

STRUČNI ČLANAK

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JURISDICTION OVER GRAVE BREACHES OF HUMAN RIGHTS IN IRAQ COMMITTED BY PMSCs¹ CONTRACTED WITH THE USA²: THE NISUR SQUARE INCIDENT

Abstract: *This article examines and analyzes the available legal options to the jurisdiction over grave breaches of human rights suffered by Iraqi civilians at the hands of the personnel of private military and security companies contracted with the U.S. armed forces in Iraq, with reference to the incident of the killing of 17 Iraqi civilians and wounding others in the Nisur Square in Baghdad in 2007 as a result of shooting by Blackwater company personnel. During its direct administration to Iraq as an occupying power the United States have granted to members of its armed forces and contractors immunity from jurisdiction of Iraqi laws. Such immunity helped to some degree, to commit serious violations of human rights against Iraqi civilians and rendered the litigation or prosecution of perpetrators complex, given that the local remedies must be exhausted before searching the possibility of jurisdiction at the international level.*

Key words: Human Rights, Civilians, Jurisdiction, Nisur incident.

INTRODUCTION

In March 2003, the USA and the allied countries have launched a military campaign against Iraq under the pretext that it possesses weapons of mass destruction and exposes international peace and security at risk.

The campaign has led to the toppling of the Iraqi political regime and the USA became an occupying power under the UN Security Coun-

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1 Private Military and Security Companies.

2 United States of America.

Resolution 1483 in 2003, responsible for managing the general affairs in Iraq. Therefore, it founded the Coalition Provisional Authority (CPA) under the chairmanship of the civil governor of Iraq, who was granted absolute legislative and executive powers to manage the affairs of Iraq on behalf of the Government of the United States in Washington.

In accordance with the rules of international humanitarian law, the occupation authority has the duty to protect civilians and prevent violations of human rights in occupied areas, the obligation to investigate and prosecute the perpetrators of such violations and to impose the rule of law and order. However, a serious violations of human rights committed against Iraqi civilians by U.S. troops and contractors, in particular by the personnel of private military and security companies, which were assigned to perform functions of security and combat in Iraq.

The Nisur incident is one of the many examples of grave breaches of human rights against civilians in Iraq committed by the members of private military and security companies, which demonstrated just how weak are the standards of prevention and deterrence against violators of human rights in Iraq by U.S. forces and contractors.

PART 1: THE NISUR INCIDENT: FACTS, BACKGROUND AND RELATED PROVISIONS OF HUMAN RIGHTS

On September 16, 2007, Blackwater military contractors allegedly shot and killed 17 Iraqi civilians in Nisur Square, Baghdad. An Iraqi investigation into the events stated that as the convoy drew close to Nisur Square, a distant Kia sedan car with a woman and her grown son in it was driving slowly on the wrong side of the road, and ignored a police officer's whistle to clear a path for the convoy. The security team first fired warning shots and then lethal fire at the car. After this, stun grenades were fired off by contractors to clear the scene. Iraqi police and Iraqi Army soldiers, mistaking the stun grenades for fragmentation grenades, opened fire at the Blackwater team, to which the Blackwater team responded. According to Iraqi investigators, a Blackwater helicopter present during the attack fired several times from the air. Blackwater has denied these charges. Blackwater had stated that a car bomb detonated close to the meeting point and that their security team then evacuated the State Department officials. Blackwater says the convoy passed through Nisur Square, between al-Mansour and al-Yarmukh neighborhoods, and was attacked. According to Blackwater vice-president Marty Strong, it was hit with "a large explosive device" and "repeated small arms fire" which disabled a vehicle. Several sources

have stated that the explosion was caused by a mortar round, though this is not reflected in the Department of State incident report. A State Department report states that eight to ten attackers opened fire “from multiple nearby locations, with some aggressors dressed in civilian apparel and others in Iraqi police uniforms”. The report says that as the convoy tried to leave, its route was blocked by insurgents armed with machine guns at 12:08 pm. According to another US government report, “The team returned fire to several identified targets” before leaving the area and a second convoy en route to help was “blocked/surrounded by several Iraqi police and Iraqi national guard vehicles and armed personnel”. A US Army convoy, possibly the same one delayed by Iraqi forces, arrived approximately a half hour later, backed by air cover, to escort the convoy back to the Green Zone. The U.S. State Department said it planned to investigate what it called a “terrible incident”. According to Iraqi Prime Minister Nuri al-Maliki, Secretary of State Condoleezza Rice promised a “fair and transparent” investigation into the incident. The State Department announced an American-Iraqi joint commission to investigate both the shooting and the use of private security contractors as a broader issue. The committee was co-chaired by Abd al Qadir, the Iraqi Minister of Defense and Patricia A. Butenis, the Chargé d’affaires of the U.S. Embassy in Iraq. Major Gennal Abdul-Karim Khalaf, an Interior Ministry spokesman, said Iraqi authorities had completed their investigation into the shooting and concluded that Blackwater guards were responsible for the deaths. US Military reports appear to corroborate the Iraqi government’s contention that Blackwater was at fault in the incident. On October 2, 2007 the Democratic staff of the House Oversight and Government Reform Committee released a report stating that Blackwater USA guards have used deadly force weekly in Iraq and have inflicted “significant casualties and property damage”. The report found that the guards fired their weapons an average of 1.4 times a week. The report further said that Blackwater reports that its forces fired first in over 80 percent of the cases. On October 4, 2007 U.S. military reports indicated Blackwater’s guards opened fire without provocation and used excessive force. “It was obviously excessive”, a U.S. military official speaking on condition of anonymity told the Washington Post. “The civilians that were fired upon, they didn’t have any weapons to fire back at them. And none of the IP (Iraqi police) or any of the local security forces fired back at them”, the official continued. The Blackwater guards appeared to have fired grenade launchers in addition to machine guns. On October 13, 2007, the FBI reported it had found at least 14 of the 17 Iraqis killed to have been without cause. The three justifiable killings involved the two passengers of a white

Kia sedan car which rolled toward the convoy, as well as an unidentified Iraqi nearby. Much of the blame for the unjustified casualties has been put on “turret gunner no. 3”, Paul Slough, 29, of Keller, Texas, who fired a large number of rounds during the event. Anne Tyrrell, a Blackwater spokeswoman, responded to the findings saying Blackwater “supports the stringent accountability of the industry. If it is determined that one person was complicit in the wrongdoing, we would support accountability in that”. The key people in this event have not spoken with the investigators. On October 11, 2007, the Center for Constitutional Rights filed a suit against Blackwater USA under the Alien Tort Claims Act on behalf of an injured Iraqi and the families of three of the seventeen Iraqis who were killed by Blackwater employees during the September 16, 2007 shooting incident. The Justice Department was originally not expected to bring criminal charges against the corporation, however in December 2008, the Justice Department announced they were charging five of the Blackwater employees, and ordered them to surrender themselves to the FBI. Charged with manslaughter are Donald Ball, a former Marine from West Valley City, Utah; Dustin Heard, a former Marine from Knoxville, Tennessee; Evan Liberty, a former Marine from Rochester, New Hampshire; Nick Slatten, a former Army sergeant from Sparta, Tennessee, and Paul Slough, an Army veteran from Keller, Texas. A sixth Blackwater guard, Jeremy Ridgeway of California, struck a deal with the prosecutors, turned on his former colleagues, and pleaded guilty to one count each of manslaughter, attempted manslaughter, and aiding and abetting. The trial was set for early 2010, but the charges were dismissed by District Judge Ricardo Urbina. The disputed evidence concerned statements the guards were compelled to give to state department investigators: as these statements would have been self-incriminating, they were therefore protected under the Fifth Amendment to the United States Constitution. “Prosecutors should therefore have built their case against the men without them”, a BBC report explained. On April 22, 2011 a federal appeals-court panel revived the Justice Department’s prosecution of the former Blackwater Worldwide guards accused. A three-judge panel of the Court of Appeals for the District of Columbia Circuit found “systemic” errors in a district court’s 2009 decision to dismiss charges against the five former Blackwater guards. The district court found that the government mishandled the case by using tainted statements the guards provided in the initial investigation. The official court document explained that “the government failed to establish that the Iraqi witnesses it presented to the second grand jury were not in any way influenced by their previous exposure

to the defendants' compelled statements. This evidentiary use of tainted information constitutes yet another Kastigar violation."³

Based on the above, the incident resulted in the deaths of civilians due to the actions of the personnel of the PMSCs contracted with the USA in Iraq. Here one should address the international legal provisions relating to this act (wilful killing). The most important texts relevant are the Geneva Conventions of 1949, which ensure the protection of civilians against grave violations of human rights

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Article (50):

“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Article (147):

“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Article (11/4):

“Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.”

3 http://en.wikipedia.org/wiki/Blackwater_Baghdad_shootings, http://www.expose-the-war-profiteers.org/DOD/iraq_II/blackwater.htm.

Hill, J. S., 2007, *Blackwater, The rise of the world's most powerful mercenary army*, New York, Nation Books.

Article (85) paragraph 2:

“Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.”

And paragraph 3:

“In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:

- (a) making the civilian population or individual civilians the object of attack;*
- (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);*
- (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);*
- (d) making non-defended localities and demilitarized zones the object of attack;*
- (e) making a person the object of attack in the knowledge that he is hors de combat;*
- (f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.”*

The term’s “grave breaches regime” refers to the definitions of grave breaches and to the procedural rules governing grave breaches. As a matter of treaty law, this regime is set out in the Geneva Conventions of 1949 and has been further expanded in Additional Protocol I of 1977. The grave breaches of the Geneva Conventions have also been incorporated into the Statute of the International Criminal Court (ICC) as war crimes in international armed conflict over which the Court has jurisdiction. (ICCSt., Art. 8(2)(a).)⁴

Article (8/2) of the ICC statute:

“For the purpose of this Statute, ‘war crimes’ means:

⁴ Henckaerts, J. M., 2009, The Grave Breaches Regime as Customary International Law, *Journal of International Criminal Justice*, 7, p. 683.

(a) *Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:(i) Wilful killing..”*

Therefore, it can be said that the killing of Iraqi civilians by the actions of members of the Blackwater company on 16 September 2007 in Baghdad, is one of such grave breaches of human rights within the meaning of the relevant Geneva Conventions and is a war crime under the Statute of the International Criminal Court.

PART 2: DEFINITION OF PRIVATE MILITARY SECURITY COMPANIES (PMSCs) AND THEIR LEGAL STATUS

2.1 DEFINITION

There is no specific definition of the concept of private military security companies (PMSCs) agreed upon by the authors. In the summer of 2009 there was an attempt by a working group in the United Nations High Commissioner for Human Rights to elaborate a draft international convention for the definition and regulation of private security companies. According to this project, the private military and security company is “a corporate entity which provides on a compensatory basis military and/or security services, including investigation services, by physical persons and/or legal entities”⁵

Some scholars and writers define private military security companies (PMSCs) so as to include any activity taken by the company for the protection of individuals or places, or anything else.⁶ Others widen the definition to cover activities related to the analysis of intelligence and operational coordination and training of security forces.⁷

Due to the absence of a clear and unanimous definition of PMSCs, scholars have been using many different terms to refer to them; Private Military Companies (PMC), Private Security Companies (PSC), Private Military Firms (PMF), Military Service Providers (MSP), Mercenary

5 Office of the United Nations High Commissioner for Human Rights, 2009, *Draft International Convention on the Regulation Oversight and Monitoring of Private Military and Security Companies, Final Draft for Distribution*, July 13, 2, (<http://www.mgimo.ru/files/121626/draft/pdf.pdf>).p6).

6 Dogru, A. K., 2010, *Outsourcing, Managing, Supervising, and Regulating Private Military Companies in Contingency Operations*, thesis, Naval Postgraduate School, Monterey, California.

7 Dogru, A. K., 2010.

Companies, Private Military/Security Contractors, etc. Moreover, the term of military/security contractors has been used to refer both to companies and to individual employees.⁸

British Green Paper classifies the PMSCs according to the services provided into: a) combat and operational support, b) military advice and training, c) arms procurement, d) intelligence gathering, e) security and crime investigation, and f) logistical support.⁹

Doug Brooks, calls the PMSCs Service Providers, and classifies them into three categories: (a) Nonlethal Service Providers, (b) Private Security Companies, and c) Private Military Companies.¹⁰

Peter Singer names the PMSCs as Private Military Firms (PMFs) and classifies them into three categories: a) military provider firms (implementation and command), b) military consultant firms (advisory and training), and c) military support firms (nonlethal aid and assistance).¹¹

Deborah Avant's classifies PMSCs in terms of their functions or services as following:

- (1) Military Functions: armed operational support, unarmed operational support on the battlefield, unarmed military advice and training, and logistical support.
- (2) Police Functions: armed site security, unarmed site security, police advice and training, crime prevention and intelligence.¹²

Nicholas Dew and Bryan Hudgens classify PMSCs in the following manner:

- (1) Operations: attack operations, protection services;
- (2) Advisory & Training: advisory, training;

8 Dumlupinar, N., 2010, *Regulation of Private Military Companies in Iraq*, thesis, Naval Postgraduate School, Monterey, California.

9 United Kingdom Foreign and Commonwealth Office, 2002, *Private Military Companies: Options for Regulations*, London, The Stationary Office, HC 577, February 12, 10, (http://www.fco.gov.uk/resources/en/pdf/pdf4/fco_pdf_privatemilitarycompanies).

10 Brooks, D., 2002, Protecting People: the PMC Potential, a working document presented as *Comments and Suggestions for the UK Green Paper on Regulating Private Military Services*, July 25, (<http://www.hoosier84.com/0725brookspmcregs.pdf>, June 26, 2009).

11 Singer, P. W., 2003, *Corporate Warriors: The Rise of the Privatized Military Industry*, London, Cornell University Press, p. 93.

12 Avant, D. D., 2005, *The Market for Force: The Consequences of Privatizing Security*, New York, Cambridge University Press, p. 17.

- (3) Support Services: in this category, they presented a number of subcategories ranging from tactical equipment maintenance and operation to administrative services.¹³

2.2 LEGAL STATUS OF PMSCs

2.2.1 PMSCs and Persons Who Accompany the Armed Forces

Article 4/4 of the Geneva Convention Relative to the treatment of Prisoners of war of August 12, 1949 (GENEVA CONVENTION III) defines Persons who accompany the armed forces and gives them the status of prisoners of war for their arrest or detention:

“Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.”

This provision describes the legal status of persons who are involved in combat missions and who do not have intention to be involved in them. But, what is the legal effect of this provisions if those persons do participate of combat operations? According to one position, such persons retain their right to be treated as prisoners of war when captured. This view is criticized because it encourages the involvement of civilians in combat operations and makes the distinction between civilians and combatants meaningless. The second position is that they should be deprived of the status of prisoners of war as a result of their participation in combat operations. A third position is that they could be deprived of the status of prisoners of war when taking part in combat operations only if they meet the requirements for legitimate combatants.¹⁴

Therefore, the PMSCs personnel that accompany military forces to assigned tasks and operations fall within the scope of application of this provision, unlike those who work with military forces to carry out its functions or to participate in combat and the use of force.¹⁵

13 Dew, N., Hudgens, B., 2008, The Evolving Private Military Sector: A Survey, *Acquisition Research Sponsored Report Series*, NPS-AM-08-012, prepared for Naval Post-graduate School, August 11, 18, (http://acquisitionresearch.net/_files/FY2008/NPS-AM-08-012.pdf).

14 Walter, P., *The Legal Status of Private Contractors Under International Humanitarian Law*, 18, (<http://www.guardian-gbs.com/Presse/afhandling.pdf>).

15 Dumlupinar, N., 2010, p. 91.

2.2.2 PMSCs and Combatants

Article 43/1/2 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, defines the combatants as following:

1. *The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.*
2. *Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.*¹⁶

Some believe that the legal status of PMSCs is still uncertain, since they are not non-combatants in accordance with the Fourth Geneva Convention because they carry weapons and act on behalf of the government, and, moreover, they are not lawful combatants under the Third Geneva Convention because they are not wearing uniforms and are not subject to a system of command.¹⁷

The importance and the need to determine the legal status of PMSCs lies in its effects with regards to the international responsibility for their actions and their enjoyment of the rights and legal privileges whether as members of the armed forces of the State under Article 43/2 of the Additional Protocol I, or as members of the armed forces or militias that are part of the armed forces under Article 4/A/1 of the Third Geneva Convention or as members of militias allied to independent or other corps of the voluntary force under Article 4/A/2 of the Third Geneva Convention.¹⁸

Some believe that the condition to apply Article 43 of the Additional Protocol I is that the groups which are referred to must be under the command responsibility of the parties to the conflict and this is not the case

16 <http://www.icrc.org/ihl.nsf/full/470?opendocument>.

17 Schreier and Caparini, 2005, *Privatizing security, practice and governance of private military and security companies*, paper presented as a part of the policy dialogue on issues pertaining to the core mission of Geneva centre for the democratic control of armed forces, Geneva, March, occasional paper no. 6, p. 57.

18 Expert Meeting on Private Military Contractors, 2005, *Status and State Responsibility for their Actions*, University centre for international humanitarian law, Geneva, August 2005, p. 9.

with the PMSCs. Moreover, Article 4/A/2 of the Third Geneva Convention, lists four conditions necessary for its application, which the PMSCs do not meet:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) That of having a fixed distinctive sign recognizable at a distance;
- (c) That of carrying arms openly;
- (d) That of conducting their operations in accordance with the laws and customs of war.¹⁹

Others find that PMSCs can be regarded as armed forces in certain cases in terms of Article 43/1 of the Additional Protocol, because this Article is intended to define the concept of the armed forces of a state while the Article 4/A of the Third Geneva Convention distinguishes between the armed forces and the militias that are part of the armed forces, allied militias and independent corps of volunteers. Therefore, Article 43/1 aims to explain and make all groups fall within the concept of armed forces as long as they fulfill identified requirements in order to avoid relying on national laws of states to define members of the armed forces. Consequently when a state contracts with PMSCs to take part, on behalf of it, in armed conflict, the members of these companies are considered members of the armed forces of the state.²⁰

Some believe that the PMSCs may be awarded the status of combatants or retain the status of prisoners of war for the arrest according to three conditions: first, exercise a combat role in armed conflict and not merely accompany the armed forces in the sense referred to in Article 4/A/4 of the Third Geneva Convention and Article 50 of the Additional Protocol I. Second, under Article 43 of the Additional Protocol I, any group should have the legal status of combatants. The third condition is that PMSCs companies must meet the requirements of being distinctive from others and carrying arms clearly during the engagement, based on Article 44/3 of the Additional Protocol I to retain the status of prisoners of war.²¹

Others note that PMSCs may not meet the concept of members of other militias and members of other volunteer corps referred to in Article 4/A/2 of the Third Geneva Convention because there is a crucial dif-

19 Expert Meeting on Private Military Contractors, 2005, p. 10.

20 Expert meeting on Private Military Contractors, 2005.

21 Expert meeting on Private Military Contractors, 2005, p. 11.

ference between this Convention and the Additional Protocol. Article 43 states that the group must be subject to the responsibility of commands to one of the parties to the conflict, while according to Article 4/A/2 of the Convention it could be described as belonging to one of the parties to the conflict, although the PMSCs cannot be considered as being subordinate to state, but may meet the requirements of the combatant status in accordance with Article (43/2).²²

As for the responsibility commands, some believe that the contract entered into by the PMSCs would render them to be in a position of responsibility before a Contracting State terms of Article 43/1, whilst, others believe that this condition does not mean that the PMSCs should be subordinate to one of the parties to the dispute only but also should exercise its functions under a series of regulatory orders and commands of the armed forces, and, this cannot be achieved unless the state integrates the PMSCs personnel within its armed forces.²³

2.2.3 PMSCs and Mercenaries

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 I), 8 June 1977, defines mercenaries as following:

1. *A mercenary shall not have the right to be a combatant or a prisoner of war.*
2. *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.*²⁴

22 Expert meeting on Private Military Contractors, 2005.

23 Expert meeting on Private Military Contractors, 2005, p. 12.

24 Expert meeting on Private Military Contractors, 2005.

The International Convention against the Recruitment, Use, Financing and Training of Mercenaries was adopted by the UN 1989 defines a mercenary in Article 1 as any person who:

- (a) *Is specially recruited locally or abroad in order to fight in an armed conflict.*
- (b) *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 rank and functions in the armed forces of that party.*
- (c) *Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict.*
- (d) *Is not a member of the armed forces of a party to the conflict; and*
- (e) *Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.*²⁵

International law gives combatants the right to participate directly in combat operations, and the right as prisoners of war in case of arrest, while it is not allowed to mercenaries to take part in combat operations directly and they are deprived of the enjoyment of the rights of prisoners of war for the arrest.²⁶

It is noted that above mentioned article requires the mercenaries to be recruited specially to fight in an armed conflict, while the operation of many of the PMSCs cannot always be categorized as such, although they move easily from one place to another and from contract to contract without giving any importance to the specialization in a specific conflict.²⁷

It is also set forth that mercenaries participate directly in combat operations, while many PMSCs do not contribute directly in the fighting, but only supply limited functions in providing security for the purposes of defense or protection, or even just advice and training. In addition it is stipulated that the mercenaries should not be nationals of the disputing parties or residents in the territory controlled by one of the disputing parties. This condition is also not met by a number of PMSCs given they may have members who are nationals of Contracting State or host state in which the contract is carried out.²⁸

We note here that this article included the criteria that must be met for individuals to be treated as mercenaries. Some of the PMSCs work

25 <http://www.un.org/documents/ga/res/44/a44r034.htm>.

26 Dumlupinar, N., 2010, p. 91.

27 Salzman, Z., 2008, Private Military Contractors and the Taint of Mercenary Reputation, *International Law and Politics*, 40, p. 881.

28 Salzman, Z., 2008.

directly for government agencies and others work independently for the Contracting State. Some of them are direct parties to the contract and some are a sub-contracted party. Some carry weapons and wear distinctive uniforms but others look like civilians. It is therefore difficult to conclude whether the standards set in Article 47 apply fully to the PMSCs so as to make it possible for them to be considered as mercenaries.²⁹

The definition of the concept of mercenaries, as contained in Article 47 of the Additional Protocol I to the Geneva Conventions, is narrow and covers a few categories of people. It is difficult to apply and to assess or prove the financial motives of the people so as to be able to describe them as a mercenaries. People who accompany the armed forces but who are not enrolled in this forces referred to in Article 4/A/4 of the Third Geneva Convention, for example, such as were those who accompanied the U.S. armed forces in armed dispute with Iraq in order to be considered mercenaries, pursuant to Article 47 of Additional Protocol I, must meet all the requirements set forth in this article. If we assume that in the case of Iraq they were the citizens of the United States then they cannot be considered mercenaries even if they were not part of the armed forces and were recruited specifically to fight in armed conflict and participated directly in combat operations motivated by desire to get private benefits.³⁰

Some believe that the situation is not clear, and that the intention behind Article 47 was not to address mainly the companies. But if the nationality of the company and the nationality of its members are identical and not of the nationality of one of the parties to the conflict then the provision will be applicable. On the other hand, other scholars find that the important issue under this provision is to determine the nationality of individuals (PMSCs Personnel) and not the nationality of the company, which is irrelevant.³¹

In addition, the text stipulates that the motive for participation in combat operations is to obtain a private benefit. It is difficult to determine whether the motivation was financial or ideological or was just a pursuit of adventure. PMSCs personnel do not believe that they are recruited to fight in a particular dispute but think they are just engaged to guard something or to provide military training. Some believe that the requirements of this Article would be met if PMSCs members are recruited in order to carry out activities that could lead them to participate directly in combat operations. Other calls for determining the nature of the (object) which is protected or guarded by PMSCs whether it is military or civilians. Namely,

29 Dumlupinar, N., 2010, p. 92.

30 Expert meeting on Private Military Contractors, 2005, p. 23.

31 Expert meeting on Private Military Contractors, 2005, p. 25.

Article 52/2 of the Additional Protocol I indicates the attacks shall be limited strictly to military objectives, and Article 49/1 defines attacks as acts of violence against the adversary, whether in offence or in defence, and consequently if a duty of the PMSCs is to safeguard an objective, any act of violence committed in order to protect this objective is an attack in accordance with Article 49/1. If a PMSC is hired to protect a military objective for the sake of one of the parties to the conflict from attacks by the other party, this means that it may have been recruited to participate in an attack and consequently its members have been recruited to fight terms of Article 47/2/A.³²

2.2.4 Attribution of PMSCs' Conduct to State

Article 5 of the draft articles on responsibility of states for internationally wrongful acts adopted by the International Law Commission at its fifty third session, 2001, reads:

“The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”³³

Therefore, so as to meet the requirements for the application this provision and to claim state responsibility for abuses of human rights committed by PMSCs, two conditions must be fulfilled:

First /exercising elements of governmental authority, such as power to arrest, detention and judicial control and management of prisons and other control authorities and arrest.³⁴

Some would say that the concept of governmental authority is broader than the concept of government activity. When someone, such as PMSC, is commissioned to exercise a governmental activity which contains some form of governmental authority, which is an integral part of state's function then article 5 will be applied.³⁵

There is no full list of what is considered as main functions of a state. The list at least covers security, defense and judiciary powers. As a result

32 Expert meeting on Private Military Contractors, 2005, p. 26.

33 *Yearbook of the International Law Commission*, 2001, vol. II (Part Two), (http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf).

34 Commentaries to the Draft articles on responsibility of states for internationally wrongful acts adopted by the international law Commission at its fifty third session, 2001, supra note 4, p. 44–92.

35 Expert meeting on Private Military Contractors, 2005, p. 16.

of the increasing trend towards the privatization of state facilities we must examine the case under consideration as to whether there is a consensus to regard it within the concept of the state functions or not, whether there is an international obligation which bounds a specific state to exercise a specific function, for example, the occupying power is legally obliged under the rules of international humanitarian law to maintain public order in the occupied territory, and such activity is one of its main function; it therefore cannot escape from responsibility by contracting with a private entity to perform this task.³⁶

Others believe that any behavior related to the conduct of combat operations has the character of government power, and therefore, any action performed by PMSCs in the field of conflict is the exercise of governmental authority, because only the members of the armed forces or persons authorized by the military forces are entitled to be present in conflict zones.³⁷

Second /empowered by the law of State. It is not enough that PMSCs exercise elements of governmental authority in order for state responsibility for human rights abuses to entail, they must also be empowered by the law of State. This does not mean that the State enacts a special law to authorize PMSCs to perform such functions or activities, it is enough that the exercise of these activities is within the scope of the legal system of the Contracting State.³⁸

Article 8 of the draft articles on responsibility of states for internationally wrongful acts adopted by international law commission at its fifty third session, 2001:

“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

The distinction between acting on the instructions of the State or under its directions and control is that the latter (direction and control) enable state to exercise control on the field, for example, when a state contracts with PMSCs to protect oil fields, this company will no be considered to be under the direction of the contracting state unless this state performs direct supervision over the work otherwise; the company works under instruction of the state only. In addition, it might be said that the contract between the state and the PMSCs is a type of instruction referred

36 Expert meeting on Private Military Contractors, 2005.

37 Expert meeting on Private Military Contractors, 2005.

38 Expert meeting on Private Military Contractors, 2005.

to and the Contracting State has to put the instructions clearly because the ambiguity of the instructions would lead to interpretations and push PM-SCs to commit illegal acts and raise the responsibility of the Contracting State at the same time.³⁹

2.2.5 Legal Status of PMSCs As The Sub-Contractors

It must be determined whether the PMSCs are empowered by the law of State to perform some governmental activities or not, for example, if the state contracted with PMSCs for the management of camps or imprisonment facilities and this company had sub-contracted with another company to do so, we must examine whether the sub-contracted company is empowered by the law of State to manage camps or imprisonments or not, and if so, whether, state responsibility may arise according to Article 5.⁴⁰

However, if the contract between the contracting state and the PMSC does not allow sub-contracting and the PMSC had subcontracted another company to perform its duties, it falls under Article 7:

“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”⁴¹

If the contract does not contain any provision pertaining to the possibility of subcontracting the company, sub-contracting will not be considered a violation of the contractual authority and will not prevent state responsibility for unlawful acts.⁴²

PART 3: IRAQI JURISDICTION AS A HOST STATE

The Montreux Document, which was endorsed on 17 September 2008 by 17 states, including the United States and Iraq, points out that the host states (the state which PMSCs exercise activities within its territory) has to estimate whether the national legal framework is sufficient to organize the work of such companies.⁴³

39 Expert meeting on Private Military Contractors, 2005, p. 18–19.

40 Expert meeting on Private Military Contractors, 2005, p. 20.

41 Expert meeting on Private Military Contractors, 2005.

42 Expert meeting on Private Military Contractors, 2005.

43 Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, *UN Document A/63/467-S/2008/636* (October 8, 2009), (<http://www.>

It is noted that countries in which the PMSCs engage in territorial activities of military or security services are countries with weak institutions, which suffer from problems in imposing public order and the rule of law, and it is hence, difficult for them to invoke the PMSCs personnel legal accountability when they commit any crimes or violations of human rights. The Montreux document calls on the host state to cooperate with the Contracting State to get to the adequate regulation for the activities of PMSCs. In order to formulate such regulation, the host state such as Iraq has to call for the PMSCs to obtain necessary official licenses and these licenses should be granted only after making sure that the company has adequate financial, economic ability and a clear record of its personnel and property.

Under the order No. 17 of 2003 issued by the Coalition Provisional Authority in Iraq (CPA) the coalition forces and civilian contractors have immunity from the jurisdiction of Iraqi law as stated in Section 4/2 of this Order:

Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts, including licensing and registering employees, businesses and corporations; provided, however, that Contractors shall comply with such applicable licensing and registration laws and regulations if engaging in business or transactions in Iraq other than Contracts. Notwithstanding any provisions in this Order, Private Security Companies and their employees operating in Iraq must comply with all CPA Orders, Regulations, Memoranda, and any implementing instructions or regulations governing the existence and activities of Private Security Companies in Iraq, including registration and licensing of weapons and firearms.

And 4/3:

Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto. Nothing in this provision shall prohibit MNF Personnel from preventing acts of serious misconduct by Contractors, or otherwise temporarily detaining any Contractors who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Sending State. In all such circumstances, the appropriate senior representative of the Contractor's Sending State in Iraq shall be notified.⁴⁴

[icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/\\$FILE/Montreux-Documents-Document-eng.pdf](http://icrc.org/web/eng/siteeng0.nsf/htmlall/montreux-document-170908/$FILE/Montreux-Documents-Document-eng.pdf)

44 *Coalition Provisional Authority Order Number 17* (Revised) Status of the Coalition Provisional Authority, MNF – Iraq, Certain Missions And Personnel in Iraq (http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf).

Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, signed in November 17, 2008, Article 12 reads as follows: “...Iraq shall have the primary right to exercise jurisdiction over members of the United States Forces and of the civilian component for the grave premeditated felonies enumerated pursuant to paragraph 8, when such crimes are committed outside agreed facilities and areas and outside duty status ...”. “Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees.” “The United States shall have the primary right to exercise jurisdiction over members of the United States Forces and of the civilian component for matters arising inside agreed facilities and areas; during duty status outside agreed facilities and areas; and in circumstances not covered by paragraph 1.”

Although the agreement gives the primary jurisdiction to Iraq over the first contractors with the U.S. forces, it does not apply retroactively. Therefore, the perpetrators of The Nisur incident remain immune from the jurisdiction of the Iraqi courts.

PART 4: JURISDICTION OF THE USA AS A CONTRACTING STATE

There are currently only two states that have a national law regulating the work of PMSCs: South Africa and the United States of America.⁴⁵ The law of South Africa prevents any kind of mercenarism within its territory and at the same time prevents its citizens from engaging in any activity of this type abroad without obtaining permission from the government. However, the main problem facing the application of this law is the lack of a mechanism to enforce its provisions. Therefore, there are many South African companies operating in Iraq without the approval of their government (the Government of South Africa).⁴⁶

The United States of America are considered to most widely use the services of PMSCs in the world. Consequently, it is reasonable to expect that the USA has accumulated ample experience in dealing with legal issues arising from the activities of the PMSCs. The U.S.A. Congress adopted a number of statutes that formed the legal framework to regulate the work of these companies and determine the responsibility for the crimes and violations committed by its members abroad. Between 1994 and 2002,

45 Dumlupinar, N., 2010, p. 43.

46 Dumlupinar, N., 2010, p. 45.

the Pentagon concluded more than three thousand contracts with private companies to take advantage of the military and security services.⁴⁷

The U.S.A. federal agencies used to renew contracts with PMSCs that have good reputation and small cost. It can collect information on violations committed by these companies with the help of the media, local citizens, security forces, non-governmental organizations working in the place of work of PMSCs.⁴⁸ There are also institutions and agencies ensuring effective control mechanisms and providing the government and Congress with vital information concerning the activities of PMSCs, such as the *Government Accountability Office*, *Congressional Research Service* and the *Special Inspector General for Iraq Reconstruction*.⁴⁹

Nevertheless, the legal regulation of the U.S.A. for the work of PMSCs is not free from deficiencies, although the Uniform Code of Military Justice (UCMJ) has been expanded to include civilians who accompany military forces during contingency operations. Some members of these companies are still outside the scope of prosecution for political reasons. The state must also refrain from commissioning PMSCs for the functions that are the core competence of the state or governmental forces; and it must also strengthen the licensing system to ensure direct control over the PMSCs registered in the United States but operating abroad through taking into account the criminal record and behavior, or past practices of the company before giving it approval to work.⁵⁰

Under the 2007 Defense Authorization Act, the Congress expanded the UCMJ to cover civilian contractors who exercise their duties in emergency operations in contingency operations. Article 2 (a)(10) of the UCMJ states that, “In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field” are subject to UCMJ.⁵¹

United States Code 101 defines “contingency operations as follows:

...a military operation that-

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

47 Wither, J. K., 2005, European security and private military companies: the prospects for privatized battle groups, *The Quarterly Journal*, Summer, p. 112.

48 Dogru, A. K., 2010, p. 108.

49 Dogru, A. K., 2010, p. 109.

50 Dogru, A. K., pp. 109–110.

51 *Uniform Code of Military Justice (UCMJ) Article 2(a)(10)*, (<http://usmilitary.about.com/od/justicelawlegislation/a/ucmjart2.htm>, July 28, 2010).

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, or 12406 of this title, chapter 15 of this title, or any other provision of law during a war or during a national emergency declared by the President or Congress.⁵²

In the past, civilians were prosecuted under the Uniform Code of Military Justice in times of war, but now they are subject to this law, even during contingency operations.⁵³

Military Extraterritorial Jurisdiction Act of 2000 (MEJA), also deals with crimes committed by civilians during their participation in military operations abroad, and it covers private personnel working for the Ministry of Defense.⁵⁴

DoD Instruction 5525.11 was issued in 2005 to implement MEJA outside the United States, and it obligates the DoD Inspector General to notify the Attorney General when DoD personnel commit a federal crime overseas. It also requires DoD Inspector General to be responsible for conducting investigations to put MEJA into effect.⁵⁵

PMSCs personnel and civilian contractors could be prosecuted before U.S. courts under the federal legislations, which have expanded the scope of criminal jurisdiction to include the citizens and facilities of the United States abroad.⁵⁶

When it comes to the citizens of the United States, whether they be offenders or victims, the Special Maritime and Territorial Jurisdiction Act covers:

(A) The premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and

(B) Residences in foreign States and the land appurtenant or ancillary thereto, irrespective of ownership, used for purposes of those missions or

52 (10 U.S.C.101 (a)(13), (<http://law.justia.com/us/codes/title10/10usc101.html> 28/1/2012).

53 Dogru, A. K., 2010, p. 100.

54 *Military Extraterritorial Jurisdiction Act of 2000*, P.L.106–523 114 Stat, 2488. (<http://www.pubklaw.com/hi/pl106-523.pdf> July 28, 2010).

55 Department of Defense INSTRUCTION NUMBER 5525.11, (<http://www.dtic.mil/whs/directives/corres/pdf/552511p.pdf>).

56 Else, J. K., 2010, *Private security contractors in Iraq and Afghanistan: Legal Issue* Congressional Research Service, January 7, p. 18.

entities or used by United States personnel assigned to those missions or entities.⁵⁷

There are also many federal acts that sanction the perpetrators of the crimes even if they committed abroad. The War Crimes Act 1996, as amended by the Military Commissions Act of 2006, prohibits “grave breaches” which are defined to include torture, cruel or inhuman treatment, performing biological experiments, murder of an individual not taking part in hostilities, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages. Although federal jurisdiction is established for these crimes when they are committed by or against U.S. nationals or U.S. service members, the statute does not appear to cover foreign nationals who commit war crimes in connection with U.S. contingency operations overseas, even if they are employed by the U.S. government or U.S. government contractors.⁵⁸

As for those employees accompanying the U.S. armed forces abroad they could be prosecuted under *MEJA* act for the crime which is punishable by imprisonment for a term exceeding one year if committed within the territorial jurisdiction of the United States of America. This category of persons employed by the armed forces, includes civilians and contractors with the U.S. Department of Defense and their staff sub-contractors as well as contractors with the other federal agencies such as the CPA (such as, the Coalition Provisional Authority in Iraq) and other entities retaining the functions of the Ministry of Defense overseas.⁵⁹

Another statute that under which the contractors can be prosecuted is the Uniform Code of Military Justice of 1950 *UCMJ* and the instruction to implement issued by U.S. Department of Defense in 2008.⁶⁰

According to the Alien Tort Statute (ATS), “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Thus, the ATS envisages subject-matter jurisdiction where (1) the plaintiff is an alien, (2) the cause of action lies in tort, and (3) the tort was committed in violation of a U.S. treaty or the law of nations. In general,

57 Else, J. K., 2010, p. 19.

58 Else, J. K., 2010, p. 21.

59 Else, J. K., 2010, pp. 21–22.

60 *Secretary of Defense Memorandum*, 2008, UCMJ Jurisdiction over DOD civilian employees, DOD contractor personnel and other persons serving with or accompanying the armed forces overseas during declared war in contingency operations, March, 10, (www.nimj.com/document/2a10.pdf).

treaties and the law of nations regulate state action, rather than private individuals or entities acting in their own capacity.⁶¹

PART 5: JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (ICC)

According to Article (8) of the Statute of the International Criminal Court, the grave breaches of human rights contained in the Geneva Conventions 1949, are considered war crimes within the jurisdiction of the Court.

Although Iraq and the United States are not parties to the Statute of the International Criminal Court, Article 12 of the statute allows for non-party State to accept jurisdiction of the Court for crimes that were committed within its territory or if Perpetrators are its nationals, stating the following:

1. *A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.*
2. *In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:*
 - (a) *The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;*
 - (b) *The State of which the person accused of the crime is a national.*
3. *If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9).*

Since it is unlikely the United States of America will resort to this provision, the Iraqi government can resort to it in order to prosecute the perpetrators of the Nisur incident by accepting *ad hoc* jurisdiction of the ICC according to the Article (12), but it must be taken into account that the ICC's jurisdiction is complementary to national jurisdiction. Paragraph 10 of the statute's preamble emphasizes that:

“The International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”

61 Lam, J. S., 2009, Accountability for Private Military Contractors Under the Alien Tort Statute, *California Law Review*, pp. 1465–1466.

The complementary principle aims to encourage States to ensure investigation and prosecution of perpetrators of international crimes that fall within the jurisdiction of the Court.

And as long as the case of the Nisur incident is still pending before the USA courts we must wait until a final decision thereof and the exhaustion of local remedies in order to consider the next possible step at the international level.

PART 6: UNIVERSAL JURISDICTION

Another option could be invoked in order to avoid impunity of the PMSCs personnel when they commit grave breaches of human rights is the principle of universal jurisdiction.

Criminal jurisdiction is traditionally based on the location where the crime was committed (territorial principle), the nationality of the perpetrator (active personality principle), the nationality of the victim (passive personality principle) or the protection of national interests or security (protective principle). Yet perpetrators may be located or resident within a third state in which none of these requirements is fulfilled. A relevant state may be unwilling to bring certain charges before its national criminal courts. These were good reasons for introducing the principle of mandatory universal jurisdiction in 1949.⁶²

Article 49 of the first Geneva convention reads:

“...Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case...”

The same content is included in GC II, Art. 50, GC III, Art. 129, GC IV, Art. 146.

The Commentary to the Geneva Conventions stated, ‘[t]he universality of jurisdiction for grave breaches is some basis for the hope that they will not remain unpunished and the obligation to extradite ensures the universality of punishment.’⁶³

62 Fleck, D., 2009, Shortcomings of the Grave Breaches Regime, *Journal of International Criminal Justice*, 7 p. 847.

63 Ferdinandusse, W., 2009, The Prosecution of Grave Breaches in National Courts, *Journal of International Criminal Justice*, 7, p. 724.

Several states have prosecuted war crimes specifically charged as grave breaches. Some of these prosecutions took place on the basis of universal jurisdiction. In Denmark, a Bosnian asylum seeker was prosecuted and convicted in 1994 for grave breaches of the Third Geneva Convention and the Fourth Geneva Convention committed in July and August 1993 in the prison camp of Dretelj, situated in what is now the Republic of Bosnia and Herzegovina.⁶⁴

The defendant had been recognized by other asylum seekers in Denmark as a former prisoner in the Dretelj camp who had joined the guards in mistreating and killing fellow prisoners. He was charged and convicted for having committed acts in the prison camp amounting to grievous bodily harm within the meaning of Section 245 of the Danish Penal Code and Articles 129 and 130 of the Third Geneva Convention and Articles 146 and 147 of the Fourth Geneva Convention. He was sentenced to 8 years' imprisonment. The Court also ordered the defendant to be expelled from Denmark subsequent to having served his prison sentence.⁶⁵

In Switzerland, a Bosnian Serb asylum seeker was prosecuted for mistreatment of detainees in the prison camps of Omarska and Keraterm in 1992. The defendant was charged with grave breaches of the Third Geneva Convention, the Fourth Geneva Convention and Additional Protocol I, as well as violations of Common Article 3 and Additional Protocol II.7. He was, however, acquitted on the facts. The court found the armed conflict at the time to be international in character, but concluded it remained doubtful whether the accused had actually been in the camps.⁶⁶

CONCLUSION

The nature of the work of PMSCs impose upon them to be in obligation towards the Contracting State under the terms of their contract and toward the host state to respect their laws and in all cases to respect human rights and freedoms.

However, the situation seems unusual for PMSCs in Iraq. They, in fact, believe that they have the obligation only before the contracting State (USA), because the contracting State assumed direct management of the affairs of the host state (Iraq) (2003–2004) as occupying power and enacted legislative order (No. 17 of 2003) which granted PMSCs personnel

64 Ferdinandusse, W., 2009.

65 Ferdinandusse, W., 2009, p. 725.

66 Ferdinandusse, W., 2009.

immunity from prosecution under the jurisdiction of the Iraqi judiciary for violations and crimes committed in Iraq. Therefore, the Iraqi courts became unable to exercise their jurisdiction over grave breaches of human rights suffered by Iraqi civilians at the hands of members of the PMSCs, the Nisur incident being a flagrant example of these breaches.

Even after the conclusion of the withdrawal agreement between Iraq and the United States of America under which the situation is rectified by giving the Iraqi judiciary primary jurisdiction over actions of the PMSCs, the problem remains because the terms of this agreement do not apply retroactively to cover acts or abuses committed in the past before the date of its entry into force (2009).

The debate still exists on the legal status to the legislative order (No. 17 of 2003) enacted by the Coalition Provisional Authority (CPA). There are those who believe that this order is still in effect as a statute which is not repealed yet, and it needs another legislation issued by the legislative authority of Iraq to be nullified or amended.

In addition, the Law of Administration for the State of Iraq for the Transitional Period of 8 March 2004 prescribes in Article 26/c that the laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law.

In addition, the current Constitution of the Republic of Iraq of 2005, provides in Article 126 that existing laws shall remain in force, unless annulled or amended in accordance with the provisions of this Constitution.

Consequently, the Iraqi parliament must enact special legislation to cancel the order No. 17 of 2003 including at the same time a regulation of the activities of PMSCs and accountability of their personnel for their violations of human rights based on international legal standards in this field.

Internationally, there is no convention which addresses PMSCs directly and explains their rights and obligations accurately. There is therefore ample room for different interpretations and explanations concerning their legal status and jurisdiction over violations of human rights committed by the PMSCs. It must be borne in mind that the jurisdiction at the international level, both for the International Criminal Court or universal jurisdiction is not something simple but entails long and complex procedures.

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JURISDICTION OVER GRAVE BREACHES OF HUMAN RIGHTS IN IRAQ COMMITTED BY PMSCs CONTRACTED WITH THE USA: THE NISUR SQUARE INCIDENT

Hayder Ajeel Fadhil Altamimi

SUMMARY

The incident of the killing of 17 Iraqi civilians and wounding others in the Nisur Square in Baghdad as a result of shooting by Blackwater company personnel on September 16, 2007 is one of the many examples of grave breaches of human rights against civilians in Iraq committed by the members of private military and security companies (PMSCs) contracted with the USA.

What makes this case complex is that there are no clear legal provisions of international humanitarian law that address the responsibility of PMSCs personnel who have committed gross violations of human rights.

When analyzing the legal status of members of the PMSCs under the Geneva Conventions and the rules of international humanitarian law we notice that there is no specific agreed-upon definition of PMSCs.

The legal status may sometimes be confused with combatants, persons who accompany the armed forces, militia or mercenaries.

Internationally, there is no convention which addresses directly PMSCs and explains their rights and obligations accurately. There is therefore, ample room for different interpretations and explanations about their legal status and jurisdiction over violations of human rights committed by the PMSCs. It must be borne in mind that the jurisdiction at the international level, both for the International Criminal Court or universal jurisdiction is not something simple but needs a long and complex procedure.

The possibility of resorting to the International Criminal Court is theoretically possible but practically it seems difficult.

Despite the fact that the statute of the court allows for non-party State to accept jurisdiction of the Court, the case will depend on the condition of the exhaustion of local remedies according to the Complementary principle of the International Criminal Court jurisdiction.

Key words: Human Rights, Civilians, Jurisdiction, Nisur incident.

NADLEŽNOST ZA TEŠKA KRŠENJA LJUDSKIH PRAVA
U IRAKU KOJA SU IZVRŠILE PRIVATNE
VOJNOBEZBEDNOSNE KOMPANIJE KOJE SU ZAKLJUČILE
UGOVOR SA SAD: INCIDENT NA TRGU NISUR

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REZIME

Incident prilikom kojeg je ubijeno 17 iračkih civila, a više njih ranjeno na trgu Nisur u Bagdadu, kao posledica pucanja pripadnika kompanije Blekvoter, 16. septembra 2007. godine, predstavlja jedan od mnogih primera teških kršenja ljudskih prava civila u Iraku koja su izvršili pripadnici privatnih vojnobezbednosnih kompanija (PVBK) koje imaju zaključene ugovore sa SAD.

Ono zbog čega je ovaj slučaj složen jeste činjenica da ne postoje jasne odredbe međunarodnog privatnog prava kojima se reguliše odgovornost pripradnika ovih kompanija za kršenje ljudskih prava.

Prilikom analize pravnog položaja pripadnika PVBK u skladu sa Ženevskim konvencijama i pravilima međunarodnog humanitarnog prava, uočava se da ne postoji opšteprihvaćena definicija privatnih vojnobezbednosnih kompanija.

Njihov pravni položaj se može pomešati sa pravnim položajem boraca, lica koja prate vojne snage, milicije ili plaćenika.

Sa stanovišta međunarodnog prava, ne postoji nijedna konvencija u kojoj su PVBK neposredno regulisane i u kojima se precizno propisuju njihova prava i obaveze. Stoga postoji široko polje za različita tumačenja i objašnjenja njihovog pravnog položaja, kao i nadležnosti za kršenja ljudskih prava koja izvrše PVBK. Pritom se mora imati na umu činjenica da nadležnost na međunarodnom nivou, kako u slučaju Međunarodnog krivičnog suda, tako i kada se misli na univerzalnu nadležnost, nipošto nije jednostavno pitanje.

Mogućnost nadležnosti Međunarodnog krivičnog suda postoji u teoriji, ali se čini da bi je bilo teško postići u praksi.

Uprkos činjenici da statut suda omogućava državi koja nije potpisnica da prihvati nadležnost Suda, u konkretnom slučaju to će zavisiti od ispunjenosti uslova da se iscrpu lokalni pravni lekovi, u skladu sa dodatnim načelima o nadležnosti Međunarodnog krivičnog suda.

Ključne reči: ljudska prava, civili, nadležnost, incident na trgu Nisur.

Dostavljeno Redakciji: 17. oktobra 2012. god.

Prihvaćeno za objavljivanje: 21. decembra 2012. god.