
**PRIVATE MILITARY COMPANIES:
THE CHALLENGES THEY POSE IN
CONTEMPORARY ARMED
CONFLICTS**

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I. INTRODUCTION

International Humanitarian Law (IHL) has always sought, and more often than not succeeded, to define the place of all entities that exist within the radius of armed conflict in order to afford necessary protections to civilians, parties and non-parties to the conflict. It has therefore progressively been forced to make provision for private arms carriers, entities that have continued to feature prominently in the battlefield. Its success over time in defining their status and responsibilities as far as armed conflict is concerned cannot under whatever standards be ranked as poor. However, the same cannot be said of IHL from the late 80s and early 90s with the emergence of a new breed of private arms carriers – Private Military Companies (PMCs).

Contemporary conflicts indeed pose special challenges in relation to the progressive disappearance of the battlefield in the traditional sense. New methods of warfare have rendered inoperative definitions based on a person's geographic proximity to a combat zone.¹ This among other reasons² has led to increased reliance of some countries on technologically advanced means of combat often resulting in asymmetric warfare. 'Privatization' of armed forces has become *la mode* in the armed conflicts of today. This has led some countries to outsource some of their military activities. Contracts for the sale of arms, for example, are no longer limited to the simple purchase of a weapon but often, even during an armed conflict, include the maintenance and functioning of the system by the civilian employees of the seller. Such agreements raise legitimate questions regarding the status of the employees involved.

While civilians have always supported the armed forces in some form, new developments have placed civilian employees of those forces in positions vital

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¹ Such would for example be the definition of a combatant to be found in the 1977 protocol 1 additional to the Geneva conventions of 1949. A combatant is defined as one who carries arms openly during each military engagement and during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

² Such as the need to have a slimmer military budget.

to the success of combat operations. The rise of PMCs has only served to blur the distinction between combatants and civilians.

II. BACKGROUND TO THE FORMATION OF PMCS AND THE SUBSEQUENT ACCOUNTABILITY DILEMMA

In July 1998, the UK (labour) government was embarrassed by the revelation that a British diplomat, the British High Commissioner in Sierra Leone, had given a degree of approval to Sandline International (a PMC) to supply weapons to Sierra Leone, despite an apparent UN embargo. In what became known as the "Arms to Africa Affair," the subsequent (Legg) inquiry determined that the UK export controls relating to arms were wholly outdated, inadequate and "based on legislation dating back to 1939."³ In response to the Legg Report, the Blair Government drafted a Green Paper⁴ that details proposals for the regulation of PMCs at the national level. The paper, as far as accountability by PMCs for violation of IHL is concerned, acknowledges⁵:

National armies are accountable domestically through the political process. Soldiers who commit war crimes together with their military commanders and political superiors who bear responsibility can be prosecuted in national courts and...the International Criminal Court. This liability under international humanitarian law would also apply to employees of PMCs who became involved in armed conflict. In many cases however this is a highly theoretical proposition – a weak government which is dependent for its security on a PMC may be in a poor position to hold it accountable. (emphasis added)

Later, after the release of this paper, SI⁶ officially announced on 16th April 2004 that it had ceased operations citing:

The general lack of governmental support for Private Military Companies willing to help end armed conflicts in places like Africa, in the absence of effective international intervention, is the reason for this decision. Without such support the ability of Sandline to make a

³ A Parker, 'New Rules Likely on Mercenaries,' p. 2. FT.com, Available from <<http://news.ft.com/ft/gx.cgi/ftc?pagename=View&c=Article&cid=FT3TF5GG5G> C&live=. Internet.> (Accessed 30 November 2000).

⁴ A Green Paper is an official UK government planning document. The Paper recommends policy to the Government based on a consultative research process.

⁵ United Kingdom, Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation* (2001-02 HC 577) para 34. Available at <<http://www.fco.gov.uk/Files/kfile/mercenaries,0.pdf>>. (accessed 24 February 2006)

⁶ The company at the centre of the 'Arms to Africa Affair.'

positive difference in countries where there is widespread brutality and genocidal behaviour is materially diminished.⁷

Is this to be construed as an implied concession by the PMC that it had been conducting its operations in a legal vacuum and that its determination to continue doing so was so overwhelming as to make it cease its operations in the face of attempts to introduce regulations by the UK government? If so, does it then mean that other PMCs that have not ceased their operations⁸ are operating in the same legally challenged atmosphere? Has International Law and more particularly IHL failed to address the challenge posed by PMCs leaving every state to set its own standards as far as regulating the industry is concerned? What does IHL say about PMCs and their accountability for violations of the same? These and other questions provoke numerous observations and give rise to a clear divergence of views.

PMCs are a fairly new development yet the industry is surprisingly big business. It has several hundred companies, operating in over 100 countries on six continents, and over \$100 billion in annual global revenue⁹. In fact, with the recent purchase of MPRI by the *Fortune* 500 firm L-3, many Americans already own slices of the industry in shares.¹⁰ In the immediate aftermath of the September 11 attacks on the World Trade Centre in the US, the industry was one of the few to rise in stock valuation rather than plummet.¹¹ The reason is that the attacks essentially lodged a "security tax" on the economy, from which the private military industry stood to benefit.¹²

The industry's growth meant that almost any military capability could now be hired off the global market. After they receive contracts from clients, who range from state governments and multinational corporations to humanitarian aid groups and even some suspected terrorist groups, the firms recruit military specialists to fill them. They find their employees through formal job announcements in trade journals and through informal alumni networks of elite units.¹³ The vast majority are recently retired, meaning that the cost of training is borne elsewhere, an added saving. Where once the creation of a military force

⁷ This official statement is available at <http://www.sandline.com> (accessed 24 February 2006)

⁸ Such as MPRI which is a legally registered corporate entity structured as a profit-making body selling military expertise that does not reside within a state itself. It has its headquarters in Alexandria, Virginia and manages programs throughout the United States and in more than twenty countries overseas.

⁹ L Peterson, *Privatizing Combat, the New World Order*, in *Making a Killing: The Business of War* 5, 6 (2002).

¹⁰ PW Singer, 'Peacekeepers, Inc.,' *Policy Review*, June 2003 available at <<http://www.policyreview.org/jun03/singer.html>> (accessed March 6, 2006).

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

required huge investments in time and resources, today the entire spectrum of conventional forces can be obtained in a matter of weeks, if not days. The barriers to acquiring military strength are thus lowered, making power more of a commercial affair. In other words, clients can undertake operations, which they would not be able to do otherwise, simply by writing a cheque.

The term "Private Military Company"¹⁴ is not a legal one. In fact it does not exist within any extant international convention or legislation. P.W. Singer confirms¹⁵:

In a world where we police even the fat content of cookies, perhaps what is most surprising is that this industry, so central to national and global security, is completely unregulated. No international laws apply. National laws are little better, with the majority of states, including Britain, having none that fully controls the firms. (emphasis added)

The origin of PMCs can safely be attributed to the end of the cold war. Samuel Huntington, one of the West's most eminent political scientists argues that¹⁶:

the moment of euphoria at the end of the Cold War generated an illusion of harmony, which was soon revealed to be exactly that. The world became different in the early 1990's, but not necessarily more peaceful.

The end of the Cold War averted the threat of global and nuclear war between the superpowers; however, it unleashed a surge in interethnic and internecine conflicts throughout many parts of the world, from the Balkans to Sub-Saharan Africa and Asia. While conflict within and among states in these regions was not exceptional, the use of PMCs by legitimate governments as a force multiplier, to conduct direct combat operations against their adversaries, was unprecedented. The monopoly of force, previously vested in the armed forces of nation-states for the purpose of their own integral defense and security, was now being exercised by commercial entities and specifically for financial profit. The evolution of PMCs abruptly challenged the extant international

¹⁴ There is no agreement on an appropriate nomenclature for these firms. While some prefer 'private military company' or 'Private Military Firm', it is clear that some of these firms do not offer purely military services, but all of them are in the business of providing security. For this reason, others use the term 'private security company', but this tends to be used to describe the industry that provides purely domestic security services. A good number concur on the term 'transnational security corporation', a term which stresses the broader element of security and also the cross-border operations of these firms yet others find comfort in the terms 'private military actors' and/or 'Private Arms Carriers'. In spite of all this, no known convention/treaty makes mention of any of these terms.

¹⁵ Singer, 'The Dogs of War Go Corporate,' *London News Review*, March 19, 2004. Available at <<http://www.sandline.com/hotlinks/publications.html>> (accessed 2 March 2006)

¹⁶ SP Huntington, *The Clash of Civilizations*, p. 31.

conventions that defined mercenary status. Their evolution is attributable to four main factors, commensurate with the ending of the Cold War.

First, the bipolar order of the Cold War had previously established an international order structured by *horror ad vacuum*--whereby every state had some utility for the main (protagonists) in that it was important to prevent its control by the rival.¹⁷ The defeat of the Soviet Union as a superpower nullified this framework of international relations. The West¹⁸ responded by the pursuit of a new direction of *active disengagement* from other states and regions, reassessed as declining in strategic interest. Furthermore, some states became peripheral to declared vital national interests. Presence, commitment, and political solidarity were replaced by a determination for localized responsibility for peace, security, and economic development. The West was no longer eager to try to and manage distant regional ethnic and nationalist conflicts as intimately as it had during the Cold War.

Secondly, the United States (US) loss of 18 dead and 73 wounded military personnel, in Mogadishu on 3 October 1993, as part of the failed United Nations (UN) Mission in Somalia,¹⁹ initiated a fundamental reshaping of the West's perceptions of responsibility and obligation, to respond to foreign crises. The West became (politically) unwilling to commit and risk its own military forces in an effort to resolve regional conflicts and humanitarian disasters for fear again of "crossing the Mogadishu Line." Lacking determined international action in the form of direct intervention from the West, less powerful and developed nation-states could not guarantee their own security, nor provide for and raise effective national armies against interstate wars and internal civil wars. This situation resulted in an increasing world demand for PMCs that could create and contribute to nation-states' security.

Thirdly, the end of the Cold War resulted in the rapid downsizing of the characteristic massive standing armies of the East and the West. Between 1985 and 1994, militaries of states were reduced by five million people.²⁰ The US alone reduced its armed forces manpower strengths by approximate 30

¹⁷ JN Pinto, 'The Crisis of the Sovereign State and the Privatization of Defense and Foreign Affairs,' p. 5.

¹⁸ The West is hereby defined as the governments of the USA, UK, Canada, and France. The leading role and contribution by these governments in any international crises strongly influences any collective response by other Western governments.

¹⁹ This decision was significantly influenced by the actions of certain international media outlets in broadcasting graphic footage of the bodies of the slain servicemen being dragged through the streets of Mogadishu. These US servicemen were killed in a separate security operation directed against the clan leadership of Mohammed Farrah Aideed as distinct from the UN sponsored humanitarian operation.

²⁰ H Sanchez, 'Why Do States Hire Private Military Companies?' p. 2.

percent.²¹ These former military personnel forged a pool of very experienced and readily available skilled professional recruits for PMCs.

Lastly, the collapse of the Soviet Union triggered depressed economic conditions within the majority of its former client states. As a deliberate measure to obtain foreign currency with which to rebuild their economies, nation-states readily sold lucrative former Soviet assets. This action resulted in the unprecedented availability of sophisticated military equipment and trained personnel, to nonaligned Western nations and commercial interests, particularly the versatile fleet of Soviet helicopter transport and gunship aircraft.

III. CONTEMPORARY PMC ACTIVITY

Military Professional Resources, Inc. (MPRI) is a legally registered corporate entity²². Sandline International was a legally registered PMC before it announced a closure of its operations.²³ Executive Outcomes was founded in 1989 in South Africa by Eben Barlow. It was however disbanded in 1999 after it became almost impossible to operate following the enactment by South Africa of the South African Regulation of Foreign Military Assistance Act (FMA).²⁴

In 1992 Executive Outcomes was hired by Sonangol, an Angolan parastatal company, to secure the Soyo oilfield and the computerised pumping station owned by Chevron, Petrangol, Texaco and Elf-Fina-Gulf. A small force from Executive Outcomes backed by two Angolan battalions regained the oilfield early in 1993. Executive Outcomes then withdrew leaving the Angolan battalions in place. Soyo was subsequently recaptured by UNITA.

Both EO and Sandline were hired on separate occasions by President Ahmed Kabbah of Sierra Leone in his efforts to defeat the Revolutionary United Front (RUF), which had kept his democratically elected government from ruling the country. The initial deployment of EO in 1995 successfully quashed the rebel movement and maintained peace during the 1996 and 1997 elections.²⁵ However, the withdrawal of an International Monetary Fund (IMF) loan due to the mercenaries' presence made it impossible for Kabbah to pay EO. The group's withdrawal led to a coup ousting Kabbah less than three months later. Pro-PMC crusaders have been quick to use this as an example of how PMCs have been used to assist legitimate governments overcome rebels as opposed to

²¹ L Taulbee, 'Mercenaries and Private Military Companies in Contemporary Policy,' p. 434.

²² See < <http://www.mpri.com/>>(accessed 20 February 2006) for a detailed analysis of the activities MPRI engages in as well as information relating to its corporate status.

²³ See *Supra* note 7.

²⁴ FMA entered into force in September 1998.

²⁵ S Creehan, 'Soldiers of fortune 500: International Mercenaries,' *Harvard International Review* (2002), for a summary of how the events unfolded.

mercenaries who help rebels to topple legitimate governments. One of them laments with particular reference to the situation in Sierra Leone in 1995;

It is hard to imagine that this positive development would have come about without the PMC.²⁶

In 1998, Sandline was hired to finish what EO had started. Sandline's involvement in Sierra Leone again restored Kabbah to power, but controversy quickly arose in the United Kingdom when Sandline came under investigation by the Department of Customs and Excises for alleged violations of a UN arms embargo in Sierra Leone. The controversy only deepened when the company claimed that it had the support of the British High Commissioner in Sierra Leone and the tacit approval of the British Foreign Office. A House of Commons Select Committee inquiry eventually exonerated the company of wrongdoing, but only after a damaging political scandal in the British Foreign Office²⁷. Back in Sierra Leone, Sandline was forced to withdraw after a peace accord with the rebels was hastily signed and the RUF leader was installed as vice president under Kabbah.

In 1994 MPRI was contracted by the Croatian Government to design a programme to improve the capabilities of the Croatian armed forces and 'to enhance the possibility of Croatia becoming a suitable candidate' for NATO's Partnership for Peace Programme. It received a licence from the State Department for this contract. The MPRI Programme began in January 1995. Later that year Croatian forces performed unexpectedly well in 'Operation Storm' - an offensive against Serb forces in the Krajina region.

IV. NEED FOR REGULATION AND SPECIFIC PMC TREATY

There is no international literature of authority that adequately or succinctly defines the term "private military company." The current context of international legislation and convention is only definitive of mercenary organizations and operations²⁸. These documents are outdated and hence inadequate in application to PMCs. The significance of current international legislation is the descriptive outline of what actions are not defined as mercenary. This in effect establishes a de facto framework for PMCs to operate within and claim a modicum of international legitimacy.

²⁶ D Brooks, 'Hope for the "Hopeless Continent": Mercenaries, Traders: Journal for the Southern African Region,' Issue 3, July - October 2000. Available at <<http://www.tradersP.co.za/index.html>> (accessed on 2 February 2006).

²⁷ See supra notes 3, 4 and 5.

²⁸ See supra note 16.

The Oxford English Dictionary defines a mercenary as 'a professional soldier serving a foreign power'²⁹. On the other hand the most widely used legal definition of a mercenary is very narrow. Article 47(2) of the First Additional Protocol of 1997 to the Geneva Conventions defines a mercenary as one who:

'(a) is specifically recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;

(d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

(e) is not a member of the armed forces of a party to the conflict; and

(f) has not been sent by a state which is not a party to the conflict on official duty as a member of the armed forces.'

It should be noted that this definition is cumulative and so a mercenary is defined as someone to whom all of the above apply. Its limitations are numerous;

1. The cumulative and concurrent requirements to satisfy the definition of a mercenary.
2. The narrow focus on the status of the individual conducting an action, as opposed to a wider focus on the act of direct intervention in armed conflict as a combatant.
3. The lack of any fundamental differentiation between corporate entities conducting military-style operations and traditional freelance style mercenaries.

²⁹ This is a wide definition, which would include many people engaged in legitimate activities, for example Gurkha troops in the British and Indian Armies, troops in the British Army who have been recruited in Commonwealth countries, loan service personnel, the French Foreign Legion and the Swiss Guard in the Vatican.

A number of scholars therefore regard this definition as unworkable³⁰ for practical purposes. In particular it would be difficult to prove the motivation³¹ of someone accused of mercenary activities. Contracts can also be drafted so that those employed under them fall outside the definitions in the convention. Tim Spicer, the former Chief Executive of Sandline International on its involvement in New Guinea, affirms;

Sandline people are always enrolled in the forces, police or military, of the client state; in Papua New Guinea, all of us were appointed as Special Constables and were subject to the same laws, rules and regulations that governed any other government servant. We did not operate as a private army.³²

There are also cases of foreign nationals providing military services who have been granted or have applied for local citizenship with the effect that under (d) above, they could not be described as mercenaries.

Additionally, international law recognizes a role for civilian support specialists on the battlefield, which specifically precludes their inclusion as mercenaries.³³ MPRI has exploited the wide parameters of subparagraph 2(b) that enables foreign advisors and military technicians to be excluded from the definition of being a mercenary.³⁴ The understanding is that the individual status of MPRI contracted personnel is not compromised in accordance with the Additional Protocol.

Sandline (before ceasing operations) and MPRI have also exploited the wide parameters of subparagraph 2(c). Financial remuneration from contracted operations is paid by States directly to the corporate entity. Therefore it is very difficult to make any effective and succinct comparison concerning the rates of payment between contract employees and personnel within the armed forces of the host State.

As a result, there is international recognition that private military corporations are not mercenaries and in fact are legitimate national corporations organized in accordance with the legal codes of their respective home countries.³⁵ Most

³⁰ See generally P Addo, *Mercenarism in West Africa: A Threat to Ghana's Democracy*

³¹ Volunteers are excluded by the Geneva Convention definition under (c) if their motives are idealistic rather than financial. In practice it may be difficult to distinguish volunteers from traditional mercenaries. Volunteers (eg Islamic militants in Afghanistan, Chechnya or the Balkans) are frequently paid and money may be as much a part of their motivation as ideology.

³² T Spicer, *An Unorthodox Soldier*, p. 24.

³³ See Article 4(4) of Geneva Convention III which affords such persons Prisoner Of War (POW) status.

³⁴ See <<http://www.mpri.com/>> Supra note 24 (accessed 20 February 2006) MPRI purports to be engaged in the integral equipping and training of a foreign state's personnel for direct combat operations.

³⁵ Countries such as USA and South Africa have legislation to regulate PMCs.

important, the United Nations agrees that PMCs do not meet the stated definition of a mercenary.³⁶

Moreover, the date of coming to force of protocol I to the Geneva Conventions³⁷ immediately indicates that its framework does not encompass the evolution of PMCs that occurred in the latter period of the late 1980s and early 1990s. The Convention elucidates the term mercenary against the backdrop of the period in which it was drafted. Therefore, the applicability and relevance of this Convention as a definitive means for the current legal context of PMCs is substantially degraded. The document does not address the evolution of PMCs and their application within modern conflict.

A second ramification owing to the declining relevance of this Convention is that any subsequent international convention or legislation designed on the basis of this document will also be erroneous in application to the current context of PMCs. The International Convention against the Recruitment, Use, Financing, and Training of Mercenaries adopted by the UN in 1989 as well as the 1977 Convention of the Organization of African Unity (OAU) for the Elimination of Mercenarism in Africa fall victim to this definition. The Conventions are focused on mercenary actions that are perceived to be a means of violating human rights and impeding the exercise of the right of peoples to self-determination. This focus has centered on events in Africa and other parts of the Third World. The Conventions do not consider the potential for a discrete relationship to exist between a PMC and its national government and their practical employment in other parts of the world.

It therefore follows that there exists no universal law that has kept parallel development with that of corporate private military companies since the conclusion of the Cold War. This leaves PMCs to continue operating in a legal vacuum as far as International Humanitarian Law is concerned. With this in mind, the question regarding the accountability of PMC employees for violations of IHL becomes a legitimate one.

V. PMCS AND VIOLATIONS OF IHL.

A breach of Geneva Law that primarily protects civilians and persons no longer taking part in hostilities could amount to crimes such as Genocide³⁸, crimes

³⁶ In 1997, the UN Special Rapporteur for Mercenaries noted that private military corporations "cannot be strictly considered as coming within the legal scope of mercenary status"; see 20 February 1997 "UN Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-Determination."

³⁷ Its year of entry into force is 1977.

³⁸ ICC statute at Art. 6, ICTR statute at Art. 2.

against humanity³⁹ as well as war crimes⁴⁰. On the other hand a violation of the 1907 Hague convention on the laws and customs of war could lead to the crime of aggression⁴¹ or amount to war crimes⁴². While these crimes are committed by individuals who would be individually responsible and liable to prosecution, questions abound as to whether the state to which PMCs belong can face penal sanctions for the same crimes.

VI. THE NOTION OF STATE RESPONSIBILITY FOR CRIMES UNDER INTERNATIONAL LAW

Elihu Root, speaking as president of the American Society of International Law in 1916 remarked;

Upto' this time breaches in international Law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular Nation upon which the injury was inflicted and the nation inflicting itInternational law violated with impunity must soon cease to exist and every state has a direct interest in preventing those violations which if permitted to continue would destroy the law.⁴³

The years after the First World War saw many initiatives which tried to draw conclusions from the experience and to define particular serious violations of international Law which would give rise to special sanctions and responsibilities *erga omnes*. These initiatives however all have in common that they were treaty-based or treaty oriented. While the Versailles Treaty postulated that Germany had committed a crime by starting and conducting the World War and that German leaders should be tried for crimes against the law of nations, the League of Nations was the first international institution which provided for collective sanctions in case a state resorts to war against its stipulations. The Geneva Protocol of 1924 on the Pacific Settlement of International Disputes which never entered into force declared the resort to war to be a 'crime' against which all nations were called to act.⁴⁴ In addition to the development of the concept of 'crime of state', initiatives were undertaken to establish the international criminal responsibility of individuals.

³⁹ ICC statute at Art. 7, ICTR statute at Art. 3.

⁴⁰ ICC statute at Art 8.

⁴¹ Defined by the General Assembly in Res. A/3314 of 14 December 1974 as the sending by or on behalf of a state armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another state of such gravity as to amount to acts of trans border military acts by state organs or its substantial involvement therein. In its Nicaraguan judgment of 1986 the ICJ accepted this text as being an expression of Customary law and took it as a point of departure in its assessment of the case.

⁴² Supra note 42.

⁴³ Root, 'The Outlook for International Law', 10 *American Journal of International Law* (1916), p. 1 at 7 *et seq.*

⁴⁴ League of Nations, *Record of Fifth Assembly* (1924), Plenary meetings, 498.

Does there then exist a concept of “due diligence” for violations of IHL within the requirement to ensure respect for the same by persons other than a state’s own armed forces? If a government hires a PMC to undertake a specific function, is the PMC acting on its instructions or under its direction or control? And if so who is to take responsibility if IHL is violated? Is it the state or the Company? What are States’ duties of instruction in IHL to such companies under e.g. Article 128 of the Third Geneva Convention, Article 144 (2) of the Fourth Geneva Convention and Article 19 of Additional Protocol II? Does a failure to do this, together with violations by a PMC, incur State responsibility? If so, which State is responsible?

Can the more general duty to “ensure respect” *erga omnes*⁴⁵ be of any relevance? Is there any difference if the violations are committed by a company which is in turn hired by the company initially hired by the government?

An argument can be sustained that the above questions cannot find clear answers within the existing IHL framework.

VII. THE INGREDIENTS OF STATE RESPONSIBILITY

For a state to be responsible for wrongful acts under international Law there has to be in existence an international legal obligation in force as between two particular states, there has to have occurred an act or omission which violates that obligation and which is imputable to the state responsible, and finally that loss or damage has resulted from the unlawful act or omission⁴⁶. It is a principle of international law and even a greater conception of law that any breach of an engagement involves an obligation to make reparation⁴⁷. This obligation to make a reparation also finds expression in the *Spanish zone of Morocco claims*⁴⁸ where the following was stated:-

Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. Responsibility results in the duty to make a reparation if the obligation in question is not met.⁴⁹

At its fifty-third session (2001), the International Law Commission adopted on second reading a complete text of the Articles on Responsibility of States for

⁴⁵ The general duty of States to exert their influence to the degree possible to stop violations by others.

⁴⁶ EJ de Are’chaga, ‘International Responsibility,’ in *Manual of Public International Law* (London, 1968), pp. 531, 534.

⁴⁷ *Chorzow Factory case PCIJ* series A no. 17, 1928, pg 29.

⁴⁸ 2 RIAA, p. 615 (1923).

⁴⁹ *Ibid* at p. 641.

Internationally Wrongful Acts, together with accompanying commentaries.⁵⁰ The Articles on State Responsibility (as they will be called here) were referred to the General Assembly for consideration. Article 2 of these Articles on state responsibility provide as follows.

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

The only forms of reparation envisaged in the Articles on State Responsibility are restitution, compensation and satisfaction, either singly or in combination.⁵¹ This begs the question whether International Crimes⁵² should be subjected to the same legal regime where wrongfulness gives rise to an obligation to pay reparations. Can crimes such as genocide, crimes against humanity and war crimes be adequately addressed by reparations? Can international courts impose punitive damages on states that are found responsible for having committed international crimes? Should international law be pushed in the direction of punitive damages? What options do we have as far as punishing states responsible for international crimes is concerned?

One might well ask what we can do to a state that violates its obligations under international law by condoning grave violations of International Humanitarian Law other than imposing punitive damages. The argument that imposing punitive damages on the state without punishing the individuals concerned amounts to hot air cannot be dismissed as frail. The notion of individual criminal responsibility has been accepted and is established practice in international law.⁵³

⁵⁰ For the text of the Articles and commentaries see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, chap. V. These are reproduced with a critical apparatus in J Crawford, *The ILC's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge:).

⁵¹ *Supra* note 52 at Art 34. Moreover Art. 31 provides that the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

⁵² Genocide, Crimes Against Humanity, War Crimes and Aggression.

⁵³ 'Universal Jurisdiction' allows any state to demand for any person who has committed atrocious crimes and to punish that person after his trial by a fair and impartial tribunal regardless of where the crimes were committed. The International Criminal Tribunals for Rwanda and Yugoslavia were established to try and punish individuals responsible for atrocities in Rwanda and Yugoslavia respectively. The Sierra Leone Special Court was set up for the same purpose. Further Individual Criminal Responsibility is envisaged by the ICC statute at Article 25.

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Internationally Wrongful Acts, together with accompanying commentaries.⁵⁰ The Articles on State Responsibility (as they will be called here) were referred to the General Assembly for consideration. Article 2 of these Articles on state responsibility provide as follows.

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of an international obligation of the State.

The only forms of reparation envisaged in the Articles on State Responsibility are restitution, compensation and satisfaction, either singly or in combination.⁵¹ This begs the question whether International Crimes⁵² should be subjected to the same legal regime where wrongfulness gives rise to an obligation to pay reparations. Can crimes such as genocide, crimes against humanity and war crimes be adequately addressed by reparations? Can international courts impose punitive damages on states that are found responsible for having committed international crimes? Should international law be pushed in the direction of punitive damages? What options do we have as far as punishing states responsible for international crimes is concerned?

One might well ask what we can do to a state that violates its obligations under international law by condoning grave violations of International Humanitarian Law other than imposing punitive damages. The argument that imposing punitive damages on the state without punishing the individuals concerned amounts to hot air cannot be dismissed as frail. The notion of individual criminal responsibility has been accepted and is established practice in international law.⁵³

⁵⁰ For the text of the Articles and commentaries see *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, chap. V. These are reproduced with a critical apparatus in J Crawford, *The ILC's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge:).

⁵¹ *Supra* note 52 at Art 34. Moreover Art. 31 provides that the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

⁵² Genocide, Crimes Against Humanity, War Crimes and Aggression.

⁵³ 'Universal Jurisdiction' allows any state to demand for any person who has committed atrocious crimes and to punish that person after his trial by a fair and impartial tribunal regardless of where the crimes were committed. The International Criminal Tribunals for Rwanda and Yugoslavia were established to try and punish individuals responsible for atrocities in Rwanda and Yugoslavia respectively. The Sierra Leone Special Court was set up for the same purpose. Further Individual Criminal Responsibility is envisaged by the ICC statute at Article 25.

VIII. IMPUTABILITY TO THE STATE

Articles 51, 52, 131 and 148 of Geneva Convention 1, 2, 3 and four respectively envisage responsibility on the part of states for grave breaches as defined in articles 50, 51, 130 and 147 of the respective conventions.⁵⁴

Article 91 of the 1st Protocol to the Geneva Conventions provides as follows:

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.

Protocol II to the Geneva Conventions does not have any provision making particular reference to responsibility.

The question as to whether an internationally wrongful act committed by an entity (such as a corporation) other than the state can be attributable to the state is a difficult question in international law. The situation is further complicated when the non-state entity goes against the express provisions of the state. Under what law will the non-state entity be held liable when its not a party to any treaty outlawing such acts? Is liability under international law strict?

One now begins to see why a topic that should on the face of it have taken one summer's work, has taken forty years. It has been interpreted to cover not only issues of attributability to the state, but also the entire substantive law of obligations, and the entirety of international law relating to compensation.⁵⁵

Article 4 of the articles on state responsibility provide as follows:-

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.

⁵⁴ The articles provide that no high contracting party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or any other High Contracting Party in respect of grave breaches of the Geneva Conventions.

⁵⁵ R Higgins, *Problems and Process: International Law and How We Use It'* (1994), p. 148.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5 of the same then goes further and provides the link between a state and an entity lacking the character of a state. It states:-

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.

Article 7 of the same seems to impose an element of strict liability on the notion of state responsibility. It states:-

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.

The articles on state responsibility apply without prejudice to the aspect of individual responsibility under international law of any person acting on behalf of a State.⁵⁶

The articles have not achieved the status of a treaty. However, the fact that they were reached at in a scholarly forum leans to the presumption that they are evidence of a source of law. In the wording of Article 38(1) of the Statute of the International Court of Justice, the articles are a "subsidiary means for the determination of rules of law." That is, the work of the ILC is similar in authority to the writings of highly qualified publicists. This is the view of Clive Parry⁵⁷ and Ian Brownlie⁵⁸. Whether their applicability and binding nature in the absence of a treaty should not be held to be in dispute can only be known when the matter is raised before an international court or tribunal.

IX. CONCLUSION

PMCs are undoubtedly amorphous entities in modern day armed conflict. While humanitarian law outlining the position and status of rebels and guerilla movements among other private arms carriers in the context of armed conflict is fairly adequate, that on PMCs is unclear and uncertain if not altogether

⁵⁶ See article 58 of the Articles on State Responsibility.

⁵⁷ C Parry, *The Sources and Evidences of International Law* (1965), pp. 23-24, 114.

⁵⁸ I Brownlie, *Principles of Public International Law* (3d ed. 1979), p. 26.

inexistent. This lack of clarity can only be averted by either specifically including PMCs in the existing definition of a mercenary or coming up with a PMC specific law of an international character outlining the status of PMCs as well as what they can and cannot do.

Without such a law, active military assistance operations conducted by private military companies will remain legitimate, but that measurement of legitimacy can only be assessed as being de-facto and amoral. Moreover these missions will continue to be conducted within a vacuum of effective regulation and accountability at the international and national levels that is decidedly inappropriate for the international realm in the twenty first century.