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# Private Military Contractors, Security Forces, and Mercenaries

Naomi Pearson Wilfrid Laurier University

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## Private Military Contractors, Security Forces, and Mercenaries Naomi Pearson

The art of war is of vital importance to the state. It is a matter of life and death, a road either to safety or to ruin. Hence it is a subject of inquiry which can on no account be neglected.

- Sun Tzu, The Art of War

Tarfare changes as the result of advances in technology and weaponry, revisions to the concept of national sovereignty, and the development of human rights law. In recent years, billions of dollars in the global economy have been funnelled into the production of new war technologies such as machine guns, light armoured vehicles, missiles, and drones. In fact, \$1,776,000,000<sup>1</sup> of the global economy was spent on military expenditure in 2014 alone (SIPRI 1-8). Changes in warfare, however, do not reside simply in the advancement of steel, gunpowder, and pressure switches; war can be shaped by the organization and classification of those individuals fighting it. The recruitment and hiring of private military contractors (PMCs) by governments, powerful companies, and wealthy individuals is one recent shift in the dynamics of warfare (Scahill 42-48). Private military contracting has increased the danger to civilians within conflicts through the ambiguity in which PMCs operate, the lack of traditional military discipline within their ranks, and the manipulation of the jurisdictional holes that currently exist in International Humanitarian Law (IHL). Focusing on the United States' implementation of American contracting companies in the Iraq and Afghan wars, this article will investigate international treaties and laws that limit the use of PMCs.

### I. The Ambiguous Armed-Force

PMCs are companies that perform tasks that have traditionally been executed by the military of a sovereign nation (Singer, "Superpower for Hire"). Contracts are granted to companies that specialize in a range of areas, including information technologies, food services, language and speech translation, construction, and pro-

<sup>1</sup> All dollar figures in this article refer to American currency.

viding security and operational support for combat missions. This article will focus on those who are employed in and around combat roles. PMCs often work outside of the protected safe zone of a military instillation in order to perform duties as bodyguards and escorts for high-ranking political officials and wealthy CEOs. PMCs also frequently assist in combat operations by providing operational and logistical support, gathering intelligence, and training military and civilian personnel (DCAF 1-7).

The private military industry experienced a boost from the interest of the United States Department of Defence in the late 1990s. This unprecedented growth had ties to the so-called Rumsfeld Doctrine – a doctrine that re-envisioned the use of the American military and its budget (Klein 283-298). The Rumsfeld Doctrine was intended to counter the Powell Doctrine which called for the American military to operate as an overwhelming force of operational 'boots on the ground' soldiers. The Powell Doctrine asserted a view of military strength that relied on numbers, whereas Rumsfeld's approach stressed that the United States' military prowess came from its elite technology. The Rumsfeld Doctrine was novel because it required (at least theoretically) significantly fewer foot soldiers to achieve victory (Korb, "Rumsfeld's Folly"). The Rumsfeld Doctrine was created in connection with a neoliberal push for privatization and outsourcing within the American government, and was supported by the economics of Milton Friedman. While less American soldiers were enlisted in this neoliberal economy, privatized military positions would soon be in high demand (Klein 283-298). In many ways, the outsourcing of military roles to PMCs in Iraq was what distinguished contracting companies from mercenaries. Fitting PMC contracts into Friedman's model of privatization legitimized an otherwise illegal practice by officially aligning it with the economic and defence policies of the United States (Ettinger 744-745).

While the scope and magnitude of subcontracting in Iraq was substantial, it was largely unreported to the American public. By 2007, there were more PMCs hired by the United States than there were government soldiers serving in Iraq. Though hired by the United States, these contractors came from numerous countries all over the world; it is estimated that contractors in Iraq came from as many as 100 different countries and over 630 different contracting companies (Scahill 48). This diversity is a potential source for concern in combat situations because it calls into question the allegiances of those engaged in combat. In a national army, soldiers fight for their state: their loyalties are to their government, monarch, or country. With PMCs, which often include members from several different sovereign nations, soldiers are primarily concerned with monetary gain (Kidane 361-365).

Over the past two decades, the United States government has spent the most of any nation on the PMC industry. During the Iraq war, spending on contracts grew from \$50 million in 2003 to \$613 million in 2006 - an increase of \$563 million in just three years (Scahill 45). The private military industry is also a growing sector that continues to see increased revenues and investment. Current estimates place the global value of private military contracts in 2014 to be roughly \$218 billion (Thomas, "Superpower for Hire"2). Despite these large expenditures, many nations are not required to report on their activities with PMCs. For instance, the United States kept their involvement with PMCs in Iraq quiet due to the fact that no one government body was legally required to report the deaths of contractors during the war (Isenberg, "Undercounting"). It still remains unclear just how many civilian contractors were killed during the War in Iraq, though it is estimated to be over 400 casualties. The reason for the lack of accountability is that no central agency was responsible for recording PMC casualties, whether American or foreign national (Isenberg, "Undercounting"). Therefore, it still remains difficult to determine the exact number of PMC casualties.

#### II. The Dangers of Indiscipline

Discipline is essential for the control of military personnel and attaining victory on the battlefield. During war, commanders find it necessary that their soldiers are disciplined enough to stand their ground and defend those fighting alongside them. Otherwise, the military cannot function as a cohesive unit; the chain of command will break down and disorder will ensue (Tzu 86). French philosopher and historian Michel Foucault offers a discussion of the concept 'discipline' in his analysis of seventeenth and eighteenth century European warfare. He argues that the construction of military and state power transformed what it meant to be a soldier. According to Foucault, the seventeenth century soldier was brightly dressed, recognizable for 'traditional' battlefield combat, and carried himself with a sense of individualistic identity (Godfrey, Lilley, and Brewis 553-554). In contrast with the seventeenth century soldier, Foucault claims that:

[b]y the late eighteenth century, the soldier has become something that can be made; out of a formless clay, an inapt body, the machine required can be constructed; posture is gradually corrected; a calculated constraint runs slowly through each part of the body, mastering it, making it pliable, ready

<sup>2</sup> Since there are few restrictive regulations or methods that monitor PMC contracts, it should be noted that these figures are only a rough approximation.

at all times, turning silently into the automatism of habit. (qtd. in Godfrey, Lilley, and Brewis 553-554)

Foucault's commentary on discipline speaks to the changing nature of modern military structures. Without effective discipline, the United States military is not able to function effectively. It is through discipline that the United States is able to turn out highly skilled soldiers who are loyal to their state and who identify with a common brotherhood, rather than focusing on their own individual needs (54). During the war in Iraq, however, a breakdown of discipline occurred in many areas when private contractors were hired to do the work of the military. Though many privately contracted soldiers were previously enlisted in the military, they were no longer forced to subscribe to the chain of command. Military discipline and ethical codes were no longer explicitly forced upon privately contracted soldiers on the battlefield or while off duty.

There are several occasions where lack of discipline proved fatal, both for PMCs and local civilian populations. In 2004, a group of civilian contractors working for Blackwater Worldwide Co. was killed when the plane they were flying crashed into the Afghan mountains (Wald, "2004 Crash"). Though they were contracted by the United States government to deliver mortar shells from Bagram Air base, the craft they were flying was not military grade - it was a standard civilian air taxi. A 2005 investigative report conducted by the United States military notes that the accident occurred due to a lack of proper in-country training by Blackwater. Moreover, the flight recorder revealed that the pilots were unfamiliar with their flight path. It was later found that neither military, nor Federal Aviation Administration standards were observed during the flight. No one onboard was wearing the required oxygen masks for the plane's unpressurized cabin. The victims' families and numerous review boards argued that the accident would not have occurred if the military been in control of the flight (Wald, "2004 Crash"). They claimed that the strict safety standards under which government military pilots and flight crews are forced to operate could have reduced the likelihood of this tragedy.

That same year, international news headlines were made when four Blackwater PMCs were killed while on contract in Fallujah, Iraq. In March of 2004, Blackwater contractors were sent to escort a culinary convoy through the city of Fallujah during a tense period in the city's diplomatic relations between the local Iraqis and American troops. Coalition forces were sent into Fallujah in an attempt to root out opposition forces that had developed a well-defended stronghold in the city. Tensions continued to rise as coalition forces experienced little success at clearing Fallujah (Scahill 114-124). Despite these conditions, Blackwater officials sent contractors

into the city without armoured vehicles or the use of rear gunners. Blackwater also failed to provide its contractors with equipment, such as maps of the city, which were essential for safe navigation. Without the protection of rear gunners, the convoy was attacked by an angry mob (presumably roused by militants) and quickly overrun. As a result, four PMCs were killed; their bodies were stripped of clothing, burned, and hung from a bridge. The city quickly devolved into a state of chaos and violence, the magnitude of which required United States forces in the area to engage in heavy street fighting (Parker, "What Exactly Happened").

The families of the four contractors filed a lawsuit against Blackwater, stating that the company sent their employees into a dangerous situation with inadequate protection. While Blackwater Co. refused to provide the families of the victims with a detailed account of those events, the information that was released through the lawsuit demonstrated a lack of foresight and responsibility from Blackwater leaders (Neff, "Memos"). A congressional investigation agreed with the survivors of the attack in Fallujah that Blackwater had ordered its employees into the city without the necessary military equipment. The investigation branded Blackwater as "unprepared and disorderly" (Dalesio, "Blackwater Suit Ends"). In 2010-2011, seven years after the massacre, Blackwater was sold and the company rebranded itself as Academi Xe. The judge moved to dismiss the lawsuit because of the families' lack of resources to fund their case. The lawsuit was then closed, thus ending any hope the victims' families had for answers (Baker, "Blackwater Suit Tossed").

These are only two of many cases in which a disregard for safety standards and negligence on behalf of private military companies has endangered the safety of contracted staff. Herein lies one of the most problematic issues with the introduction of contractors into combat roles: the lack of discipline. Michel Foucault refers to the military as part of what he calls 'the disciplinary society.' This type of society has common techniques for ensuring that power relationships properly functioned among their members, even in complex and demanding situations (Bogard 325-346). The lack of discipline, which is pragmatically necessary to organizations that operate under complex power relationships and in stressful environments, can result in the degeneration of the morality of war.

#### III. International Humanitarian Law and Private Military Contractors

The purpose of IHL is to safeguard those who would otherwise be left unprotected in warfare. Since its inception, IHL has evolved to match prevailing military attitudes, new technologies, and gaps in law during times of war. The development of these principles and treaties is continuous process and remains far from perfect. At present, there are few Humanitarian Laws governing the actions of PMCs. Given the

aforementioned concerns with PMCs, it is essential that states collaborate to develop appropriate laws for companies who contravene existing regulations and codes of conduct. Human rights workers and legal experts must act within existing treaties and laws in order to protect civilians from the rampant abuses caused by the private military industry (Gomez del Prado, "Privatization of War"). Tracing these treaties and laws against questionable PMC activities will illustrate how some of the largest PMCs contracted by the United States have manipulated IHL in order to avoid prosecution.

The first example of IHL relevant to the operations of PMCs is the St. Petersburg Declaration of 1868. The St. Petersburg Declaration was the first formal written declaration prohibiting the use of certain types of weapons during war. The weapon in question was a Russian munition that was invented in 1863. The Russian munition was designed to explode when it came into contact with a hard substance such as a wall or horse cart. The Russian shell's tactical value was in the destruction of munitions wagons; after impact, the fracturing nature of the shell would subsequently destroy all other ordnance on the wagon. The munition was later modified to explode on contact with softer materials such as the human body. After informed of this, the Russian government sought to ban the weapon internationally. Any "civilized nation" that wished to take part in the treaty was welcomed to prohibit what had been deemed an inhumane weapon of warfare (ICRC). That is, the St. Petersburg Declaration of 1868 prohibited the use of weapons and projectiles that would cause unnecessary human suffering. The 1868 Declaration's mission was to set the "technical limits at which the necessity of war ought to yield to the requirements of humanity" (ICRC). The St. Petersburg Declaration set the basis for IHL treaties and declarations that would soon follow.

After two World Wars and several million casualties, the Geneva Conventions were established. 1949 was the last year that the Geneva Conventions were revisited in their entirety; however, additional articles and three new protocols were added in 1977 and 2005. The Geneva Conventions recognised the fact that before 1945, laws regarding warfare only applied to armed forces (specifically those who were able-bodied). Consequently, the Geneva Conventions were established to protect those who were not shielded under previous laws, such as wounded soldiers, prisoners of war, victims of shipwrecks, civilians, and other vulnerable persons. The document defines what comprises a 'captured person' and details the rights they have to proper treatment, medical aid, religious practices, and communication with their families (ICRC). The Geneva Conventions are vital to IHL, but article four is most applicable to PMCs. Article four of the Geneva Conventions "affords protection to civilians, even in occupied territory and defines what constitutes a civilian within

conflict" (ICRC). Article four is the first document that clearly defines and protects civilians within armed conflict. The document also defines categories of civilians in both belligerent states and occupied states. While 196 countries have ratified the Geneva Conventions as of 2014, the treaty only binds nations who have signed it. That being said, several acts committed by PMCs clearly violate the Geneva Convention (ICRC, "Commentary").

The International Convention against the Recruitment, Use, Financing and Training of Mercenaries (ICRUFTM) was opened for ratification in 1989, but did not enter into force until 2001 (United Nations Human Rights). Only thirty-three states were party to the convention and of those a mere ten signed the original convention.<sup>3</sup> The 1989 Mercenary Convention defines a mercenary as any person who: <sup>4</sup>

(a) Is specially recruited locally or abroad in order to fight in an armed conflict; (b) 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 rank and functions in the armed forces of that party; (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (d) Is not a member of the armed forces of a party to the conflict; and (e) 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. (United Nations Human Rights)

The ICRUFTM also bans a nation from hiring, recruiting, financially funding, and training mercenary forces (ICRC). While this document had little legal power at the time, it addressed a growing issue in warfare that has become a major concern. The fact that few countries signed the treaty speaks to the complex nature of banning PMCs. One of the most complicated aspects of attempting to gain support for this convention has to do with its implications for the United States; the ICRUFTM would effectively require the United States government to stop using one of its most powerful military tools – PMCs.

The United States government has gone to great lengths to keep PMCs operating in Iraq and Afghanistan. In Iraq during the early 2000s, Paul Bremer was an American diplomat in command of the Coalition Provisional Authority. Bremer

<sup>3</sup> State signatories to The 1989 ICRUFTMwere Angola, Congo, Democratic Republic of the Congo, Germany, Montenegro, Morocco, Nigeria, Poland, Romania, and Serbia.

<sup>4</sup> While the ICRUFTM includes a more extensive definition of 'mercenary', the provided definition is sufficient for the purposes of this article.

often used Blackwater's services for his personal protection while travelling through Iraq on diplomatic and military missions (Engelhart, "Order 17"). Before handing full control back to Iraqi authorities, Bremer and the United States government created Order 17, which effectively gave contractors diplomatic immunity from any kind of Iraqi prosecution (Coalition Provisional Authority Order Number 17). This kind of immunity had severe repercussions for the Iraqi population.

On September 16, 2007, Blackwater Worldwide Co., a company who obtained one of the largest contracts during the Iraq war, was driving a convoy through the Iraqi city of Baghdad. Many civilian witnesses reported seeing Blackwater contractors fire what Blackwater would later claim were self-protecting 'warning shots' while city driving. If a civilian vehicle came too close to a Blackwater convoy, contractors would fire live rounds in front of the vehicle to get the driver to move. Blackwater guards claimed that these kinds of defensive measures were used in an altercation in Nisour Square; the altercation with Blackwater guards led to the deaths of seventeen civilians and wounding of thirteen more (Scahill 3-9). The contractors in question were quickly flown out of the country and protected from Iraqi courts under Paul Bremer's Order 17. In a case launched in the Federal District Court, Blackwater guards, Paul Slough, Evan Liberty, Dustin Heard, and Nicholas Slatten, claimed that they acted in self-defence against a small car that allegedly opened fire on their convoy. However, there was no evidence at the crime scene, nor in witness statements that anyone in the square had fired at the contractors. Instead, witnesses claimed that the Blackwater convoy randomly fired their high-powered weapons at indiscriminate civilians without provocation. On October 22, 2014 all four Blackwater guards were found guilty, on three counts of voluntary manslaughter, one charge of murder, and numerous weapons infractions (Apuzzo, "Blackwater Guards Guilty").

The Nisour Square incident is one example where PMCs have been brought to trial and convicted of criminal charges. For several years, there has been a sense of ambiguity among the American legal community about how PMCs guilty of infractions abroad should be tried for their crimes. In 2006, the U.S Congress amended article 2 (a) (10) of the Uniform Code of Military Justice (UCMJ) as an attempt to remedy the situation (Isenberg, "JAGs"). Under these modifications, civilian contractors working for the United States government would theoretically be subject to military law and the United States' Court Marshall for overseas crimes. While changing the UCMJ appeared to achieve greater scope in terms of prosecuting PMCs, in reality the United States Armed Forces had little constitutional authority to do so. There was a lack of legal precedent under the UCMJ of military tribunals convicting civilian personnel for war crimes. When alterations to the UCMJ were proposed to Congress in 2006, there was very little debate or discussion. The lack of discussion was likely due to the known limits of the UCMJ's jurisdictional authority. The proposed amendments may also have been seen as a political tactic to alleviate the fears of

the American public towards reckless PMC behaviour (Isenberg, "JAGs"). Civilian judges and the United States Supreme Court have listed strong objections to the constitutional authority of American military tribunals to try civilians. Accordingly, few cases prosecuting civilian contractors, including the Nisour Square incident, have been brought before military courts since the enactment of the UCMJ. Therefore, the Nisour Square incident is a confirming instance of the lack of jurisdictional reach by the UCMJ (Isenberg, "JAGs").

The Blackwater case in Nisour is just one example of how contractors have violated IHL by ignoring rights afforded in the Geneva Convention. PMCs have also violated IHL through the use of torture. In 2003 and 2004, PMCs directed and assisted in torturing individuals at the Abu Ghraib prison in Iraq, notably L-3 Communications and Titan CACI (Gomez del Prado, "Privatization of War"). This too violates the Geneva Convention under the rights of 'captured persons' (ICRC). As previously discussed, Order 17 issued by Paul Bremer and the Provisional Authority provided immunity to all of these individuals from prosecution in Iraq. IHL needs to be strengthened in order to address legal loopholes that are currently exploited by contractors, their CEOs, and governments who employ PMCs (Engelhart, "Order 17").

#### IV. Conclusion

Although existing laws attempt to restrict the contracting of mercenaries in some ways, much still needs to be done. The ambiguous nature of the PMC industry presents a challenge to IHL since it leaves the public largely uninformed and lawbreakers unaccountable (Kidane 361-365). Greater awareness and accountability from in-country contractors and the governments employing them is also needed. Moreover, the lack of military discipline within PMCs presents a serious question as to whether or not contractors are able to properly follow orders, impose restraint, and follow safety standards in combat. Finally, there remains the question of effectively implementing IHL. In particular, questionable relationships between the American government and contracting companies hired during the Iraq war, such as Blackwater Worldwide Co, have enabled PMCs to evade IHL (Engelhart, "Order 17").

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