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The Second Largest Force: Private Military Contractors & State Responsibility

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The Second Largest Force:
Private Military Contractors & State Responsibility

Markus Wagner[1]

The paper is concerned with private military contractors, their expanding use and the challenges this poses to a system in which private actors – at least so far – have been considered to be acting outside of existing international accountability structures.

The paper proceeds from a brief historical overview of the use of non-state military forces to a delineation of what private military forces are (and what they are not), what distinguishes them from mercenaries (and what does not). This is followed by an analysis of how private military forces' conduct can be attributed to the states employing them, thereby contributing to the debate over the advantages and disadvantages of their proliferating use in recent conflicts.

The article proposes a range of legal and policy rationales to reassess the arguments that are being advanced for the use of private military forces in today's conflicts – with respect to their legal status, their political utility and their impact on democratic accountability mechanisms.

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"If the consent of the citizens is required in order to decide that war should be declared […] nothing is more natural than they would be very cautious in commencing such a poor game, decreeing for themselves all the calamities of war."

Immanuel Kant[2]

I. INTRODUCTION

There has been a strong development towards privatization in a number of areas, such as telecommunication and mail services; a number of states – both domestically and abroad – have privatized or are in the process of privatizing parts of their social service[3] and prisons.[4] The former may serve as a positive instance of privatization, where consumers have benefited to a considerable extent from privatization through competition, falling prices, accelerated innovation of new technologies and (sometimes) better service. While the privatization of telecommunication and mail service is largely uncontested, the widely hailed process of privatization in other areas might also have its limitations. It might be important to ask questions concerning the limitation of privatization. One area where such a development is taking place is the ongoing privatization of law enforcement. While there has not yet been a handover of the prosecution of crime and judicial decision-making in the field of criminal law, law enforcement has seen a considerable influx of private enterprise elements. So has the area of prison services. Whether one can speak of the privatization of public power domestically in a more general sense has yet to be seen. A comparison of studies in this field from the 1970s with the numbers that are available today indicates that this may be the case.[5]

A similar development can be observed on the international level. There is a growing tendency to privatize public power that is directed outside of national borders through the

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[2] Immanuel Kant, "Perpetual Peace" in *The Enlightenment* (Peter Gay ed., 1974), 790 et seq.
[3] Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. Rev. 1739 (2002).
[4] The literature – especially in the United States – has become extremely voluminous, see e.g. Warren J. Ratliff, *The Due Process Failure of America's Prison Privatization Statutes*, 21 Seton Hall Legis. J. 371, 397 (1997); *Developments in the Law: The Law of Prisons: III. A Tale of Two Systems: Cost, Quality, and Accountability in Private Prisons*, 115 Harv. L. Rev. 1868, 1871 (2002); David E. Pozen, Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom, 18 J.L. & Politics 253 (2003); GERALD G. GAES, MEASURING PRISON PERFORMANCE: GOVERNMENT PRIVATIZATION AND ACCOUNTABILITY (2004); CURTIS R. BLAKELY, AMERICA'S PRISONS: THE MOVEMENT TOWARD PROFIT & PRIVATIZATION (2005); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT (2007).
[5] TREVOR JONES AND TIM NEWBURN, PRIVATE SECURITY AND PUBLIC POLICING (1998); GEORGE O'TOOLE, THE PRIVATE SECTOR: PRIVATE SPIES, RENT-A-COPS, AND THE POLICE-INDUSTRIAL COMPLEX (1978); see also Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 Conn. L. Rev. 879, 896-899 (2004).

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increasing employment of private military firms (PMFs) or mercenaries.[6] If one conceives of the state as an entity through which the constitutive polity is willing (and must be able) to exercise such public power with an attendant mechanism of responsibility and accountability, then such a development is deeply troublesome.[7] Although the Weberian ideal of the monopoly of force in the hands of the state[8] has probably never been fully realized, there are aspects of this vision that have seemed to serve Western democracies well over the last century.[9]

The standard line of argument in favor of a privatized military force goes as follows: they provide the same service in an economically efficient way and can be deployed more rapidly, and are overall easier to manage.[10] Some of these claims may be true – indeed it is not

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[6] At least one author who has served in Somalia as a legal advisor to the US military and the United Nations proposed that UN missions should no longer consist of government forces as was and still is the case today, but rather that the UN should contract such missions out to "private organizations to raise and command an army (or navy, an air force, or whatever combination of them is appropriate) – a private force specifically tailored for the mission." Frank W. Fountain, *A Call for* '*Mercy-Naries*'*: Private Forces for International Policing*, 13 Mich. St. U.-DCL J. Int'l L. 227, 228-229 (2005). For a highly positive portrayal of the private military industry, see a previous version of the International Peace Operations Associations (IPOA) website, now available at <http://ipoaworld.org/eng/ > (visited March 10, 2009), which proclaimed that there exists "a frustration that more is not being done to ensure that international efforts to end conflicts succeed", vying for a "clear recognition that the private sector can play a larger role to fundamentally improve peace and stability operations." The current version of the website is more cautious when it describes IPOA as being "committed to raising the standards of the peace and stability operations industry to ensure sound and ethical professionalism and transparency in the conduct of peacekeeping and post-conflict reconstruction activities." IPOA is a trade group of private military firms. For an insightful discussion, see Canadian Broadcasting Corporation Radio, Private Military Companies as UN peacekeepers, September 10, 2003, http://www.cbc.ca/dispatches/sept03june04.html (visited May 5, 2006).

[7] *See* PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT, 7-12 (2007) for a discussion on the diminishing accountability of the state due to recent increased reliance on the private sector. See also Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 Boston College L. Rev. 989, 1022 (2004-2005); Zoe Salzman, Private Military Contractors and the Taint of a Mercenary Reputation, 40 N.Y.U. J. Int'l L. & Pol. 853, 872 (2007-2008).

[8] MAX WEBER, POLITIK ALS BERUF (5th ed., 1968). See the following section for an analysis of the relevant short time period in which a quasi- or near-monopoly for the use of force has existed.

[9] Although conscription based armies are on the decline today, one of the fundamental ideas – apart from not wanting a "state within a state", i.e. an additional powerful player that could threaten the traditional legislative, executive and judicial powers – was to create a close relationship between the armed forces and the rest of society, where the latter was constantly able to exert influence on the former. The German concept of "citizens in uniform" (*Staatsbürger in Uniform*) presented the very epitome of this line of thought, although judging by the public debate over the abolishment of mandatory military service there, the argument's force has diminished greatly.

[10] For a highly positive portrayal of the private military industry, see a previous version of the International Peace Operations Associations (IPOA) website, now available at < http://ipoaworld.org/eng/ > (visited March 10, 2009), which proclaimed that there exists "a frustration that more is not being done to ensure that international efforts to end conflicts succeed", vying for a "clear recognition that the private sector can play a larger role to fundamentally improve peace and stability operations." The current version of the website is more cautious when it describes IPOA as being "committed to raising the standards of the peace and stability operations industry to ensure sound and ethical professionalism and transparency in the conduct of peacekeeping and post-conflict reconstruction activities." IPOA is a trade group of private military

difficult to imagine that private companies are more efficient in transporting soldiers and their equipment in the vicinity of the battlefield and in providing for food and sanitary services. It has also been argued that self-regulating market forces would force out inefficient companies and validate those that are most successful (though it is doubtful what the measure for success would be). Nevertheless, there is a feeling of uneasiness about entrusting private companies with such tasks. While even current military conflicts are a far cry from being fought according to the chivalristic notion underlying the laws of war, it is nevertheless imperative to attempt to circumscribe not only the responsibilities of the private entities (which could be done and is done through the contracts between governmental agencies and the private firms), but also the responsibility of states employing them.[11]

The paper will proceed as follows: a brief historical overview of the development towards what has now become known as PMFs (II.) is followed by a section highlighting the differences and parallels of PMFs with mercenaries (III.); the paper then turns to how we might think about the conduct of these PMFs within the sphere of international law and suggests that the acts of private military companies are best attributed to the state or entity employing such firms (IV.), before making a few concluding remarks (V.).

II. HISTORICAL OVERVIEW

At first glance, PMFs appear to be a relatively new development. This perception does not withstand historical scrutiny. The participation of private actors in warfare is about as old as warfare itself and has continued to exist throughout the ages. The circumstances of their deployment, their structure, their abilities and the tasks entrusted to them have however undergone considerable changes over time.

Maybe ironically, the oldest accounts of mercenaries go back to the army of King Shulgi of Ur in Mesopotamia and what is now Iraq (ca. 2094-2047 B.C.) and continued throughout Western ancient history.[12] During the Middle Ages horsemen became the weapon of choice –

[11] For some, the movement towards privatization of military endeavors should either be pushed back entirely or at least into the areas of support or maintenance. Such a push-back seems highly illusionary and hence this paper will not pursue such an agenda. Despite the general notion of this article against the employment of PMFs / raising the level of accountability of states employing PMFs, it is important to stress that the behavior of PMF personnel should not necessarily be characterized in negative terms.

[12] PETER W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2003).

their advantage on the battlefield came from their additional armor, higher speed and power of the horses, which enabled them to carry longer, heavier and thus more effective weaponry. War had become a business for professionals. In France, before turning into a highly centralized state with Paris as its focal point in the 13th century under Philip II.,[13] power was spread between the royal house and the feudal lords to such an extent that the crown eventually decided to build up its own army through the "hiring of bands of mercenary troops, and the raising of a paid soldiery at home".[14] The enlargement of the royal domain and the improved efficiency of the administration led to the creation of a "true national soldiery".[15] The city states in Italy demanded a military class beyond what the countryside or the available wars would support. These individuals, termed *soldi*, ranged in status from landless knights, foot soldiers (*fanti*, i.e. boys) or specialists troops such as those using cross-bows, worked as "free lances", deploying for whoever offered the best pay, but when a war ended they were left stranded in foreign lands with no employment.[16] Soon they banded together and formed "companies",[17] traveling together, supporting and protecting one another and searching for employment as a group – and sustaining themselves by harassing or blackmailing individuals or towns in between campaigns.[18] Soon, these groups became known as "free companies" – thereby challenging the traditional feudal hierarchical and fixed power structures of the time.[19] Italian city states came to rely heavily on these mercenaries by the 13th century[20] and led to a greater degree of professionalization of the trade. The mercenary bands acquired considerable power during the 14th century, with some having no fewer than 6,500 individual members.[21] In tandem with their successes, the groups gained a reputation as vicious and barbaric. Machiavelli wrote that "mercenaries […] are useless and

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[13] EDGARD BOUTARIC, INSTITUTIONS MILITAIRES DE LA FRANCE AVANT LES ARMEES PERMANENTES, SUIVIES D'UN APERÇU DES PRINCIPAUX CHANGEMENTS SURVENUS JUSQU'A NOS JOURS DANS LA FORMATION DE L'ARMEE, Paris, 242-243 (1863).
[14] WILLISTON WALKER, ON THE INCREASE OF ROYAL POWER IN FRANCE UNDER PHILIP AUGUSTUS 1179-1223, 141 (1888).
[15] *Ibid.,* at 140 and 143.
[16] Singer, *supra* note 12, 26.
[17] The term company derives from *con pane*, referring to the bread the troops received. Although different etymological explanations are proffered, most refer to the word companion, formed of the words *con pane*. This eventually was transformed to the old French term *compaignie*, meaning body of soldiers. See THE OXFORD ENGLISH DICTIONARY, volume III, 589-590(J.A. Simpson and E.S.C. Weiner eds, 2nd ed., 1989) (company) and 587-588 (companion).
[18] Singer, *supra* note 12, 24.
[19] Singer, *supra* note 11, 24.
[20] MICHAEL HOWARD, WAR IN EUROPEAN HISTORY 2 (1976).
[21] *Ibid*., 53. The so-called Grand Catalan Army eventually turned against their former employer and conquered Athens in 1311, setting up their own duchy in Athens which lasted for more than 60 years.

dangerous. […] [They] are disunited, ambitious, undisciplined, and disloyal."[22] Indeed he went so far as to see the reason for Italy's decline during his time in the reliance of Italian cities on mercenaries. The decline in importance of the medieval private military company continued when King Charles VII. of France managed to solve the problem of the free companies by offering them constant pay – a process begun two centuries earlier under Philip Augustus. Under Charles VII., some mercenaries evolved into a standing army, while others were forcibly disbanded.[23]

The so-called Westphalian system increased the importance of the state as the central actor – including standing armies made up of citizenry as opposed to hired soldiers. The increased use of advanced technology meant that only little training was necessary to establish a powerful army; the rise of the tax-dependent state meant that it was no longer feasible for the nobility to accept marauding bands of mercenaries which harassed the population in times of peace, thus diminishing the state tax base; citizens became more reluctant to accept rulers going to war for their personal profit; standing armies were considered to be more reliable in the long run and the number of individuals that could be mobilized was higher and the growing identification with the construct of the state by its citizens. This process reached its climax in the Western world in the first half of the 20th century and meant that such mobilization was less dependent on the pay received, but rather the ability to portray an external power as a credible threat.[24]

III. PRIVATE WARRIORS – TYPOLOGY, NEGATIVE DELINEATION AND AN ATTEMPT AT A POSITIVE DEFINITION

1. Negative Delineation – Dissimilarities with Other Phenomena

What sets mercenaries apart from ordinary soldiers is a combination of characteristics that include independence, motivation and method of recruitment. Mercenaries are more

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[22] The Italian version reads: "Le mercenarie e aussiliarie sono inutile e periculose […]; perché le sono disunite, ambiziose, sanza disciplina, infidele […]." NICCOLÒ MACHIAVELLI, IL PRINCIPE E DISCORSI SOPRA LA PRIMA DECA DI TITO LIVIO 67 (1970).
[23] Howard, *supra* note 20, 18.
[24] Though efficient, this approach had its obvious weakness in that the rulers were increasingly reliant on their own citizenry. DEBORAH D. AVANT, THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY 10-15 (2005), listing numerous firms, but by no means all., arguing that external shock and not ideological change was responsible for the abolition of mercenary armies.

independent than enlisted soldiers, their only tie to the entity they are fighting for being some kind of contractual arrangement. There is no direct punishment for a private contractor laying down his weapons in the battlefield, while enlisted soldiers in various countries would face disciplinary action for desertion. In the same vein, leaving a PMF prior to the end of the contractual commitment does not carry with it the same ramifications for subsequent applications for professional positions in other areas as being dishonorably discharged from a regular army. In terms of motivation, regular armies serve a dual function as combat troops, while at the same time exerting a deterrence effect. Although the same could theoretically be said in the case of mercenaries, there are very few examples of such employment as the cost of mercenaries is usually comparatively high and the majority of states would be hard pressed to afford such expenses in times of peace. On a personal level, monetary reasons do not represent the primary motivation for enlistment, but in the past has oftentimes included reasons that are more closely connected with national identification. Finally, the method of recruitment for mercenaries did not follow traditional military recruitment, which either appealed to national identity or made military service compulsory. Rather, it was based on mainly financial incentives to lure individuals into a specified combat action.

2. Typology of Yesterday's and Today's Private Military Market

Relegated to minor importance through the first half of the 20th century, mercenarism regained widespread usage after WW II in a number of proxy wars. This quantitative change was accompanied by a qualitative change in that mercenaries in the mid-20th century could no longer be characterized as large numbers of individuals who formed well-organized, sometimes wholly integrated companies. Rather, the industry of the day consisted of individualistic mercenaries connected through loose networks – ready to go into combat in the proxy wars of the developing world, for tyrannical regimes or legitimate governments, sometimes literally at a phone call's notice.[25]

[25] See interview with Michael Grunberg, spokesperson for Sandline International, Spiegel, May 3, 2004, 142 (stating that most members of Sandline combat troops are contacted through informal networks. See also an advertisement in the Daily Express (London), June 2, 1975, 11 which reads:

> "EX-COMMANDOS, Paratroopers, SAS troops wanted for interesting work abroad. Ring Camberley 3356."

While the proxy wars came to a halt with the breakdown of the bipolar system of the Cold War around 1990, internal as well as external conflict increased markedly.[26] The former enemies of the Cold War cashed in on the peace-dividend – reportedly leaving six million former military personnel out of work.[27] While only a relatively small number of former military and intelligence personnel may have been hired by governments, insurgency groups, private corporations or other entities or individuals, there was an abundance of experienced professionals willing to take on mercenary duty or the supply and training of foreign military or non-government groups. These firms can be grouped into three conceptual categories: military provider firms, military consultant firm, and military support firm.[28]

a) Military Provider Firms

The main suppliers of available military personnel were the states of the former Eastern bloc, Great Britain, the United States and notably South Africa. South Africa proved to be the breeding ground for a new generation of military companies – with the infamous company EO as the vanguard of this development. EO was incorporated in Great Britain and South Africa in 1989 and was comprised of highly experienced veterans of the South African Defense Force, especially from the infamous 32nd Battalion as well as covert operation units.[29] EO is noteworthy for two aspects: its employees were actively involved in conflicts in Angola in 1993 as well as in Sierra Leone in 1995[30] and during these conflicts it provided the promised "land, air and sea warfare".[31] After being hired in April 1995, an EO contingent of experienced military personnel not only stopped the advancing rebel forces of the Revolutionary United Front (RUF) moving towards the capital of Freetown. EO's force of less than 300 drove back the RUF almost 80 miles within nine days – mostly through the deployment of attack helicopters in the hands of experienced pilots, against which the rebels

[26] Mikael Eriksson, Margareta Sollenberg and Peter Wallensteen, *Appendix 1A. Patterns of major armed conflicts, 1990-2001*, in Sipri Yearbook 2002 – Armaments, Disarmament and International Security, 63 (2002).
[27] Peter W. Singer, *Corporate Warriors: The Rise and Ramifications of the Privatized Military Industry*, 26 *International Security*, 186, 193 (2001/2002).
[28] See Singer, *supra* note 12, 88 et seq.
[29] Francois Misser & Anver Versi, *Soldier of Fortune: The Mercenary as Corporate Executive*, 227 African Bus. 9 (1997).
[30] *Ibid.*, 12.
[31] *Ibid.*, 12.

did not have appropriate remedies.[32] Further advances followed and ultimately a peace accord was signed between the government and the RUF.[33]

b) Military Consultant Firms

Military consulting firms provide "training, simulation and government services [through] highly skilled and experienced military, law enforcement, diplomatic and private sector leaders with uncompromising professionalism who apply integrity, innovative ideas and integrated solutions to defense and national security challenges."[34] These companies' services range from regular military training to maritime simulations in addition to what it calls "democracy transition".[35] E.g. MPRI, founded in 1987 by eight former high-ranking US military officials, VA, provided crucial military advice to the Croatian Army in 1995. Following a series of meetings with MPRI personnel, the Croatian army launched a 4-day military offensive in August of 1995 in the Krajina region called Operation Storm, causing fatalities in the hundreds and displacing hundreds of thousands.[36] It services were described as follows: "MPRI represents a private channel through which to gain U.S. military expertise in conditions in which conventional U.S. military assistance programs are not appropriate for

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[32] Singer, *supra* note 11, 112-115 and 117.
[33] Republic of South Africa, Regulation of Foreign Military Assistance Bill, B 54-97, available at <http://www.info.gov.za/view/DownloadFileAction?id=71744> (last visited March 10, 2009). Para. 7 of the "Memorandum on the Objects of the Regulation of Foreign Military Assistance Bill, 1997", which is attached to the bill, mentions the rationale of the bill, which consists in, inter alia: "South African citizens who wish to provide any form of foreign military assistance will in future encounter the same comprehensive regulatory procedures and rigorous control measures that arms transfers are subjected to."
[34] MPRI, About Us, http://www.mpri.com (visited May 2, 2006).
[35] MPRI, Products and Services – International Security Sector Training and Education, http://www.mpri.com (last visited May 2, 2006).
[36] Amnesty International, *Croatia: Operation* '*Storm*' *– Still No Justice Ten Years On*, AI Index EUR 64/002/2005, 4 August 2005, available at <http://web.amnesty.org/library/index/engeur640022005> (25 April 2006); Tina Garmon, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 Tul. J. Int'l & Comp. L. 325, 336 (2003). A more cautious stance is taken by Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 Mil. L. Rev. 1, 14 (2003) arguing that the number of individuals MPRI provided and the time period they worked in was insufficient to craft a powerful army. There is furthermore a question as to whether such support could be said to be in violation of an arms embargo that existed at the time. United Nations Security Council Resolution 713 imposed a "general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia", see S/RES/713, September 25, 1991. However, it could be argued that the resolution does not expressly prohibit military assistance that does not amount to the delivery of weapons or other military equipment. The relevant operative paragraph 7 of the resolution reads: "Calls on all States to refrain from any action which might contribute to increasing tension and to impeding or delaying a peaceful and negotiated outcome to the conflict in Yugoslavia, which would permit all Yugoslavs to decide upon and to construct their future in peace." There are however reports that MPRI had indeed delivered such goods, see Gregory Copley, *Croatia Prepares for War on Eastern Slavonia*, Def. & Foreign Aff. Strategic Pol'y, October 31, 1995, 3.

political or tactical reasons."[37] Such developments are begging the question as to whether these companies, despite their incorporation as private entities, do not sometimes function as a proxy for governments.

c) Military Support Firm

A final category is labeled "military support firm", the epitomic corporation being KBR, a subsidiary of Halliburton. Such firms provide supplementary services such as logistics, technical support and transportation and go wherever the military goes.[38] An important distinction of such firms is that they are not of military origin, thus moving in the opposite direction of the other two types of firms: instead of being composed of military personnel offering courses on "democracy transition", these firms have a civilian background and have eventually moved in the realm of the military.[39]

3. Failed Attempts at a Positive Definition – What are Private Military Firms?

What distinguishes PMFs from their ancestry is their reliance on modern business and legal structures: they are incorporated and registered, with the majority of firms residing in developed countries. They trade and compete more openly, recruit more professionally and provide services to a wider variety of clients than their predecessors. Many PMFs are tied to other business entities; some are subsidiaries of corporations listed on public stock exchanges.

A useful model for conceptualizing PMFs is to divide them according to their proximity to the actual combat zone. The advantage of this concept is that it is better able to explain bleedover effects. This effect is largely unproblematic in the case of the outermost circle, the military support firms. There are only very few arguments that could be made to advocate

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[37] Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 Stan. J. Int'l L. 75, 105 (1998). Zarate interviewed James Pardew, U.S. Special Representative for Military Stability in Yugoslavia, in early 1997, who stated that "the players in the Balkan conflict saw MPRI as an agent of the United States despite the fact that MPRI had no official status".

[38] Singer, *supra* note 11, 136.

[39] It should be noted however that while these firms do have a different background from the military provider and military consulting firms, they also share certain characteristics, such as entering the market at a similar time and as of late, a strong effort at recruiting retired military personnel. This points towards a development that indicates a merging of at least some of the tasks typically ascribed to military consulting firms. See generally Singer, *supra* note 11, 136.

against the use of private actors for delivering mail to the theater of operations or for providing the operational capabilities to transport soldiers and equipment over long distances, save for guaranteed punctuality and true economic efficiency.[40] The further one moves from the outer circle towards the figurative center, and thus to the real battlefield, the more problematic the involvement of PMFs becomes. It is sometimes impossible to distinguish between a PMF taking on a training role and one that takes part in the hostilities. These categorizations are helpful on a conceptual level in order to distinguish various tasks performed by different (or sometimes the same) firms. In their application on the ground, these categorizations are much harder to maintain as inevitably a mission might take on a different form depending on the circumstances. It might therefore be best to analyze a given situation functionally, making an evaluation dependent on the actual behavior of the PMF and/or its employees. This approach too may be criticized for its inherent shortcomings: it makes the classification of an actor as a combatant or a non-combatant fluid; it also creates uncertainty when anticipating an outcome once the action (or inaction) undergoes legal scrutiny. In the face of an increasingly complex reality however, these categorizations will be hard to maintain. What is clear is that today's actors share one motivation with mercenaries: financial gain. This is even admitted by authors who otherwise go to great lengths to distinguish PMFs and mercenaries.[41] If anything, given the corporatization and the close linkages between PMFs and the military both on the battlefield and at home, the definition of mercenarism at least provides a framework for thinking about this phenomenon. And given that the presence of PMFs will not only not abate, but most likely increase in the future and given it appears necessary to find a suitable solution to deal with this phenomenon.

IV. STATE RESPONSIBILITY – LEGAL FRAMEWORK UNDER THE ILC ARTICLES ON STATE RESPONSIBILITY

[40] There are however also operational drawbacks to the employment of PMFs. Unfulfilled contracts in times of high dependency (e.g. fuel or food deliveries), overcharging, post abandonment and sometimes lack of true competition make it questionable whether outsourcing in the military sector follows traditional market mechanisms. See generally JOHN H. DONAHUE, THE PRIVATIZATION DECISION – PUBLIC ENDS, PRIVATE MEANS, 57 et seq. and 102 et seq. (1989).

[41] Montgomery Sapone, *Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 California Western International Law Journal 1, 4 (1999-2000).

Political scientists have taken on the problem that PMFs pose for a much longer time than legal scholars; books by Peter W. Singer[42] and Deborah Avant[43] have done groundbreaking work. The legal analysis has until now been focused on whether such entities can violate human rights as they are not state entities[44] or whether they are bound by the Geneva Conventions,[45] on whether legal action can be taken domestically,[46] or on whether they can be defined as mercenaries.[47] Finally, questions have also been raised as to the individual criminal accountability of those who committed crimes while rendering their services.[48]

Only to a very limited extent has the issue been taken up in the context of the responsibility of states.[49] Under the Articles on the Responsibility of States for Internationally Wrongful Acts and under customary international law, action of private actors can be attributed to states. Considering that most of the action taken by PMFs was mandated by the countries which employed them, it seems appropriate to appraise the action of these entities under this legal framework.

There may also be good reasons for an increase in responsibility, namely state responsibility, for those nations employing PMFs, as it may increase the protection of regular soldiers on the battlefield. The increased frustration of commanders with action taken by private contractors was palpable when a commanding officer made the following statement in September 2005:

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[42] See especially Singer, *supra* note 11, 330.
[43] See Avant, *supra* note 23.
[44] Claudia T. Salazar, *Applying International Human Rights Norms in the United States*, 19 St. John's J. Legal Comment. 111 (2004); Heather Carney, *Prosecuting the Lawless: Human Rights Abuses and Private Military Firms*, 74 Geo. Wash. L. Rev. 317 (2006).
[45] Michael N. Schmitt, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century*, 5 Chi. J. Int'l L. 511 (2005).
[46] Scott J. Borrowman, Sosa v. Alvarez-Machain *and Abu Ghraib – Civil Remedies for Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 BYU L. Rev. 371; Garmon, *supra* note 35**Error! Bookmark not defined.**, 325; Nathaniel Stinnett, *Regulating the Privatization of War: How to Stop Private Military Firms from Committing Human Rights Abuses*, 28 B.C. Int'l & Comp. L. Rev. 212 (2005).
[47] *See* Sarah V. Percy, *This Gun's for Hire*, 58 International Journal 721 (2003); Ellen L. Frye, *Private Military Firms in the New World Order: How Redefining* '*Mercenary*' *can Tame the* '*Dogs of War*', 73 Fordham L. Rev. 2622 (2005)
[48] Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad – A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 Cath. U. L. Rev. 55 (2001); Fredrick A. Stein, *Have we Closed the Barn Door Yet? A Look at the Current Loopholes in the Military Extraterritorial Jurisdiction Act*, 27 Hous. J. Int'l L. 579 (2005).
[49] One notable exception is Chia Lehnardt, *Private Military Companies and State Responsibility*, *in* FROM MERCENARIES TO MARKET, 139 et seq. (Simon Chesterman & Chia Lehnardt eds., 2007).

> "These guys run loose in this country and do stupid stuff. There's no authority over them, so you can't come down on them hard when they escalate force […]. They shoot people, and someone else has to deal with the aftermath. It happens all over the place."[50]

Whether or not this is true is a matter of exploration.[51] The incident points to a larger problem however, namely a divergence between those that commit the crimes and those that are the targets of retaliatory attacks.[52] This is not to say that PMFs are necessarily acting outside legal constraints, but it appears that they are not under – or at least do not feel – the constraints inherent on ordinary military personnel. One way of achieving this goal may be to attribute the action of PMF personnel to those states making use of them, thereby forcing them to institute better control mechanisms than are currently in place.

1. ILC Articles on State Responsibility

a) History of the Articles on the Responsibility of States for Internationally Wrongful Acts and Current Status

The issue of state responsibility had been under consideration prior to WW II,[53] but no principles could be agreed upon. After 1945, the topic was taken up again. The first special rapporteur on state responsibility noted that "it would be difficult to find a topic beset with greater confusion and uncertainty."[54] At the same time, Bruno Simma, now on the bench of the International Court of Justice, regards the issue of State responsibility as the "most

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[50] Jonathan Finer, *Security Contractors in Iraq Under Scrutiny After Shootings*, Washington Post*,* September 10, 2005, A1.
[51] Such exploration may prove to be immensely difficult. Private military firms are not forthcoming with information and are under no obligation to provide it.
[52] Numerous such reports have been filed, see e.g. Jonathan Finer, *Security Contractors in Iraq Under Scrutiny After Shootings*, Washington Post*,* September 10, 2005, A1.
[53] League of Nations, *Official Journal, Special Supplement*, No. 53, 9.
[54] Yearbook of the International Law Commission 2 (1956), A/CN.4/SER.A/1956/Add.1.Yearbook of the International Law Commission 2 (1956). This is – at least in part – attributable to the fact that lawyers trained in common law are unfamiliar with the abstract treatment of legal issues such as "responsibility". See e.g. Daniel Bodansky and John R. Crook, The ILC's State Responsibility Articles – Introduction and Overview, 96 Am. J. Int't L. 773, 774 (2002). One may take as evidence of this distinction that with the exception of the last rapporteur, all previous holders of the position came from civil law countries. These fundamental differences continued to be of concern within the ILC until the final debates on the matter. See Bruno Simma, *Presentation by Mr. Bruno Simma*, *in* THE INTERNATIONAL LAW COMMISSION FIFTY YEARS AFTER: AN EVALUATION, PROCEEDINGS OF THE SEMINAR HELD TO COMMEMORATE THE FIFTIETH ANNIVERSARY OF THE INTERNATIONAL LAW COMMISSION, 21-22 April 2000, 43, 50 (2000).

interesting, maybe the most important, advance in codification" since the inception of the ILC.[55]

The articles on state responsibility do not contain provisions specifically prohibiting certain conduct. Rather they are aimed at determining the conditions for the existence of an internationally wrongful act and the legal consequences of failure to fulfill obligations established by the "primary" rules (contained in international treaty or customary law, such as the obligation not to use force). Thus, the ILC created abstract-general rules which could be used in the determination of whether a breach of an obligation has indeed occurred and what general consequences would flow from such a breach.[56] These rules were designed to universally "apply to the whole field of international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the individual community as a whole."[57]

Legally speaking, the articles have no binding force and do not create any legal obligations for states. Such a status was also not conferred by the decision of the General Assembly through the passage of A/RES/56/83.[58] The proper role of the articles on state responsibility at this point – focused on the particularities of attribution – may be one of the most thorough analyses of how to attribute conduct to states in order to hold a state liable for action taken by its organs or by proxies. It is thus a question of whether the standards laid down in the articles on state responsibility are convincing and applicable in a certain area of international law.[59]

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[55] Simma, *supra* note 54, 43.
[56] Before the adoption of the final document in 2001, a document was transmitted to UN member states in 1996 which still contained the now-infamous Article 19 which distinguished between "international crimes" and "international delicts". Draft Code of Crimes Against the Peace and Security of Mankind, in Report of the International Law Commission, U.N. GAOR, 51st Sess., Supp. No. 10, U.N. Doc. A/51/10 (1996), reprinted in 2 Y.B. Int'l L. Comm'n pt. 2 (1996). On the controversy over this distinction, see Manfred Mohr, *The ILC's Distinction Between "International Crimes" and "International Delicts" and its Implications*, *in* UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 115 (Marina Spinedi & Bruno Simma eds., 1987); Joseph H.H. Weiler, *On Prophets and Judges: Some Personal Reflections on State Responsibility and Crimes of State*, *in* INTERNATIONAL CRIMES OF STATE 319 (Joseph H.H. Weiler et al. eds., 1989). For a detailed account of the several phases the issue of state responsibility underwent, JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES OF STATES RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002) (hereinafter COMMENTARIES, IN CRAWFORD); Marina Spinedi, *From One Codification to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility*, 13 Eur. J. Int'l L. 1099 (2002); Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law*, 281 Recueil De Cours 9 (1999).
[57] Crawford, *supra* note 55, 76.
[58] A/RES/56/83, Responsibility of States for internationally wrongful acts, 28 January 2002.
[59] There is an explicit provision within the articles on state responsibility pertaining to rules deviating from the abstract principles contained in the document, namely Article 55 which is entitled *lex specialis* and which reads:

These general principles have been developed through careful analysis of previous decisions by international courts, arbitral tribunals and in many cases can be said to establish customary international law. One aspect that may speak in favor of the persuasiveness of (at least some portions of) the articles on state responsibility is their use in international dispute settlement mechanisms,[60] such as the WTO Appellate Body and panels,[61] the International Court of Justice[62] or the International Tribunal for the Law of the Sea.[63] There are some – albeit scattered – references to attributional elements in the findings of international courts and tribunals to date, most of which have been incorporated into the articles on state responsibility and which will be dealt with in greater detail below.

It is the first aspect of the two-fold strategy pursued by the ILC that is of interest for this paper, i.e. whether an attributable breach of an obligation incumbent upon a state has indeed occurred. More specifically, the paper attempts to show if and to what extent the action of private military contractors can be attributed to a state.[64]

There are two requirements to determine whether the conditions for the existence of an internationally wrongful act are met:[65] (a) the attribution of an action or omission to a state and (b) the breach of an international obligation of the state (Article 2 of the Articles of Responsibility of States for Internationally Wrongful Acts). Distinguishing the two elements is of crucial importance when invoking any kind of responsibility under international law. It is not wholly precise (but it may sometimes be sufficient) to claim that a certain act results in the responsibility of a state. Such a statement carries the implicit assumption that the act is

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> "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."

[60] See generally the contributions in MALGOSIA FITZMAURICE AND DAN SAROOSHI (eds), ISSUES OF STATE RESPONSIBILITY BEFORE INTERNATIONAL JUDICIAL INSTITUTIONS, 2004.

[61] See the applicable WTO panel and Appellate Body decisions, e.g. WT/DS192/AB/R (Cotton Yarn), WT/DS202/AB/R (Line Pipe) and others.

[62] Gabčíkovo-Nagymaros Project (Hung. v. Slovakia), 1997 I.C.J. 7.

[63] M/V "Saiga" (No. 2) (St. Vincent & the Grenadines v. Guinea) (Int'l Trib. Law of Sea July 1, 1999), 38 ILM 1323 (1999).

[64] See generally on the issue of attributability J.G. Starke, *Imputability in International Delinquencies*, 19 BYbIL 110 (1938); Gordon Christenson, *The Doctrine of Attribution in State Responsibility*, *in* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES FOR ALIENS, 321 (R.B. Lillich ed., 1983); Gaetano Arangio Ruiz, *State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance*, *in* MÉLANGES MICHEL VIRALLY, LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT 25 (1991); JOACHIM WOLF, DIE HAFTUNG DER STAATEN FÜR PRIVATPERSONEN NACH VÖLKERRECHT 61 (1997).

[65] This language is borrowed from the aforementioned Article 55 of the articles of state responsibility and it best denotes what is meant by the German term *Tatbestand*.

attributable to the state. On the other hand, the attribution of conduct to a state – at least in theory – says nothing about the legality or illegality of any action, as there may be justifying circumstances for the action taken.[66]

2. Application of Attributional Elements to Private Military Firms

As described above, PMFs have been employed by individuals in rare cases, entities (such as insurgent groups or private companies) and states. As this analysis is limited to the attribution of conduct of PMFs to states, only the latter relationship will come under close scrutiny. Before turning to the attribution of conduct by private actors, it is useful to briefly sketch the general scheme of attribution laid down in the articles on state responsibility.

a) State Organs

Within the attribution mechanism in the articles on state responsibility, Article 4 states the principle that acts carried out by state organs are attributable to states under international law. It provides under the heading "Conduct of Organs of a State":

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

This principle encompasses all traditional functions of the state, mentioning the legislative, executive, judicial as well as other branches, regardless of the constitutional or other legal design that a position might entail.[67] In line with traditional legal thinking in international law

[66] The articles on state responsibility recognize this through the inclusion of Articles 20-27 which cover "Circumstances Precluding Wrongfulness".

[67] The term "other branches" allows for differences in how the separation of powers is carried out in different states. More importantly, the ILC attempted to cover instances of so-called "administrative guidance" and cites two WTO cases involving Japan where such practice is especially prevalent. ILC Commentaries in: Crawford, *supra* note 56, 96. These cases include the so-called Kodak/Fuji dispute, WTO, WT/DS 44, Japan – Measures Affecting Consumer Photographic Film and Paper, 31 March 1998, paras. 10.12 et seq. For a closer analysis of

and contrary to the approach taken by the liberal school in political science,[68] the state is regarded as a black box. At the same time, the provision is also an expression that there are limits as to what conduct will be attributed to a state and a "recognition of the autonomy of persons acting on their own account and not at the instigation of a public authority."[69]

In addition to conduct of state organs, it is also the conduct of non-state actors that is attributable, provided that they are exercising governmental control (Article 5).[70] The provision is geared to capture action by para-statal entities as well as former state corporations, i.e. entities that exercise a public function "normally exercised by State organs, and the conduct of the entity relates to the exercise of the governmental authority concerned".[71] Among other examples cited in the commentaries, the ILC singles out private security firms to which states "contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations."[72] It is clear that the internal law of the state is not determinative for finding whether a certain entity exercises governmental authority.[73] There are obvious problems with the formulation "normally exercised by State organs". The standard for this normalcy is only vaguely circumscribed and it is hard to imagine that consensus for any kind of general baseline standard would emerge. Thus, the commentary provides only rudimentary guidelines for concluding which government functions falls under this category. Regarding the military sector, it may well be argued that at least traditional combat action as well as the training of combat troops has been and still is considered a government function. While the latter aspect is increasingly taken over by private contractors as well, the large majority of training in military units around the world still takes place through state organs. Thus, in those cases in which training has been delegated to PMFs, their

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the concept of administrative guidance in Japan, see Ulrike Schaede, *Self-Regulation and the Sanctuary Strategy: Competitive Advantage Through Domestic Cooperation by Japanese Firms*, The Changing Japanese Firm, Columbia University Business School, New York, December 1998, www-1.gsb.columbia.edu/japan/pdf/wp154.pdf (last visited March 10, 2009), and Kazuo Sato, *Trade Policies in Japan*, in NATIONAL TRADE POLICIES, vol. 2, 109 (Dominick Salvatore ed., 1992).

[68] E.g. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, 2004.

[69] ILC Commentaries, in: Crawford, *supra* note 55, 91.

[70] Article 5 – entitled "Conduct of persons or entities exercising elements of governmental authority" – reads:

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

[71] ILC Commentaries, in: Crawford, *supra* note 55, 92.

[72] *Ibid*., 92.

[73] *Ibid*., 93.

action (or lack thereof in the case of training in international humanitarian law) may be attributed to the states contracting with PMFs.

b) Non-State Actors Under State Direction or Control

The general principle laid down in Article 4 has a number of explicit exceptions. First and foremost among them is the case in which conduct of private actors is directed or controlled by a state (Article 8):[74]

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

The provision is evidence of a generally accepted notion in international law that despite the general principle laid down in Article 4, there are nevertheless situations that warrant for private conduct to be attributed to a state.[75] On closer analysis, the provision distinguishes between two situations: (i) private individuals who act on the instruction of a state and (ii) private individuals whose actions are under the direction or control of a state. In both instances, attribution of conduct is possible. The exact line between these situations may be difficult to draw in some cases and will be a factual question; however, the private actors in the first alternative appear to be under closer supervision than under the second. Whether this means that private individuals or entities should be seen as the "extended arm of the

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[74] Another exception can be found in Article 9, which reads:

> "The conduct of a person or a group of persons shall be considered an act of State in international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority."

The provision covers cases in which private persons or entities act in the absence of state authority and applies by and large to extraordinary circumstances, such as "during revolution, armed conflict or foreign occupation, where the regular authorities dissolve, are disintegrating, have been suppressed or are for the time being inoperative." ILC Commentaries, in: Crawford, *supra* note 55, 114. One of the classical situations may be that of Somalia, which at the beginning of the 1990s must be considered to be a failed state, see Daniel Thürer, *The "Failed State" and International Law*, 836 International Review of the Red Cross 731 (1999); the US-Iranian claims tribunal alluded to this principle in the well-known case *Yeager v. Islamic Republic of Iran*, Iran-United States Claims Tribunal Reports 17 (1987-IV), 104.

[75] Commentaries, in Crawford, supra note 55, 110. See also early arbitral decision, e.g. The "Zafiro", RIAA, vol. VI, 160 (1925); Stephens, RIAA, vol. IV, 265, 267 (1927); Lehigh Valley Railroad Company, and others (USA) v. Germany (Sabotage Cases): "Black Tom" and "Kingsland" incidents, RIAA, vol. VIII, 84 (1930) and RIAA, vol. VIII, 225, 438 (1939), respectively.

instructing state organ",[76] is open to question. One may even opine that at times (especially in war time or war-like conditions) these private entities are under closer scrutiny and at other times the guidance they receive is more remote. The commentaries consider the first group to be a clear case, as opposed to the second alternative – and in the words of the ILC "cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as 'auxiliaries' while remaining outside the official structure of the State."[77] Based on the information available on PMFs, one could conclude that PMF engagement is a clear case of this first category, where these groups are nothing but a mere extension of the armed forces of the country in question. But from various reports, it appears that the situation is more complicated and that some of the groups are being given more general orders before going into the battle zone.[78]

The second alternative – being more remote – falls between the first one and situations which are only incidental and thus do not form an integral part of any operation. This second alternative has been concretized in at least two well-known cases: *Military and Paramilitary Activities in and against Nicaragua*[79] before the ICJ and the ICTY Appeals Chamber decision in *Prosecutor v. Tadić*.[80] The ICJ placed at the heart of its analysis on whether the acts of the *contras* could be attributed to the US the level of control exercised by the US government and arrived at the conclusion that while there was a considerable amount of "planning, direction and support",[81] the *contras'* actions were not attributable to the US.[82] Rather the court would have required a higher degree of control, namely "effective control of the military and paramilitary operations"[83]

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[76] Rüdiger Wolfrum, *State Responsibility for Private Actors: An Old Problem of Renewed Relevance*, *in* INTERNATIONAL RESPONSIBILITY TODAY – ESSAYS IN MEMORY OF OSCAR SCHACHTER 423, 427 (Maurizio Ragazzi ed., 2005).
[77] ILC Commentaries, in Crawford, *supra* note 55, 110. The ILC specifically mentions the "individuals or groups of private individuals, who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as 'volunteers' to neighboring countries, or who are instructed to carry out particular missions abroad."
[78] See generally United States Government Accountability Office, Report to Congressional Committees, Rebuilding Iraq – Actions Needed to Improve Use of Private Security Providers, GAO-05-737, July 2005.
[79] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, 3.
[80] IT-94-1, *Prosecutor v. Dusko Tadić*, 15 July 1999. Both cases are sufficiently well-known not to merit a detailed description of the event.
[81] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, 3. para. 86.
[82] Specifically, the court considered that "there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf." Ibid., para. 109..
[83] *Ibid*., para. 115..

More than a decade later, in a different political climate, under different power arrangements, and making findings on individual criminal responsibility rather than state responsibility, the Appeals Chamber of the ICTY decided to deviate from the high threshold of the *Nicaragua* decision of the ICJ. Distinguishing itself clearly from the ICJ, it had this to say about the extent of control that was necessary in order to attribute conduct:

> "The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control."[84]

It thus put forth less stringent requirements than the ICJ in Nicaragua, but it should be borne in mind that the political environment that the ICTY decided in and the parties involved were of a different nature. It is not at all clear whether the violations of international law which raise matters of state responsibility need to be a part of the operation as such or whether the requirement is less stringent, i.e. that the action in question was carried out on the occasion of the tasks performed "under the direction or control" of the state.

There are a number of reasons that militate against a construction aimed at attributing only such conduct that was either specifically authorized or carried out with a specific control mechanism at hand. First and foremost, it would create almost perverse incentives for states to outsource all those acts which might put the state at risk of violating international law. As long as that state would not put into place a control mechanism, but would only pay for the deployment of private military forces, action by such contractors would not be attributable. This would be especially troublesome in matters such as military combat, where by its very nature the degree of control cannot always be maintained at a high level. The situation immediately following the end of Saddam Hussein's regime was indeed characterized by a low level of control.[85] It is during these times that the principles underlying the international responsibility of states by their design appear to attempt for states to put in place mechanisms

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[84] IT-94-1, *Prosecutor v. Dusko Tadić*, 15 July 1999, para.117 (emphasis in original).
[85] Dana Priest & Mary Pat Flaherty, *Under Fire, Security Firms Form an Alliance*, Washington Post, April 8, 2004, A1.

for control. If for whatever reasons such control mechanisms are not put in place, the state sending PMFs may face the responsibility for PMF misbehavior through the process of attribution. In essence, the articles on state responsibility could therefore be said to be a mechanism to push states towards implementing controlling institutions in times when they employ private entities. Another argument that may be advanced is that a construction requiring a high level of control (as promulgated by the ICJ in the *Nicaragua* case) would render the differentiations contained in Article 8, which functions as an exception to Article 4, almost meaningless. The wording explicitly distinguishes between two situations: one in which a private party acts on the instructions of the state and one in which these private groups are under the direction or control.

This analysis leaves open the question of private individuals or entities which contravene instructions or exceed their authority? While Article 7 of the articles on state responsibility provides generally for such excess of authority or contraventions of instructions,[86] the commentary points out that the provision "only applies to the conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority" and mentions specifically Articles 4, 5 and 6.[87] One may try to argue that this leaves a gap for exactly those situations in which PMFs operate. Such contractors are not organs of a State or of a person or entity empowered to exercise elements of the governmental authority (Article 7); yet at the same time, they are also not acting "in the absence or default of the official authorities" (Article 9). One could however claim that the underlying rationale for Article 7 is that states are obliged to create some form of control mechanism to avoid excessive abuse. There are numerous examples in the field of international humanitarian law that this would indeed be the case. Article 91 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949 can be seen as an expression of this rationale.[88]

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[86] Article 7 reads:

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

[87] ILC Commentaries, in: Crawford, *supra* note 55, 108. The "distinct problems" of unauthorized conduct by other persons, groups or entities are covered in Articles 8, 9 and 10.

[88] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts* (Protocol I), 1125 UNTS 3, Art. 91:

> "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

On the face of it, this provision covers conduct by the armed forces of a state. However, one could argue that the underlying rationale of this (as well as similar) provision(s) is applicable to PMFs who are operating for a state as well. At the same time, this would reflect the reading of Article 8 of the articles of state responsibility suggested above. By employing PMFs, a state has set in motion a development that replaces its regular troops with individuals who do not form part of the regular military command structure. If such groups are either "under the instructions of, or under the direction or control of [a] State in carrying out this conduct", their conduct would be attributable to the state. Rather than employing a static approach to such situations and focusing on the official designation of a particular entity, it appears more prudent to take a functional approach, i.e. to focus on the actual role that private actors play.

It is important not to overstretch the attribution framework, i.e. not all action carried out by PMFs may be attributable to states under the rules of state responsibility. If even *ultra vires* action were attributable to the state, the relationship between Article 4 as the general rule and Article 8 as an exception pertaining to private actors would be turned on its head. In line with principal/agent doctrine in other fields, the outer limits of a state's responsibility would be those where the acts of an individual or entity would be wholly unrelated to the task assigned to them.

c) Affirmative Duties and Attribution of Private Conduct

The concept of requiring states to intervene in certain situations that are under their jurisdiction – i.e. creating positive duties incumbent upon states – is hotly debated. First and foremost, examples in the field of human rights come to mind; the idea underlying the Canadian government-led Responsibility to Protect (R2P) project; the very notion of international humanitarian law; and some aspects of the emerging field of international criminal law – all of these are examples of the idea of states incurring positive duties. These cases differ from those mentioned above in that it is not concrete action that causes state responsibility, but rather an omission. However, this would necessitate a positive duty (as a primary duty) of the state to intervene. Such duties may be found in the express language of certain treaties.[89]

[89] See e.g. Article 139 of the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3.

However, there is at least one ICJ decision in which such a duty was construed from treaty texts that did not expressly provide for it and sometimes this duty was derived from "general international law".[90] One may also find support for such a stance in the case law of the Iran-United States Claims Tribunal,[91] namely the *Yeager* case, in which the arbitrators specifically dealt with the issue of attribution. In that case, Mr. Yeager, a US national working for a US company in Tehran, and his family were forced to leave Iran. The so-called "Komitehs" forced Yeager and his family to leave Iran.[92] These groups, loyal to the new government under Ayatollah Khomeini, were seen by the tribunal as state agents.[93] However, the tribunal also offered a second reading: in order to avoid responsibility for the action of the members of the "Komiteh", the government of Iran would have had to distance itself from their activity in principle and their role in the maintenance of public security as opposed to calling "for more discipline, phrased in general rather than specific" language.[94] The tribunal concluded that Iran "cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary 'Komitehs' and at the same time deny responsibility for wrongful acts committed by them."[95]

Related to the events in Iran at that time is a judgment by the ICJ concerning the occupation of the US embassy in Tehran in November 1979 by private individuals and the subsequent holding hostage of the embassy staff. The ICJ found that in addition to a positive responsibility of Iran to protect the embassy and the consulates under various provisions of

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[90] See only *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ Reports 1980, 3, 31.

[91] See generally WAYNE MAPP, THE IRAN-UNITED STATES CLAIMS TRIBUNAL: THE FIRST TEN YEARS, 1981-1991: AN ASSESSMENT OF THE TRIBUNAL'S JURISPRUDENCE AND ITS CONTRIBUTION TO INTERNATIONAL ARBITRATION (1993); RICHARD LILLICH & DANIEL BARSTOW MAGRAW (eds.), THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF STATE RESPONSIBILITY (1998); MOHSEN MOHEBI, THE INTERNATIONAL CHARACTER OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1999).

[92] The Revolutionary Guards Corps are now recognized in Article 150 of the Iranian Constitution, which can be taken at least as an indication that there was a close connection between them and the new government. The provision reads:

> "The Islamic Revolution Guards Corps, organized in the early days of the triumph of the Revolution, is to be maintained so that it may continue in its role of guarding the Revolution and its achievements. The scope of the duties of this Corps, and its areas of responsibility, in relation to the duties and areas of responsibility of the other Armed Forces, are to be determined by law with emphasis on brotherly cooperation and harmony among them."

[93] *Yeager v. Islamic Republic of Iran*, Iran-United States Claims Tribunal Reports 17 (1987-IV), 104. (para. 44).

[94] *Ibid*., para. 45.

[95] *Ibid*.

the *Vienna Convention on Diplomatic Relations*,[96] Iran was also responsible under "general international law".[97] The court found that the "facts establish to the satisfaction of the Court that […] the Iranian Government failed altogether to take any 'appropriate steps' to protect the premises, staff and archives of the United States' mission against attack by the militants, and to taken any steps either to prevent this attack or to stop it before it reached its completion."[98]

Finally, one may turn to the case of *Ilaşcu and Others v. Moldova and Russia*.[99] In this case, Moldova and Russia were jointly found responsible, *inter alia*, for the incarceration of Mr. Ilaşcu and three other individuals. The actual incarceration had taken place on the territory of Moldova; however, the government did not have effective control over the territory of Transdniestria. Rather, the suit specifically alleged that Russia had de facto control over the territory due to its considerable military presence and the support it has given to the separatist movement. In light of this support and turning to the responsibility of Russia, the ECHR – making implicit reference to the reply of the ICTY to the ICJ's control test in *Tadic* as well as citing its own jurisprudence,[100] found "a continuous and uninterrupted link of responsibility on the part of the Russian Federation for the applicants' fate" and that "the Russian Federation made no attempt to put an end to the applicants' situation brought about by its agents, and did not act to prevent the violations allegedly committed […]."[101]

This line of argument may have two effects with respect to PMFs. First, one can argue that there is a duty of states to intervene should they become aware of violations of international obligations they have entered into, committed at the hands of private individuals or entities. The result could range from the payment of a contractual fine to the termination of the

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[96] 619 U.N.T.S. 341, Articles 22, 24, 25, 26, 27. In addition, the ICJ found Iran in violation of analogous provisions (Articles 31 (3), 28, 33, 34, 35, 40) of the 1963 *Vienna Convention on Consular Relations*, 857 U.N.T.S. 239.
[97] *United States Diplomatic and Consular Staff in Tehran*, *(United States of America v. Iran*), ICJ Reports 1980, 3, 31.
[98] *United States Diplomatic and Consular Staff in Tehran*, *(United States of America v. Iran*), ICJ Reports 1980, 3, 31-32.
[99] *Ilaşcu and Others v. Moldova and Russia*, Application No. 4878/99, Judgement, 8 July 2004.
[100] *Ibid.,* para. 314-317. The ECHR's own jurisprudence regarding the connection between Turkey and "Turkish Republic of Northern Cyprus" (TRNC) in the Loizidou case is instructive as it opined that because of the large presence of Turkish troops in the northern part of Cyprus that Turkey "exercised effective overall control of that part of the island" and that any action taken in that territory was thus attributable to Turkey. *Loizidou v. Turkey* (*Merits*), Judgment, 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2234-2235, para. 56. See also *Cyprus v. Turkey* judgment, Grand Chamber, application no. 25781/94, ECHR 2001-IV, para. 77.
[101] *Ibid*., para. 393.

contractual relationship; regarding its international obligation the contracting state would remain responsible towards any entity making claims against it.

One could also fit into this framework a more effective cause of action. The large majority of PMFs currently employed throughout the world are either headquartered or incorporated in developed countries. This is especially true for military consulting firms and military support firms. A more effective remedy instead of the imposition of a fine or terminating a contract would thus be to apply pressure on the assets of the firm itself. Such action could take various forms: mild sanctions could include the exclusion for consideration for the next round of contracts or harsher sanctions, such as the revocation of the company's business license.

If there were a genuinely level playing field between regular military forces and PMFs, one would also have to envision the incorporation of penalties for violations of international legal obligations. This would create incentives for PMFs to adhere to legal obligations of the employing state as it would otherwise incur a financial penalty. The downside of this approach is an increase in price for the employing state, as PMFs would most likely price such penalties into their cost structure. States may not have an incentive to take such action as it would make PMF deployment less attractive. It would however level the playing field between traditional military units and PMFs vis-à-vis their deployment costs. None of these mechanisms have been used to this point and the only "penalty" for "misbehaving PMFs" currently in operation is the termination of contracts. Other approaches might be financially more burdensome – decreasing the attractiveness of PMFs for states, but they should certainly be more closely explored.[102]

[102] Some authors have investigated this issue, e.g. Cedric Ryngaert, *Litigating Abuses Committed by Private Military Companies*, 19 European Journal of International Law 1035; Laura Dickinson, *Control as a Tool for Regulating Private Military Companies*, *in* FROM MERCENARIES TO MARKET 217, 236 (Simon Chesterman & Chia Lehnardt ets., 2007). Such approaches have had some impact in the other fields of law, specifically environmental law. See e.g. ENVIRONMENTAL PROTECTION – POTENTIALS AND LIMITS OF CRIMINAL JUSTICE (Günter Heine, Mohan Prabhu and Anna Alvazzi del Frate eds., 1997); CRIMINAL RESPONSIBILITY OF LEGAL AND COLLECTIVE ENTITIES (Albin Eser, Günter Heine and Barbara Huber eds., 1999).

V. CONCLUSION

The proliferation of PMFs is worrisome on a number of levels. While more direct causes of action may be able to mediate the most egregious examples of PMF behavior,[103] they do not undertake the more general question over the appropriate role that PMFs should play in today's military endeavors. The approach offered here has its own drawbacks: it has to be acknowledged that there are no immediate results for victims of misconduct from a finding that an individual's acts who is on the payroll of a PMF or a firm's action are attributable to a country and therefore form the basis of responsibility under international law.

The approach suggested here embodies one of holding governments accountable through their international obligations and exerting a higher degree of oversight over PMFs by way of a trickle-down effect. The efficacy of this approach should not be underestimated: the large majority of PMFs conduct their operations at the request of a state. This is due to a number of factors, the most important ones being purported economic efficiency and the relatively low political costs of using PMF personnel instead of a country's military.

The economic costs of outsourcing are not well known. The available evidence appears to suggest that governments have radically underestimated the primary economic costs arising from reliance on PMCs (through e.g. no-bid contracts) as well as the secondary economic costs, including personnel and contractor replacement costs, workers' compensation, increased insurance premiums, evacuation and rescue costs, and increased reconstruction costs.[104] The non-availability or inconsistency of this type of information is deeply troublesome and has been the source for considerable criticism.[105] The low economic costs are partially due to non-existing oversight: it is clear that a state is responsible for violations of international humanitarian law its soldiers have committed abroad. It may turn out that the costs for instituting an oversight mechanism over PMF personnel are either impossible to

[103] See in this regard an incident involving Blackwater personnel in September 2007 in Baghdad during which 17 civilians were killed as well as the subsequent attempts to bribe Iraqi officials in order to maintain an operating license. Mark Mazzetti and James Risen, Blackwater Said to Pursue Bribes to Iraq After 17 Died, New York Times, November 11, 2009, A1.
[104] James Cockayne, *Make or Buy? Principal-Agent Theory and the Regulation of Private Military Companies*, *in* From Mercenaries to Market 196, 198. (Simon Chesterman and Chia Lehnardt eds., 2007).
[105] James Glanz, The Struggle for Iraq: Reconstruction; Army To Pay Halliburton Unit Most Costs Disputed By Audit, N. Y. Times, February 27, 2006, at A1.

enumerate[106] or even so high as to be prohibitive. If anything, this would constitute an argument against the use of PMFs. The regular military functions with innate command-and-control structures, which – albeit not perfect – provide a limiting effect on military misconduct.[107] The lack of such control mechanisms in the case of PMFs is a financial advantage for private companies. If those costs were taken into account the purported advantages of PMFs might not be as obvious any longer and at the very least would level the playing field between PMFs and the regular military.

Apart from the – unknown – economic aspects of employing PMFs however, there are less tangible, but maybe more important aspects that must be taken into consideration when discussing the use of PMFs in engaging in conflicts or waging war. One of the main benefits of employing PMFs is that military confrontations are politically cheaper to carry out than when using regular troops. At home, the death of an enlisted member of the armed forces is – and should be – a tragic reminder of the human costs involved in fighting an armed conflict.[108] The same sentiment is not shared for those who die receiving their paychecks not from a defense department located in a country's capital, but from a company such as Sandline or MPRI-L3. Their families or friends are just as aggrieved as those whose mother, father, daughter, son, brother or sister has fallen for her / his country; however, the nation does not mourn for these individuals the same way and their ceremonies do not invoke national symbolism. They are seen as the "dogs of war" or mercenaries, fighting for personal gain. And at least so far, it does not appear that the death of contractors carries as high a price for politicians as the death of enlisted soldiers.

While legally not falling under the restrictions of international legal instruments (leaving states free to use them), the utility of PMFs has not been lost on decision-makers. The current

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[106] Minow, supra note 6, 1005. But see See e.g. E. L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Imlications for International Humanitarian Law Enforcement*, 49 Harv. Int'l L.J. 221, 243 (2008) suggesting amendments to international humanitarian law rules that would require oversight over PMFs in lieu of an outright ban on mercenarism due to the high degree of reliance on PMFs by governments.
[107] Jeffrey S. Thurnher, *Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts,* 2008 Army L. J. 64, 87 et seq. (2008).
[108] Those "reminders" are not always in the public realm. Different countries have different traditions of how to deal with this issue. In the US, pictures of soldiers' coffins have been banned from public view since 1991. Briefly suspended after a large number of photos were released in 2004 under a Freedom of Information Act request and subsequent press coverage, the policy had remained firmly in place until February 2009. This policy was overturned by the Obama Administration. Coffins of U.S. soldiers can now be photographed by the media as long as the families of the fallen soldiers consent to the photographs. See Elizabeth Bumiller, *Defense Chief Lifts Ban On Pictures of Coffins*, N.Y. Times, Feb. 27, 2009, A13.

state of affairs apparently allows buying one crucial element of armed conflict (military prowess) without paying the political and legal price for doing so. A volunteer army – compared to a conscription army – removes the polity from this institution already to a considerable extent. Such a connection is at its strongest in military structures which incorporate elements of the draft or mandatory conscription. A private military force filling its ranks with mercenaries makes this connection disappear altogether.

The attribution of the conduct of PMFs and their personnel to the state / entity (and the state[s] behind it absent independent legal personality) has the potential to contribute to these ideas. It is far from clear why the principles of a legal regime devised for situations where at least one side is using a state's armed forces should not be applied equally in situations in which private actors are participating in the hostilities at the behest of a state. If PMFs are cheaper economically speaking, their comparative advantage over a state's standing army may be a good reason to deploy them in certain situations. The hidden costs of such employment should however not be forgotten.