

# **LEGAL STATUS OF MERCENARIES (BLACKWATER)**

By

Qaiser Javed Mian  
Attorney at Law

Earlier, a mercenary was defined as “**one who works only for hire**”. From the Latin word *merces* “**pay, reward, wages**” and “**mercenarius**” which is “one who does anything for pay”, the literary definition is one who is “hired, paid”. Through history the term “mercenary” has received a negative connotation.

It has received a hypocritical treatment and has been accepted in some situations and prohibited elsewhere. Some states prohibit the use of mercenaries and their citizens’ status as mercenaries while others see mercenaries as a way to resolve conflict without the use of their traditional forces. The present domestic laws within the US and the UK have developed an alternate line to the intent of the Additional Protocol and the United Nations Convention. Both nation-states’ domestic law prohibits the recruitment of mercenaries and the actual conduct of mercenary activities.

In 2003, France criminalized mercenary activities, as defined by the Protocol to the Geneva Convention for French citizens, permanent residents and legal entities. (Penal Code, L436-1, L436-2, L436-3, L436-4, L436-5). In 1998, South Africa passed the “Foreign Military Assistance Act” that banned citizens and residents from any involvement in foreign wars, except in humanitarian operations, unless a government committee approved its deployment. In 1927, Switzerland banned its nationals from serving as mercenaries, except for being the Vatican Swiss Guards. In Austria, anyone who voluntarily serves in the armed forces of another country automatically loses Austrian citizenship. Great Britain passed the “Foreign Enlistment Act” in the late 18<sup>th</sup> century, making it illegal for British subjects to join the armed forces of any state warring with another state at peace with Great Britain. In Italy, it is illegal to recruit Italians on Italian soil for fighting in behalf of a foreign government without the approval of the Italian government. Further, the United States passed the Anti-Pinkerton Act of 1893 (5 USC 3108) which forbade the US Government from using “Pinkerton National Detective Agency” employees, or similarly private police companies, as strikebreakers. **In 1977, the US Fifth Circuit Court of Appeals interpreted this statute as forbidding the US Government from employing companies offering mercenary, quasi-military forces as strikebreakers and armed guards for hire.** *United States ex rel. Weinberger v. Equifax*, 557 F.2d 456, 462 (5<sup>th</sup> Cir. 1977), cert. Denied, 434 U.S. 1035 (1978).

## **United Nations**

The UN is examining the role and use of mercenaries in the conflicts of the world, monitoring possible abuses and providing the findings of the respective reports keeping in view the UN Additional Protocol to the Geneva Convention (1977). As per Article 47, “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. It should be noted that many countries, including the United States, are not signatories to the *Protocol Additional GC 1977 (APGC77)*.

The legal status of civilian contractors depends upon the nature of their work and their nationalities with respect to that of the combatants. If they have not *in fact, taken a direct part in the hostilities* (APGC 77 Article 47.b) they are not mercenaries soldiers and are entitled to Geneva Convention Protections. On 4<sup>th</sup> December, 1989, the United Nations passed resolution 44/34 the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*. The law entered into force on 20<sup>th</sup> October, 2001 and is usually known as the “UN Mercenary Convention”.

### **Private Companies**

Private Companies are also known as *Private Military Corporations, Private Military Firms, Military Service Providers* and generally as the *Private Military Industry* and mercenaries may be synonymous terms. The services and expertise provided include defense functions, military training, force protection and security tasks. For a detailed discussion, you may refer to, Antenor Hallo de Wolf, “Modern Condottieri in Iraq: Privatizing War From The Perspective of International and Human Rights Law”, 13 Ind. J. Global Legal Stud. 315 (Summer 2006). Quoting Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F.L. REV. 1, 8 (2001). They often provide services to supplement operations involving official armed forces, they also are used to undertake security tasks where no state actor is involved, such as providing personal security details. According to Antenor Wolf in his aforesaid book, “The U.S. Company MPRI, for example, recruits experienced former Army personnel that are then contracted out to provide training to military forces, develop military doctrine, provide assistance for peacekeeping and humanitarian operations, or to assist in the war against terrorism. The US Department of Defense already has many years of experience in actively contracting with various companies for the provision of these tasks and services.” In this regard, **See also Protect Afghan Leader, WASH. POST, Dec. 2, 2002: Afghan leader Hamid Karzai is continuously escorted by private security gurads. DynCorp’s Assignment.**

The private military companies concentrate in areas of low intensity conflict, where deploying traditional armed forces might be politically, diplomatically, or economically too risky; however, such companies also collaborate with states in providing military training and national defense. Contracting out or delegating tasks that had previously been carried out exclusively by national armed forces, although not a new phenomenon, has gathered enormous momentum in the last thirty years. Among the reasons cited for the increasing reliance on private companies to provide military tasks and services are the reduction of military budgets in a number of Western countries and the desire to cut costs. Indeed, de Wolf found that the employment of such companies initially involved contracting out certain logistical aspects of running an army, such as building military bases, the preparation and delivery of meals for military personnel, and the maintenance and repair of military equipment and weaponry. **But now the state monopoly on the use of lethal force is being transferred to private entities, sometimes without any clear line and intentionally keeping grey areas. More recently according to de Woolf, tasks that could be considered part of the core responsibilities of the armed forces are being contracted out to private companies. These may include training soldiers, providing armed convoys in conflict situations,**

**providing security for buildings, industrial installations, and high-profile persons, and in some cases, direct participation in combat activities.**

### **The BOOST OF MERCANRY INDUSTRY**

In the United States, the push to privatize such operations became prevalent during the administration of George W. Bush. This has resulted in becoming an over \$100 billion a year industry. A Department of Defense interim rule originally authorized contractors, other than private security contractors, to use deadly force against enemy armed forces in only self-defense. (See 71 Fed. Reg. 34826, revises the Department of Defense Instruction number 3020.41.) The new amendment allowed private security contractors are authorized deadly force when protecting their client's assets and persons, consistent with their contract's mission statement. This placed responsibility with the combatant commander to ensure that private companies' contract mission statements do not authorize performance of inherently Government military functions, i.e. preemptive attacks or assaults or raids, etc. Otherwise, civilians with US Armed Forces lose their law of war protection from direct attack, if and for such time as they directly participate in hostilities.

In Washington Post, June 1, 2007, A U.S federal judge ordered the military to temporarily refrain from awarding the largest security contract in Iraq. The order followed an unusual series of events set off when a U.S. Army veteran, Brain X. Scott, filed a protest against the government practice of hiring what he calls mercenaries, according to sources familiar with the matter. The contract, worth about \$475 million, calls for a private company to provide intelligence services to the US Army and security for the Army Corps of Engineers on reconstruction work in Iraq. The case, which was being heard by the US Court of Federal Claims, puts on trial one of the **most controversial and least understood aspects of the Iraq war: the outsourcing of military security to an estimated 20,000 armed contractors who operate with the little oversight.** *Further see* "Washington Post" 18 August 2006, the US Comptroller General rejected bid protest arguments that US Army contracts violated the Anti-Pinkerton Act by requiring that contractors provide armed convoy escort vehicles and labor, weapons, and equipment for internal security operations at Victory Base require contractors to provide quasi-military forces as strikebreakers.

As with any marked economy responding to supply and demand, companies that provide these types of unique services have expanded. There are, by some reports, over 45 such companies in the USA alone, with more in the UK and elsewhere around the world. (See Foreign and Commonwealth Office, **Private Military Companies: Options for Regulation, 2001-2, H.C. 577, at pages 9-26.**) The International Peace Operations Association ("IPOA") is U.S. trade organization for private mercenary companies. The IPOA was founded by former academic, Doug Brooks in April 2001 and now has its own in-house journal, *The Journal of International Peace Operations*. This organization has several companies as members including; **Blackwater USA**, Armor Group International PLC, Pacific Architects and Engineers, Hart Security, MPRI, etc.

*Several authors have described the expansion of this sector and its rise and importance in current functioning of the military. Between 10.000 and 20.000 former military or security personnel are earning up to \$1500 a day working in Iraq and Afghanistan on a variety of tasks including the armed protection of Afghan President Hamid Karzai. It is big business and it is expanding, fueled by the enthusiasm of the US and other Western governments for outsourcing risks. According to the *International Alert*, the global market for private security is expected to grow to \$210 b. in 2010 from \$30 b. in 2004. In this regard, you may refer to, "**The Market for-Force: The Consequences of Privatization Security**, by Deborah D. Avant, George Washington University, August 2005; **Private Armies and Military Intervention**, David Shearer, April 1998; **Corporate Warriors: The Rise of the Privatized Military Industry**, Peter W. Singer, Cornell University Press, (March 2004); **Privatizing Security: Law, Practice and Government of Private Military and Security Companies** by Fred Schreier and Marina Caparini; DCAF Occasional Paper 6, The*

Geneva Centre for the Democratic Control of Armed Forces, March 2005; *“Soldiers of Misfortune – Is the Demise of National Armies a Core Contributing Factor in the Rise of Private Security Companies?”* by Maniger, Stephan in Kummel, Gerhard and Jager, Thomas (Hrsg.); *Private Security and Military Companies: Chances, Problems, Pitfalls and Prospects*, V.S. Verlag fur Sozialwissenschaften, Wiesbaden, 2007. Furthermore please see also, Paul Kelthy, “Private security firms in war zones worry NGOs”, 11 August 2004.

### International Law

International humanitarian law (1907 Hague Regulations of Warfare, 1949 Geneva Conventions) does not prohibit the deployment of private armies or mercenaries in armed conflicts and does not impose major restrictions on the use of private actors that support or accompany conventional armed forces. However, these participants are obligated to abide by the rules of international humanitarian law, and civilians, even if they are allowed to accompany the armed forces, are not allowed to actively participate in the fighting. ( See, Antenor Hallo de Wolf, “Modern Condottieri in Iraq: Privatizing War From The Perspective of International and Human Rights Law”, 13 Ind. J. Global Legal Stud. 315 (Summer 2006).

### National Law

Generally speaking no national legislation exists that prohibits the activities of such companies. A number of countries, however, have adopted legislation to restrict or control their business operations and conduct. This is the case of South Africa, the UK and the US.

Although these regulations explicitly acknowledge the necessity of strictly monitoring contract performance and overseeing the quality of the services by these companies but nothing effective is being done. This means that the companies themselves have to perform the necessary supervisory and management functions over their employees. **This author is not aware of any legislation in Pakistan relating to such companies, and absolutely absurd, non serious, self contradictory and irresponsible statements are being made by the spokesmen of the Government. Neither the National Assembly is taken into confidence nor the public at large is informed of the actual facts in spite of such companies’ well-publicized presence in Islamabad, Peshawar and Balochistan etc.**

### The Sandline Affair

#### 1. Factual Background

In 1997, Sandline International, a company specializing in rendering military and security services of an operational training and support, signed an agreement (“Agreement”) with the Deputy Prime Minister of Papua, New Guinea (“Guinea”) to provide military personnel for conducting offensive operations in the island of Bougainville against a separatist movement. On the eve of the operation’s deployment, Sandline’s personnel were arrested by Guinea’s national forces, following a military uprising in protest against the Agreement. Although the judicial inquiry that followed to establish the facts did not question Sandline’s effective engagement, Guinea suspended the agreement, claiming the Agreement has been frustrated since its performance had become impossible.

#### 2. The arbitration proceedings

In accordance with the **Agreement’s arbitration clause, which allowed the parties to seek international arbitration under the UNCITRAL Rules**, Sand line brought the case before an arbitration tribunal which was seated in Cairns (Australia) and later in London. Sand line claimed the Guinea was obligated to pay \$18 m. for the deployment of its personnel (in addition to the \$18 m. already paid). Guinea argues that the Agreement was null and void because it was illegal in both its formation and performance under Section 200 of its National Constitution, which prohibited the raising of unauthorized forces and that those who signed it lacked the capacity to do so. Sand

line's response contested the allegation of illegality but said that the *Agreement was governed by English Law*, which included public international law and that under international law Guinea could not rely upon Section 200 of its Constitution.

The tribunal concluded that since the Agreement was an international contract, Guinea "cannot rely upon its own internal laws as the basis for a plea that a contract concluded by it is illegal". Since if it were otherwise, a contracting state with control over its internal laws could choose whether or not to honor the contracts. Because (a) the Agreement was closed with the Deputy Prime Minister of Guinea and has the approval of the Prime Minister and other national organs and (b) the question of illegality under national law was not raised at the time of the Agreement, the tribunal decided that a valid contract has been concluded between the parties. The tribunal did not question the legal status of Sandline under international law or the international legal validity of the Agreement and Sandline's activities. In fact, it concluded that, even if the Agreement was illegal under national law, this did not have any bearing on international law. The tribunal observed that "the agreement was not illegal or unlawful under international law or under any established principle of public policy. A political decision having been made by Guinea to enter into it, its execution by a person with apparent authority to bind the state gave rise to a valid contract in the eyes of international law".

Thus, the tribunal rejected Guinea's arguments and decided that it was liable to Sandline for its failure to perform the terms of the Agreement and that Sandline was entitled to recover the \$18 m. for Guinea. From this award it may be concluded that Private Security Companies are seen currently as international economic actors in the same vein as normal multinational corporations. However, the services they render make it even more necessary to regulate their activities. Please see aforesaid book of Antenor Hallo de Wolf, *Ibid* (extracts are quoted from Wolf's book).

## CONCLUSION

In summary, illegal contracts cannot be arbitrated; they are not arbitrable. The arbitrability itself must be decided by the arbitrators according to the law of the place of arbitration. Although the illegality of the mercenary agreements depends on the law of each jurisdiction, generally they are not prohibited by international law and national law. However, experience demonstrates that such contracts and activities need strict regulation and supervision, especially after the recent abuses.

Hallo de Wolf, who is widely followed in this exposition, summarizes the situation regarding such companies saying that there is currently no rule of international law that prohibits the deployment of such companies or the privatization of military tasks and services as long as the personnel employed by these companies and states are not mercenaries. However, in light of the special activities they carry out, offer services, that may include the coercive use of lethal force.

Paces' members present problems of identification and accountability. They are not clearly military but neither are they local actors. Many voices have raised to remedy the situation like the UK Foreign Affairs Committee, which complained of the lack of centrally held information on contracts between government departments and such companies was unacceptable and recommended that the government take steps to collect such information and to update it regularly. **(See UK Foreign Affairs Committee. Report on Private Military Companies, Session 1989-1999).**

**In the circumstances no one can imagine if the Pakistani Government, what to talk of accountability, has even a very rough estimate of the identification and number and placement of such companies working within our so-called sovereign territory as well as the other territory under our so-called control.**

Qaiser Javed Mian  
LLB, LLM (U.S.A.)  
Attorney at Law.  
Equity Law Office,

9-Turner Road, Lahore.  
0300-8445227  
042-7310044.