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MASTER OF DEFENCE STUDIES RESEARCH PROJECT

**The Canadian Forces' Use of Armed Contractors:
A Step Too Far in the "Team Canada" Approach to Global Engagement?**

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TABLE OF CONTENTS

TABLE OF CONTENTS	ii
ABSTRACT	iv
1.0 INTRODUCTION	1
2.0 PRIVATE MILITARY INDUSTRY	3
2.1 HISTORICAL BACKGROUND	4
2.2 WHAT ARE PMFs?	6
2.2.1 Advantages	10
2.2.2 Challenges	11
2.2.3 Regulation and Safeguards	13
3.0 CANADIAN FORCES CONTRACTOR SUPPORT	18
3.1 CANADIAN FORCES CONTRACTOR AUGMENTATION PROGRAM	19
3.1.1 Program Governance Overview	21
3.1.1.1 Limitations	23
3.1.1.2 Conditions for Employing Deployed Contractor Support	23
3.1.1.3 Risk Mitigation	24
3.1.1.4 Transition	25
4.0 INTERNATIONAL HUMANITARIAN LAW	25
4.1 TYPES OF ARMED CONFLICT	26
4.2 STATUS OF PERSONNEL IN ARMED CONFLICTS	28
4.2.1 Combatant Status	28
4.2.2 Non-Combatant Status	30
4.2.3 Unlawful Combatant Status	32
4.3 PROTECTIONS AFFORDED ARMED CONTRACTORS IN INTERNATIONAL ARMED CONFLICTS	34
4.3.1 Armed Contractors as Unlawful Combatants	34
4.3.1.1 Direct Participation	34
4.3.1.2 Mercenaries	37
4.3.2 Armed Contractors as Combatants	38
4.4 PROTECTIONS AFFORDED ARMED CONTRACTORS IN NON-INTERNATIONAL ARMED CONFLICTS	39

5.0 IMPLICATIONS OF ARMED CONTRACTORS ON THE COMMANDER	42
5.1 COMMAND AND CONTROL	43
5.2 FLEXIBILITY	46
5.3 SUPPORT	49
5.3.1 Force Protection	49
5.3.2 Logistics Support	50
5.3.3 Additional Security	51
5.4 EXPERIENCE	53
5.4.1 Brain Drain	53
5.4.2 Training	54
5.4.3 Loss of Capability	54
6.0 CONCLUDING REMARKS	56
BIBLIOGRAPHY	60

ABSTRACT

The paper examines the use of armed contractors in support of CF operations under the “Team Canada” approach to global engagement. The paper identifies four key areas for review: the private military industry, the existing use of contractors on CF deployed operations, International Humanitarian Law and an assessment of how armed contractors would impact the commander. The private military industry is comprised of Privatized Military Firms that have the capability to provide the full range of armed services to the CF. The CF possesses sufficient capability to manage the complex contractual issues related to armed contractors without having the need to create a new management structure. A key issue related to the use of armed contractors is the status of the contractor under International Humanitarian Law in both international and non-international armed conflicts, which must be addressed by the CF prior to their deployment. The commander is faced with a number of concerns with the use of armed contractors, which include command and control, lack of operational flexibility and the potential loss of experienced military personnel. The paper contends that the CF should not utilize armed contractors as part of its “Team Canada” contribution to deployed operations because of the International Humanitarian Law issues and the negative aspects of the challenges to the commander.

1.0 INTRODUCTION

The private military industry may be one of the most important, but little understood developments in security studies to have taken place over the last decade. This new industry, where firms not only supply the goods of warfare, but rather fulfil many of the professional service functions, is not only significant to the defence community, but has wider ramifications for global politics and warfare.¹ Peter W. Singer

The 2005 International Policy Statement highlights the “Team Canada” approach to Canadian global engagement, which includes the civilian Federal Public Service (Diplomacy, Development and Trade portions of “3D&T”), the Canadian Forces (CF), the Royal Canadian Mounted Police (RCMP) and the private sector. This integrated approach to Canadian foreign policy will increase the likelihood that CF personnel will be deployed abroad and increase the potential for greater CF/private industry partnership. This significant change in government policy presents an opportunity for the CF to proactively examine its future operational requirements to determine if the contracting of services from the private military industry could support an increase in operational tempo.² The focus of the International Policy Statement on failed and failing states also has the potential to increase the number of CF personnel being deployed to more hostile locations, such as Afghanistan, and presents the CF with additional challenges related to training and retention. An examination of the private military industry, with a focus on

¹Peter W. Singer, *The Private Military Industry and Iraq: What Have We Learned and Where to Next?* Policy Paper (Geneva: Geneva Centre for the Democrat Control of Armed Forces, n.p., 2004), 1.

²Deborah Avant, "Privatizing Military Training: A Challenge to U.S. Army Professionalism?" in *The Future of the Army Profession*, (New York: McGraw-Hill Primis Custom Publishing, 2002): 179-196.

the use of armed contractors³ in support of CF deployed operations, would assist in determining if privatization could provide the CF with additional operational flexibility.

Caution should, nonetheless, be exercised to ensure that the ramifications regarding the use of armed civilians in a theatre of operations are well understood. The lack of clear international regulations pertaining to the undertakings of the private military industry, the implications of armed civilians operating in an armed conflict and the repercussions of armed contractors on the combatant commander must be explored to ensure that armed contractors act as a force multiplier rather than a constraint to operations.

The objective of this paper is to examine the main issues related to the use of armed contractors by the CF and to recommend that the CF limits its use of contractor support under the “Team Canada” approach by not utilizing armed contractors in support of deployed operations. The private military industry will be explored to identify the sectors of the industry and the range of services available for hire, the advantages and challenges of utilizing its services and the regulations and safeguards that need to be considered when contracting private military services. Canada’s participation in armed conflict is subject to International Humanitarian Law. As such, the legal challenges related to the status of armed contractor personnel and the protections afforded to civilians under the Law of Armed Conflict will be scrutinized to ascertain the legal liability of the CF when employing armed contractors on operations. To conclude, the consequences and limitations on the commander associated with the use of armed

³The term armed contractor refers to a private military firm and not the employment of individuals on a personal services basis.

contractors will be identified to indicate that the use of armed contractors by the CF would not be appropriate at this time.

2.0 PRIVATE MILITARY INDUSTRY

The responsibility of government to protect itself and its own citizens is arguably the most important function of the state. Scholars and critics have argued that military protection is of such importance to the state that no part of this responsibility should be abrogated to the private sector.⁴ Other observers are of the opinion that the growth in the number of private security companies is merely a logical evolution of the existing global market for the production of military goods.⁵ This paper will not present arguments related to whether the private military industry (PMI) should exist. The fact that there is significant dialogue on the subject amongst the United Nations, national governments, academia and militaries across the world suggests that the issues related to the PMI do not deal with their survival but rather with how the PMI can be regulated and integrated into the security agenda.⁶ This chapter will provide a historical background to the use of contractors in support of military operations, define the PMI and identify the advantages and challenges of utilizing companies within the PMI to highlight the industry capabilities that would be available to support CF deployed operations.

⁴Laura Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law*, University of Connecticut School of Law Working Paper Series, Paper 53 (Connecticut: University of Connecticut School of Law, The Berkeley Electronic Press, 2005), 147.

⁵Caroline Holmqvist, *Private Security Companies: The Case for Regulation*, SIPRI Policy Paper no 9 (Stockholm: Stockholm International Peace Research Institute, n.p., 2005), 2.

⁶Atul Bharadwaj, "Privatization of Security: The Mercenary-Market Mix," *Defense Studies*, Vol 3, No 2 (Summer 2003): 66.

2.1 HISTORICAL BACKGROUND

The use of contractors, particularly mercenaries, in support of military operations has been ongoing since the advent of war. In the early sixteenth century, Machiavelli warned against the use of contractors when he stated that:

The mercenaries and auxiliaries are useless and dangerous, and if anyone supports his state by the arms of mercenaries, he will never stand firm or sure, as they are disunited, ambitious, without discipline, faithless, bold amongst friends, cowardly amongst enemies, they have no fear of God, and keep no faith with men.⁷

The modern use of civilian contractors has evolved considerably since the time of Machiavelli. During World War II, the primary role of contractors was to provide simple logistics support, such as transportation, medical services and supply. The Vietnam War saw an expansion of these services into more complex functions such as technical support, which included working beside military personnel. Currently, contractor support is embedded into support plans because of the highly integrated nature of contractor support to major weapons systems.⁸

There has been a significant and rapid growth in the PMI during the 1990s that has increased the importance of the private sector in the areas of defence and security. Deborah Avant notes the increased use of contractor personnel by the United States between the First Gulf War and Operation Iraqi Freedom. The ratio of contractors to military personnel in the First Gulf War was 1 to 50, which

⁷As quoted in Eugene B. Smith, "The New Condottieri and US Policy: The Privatization of Conflict and Its Implications," *Parameters*, (Winter 2002-03): 1.

⁸Fred Schreier and Marina Caparini, *Privatising Security: Practice and Governance of Private Military and Security Companies*, Occasional Paper no 6 (Geneva: Geneva Centre for the Democrat Control of Armed Forces, n.p., 2005), 18.

increased to 1 to 10 during Operation Iraqi Freedom.⁹ From a monetary perspective, the projected increase in the global international security trade between 1990 and 2010 will be approximately \$150 billion US.¹⁰ This increased reliance on contractor support has also served to increase the influence of the private sector to the extent that it is a major team member in the planning for all operations.

There is general agreement among academics as to why the increase in the PMI has taken place. Elke Krahnmann ascertains that three main factors have accelerated the growth of the PMI since 1990, which are as follows:

1. There has been an increase in the number of small conflicts in the Third World in which the fragile regimes can no longer rely on financial and military support from the United States and the Soviet Union/Russia.
2. There has been a decreased willingness of European and North American governments to participate in peacekeeping operations that do not have a direct influence on their security interests.
3. There has been a general reduction in defence budgets and a trend to outsource military tasks after the end of the Cold War.

The second and third factors explain the appearance of a security governance framework in which states continue to maintain significant military forces but augment military capabilities with private sector support. The concern among parliamentarians and citizens is that there must be transparency in the use of contractors in support of both domestic and deployed operations in order to ensure

⁹Deborah Avant, "The Privatization of Security and Change in the Control of Force," *International Studies Perspectives*, (5 2004): 153.

¹⁰Bharadwaj, *Privatization of Security* ..., 68.

that security policy remains a core government function.¹¹ Robert Mandel highlights how the absence of a clear and immediate threat created the desire to reduce defence funding and the size of standing military forces.¹² As military forces were being downsized, the services of trained personnel continued to be required. National deficits created increased demands by governments to reduce expenditures, which translated to a desire for leaner and less costly armed forces and a focus on reducing the “tooth-to-tail” ratio. The reaction of departments of defence was to examine capabilities and focus only on core competencies. Non-core activities were eligible for out-sourcing, which created further market opportunities for the industry.¹³ As a result, the conditions were set for the private sector to re-emerge to fill the gap created by reduced participation of states in providing international security.¹⁴ The following section will explore the range of services offered by the PMI that can be utilized by states to reduce overhead costs or to meet the operational requirements for future conflicts.

2.2 WHAT ARE PMFs?

There are two key aspects to the analysis of what constitutes the PMI. The first deals with the characteristic of firms within the industry as a corporate entity and the second deals with the types of services that the industry can provide. The modern PMI

¹¹Elke Krahnemann, *Private Firms and the New Security Governance*, Paper (New Orleans: International Studies Association 43rd Annual Convention, n.p., 2002), 3-10.

¹²Robert Mandel, "The Privatization of Security," *Armed Forces & Society*, Vol 28, No 1 (Fall 2001): 131.

¹³Schreier and Caparini, *Privatising Security* ..., 4.

¹⁴Richard Victor Smith, *Can Private Military Companies Replace Special Operational Forces?* Paper (Kingston: CDAI-CDFAI 7th Annual Graduate Student's Symposium, n.p., 2004), 6.

differs significantly from the industry of the 1960s in that it is comprised of companies that are legal enterprises that operate in accordance with the laws of a legitimate state. Moreover, companies are organized and incorporated as a legitimate business with the intent of being a viable concern on a permanent and continuous basis.¹⁵ This section will examine each of these aspects and identify a number of advantages and challenges of utilizing private companies in support of deployed operations.

The PMI is for all intents and purposes motivated by profit and operates in the same manner as other industries. Business relations are formalized through contracts, which stipulate the work to be performed, the agreed standards and the remuneration for each task. Companies work for money and if funding ceases, so do the services. The long-term viability of the PMI provides a measure of self-regulation and a willingness to adhere to national and international laws. In a nutshell, the PMI is motivated by profits and will work towards the goal of achieving a steady income stream by providing excellent services, particularly to states.¹⁶ Businesses are cognizant of the “mercenary” reputation of previous companies in the industry and focus their marketing on corporate culture and ethics. The mercenary perception and the need to distinguish between the types of services available from the industry serve to highlight the importance of how each type of firm within the industry operates.¹⁷

¹⁵James Larry Taulbee, "The Privatization of Security: Modern Conflict, Globalization and Weak States," *Civil Wars*, Vol 5, No 2 (Summer 2002): 3.

¹⁶Doug Brooks, *Creating the Renaissance Peace: The Utilisation of Private Companies for Peacekeeping and Peace Enforcement Activities in Africa*, Africa Institute of South Africa 40th Anniversary Conference, Pretoria: n.p., 2000, 5.

¹⁷Bharadwaj, *Privatization of Security ...*, 70.

There is, unfortunately, no clear agreement as to what constitutes the industry. Peter W. Singer defines the private military industry as being comprised of Privatized Military Firms (PMFs) that are intricately linked to warfare. He also notes how the private military industry has evolved in a similar manner to other industries in that there has been a shift from the manufacturing of weapons systems to the provision of military services. The industry provides military services related to “the provision of military skills, conducting tactical operations, strategic planning, intelligence, operational and logistics support, troop training, and technical assistance etc [sic].”¹⁸ He divides the service portion of the industry into three basic business sectors:

1. Private Military Companies. They offer direct tactical-level assistance to customers and may include combat related services. This sector allows nations to provide military support without having to deploy military personnel and includes defensive services such as the armed guarding of military camps and infrastructure.
2. Military Consulting Companies. They provide strategic advice and training assistance to customers who are looking to transform their organizations. This sector allows a state to quickly improve its military capability.
3. Military Support Companies. They provide logistics, intelligence and maintenance services to armed forces. This sector allows military personnel to focus on core combat capabilities and also allows nations to reduce the political impact of large numbers of forces in a theatre of operations.¹⁹

Caroline Holmqvist recognizes the confusion regarding the use of the terms Private Military Companies and Private Security Companies and has attempted to provide her own clarification of the services provided by the industry. She defines Private Military Companies as companies that provide offensive services that are designed to have a military impact. Private Security Companies refer to companies that

¹⁸Singer, *The Private Military Industry and Iraq* ..., 1.

¹⁹Ibid., 2-3.

provide defensive services, focusing on protection of personnel and property. The difficulty with this classification, however, is twofold. The first is that what can be perceived as defensive in one instance may have offensive consequences in another situation. The second is that companies meet the demands of the market and tailor their services to meet this demand. Consequently, companies will transition between offensive and defensive tasks thus making this categorization misleading.²⁰

Schreier and Caparini identify simpler categorizations to distinguish between companies within the service portion of the industry. One categorization is by level of engagement in combat operations ranging from “active” engagement to “passive” engagement in the provision of training and advice. But the difficulty with this classification is that a company can move between active and passive engagements, which confuses the issue of categorization and offers no insight into the industry. Another possibility is to distinguish between “hard” and “soft” operations. The weakness with this definition is the lack of clarity with the terms. Finally, companies can also be differentiated by whether “armed” or “unarmed” services are provided. While this definition can clearly differentiate between combat and non-combat related services, the category is too broad when examining the full range of non-combat services, which may include training or logistics support.²¹

This paper will utilize Singer’s definition of PMF as it provides an appropriate classification of services in the context of how the CF would utilize private military

²⁰Holmqvist, *Private Security Companies* ..., 5.

²¹Schreier and Caparini, *Privatising Security* ..., 33-34.

services. Prior to discussing the implications to the CF of utilizing contractors, it will be important to address the advantages and challenges associated with their use.

2.2.1 Advantages

A PMF has the ability to provide a nation with numerous capability options and is considered an advantage in itself. Industry supporters recognize additional advantages of using a PMF as follows:

1. Flexibility. Each business sector has the flexibility to work quickly on short notice. This flexibility can be provided across the spectrum of services including combat-related missions, training, translation services, intelligence gathering and the construction of bases.²²
2. Qualified personnel. Companies recruit former military personnel from all trades and classifications, including Special Forces. This allows companies to have access to a broad spectrum of skill and experience levels. This advantage leverages the flexibility aspect of the PMF by quickly assembling a trained force to meet any contingency.²³
3. Robust. PMF personnel are contracted specifically for each mission and are aware of the risks involved. Moreover, the lack of political affiliation means that a PMF has fewer constraints that would require disengagement from the mission.²⁴
4. Surge capability. A PMF has the ability to provide states with a surge capability to meet all contingencies. Military Consulting Companies can provide short-term training capacity or Private Military Companies can conduct force protection tasks to allow regular forces to augment deployed combat forces in periods of heightened risk.²⁵
5. Unique solutions. Flexibility and experienced personnel allow the PMF to develop unique solutions to problems. The fact that the major companies are

²²Dickinson, *Government for Hire* ..., 148-149.

²³Holmqvist, *Private Security Companies* ..., 6.

²⁴Brooks, *Creating the Renaissance Peace* ..., 5.

²⁵Avant, *The Privatization of Security* ..., 155.

mostly based in major Western countries provides underdeveloped countries that use these companies the ability to increase their interdependence with the West.²⁶

6. Lower political costs. A PMF enables a nation to deploy fewer forces and to reduce the political costs associated with large numbers of forces in-theatre. The benefits relate to fewer troops being placed at risk and keeping casualty rates down because contractors are not generally included in official casualty data.²⁷

2.2.2 Challenges

A PMF does present a number of potential challenges for nations utilizing their services. The challenges faced by weak states and efficient states are significantly different. This section will focus on those challenges that could be faced by an efficient state, such as Canada, and are as follows:

1. Unclear rules of engagement and mandates. Armed contractors need to be covered by approved rules of engagement (ROE). Legal issues regarding ROE need to be clarified to ensure that all mission personnel are operating under the same guidelines. The lack of a clearly defined mandate has the potential to create mission creep or the possibility of unacceptable delays in service. A clearly established mandate will ensure that both the contracting party and the contractor are aware of the exact nature of the services to be provided and are able to plan for any required change in services in a timely manner. Likewise, an explicit mandate clearly establishes acceptable methods for performing armed services, particularly if the services may involve politically sensitive activities such as responsibility for detainees.²⁸
2. Accountability. A PMF is for the most part aware of its contractual obligations and is aware of the impact of contract failure on its reputation. Notwithstanding this awareness, there is still no guarantee that a company will fulfill its contract. In general, the risk of contractor default increases with the danger of the mission.²⁹ Notwithstanding the risk of default, there have been no notable defaults by armed contractors in Iraq or Afghanistan to date, despite the number of contractor deaths from deliberate and accidental targeting. Additional accountability issues related to contracting are of sufficient importance that they will be addressed separately in the following section.

²⁶Mandel, *The Privatization of Security* ..., 132.

²⁷Dickinson, *Government for Hire* ..., 149-150.

²⁸Holmqvist, *Private Security Companies* ..., 25-26.

²⁹Ibid., 28.

3. Transparency and oversight. Oversight is complicated by the industry practice of subcontracting, which leads to a diffusion of authority during project implementation.³⁰ Subcontracting can be convoluted because of the ability of a PMF to hire individuals under a personal services contract, who are themselves a subcontractor of a prime contractor. The resulting effect is that a nation contracting a PMF may not have complete oversight over all of the employees hired under the contract.³¹

Competition within the industry precludes transparency during the tendering process because of the confidentiality of corporate information. Umbrella-type contracts, which include a fixed price for an unspecified number of tasks, further reduces transparency because of the lack of awareness of the total contract commitment when the contract is signed. This can potentially lead to abuse if appropriate control measures are not in place.³² Ironically, there is not complete consensus over the issue of umbrella contracts. Doug Brooks argues that “Contract clauses should include the possibility of ‘mission creep’ – the expansion of the original mission or the necessity for additional missions (such as humanitarian medical services).”³³ This additional flexibility reduces the time required to formally negotiate changes to the contract. A compromise between these two extremes can be taken by adding flexibility within the contract for unforeseen requirements but at a level that provides visibility to the potential liability; i.e., there is a maximum limit to the unforecasted element be it a dollar amount, number of billable hours, etc.

Schreier and Caparini identified complications associated with a PMF operating as a virtual company. Virtual companies are companies that do not have a stable employee base but rather maintain a database of personnel, which can also be shared among multiple companies that are hired on a contract-by-contract basis. This type of employment policy does not allow visibility into the type of people that will be employed by the contractor and has the potential of encouraging a PMF to operate with only a short-term focus.³⁴ Doug Brooks also identifies a concern with the lack of visibility over personnel lists from the perspective of the PMF being able to prove that the company or employees do not have any vested interest or link to any party of the conflict.³⁵ This is an important matter in that it

³⁰Ibid., 31.

³¹David Isenberg, *A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq*, British American Security Information Council, n.p., 2004: 16.

³²Holmqvist, *Private Security Companies ...*, 31.

³³Brooks, *Creating the Renaissance Peace ...*, 7.

³⁴Schreier and Caparini, *Privatising Security ...*, 20.

³⁵Brooks, *Creating the Renaissance Peace ...*, 8.

has the potential to create considerable political embarrassment to the contracting nation.

The use of a PMF can be used by the executive branches of government to avoid oversight by the legislative body of government.³⁶ In the Canadian context, this would allow the government to conduct foreign policy without going through Parliament.

4. Lack of coordination: former security sector personnel. Differing cultures and suspicion make coordination between the contractor and military forces difficult. PMF responsibility for providing their own equipment on an operation makes communications a challenge, when contractor and military personnel are not co-located, because of the historical lack of interoperable equipment. Responsibility for contracting also complicates coordination as there is the possibility that the lead contracting agent is not part of the armed services, thus creating an additional external coordinating body.³⁷ This segregated procurement responsibility is evident in Canada where contracting responsibility lies with the Department of Public Works and Government Services and not with the Department of National Defence.

2.2.3 Regulation and Safeguards

A significant concern associated with the use of armed contractors relates to legitimacy. There is currently no appropriate international regulation, of the standard of the Geneva Conventions, to regulate the private military industry. The definitions used in international discussions regarding the non-state use of force have regrettably focused on mercenary-type activities that were prevalent in the 1960s and 1970s and have proven inadequate in the context of the modern PMF. For example, the three major international documents pertaining to the use of non-state force, namely Additional Protocol I (1977), the Convention on the Elimination of Mercenarism in Africa (1977) and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries

³⁶Smith, *The New Condottieri* ..., 6.

³⁷Holmqvist, *Private Security Companies* ..., 32.

adopted by the United Nations (1989), continue to use the term “mercenary”.³⁸ Fortunately, national regulation, albeit in varying forms, does exist in most states to govern the activities of the PMF within the confines of the nation and/or in terms of its exports abroad.³⁹ Weaknesses in national regulations, however, reinforce the need for controls at the international level to close legal loopholes. Likewise, it will be equally important for nations such as the United States to enforce existing laws pertaining to government contracts employing PMF personnel abroad.⁴⁰ This section will identify a number of the safeguards that can be incorporated to facilitate a positive relationship between the nation and the PMF, despite the lack of international regulation of the industry.

Doug Brooks presented a number of suggestions to the Foreign and Commonwealth Office on the regulation and potential use of private military companies by the British government that merit consideration by all nations. He identified the following key points:

1. A PMF is willing to accept a high level of regulation provided that there are adequate financial incentives. Regulation without benefits would encourage some companies to evade regulation. The willingness of companies to accept strict United States control through the International Traffic in Arms Regulations (ITAR) reinforces this point. A weakness for states sponsoring an ITAR type program, however, is that companies that comply with the process may be perceived as having received government endorsement of their activities.
2. Regulations related to human rights and International Humanitarian Law will be readily accepted by the industry that currently accepts these standards.

³⁸Alexandre Faite, "Involvement of Private Contractors in Armed Conflict: Implications Under International Humanitarian Law," *Defense Studies*, Vol 4, No 2 (Summer 2004): 169.

³⁹Christopher Spearin, "A Private Security Panacea? A Specific Response to Mean Times," *Canadian Foreign Policy*, Vol. 7, no. 3 (Spring 2000): 73.

⁴⁰Holmqvist, *Private Security Companies* ..., 28.

3. Government hiring of a PMF should include contract terms with detailed financial and legal penalties for non-compliance.
4. Regulation should not impede a PMF from being able to rapidly respond to a crisis. This point acknowledges that nations may seek to utilize a PMF in support of peacekeeping operations in developing countries.
5. Over-regulation should be opposed. Over-regulation may encourage a PMF to elude or disregard the regulations.⁴¹

Brooks's recommendations emphasize the importance of continually reviewing laws and regulations to ensure that national laws adequately reflect the changes in the industry and allow all stakeholders to benefit from a positive business relationship.

Robert Mandel presents the view of self-regulation from the industry perspective, which puts forth the argument that the integrity of PMF employees themselves provides a control mechanism. Industry control is established through the careful selection of clients to ensure that the military capabilities provided to the customer cannot be used against the company's home state and that any defensive training that is provided to a customer cannot be easily converted to offensive outcomes.⁴² While self-regulation is a conceptual possibility, it would increase the risk to customer nations, especially given the broad range of services that can be provided. The potential impact that a PMF can have through the provision of their services, particularly to weak states, requires independent regulation and oversight. In addition, notwithstanding the fact that a PMF may have a positive record in terms of abiding by human rights and International Humanitarian Law,

⁴¹Doug Brooks, *Protecting People: the PMC Potential, Comments and Suggestions for the UK Green paper on regulating Private Military Services*, International Peace Operations Association, version date 25 July 2002, 4-5.

⁴²Mandel, *The Privatization of Security ...*, 135.

independent measures are still required to ensure appropriate and standardized oversight.⁴³

Laura Dickinson imparts a number of issues related to the use of contracts that could be used as a new form of government oversight and accountability. The contention is that a properly written contract can incorporate national values and include enforcement procedures to improve compliance.⁴⁴ A good example is the requirement to comply with the terms of the Geneva Conventions in the same manner as the military force that they are supporting or to conduct training prior to deployment. Dickinson does, however, identify a number of challenges related to any contractual arrangement.

They are:

1. To ensure that contract compliance remains a core task of government.
2. Oversight becomes difficult because not all contract provisions can be easily mapped to goals or measures.
3. The cost of compliance reporting may be excessive to both the government and the contractor while not necessarily contributing to greater accountability.
4. Review of contracts may not be possible because of the lack of quantifiable outcomes.
5. While oversight may be possible, termination of a contract for cause may not be a viable option because of the need to find a replacement method for the provision of the good or service.⁴⁵

These challenges are not minor in nature. A simplistic view of the contract process would surmise that the gaps in international and national regulations could be bridged by

⁴³Christopher Spearin, "International Private Security Companies and Canadian Policy: Possibilities and Pitfalls on the Road to Regulation," *Canadian Foreign Policy*, Vol. 11, no. 2 (Winter 2004): 1-4.

⁴⁴Dickinson, *Government for Hire ...*, 171.

⁴⁵Ibid., 171-172.

including specific clauses into the contract. The contracting challenges identified by Dickinson, however, indicate the opposite to be true and infers that a well-written contract is not the panacea. Specifically, oversight and contract management needs to be well-defined in order to ensure that monitoring of contractor compliance is both possible and effective. Moreover, the difficulties in linking the contract to specific goals and objectives is problematic and becomes challenging from a measurement perspective. Thus, the safeguards that are possible from the contracting process become more effective as part of an international and national regulatory framework rather than a stand-alone solution.

The examination of the private military industry has demonstrated that there has been a long history of successful integration of contractors into military operations, including the use of armed contractors. The industry, as categorized by Peter Singer, is divided into three sectors: Private Military Companies, Private Consulting Services and Military Support Companies. The Private Military Company sector, while having the ability to provide both offensive and defensive services, predominately focuses on defensive tasks, which are more acceptable because of the clear distinction between protecting and attacking people.⁴⁶ The use of a Private Military Company to provide guarding services clearly falls under the defensive category and offers additional capability during periods of high operational tempo. The industry currently has the capacity to support the anticipated requirements of the CF. Specifically, a PMF can support a “Team Canada” approach to global engagement by providing the CF with

⁴⁶Schreier and Caparini, *Privatising Security* ..., 42.

armed guarding services of camps on deployed operations. An examination of the benefits of using armed contractors would need to be conducted for each operation to ensure that the advantages identified by the industry are greater than the challenges and significant regulatory shortfalls of the industry.

A review of the current use of contractor support to deployed operations will be made to determine if the CF has the ability to utilize current governance structures to administratively support the use of armed contractors or if a new management structure would be required.

3.0 CANADIAN FORCES CONTRACTOR SUPPORT

The CF has been involved in numerous deployed operations over the last decade, which has included missions in Bosnia-Herzegovina, the Golan Heights, East Timor and most recently Afghanistan. The high operational tempo has created a significant strain on CF personnel, particularly those in support and specialized trades. This strain has created significant challenges for the CF to sustain its deployed operations.⁴⁷

Departmental studies were conducted in the late 1990s to ascertain whether support services could be contracted to the private sector under certain conditions. It was determined that peace support and peacekeeping operations were generally of long duration and had traditionally transitioned from hostile to stable environments. Under these conditions, contracted support services would allow the CF to employ military personnel on core capabilities. Furthermore, contractor augmentation would improve the

⁴⁷Canada, Department of National Defence, *Backgrounder, Canadian Forces Augmentation Program*, backgrounder on-line; available from http://www.forces.gc.ca/site/newsroom/view_news_e.asp?id=1409; Internet; accessed 11 November 2005: 1.

quality of life of support personnel and provide the CF with additional flexibility to support operations in locations in which contracted support is not an option.⁴⁸

The Canadian Forces Contractor Augmentation Program (CANCAP) was developed to provide a capability to offer support to deployed operations for up to 1,500 military personnel in any location as well as for up to two concurrent 1,500 man operations anywhere in the world.⁴⁹ This section will examine CANCAP to identify the key features and governance issues that could be utilized in the contracting of a Private Military Company.

3.1 CANADIAN FORCES CONTRACTOR AUGMENTATION PROGRAM

The CANCAP program governance structure defines CANCAP as a “longer-term force sustainment enabler, by permitting a reduction in the number of Combat Support (CS) and Combat Service Support (CSS) personnel serving in a theatre of operations, presuming the local conditions are reasonably stable and secure.”⁵⁰ The key objectives of CANCAP are:

1. To provide the CF with additional operational flexibility through a greater support capacity.
2. To make military personnel available to work in areas where their military skills are most needed and improve the “tooth-to-tail” ratio.
3. To focus on the maintenance of support to CF war fighting skills in CS and CSS forces.

⁴⁸Ibid., 1.

⁴⁹Ibid., 2.

⁵⁰Canada, Department of National Defence, Canadian Forces Contractor Augmentation Program: Program Governance, n.p., n.d., 2.

There was a prerequisite for Canadian content and the contract bids were evaluated based on technical considerations, with cost being only one consideration.⁵¹

The contract was awarded to SNC-Lavalin/PAE Government Services in December 2002. The CANCAP contract was for five years with options to extend the contract for two additional two-year periods and one additional one-year period. The contract value was for \$200M CDN over the initial contract period and an additional \$200M CDN for the option years.⁵² The CANCAP contract was intended to be a general framework to assist in the delivery of support services for contingency operations that have yet to be identified. The contract includes a planning and management capability and immediate access to a world-class service provider. The following contracted services may be provided, depending on the mission:

1. Administration and Management,
2. Food Services,
3. Materiel Management and Distribution,
4. Communication and Information Systems (CIS),
5. Land Equipment Maintenance,
6. Health Services,
7. Transportation,
8. Accommodation and Support,
9. Engineering Services (Construction Engineering) Common Tasks,
10. Power Supply and Distribution,
11. Water Supply and Distribution,
12. Waste Management,
13. Facilities Operations and Management,
14. Roads and Grounds,
15. Fire Services,
16. Geomatic Support,
17. Environment Management, and
18. Ammunition Management.

⁵¹Canada, *Backgrounder, Canadian Forces Augmentation Program ...*, 2.

⁵²*Ibid.*, 2.

The services that will be required for a specific mission will be defined in a Task Order, which constitutes the mission-specific contract for services. These services are all inclusive, but amendments can be made to the CANCAP contract to increase the scope of services; (i.e., add ‘armed guarding services’) to be provided by the contractor.⁵³

3.1.1 Program Governance Overview

A review of the CANCAP governance structure will assist in determining whether the existing process can support the “Team Canada” approach by providing a management framework that would support the use of armed contractors to provide guarding services to the CF on deployed operations. Moreover, the structure will also be used as the basis for further discussion on the implications of armed contractors on the commander. This section will highlight the key elements of the CANCAP governance structure.

Overall program management responsibilities for CANCAP are directed from National Defence Headquarters (NDHQ) and will be taken by the Assistant Deputy Minister (Materiel) [ADM (Mat)] as the lead group principle. Approval authority for the use and funding of CANCAP capabilities in support of specific deployed operations is the responsibility of the Commander Canadian Expeditionary Forces Command (CEFCOM).⁵⁴ The Commander CEFCOM will allocate the required initial mission funding for the employment of CANCAP through the operational planning process. J4 Logistics, as the NDHQ Joint Staff Coordinator for CANCAP services, is responsible to

⁵³Canada, *Program Governance* ..., 2.

⁵⁴The governance documents were developed prior to CF transformation and identify the Deputy Chief of the Defence Staff (DCDS) as the approval authority for deployed operations. For clarity, this paper will replace reference to the DCDS with Commander CEFCOM to reflect the new structure for deployed operations which became effective 1 February 2006.

initiate the staffing process at the national level for the possible use of CANCAP. The Commander of the Joint Support Group (JSG) will plan for and recommend the employment of the CANCAP contract in specific theatres through the operational planning process and the development of Task Orders. Management and oversight responsibilities will be conducted by key departmental personnel once a CANCAP Tasking Order has been issued.⁵⁵

Approval of Task Orders takes place at various levels depending on the value of the mission-specific contract. ADM (Mat) will review all Task Orders over \$400K CDN for services or \$40K CDN for goods prior to approval by the Department of Public Works and Government Services, which is the contracting authority for the CANCAP contract. All other Task Orders less than \$40K CDN for goods and \$400K CDN for services shall be approved by the Commander of the Joint Task Force (JTF) with an information copy provided to ADM (Mat). The Commander of the JTF, as the user of the services provided in the Task Order, has overall authority for contractor support activities in-theatre. Task Order management within the theatre of operations is conducted by the Commander of the Joint Task Force Support Group (JTFSG), supported by a deployed JTFSG Headquarter Contract Management Cell (CMC).⁵⁶

A CANCAP Executive Steering Committee (ESC), which is a joint, DND/CF – Contractor committee, can be established to resolve disputes that could not be settled in the field or at NDHQ. The establishment of this committee is generally dependent upon

⁵⁵Canada, *Program Governance* ..., 3.

⁵⁶Ibid., 3.

the size of the Task Order and will normally be put in place when the Task Order value is greater than \$10M CDN.⁵⁷

3.1.1.1 Limitations

The concept of operations is to utilize the contractor only when the security risk of the mission is deemed acceptable and it is safe to host the contractor into theatre. The risk assessment must be taken into consideration during the operational planning process to assess the potential use of contractor support. The potential impact upon the cohesion and operational effectiveness of the deployed force must also be taken into consideration given that the contractor will place force protection and administrative burdens upon the Commander JTF. An important consideration to remember is that the contractor may only be tasked to perform those tasks contained in the terms and conditions of the applicable contract and may not be assigned other duties.⁵⁸

3.1.1.2 Conditions for Employing Deployed Contractor Support

The Commander JSG will produce detailed requirements for contractor support, and a contractor support plan on behalf of the commander, that will be submitted to NDHQ for Commander CEFCOM approval. Approval for the use of contractor support is subject to the following conditions:

1. The in-theatre security risk must be acceptable for the use of the contractor.
2. The CANCAP Contractor will normally be employed only after CF in-theatre support arrangements have been established. If at all possible, in-theatre support arrangements should reach a reasonable steady-state prior to the deployment of the contractor.

⁵⁷Ibid., 4.

⁵⁸Ibid., 6.

3. Applicability of the mission Status of Forces Agreement (SOFA) to the contractor must be confirmed. If not yet available, or if not applicable to contractors, the contractor firm must be made fully aware of this fact prior to deployment. Once a SOFA has been negotiated, the applicability of the SOFA agreement to the contractor must be evaluated to identify those provisions that may not be applicable to the Contractor.
4. The contractor's plans must be capable of delivering services in accordance with the performance standards specified in the Task Order.
5. The contractor will be able to deliver the full range of support services in theatre as requested in the Task Order within a minimum of 90 days following receipt of the Task Order. Exceptions to this 90 day lead time may apply where the provision of requested services is required sooner or would be subject to difficulties outside the control of the contractor in which case the prescribed minimum number of days would be negotiated.
6. Funds are available for the period of employment of the contractor within the fiscal framework.⁵⁹

3.1.1.3 Risk Mitigation

There is a risk associated with the introduction of any type of contractor into a theatre of operations just as there is a risk in all military activities. The planning for the employment of the CANCAP contractor must include a risk mitigation strategy, which will generally be in the form of a backup plan to replace the contractor with military personnel should circumstances decree such action. This is a significant consideration because a sudden increase to the security risk can reduce contractor freedom of action to the point where the contractor must be replaced by military personnel. In situations not requiring evacuation of contractor personnel, the Commander JTF may be required to dedicate a significant combat capability to the force protection requirements of the contractor.⁶⁰

⁵⁹Ibid., 6-7.

⁶⁰Ibid., 8-9.

3.1.1.4 Transition

The contractor will be integrated into the theatre support plan at an appropriate time to allow for a smooth handover of contracted support services from military personnel to the Contractor. Handovers will generally take place between the CF and the CANCAP contractor and will transition back to the CF upon termination of the contract or closure of the mission. The Contractor is to make certain that adequate in-theatre coordination takes place to ensure that contractor services are harmonized with military support elements.⁶¹

The Canadian Forces Contractor Augmentation Program provides the CF with sufficient expertise in the development and management of support contracts to be able to easily manage a contract for armed services. The governance structure could be adapted to include the unique issues related to weapons and rules of engagement that would be applicable to guarding services. While the administrative expertise exists to manage the contract, the following section will explore the International Humanitarian Law issues related to armed civilians to evaluate the whether the CF should employ armed contractors.

4.0 INTERNATIONAL HUMANITARIAN LAW

Canada has a number of obligations under International Treaties and Customary International Law that require CF deployed operations to be conducted in accordance with applicable International Humanitarian Law (IHL), commonly referred to as the Law

⁶¹Ibid., 9.

of Armed Conflict. The purpose of IHL is to regulate the manner in which hostilities are conducted and to safeguard the victims of armed conflict. IHL protects the basic human rights of all persons who fall into the hands of an enemy, which are prisoners of war (POW), the wounded and sick and civilians. IHL also seeks to preclude the civilian population from the dangers arising from military operations and to protect combatants from unnecessary suffering.⁶²

Numerous nations, particularly the United States, have made extensive use of contractors to provide armed support to deployed operations. This increased emphasis on armed contractors also has the potential to provide significant benefits to Canada. Prior to the CF utilizing armed contractors as a component of its “Team Canada” role, it will be important to conduct a legal assessment of the use of armed contractors. The assessment of the legal issues must examine Canada’s ability to meet its treaty obligations and ensure that the CF and PMF employees are adequately protected from legal liability. This chapter will examine the IHL issues related to the use of armed contractors by the CF. Specifically, the IHL issues that will be examined are: the type of international conflicts in which CF personnel will participate, the possible legal status of armed contractor personnel on these missions and the protections afforded to each status category.

4.1 TYPES OF ARMED CONFLICT

IHL addresses two types of armed conflict: international armed conflict and non-international armed conflict. An international armed conflict is one in which fighting

⁶²Office of the Judge Advocate General, “Chapter 1 – Introduction to the Law of Armed Conflict,” in *Law of Armed Conflict at the Operational and Tactical Levels*, 2001 ed., ed. Directorate of Law Training, I - 1-1.

takes place between two or more states. This definition, however, has been expanded to include wars of national liberation. A non-international conflict is one that takes place within the territorial boundaries of a state between regular military forces and an identifiable armed group, or between armed groups fighting one another. The duration and intensity of the fighting are key factors in determining whether an internal conflict is categorized as a non-international armed conflict or as an internal disturbance.⁶³

The Geneva Conventions and Additional Protocols are the major bodies of law that serve to protect the parties involved in an armed conflict and every individual not, or no longer, involved in the conflict. It is important to note that states have an obligation to ensure that persons alleged of serious violations of IHL are prosecuted. Prosecution can be taken by the state or the accused can be handed over to a competent authority for judgment, regardless of the nationality of the accused or the time and place the alleged incident took place.⁶⁴ All Geneva Conventions and Additional Protocol I apply to international armed conflicts while only common Article 3 of the four Geneva Conventions and Additional Protocol II apply to non-international armed conflicts.⁶⁵

Non-international armed conflicts impose a greater risk to the CF contribution to “Team Canada” because there is no combatant privilege and the concept of POW does not exist as it does for international armed conflict under the Third Geneva Convention.⁶⁶ Consequently, this becomes an important consideration to the CF in determining whether

⁶³International Committee of the Red Cross, *International Humanitarian Law: Answers to Your Questions* (Geneva: n.p., 2002), 4 - 16.

⁶⁴Ibid., 35.

⁶⁵Ibid., 16.

⁶⁶Andres Kreusi, “Private Military and Security Companies, The Law of Armed Conflict and the ICRC,” (Essay, George Washington University, 2005), 3.

armed contractor support will be utilized given that the number of non-international armed conflicts in which CF personnel may be involved in is increasing. Furthermore, it is CF policy that the CF will, as a minimum, apply the spirit and principles of IHL during all operations other than domestic operations.⁶⁷ As a result, the type of operation will be critical in determining the status and legal protection under IHL that would be provided to armed contractors. The following section will highlight the key issues related to the status of personnel in international and non-international armed conflicts.

4.2 STATUS OF PERSONNEL IN ARMED CONFLICTS

There are effectively three categories of people involved in armed conflicts: combatants, non-combatants and unlawful combatants.⁶⁸ Each category will be explored in detail to identify the specific status that is relevant in determining whether to use armed contractors on CF deployed operations; namely, issues related to liability, protection and targeting.

4.2.1 Combatant Status

In general, combatants are characterized as members of the armed force as defined under the Third Geneva Convention (Article 4 A (1), (2), (3) and (6)) and Additional Protocol I (Article 43). Article 43 of Additional Protocol I states that:

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 or 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

⁶⁷Office of the Judge Advocate General, Chapter 17 – in *Law of Armed Conflict ...*, 17-1.

⁶⁸Office of the Judge Advocate General, Chapter 3 – in *Law of Armed Conflict ...*, 3-1.

disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.
3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.⁶⁹

Combatant status is important in armed conflict because it provides significant immunities and privileges, the most important of which are the right to take a direct part in the hostilities, the right to be treated as a POW, and as a POW, to be released and repatriated without delay at the termination of the conflict. With respect to targeting, however, combatants become legitimate military targets, unless declared *hors de combat*⁷⁰ under Article 41 (2) of Additional Protocol I.⁷¹ Article 4 A (2) of the Third Geneva Convention expands the definition of combatant to include those individuals belonging to a formed militia belonging to a party to the conflict provided that they are:

1. Commanded by a person responsible for his subordinates;
2. Wear a fixed distinctive sign recognizable at a distance;
3. Carry arms openly; and

⁶⁹Office of the Judge Advocate General. "Geneva Additional Protocol I - 1977, Part III Methods and Means of Warfare Combatant and Prisoners-of-War, Article 43," in *Collection of Documents on the Law of Armed Conflict*, 2001 ed., ed. Directorate of Law Training, 148.

⁷⁰A person is *hors de combat* if: (a) he is in the power of an adverse Party; (b) he clearly expresses an intention to surrender; or (c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

⁷¹Office of the Judge Advocate General, Chapter 3 – in *Law of Armed Conflict ...*, 3-1.

4. Conduct their operations in accordance with the laws and customs of war.⁷²

In summary, armed contractors that are classified as combatants are able to engage in direct combat, are protected if taken as a POW, or are *hors de combat*, but are considered legitimate targets. From an IHL perspective, the classification of armed contractors as combatants provides a clear link between the individual and the range of actions that he or she could be called upon to perform.

4.2.2 Non-Combatant Status

Non-combatants are not entitled to take a direct part in hostilities and as such are not treated as a POW in the event of capture. Non-combatants include chaplains, medical personnel, civilians, journalists and personnel accompanying the force.⁷³ When discussing the use of armed contractor personnel, the non-combatant status of civilians and persons accompanying the force is most applicable. Article 13 of Additional Protocol II outlines the protections of the civilian population:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

⁷²Faite, *Involvement of Private Contractors in Armed Conflict* ..., 171.

⁷³Office of the Judge Advocate General, Chapter 3 – in *Law of Armed Conflict*..., 3-1.

3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.⁷⁴

Thus, non-combatants may be disciplined for taking a direct part in hostilities if convicted by a regularly constituted court. The main benefit of non-combatant status is the right, generally speaking, to not be directly targeted.⁷⁵

The Third Geneva Convention recognizes contractors that support military operations as persons who accompany the armed forces without actually being members thereof. There is a requirement for the armed forces that they accompany to authorize their participation through the issuance of an authorized identity card. The main drawback of this status, unlike the status of civilian, is that they risk being attacked as a legitimate military target. If captured, they are entitled to the status of POW provided that they do not take an active part in hostilities.

In brief, armed contractors that accompany the CF and are classified as non-combatants would not be able to engage in direct combat, would be protected if taken as a POW or are *hors de combat* but risk being attacked. From an IHL perspective, the classification of armed contractors as non-combatants provides a number of difficulties related to interpretation of direct participation in the conflict and the potential liability of the individual to be disciplined for taking a direct part in hostilities if convicted by a regularly constituted court. The issue of direct participation will be explored in further detail in the following section.

⁷⁴Office of the Judge Advocate General. "Protocol II ..., Article 13," 168.

⁷⁵Office of the Judge Advocate General, Chapter 3 – in *Law of Armed Conflict ...*, 3-1.

4.2.3 Unlawful Combatant Status

Unlawful combatants are those individuals who take a direct part in hostilities without having the legal right to do so under IHL. Unlawful combatants include civilians (other than a *levee en masse*⁷⁶), mercenaries and spies. Unlawful combatants may be directly targeted during the period in which they take a direct part in the hostilities. If captured, unlawful combatants are not entitled to POW status and may be punished following a fair trial affording all judicial guarantees.⁷⁷

The definition of a civilian and a spy is relatively straight-forward. The question of who is a mercenary is less clear. Article 47 of Additional Protocol I defines mercenary as 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.⁷⁸

⁷⁶Article 4 A (6) of the Third Geneva Convention defines *levee en masse* as “Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”

⁷⁷Office of the Judge Advocate General, Chapter 1 – in *Law of Armed Conflict ...*, 3-4 - 3-5.

⁷⁸Office of the Judge Advocate General. “Protocol II ..., Article 13,” 149.

Unfortunately, the definition of mercenary within IHL has significant weaknesses. Major Milliard, United States Army Judge Advocate, highlights the main weakness in terms of the fact that while Article 47 deprives a mercenary of combatant status and the protections of POW status, “The mere fact of being a mercenary is not, however, made a criminal act [by Article 47].” Prosecution becomes a domestic issue and relies on the presence of domestic legislation that criminalizes mercenary activities.⁷⁹

The key issue for the CF with the employment of armed contractors will be to ensure that they do not have the status of unlawful combatants. Unlawful combatants are likely to be considered criminals, subject to national prosecution, are not entitled to POW status and can be targeted during the period that they take a direct part in hostilities.

The status of armed contractors is a critical element of a CF “Team Canada” approach that includes the employment of PMF personnel. Status will determine the legal right to engage in armed conflict, the level of protection entitled by the individual and the ability of the individual to be directly targeted. Moreover, the status of the contractor will allow legal authorities to assess the obligations of the Canadian government under IHL. The next section will examine the protections afforded to armed contractors in an international armed conflict.

⁷⁹Todd S. Milliard, "Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies," *Military Law Review*, Vol 176 (June 2003): 41.

4.3 PROTECTIONS AFFORDED ARMED CONTRACTORS IN INTERNATIONAL ARMED CONFLICTS

The status of contractors traditionally employed by the CF is generally covered under the provisions of persons accompanying the force, which limits their support to activities that do not take a direct part in hostilities. The issue of armed contractors to guard CF installations on deployed operations presents a number of new IHL questions related to the protections afforded the contractor that must be considered prior to their employment. This section will examine the protection issues that would be faced by armed contractors given the available status categories under IHL and recommend that, from a legal perspective, the CF only employ armed contractors when they are classified as combatants.

4.3.1 Armed Contractors as Unlawful Combatants

When examining armed contractor support, there are two key issues related to unlawful combatant status: what is considered direct participation in hostilities and what is the definition of a mercenary. The answers to these questions are important in making certain that the CF and contractor personnel do not violate IHL.

4.3.1.1 Direct Participation

There is currently insufficient clarity in the Geneva Conventions and the Additional Protocols as to what constitutes direct participation in hostilities. Alexandre Faite, Legal Advisor to the ICRC, states that "... the commentary [issued by the ICRC] on Additional Protocol I states that 'direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the

enemy forces.”⁸⁰ The use of force by a contractor in self-defence is not seen as a direct use of force. However, the distinction between defensive and offensive use of force is often unclear. Faite goes on to further state that direct participation requires examination of two questions: “Whether the facility that the private company is guarding is a military objective or not, and what course of action is taken by personnel of private companies in the event of an attack.” He argues that the use of force by contractors in the guarding of military infrastructure such as bases, barracks or ammunition dumps would not constitute in itself a direct participation in hostilities. Furthermore, the fact that a target is a legitimate military target does not immediately imply that a private contractor guarding the facility is directly participating in the conflict.⁸¹ Therefore, based on Faite’s interpretation of IHL, armed contractors guarding military facilities would not be directly participating in hostilities. Hence, armed contractors would not lose their status as civilians. They would, however, lose their immunity from direct attack during the performance of their duties and may be targeted.⁸²

Major Joseph Perlak, USMC Judge Advocate, agrees with Faite in that he recognizes that protections are afforded to civilians on a conditional basis until such time as they directly participate in hostilities. Perlak notes, however, that there is a discrepancy between the direct participation wording in Additional Protocol I and common Article 3 of the Geneva Conventions. Specifically, common Article 3 uses the

⁸⁰Faite, *Involvement of Private Contractors in Armed Conflict* ..., 173.

⁸¹*Ibid.*, 174 - 175.

⁸²*Ibid.*, 174.

wording “active” part of hostilities rather than “direct”.⁸³ Active participation creates additional complexities regarding the use of armed contractors in that while guarding services can be viewed as defensive, the activity could be seen as active participation in that it sustains a combat capability by freeing up military personnel for offensive operations. While common Article 3 specifically applies to conflict “not of an international nature”, its inclusion in each of the Geneva Conventions could provide sufficient confusion as to place the status and appropriate protections of an armed contractor at risk. Unfortunately, Perlak does not implicitly address the issue of armed contractors, but recognizes the importance of protecting contractors from direct attack and the need to provide a Geneva Convention identification card to ensure that POW status is granted in case they become captured.⁸⁴

It is useful to note the similarities between Faite and Perlak with respect to direct participation. Perlak does, however, add a degree of uncertainty with respect to the conflicting wording of “direct’ and “active”. Therefore, the CF must be cognizant of the differing interpretation and that armed contractors, depending on the belligerent, could be deemed unlawful combatants who are actively participating in the conflict rather than a civilian, who is not taking a direct part in the conflict. As a result of this confusion, legal authorities will need to ensure that all stakeholders in a conflict have a common understanding of the status of armed contractors. If a clear understanding of the protections cannot be ascertained, armed contractors should not be utilized as part of a CF “Team Canada” contribution on deployed operations.

⁸³Joseph R. Perlak, "The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel," *Military Law Review*, Vol 169 (2001): 109 - 110.

⁸⁴*Ibid.*, 110 - 111.

4.3.1.2 *Mercenaries*

The existing provisions of IHL pertaining to mercenary activities are lacking because they focus on the traditional post-colonial activities that were prevalent in Africa and fail to account for the transformed military services market, which is largely used by legitimate nation states.⁸⁵ Whilst Article 47 of Additional Protocol I serves to eliminate both the right of mercenaries to serve as lawful combatants and the immunity to be treated as a POW, the definition is problematic because it requires that all six of the conditions be satisfied. Likewise, the burden of proof is further complicated because of the difficulty to prove that the individual intended to be employed as a mercenary. Faite contends that from a legal perspective, employees of private military companies are unlikely to be classified as mercenaries as they will generally fall outside the definition provided in IHL, which mirrors the Article 47 definition. For example, it could be argued that if an individual is a permanent employee of a company, vice recruited to participate in a specific conflict, the condition contained in Article 47 (a) would not be satisfied. As a result, the individual would not be considered a mercenary.⁸⁶ The use of armed contractors by the CF would not be constrained by the mercenary provisions of IHL as Canadian procurement practices are geared towards the contracting of services from legitimate companies. Hence, there is little risk that armed services would be provided by an employee classified as a mercenary.

⁸⁵Todd S. Milliard, *Overcoming Post-Colonial Myopia* ..., 5.

⁸⁶Faite, *Involvement of Private Contractors in Armed Conflict* ..., 169 - 170.

4.3.2 Armed Contractors as Combatants

Lieutenant-Colonel (LtCol) Castillo, United States Air Force, argues that IHL recognizes the need for civilian support to combat forces, but contends that this support is only in non-combatant roles that keep civilians out of direct engagement with military forces.⁸⁷ IHL does, however, provide flexibility for the employees of a PMF to be classified as combatants if they fulfill the conditions of an organized group identified in Article 4 A (2) of the Third Geneva Convention. The advantage of being categorized as a combatant is that they have the right to participate in combat and enjoy all of the immunities of an armed force. To this end, if an armed contractor security force is required to directly engage enemy forces, there are no issues related to direct participation or transition from defensive to offensive operations.⁸⁸

The main difficulties associated with armed contractors being part of an organized group deal with the desire of the contractor to forego a purely contractual arrangement in place of a more complicated command and control arrangement between itself and the contracting government's military forces. The issue of protection becomes one of balance between the immunity from prosecution and the protections associated with POW status and the loss of protection associated with not being directly targeted that is enjoyed by civilians. Targeting issues may be more problematic for the employer and require a greater emphasis on force protection and associated personnel costs related to higher risk as employees are legitimate military targets. From a CF perspective,

⁸⁷Lourdes A. Castillo, "Waging War with Civilians," *Aerospace Power Journal*, (Fall 2000): 29.

⁸⁸Faute, *Involvement of Private Contractors in Armed Conflict ...*, 171 - 174.

however, combatant status of armed contractors simplifies the obligations related to IHL and provides a more seamless approach to “Team Canada”.

The following section highlights the significant differences regarding the protections afforded to armed contractors in a non-international armed conflict and the increased risks associated with integrating armed contractors in a “Team Canada” approach to global engagement.

4.4 PROTECTIONS AFFORDED ARMED CONTRACTORS IN NON-INTERNATIONAL ARMED CONFLICTS

The use of armed contractors in non-international conflicts is more problematic than in an international armed conflict because of the lack of clear guidelines regarding the status of participants to the conflict. Unless the parties to the conflict agree to follow all relevant Geneva Conventions, only common Article 3 of the Geneva Conventions, which outline the minimum conditions of IHL that must be observed during a non-international armed conflict, apply. Common Article 3 of the Geneva Conventions states that, as a minimum, the parties are obliged to apply the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the abovementioned persons:
 - (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;

- (c) outrages upon personal dignity, in particular humiliating and degrading treatment; and
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.⁸⁹

Regrettably, Article 3 does not provide a definition of non-international armed conflict and therefore does not affect the legal status of the parties to the conflict. Consequently, a state can treat its opponents in accordance with its national legislation as either traitors or as common criminals.⁹⁰ As previously identified, the wording of common Article 3 is important because it holds the lesser standard of “active” part in hostilities rather than “direct” and, if no agreement is made between the parties, each state’s law can be used to resolve alleged breaches to IHL. The CF must be cognizant of the risks to armed contractor personnel on a non-international armed conflict to ensure that they are employed in accordance with IHL. This risk can be mitigated through Status of Forces Agreements or Military Technical Arrangements with the host nation prior to the deployment of armed contractors to ensure adequate immunity from criminal prosecution.

The presence non-state actors, such as in the Global War on Terror, further complicates the issue of non-international armed conflict. Under IHL, only states are considered legitimate stakeholders with the obligation to be bound by the Geneva

⁸⁹Office of the Judge Advocate General. “Geneva Convention (IV) Relative To The Protection Of Civilian Persons In Time Of War – 1949 , Part I – General Provisions, Article 3,” in *Collection of Documents on the Law of Armed Conflict*, 2001 ed., ed. Directorate of Law Training, 118.

⁹⁰Office of the Judge Advocate General, Chapter 17 – in *Law of Armed Conflict ...*, 17-2.

Conventions, or in the case of non-international armed conflicts, the authority to enter into an agreement regarding how breaches will be resolved. Thus, the CF should not use armed contractors in an operation involving non-state actors as there would be no legal foundation to protect their status and ensure appropriate protection under IHL.

Canada's obligations under International Treaties and Customary International Law require CF personnel and accompanying civilian personnel deployed on a CF operation to act in accordance with the applicable IHL. The availability of armed contractors to augment military personnel has increased the need for Canada to assess the legal issues related to both international and non-international armed conflict to ensure that the CF and PMF employees are adequately protected. The status of armed contractors is a critical element of a CF decision to employ PMF personnel on deployed operations because status will determine the legal right of the contractor to engage in armed conflict, the level of protection entitled by the individual and the consequence of the individual being directly targeted. Combatant status of contractor personnel provides the most flexible solution to the CF from a purely legal perspective because of the clear guidelines for conduct established under IHL. Latitude exists within the interpretation of personnel accompanying the force to employ armed contractors as "civilians". The ambiguity within IHL, however, may leave this option open to legal challenge and place the contractor at risk while the matter is adjudicated. Therefore, the CF should only employ armed contractors if they possess the status of combatant under IHL.

The following section will examine the implications of armed contractors on the commander. It will be important to note that the considerations of the commander are exclusive of the legal issues under IHL.

5.0 IMPLICATIONS OF ARMED CONTRACTORS ON THE COMMANDER

The use of armed contractors on a deployed operation will have a significant impact on the Task Force Commander (to be referred to as commander). The underlying dilemma for the commander in the use of armed contractors is to balance his desire for mission success with that of a contractor's desire to maximize profits. This dilemma is complicated by the fact that there is no traditional military relationship between the commander and the PMF, but rather one between the contracting agency and the contractor. The relationship is established through the contract, or Statement of Work (SOW), which defines the tasks and performance obligations to be performed.⁹¹

The use of contractors on the battlefield can provide advantages to the commander, such as access to expertise and the ability to reduce the military "tooth-to-tail" ratio, which would increase the number of troops allocated to combat tasks. This section will examine the implications of the use of armed contractors on the commander, with specific emphasis on the issues related to command and control, flexibility, support to contractors and military experience.

⁹¹Mark D. Terry, "Contingency Contracting and Contracted Logistics Support: A Force Multiplier," (Newport: Naval War College Paper, 2003), 12.

5.1 COMMAND AND CONTROL

When discussing the implications of the use of armed contractors on a deployed operation, it is important to examine the level of command and control that the commander can exert over those resources. While there are numerous definitions of command and control, this paper uses the definition presented by Ross Pigeau and Carol McCann. The two DND defence scientists, specializing in research on command, define command as “the creative expression of human will necessary to accomplish the mission” and control as “those structures and processes devised by Command to manage risk.”⁹² It will be demonstrated that the commander does not have the ability to exert command and control over the armed contractor. The discussion of the command and control issues will focus specifically on the lack of ability of the commander to express his “human will” and his inability to exert sufficient control to “manage risk”.

Joseph Perlak emphasizes that armed contractors are not led in the same manner as soldiers and highlights the relationship between contractors and commanders, as follows:

The contract relationship is based on performance, which leaves supervision to superior employees within the contractors’ organizations [sic]. The fact that they may be under contract to provide services or perform skills does not translate into a command relationship over contractors. ... commanders must still rely on the contracting officer to directly enforce contractor discipline.⁹³

⁹²Ross Pigeau and Carol McCann, “What is a Commander?” in *Generalship and the Art of the Admiral* (St. Catherines: Vanwell Publishing Limited, 2001), 103.

⁹³Perlak, *The Military Extraterritorial Jurisdiction Act ...*, 119.

The commander cannot directly exercise unity of command but is generally required to operate through a contracting officer to modify the existing contract.⁹⁴ The SOW constrains the commander in his ability to express his human will over the PMF and to use discipline if the situation warrants because the SOW states the specific responsibilities of the contractor. Moreover, the contract relationship identifies the dispute resolution measures that have been negotiated, with the solution normally being financial or performance-based. In the Canadian context, if an alleged breach of contract takes place, both parties have recourse to resolve the dispute in the Federal Court of Canada if the chain of command cannot settle the dispute to the contractor's satisfaction. The contractual relationship creates a fundamental problem for the commander because it eliminates his ability to use all of the tools at his disposal to exercise "command". Discipline, for example, is an important tool because it formalizes the relationship between the commander and his subordinates and utilizes the threat of punishment to ensure that the will of the leader prevails.⁹⁵ Unfortunately, this leadership tool is not available to the commander when dealing with a contractor. Moreover, the inability to resolve all issues in-theatre leads to the possibility of problems remaining outstanding for long periods of time if either party insists on using all available dispute resolution mechanisms.

The American experience in Iraq has highlighted the difficulties to the operational commander in controlling the armed contractor since he does not possess the authority, because of the lack of a declared war, to compel a contractor to perform his duties under

⁹⁴Terry, *Contingency Contracting* ..., 12.

⁹⁵Perlak, *The Military Extraterritorial Jurisdiction Act* ..., 118.

the contract once hostilities started and the threat level increased. In addition, it was not unlawful for contractor personnel to leave the area of operations. The only recourse available to the commander was the denial of simple administrative privileges, such as access to the mess or Base Exchange, or to request that the contract management authority take appropriate disciplinary action.⁹⁶ LtCol Castillo highlights the contradiction between the commander's lack of command over armed contractor personnel and the responsibility to coordinate contractor support, which includes the flow of contractor personnel and equipment on military transportation.⁹⁷ Hence, the lack of ability of the commander to command the contractor, vice manage the contract, provides significant problems in terms of unity of command and flexibility. The issue of flexibility will be addressed in further detail in the following section.

The presence of armed contractors not only limits the commander's ability to manage risk because of the constraints of the contract, but also adds additional responsibilities. Specifically, the commander is constrained by his obligation to protect the legal status of armed contractor personnel and to ensure that they do not take actions that would affect their status and as a result make them liable to criminal prosecution.⁹⁸ The increased presence of armed contractors may also escalate the risk to the mission if the number of contractor personnel increases to the point that they become a critical vulnerability. The enemy could attack friendly fielded forces through this critical vulnerability by encouraging mass departures of armed contractors from the theatre of

⁹⁶Terry, *Contingency Contracting* ..., 15.

⁹⁷ Castillo, *Waging War with Civilians*, 29.

⁹⁸Terry, *Contingency Contracting* ..., 16.

operations, which would create critical capability deficiencies or require the reallocation of forces from offensive to defensive operations.⁹⁹

The CF commander will need to be aware of the command and control issues associated with the use of armed contractors and ensure that adequate mechanisms, including an in-theatre CF contracting office, are in place to meet all operational contingencies.

5.2 FLEXIBILITY

The key benefit of the use of armed contractor support would be the increased flexibility provided to the commander because of highly experienced personnel and the ability to increase the number of combat troops allocated to directed operations because of a lower military “tooth-to-tail” ratio.¹⁰⁰ This relief of pressure could be in terms of negating the requirement for a separate force protection company to be deployed to theatre, thus lengthening the time between deployments for combat forces, the elimination of an additional duty normally assigned to deployed forces or the ability to obtain a capability that is not currently available. It is interesting to note, however, that the flexibility that contracting strives to achieve is also one of the greatest risk areas for the commander.

Professor Uttley identifies a key risk to mission accomplishment as being the operational constraints associated with the commander not being able to adapt to the changing operational situation because of the constraints of the contract and the

⁹⁹Gregory A. Cate, “Are the Department of Defense Outsourcing Efforts Smart Business for Military Operations and the Operational Commander?” (Newport: Naval War College Paper, 2003), 8.

¹⁰⁰Schreier and Caparini, *Privatising Security ...*, 47.

restrictions of IHL.¹⁰¹ Perlak identifies the importance of the contracting officer in the process as he is the only person able to contractually obligate the government. The contracting officer is critical in terms of negotiating the initial contract and making amendments to existing agreements as required to meet the commander's changing situation. Hence, the commander will require an in-theatre contracting capability sufficiently robust to meet any unforeseen requirement that may arise from the use of armed contractors.¹⁰² Notwithstanding that a contract could have flexible terms to allow for amendments, the contract amendment process still requires time to negotiate the changes and must be processed through the appropriate contracting officer, which increases risk to the commander. To this end, freedom of action is inhibited because of the contract.¹⁰³

David Isenberg speaks to the issue of reliability under fire and the concern that this presents. The concern relates to whether contractors will remain in the area of operations once hostilities escalate or if they will walk away from the contract.¹⁰⁴ LtCol Castillo points out that the flexibility associated with the commander's freedom to improvise tactics, utilize weapons and redeploy personnel has historically been essential to victory. Increased contractor support also reduces the ability of leaders to allocate even simple tasks, requiring little skill or training, to troops because of the reduced force structure. These reductions in flexibility limit mission accomplishment because of the

¹⁰¹Matthew R. Uttley, "Private Contractors on Deployed Operations: the United Kingdom Experience," *Defense Studies*, Vol 4, No 2 (Summer 2004): 156.

¹⁰²Perlak, *The Military Extraterritorial Jurisdiction Act ...*, 120.

¹⁰³Castillo, *Waging War with Civilians*, 28.

¹⁰⁴Isenberg, *A Fistful of Contractors ...*, 49.

need to amend the contract during the operation as not all contingencies can be foreseen.¹⁰⁵

Peter Singer provides a different context to the question of contractor reliability by viewing the problem in terms of the decision making ability of the individual employee. While a soldier has no discretion to leave the theatre of operations once he/she enlists, PMF employees retain the legal authority to decide who they want to work for, where and at what price they will work. Moreover, this right does not cease once the employee deploys to theatre and they can choose to leave if they find other employment, get bored or tired or are worried about the risks, etc.¹⁰⁶ Therefore, contractor reliability is not only correlated to the danger inherent with military operations, but also the market demands of the civilian job market and the desires of the individual employee, which are factors that the commander cannot influence.

In the Canadian context, the commander's flexibility is degraded by the requirement to ensure that there are sufficient military resources to take over contractor responsibilities in case of unacceptable risk. This issue becomes problematic as the use of contractor support is generally selected to reduce military personnel numbers. Accordingly, replacement forces will need to be reemployed in-theatre or forces must be made available in Canada as a strategic over-the-horizon reserve. Hence, Canadian commanders at the strategic and operational levels will need to ensure that a sufficient force protection capability exists should the contractor default on his contractual

¹⁰⁵ Castillo, *Waging War with Civilians*, 28 - 30.

¹⁰⁶ Singer, *The Private Military Industry and Iraq ...*, 8.

obligations or become incapable of providing adequate protection during heightened periods of risk.

5.3 SUPPORT

The existence of armed contractors in the battlespace presents the commander with the concern for their care and safety that must form an integral part of the campaign plan.¹⁰⁷ The use of contractors provides additional constraints on the commander that are not necessarily implicitly identified in the contract. Additional support requirements related to the use of armed contractors could include: force protection that extends beyond the camp perimeter or assigned contractor responsibilities, logistical support or additional security for military forces because of the presence of contractors. Each of these issues will be explored in the context of the additional or potential risks that the commander must consider.

5.3.1 Force Protection

Matthew Uttley highlights the change in performance of modern weapons systems as a threat to the safe areas where armed contractors are typically employed. Similarly, an asymmetric operational environment such as Afghanistan provides increased risk from enemy interdiction operations, suicide bombers and Improvised Explosive Devices, which were not previously a consideration in traditional deployed operations.¹⁰⁸ The implication raised by Uttley is that there are no longer safe or low risk areas where contractors can be employed because the entire battle space is a danger zone. The

¹⁰⁷Cate, *Are the Department of Defense Outsourcing Efforts Smart Business* ..., 20.

¹⁰⁸Uttley, *Private Contractors on Deployed Operations* ..., 156.

resulting responsibility of the commander is the need to ensure that a more robust force protection capability exists. Notwithstanding that armed contractors may be employed to provide force protection of the camp, the responsibilities of the contractor would likely be limited to a conventional attack on the camp perimeter. As a result, the commander will need to ensure sufficient force protection from rocket attack and threats beyond the immediate perimeter of the camp for both military and contractor personnel. Moreover, the lack of flexibility to use contractors on offensive force protection tasks, such as the pursuit of attacking forces outside the confines of the camp, will require personnel to be re-tasked from normal patrols to complete a task that would normally have been conducted by the military force protection unit.

5.3.2 Logistics Support

A contractual arrangement for the use of armed contractors by the CF would likely include the condition that the CF provides logistical support to contractor personnel. This is a reasonable assumption given the austere locations where the CF will likely be deployed and the need in some cases to restrict air traffic to military aircraft. This logistical support task provides an additional constraint on the commander as he is responsible for the flow of equipment, personnel and materiel into the theatre. The need for close coordination with the contractor is required to ensure the appropriate priority for the use of both inter-theatre and intra-theatre transport.¹⁰⁹ This burden is exacerbated when the camp is located far from the airport or seaport of disembarkation as a rail and/or road element is added. Contractor support requirements can be identified early in the process by including contractors in the initial planning process with the joint staff. Early

¹⁰⁹ Castillo, *Waging War with Civilians*, 29.

planning will identify all transport requirements, but it does not resolve the issue that for every contractor occupying a seat on a plane, ship or vehicle, it is one less seat available to the commander for a soldier.¹¹⁰

For the CF, it would be important to ensure that the CF Movement Table for a deployment includes all contractor support requirements and prioritizes the flow of military and armed contractor personnel into theatre. Furthermore, additional transportation assets may be required to sustain contractor requirements, which may be in excess of the traditional support provided to military personnel. From a command perspective, the risks associated with support to contractors can be mitigated through coordination and planning and sufficient transportation assets to meet all CF and contractor requirements.

5.3.3 Additional Security

The use of armed contractors may create an additional security risk that will need to be assessed by the commander. Uttley identifies weaknesses with contractor internal security measurement and security screening that increases the operational security risk not generally associated with military personnel.¹¹¹ This problem is aggravated as armed contractors employ third party or host nation personnel in translation services or low-skilled logistics support functions to reduce personnel costs. Mark Terry expands on this issue by recognizing the need for the commander to evaluate the force multiplier effect of contractor support with the increased security requirements to counter the danger of

¹¹⁰Ibid., 29.

¹¹¹Uttley, *Private Contractors on Deployed Operations* ..., 157.

enemy infiltration, sabotage and/or communications disruptions.¹¹² Fortunately, this issue is mitigated significantly when dealing with the contractor employees that perform the actual “armed” duties because of the industry practice of hiring skilled former military and security personnel. The impact on the commander, therefore, will be the need to ensure that proper security screening of locally hired contractor support personnel takes place in-theatre. Strategic security assets such as the Canadian Security and Intelligence Service or the National Investigative Service would be required to ensure that non-locally hired personnel are adequately screened prior to deployment.

The commander must be aware that the use of armed contractors presents a number of support responsibilities that may not be specifically identified in the contract. Logistics support presents the least risk as this issue can be mitigated through planning and coordination between the contracting officer in-theatre and the contractor representative. Force protection of contractor personnel provides medium risk in terms of ensuring that adequate infrastructure is available and that a contingency plan exists to divert troops from patrolling duties to camp protection. The security risk of contractor personnel presents the greatest risk of the three issues because of the traditionally high use of locally hired personnel for translation services and low-skilled logistics support. The security screening of contractor personnel would, however, mitigate this risk to acceptable levels.

¹¹²Terry, *Contingency Contracting* ..., 18.

5.4 EXPERIENCE

As military forces transfer more non-core and core functions to contractors, there is the potential for a significant long-term impact on operations. The matter of loss of experience resulting from military personnel retiring from the military to join privatized military firms is a concern to military commanders at all levels rather than specifically to the operational or tactical commander. This section will examine the inter-related issues of loss of experience and “brain drain,” which leads to the requirement to conduct training, and the loss of capability. These issues are closely related as the loss of experience can only be countered through training or a permanent loss of capability.

5.4.1 Brain Drain

The trend to outsource key capabilities will lead to a loss of military capability and the ability for the commander to react if a contracted solution no longer becomes viable. A “brain drain” is created because of the transfer of skills from the military to the private sector and the rapid technological advances that accompany the use of modern weapons systems and modern logistical practices.¹¹³ The brain drain can result from personnel with high skill level, such as Special Operations Forces, leaving the military to seek higher paying employment with contractors or by transitioning to other military employment and allowing skills to lapse. The effect of this loss of skill sets is a degradation of the commander’s flexibility, should contractor personnel be unable to conduct their duties, because of the lack of military personnel with the appropriate knowledge and experience to complete the tasks in an efficient and effective manner.

¹¹³Kyle M. Ballard, “The Privatization of Military Affairs: A Look Into the Private Military Industry,” Paper, The New Hampshire Institute of Politics, n.p., n.d, 14.

5.4.2 Training

The loss of skilled personnel leads directly to the training time required to rebuild a capability if a contractor solution is no longer viable or if a redundant military capability is required for the function. Uttley asserts that the long-term risk of contracting is greater for the armed services than the contractor. This is particularly evident in a “contractor-rich, deployed environment” because of the loss of ability within the military to take up these responsibilities. The problem is made worse by the fact that there is a blurring between core and non-core functions. Moreover, contracting policies in the United States, the United Kingdom and Canada stress the concept that contractors “augment” deployed forces rather than “replace” them. This definition becomes cloudy when entire functions are being conducted by contractors with no mission capable military personnel to provide a redundant capability.¹¹⁴ The implications of using armed contractors are that there may be a shortage of military personnel with the appropriate mission specific training to provide augmentation on short notice should the contractor default.

5.4.3 Loss of Capability

The use of contractor support provides capability at the desired experience level. The problem with reverting a function back to military personnel is that that experience level can no longer be purchased; “it takes eight years to gain eight years of experience.”¹¹⁵ Therefore, it will be essential for military manpower specialists to be aware of the long-term military requirements to ensure that the training system is geared

¹¹⁴Uttley, *Private Contractors on Deployed Operations* ..., 157.

¹¹⁵Castillo, *Waging War with Civilians*, 29.

to provide skills training and that employment is available to gain the requisite level of experience. The commander will need to be aware of the redundant capabilities available to him in order to understand the integration of contractor operations into his military operations and be better able to plan for operational contingencies.

The effect of loss of experience is a systemic problem that cannot be influenced to a great extent by an operational commander. The use of armed contractors to support CF operations presents a low risk to the commander because of the basic skills involved in the service. The main issue in guaranteeing a redundant capability relates to having adequate combat forces available to perform contractor duties, rather than detailed technical skills.

The use of armed contractors to support a “Team Canada” deployed operation would have a significant impact on the commander. The use of civilian contractors obligates the commander to protect the legal status of contractor personnel and to ensure that they do not take actions that would affect their status. Command and control mechanisms in the form of an in-theatre CF contracting office would be needed to allow the commander to meet all operational contingencies and monitor contractor performance. Flexibility would be degraded because of the need to have sufficient military resources available to ensure that sufficient surplus capability exists should the contractor become unable of providing armed security during periods of unacceptable risk. There are support responsibilities that may not be included in the contract that will require planning and coordination between the CF contracting officer and the contractor representative. The effect of loss of experience is a systemic problem and needs to be

addressed at the strategic level to ensure that properly trained and experienced military personnel are available to the commander for operations.

6.0 CONCLUDING REMARKS

The purpose of this paper was to examine the central issues related to the use of armed contractors by the CF and to recommend that the CF not utilize armed contractors as part of the CF contribution to a “Team Canada” approach to global engagement. A review of the private military industry revealed that there has been a long history of successful integration of contractors into military operations. The industry, according to Peter Singer, is divided into three sectors: Private Military Companies, Private Consulting Services and Military Support Companies. The CF has the potential to benefit from each sector, whether it be armed defensive services from the Private Military Company sector, training and consulting support from the Private Consulting Services sector or support services from the Military Support Company sector. The private military industry currently has the capacity to support all of the potential requirements of the CF, particularly the provision of armed services for the protection of camps on deployed operations.

The review of the Canadian Forces Contractor Augmentation Program revealed that the CF currently possesses sufficient expertise in the management and development of contracts within the private military industry to meet the more complex requirements of a contract for armed services. The existing governance structure is sufficiently robust that it could be adapted to include the specific weapons-related issues of Private Military Companies.

One of the key concerns, however, regarding the use of armed contractors relates to Canada's obligations under International Treaties and Customary International Law. The status of armed contractors is a critical element of a CF decision to employ PMF personnel on deployed operations because the status of the contractor will determine the legal right of its personnel to engage in armed conflict, the level of protection entitled by the individual and the ability of the individual to be directly targeted. Combatant status of armed contractor personnel provides the most flexible solution to the CF from a legal perspective because of the clear guidelines for conduct established under International Humanitarian Law. The latitude that exists within the interpretation of personnel accompanying the force to employ armed contractors as "civilians" is ambiguous and may leave the status of the contractor open to legal challenge and place the contractor at risk while the matter is adjudicated. Therefore, it was recommended that the CF only employ armed contractors if they possess the status of combatants under International Humanitarian Law.

The final part of this paper examined the impact on the commander of using armed contractors on a deployed operation. The main challenge to the commander dealt with the lack of command and control over the contractor and the need to operate through a warranted contracting officer. There would be a reduction in flexibility because of the inability to re-task contractor personnel, or to use military personnel that have been replaced by the contractor, to meet immediate operational requirements. In addition, flexibility is lost by the commander having to have sufficient military resources available to take over contractor responsibilities in case of unacceptable risk that would prevent the contractor from performing his duties. The commander will be faced with support

responsibilities, such as movement and infrastructure support that will require planning and coordination between the CF contracting officer and the contractor representative. Lastly, the effect of the loss of experience because of the reduction of personnel or loss of capabilities due to out-sourcing is a systemic problem that needs to be addressed at the strategic level to ensure that properly trained and experienced military personnel are available to the commander for operations.

When each issue is examined in isolation, the use of armed contractors by the CF makes intuitive sense. It is important, however, to examine all of the issues together to evaluate the true benefits to the commander and the deployed troops. The legal issues related to each specific mission need to be resolved to make certain that all stakeholders are aware of the legal status of armed contractors and to ensure proper accountability for contractor actions. To conclude, the lack of command and control and flexibility over all armed forces within the battle group will place too many restrictions on the commander and will impede his ability to have absolute control over all Canadian combat capability. Therefore, this paper concludes that at this time, the CF should not utilize armed contractors as part of the CF contribution to the “Team Canada” concept.

There may, however, be a future possibility to fully exploit the “Team Canada” approach to global engagement. The main shortfalls in the use of armed contractors that have been identified in this paper deal largely with the inadequacy of existing policies, regulations and procedures and the impact of these issues on the commander. Latitude may exist in the future to utilize innovative measures to prevail over the existing challenges. The United Kingdom, for example, allows for the use of Sponsored Reserve status to overcome the major legal issues and challenges faced by the commander and

have the potential to provide significant flexibility. Updated International Humanitarian Law, which address the realities of the services provided by the private military industry, would allow for a completely different examination of the use of armed contractors by the CF. As the private military industry evolves, the supporting framework will likely change to reflect the new realities. Should these changes take place in a positive atmosphere, it may be possible for the CF to adopt a truly “Team Canada” approach to supporting deployed operations in the future.

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