



"HENRI COANDA"
AIR FORCE ACADEMY
ROMANIA



"GENERAL M.R. STEFANIK"
ARMED FORCES ACADEMY
SLOVAK REPUBLIC

INTERNATIONAL CONFERENCE of SCIENTIFIC PAPER
AFASES 2015
Brasov, 28-30 May 2015

GUNS FOR HIRE: PRIVATE MILITARY COMPANIES AND THEIR STATUS UNDER INTERNATIONAL HUMANITARIAN LAW

Cosmin Ivanciu*

*Faculty of Aeronautical Management, "Henri Coandă" Air Force Academy, Brasov, Romania

Abstract: *An increasing number of states are more and more frequently employing private military companies to be present in areas where armed conflicts are occurring and require them to fulfill tasks, traditionally fulfilled by military personnel. The preponderant idea among international public judgment is that the best way of action is to shape out a framework for such service providers. Bringing into picture two examples from Iraq Theatre of Operations, as starting points, this paper aims to highlight the amplitude of this phenomenon, analyzing its variation, in number of employees, from 2010 to present days within the Afghan Theater of Operations. Following the overview of the private military companies industry, a brief outline will be granted on the law of mercenaries in international humanitarian law. The difficulty of looking upon these private military company employees as combatants or civilians in accordance with the legal international humanitarian law definitions and that the concept of mercenary is unhelpful for regulating these companies will then be debated. The paper will sum up with some general suggestions that states may wish to take into consideration when trying to legalize these private military companies status and with an overview of elements of the Romanian law in relation to mercenaries, private military and security companies.*

Keywords: *private military company, international humanitarian law, mercenary, combatant, civilian.*

1. INTRODUCTION

However out of the common road seems to be, currently new security or military assistance providers rise up in the private sector. Private military companies (PMCs) are becoming a worldwide well-known occurrence. These quite new entities perform tasks in uncommonly blurred situations where the action of pointing out the boundaries between legal and illegal is a demanding job. The new business branch of security provided by private companies is responsible for handling large amounts of weapons and

military equipment. It offers its services in support of military operations enrolling former militaries as civilians to carry out passive or defensive security.

Often addressed as *mercenaries*, they do not fall under the international humanitarian law definition for this category of personnel and modern-day PMCs prefer to refer to their staff as *security contractors* or *private military contractors*. The definition of *mercenary* under international law is so exclusive that it is difficult to outline who would actually qualify as a mercenary. A repeatedly and notorious quotation belongs to Geoffrey Best and fully

explains this inconvenience: “any mercenary who cannot exclude himself from this definition deserves to be shot - and his lawyer with him”^[1].

The initial point was the statement that “these private military companies act in a void, virtually free from legal restraints”^[2].

2. BRIEF SCOPE OF THE INDUSTRY

March 31, 2004. City of Fallujah. Iraq. Four employees of the US-owned private military company Blackwater are ambushed and killed by an angry Iraqi crowd, their corpses incinerated and mutilated, and then hung sinisterly from a bridge. As a response, because the city of Fallujah was like a painful thorn for the US forces since their arrival in Iraq, the following assault that involved both participation of US forces and Blackwater contractors on Fallujah in April 2004, using a total disproportionate means of attack, have resulted in raising questions about the connection between the military and these contractors and the exactness of addressing them as *civilian contractors*.

Second example refers to the participation of employees of the private military company CACI in the mistreatment of inmates at the Iraqi Abu Ghraib detention facility and the attention drawn by the tasks these contractors are performing, as well as to their accountability for human rights abuses they may commit.

These two incidents^[3] draw the public opinion attention on the feeling of mightiness

these PMCs have about themselves. Held under the auspices of the United Nations, an assembly of specialist on the subject of PMCs industry pointed out, into a report, that all these armed entities maneuvers in a field of activity valued at US\$100 billion^[4]. Therefore, this fellowship represents a compelling strength that will not dissipate all at once. PMCs play a worldwide substantial role, frequently with strategic effect on both the process and consequences of conflicts.

As for the types of services they provide, Peter Singer separates PMCs into three business sectors:

1. “military provider firms supplying direct, tactical military assistance that can include serving in front-line combat;

2. military consulting firms that provide strategic advice and training;

3. military support forms that provide logistics, maintenance and intelligence services to armed forces”^[5].

From instructing military personnel in former Yugoslavia, in collaboration with regular armed forces, raising encampments for dislocated individuals in Macedonia, helping US Central Intelligence Agency in South America in its fight against drugs and protecting oil pipe lines and diamond mines in Africa to a wide variety of tasks performed in Iraq and more recently in Afghanistan, private military companies have been implicated in an extensive range of missions and expanded their tentacles all around the globe. “In Angola, for example, domestic laws require extraction companies to bring their own security forces, many of which may end up engaged in battles with local rebel groups”^[6]. Governments may use, also, private military companies in order to elude some imposed

^[1] Geoffrey Best: “*Humanity in Warfare: The History of International Law of Armed Conflict*”, Columbia University Press, 1980, p.328, ISBN-10: 0231051581, ISBN-13: 978-0231051583.

^[2] Heather Carney: “*Prosecuting the lawless: Human rights abuses and private military firms*”, George Washington Law Review, vol. 74, 2006, p. 323.

^[3] Shaista Shameem, United Nations former Special Rapporteur on the right of people to self-determination and the application of that right to people under colonial or alien domination or foreign occupation, officially refers to these two incidents in her annual report, “*Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*”, UN Document E/CN.4/2005/14, paragraphs 49 and 50.

^[4] UN Document E/CN.4/2005/23 - “*Report of the Third Meeting of Experts on traditional and new forms of mercenary activity*”, paragraph 12.

^[5] Peter Singer: “*Corporate Warriors: The Rise of the Privatized Military Industry*”, Cornell University Press, New York, 2007, ISBN-10: 0801474361, ISBN-13: 978-0801474361.

^[6] Peter Singer: “*Corporate Warriors: The Rise of the Privatized Military Industry*”, Cornell University Press, New York, 2007, ISBN-10: 0801474361, ISBN-13: 978-0801474361.



"HENRI COANDA"
AIR FORCE ACADEMY
ROMANIA



"GENERAL M.R. STEFANIK"
ARMED FORCES ACADEMY
SLOVAK REPUBLIC

INTERNATIONAL CONFERENCE of SCIENTIFIC PAPER
AFASES 2015

Brasov, 28-30 May 2015

constraints, like it is, for instances the number of regulate army troops being sent in missions abroad.

In Afghanistan, although the RSM (Resolute Support Mission)^[7] presence is twisting down, "the increase in the contractors to troop ratio is yet another indication that although the vast majority of troops are leaving Afghanistan, a private army will remain in the country for years."^[8]

A brief analysis of these numbers (figure 1), from 2010 to 2015, proves that, indeed RSM troops are, slowly but surely, being replaced by a subcontracted private army.

As resulting from the analysis, even if the troops are leaving Afghanistan their tasks are taken over by the private military companies, proven by the exponential increasing ratios. A comment is, also, needed to be done. The number of private contractors represents only those employed by U.S. companies, but not necessarily Americans. These figures only count those contractors employed by the U.S. Department of Defense. Taking into account that many other institutions or private companies use these contractors, too, the ratios are even higher or even more disproportionate.

Using private military companies may have some possible advantages like rapid deployment, the mitigation of public opinion on use of regular armed forces or they can act

like a counter weight to local armed forces in countries where the political institutions have no, or no longer, a real authority. Also, outsourcing some military services, like logistics or maintenance, can be justified by a desire of seeking efficiency and allowing the regulate military forces to focus on the main, more important, combat missions.

Real or not, these advantages are counter balanced by some important disadvantages. Private military companies' employees are rather motivated by financial gain then by a sense of duty and they do not follow a military hierarchy.

3. MERCENARIES UNDER INTERNATIONAL HUMANITARIAN LAW

The root for the mercenaries' status finds its place of birth within the Protocol Additional I (adopted on 8th of June 1977) to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts.

Also, their status is defined in two other international conventions: first comes the International Convention against the Recruitment, Use, Financing and Training of Mercenaries adopted on 04th of December 1989 by United Nations General Assembly Resolution A/RES/44/34, entered into force on 20th of October 2001 and, secondly, Convention for the Elimination of Mercenarism in Africa, entered into force on 22nd of April 1985.

Since the mercenary conventions appropriate delimitation for mercenary term that is comparable to that established in Article 47 of Protocol I, I shall use that definition.

[7] The Resolute Support mission (RSM) is a new NATO-led mission to train, advise and assist the Afghan Security Forces and institutions. The mission was launched on 1 January 2015, immediately following the stand-down of the International Security Assistance Force (ISAF).

[8] David Francis: "U.S. Troops Replaced by an Outsourced Army in Afghanistan", The Fiscal Times, 2013. See it at <<http://www.thefiscaltimes.com/Articles/2013/05/10/U-S-Troops-Replaced-by-an-Outsourced-Army-in-Afghanistan#page1>>.

Figure 1

| Year | Number of ISAF/RSM troops | US nationals (from ISAF troops number) ^[9] | Private contractors ^[10] | ISAF/RSM to private contractors ratio | US to private contractors ratio |
|------|---------------------------|---|-------------------------------------|---------------------------------------|---------------------------------|
| 2010 | 130.930 ^[11] | 90.000 | 88.000 | 0,67:1 | 0,97:1 |
| 2011 | 130.313 ^[12] | 90.000 | 101.789 | 0,78:1 | 1,13:1 |
| 2012 | 102.508 ^[13] | 68.000 | 109.564 | 1,06:1 | 1,61:1 |
| 2013 | 84.271 ^[14] | 60.000 | 85.528 | 1,01:1 | 1,42:1 |
| 2014 | 28.360 ^[15] | 18.180 | 45.349 | 1,59:1 | 2,49:1 |
| 2015 | 13.195 ^[16] | 6.839 | 39.609 | 3,00:1 | 5,79:1 |

“A mercenary is any person who:

a) is specially recruited locally or abroad in order to fight in an armed conflict;

b) does, in fact, take a direct part in the hostilities;

c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation 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 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.”¹⁷

One is possible to be framed as mercenary, if, cumulatively, fall under all these six conditions. This definition is simply too restrictive and infeasible. It’s an undisputable reality that nowadays international conflicts are supported by many countries around the world. And, also, take into account that there is not only a probability, but certitude that the majority of these private security companies’ employees are nationals of a party to the conflict - subparagraph (d). So, after all, Geoffrey Best was right in his statement about the huge opportunity of driving through the stipulations of this definition.

Analyzing the status of private military companies’ employees usually stops with

^[9] Figures reported on the RSM official website on the same placemats as the total figures of RSM troops (see below notes 11 to 16).

^[10] Ian S. Livingston, Michael O’Hanlon: “*Afghanistan index*”, Brookings Institute, 10th of February 2015.

^[11] Figure reported on November 15, 2010 on International Security Assistance Force official website. See it at <http://www.nato.int/isaf/placemats_archive/2010-11-15-ISAF-Placemat.pdf> (last visited on 25th of April 2015).

^[12] Figure reported on December 08, 2011 on International Security Assistance Force official website. See it at <http://www.nato.int/isaf/placemats_archive/2011-12-08-ISAF-Placemat.pdf> (last visited on 25th of April 2015).

^[13] Figure reported on December 04, 2012 on International Security Assistance Force official website. See it at <http://www.nato.int/isaf/placemats_archive/2012-12-04-ISAF-Placemat.pdf> (last visited on 25th of April 2015).

^[14] Figure reported on December 01, 2013 on International Security Assistance Force official website. See it at <http://www.nato.int/isaf/placemats_archive/2013-12-01-ISAF-Placemat.pdf> (last visited on 25th of April 2015).

^[15] Figure reported on November 07, 2014 on International Security Assistance Force official website. See it at <http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2014_11/20141111_141107-ISAF-Placemat-final.pdf> (last visited on 25th of April 2015).

^[16] Figure reported on February 25, 2015 on Resolute Support Mission official website. See it at <http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2015_02/20150227_1502-RSM-Placemat.pdf> (last visited on 25th of April 2015).

^[17] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 47, paragraph 2.



"HENRI COANDA"
AIR FORCE ACADEMY
ROMANIA



"GENERAL M.R. STEFANIK"
ARMED FORCES ACADEMY
SLOVAK REPUBLIC

INTERNATIONAL CONFERENCE of SCIENTIFIC PAPER
AFASES 2015
Brasov, 28-30 May 2015

framing them if they qualify as mercenaries. But this assessment doesn't answer the question of how private military companies' employees are allowed to behave in conflict situations. If it's tried to regulate the PMCs status, it is imperious to deliberate upon whether their employees are civilians or combatants.

Combatants are "members of the armed forces of a Party to a conflict (other than medical personnel and chaplains), that is to say, they have the right to participate directly in hostilities"^[18]. Being a combatant exempts one from any criminal charges (such as killing an enemy), as long as his behavior doesn't break international humanitarian law norms and, furthermore, grants him prisoner of war status.

Since PMCs employees are not members of the regular armed forces, the conclusion is that they cannot be assimilated to combatants, so they do not benefit of a prisoner of war status, fact specifically mentioned in the Protocol I to Geneva Conventions, first paragraph of article 47.

From international humanitarian law point of view, somebody can be a combatant or a civilian. Therefore PMCs employees may be assimilated with civilians. But a civilian is defined as "any person who does not belong to one of the categories of persons"^[19] defining combatants. But many PMCs employees take direct part in hostilities while others, although they do not directly take part in hostilities, they bring a certain advantage to the war

effort, depriving them, even more, of a possible civil status. But nobody is allowed to breach the norms of international humanitarian law and, so, these *civilian contractors* may be trialed under their national jurisdiction and in accordance with the national norms on mercenarism (if that certain state has specific norms incriminating mercenarism).

With the increasing use of private military companies' personnel around the world, now more than ever it's necessary to regulate their activity.

There is much confusion over human rights mistreatments executed by private military companies. All these non-state entities must be accountable for violations of human rights and is, also, necessary to show the responsibility of individuals under international humanitarian law. One option for building human rights legally stringent for private military companies is to concept them as institutionalized agencies. Another way is to write human rights stipulations promptly into contracts assumed with these PMCs. These solutions do not necessarily represent the law as it stands now, but rather reflect the direction in which the law should go.

Another idea would be to create a convention that would specify the minimum control standards, such as a new system of granting the functioning license that would include an exact list of the activities performed by a specific PMC.

4. ELEMENTS OF THE ROMANIAN LAW IN RELATION TO MERCENARIES, PRIVATE MILITARY AND SECURITY COMPANIES

The Romanian Constitution adopted in 1991, as amended by Law no. 429/2003, qualifies that "the organization of military or

^[18] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 43, paragraph 2.

^[19] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 50, paragraph 1.

paramilitary activities outside a State authority is prohibited.”^[20]

Therefore, the State may not enroll, dispose, financially support or instruct mercenaries. Moreover, the concept of private military companies is not codified by the Romanian domestic law.

As far as the activity of private security companies is concerned, the Romanian legislation in the field, Law no. 333/2003 regarding the security of objectives, goods, valuables and the protection of individuals, along with its implementation norms, Government Decision no. 1010/2004, allows for the private companies to act strictly in the field of protection and security, any involvement in military or paramilitary activities being a crime.

Specialized security and protection companies may have, according to the law, one or more fields of activity, such as safeguarding services for objectives, possessions and objects of value, for the transport of possessions and objects of value or specialized personal protection services (bodyguards), as well as counseling services in all these fields.^[21]

To start a legal way of functioning these companies have to obtain a license issued by the General Inspectorate of the Romanian Police, with the prior approval of the Romanian Intelligence Service. Licenses can be renewed every three years.^[22]

As for sanctions, the law specifies the crimes specialized security companies are punished for (among others, performing actions of aggression, constrained execution, debt recoveries, labor conflicts or opposition to actions of restoring order by the competent public authorities) and they are punishable with imprisonment for a period of 6 months up to 3 years or with a fine if the action is not a crime.^[23]

^[20] The Constitution of Romania of 1991, article 117, paragraph (4)

^[21] Law no. 333/2003 regarding the security of objectives, goods, valuables and the protection of individuals, republished in Official Monitor no. 189/18th of March 2014, article 19, paragraph 4.

^[22] See above note 21, article 31, paragraph 1.

^[23] See above note 21, article 57.

Above all, Romania ratified the Additional Protocols I and II to Geneva Conventions from 12 August 1949, by Decree no. 224/11 May 1990.

Romania also signed the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (December 4, 1989) on December 17, 1990, but the text was not, yet, ratified.

5. CONCLUSIONS & ACKNOWLEDGMENT

Being motivated by their own profit, it seems that private military companies will remain an integrate part of the security environment in the predictable future and it is an unquestionable need of improving the regulations, either by national or international measures. It's understandable why they will always have pretenders for employment, since after the end of The Cold War and the completion of the world's bipolarity, once the armies start reducing their personnel, there is a large amount of specialized military work force, especially former special operations fighters that found themselves in harsh financial situation.

These private military companies operate in extremely obscure circumstances where the border between a legal behavior and an illegal combat conduct is difficult to be identified.

Individuals carrying and using weapons or fulfill other essential military functions, under any circumstances they cannot be framed as civilians. Those individuals carrying weapons can permutate in an effortless manner from a defensive to an offensive posture and can perpetrate human rights violations. They cannot be assessed to combatants or supporting the combatants under international humanitarian law either, since they are not part of the armed forces or in the chain of command, and often belong to a large number of different nationalities. PMCs employees cannot, mostly, be considered to be mercenaries in the sense given by the definition of mercenaries as stipulated in the international conventions.

Private military and security companies operate in a legal vacuum: they pose a threat to



"HENRI COANDA"
AIR FORCE ACADEMY
ROMANIA



"GENERAL M.R. STEFANIK"
ARMED FORCES ACADEMY
SLOVAK REPUBLIC

INTERNATIONAL CONFERENCE of SCIENTIFIC PAPER
AFASES 2015
Brasov, 28-30 May 2015

civilians and to international human rights law and this happen when PMCs stop taking orders and start taking over. Once the military's stretchiness it's increasing more and more, day by day, the more governments are going to hand over many of their functions to outsourced armies, because for some war is big business and this fact is accepted by some governments and the need to have a clear definition for this category of personnel raises, in order to distinguish them from other categories existing nowadays within a modern battlefield.

This work was possible with the financial support of the Sectorial Operational Programme for Human Resources Development 2007-2013, co-financed by the European Social Fund, under the project number **POSDRU/159/1.5/S/138822** with the title **"Transnational network of integrated management of intelligent doctoral and postdoctoral research in the fields of Military Science, Security and Intelligence, Public order and National Security – Continuous formation programme for elite researchers - "SmartSPODAS"."**

6. REFERENCES

1. Peter Singer: *"Corporate Warriors: The Rise of the Privatized Military Industry"*, Cornell University Press, New York, 2007, ISBN-10: 0801474361, ISBN-13: 978-0801474361.
2. Robert Young Pelton: *"Licensed to Kill: Hired Guns in the War on Terror"*, Broadway Books, New York, 2007, ISBN-10: 1400097827, ISBN-13: 978-1400097821.
3. Erik Prince: *"Civilian warriors: The inside story of Blackwater and the Unsung Heroes of the War on Terror"*, Penguin Group, New York, 2014, ISBN-10: 1591847451, ISBN-13: 978-1591847458.
4. Jeremy Scahill: *"Blackwater: the rise of the world's powerful mercenary army"*, Nation Books, 2008, ISBN-10: 156858394X, ISBN-13: 978-1568583945
5. Mark Bina: *"Private military contractor liability and accountability after Abu Ghraib"*, John Marshall Law Review, vol. 38, 2005.
6. Heather Carney: *"Prosecuting the lawless: Human rights abuses and private military firms"*, George Washington Law Review, vol. 74, 2006.
7. James Coleman: *"Constraining modern mercenarism"*, Hastings Law Journal, vol. 55, 2004.
8. Laura Dickinson: *"Government for hire: Privatizing foreign affairs and the problem of accountability under international law"*, William and Mary Law Review, vol. 45, October 2005.
9. Michael Schmitt: *"War, international law, and sovereignty: Re-evaluating the rules of the game in a new century – humanitarian law and direct participation in hostilities by private contractors or civilian employees"*, Chicago Journal of International Law, vol. 5, January 2005.
10. David Francis: *"U.S. Troops Replaced by an Outsourced Army in Afghanistan"*, The Fiscal Times, 2013.
11. Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.
12. International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, UNGA Res. A/RES/44/34, entered into force 20 October 2001.
13. Convention for the Elimination of Mercenarism in Africa, Organization of

African Unity, Libreville, 3 July 1977, CM/817 (XXXIX), Annex II, Rev. 3, entered into force 22 April 1985.

14. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

15. UN Document E/CN.4/2005/23 - *“Report of the Third Meeting of Experts on traditional and new forms of mercenary activity”*.

16. UN Document E/CN.4/2005/14 - *“Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”*.

17. UN Document E/CN.4/1997/24 - *“Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”*.

18. The Constitution of Romania of 1991.

19. Law no. 333/2003 regarding the security of objectives, goods, valuables and the protection of individuals, republished in Official Monitor no. 189/18th of March 2014.

Web:

1. <http://www.thefiscaltimes.com/Articles/2013/05/10/US-Troops-Replaced-by-an-Outsourced-Army-in-Afghanistan#page1>

2. <http://www.dailymail.co.uk/home/moslive/article-1360216/How-make-killing-Kabul-Western-security-crisis-Afghanistan.html>

3. http://www.nato.int/isaf/placemats_archive/2010-11-15-ISAF-Placemat.pdf

4. http://www.nato.int/isaf/placemats_archive/2011-12-08-ISAF-Placemat.pdf

5. http://www.nato.int/isaf/placemats_archive/2012-12-04-ISAF-Placemat.pdf

6. http://www.nato.int/isaf/placemats_archive/2013-12-01-ISAF-Placemat.pdf

7. http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2014_11/20141111_141107-ISAF-Placemat-final.pdf

8. http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2015_02/20150227_1502-RSM-Placemat.pdf