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Exploring Mercenaries

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While the mercenary profession has existed for centuries, the modern day Private Military Company (PMC) is a new concept and entity in warfare. The modern PMC has its roots in the end of Zimbabwe Rhodesia in 1980, when white soldiers no longer had a role in the black ruled Zimbabwe (Shadow Company, 2006)[1]. This prompted an exodus of Rhodesian soldiers to the then apartheid South Africa and an influx of ex-Rhodesian military joining the South African Defence Force (SADF) (Shadow Company, 2006)[2]. With gradual dissolution of apartheid in South Africa and the breakup of the SADF, ex-military personnel began to establish PMCs. The largest and most influential PMC, Executive Outcomes, was the forerunner to PMCs in society today – it offered full service military personnel for hire in all military theatres (land, air, and sea) (Shadow Company, 2006)[3]. The PMC is the contemporary form of the mercenary trade. PMCs, depending on their contracts, are tasked with providing logistics, military training, services on and off battlefields, and soldiers to serve in active combat roles. As a preface to this paper it is important to view mercenaries and PMCs as not mutually exclusive but as linked entities – as mercenaries are defined as individuals who take part in armed conflict, who are not a national party to a conflict, who are motivated to participate for private gain, and who are promised material compensation by or on behalf of a party to the conflict (United Nations, 1996)[4]. Therefore, individuals who are under the employment of PMCs and are tasked with serving in active combat are mercenaries, although the working nomenclature in scholarly research and modern discourse on this subject refers to mercenaries as ‘contractors’. This paper is aimed at exploring the PMC sector in the United States and answering three questions: 1) What is the size of the PMC industry within the U.S.? 2) What is the legal status of U.S. PMC contractors within the scope of the Iraq War and internationally, and 3) How do PMCs relate to Herfried Münkler’s concept of “New Wars” and are they indicative of a fundamental change in the model of warfare?

PMCs – The Size and Price of the Sector

The deployment and existence of PMCs within the U.S. defence and intelligence sector is incredibly large. The size and depth of this deployment creates difficulties in finding consistent and accurate statistics as to the sectors size in recent and current military deployments, specifically Iraq and Afghanistan. The Office of the Director of National Intelligence found that PMC contractors consisted of 29% of the workforce within the U.S. Intelligence Community (USIC)[5] at a cost equal to 49% of their [U.S. Intelligence Community] personnel budgets, in a 2008 study (Priest and Arkin, 2011, 320). However, even with these figures it is still hard to judge the amount of PMCs currently involved in contracts with the USIC, although some attempts in more recent years have come out with estimated figures. It is also difficult to accept these numbers as authoritative due to conflicting inquiries by various branches of the U.S. government as well as inconsistencies in conclusive data. A 2011 Congressional investigation into PMC contracting practices estimated that roughly 199,783 contractors were employed in Iraq and Afghanistan during the 2010 fiscal year (United States of America, 2011, 200-205). Contra to these Congressional findings another estimate from the Government Accountability Office found a total of 262,681 contractors and supporting personnel employed by the Department of Defense (DOD), State (DOS), and USAID in Iraq and Afghanistan, with 18% (47,282) of them serving in a security role (Ettinger, 2011, 2). Ettinger draws from this data that for every uniformed U.S. soldier in the Middle Eastern theatre there are two contracted individuals, an increase from the 1991 Gulf War which had a contractor to soldier ratio of 1:50 (2011, 2). These estimated figures show a sharp increase in the contractor to soldier ratio as outlined in the PMC documentary *Shadow Company* which held the contractor to soldier ratio at 1:10 in 2006 (Shadow Company, 2006). Numbers surrounding PMCs and contractors involved with U.S. conflicts become more dubious when the concept of funding and payment is involved. The Advisory Council on International Affairs

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(AIV) reported that the DOS spends roughly \$4 billion USD on PMCs in operational areas (Ter Beek et al., 2007, 10). Cumulatively a 2011 Commission on Wartime Contracting estimated that at least \$117 billion USD had been spent on PMC contractors since the beginning of the Iraq and Afghanistan missions in 2001, \$154 billion USD spent by the DOD, \$11 billion USD by the DOS, and \$7 billion USD by USAID (United States of America, 2011, 209-217). This study also took into account \$12 billion USD lost to fraud and inefficiency (United States of America, 209-217). There is also the question of future fund allocation to PMCs involved with various sectors of the U.S. government. In 2007 a \$150 billion USD was allocated to a ten-year omnibus contract with provisioning the U.S. Army until 2017 (Ettinger, 2011, 2). Ettinger places the role of PMC contracts and contractors into perspective by drawing the conclusion from the government data that PMCs and contractors constitute the second largest contingent of coalition forces or NATO partners involved in the Iraq and Afghanistan conflict, and that reliance on PMCs in these conflicts is without precedent (Ettinger, 2011, 2). Regardless of the sector numbers, and the difficulty of producing consistent and accurate statistics for the makeup of the PMC sector in the U.S., the data shows that the sector is not only playing a massive role in contemporary American conflicts at an unprecedented level, but that the amount of investment from the government into the PMC sector has also grown at an astonishing rate.

PMCs – Legality Within the Iraq War and Internationally

With PMCs taking an unprecedented role alongside U.S. forces in the recent Iraq War, it is important to examine the legal dimension of non-state actors – contractors – working in a quasi-military role. Internationally, PMC contractors do not have the right to be combatants within warfare (United Nations, 1996). This is outlined in Article 47 of Protocol 1 of the Geneva Convention, which also outlines the criteria of a mercenary (contractor) within the greater framework of war (United Nations, 1996). Because of this distinction conferred upon PMC contractors, if they are deployed during an armed conflict they are regarded as civilians, not combatants, under international law (Ter Beek et al., 2007, 16). This gives them the permission to carry firearms and other such armaments without being considered combatants (Faite, 2008, 7). Notwithstanding, the laws surrounding when a contractor crosses the threshold from being a civilian into being a combatant are murky under international humanitarian law. For instance, Article 50 of Protocol I states that as long as contractors are civilians they are protected against direct attacks “unless and for such time as they take a direct part in the hostilities” at which time contractors lose their protection as civilians. However, these protections afforded to civilians are restored to contractors upon their cessation of making direct contributions to hostilities (Faite, 2008, 7). Although Article 50 gives the criterion for when contractors shift from civilians to combatants, by taking a direct part in hostilities, the Geneva Conventions fail to give a definition of what a direct role consists of (Faite, 2008, 7). Discourse and literature as to what constitutes a direct role in hostilities has been extensive, with former contractors stating that force is only authorized in retaliation or self-defence (Shadow Company, 2006)[6]. During the Iraq War, the laws applying to PMCs and contractors operating in Iraq fell to the jurisdiction of the Coalition Provisional Authority (CPA). CPA Order 17 determined that contractors were not subject to Iraqi laws or regulations in matters relating to the terms and conditions of their contracts (The Coalition Provisional Authority, 2006, 4), but contractors were required to comply with all CPA orders (The Coalition Provisional Authority, 2006, 4). Within the U.S. PMC contractors sit in a legal gray area. The Congressional Research Service issued a report on the prosecution of contractor personnel in U.S. federal or military courts. According to this report, contractors may be prosecuted for certain crimes under the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), or in certain circumstances the Uniform Code of Military Justice (UCMJ) (Elsea, 2011, 18). However, the report goes on to state that crimes committed by contractors may not fall within statutory definitions[7] and thus might fall outside the jurisdiction of U.S. criminal law, even though the U.S. is responsible for contractor conduct as a matter of state responsibility under international law (Elsea, 2011, 18). Even within the scope of the Iraq War, the legality of PMC contractors is ambiguous under international humanitarian law, CPA regulation, and statutory definitions for both the UCMJ and MEJA. All of this creates an ambiguous region for laws surrounding contractors stationed not only in Iraq, but in the broader scope of global conflicts. While international law defines contractors as civilians, insofar as their contribution to hostilities, and contractor presence legal, existing conventions, statutes, and legislation in the U.S. allows for the possibility of American PMC contractors who may have been involved with criminal actions in a warzone to escape prosecution under the MEJA and UCMJ, despite U.S. responsibility for contractors under international law (Elsea, 2011, 18).

PMCs and Münkler's 'New Wars'

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In Münkler's paper, *Old and New Wars*, Münkler crafts a rubric for what constitutes new war. New wars, in contrast to old wars, are characterized by the sum of three elements: 1) development of insurmountable military asymmetry, 2) the gradual *privatization of war*, and 3) the *de-militarization of war* (Münkler, 2012, 193-194). To examine how PMCs relate to Münkler's concept it is first important to break down this analysis into individual parts. Münkler defines the development of insurmountable military asymmetry as the point where the actors in war who are militarily inferior are hardly capable of warfare due to asymmetrical military power by the other party (2012, 193). PMCs are representative of military asymmetry. Contractors are tasked with taking auxiliary roles that would otherwise have to be handled by trained soldiers. By looking at available data concerning the cost of contracting PMC services, the ability to hire contractors to perform in any capacity within a warzone is a cost prohibitive in and of itself. This makes it evident that in order to solicit PMC services, a party must have more resources, specifically ample funding. In the case of the Iraq War the ability of the U.S. to hire contractors at a rate of 2:1 (Ettinger, 2011, 2) to U.S. soldiers further solidifies the military asymmetry between the U.S. and the various parties involved in the Iraqi insurgency. Münkler defines the gradual privatization of war as states no longer being the monopolists of war, and non- and sub-state actors increasingly seizing the initiative [of war making] from states, which for the most part have been reduced to reactive positions (2012, 194). While it is true that the use of PMCs does represent privatization in warfare, that is to say the contracting of companies to do the work that trained soldiers could do otherwise, Münkler's definition of privatization fails to apply to the use of PMCs in modern warfare in its full sense. Current international law views contractors as civilians when deployed alongside an armed force (United Nations, 1996)[8]. At no point in hiring contractors to perform in auxiliary roles within active combat is the monopoly of force transferred explicitly or implicitly to non/sub-state actors. Contrary to what Münkler states in regards to private actors seizing war making initiative whilst pushing states back into reactive positions, the inverse seems to be true with contractors. Contractors are postured in reactive positions while deployed, only being authorized in the use of defensive force (Shadow Company, 2006)[9] as offensive force causes revocation of their civilian and contractor status under international law (Faite, 2008, 7). Münkler writes that the de-militarization of war sees regular armed forces losing the control and monopoly of warfare, while seeing an increasingly colourful mix of combatants rather than regular armies, with their targets largely being civilian and non-military infrastructure (2012, 194). Again, while PMC contractors technically represent the de-militarization of war by being non-state actors tasked with military roles, they do not completely represent Münkler's concept of de-militarization. While Münkler writes that within de-militarization civilians and non-military infrastructure increasingly becomes active targets, this notion is simply untrue for PMC contractors. As stated by Globe Risk CEO Alan Bell, as well as political scientist P.W. Singer, PMC contractors are concerned with protecting their 'noun' (a person, place, or object) and not taking active targets for offensive purposes (Shadow Company, 2006). Münkler notes that only when considered together do these features describe new wars (2012, 194). In the case of PMCs, under Münkler's criteria they are not a feature of new war. While his point regarding military asymmetry does apply to the hiring of PMC contractors in active combat, the criteria for gradual privatization and de-militarization of war fail to address the nuances in international law concerning the actions of contractors in battle.

By examining the research questions proposed at the beginning of this paper, a more comprehensive picture of the PMC sector within the U.S. is presented. Through examining research on the size and depth of PMCs within the U.S., it is clear that the use of contractors and PMC services in the 21st century is unprecedented – not only in personnel used but in the amount spent in government contracts with PMCs. By delving into the existing laws surrounding contractors at the international level as well as the national level, a better understanding of the legal framework of how PMC operations take place is achieved. The common misconception of lawlessness and statelessness of PMC contractors is shown to be wrong, because of the complex set of laws outlined by not only the U.S. but also through the Geneva Conventions. Finally, by comparing contemporary PMC operations to Münkler's framework of new wars, the notion that PMCs and contractors are symbolic of a transition to a more de-militarized and privatized new war status is rejected. The research in this paper has led to the conclusion that PMCs and contractors alike do not mark the shift to new wars as outlined by Münkler. Instead it shows that the time-worn profession of mercenaries still lives on in the modern era. However, the statistics surrounding PMCs show a meteoric growth in the sector, and academics have reached a consensus that contractors are being utilized at unprecedented levels. Perhaps this may not mark a shift to new wars in Münkler's sense of the term, but it may denote a shift from traditional interstate warfare to warfare where auxiliary roles are no longer occupied by soldiers and officers of a state's army, but instead by individuals coming from the private military sector.

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- [1] Stated by PMC researcher and author Madelaine Drohan
- [2] Stated by PMC researcher and author Madelaine Drohan
- [3] Stated by PMC researcher and author Madelaine Drohan
- [4] This explanation is included in Article 47 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), published by the United Nations through the OHCHR.

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[5] That is to say all 16 members of the USIC including: 1 independent agency, 8 agencies within the U.S. Department of Defense, 1 agency within the U.S. Department of Energy, 2 agencies within the U.S. Department of Homeland Security, 2 agencies within the U.S. Department of Justice, 1 agency within the U.S. Department of State, and 1 agency within the U.S. Department of the treasury.

[6] Stated by Brookings Institute political scientist P.W. Singer, Vietnam veteran and PMC consultant John F. Mullins, PMC lobbyist Doug Brooks, security contractor Cobus Claassens, and author Robert Young Pelton.

[7] Such definitions under the UCMJ, MEJA, and Special Maritime and Territorial Jurisdiction Act are outlined within the Congressional Research Service's full report on Private Security Contractors in Iraq and Afghanistan: Legal Issues on pages 19-29

[8]Article 47 of Protocol Additional to the Geneva Conventions (Protocol 1)

[9] Stated by Brookings Institute political scientist P.W. Singer, Vietnam veteran and PMC consultant John F. Mullins, PMC lobbyist Doug Brooks, security contractor Cobus Claassens, and author Robert Young Pelton.

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