

THE NEW AUTONOMOUS CORPORATE WARRIORS AND THEIR IMPLICATIONS FOR HUMANITY.

by
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I INTRODUCTION

The post-Cold War rise of private military contractors (PMCs) and their impact on the laws of war, in particular International Humanitarian Law (IHL), requires investigation. The need for accountability together with the repercussions for the Geneva Conventions and state sovereignty is immediate. This article is aimed at uncovering some of the implications this growing phenomenon has for society. Issues surround the sufficiency of current international law to regulate PMCs acting in war zones. The development of the laws of war from the Christian ages through Rousseau's 'social contract' to the current times of corporate privatisation of previously held sovereign state domains is considered. The likelihood of successfully subjecting PMCs to prosecution for war crimes in the current climate of regulation is minimal. The idea of states using PMCs for inappropriate gain is discussed along with the threat created by this phenomenon to the stability of national armies. The author concludes the need for investigation, review and control of the privatisation of the military is urgent.

The international community responded to World War II by outlawing war. It has obviously not been effective as an estimated 20 million people have been killed in wars, revolutions and massacres since 1945.¹ This is despite the fact that conflict is prohibited by international law, except in narrow and specific situations, namely: actions by the United Nations to restore peace, operations that are legitimate self-defence and internal conflicts which, while not under the jurisdiction of the United Nations due to the doctrine of sovereignty, are becoming increasingly subject to international obligations. Sir John Fisher, First Lord of the British Admiralty exhibited insight when he observed '[t]o humanise war is like trying to humanise hell'.²

The state is the recognised entity in international law.³ However, not since the 18th century has the state's monopoly over the right to use violence been so challenged.⁴ The certainty of the state's position has been undermined not only by the recognition of some international organisations and individuals as subjects with limited capacity,⁵ but the rise of the corporate entity controlling trained and well-equipped

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¹ Patrick Brogan *World Conflict* (1992) 644.

² Sir John Fisher, First Lord of the British Admiralty and creator of the battleship 'Dreadnought' made this comment in 1907 concerning the Hague Conference in Jean Pictet, 'The nature of Humanitarian Law', in *Development and Principles of International Humanitarian Law* (1985) 79-95, 80.

³ James, L. Briery *The Law of Nations* 6th ed. (1963) 34-37.

⁴ Ulric Shannon 'Private Armies and the Decline of the State', in Kenton Worcester, Sally Avery Bermanzohn, & Mark Ungar (eds) *Violence and Politics Globalization's Paradox* 2002 32-47.

⁵ Sam Blay, Ryszard Piotrowicz & Martin Tsamenyi, *Public International Law: An Australian Perspective*, 2nd ed. (2005) 1.

civilian armies available for hire.⁶ The partial privatisation of armies is leading the world into uncharted territory. While there have been mercenaries and soldiers of fortune before, there have never been multinational companies, on the scale seen today, pursuing wealth by recruiting forces over the Internet, ready for action wherever conflict is occurring around the globe. PMCs are non-state actors, namely corporations, who employ short-term contractors to engage in occupations such as intelligence, combat, combat training, logistics, weapons expertise, and security, previously the province of national militaries or public bodies.

The rationale behind the international community's attempt to humanise war involves balancing military desires against concern for humanity. Two fundamental principles, namely distinction⁷ and proportionality,⁸ are central to this balancing act. Distinction requires that a difference be maintained between military and civilian targets on the basis that only combatants are to be the object of military pursuit, and actions can only be undertaken where a military advantage is the result. In so doing, the principle of proportionality requires that no damage above what is required to achieve the military advantage is acceptable.

This article discusses the development of International Humanitarian Law (IHL) from the concepts of the civil-military relationship through the effects of the end of the Cold War to today. Second, the rise of PMCs is considered with particular regard to definitional problems, accountability and control, sovereignty and the impact on IHL. Finally the implications for IHL together with social, political and legal consequences are considered. While this article is concerned with the legal response to PMCs it cannot consider the phenomenon in isolation from the political and social context in which they have arisen. Sam Blay has stated:

However one chooses to construct the theoretical possibilities of the separate existence of law and politics, the practical reality is that, as international law is created principally through the political agreement and the practice of states, the law reflects more the political interests of the law makers. It is a tool for the pursuit and achievement of their political objectives.⁹

It is in the political and social context that IHL has developed over the centuries and it reflects fundamental values of humanity held across time and cultures.

⁶ See e.g. Jean-Marie Guehenno 'The Impact of Globalisation on Strategy', *Survival* Vol.140, No.4 (Winter 2000) 6: 'When military powers are no longer exclusively sovereign states but include "interdependent players caught in a network of transnational transactions", familiar concepts such as the simplified "balance of power" lose some of their analytical muscle' in Peter W. Singer, 'Corporate Warriors: The Rise And Ramifications of the Privatized Military Industry', *International Security*, Vol. 26, No.3, Winter (2001/2002) 27.

⁷ *Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts* (Protocol I) (entered into force 7 December 1978) 1125 U.N.T.S.3, Art 48 (hereinafter Additional Protocol I).

⁸ Additional Protocol I art 51.

⁹ Sam Blay 'The Nature of International Law' chapter 1 in Blay, et al see above n 5 at 6.

II DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

From God to Humanity

Despite the prohibition of wars after World War II and the United Nations Charter providing that ‘armed conflict’ can only occur in limited situations,¹⁰ we have, if anything, seen an escalation in armed conflict.¹¹ It seems the notion of self-defence provided for in the Charter permits a chink in the armour of peace such that today it can be used to support the emerging doctrine of the use of ‘pre-emptive force’.¹²

The Christian ages cloaked war with the doctrine of *justa causa* meaning “just cause”, that is, in self-defence or to redress a wrong.¹³ This moralising of violence led to the consequences of the crusades during the Middle Ages.¹⁴ Today, some leaders still rely on their authority being backed by God and the rhetoric of good and evil.¹⁵ The doctrine of ‘just war’ embraced by Saint Augustine and Saint Thomas Aquinas¹⁶ creates a dangerous cocktail of morals with political desires. A legitimate sovereign was said to have the authority, often from God, to establish armies and so rule. This reintroduces the notion that violence can be morally justified. The dilemma in this is that if both sides of a conflict believe their cause is morally sound, it will sustain the conflict. We appear under such notions to be rapidly regressing to the Middle Ages and the world of warlords and suzerains.¹⁷

Dutch jurist Hugo Grotius brought justification down from the level of the divine to human reason.¹⁸ It was sovereign nations, the only actors on the international plane, who determined the law of nations, which was to protect the basic rights of the individual. Nations could wage war to protect the people of the nation state, and the use of violence beyond what was necessary for victory could not be justified. It took time before Louis XIV and Frederick II began the change from armies of mercenaries to disciplined regular national armies composed of trained and paid members of the citizenry.¹⁹ Humanitarianism arose with the 17th Century’s Age of Enlightenment in which all individuals were seen to have equal and inalienable rights guaranteed by the protective apparatus of the state. The 18th Century saw this further developed, with war becoming a human game, governed by its own rules, rather than ruled by divinities and justified by gods. With this there developed the phenomenon

¹⁰ Art 2(4) of the United Nations Charter provides four exceptions to this prohibition: art. 51-individual or collective self-defence; Chap VII – Security Council action; arts 10, 11 & 14 - Gen. Assembly recommendation for UN force; art 53 - authorised UN regional action.

¹¹ See e.g. Brogan supra n 1.

¹² See e.g. Christopher Greenwood ‘International Law and the Pre-Emptive Use of Force: Afghanistan, Al-Qaida, and Iraq’ (2003) *San Diego International Law Journal* 7.

¹³ Jean Pictet *The Development of humanitarian thought and practice of states throughout the ages*, in *Development and Principles of International Humanitarian Law*, 1985, 6-27 at 11.

¹⁴ *Ibid*, 12.

¹⁵ See e.g. United States President George W. Bush *State of the Union Address* (2003) in which he stated ‘Americans are a free people, who know that freedom is the right of every person and the future of every nation. The liberty we prize is not America’s gift to the world, it is God’s gift to humanity. We Americans have faith in ourselves, but not in ourselves alone. We do not know -- we do not claim to know all the ways of Providence, yet we can trust in them, placing our confidence in the loving God behind all of life, and all of history. May He guide us now. And may God continue to bless the United States of America’ <<http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>> at 29 June 2004.

¹⁶ Pictet supra n 13 at 13.

¹⁷ Shannon supra n 4.

¹⁸ Pictet supra n 13 at 19-20.

¹⁹ *Ibid*, 21.

of national armies designed to have a relationship of service with the state. The Westphalia system asserted that conflict was the province of states alone. As historian Martin van Creveld states:

It is the government that directs, the army that fights, and the people who watch, pay and suffer.²⁰

The Civil - Military Relationship

The French philosopher Jean-Jacques Rousseau, in *The Social Contract*, espoused the idea of the social contract between the state and the individual. He held the following belief in regard to the role of the citizen-soldier viz-a-vis their position in relation to the state and their enemies:

War is not a relation between man and man, but between state and state, and individuals are enemies only accidentally, not as men nor even as citizens, but as soldiers; not as members of their country, but as defenders ... The object of the war being the destruction of the hostile state, the other side has a right to kill its defenders while they are bearing arms, but as soon as they lay down and surrender they cease to be enemies or instruments of the enemy, and become once more merely men, whose lives no one has any right to take.²¹

It became the duty of the citizen to spend some time serving in the defence of the state in return for the guarantee of state protection. There are many advantages in this. The civilian serving in the army is part of the society which he or she is involved in protecting; their desire to return to that society and their normal life when their duty is fulfilled and not to prolong the period of conflict is strong. They are answerable and accountable through their governments directly to the whole of the society they are defending, they will not profit from the prolonging of the conflict, receiving a wage that is balanced within the context of employment available in that society.²²

Contrast this with PMCs and their contracted civilians who are trained for only one occupation, who follow only where the action is because that is where the money is, who thus have an interest in sustained conflict, and who are not part of a society to which they are necessarily morally tied and answerable. Their only obligations are to their private employer, a company. The company, in turn, is only answerable to its shareholders and the national laws of the company's registered state, when such laws can be enforced.²³

Rousseau's 'social contract' has changed. There are now new players on the international field. These are individuals and corporations whose wealth and power outstrip many states and who are no longer prepared to stand on the sidelines. The contract is now no longer between a state and its citizens, but intruding into the social contract is the corporation. The intermediary wields immense power. Here the contract is not between all the citizens of a defined geographical, territorial and

²⁰ Martin van Creveld *Nuclear Proliferation and the Future of Conflict* (1993) 20 in Shannon supra n 4 at 32.

²¹ Jean-Jacques Rousseau *The Social Contract* (1762) ed. & translated Maurice Cranston (1968) 57. This idea underpins much of IHL. See e.g. Additional Protocol I 1977 art 41.

²² R. Claire. Snyder 'Patriarchal Militarism', in Carl Boggs (ed), *Masters of War: Militarism and Blowback in the Era of American Empire* (2003) 261-276.

²³ Joel Bakan *The Corporation: The Pathological Pursuit of Profit and Power* (2004) 60-84.

cultural society but between an impersonal, invisible legal entity, the corporation, and its shareholders who do not necessarily represent a cohesive group in terms of societies.²⁴

The citizen-soldier contains the tension between military drive and democratic ideals because they do not profit from war. Their desire is not to remain at war, but to return and live in their society. As Machiavelli said, the citizen-soldier 'when he was not soldiering, was willing to be a soldier, and when he was soldiering, wanted to be dismissed'.²⁵ On the other hand, Machiavelli noted professional soldiers could not be trusted because they 'are obliged either to hope that there will be no peace, or to become so rich in time of war that in peace they can support themselves'.²⁶ This rise in PMCs has come about due to changes in geo-political tensions, creating a political reality the law now has to contend with anew.

Effect of the end of the Cold War and other conflicts

The end of the Cold War between the superpowers, and the end of apartheid in South Africa, saw national armies downsized with many trained soldiers being released to return to their civilian lives. However, few had any experience outside of their military occupation and no attempt was made to prepare them for reintroduction to civilian life. This provided a ready made stable of men trained in the art of war, looking for work and a natural inclination to turn to occupations in law enforcement, security and prisons.²⁷ A booming industry has developed with PMCs recruiting personnel globally over the Internet,²⁸ for rapid deployment to the hot spots of conflict. Part of the need for PMCs in conflict zones is driven by today's military technology, for instance the unmanned Predator drones, Global Hawks and B-2 stealth bombers, have such sophisticated weapon systems that the skills of civilian experts are called on for their operation. PMCs are also making profit from contracts in the umbrella of conflict, ranging from security work to training national armies and police.²⁹

Retired military have been found working for PMCs offering their services in training state's new military and police forces. Some have argued the role of the Virginia based company, Military Professional Resources Incorporated (MPRI) changed the fortunes of the Croats in the Balkans conflict by training and advising

²⁴ Singer supra n 6 at 12: 'Importantly, this shift encourages the proliferation and criminalization of local warring groups. ...Warfare itself becomes self-perpetuating, as violence generates personal profit for those who wield it most effectively (which often means most brutally), while no one group can eliminate the others'.

²⁵ Machiavelli: *The Chief Works and Others*, trans. A Gilbert (1965), *Art of War*, I 576 in R. Claire. Snyder, 'Patriarchal Militarism', in Carl Boggs (ed), *Masters of War: Militarism and Blowback in the Era of American Empire* (2003) 263.

²⁶ Ibid.

²⁷ Sam Vaknin *Analysis: Private armies -1* (2002) United Press International <<http://www.upi.com/view.cfm?StoryID=20020717-092201-5132r>> at 13 May 2004: 'More than 5 million soldiers were let go all over the world between 1987-1994, according to Henry Sanchez of Rutgers University. Professional soldiers, suddenly unemployed in a hostile civilian environment, resorted to mercenarishp. A few became rogue freelancers. The role of the Frenchman Bob Denard in the takeover of the Comoros Islands is now mythical. So is the failed coup in Seychelles in 1981, perpetrated by Colonel "Mad" Mike Hoare, a British ex-paratrooper', para 7.

²⁸ See e.g. MPRI L-3 Communications, 'Job Opportunities' 2004 <http://www.kpri.com/site/subchannels/job_listings.cfm> at 20 June 2004.

²⁹ See generally Nelson Schwartz, *The War Business: Pentagon's Private Army* (2004) <Factiva. file://C:\Documents%20and%20Settings\collins\Local%20Settings\Temporary%20Int> at 21 June 2004; Sam Vaknin, *Private Armies* (2004) <<http://samvak.tripod.com/pp160.html>> at 13 May 2004.

their army and by playing such a critical role they have led to a demand for such entities.³⁰ PMCs have been involved in providing security for Paul Bremer, as Head of the CPA, Iraq, protection for Afghanistan's President, Hamid Karzai, the construction and maintenance of Camp Bondsteel, Kosovo (the biggest US military base built since Vietnam), the war games simulation training school near Hadzici Sarajevo, to name but a few examples.³¹ The emergence of a new war front, with the so-called 'Global War on Terror', since 11 September 2001 (hereafter 9/11) has seen hopes of peace as a result of a more active Security Council since the end of the Cold War dashed.

International Humanitarian Law as it Exists Today

Kofi Annan, Secretary-General of the United Nations, succinctly highlighted the shift demanded by 9/11 in the role of international law during his Nobel Peace Prize Lecture in 2001 when he stated:

We have entered the third millennium through a gate of Fire. If today, after the horror of 11 September, we see better, and we see further – we will realize that humanity is indivisible....

In the twenty-first century I believe the mission of the United Nations will be defined by a new, more profound, awareness of the sanctity and dignity of every human life, regardless of race or religion. This will require us to look beyond the framework of States, and beneath the surface of nations and communities....

In this new century, we must start from understanding that peace belongs not only to States or peoples, but to each and every member of those communities. The sovereignty of States must no longer be used as a shield for gross violations of human rights.³²

This demand for the respect of the human dignity of the individual forms the bedrock of the four Geneva Conventions of 1949. Having achieved almost universal ratification they, together with the Additional Protocols I and II of 1977, are the skeletal structure on which the flesh of humanitarian law hangs. This structure, built over the last two centuries, attempts to balance state security with the preservation of life and dignity, so that the effects of violence in armed conflicts is controlled and minimised with the right to use force being limited.³³ This balance provides the backbone of IHL. However, of concern is the attitude of the only remaining superpower.³⁴ The USA has publicly declared the provisions of Additional Protocol

³⁰ See e.g. Deborah Avant *The Market for Force: Exploring the Privatization of Military Services* [n.d.] <http://www.totse.com/en/politics/the_world_beyond_the_usa/ndp.html> at 15 June 2004.

³¹ Ian Traynor 'The Privatization of War: \$30 Billion Goes to Private Military; Fears Over 'Hired Guns' Policy', *Guardian/UK* (London), 10 December 2003; See also The (UK Green Paper) Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation*, February 12 2002, London.

³² Kofi Annan, 'Nobel Peace Prize Lecture', 10 December 2001, in Martin Dixon & Robert McCorquodale, *Cases & Materials on International Law* 4th ed. (2003) 17.

³³ Additional Protocol I art 35(1).

³⁴ See Pete Yost and Douglasin Jehl 'Memo to Bush may have led to torture', *Los Angeles Times, The New York Times*, May 18, 2004, para 1-4 'A memo reportedly written by the White House legal counsel Alberto Gonzales to President George Bush after the September 11 attacks advised: "In my judgment this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions." The Secretary of State, Colin Powell, "hit the roof" when he read the memo, the magazine said, and fired off a note to Mr Bush, warning that the new rules "will reverse over a century of US policy and practice" and have "a high cost in terms of negative international reaction".

I, that demand the protection of civilians from the hazards of war, as unacceptable militarily and a justification for refusal to ratify the Protocol.³⁵

The essential fundamentals of the laws of war (Hague Conventions) and IHL (Geneva Conventions and Protocols) is that they mandate the life, health and dignity of all persons not taking part in active hostilities. The aim is that military operations, no longer called 'wars,' are contested in a manner that minimises suffering and the impact of violence on humans, property and the environment. To reinforce these humanitarian concepts, as demanded by Annan's twenty-first century mission for the United Nations, a range of treaties have been added to the basic 'body' of laws. These include restrictions on the use of certain weapons, torture, protection of cultural heritage and most recently; the establishing of The International Criminal Court to aid in the continued development of international humanitarian law.³⁶

Unfortunately however, instead of the incorporation of the political, social and moral dimensions of the law, there is now an over-reliance on black letter law to argue that what is not forbidden is permissible. This development in the law of war has been vigorously pursued in the USA, with the argument that certain methods of interrogation such as stress and duress, isolation, sleep deprivation, application of heat, cold, and noise, fall outside the category of torture and humiliating or degrading treatment, and are legally permissible.³⁷ The use of the narrow literary construction for the interpretation of the rights and obligations contained in the Geneva Conventions, as opposed to the more commonly adopted 'purpose' or 'mischief' method of construction used in many common law jurisdictions, allows for the evasion of well intentioned humanitarian principles contained in IHL. The Martens Clause³⁸ is an attempt to overcome the evasion of the humanitarian principles underlying the Geneva Conventions by setting a minimum standard to apply to all situations of conflict, in which standards of civilised behaviour, deriving from custom, humanity and the public conscience, are to apply. However, achievement of such ideals still seems elusive.

³⁵ Few of the states currently involved in conflicts have ratified Additional Protocol I 1977. Ruth Wedgwood, 'Al Qaeda, Terrorism, and Military Commissions', *American Journal of International Law* (2002) 1-10, 9: notes neither Afghanistan nor the US has ratified Protocol I along with many other states and it is sharply contested that it represents international customary law.

³⁶ See generally Mario Profaca, 'International Criminal Tribunal. International Law: Treaties and Conventions'2004 <<http://public.srce.hr/~mprofaca/lawsorce.html>> at 29 June 2004.

³⁷ Additional Protocol I art 75 provides certain fundamental guarantees but has not been ratified by the USA. *The Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment* to which the USA is signatory has been rendered ineffective in that the USA has determined it is only applicable to conduct prohibited by the Fifth, Eighth and Fourteenth Amendments of the USA Constitution. For an example of this process at work refer to 'Working Group Report on Detainee Interrogations in the Global War on Terrorism, outlining the argument for torture of terrorism detainees' March 2003.

<http://msnbc.com/modules/newsweek/pdf/040608_Hirsh_WorkingGroupReport.pdf> at 29 June 2004 .

³⁸ See Common Article 3 of the *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1949, (entered into force 21 October 1959)75 U.N.T.S. 31(hereinafter referred to as Geneva Convention I); *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*,(entered into force 21 October 1959), 75 U.N.T.S. 85 (hereinafter referred to as Geneva Convention II); *Geneva Convention (III) Relative to the Treatment of Prisoners of War*,(entered into force 21 October 1959) 75 U.N.T.S. 135 (hereinafter referred to as Geneva Convention III); *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, (entered into force 21 October 1959) 75 U.N.T.S. 287 (hereinafter referred to as Geneva Convention IV); Additional Protocol I art 1(2) and the Preamble to *Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, (entered into force 8 December 1978) 1125 U.N.T.S.609 (hereinafter Additional Protocol II).

Within this context, the new phenomenon of PMCs is emerging and is challenging the existing laws to grapple effectively with the issues raised. This phenomenon has historical roots dating back over 250 years.³⁹ However, the new shoots are sprouting a modified version with significant implications for all humans, as well as IHL.

III THE NEW FORCE – PRIVATE MILITARY CORPORATIONS

The Proliferation of Private Military Corporations

The deep penetration into warfare by PMCs means they are now second only to the USA in contributors to the coalition forces in Iraq. The exact number cannot be accurately ascertained but estimates are between 10,000 –20,000 personnel.⁴⁰ This figure is a significant increase from the 1991 Gulf War, when it was estimated that there was one PMC for every 100 defence personnel, to a ratio now of one to ten.⁴¹ This change in the way war is conducted highlights significant outcomes not only for the ability of the USA to engage in conflicts, arguably now dependant on PMCs, but for the future of world security in general.

An indication of the level of activities undertaken by PMCs can be found in one such PMC's list of capabilities: MPRI, declares it is capable of providing war gaming, combat training, force deployment and management, democracy transition assistance programs, new equipment integration and training, doctrine development, anti-terrorism/force protection, investigations and consequence management. The mission statement of MPRI says it uses 'methodologies of proven effectiveness', with no mention of legal means. MPRI also indicates that its employees 'devote their lives to *the nation*' presumably this means the USA and not the nation in which they are operating, or to whom they are contracted. Moreover while MPRI states that their employees have 'deeply-held values', nowhere are these specified.⁴²

The treatment of prisoners at Abu Ghraib prison has also raised public awareness of the involvement of figures, other than national military, in the prosecution of wars.⁴³ Questions concerning the accountability of PMCs are now arising. Thirteen USA opposition senators wrote to Defence Secretary, Donald Rumsfeld, to ask for an explanation concerning civilian contractors in Iraq. The letter said 'It would be a dangerous precedent if the USA allowed the presence of private armies operating outside the control of governmental authority and beholden only to those who pay them'.⁴⁴ To date it would seem that there is only one USA civilian, an ex-Central Intelligence Agency (CIA) interrogator/contractor working in Afghanistan that has

³⁹ See e.g. Shannon supra n 4.

⁴⁰ See e.g. Spencer Ante *The Other U.S Military: The private contractor biz is hot, vast and largely unregulated. Is it out of control?* Business Week Online May 31, 2004.

<http://www.businessweek.com/print/magazine/comtent/04_22/b3885116.htm?mz> at 20 June 2004; See also Ian Traynor supra n 31.

⁴¹ See e.g. Nelson Schwartz supra n 29.

⁴² See e.g. MPRI L-3 Communications 'MPRI Capabilities & Mission Statement', (2004)

<<http://www.mpri.com/site/mission.html>> at 20 June 2004.

⁴³ See e.g. Seymour Hersh 'Torture at Abu Ghraib. American soldiers brutalized Iraqis. How far up does the responsibility go?' *The New Yorker*, October, 5 2004.

<http://www.newyorker.com/printable/?fact/040510fa_fact> at 29 June 2004.

⁴⁴ ABC News Online, 'Answers sought on US 'private armies' in Iraq.' *Australian Broadcasting Corporation* 2004.

<<http://www.abc.net.au/cgi-bin/common/printfriendly.pl?http://www.abc.net.au/news/n>> at 13 May 2004.

been indicted by the USA Justice Department in relation to a suspicious death.⁴⁵ The development of the PMCs raises a number of concerns. Four main areas of concern are considered in the next Part.

IV CONCERNS

The issues raised by these new forces are many, but they are considered here in four main areas: definitional problems, accountability and control, sovereignty, and issues for IHL.

Definitions: Mercenaries, Armed Forces, Spies, Civilians and PMCs

PMCs create new definitional problems for existing IHL. Contractors working for PMCs are not to be confused with mercenaries, which have been outlawed by international law.⁴⁶ The 1989 *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, mainly follows the definition of mercenary found in Additional Protocol I Art 47 (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 a 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.*

Article 47(2) has been criticised as largely unworkable creating a cumulative definition of dubious specificity requiring proof of subjective motive.⁴⁷ In relation to PMCs paragraph (a) and (f) of Art 47 highlight immediate issues. The requirement that mercenaries be ‘specially recruited in order to fight in an armed conflict’ raises points of distinction that would arguably exclude large numbers of PMCs who may

45 See e.g. R. Jeffrey Smith ‘Interrogator Says U.S. Approved Handling of Detainee Who Died’, *Washington Post* Wednesday, April 13 2005, A07<<http://www.washingtonpost.com/wp-dyn/articles/a48239-2005apr12.html>> at 10 June 2005; Conor O’Clery ‘35 years later, the US soldiers exposed as a gang of butchers.’ *The Irish Times* (Dublin) 10 April 2004, para 7 - Little outcome can be expected in relation to private contractors when defence personnel are exempted. The USA has investigated evidence of wounded Iraqi soldiers to whom the Geneva Convention applies being deliberately shot after being aired on CNN reports. An Iraqi guard was lying gravely wounded and amongst calls of glee was shot dead as he tried to move. In at least one of the investigations USA troops were cleared of any wrongdoing.

46 1989 *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, however few countries have ratified. The governing principle of law was stated by the General Assembly in its Declaration of 1996: ‘States, guided by the purposes and principles of the Charter of the United Nations and other relevant rules of international law, must refrain from organising, instigating, assisting or participating in terrorist acts in territories of other States, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts. The General Assembly’s definition of aggression provides in Article 3(g) that: Any of the following acts...qualify as an act of aggression:...The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to acts listed above, or its substantial involvement therein.’; Additional Protocol I art 47.

47 UK Green Paper, supra n 31at para 6.

argue they are not recruited specifically 'to fight' but rather are to provide defensive security or other roles in addition to fighting. PMCs being contracted by 'a state which is not a Party to the conflict on official duty as a member of its armed forces' will fall outside the definition. Further Art 5(2) of the 1989 Convention relates to states recruiting, using, financing and training mercenaries for use against peoples seeking self-determination. This clearly does not cover conflicts such as the recent Afghanistan and Iraqi conflicts. While the 1989 Convention highlights concerns by the international community to address the issue of mercenaries it has to date only been ratified by a few countries and does not address the specific problems raised by PMCs.

Armed forces are defined to include all organised armed forces, groups and units that are under a command responsible to a party to the conflict, even if the party is represented by a government or authority not recognised by the opposing party.⁴⁸ Such armed forces have to be subject to an internal disciplinary system that is bound to enforce compliance with rules of international law applicable in armed conflict. Only people so defined are legally entitled to directly participate in hostilities as combatants under international law. However, armed forces in international law are composed not only of combatants, but also non-combatants - medical, religious and civil defence personnel - who cannot take part in hostilities.⁴⁹ Civilians who accompany armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or those services responsible for the welfare of the armed forces are entitled to prisoner of war status if captured.⁵⁰ These are to be distinguished from contractors working for PMCs who operate independently of armed forces and are not civilians accompanying armed forces. With PMCs the word 'military' is highlighted in the sense that these civilians are providing, assisting or engaging in some form of military or security role in a conflict zone which involves bearing arms, whether openly or not.

Spies, terrorists, insurgents and freedom fighters have their own definitional issues and generally relate to civilians armed for reasons other than self-defence in non-international armed conflicts where there is no distinction between the various categories of persons.⁵¹ Organisations such as the Irish Republican Army, Palestinian Liberation Organisation, and African National Congress have all been labelled as terrorists or freedom fighters. However, Common Art 3 of the Geneva Conventions and Art 4 Additional Protocol II comprehensively covers such persons. Such definitional problems will not impact on the issue of PMCs in international conflicts. For instance spies are defined in Art 46 Additional Protocol I as 'any member of the armed forces of a Party to the conflict', this immediately excludes PMCs who are not members of the armed forces and may well not be nationals of a Party to the conflict.

Terrorists have been subject to many attempts at legal definition to pin them down. However, despite the on going debate surrounding a suitable definition of terrorists they can arguably be distinguished from PMCs by the fact that they are usually motivated by ideology, rather than profit and they can act alone or in ad hoc organisational structures. PMCs operate in commercial legal structures such as

⁴⁸ Additional Protocol I. art.43.

⁴⁹ Geneva Convention I art 13, Ch IV; Additional Protocol I. art 43 & Ch. VI.

⁵⁰ Geneva Con. III art 4 (4).

⁵¹ Additional Protocol I art. 44(2); Gen Cons. Common art.3, See, eg, Hans-Peter Gasser 'Prohibition of terrorist acts in international humanitarian law', paper given at the 11th Round Table on Current Problems of International Humanitarian Law, San Remo, 9 -14 September 1985.

companies, they are often recognised, if not contracted, by governments and seek society's acceptance and approval.

Civilians are defined as any person not belonging to the armed forces.⁵² Where an individual is not covered by international agreements then as a civilian, at the minimum, they remain under the protection and authority of the principles of the law of nations derived from customary law, the laws of humanity and the dictates of public conscience.⁵³ Civilians of countries who are signatory to the *Rome Statute of the International Criminal Court* can be subject to prosecution for crimes under the statute. However as this is limited to a natural person over the age of 18 years then PMCs will fall outside of the ICCs jurisdiction.⁵⁴

So how are PMCs, engaged in armed conflict, to be considered under the Geneva conventions if, for instance, their contractors become prisoners or commit crimes? They are not non-combatants (within the definition of Additional Protocol 1 Arts. 43, 44) since they carry arms, but they can't be considered combatants if they do not wear a uniform and do not answer to a command authority or follow the rules of IHL.⁵⁵ People, such as members of Al-Qaida, have been denied combatant and prisoner of war status because they do not satisfy these criteria. The USA has defined them as 'unlawful or enemy combatants' for the purpose of making them legitimate targets for lethal force, with Presidential authority being given for their assassination far from traditional battlefields.⁵⁶ This begs the question whether civilian contractors working for PMCs may be seen as legitimate targets open to similar treatment by the other side.⁵⁷ Arquilla and Ronfeldt state:

The revolutionary forces of the future may consist increasingly of widespread multi-organisational networks that have no particular national identity, claim to arise from civil society, and include some aggressive groups and individuals who are keenly adept at using advanced technology, for communications as well as munitions.⁵⁸

Evidence of the fine line walked by PMCs can be seen in the case of the 70 suspected mercenaries arrested in Zimbabwe who are alleged to have been en route to Equatorial Guinea to stage a coup. The men denied the charges, stating that they

⁵² Additional Protocol I art 50.

⁵³ *Hague Convention IV (18 October 1907) Convention Respecting the Laws and Customs of War on Land* (entry into force 26 January 1910) Preamble; Additional Protocol I, art 1(2).

⁵⁴ *Rome Statute of the International Criminal Court* Article 25(1) The Court shall have jurisdiction over natural persons pursuant to this Statute; Article 26 The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of the crime.

Given Article 8(2)(b)(xxvi) makes it a war crime to enlist anyone under the age of 15 it begs the question what happens to persons between the age of 15 and 18 years who commit war crimes?

⁵⁵ Additional Protocol I, arts 43, 44(3).

⁵⁶ James Risen and David Johnston 'Bush has widened authority of C.I.A. to kill terrorists', *The New York Times* (New York), December 15 2002, pp. 1 and 22. Mr Harethi and five other people were killed by an unmanned Predator drone attack in a remote part of Yemen.

⁵⁷ Timothy McCormack *The Use of Force in Public International Law. An Australian Perspective*, 2nd ed. Blay et al above n 5 at 251-253; BBC News World Edition 2004, 'S Korean hostage beheaded in Iraq', <http://news.bbc.co.uk/2/hi/middle_east/3830843.stm> at 29 June 2004 'The beheaded body of translator Kim Sun-il, 33, was found on the road between Baghdad and Fallujah. Mr Kim was working for a security company supplying the US military when he was abducted last week', para 1-2.

⁵⁸ John Arquilla and David Ronfeldt 'Cyberwar is coming!' in J. Arquilla and D Ronfeldt (eds) *Athena's Camp: Preparing For Conflict In The Information Age* (1997) 23 at 49.

were employed as security personnel to guard mining operations in the Democratic Republic of Congo.⁵⁹

These definitional problems have been subject to consideration by various bodies. Predominate among them is a British Green Paper entitled 'Private Military Companies: Options for Regulation' prepared by order of the House of Commons in 2002. The conclusion from the investigation suggested that definition is essential for regulation. However, it concluded after a thorough overview, that the terminology is often driven to 'suit the agenda of those drafting . . . [and is] not necessarily very useful'.⁶⁰

Accountability and Control

When military personnel and war criminals, for which there are clear laws regulating accountability, are seen to escape prosecution it can be argued there is an increased likelihood that the legal system will fail to render PMCs accountable.⁶¹ Indeed to date, there has been little accountability of PMCs with only one contractor of a PMC having been charged with any offence in relation to the recent conflicts in Afghanistan and Iraq.⁶²

The first concern is a lack of transparency and oversight to PMCs operations. No one can say accurately exactly how many PMCs are carrying out duties that would normally be carried out by national military personnel in conflict zones throughout the world. It is a concern that governments cannot provide this information, and yet they are the prime contractors with these companies, spending taxpayer's dollars on the services of such companies.⁶³

The current conceptions in international law are that only states have the right to maintain military forces which are controlled through a process of accountability that leads directly back to the leaders of the states and ultimately its citizens. The Geneva Conventions make all commanders legally responsible for respecting and enforcement of the Conventions; they are accountable for the dissemination of IHL and ensuring that wrongdoers are punished.⁶⁴ When even USA military personnel in Iraq claim never to have heard of the Geneva Conventions it raises greater concerns that PMCs are operating without these controls.⁶⁵

⁵⁹Chinaview 2004 'Zimbabwe sets trial date for suspected mercenaries', <http://news.xinhuanet.com/english/2004-06/23/content_1543486.htm> at 24 June 2004.

⁶⁰ UK Green Paper, see supra n 31 at para 16.

⁶¹ See e.g. Geoff Elliot 'Mistrial as Judge rejects England's plea', *The Australian*, May 6, 2005, "The mistrial could mean...Private England ...faces fresh charges if the army seeks to have her tried again or the case is dropped entirely." at 9.

⁶² See e.g. R. Jeffrey Smith supra n 45.

⁶³ See e.g. Jonathan Karl and Gaelle Drevet 'Private Armies for Hire: Outsourcing Military Security to Private Companies Has Risks', ABCNEWS.com 2004 <http://abcnews.go.com/sections/WNT/World/private_armies_040401.html> at 13 May 2004. Not only is the USA Administration not able to say how many civilians are working for private contractors in Iraq but they also don't know how many have been killed, para 18.

⁶⁴ Additional Protocol I art 87.

⁶⁵See e.g. Al Tompkins 'The Story Behind the Lynndie England Interview', Poynteronline 2004 <http://www.poynter.org/content/content_view> at 29 June 2004 para. 20 'She didn't seem to recall knowing much about the Geneva Conventions rules, but Private England's lawyer who is highly experienced in military affairs said once a year, these soldiers are instructed in the provisions of the Geneva Convention. But he said it was not reinforced in any way when they were 'on the ground' in Iraq'.

Prosecutions of breaches of IHL are the responsibility of each state in relation to its own military forces. We are seeing this occur in relation to a number of the soldiers at Abu Ghraib.⁶⁶ However, the application to PMCs seems to be somewhat murkier, with unclear outcomes for prosecution compared to the immediate dealing with offending military personnel. The Abu Ghraib incidents only came to light slowly, after one soldier and the responsible officer, to whom he reported, exposed it.⁶⁷ The International Committee of the Red Cross (ICRC), whose responsibility it is to oversee the conditions of prisoners of war and report any concerns to the controlling state, seemed largely to be ignored in relation to its complaints within the Coalition Administration.⁶⁸ It is now clear that USA Secretary of Defence, Donald Rumsfeld, had authorised the use of stress positions, 30 days' isolation, 20 hour interrogations, removal of clothes (in conditions of heat and cold), and use of dogs and loud music on USA detainees.⁶⁹ A statement by Senator Edward Kennedy on the first anniversary of the Abu Ghraib incident confirms:

The Bybee Torture Memorandum was eventually repudiated by the Justice Department, but the Pentagon's Working Group Report of April 2003, which incorporated the Bybee Memorandum nearly verbatim, has still not been explicitly superseded, and no new guidance has gone to the field.⁷⁰

If this is the regard paid to IHL by senior levels of government, the question must arise as to what will happen to such principles under the cloak of privatisation, where the media and citizens do not have such ready access to information and accountability is not so immediate.

Military personnel, whether on or off duty, are subject to military discipline. However, a civilian who commits an offence is answerable only to either the national law of the state in which he or she is temporarily based or the law of the state of their nationality where that state has passed legislation, permissible under international law, to operate extraterritorial jurisdiction. If it is the former situation then as this is invariably going to be in a conflict zone operating in wartime, often in the context of a failed state, there is little likelihood of such a person ever being subject to the local law. In the latter case the lack of such prosecutions evidences unwillingness by states to undertake prosecutions in these circumstances.⁷¹

In the latest IHL development: the establishment of the much awaited International Criminal Court (ICC), the phenomenon of PMCs remains unaddressed, with the ICC's jurisdiction being limited to natural persons over the age of 18 years.⁷² With reparations being ordered only against parties criminally responsible, corporations will also escape any financial liability under the ICC.

⁶⁶ See e.g. Richard A. Serrano, 'Dog handlers charged in Abu Ghraib abuse', *Los Angeles Times* (Los Angeles), June 3 2005; Tim Whitmire, 'Wartime Prosecutions Come under Scrutiny; Dismissals, short sentences for U.S. soldiers prosecuted for deaths of Iraqis, Indiana Printing & Publishing Co June 06, 2005, <<http://www.zwire.com/site/news.cfm?>> at 09 June 2005.

⁶⁷ See e.g. Robert Scheer, 'Sadistic tactics bring out the brute in the land of the free', *Los Angeles Times* (Los Angeles), May 6 2004.

⁶⁸ See e.g. Douglas Jehl and Eric Schmitt, 'Army answered jail complaints by shutting out Red Cross', *The Sydney Morning Herald* (Sydney), Thursday, May 20 2004, World, 8.

⁶⁹ SBS Newsreport 23/06/2004.

⁷⁰ See e.g. Edward M. Kennedy, 'Abu Ghraib – One Year Later', <<http://tedkenedy.com/journal/59/abu-ghraib---one-year-later>> at 6 June 2005.

⁷¹ See e.g. Whitmire supra n 66.

⁷² *Rome Statute of the International Criminal Court* above n 54; See e.g. Geoffrey Robertson, 'The International Criminal Court' Chapter 9 in *Crimes against humanity. The struggle for global justice*, 325-367.

To further exacerbate accountability issues, there is a developing practice in Western countries of obtaining immunity from prosecution of military forces and nationals while in another state territory.⁷³ Immunity from prosecution such as in Iraq and the Australian police serving in Papua New Guinea,⁷⁴ only further perpetuates the exemption of accountability of individuals when operating in conflict zones in other states. The fact that the USA has refused to participate in the ICC and is actively enlisting states to sign so-called 'Article 98 agreements' prohibiting the surrendering of USA war crimes suspects is a further example.⁷⁵

The second concern in regard to accountability and control is that states may find the existence of PMCs useful when wanting to implement politically unpopular foreign policies, or they might provide more efficient, cost effective services. The Australian Strategic Policy Institute (ASPI) in its 2005 report 'War and Profit: Doing Business on the Battlefield',⁷⁶ supports the increasing use of PMCs in battle zones. However, there are implications for democracies and IHL.

Part of the accountability issue relates to governments waging war by proxy, being one step removed, media and government attention is not attracted to the activities of PMCs in the same manner that surround a state's national military being deployed into a conflict zone. Little media attention is paid to employees of PMCs killed in conflict zones, compared to the public reaction to the number of national military killed or wounded.⁷⁷ Evidence of this can be seen in the contrast between the media coverage received by three civilian contractors for California Microwave Systems, a subsidiary of Northrop Grumman Corp, who since February 2003 have been held by Colombian rebel forces after their plane crashed while on a clandestine mission,⁷⁸ compared with the publicity surrounding the hostage taking and rescue of Private Jessica Lynch in Iraq.⁷⁹ It was not perhaps until the burning and mutilation in such a publicly horrifying manner of four Blackwater employees in Iraq that the involvement of PMCs in conflict zones has begun to be understood by the public:

⁷³ See e.g. CPA Order 17 (Revised); Ian Traynor supra n 31 at para 34: Dyncorp was given the contract to train the Bosnian police force. 'However a number of its employees were implicated in a sex slave scandal, with girls as young as 12 years old, for which the employees allegedly were dismissed but were never prosecuted and with no apparent adverse repercussions for the company, who have trained the Haitian police, Afghan police and who have now been given a multi --million dollar contract to train the Iraqi police force'.

⁷⁴ See e.g. Joint Agreement on Enhanced Cooperation between Papua New Guinea and Australia on 30th June 2004 (Agreement). This agreement was held to breach the Papua New Guinea Constitution in Papua New Guinea [In the Supreme Court of Justice at Waigani] SCR N0 2 of 2004.

Special Reference Pursuant to Constitution Section 19, Special Reference by the Morobe Provincial Executive. 8 December 2004, 13 May 2005 < <http://www.paclii.org/pg/cases/PGSC/2005/1.html> > at 1 June 2005; Shane Mcleod, 'PM - Aust -PNG police talks continue', *ABC Online* 2004 < www.abc.net.au/pm/content/2004/s1066477.htm > at 08 December 2004.

⁷⁵ Carl Bloggs, 'Outlaw Nation: the Legacy of U.S. War Crimes' in Carl Bloggs (ed) *Masters of War. Militarism and Blowback in the Era of American Empire* (2003) 191-226, 194.

⁷⁶ Mark Thompson, 'War and Profit: Doing Business on the battlefield', *ASPI Strategy Report* 30 March 2005.

⁷⁷ Christopher Bollyn, 'Mainstream Media's Sanitized War Coverage Helps Mask Carnage', 2004 American Free Press. < http://www.americanfreepress.net/03_28_03/Mainstream_Media_s_Sanitized_/mainstream_media_s_sanitized_.htm > at 10 June 2005.

⁷⁸ Max Jourdan, Foreign Correspondent, 'Colombia - The Forgotten Hostages', broadcast ABC 19 April 2005 < <http://www.abc.net.au/foreign/content/2005/s131-9302.htm> > at 20 April 2005.

⁷⁹ Dante Chinni, 'Jessica Lynch: Media Myth-Making in the Iraq War', *Journalism.Org* < <http://www.journalism.org/resources/research/reports/war/potwar/lynch.asp> > at 10 June 2005.

The four Americans killed in Fallujah were employees of Blackwater Security Consulting whose 450 employees in Iraq offer security to Paul Bremer, Head of the CPA, and convoy trucks amongst other projects. An attack on US government headquarters in Najaf was repelled by eight Blackwater commandos alone with that company's equipment being used to provide back up and remove wounded US marines.⁸⁰

This would appear to be frontline combatant involvement undertaken by PMCs.

A third concern is the consequent involvement of such companies in intelligence gathering, a domain usually the preserve of states. Many of the companies are reliant on their own intelligence gathering as there appears to be little coordination between PMCs and the national armies with no overall command structure. Intelligence gathering, which has been an area of controversy for governments, can only become more so with the involvement of competing PMCs.

In domestic legal systems of modern constitutional democracies, intelligence gathering is an acutely sensitive issue, precisely because it has the potential for infringing privacy and other protected rights. Hence procedures and objectives are prescribed by statute and supervised by the judiciary. Transnational intelligence gathering operates with considerably fewer legal and political constraints, yet may provoke crises when discovered - witness the disquiet caused by reports that the CIA used UNSCOM as a cover for electronic eavesdropping on Iraqi government communications.⁸¹

If PMCs have personnel in conflict zones that are operating solely in the interests of their employer, military power will be determined by the ability to pay, giving private organisations influence over government policy and public goals. Joel Bakan, professor of law at the University of British Columbia notes:

Through a process of privatisation, governments have capitulated and handed over to corporations control of institutions once thought to be inherently "public" in nature. No part of the public sphere has been immune to the infiltration of for-profit corporations.⁸²

States tolerance of the invasion of PMCs in the public domain of armed forces may be influenced by the usefulness of such companies to avoid politically sensitive activities by covert actions.

Sovereignty

Peter Singer, a security analyst from Brookings Institute,⁸³ points out that the nation state is rapidly losing one of its essential attributes, namely the monopoly on the right to use force within international law. Bakan goes further and says:

If corporations and governments are indeed partners, we should be worried about the state of our democracy, for it means that government has effectively abdicated its sovereignty over the corporation.⁸⁴

⁸⁰ See e.g. O'Clery supra n 45 at para 10.

⁸¹ Michael Reisman, 'International legal responses to terrorism', *Houston Journal of International Law*, Vol.22, No. 1 (1999), 9-61 at 15.

⁸² Bakan see supra n 23 at 113.

⁸³ See e.g. Singer supra n 6.

⁸⁴ Bakan see supra n 23 at 108.

Of the \$87 billion approved by the USA Congress for the Iraq conflict, it is estimated that \$30 billion will go to PMCs.⁸⁵ Companies are motivated by profit, it is their whole *raison d'etre*, they are not concerned with matters of foreign policy or security unless and until it impacts on their ability to make profits. Often, of course, this will be the case and then the concern becomes one of the impact of powerful companies (whose wealth may far exceed the gross domestic product of some nation states), in their ability to lobby and influence states to adopt policies that will advantage their profit making. Often it is humanitarian ideals, the environment and minority cultures that suffer in this process. The democratic process is meant to give voice to these concerns, but fear arises that PMCs having access to state of the art intelligence and defence hardware may drown the individual voice. Economist Milton Friedman admits that a function such as that of the armed forces is one of the few areas that should remain non-privatised in the public domain and under government control:

Nothing but the most basic functions – the judicial system, the armed forces... Friedman says, should be within the government's control.⁸⁶

Enes Becirbasic, a Bosnian military official, highlighted a major concern when dealing with MPRI stating 'It's a conflict of interest. I represent our national interest, but they are businessmen'.⁸⁷ When the Papua New Guinea government signed a contract with the PMC, Executive Outcomes (Sandline), to train the army to contain a secessionist rebel uprising, the national army rebelled and five days of rioting and protests ensued.⁸⁸ States that hire PMCs are usually financially poor but mineral rich, and as such are vulnerable to the persuasion to use PMCs.⁸⁹

The common practice around the Western world of downsizing to improve efficiency and make a profit is impacting in the military world. USA Secretary of Defence, Donald Rumsfeld, has pledged that he will try to cut a further 200,000 jobs in the armed forces, pursuing a policy of downsizing and outsourcing, with the USA military only 60 per cent of what it was a decade ago.⁹⁰ The question is where redundant national military personnel go, given that often, their only employment has been in the army. They tend to become a ready supply for PMCs moving into the area, offering better pay and conditions. Furthermore, the price paid for services by companies like Blackwater is causing many military personnel to leave their national armies.⁹¹ Huge implications exist for national armies around the world; whether they can compete and whether they will be able to attract enough personnel to maintain a national armed force with quality personnel.⁹² Former Rear Admiral John D. Hutson

⁸⁵ See e.g. Traynor supra n 31.

⁸⁶ Bakan supra n 23 at 113.

⁸⁷ Traynor supra n 31 at para 41.

⁸⁸ Vankin supra n 18.

⁸⁹ Avant supra n 30; Singer, supra n 6.

⁹⁰ See e.g. Traynor supra n 31; Singer, *ibid*.

⁹¹ Traynor, *ibid*, para 28, 'One senior British officer complains that his driver was recently approached and offered a fortune to move to a rather "dodgy outfit". Ex SAS veterans in Iraq charge up to \$1000 a day'; Luke McIlveen, 'High Pay goes with high-risk territory', *The Courier-Mail* May 3, 2005, "The risks are great; but for former soldiers like Ahmelman, so are the rewards. Salaries of \$9,000 a week are not uncommon." 4.

⁹² Kim Landers, 11 March 2005 Skills Shortage Hits Defence Force, *ABC Online* 'In the last two years 31 SAS soldiers have left the Australian Defence Force to take up these lucrative private sector positions'. The Australian Defence Force Chief, General Peter Cosgrove admitted to a Joint Parliamentary inquiry that the Australian defence force is competing with 'mind-boggling sums that

and Dean of the Franklin Pierce Law Centre has concerns about whether outsourcing has gone too far and what will be the procedure for dealing with such people, who are not accountable in the way national military are, resulting in a diminution of human rights:

I have a serious problem with people in sensitive positions, like interrogators.⁹³

The end result of permitting PMCs to equip themselves with the ability to engage in killing undermines not only state sovereignty but a key premise of international law namely the control of the state over the monopoly on the use of force. Unless the state can reassert control and show a willingness to make PMCs accountable to the democratic process democracy will fail.⁹⁴

Education in Human rights /IHL

For the humanitarian perspective to prevail and be practised in the field of conflict, it is essential that all people are educated in IHL and the laws of armed conflict. To this end the ICRC, while not engaging in public debate about the rights or wrongs of this new corporate phenomenon have undertaken an education campaign in IHL for such contractors.⁹⁵ The repercussions of the failure to understand these rules is experienced by the loss of morale and domestic support for governments engaged in conflict, the incident in relation to prisoners at Abu Ghraib being one example. A nation can only wage a war as long as it has the continued support of its people. Governments, well aware of this, must maintain huge public relations campaigns.⁹⁶

Part of the education process in IHL has occurred through the prosecution of war criminals. Since 1945 there have been some significant trials of war criminals, such as the Nuremberg and Tokyo War Crimes Tribunals and more recently the ICTY trials (of Milosevic and other lesser known individuals such as Tadic) and the not so successful Rwandan Tribunal.⁹⁷ However for all these public cases, often seen as the imposition of victors' justice, there seems to have been much impunity for the violators of IHL.⁹⁸ Some reasons for this include the camouflage of offences by the violence of conflict, and the fact that combatants on the winning side are likely to evade prosecution, as such prosecution would dissuade future combatants and weaken the victor's military morale.⁹⁹ Prosecution not only challenges the 'justice' of the 'winner', when normally everything is forgotten in victory or the desire to

have been dangled in front' of defence personnel to attract them away from the Australian defence forces. <<http://www.abc.net.au/pm/co> accessed 15/03/2005> at 15 March 2005.

⁹³ See e.g. Ante supra n 40 at para.13.

⁹⁴ See e.g. Shannon supra n 4 at 40-45.

⁹⁵ ICRC, 'The ICRC to expand contacts with private military and security companies' August 4, 2004<<http://www.icrc.org/web/eng/siteeng0.nsf/html/63HE58> >at 18 May 2005.

⁹⁶ Nina J Easton and Susan Milligan, 'PR Blitz counters antiwar protest', *The Boston Globe*, <<http://www.boston.com/news/nation/washington/articles/2005/08/23> > at 25 August 2005.

⁹⁷ Amnesty International, 'Rwanda Gacaca: A question of Justice', Amnesty International 2002 <<http://web.amnesty.org/library/print/ENGAFR470072002>> at 13 May 2004.

⁹⁸ See, eg, Matthew Moore, 'Militia chief is first to be jailed for massacres', *The Sydney Morning Herald* (Sydney), Thursday, May 20 2004, News 10: the sentencing for 8 years of Beni Ludji may well be the only imprisonment of an Indonesian for the East Timor massacres.

⁹⁹ See e.g. O'Clery supra n 45; A prime example is the recent uncovering of evidence of mass slaughter in Quang Ngai province, Vietnam in 1967 by a unit called Tiger force. The massacre has been kept secret for 35 years, although known to the White House and Pentagon, and the 18 soldiers alleged to have committed the crimes have never been prosecuted.

forget war, but is also prohibited by the sheer cost and logistics of Westernised juridified accountability, as in Rwanda.¹⁰⁰

If this is the state of successful enforcement of IHL in regard to national military personnel it is possible to imagine the impunity with which PMCs will act when such legal constraints arguably do not effectively apply. Major General Antonio M. Taguba, in his report into the torture of prisoners in Iraq found that two interrogators-for-hire, neither of which have been charged with any offences, one from CACI International Inc¹⁰¹ and the other from a subcontractor for Titan Corporation, were in conjunction with military personnel ‘either directly or indirectly responsible for the abuses at Abu Ghraib.’¹⁰²

Apparently well-structured societies may have trouble upholding IHL principles if the society has become overly militarised and humanitarian considerations are not given priority in the education processes. Military forces that use excessive force in their attempts to attain peace and security will only succeed in alienating peoples and minorities, often creating escalating cycles of violence rather than the peaceful outcome the use of force was meant to achieve.¹⁰³ Australia is now increasing this brutalisation process by having SAS troops trained to withstand torture:

Australian soldiers are being blindfolded, stripped naked and menaced by savage dogs for up to three hours in extreme training exercises to prepare them to resist torture.

The intensive regime, approved at the highest level of government, is about to be upgraded in response to the growing threat from enemies who do not respect the rules of the Geneva Conventions.¹⁰⁴

This failure to prosecute and diminution in application of the principles of IHL sends a clear message to those who matter most, namely personnel in conflict zones, that IHL can be disregarded.

V IMPLICATIONS FOR IHL.

The New World

The aftermath of 9/11 has seen the vultures fly around the broken carcass of human rights and IHL. The fear instilled by the word terrorism, a threat seen as being everywhere and in everything, has challenged the law and centuries of development in a progression towards the legal control of violence and protection of human rights. An example of this is the USA government’s refusal to act within the constraints of the international existing regime, in refusing to accept that an appropriately established tribunal, and not the executive, is entitled to determine whether a person is to be categorised as a prisoner of war, or to be given a new name ‘unlawful or

¹⁰⁰ See supra n 97.

¹⁰¹ Formerly named Consolidated Analysis Centre renamed CACI International Inc.

¹⁰² See, e.g. Hersch supra n 43 at para 32.

¹⁰³ Since the ‘success’ of the coalition forces in removing Saddam Hussein thousands of people have been killed in Iraq: see, eg, Casualties in the Iraq war CBC News Online | Updated March 23, 2005 <<http://www.cbc.ca/news/background/iraq/casualties.html>> at 30 March 2005.

¹⁰⁴ See, e.g. Simon Kearney, *SAS naked and bound in training*, *The Australian*, 20 August 2005; David Leigh, UK forces taught torture methods, *The Guardian*, 8 May 2004 ‘There is a reservoir of knowledge about these interrogation techniques which is retained by former special forces soldiers who are being rehired as private contractors in Iraq’.

enemy combatant', and placed outside the law as it is understood by the international community.¹⁰⁵

The international community is gradually coming to acknowledge that the interests of the individual must prevail over the interests of the state in certain situations.¹⁰⁶ The establishment of the ICC is one such example. The regime of human rights has paved the way for acceptance by the international community that the sovereignty of states must yield to basic fundamental principles of human rights.¹⁰⁷ The question is will governments feel compelled to enshrine in law the need for corporations to abide by IHL. A further question is will shareholders and their legal entitlement to profits yield to the greater need of human rights and whether the deterrent of public loss of credibility of corporations will act as a sufficient motivation for such entities to show respect for human rights.¹⁰⁸ One wonders whether dismissal of an employee is a sufficient threat to ensure the observance of IHL and human rights given the ability of companies to hide behind a corporate veil and invest huge amounts in public relations damage control and spin.¹⁰⁹ With PMCs like Blackwater Consulting holding competitive 'world swat challenges' with live fire, it is hard to believe that the international community can maintain a consciousness of humanity that supports peace over war.¹¹⁰

Consequences – Politically, Socially and Legally

Humanitarian law is a law made by and for states. It is not readily applicable to corporate entities. Nietzsche's description of the 'cold monster of the state' as an 'entity that defends its subjects and is the champion of a kind of collective egoism, a powerful instrument acting for the most immediate advantages of its people in preference to all else', could more chillingly be applied to the 'cold monster of the heartless corporation'.¹¹¹

With corporations, 'people' are taken out of the equation and replaced with 'profits,' pushing the world towards the inhumane abyss.¹¹² The conglomeration of defence, mining, technology and arms corporations presenting powerful lobby groups and significant power blocks mean that a new player has to be factored into IHL if any semblance of control balancing humanitarian concerns against military might is to

¹⁰⁵ See e.g. Wedgewood, supra n 35; 'Working Group Report on Detainee Interrogations in the Global War on Terrorism, outlining the argument for torture of terrorism detainees'.

¹⁰⁶ See e.g. Kessel, Jerrold, 'Israel Supreme Court bans interrogation abuse of Palestinians', CNN 1999 <<http://www.cnn.com/WORLD/meast/9909/06/israel.tortue/>> at 24 June 2004; It is encouraging to see the rule of law prevailing with the US Supreme Courts recent decision *Rasul et al. v. Bush, President of the United States, et al.* Decided June 28 2004 which found 6:3 that Guantanamo Bay and therefore the detainees held there are subject to the legal jurisdiction of the US. 'Held: Petitioners here differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control' <<http://a257.g.akamaitech.net/7/257/2422/28june20041215/www.supremecourtus.gov/opinions/03pdf/03-334.pdf>>at 18 May 2005.

¹⁰⁷ See e.g. Rhonda K.M. Smith, *International Human Rights* (2003) 26-28.

¹⁰⁸ See e.g. Bakan supra n 23 at 75-79.

¹⁰⁹ Andrew Terry & Des Giugni, *Business, Society and the Law* 3rd ed. (2003) 168-169.

¹¹⁰ See e.g. Blackwater Security Consulting, 'Blackwater USA' 2004. <<http://www.worldswatchchallenge.com/welcome.htm>> at 21 June 2004.

¹¹¹ See e.g. Pictet supra n 2 at 87.

¹¹² See e.g. Jane Caputi, *Gossips, Gorgons & Cronos The Fates of the Earth* (1993).

prevail. Connections between mining and security corporations that are designed to maintain profitability, efficiency and effectiveness through complex financial arrangements result in entities that are very different to the concept of mercenaries as previously known.¹¹³

The notion of 'unlawful or enemy combatants' is likely to haunt Western governments for a long time to come. The USA justifies its treatment of Al-Qaida on the basis that they are non-contracting parties to the Geneva Conventions and Additional Protocols.¹¹⁴ However, this assumption betrays the clear and well-reasoned basis set out in the Geneva Conventions for all contracting parties to follow their obligations, irrespective of whether the enemy is a party or not.¹¹⁵ The ICRC stresses the absolute nature of the Geneva Conventions in which states solemnly bind themselves to the obligations to be observed at all times irrespective of whether there is reciprocal action by the other state or aggressor. Humanitarian law cannot afford to become a smoke screen behind which powerful nations and corporations can hide, by picking and choosing what rules are applicable to armed conflicts. 'Persons who have been put out of action on the battlefield, or kept out of the war altogether, must also be kept out of political manoeuvring'.¹¹⁶ The Honourable Sir William Deane, former Governor-General of Australia stated that the:

... denial of the fundamental responsibility of a democratic government to seek to safeguard the human rights of all its citizens, including the unpopular and the alleged wrongdoer, in the case of the two Australians indefinitely caged, without legal charge or process, in Guantanamo Bay jail . . . encompasses the challenge to advance truth and human dignity rather than to seek advantage by inflaming ugly prejudice and intolerance.¹¹⁷

Definitional problems need to be resolved. A new treaty dealing with this development should be considered. It may be timely to utilise the little used provisions of Art. 90 of Additional Protocol I, in a wider role than was initially envisioned, and to invite an International Fact Finding Commission to investigate the impact of PMCs. These measures would encourage respect for, and greater awareness of, the Geneva Conventions and Protocols. The use of Article 90 Additional Protocol I could provide a starting place for investigation and debate.

Most inquiry to date has been at a national level, for example the UK Green Paper.¹¹⁸ The Australian Strategic Policy Institute has supported the use of PMCs on the battlefield provided the legal regulatory framework can be tightened. The ICRC has declared that it will not engage in discussion on the rights and wrongs of PMCs but rather focus its effort on education of IHL for such organisations.¹¹⁹ The Bellagio

¹¹³ See e.g. Shannon supra n 4.

¹¹⁴ See e.g. Defence, 'Working Group Report on Detainee Interrogations in the Global War on Terrorism, outlining the argument for torture of terrorism detainees' above n 37 4. 'It should be noted, however, that it is the position of the U.S. Government that none of the provisions of the Geneva Conventions Relative to the treatment of Prisoners of War of August 12, 1949 (Third Geneva Convention) apply to Al - Qaida detainees because, *inter alia*, Al-Qaida is not a High Contracting Party to the Convention'.

¹¹⁵ Geneva Conventions I, II, III, IV Common arts 1 & 2.

¹¹⁶ Pictet supra n 2 at 91.

¹¹⁷ The Honourable Sir Deane, William, 'Address by The Honourable Sir William Deane on the occasion of the conferral of the degree of Doctor of Laws honoris causa at The University of Queensland in 2003 para 5.

<<http://by19fd.bay19.hotmail.msn.com/cgi/getmsg?curmbox=F000000001&a=473>> at 10 May 2004.

¹¹⁸ U.K. Green Paper, supra n 31.

¹¹⁹ ICRC supra n 95.

Conference in 2002¹²⁰ considered ways of controlling resource flows, particularly financial resources to conflict zones, with a view to creating an international sanctioning regime that curtailed economic gain from conflict. Overall the responses to PMCs are piecemeal and contradictory.

Further social and political difficulties are being created by the looming world scarcity of oil and other resources, which puts a premium on extraction of such resources. Halliburton is a PMC, not unlike the British East India Company, that has used its military capacity to protect extraction of oil in Angola and now Iraq, as well as supplying petroleum to the USA military in Iraq.¹²¹ Vice President of the USA, Dick Cheney, has been involved with a number of companies such as Halliburton and Brown & Root that were contracted to supply food, water, laundry, heavy equipment and security services in conflict zones. This mix of political and private interests is a murky area where conflicts of interest need to be thoroughly considered and leadership needs to be above reproach.¹²²

John Hari, writing for *The Independent*, London,¹²³ looks to the lessons of history and reminds us of the East India Company's disregard of explicit orders by the British government in its attack on Portuguese garrisons in pursuit of its own profit. He also refers to the fate of the Hundred Years War which was determined by private armies burning towns that refused to pay for their protection. What does a state do if a PMC decides it doesn't want to work for it any more and worse still, if the other side pays more? PMCs are making huge profits and are in demand. Computer Sciences Corp, an IT company, bought Dyncorp for almost US\$950 million and I-3 Communications obtained MPRI for US\$35 million in 2000.¹²⁴

State responses

As the main actors in international public law, states are under an obligation to enact domestic legislation and to ensure the rules of IHL are upheld.¹²⁵

States are bound to refrain from resorting to terrorism and are to do everything in their power to prevent terrorist acts from being committed by individuals in a territory under their jurisdiction. This puts a direct obligation on the persons who act on behalf of the state, including – and this is particularly important – members of the armed forces, of the police and similar organisations. International humanitarian law does not put direct obligations on individuals who do not in some way represent the state.¹²⁶

¹²⁰ International Peace Academy, 'Policies and Practices for Regulating Resource Flows to Armed Conflict', IPA Conference Report, Bellagio, Italy 21-23 May 2002.

¹²¹ For more on Halliburton see Schwartz, supra n 29; Singer, supra n 6 at 23: 'During the Balkans conflict... Brown & Root is alleged to have failed to deliver or severely overcharged the US Army on four out of seven of its contractual obligations'.

¹²² See e.g. Nick Calacouras, 'A Profit Powerhouse', *The Student Leader*, 6 March 20005.

¹²³ John Hari 'This nightmare world full of privatised armies', *The Independent* (London), 14 November 2003, para 10.

¹²⁴ See e.g. Ante, supra n 40 at 22-27 - A number of contractors working in Iraq are currently being audited by the Coalition Provisional Authority to eliminate fraud and abuse of United States domestic law.

¹²⁵ For an overview of laws, see e.g. UK Green Paper supra n 31.

¹²⁶ See e.g. Gasser, supra n 51.

States' domestic legislation, however, has been ineffective for many reasons, including the lack of will and resources to enforce it.¹²⁷ On an international level, what is meant by a war crime is also unclear, resulting in largely unsuccessful war crimes prosecutions to date, even where international regulation applies.¹²⁸

Various attempts to control PMCs or, more commonly, mercenaries have been made by states with little success.¹²⁹ South Africa passed the *Regulation of Foreign Military Assistance Act* No. 15 of 1998 in an attempt to control its citizens when participating as combatants in armed conflict for private gain. Such legislation, however, does not appear to have prevented a number of South African PMCs from operating in Iraq in contravention of this law, with only two such companies having registered their operations in accordance with the legislation, while others have not.¹³⁰ The Australian *Crimes (Foreign Incursions and Recruitment) Act* 1978 makes it an offence to recruit mercenaries within Australia or for Australians to fight in non-governmental forces abroad. The Act excludes persons such as David Hicks; an Australian found fighting with the Taliban forces in Afghanistan. The Act is mainly of deterrence value only. Michelle Bachelet, Chile's Defence Minister, has been concerned that paramilitary training of Chilean nationals from Pinochet's regime breaches Chilean laws concerning private citizens' use of weapons.¹³¹ PMCs are not readily accountable for their actions: not being part of a military chain of command, they are subject to the law of the country in which they are temporarily located. A further problem is exemption agreements such as the Coalition Provisional Authority (CPA) agreement with Iraq where PMCs have been ensured immunity from prosecution under Iraqi law.¹³²

Some acknowledgment of the need to control this new phenomenon is occurring at national levels with the UK Green Paper investigation that looks at a number of options for regulation.¹³³ Unfortunately none of these seem entirely satisfactory. Self-regulation, a preferred option for many of the PMCs concerned,¹³⁴ has been

¹²⁷ See e.g. Gerry Simpson, 'War Crimes: A Critical Introduction', in T.H.L. McCormack and G.L. Simpson (eds) *The Law of War Crimes* (1997) 1- 30.

¹²⁸ Ibid, 12: '... the meaning of war crimes itself has given rise to a proliferation of meanings. These include (1) the generic everyday usage of the term to signify abhorrent acts carried out in war or peace and including genocide and crimes against humanity, (2) the legalistic definition of war crime as a technical breach of the laws of war, (3) the grave breaches enumerated in the Geneva Conventions and Protocols, (4) the category "violations of the laws and customs of war" contained in the Statute for War Crimes Tribunal for the Former Yugoslavia and (5) the term "exceptionally serious war crimes" used by the International Law Commission in its Draft Codes on Crimes Against the Peace and Security of Mankind. While states have laws that can apply to private corporate armies very few have ever resorted to them. Australia possibly stands as an exception with the DPP having laid charges under the *Australian Crimes (Foreign Incursions and Recruitment) Act* 1978'.

¹²⁹ See, eg, UK Green Paper, supra n 31 at 40-43.

¹³⁰ See, eg, Bill Berkowitz, *Mercenaries 'R' U.S.*, 'Private Pentagon contractors are paying soldiers of fortune from Chile and South Africa up to \$4,000 per month for stints in Iraq' (2004) in which Berkowitz notes that Erinys, a joint South African- British company, secured a multimillion dollar contract to protect oil wells in Iraq without registering its operations pursuant to the Regulation of Foreign Military Assistance Act, para. 20, WorkingForChange <<http://www.workingforchange.com/article.cfm?itemid=16701>> at 24 June 2004.

¹³¹ Ibid, para 5.

¹³² The *Military Extraterritorial Jurisdiction Act of 2000*, Pub L No 106-523, 114 Stat 2488 (US) may operate in limited circumstances but has only been used once since its passage; See CPA Order 17 (Revised) on the 'Status of the Coalition, Foreign Liaison Missions, Their Personnel and Contractors', which states explicitly that under 'international law... [they] are not subject to the laws and jurisdiction of the occupied territory' but rather the law of their parent countries'.

¹³³ UK Green Paper, supra n 31.

¹³⁴ Sandline International, '*Private Military Companies – Independent or Regulated?*', 28 March 1998 <<http://www.sandline.com/white/regulation.doc>> at 16 May 2005.

adopted by a number of USA companies working under the umbrella of the International Peace Operations Association (IPOA).¹³⁵ Nine companies are members of IPOA and pledge to follow a code of conduct. However, like all codes of conduct, the question comes down to the nature and effectiveness of its enforcement mechanism.

VI CONCLUSION

Law is more reactive than proactive and experiences periods of advancement and regression. However, the struggle between good and evil is in eternal opposition, *odi et amo*, and may need to be contained by more than laws. A political and social desire coming from knowledge, education and an understanding of these forces is demanded from every individual before the law can fully respond. Grieg states:

This interplay between the political and the legal must be kept in mind throughout any study of international law... [I]nternational law cannot exist in isolation from the political factors operating in the sphere of international relations'.¹³⁶

To maintain the balance between military interests and human rights not only is a strong legal system and willingness to uphold the law required but also a strong political and social will.

States have impacted the development of IHL through their attitudes, sometimes sadly in ways that diminish these laws. 'We are all aware that nothing is more dangerous than the legal fictions which are now so prevalent and so poisonous to international relations'.¹³⁷ The concern is that if states act with impunity, the rise of PMCs will only make the enforcement of IHL all the more difficult. The end of the Cold War has definitely led us into a New World order but unfortunately, not the one of greater peace and justice that was anticipated. It is to be hoped, however, that with all the machinery of the United Nations in place, IHL will be accepted as a universally acknowledged value and will be sustained even if certain regressive periods occur from time to time.

¹³⁵ International Peace Operations Association IPOA 2004 <<http://www.ipoaonline.org/>> at 20 June 2004.

¹³⁶ D.W.Grieg, *International Law*, 2nd ed (1976) 1.

¹³⁷ Pictet supra n 2 at 91.