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'*Warriors for Hire?* – Private military contractors and the international law of armed conflicts

"War is father of all, king of all.
Some it makes gods, some it makes men,
some it makes slaves, some free."
(Heraclites, Fragment 44)

1. Introduction

The reliance on private contractors in military operations, especially in international and non-international armed conflicts has definitely increased in the last ten-to-fifteen years. While in the 1991 Gulf war the ratio of military personnel to civilian contractors was 100 to 1, in Bosnia it nearly reached 1 to 1, and in the 2003 Iraq war it estimated 10 to 1. It has become a trend to speak about an 'outsourcing of war'.[2] Private military contractors serve today at many positions linked to the armed forces from providing catering and water supplies, sanitizing, but also providing military support such as armours, ammunition, driving and transporting military supplies. There are many examples of cases when the tasks of civilian contractors include the maintenance and operation of unmanned reconnaissance vehicles, providing security for various military and military-related objectives and, moreover, operation of – often high-tech – weapons.[3] The extensive use of civilian contractors became almost unavoidable in most cases; the reason behind it is manifold. It is not only the dramatic downsizing of the armed forces and the lack of proficient personnel because of constant rotation, but also the super high-technology of the operated weapons which requires a sophisticated expertise. Beside that, financial aspects also became a priority consideration. Including all the additional costs and charges, the employment of civilian contractors on a case-by-case basis is stated to be much cheaper than the maintenance of a standing army. Considering the nature and complexity of current international conflicts, the domestic political support for a foreign operation is much easier to sustain if the loss of soldiers can be minimized, or, even avoided. The death of civilian contractors is usually not counted in the statistics. Despite the practical role and importance of private military contractors as actors in the battlefield, there is a severe confusion concerning their legal status under the international law of armed conflicts, even concerning their exact definition in the international legal literature.

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[2] Singer, P. W.: "Outsourcing war", Foreign Affairs, Vol. 84, Issue 2 (2005), p. 119; Schreier, Fred – Caparini, Marina: Privatising Security: Law, Practice and Governance of Private Military and Security Companies. Geneva Centre for the Democratic Control of Armed Forces (DCAF) Occasional Paper – No.6, Geneva, March 2005. pp. 97-102.

[3] On the issue see in detail: Interview with Andrew Bearpark by Toni Pfanner. International Review of the Red Cross, Volume 88 Number 863 September 2006, pp. 449-457.

This study aims to provide a brief overview about their possible legal status under the law of armed conflicts, as well as the main legal issues related to their activities, *e.g.* their liability for human rights violations, their influence on wartime neutrality, or the responsibility of states for their acts.

2. Who are the private military contractors?

Private military contractors are essentially private corporate entities, *i.e.* registered companies the establishment and activity of which is primarily regulated by the law of the State of registration. There are various titles for those entities such as private military firms, private security companies or services, however, their prevailing title is private military companies (PMCs).[4] The reason behind that multiplicity lies in the manifoldness of their activities. Private security companies are often referred to as entities essentially providing defensive services like protection of persons and objects; private military firms and companies are seen as providing the widest variety of services, including even combat force in the battlefield.[5] The title private military contractors deems, for the purposes of the study, a frame-concept for all the corporations above, including all the services provided by them.

3. Legal status of private military contractors and their employees under the international law of armed conflicts

One of the basic principles of the law of armed conflicts (also known as *ius in bello*) is the distinction between '*combatants*', namely persons who are "*authorized by international law to fight in accordance with international law applicable in international armed conflicts*"[6] and '*non-combatants*' including '*civilians*'. It must be noted, however, that the categories above are definitely individual categories, *i.e.* they are intended to classify the individuals on their own and not collectively. In this regard, private military contractors as corporate entities cannot be themselves subjects of the law of armed conflicts but only their employees, who are eventually actively engaged in the hostilities. Therefore, it is only relevant to examine the possible classifications of individuals employed by contractors. It shall be noted that the notion of 'combatant' and 'civilian' only exists in the law of international armed conflicts, but does not exist in internal armed conflicts. Nevertheless, the obligation to distinguish between a combatant and a civilian is generally claimed to be a customary norm of international law applicable both in international and non-international armed conflicts.[7] Consequently, the following classification may have an equal standing in both types of conflict. Nevertheless, it is

[4] See e.g.: Lilly, Damian: 'From Mercenaries to Private Security Companies: Options for Future Policy Research', International Alert, November 1998; Goddard, S.: The private military company: A legitimate international entity within modern conflict, A thesis presented to the Faculty of the U.S. Army Command and General Staff College, Fort Leavenworth, Kansas, 2001; Brooks, Doug: Messiahs or mercenaries? The future of international private military services, International Peacekeeping: Managing Armed Conflicts in the 21st Century. 7(4), [Winter 2000].

[5] Cf. Cameron, Lindsey: Private military companies: their status under international humanitarian law and its impact on their regulation. International Review of the Red Cross, Vol. 88 No. 863 September 2006, p. 576.

[6] Ipsen, Knut: Combatants and Non-Combatants. In: Fleck, Dieter (ed.): The Handbook of Humanitarian Law in Armed Conflicts, Oxford, 1995, p. 67. (Emphasis added.)

[7] Cf. Henckaerts, Jean-Marie – Doswald-Beck, Louise: Customary International Humanitarian Law, Vol. I. ICRC – Cambridge University Press, 2005. p. 3.

not at all decided, what status the employees themselves enjoy under the law of armed conflicts, in which category they fit. Therefore, employees of private military contractors may be civilians, civilians accompanying the armed forces, mercenaries, or even combatants, depending on whether or not they are able to fulfil the conditions set by *ius in bello*. This classification is of essential importance in order to determine the legality of their activities and the scope of their responsibilities.

a. The 'mercenary' question

In the international literature concerning the legal status of PMC employees there is a prevailing theory according to which these may be classified first of all as mercenaries under the laws of war.[8] Under the international law of armed conflicts, especially under Article 47(2) of the Additional Protocol I of 1977, in order to be classified as a '*mercenary*', a person shall fulfil six criteria cumulatively; not fulfilling any of the criteria below prevents him to be deemed a '*mercenary*':

"[a] mercenary is any person who:
(a) is specially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(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."

In my view, there can be (rather exceptional) cases when all the conditions are fulfilled at the same time and, therefore, subcontractors can be classified as 'mercenaries'. Herewith I would like to stress again that the most important factor is the direct participation in the hostilities. This condition determines not only the legal status of the person but also the possible responsibility for its acts. However, the status of mercenaries does not provide legality for subcontractors; neither in that case are they entitled to combatant or POW status and they can be subjects of criminal charges for the mere fact of taking a direct part in the hostilities.[9] Another (rather subjective) remark has to be added at this point. The classic definition of 'mercenaries' were and are not intended to cover the activities of subcontractors but to provide a comprehensive regulation for a serious legal and political problem emerged during and after

[8] See in particular: Shearer, David: Private Armies and Intervention, Adelphi Paper 316, IISS, 1998, pp. 16-21; Zarate, Juan Carlos: The Emergence Of A New Dog Of War: Private International Security Companies, International Law, And The New World Disorder, Stanford Journal of International Law, Vol. 34 (Winter 1998), pp. 75-162.; Kassebaum, David: A Question of Facts – The Legal Use of Private Security Firms In Bosnia, Columbia Journal of Transnational Law, Vol. 38 (2000), pp. 581-602.; O'Brien, Kevin A.: PMCs, Myths and Mercenaries, supra note 8.; Singer, P.W.: War, Profits, And The Vacuum of Law: Privatized Military Firms and International Law, Columbia Journal of Transnational Law, Vol. 42 (2004), pp. 521-549.

[9] As Article 47(1) of Additional Protocol I of 1977 reads: „A mercenary shall not have the right to be a combatant or a prisoner of war."

the wars of decolonisation in the second half of the 20th century. Being a 'mercenary' in the legal and in the political or military meaning must be therefore distinguished. Nevertheless these regulations constitute a part of the current system of *ius in bello* and therefore can and must be applied in the relevant cases.

b. Can employees of PMCs be combatants?

Under the Geneva Conventions and their Additional Protocols and also under customary international humanitarian law, combatants are essentially members of the armed forces of the belligerent Parties (officers, NCOs, soldiers) and also – under certain circumstances – members of militias and volunteer groups if those are part of the armed forces.
A proper summary of the legal requirements can be found in Article 43 of Additional Protocol I of 1977:

"1. The armed forces of a Party to a conflict consist of all *organized armed forces*, groups and units which are *under a command responsible to that Party for the conduct of its subordinates*, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be s*ubject to an internal disciplinary system* which, ' inter alia ', shall enforce *compliance with the rules of international law applicable in armed conflict.*
2. *Members of the armed forces of a Party to a conflict* (other than medical personnel and chaplains covered by Article 33 of the Third Convention) *are combatants*, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict."

Article 4 of III Geneva Convention of 1949 provides for further detailed requirements:

„1) *Members of the armed forces* of a Party to the conflict as well as *members of militias* or *volunteer corps* forming part of such armed forces.
(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

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

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

As it can be seen from the above, the most important elements of the combatant status are as follows: belonging to an organized armed unit or force which forms part of the 'official' armed forces of a belligerent Party; serving under organized and responsible command; having a fixed and clear distinction from civilian persons (*e.g.* uniform or other emblems); carrying arms openly (at least right before and during hostilities); and complying with the rules and laws of

armed conflicts. The most important effects of the combatant status are the right to take a direct part in the hostilities and to be entitled to a prisoner-of-war statues of captured by enemy forces. In relation to PMC employees, the question emerges: is it legally or practically possible to consider them as combatants? In order to answer this complex question, two further issues shall be examined.

ba. The legal relationship between the contractors, their employees and the armed forces

At this point we shall return to the examination of the status of contractors as private corporations, since the basis of the legal relationship, namely the contract is concluded between the armed forces and the company (the contractor) concerned.
According to the most commonly referred US military manual, FM 3-100.21 (100-21) on *Contractors on the Battlefield*, a contract is

„[…] a legally enforceable agreement between two or more parties for the exchange of goods or services; it is the vehicle through which the military details the tasks that it wants a contractor to accomplish and what will be provided to the contractor in return for the goods or services."[10]

The contract is established between the armed forces represented by the *contracting officer* and the *representatives of the private contractor company*. The contract is generally regulated by national law and not by international law. Therefore, international legal norms hardly influence and concern the form and contents of the contract, except of possible international legal obligations of the contracting State (which the armed forces are an organ of). The crucial point is that the contract shall contain all the details of the cooperation, such as the exact tasks of the contractor, deadlines and other additional requirements. Summing up, it is only the contract that shall contain all the rights and obligations of the contractors and subcontractors. During the exercise of their tasks, contractors and their employees are only obliged to the extent of their contract; the same applies regarding their rights.
As stated in FM 3-100.21 (100-21),

"[c]ommanders do not have direct control over contractors or their employees (contractor employees are not the same as government employees); only contractors manage, supervise, and give directions to their employees. Commanders must manage contractors through the contracting officer […]."[11]

The communication and the exchange of requirements is, therefore, further managed by a so-called *contracting officer*:

"[t]he contracting officer […] is the only government official with the authority to direct the contractor or modify the contract."[12]

[10] FM 3-100.21 (100-21), Contractors on the Battlefield, January 2003, Headquarters, Department of the Army, p. 1-2, para. 1-5.
[11] Ibid., p. 1-7, para. 1-22.
[12] FM 3-100.21 (100-21), p. 1-8, para. 1-26.

Before turning to the analysis of the contracting officer's role, another aspect shall be mentioned. In international, especially in multilateral crisis-management operations, the legal status of the armed forces is generally regulated by 'Status of Forces Agreements' (SOFA). In many cases, but not as a rule, SOFAs may also contain provisions regarding the legal status and obligations of contractors and subcontractors, especially in financial and jurisdictional issues. However, States are not obliged under international law to include such provisions. In their absence, in cases, when the presence of the armed forces is dependent upon the host State's consent, private military contractors are obliged to organize the legal basis of their presence separately, *e.g* through independent agreement with the host State.

As it can be seen from the above, contractors and their employees are not drawn into the military chain of command, therefore PMC employees cannot be deemed military personnel, even if they exercise their tasks for the armed forces. PMC employees cannot be commanded or managed by field commanders, only by their employers, *i.e.* the private military contractors. The procedure and requirements of belonging to a state's armed forces or units linked to it is generally regulated by the individual states' national laws and regulations. It usually includes enlistment, incorporation into the military chain of command and control, as well as into a specific employment status. As it is obvious from the above, the case of PMC employees is essentially different from this procedure, and the consequences are obvious. Now, the question may be raised to what extent PMC employees are entitled to the defence (even with the use of force) of the armed forces, in cases of emergency? Even that question shall be regulated by the contract. The general practice is that contractors shall provide for security for their own employees (within the limits pointed out above). That is, the armed forces are not obliged to provide security for subcontractors unless contracted differently.

bb. The problem of direct participation in the hostilities

The combatant that has the right to take a direct part in the hostilities has the right to engage in attacks against enemy military objectives and cannot be punished for this engagement (if criminal acts are not committed during the engagement). However, there cannot be found an elaborated definition of "direct participation in the hostilities" in the positive law of armed conflicts. As a starting point, we may refer to the Commentaries of the Additional Protocols of 1977:

"Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place."[13]

Using this definition, a direct participation in the hostilities shall mean an active engagement in 'attacks'.[14] The core point of this determination definitely lies within the link of the actual act and its consequences, namely, the harm caused to the adversary. It is not the aim of this study to provide an in-depth analysis of this specific issue; nevertheless it is true that the notion of

[13] : Sandoz, Yves, et al., eds., Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Dordrecht, Martinus Nijhoff Publishers, 1987. p. 516.
[14] Cf. McDonald, Avril: Guns 'n butter for hire: Some legal issues concerning private military companies, Background paper for Conference on Private Military Firms, Clingendael Institute, 2 June 2004, para. 3.3.

'direct participation' is extremely challenged currently.[15] Especially in the light of modern warfare, it is often difficult to determine when and how a person is taking a direct part in the hostilities. It can be stated in advance that military advisers, personnel providing military training or maintenance and service of complex weapons systems are generally excluded from this category. [16] It can be argued whether a civilian employee of a contractor who *e.g.* operates an air-defence system on a warship or operates an attack guided-missile system in a way that he leads the guided-missile to target, takes a direct part in the hostilities (the same applies to similar kinds of weapons systems). In the author's view, in order to apply the rules of *ius in bello* to the current factual situations (which is a main goal of the laws of war), the cases above can validly be classified as taking a direct part in the actual fighting. Another case can nevertheless be much more argued – the operation of a robotic plane that collects intelligence and does targeting. If that reconnaissance operation is closely linked to target selection and targeting, it may deem a direct participation. Also in this regard, the crucial element is how direct the contribution to the actual combat situation is.[17] Nevertheless, taking a direct part in the hostilities is not limited exclusively to offensive operations but also includes defence in a combat situation. The range of such situations is too wide to enlist but some typical examples can be mentioned: *e.g.* if PMC employees are tasked to protect facilities which, under the general law of armed conflicts, can be qualified as military objectives (such as oil refineries, army posts, military equipment storages – however, the term 'military objective' can be interpreted flexibly), and they are attacked, this situation can constitute 'hostilities' in the scope of *ius in bello*, and if subcontractors use armed force to protect themselves (and/or the facility), they actually take a direct part in the hostilities. On the other hand, providing personal security (*i.e.* bodyguards) and using force in self-defence or in the defence of the protected person requires further investigation, whether the protected person can be seen as a military objective (*e.g.* a high-ranking military officer).
Summing up, the issue of direct participation shall be examined in every case separately, considering the actual activity and its contribution to the war efforts.

c. PMC employees as civilians

It is a general axiom of *ius in bello* that individuals are either combatants or non-combatants. The are also views that the two main categories are combatants and civilians[18], however, in my view, civilians are also non-combatants, which is a broader term, including (beside civilians) also military personnel not having combatant status. There is no positive definition of 'civilians', hence, the logic is easy: individuals who are not combatants or members of the non-combatant military personnel are to be seen as civilians. Since it becomes more and more obvious that PMC employees can only exceptionally be treated as combatants, non-combatant military persons or mercenaries, it seems that they shall be seen as civilians. If they are to be treated as civilians, the most important rule shall be set right in the beginning: PMC employees do not have the right to take a direct part in the hostilities.

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[15] Quéguiner, Jean-François: Direct participation in hostilities under international humanitarian law. Working Paper, November 2003. Program on Humanitarian Policy and Conflict Research at Harvard University. <http://www.ihlresearch.org/portal/ihli/alabama.php>
[16] See in particular: Sandoz, Yves, et al., eds., Commentary on the Additional Protocols of 8 June 1977, p. 579.
[17] Cf. McDonald, Avril (2004): op. cit., para. 3.3.
[18] Cameron, Lindsey (2006): op. cit. p. 587.

d. PMC employees as civilians accompanying the armed forces

There is also a generally accepted theory that the legal status of the employees of private military contractors under the international law of armed conflicts is regulated by Article 4(4) of the III Geneva Convention of 1949[19], regarding *'Civilian personnel accompanying the armed forces without being members thereof'*. It states that

"[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, *supply contractors*, members of labour 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."

It shall be seen from the text that the primary legal status of PMC employees is '*civilians*', which means that those individuals are in no case entitled to take a direct part in the hostilities. Violating this rule has not only the consequence of losing their 'prisoner-of-war' (POW) status if fallen into enemy hands, but also involves a serious individual criminal responsibility.[20] This specific type of civilians are generally to be treated as prisoners-of-war if captured, while civilians generally will not be POWs but remain civilian internees. In general, as civilians, they cannot be subjects to direct armed attacks, however, based on the specific nature of their activities in some cases (*e.g.* transporting ammunitions, providing security for military installations), they may deem *military objectives* under Article 52(2) of Additional Protocol I of 1977[21]. Theoretically, there is no specific provision under the laws of armed conflicts which would prevent them to carry side-arms for the case of self-defence. However, in practice it may be problematic because it may encumber them to distinguish themselves from combatants. It is an important element in Article 4(4) that contractors shall be provided with a specific identity card indicating their exact legal status.

Here again, we see a series of cumulative conditions:

1. accompanying the armed forces – it is subject of debate whether this condition implies a physical or geographical link between the forces and the contractors. In my view, it largely depends on the services provided by the contractors, and no general rule can be set;
2. not being members of the armed forces – it has been discussed above, what requirements are to be fulfilled under this condition, and it has also been proved that PMC employees are not members of the armed forces;
3. wearing a special ID card in order to prove their special status – the text implies that this requirement is also compulsory, its lack may prevent the person concerned from being treated a civilian accompanying the armed forces;
4. the services listed are generally supplementary and do not interfere with the primary activities of the forces, *i.e.* combat. It may imply that contractors shall only provide auxiliary services and shall not themselves engage into combat operations.

[19] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
[20] See Article 5 of the III Geneva Convention of 1949.
[21] 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.

If PMC employees fulfil these conditions, they can be treated as civilians accompanying the armed forces without being members thereof.

4. Do private military contractors comply with the international law of wartime neutrality?

The first additional question concerning the legal status of PMCs or their state of nationality is: does the state violate its duties under the *international law of wartime neutrality* if it approves the active participation of a PMC in an armed conflict which the state itself is not a party of? The rules of wartime neutrality are first of all based on the V Hague Convention of 1907[22], which forms a part of customary international law, and therefore applies for all states. However, many authors are of the view that most of those rules are somewhat outdated, first of all as a consequence of the establishment of the collective security system.[23] On the other hand, neutral states still have specific rights (*e.g.* non-violability) and duties (*e.g.* humanitarian assistance and non-intervention) under the current system of wartime neutrality. Regarding the legality of recruiting employees for PMCs, the most important provision is Article 4 of the V Hague Convention of 1907 which states that

"[c]orps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents."

In this regard, the term 'combatants' has not got the same meaning as in the Geneva Conventions of 1949 (but a much broader), therefore this provision can also apply for the case of PMCs. In accordance with Article 5, the neutral state is obliged to prevent and punish "acts in violation of its neutrality unless the said acts have been committed on its own territory". The state can only escape from responsibility if persons from its territory are "crossing the frontier *separately* to offer their services to one of the belligerents"[24] (Art. 6.).
It means that only individuals or "small, unorganised groups" are entitled to join the armed conflicts from a neutral territory[25] and not organisations, or, in our case, corporations with organized employment, such as PMCs. However, in accordance with Article 7,

"[a] neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet".

This provision is directly intended to regulate trade or service provided by private entities. The provision can also apply for *passive* services, *e.g.* military advice, training or system maintenance by PMCs. Nevertheless, if the neutral state limits the rights of its private entities, it must not discriminate between the belligerent parties. It must be noted, however, that since 1945 the freedoms above shall not prejudice the success of UN Security Council sanctions under Chapter VII of the UN Charter.

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[22] Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907.
[23] See e.g. Goia, Andrea: Neutrality and Non-Belligerency. In: Post, Harry H.G. (ed.), International economic law and armed conflict, Martinus Nijhoff Publishers, Dordrecht, 1994, pp. 52-53.
[24] Emphasis added.
[25] Green, Leslie C.: The Contemporary Law of Armed Conflict, 2nd edition, Manchester University Press, 2000, p. 272.

If a citizen of a neutral state takes a direct part in the hostilities without being a lawful combatant, he shall be treated in the same manner as the civilian citizens of the belligerent Parties (Art. 17 of the V Hague Convention of 1907). Summarizing the above, a third, neutral state does not violate its duties under the law of wartime neutrality, if it allows or approves PMCs on its territory to support any of the belligerent parties, as long as the support does not include active (combat) service.[26] (We are back at the same crucial point – "taking a direct part in the hostilities".)

5. Accountability for violations of human rights and the laws of armed conflicts

Perhaps the most important legal consequence of the participation of private military contractors and their employees in modern armed conflicts is the question concerning their accountability, responsibility and liability for violations of the applicable legal norms and for damages caused. In the international literature of contractors there are several confusions regarding these topics, with the central question whether they have any responsibilities at all under international law. In the following I attempt to investigate under what circumstances PMC employees can be held responsible for internationally wrongful acts.

a. Individual criminal responsibility and the question of jurisdiction

As mentioned above, if a (non-combatant) civilian person takes a direct part in the hostilities, he/she can be subject of criminal charges for that mere fact, if fallen into enemy hands. The same applies for PMC employees if they are classified as non-combatants or even civilians. Another question can be raised, if the person violates other laws applicable in armed conflicts. Risking the statement of the obvious, it may be noted, that the basic principle of almost all criminal legal systems is that citizen remains bound by the norms of the criminal law of his/her state of nationality, even abroad. Establishing a concurring jurisdiction, the person can be bound at the same time by the criminal law of the state of residence.[27] Therefore, if an employee or member of a subcontractor commits a crime (e.g. murder, rape or pillage) as a civilian or a mercenary (*i.e.* not a lawful combatant) in an armed conflict in another state, it can be subject of criminal charges in both states depending on the criminality of the act (i.e. whether it is crime in both states). Moreover, in some states 'serving as a mercenary' itself constitutes a crime. In many countries today there are legal acts to prohibit and criminalize citizens who take part in foreign wars without an expressed authorization of the government. Nevertheless, PMC employees as civilians usually do not fall within the scope of military criminal codes; they shall be prosecuted under the general criminal code of the state of nationality. Exercising criminal jurisdiction is not only a right but also a duty of states; therefore no crimes shall be left unpunished, however, based on the principle of fair trial. Neither PMC employees should escape from the criminal jurisdiction of their state of nationality in any case. It is the case even if the contracting (receiving) state grants immunity

[26] In our view, this statement can also be based on the international customary norms of wartime neutrality.
On mercenaries and neutrality law see also: Hampson, F.J.: Mercenaries: Diagnosis before proscription, Netherlands Yearbook of International Law Vol. XXII (1991), pp. 17-19.

[27] On the principles of jurisdiction see: Ratner, Steven R. - Abrams, Jason S.: Accountability for human rights atrocities in international law. Beyond the Nuremberg legacy, Clarendon Press, Oxford, 1997, pp. 139-141.

from its own criminal jurisdiction for PMC employees in the agreement. This immunity is not nearly absolute because it cannot flow from the general international law – as private military contractors are not subjects of it. At any rate, the contracting state has the sovereign right to grant immunity for foreign persons, which does not in any way preclude their criminal responsibility towards the state of nationality. Nevertheless, there are specific crimes constituting a basis of universal criminal jurisdiction, which means that all states of the international community may exercise criminal jurisdiction regardless of any factual interest. Even so, these crimes create at the same time crimes under international law with a special international criminal responsibility.

There is no doubt about the fact that even employees of PMCs, regardless of their status under *ius in bello*, can commit *'war crimes'* that is *the grave breaches of the laws and customs of warfare, especially those of the Geneva Conventions of 1949 and their I and II Additional Protocols of 1977*.[28] The most important question in this regard is the enforcement of individual accountability. International crimes can be prosecuted before national courts or international criminal tribunals, having in sight the prohibition of retroactive application of law and punishment (especially in the case of international tribunals).[29] The jurisdiction of the newly established International Criminal Court (ICC) extends to war crimes, however, the exercise of it has some obvious obstacles, which are not to be interpreted in this study.

It shall be noted that there are certain studies reporting criminal acts committed by PMC employees all around the world, however, there is no reliable information about criminal procedures against PMC employees accused with war crimes.[30]

b. Liability for damages caused by PMCs

The problem of (civil or tortious) liability to pay compensation for damages caused by contractors is perhaps more complex than that of criminal responsibility, still, this question falls outside the scope of the laws of armed conflict. The main question is, as always: who shall pay, who shall bear responsibility? There can be several answers to this question: the individual, the contractor or the state that contracted the company. As the individual represents its employer and (in the legal meaning) acts in its name, the responsibility can generally be borne by the latter two. Theoretically, it cannot be excluded that the company itself shall provide compensation for damages caused. This can be the case especially if its employees are not acting as lawful combatants and, beside that, the company itself cannot rely on the principle of 'military necessity'. Here again, the conditions set out in the contract may be decisive in that regard. One must be however very careful at this question, because the question of liability can be determined or influenced by further legal factors, including the legal provisions of the contracting state concerning state liability for wartime damages. On the other

[28] Grave breaches of other specific international humanitarian agreements not enumerated here may also constitute war crimes. On 'war crimes' in the ICC Statute see in detail: Dörman, Knut with contributions by Doswald-Beck, Louise and Kolb, Robert: Elements of war crimes under the Rome Statute of the International Criminal Court. Sources and Commentary, Cambridge University Press, 2002.

[29] On the topic of international criminal responsibility see: Cassese, Antonio: International Criminal Law, Oxford University Press, 2003.

[30] See e.g. Cameron, Lindsey (2006): op. cit. pp. 573-574.; Perrin, Benjamin: Promoting compliance of private security and military companies with international humanitarian law. International Review of The Red Cross, Volume 88 Number 863 September 2006, pp. 613-636.

hand, it can neither be excluded that the contracting state shall bear full liability for damages caused; eventually, contractors may act on behalf of the contracting state. It would be too far-fetched to establish general rules concerning civil liability for international torts in this specific case.

c. Possibility of state responsibility under international law

There is also a possibility for invoking the international responsibility of the contracting (receiving) state for wrongful acts committed by the contractors against other state(s), if their acts can *be attributed* to the contracting state,[31] specifically if they "exercise elements of the governmental authority"[32], *e.g.* if companies are contracted to maintain or restore order, or as prison guards (interrogators), or, moreover, based on recent international cases, if contractors execute paramilitary or reconnaissance operations based on a contract with the state,[33] etc. It must be stressed that in order to invoke the responsibility of a state for internationally wrongful acts (exclusively by other state(s)), it must be proved that the acts can be attributed to that state, *i.e.* "in fact acting on the instruction of, or under the direction or control of, that state".[34]

As it may be seen, there are several possibilities to invoke individual criminal or civil responsibility for wrongful acts, however, especially during armed conflicts, their proving and procedure may come up against difficulties.

7. Conclusions – *de lege feranda*

As seen above, there are several international legal problems concerning the activities of private military contractors. The current system of international law of armed conflicts is undeniably not suited for the challenges raised by these new entities; the norms which can be applied are not intended to cover them. However, we have to bear in mind that the lack of expressed legal norms on private contractors must not prevent us from applying the existing system of norms. Declaring *non liquet* threatens with the loss of legal control over the activities of PMCs and with the marginalization of the rule of law, which is, in my view, more dangerous than declaring some of their activities illegal under the current norms of *ius in bello*. The applicable norms are neither helpful in all cases; there are several borderline cases when the classification of the employees of the contractors depends on tiny interrelations of circumstances. Consequently, each case of each person shall be examined separately, which is also a principle of the law of armed conflicts. Nevertheless, one thing can be stated almost positively: currently, members or employees of PMCs are not entitled to take a direct part in

[31] On the international responsibility of states see in particular: Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001) (extract from the Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2), November 2001.

[32] Article 5 of the Draft Articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001).

[33] On recent interpretation of military or paramilitary operations attributable to states see: Prosecutor v. Tadič Case, ICTY Appeals Chamber, 1999. (IT-94-1)

[34] Article 7 of Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001), (A/56/10), chp.IV.E.2).

the hostilities. Therefore, the next step has to be taken by military experts and politicians. If they find that private military contractors can make a useful contribution to conflict resolution and maintenance of order, they have to initiate the establishment of a comprehensive legal framework governing their status, functions and accountability. This can also happen in the form of an international conference concluding a legally binding international agreement. The international law-making must be, on the other hand, accompanied by domestic legislation in every state concerned.

A solution may also be the conclusion of an Additional Protocol IV to the Geneva Conventions of 1949 on the status of private entities in times of international and non-international armed conflicts. I would like to emphasize that, in my view, the central questions shall be the framework for accountability and legal control under international law. If private military contractors are intended to be lawful combatants, a clear, transparent and internationally standardized authorization and monitoring procedure should be established with the involvement of NGOs like the International Committee of the Red Cross (ICRC) and renowned human rights organisations. On the domestic legal side, the legal framework of a specific civil control should be established with detailed norms on the accountability towards the state organs.

The fact is undeniable: the involvement of private military contractors in the current and future armed conflicts becomes more and more increasing and important. It is high time the international community met the legal exigencies raised by their existence and activities.