the security balance in the region, without involving the security organizations. As explained by Deborah Avant and Lee Sigelman¹⁶, the use of private contractors reduces the level of regular troops' engagement, which usually bears an important political cost. Other authors have shown that the use of PMCs avoids the democratic framework and the "check and balance" type mechanisms. This situation is mainly due to the corporatist character of the PMCs, which forbids the effective intervention of the public sector monitoring mechanisms. In short, as

¹³ Valerie Bailey Grasso - Defense Logistical Support Contracts in Iraq and Afghanistan: Issues for Congress , <http://fas.org/sgp/crs/natsec/RL33834.pdf>, p. 18. Accessed on 20.09.2014

^a David Isenberg - MPRI Couldn't Read Minds: Let's Sue Them , in Huffington Post, on 19.08.2010, at http://www.huffingtonpost.com/david-isenberg/mpri-couldnt-read-minds-l_b_688000.html, accessed on 20.09.2014

¹⁵ Resolution 713 (1991) Adopted by the Security Council at its 3009th meeting, at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3b00f16f1c>, accessed on 21.09.2014

¹⁶ Deborah AVANT, Lee SIGELMAN, „Private Security and Democracy: Lessons from the US in Iraq”, publicat în Security Studies, Volume 19, Issue 2, 2010, p. 255, at <http://www.tessexperiments.org/data/AvantSigelman-securitystudies.pdf>, accessed on 22.09.2014

Deborah Kidwell¹⁷ has noticed, a dichotomy has been created, in which public wars are borne with private armies.

The last argument for the use of PMCs is their claimed military flexibility. These companies are mission-specific tailored; their mobilization does not create a security shortage in some other places, through military personnel redeployment. However, several PMCs became well known just for undermining the military counterinsurgency effort. The behavior of the PMC personnel is focused through personal protection and profit maximizing and the “win the minds and hearts” strategies are not on the top of the priorities list. The incidents that the Blackwater USA (now Academi) had been involved in Fallujah¹⁸, Irak (2004) and Najaf¹⁹, Irak (2004), the sexual scandal generated by the employees of Dyncorp in Bosnia²⁰ in 1999 or the Abu Ghraib prison scandal²¹ (in 2003, involving CACI and Titan International providers) have undermined not only the military war effort in those areas but the international credibility of the U.S. military also.

Conclusions.

In short, we have shown that the security privatizing process, in the form of private military companies, is a new phenomenon, which raise questions and creates new challenges for the established security environment actors.

The international law governing the mercenaries, which are close and similar in features with the PMCs, is difficult to be implemented and applied, due to the differences in positions of the national states; these differences invalidate the efforts of the international security organizations for the regulation of the phenomenon.

The costs and the benefits of using PMCs are still unclear, due to the lack of information or their controversial nature.

We consider of paramount importance the study of this relatively new phenomenon, with the purpose of finding the best methods of control, within the actual framework of the international relationships.

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¹⁷ Deborah C. Kidwell, „Public War, Private Fight? The United States and Private Military Companies”, edited by the Combat Studies Institute, Fort Leavenworth, 2005, at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA446127>, accessed on 29.08.2013

¹⁸ Scahill, Jeremy – *Blackwater - The Rise Of The World's Most Powerful Mercenary Army*, Nation Books, 2007, p. 72-79, p.

¹⁹ Id., p. 87-96

²⁰ Lia Petridis Maiello - *When Peacemakers Become Perpetrators: Kathryn Bolkovac Introduces The Whistleblower at the UN*, at http://www.huffingtonpost.com/lia-petridis/the-whistleblower-author-interview_b_2663231.html, accessed in 23.09.2014

²¹ Taguba, Antonio M. - *AR 15-6 Investigation Of The 800th Military Police Brigade*, at https://www.thetorturedatabase.org/files/foia_subsite/pdfs/DODDOA000248.pdf, accessed on 23.09.2014

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