

# The Impact of Private Military Companies in Military Operations

*El impacto de las Empresas Militares Privadas en las Operaciones Militares*

**Abstract:** The aim of this article is to analyse the employment of Private Military Companies (PMC's) in military operations and UN missions. The PMCs operate throughout the world, commissioned by governments, intelligence agencies, private industries, warlords, drug cartels and rebel groups to support their militaries and investments. These companies share not only similar corporate aims but also a professional ethos; they are largely run and staffed by ex-military personnel. The existing literature confirms the fact that Africa is the largest theatre of PMC's operation next to Iraq and Afghanistan (GWATTWA, 2016). This phenomenon continues to raise serious concerns to the national armed forces, as most governments are still reliant on their military forces to protect their borders and vital interests. Traditionally military function has been known to be the sole responsibility of the state; (SINGER, 2008) however, the PMCs are continuing to infringe on that mandate. The international system has undergone a significant change since the United States (US) terrorist attack incident in September 2011, where the PMC's has become broadly acceptable elements of the Global War on Terrorism (GWT). Therefore, this article will look into the employment of PMCs in different countries and analyse the trend and legalities involved. Finally, a conclusion will be drawn to identify measures to curb or minimise the threats posed by PMCs to state militaries and military operations.

**Percy Nyati** 

Exército da África do Sul.  
Pretoria, Gauteng, África do Sul  
prcynyati@gmail.com

**Keywords:** The employment of Private Military Companies (PMCs).

**Resumen:** El propósito de este artículo es analizar el empleo de empresas militares privadas (EMPs) en operaciones militares y misiones de la ONU. Las EMPs operan en todo el mundo, encargados por gobiernos, agencias de inteligencia, industrias privadas, jefes militares, cárteles de droga y grupos rebeldes para apoyar a sus fuerzas armadas e inversiones. Estas compañías comparten no solo objetivos corporativos similares, sino también un espíritu profesional; están en gran parte dirigidas por ex militares y también los emplean. La literatura existente confirma el hecho de que África es la mayor etapa de operación de las EMPs, junto con Irak y Afganistán (GWATTWA, 2016). Este fenómeno sigue siendo motivo de grave preocupación para las Fuerzas Armadas Nacionales, ya que la mayoría de los gobiernos siguen dependiendo de sus fuerzas militares para proteger sus fronteras e intereses vitales. Tradicionalmente, se ha sabido que la función militar es responsabilidad exclusiva del Estado; (SINGER, 2008) sin embargo, las EMPs continúan violando esta norma. El sistema internacional ha experimentado un cambio significativo desde el incidente del ataque terrorista en los Estados Unidos (EE.UU.) en septiembre de 2011, donde las EMPs se han convertido en elementos ampliamente aceptables de la guerra contra el Terrorismo (GT). Por lo tanto, este artículo analizará el uso de EMP en diferentes países, y analizará la tendencia y las legalidades involucradas. Finalmente, busca identificar, en la conclusión, medidas para frenar o minimizar las amenazas que plantean las EMPs a las fuerzas armadas y operaciones militares estatales.

**Palabras clave:** Empleo de Empresas Militares Privadas (EMPs).

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## 1 Introduction

Private Military Companies (PMCs), embody an industry operating openly on the global market, organised along permanent corporate lines and showing signs of growth rather than contraction, at times creating a challenge for military operations. Recently there has been an increased prominence in the old profession of PMCs operating in armed conflicts, purely on the basis of profit. A definition of PMC is therefore essential to achieve a mature understanding of this modern phenomenon. The PMCs are essentially business organisations that trade in professional services intricately linked to military activities and warfare. The functions of PMCs fall into three broad types of activity: combat support, military support and security services.

Moreover, PMCs are corporate bodies that specialise in the provision of military skills, including combat operations, strategic planning, intelligence, risk assessment, operational support, training and technical skills. Members of these organizations are colloquially called as ‘mercenaries’, otherwise known by their companies as contractors and or security experts, meanwhile their business is considered as Private Security Sector.

These companies have managed to formalise the historically known profession of mercenaries into private contractors, by providing military services to states and non-state entities in exchange for payment.

At times they are viewed as simply resourceful service providers that operate in areas of conflict, who can also assist when governments need additional military support/service.

The war in Iraq and Afghanistan along with ‘Global War Against Terror’ (GWAT) can be mentioned as one of the examples, where the PMCs are extensively employed.

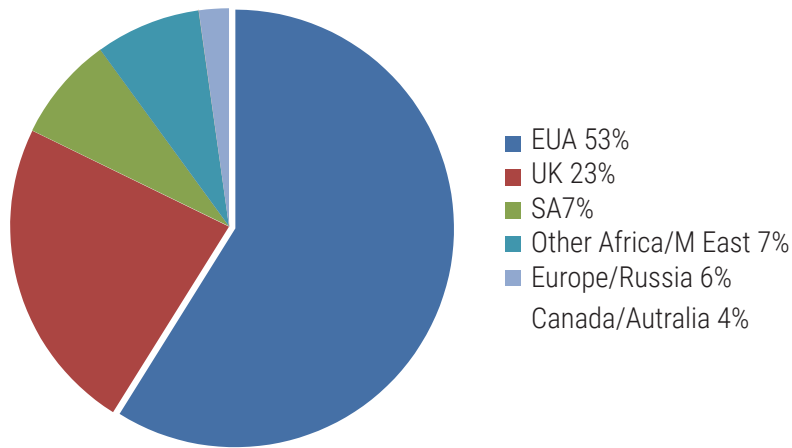
Since 2001 some of these companies have generally been referred to as Private Military Companies (PMC), Private Security Companies (PSC) and Private Military and Security Companies (PMSC)<sup>1</sup>. This paper will however, use the overarching term of ‘PMC’ to refer to all private personnel engaging in military operations, combat in particular.

Today, the international system is experiencing a huge increase in the number of PMCs operating on the international stage. They are in every respect global actors, operating on every Continent (KINSEY, 2006). It is reported that the United States (US) is the world's largest employer of private military and security services in the world. That the US is the world leader in the use of contractors can be seen in the Graph 1 below (ORGANIZATION OF AMERICAN STATES, 2012).

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1 The issue of the reluctance of PMC to be associated with the term ‘mercenary’ is examined for Sarah Percy in “Mercenaries: the history of a norm in international relations”.

Graph 1 – Geographical distribution of private security contractors



Source: Internet Accessed on Sep 6, 2018 (Refer to End notes 3).

US is the world's largest consumer of private military and security services and as such, also there is a large amount of data of other government's employing PMCs which will be discussed in detail later in the paper.

An anti-corruption organisation, Transparency International has taken a focus on PMCs and came to the conclusion that while the sector is growing, it still lacks transparency, oversight and at times violating the International Law. The organisation argued that the traditional government function is now being delegated to PMCs, which poses a serious challenge for military organisations. Given that companies involved in international affairs are not subject to international law, the governments of countries that participate in military interventions are required by certain agreements to ensure that PMCs comply with International Humanitarian Law (IHL).

The risk associated with the employment of PMCs is therefore becoming increasingly difficult to attribute responsibility or accountability. Some of these companies can also contribute to the instability of countries, more so because most PMCs interventions occur in countries where there is collapse of rule of law or and political instability.

A Brazilian Professor, De Leon Petta, wrote that the weakening of the national state power and its monopoly on violence would actually lead to the PMCs to operate as an alternative forms of military that can be hired anywhere through irregular means. These companies will operate freely causing troubles in the domestic or public policy, or too many international repercussions.

The document would therefore, investigate whether the use of PMCs has an effect on the very foundation upon which the military should operate and if so, what is the impact on military operations.

The study is divided into four distinct sections, the first, serves to assist in providing various definitions of PMC's. The second part deals with the role of International Law/ Statutes (IHL) to PMC. The third part examines the growing reliance on PMCs by United Nations (UN) and further analysis factors behind the emergence of the PMC's. Examples where the PMC's are employed by national militaries and private companies (corporate link).

Identification of the advantages and disadvantages. In this chapter the writer will mention some of. Lastly the writer will analyse the South African position on the matter at hand and conclude by summarizing the recommendations and address problem areas of PMCs.

## 2 Private military contractors-private military companies definition

Definition and Legal Basis with reference to International Humanitarian Law (IHL). This paper will start by defining Private Military Companies (PMC's), in order to give a clear understanding and context of this modern military practice. A distinction between the PMC's and mercenaries also needs to be clarified, as the focus will only be on PMCs, albeit used as synonyms at times.

PMCs work predominantly for governments; they are corporate bodies that specialise in the provision of military skills, including combat operations, strategic planning, intelligence, risk assessment, operational support, training and technical skills. Most of the companies work under contracts drawn up with legally constituted governments, unlike the mercenary, that do not "do business" with simply anyone in the market. Beyond this, the trend is already apparent that the PMCs may in the future work increasingly with, and for, international institutions such as the United Nations (UN), its agencies, or other legitimate humanitarian organizations.

The PMCs, predominantly of U.S. or British origin, are permanent structures established like any other corporate organisation. They function and are structured along the lines of any other business entity. They have a clear hierarchy, including executives and boards of directors, a corporate identity, and shareholders who have the right to demand a degree of business transparency. The industry is also heterogeneous and includes both reputable companies and ad hoc ventures of lesser quality and with less focus on military operational ethics.

These companies have managed to formalise the known profession of mercenaries by providing military services to states and non- state entities in exchange for payment.

Mercenaries have historically prospered in times of unstable conditions or following changes in the existing order.

This was the case in the employment of mercenaries in the Belgian Congo and in Angola in particular, in the breakaway Nigerian province of Biafra, and since then in Zaire, Chechnya, Colombia, Congo (Brazzaville), Eritrea, Kashmir, Liberia, Sierra Leone, lately in Afghanistan and many more other countries (UNITED NATIONS, 1997). An Article 1 of the United Nations (UN) Convention defines a mercenary as any person who is specially recruited locally or abroad in order to fight in an armed conflict, motivated essentially by the desire for private gain. The convention further defines that, is any person specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at overthrowing a Government or otherwise undermining the constitutional order of a State. Such a person has not been sent by a State on official duty; and is not a member of the armed forces of the State on whose territory the act is undertaken. Lastly the Oxford English Dictionary defines a mercenary

as “a hired soldier in foreign service”. The noun “mercenary” is inherently, used as a common phrase and a pejorative term, at times used loosely but generally to propagandize the issue of PMC operations.

It is also worth mentioning that a State that has ratified either or both of the UN and African conventions against mercenarism has an obligation to prosecute and punish mercenaries accordingly. The above definitions would therefore assist to give a clear context and not to confuse or use the two theories as synonyms; this paper is not about mercenaries, but, about the PMCs.

### **3 PMCs in accordance with international humanitarian law-analysis**

Under customary and International Humanitarian Law (IHL), civilians lose protection against direct attack either by directly participating in hostilities or by ceasing to be civilians altogether, namely by becoming members of State armed forces or organized armed groups belonging to a party to an armed conflict<sup>2</sup>. Members of organised armed groups belonging to a non-State party (PMC) to the conflict cease to be civilians for as long as they remain members by virtue of their continuous combat function. Therefore, the status of PMC employees in an armed conflict under IHL is determined, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved (INTERNATIONAL..., 2013).

Unless they (PMCs) are incorporated in the armed forces of a State or have combat functions for an organised armed group belonging to a party to the conflict, the employees of PMCs are civilians as mentioned above. Accordingly, they may not be targeted; they are protected against attack unless and for such time as they take a direct part in hostilities. If, however, the PMCs members carry out acts that amount to taking a direct part in hostilities, they lose protection from attack during such participation. If captured they can be tried for merely participating in hostilities, even if they have not committed any violations of IHL. Guarding military bases against attacks from the opposing party, gathering tactical military intelligence and operating weapons systems in a combat operation are some of the examples of direct participation in hostilities in which PMC personnel may be involved.

The States cannot absolve themselves of their obligations under IHL by contracting PMCs, the law requires that States to observe the law when employing PMCs in military operations. Moreover, States must ensure that mechanisms exist for holding accountable the PMCs employees suspected of violating the law.

Several international initiatives have been undertaken with a view of clarifying, reaffirming or developing international legal standards regulating the activities of PMC. Ensuring their compliance with standards of conduct reflected in IHL and human rights law. Therefore, a Montreux document was drafted as an initiative to provide guidelines for the PMCs.

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<sup>2</sup> Regarding the terminology of “loss of protection against direct attacks” used in the Interpretive Guidance.

### a) Montreux Document

Following a joint initiative of the Swiss Federal Department of Foreign Affairs and the International Committee of the Red Cross (ICRC) meeting (INTERNATIONAL..., 2013)<sup>3</sup>, where 17 States endorsed the document on PMCs. This Document reaffirmed the existing legal obligations of States with regard to PMCs. The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law further provides the explanation (MELZER, 2009). In view of the serious consequences for the PMC combatants/individuals concerned, the above document endeavours to clarify the precise modalities that govern such loss of protection under IHL. The document recommends a catalogue of good practices for the practical implementation of existing legal obligations.

The effective take up and implementation of the Good Practices will be a marker of States' commitment to ensuring accountability of PMCs and the States that contract them, and justice for the victims of abuses in military operations. The framework is based on three overarching principles, the State duty to protect all human rights from abuses by, or involving, transnational corporations and other business enterprises; the corporate responsibility to respect all human rights; and the need for access to effective remedies. However, the Montreux Document failed to address the most critical aspects of the Law of Armed Conflict, duty to protect and responsibility to respect, even though this construction constitutes the consensus formulation in relation to the standard governing business and human rights.

The failure of IHL to establish the exact legal status of PMCs effectively defers the problems to the national level. However, the above-mentioned initiatives and other states have endeavoured to come up with workable solutions to address issues related to the PMC.

### b) International Peace Operations Association (IPOA)

The other initiative comprises leading private security and military companies, including companies registered in US, are members of the International Peace Operations Association (IPOA), which in 2005 adopted a specific Code of Conduct written mostly by INGOs. The organisation decided to take every practicable measure to minimize loss of life and destruction of property. Signatories agreed to follow all rules of IHL and human rights law that are applicable as well as all relevant international protocols and conventions, including but not limited to, Universal Declaration of Human Rights (1948). According

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3 The 2008 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies Regarding the terminology of "loss of protection against direct attacks" used in the Interpretive Guidance. The 2008 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies.



to the values & mission of the association, the organization bases its operations respect for human rights, transparency, corporate accountability as well as ethics. Though these rules are not enforceable, member companies are expected to abide by them<sup>4</sup>.

Domestic laws differ enormously regarding the legality of outsourcing of military services to private companies: some countries maintain an outright prohibition of such outsourcing; others even criminalize the serving of nationals in such companies as such service is assimilated with mercenarism (i.e. South Africa). The corporate nature of PMCs is a barrier to their accountability for violations of international law (CROW; JOHN, 2017).

No international court has jurisdiction over these corporations and there is no pre-existing mechanism in place bound by international law to account and manage for PMCs use of force.

In many legal systems the provision of military and security services is subject to strict licensing and vetting procedures for individual employees, while in others it may be treated as part of the exercise of economic freedoms.

The UN as the proponent of human rights neither provides a legal basis for peacekeeping operations nor does it mention PMCs, therefore, the next discussion will focus on the role of PMCs in UN missions.

#### **4 The employment of pmcs in united nations (un) operations**

This chapter will analyse the employment of PMCs in UN peacekeeping and humanitarian operations. The utilisation of PMCs by international organisations raises distinct and complex legal issues. It must be taken into account that there is limited amount of information available about PMCs contracted to UN, as information on security arrangements is often both proprietary and confidential. In 1989, the General Assembly passed resolution 44/34, the International Convention against the Recruitment, use, financing and training of mercenaries (the only official document that is closely related to PMCs) and the regulation entered into force in 2001.

The use of private security contractors has always been controversial issue at the UN, which also commissioned a feasibility study in the late 1990s to determine whether Private Security Companies (PSC) could maintain security in the refugee camps established in (former) eastern Zaire, following the Rwandan genocide. The idea was abandoned as it was found to be too costly and politically controversial. Also there has been criticism and concerns raised of the unacceptable behaviour by some of the PMCs. The resolution urged the UN to take precautions that its hiring practices don't alter the international character of the organisation or endanger its staff. To this point UN efforts to regulate the private security industry have been largely inadequate,

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<sup>4</sup> Available at: <http://ipoaworld.org/>. Access on: Sep 18, 2018.

mainly due to the fact that the nations who most likely to employ PMCs, including the US, have not ratified the Convention.

The UN Working Group on Mercenaries has previously urged the international community to assist in regulating PMCs and a draft resolution was submitted to the General Assembly and Human Rights Council. However, countries that heavily use PMCs are not keen to pass a legally binding resolution. As such, the Working Group strongly reiterated the need for an international, legally binding convention to ensure adequate human rights protections for all affected by the activities of the PMCs.

An example that can be mentioned in this regard is the incident that took place on 4 August 2017, where a federal appeals court reviewed the murder conviction of a former Blackwater<sup>5</sup> private military contractor and ordered resentencing for three PMC employees involved in the deadly 2007 Nisour Square tragedy that killed or injured at least 31 Iraqi civilians<sup>6</sup>. As discussed above, the eventual convictions of these four individuals were considered anomalies as private military contractors have largely operated without legal oversight or consequences. This new ruling could result in significantly reduced sentences for the three contractors, which can have negative consequences for future military operations in general.

It is also worth noting that PMC that have triggered the most criticism are those which ‘sell’ purely military services to conflict states and take direct part in hostilities<sup>7</sup>. These types of PMCs are hired by weak states, which are usually in civil war and need military reinforcement so as to confront the opposing groups. In this case the PMC has a key role in the outcome of the conflict because it strengthens one conflicting party against the other. Thus, the lack of accountability mechanisms between PMCs and governments are disconcerting and urgent action is necessary to ensure that PMCs are adequately regulated.

### a) Privatisation of Peace-Keeping

The PMCs are not only hired by states, but UN has used private security companies during its missions worldwide since the 90<sup>8</sup>. However, the organisation has always stressed the fact that it only hires PSC (UN Doc. A/69/338 2014, 2).

It is difficult to make a clear distinction between security (PSCs) and military (PMCs). Usually, the companies offer a wide range of tasks in military operations which include security and military tasks at the same time. However, it is not possible to draw a clear line between these

5 American Private Military Company founded in 1997 by former Navy SEAL officer Erik Prince.

6 United States v. Slatten, 865 F.3d 767, 820 (D.C. Cir. Aug. 4, 2017) (“For the foregoing reasons, we vacate defendant Nicholas Slatten’s first degree murder conviction and remand for a new trial. Further, we vacate defendant Evan Liberty’s conviction for the attempted manslaughter of Mahdi Al-Faraji. The Court remands the sentences of Liberty, defendant Paul Slough and defendant Dustin Heard for resentencing consistent with this opinion. In all other respects, the Court affirms the judgment of the district court.”); see United States v. Slough, *infra* note 11 (detailing the original convictions and sentencing of the four Blackwater contractors).

7 PMCs are divided into three categories according to the type of services they provide (military supportfirms, military consulting firms and military provider firms). In practice, this distinction is not confirmed because there are companies that offer several and different types of military assistance.

8 Ver United Nations General Assembly 68th Session A/68/339.



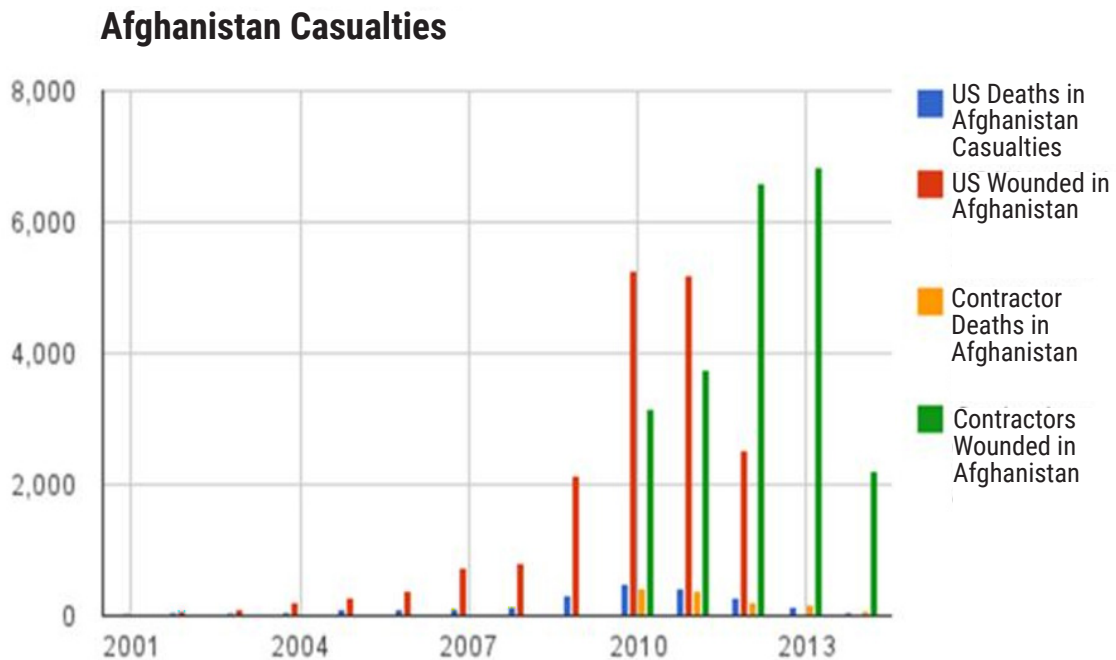
two categories, given that most of the personnel from non-combat PMSCs come from combat background. In October 2007, the UN released a two-year study that reported that although hired as "security guards", private contractors performed military duties. Due to this, it suffices to conclude that the UN hires PMCs to perform military and security tasks.

It should be noted that when referring to own contracting, the UN does not use the term 'military' and has expunged this word from security services. In UN language, the term private security company (PSC) is normally used. While the UN may wish to play down the military aspect, these companies are connected directly or indirectly to the same corporate PMC web (*which will be discussed later in the document*).

Although UN publishes lists of contractors, it does not mention the specific tasks which they were hired for. The reliance on these firms is growing as its personnel become increasingly targeted in conflict zones. According to the Standing Committee for the Security at least 71 UN and associated personnel, 53 peacekeepers and 18 civilians, including 2 police personnel and 15 contractors, were killed in malicious attacks in the line of duty during 2017.

The casualties in 2017 are the highest number ever recorded by the Committee. In the past five years, at least 310 UN personnel have died in deliberate attacks (UNITED NATIONS, 2018). Graph 2 below illustrates casualty suffered by US soldiers and contractors in Afghanistan:

Graph 2 – Statistics of PMC casualties in Afghanistan



Source: Global Data and Statistics.

In countries like Afghanistan and Somalia, the UN is reluctant to rely on local police forces, therefore, resorts to private contractors to protect its personnel and facilities.

Legitimate concerns have been raised that the use of PMCs to provide protection for UN staff may create conditions where personnel are more vulnerable to attack.

### **b) Growing Demand of PMC in UN**

Since 1990s the demand for UN delivery on the ground has increased massively over recent years. The formulation of a ‘culture of protection’ and the ‘responsibility to protect’ established that the international community had responsibilities that transcended sovereign borders.

Accordingly, UN peace operations have evolved considerably in scope, from interpositioning and observation to peace-making, and further to post-conflict reconstruction (UNITED NATIONS, 2001; INTERNATIONAL DE DEVELOPMENT RESEARCH CENTRE, 2001).

During this period there was also a shift away from western states as prominent troop providers, towards developing nations largely taking over this task. At the same time, the new operational environments have often been characterised by complex conflict structures and multiple emergencies. Not only do they tend to require more comprehensive operations, but they also represent the riskiest operational environments for international relief or peace operations personnel.

Combined, these factors have put the UN under enormous stress in terms of human, financial and organisational capacities, and have consequently greatly contributed to the increased UN use of PMCs/PMSC/PSC.

Additionally, the peacekeeping principles i.e. consent, impartiality and use of force only for self-defence, need to be analysed despite the above-mentioned context detailing the IHL regarding the PMCs. Doug Brooks, the President of the International Stability Operations Association (ISOA), claims that using PMCs for humanitarian intervention and peacekeeping would be, efficient and better. He argues that PMCs could solve the current peacekeeping crisis by providing easily available, well-trained and well-equipped personnel within a very short space time. A subsequent UN report emphasized the importance of rapid deployment and on-call expertise for peacekeeping operations (INTERNATIONAL ALERT, 2001). Despite these apparent benefits, there has been a decisive push against the normalisation of PMC use in UN; in 1998, the then UN Secretary-General Kofi Annan famously declared that “the world may not be ready to privatise peace” (UNITED NATIONS, 1998, n.p.) which seems to ring true in most diplomatic and academic circles today that the employment of PMCs is undesirable for UN operations. The UN often uses PMCs to protect diplomats and humanitarian actors.

In the past UN has even contemplated to outsource peacekeeping to PMCs when no state was willing to send troops. Contrary to Doug Brooks’ assessment, Peter W. Singer, said that “the profit motive clouds the fog of war.” “Profit maximization encourages PMCs to hide operational failures, overcharge, and prolong conflict”. PMCs have the option to break contracts when the job becomes too difficult or non-profitable meanwhile compromising military operations. The UN would have no guarantee that the companies would stay in a

deteriorating security situation or runs over budget and or if a PMC employees misbehave, the UN would have little recourse.

The employment of PMCs to stop conflict in a weak state does not build the legitimacy of the state's public authority. The underlying problems will remain, conflicts will reignite and PMCs will continue to profit. Lastly, many scholars are of the view that "if the UN had greater capacity to conduct effective peace operations; private companies would not be needed". In the absence of countries contributing troops, PMCs becomes a viable alternative to traditional humanitarian and peacekeeping operations. It is therefore critical that all the UN requirements are fulfilled when needed. Therefore, the next discussion will concentrate on the very factors which influence the existence of PMCs.

### c) Factors influencing the existence of PMCs

There are several drivers or justifications for the contracting out phenomenon which are common around the world. The changing environment of warfare, growing instability and increased globalization has created a market for PMC services. Several factors have contributed to the countries increased use of contractors for support services are as follows:

- The increased requirements associated with the Global War on Terrorism (GWOT) and other contingencies;
- Policy to rely on the private sector for needed commercial services that are not inherently governmental in nature;
- Initiatives, such as competitive sourcing and utility privatization programs;

Most African countries are normally plagued by a host of intra-state instabilities, lawlessness, criminality, civil wars, ethnic clashes, recurrent coups d'état etc. The countries embody various forms of non-state violence and a clear absence of the state's monopoly over force and all forms of organised violence (CAWTHRA; LUCKMAN, 2003). With violent challenges faced by politically unstable countries.

Many African governments have also turned to the PMCs as a means to uphold and defend the state. Destabilising conditions have created both a demand and a market opportunity for PMCs.

The reliance on private military/security contractors is increasing throughout the world; already private security guards far outnumber uniformed police and military combined in many countries, as follows:

- In South Africa for example, private security industry is among the largest in the world, with over 9,000 registered companies, 450,000 registered active private security guards and a further 1.5 million qualified (but inactive) guards; security personnel are actually more than the combined South African Police and Defence Force (EASTWOOD, 2013).

- In Latin America, the ratio of private security guards to police officers is 6.7 to 1 in Guatemala and 4.9 to 1 in Brazil.

- The Argentinean guards at the airports will be privatized, which had previously relied on the Air Force police (ORGANIZATION OF AMERICAN STATES, 2012, p. 139). The oldest and simplest justification for government is to protect citizens from violence. In other words,

should the state fail to honour its obligation to protect its people, the PMC will emerge as organised entities to take over that role.

Once this occurs, the state has failed in its quintessential function, of protecting its citizens. Governments can only stretch so far, meaning some people are more than willing to pay private military companies to go the extra mile in protecting their assets.

Firms operating in crisis zones around the world require protection as well, which has created a need for more vigilant and military service providers. At times, these companies also assist governments and armed forces, providing highly military trained personnel and logistical support. Currently there are 23,525 private contractors in Afghanistan providing a wide variety of services, worth over 2.6 billion dollars per year, to the US Department of Defense (ORGANIZATION OF AMERICAN STATES, 2012).

The dangers of states failing in their essential security function are unambiguously prevalent in some of the African countries, especially countries where the PMCs were employed. There are indications that military personnel will to some degree be replaced by private contractors in several countries. There is also big idea from the PMCs to extricate US soldiers from this quagmire, and somehow being the solution to the crises in Afghanistan. Not surprisingly, the private-military industry is behind this proposal. Erik D. Prince, a founder of the private military company Blackwater Worldwide, and Stephen A. Feinberg, a billionaire financier who owns the giant military contractor DynCorp International, each see a role for themselves in this future. An employment of PMC by US will be analysed and discussed further in the document.

#### **d) United States use of PMCs**

Nearly 300 companies from the US and around the world supply PMCs in Iraq almost as large as the regular force members. About 126,000 men and women working for PMCs serve alongside about 150,000 American troops, the Pentagon has reported. Never before has the US gone to war with so many civilians on the battlefield, doing military functions ranging from armed guards, military trainers, translators, interrogators, chefs and maintenance workers and technicians, previously done only by state militaries. While other countries' armed forces may not be engaged in combat as US forces, there is still a strong appeal to the logic of contracting out. In theory, at least, contractors should be cheaper than professional military personnel in that they can be let go when there is no longer a need for them and none of the additional costs, such as health benefits, dependents' allowances, pensions, and the like are required (FRANCO, 2015)<sup>9</sup>.

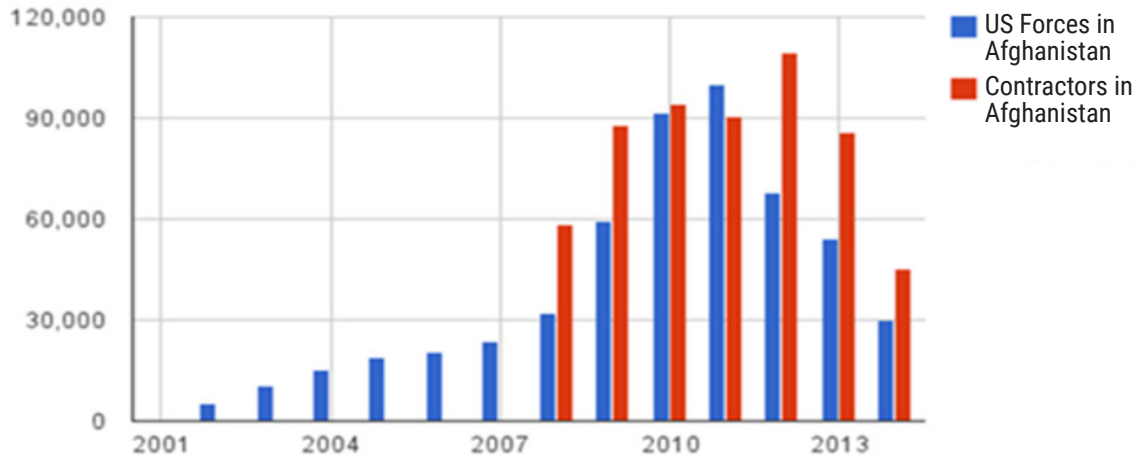
The Department of Defense (DOD) has long relied on contractors to provide the US military with a wide range of goods and services, including weapons, food, and operational support in military operations.

The employment of PMCs in Afghanistan is depicted in the Graph 3 as follows:

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<sup>9</sup> It is worth noting that the Brazilian lower house, the Câmara, approved a bill in January 2015 to outsource labor.

Graph 3 – U.S. Forces and Contractors in Afghanistan



Source: Private Security Monitor.

Contrary to common perceptions, majority of civilian contractors in the war zones actually not Americans and foreigners are the ones who are dying the most as the US accelerating outsourcing functions previously performed by soldiers. The irony about the above is that US is the biggest employer of these PMCs due to the fact that the PMCs headquarters are situated in US and hire the required skills from all over the world.

The US Labor Department does not publish the details of the nationalities of the contractors it listed as killed or wounded, suggesting that doing so would actually be in violation of personal privacy under the US Privacy Act. Despite the lack of reference to contractors in official documents and the main line press, the use of private contractors continues today as an important phenomenon as is indicated by the fact that even after the departure of US troops from Iraq in December 2011, there still remained almost 11,000 private contractor<sup>10</sup>. The US Federal Criminal Statute prohibits US citizens from enlisting or from recruiting others from within the US to serve a foreign government or party to a conflict with a foreign government with which the US is at peace.

### 5. Pros and cons of PMC Advantages of PMCs

This paper will further analyse the factors behind the use of the PMC's by identifying the advantages and disadvantages of the industry. The divergent narratives of those in support or against the PMCs have created a serious debate in the military and academic fields. The proponents maintain that the use of PMCs non-combat roles has a place in efficient military operations as follows:

<sup>10</sup> Schwartz & Church (2013) Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress Congressional Research Service, p. 25. "Table A-2. Contractor Personnel and Troop Level in Iraq" These included private security contractors and others.

### a) Advantages

- Privatisation and outsourcing some of military functions can reduce public spending and increase efficiency due to limited number of personnel in operations.
- The cost of training is borne elsewhere (combat ready soldiers).
- Using contractors saves money and frees up the military to concentrate on its core missions rather than non-military tasks.
- Moreover, casualties among PMC employees would not cause the same political problems that the deaths of a country's armed forces would do.
- The Congressional Budget Office in US estimated that the reduction in the number of armed forces since the late 1980s has reduced retirement fund payments alone by nearly \$12 billion (CONGRESSIONAL BUDGET OFFICE, 2004).
- Without PMC capacity, the US would have to maintain a much larger standing military (BROOKS, 2004).
- The PMCs can be mobilized on short notice to add to existing military capabilities.
- PMCs in UN operations performing selected tasks that the organisation does not have the capacity or means to deliver.
- Others believe terrorism and violent extremism are not only the problems for governments alone to solve, therefore PMCs can assist.

Employing the national militaries for non-combat operations weakens the military by distracting it from its core mission of fighting wars.

The armed forces should not be used in operations that are not fundamental to national security, such as drug interdiction and nation-building. Those against the use of PMCs maintain that the private companies should not be used in military operations. The arguments of those against the use of PMCs in military operations highlight the dangers that are associated with the business. By providing state-like military and security services, PMCs attain state-like agency in the sense that they perform a core state sovereign function. This significantly challenges the notion that military function as the sole monopoly of the state. The growing existence of PMCs can only be reduced if national governments can take the following into considerations:

### b) Disadvantages

- To delegate these functions is to abdicate an essential responsibility of government that raises immense questions of sovereignty.
- By privatising the military/security function, the decision-making process is privatised as well.
- Government agencies are no longer the exclusive mechanism for executing foreign and military policy (SINGER, 2008, p. 35).
- It challenges the current standard of public trust to the national militaries.



- There are a number of cases mentioned above of PMCs found to be involved in unethical behaviour.
- Various PMCs have been linked to the proliferation of small arms and light weapons (SALW) worldwide, contravening various UN arm embargoes and undermining the demilitarisation agenda in general<sup>11</sup>.
- The now PMC, defunct Executive Outcomes (EO), has used indiscriminate weapons in their tactical field operations, namely the cluster fuel air bomb, which is viewed as immoral under national military codes and international conventions pertaining to the conduct of war (VINES apud MUSAH; FAYEMI, 2000, p. 174).
- More maliciously, a few PMCs have acted as covert proxy agents for their home states. Dyncorp, a US PMC, has engaged in counter-guerrilla warfare, reconnaissance, and fire fights with Columbian rebels, as many speculate on behalf of the US government (SINGER, 2008, p. 37).
- In the case of UN the PMCs services are not always directly procured by UN; they may also be seconded to an operation by a member state or provided by third parties who can pose serious threat.
- PMC can prolong conflicts for profits.
- PMCs are often too small to deal with serious conflicts and Military Operations.

The PMCs are still not globally welcome, but in some instances they have been embraced as needed and capable of conducting military operations. The major powers like US and UK, have accepted PMCs as valuable service to implement foreign policy. However, UN and other States and non-state organizations strongly disapprove of these PMCs (“mercenary”) groups because they have been accused of human rights violations and lack of accountability in the past.

Nowadays, PMCs have become corporate entities which have transformed the manner in which the military operation used to be conducted. There are companies that are capable of succeeding where nation states or UN has not accomplished its mandate due to various reasons but the regulations/law must be strengthened in this regard. The next topic will therefore, discuss the relationship between the PMC and the corporate web or the PMC as corporate entities.

#### a) PMC Corporate Web

In some countries around the globe the war (privatisation of war) has become an area of business activity and therefore a profitable sector. In this context, private armies were developed, namely commercial enterprises or PMCs, which offer military services usually in fragile and or unstable states. ‘Mercenaries’ have adapted to

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11 Sandline (UK PMC) supplied arms to the Kabbah regime and rebel supporters in 1998, going against a UN imposed arms embargo; Brown and Root (US PMC) along with IDAS (Belgian PMC) supplied weapons and services to the opposing factions in the Democratic Republic of the Congo against a UN arms embargo (MUSAH; FAYEMI, 2000, p. 26). See also MUSAH; FAYEMI, op. cit. p. 923.

changing trends in management and warfare by transforming into corporate entities under the title of private security contractor, or PMCs. Many PMCs form an intrinsic part of larger corporate web of companies and industries. This network of subsidiaries and affiliates covers a comprehensive array of services i.e. mining, manufacturing, communications, engineering, consulting, transportation, security, production, services, and infrastructural (MUSAH; FAYEMI, 2000, p. 1).

#### b) Economic Exploitation of Unstable States by PMC Corporate Web

Nowadays, war has become an area of business activity and therefore a profitable sector in this regard. In this context, PMCs were developed, namely commercial enterprises, which specialise in military services usually in fragile states facing a crisis i.e. a civil conflict.

The collaboration of corporate firms represents a powerful linking up of diverse economic interests that have essentially led to the creation of hegemonic corporate empires (CILLIERS, 1999, p. 2-7).

The corporate networks have come to part-own some states in Africa, for example, both the Angolan and Sierra Leonean governments are experiencing the long-term drawbacks of sub-contracting their state security functions to PMCs. Both states experiencing intra-state instability, civic lawlessness, the looting of natural resources, and violent challenges to the state, have sought security through PMCs. Unable to provide financial payment to the PMC for its services, these two governments have resorted to payment through mining and mineral concessions (MUSAH; FAYMI, 2000, p. 23). In Angola, Executive Outcome (EO) was paid over US\$40 million a year in diamond and offshore oil exploration and extraction concessions (PECH, 1999, p. 86). They made use of these concessions through their affiliates Diamond Works and Branch Mining. Similarly in Sierra Leone, EO/Sandline was compensated for their service through the selling off of 30% of the country's diamondiferous land to Diamond Works.

This concession is worth an estimated over US\$200 million (MUSAH; FAYMI, 2000, p. 912). What this essentially represents is "the long-term mortgaging of a country's natural resources undermining the right to independent development and ultimately state sovereignty.

The above-mentioned deals are largely motivated by profit, whilst at the same time exploiting the economic and security instability of these countries. There are clear pragmatic threats and opportunities that arise with the use of PMCs in military particularly in African continent. The key to harnessing its perils and promoting its attributes can only come through regulation and clear rules of engagement

being set. Some of these companies are operating under the false pretence as security companies, but engaging in combat military activities. These companies are primarily responsible to shareholders rather than their nation's states.

### c) Powerful PMCs

In 2017 July, the Trump administration confirmed America's affinity for PMCs when the president's advisers recruited Erik Prince, the founder of Blackwater Worldwide security firm and Stephen Feinberg, owner of the military contractor DynCorp International, to draft alternative military strategies in the Middle East that rely primarily on private contractors and also to develop proposals to rely on contractors instead of American troops in Afghanistan. It is for this reason that this document highlights the involvement of PMC Corporate in diplomatic and military affairs. The data in Graphs 1, 2, 3 indicates some of the most powerful PMCs in the world as follows:

- **Academy**

Originally going under the name Blackwater USA, American PMC ACADEMI was established in 1997 by ex-U.S. Navy SEAL Erik Prince. Blackwater was awarded its first government contract in 2000, where more than 100,000 sailors were trained for action. Blackwater was heavily and controversially involved in the Iraq War. According to its official website, ACADEMI offers "stability and protection to people and locations experiencing turmoil." It also works with states, local government, global commercial clients, numerous law enforcement and intelligence organisations and agencies and allied governments around the world.

**Figure 1 – American PMC 'ACADEMI**



Source: Security Degree Hub, [2018].

- **Defion Internacional**

Defion Internacional, is a PMC situated in Lima, Peru, it supplies military specialists who are mostly recruited from Latin America. These personnel are often contracted out to other companies; in fact, the company first became known when it trained recruits to work with Triple Canopy<sup>12</sup> in Iraq. It has bureaus in Sri Lanka, the Philippines, Iraq and Dubai, and specializes in training, logistics, bodyguards, drivers and administrative personnel. Latin American security staff stationed in the Middle East has been described as “guns for hire.” The last PMC by the name of ‘Executive Outcomes’ is depicted in Figure 2 below:

Figure 2 – Executive Outcome Logo



Source: Global Security, [2018].

<sup>12</sup> Triple Canopy, founded by former Delta Force commandos in 2003, is one of several PMC that have appeared in recent years to support US military operations in Iraq, Afghanistan and other countries.

Executive Outcomes is one of the companies that effectively established Private Military Companies (PMCs) as an industry. It was founded in 1989 in South Africa and registered in Britain in 1993. According to the company's website, Executive Outcomes its sole purpose was to bring stability to the region by supporting legitimate governments in their defense against armed rebels.

The intermixing of paramilitary and commercial ventures made it difficult to determine the number of mercenaries (PMC operatives) involved in various countries. Additionally, persons who are "employed by or accompanying the armed forces" overseas may be prosecuted under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) or, in some cases, the Uniform Code of Military Justice (UCMJ). But even with this statutory authority, some contractors "might fall outside the jurisdiction of US criminal law, even though the US is responsible for their conduct as a matter of state responsibility under international law and despite that such conduct might interfere with the ability of the Multi-National Forces in Iraq to carry out its US mandate."

## 6 South african stance on PMC'S

This chapter will analyse the South African position on the matter at hand, which led to the government introducing a law preventing civilians and former soldiers from offering military/security services to foreign conflicts. The Prohibition of Mercenary Activities and Regulation Act, of 2006 was introduced in response to the increase of PMCs industry in military operations.

The legislation was passed after a number of South Africans were involved in several attempted coups and conflicts in African states and other parts of the world.

The Act outlaws mercenary activity and allows the government to declare certain conflicts prohibited to all South African citizens<sup>13</sup>.

In 2004 more than 70 South Africans were arrested in Zimbabwe in a plane which flew in from South Africa, on suspicions of mercenaries activities. The alleged leader, ex- Special Air Service (SAS) officer Simon Mann (the son of a former UK Prime Minister, Margaret Thatcher) was also arrested. The Boeing 727 (N4610) was impounded, carrying three crew and 64 former soldiers (mercenaries) recruited in South Africa. The majority of those alleged to have been the mercenaries planning to carry out the coup in Equatorial Guinea were South Africans and former members of Special Forces. This incident point to the dangers associated with PMCs, operating in foreign countries. Subsequent to the aforementioned incident, the South African Government enacted Act No. 27, 2006 signed on 12 November 2007. The Act aimed to:

- Prohibit mercenary activities by South Africans.
- Regulate the provision of assistance or service of a military or military-related nature in a country of armed conflict.
- Regulate the enlistment of South African citizens or permanent residents in other armed forces.

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<sup>13</sup> South African Regulation of Foreign Military Assistance Act (RFMA).

- Regulate the provision of humanitarian aid in a country of armed conflict. The Act provides for extra-territorial jurisdiction for the courts of the Republic with regards to certain offences and it provide for penalties for offences related to the Act.

The Act was also in response to the concern of the cabinet with the increased participation of South African citizens in conflicts around the world. For instance, In 2005 the South African private military company, Specialised Tasks, Training, Equipment and Protection International (STTEP) was hired by the Nigerian government to provide military training for the offensive against Boko Haram (FREEMAN, 2015)<sup>14</sup>. Its chairman, Eeben Barlow, was the founder of the South African Executive Outcomes, which ceased operations in 1998.

The recent case took place in 2018, in March, where a South African citizen, William Endley, a former career officer in the South African Army was sentenced to death in South Sudan, Juba. According to media reports Endley was accused of training rebels to fight against the South Sudan's government and the court agreed, convicting him of treason (ALISON, 2018).

However, on 02 November 2018 Mr Endley was pardoned by President Salva Kiir and released after having spent over two years in jail. The case of Endley gives a clear indication that still more has to be done to deter citizens from engaging in foreign military related activities. It is evident from the small number of prosecutions and convictions under the Act that there are some deficiencies in the Act, which still need to be addressed urgently, in order to ensure that countries, effectively combats the unlawful recruitment of serving or former South Africans soldiers.

## 7 Recommendations

The PMCs activities in internal or foreign military operations are inevitable in many States and military organisations. This widening use of PMC presents a new legal and ethical challenge for military operations. Therefore, stronger regulations and protocols are urgently needed to regulate the PMC activities. This paper offers six recommendations as follows:

- a) States
  - States must come up with a Convention to regulate the PMCs from a national, regional and international level. It is very important for States to work together to align their legal norms and to share information so that PMCs do not find any gap to exploit. States must ensure that the relevant standards are met and that the law is respected.
  - Creation of all PMCs register employed by the State in order to promote transparency and set the limits of this industry.

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<sup>14</sup> "Run by Colonel Eeben Barlow, a former commander in the South African Defence Force, the group of bush warfare experts were recruited in top secrecy in January to train an elite strike group within Nigeria's disorganised, demoralised army" (FREEMAN, 2015, n.p.).



- This register must be made available to UN as it is the relevant body to create and maintain this register (especially when the UN Convention on PMC has been amended/strengthened accordingly).
- Signatory Countries should identify which functions conducted by armed forces are deemed to be ‘inherently governmental’ and must therefore be performed only by national armed personnel and which can be contracted out to PMCs.
- Interconnected systems between State security structures to monitor the activities of the PMC,
- i.e. Employees, Weapons, contracts etc. There is a need for mandatory information sharing between the States and UN departments.
- The troop contributing countries must always be prepared to support UN when the need arises, to prevent PMCs from seizing the opportunity.

b) International Humanitarian Law (IHL).

- Law of Armed Conflict. The existing legal framework (IHL) needs to be strengthened further as it does not elaborate with enough detail and accuracy for States and PMCs. Such international regulation of PMC will reduce their vulnerability to criminal and military violations in military operations.
- The IHL must ensure that mechanisms exist for holding accountable the states employing the PMCs suspected of violating the law.
- The PMCs found guilty of contravening the law must be prosecuted accordingly by the nation states and the offence must also be forwarded to UN for further scrutiny.
- PMC (Corporate) Industry: Corporates rendering service to military operations must be subjected to stringent vetting and selection process prior employment.

c) Military career path

- Reskilling. Resources and programs to help soldiers to prepare for their next step of transitioning into civilian status, opportunities must be created for soldiers exiting the force. The initiative would discourage soldiers from joining the PMCs.
- The serving members must be made aware of legal consequences for any violation of the laws governing the PMCs.

## 8 Conclusion

This article studied the role of the PMCs in military operations in order to analyse the role of PMCs, by examining the threats posed to the military operations (particularly to National Militaries). It is inevitable that the role of PMCs is likely to be on an upward trend, by continuing to play a major part in the military operations for the foreseeable future. Therefore, diligent oversight and regulation of PMCs industry, is necessary to ensure that it is strictly regulated in line

with IHL. The PMCs have paradoxically been the solution to market induced complications and pressures faced by the states as well as the international organisations like UN. At times the PMCs have acted as rescuer for the crumbling states, brought solutions to a difficult sovereign function, thereby representing an extended capacity of the state through private agents. However, in some instances the conduct of the PMCs was found to be problematic.

The de-monopolisation of violence (which belongs to the state) contains inherent threats with regards to excess, lack of transparency, lack of accountability, and ultimately lack of control. The existence and acceptance of the PMCs in military operations forever alters the social fabric of the state regardless of the numerous benefits and advantages that they may bring. Privatisation of military and the commodification of violence represent a significant abdication of the state's responsibility to fulfil its social contract. Military and security provision has been at the core of the state.

The document has addressed the role of PMCs in United Nations and came to a conclusion that despite the apparent benefits, the employment of PMCs is undesirable for the organisation.

UN insisted that, private contractors have not been used in combat roles. It was mentioned that UN uses PMCs for a wide range of services, including armed and unarmed security, risk assessment, security training, logistical support and consultancy but not combat. The use of armed private security contractors in combat operations has always been controversial issue at the UN and the organisation continue to be against the normalisation of (combat) PMCs in UN missions. In addition the use of PMCs, in peace operations can be useful only in non-combat operations.

The primary role of the International Humanitarian Law highlighted in the document is to ensure that all the PMCs strictly adhere to all relevant international laws and protocols on human rights. The PMC often recruit former soldiers, which poses a threat to national security of those respective nations. Not only does the employment of PMCs can affect diplomatic relations, but also the contravention of International Law by individual employees. Thus, South Africa has enacted an Act to regulate the enlistment of South African citizens or permanent residents in other armed forces, and to regulate the provision of humanitarian aid in a country of armed conflict. The law was passed in response to the government concerns to prevent South African citizens in participating in conflicts around the world.

In conclusion it is not the intention of this article to vilify or to encourage the use of PMCs; hence the advantages and disadvantages were highlighted. Consequently, a clear distinction between military functions to be performed only by national armed personnel and which can be contracted out to PMCs must be clarified. It is unavoidable that the PMCs will continue to be used by many countries in military operations, but the unchecked expansion of PMCs in some instances, has yielded negative results including inability to resolve conflicts in many countries where they operated. Some of these companies were implicated in human rights violations in Iraq as mentioned in the document.

This article has exhibited the effect (positive/negative) of PMCs to States, organisations and Military organisation in order to suggest solutions to the security and legal issues associated with PMCs in military operations.

## **Epigraph**

"The World may not be ready to Privatise Peace."

Kofi Annan (08 April 1938 – 18 August 2018), Seventh Secretary-General of the United Nations (UN) 1997- 1998. Annan and the UN were the co-recipients of the 2001 Nobel Peace Prize.

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