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Статус приватних військових компаній у міжнародному праві
(The Status of Private Military Companies Under International Law)

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Вищий навчальний заклад «Український католицький університет»

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Шийці Івану Богдановичу

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3. Вихідні дані до проекту (роботи): велика кількість наукових праць англійською мовою, що стосуються діяльності приватних військових компаній та застосовного права до їх діяльності; незначна кількість наукових праць, яка прямо адресує питання статусу приватних військових компаній; роботи написаної українськими науковцями, які розкривають питання статусу приватних військових компаній під час міжнародних збройних конфліктів немає.

4. Зміст розрахунково-пояснювальної записки (перелік питань, які потрібно розробити):

1) провести класифікацію послуг, що надають приватні військові компанії;

2) дослідити можливі статуси приватних військових компаній та їх працівників за міжнародним правом застосовним до міжнародного збройного конфлікту;

3) які існують міжнародні ініціативи щодо регулювання діяльності приватних військових компаній?

4) проаналізувати, вплив послуг, що надаються приватними військовими компаніями на їх статус, та статус їх працівників за міжнародним правом;

5) дослідити питання регулювання приватних військових компаній на національному рівні США, Великобританії та України,

6) розробити можливості удосконалення регулювання щодо приватних військових компаній в Україні

5. Перелік графічного матеріалу (з точним зазначенням обов'язкових креслень):
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LIST OF ACRONIMS AND ABBREVIATIONS

1. African Mercenary Convention - OAU Convention for the Elimination of Mercenaryism in Africa of 3rd July 1977
2. ARSIWA - Articles on Responsibility of States for Internationally Wrongful Acts
3. Code of conduct - International Code of Conduct for Private Security Service Providers;
4. DOD - Department of Defense of the United States of America
5. DOS - Department of State of the United States of America
6. ECHR - European Court of Human rights
7. FAR - Federal Acquisition Regulation
8. Geneva Protocol I - Additional Protocol to the Geneva conventions of 12 august 1949, and relating to the protection of victims of international armed conflicts, of 8th June 1977;
9. ICJ - International Court of Justice
10. International Mercenaries Convention - International Convention against the Recruitment, Use, Financing and Training of Mercenaries, of 4th December 1989
11. MEJA - Military Extraterritorial Jurisdiction Act
12. Montreux document - Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict;
13. PAAF - persons who accompany the armed forces
14. PMSC - Private military and security company;
15. SMTJ - Special Maritime and Territorial Jurisdiction Act
16. UCMJ - Uniform Code of Military Justice
17. UN - United Nations

INTRODUCTION

Attempts to regulate warfare is not a new thing to humanity. During numerous wars conducted, the system of international humanitarian law was developed - the rules that regulate the commencement of warfare and the conduct of warfare. International law demands respect for human rights, rule of law and minimal casualties caused while reaching the goal of war.

While regulating the warfare it is needed to be considered that modern warfare demands modern approaches to combat, peacekeeping and stabilization after ending of active warfare. The military requires efficient, fast reaction on threats and their elimination, especially in unconventional warfare that are conducted now in the Middle East, Ukraine and Africa. Due to such requirements the violation of human rights appear very often. And the question appears even more difficult when private entities provide services to armie and, unconventional soldiers together with mercenaries participate in hostilities and are used by different parties to the conflict.

In such environment, PMSCs do operate and conduct their business activities. Lately the governments of the USA and UK are more and more likely to hire a contractor for performance of different tasks in zones of international armed conflict.¹ Thus, with the increase of PMSCs' personnel deployed in such areas the more human rights violation may appear. The issue of regulation of the ambiguous PMSCs' status is one of the questions in nowadays international humanitarian law.

The issues of regulation of business activities in time of warfare is not new though. Such activities range from mercenarism to catering in military bases and were performed since the first wars. Every category of this wide range of involved persons has different legal status, thus is under different legal regimes that demand different treatment. The defining of these legal statuses will more clearly define rules of behavior with the PMSC

¹ Erik Prince | Full Address and Q&A | Oxford Union
https://www.youtube.com/watch?v=VV_skhRZOMw

and their personnel, thus will cause less violation for the reasons of mistreatment.

The PMSCs' personnel possess the most ambiguous status in international armed conflict. Therefore, the aim of this Paper is to provide the understanding of different and even changeable statuses of private military companies and their personnel.

The is to define applicable international law that imposes the status of PMSCs and the influence on PMSCs' employees in connection with good practices of conduct PMSCs activities and national legal framework of USA, UK and Ukraine within the circumstances of international armed conflict. This will provide reasonable expectations of PMSCs' conducts in the scope of international law.

The questions to answer in this paper are:

1. What statuses under international law can be applicable to PMSC and their employees in the scope of international humanitarian law in the circumstances of international armed conflict;
2. What are the obligations of the state towards regulation of PMSCs activities within the circumstances of international armed conflict?
3. What are good practices of contracting PMSCs in modern world and how do they influence on statuses under international law that can be applicable to PMSCs and their employees within the circumstances of international armed conflict?
4. What are regulatory approaches and legal frameworks towards PMSCs' activities in the USA, UK and Ukraine? How do they influence the status of PMSCs and their employees within the circumstances of international armed conflict?
5. What possibilities there are to improve regulations of PMSCs' activities in Ukraine?

The object of this research is the international humanitarian law, non-compulsory good practices of PMCSs' regulations and national framework of USA, UK and Ukraine towards regulations of PMSCs.

The subject of this research is the status of PMSCs and their personnel under international humanitarian law, non-compulsory good practices of PMCSs regulations and

national framework of USA and UK towards regulations of PMSCs within the circumstances of international armed conflict.

The research is performed by analysis of legal document, publications of scholars and reports on the matter of this paper. As to the method, the services-based method is applied. This means that the services and their conduct are being viewed as the decisive criterion for defining the statuses of PMSCs and their employees.

The most fundamental works used in this paper are the commentaries on Geneva Conventions and their protocols, the Commentaries to articles on Responsibility of States for Internationally Wrongful Acts together with applicable cases (Nicaragua case and Genocide case). The other documents are the Montreux document with materials of Conferences that provide guidance on the development of good practices towards PMSCs activities. The works of such scholars that refer to international humanitarian law and PMSC as Jeffrey Herbst, Kristine Huskey, Scott Sullivan, Djamchid Momtaz, Martinus Nijhoff, Elena Laura Álvarez Ortega, Jean S. Pictet are used for the purposes of this work. As to national framework, the most used are the reports of NGOs regarding the situation of the regulation of PMSCs activities regulations together with national legislation.

First chapter is dedicated to definition and classification of services that are provided by PMSCs, description of all possible statuses of PMSCs under international law and their applicability.

Second chapter defines modern regulation and good practices and their influence on PMSCs personnel status and PMSC and status in to connection to the state contracted the PMSCs.

The third chapter bears more practical aspect of the researches and through defining applicable national legislation within the framework of international law describes the possibilities of changing the status of PMSC and their personnel.

The fourth chapter is fully dedicated to analysis of Ukrainian regulations towards PMSCs and to the improvement of these regulation.

CHAPTER 1. REGULATION OF PRIVATE MILITARY COMPANIES IN INTERNATIONAL LAW

SECTION 1.1. Services provided by PMSCs

Military institutions just like any other governmental institutions are large consumers of goods and services. One of the core issues for the activities of PMSCs is the services provided by these companies. Together with other criteria it will influence on the status of PMSC.

Given the scope of this paper only the services of military nature (or military services) provided in a time and area of IAC by private sector to a state shall be analyzed. Thus, the distinction between military and non-military services should be defined. Basically, mere providing of services to military does not mean the services are of military nature. E.g. nevertheless, fuel supply influences the combat capacity of the party to an IAC it does not result to a military nature of a service.

The main difference between military and non-military services is whether they are of a military-specific nature or of kind of general services. With regard to services, the services provided by PMSCs, in order to result in military character should be commonly performed by military personnel and which are being outsourced in time of IAC. The services of military nature are those which were tailored to fit a specific need of military institutions, unlike non-military services that tailored to be provided to general public (that includes military institutions). Military services are those which do not have any demand among non-military institutions.

Having defined the difference between military and generic services it worth to perform classification of companies that provide military services. In the regard of services provided by PMSCs, the publicist such as Herbert Wulf describe companies that provide military and security services as follows:

(a) private security companies, which provide security services to private citizens and companies as well as to some governments;

(b) defence producers, which engage in the research, development, production and financing of military equipment to military customers;

(c) service providers, which engage in the provision of management and financing services to the military sector;

(d) private military companies, which provide military services to military customers, humanitarian organizations and United Nations agencies;

(e) non-statutory armed force, which are rebels, warlords and groups involved in organized crime; and

(f) mercenaries, which are combat troops used by non-state actors.²

First of all I would like to note out the classification of Singer, P.W. “Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security”. Singer divides PMSCs that to the following types based on the services provided and area of activity:³

1. Military provider firm that work in the tactical battlefield area. Military provider firms are the PMSCs that provide services of direct combat and participation in a fight. On one hand, this kind of PMSCs can be used as a stand-alone battle unit with its own a chain of command being subordinated to highest military officials of the contracting state or an affiliated force subordinated to any level battle commander. In the abovementioned case, military provider firms do provide services of tactical and operational and units command, fire support, sniping, scouting, fast reaction functions, direct combat as a stand-alone unit and others within the hostile environment. On the other hand, the military provider firms’ employees may be spread throughout the customer’s military unites being a member of a unit with specialized and uncommon skills or in-field advisors to a low rank commander. This being sad, the military provider firms’ employees

² See e.g. Wulf,H., *Internationalizing and Privatizing War and Peace* (Palgrave Macmillan: Hound-mills, 2005), pp.

³ Singer, P.W. “Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security.” *International Security*, vol. 26, no. 3, 2001, pp. 186–220. JSTOR, JSTOR, www.jstor.org/stable/3092094.

are often regarded as most experienced and well-trained individual in a unit who provide leadership, training to other individuals, liaison with other units etc. Thus, in both cases, military providing firm is contracted to fill the gap within the battle units or to obtain a new battle unit. This brings us to the following: the key to define this kind of companies is that the services provided by them are aimed to increase a military capacity from the lowest to operational level of a customer and at the same time to decrease a military capacity of the customer's adversary by means of direct influence with the aim to reshape tactical / operational combat environment with sharing of risks of battlefield situation between the customer and the firm.

2. Military consulting firm that work in the general theatre of war. Military consulting firm, unlike military provider firm, does not take a direct part in combat activities. This kind of PMSCs is involved in planning of operations but are not responsible for and do not perform the military decisions making process. Military consulting firms are hired for advising and providing expertise at the operational and strategic combat levels. The services provided by military consulting firms are of organizational and military practical nature. The organizational segment of services covers a whole range of issues on how to build the customers military, how to structure units, make chain of command efficient, what weaponry system should be obtained etc. The other segment – the practical one – is a range of issues on how to increase customers and to decrease customer's adversary military capacity at the theatre of war. In this regard, the military consulting firms provide a strategic and operational planning advise to a customer. In modern warfare planning of operations may largely influence the combat activities and the advise provided by military consulting firms may reshape the strategical and operational combat environment. Yet, the customer decides whether to implement the provided advise and bears all risks regarding its implementation.

3. Military support firms that work in the general military theatre. Military support firms are the most common PMSCs that do operate in combat and non-combat environments. This kind of firm is designed to provide supportive services such as catering,

non-convoy logistics, equipment maintenance, repair and overhaul (hereinafter – MRO), information technologies services etc. The provided services are those which are consumed during the time of peace and conflict and are aimed for sustainability of the customers military, cutting the costs of normal and conflict operations and providing expertise for high-technology equipment used by the customer's military. Yet, the services provided by military support firms affect on military capacity, the firm or its employees do not participate in any kind of combat under military command. Basically, they do perform the tasks of rear-range military forces that are not battle units (logistics, financial and payroll support, contact centers, community support etc.).

Further, I would like to refer to the typology of the PMSCs given proposed by Mark Fullon in the Post-fordist military: An Inquiry into the Political Economy of Private Military Companies".⁴ Mark Fullon divides PMSCs on basis of engaging in defensive and offensive combat in a following way:

1. Non-combat offensive companies do not take direct part in combat but support military operations through advising, consulting, planning analysis skills training and weaponry usage of military personnel. They and their employees are not part of any military unit. These companies are regarded offensive because of the large impact on offensive tactical and operational military capabilities of the customer.

2. Non-combat defensive companies are the companies that provide services “non-lethal in nature” that are in the back-end military support. Such services are logistics of goods and personnel, catering, weapons and equipment MRO, administrative functions, medical (post-combat) support etc.⁵ Nevertheless, these companies do influence on overall military capacity of the customer, however, they do not take part in combat and their activity does not impact on offensive tactical and operational military capabilities of the customer

⁴ Fullon, M. A. "THE POST-FORDIST MILITARY: An Inquiry into the Political Economy of Private Military Companies." Griffith University (2011).

⁵ Fulloon, Mark. "Non-State Actor: Defining Private Military Companies." Strategic Review for Southern Africa 37.2 (2015): 29.

3. Combat offensive companies provide services as being a stand-alone unit, a part of military units or in command of military units. They perform handling the battle, offensive regular and special operations with a direct purpose of decreasing the customer's adversary military capacity. Companies and their employees do take direct part in combats, firefights etc.

4. Combat defensive companies participate in all kind of security activities in a combat environment such as: protection / guarding of military personnel, customers official, building and premises; the participate in patrols, convoys and other types of activities with a main goal of anticipation of decreasing of customer's military capacity. Even they posses the needed weapons and personnel to participate in offensive military operations, just like the Combat offensive companies, but engage in combat only being under attack or at the risk of being attacked.

Given the scope of this paper, the mere typology of the companies is not as relevant, as the typology of the services provided by PMSCs are. Nevertheless, the method used by Singer is useful since it defines the three levels of PMSCs activities (the tactical battlefield, the theatre of war and the military theatre) and what services are provided at those levels that will be used in the development of classification of services provided by PMSCs that shall be used in this paper. Moreover, the method of classification chosen by Fullon on bases of offensive combat engagement can also be used for classification of services.

I propose the following classification of services based on SIPRI classification of services provided in Insights on Peace and Security No. 2008/1 September 2008⁶;

1. Research and Development (hereinafter – R&D):
 - a. Basic research and technology development;
 - b. Strategic research and consulting;
 - c. Threat analysis;

⁶ Perlo-Freeman, Sam, and Elisabeth Sköns. The private military services industry. Stockholm International Peace Research Institute, 2008.
https://www.files.ethz.ch/isn/93157/2008_01_SIPRIInsight.pdf

d. War-gaming.

On one hand, this kind of services are commonly provided on long term basis in peace time and during the time of war by PMSCs, state institutions, think tanks and science hubs. Normally, R&D do increase the military capabilities in long time perspectives and are highly useful for reaching strategic goals. On the other hands, R&D services are also used in the process of modern weapons, intelligence systems development. Due to these reasons, R&D is provided for military overall and thus, companies (even PMSC) providing R&D services and their employees do not take direct part in combat. This is why, the R&D services are of non-combat defensive nature provided at general military theatre.

2. Technical services:

- a. Information technology services;
- b. System support;
- c. MRO.

These services include architecture of military command system, building IT infrastructure in hostile areas and areas of armed conflict, ongoing support of electronic systems and military equipment maintenance, repair and overhaul. Nowadays, due to the trends of “privatization of warfare” many weapon systems producers provide ongoing support and performance warranties for produced equipment that is supplied to different military and paramilitary institutions. In this regard, the Technical services are non-combat in nature. These services can be provided both within the area of international armed conflict and outside it, meaning they are provided at the general military theatre but may be focused on general theatre of war. Thus, bringing up the possibility of PMSCs and their employees to operate in areas (with consequent possibility) to take part in IAC.

3. Operational support:

- a. Non-combat offensive:
 - i. Operational analysis, consulting and planning. Within the scope of this services, PMSCs do provide combat environment analysis, consult on operational means

and forces to be used and participate in operation planning, even with a possibility to participate in military decisions making process.

ii. Training. Training of military personnel includes training of individual militants and units as whole. Also, the training services provide training with modern weaponry systems, practice shooting at firing ranges, combat maneuvers, command of troops etc.

iii. Intelligence services provided by PMSCs include recon, data gathering and analysis with particular intelligence means by fieldwork, in cyberspace, through open canals of communications and through adversary's communications.

Non-combat offensive operational support means the services are provided of non-combat character but with the goals of increasing operational offensive military capacity before and during the military operations in time of IAC. Nevertheless, the services are of non-combat character, they do increase the possibilities and capacity to lethal force usage by the battle-operative staff, middle and large scaled battle-units (corpse, brigade, battalion, company).

b. Non-combat defensive services:

i. Weapons destruction and demining. PMSCs are often hired by states or international organization to support humanitarian operations or IAC party through providing assistance in or performing demining. These services are not performed during IAC for military purposes and are performed after its end for humanitarian purposes.

ii. Facilities management. This includes services provided from simple supply chain consulting for a military base to a fully scaled military base deployment and equipping with weaponry and security systems.

iii. Logistics of provision and personnel. These services include advising and consulting on issues of logistics, chain of supply, convoy for both the specific area of operations and overall military system logistics. They do also include direct logistics performance, yet without of armed convoy, in safe zones or out of operations area without any armed defensive capacity.

- iv. Medical care, catering, functional and administrative support.

Just like non-combat offensive operational support services, the defensive ones are of non-combat character. However, they are aimed at increasing the overall military capacity in both defensive and offensive operations. Unlike the offensive services, they are replacing the back-end of warfare machine and are utilized by the governments for releasing the troops that provide non-combat support to use them in the battle activities, thus increasing military capacity at the actual area of the operation. Normally, the companies' employees that provide these services are far from the actual area of battlefield with no need of armed defensive capacity and the equipment used is non-lethal in nature.

4. Armed services:

- a. Combat offensive services:

- i. Engagement in combat operations. This service is one of the core functions of the military which may be outsourced by PMSCs with main goal to decrease adversaries' military capacity directly through means of battle. While providing these services PMSCs' employees act in a role of regular forces in battle environment.

- ii. Covert operations also may be provided by the PMSCs that include performance of coups, sabotage, diversion and special reconnaissance, assassinations etc. These kinds of operation are normally carried out by special forces units. The main goal of covert operations is to decrease military capacity of the adversary while the operation, its' planning and execution is being concealed or intended being in secret.

- iii. Fire support and sniper support may be provided for supporting of governmental regular forces in offensive operations as a part of these forces or as stand-alone unit. Nevertheless, PMSCs' employees in this kind of services are a part of unified forces participating in offensive tactical operation.

- iv. Artillery spotting and fire adjustment is performed within the scope of offensive tactical operations (within a scale of unit-battalion) by PMSCs as a part of a battle unit participating in the operations.

- b. Combat defensive services:

i. Logistics and convoy armed services differ from operational support logistic services by possession of armed lethal capabilities and are ready to engage in combat with aim to preserve military capability of the client.

ii. Evacuation services are provided by PMSCs in highly-risk area of operation in order to remove military personnel, civilians, casualties, equipment and assets from the high-risk environment. Due to high-risk environment in which evacuation services are provided, the PMSCs' employees are armed and resort to lethal force in case of self-defense.

iii. Close protection is similar to the evacuation with a main goal to save the protected by means of fast removal of the protectee from the high-risk environment with resort to lethal force in case of attack.

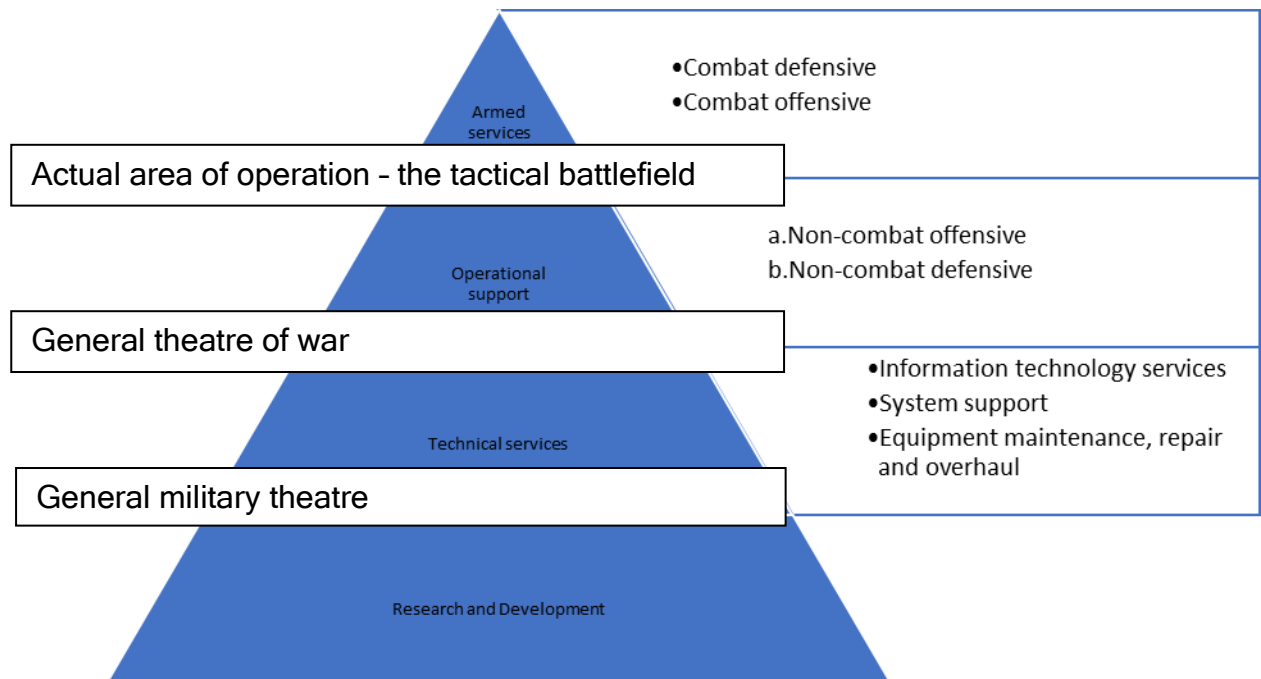
iv. Guarding of buildings, installations, adjustments.

Armed services provided by PMSCs are of different characters. PMSCs' employees are structured inside the battle units of the military, or they are stand-alone units with different roles. The employees may perform different tasks and missions: beginning with a role of a private to a role of battle commander. Therefore, the impact of PMSCs may reshape the combat situation on strategic, operative and tactical levels.⁷ The main characteristic of armed services is that the PMSCs that provide them do possess lethal capacity and the employees are in high-threat violent environment while performing these services.

The PMSCs providing armed services both combat offensive and defensive do use light and heavy firearms, armored vehicles, aerial vehicles, even artillery. In this regard the main difference between combat offensive and defensive services is that the combat offensive services are provided with main goal of decreasing military capacity of an adversary, while combat defensive are particularly aimed to preserve military capacity of the client. Thus, the difference lies in different rules of engagement: combat offensive

⁷ Erik Prince | Full Address and Q&A | Oxford Union
https://www.youtube.com/watch?v=VV_skhRZ0Mw

services provide that PMSCs' employees shall resort to hostilities upon spotting the adversaries forces, whereas the defensive services provide that lethal force is used only for purpose of self-defense. Other difference is that the combat offensive services provide that PMSCs' employees are under unified command that is in head of mission, and the combat defensive services provide a possibility for PMSCs' employees of being under different command units of the client. In this regard, PMSCs that provide armed services in various locations of tactical battlefields do perform a core military function which is carrying out a battle.

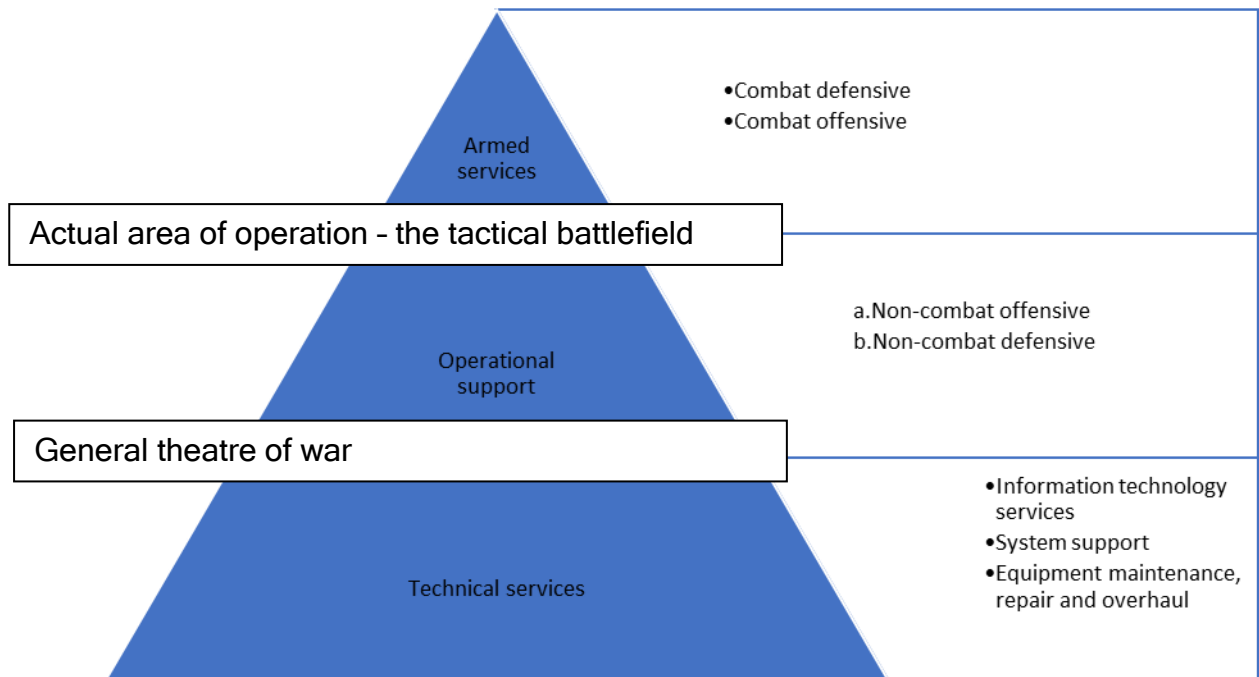


Having discussed the typology of services provided by PMSCs within its scope, I shall refer to the other factor connected to the abovementioned services – the place of services and types of services consumer.

First of all, it should be noted that, the PMSCs services to a state can be provided during both the time of IAC and during the time of peace. Secondly, the PMSCs services can be provided in the area of IAC and out of it. The scope of this paper does cover only the services provided to a party of an IAC during IAC.

Given the fact, R&D services are provided out of IAC area and continuously (with no direct connection to IAC), they are out of the scope of this paper. In connection to all of abovementioned classification, the scope of this paper covers Technical services, Operational support services and Armed services during the time of IAC and in IAC area. For the purposes of services provided in cyberspace, the place of services shall be the place of adversary's objects related to services provided in cyberspace.

Thus, summarizing all of abovementioned classifications of services provided by PMSCs, the following classification shall be used for the purposes of this paper:



SECTION 1.2. Regulations of international law towards the status of private military companies

The second issue to be covered in this Chapter is the question of status of PMSCs. The scope of this Paper covers the status of PMSC that is hired by the state-party to international armed conflict. Thus, the issue of status of such PMSCs is to be discussed in connection with the state contracted the PMSC. The mere connection between the state and contracted PMSC, to my opinion should be discussed within the scope of attribution of PMSC activities to state. The argument for such scope is that in case of absence of attribution to any state, the PMSC will be threatened under domestic law of the state it

operates in, thus not contribution to the issue of its status under international law is made, except the cases of gross human rights violation enacting the jurisdiction of international criminal law.

Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter - ARSIWA) is one of the most useful international document with regard to the issue described. It is based on international customary law and was developed by International Law Commission. The General Assembly resolution 56/83 of 12 December 2001 adopted the ARSIWA.

The issue of attribution regarding the usage of PMSC arises in three different forms that may be described by ARSIWA:

- A. PMSCs as a state organ - under Article 4.
- B. PMSC is the entity empowered to exercise state authority - under Article 5.
- C. PMSC directly controlled by a state - under Article 8.

SUB-SECTION 1.2.1. Status of PMSC as a state organ

According to ARSIWA article 4, the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. An organ includes any person or entity which has that status in accordance with the internal law of the State.⁸

Nevertheless, PMSCs are highly regulated, the intention of the industry is the outsourcing of military and paramilitary activities, therefore the PMSCs are not part of state authority by definition. However, there is a slight possibility to regard PMSCs as a state organ since there is a high margin of appreciation of a state to regulate its internal governmental structure. The issue is covered by ARSIWA commentary, however, there are

⁸ International Law Commission. "Draft articles on Responsibility of States for internationally wrongful acts." *Report of the International Law Commission on the Work of Its Fifty-third Session* (2001).

no specific elements to be exercised in order to define a private entity as a state organ. Nevertheless, the question of internal law and structuring of state organs is a part of state appreciation the status of an organ may also be inferred from other than formal — factual— elements.⁹ The position was adopted by ICJ in its judgment in the Bosnia Genocide Case.

Such examples usually occur in countries where the risk of coup d'état are high and armed forces are in the state of combat infectives. These conditions require external military advice and even command. As an example, the case of Sierra Leone civil war of 1991-2002 might be discussed. Sandline International and its affiliated structures provided military services, including offensive combat services, military advises and training of military personnel.¹⁰ Moreover, under the terms of the contract the executive organs of Sandline International were incorporated in the chain of command and possessed formal military authority over units and parts of Sierra Leone armed forces.¹¹

Notwithstanding the incorporation of PMSC structures into state authority or into a chain of command, or into military units, the concept of de jure and de facto organs also exist. Under this concept, which was brought by ICJ Genocide Convention Case. In case of the de jure organ, the responsibility of the state for its conduct is clear, the conduct of de facto organ is arguable. The attribution of de facto organ to a state is to be determined on case by case basis and is to be established by proving that the entity is actually de facto state organ.¹²

The ICJ jurisprudence states that “persons, groups of persons or entities may, for

⁹ P 1. alchetti, Paolo. "De facto organs of a state." Max planck encyclopedia of public international law 2 (2012): 1048-1052 Oxford Public International Law

<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1394?rskey=J8Bla6&result=1&prd=OPIL>

¹⁰ Tonkin, Hannah. State control over private military and security companies in armed conflict. Vol. 84. Cambridge University Press, 2011.

¹¹The Oxford Handbook of International Law in Armed Conflict edited by Clapham, Andrew; Gaeta, Paola; Haack, Tom; Priddy, Alice (13th March 2014), Main Text, Part VI Key Issues in Times of Armed Conflict, Ch.25 Private Military and Security Companies

¹² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 40 <http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>

purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument”.¹³

The question whether to consider a PMSCs as a state organ should be viewed in light of complete dependence of PMSC. Even in cases when PMSCs enjoys formal independence, however, is completely dependent on state financing, political, military, logistical support and in fact, serves as a front for covert state activity the PMSC may not be considered as independent. Other argument and criteria for such position may be the management of the company that consists of former or present military or special services officials. However, the case possesses very high threshold in proof and the status of PMSC as a state organ must be determined with high scrutiny on a case by case basis, thus being arguable.

The other sufficient feature of PMSC acting in the capacity of a state organ is the state responsibility for the conduct of such PMSC even for ultra vires actions. This means that as long as the PMSC is considered to be de facto or de jure state organ, any actions even not prescribed by contract or other terms of providing services, the state is liable for any PMSC conduct.

Thus, applying the status of PMSC as a state organ most likely shall lead to consideration that PMSC personnel enjoys the status of combatants or mercenaries for reason of direct participation in hostilities within the state military objective and planning by providing services to armed forces. The other statuses may be applied respectfully to the services provided by PMSC and performed by each employee separately in a specific conduct.

¹³Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43 <http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>

SUB-SECTION 1.2.2. Status of PMSC as entity empowered to exercise state authority

The example of PMSC acting in the capacity of a de jure or de facto state organ exists, however, may not be treated as an usual example of cooperation between state and PMSCs. Much more spread type of cooperation is performed under terms of the contract that empowers PMSC to act on behalf of the state for performing different tasks normally governmental nature.

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.¹⁴ For this reason, there are two elements to be exercised for attribution of the PMSC conduct to a state: (i) what is “law” that empowers the PMSC and (ii) what is exercising of governmental authority?

As to the “law” that empowers the PMSC to exercise governmental authority nowadays, jurisprudence does not give the precise criteria or definition on this subject. However, we may presume that internal state legislation including bylaws definitely is in the scope of “law” within the meaning of Article 5 of ARSIWA. The issue occurs in cases where the legislation concerning PMSC is absent. Some experts state that “according to the jurisprudence of international courts and tribunals, the factual exercise of governmental authority is decisive, not the mode of its empowerment. The ICJ consequently held that a State is responsible for any case of governmental authority exercised ‘on its behalf’”¹⁵ others state that “this provision [ARSIWA article 5] envisages only the case where the individual is empowered by internal law to exercise governmental authority”.

I do support the first position for the following reasons:

¹⁴ International Law Commission. "Draft articles on Responsibility of States for internationally wrongful acts." *Report of the International Law Commission on the Work of Its Fifty-third Session* (2001).

¹⁵ Kees, Alexander. "Responsibility of States for Private Actors." *MPEPIL* (2011). <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1092>

a. The second position may resolve in “equivalent to giving the State the possibility of determining the extent of its responsibility itself on the international level; domestic law would provide States with a way out of responsibility”.¹⁶

b. The nature of enforcement other articles regarding attribution of different persons conduct to state considers internal law as factual links between states and other persons, but not the formal enactment of some regulations.

c. The absence of legislation regarding empowerment of PMSC to exercise governmental activities shall lead to the contract as the last resort for proving the existence of “law”. The nature of that contract is even more arguable since states have not agreed upon its status during the Montreux document development.

The threshold for meeting the requirements of de facto state organ is high and requires specific criterion to be met - the complete dependence from the state. However, the empowerment to exercise governmental authority has a lower threshold, since “[private entity] may not strictly being agents or organs of that State, belong nevertheless to public entities empowered within its domestic legal order to exercise certain elements of the government authority”.¹⁷ This status of PMSC empowered to exercise state authority is in the same manner as the status of the organ of the state proves the existence of a factual link between state and hired PMSC.

SUB-SECTION 1.2.3. Status of PMSC as directly controlled by a state

Though the case of consideration of PMSCs as a state organ is very arguable and the issue of empowerment is not clear enough and may not appear in many cases, the attribution of PMSCs conduct to a state may be proved under terms of control executed

¹⁶ Momtaz, Djamchid. "Attribution of conduct to the state: State organs and entities empowered to exercise elements of governmental authority." *The Law of International Responsibility* (2010): 237.
<http://opil.ouplaw.com/view/10.1093/law/9780199296972.001.0001/law-9780199296972-chapter-19#law-9780199296972-note-935>

¹⁷ Separate Opinion of Judge Ago Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, ICJ Reports 1986, p 187-188 (para 15)

over PMSC by a state. Such reasons are prescribed by ARSIWA under article 8, that states “the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is, in fact, acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”.¹⁸

The threshold for proving the control is much less than in case of PMSC as a state organ, however, requires a number of certain conditions to be met. The second issue of attributing the conduct of PMSC to a state is a question of distinguishing between “effective” and “overall” control of the state towards the private entity. The test adopted by ECHR in *Loizidou Case* and *Catan and others v Moldova and Russia* is not a relative test for the question of attribution of PMSCs conduct to a state since its aim was to determine the jurisdiction of a state but not the attribution.¹⁹

At first, I would like to describe the difference between overall and effective control. The difference between effective and overall control is as follows:

a. Different jurisdictional appliance. The test of effective control was used by the International Court of Justice in *Nicaragua case*.²⁰ The test of overall control was used by International Criminal Tribunal for former Yugoslavia in particular in *Tadic case*. Thus, the goals of the proceedings differ: in the first case the goal was in proving the absence or presence of state responsibility for internationally wrongful act; in the second case – proving the criminal liability of the individual.

b. The effective control test requires a higher standard of proof for attribution, then the overall control test. In particular, the effective control test, among other criteria specifies the control over a specific conduct, in comparison, the overall control test requires

¹⁸ International Law Commission. "Draft articles on Responsibility of States for internationally wrongful acts." *Report of the International Law Commission on the Work of Its Fifty-third Session* (2001).

¹⁹ Palchetti, Paolo. "De facto organs of a state." *Maxplanck encyclopedia of public international law* 2 (2012): 1048-1052. http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e_1394?rskey=J8Bla6&result=1&prd=OPIL

²⁰ Ortega, Elena Laura Alvarez. "The attribution of international responsibility to a State for conduct of private individuals within the territory of another State." *InDret* 1 (2015). http://www.indret.com/pdf/1116_es.pdf

the control over the entity in general but not the specific conduct.

c. The effective control test is a test for determining the attribution of private entity conduct to a state in light of state responsibility. The test of overall control applies in cases of personal criminal responsibility in cases governed by International Humanitarian Law and Rome Statute.

With this regard, I would like to bring the light to the question of determining which test is to be used for consideration of attribution issue and determine the status of PMSC.

First of all, the ICJ had made a statement in Bosnia case, that the overall control test “has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility”.²¹ Moreover, the test of overall control in concept was applied in order to determine whether certain military units operating within one State may be attributed to another State so as to qualify a conflict as international in terms of the Statute of the International Criminal Tribunal for the Former Yugoslavia.²²

Secondly, while taking into account the issue of different types of responsibilities the test of effective control is to be applied when considering the attribution of private entity conduct in light of state responsibility.

Thirdly, the overall control is prima facie proven in cases of hiring PMSC by a state, since the contract itself regulates the scope of services provided by PMSC, the amount of personnel and their means to provide services, territory where the services are provided and the entities to whom they are provided, thus the threshold of overall control is already reached. Therefore, I support the concept that the overall control test should be applied in cases of personal criminal liability of a responsible person, but the question of state responsibility must be determined under effective control test. Thus, the conduct of a

²¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43 <http://www.icj-cij.org/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>

²² Kees, Alexander. "Responsibility of States for Private Actors." *MPEPIL* (2011).

<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1092>

PMSC hired by state may be attributable to the mentioned state in case the PMSC is acting on in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

SECTION 1.3. Regulations of international law towards the status of private military companies' employees

The status of PMSC employee is the one of the most relevant issues to be defined for determination of the PMSC status under international law since, PMSC operates through their employees and the conduct of the employee shall define the case by case in causing the loss or obtaining the different statuses under international applicable law. Thus Section 1.3. is dedicated to several possible statuses of a person during international armed conflict.

SUB-SECTION 1.3.1. Mercenary as a status of PMSC employee

While defining the status of a PMSCs employee, at first glance, the most relevant association with mercenaries comes to mind. The definition of mercenaries and the status of mercenaries is described in the range of international legal documents:

- a. Additional Protocol to the Geneva conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts, of 8th June 1977 (hereinafter - Geneva Protocol I).
- b. International Convention against the Recruitment, Use, Financing and Training of Mercenaries, of 4th December 1989 (hereinafter - International Mercenaries Convention).
- c. OAU Convention for the Elimination of Mercenaryism in Africa of 3rd July 1977 (hereinafter - African Mercenary Convention).

Except the abovementioned instruments, the customary international law is also applicable. For the purpose of codifying, searching for trends in international law and reporting on the usage of mercenaries, the United Nations Commission on Human Rights

appointed the Special Rapporteur on Mercenaries by its Resolution 1987/16.²³ Following that decision and the satisfying work of the Special rapporteur, the special U.N. Working Group on Mercenaries with the mandate to continue to monitor mercenary activity and the use of PMCs was created by Resolution 2005/2.²⁴

General understanding is to be prescribed by abovementioned hard international law. The Geneva Protocol I is the most widely spread document, that defines the status of mercenary. A person is a mercenary in case:

- a. of specially recruitment locally or abroad in order to fight in an armed conflict;
- b. does, in fact, take a direct part in the hostilities;
- c. is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- d. is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- e. is not a member of the armed forces of a Party to the conflict; and
- f. has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.²⁵

On one hand, these criteria are applied only during the situation of applying Geneva Convention in general owed to Article 2 and Article 3 of the Geneva convention. This means that the existence of mercenary status under Geneva Protocol 1 is only possible

²³ UN, General Assembly. "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 (A/62/150)." *New York: UN* (2007).

²⁴ UN Commission on Human Rights, Human Rights Resolution 2005/2: The Use of Mercenaries As a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination, 7 April 2005, E/CN.4/RES/2005/2, available at: <http://www.refworld.org/docid/45377c39c.html> [accessed 26 December 2017]

²⁵ Geneva Protocol, I. (1977). Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts..

during the international armed conflict.²⁶ And the status of mercenaries in non-international conflict does not even occur.²⁷

On the other hand, not only the participation in international armed conflict is needed, the criteria stipulated by Geneva Protocol I are cumulative criteria. Thus, the person must meet all six criteria at once, to be regarded as a mercenary. Being the norm of customary international law, the article 47 of the Geneva Protocol I is unworkable and hardly enforceable, since the person must meet all six criteria to be treated as mercenary.²⁸

Even in cases, when the person is in fact a mercenary, the mercenaryism as such is not prohibited by Geneva Conventions or international humanitarian law in whole.²⁹

Second international instrument, regarding mercenaries is the Mercenary convention. Unlike African Mercenary Convention that has same status with slightly changed wording, the Mercenaries convention differs from the Geneva Protocol I and changes the focus of the understanding of the mercenary and broadens the scope of the mercenary status.

The Article of the Mercenary Convention defines a mercenary similarly to the Geneva Protocol I, however adds the other criteria under which, the mercenary:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

a. Overthrowing a Government or otherwise undermining the constitutional order of a State; or

²⁶ Nijhoff, Martinus. "Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field." *Conventions and Declarations*. Springer Netherlands, 1915. 11-16. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument>

²⁷ Lachenmann, Frauke, and Rüdiger Wolfrum, eds. *The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law*. Oxford University Press, 2016. <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e329?rskey=IGGGMU&result=1&prd=OPIL>

²⁸ Cameron, Lindsey. "Private military companies: their status under international humanitarian law and its impact on their regulation." *International Review of the Red Cross* 88.863 (2006).

²⁹ Cameron, Lindsey. "Private military companies: their status under international humanitarian law and its impact on their regulation." *International Review of the Red Cross* 88.863 (2006).

- b. Undermining the territorial integrity of a State;³⁰

This definition was brought out during post-colonial conflict in Africa and the parties to this convention had specific circumstances in mind when they drew up the extensive criteria for a mercenary, particularly - the usage of mercenaries for coup d'états or rebellions.³¹ Nevertheless, both African Mercenary Convention and Mercenary Convention are not widely spread since there are 30 and 32 parties to these conventions.

With regard to definitions and criteria (especially para (a) of article 47 of the Geneva Protocol I) of the person to be defined as a mercenary, the services to be provided by PMSCs are the Armed services: both combat offensive and defensive. These services are provided at the actual area of operation – tactical battlefield. Due to these two reasons, the criteria prescribed by para (a), (b), (e), (f) of part 2 of Article 47 of Geneva Protocol I are met. However, providing these kind of services does not directly lead to the obtaining of the mercenary status, since the employee must satisfy the following personal criteria that do not depend on state contracting the PMSC or PMSC itself:

- a. the special origins of PMSCs employees is required;
- b. motivation of the PMSCs employees allegedly deemed as mercenary should be defined on case by case basis;

SUB-SECTION 1.3.2. Spy as a status of PMSC employee

The second status that may be imposed on PMSC employee is a status of a spy since, collecting of information, intelligence activities and gathering of information is a substantial part of services Provided by PMSC. Unlike the mercenary which is a narrowly tailored legal term, the status of a spy is not defined under the international humanitarian law. However, such status is regulated by Geneva Conventions and Hauge regulations in a manner that describes the activities to conducted by a person for obtaining the status of a spy and those features that exclude a person being considered as a spy. Thus, there are

³⁰ ORGANISATION, O. A. U. (2008). OAU Convention for the Elimination of Mercenarism in Africa.

³¹ Herbst, Jeffrey. "The regulation of private security forces." *The Privatisation of Security in Africa, South Africa, South African Institute of International Affairs* (1999): 115..

certain provisions to be met by a person to be regarded as a spy:

a. to collect or acting in attempt to collect information of military value in zone of adversary;³²

The provisions of both the Geneva Conventions and Hauge regulations do not distinguish the attempts to collect information and collection of the information. The information of military value is any information that may create military advantage while the military character is not sufficient.

b. to act in a way under disguise and secretly;

The Geneva Conventions and Hauge regulations refer to the uniform, however the interpretation of the uniform is broader and includes the any distinguishing signes that do inform that activity is not secretly conducted.

These provisions in modern warfare however create a little value on the subject of colleting information secretly since they were developed before new means of intelligence were created. Thus, creating a broad field for interpretation of the abovementioned activities with the usage of modern equipment and means of cyber warfare in a way that intelligence by modern means constitutes an act of espionage.

The issue at hand is that the status of PMSCs employee before conducting the intelligence activity is crucial for defining his rights in case of being captured.

The status of a spy applies to all persons who fall under the abovementioned conditions, though in a different way. In this manner, the combatant who conducts gathering of information under condition of espionage is immune for previous conducts in case of rejoining the forces he belongs to before being captured and preserves all immunities and privileges as a combatant.³³ In case the soldier is being captured during the

³² 20. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, art. 29 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=090BE405E194CECBC12563CD005167C8>

³³ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, art. 29 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=090BE405E194CECBC12563CD005167C8>

espionage activities, he will lose all privileges of combatant (described in sub-section 1.3.4.). On the contrary, the civilian does not possess any immunities after joining the forces, that makes a civilian liable for acts of espionage any time after conducting them.

Referring back to the services provided by PMSCs, the PMSC's employees might be regarded as spies only in case the PMSC provide non-combat offensive operational support services through means of recon, data gathering and analysis with particular intelligence means by fieldwork at the actual area of operations.

SUB-SECTION 1.3.3. Civilian and persons who accompany the armed forces (PAAF) as a status of PMSC employee

Given the fact that the nature of PMSCs activities in most cases provide working together with governmental forces of different countries, the possibility of applying the status of person who accompany the armed forces should be taken into account. For this reason, let me describe the characteristic of this status, the criteria to be met and the consequences of obtaining this status by PMSC employee.

The PAAF status is not prescribed directly, however, is derived from Geneva Convention relative to the treatment of prisoners of war of 12 August 1949 (hereinafter - Geneva Convention III), particularly by Article 4. PAAF is one of the category of civil persons who enjoy the status of prisoners of war in case of falling into the power of the enemy. The Paragraph (4) of Part A of Article 4 of the Geneva Convention III states: "person who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model".³⁴

ECBC12563CD005167C8

³⁴ Pictet, Jean S., ed. *The Geneva Conventions of 12 August 1949: Commentary. Geneva Convention Relative to the Treatment of Prisoners of War; by Jean de Preux; with Contributions by Frédéric Siordet [and Others]; Translated Into English from the Original French by AP de Heney.* International

Analysis of this provisions gives the following specific cumulative criteria which are to be met by the PMSC employee to be granted the status of PAAF and enjoy the prisoner of war status:

- a. not being a member of accompanied armed forces;
- b. provide different services for accompanied armed forces aimed at welfare of these armed forces;
- c. the authorization from the accompanied armed forces, with an identity card;

Obtaining the status of PAAF gives a person right to:

- a. neither to be treated as a member of armed forces, nor as combatant;
- b. be treated as a prisoner of war in case of falling in power of the adversary;³⁵

However, obtaining the status of PAAF by PMSCs employee may influence the situation when status of prisoner of war is discussed. The analysis of Article 50 of the Geneva Protocol I shows that PAAF is a civilian that enjoys the status of prisoner of war in case of being captured by adversary however, remains a civilian in the meaning of distinguish between combatants and non-combatants. Thus, taking into account Article 52 of Geneva Protocol I and the abovementioned, PAAF is protected against attacks.

On one hand, meeting of PAAF criteria is commonly in many cases for PMSCs employees contracted to provide services to armed forces. On the other hand, treating the PMSCs employees solely as civilians even those accompanying armed forces, may compromise the protection of the civil population during international armed conflict by causing confusion to the adversary.

The PAAF protection of a civilian is not a permanent and may be lost. As to first argument, Article 51 (3) of the Geneva Protocol I states that a civilian loses a protection against attack in case of direct participation in hostilities.

Committee of the Red Cross, 1960 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=ECA76FA4DAE5B32EC12563CD00425040>

³⁵ Perrin, Benjamin, ed. *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*. UBC Press, 2012.

Sometimes PMSCs activities fall in the scope of conducting offensive or even defensive operations that may result in losing protection of a civilian. For proving this position there are three arguments:

- a. Unclear definition of direct participation in hostilities – within the meaning of two elements: “harm” and “direct participation”;
- b. Belligerent nexus between a civilian conduct and harm caused;
- c. Possibility of remaining the status of civilian protected of attack after participation in hostilities;

Nevertheless, this norm is a commonly accepted rule, the definition of direct participation is still unclear. In any event, the term “direct participation” is to be defined through interpretation of “hostilities” and “direct participation”. Giving a broader interpretation with regard to the usage of means of modern warfare the participation in hostilities for PMSCs may be frequently imposed.

As to the first argument, the Commentary on Geneva Protocol I states that “direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces”.³⁶ In any event, direct participation in hostilities is taking action that are aimed at reducing one of the parties' military capacity. The ICRC publication states that “examples of causing military harm to another party include capturing, wounding or killing military personnel; damaging military objects; or restricting or disturbing military deployment, logistics and communication, for example through sabotage, erecting road blocks or interrupting the power supply of radar stations; interfering electronically with military computer networks (computer network attacks) and transmitting tactical targeting intelligence for a specific attack are also examples”.³⁷ In support of this thesis, Inter-American Commission on Human Rights stated

³⁶ Pilloud, Claude, et al., eds. *Commentary on the additional protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Martinus Nijhoff Publishers, 1987. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5E5142B6BA102B45C12563CD00434741>

³⁷ 25. “Direct participation in hostilities: questions & answers.” ICRC, 2 June 2009,

that direct participation in hostilities means “acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and materiel”.³⁸

The specified usage of the wording “direct participation” means that in case of any other participation than “direct” the civilians may still enjoy the protection against the attack. It worth saying that “any civilian conduct having a belligerent nexus and resulting in the required threshold of harm qualifies as participation in hostilities, that participation would be regarded as direct or indirect depending on whether the required harm is caused directly or indirectly”.³⁹ That is to say, the threshold of “direct” must be viewed through overall effect of a civilian conduct, its integration and consistency with military efforts. Therefore, in case if the civilian conduct is coordinated by military command or is integrated within the military plan the execution of which is reasonably expected to cause harm to the adversary, such a conduct most probably will resolve in “direct” participation.

As to the second, argument – the belligerent nexus issue – the “harm” caused even “directly” must meet the requirement of being “specifically designed to do so in support of a party to an armed conflict and to the detriment of another”.⁴⁰ Therefore, not all of the actions performed by a civilian that “causes harm directly” may be treated as the “direct participation in hostilities”. The action that cause harm directly to the adversary’s military capacity, for example, defensive actions of armed civilian against the attack is more likely to be aimed at preserving the civilian’s health and life in course of unlawful attack rather than support the other party to a conflict. However, the such defense will be treated as self-defense (lacking the belligerent nexus) only in cases the adversary’s attack is unlawful, therefore the defense of a civilian in course of protection of legitimate military targets will

www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm

³⁸ 26. Inter-American Commission on Human Rights, Third report on human rights in Colombia, 26 February 1999

³⁹ Melzer, Nils. "Civilian Participation in Armed Conflict." (2010).

<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1674?rskey=uhwAK&result=1&prd=OPIL>

⁴⁰ ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Geneva, May 2009; available at <http://www.icrc.org>

meet the criteria of belligerent nexus.

As to the third argument, the civilian will not enjoy the protection against attack while participating directly in hostilities. However, the first point is that duration of hostilities differs and does not have any defined time framework. That is to say, the hostilities, as to the Commentary on Geneva Protocol I “includes [not only combat, but] preparations for combat and the return from combat; [civilian] not only making use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon”.⁴¹

Therefore, the following interim conclusion can be made: direct participation in hostilities can be applicable only in cases PMSCs operate in the Actual area of the operation, thus all three types of Services may result in direct participation in hostilities that leads to the forfeiture of the protection that civilian enjoys. Taking this issue into consideration, the services themselves must be analyzed for the hostility aspect as a core aspect defining the existence of the protection and its’ forfeiture.

1) As to the Technical support services that are provided in the Actual area of the operation, they are aimed on strengthening of military capabilities of the contracting party by means ongoing MRO of the military equipment and optimizing the communication between the party’s units. The Technical support services may and will lead to obtaining an advantage of the contracting party before the adversary, however this advantage is gained through non-offensive, non-combat and non- belligerent methods, therefore is not aimed at causing harm or decreasing of military capacity of the contracting state’s adversary.

2) As to the Operational support services provided at the Actual area of the operations, loosing a protection depends on two issues whether the services are aimed at causing harm to military infrastructure and capability of an adversary or increasing military

⁴¹ Pilloud, Claude, et al., eds. *Commentary on the additional protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Martinus Nijhoff Publishers, 1987 <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5E5142B6BA102B45C12563CD00434741>

capabilities of a contracting state and what is more important, whether the services meet the threshold of “direct” participation.

a. Planning, advising and consulting performed by PMSCs’ personnel most likely will resolve into forfeiture of the protection of that personnel in cases whereas these services are integrated and consistent with overall military plan of the operation, meaning that the provision of these services is included into military decision making process with a decisive character. This is supported by the fact that participation in the hostilities includes not only usage of weapons against adversary, but the actions performed without weapons that are of their nature or purpose, intended to cause actual harm to enemy personnel and materiel. In case the services do not have the decisive character, they will not meet the criteria of the “direct” participation, since the consultant lacks authority for the actions to be performed, thus having an indirect character and lacks the belligerent nexus. Even in case when the plan provided by the PMSC is executed, the execution of the plan needs to be ordered by the military personnel that is authorized.

b. As to intelligence support or operations in cyberspace, demining and demilitarization (performed during IAC) the protection is lost in cases that the PMSCs’ activities cause actual harm to military infrastructure and do decrease military capacity of the adversary.

c. As to other services, both of offensive and defensive characters, they do not meet the threshold of a “hostility” or “direct” participation.

3) As to the Armed services prima facie they all meet the criteria of “direct” participation in hostilities, since all services are carried out with weapons and are aimed whether to decrease adversary’s military capability by means of armed attack, or to preserve a contracting party’s military capabilities by means of armed protection. Nevertheless, both offensive and defensive Armed services do meet the threshold of harm and “direct” participation, the third element of belligerent nexus is required. Therefore, the PMSCs’ employees will most likely lose the protection against attack where the Armed defensive services are aimed at preserving military objects of the contracting party,

however there will be no forfeiture of the protection in case the defensive services are carried out with the aim of defending the civil objects or civilians of the contracting party. As to Armed offensive services, the PMSCs' employees that carry them out will lose the protection in any event whether by means of civilian directly participating in hostilities or by applying a combatant status.

SUB-SECTION 1.3.4. Combatant as a status of PMSC employee

The status of combatant is prescribed by Article 43 of the Geneva Protocol I. The members of the armed forces of the party to the conflict are regarded as combatants except for chaplains and medical personnel. Combatant status provides entitled persons with a right to enjoy the prisoner of war status in case of being captured by an adversary and gives right to participate directly in hostilities. The status of combatant also makes a person with this status a legitimate aim on the battlefield and imposes immunity prima facie over participation in hostilities.

The status of a combatant for PMSCs employee is an essential for an understanding of three aspects:

- a. Whether the PMSCs employee is a legitimate aim;
- b. Whether the PMSCs employee has a right to lawfully participate in hostilities;
- c. Whether the PMSCs employee may be accused of participation in hostilities;
- d. Whether the PMSCs may be entitled to POW status if captured by the adversary.

The following criteria/conditions of combatant status within the scope of armed forces member under Article 43 of the Geneva Protocol I may be derived:

- The person is under command responsible to that party for the conduct of its subordinates;
- The person is subjected to an internal disciplinary system that shall enforce compliance with the international humanitarian law.

With this regard, the understanding of incorporation of PMSCs into armed forces is essential. Usually, PMSCs are not the part of any meaning of the armed forces, therefore

the employees lacking the indispensable precondition for combatant status.⁴² The whole process of outsourcing military services and privatization of war aims to dismiss the private contractors from the chain of command and therefore out of military subordination system, thus to reduce the responsibility of military command for wrongful acts. Nevertheless, it is a question of internal law of a state whether the contract between the state and PMSC is enough to meet the incorporation threshold.

However, there is a possibility of incorporation of the paramilitary organization into armed forces or militia connected to be entitled to combatant status⁴³. With this regard, the overall incorporation should be considered within the framework of following incorporation criteria:

- a. being commanded by a person responsible for his subordinates,
- b. having a fixed distinctive sign recognizable at a distance,
- c. carrying arms openly, and
- d. of conducting their operations in accordance with the laws and customs of war.⁴⁴

The Geneva Conventions are silent on the type of incorporation of any group into armed forces. Thus, this question is to be considered under domestic law of contracting state, provided it is understood for an adversary who belongs to the armed forces of a contracting state. Due to this fact, the status of combatant is also depended on the terms and conditions of hiring the PMSC by the state. The examples of these conditions are as following:

- a. providing services to fight for a state that is a party to an armed conflict – may

⁴² Melzer, Nils. "Civilian Participation in Armed Conflict." (2010).
<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1674?rskey=QkWPot&result=1&prd=OPIL>

⁴³ Lehnardt, Chia. "Private Military Companies" (2011)
<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e2091>

⁴⁴ Melzer, Nils. "Civilian Participation in Armed Conflict." (2010).
<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1674?rskey=QkWPot&result=1&prd=OPIL>

lead to granting of status of de facto combatant, thus making PMSCs' employees a legitimate military target, immunity from responsibility for direct participation in hostilities, entitlement of POW status if captured by the adversary;

b. providing services others than may resolve in direct participation in hostilities – will not lead to the status of combatant, thus the PMSCs' enjoys the status of civilian or PAAF with no right to directly participate in hostilities, not being a legitimate military target and not entitled of POW status if captured by the adversary, except cases of being PAAF.

By differentiating the objectives of a state at a phase of hiring PMSC, the status of each employee of hired PMSC differs. By meeting the first condition the employee obtains the status of combatant in case of every incorporation criterion described above is preserved. By contrast the second example of the conditions provides the PMSC employee with no status of combatant. Moreover, it is up to state to decide, whether the person is entitled to fight on its' behalf, therefore granting the status of PAAF to PMSCs' employees will result in lack of meeting criteria for combatant status, since PAAF do not have a right to participate in hostilities.

Therefore, the services provided by PMSCs to a contracting state are essential in granting the combatant status to PMSCs' employees in the following manner:

1. Technical services are non-combat in nature, therefore the contracted personnel will not meet the criteria of being hired for fighting. Thus, the PMSCs' employees that provide Technical services may not be treated as combatants.

2. Operational support services are of other nature. The planning and consulting services e.g. are one of the services types that are not expected to use of weapons while carried out. However, the employee that provides that services directly may be granted a combatant status in cases of incorporation into military decision making process with a decisive right while preserving all of incorporation criteria. Similarly, the other operational support services preclude the combatant status, while no PAAF authorization is issued and incorporation criteria are met.

3. As to Armed services, mostly the combatant status entitlement will depend on the following issues in the following way:

a. The Armed offensive services are contracted for actual engaging the adversary with weapons and lethal force. In this case, the contracting state explicitly hires PMSCs' to fight in the armed conflict. Therefore, the PMSCs' employees are entitled to combatant status provided at least the incorporation criteria are met, the mercenary status is not applicable, and the adversary is informed that these PMSCs' employees are a part of the armed forces or militia under paragraph 3 of Article 43 of the Geneva Protocol I. In case these three characteristics of contracting are not met, the PMSCs' employees may not be considered as combatants but are considered as civilians.

b. The Armed defensive services are contracted by military or civil authorities. In cases, the PMSCs are contracted by civil authorities for Armed defensive services towards civil infrastructure, the PMSCs' employees will not gain the status of combatants due to the lack meeting the incorporation criteria however, being contracted for direct participation in hostilities. In cases the PMSCs are contracted by military authority for providing Armed defensive services, the same rules applicable to Armed offensive services apply.

As to the attribution issue and the status of PMSC under international law the following correlation should imply:

1. The PMSC is considered a state organ whenever the PMSC is established by the state, even through proxy entities, however, remains complete and full dependence on the state in course of the operations. The provision of Armed an Operational support services (in cases of incorporation into military decision making process with decisive rights) may result in this situation, since the incorporation criteria will be met. Therefore, the uncomplete dependence will appear in cases of contracting by other than state entities or not meeting the incorporation criteria which surely will not be met be PMSC providing Technical services.

2. The PMSC is to be considered as empowered to perform governmental

functions in cases where the precised regulations towards PMSC exists that provide possibility to empower the PMSC to perform governmental functions by means of contract. Therefore, the contract may be treated as part of national legislation. As to the functions, performed by the PMSCs they must meet the criteria of governmental functions, thus to personnel carries out Operational support and Armed services being a part of armed forces and combatants respectively.

3. The PMSC is considered to be directly controlled by a state whenever it the effective control test is passed. The mere existence of the contract between the state and the PMSC does not meet the criteria of effective control. However, in cases of provision of Armed services and operational support services, the PMSCs' personnel may be included into the chain of command, thus to carry out the percised tasks. Therefore, in cases the PMSCs' personnel may be granted the status of the combatants, the effective control test criteria will be met.

CHAPTER 2. REGULATIVE STANDARDS AND GOOD PRACTICES TOWARDS REGULATION OF PRIVATE MILITARY COMPANIES

SECTION 2.1. Obligations of state prescribed by international law toward PMSC activities

With regard to international law that regulates activities of PMSC, I would like to cover two issues. Firstly, I would like to shape out positive and negative obligations of a state to regulate warfare-related activities, specifically towards PMSCs. Secondly, the analysis of good practices and codes of conduct as the supplementary sources of international law imposing obligations on PMSCs and states shall be made. These two elements will enlighten the state obligations towards regulations of PMSC and define the status of PMSCs and their employees acting in accordance with these regulations.

For the first issue, the question lies in the scope of general positive obligations of a state with regard to human rights law and international humanitarian law.

According to Geneva Conventions Article 1, the obligation to “respect and to ensure respect for the present Convention in all circumstances”⁴⁵ is imposed upon states as a norm of customary international law⁴⁶. Unlike other norms of international humanitarian law prescribed by Geneva Conventions, this specific obligation is effective at any time - during international, non-international armed conflict and during peacetime⁴⁷, since a specific wording of Article 1 same to all Geneva Conventions that refers to “High Contracting Parties”.

Considering that obligation to “respect” international humanitarian law by the state is undisputable, the existence of such obligations towards PMSCs is not that clear. This obligation is indirect since it is imposed on PMSCs through the positive obligation of a

⁴⁵ Nijhoff, Martinus. "Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field." *Conventions and Declarations*. Springer Netherlands, 1915. 11-16. <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AF A66200C1257F7D00367DBD>

⁴⁶ Military and Paramilitary Activities in and against Nicaragua case, Merits, Judgment, 1986, para. 220, and ICRC Study on Customary International Humanitarian Law (2005), Rule 144.

⁴⁷ ICRC Study on Customary International Humanitarian Law (2005), Rule 139

state to “ensure respect” to international humanitarian law by different means in the framework of all actors acting on behalf of a state, that is the conduct of such actor is attributable under different conditions to a state. Moreover, such positive obligation to “ensure respect” imposed on state towards the whole population over which a High Contracting Party exercises authority.⁴⁸

The obligation to “ensure respect” is to be performed in peacetime⁴⁹ and consist of different elements that are prescribed by Geneva conventions and additional protocols:

- a. To instruct armed forces on application of international humanitarian law and to educate military personnel in these terms;⁵⁰
- b. To adopt relevant internal legislation aimed at application of international humanitarian law;⁵¹
- c. To search for, prosecute or extradite alleged perpetrators of grave breaches ‘regardless of their nationality’ and to enact any necessary legislation in this respect;⁵²

⁴⁸ 34. ICRC Study on Customary International Humanitarian Law (2005), Rule 139

⁴⁹ Nijhoff, Martinus. "Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field." Conventions and Declarations. Springer Netherlands, 1915. 11-16.

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⁵⁰ 3 6. The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, Geneva, art. 47; The Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, Geneva, art. 48; The Third Geneva Convention, relative to the treatment of prisoners of war, 1929, Geneva, art. 127; The Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, Geneva, art. 144. 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. 83

⁵¹ The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, Geneva, art. 48; The Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, Geneva, art. 49; The Third Geneva Convention, relative to the treatment of prisoners of war, 1929, Geneva, art. 128; The Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, Geneva, art. 145. 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. 84.

⁵² 38. The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, Geneva, art. 49; The Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, Geneva, art. 50; The Third Geneva Convention, relative to the treatment of prisoners of war, 1929, Geneva, art. 129; The Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, Geneva, art. 146. 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. 85.

- d. To protect from abuses the emblem of ICRC;⁵³

However, there are also negative obligations not prescribed directly by Geneva Conventions and Additional Protocols, however, derived from them and supported by ICJ jurisprudence. These obligations are compulsory in terms of international customary law:

- a. To refrain from actions of encouraging the violation of International humanitarian law;⁵⁴
- b. Not to aid or support by different means (financial, advisory, logistical, planning or political) in committing internationally wrongful acts by other states or non-state actors;⁵⁵
- c. Not to consider as the legal conducts performed in violation of international humanitarian law;⁵⁶

These positive and negative obligations are the basic framework of how a state should imply PMSC policies. Insofar the framework may be developed through principles of state-business relations in general, specifically under the Protect, Respect and Remedy Framework as Guiding principles on business and human rights of UN. These principles were endorsed by Human Rights Council in its resolution 17/4 of 16 June 2011. The aim of this principles is to prevent the abuses of human rights and mitigate risks of such abuses committed by business structures. The principles propose the set of actions that should be taken by the state to achieve the aim.

⁵³ The First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, Geneva, art. 54; The Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949, Geneva, art. 45. 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. 18. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005, art. 6..

⁵⁴ Case, Nicaragua. "Case concerning military and paramilitary activities in and against Nicaragua." Judgement on the Merits (1986), para. 220

⁵⁵ International Law Commission. "Draft articles on Responsibility of States for internationally wrongful acts." Report of the International Law Commission on the Work of Its Fifty-third Session (2001). commentary on Article 16, para. 5.

⁵⁶ Wedgwood, Ruth. "The ICJ advisory opinion on the Israeli security fence and the limits of self-defense." American Journal of International Law 99.1 (2005): 52-61.para. 15

In any event, the positive obligation of a state regarding regulation of PMSC, in cases of attribution of the PMSCs conduct to such state are as follows:

- a. providing access to effective remedies which can include providing victims access to judicial or administrative mechanisms that are expeditious, fair, inexpensive, and accessible;⁵⁷
- b. ensuring those responsible make adequate restitution or otherwise support victims of the worst abuse with compensation themselves;⁵⁸ and
- c. providing victims access to material, medical, psychological, and social assistance;⁵⁹
- d. where the violation in question involved is a grave breach of the Geneva Convention, there is, additionally, a state obligation to provide a penal sanction.⁶⁰

Taking into consideration the process of privatization of war, the global community takes efforts to control and regulate the market of PMSCs. These efforts can be discussed in the aspect of international non-compulsory documents and supplementary law or standards. In this Section, I shall discuss the status of PMSC working under or in accordance with such instruments.

The Montreux Document is the result of an initiative launched jointly by Switzerland and the International Committee of the Red Cross. The drafting of the Montreux Document was based on the work of four intergovernmental meetings which took place between January 2006 and September 2009 with 17 governments participating.⁶¹

⁵⁷ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Resolution A/RES/60/147, 16 December 2005

⁵⁸ Fattah, Ezzat A. "The United Nations declaration of basic principles of justice for victims of crime and abuse of power: A constructive critique." *Towards a critical victimology*. Palgrave Macmillan UK, 1992. 401-424.

⁵⁹ 45. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power New York, 29 November 1985, A/RES/40/34, Principle 14

⁶⁰ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (Cambridge: Cambridge University Press) ('Customary Law Study'), vol I, Rules, Rule 4, 14.

⁶¹ *The Montreux Document*, www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/montreux-

Nowadays 54 states and 3 International organizations (the European Union, Organization for Security and Co-operation in Europe, North Atlantic Treaty Organization) are participants to the Montreux Document.⁶²

Given the extent of use of the Montreux Document in the world, it is the largest and most narrowly tailored legal document on PMSCs activities. Nevertheless, it provides little information regarding the status of PMSCs personnel, such status may be derived through means of service-based approach from the provisions of the document provided that the states and PMSCs act accordingly. Though, it should be stated and emphasized that this document is not a legally binding instrument and does not affect existing obligations of States under customary international law or under international agreements to which they are parties and does not impose any new obligations.⁶³ The Montreux Document is the codification and remainder of states' obligations under international humanitarian law and human rights law.

While Montreux Document does not develop any new obligations for the parties, the document brings consensus between all parties that international law is applicable to PMSCs or rather to their activities. But what is more important Montreux Document provides all essential aspects of interpretation and applying international law to PMSCs and their personnel, managers and states.

The Preface states that Montreux document constitutes a mutual understanding of terms used in PMSCs activities. Thus, PMSCs are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of

[document.html](#)

⁶² Cockayne, James. "Regulating private military and security companies: The content, negotiation, weaknesses and promise of the Montreux Document." *Journal of Conflict & Security Law* 13.3 (2008): 401-428.

⁶³ UNGA 'The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies During Armed Conflict: Montreux, 17 September 2008' (6 October 2008) UN Doc A/63/467-S/2008/636, 7. PREFACE

weapons systems; prisoner detention; and advice to or training of local forces and security personnel.⁶⁴

It also refers to the other terms such as “Home States” as states of the nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the “Home State”.⁶⁵

The essential parts of these definitions are as follows:

- (i) that any entity performing the described activities is treated as PMSCs, while the name, form, and structure is not essential;
- (ii) the exhausted list of activities which are to be related to PMSCs activities (e.g. the manufacturer of military weapons is not the PMSC);
- (iii) the nationality of the PMSC is not fully relying on the place of incorporation but in addition to the place of management.

The other relevant definition is a Contracting state. The Montreux document prescribes, that Contracting states are States that directly contract for the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC.⁶⁶ As for the states where PMSCs operate, they are defined as Territorial states.

The aim of discussing the Montreux document in this paper is to define the status of PMSC in connection with Contracting state acting in accordance to this document and what legal issues will arise during the determination of this status.

The Montreux document addresses two main issues for States and PMSCs involved in contracting. Firstly, the Montreux document reflects obligations for all parties that are under international law. Secondly, it reflects the existing Good practices that are aimed at reduction of violation of international law within the activities of the PMSCs. Analysis of these two elements is relevant for the definition of a status of PMSC under these practices

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid

and risks assessment for states while hiring PMSCs.

The following obligations are imposed on the Contracting state while hiring the PMSC, which by the nature reflect positive obligations under international humanitarian law:

- to perform due-diligence with regard to contracting PMSC;
- to enact legislation that must determine the responsibility for violation of international humanitarian law and human rights law;
- to provide reparations for violations of international humanitarian law and human rights law caused by wrongful conduct of the personnel of PMSCs when such conduct is attributable to the Contracting States;⁶⁷

The Good practices regarding hiring PMSC influencing the status of such PMSCs are:

- to specifically define services that should be performed by PMSCs taking into account the possibility of direct participation in hostilities;
- To negotiate with territorial state rules regulating PMSCs and define status of PMSCs personnel.

The Good practices nevertheless do not describe the status or the relevant law to be applied to PMSC by Contracting state. Moreover, the status of PMSC and its employees is to be defined under terms of negotiations or other procedures with states involved in the process.

There are points to be mentioned:

- a. The Montreux document does not forbid the contracting state to allow direct participation in hostilities by PMSCs, however, this issue must be addressed by regulation of the Home state which decides whether these services may be exported.
- b. The status of PMSC and their personnel should be defined on case by case

⁶⁷ *The Montreux Document*, www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/montreux-document.html

basis between all involved parties;

c. The due-diligence question is put very strict on the parties involved;

d. The default status of PMSC personnel is civilians, however, is to be defined on case by case basis in terms of contract;

As to state obligations exist under different sources of law, the private military enacts self-regulation mechanism to prevent human rights abuses and violation of the international humanitarian law. The most relevant document in this regard is the International Code of Conduct for Private Security Service Providers (hereinafter - Code of Conduct). The process of developing the Code of conduct was launched by Switzerland government and brought together PMSCs and states including Australia, United Kingdom, and the USA. This document similarly to Montreux document is not the primary source of international law compulsory to states, however, brings value to the regulation of PMSCs activities and what is more important, concludes the mutual understanding of PMSCs that possess significant military and security resources.

The Code of conduct was signed by 708 PMSCs, 7 governments and 22 NGOs are the parties to the Code of conduct.⁶⁸

The Code of conduct was developed in light of Montreux Document, Respect, Protect, Remedy framework and implies obligations on PMSCs to support the rule of law, respect the human rights of all persons, and protect the interests of their clients. The Code of conduct imposes obligations on PMSCs to operate in accordance with the code by means of implementation of policies prescribed by this Code in internal instructions and serves as a founding instrument for a broader initiative to create better governance, compliance, and accountability.⁶⁹ Thus, this Code is compulsory to the signatory PMSCs.

The main provision of the Code of conduct that might influence the status of PMSCs during international armed conflict is prescribed by paragraph 31 that states

⁶⁸ *History | ICoCA - International Code of Conduct Association*, icoca.ch/en/history

⁶⁹ *The ICoC | ICoCA - International Code of Conduct Association*, icoca.ch/en/the_icoc#a-preamble

“Signatory [PMSCs] will require that their Personnel does not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life”.⁷⁰ As it was discussed above, the cases of use of force for self-defense or defense of others against the imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life is a right of a civilian during armed conflict.⁷¹

Nevertheless, these initiatives, and codes constitute mutual consent and understanding of obligations and responsibilities towards PMSCs activities they are not a part of the international hard law. The mere existence of these documents may not be treated prima facie as part of the international customary law since there is a lack of both state practice and opinio juris. Nevertheless, the adoption of practices by states whereas the pre-contraction due-diligence regarding compliance with abovementioned documents by the PMSCs is to be performed⁷², may contribute to the human rights protection, the mere absence of such practices in sssss international law is just not enough. The international armed conflict is the environment where obligations towards human rights are forgotten frequently. As it was stated by L. Cameron “people handling weapons in situations of armed conflict clearly need to be bound by more than a voluntary code of conduct”.⁷³

Taking into account all above mentioned, the status of PMSC personnel operating in full compliance with both Montreux document and Code of conduct may be defined in terms of civilian or person that accompanies armed forces in most cases. The statuses of

⁷⁰ *The ICoC | ICoCA - International Code of Conduct Association*,
icoca.ch/en/the_icoc#a-preamble

⁷¹ *The ICoC | ICoCA - International Code of Conduct Association*,
icoca.ch/en/the_icoc#a-preamble

⁷² Cockayne, James. "Regulating private military and security companies: The content, negotiation, weaknesses and promise of the Montreux Document." *Journal of Conflict & Security Law* 13.3 (2008): <http://opil.ouplaw.com/view/10.1093/law/9780199559695.001.0001/law-9780199559695-chapter-25?rskey=Cz4Ylo&result=3&prd=OPIL#law-9780199559695-chapter-25-note-154>

⁷³ L. Cameron, 'Private Military Companies: Their Status under International Humanitarian Law and its Impact on Their Regulation' 125

PMSC as state organs may not be applicable. The statuses of mercenary or spy of the PMSCs employee is not covered by the scope of the Montreux document or Code of conduct.

CHAPTER 3. NATIONAL LEGAL FRAMEWORK FOR PRIVATE MILITARY COMPANIES

SECTION 3.1. Regulation and control of private military companies in the USA: legislative dimension

The USA regulation on PMSC does not consist of a uniformed or codified act, but of numerous provisions of federal laws or bylaws acts. These chapter is devoted to analysis of de facto and de jure status of private military contractors hired by USA for providing services in international armed conflict zones. This Chapter describes USA PMSC regulation within scope of (i) general and specified regulations of contracting PMSC by DOD and DOS, thus to shape out the possible status for PMSCs personnel, (ii) the jurisdiction over conducts of PMSCs and their personnel and (iii) regulation on the use of force rules, thus to define most common status of PMSCs personnel in terms of international humanitarian law.

There is also the other position, that the requirements for contracting PMSCs in the USA e.g. are far more precise and more aimed against human rights abuses then any of the abovementioned documents impose.⁷⁴ Such position was stated by Eric Prince - the founder of PMSC - Blackwater international (nowadays Academy International).

As to General regulations of contracting, these regulations consist of laws enacted by United States Congress. The USA regulations of contracting has in its basis the functional criteria which may be contracted by PMSCs and is prescribed by the Office of Management and Budget Ordinance A-76 that prohibits outsourcing of inherently governmental functions to all organs of USA government. The other document regulating the inherently governmental functions for DOD is the DOD Instruction 1100.22. Under this Instruction functions are divided to three groups:

- a. inherently governmental - the functions that cannot be contracted;
- b. commercial (exempt from private sector performance) - the services that may

⁷⁴ OxfordUnion. "Erik Prince | Full Address and Q&A | Oxford Union." *YouTube*, YouTube, 3 May 2017, www.youtube.com/watch?v=VV_skhRZ0Mw

have been contracted, however the act of law, executive order or international agreement prohibits the contracting of such function and may be performed by DOD civil personnel only;

c. commercial (subject to private sector performance) - any functions that are not included in abovementioned groups;⁷⁵

d. If the function is inherently governmental or exempt from private sector performance but may be separated to different sub-functions, it may be performed by PMSC in part of a sub-function which is not inherently governmental itself.

These groups are based on FAR that defines of what nature these functions are. The inherently governmental functions are “[that]so intimately related to the public interest as to require performance by Federal Government employees... [that] significantly affect the life, liberty, or property of private persons”.⁷⁶

The specific functions that cannot be performed by PMSC are:

- a. Criminal investigations;
- b. Military command and leadership of personnel in combat, combat support, or combat service support role;
- c. Direction and control of intelligence and counter-intelligence activities;

Nevertheless, any function may be considered as governmental in case of one of these criteria defined by DOD is applicable:

a. Military-unique knowledge and skills are required for performance of the functions. This criterion is applicable in all cases of military assessment, advising towards the DOD or the chain of command and in cases of military justice enforcement.

b. Military incumbency is required by law, orders or treaty. The criterion applies to all cases when any legal act requires the governmental official make the decision.

⁷⁶ Department of Defense, USA, INSTRUCTION NUMBER 1100.22 April 12, 2010, SUBJECT: Policy and Procedures for Determining Workforce Mix, available at: <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/n0022p.pdf>

- c. Military performance is required for command and control, risk mitigation, or esprit de corps.
- d. Military manpower is needed to provide for overseas and sea-to-shore rotation, career development, or wartime assignments.
- e. Unusual working conditions or costs are not conducive to civilian employment.⁷⁷

Under these criteria the functions of direct participation in hostilities in course of offensive operations is an inherently governmental function. However, the DOD contracts PMSCs for “standard security and quick-reaction force duties in Iraq and does not view those activities as inherently governmental”⁷⁸. Even though these functions lay in the scope of direct participation in hostilities, thus requires the status of combatant to be provided to the PMSC employee performing this function that leads to the incorporation into armed forces. However, the incorporation into armed forces cannot be appropriate under the functional concept and criteria provided above.

Moreover, some scholars state, the mobile security (accompanying of convoys, medic evacuation etc.) is the inherently governmental function, the definition of such functions lies beyond the status of inherently governmental under USA regulation.⁷⁹

Thus, this basic approach that derives from functions to be performed during international armed conflict has its significant drawbacks. Neither of these abovementioned documents provides governing principles useful in illuminating how or why certain functions obtain ‘inherently governmental’ status.⁸⁰ As to specifically the DOD Instruction

⁷⁷ Ibid.

⁷⁸ DeWinter-Schmitt, Rebecca. "Montreux five years on: An analysis of state efforts to implement Montreux document legal obligations and good practices." Washington, DC: American University Washington College of Law Center for Human Rights & Humanitarian Law and NOVACT (2013). <http://novact.org/wp-content/uploads/2013/12/MontreuxFinal.pdf> p.42

⁷⁹ Marcus Hedahl, Unaccountable: The Current State of Private Military and Security Companies, 31 Criminal Justice Ethics, no. 3 at 182

⁸⁰ Kristine Huskey & Scott Sullivan, United States: Law and Policy Governing Private Military 172 Contractors after 9/11

1100.22 the criteria are so unclear and inherently governmental functions may be distributed to commercial under the decision of military officers, thus the risk of defining the function as “commercial” in cases it is actually “inherently governmental” exists. Especially the risk lays in the scope of participation in hostilities, whereas the borderline between offensive and defensive hostilities is not defined.

One of the most significant criteria that define status of PMSCs and PMSCs personnel are rules regarding use of force and rules of engagement that apply under national law or under the contract. These rules particularly define the level of incorporation into armed forces directly on the battlefield or in environment of international armed conflict that may lead to participation in hostilities. As a basic rule that is prescribed by Code of conduct or Montreux document - the force may be used only in state of self-defense or defense of third parties where the threat to life exist. However, the USA regulation imposes different rules of use of force that might result in changing the de facto status of PMSC or PMSCs personnel or to losing particular benefits and immunities under different statuses during international armed conflict in particular situation.

When applying rules of engagement to the PMSC it is needed to be considered the bipolar regulatory nature of such rules. On one hand basic USA rules that apply to PMSC under USA regulation are the same as for military units and armed forces under Chairman of The Joint Chiefs of Staff instr. 3121.01b, Standing Rules of Engagement Chapter 5, Appendix A.⁸¹ The basic rules, however, do not describe fully the circumstances allowing the use of deadly force, they refer to specific requirements that apply to a particular operation - the Theatre specific Rules of engagement. These rules are to be defined by Department of defense on case by case basis with regard to features and objectives of operations.

⁸¹ CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES (13 June 2005), Appendix A, available at: https://www.loc.gov/rr/frd/Military_Law/pdf/OLH_2015_Ch5.pdf

On the other hand, the specific rules of engagement may be defined not only by the DOD officials, but by the specific contracts between PMSCs and USA authorities. With this regard the analysis of rules of engagement of operations in Afghanistan and Iraq shall be made. These rules will be analyzed within the framework of DOD-PMSC and DOS-PMSC contract for understanding the difference of purely military defensive services and security of civil personnel.

As to DOS - Blackwater International contract # SAQMP005D1098 rules of engagement, they are divided on two groups - the rules of use of force and rules of use of deadly force. The second apply only in cases where the first were ineffective in course of protection the protected person/object or in case the threat had not passed. The first group of rules - the use of non-deadly force - allows to use force only in circumstances were:

- a. The use of non-violent methods was insufficient;
- b. Force may be used only for protection of a PMSCs employee or other person in case of attempt to strike the PMSCs employee, in the performance of duty or to forcibly detain him, causing a serious disturbance on the post by striking or assaulting;

The use of deadly force is permissible in case of:

- a. Non-deadly use of force is insufficient and the risk infliction bodily harm to or threat to the life of the PMSCs employee or other person still exists;
- b. The use of deadly force is justified in any person attempts to use lethal force on a PMSCs employee, or lethally assault the PMSCs employee or another individual, or in any way cause the death of another individual;

As it is seen from above these rules are not narrowly tailored and do many possibilities to justify the use of deadly force by subjective perception PMSCs employee.

The other rules of use of force for DOD-contracted PMSCs stated that:

- a. Use of deadly force is permissible only when one reasonably believes will cause death or serious bodily harm to the PMSCs personnel or others.
- b. Use of deadly force is permissible in circumstances of self-defense, defense of persons as specified in contract, in order to prevent life threatening offenses against

civilians.⁸²

The main between DOS- and DOD-contracted PMSCs is that the DOS-contracted PMSC are allowed to use deadly force only in case of non-deadly force is not sufficient to prevent casualties. Instead, the DOD-contracted PMSCs are allowed to use deadly force in cases of reasonable belief of life threatening situation. Such rules are even more ambiguous and subjective perception of the situation prevails. Thus, making the only difference between armed forces and DOD-contracted PMSC that armed forces may engage combatants directly without any preventive measures or circumstances appear. This provision in conjunction with task orders that regulate the area of PMSCs activities may put the PMSCs in a hostile zone where the existence of a life threatening situation is presumed, thus making them to engage in combat unintentionally.

As to defining the status of PMSC personnel, I would like to refer to the other aspect of regulations towards PMSCs activities - the issue of jurisdiction over the conduct of USA PMSCs employees. Bringing light to this issue will contribute to the distinction of statuses between PMSC personnel and USA Armed forces personnel, the level of incorporation of PMSCs into USA armed forces as one of the aspects of defining the status of PMSCs under USA regulations.

The fundamental documents for describing the jurisdiction over PMSCs are Special Maritime and Territorial Jurisdiction Act (SMTJ), Military Extraterritorial Jurisdiction Act (MEJA) and Uniform Code of Military Justice (UCMJ).

The SMTJ is a general Act that defines cases of jurisdiction of USA courts over the conduct of USA residents committed abroad. Together with MEJA the SMTJ establishes the possibility of prosecution of PMSCs personnel “with respect to offenses committed by or against a national of the USA the premises of military or other USA Government missions or entities in foreign States, including the buildings, parts of buildings, and land

⁸² Coalition Provisional Authority Memorandum number 17, International Organization, Registration requirements for private security companies (PSC), available at: http://www.esd.whs.mil/Portals/54/Documents/FOID/Reading%20Room/CPA_ORHA/07-F-1059_doc4.pdf

appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership”⁸³ for felonies, punishable by more than one year in prison under the committed by those employed by or accompanying the armed forces as well as former service members after their separation from service.⁸⁴

As to USA courts have the jurisdiction over the PMSCs activities hired by USA government under provisions of MEJA and SMTJ, the UCMJ provides procedural rules of trying the case regarding PMSCs personnel in general. As it is stated under Article 2 of paragraph 801 of UCMJ the persons subjected to UCMJ are “[whether] In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field”.⁸⁵ Therefore, these three acts establish the total jurisdiction over PMSC personnel contracted by USA government for providing services abroad. These rules are identical to those which are applicable to regular members of armed forces. This contributes to the status of PMSC as the de facto organs of the state during international armed conflict.

The jurisdiction established by SMTJ, MEJA and USMJ applies to all cases except those contradict the international agreement provisions. The example of such agreement is Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq of January 1, 2009. This agreement establishes different then national USA legislation jurisdiction over PMSCs personnel. Article 12 of the Agreement is dedicated to issue of jurisdiction over USA Armed forces personnel and private contractors contracted by USA Armed forces. Under the provisions of this article it is stipulated that “Iraq shall have the primary right to exercise jurisdiction over United

⁸³ 18 U.S. Code § 7 - Special maritime and territorial jurisdiction of the United States defined, available at: <https://www.law.cornell.edu/uscode/text/18/7>

⁸⁴ 10 U.S. Code § 802 - art. 2. Persons subject to this chapter, available at: <https://www.law.cornell.edu/uscode/text/10/802>

⁸⁵ 65. 18 U.S. Code § 3261 - Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States, available at: <https://www.law.cornell.edu/uscode/text/18/3261>

States contractors and United States contractor employees”.⁸⁶ Therefore, the specific jurisdictional rules apply for the prosecution of PMSCs personnel hired by DOD in Iraq.

It should be mentioned that everything abovementioned regarding jurisdiction of USA in Iraq is applicable only to PMSCs contracted by DOD and these provisions do not apply to PMSCs contracted by DOS or any other body that is not DOD. That creates a gap between PMSCs personnel contracted under different state organs. A slightly different situation appeared in Afghanistan where the similar agreement was signed.⁸⁷ Under this agreement the USA forces are immune from Afghanistan jurisdiction, however, PMSCs are not treated as a part of such forces. Therefore, the situation of conflict of jurisdiction appears with regard to DOD contracted PMSCs.

With regard to USA regulations towards private military companies, the following characteristics were analyzed and the following interim conclusions may be made:

1) Functions performed by PMSCs. Given the fact that USA applies the inherently governmental functions principle which restricts government from contracting PMSCs for offensive operation and commanding the troops, the following services may be contracted:

- a) Technical services fully;
- b) Operational support services provided, that the PMSCs’ personnel do not possess the authority to command (i.e. Analysis, consulting and planning services; intelligence and reconnaissance services) during execution of operations.
- c) Armed services may be contracted in the capacity of combat defensive services only. However, there might be a possibility whereas the provision combat defensive services will lead to a offensive conduct under circumstances of putting the PMSCs’ personnel in a knowingly hostile area.

⁸⁶ Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq <https://www.state.gov/documents/organization/122074.pdf>

⁸⁷ T.I.A.S. Exchange of notes September 26 and December 12, 2002 and May 28, 2003. Entered into force May 28, 2003.

2) Military and civil contracting is applicable to USA DOD and DOS respectively. This criterion is sufficient for defining whether the PMSCs' personnel may or not may be granted the status of de facto combatants under incorporation criteria applicable to assumed combatants. In first instance, the criteria of incorporation may be met provided other circumstances are in place, whereas in the second instance, the criteria may not be met in any event.

3) Rules of engagement and rules on use of force. Rules of engagement depend on the tactical situation at Actual area of the operations and are defined by Chief Officer. They are the minimum standard of conduct and applicable to all personnel that is in the area of the operation, with no difference whereas the PMSCs were contracted by DOD or DOS. As to rules on use of force, they depend on the contractual provision, however, are up to the standard for use of deadly force in circumstances of self- defense or defense of others. The difference between the rules of use of force for PMSCs contracted by civil or military authority lies in the assessment of the circumstances that allow self-defense and preliminary use of non-lethal force.

4) Subordination and jurisdiction over the PMSCs' activities. The PMSCs are subordinate to the body contracting them and responsible for execution of the contract before them. As to jurisdiction, the DOD contracted personnel and any other military member is responsible under UCMJ. As to jurisdiction over the PMSCs' personnel contracted by DOS, the responsibility is imposed through MEJA or SMTJ.

5) In this regard, the PMSC lack the full dependence criteria in order to be considered as a state organ, lacks the met criteria to be considered as empowered by state to perform governmental function since, the functions of government are excluded from the contract. However, the PMSC may meet the criteria to be considered directly controlled by a state due to specific rules of engagement, responsibility and subordination apply, provided other element of effective control test are met.

In conclusion, taking into account the regulatory framework of the USA towards PMSC, the following statuses of PMSCs' personnel apply:

1) As to Technical services the PMSCs' personnel shall be of a civilian or PAAF status⁸⁸, since there are no criteria of incorporation met for combatant status, the personnel does not take direct participation in hostilities.

2) As to operational support services, given the fact that PMSCs' employees may not be in charge of any operation, may not have the combat authority which are of inherently governmental function, the combatant status may not apply. The PMSCs' personnel status is of civilians or PAAF in cases the proper state authorization is issued.

3) As to Armed services, only the Armed defensive services may be contracted, therefore the only possibility to for an PMSCs' employee obtain a de facto combatant status is: to be contracted by DOD, to protect military objects, the adversary is informed of a PMSCs being a part of armed forces.

SECTION 3.2. Legal implications of private military companies' regulation in the United Kingdom

UK national framework for regulation of PMSCs activities in armed conflict is a complex of international agreements on status of forces, internal legislation acts, licensing conditions, compulsory self-regulation, export control regulations and contracts. The UK is a great supporter of international self-regulatory volunteer acts such as the Montreux document and Code of conduct for Private Security Providers which were described above.

United Kingdom specialized legislation is in the stage of development with aim to provide mostly self-regulatory framework for PMSCs for two reasons:

- a. avoids the difficulties inherent in investigating and enforcing orders in relation to PMSC conduct abroad;
- b. self-regulation is stimulating the defense industry generally;⁸⁹

⁸⁸ "In 2005, DOD adopted Instruction No. 3020.41 on contractor personnel authorized to accompany the U.S. Armed Forces.⁴⁸ As well as exemplifying the U.S. position according to which PMSC personnel are considered —civilians accompanying the armed forces,|| it outlines the ways in which PMSCs can provide support to contingency or other military operations conducted by the U.S. Armed Forces, and the limits of that support" U.S.-Hired Private Military and Security Companies in Armed Conflict: Indirect Participation and its Consequences, Alice S. Debarre

⁸⁹ DeWinter-Schmitt, Rebecca. "Montreux five years on: An analysis of state efforts to implement

and unlike the USA legislation provides little information of PMSCs specific regulations, however, the regulation is based on international documents of self-regulatory character. There is an understanding within the UK government for usage of PMSCs in defensive manner in accordance with international self-regulatory documents mentioned above.⁹⁰ For this reason, the UK government has adopted the ASIS ANSI PSC1 Standard that all PMSCs operating abroad. The Parliamentary Under Secretary of State, Foreign and Commonwealth Affairs Mark Simmons stated “to this end, we have been working closely with interested partners, including industry and civil society, to establish a voluntary, independently audited and internationally recognized regulatory system that is practicable, effective, and affordable. We now intend to issue an HMG publication specifying that ASIS PSC 1-2012 is the applicable standard for UK-based P[M]SCs working in complex environments on land overseas”.^{91 92 93} Such implementation is not adopted by act of law, however the belongs to the governmental practice of UK.^{71,72}

ASIS ANSI PSC1 Standard is a specifically tailored document that describes specific requirements to be met by PMSCs for providing services in zones of armed

Montreux document legal obligations and good practices." *Washington, DC: American University Washington College of Law Center for Human Rights & Humanitarian Law and NOVACT* (2013). <http://novact.org/wp-content/uploads/2013/12/MontreuxFinal.pdf> p.72

⁹⁰ Foreign & Commonwealth Office, 16 December 2009, Public Consultation on Promoting High Standards of Conduct by Private Military and Security Companies (PMSCs) Internationally: Summary of Responses Foreign & Commonwealth Office, 16 December 2009

http://psm.du.edu/media/documents/national_regulations/countries/europe/united_kingdom/united_kingdom_fco_consultation_standards_conduct_pmsc_internationally_summary_2010.pdf 42

⁹¹ ASIS ANSI PSC1 Standard Adopted by UK for Private Security Service Providers Overseas Alexandria, Va. 2012-01-01 <https://www.asisonline.org/News/Press-Room/Press-Releases/2012/Pages/ASIS-ANSI-PSC1-Standard-Adopted-by-UK-for-Private-Security-Service-Providers-Overseas.aspx>

⁹² Provision of Security Guarding Services in Iraq, Ref. no. CPG01640-2 § 6, Contracts Finder, [hereinafter FCO-Control Risks Group Contract], <https://online.contractsfinder.businesslink.gov.uk/Common/View%20Notice.aspx?site=1000&lang=en¬iceid=1046839&fs=true> (last visited Nov. 16, 2013)

⁹³ Foreign & Commonwealth Office Written Ministerial Statement 16 September 2010 Promoting High Standards of Conduct by Private Military and Security Companies internationally http://psm.du.edu/media/documents/national_regulations/countries/europe/united_kingdom/united_kingdom_written_ministerial_statement_standards_pmscs_2010.pdf

conflict. Giving the fact, that ASIS ANSI PSC1 Standard is applicable by government in every approved contract with PMSCs, the scope of these documents shall define services that may be provided PMSCs together with the rules of use of force.

Unlike the USA standards, there is no legislative act that defines functions that can be contracted and the consideration of “inherently” governmental functions is absent. Thus, the functions that may be contracted are purely defined by government in particular contracts, mostly under rules of ASIS ANSI PSC1 Standard. The other element of the services definition is that there is a general absence of public discourse on the functions that may be contracted.⁹⁴

As to ASIS ANSI PSC1 Standard, the functions that may be contracted are not prescribed directly with the exhaustive list, but only with general clause that such services may not contravene international law and national laws of home state and state of operations. The other aspect of the Standard is based on Montreux document and Code of conduct that requires governments take into account whether the service could result in direct participation in the hostilities. Giving the fact, the participation in the hostilities by civilians is unlawful under UK legislation and international law, the providing of services that demand participation in hostilities are forbidden.

As to rules of engagement the ASIS ANSI PSC1 Standard prescribes those rules of use of force previously defined in general by Montreux document and Code of conduct. Under the applicable standing rules of use of force, the PMSC employee may withdraw to use of force under the following circumstances:

- a. force may be used only in proportionate amount;
- b. use of force must comply to specific rules applicable to national standards and contractual provisions;
- c. deadly force may be used the in case of existence of imminent threat to life or

⁹⁴ DeWinter-Schmitt, Rebecca. "Montreux five years on: An analysis of state efforts to implement Montreux document legal obligations and good practices." *Washington, DC: American University Washington College of Law Center for Human Rights & Humanitarian Law and NOVACT* (2013). <http://novact.org/wp-content/uploads/2013/12/MontreuxFinal.pdf> p.74

of serious injury of the employee or protected persons only after non-deadly force measures had been exhausted;

The regulation of UK regarding exports and licensing of PMSCs services is based on the principle of self-regulatory and volunteer conducts, thus, there are no licenses needed to provide services to the UK government or to operate abroad. However, PMSCs-residents of UK operating abroad are subject to arms export control legislation and any arms embargoes that might be relevant to their operations.⁹⁵

In conclusion, the UK regulations towards PMSC, the following statuses of PMSCs' personnel apply:

1) As to Technical services the PMSCs' personnel shall be of a civilian or PAAF status, since there are no criteria of incorporation met for combatant status.

2) As to operational support services, given the fact that PMSCs' employees may be in charge of any operation, may have the combat authority under ASIS ANSI PSC1 Standard, the combatant status may apply. The PMSCs' personnel status is of civilians or PAAF in cases the proper state authorization is issued.

3) As to Armed services, only the Armed defensive services may be contracted under ASIS ANSI PSC1 Standard, therefore the only possibility to for an PMSCs' employee obtain a de facto combatant status is: to be contracted by military authority, to protect military objects, while the adversary is informed of a PMSCs being a part of armed forces.

⁹⁵ DeWinter-Schmitt, Rebecca. "Montreux five years on: An analysis of state efforts to implement Montreux document legal obligations and good practices." *Washington, DC: American University Washington College of Law Center for Human Rights & Humanitarian Law and NOVACT* (2013). <http://novact.org/wp-content/uploads/2013/12/MontreuxFinal.pdf> p.73

CHAPTER 4. POSSIBILITIES AND PERSPECTIVES OF LEGAL REGULATION TOWARDS PRIVATE MILITARY COMPANIES IN UKRAINE

Section 4.1. The existing legal framework of private military companies' conduct in Ukraine

Just like in other countries' regulations, this chapter describes regulations towards PMSCs in Ukraine through a service-based methodology that shall cover the regulations of Technical services, Operational support services and Armed services. The regulations shall be viewed through the prism of export, import and governmental acquisitions. Services provided to military institutions by private enterprises are treated in Ukraine as being a part of services and supplies of goods performed by Defense industrial complex of Ukraine which consists of different organizations, enterprises and institutions of governmental and private property.⁹⁶

The exportation or importation of military services by Ukrainian PMSCs is performed under Law of Ukraine on Foreign economic activity. This act prescribes the procedures of commercial engagement of Ukrainian enterprises with foreigners, including military institutions of other states and foreign enterprises engaging with Ukrainian military institutions. The law on Foreign economic activity provides that the issues of importation and exportation of military services are considered under laws of Ukraine. In this regard more specific regulations are prescribed under the Ukrainian law On state control over international transfers of military goods and dual-use goods⁹⁷ which is the main document that defines rules on exportation and importation of military services is the Ukrainian law on state control over international transfers of military goods and dual-use goods in the following way:

⁹⁶ On National Security Law of Ukraine 2018 (SC) (UA) <http://zakon.rada.gov.ua/laws/show/2469-19/print>

⁹⁷ On International transfer of military and dual-designated goods Law of Ukraine 2003 (SC) (UA)

- Military product: armament, ammunition, military or special machinery, special component parts for their production, explosives; materials and equipment specially designed for development, production or use of the abovementioned products;

- Military services: provision of services (together with intermediary (broker)) in the sphere of development, construction, assembly, testing, repair, maintenance, modification, modernization, operation, machine control, demilitarization, utilization, selling, storage, recognition, identification, purchase or usage of military products or technologies for foreign legal entities or persons in Ukraine or abroad, provision of abovementioned services financing for abovementioned entities.

- Military technologies are referred as special information in any form (except public information) that is necessary for production or usage of military goods or provision of military services. This information is provided in forms of technical data or technical support:

- Technical data is defined as projects, plans, schemes, diagrams, formulas, specifications, software, handbooks and instructions provided in paper or electronic forms.

- Technical support is referred as performing of instruction, consultations, skill advancement activities, education, seminars on practical performance.

The definition of military services is correlated with this paper classification of Technical services and partially Operational support services provided by PMSCs. The main characteristic regarding classification of military services is that the exportation and importation of military services is not regulated directly. The military services are viewed as a part of military products supply. Furthermore, on one hand, Ukrainian legislation regulates all military Technical services that appear from supply of military products and Operational support services that are directly connected with military products (training of usage of military products, demining). On the other hand, the Armed services and most of Operational support services (e.g. logistics of personnel, intelligence, consulting, analysis and planning of the operations, medical care and administrative support) are not covered by Ukrainian special legislation for export and import of arms and military products. In

this regard, the first issue of Ukrainian legislation toward military services appears – lack of regulation towards the private military industry.

While having a lack of regulation towards importation and exportation of the Operational support and absence of Armed services, Ukrainian legislation provides highly governmentally regulated procedures towards exportation and importation of the abovementioned services that constitutes the second issue. The procedure is as follows:

1) To register as a subject for international transfer of military goods at State Service of Export Control of Ukraine:

- a. To perform preliminary identification of imported / exported goods;
- b. To apply for a preliminary expertise of goods;
- c. Other formal documents (powers of attorney, charter documents etc.);

The State Service of Export Control of Ukraine performs identification of goods and preliminary expertise after which registers the commercial entity as a subject for international transfer of military goods that is evidenced by a certificate of registration valid up to 3 (three) years. This certificate empowers the commercial entities to perform testing of imported goods, to temporary exportation for purposes of exhibitions, certifications or MRO of previously supplied products. The terms of procedure for registration of the Subject is no more than 30 days, but can be prolonged under specific circumstances.

2) In case the commercial entity registered as a subject for international transfer of military goods has an intent to export / import goods to end-user, it is obliged to obtain authorization from the Cabinet of Ministers of Ukraine under the Procedure of authorization of commercial entities on exportation and importation of military goods and dual-use goods and goods containing state secret. The Subject shall apply for authorization through State Service of Export Control of Ukraine. The State Service of Export Control of Ukraine together with Security Service of Ukraine, Ministry of internal affairs, Ministry of Foreign affairs, Internal Intelligence Service, Ministry of Finance form the joint committee that decides whether to authorize the Subject or to reject his application. The joint committee may consist of additional governmental bodies in cases that the exportation

/ importation of goods is within the competence of the abovementioned bodies. The Criteria considered for obtaining authorization are:

- a. Whether the Subject has previously performed international transfer of military goods and the result of this performance;
- b. Whether the Subject participated in Defense procurement;
- c. Whether the exportation / importation of the goods contradicts the state interest;
- d. Whether the Subject enacted an Internal control procedure which is necessary for export / import purposes;
- e. Whether the Subject has debts;
- f. Whether the Subject has a necessary production and scientific capacity;

The period for consideration is up to 60 days, however it might be prolonged in case of any state body provides objections to the export / import operation.

In case, all of the abovementioned criteria are met, the State Service of Export Control of Ukraine shall submit the pre-authorization to the Cabinet of Ministers of Ukraine for approval. The Cabinet of Ministers shall approve the pre-authorization by means of Cabinet of Minister's resolution which forms the register entry for Subjects authorized for international transfer of military goods.

After this, the abovementioned subject must obtain the Conclusion from State Service of Export Control of Ukraine in order to enter negotiations with a purpose to conclude Foreign economic contract for exportation / importation of military goods in case import shall be performed from a state which is under embargo or export shall be performed into the state under embargo. Having received the Conclusion, the Subject may apply for Permission that grants the right to perform exportation / importation of military goods. In case of there is no embargo towards the importing state or towards the state of export, the permission is applied for without prior Conclusion. The Conclusion / Permission are issued in three form: general (for multiply supply to / from a specified end-user), open (for

multiply supply to / from a specified state), single (for single supply to / from a specified end-user).

As to Defense procurements, they are performed under legislation of Defense procurement (in case secret of a state is included). The main act that regulates the defense acquisitions is the Law of Ukraine on State Defense order. This law prescribes procedures that undertake the state organs responsible for state defense in order to acquire military products and military services for purposes of State Defense. It worth saying that the state organs that acquire military products and military services for purposes of State Defense (hereinafter – the State customer) are defined by Cabinet of ministers under Resolution of cabinet of ministers of Ukraine and consist of all state organs responsible for Ukrainian state defense.⁹⁸

The Law of Ukraine on State Defense order is applied to any procurement of military services by State customers for purposes of state defense in all cases of acquisitions of the products or services that include secret of the state.

The law prescribes three forms of acquisition:

- Defense products – armament, military and specialized vehicles, military designated weapons, special completing products for their production and usage, materials and equipment designated for their development, production or usage, special equipment; Defense services – services for support of military and special infrastructure, for operation and usage of military equipment;

- Defense works – R&D designated for National security and defense; works provided for development, modernization, utilization of defense products, development of special technologies, material and standards; development of new defense production facilities; development of military infrastructure; mobilization preparation; MRO and

⁹⁸ Issues of state defense order Resolution 2011 (CM) (UA) <http://zakon.rada.gov.ua/laws/show/464-2011-%D0%BF>

utilization of defense products; administrative support of military infrastructure and document flow.

In connection to this paper core classification of military services that are provided by PMSCs, the Law of Ukraine on State Defense order are whether defense services or defense works. Both these categories may fully cover all discussed services provided by PMSCs: Technical services, Operational support services, Armed services. This situation is a consequence of prescribing the procurement order on case-by-case basis for different periods without a properly tailored framework. As to the Armed services specifically, there are other legislative provisions which are described further that preclude their procuring.

As to such services as Facilities management, Logistics of goods and personnel, Medical care, catering, functional and administrative support, System support services and Information technology services that do not include secret of the state, general procurement rules apply under Ukrainian law on Public acquisitions.

- under legislation for Public acquisitions;
- under legislation for Guaranteed defense procedures;

As to the procurement during special legal regimes, such as Special period, Emergency period, Anti-terrorist operation period, the special legislation regulates the acquisition of military services and products. Main legal act is a Law of Ukraine on Aspects of goods, works, services procurement for purposes of guaranteed provision of defense requirements. This act, similarly to Law of Ukraine on Public procurements prescribes procedures for regulates acquisitions of state authorities that do not constitute secret of a state. Unlike the public procurement procedures, this law applies to acquisition performed by Customers⁹⁹ that are responsible for state defense within a time-framework of special periods. The procedure itself is tailored in a simplified manner in order to perform fast (up to 15 days), efficient procurements mainly through negotiations procedures.

Thus, the defense procurements may be performed under:

⁹⁹ On Aspects of goods, works, services procurement for purposes of guaranteed provision of defense requirements Law of Ukraine 2016 (SC) (UA) <http://zakon.rada.gov.ua/rada/show/1356-19#n23>

- defense order procedures for services that consist secret of a state by bodies responsible for state defense;
- guaranteed provision of defense requirements procedures for procurements that do not constitute secret of a state in a special periods;
- Public procurement procedures for any other procurements that defense order procedures or guaranteed provision of defense requirements procedures do not apply to.

As to the armed services, Ukrainian legislation does not provide specific requirements, licensing or other permission system to control Armed services in Ukraine. Nevertheless, Ukrainian legislation provides licensing for Security services. The difference between Armed services as defined in the first chapter of this paper and Security services defined by Ukrainian law on Private security activity is that:

1) Arms and lethal force – security companies’ employees are restricted from usage of arms of lethal capabilities during provision of security services and are empowered to use non-lethal weapons and physical force in case of threat to them or to secured object / person. Security companies’ employees are forbidden to use military designated weapons in course of their activities and are liable for such usage under general criminal law. In contrast, the employees of PMSCs do use firearms for services provision under specific rules prescribed by the contract and applicable law and are empowered to use lethal power in specific circumstances.

2) Equipment and vehicles – security companies are limited to the equipment and munitions prescribed under Cabinet of Ministers resolution on Impact munitions procured, stored and used by security entities.¹⁰⁰ This kind of equipment in normal course of operations cannot bring to lethal consequences, is not designated for military purposes and has limited defensive capabilities. As to the vehicles, security companies use modified civilian vehicles equipped with special light and sound signals for purposes of fast-

¹⁰⁰ On list of special munition which are bought, stored and used by private security entities Resolution 2013 (CM) (UA) <http://zakon.rada.gov.ua/laws/show/97-2013-%D0%BF/paran8>

response activities and light-armed vehicles for protection of valuable / dangerous cargo security. In contrast, PMSCs may be equipped with military designated munitions and all types of vehicles (including Armed personnel carriers).

3) Main customers of PMSCs are governments and in less amount – private entities, the Ukrainian Security companies' customers are mostly private entities, however state owned enterprises and governmental non-military bodies procure the services under public procurement procedures.

Nevertheless, security companies may not use firearms of military designation or of lethal force capacity, the personnel acting in private capacity acquire lethal civil firearms designated for self-defense or hunting but not designated for military or law enforcement purposes.¹⁰¹ Having acquired the abovementioned firearms, security personnel perform duties prescribed by the employer company. On one hand, this conduct is not forbidden under Security activities law or under Licensing requirements for security activities, on the other hand lack of legislation regarding purchase, usage, caring, transportation of firearms creates a legal vacuum regarding such conduct. Ukrainian Minister of internal affairs claimed that his ministry shall treat this type of conduct as illegal and the companies shall have their licenses terminated and employees shall have their firearms confiscated. However, no such cases occurred. In this regard, the security companies are not designated to provide the same services as PMSCs, they may fall under definition of PMSCs prescribed by Montreux document, since they provide armed services.

In cases of military services export to which legislation on international transfer of military goods apply, the employees providing services abroad, in regions of international armed conflict shall be under the status of civilian and persons accompanying armed forces. This is based on the kind of services to which the abovementioned legislation applies. The services themselves:

- they are product oriented;

¹⁰¹ Avakov, A. Statement on disarmament of private security entities Interview (Radiosvoboda) Retrieved from: <https://www.radiosvoboda.org/a/26915816.html> TPEBA

- participation in hostilities is not covered with the services' scope;
- the employees abroad are not integrated into the system of military decisions making process and are not a part of chain of command;

These criteria are form that, the employee may not be regarded as Combatant, Spy or Mercenary, thus providing only the status of civilian. The status of the PAAF may be imposed in case of the contracting state shall issue the authorization from the accompanied armed forces.

Section 4.2. The perspectives and propositions on improvement of regulation towards private military companies in Ukraine

The situation described above is an existing objective reality for the Ukrainian PMSCs companies operating in Ukraine and abroad. Nowadays, there are companies that perform activities on the territory of Ukraine that may be treated as PMSCs activities under definitions of this paper. These companies declare that they provide:

- Omega consulting group that provides services in eighteen countries, in Africa, Near and Middle East, and Europe including Ukraine providing unregulated by Ukrainian law operational support services and armed combat-defensive services such as Fixed site & mobile protection; Protection in high-risk areas; Critical infrastructure protection; Emergency evacuation; Security assessments & planning; Technical systems; Information security; Anti-poaching operations; Training in: land, maritime operation, Special operation tactics, marksmanship (military and law enforcements combat training); Intelligence and analytics; Consulting on operational and tactical level.¹⁰² The companies clients are private commercial entities and governments and they tend to work under non-specified agreements, basically the consulting agreements.¹⁰³

- Ukrainian Private Military Company operates abroad (mostly in Africa) providing Armed combat-defensive services and Operational support (training)

¹⁰² Omega Consulting Group Services 2018 Retrieved from: <https://www.omega-consulting.com.ua/>

¹⁰³ Kabalko, A. Interview (Radiosvoboda) Retrieved from: <https://www.radiosvoboda.org/a/28748594.html>

services.^{104,105} This company provides the following services: Risk management and analytics; Defense and armed security; Patrolling, special operations, convoying; Anti-terrorist, anti-piracy, counter-narcotics; Training and consulting in unconventional warfare; Training in maritime and land marksmanship, military foreign language.

- European Security Academy (Ukrainian Branch) is one of the worldwide private military companies operating in Ukraine for provision of operational support (training) services for civilian and military / law enforcement personnel: Training in maritime and land marksmanship, defense and close protection, driving, close quarter combat.¹⁰⁶ What is more important, this company had trained Ukrainian governmental forces in recent years.¹⁰⁷

- Templar is a Ukrainian PMSC that provides services of Operational support (mainly intelligence and reconnaissance) for Ukrainian forces in Joint Forces operation zone in eastern Ukraine¹⁰⁸ and provides training courses of tactical medicine.¹⁰⁹

As to first three companies, they activity is not covered by any legislation of Ukraine and they operate in legal vacuum whereas these services are either permitted or forbidden to be provided. This results in a mere insecurity of the PMSCs' personnel during IAC, since their status is ought to change on case-by-case basis (see. Section 1.3.1-1.3.4) with no possibility of Ukraine to influence it. As to governmental procurement of the

¹⁰⁴ Akram Kharief, Le Sahel, nouvel eldorado pour les compagnies militaires privées 23 May 2018 Retrieved from: <https://www.middleeasteye.net/fr/reportages/le-sahel-nouvel-eldorado-pour-les-compagnies-militaires-priv-es-80283626?fbclid=IwAR2YkYQNvqviEXkNvXvabJEFicAoCF3xuwWyRz1yyIqnwvuPOv9jMxI4-eE>

¹⁰⁵ Ukrainian Private Military Company Services 2018 Retrieved from: <http://www.upmc.com.ua/>

¹⁰⁶ European Security Academy Services 2018 Retrieved form: <https://www.euseca.com>

¹⁰⁷ Large European military company has trained Azov fighter of Ukraine and Ukrainian ultra-right 31 August 2018 Retrieved from: <https://tsn.ua/ukrayina/velika-yevropeyska-viyskova-kompaniya-trenuvala-biyciv-azovu-ta-ukrayinskih-ultrapravih-bellingcat-1209546.html>
<https://tsn.ua/ukrayina/velika-yevropeyska-viyskova-kompaniya-trenuvala-biyciv-azovu-ta-ukrayinskih-ultrapravih-bellingcat-1209546.html>

¹⁰⁸ Outsourced air reconassense: no losses in 120 flights 10 Nowember 2015 Retrieved from: <https://www.radiosvoboda.org/a/27356462.html>

¹⁰⁹ Templar, Services 2018 Retrived from: <http://private-military.company/>

services such as training, there are provided without proper procedures and are paid for directly by the military personnel.

However, the Ukrainian legislation for such as mid-term strategies provide a possibility to regulate this industry. The possibility is derived from the conditions of usage of private entities to ensure National security and defense. These conditions are provided in National security strategy of Ukraine, Cybersecurity strategy of Ukraine, Military security strategy of Ukraine, Ukrainian Defense industrial complex development strategy. Moreover, certain steps were carried out by Cabinet of Ministers of Ukraine, National Security and Defense Council of Ukraine President of Ukraine towards deregulation of private entities conduct in the defense industry for exportation / importation.¹¹⁰

Considering the abovementioned preconditions, I propose further development of the regulations of PMSCs based on the service-based analysis approach with dividing for the following types of commercial operations: general regulations towards licensing in Ukraine, export, import, governmental procurement operations.

The first issue for the development of legal framework of Ukraine for PMSCs activities is to define military services as a stand-alone unit of the defense industry. This will ensure the possibility of separate regulations towards military goods supply and military services provision.

In regard of privatization of military activities, the concept of inherently governmental functions adopted in the USA may be applied. Basically, the services that are aimed at offensive engagement of the enemy and direct participation in hostilities in an offensive manner should be treated as inherently governmental. This includes also, any

¹¹⁰ 15. National security strategy of Ukraine President order 2015 (Pr) (UA)

<http://zakon.rada.gov.ua/laws/show/287/2015> 16;

Cybersecurity strategy of Ukraine President order 2016 (Pr) (UA)

<http://zakon.rada.gov.ua/laws/show/96/2016> 17;

Military doctrine of Ukraine President order 20 (Pr) (UA) <http://zakon.rada.gov.ua/laws/show/555/2015>

18; Ukrainian Defense industrial complex development strategy Resolution 2018 (CM) (UA)

<https://www.kmu.gov.ua/ua/npas/pro-shvalennya-strategiyi-rozvitku-oboronno-promislovogo-kompleksu-ukrayini-na-period-do-2028-roku>

inclusion of PMSCs personnel into military or law enforcement decision making process with a right to make decisions that are obligatory to perform by military or law enforcement personnel. Additionally, inherently governmental functions are those, which require any judicial decision to be issued, such as surveillance.

As to operational support services, the license should be obtained for services that include non-decisive Consulting, advising and planning in the sphere of military decision making process, structuring of military and law enforcement bodies, services that include usage of firearms or explosives during the provision (training on firearms, marksmanship etc.) or directly aimed at usage of military designated firearms or explosives. This in principle is designated to ensure the quality, accountability, responsibility and control over the activities of private entities in the sphere that is of high-risk, high-training or knowledge requirement, or crucial for state character.

As to other Operational support services, such as logistics, facilities management and other that do not include direct usage or not aimed at direct usage of licensed or military or dual designated products, should not be regulated under licensing procedures and should be provided under generally applicable commercial legislations. This is based on the nature of the abovementioned, since they are not of inherently governmental character and the goods that are used for provision of these services is of general character. However, other licenses or requirements may be necessary, e.g. for provision of medical services.

Thus, licensing of Operational support services and Armed services should cover the provision of services that are:

- Provided with usage of military designated or dual designated firearms;
 - Aimed at usage of licensed or military designated products,
- while
- inherently governmental functions may not be contracted.

Therefore, Licensing of armed and operational services with possibility to carry on contracts with military designated small weapons and equipment possessed by Ukrainian PMSC should be provided in the following manner:

1) The possession of military designated small weapons for carrying and usage under state defense procurement contracts, contracts on protection of strategic infrastructure, valuable or dangerous cargo, exportation contracts (in the amount the host state legislation requires) should be allowed under permission system of Ukraine. This requirement shall provide PMSCs with competitive possibilities on international market of military services and adequate protection for personnel during execution of high-risk missions. In this regard the following provision should be adopted:

a. In case of exportation of services, the temporary exportation of military and dual-designated goods while providing services abroad should be performed under exportation control for the abovementioned goods procedures,

b. In case of exportation of services without temporary exportation of military and dual-designated goods while providing services abroad, the procedures of military services exports control should apply,

these provisions allow to comply with Ukrainian obligations toward international transfer of military and dual-designated goods while providing military services abroad;

2) Requirements to conduct should be met at least under ANSI/ASIS PSC.1-2012 standards and no export contract may be signed in case it contravenes the abovementioned standards – this provision allows to control the conduct of PMSCs during any execution of any contract, and moreover ensures that PMSCs are in compliance with ICoC and Montreux document that are international standards for military services;

3) The state must ensure a proper authorization for PMSCs for obtaining a PAAF status for that are contracted by Ukrainian government for Armed defensive and Operational support services during IAC;

4) Ukrainian government must ensure the application of contractual provision under which a contracting state is obliged to authorize PMSCs personnel with PAAF status in course of carrying out the Armed defensive and Operational support services during IAC under export permission provisions;

5) The PMSC should obtain the security clearance for designated employees in case the provision of services provides access to secret of a state.

The first issue with Technical services is that in nature they differ from Armed and operational support services, since they are product-oriented and do not provide the use of weapons or direct influence on the battleground. The second issue is that their provision is not in any event of the inherently governmental character. Therefore, other regulations should be applied.

As to the licensing, this issue must be treated in two perspectives: firstly, do the services constitute high-risk, high-training or knowledge requirement, or crucial for state character; secondly, do their provision requires a security clearance.

The answer for both these issues depends on which specific kind of services are provided. In case Technical services are connected to modernization or support of military designated products and information system, state special communication system their cryptographic security, the Technical services will require the security clearance under secret of a state legislation.¹¹¹ Moreover, these products and system are of crucial significance to interests of a state, therefore both security clearance and license, as to my opinion, should apply in a manner that the license should become a precondition to obtaining a security clearance for Technical services provision that require a security clearance.

To support this position, the license is required for activities in sphere of cryptographical security and MRO of firearms of non-military designation. However, there is no licensing requirements towards the demilitarization, demining, MRO of military designated firearms and vehicles, since had been terminated in 2015.¹¹² This makes impossible to legally provide MRO for the abovementioned products by private entities.

¹¹¹ On Secret of a State Law of Ukraine 1994 (SC) (UA) <http://zakon.rada.gov.ua/laws/show/3855-12>

¹¹² On Licensing of commercial activities Law of Ukraine 2015 (SC) (UA) <http://zakon.rada.gov.ua/laws/show/222-19>

The legislation on international transfer of military products, as it was stated above, is very product oriented and provides possibility on export / import of Technical services in connection with military products supply. I propose to cut off the connection between Technical services provision from military products supply by providing separate procedure on authorization and permission of export / import of Technical services based on the principles of:

- Licensing of Technical services within the territory of Ukraine for commercial entities that do not provide supply of military products;
- Expertise by State export control service performed for services;

Therefore, the following steps toward regulation of Technical services should be performed:

- 1) Impose a licensing procedure for MRO of military designated firearms and vehicles;
- 2) In case of provision of services in the general theatre of war or the state must ensure the application of contractual provision under which a contracting state is obliged to authorize PMSCs personnel with PAAF status in course of carrying out the Technical services during IAC under export permission provisions;
- 3) In the sphere of secret of a state legislation:
 - a. The precondition for technical services provision that are connected to secret of a state is the obtained license;
 - b. The PMSCs' and their employees should obtain security clearance before the services are provided;
 - c. The security clearance is not necessary for MRO of well-known military vehicles and weaponry systems and technical, cryptographic and IT support of systems that do not constitute or do not contain a secret of a state information;

As to the status of PMSCs' and their employees, in case of enacting the abovementioned regulatory service-based frameworks for contracting abroad or at the territory of Ukraine shall be as following:

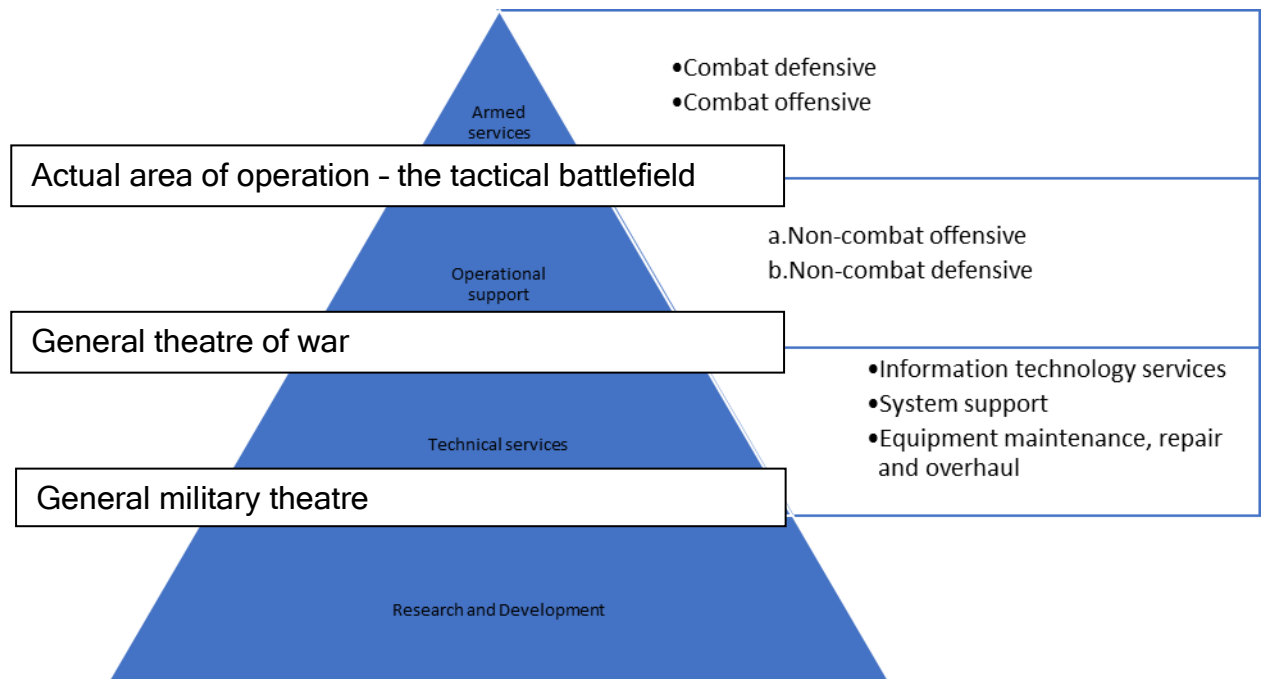
1) As to Technical services the PMSCs are not contracted to fight in combat, thus lack the incorporation criteria for combatant and criteria for mercenaries; given the nature of services, the status of a spy is also not applicable, therefore, the PMSCs' employees that provide Technical services will be under the status of civilian or PAAF (provided Ukraine had issued authorization);

2) As to Operational support services provided under ANSI/ASIS PSC.1-2012 and under inherently governmental principle, there is no preconditions to PMSCs' employees to participate in hostilities by means of providing the abovementioned services, thus the status of civilian or PAAF (provided Ukraine had issued authorization) is imposed.

3) As to Armed services only the Armed defensive services may be contracted while the government should issue the authorization of PAAF. Therefore, the employees may fall under the status of de facto combatant only in cases of being hired by military authority for protection of military objects, while meeting the incorporation criteria provided the adversary is informed of the PMSC carries out the duties of armed forces. Thus, the PMSCs' employees in most cases are to be considered as civilians with no right to participate in hostilities, however the POW privilege is not lost upon being captured in cases of participation in hostilities.

CONCLUSIONS

The first chapter was devoted to definition and classification of services provided by PMSC that became a basis for overall research. The services were classified on the basis of location: Actual area of operation – the tactical battlefield; General theatre of war; General military theatre; and character: defensive or offensive; non-combat or combat. The following scheme was developed.



The other issue considered in the first chapter was the definition of different applicable statuses of PMSCs that are hired by the state that is a party to the international armed conflict. This was a starting point for defining different statuses of PMSCs' employees in connection to the PMSC status and with regard to their conduct.

The second chapter was devoted to analysis of positive and negative obligations of the state that might influence the status of PMSCs. Such analysis lead to the decision that performance of the good practices fully covers the matter of obligations towards PMSCs regulation. Nonetheless, good practices or code of conduct does contribute little on the status of PMSCs and their employees.

Having discussed the different legal statuses of persons involved in international

armed conflict and good practices, the analysis of national legal frameworks of the most extensive users of PMSCs services - the USA and UK - were analyzed. This analysis revealed the differences in regulations from very regulated by the state to almost fully self-regulative. However, the completely different approaches showed that the usage of only few criteria particularly define the status of PMSCs - the rules of engagement, level of incorporation into armed forces and functions to be appointed to PMSCs and factual conduct of the PMSC personnel whereas the good practices are preserved during the conduct.

In concluding all abovementioned, worth saying that having analyzed the different statuses of PMSC employees in armed conflict, the following conclusion regarding PMSCs employees can be made:

The PMSCs employees should be rarely regarded as mercenary, since:

- Qualification of personal motivation is hardly provable;
- Specific criteria of employees' origins to be met;
- The employee should participate in hostilities directly while not

being incorporated in armed forces.

The status of civilian is a default status however, the protection of attack may be lost in times of direct participation in hostilities. As to the PAAF status is a status of a civilian with the privilege of enjoying the prisoner of war status in case of being captured. However, the PAAF is provided only in cases of a state that is a party to international armed conflict authorizes and acknowledges such status by means provided with Geneva Conventions.

The combatant status is significantly rarely imposed since the direct aim to entitle this status by a state-party to an international armed conflict is needed, provided the person does not meet the mercenary criteria status and is directly incorporated in armed forces.

However, the status of PMSC in connection with attribution to a state may influence the abovementioned status of PMSC personnel in the following way:

- The PMSCs employee may obtain the status of combatant in case PMSC

provides services to armed forces and PMSC is the de facto organ of a state. This means that the PMSC meets the incorporation threshold and it lacks independence and may not refrain from state authority orders. Thus, making it only option for the PMSC employee to lawfully participate in hostilities and one of the options of possessing the prisoner of war status in case of being captured by adversary.

- The PAAF status of PMSCs employee occurs while PMSC provides services only to armed forces together with authorization of a state to such status.

All other cases of PMSC status will normally not influence the status of PMSCs employee thus providing them with a status of civilian while providing services to non-armed forces state authority. The status of a spy, however, may be applicable for any previous statuses of PMSCs employee for providing espionage.

According to the criteria derived from general international law, the following statuses of PMSCs and their personnel that operate in full compliance with the Montreux document and Code of Conduct provided the Contracting state applies Good practices, are applicable:

- The status of de facto organ of a state may not be applied to PMSCs for existence of high level of independence of PMSCs from the state for the reasons of negotiations with Territorial states and terms of withdrawal from agreement. The status of combatant is not applicable since the Armed offensive services and incorporation into chain of command are forbidden under good to the PMSCs personnel.
- The status of PMSC as empowered by state to conduct governmental functions may appear, as the Good practices and neither obligations do not forbid such conduct. The status of PMSCs employees may be regarded both as civilian and the PAAF with respect to certain authority contracted the PMSCs. However, the loss of protection of civilian against the direct attack may not occur as to, the fact that the only applicable reason to use of force is the case of self-defense or defense of the third parties.

- The statuses of mercenary or spy may be applicable as to the fact the conditions under which the status is applicable are not covered by the scope of both Montreux document and the Code of Conduct.

The differences of regulatory frameworks of most extensive users of PMSCs services was made that revealed the possibility of completely different approaches for regulations of PMSC conduct influence little on the status of PMSC, however the status of PMSCs and their personnel is defined by factual circumstances.

The absence of possibility to contract the inherently governmental functions, tender procedures and reasonable negotiability in the USA and UK provides, that PMSC may not be de facto state organ because of existence of independence of the PMSC, thus the status of combatant of PMSC employee cannot be reached.

The differentiations of services to military and non-military state organs differentiate between civilian and PAAF status of personnel. The status of mercenary or spy may be reached by PMSCs employees however in very rare cases.

The analysis of Ukrainian regulation revealed that there are no specified regulations towards PMSCs and their services. The mere existence of international obligations towards international transfer of arms does not meet the criteria prescribed by good practices to regulate the PMSCs' activities. The lack of such regulations makes the services provider vulnerable while the state interests are not secured. This creates a need to whether regulate the industry or fully forbid it. As to my opinion the first approach should be enacted.

Therefore, having summarized all of the abovementioned, the improvements were proposed on the basis of service-based approach, licensing, international standardization and the principle of not contracting the inherently governmental functions. Therefore, the statuses of PMSCs' and their employees will be similar to those contracted by USA or UK governments.

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ЗАЯВА
студента ВНЗ «Український католицький університет»
про оригінальність академічної роботи та самостійність її виконання

Декларуючи свою відданість засадам академічної доброчесності й християнської етики праці, та відповідно до діючого «Положення про запобігання плагіату й коректне застосування цитат у навчальному процесі Українського Католицького Університету», цим посвідчую, що підготовлена мною на кафедрі *Кафедри теорії права та прав людини Факультету суспільних наук* академічна робота Статус приватних військових компаній у міжнародному праві (The Status of Private Military Companies Under International Law) є **самостійним дослідженням і не містить елементів плагіату**. Зокрема, всі письмові запозичення з друкованих та електронних публікацій у підготовленій мною академічній роботі оформлені та мають відповідні покликання.

Водночас заявляю, що я ознайомлений/а з визначеною в діючому «Положенні про запобігання плагіату й коректне застосування цитат у навчальному процесі Українського Католицького Університету» дефініцією поняття «*плагіат*» як «оприлюднення, повністю або частково, чужого твору науки, літератури, мистецтва (ідеї, результатів дослідження, відкриття, раціоналізаторської пропозиції) під своїм іменем, а також відтворення у своїй самостійній письмовій роботі чи науковому дослідженні текстів інших авторів, що опубліковані в паперовому чи електронному вигляді, без відповідного покликання на їхнє джерело».

Я також усвідомлюю, що несу повну відповідальність за присутність в академічній роботі плагіату, і розумію всі негативні наслідки для власної репутації та репутації Університету в разі порушення мною норм академічної доброчесності. Я також визнаю слушність політики УКУ, яка передбачає, що виявлення плагіату в моїй академічній роботі може бути підставою для відрахування з числа студентів Університету.

Дата

Підпис

