

## It's just another war!

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*This article describes the increasing use of private military corporations (PMCs) and the implications for International Humanitarian Law (IHL). After considering the development of the laws of war alongside the rise of corporations the author questions the likely effect this new development may have for sovereign states and the notion that only states have the right to control military power. The author argues that this development will have consequences for sovereign democracies, IHL and Human Rights.*

The thought of 20 million people killed in conflicts around the globe since World War II can leave one believing that conflict seems inevitable, certain and evermore deadly. The inevitability and increase in conflict can be discerned from the fact that more peacekeeping missions have occurred during the 1990's than the entire life span of the United Nations. This raises the question is it a 'just war' or is it just another war?

### Development of IHL

The Christian ages concept of *justa causa* meaning 'just cause' as an argument for war was inevitably found to be wrong. It was a self-serving argument that could be used to make any conflict, where the cause was based on religious or moral grounds, appear acceptable.

In the 18<sup>th</sup> century's Age of Enlightenment more stringent rationales for the conduct of war were formulated and concepts such as Rousseau's social contract<sup>1</sup> and a civil society

were adopted. War needs more than a just cause; as with any deadly game a strict code of conduct and rules are required. Henry Dunant, witnessing the carnage on the battlefields of Solferino Italy in 1859, organized the establishment of the International Committee of the Red Cross leading to the Geneva Convention of 1864. In 1863 President Abraham Lincoln instigated General Order No.100, otherwise known as the *Lieber Code*. This Code ruled out the practices of 'no quarter', leaving wounded enemy to die, or killing those whom surrendered. So the laws of war developed and have been distilled in their current form in the four Geneva Conventions of 1949 and the two Additional Protocols.<sup>2</sup> These provide the framework for IHL and address the underlying concerns for humanity within the conduct of war. The Progress report on the prevention of armed conflict prepared by the now retired United Nations Secretary-General, Kofi Annan and presented to the Sixtieth Session of the General Assembly on 18 July 2006 acknowledges that while a culture of

### References

<sup>1</sup> Jean- Jacques Rousseau, 1762 *'The Social Contract'* ed & translated Maurice Cranston 1968, 57, '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'.

<sup>2</sup> *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) Relative to the Treatment of Prisoners of War; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War; Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the protection of Victims of International Armed Conflicts; Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).*

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prevention is developing, more needs to occur between the rhetoric and reality at the operational, structural and systemic levels, including the strengthening of norms and institutions, to prevent wars and the ongoing destruction of lives.

### **Rationale for the Rules of War**

The IHL principles of discrimination and proportionality<sup>3</sup> were developed in detail to ensure that those who participated in conflict were clear about the rules. These rules attempted to provide a balance between military goals and the protection of humans during war. Combatant immunity is a key principle of IHL that allows combatants in conflict to engage in activity that in non-conflict would be considered criminal, namely the deliberate killing of another. This dramatic overturning of basic principles of humankind calls for considerable control requiring laws of war which specify the criteria for military command and control.

Lawful combatants are established by factors such as: (1) whether they are under responsible command; (2) whether they are wearing a fixed and recognisable sign, or (3) whether they are carrying arms openly. Through this process national armies are held accountable, ultimately to their citizens. The United Nations Charter has limited the use of force to the realms of self-defence with legal use of force being possible in only four situations.<sup>4</sup>

So one may well ask what has happened to all that? Why are we seeing the rhetoric of 'just cause' and 'moral right' return?<sup>5</sup> Why do we

see played across our TV screens wounded soldiers who are *hors de combat* being shot in the battlefield?<sup>6</sup> More disturbingly why are civilian employees of PMCs, involved in interrogating prisoners of war, carrying weapons in conflict zones, and openly participating and profiting in the theatre of war? And why are PMC employees now considered fair game by insurgent and rebel groups?<sup>7</sup>

The conduct of war has changed and IHL may have to catch up if it is not to become redundant. It has been suggested that much of the terminology of the Geneva Conventions and the legal paradigm in which war is conducted, has become redundant. Concepts such as international and internal conflict no longer reflect the real world. John Ralston Saul has referred to it as 'normalization of irregular wars'.<sup>8</sup> With the so-called 'war on terror' the debate rages around the Geneva Conventions applicability to wars, which are conducted very differently to the way envisioned at the time of their creation.

One argument is that the laws are valid but not being observed; another argument is that they no longer cover the reality and should be drafted anew.<sup>9</sup> We have witnessed the

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*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.

<sup>6</sup> R Fisk, 2004 "Smoke Him": Video shows wounded men being shot by US Helicopter, May 6 *Counterpunch*, (ed) Cockburn, A & St Clair, J.<<http://www.counterpunch.org/fisk05062004.html>> at July 2005.

<sup>7</sup> See, eg, T Wagner, April 22, 2005 'More Blackwater employees killed in Iraq', *Associated Press* <<http://home.hamptonroads.com/stories/story.cfm?story=85371&ran=122760>> at 1 March 2006.

<sup>8</sup> J R Saul, *The Collapse of Globalism and the reinvention of the world*, 2005 Penguin Books, p.258.

<sup>9</sup> R.E. Brooks, 'War everywhere: Rights, National, Security Law and Law of Armed Conflict in the Age of Terror', 2004 *University of Pennsylvania Law Review*, Vol 153 675-761.

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<sup>3</sup> Additional Protocol I arts 48 & 51.

<sup>4</sup> Art 2(4) of the United Nations Charter provides four exceptions to the prohibition on the use of force, namely: Art. 51 – individual or collective self-defence; Ch VII – Security Council action; Art.10,11 &14 – General Assembly recommendation for UN force; Art 53 – authorised UN regional action.

<sup>5</sup> See, eg, United States President George W. Bush, State of the Union Address (2003) in which he stated '*The liberty we prize is not America's gift to the world, it is God's gift to humanity...we do not claim to know all the ways of Providence, yet we can trust in them,*

development of a new phenomenon such as stateless fighters with no clear chain of command and no uniforms fighting a war across state boundaries, with no foreseeable possibility of termination or winning. With this possibility of indeterminate conflict the question of endgame arises.

President Bush declared the Third Geneva Convention is no longer applicable and has had amendments passed to retrospectively prohibit prosecutions of individuals, including civilians, who engage in "outrages upon personal dignity, in particular humiliating and degrading treatment," on the basis that this terminology is too vague to enforce. This is a response to avoid any prosecutions of administration officials and members of the CIA as a result of the US Supreme Courts ruling in *Hamdan v. Rumsfeld* 548 US, 126 S Ct 2749 (2006), that 'common article 3' of the Geneva Conventions did apply. The *Military Commissions Act 2006* provides in sec5(a)

*In General- No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.*

Rather than the reduction of standards to more brutalizing levels, there is a greater need to tighten the constraints and strengthen the culture of non- violence.

PMCs further confuse the issues surrounding the war on terror. The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of persons to self-determination, established in July 2005 by the Commission on Human Rights resolution 2005/2, has expressed concern at the increasing phenomenon of outsourcing core military functions to PMCs by states. Although the Working Group encourage states to accession

of the 1989 Convention Against the Recruitment, Use, Financing and Training of Mercenaries Res 44/34 4/12/1989 (Australia not being a party to the treaty), they acknowledge that

...the creation of transnational companies or satellite subsidiaries with legal personality in one country, providing services in another and recruiting personnel from third countries... fall into a grey area not specifically covered by the 1989 Convention, which demonstrates the need for appropriate national regulation, control and monitoring.<sup>10</sup>

The need for democratic control over the military is essential to the fulfilment of the rule of law in healthy democracies. Richard Ponzio has noted...

Afghanistan, security institutions may actually rest in private hands – with war lords, paramilitary groups or private security companies – and thereby contribute to crime and human rights violations...Indeed, this situation has helped to sustain Afghanistan's deadly conflict over the years.<sup>11</sup>

This raises even greater concerns for peace when military forces extend beyond state armies to PMCs.

## The Corporation

The corporation, in its endless pursuit of wealth, is unfettered by geographical location and national sovereignties. It has taken wing like a pterodactyl dinosaur,

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<sup>10</sup> The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of persons to self-determination: <<http://www.ohchr.org/english/issues/mercenaries/ind ex.htm> > at 1 Oct 2006.

<sup>11</sup> R Ponzio, Public Security Management in Post conflict Afghanistan: Challenges to building local ownership Chpt 3 in A H. Ebnöther and P Fluri (eds) *After Intervention: Public Security Management in Post-Conflict Societies: From Intervention to Sustainable Local Ownership*.2005 pp.64-65.

sweeping the globe in search of its next *preyfit*, like a true scavenger for gold.

In 1990 there were 3000 transnational's. Today there are over 40,000. There were 63,000 subsidiaries. Today there are over 820,000. Altogether these structures produce a quarter of the world's GDP.<sup>12</sup>

A corporation files articles of incorporation with the government of a state within which it operates. If operating outside the state it registers with the government of the states within which it operates as a foreign corporation and may be subject to the laws of the host state, assuming the host state has a functioning legal system, which is often not the case where it is at war, or is a failed state.

In the early 19<sup>th</sup> century corporations were given limited charter by the legislator of the state within which they operated which focused on the protection of the public interest. Later they were recognised as having the entitlements of a natural person (*Santa Clara County v Southern Pacific Railroad Co.*, 118 U.S. 394 (1886)). This historic US Supreme Court decision was the beginning of power transference to wealthy corporations in competition with individuals, small businesses and now even states. From 1886 there has been a steady progression of legal changes to favour corporations, taking away the control of the state and its citizens.

Once a corporation is registered, and focused on the corporate shareholders (not stakeholders) interests, there is little governmental restriction. The lifespan of a corporation or its ownership of land and capital is no longer limited. This lack of internal governance has raised debate on the need to amend section 181 of the *Corporations Act 2001* (Cth) to require directors to consider broader issues of social

responsibility as well as profit for shareholders.<sup>13</sup>

The UK is leading the way in this area with the *Companies Act 2006* receiving Royal Assent on the 8<sup>th</sup> November 2006. This law requires directors to take into account interests of stakeholders such as employees, suppliers, customers, the community and the environment but still ultimately gives the shareholders interest priority. UK companies causing harm to people overseas may be bought to account in the UK courts. The UK has also shown considerable initiative on PMCs, acknowledging the delicate policy questions for governments who, while not wanting to be seen as endorsing undesirable activities, also do not want to limit companies in conducting business of economic benefit to the UK.<sup>14</sup>

Notwithstanding this desire to maintain sovereignty, western governments' liaisons with their corporate creations mean they are now entangled in a death tryst. The invasion of the last sacred domain of sovereign democratic states, namely the right to bear arms in defence of its citizens, is being handed over to PMCs. These can now be found in large numbers listed on public websites.<sup>15</sup> In the first Gulf war in 1991 it is estimated the ratio of PMC personnel to state defence personnel was 1:100; in the 2003 Iraq war this ratio has been reduced to 1:10.<sup>16</sup>

The 20<sup>th</sup> century's unique protection of these sacred domains is rapidly being overcome by their privatisation. Joel Bakan, Professor of

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<sup>12</sup> See n 8. p.190

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<sup>13</sup> T Wilson, 'The Pursuit of profit at all costs, corporate law as a barrier to corporate social responsibility,' *Alternative Law Journal* Vol 30: 6 Dec 2005 278.

<sup>14</sup> Ninth Report of the Foreign Affairs Committee Private Military Companies Session 2001 UK.

<sup>15</sup> See, eg, Private Military Organization < <http://www.privatemilitary.org/pmcs.html> > at 20 January 2006.

<sup>16</sup> See, eg, N Schwartz, *The War Business: Pentagon's Private Army* (2004) <<http://www.fortune.com/fortune/articles/0,15114,427948,00.html> > at 20 May 2005.

Law at University of British Columbia, has stated 'No part of the public sphere has been immune to the infiltration of for-profit corporations.'<sup>17</sup> Even Milton Friedman, economist and advocate of privatisation, saw basic functions such as the judiciary, military and social welfare, as being outside the arena of privatisation and thus insulation from democratic control.

### **What is this phenomenon of the armed PMCs? What are the implications for nation states, citizens, democracies and the future of conflict?**

According to Chief Justice John Marshall's 1819 definition 'a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.' Why then have they become so powerful, all pervasive and controlling in our lives? And why are we now arming them? The answer is in their ability to create wealth which arguably benefits governments and certainly shareholders.

#### ***Money and conflict***

Multinational corporations, such as Northrop Grumman, Halliburton and CACI, manufacturers and suppliers of the weapons of war have seen the opportunity for the extension of their business into the new and profitable arena of security. President of Northrop Grumman, Ronald D. Sugar noted a \$30 billion revenue intake for his company in 2004 and went on to state in the annual report:

Our strategy continues to be to aggressively apply Northrop Grumman's formidable talent and technology to spur the revolutionary advances that are redefining what is possible on the battlefield, in our nations war on terror... all while creating value for our shareholders... Looking ahead we will...aggressively

pursue opportunities for future growth.<sup>18</sup>

Corporations, whose wealth now exceeds many nation states,<sup>19</sup> can access the well-trained ex-soldiers from downsized national armies who are ready to go anywhere and do anything for the right price. Examples abound where PMCs have operated in states such as Angola, Sierra Leone, Liberia, Colombia, Balkans, Iraq, and Papua New Guinea. Enrique Bernales Ballesteros, Special Rapporteur on the use of mercenaries, has commented that mercenaries are involved wherever there have been terrorist attacks and the international community needs to take the connection seriously.<sup>20</sup>

For PMCs conflict, war and destruction equal profits.<sup>21</sup> Where profits are to be made other concerns are diminished and, unless people debate and understand the issues, ensure control and accountability through regulation and enforcement, the situation will get worse. Conflict presents industry with opportunities, wealth and power from:

- armament development and sales;
- IT to support intelligence gathering and the sophisticated weapons technology;
- the availability of scarce resources and opening of new markets;
- provision of services to large armies;

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<sup>18</sup> Northrop Grumman Corporation, '2004 Annual Report', 5. <[www.northropgrumman.com/about\\_us/noc\\_annual\\_reports.html](http://www.northropgrumman.com/about_us/noc_annual_reports.html)> at 30 May 2005.

<sup>19</sup> Global Policy Forum, 'Comparison of Revenues among States and TNCs', 10 May 2000, <<http://www.globalpolicy.org/soecon/tncs/tncstat2.htm>> at 1 Oct 2006.

<sup>20</sup> Statement by Special Rapporteur on Mercenaries: Fifty-sixth General Assembly, Third Committee, 31 Oct 2001 26<sup>th</sup> meeting (AM).

<sup>21</sup> See, e.g, The Center for Public Integrity, May 30 2005, 'Contractors Ranked by Total Contract Value in Iraq and Afghanistan from 2002 through July 1, 2004',

<<http://www.public.integrity.org/wow/resources.aspx?act=total>> at 30 May 2005; CACI International Inc website. In 2003 -2004 this company increased the net income by 42% to \$63.7m with total assets of \$1.154B< <http://www.caci.com/>> at 1 July 2005

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<sup>17</sup> J Bakan *The Corporation. The Pathological Pursuit of Profit and Power*, 2004 Penguin Canada, 113.

- rebuilding entire communities, cities and countries from their financial institutions through construction and infrastructure.

If states approve PMCs move into this public domain the chance for peace, and security in the world will diminish.

The UK Department for International Development in a review of the security sector in 2000 highlighted the following key principles for Democratic Governance of Security -

- Ultimate authority for security must be held by elected representatives of the citizens.
- Public Security should operate in accord with international, constitutional and human rights law.
- Information about security planning and resources should be available both within government and publicly with small adjustments for national security.
- Civil-military relations should be based on a clear hierarchy of authority in a relationship with civil society that is transparent and respects human rights.
- Civil authorities accountable to citizens need to have the capacity to exercise political control over the operations and financing of security forces.
- Civil society must be able to monitor security forces and have the ability to provide constructive input to the political debate on security.
- Security personnel must be highly disciplined and trained in their duties and reflect the diversity of the society they represent.
- Policy makers must place priority on fostering peace.<sup>22</sup>

The introduction of PMCs raises the question of accountability and how any of these goals can be satisfied.

### ***Need to enforce control***

Afghanistan and Iraq are examples of the need to reassert public, transparent and accountable

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<sup>22</sup> See n 11 pp. 93-94.

control over security. Samuel Huntington's *The soldier and the State* (1957) espoused the view of military conservatism, namely, that military personnel will be more reluctant to enter into conflict than their civilian counterparts. This has been overstated and current research establishes that civilian control is needed to deter the military's preference for the use of force. Sescher's<sup>23</sup> comprehensive study concludes 'that civilian control of the military is not merely a means to promote democracy, but it is also a force in favor of peace' and Fordham<sup>24</sup> establishes that access to greater military capability increases the likelihood of the use of force.

While there have been some attempts to make corporations liable for war crimes, most have been unsuccessful. The first attempt to impose liability on a group of individuals in charge of a company for their involvement in war crimes occurred in *United States v Kraunch et al* (The I.G. Farben case).<sup>25</sup> In this case twelve individuals in charge of a German pharmaceutical company were prosecuted for war crimes when they used concentration camp labour to run their factories. However, the prosecution was still of natural individuals.

The US *Alien Tort Claims Act (ATCA)* has been called in aid most recently in the case of *Talisman Energy v. Presbyterian Church of Sudan (plus other parties)*, in the Southern District of New York; The Court held that the ICTY and ICTR Statutes and their

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<sup>23</sup> T S. Sescher 'Are Soldiers less War-Prone than Statesmen?' *Journal of Conflict Resolution* Vol 48 No 5 Oct 2004 746-774 p.771.

<sup>24</sup>B O. Fordham 'A Very Sharp Sword. The Influenced of Military Capabilities On American Decisions to Use Force', *Journal of Conflict Resolution* Vol 48 no 5 Oct 2004 632-656.

<sup>25</sup>*Kraunch et al., United States v.*, 8 CCL No. 10 Trials 1081, 194; see J C. Watkins, Jr. & J P Weber, 2006 *War Crimes and War Crime Trials: From Leipzig to the ICC and Beyond Cases, Materials and Comments* University of Alabama and Carolina Academic Press.

tribunal decisions support the principle that private actors in addition to states are subject to customary international law prohibiting violations of *jus cogens* norms such as genocide. However, the *ATCA* is a procedural statute only, utilised where clearly defined norms recognised by the law of nations exist.

The *Talisman case* concerned (private law) litigation launched by residents of southern Sudan who alleged that they were victims of genocide and crimes against humanity perpetrated by the government of Sudan and Talisman Energy. Jurisdiction was exercised over Talisman on the basis of a subsidiary's contacts with NY. By lifting the corporate veil the subsidiary was said to be a 'mere department' of Talisman. Talisman was a Canadian company and Canada sent a diplomatic note in an earlier hearing expressing an objection to the exercise of jurisdiction under *ATCA* to 'activities of Canadian corporations that take place entirely outside the US'.<sup>26</sup>

It is clear that only a small number of international legal norms apply directly to corporations in the areas discussed, such as war crimes and forced labour or slavery. Based on the classical model of international law, international regulation of corporations occurs indirectly through the requirement that states be responsible for the regulation and control of non-state actors, such as corporations.

Vazquez<sup>27</sup> mounts the strong argument that to directly impose international obligations on corporations would disempower states and challenge state sovereignty. The evolution of

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<sup>26</sup> See *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846 (S.D.N.Y.) at 2. The letter stated that Canada passed the *Foreign Extraterritorial Measures Act* so the Attorney General of Canada could prohibit anyone in Canada from complying with measures from a foreign state or tribunal affecting international trade or commerce.

<sup>27</sup> C M Vazquez 'Direct vs Indirect Obligations of Corporations under International Law', 2005 Vol, 43, *Columbia Journal of Transnational Law Association Inc.* p.927

international legal norms and customary law would not develop if states lost the right to abrogate individuals or corporations from international responsibilities or the right to impose conflicting regulations. International law does not impose criminal or civil liability on juridical persons such as corporations; these remain distinctly within the realm of states. Even the advancements achieved with the International Criminal Court do not extend liability to corporations, being only applicable to 'natural persons over the age of 18 years': Art 25 (1).

Many codes of conduct and standards for corporations to observe international human rights norms have been drafted but at the end of the day they are largely reliant on self-regulation.<sup>28</sup> The Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights is arguably the most comprehensive, and authoritative statement on international human rights law applicable to companies. While such codes have no immediate international law ramifications they present guidance for states in developing national regulatory frameworks. However, the Australian government response to the Norms is to leave it to self regulation

The Australian Government is strongly committed to the principle that guidelines for Corporate Social Responsibility (CSR) should be voluntary. The Norms represent a

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<sup>28</sup> See e.g United Nations Conference on Trade and Development, *The Social Responsibility of Transnational Corporations*, U.N. Doc. UNCTAD/ITE/IIT/Misc.21 at 6 (1999); International Chamber of Commerce, *The Global Compact, Business and the UN*, INT'L HERALD TRIBUNE, Jan.25, 2001, at 11-14; the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises, and the Draft 'Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (E/CN.4/Sub.2/2002/13) developed at the UN Sub-Commission on the Promotion and Protection of Human Rights. An electronic version can be found at [www1.umn.edu/humanrts/links/NormsApril2003.ht](http://www1.umn.edu/humanrts/links/NormsApril2003.ht).

major shift away from voluntary adherence. The need for such a shift has not been demonstrated... We believe the way to ensure a greater business contribution to social progress is not through more norms and prescriptive regulations, but through encouraging awareness of societal values and concerns through voluntary initiatives.<sup>29</sup>

It seems there are benefits for governments in this deadly liaison. Berg Harpviken, Strand & Suhrke state in relation to Afghanistan

By collaborating with local commanders to hunt down suspected enemy units, US forces are nurturing the warlord phenomenon and related problems. The practice of arming, training and paying local militia units was formally reconfirmed as policy in early 2004. In pursuit of the war, the US has subordinated matters of democratic development and human rights to the needs of a close working relationship with Afghan military commanders at both the national and local levels.<sup>30</sup>

The current crisis facing Afghanistan is inherent in these arrangements of momentary convenience, with the possibility that Afghanistan will now become a 'failed state'.

### ***Definitional problems***

IHL has definitions for actors and non-actors in war zones that do not nicely fit PMCs or their employees. Agreements between the states involved in conflict and the regimes that they will support generally exclude the state, on whose territory the crime is most likely to

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<sup>29</sup>Focus: Corporate Governance- November 2005 Update on the Australian Government's corporate social responsibility inquires par.19 <<http://www.aar.com.au/pubscorpgov/ma/focgnov05.htm>> at 29 September 2006

<sup>30</sup> K B Harpviken, A Strand & A Suhrke, 'Conflictual Peacebuilding: Afghanistan Two Years After Bonn', PRIO and CMI Report, *The International Peace Research Institute and Chr. Michelsen Institute*, Oslo and Bergen, 2004, p.vii.

be committed, from prosecuting. These contracts often involve a failed or war torn state, which has neither the ability nor the infrastructure to investigate and prosecute crimes. Under the terms of the Coalition Provisional Authority in Iraq it was the perpetrator's national state that was left to prosecute.<sup>31</sup> This can be seriously deficient when we consider that for military personnel, who have clear military laws applicable, there have been minimal prosecutions and low sentences, even when evidence of abuse is blatant.<sup>32</sup> How much more likely is it to happen with PMCs, in particular, in a victor state that does not have an interest in deterring its national civilians from participating in the 'just cause'?

A Status of Forces Agreement (SOFA) often provides immunity from local laws of host states to defence personnel who are subjected to extraterritorial jurisdiction under the *Defence Force Discipline Act 1982 (DFDA)* and this can be extended to civilians accompanying defence personnel where they formally agree. However, a civilian who does not agree to the extension of extraterritorial jurisdiction and to whom a

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<sup>31</sup> See Memoranda Office of the Administrator of the Coalition Provisional Authority Baghdad, Iraq Public notice Regarding the Status of Coalition, Foreign Liaison and Contractor Personnel June 26, 2003 which states explicitly that under 'international law... [they] are not subject to local law or the jurisdiction of local courts. With regard to criminal, civil, administrative or other legal process, they will remain subject to the exclusive jurisdiction of the State contributing them to the Coalition.'  
<[http://www.iraqcoalition.org/regulations/20030626\\_20030626\\_CPANOTICE\\_Foreign\\_Mission\\_Cir.html.pdf](http://www.iraqcoalition.org/regulations/20030626_20030626_CPANOTICE_Foreign_Mission_Cir.html.pdf)>viewed 25 July 2008.

<sup>32</sup> See, eg, Taguba Report- Hearing Article 15-6 Investigation of the 800<sup>th</sup> Military Police Brigade <<http://www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm>> at 14 June 2005; Tony Gutierrez, 28 Sept 2005, 'England Sentenced to 3 years for Prison Abuse', Associated Press: Nine low-level soldiers have faced court martial charges with the highest sentence being 10 years and no Officers have been tried.<<http://www.msnbc.msn.com/id/9492624/> at 20> at January 2006.



SOFA applies may fall outside all legal jurisdictions.<sup>33</sup>

The US Department of Justice has published a number of memos confirming there is nothing in US law prohibiting the use of 'cruel, inhuman and degrading treatment' when committed by non-military US citizens acting outside the borders of the US and has backed this up with proposed amendments to the *Crimes Act 1996*. With the belief in a just cause, such people are often seen as heroes beyond prosecution and in the aftermath of war, the victor state is keen that such individuals not be prosecuted.

The PMCs argue their desire to maintain a good public relations image is sufficient to make them want to operate within the IHL regime.<sup>34</sup> However, when serious breaches of IHL are committed, is it enough that sacking of the employee is the only repercussion they are likely to face? Further, the corporation is unlikely to be subject to any prosecutions.

Contrast this with the enforcement of discipline Australian defence personnel face under the *DFDA* where public image is all important. In *Re Aird & Ors; Ex Parte Alpert (B60/2003)* an Australian soldier stationed in Malaysia was accused of rape while on leave in Thailand and subjected to a court martial. By a 4-3 majority, the High Court held that it is constitutional for parliament to make the soldiers alleged conduct a service offence under the defence power.

A desire to control military personnel's actions when on leave by extension of Australian courts martial to criminal actions in a friendly foreign country with a fully functioning criminal law system is unlikely to

be applied to PMC employees, even when contracted to governments. This may well result in reluctance on the part of PMCs to consent to the *DFDA* applying to their employees.

Supposing a PMC employee contracted to the Australian Defence force goes to South Africa on leave and there, as a civilian, rapes a woman. If it is known the employee is connected to Australia's defence then it could be seen as damaging Australia's reputation. The fact that the person is a civilian and on holiday at the time would not necessarily prevent the problem arising. The question of service connection arises and could still clearly effect Australia's reputation. In theory civilians holidaying in a foreign country, could be subject to court martial under Australian law whilst employed by a PMC contracted to the Australian government, and having consented to the application of the *DFDA*. If they have not consented to its application, but it is publicly known of their contractual relationship with the government, then not only is a different standard applicable, as between defence employees and PMC employees, but Australia still faces the same consequence to its reputation, however, with no recourse for action.

Furthermore, if it is not publicly known that the PMC is contracted by the government then there is little political repercussion when a PMC employee commits an offence, or is killed or captured in a conflict zone as opposed to regular defence personnel.<sup>35</sup> The lack of public outcry enables the conflict to continue out of the public eye. The risk of political fallout is lessened and maintaining domestic support for the war effort is easier. The audience costs of governments

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<sup>33</sup> ASPI 'War and Profit Doing Business on the Battlefield', 30 March 2005 <<http://www.aspi.org.au/board.cfm?pubID=66#>> at 27 September 2006.

<sup>34</sup> See, eg, Sandline International, 'Private Military Companies- Independent or Regulated?' 28 March 1998 <<http://www.sandline.com/white/regulation.doc>> at 24 May 2005.

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<sup>35</sup> For instance how well known are the names of Jon Hadaway, Wayne Schultz, Chris Ahmelm (private contractors killed in Iraq) compared to the now household name of Private Jake Kovco. <<http://www.icasualties.org/oif/Civ.aspx>> at 1 Oct 2006.

conducting foreign policy in the public arena can have negative consequences in the domestic arena politically, thus increasing the incentive for governments to use private third actors away from the public spotlight.<sup>36</sup> Being removed from such PMCs activities, states can engage in clandestine operations aimed to further their interests in many different ways, including economically, ideologically and politically.<sup>37</sup> Lai's<sup>38</sup> study indicates the result of private mobilization significantly increases the likelihood that conflict will escalate into war.

Despite the Additional Protocols I & II attempts to cover civil conflict and unconventional armies, combatants like al Qaeda and PMC employees in combat zones who carry no loyalties to a nation state, arguably fall outside the control of the Geneva Conventions and Additional Protocols. The notion of 'unlawful combatant', a term not used in the Geneva Conventions, introduces the possibility that states can step outside the intent of the law as imposed by the conventions by merely changing the terminology. Liberia has already used the U.S precedent when detaining an American national, Hassan Bility in 2002 for 6 months without trial, saying the activist was detained as an 'unlawful combatant'.

### ***Jurisdictional issues***

Under the classical model of international law nation states, since the Peace of Westphalia,

<sup>36</sup> M Baum 'Going Private', *Journal of Conflict Resolution* Vol 48 No 5 Oct 2004 603-631.

<sup>37</sup> See, eg, S M Hersch, 2004 'The Gray Zone: Has a Secret Pentagon Program come to Abu Ghraib?' *The New Yorker* <<http://www.newyorker.com/printables/fact/040524fact>> at 9 February 2006; Mining Watch Canada, 'Anvil Mining and the Kilwa Massacre, D.R. Congo: Canadian Company Implicated?', <[www.miningwatch.ca/index.php?/Anvil/Anvil\\_Mining\\_Kilwa](http://www.miningwatch.ca/index.php?/Anvil/Anvil_Mining_Kilwa)> at 1 July 2005.

<sup>38</sup> B Lai 'The Effects of Different Types of Military Mobilization on the Outcome of International Crises', *Journal of Conflict Resolution* Vol 48 No 2 April 2004 211-229.

have been considered the only actors on the international plane entitled to exclusive control over military power. Corporations being government creations are in theory answerable to the state. However, with privatisation of sacred areas of the public domain, globalisation and governments 'in-bed' with corporations, the pterodactyls are left free to wonder the globe in search of their *preyfits*. Most concerning of all is that globalization has led to multinational corporate pterodactyls being largely left to operate in foreign jurisdictions with states having minimal will to enforce the law. As can be seen from the *Talisman case*, Canada was not interested in regulating Talisman's conduct even when associated with serious infringement of the law of nations.

Corporations in the global arena can pick and choose their corporate home to suit the degree of freedom they desire. For instance, choosing a state such as Delaware, U.S.A, means the corporation pays no taxes, or Nevada, U.S.A, means a corporation can be registered without record of who owns it. There is need for transnational regulations that pierce the corporate veil by tracing liability back to the parent companies. Liability of natural persons within companies as well as the juridical entity itself has to be followed through. The rules of jurisdiction, with each state determining whether claims can be bought, is an issue that must be faced by the international community as a whole.

PMC employees have no loyalty to any particular nation, only to the company, who in turn has a sole legal obligation to its shareholders to return a profit. This defeats the governance principle of an army reflecting the diversity of the population it is established to defend. Noam Chomsky has criticised corporations for their fascist structures:

I think that until major institutions of society are under popular control of

participants and communities, it's pointless to talk about democracy.<sup>39</sup>

Responsibility of multinational corporations for criminal and tortious acts is a grey area, crossing national, private international and public international law. The use by US courts of the ATCA has itself incurred criticism for the courts activism in this area. Globalisation has resulted in a series of fragmented sovereignties with diminishing barriers between jurisdictions making accountability almost impossible.

### *Threats to sovereign states*

The development of PMCs becomes a dangerous liaison for states and their governments. We see taxpayer funded and trained defence personnel leaving defence services to chase the lure of dollars to be had with PMCs.<sup>40</sup> This presents a new threat to national armies to avoid becoming depleted and second rate. Governments will have no choice but to outsource control to the PMCs.

Corporations are dependant on governments for their very existence, but it is difficult, and rare for governments to kill a corporation,<sup>41</sup> This will become even more so with the gun in the hands of their monster creations. For who holds the gun holds the power and what happens when the enemy can pay the PMC more, or offers a better deal? Who is left to

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<sup>39</sup> N Chomsky *Language and Politics* (1988) AK Press, p.162.

<sup>40</sup> L 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; K 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 former 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 have been dangled in front*' of defence personnel to attract them away from the Australian defence forces. <<http://www.abc.net.au/pm/co>> at 15 March 2005.

<sup>41</sup> See above n.17, 156-158.

fight the 'just war' and where is the ability or incentive to develop and enforce applicable laws of war?

The Australian Government while not a signatory to the Mercenary Convention of 1989 has the capacity through legislation like the *Crimes (Foreign Incursions and Recruitment) Act 1978* to prohibit Australian citizens and those ordinarily resident in Australia from engaging in hostile acts in foreign states. However, while this possibility for control at a domestic level exists the will to use it is questionable. The Minister has the ability to exempt organisations and the law only relates to recruiting not actual operations in foreign states.

States are encouraged to adopt the draft guidelines on the Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights to model domestic legislation for the control of PMCs. However, our current government shows a distinct preference for self-regulation as previously noted. With state reluctance to take control of its corporate creations and the move of such juridical transnational entities into the domain of defence and security, the efficacy of relying on state enforcement of international obligations comes under question.

As Professor Bakan notes:

The notion that business and government are and should be partners is ubiquitous, unremarkable, and repeated like a mantra by leaders in both domains... Democracy, on the other hand,...requires that the people, through the governments they elect, have sovereignty over corporations, not equality with them: that they have authority to decide what corporations can, cannot, and must do. 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.<sup>42</sup>

## **Conclusion**

With the international obligation to regulate non-state actors imposed on states, who for reasons described lack the will to do so, together with definitional, jurisdictional and enforceability issues, PMCs are left largely to their own devices in conflict zones. It is a bleak future for peace and human rights when governments' blind infatuation with their corporate creations means that 'Cronus like' PMCs may turn against their very creator, those whose existence they are arguably there to protect.

There is a need for public debate, awareness and outrage at this invasion of the final frontier, namely the right of governments to control military power. Citizens should demand that it be rolled back with states taking the responsibility they hold to their people seriously by legislating to render unlawful such activities and stridently enforcing such legislation. This debate and these changes are vital for the future of democracy and peace in the world.

See Memoranda Office of the Administrator of the Coalition Provisional Authority Baghdad, Iraq Public notice Regarding the Status of Coalition, Foreign Liaison and Contractor Personnel June 26, 2003 which states explicitly that under 'international law... [they] are not subject to local law or the jurisdiction of local courts. With regard to criminal, civil, administrative or other legal process, they will remain subject to the exclusive jurisdiction of the State contributing them to the Coalition.'

[http://www.iraqcoalition.org/regulations/20030626\\_20030626\\_CPANOTICE\\_Foreign\\_Mission\\_Cir.html.pdf](http://www.iraqcoalition.org/regulations/20030626_20030626_CPANOTICE_Foreign_Mission_Cir.html.pdf)  
viewed 25 July 2008.

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<sup>42</sup> Ibid, 108.