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The Practice of Shared Responsibility in relation to Private Military Contractors

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The Practice of Shared Responsibility in relation to Private Military Contractors

Chia Lehnardt∗

1. Introduction

Contracted by both state and non-state actors, private military contractors (PMCs)[1] provide services that are typically associated with the armed forces of a state: logistic support; collection of intelligence both on the strategic and tactical level; the training of troops; and importantly, activities including the potentially lethal use of force: the staffing of checkpoints, protection of personnel and military assets, and sometimes combat functions. A more recent development features private security companies providing protection to merchant vessels against piracy. In multilateral peacekeeping operations international organisations might come into play as well.[2]

If private military personnel are hired by a state, they remain outside the structure of the state or international organisation. As they are not subjects of international law, private military or security personnel do not incur international responsibility. At the same time, their conduct might implicate several international law subjects – for example, the state under whose law the company is incorporated (the home state); the state in whose territory it operates (the host state); or the state that has contracted the company (the contracting state).

Therefore there are two aspects that are central to the question of shared responsibility for the conduct of private military personnel. A prerequisite question is whether there is international

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[1] Other terms used in the literature include 'private military and security companies' and 'private security companies', while the term 'private military companies' is in most cases defined much more narrowly and reserved for those companies that actually fight wars alongside, or in place of national armed forces, as opposed to those firms providing 'security services' or 'support functions' only. The term 'private military companies' is preferred here, as it points to the qualitative difference between security companies guarding premises in a stable environment on the one hand, and companies operating in a conflict zone on the other.

[2] See Chapter 23 in this volume, R. Murphy and S. Wills, 'United Nations Peacekeeping Operations', in P.A. Nollkaemper and I. Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge University Press, 2016), __.

responsibility at all – how does the fact that private military contractors are at play affect the responsibility of the contracting state, or the state in whose territory they operate? Second, are international law subjects that contract them, or allow them to operate, responsible for their conduct? How does their responsibility, if any, relate to each other? This question is of significant practical relevance. Private military personnel have been retained by the majority of states, by international organisations, non-governmental organisations, and companies operating in unstable environments.[3] They provide their services often in situations of armed conflict or low-intensity conflicts and thus in an inherently volatile setting. It therefore comes as no surprise that they are susceptible to violating interests protected by international law, just like armed forces. In Abu Ghraib, Iraq, employees of two companies were implicated in the abuses of prisoners. Also in Iraq, employees of the company formerly known as 'Blackwater' shot several civilians in Nasoor Square. In both cases the companies were contracted by the United States (US) government.[4]

The use of private military companies in multilateral peacekeeping operations is a phenomenon that has received less coverage, but has become a regular feature in the last two decades. The activities they undertake in the context of United Nations (UN) peacekeeping range from 'second rank' activities, such as the building of barracks or transport of supplies, to more sensitive tasks, including the provision of intelligence or training of militaries, to functions involving the use of force.[5] Similarly, the North Atlantic Treaty Organization (NATO) contracts private military companies on a regular basis.[6] Although no incidents similar to those in Iraq have been reported, it is conceivable that private military personnel contracted by international organisations violate interests protected by international humanitarian and human rights law.

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[3] See 'Bericht des Schweizer Bundesrats zu den privaten Sicherheits- und Militärfirmen' (Report of the Federal Council of Switzerland on private military and security companies), 2 December 2005, available at www.admin.ch/opc/de/federal-gazette/2006/623.pdf, at 633/634. While a number of states contracting PMCs is difficult to come by, it is safe to say that the market has steadily grown. In 2005, the number of companies has been estimated to be 100, ibid., at 640.

[4] On the use of private military personnel and resulting international law violations see, e.g., Human Rights First, 'Private Security Contractors at War: Ending the Culture of Impunity' (2008), available at www.humanrightsfirst.org.

[5] C. Lehnardt, 'Peacekeeping', in S. Chesterman and A. Fisher (eds.), *Private Security, Public Order: The Outsourcing of Public Services and its Limits* (Oxford University Press, 2010), 197, at 200.

[6] A.B. Munoz-Mosquera and N.P. Chalanouli, 'Regulating and Monitoring PMSCs in NATO Operations', in B. D'Aboville (ed.), Private Military and Security Companies, 35th Round Table on Current Issues of International Humanitarian Law (Sanremo, 6th-8th September 2012) (Milan: International Institute of Humanitarian Law, 2013), at 128.

A more recent development is private security personnel providing protection to merchant vessels off the coast of Somalia.[7]

2. Primary norms

It has sometimes been suggested that private military contractors are mercenaries, and are therefore banned under international law. The International Convention against the Recruitment, Use, Financing and Training of Mercenaries[8] and the Organization of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa[9] prohibit the use of mercenaries, and Article 47 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)[10] confirms the general rule that civilians participating directly in the hostilities are not entitled to a prisoner of war status. These three Conventions share a nearly identical definition, defining a 'mercenary' essentially as any person who is a) specially recruited locally or abroad in order to fight in an armed conflict; b) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation; c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; d) is not a member of the armed forces of a party to the conflict; and e) has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces. There is broad consensus that due to the number of requirements to be met for anyone falling under this definition, and the fact that

[7] N. Ronzitti, 'The use of private contractors in the fight against piracy: policy options', in F. Francioni and N. Ronzitti (eds.), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford University Press, 2011), 37; International Maritime Organization, 'Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area', MSC.1/Circ.1406/Rev.2, 25 May 2012; 'Somalia's Piracy: Armed Guards to Protect British Ships', *BBC Online*, 30 October 2011; C. Bolsover, 'Germany is Close to Deploying "Mercenaries" to Protect Ships from Pirates', *Deutsche Welle online*, 18 August 2011.

[8] International Convention against the Recruitment, Use, Financing and Training of Mercenaries, New York, 4 December 1989, in force 20 October 2001, 2163 UNTS 75.

[9] OAU Convention for the Elimination of Mercenaries in Africa, Libreville, 3 July 1977, in force 22 April 1985, OAU Doc. CM/433/Rev.L.Annex 1 (1972).

[10] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, in force 7 December 1978, 1125 UNTS 3 (Additional Protocol I).

some of them can easily be circumvented, the two Conventions relating to mercenarism and Article 47 Additional Protocol I have little practical relevance.[11]

The most relevant primary norms in the context of private military contractors are human rights law and international humanitarian law. Although soft law like codes of conduct and other forms of voluntary self-regulation do not establish responsibility under international law, they are discussed here as attempts to place some regulation on the companies as private subjects.

2.1 Human rights treaties

The two main issues in the application of human rights treaties are the question of extraterritorial application, and the due diligence required from states to protect human rights – in particular the rights not be arbitrarily deprived of life[12] or arbitrarily detained,[13] the right not to be subjected torture or cruel, inhuman and degrading treatment or punishment –[14] from violations through private actors.

2.1.1 Extraterritorial application of human rights treaties

If a state contracting a company is different from the state where the company operates (the host state), a first question that needs to be addressed is whether human rights treaties apply to the contracting state in its operations outside its territory. Generally, the host state is bound by human rights obligations; the question of whether human rights responsibility is shared with the contracting state or home state depends on whether those states must abide by human rights obligations as well.

[11] Bericht des Schweizer Bundesrates zu den privaten Militär- und Sicherheitsfirmen (2005), n. 3, at 668; E. Gaillard, 'Business goes to war: private military/security companies and international humanitarian law' (2006) 88 IRRC 525, 526.

[12] Article 6 of the International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR).

[13] Article 9 ICCPR, ibid.

[14] Article 7 of the ICCPR, ibid.

The main criterion is control, although the precise circumstances that establish jurisdiction are still unclear.[15] It is more likely that an occupying state is bound by human rights obligations, than a state that merely is present in another state with its armed forces. This issue poses difficulties also when considering obligations of the home state of the company. The host state is often a weak state with little enforcement capacities. By contrast, home states are often strong states (e.g. United States, United Kingdom, France) with better leverage. Therefore, a comprehensive export control system placing private military services under the same control as military goods is arguably desirable. The Montreux Document,[16] which purports to clarify and reaffirm existing obligations of states, speaks of an obligation of the exporting state under human rights law to prevent misconduct of private military personnel.[17] It is not clear what precisely is meant by this. While some scholars have argued that the home state is under an obligation to control exports of private military services from their territory,[18] it is difficult to argue that there is an international law obligation to such an effect. Under human rights law, the home state as such is not under an obligation to protect human rights outside its territory.

[15] See e.g. Human Rights Committee, 'Concluding Observations: United States of America', UN Doc. CCPR/C/79/Add.50 (3 October 1995), para. 284; Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc. HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008), 243, at 245, para. 10; *Lilian Celiberti de Casariego* v. *Uruguay*, Communication No. 52/1979, HRC, UN Doc. CCPR/C/OP/1 (1984), 92, paras. 10.1.-10.3. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, at 179/180, paras. 109, 111; *Loizidou* v. *Turkey*, App. No. 15318/89 (ECtHR, 23 March 1995), paras. 62–64; *Ilaşcu and others* v. *Moldova and Russia*, App. No. 48787/99, (ECtHR, 8 July 2004), paras. 314–316, 331, 392, 393; *R (Al-Skeini)* v. *Secretary of State for Defence* [2007] UKHL 26.

[16] Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, Montreux, 17 September 2008, UN Doc. A/63/467–S/2008/636 (6 October 2008) (Montreux Document).

[17] Montreux Document, ibid., Part One, C.15: 'Home States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.'

[18] F. Francioni, 'The Role of the Home State in Ensuring Compliance with Human Rights by Private Military Contractors', in F. Francioni and N. Ronzitti (eds.), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford University Press, 2011), 93, at 104; O. De Schutter, 'The Responsibility of States', in S. Chesterman and A. Fisher (eds.), *Private Security, Public Order: The Outsourcing of Public Services and its Limits* (Oxford University Press, 2010), 25; R. McCorquodale and P. Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70 MLR 598, at 618.

2.1.2 Due diligence obligations under human rights law

Provided the extraterritorial application of the respective human rights treaty can be established, Article 1 of the European Convention on Human Rights,[19] Article 2 of the International Covenant on Civil and Political Rights (ICCPR),[20] and Article 1 of the American Convention on Human Rights oblige states to 'ensure', 'protect', or 'secure' human rights.[21] These obligations have been interpreted as requiring states to take positive steps in order to prevent the violation of rights through private actors or, if such a violation has occurred, to investigate and sanction the conduct,[22] as has also been confirmed in the Guiding Principles on Business and Human Rights.[23]

What this suggests is that the conduct of private military personnel can generate the responsibility of the contracting state for failure to prevent, or adequately respond to, such conduct, even if it is not clear what role state organs have played in the specific operation. In determining what diligence is due, it is possible to determine factors to be taken into account, such as the risk of violation of international law, which would be assessed, inter alia, on the basis of what private actors are in play – whether, for instance, they are armed or not, as well as the protected group.[24] A crucial factor in assessing the required diligence standard is the fact that the company carries out a potentially hazardous activity on the basis of the contract with the state: considering the contracting state put the company in a position to violate individual rights in the first place, it would be appropriate to require a particular high due diligence standard of the contracting state.

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[19] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (European Convention on Human Rights).

[20] ICCPR, n. 12.

[21] American Convention on Human Rights 'Pact of San José, Costa Rica', San José, 22 November 1969, in force 18 July 1978, 1144 UNTS 123. See also Human Rights Committee, 'General Comment No. 20: Article 7 (Prohibition of torture, or the cruel, inhuman or degrading treatment or punishment)', UN Doc. HRI/GEN/1/Rev.9 (Vol. I) (27 May 2008), 200, at 212, at para. 8; 'General Comment No. 6 (Right to life)', UN Doc. HRI/GEN.1.Rev.9 (vol. I) (27 May 2008), 176, at 177, para. 3; General Comment No. 31, n. 15, 244 at para. 7; *Costello-Roberts* v. *the United Kingdom*, App. No. 13134/87 (ECtHR, 25 March 1993), para. 28; *Velásquez-Rodriguez* v. *Honduras*, IACtHR, (Ser. C) No. 4 (1988), para. 172.

[22] See A. Reinisch, 'The Changing International Framework for Dealing with Non-State Actors', in P. Alston (ed.), *Non-State Actors and Human Right*s (Oxford University Press, 2005), at 79–80.

[23] Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', UN Doc. A/HRC/17/31 (21 March 2011); Human Rights Council, UN Doc. A/HRC/RES/17/4 (6 July 2011) (Guiding Principles on Business and Human Rights).

[24] General Comment No. 31, n. 15, 247, para. 17; *Joaquín David Herrera Rubio and others* v. *Colombia*, Communication No. 161/1983, HRC, UN Doc. CCPR/C/OP/2 (1990), 192, para. 12.

On that basis, to avoid responsibility, the contracting state does not have much discretion in determining what measures to take to protect individual rights. If its private military personnel are armed and deployed in an unstable environment, it must ensure oversight, adequate training, and background vetting of private military personnel – and it might also be obliged to integrate them in the military chain of command, if circumstances warrant the conclusion that such tight control is the only adequate means to prevent violations of international law. If a violation has occurred nonetheless, the state must investigate the case and, if necessary, sanction the person responsible for it.[25]

If flag states allow private military personnel to be present on merchant vessels to defend them against pirates they are under a duty to ensure that human rights are adequately protected, for example by placing private security contractors under regulation.

However, generally the practical effect of the duty to exercise adequate control of the contracting or host state over contractors, or the duty to prosecute, is often limited. In principle, private military companies are subject to the law of the state they operate in.[26] Given that states outsource military functions in an attempt to reduce standing armed forces and costs, private contractors remain in principle outside the chain of command. Moreover, in practice weak states – where the companies conduct much of their business – are likely to be reluctant to exercise jurisdiction on political grounds. Factual dependency severely compromises prospects of the host government enforcing its laws against contractors.[27] In addition, when contracted by a state different from the host state, contractors might benefit from an agreement between the contracting and the host state, extending the immunity granted to state officials and troops to contractor personnel. For example, contractors working for US forces in Iraq were immune from local laws until the withdrawal of US troops in 2009, by virtue of an order issued by the Coalition Provisional Authority (CPA).[28] The lack of

[25] See Human Rights Committee, 'Concluding observations of the Human Rights Committee: Lesotho', UN Doc. CCPR/C/79/Add.106 (8 April 1999), at para. 19; 'Concluding observations of the Human Rights Committee: Guatemala', UN Doc. CCPR/C/79/Add.63 (3 April 1996), at para. 20; *Alonso Eugénio da Silva* v. *Brazil*, IACHR, Case No. 11.598, Report No. 9/00, 24 February 2000, at paras. 33, 40.

[26] C. Bakker, 'Duties to prevent, investigate, and redress human rights violations by private military and security companies: the role of the host state', in F. Francioni and N. Ronzitti (eds.), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford University Press, 2011), 130.

[27] This has been pointed out as a challenge to the implementation of the Montreux Document, B.S. Buckland and A. Burdzy, *Progress and Opportunities, Five Years On: Challenges and Recommendations for Montreux Document Endorsing States* (Geneva: DCAF, 2013), at 6.

[28] CPA Order No. 17 (revised) of 27 June 2004, available at www.refworld.org. The US government sought to extend liability by including it in the troop withdrawal agreement with the Iraqi government. However, that endeavour was abandoned following an incident involving private military personnel killing 17 civilians,

effective prosecution of crimes committed by personnel contracted by the United States in Iraq has resulted in effective impunity of private military personnel.[29] Like states, the UN can also incur responsibility for a lack of due diligence. The organisation can become responsible if it violates its duty to exercise adequate control over the personnel it deploys, or if it failed to take other measures to ensure that the companies carrying out functions in UN peacekeeping operations respect the applicable law. With regard to the obligation to adequately sanction misconduct on the part of private military personnel, it should be noted that the UN can terminate the contract, or demand the removal of the alleged wrongdoer from the area of operation, but has no further means at its disposal to ensure adequate sanctioning of any violation of international law. Thus, in the end, the obligation to effectively sanction misconduct of private military personnel is likely to rest solely on the host state and the state which has contributed the private personnel.

2.2 International humanitarian law

With regard to international humanitarian law, if an occupying state allows private military personnel to violate international humanitarian law, it might be responsible on the basis of Article 43 of the Hague Regulations.[30] In that vein, the ICJ found Uganda, as the occupying power in the Ituri district in the Democratic Republic of the Congo, responsible for its lack of vigilance in preventing the violation of human rights and international humanitarian law, and its violation of the obligation not to tolerate such violence by any third party.[31] This can be interpreted as an obligation for contracting states to ensure that the companies they hire do not violate the laws of armed conflict. For other states, Article 1 of the Geneva Conventions and Additional Protocol I establishes a positive obligation for states 'to ensure respect' for

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Congress of the United States, Congressional Budget Office, *Contractors' Support of US Operations in Iraq* (Washington, DC, August 2008), at 23; D. Pallister, 'Foreign security teams to lose immunity from prosecution in Iraq', *The Guardian*, 27 December 2008.

[29] See Human Rights Council, 'Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies – Submission by the Working Group on the use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination', UN Doc. A/HRC/WG.10/2/CRP.1 (6 August 2012), para. 29; 'Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination', UN Doc. A/HRC/15/25/Add.3 (15 June 2010) (advanced edited version).

[30] Regulations concerning the Laws and Customs of War on Land, annexed to the Convention (IV) respecting the Laws and Customs of War on Land, the Hague, 18 October 1907, in force 26 January 1910, 1 Bevans 631 (Hague Regulations).

[31] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, Judgment, ICJ Reports 2005, 168, at paras. 178, 179.

international humanitarian law. Moreover, while there is no obligation for home states to put a systematic export control system in place, the Geneva Conventions impose an obligation on all states, including the home state, to prevent and prosecute grave violations of international humanitarian law.[32]

2.3 Complicity

Another possibility of establishing responsibility of the home state is on the basis of complicity (Article 16 ILC Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)).[33] On that basis, the home state of the company can be responsible for aiding and abetting the host state in committing violations of international law through private contractors. Similarly, the contracting state can be complicit in violating human rights and international humanitarian law on the part of the host state. A prerequisite is that the complicit state is aware of the circumstances making the conduct of the assisted state wrongful, and that the state gives the aid with a view to facilitating the commission of that act.[34]

2.4 'Responsibility' of companies: international criminal law, the lack of state regulation, and business initiatives and codes of conduct

There are no human rights obligations imposed on the companies or their personnel as a matter of international law.[35] As a consequence, there can be no shared responsibility under international law between these private subjects and international law subjects.

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[32] Articles 49, 50 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 31 (Geneva Convention I); Articles 50, 51, Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 85 (Geneva Convention II); Articles 129, 130 Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135 (Geneva Convention III); Articles 131, 146, 147 Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 287 (Geneva Convention IV); Articles 85, 86 Additional Protocol I, n. 10.

[33] Articles on Responsibility of States for Internationally Wrongful Acts, ILC *Yearbook* 2001/II(2) (ARSIWA).

[34] J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), 148, see discussion of Commentary to Article 16, para. 3.

[35] C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd edn (Oxford University Press, 2008), at 108, 388; For a different view see A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006).

By contrast, international humanitarian law is, in an exception to the rule that international law addresses states only, also directed at individuals,[36] although it is still a matter of uncertainty whether these provisions are binding also on individuals as individuals, and not as state agents.[37] A violation of international humanitarian law can generally trigger at least international criminal responsibility of contractors who are state agents under international law.[38] This individual responsibility might coincide with the international responsibility of one or several states. For example, if private personnel tortured prisoners, it is conceivable that the individual contractor has committed a crime against humanity under international criminal law, while the contracting state is responsible under international law for having violated the prohibition against torture, and the host state would be considered having violated its duty to prevent the act. While no such claims of individual criminal responsibility have been made before international fora, the victims of abuses committed by private military personnel in the Iraqi prison of Abu Ghraib pursued tort claims before US courts arguing, inter alia, that the defendants had committed war crimes.[39] This argument concerns the specific US tort law question of whether the particular US statute on which those claims are based, the Alien Tort Claims Act (ATCA), covers violations of international law, which are generally addressed at states.[40] Some courts have answered that question in the negative.[41] Moreover, companies have, partly successfully, relied on the US law doctrine of sovereign immunity to shield themselves from ATCA claims.[42] These difficulties, combined with a

[36] As confirmed by the Montreux Document, n. 16, Part One, E.26.

[37] C. Lehnardt, 'Individual Liability of Private Military Personnel under International Criminal Law' (2008) 19 EJIL 1015, 1018.

[38] J. Cockayne, 'Private Military and Security Companies', in A. Clapham and P. Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014), 624, 649. Indeed, private military contractors have been accused of having committed or assisted in various crimes against civilians and detainees. Apart from the abuse of prisoners at Abu Ghraib, employees hired as security guards have killed civilians in Iraq in unprovoked shootings and participated in attacks against civilians in Colombia, see Human Rights First, 'Private Security Contractors at War', n. 4, at 6; T.C. Miller, 'US Pair's Role in Bombing Shown', *Los Angeles Times*, 16 March 2003.

[39] Cockayne, ibid.

[40] Alien Tort Claims Act; according to 28 USC § 1350, US district courts have 'jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States' (ATCA). See *Filártiga* v. *Peña-Irala*, 630 F. 2d 876 (2d Cir. 1980); T. Garmon, 'Domesticating international corporate responsibility: holding private military firms accountable under the Alien Tort Claims Act' (2003) 22 TJICL 325.

[41] *Ibrahim* v. *Titan Corp*, 391 F. Supp. 2d 10 (D.D.C. 2005), at 14: 'Those authorities generally address official (state) torture, and the question is whether the law of nations applies to private actors like the defendant in the present case … in the D.C. Circuit the answer is no.'; similarly *Al Shimari et al.* v. *CACI Premier Technology*, 657 F. Supp. 2d 700 (E.D. Va. 2009), at 731-732.

[42] See Cockayne, 'Private Military and Security Companies', n. 38, 642-643; C. Lehnardt, *Private Militärfirmen und völkerrechtliche Verantwortlichkeit* (Tübingen: Mohr, 2011), 58-64.

general tendency of interpreting the ATCA more narrowly than in the past, indicate that in the future individual responsibility of contractors is unlikely to be established on that basis.[43]

Considering the numerous incidents involving private personnel that resulted in international law violations, and given the due diligence obligations particularly of the host state and the contracting state set out above, the obvious solution would be for states to place the companies under stricter regulation and supervision. However, in practice, generally states have preferred 'voluntary' regulation over 'top down' or state regulation.

Attempts to clarify existing international law obligations of states, and to provide a clearer regulatory framework for the use of the companies, include a draft Convention establishing obligations of states specifically with regard to private military companies, drafted by an intergovernmental working group established by the UN Human Rights Council,[44] and the 2008 Montreux Document, the end result of a consultation process launched by the Swiss federal government and the International Committee of the Red Cross (ICRC).[45] While the draft Convention has met with criticism, partly because it goes beyond reaffirming existing obligations,[46] the non-binding Montreux Document has found broader support.[47] It not only purports to clarify and reaffirm international law obligations on the part of the home state, the host state and the contracting state, but also sets out good practices for them in relation to private military companies during armed conflict. For example, contracting states should contractually require companies to act in conformity with relevant national law, international humanitarian law, and international human rights law. Host states should have in place appropriate rules on the use of force by private contractor personnel.[48] In fact, these examples of good practices are consequences of international law obligations as established above. However, in practice, the contracts between states and private military companies that are

[43] In its decision of 25 June 2013 regarding *Al Shimari et al.* v. *CACI*, n. 41, relying on *Esther Kiobel et al.* v. *Royal Dutch Petroleum Co., et al.*, 621 F. 3d 111 (S. Ct., 17 April 2013), the District Court for the Eastern District of Virginia dismissed the claim on the basis that ATCA, n. 40, does not provide jurisdiction for alleged violations that have occurred outside US territory.

[44] 'Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council', Annex to the Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN Doc. A/HRC/15/25 (2 July 2010).

[45] Montreux Document, n. 16.

[46] See Comments from Member States and non-governmental entities, UN Doc. A/HRC/15/25, III.D., para. 70. E.g. according to Article 4(3) of the draft Convention, n. 44, states cannot 'delegate or outsource inherently State functions to PMSCs'. No such international law obligation exists.

[47] Currently 50 states and three international organisations, October 2014, see www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html.

[48] Montreux Document, n. 16, Part Two, A.IV.15 and B.IV.43.

publicly available do not include international law/local law clauses,[49] and if they do, there is thus far no evidence that these clauses have actually been enforced.[50] Equally, for reasons stated above, the host state is unlikely to enforce its national laws vis-à-vis the companies.[51]

Due to objection on the part of states to establish a new binding set of rules for them with regard to the use of private contractors, combined with a sense that despite existing obligations of states, somehow private military personnel occupy a legal void, there has been a number attempts to provide some regulation of the companies through voluntary industry-level initiatives. For example, companies have established their own codes of conduct, which 'translate' international law obligations for private companies operating in weak states.[52] Such initiatives have been met with criticism due to the fact that they do not provide for enforcement mechanisms. The International Code of Conduct (ICoC) for Private Security Service Providers,[53] has been promoted as an initiative that features both an oversight mechanism and a third party claims process. It includes a set of principles – such as that signatory companies and their personnel will not engage in torture – that serve as a foundation for more concrete standards to be articulated by the companies and their respective national authorities. The ICoC Association may suspend membership in case of non-compliance of the Code;[54] however, the procedures for monitoring its members' activities are yet to be developed.[55] It therefore remains to be seen whether the ICoC in fact enhances accountability of the companies.

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[49] L.A. Dickinson, 'Contract as a tool for regulating private military companies', in S. Chesterman and C. Lehnardt (eds.), *From mercenaries to market* (Oxford University Press, 2007), 217, at 221.

[50] The US company 'Blackwater' (after several rebranding attempts now known as 'Academi') continued to work for the US government in both Iraq and Afghanistan in spite of several shooting incidents resulting in dead civilians; D. Hedgpeth, 'State Department to renew deal with Blackwater for Iraq security', *Washington Post*, 5 April 2008; J. Warrick, 'GAO blocks contract to firm formerly known as Blackater/Xe Services', *Washington Post*, 16 March 2010.

[51] See subsection 2.1.2 above.

[52] On business and human rights initiatives generally see S. MacLeod, 'The Role of International Regulatory Initiatives on Business and Human Rights for Holding Private Military and Security Contractors to Account', in F. Francioni and N. Ronzitti (eds.), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford University Press, 2011), 343.

[53] International Code of Conduct for Private Security Service Providers, 9 November 2010, available athttp://icoca.ch/en/the_icoc.

[54] Article 12.2.7. of the Articles of Association, available at http://icoca.ch/en/articles_of_association.

[55] See www.icoca.ch/en/monitoring.

3. Secondary norms: Attribution of conduct of private military personnel to the contracting state

The principal problem with regard to secondary norms is the question of attribution to the contracting state.

If private military companies are contracted by a state, it seems intuitive that that state is, in some way or another, responsible for the conduct of the contractors. However, while the ILC's ARSIWA offer a welcome focus point for the discussion on general questions on state responsibility, there is not much certainty regarding the details of those generally worded principles, less so with regard to private military companies.

The basic rule is that conduct of any state organ is considered an act of that state.[56] Consequently, the state will be responsible for the conduct of a state organ. Typically, however, private military personnel remain outside the structures of the state. Yet, the law of state responsibility, while taking the formal organisation of a state as a starting point, takes also into account how states actually organise themselves. This means that also persons who are not part of a formal organ of the state can trigger its responsibility, provided they act on behalf of the state. Courts have attributed private conduct to the state also where the private entity was authorised to exercise elements of governmental authority.[57]

At first glance private military companies would be an obvious example of non-state actors exercising elements of governmental authority. Yet the application of the principle of attribution is difficult because it centres on the notion of 'governmental authority' – the definition of which is inevitably political, and thus not only varies from region to region but also evolves over time. It is therefore not surprising that there is no international consensus as to what constitutes the exercise of governmental authority. Functions which, for example, the ILC, the Iran-United State Claim Tribunal, and the Inter-American Court of Human Rights have identified as constituting the exercise of elements of governmental authority include the detaining and disciplining of individuals;[58] seizure of property;[59] and the collection of military intelligence.[60] Consequently, although there is little prospect of a clear definition of

[56] Article 4(1) ARSIWA, n. 33.
[57] Article 5 ARSIWA, ibid.
[58] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 34, 100, see discussion of Commentary to Article 5, para. 2.
[59] *Hyatt International Corporation* v. *Iran*, 9 Iran-USCTR 72 (1985-II).
[60] *Case of the Rochela Massacre* v. *Columbia*, IACtHR, (Ser. C) No. 163 (2007), paras. 101-102.

the concept of governmental authority, some activities are arguably so commonly regarded as 'core governmental functions' that their performance by private companies can be said to constitute the exercise of governmental authority. As a result, the conduct of 'CACI' personnel at Abu Ghraib, who were hired to conduct interrogations; the conduct of 'Executive Outcomes' and 'Sandline International', who fought wars alongside or in place of the governments' armed forces in Angola, Sierra Leone, and Papua New Guinea; and the conduct of the contractors guarding the Erez crossing in Gaza,[61] would be attributed to the states that had contracted them. Yet, in practice, it has not been suggested that the respective companies have in fact acted for the states that had contracted them.

This is also true with regard to contractors protecting persons or buildings. This field of activity constitutes a significant source of revenue for the companies, and most incidents in Iraq where civilians were harmed occurred in this context. The classification of individual or static protection as falling under the principle laid down in Article 5 of the ARSIWA is sometimes rejected, because the exercise of the right to self-defence or help to others is a right anyone has regardless of status.[62] However, if private military personnel provides protection services to a government official, it is more convincing to argue that the latter is not only protected as a private individual, but as a representative of his government.[63] Accordingly, in such cases protection services primarily serve the functioning of the state, which would militate in favour of classifying such activities as the exercise of governmental authority.

Another indication that international law considers certain functions as the exercise of governmental authority, is that it specifically obliges or allows states to undertake certain activities. For example, Article 107 of the UN Convention on the Law of the Sea[64] provides that 'a seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service authorized to that effect', suggesting that if private military personnel were authorised by a state to seize pirate ships, their actions are considered as exercise of governmental authority of

[61] See Program on Humanitarian Policy and Conflict Research (HPCR, Harvard University), 'Private Security Companies in the Occupied Palestinian Territory (OPT): An International Humanitarian Law Perspective', Policy Brief, March 2008, available at www.hpcrresearch.org/sites/default/files/publications/PSCbrief.pdf.

[62] C. Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19 EJIL 989, at 992.

[63] See also Articles 22(2), 29 Vienna Convention on Diplomatic Relations, Vienna, 18 April 1961, in force 24 April 1964, 500 UNTS 95; and Articles 31(3), 40 Vienna Convention on Consular Relations, Vienna, 24 April 1963, in force 19 March 1967, 596 UNTS 261.

[64] United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS 3.

that state, and thus can be attributed on the basis of Article 5 ARSIWA.[65] Moreover, should states contract private military companies to hunt pirates operating off the coast of Somalia, this is likely to fall under Article 5 of the ARSIWA.[66] Similarly, if oil pipelines are guarded by private military personnel in a situation of occupation, this can be seen as a means to fulfil the contracting state's obligation to restore and maintain law and order in the occupied territory.[67]

Where the conduct in question cannot be said to constitute the exercise of governmental authority, or where no authorisation exists, private conduct can also be attributed to the state when it is carried out on the instructions of the state, or where the private actor is under state direction or control.[68] A state hiring a firm and instructing it to abuse prisoners is a fairly clear-cut case. Much more complex is the situation in which no such instructions exist, but where the state played a role in the preparation and in the implementation of the operation by directing or controlling it.[69]

The ILC noted that for the purpose of attribution, a 'real link' between the private person or group and the state machinery is required.[70] Some commentators regard the contract between a private military company and a state as sufficient to establish such a link.[71] However, the Montreux Document provides that 'entering into contractual relations does not in itself engage the responsibility of' the contracting state.[72]

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[65] Ronzitti, 'The use of private contractors in the fight against piracy', n. 7, at 41.

[66] Article 105 of the UN Convention on the Law of the Sea, n. 64. See Ronzitti, ibid., at 42.

[67] Article 43 of the Hague Regulations, n. 30.

[68] Article 8 ARSIWA, n. 33.

[69] *Prosecutor* v. *Tadić*, Judgment, ICTY Case No. IT-94-1-T, T. Ch., 7 May 1997, at paras. 588, 605, 606; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Merits, ICJ Reports 1986, 14.

[70] Crawford, *The International Law Commission's Articles on State Responsibility*, n. 34, 110, see discussion of Commentary to Article 8, para. 1.

[71] K. Nieminen, 'The Rules of Attribution and the Private Security Contractors at Abu Ghraib: Private Acts or Public Wrongs?' (2004) 15 FYIL 289, at 316; R. Wolfrum, 'State Responsibility for Private Actors: An Old Problem of Renewed Relevance', in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter* (Dordrecht: Nijhoff, 2005), 423, at 434.

[72] Montreux Document, n. 16, Part One, A.7.

4. Private military companies and responsibility under international humanitarian law: Attribution under Article 91 Additional Protocol I

In the context of violations of international humanitarian law in an international armed conflict, international responsibility may also be incurred on the basis of Article 91 of Additional Protocol I, according to which a '[p]arty to the conflict ... shall be responsible for all acts committed by persons forming part of its armed forces'. The provision is a *lex specialis* to Article 7 of the ARSIWA, which provides for responsibility of the state only if its organ acts in that capacity.[73] Combatants, or armed forces, are defined in Article 43(1) of Additional Protocol I and Article 4(A) of Geneva Convention III.[74]

The proximity of private military personnel to the armed forces, combined with an appearance that makes them often indistinguishable from their military counterparts, has sometimes led to the assumption that they are combatants. Yet, from an international law perspective there are only two ways of acquiring combatant status, both depending on the affiliation to a party of the conflict. Article 4A(1) of Geneva Convention III determines that the following category of persons is entitled to prisoner of war status as a consequence of *de jure* combatant status:

> Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

Whereas subparagraph 2 addresses *de facto* combatant and prisoner of war status:

> Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
>
> a) that of being commanded by a person responsible for his subordinates;
>
> b) that of having a fixed distinctive sign recognizable at a distance;
>
> c) that of carrying arms openly;
>
> d) that of conducting their operations in accordance with the laws and customs of war.

[73] *Armed Activities*, n. 31, paras. 214-220; J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules* (ICRC/Cambridge University Press, 2005), 530.
[74] Geneva Convention III, n. 32.

Article 43(1) of Additional Protocol I encompasses both categories of combatants (see Article 43(2) of Additional Protocol I), and supplements Article 4A of Geneva Convention III to the extent applicable:

> The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

Although the wording of the requirements of 'belonging to a Party to the conflict' and 'armed forces of a Party' as such do not exclude contractors, who are not contracted to fight, but are nonetheless armed – as, for example, security guards – the provisions should be understood more narrowly. As stated above, classification as combatant implies authorisation to fight.[75] Where a state has made it clear that a person is not entitled to fight, there is no room for considering that person a combatant. This is so because it is the sovereign right of states to organise their armed forces.[76] In most cases, private military personnel are excluded from combatant status on the ground that they were not contracted for that purpose. If contractors are given the status of civilians accompanying the armed forces,[77] or if the contracting state makes it otherwise clear that the company is contracted for 'defensive services' only, these are strong indications that the state did not authorise them to fight. While it is clear that contractors that are in fact authorised to fight – for example, by contract or tacit agreement – can qualify as combatants regardless of the formal status given to them by the contracting state,[78] the fact alone that private military personnel ultimately do take part in hostilities does not make them combatants. This is a separate question pertinent to their individual criminal accountability. Accordingly, except for those instances where contractors are, in fact, instructed to fight, it is unlikely that their conduct can be attributed to the contracting state and that the responsibility of that state can be established on the basis of Article 91 Additional Protocol I. Private military personnel contracted by the US to operate in war zones, for

[75] Article 43(2) of Additional Protocol I, n. 10.

[76] M. Bothe, K.J. Partsch, and W.A. Solf, *New Rules for Victims in Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions* (Dordrecht: Nijhoff, 1982), 232; C. Schaller, 'Private Security and Military Companies Under the International Law of Armed Conflict', in T. Jäger and G. Kümmel (eds.), *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects* (Wiesbaden: VS Verlag, 2007), 345, at 348. See also ICRC, 'Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 90 IRRC 991, at 1011.

[77] Article 4A(4) of Geneva Convention III, n. 32.

[78] K. Ipsen, 'Combatant and Non-Combatants', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford University Press, 2008), 79, at 82.

example, are formally prohibited from fighting.[79] If contractors are instructed to fight, and thus responsibility can be established, there is little room for shared responsibility, as the contractors' conduct can be attributed only to the party to the conflict which instructed them to fight.

5. Conclusion

In principle situations of shared responsibility can arise when contractors from state A, contracted by state B, operate in state C. In such situations, it is at least conceivable that both the contracting state and the host state are cumulatively responsible,[80] if private military personnel commit human rights or international humanitarian law violations. The contracting state might be responsible on the basis of attribution of such conduct, and the host state on the basis of failing to exercise due diligence.

While establishing the responsibility of the contracting state is possible in theory, notions such as governmental functions or control are matters of uncertainty. More fundamentally, determining responsibility might be more difficult in practice. Establishing responsibility on the basis of attribution requires, for example, that there have been instructions to shoot indiscriminately at civilians, or that the state has controlled the contractors engaging in human rights abuses. If the contracting state is not the state in which the contractors operate, an additional problem on the level of primary norms is whether human rights law binds the state in its operations abroad.

This might be one reason why in practice emphasis has been less on invoking state responsibility on the basis of attribution, and more on pointing to states' obligations to ensure control and regulation of private military companies. Generally, the contracting and the host state are under an obligation to place private military companies under tighter control. However, although occasionally – after highly publicised incidents like the Nisour Square shootings[81] – there have been public expressions of commitment to more adequate control,

[79] Department of Defense, Instruction No. 3020.50, 22 July 2009, available at www.dtic.mil/whs/directives/corres/pdf/302050p.pdf.

[80] See P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359, at 368-369.

[81] In 2006, military contractors working for the US Department of Defense shot at Iraqi civilians, killing 17 and injuring 20 in Nisour Square, Baghdad. The following FBI investigation concluded that at least 14 of the

since private military contractors have emerged as significant military actors on the international plane, there has been no significant progress in terms of domestic or international regulation. While the Montreux Document reaffirms that human rights treaties and international humanitarian law still apply when private military contractors are used, actual implementation and enforcement of these standards is still missing. A number of factors account for this finding. Discharging international law obligations to exercise due diligence with regard to contractors is costly, both in terms of resources and manpower. Tighter regulation, or even integration of contractors in the chain of command, would contradict the very reason for outsourcing in states that wish to reduce their armed forces and related costs. Importantly, the states in which contractors typically operate often have not the capacity to place them under adequate control and enforce existing regulation. Lastly, states are unlikely to agree to, or do, anything that will substantially curtail their use of the private military industry.[82] It is therefore unlikely that this state of affairs will change.

Instead, there is a tendency to shift the focus away from the responsibility of states, and to attempt to provide some soft law regulation by means of business initiatives and codes of conduct. While these might be useful as complimentary means of regulating the use of the companies, placing too much reliance on such measures is unlikely to provide an adequate solution. At worst, they amount to little more than window-dressing and deflect from the fact that the involved states – the home state, the contracting state, the host state – have obligations under human rights and international humanitarian law that must be met.

shootings had been unjustified acts of excess force and violated deadly force-use rules; D. Johnston and J.M. Broder, 'F.B.I. says guards killed 14 Iraqis without cause', *The New York Times*, 14 November 2007.

[82] Cockayne, 'Private Military and Security Companies', n. 38, 630.