IMPLAUSIBLE DENDIABILITY: STATE RESPONSIBILITY FOR THE ACTS OF PRIVATE MILITARY FIRMS

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Section I: Introduction

“Blackwater has made many mistakes resulting in other deaths, but this is the last and the biggest mistake. This is unjustified...Security contracts do not allow them to shoot people randomly. They are here to protect personnel, not shoot people without reason.”


On September 17 2007, the United States Private Military Firm (“PMF”) “Blackwater” was involved in a street battle in Baghdad that killed at least 9 civilians and wounded 14 others. Blackwater, allegedly acting in self-defense, had been escorting a US State Department official when the shooting began.²

The reaction of the Iraqi government was swift, commencing an investigation into the incident and revoking Blackwater’s license to operate in Iraq. However, a regulation known as Order 17, established under the US-led Coalition Provisional Authority in 2004, grants American private security firms immunity from prosecution in Iraqi courts. Further, some have doubted whether the Iraqi government could even expel Blackwater at all, because its contract is through the State Department.³

This image of Private Military Firms as unaccountable cowboys permeates contemporary discourse on the subject. But if the hands of the Iraqi government are tied, who is to bear responsibility for the acts of Blackwater and firms like it? Blackwater, and over 60 other private military and security contracting firms, are now providing services to the Coalition forces in Iraq, as well as to a myriad of private companies.\(^4\) This is a scenario that would have seemed preposterous to many a decade ago and raises the vexed question of who should bear responsibility for the rogue acts of such groups.\(^5\)

The problem is not limited to Iraq. PMFs are active in a plethora of conflict or transition zones throughout the world, as well as in stable and established states.\(^6\) From Bosnia to Sierra Leone, to the United States to Papua New Guinea, they perform activities that many had seen as ‘quintessentially governmental functions’,\(^7\) central to the Weberian monopoly on violence that was thought to define the modern state.\(^8\)

However, these functions are now being increasingly removed from the military chain of command and the direct oversight of the state, creating an increased risk those taking human life are operating with impunity.\(^9\) PMFs have already been implicated in notorious instances of human rights abuse. It is alleged that CACI and Titan employees have been

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\(^6\) Singer, Corporate Warriors, supra note 5, at 9.

\(^7\) Laura A Dickinson, Government for hire: privatizing foreign affairs and the problem of accountability under international law, 47 William and Mary Law Review 135,147 (2005).


involved in the torture of prisoners at the Abu Ghraib facility, DynCorp employees have been accused of trafficking of sex slaves in Bosnia, and the now defunct Executive Outcomes (EO) was widely denounced for indiscriminate killing of civilians during its operations in Sierra Leone, and this is to exclude numerous allegations of fraud and overcharging leveled against government contractors in Iraq.

When it comes to controlling the activities of PMFs, international law has been written off as effectively impotent. PMFs, it is lamented, do not come within the definition of ‘mercenary’, and are therefore not subject to the pejorative effects of that label under international law.

As politicians, political scientists, participants, journalists, and even criminologists ponder the regulation dilemma, therefore, the international lawyers are

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17 Singer, CORPORATE WARRIORS, supra note 5.

Private Military Firms + State Responsibility

left to lament a ‘vacuum of law’ \(^{21}\) that only serves to confirm accusations that international law is too weak to deal with the problem.\(^{22}\)

Commentators have therefore turned to sanctions under municipal law. They have argued that contractors in Iraq may be subject to the extraterritorial effect of the US *Military Extraterritorial Jurisdiction Act* \(^{23}\) or the *War Crimes Act*. \(^{24}\) Others have suggested possible remedies under the *Alien Tort Claims Act* for breaches of the ‘law of nations’. \(^{25}\)

However these municipal laws contain various loopholes and are limited in application. They do not provide the accountability necessary to ensure that PMFs carry out their functions appropriately. This has produced a virtual consensus that further regulation of the PMF industry is necessary and desirable. \(^{26}\)

Problematically, however, State governments derive numerous benefits from the use of PMFs in the current, largely unregulated, environment. Apart from economic incentives, ‘tactical privatization’ is a central factor in States’ enthusiasm for outsourcing functions

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21 Singer, Vacuum of Law, supra note 14.
22 Dickinson, supra note 7 at 141.
25 Garmon, supra note 12 at 327.
to PMFs. This refers to the ability to avoid the political accountability mechanisms and costs associated with military involvement. By using PMFs as tools of the State’s foreign policy the Executive can free itself from public oversight.

Strangely then, few commentators have tried to explain why States will be motivated to put regulatory systems in place when such benefits for maintaining the status quo exist. This paper will argue that international law can provide the missing logical step between demonstrating the desirability of systems of regulation to increase accountability on the one hand and suggesting that they will be implemented by governments on the other.

In this vein, States must recognize the possibility that, in certain circumstances, they have State Responsibility for the acts of otherwise private groups, such as PMFs, under international law. In these situations the State itself will be liable for any abuses

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27 Jon D Michaels, Beyond Accountability: The constitutional, democratic and strategic problems with privatizing war, 82 WASHINGTON UNIVERSITY LAW QUARTERLY 1001, 1037 (2004).

28 Newell and Sheehy, supra note 8 at 91.


30 One meeting of experts has discussed the issue, but reached no substantive conclusions: University Centre for International Humanitarian Law, Expert Meeting on Private! Military Contractors: Status and State Responsibility for their actions, Aug. 29-30, 2005, http://www.adh-geneve.ch/evenements/pdf/colloques/2005/2rapport_compagnies_privees.pdf. Similarly, State Responsibility is mentioned (very) briefly in the context of Foreign Sovereign Immunity in Abigail Hing Wen, Suing the Sovereign’s servant: The implications of privatization for the scope of Foreign Sovereign Immunities, 103 COLUMBIA LAW REVIEW 1538, 1583 (2003), and in the context of criminology in Jamieson and McEvoy, supra n 20 at 504. Comments on State Responsibility in the context of the American Restatement are made in Jennifer Elsea and Nina M Serafino, Private Security Contractors in
committed by PMFs; that is, the acts of private groups will be attributed to the State. As a result, the State must act to monitor PMF activity to prevent these abuses from occurring if they are to prevent their own liability.

In returning the discussion to black-letter rules of State Responsibility, we also re-assert the relevance of the state as the primary actor in international affairs. Non-state actors can only be held accountable by States, and we must therefore examine the motivations and possible liability of States if we are to fully understand the regulatory environment. By examining State Responsibility the barriers that have impeded regulation are removed. The Blackwater incident throws into stark relief the present disconnect between State Responsibility and the actions of PMFs. This disconnect, however, is illusory. This paper analyzes ways in which States may be held responsible for such acts of PMFs under international law and in doing so seeks to reconceptualize the PMF-State relationship.

With this aim in mind, Section II of this paper briefly outlines the development of PMFs and their distinctive features. Three broad categories of PMF are identified: Military Provider Firms, Military Consultant Firms and Military Support Firms. Section III sets out the desirability of regulation of PMFs and the current barriers that are impeding that regulation. Section IV demonstrates that PMFs are not mercenaries and therefore there is no primary obligation at international law that prevents States from employing them. Therefore this is not a spur to regulation or prohibition. In Section V the secondary rules of State Responsibility, as set out in the Draft Articles of the International Law Commission (Draft Articles), are outlined and then (in Section VI) applied to three PMF

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32 The arguments for human rights obligations to be imposed directly on non-state actors such as Transnational Corporations are made in D Kinley and J Tadaki, From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, 44 VIRGINIA JOURNAL OF INTERNATIONAL LAW 931 (2004).
case studies: Executive Outcomes in Sierra Leone, MPRI in Croatia and Kellogg Brown & Root in Iraq. These case studies reflect the categories of PMF outlined above. In Section VI this outcome is compared with state practice in relation to State involvement with PMFs. Section VII concludes by noting that a possible finding of State Responsibility should motivate States to ensure proper accountability of PMFs and their compliance with human rights norms.
Section II: Nature and Development of Private Military Firms

An understanding of the nature and development of PMFs demonstrates why regulation is necessary and allows us to better understand ways in which responsibility for PMF misdemeanors can be attached to the state.

Definition

Peter Singer describes PMFs as

business organizations that trade in professional services intricately linked to warfare. They are corporate bodies that specialize in the provision of military skills, including combat operations, strategic planning, intelligence, risk assessment, operational support, training and technical skills.33

The exact nature of the services provided by a specific PMF, and its exact relationship with the State, will be critical in determining whether State Responsibility exists for its actions. In the past, firms have worked for Western States, developing States, non-governmental organizations (NGOs), the United Nations (UN) and Transnational Corporations (TNCs).34 For example, Blackwater in Iraq has had contracts both with the CPA, the US State Department, and with private companies.35 While some firms limit themselves to these sources of business,36 other firms have sold their services to less legitimate groups, from dictators to drug cartels to rebel and insurrectionary forces.37

Nature and categorization

33 Singer, CORPORATE WARRIORS, supra note 5 at 8.
34 The UN hired Aegis Defence Services (headed by Tim Spicer) to provide security for the 2005 referendum and national elections in Iraq: Swain, supra note 19.
35 CNN.com, supra note 2.
37 Singer, CORPORATE WARRIORS, supra note 5 at 9.
In this essay, the ‘Tip-of-the-spear Typology’ is used to categorize Private Military Firms. This typology, as advocated by Peter Singer, is widely used and supported in the existing literature as a method of dividing firms by the function they perform. In doing so, three categories are identified:

1. Military Provider Firms;
2. Military Consultant Firms; and
3. Military Support Firms.

**Military provider firms**

Military provider firms are defined by their focus on the ‘tactical environment’ at the ‘implementation’ level. They engage in actual fighting, either as combat troops, commanders or specialists. While the distinction between ‘active’ and ‘passive’ PMFs is not useful to categorize the industry as a whole, it is useful in demonstrating different types of firm within the military provider category. Thus military provider firms providing ‘active’ or offensive services, such as Executive Outcomes in Sierra Leone can be differentiated from military provider firms providing ‘passive’ or defence services, such as Blackwater or Erinys in Iraq. While ‘active’ firms are usually used by weak

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38 *Id* at 91-100.


40 Singer, *CORPORATE WARRIORS*, *supra* note 5 at 92.

41 Contrast *id* at 89; See Brooks, *supra* note 26 at 3.
governments,\textsuperscript{42} passive firms may be used by developed States to supplement strong military forces.\textsuperscript{43}

**Military consultant firms**

Military consultant firms generally offer strategic, operational and/or organizational analysis. They may advise on how to restructure a State’s armed forces, how to conduct a particular military operation, or may engage in training on the ground. It is the client State, however, who bears the risk of casualties on the battlefield.\textsuperscript{44} The US firm MPRI typically provides such services, notably to the Croatian army in 1995, eight months before the launch of their successful ‘Operation Storm’ against the Serbs. The line between training and actual combat, however, can often be blurred. This was apparent during the Gulf War when employees of Vinnell\textsuperscript{45} accompanied the Saudi National Guard units they trained into battle.\textsuperscript{46}

**Military support firms**

Military support firms provide supplementary, non-lethal, military services, such as logistics, intelligence, technical support, supply and transportation. They specialize in ‘secondary tasks not part of the overall core mission of the client’.\textsuperscript{47} Numerous firms provide such services to military forces around the world. Kellogg Brown & Root (KBR),

\textsuperscript{42} Singer, CORPORATE WARRIORS, supra note 5 at 93.

\textsuperscript{43} Some have suggested that Military Provider Firms may be a thing of the past, having arisen as a result of unique historical circumstances: UK Green Paper, supra note 16 at 12. However, Singer suggests that ‘as long as demand for military provider services exists, some PMFs will agree to engage in active combat’: Singer, CORPORATE WARRIORS, supra note 5 at 95.

\textsuperscript{44} Singer, CORPORATE WARRIORS, supra note 5 at 95-96.

\textsuperscript{45} Vinnell Corporation has been a division of Northrop Grumman Company since 2002: http://www.vinnell.com/.

\textsuperscript{46} Singer, CORPORATE WARRIORS, supra note 5 at 97.

\textsuperscript{47} Id at 97.
for example, has numerous contracts with the US government to provide, amongst other things, housing facilities for the approximately 100,000 soldiers in Iraq. 48

The tip-of-the-spear distinction is based upon the categorization of military units in relation to their proximity to the front line. It is also analogous to the break down of commercial outsourcing, based upon an organization’s point on the business chain. 49 While firms may cross the boundaries of these categories it remains a useful framework for conceptualizing PMFs.

**Development**

The rise of these various types of PMFs has been both historically and ideologically driven. At its heart lie two factors: (1) The change in the nature of warfare that has attended the end of the Cold War; and (2) The ‘privatization revolution’ which has provided the precedent and policies by which public functions can be introduced to the market. These trends have increased the attractiveness of PMFs to both developing and developed states alike.

The end of the Cold War led to massive downsizing of state armed forces, with thousands of experienced troops finding themselves out of work. 50 In the United States, for example, the military shrunk by a third between 1989 and 2004. 51 At the same time, new global threats from non-state actors were uncovered, states collapsed and local governance was revealed as weak and unstable. 52 Conflicts long suppressed or manipulated by the

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49 Singer, CORPORATE WARRIORS, *supra* note 5 at 91.
50 Carney, *supra* note 9 at 320.
52 Singer, CORPORATE WARRIORS, *supra* note 5 at 49-66.
superpowers re-emerged.\(^{53}\) These concerns have been exacerbated post September 11.\(^{54}\) As a result both the ‘supply’ side and the ‘demand’ side of the private security market has been fuelled.\(^{55}\) That is, the end of the Cold War simultaneously created a surplus of military expertise as well as uncovering the conflicts for which PMFs are now ideally suited. The present world is one in which advanced technology\(^{56}\) and a public aversion to casualties\(^{57}\) makes delegation of military functions to private actors both achievable and desirable.

This historical turning-point has coincided with the surge in global privatization and the dominance of the economic rationalism of the neo-liberal free market ideology.\(^{58}\) Public enterprises have been sold off, bureaucracies commercialized and traditionally government functions contracted out. As a result, roles that were once exclusively provided by the state and which were viewed as fundamental to a state’s identity and its very existence are now being performed by private actors.\(^{59}\)

In 2002 the Bush administration attempted to allay concerns about ill-considered cost-cutting by stressing that government job cuts would not intrude on any functions that


\(^{55}\) UK Green Paper, *supra* note 16 at 12.

\(^{56}\) Kristen McCallion, *War for Sale! Battlefield Contractors in Latin American & the ‘Corporatization’ of America’s War on Drugs*, 36 UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW 317 (2005); See also the ‘Revolution in Military Affairs’: Singer, *CORPORATE WARRIORS*, *supra* note 5 at 62.

\(^{57}\) Garmon, *supra* note 12 at 328. This distaste is linked to the US mission to Somalia in 1993 in which eighteen US soldiers were killed and their bodies paraded through the streets of Mogadishu, see Kenneth L. Cain, *Editorial: The Legacy of Black Hawk Down*, NEW YORK TIMES, Oct. 3 2003. Spicer refers to this as the ‘CNN factor’: Spicer, *supra* note 18 at 22.

\(^{58}\) Newell and Sheehy, *supra* note 8 at 82. This is generally traced to the election of Margaret Thatcher in the UK in 1979: Singer, *CORPORATE WARRIORS*, *supra* note 5 at 66.

\(^{59}\) Newell and Sheehy, *supra* note 8 at 82.
were ‘inherently governmental’. 60 Yet the Bush Administration has privatized ‘everything in sight’ in Iraq, including guards of US installations, interrogators and other seemingly central military functions. 61 In democratic-capitalist political theory, it would seem, there are no ideological underpinnings that prevent or preclude the privatization of violence. 62

The drive to privatization is intimately linked with the desire for financial efficiency and reduced costs. Turning functions over to the private sector is seen as taking advantage of the savings provided by the rigours of market competition. 63 Superficially, the immediate economic benefits of increasing reliance on PMFs makes their hire unavoidable. 64

These factors have converged, then, to create a PMF industry that operates with new technology, more opportunities and more high level influence on how war is conducted than ever before. PMFs now appear indispensable to the continued functioning of Western militaries. 65

60 Michaels, supra note 27 at 1004. Similarly then Secretary of Defense Donald Rumsfeld declared in 2001 that the Pentagon would be challenged to eliminate or shift to private supplies any but the core activities of defense: Minow, supra note 54 at 1002.

61 Minow, supra note 54 at 1003.

62 Newell and Sheehy, supra note 8 at 82.


64 Fricchione, supra note 10 at 747. However the ‘efficiency’ argument has been criticized by a number of commentators: Fricchione, supra note 10 at 748. Many commentators merely assume the validity of the efficiency argument: Milliard, supra note 15 at 15. Singer argues that it is a ‘common myth’ that outsourcing saves money, and that privatization is more about avoiding ‘tough political choices’, as quoted in Steven L Schooner, Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government, 16 STANFORD LAW AND POLICY REVIEW 549, 553 (2005). This is examined in more detail in Section III, below.

65 Desai, supra note 39 at 832-833.
For whatever reason, PMFs are now ‘an established feature of the 21st century war landscape.’\textsuperscript{66} It is too late, it seems, to ‘put the genie back in the bottle.’\textsuperscript{67}


\textsuperscript{67} Newell and Sheehy, \textit{supra} note 8 at 100.
Section III: Making Private Military Firms Accountable – Regulation

As PMFs have developed, the vacuum of regulation in which they exist has been starkly exposed.68 As these firms are here to stay, methods for increasing their accountability must be developed.

First, this section will demonstrate why regulation of Private Military Firms is necessary. Secondly, it outlines why present systems of regulation are inadequate. Finally, it charts the barriers to further regulation and shows why States have an interest in maintaining the status quo. It therefore concludes that States will not have an incentive to put in place more extensive regulation until their responsibility for the conduct of PMFs is illuminated.

The need for regulation

For the last three hundred and fifty years, military and security functions have been reserved to the State. As a result, when these ‘inherently’ governmental functions are outsourced, a disconnect between old levels of public oversight and accountability and new private contracts arises.69 As Newell comments, ‘the privatized defence industry has no [public] constraints and it is not hard to imagine PMFs running amok.’70

69 This can also be seen as a trend endemic to the development of Corporations Law as a whole: Charlie Cray and Lee Drutman, Corporations and the Public Purpose: Restoring the Balance, 4 SEATTLE JOURNAL FOR SOCIAL JUSTICE 305 (2005).
70 Newell and Sheehy, supra note 8 at 86.
The need to PMF regulation, then, is driven by two interconnection concerns: 71 (1) PMFs and their employees do not exist within established legal structures to maintain discipline and respect for human rights (individual accountability); and (2) PMF actions are not subject to public oversight (public accountability).

PMFs operate in an environment that is defined by violence. Their very existence relies on conflict. However, while they share the field with military personnel, PMF employees are not subject to the same accountability and discipline mechanisms as their counterparts in the armed forces. 72 Military personnel exist within established legal structures, such as the court martial system, and must obey the military code of justice from their State of origin. 73 However individual contractors and members of PMFs that have been hired by states are civilians and are therefore not part of this military chain of command. 74 Their legal status is murky, discipline is sporadic and accountability is sparse. 75 Government oversight in these circumstances, if present at all, is thin. 76

A concern arises, therefore, that PMF employees have the potential to commit human rights violations with impunity. 77 Poor supervision, confused lines of authority and improper procedures are largely credited with producing the Abu Ghraib prisoner abuses,

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71 Newell and Sheehy identify four types of accountability: (1) Contract accountability; (2) Legal accountability; (3) Public accountability; and (4) Individual accountability: Newell and Sheehy, supra note 8 at 85.


73 Carney, supra note 9 at 319.


75 Fricchione, supra note 10 at 749.

76 Minow, supra note 54 at 994.

77 Herbert M. Howe, Global Order and the Privatization of Security, 22 FLETCHER FORUM OF WORLD AFFAIRS 1, 3 (1998).
in which private contractors were integrally involved.\textsuperscript{78} A number of contractors were named in the Taguba report into the abuses.\textsuperscript{79} So far, the soldiers implicated in the Abu Ghraib scandal have faced a variety of criminal punishments. However, unlike their military co-workers, the employees of Titan and CACI, while facing civil lawsuit, have not yet been charged with any crimes, despite at least 20 alleged cases of abuse that have been referred to the Justice Department.\textsuperscript{80}

In Afghanistan there has been one exception to this prevailing trend: the prosecution of David Passaro, a CIA contractor who was sentenced to over 8 years imprisonment for beating an Afghan detainee to death during an interrogation at the Asadabad base in Afghanistan.\textsuperscript{81}

In general, however, the lack of legal accountability is connected to a lack of public monitoring and oversight. Private Military Firms allow governments to carry out action that would generally not gain legislative or public approval.\textsuperscript{82} At the very least, they allow it to avoid the public debate that may moderate or limit government proposals.\textsuperscript{83} In the United States, therefore, contracts with PMFs often work to circumvent Congress’ role in military spending and in overseeing the deployment of military forces.\textsuperscript{84} In the process the public is disconnected from the foreign policy of its own state.\textsuperscript{85}

\begin{enumerate}
\item Minow, supra note 54 at 993.
\item Jackson, supra note 74, at 264; Bina, supra note 24 at 1249; Fricchione, supra note 10 at 732.
\item \textit{United States v Passaro} No. 5:04-CR-211-1 (EDNC June 17, 2004); \textit{North Carolina: CIA Contractor is Sentenced}, \textit{NEW YORK TIMES}, Feb. 14, 2007.
\item Singer, \textit{The Private Military Industry and Iraq}, supra note 48 at 10.
\item Newell and Sheehy, supra note 8 at 88.
\item Michaels, supra note 27 at 1009; Howe, supra note 77 at 4.
\item Singer, \textit{The Private Military Industry and Iraq}, supra note 48 at 10.
\end{enumerate}
Moreover, severe problems in monitoring and coordinating the making and performance of contracts with PMFs have arisen. The Pentagon now says that it has ‘no idea how many [PMF] workers it actually employs.’ The utilization of no-bid task orders under umbrella contracts creates latent difficulties in assessing performance in conflict situations. The separation of the contract officer from the contractor on the ground means that the limited standards that do exist for PMF conduct and coordination with military forces are either not known or not enforced. These contract enforcement failures are pervasive and basic, lead to a lack of control and accountability for contractor, and increase the chances of abuses of authority taking place.

Public concerns about accountability are exacerbated by the traditional monopolization of violence by the state. Military functions are seen to take on a greater importance to other privatized activities, and so when they are outsourced the public outcry possesses more force. Similarly, it is a reality that PMF employees, most notoriously at the military provider end of the PMF spectrum, kill for, and are thus motivated by, money. It is for this reason that ‘legislators confronting mercenaries cannot help but repeatedly point out this inherent evil.’ As they are not battling for ‘some ideal’, or to ‘vindicate some set of rights, or ‘to achieve national honour’ they are seen as debasing the integrity of the citizen-solider and with it the polis as a whole. While in many respects this is purely superficial, it gives rhetorical strength to the push for regulation and restriction of the private military industry.

86 Minow, supra note 54 at 1009-1010.
87 As quoted in Desai, supra note 39 at 846.
88 Minow, supra note 54 at 1006; Newell and Sheehy, supra note 8 at 90-91.
89 Fricchione, supra note 10 at 757.
90 Id at 749.
91 Minow, supra note 54 at 1007.
92 Id at 1014-1015.
93 Milliard, supra note 15 at 60.
94 Michaels, supra note 27 at 1107.
Private Military Firms + State Responsibility

Present systems of regulation

Regulation may come from four sources: (1) international bodies (2) the host state, where the contract is performed; (3) the home state, where the PMF is based; and (4) the market. At present, none of these systems are tailored to PMFs, meaning academics and prosecutors are often left trying to fit square pegs into round holes.

There is no international system of regulation that targets PMFs as non-state actors.\footnote{It could be suggested that the closest we have come to such a regime is set out in the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). Kinley and Tadaki state that ‘the Norms are…unclear as to how corporations could be held directly liable under international law for any breaches of these obligations, beyond implying that such a possibility exists.’: supra note 32 at 947.} Meanwhile, no international tribunal exists to monitor the activities of non-state actors other than the embryonic International Criminal Court,\footnote{James R Coleman, Constraining Modern Mercenarism, 55 HASTINGS LAW JOURNAL 1493, 1514 (2004); Carney, supra note 9 at 338, 344.} whose jurisdiction has been repudiated by the United States, the largest exporter of private military services.\footnote{James Crawford SC, Philippe Sands QC and Ralph Wilde, Joint Opinion, In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute, June 2003, \url{http://www.iccnow.org/documents/SandsCrawfordBIA14June03.pdf?PHPSESSID=0ebaee3404aeb1a4e8cc4750d870f07d}.} As a result, international law can only be enforced via the national law of a State.

PMF employees usually have little to fear from the host state. They often operate in failed states that lack the capacity to enforce their law.\footnote{This became apparent during the scandal surrounding DynCorp’s alleged abuses in Bosnia: James Ridgeway, Our Pimps in Bosnia, THE VILLAGE VOICE, Aug. 14, 2001; Kelly Patricia O’Meara, DynCorp Disgrace, INSIGHT ON THE NEWS, Feb. 4, 2002; Singer, Vacuum of Law, supra note 14 at 537. The worst DynCorp was exposed to were two suits for wrongful dismissal, brought by the whistleblowers: Bob Graham, Why I had to expose UN’s role in turning girls into sex slaves, THE MAIL ON SUNDAY, Aug. 11, 2002.} A weak state may also be forced, out
of strategic necessity, to overlook any violations.\textsuperscript{99} In any event, at least in the case of Iraq, all contractors are deemed immune from Iraqi law.\textsuperscript{100}

**Home State Regulation**

A lack of international sanction and national sanction by the host state puts the question on the home state of the contractor. However, because the acts in question will have been committed abroad, the application of home state law is problematic.

Only two states, South Africa and the United States, have put in place regulations on the export of military services.\textsuperscript{101} For most of the world’s governments, however, there are simply no applicable laws that regulate and define the jurisdictions under which PMFs operate.\textsuperscript{102} As one military lawyer succinctly puts it, ‘There is a dearth of doctrine, procedure and policy’.\textsuperscript{103}

*South Africa*

South Africa’s *Regulation of Foreign Military Assistance Act 1998* sought to regulate military assistance offered by individuals from within its borders. It covered the full range of services that PMFs offer and was regarded as being far-reaching and demanding.\textsuperscript{104} Under the Act, government permission was required before a PMF could

\textsuperscript{99} For a good summary see Patrick Cullen, *Keeping the New Dog of War on a tight leash: Assessing means of accountability for Private Military Companies*, 1 CONFLICT TRENDS 36, 38 (2000).

\textsuperscript{100} In July 2004, one day before the CPA transferred sovereignty in Iraq to the interim Iraqi government, Paul Bremer signed a revised version of Memorandum 17, which stipulated that the immunity rule remain in effect until multinational forces are withdrawn from Iraq or until it is amended by Iraqi lawmakers: Isenberg, *supra* note 29 at 15.

\textsuperscript{101} DCAF, *Private Military Firms, supra* note 29 at 5.


\textsuperscript{103} As quoted in *id* at 13.

\textsuperscript{104} DCAF, *Private Military Firms, supra* note 29 at 5.
offer any foreign military assistance.\textsuperscript{105} However, there was little compliance with the law\textsuperscript{106} and monitoring mechanisms under the Act were embarrassingly absent.\textsuperscript{107}

Due to its limited enforcement, and controversy surrounding its meaning and effect, the new \textit{Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006} was signed into law in November 2007.\textsuperscript{108} The new Act appears to embody a shift from criminalization and prohibition to regulation of South African participation in armed forces and security services overseas.

While the new Act is largely a product of the increased participation of South African citizens in PMFs despite the old Act,\textsuperscript{109} it remains to be seen whether the old problems of enforcement will be remedied. However, as is noted by the Institute of Security Studies, “[t]o presuppose the failure of government to effectively administer the Act would be a distinctly unwise course of action.”\textsuperscript{110}

\textit{United States}

The United States has enacted two key pieces of legislation that aim to achieve both public and individual accountability in the private military industry.

The \textit{Arms Export Control Act 1968} (AECA) regulates arms dealing and the sale of military services.\textsuperscript{111} The \textit{International Traffic in Arms Regulations} (ITAR) implements

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\textsuperscript{106} Carney, \textit{supra} note 9 at 333.
\textsuperscript{107} Frye, \textit{supra} note 68 at 2644-2645.
\textsuperscript{108} DCAF, \textit{Private Military Firms, supra} note 29, at 5.
\textsuperscript{111} \textit{Arms Export Control Act} 1968, 22 USC §2778 (2000); Frye, \textit{supra} note 68 at 2634.
\end{flushleft}
the AECA and requires any company offering military advice or services to foreign nationals to obtain a license from the State Department. If the export or military services is in excess of $50 million, Congress must be notified. The Regulations create some degree of public oversight over military services contracts.

Similarly, a level of individual accountability is provided by the Military Extraterritorial Jurisdiction Act 2000 (MEJA), which extended the Uniform Code of Military Justice to civilians ‘employed by or accompanying the Armed Forces outside the United States’. It did not initially apply to American civilians employed by a foreign government or US agencies outside the Department of Defense. In 2004, however, the MEJA was amended to apply to contractors for the Department of Defense or any federal agency, ‘to the extent such employment relates to supporting the mission of the Department of Defense overseas’. It remains to be seen how this will be interpreted. David Passaro, the CIA contractor successfully prosecuted for assaulting an Afghani prisoner in Afghanistan, was prosecuted via s 804 of the Patriot Act 2001, which extends US jurisdiction to crimes committed by US nationals at US facilities abroad.

The US pastiche of laws represents the most comprehensive regulatory regime enacted by any State. However it remains plagued by loopholes, gaps and lax enforcement. Contracts can easily be split up so that they do not reach the $50 million threshold and

115 Frye, supra note 68 at 2634. Notably, the contracts awarded to CACI for interrogation services at Abu Ghraib were with the Department of the Interior.
117 Carney, supra note 9, at 332.
119 Frye, supra note 68 at 2634.
avoid Congressional oversight. In any event, as one commentator has pointed out, much will depend on the type of service provided, rather than its dollar value. In addition, the MEJA only applies to felonies under US law, and there is no indication it will apply to past abuses.

In any event, despite these laws being on the books, the US has taken little enforcement action under them. It is astounding, as Singer points out, that with 20,000 contractors serving in Iraq for over two years, there has been just one prosecution. Only one further action has been brought under the nascent MEJA, and it therefore remains largely untested.

The only other way that jurisdiction can be exercised over PMF employees is through domestic laws of extraterritorial operation, such as the US War Crimes Act or Torture Act. However, these laws only apply to the most serious of crimes and hence neglect a vast array of PMF misdemeanors. In any event, the government’s willingness to enforce these laws is also suspect.

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121 DCAF, Private Military Firms, supra note 29, at 6.
123 Carney, supra note 9, at 332.
125 As of June 2005, the only person to be prosecuted under MEJA was Latasha Lorraine Arnt, who in February 2005 was sentenced to eight years in prison for killing her husband, a military policeman stationed at a U.S. Air Force Base in Turkey: PBS Frontline, Private Warriors, (produced by Marcela Gaviria and Martin Smith), aired Jun. 21, 2005: http://www.pbs.org/wgbh/pages/frontline/shows/warriors/faqs/.
As these regulatory regimes are limited to South Africa and the United States, the ‘reincorporation’ problem remains.\footnote{Frye, \textit{supra} note 68, at 2644.} That is, should a regime become to onerous for a PMF, it can simply relocate to a more favourable environment.\footnote{In addition, section 359 of the Russian Criminal Code prohibits the hire of mercenaries. The enforcement of this provision is unclear. The Commonwealth of Independent States has also adopted a Model Law ‘On counteracting mercenarism.’: \textit{Report of Meeting of Experts on Traditional and New Forms of Mercenary Activity as a Means of Violating Human Rights and Impeding the Right of People to Self-Determination}, Mar. 3, 2006, E/CN.4/2006/11/Add.1 at 7.} While it has considered a new regulatory approach,\footnote{UK Green Paper, \textit{supra} note 16.} for example, the United Kingdom market remains unregulated.

\section*{The Market}

The only effective limitation on PMFs, therefore, is the economic limitation of the market.\footnote{Singer, \textit{The Private Military Industry and Iraq}, \textit{supra} note 48, at 21-22.} Some argue that firms will conform with the law and with human rights norms because to do otherwise would irreparably damage their reputation.\footnote{See Howe, \textit{supra} note 77 at 2.} It is immediately apparent, however, that this regulation of the market is simply not enough.\footnote{This is obvious from a number of contemporary examples. Despite DynCorp’s involvement in sex slave trafficking in Bosnia, it was recently awarded a lucrative contract by the US government to train the Iraqi police: Toby Harnden, \textit{US Company wins first contract for reconstruction}, \textit{The Daily Telegraph} (UK), Apr. 19, 2004; No individual embodies the phoenix-like trend of PMFs more than Tim Spicer. Despite being arrested in Papua New Guinea for alleged corruption and embroiled in the arms-to-Africa scandal for his importation of Bulgarian arms to the exiled government of Sierra Leone (see below), his new company, Aegis, was recently awarded a $300 million contract to run the Coordination Centre for PMFs in Iraq: Jonathan Guthrie, \textit{Tim Spicer finds security in the world’s war zones}, \textit{Financial Times} (UK), Apr. 7, 2006.}

These regulatory regimes therefore remain insufficient. However, if regulation is indeed desirable, why are government’s reluctant to legislate to control PMFs or to enforce the existing laws? The answer lies in the enduring strength of political pragmatism.
States gain many benefits from the current unregulated environment. A central, and perhaps the determinative reason for State outsourcing of military force has been what Michaels terms ‘tactical privatization’ – the privatization of functions not for economic benefit, but for political benefit.\footnote{Michaels, supra note 27 at 1037.} This is the major barrier to increased regulation of PMFs by States, as it is perceived that such regulation would decrease the ‘responsibility gap’ between State and firm. This obstacle is not necessarily present when considering purely domestic privatization.\footnote{Alexis P Kontos, “Private” security guards: Privatized force and State responsibility under international human rights law, 4 NON-STATE ACTORS AND INTERNATIONAL LAW 199, 200 (2004).}

The image of military firms as private and independent allows States to carry out ‘covert’ foreign policy, without suffering the political costs normally associated with a military deployment.\footnote{Deborah Avant, Privatizing Military Training 7(6) Foreign Policy In Focus at 3 (2002); Dickinson, supra note 7 at 149; Fricchione, supra note 10 at 771; Desai, supra note 29 at 827; Howe, supra note 77, at 5.} The ‘guise of private commercial enterprise’\footnote{Michaels, supra note 27, at 1027.} allows PMFs to be used as a proxy of the State and a tool of foreign policy, operating without its symbolic or legal imprimatur.\footnote{Id at 1009; Zarate, supra note 29, at 92.} Many contracts between PMFs and States contain non-disclosure clauses and are deemed confidential by both parties, preventing public oversight and criticism.\footnote{McCallion, supra note 56 at 340.}

It is apparent that the economic efficiency argument for privatization is at best indecisive and at worst simply contradictory.\footnote{Michaels, supra note 27, at 1040.} The use of PMFs seems to be driven less by any supposed financial cost savings and more by political cost savings.\footnote{Singer, The Private Military Industry and Iraq, supra note 48, at 10.} The key issue, it
seems, is not the price of these actors but their status.\textsuperscript{143} By leveraging these status differentials through outsourcing military projects, the connection between an act committed by the contractor and the contracting State is obfuscated.\textsuperscript{144} This ‘plausible deniability’\textsuperscript{145} allows the State to divest itself of blame for personnel deaths or human rights abuses.\textsuperscript{146}

The United States has taken advantage of these political cost savings in a range of situations. Its involvement in the ongoing conflict in Colombia is subject to strict Congressional oversight and limitations on troop deployments, to prevent a ‘Vietnam-style’ escalation of the conflict.\textsuperscript{147} The use of PMFs, however, frees the Executive from these limitations, effectively outsourcing the ‘tough decisions’ of political management.\textsuperscript{148} The US use of MPRI in both Croatia and Bosnia allowed it to maintain an image of neutrality while at the same time influencing policy, and the outcome of conflicts vital to its interests.\textsuperscript{149} Defense Systems Limited has done the same for the British government in similar circumstances.\textsuperscript{150} In Iraq, the use of contractors allows the Bush Administration to avoid ‘American soldiers coming off cargo plans in bodybags draped with the flag,’ or the need to summon Reservists.\textsuperscript{151} In an environment in which the public have come to expect zero-casualties, PMFs hide the true costs of war.

The very rationale of ‘tactical privatization’ demonstrates why there is a fundamental lack of political will to institute change in PMF control and regulation. As will be seen, however, there is a strong possibility that this ‘responsibility gap’ is entirely fallacious. While Singer suggests that an increased push to regulation will only come with an

\begin{itemize}
\item[\textsuperscript{143}] Michaels, \textit{supra} note 27, at 1040.
\item[\textsuperscript{144}] Zarate, \textit{supra} note 29, at 144; McCallion, \textit{supra} note 56 at 341.
\item[\textsuperscript{145}] McCallion, \textit{supra} note 56, at 319.
\item[\textsuperscript{146}] Newell and Sheehy, above n8 at 88.
\item[\textsuperscript{147}] McCallion, \textit{supra} note 56, at 335.
\item[\textsuperscript{148}] Singer, \textit{The Private Military Industry and Iraq, supra} note 48, at 10.
\item[\textsuperscript{149}] Zarate, \textit{supra} note 29, at 82, 108; Kassebaum, \textit{supra} note 8, at 582.
\item[\textsuperscript{150}] Howe, \textit{supra} note 77, at 4.
\item[\textsuperscript{151}] Michaels, \textit{supra} note 27, at 1046.
\end{itemize}
instance of massive human rights abuse by a PMF,\textsuperscript{152} this paper suggests that the impetus for regulation emerges from a realization that, far from being able to use PMFs to avoid blame, in certain circumstances States will be directly responsible for the acts of PMFs which they employ or which operate under their control.

The key issue is incentive. Without an incentive to change, proposals for international or national systems of regulation appear aspirational, utopian and idealistic.\textsuperscript{153} State Responsibility provides that incentive.

\footnote{\textsuperscript{152} Singer, \textit{The Private Military Industry and Iraq}, supra note 48, at 547. Carney suggests that the abuses at Abu Ghraib can be characterized as that ‘massive violation’: Carney, \textit{supra} note 9 at 335. However, the weak response by the US government disproves this assertion, and only goes to undermine Singer’s broader argument that increased instances of human rights violations by PMFs will motivate governments to change the regulatory environment.}

\footnote{\textsuperscript{153} Contrast Singer, \textit{Vacuum of Law}, \textit{supra} note 14, at 546.}
Section IV: Making States Accountable – State Responsibility

Regulation of PMFs, therefore must come from States. However, if a realistic regulation proposal is to be put forward, we must first explain why States will act, given the benefits they may reap from keeping such firms at arms length. In this section, the responsibility of the State for the actions of PMFs will be analysed.

Primary and Secondary Rules of State Responsibility

The rules of State Responsibility can be characterized as either ‘primary’ or ‘secondary’.154 The primary rules of State Responsibility are those rules of international law which place obligations upon States. Secondary rules of State Responsibility concern the attribution to the State of the violation of one of the obligations arising from the primary rules, regardless of its origin, nature or object.155 These secondary rules apply to all international obligations and are generally characterized by the concept of ‘attribution’.156

A State will be responsible at international law, therefore, where conduct attributable to it is inconsistent with an international obligation (such as non-intervention or respect for human rights).157

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The existing literature, where it focuses on international law at all, has focused on limited international obligations under the primary rules of State Responsibility. Specifically, it has examined what obligations a State may be under in relation to mercenaries. No study has looked in any depth at the secondary rules of State Responsibility. That is, there has been no examination of the attribution of the acts of PMFs to States that may result in the breach of far less contentious obligations, such as the obligation to comply with multilateral human rights treaties.

**Consequences of finding state responsibility**

If an international obligation has been breached, an action may be brought against the State in an international court or tribunal.\(^158\) These could include the International Court of Justice, the European Court of Human Rights and *ad hoc* Tribunals established under Bilateral Investment Treaties (BITs).\(^159\) Much will depend on the primary obligation in question.

More importantly, however, if the acts of PMFs are attributed to States the State will lose its claim to neutrality and non-involvement.\(^160\) The State will no longer be able to divest

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\(^{158}\) The question of who may invoke the responsibility of a State for a breach of an international obligation by it is a complicated and controversial one, and there is not space here to consider it in full: CRAWFORD, *supra* note 157, at 23, 38-43.


\(^{160}\) Vincent-Joël Proulx, *Babysitting Terrorists: Should States be Strictly Liable for Failing to Prevent Transborder Attacks?*, 23 BERKELEY JOURNAL OF INTERNATIONAL LAW 615, 619 (2005). This is especially true considering the relative rarity of actions being brought between States in international tribunals for breaches of human rights.
itself of blame for the acts of PMFs by claiming that they are merely the acts of private corporations. The benefits of ‘tactical privatization’, both rhetorical and substantive, will evaporate.\textsuperscript{161}

We will first look, briefly, at the international obligations a State risks breaching by employing PMFs. We will then turn to the question of whether violations by PMFs could be attributed to the State under the secondary rules.

**Primary Rules of State Responsibility**

When examining applicable international law to the case of PMFs, the existing literature examines specific primary obligations relating to mercenarism, and suggests that a State has an obligation to refrain from employing mercenaries or authorizing mercenary activity.

As such its engages in an in depth analysis of various UN General Assembly Resolutions,\textsuperscript{162} the Organization of African Unity (OAU) Convention for the Elimination


\textsuperscript{162} \textsc{Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land} (Hague Convention No V), Oct. 18, 1907, 36 Stat 2310-31; \textsc{Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts}, Jun. 8, 1977, 1125 UNTS 3; \textsc{Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty}, GA Res 2131, UN GAOR 21th sess, supp No 12 at 11, UN Soc A/6014 (1965) (adopted 109 to 0); \textsc{Declaration on the Granting of Independence to Colonial Countries and Peoples}, GA Res 2465, UN GAOR, 23rd sess, supp No 18 at 4, UN Soc A/7218 (1968) (adopted 53 to 8 with 43 abstentions); \textsc{Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations}, GA Res 2625, GAOR, 25th sess, supp No 28, at 123, UN Doc A/8028 (1970); \textsc{Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and
of Mercenarism in Africa\textsuperscript{163} and the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries.\textsuperscript{164} The aim of these commentators is to appraise the existence of a customary international law rules prohibiting mercenaries. These studies then go on to analyse whether PMFs would come within the definition of ‘mercenary’ in international law.\textsuperscript{165}

However, these arguments are based upon a fundamental misconception of the nature of international law.\textsuperscript{166} Customary international law is, at its core, based on state consent, and is proven by demonstrating widespread and consistent state practice accompanied by \textit{opinio juris} (the belief that a State is legally obliged to act in a certain way).\textsuperscript{167} A mere cursory glance at state practice, however, demonstrates that the use of PMFs is not prohibited by customary international law. States, NGOs, NATO, the UN and transnational corporations (TNCs) all make extensive use of the services of PMFs.\textsuperscript{168} It is rare

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\textsc{Alien Domination and Racist Regimes,} GA Res 3103, UN GAOR 28\textsuperscript{th} sess, Supp No 30 at 142, UN Doc A/9030 (1973)
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\textsuperscript{163} \textsc{Organization of African Unity Convention for the Elimination of Mercenarism in Africa,} OAU Doc CM/817 (XXIX), Annex II (3\textsuperscript{rd} rec. 1977).
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\textsuperscript{164} \textsc{UN International Convention Against the Recruitment, Use, Financing and Training of Mercenaries,} UN GAOR, 44\textsuperscript{th} sess, Supp No 43, UN Doc A/RES/44/34 (1989) (entered into force Oct. 20, 2001).
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\textsuperscript{165} Specifically, see Singer, \textit{Vacuum of Law, supra} note 14; Milliard, \textit{supra} note 15; Coleman, \textit{supra} note 96; Frye, \textit{supra} note 68.
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\textsuperscript{166} Notably Coleman, \textit{supra} note 96, at 1499-1500.
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\textsuperscript{167} See Asylum Case (Colombia v Peru) \textsc{[1950]} ICJ Rep 266 at 276-277; North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) \textsc{[1969]} ICJ Reports 4 at 43; Fisheries Jurisdiction Case (United Kingdom v Iceland) (Merits) \textsc{[1974]} ICJ Reports 3 at 131, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) \textsc{[1986]} ICJ Reports at 98; Malcolm H Shaw, \textit{International Law} 60-61 (4\textsuperscript{th} edn., 1997).
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\textsuperscript{168} As noted above, Section II. See Singer, \textit{Corporate Warriors, supra} note 5 at 9-17 for a general survey. The use of PMFs by States and private actors is also given legitimacy by the \textsc{Voluntary Principles on Security and Human Rights,} made between the United States, the United Kingdom and various companies in 2000: \textsc{Voluntary Principles on Security and Human Rights Fact Sheet,}
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that a State would protest any such employment, precisely because they are most probably engaged in the hire of a type of PMF themselves.

Therefore, if there was at some point in the past a customary international law rule prohibiting the use of mercenaries, state practice demonstrates that it does not apply to the use of PMFs.

The only residual restriction on States, it would seem, is that imposed by a State’s party status to the UN Convention or the OAU Convention. These instruments are not widely ratified. In any event, and as the existing literature emphasizes, the definition of mercenary provided in this literature is notoriously vague and difficult to apply.

States are not, therefore, under any obligation to refrain from hiring PMFs or to restrict their operation. There is no ‘primary rule’ of State Responsibility that can be breached by their hire.

The possibility of a State breaching far more obvious international obligations has been overlooked. If PMFs commit human rights abuses, and these abuses can be attributed to the home or host State (via secondary rules of State Responsibility), that State may breach its obligations under international human rights instruments. Depending on the


OAU Convention has 25 parties: Benin, Burkina Faso, Cameroon, Comoros, Congo, Egypt, Equatorial Guinea, Ethiopia, Ghana, Guinea, Lesotho, Liberia, Libyan Arab Jamahiriya, Mali, Nigeria, Niger, Rwanda, Senegal, Seychelles, Sudan, Tanzania, Togo, Tunisia, Zambia and Zimbabwe; UN Convention has 28 parties: Azerbaijan, Barbados, Belarus, Belgium, Cameroon, Costa Rica, Croatia, Cyprus, Georgia, Guinea, Italy, Liberia, Libyan Arab Jamahiriya, Maldives, Mali, Mauritania, Moldova, New Zealand, Qatar, Saudi Arabia, Senegal, Seychelles, Suriname, Togo, Turkmenistan, Ukraine, Uruguay and Uzbekistan.

Milliard, supra note 15, at 76; Singer, Vacuum of Law, supra note 14 at 531.

identity of the victim of the abuse, it may also breach its obligations in relation to the
proper treatment of aliens.\textsuperscript{172} In other scenarios, it may breach the rules of non-
interference in the internal affairs of sovereign states, or breach international arms
embargos (that is, it may breach its obligation to comply with resolutions of the UN
Security Council).\textsuperscript{173}

**Secondary Rules of State Responsibility**

A question that has not been dealt within in the literature, therefore, is whether the acts of
firms can be attributed to the State.

This is an issue that is implicitly referred to throughout the literature. Unfortunately,
however, the focus has been on windy rhetoric rather than studied legal analysis. In this
vein Zarate asserts that PMFs are ‘political pawns’,\textsuperscript{174} ‘a type of state agent’,\textsuperscript{175} ‘vicarious
agents of the popular will’,\textsuperscript{176} ‘quasi-state agents’\textsuperscript{177} and ‘henchmen’ of the State.\textsuperscript{178}
McCallion considers that certain PMFs are ‘private extension[s] of the US military’,\textsuperscript{179}
while Garmon describes them as ‘proximate tools of foreign policy’.\textsuperscript{180}

\textsuperscript{172} For an exhaustive list of primary obligations that could be breached, or ‘causes of action’, see IAN
\textsuperscript{173} Brownlie, STATE RESPONSIBILITY, supra note 172 at 66.
\textsuperscript{174} Zarate, supra note 29 at 77.
\textsuperscript{175} \textit{Id} at 92.
\textsuperscript{176} \textit{Id} at 144
\textsuperscript{177} \textit{Id} at 153, 162.
\textsuperscript{178} \textit{Id} at 90.
\textsuperscript{179} McCallion, supra note 56 at 328.
\textsuperscript{180} Garmon, supra note 12 at 334.
Private Military Firms + State Responsibility

At no point, however, is there any consideration of the secondary rules of State Responsibility. This is despite the fact that many realize that the problem of accountability is solved if PMFs are tied to States.\(^{181}\) It is necessary, therefore, to engage in a considered and in depth discussion of the rules of State Responsibility and their applicability to PMFs. In doing so we go some way to addressing a much neglected gap in the existing literature.

The rules of attribution in customary international law are widely considered to be codified in the International Law Commission (ILC) *Draft Articles on State Responsibility* (Draft Articles).\(^{182}\) These Articles were the product of over 50 years of work by the Commission and were noted by the General Assembly in 2001.\(^{183}\)

However, despite their ‘seductive clarity, seeming concreteness, and treatylike form’ the Articles, in and of themselves, are not binding on States.\(^{184}\) Indeed, it was the intention of the ILC and Sixth Legal Committee of the UN in 2001 that the Articles be left to influence the crystallization of the law of State responsibility through application by international courts and tribunals and State practice, rather than progressing to a Convention.\(^{185}\) Ambiguities and vagaries, therefore, are to be expected and can perhaps only be resolved by courts and tribunals on specific facts. As a result, the Articles must

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\(^{181}\) Zarate, *supra* note 29 at 92; Desai, *supra* note 65 at 854.


\(^{185}\) Crawford and Olleson, *supra* note 182 at 959.
not be used mechanically, but with reference to the customary international law that is at their foundation.\textsuperscript{186}

Thus State Responsibility is essentially concerned with \textit{principles} rather than binding rules.\textsuperscript{187} There is a danger, therefore, in making sweeping generalizations without specific facts. The analysis in this paper involves determining attribution involving a specific category of relationship – that between PMFs and the State – rather than to the relationship between parties in a particular identified case. A limitation of this analysis, then, is that the category of relationship cannot be described with the same degree of precision as can a specific relationship.

However this limitation is reduced if it is accepted that the relationship between PMFs and their home or host state is capable of description with sufficient precision to enable an informed assessment of the probability of attribution.\textsuperscript{188} This limitation is also moderated by the three specific case studies dealt with below.

The approach, therefore, will be as follows: first, the requirements of each Article, and general considerations relevant to PMFs will be discussed. Secondly, three case studies will be undertaken and the rules of State Responsibility applied to each, to determine how they would operate in relation to a specific fact scenario. Conscious of the nature of the Draft Articles, outlined above, we will lastly consider the relationship between these outcomes and available state practice.

The following Articles and their applicability to PMFs will be considered:\textsuperscript{189}

\begin{itemize}
  \item \textsuperscript{186} John R Crook, \textit{Introduction to Symposium: The ILC’s State Responsibility Articles}, 96 \textit{American Journal of International Law} 773-791 (2002).
  \item \textsuperscript{187} Brownlie, \textit{Principles of Public International Law}, supra note 157 at 427; Brownlie, \textit{State Responsibility}, supra note 172, 47.
  \item \textsuperscript{188} See above Section II, ‘Nature and categorization of PMFs’.
  \item \textsuperscript{189} Draft Articles, supra note 157.
\end{itemize}
1. **Article 4: Conduct of organs of a State**

2. **Article 5: Conduct of persons or entities exercising elements of governmental authority**

3. **Article 8: Conduct directed or controlled by a State**

4. **Article 9: Conduct carried out in the absence or default of official authority**

**Article 4**

The text of Article 4 states:

*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.

Article 4 is the ‘first principle’ of attribution, and while it is not exhaustive of all cases where an entity will be deemed a State agent, it is a common point of departure. The principle that a State is liable for the acts of its organs has long been recognized. An organ of a state, therefore, is an entity operating within the structure of the State or making up the organization of the State, such as a government agency or police force. Article 4 includes the armed forces, and Brownlie argues that an even higher standard of prudence in their discipline and control is required. The designation of these forces

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191 Moore, International Arbitrations, vol III, 3129 (1871); Claims of Italian Nationals Resident in Peru (1901) RIAA vol XV 395 at 399; Salvador Commercial Company (1902) RIAA vol XV 455 at 477; Massey Claim (1927) RIAA vol IV 155; Way claim (1928) RIAA vol IV 391.


193 Commentaries, supra note 190 at 86.

194 Brownlie, Principles of Public International Law, supra note 157 at 433. Brownlie relies on Kling (1930) RIAA 575 at 579 and Huber in Spanish Zones of Morocco (1925) RIAA 617 at 645.
as organs by the internal law of a State will be sufficient to satisfy Article 4, however it will not itself perform the task of classification.  

An entity that has a separate legal personality from the State, even if wholly controlled and owned by the State is not an organ. A private corporation, therefore, cannot be characterized as an organ of the State. As a result, the conduct of a Private Military Firm, as a corporation, cannot be attributed to the State under Article 4.

It is possible, however, that the employees of a PMF could be deemed to be part of a State organ. Indeed, it is likely that this was the case during Sandline’s aborted involvement with Papua New Guinea (PNG) in 1997. During that operation, by agreement between Sandline and the PNG Government, Sandline employees were designated ‘special constables’ such that they were afforded the same rights and subject to the same responsibilities as members of the armed forces. As attribution is not affected by the higher or lower status of an official, state responsibility would not be mitigated by the temporary nature of the PMF employees’ status as a member of the State’s armed forces. In this case it is the internal law that deems the individual part of the State’s military, which is in turn classified as a State organ under international law.

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195 Commentaries, supra note 190 at 90-92.
198 The reasons for the early termination of the relationship are detailed in: Craig Cawood and Damien Sturzaker, The Sandline Affair: Illegality and International Law, 3(5) INTERNATIONAL ARBITRATION REVIEW 164-168 (2000). The Contract between PNG and Sandline is one of the few contracts between a PMF and a State that is publicly available (see SINGER, CORPORATE WARRIORS, supra note 5, Appendix 2 at 245), due to the subsequent arbitration that took place between the parties: Arbitration Between Sandline International and Papua New Guinea (1998) 117 ILR 552.
199 Spicer, supra note 18 at 24.
200 Commentaries, supra note 190 at 87.
The outcome will be the same where ‘contract officers’, unaffiliated to a particular firm, enroll in the armed forces of a State of which they are not a national.\textsuperscript{201}

While Spicer claims that this arrangement was the norm in Sandline operations,\textsuperscript{202} it does not appear to have been replicated in more recent contracts between PMFs and States.\textsuperscript{203} It will be rare, therefore, that PMF employees will be viewed directly as members of a State’s armed forces for the purposes of attribution. As a result, Article 4 will not be of central relevance when determining State Responsibility for the acts of PMFs.\textsuperscript{204}

\textsuperscript{201} Examples include the Rhodesian SAS and Selous Scouts (Rhodesia): Spicer, \textit{supra} note 18 at 48.

\textsuperscript{202} Spicer, \textit{supra} note 18 at 24. Spicer claims that ‘Sandline people’ are ‘always enrolled in the forces, police or military, of the client state’.

\textsuperscript{203} Singer, \textsc{Corporate Warriors}, \textit{supra} note 5 at 194.

\textsuperscript{204} As is indicated by the absence of any discussion of Article 4 in \textit{Expert Meeting on Private Military Contractors, supra} note \textbf{Error! Bookmark not defined}. at 18.
Article 5

The text of Article 5 states:

Conduct of persons or entities exercising elements of governmental authority

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 5 deals with situations in which the entity concerned is not an organ of the State, but is still authorized to exercise governmental authority.\(^{205}\) The article aims to address the ‘increasingly common phenomenon’ of corporations being contracted to carry out public or regulatory functions. As a result, it encompasses public corporations, semi-public entities, public agencies and even private companies.\(^{206}\)

From the text of the Article, two elements must be established in order to make out attribution: (1) That the entity is exercising elements of governmental authority; and (2) That it was empowered by the law of the State to do so.

The meaning of these elements is unclear. The text of Article 5 is frustratingly vague and the commentaries unfortunately vacuous. The existence of the Article is brushed over or ignored by many commentators on State Responsibility.\(^{207}\) Once again, therefore, it is apparent that the Draft Articles should not be applied mechanically, but consistently with their foundation and the manner in which they have been applied to specific fact scenarios.\(^{208}\) The content of the provision can be gleaned, therefore, from the

\(^{205}\) Commentaries, supra n190 at 92.
\(^{206}\) Id at 92.
\(^{207}\) Notably Brownlie: Brownlie, STATE RESPONSIBILITY, supra note 172 at 136-137.
\(^{208}\) Crook, supra note 186 at 783.
development of the provision, the parsimonious guidance provided in the commentaries and relevant case law of international courts and tribunals.\textsuperscript{209}

\textit{Governmental Authority}

What, then, will constitute ‘elements of governmental authority’ for the purposes of Article 5? The Commentaries state that ‘beyond a certain limit, what is regarded as “governmental” depends on the particular society, its history and traditions’.\textsuperscript{210} Problematically, if the historical nature of the activity is to be given weight it will become increasingly difficult to determine governmental functions as more and more functions are privatized.\textsuperscript{211} Perhaps as a reflection of this problem, no broad definition is provided.

It may be the case that there is ‘neither a definition of what constitutes an intrinsic State function nor an exhaustive list’ of intrinsic State functions. This was the view expressed at a Meeting of Experts to discuss the topic convened by the University Centre for International Humanitarian Law (UCIHL) in Geneva.\textsuperscript{212} It was suggested, however, that there could be a ‘hardcore list for which there is consensus.’\textsuperscript{213} Case law from international courts and tribunals suggests such functions could include pursuing government policy,\textsuperscript{214} maintaining law and order,\textsuperscript{215} the confiscation of property\textsuperscript{216} and undertaking immigration and customs tasks.\textsuperscript{217}

\begin{footnotesize}
\begin{enumerate}
\item This jurisprudence is a ‘subsidiary’ source of law as set out in Article 38(1)(d) of the \textsc{Statute of the International Court of Justice} and can be used as an aid in determining the content of ‘primary’ sources, such as customary international law (Art 38(1)(b)).
\item Commentaries, \textit{supra} note 190 at 94.
\item \textit{Expert Meeting on Private Military Contractors, supra} note \textbf{Error! Bookmark not defined.} at 18-19.
\item \textit{Id} at 18. Under the ‘Chatham House Rule’ the identities of experts making comments are not revealed, at 10.
\item \textit{Id} at 18.
\item Oil Fields of Texas, \textit{supra} note 197 at 351; \textit{Emilio Agustin Maffezini v Kingdom of Spain} (Decision on Objections to Jurisdiction), (2000) 16 ICSID Review 212 (Case No. ARB/97/7) at \S 1 (\textit{Maffezini}); \textit{Hyatt v Islamic Republic of Iran} (1985) 9 Iran-USCTR 72, 94 (\textit{Hyatt}).
\item \textit{Yeager v Islamic Republic of Iran} (1987) 17 Iran-USCTR 92 at \S 39 (\textit{Yeager}).
\end{enumerate}
\end{footnotesize}
The Commentaries also give a number of examples, including where ‘private security firms may be contracted to act as prison guards’. Similarly, ‘police powers’, ‘powers of detention and discipline’ and ‘immigration control or quarantine’, are also functions that would involve the exercise of governmental authority.\textsuperscript{218}

Outside of this hardcore list (if one in fact exists), however, determining whether governmental authority is being exercised will require looking at a spectrum of activity, with no clear dividing line between what is and is not such a function.

In order to make this appraisal, existing decisions of international courts and tribunals suggests certain factors that can examined. In the \textit{Maffezini v Kingdom of Spain} arbitration the Tribunal set out a two stage analysis to determine whether a corporation was exercising elements of governmental authority.\textsuperscript{219}

First, it is necessary to look at the structural relationship of the corporation to the State.\textsuperscript{220} This involves examining the level of ownership or control by the State of the corporation.\textsuperscript{221} If this is made out, a rebuttable presumption that governmental authority is being exercised arises.\textsuperscript{222} In \textit{Maffezini} the SODIGA corporation was 88\% government

\textsuperscript{217} Yeager, \textit{supra} note 215 at §61.
\textsuperscript{218} Commentaries, \textit{supra} n190 at 92.
\textsuperscript{219} Maffezini, \textit{supra} note 214 at §76-77. The \textit{ad hoc} Tribunal consisted of President Judge Thomas Buergenthal (a Judge of the International Court of Justice), Professor Francisco Orrego Vicuna and Arbitrator Maurice Wolf.
\textsuperscript{220} \textit{Id} at §77.
\textsuperscript{221} \textit{Id} at §77.
\textsuperscript{222} \textit{Id} at §78.
owned and was essentially created as a policy instrument of the government, giving rise to the presumption.\footnote{Id at §83.}

Even if this were not established, however, it will not necessarily indicate that the corporation is not exercising governmental authority.\footnote{Id at §79.} The Tribunal also suggested that it is necessary to consider the functions of the corporation, and whether those functions are ‘typically’ or ‘essentially’ State functions.\footnote{This test was also applied in Ceskoslovenska Obchodni Banka AS v the Slovak Republic ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction, May 24, 1999.} In this respect the Tribunal found that the government’s intent was to utilize SODIGA as an ‘instrument of State action’ in furthering economic development in the Galicia region of Spain. Its objectives and functions, such as soliciting new industries and investing in new enterprises, were ‘by their very nature typically governmental tasks, not usually carried out by private entities, and therefore, cannot normally be considered to have a commercial nature’.\footnote{Maffezini, supra note 214 at §86.}

This division of factors is consistent with the decisions of other international courts and tribunals as well as the broad factors suggested in the Commentaries to the Articles.\footnote{Commentaries, supra note 190 at 94.} In Hyatt v Iran, therefore, the Iran-US Claims Tribunal\footnote{The Iran-US Claims Tribunals permits claims, inter alia, by US nationals against the Iranian State and was established by the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of American and the Government of the Islamic Republic of Iran (the Declaration). In cases before the Tribunal, therefore it is often necessary for the Claimant to prove that the offending group or organization comes within the definition of ‘Iran’ in Article VII, §3 of the Declaration: ‘ “Iran” means the Government of Iran, any political subdivision of Iran, and any agency, instrumentality or entity controlled by the Government of Iran or any political subdivision thereof.’ For comments on the work of the Tribunal see Gregory Townsend, State Responsibility for Acts of De Facto Agents, 14 Arizona Journal of International and Comparative Law 635-678 (1997).} found that the actions of the ‘Foundation for the Oppressed’ were attributable to Iran for both structural and functional
reasons.\textsuperscript{229} The Foundation was created at the direction of Imam Khomeini, with the approval of the Revolutionary Council, and its Central Council was appointed by Khomeini.\textsuperscript{230} In addition, its functions, including the confiscation and holding of property on behalf of the government, aided a larger ‘public purpose’.\textsuperscript{231} Similarly, in \textit{Oil Field of Texas v Iran}, the ‘National Iranian Oil Company’ (NIOC) was deemed to be an agency of Iran as it was 100\% owned by the State and was controlled by the Prime Minister and the Cabinet.\textsuperscript{232} Its function too, was governmental – ‘to exercise the ownership rights of the Iranian nation in…oil and gas resources’.\textsuperscript{233}

When a State chooses to act through a private sector mechanism, therefore, it cannot escape responsibility for wrongful acts or omissions merely by hiding behind a private corporate veil.\textsuperscript{234} A corporation can still operate for profit while discharging essential government functions.\textsuperscript{235}

\textit{Empowered by law}

It is not enough, however, that the entity in question be performing governmental functions. To establish attribution that entity must also be ‘empowered by the law’ of the State to do so. ‘Empowerment’ refers to the necessity of a ‘nexus’ between the acts of the entity and the State. It was the lack of such a nexus that defeated many claims against Iran in the Iran-US Claims Tribunal.\textsuperscript{236}

\begin{itemize}
\item \textsuperscript{229} Hyatt, \textit{supra} note 214 at 351-359. The Court does not explicitly use the structural/functional division.
\item \textsuperscript{230} \textit{Id} at 92-93.
\item \textsuperscript{231} \textit{Id} at 92-93.
\item \textsuperscript{232} Oil Fields of Texas, \textit{supra} note 197 at 359.
\item \textsuperscript{233} \textit{Id} at 351.
\item \textsuperscript{234} Brownlie, \textit{STATE RESPONSIBILITY, supra} note 157 at 136; \textit{Maffezini, supra} note 214 at §78.
\item \textsuperscript{235} \textit{Maffezini, supra} note 214 at §80.
\item \textsuperscript{236} \textit{Jimmie Leach v Islamic Republic of Iran} (1989) 23 Iran-USCTR 233; \textit{Arthur Young & Co v Islamic Republic of Iran} (1987) 17 Iran-USCTR 245; Townsend, \textit{supra} note 228 at 653.
\end{itemize}
Although there is little guidance on the meaning of ‘empowerment’, it appears that it may be interpreted either narrowly, to require a specific law by the State granting the governmental powers to the entity, or broadly, requiring merely that a government agency be empowered under law to delegate the function to the entity.\textsuperscript{237} In the case of privately run prisons, explicitly referred to by the commentaries, specific legislation has been enacted which provides for the management of a prison to be undertaken by the private sector on a contract basis.\textsuperscript{238}

However, Crawford, while Special Rapporteur, commented that the ‘usual and obvious’ mode of empowerment ‘will be a delegation or authorization by or under the law of the State.’\textsuperscript{239} This suggests that the latter, broader interpretation should be applied.\textsuperscript{240} This is consistent with the outcome in \textit{Maffezini}. In that case the a decree ‘issued by the Ministry of Industry \textit{authorized} the National Institute for Industry to establish SODIGA.’\textsuperscript{241} Moreover, remembering that the Articles should not be applied mechanically, authorization via license or contract from the State should satisfy the requirement for empowerment.

There can be little doubt that many of the functions performed by PMFs come within the definition of ‘governmental function’ set out above. It is one of the central themes of

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\item \textsuperscript{237} Expert Meeting on Private Military Contractors, \textit{supra} note \textbf{Error! Bookmark not defined.}, at 20.
\item \textsuperscript{238} Lenny Roth, ‘Privatization of Prisons,’ Background Paper No 3/2004, Parliament of New South Wales, \url{http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/ED4BA0B9D18C2546CA256EF9001B3ADA}. This is only the case, however, due to domestic law restrictions on what functions can and cannot be delegated. That is, the legislation empowers the \textit{Government} rather than the entity in question, which is empowered by the contract.
\item \textsuperscript{239} Crawford, \textit{supra} note 154 at Add 6.
\item \textsuperscript{240} The Expert Meeting seems to favour this approach: Expert Meeting on Private Military Contractors, \textit{supra} note \textbf{Error! Bookmark not defined.}, at 22.
\item \textsuperscript{241} Maffezini, \textit{supra} note 214 at §83. Emphasis mine.
\end{itemize}
\end{footnotesize}
PMF literature that PMFs perform functions that have been historically reserved to the State.\textsuperscript{242}

At the most extreme end of the spectrum, the offensive combat operations conducted by Executive Outcomes in Sierra Leone constitute military functions that lie at the very core of the State.\textsuperscript{243} Similarly, more ‘passive’ functions, such as Blackwater defending US military bases in Iraq, are analogous to ‘police powers’ and also seem to come within the scope of governmental authority suggested by the case law.\textsuperscript{244} The guarding and interrogation of prisoners, tasks Titan and CACI undertook at Abu Ghraib, are recognized as being ‘governmental’ in nature.\textsuperscript{245} Less certain, however, are the functions of Erinys in protecting Iraqi oilfields.\textsuperscript{246} In order to establish that a PMF is exercising governmental authority in each case, then, reference must be had to the exact circumstances and relationships between the parties. It is more doubtful, therefore, that the acts of MPRI, in training the Croatian military, could be viewed as performing the governmental functions of the United States (as opposed to Croatia). Thus as one moves down the Tip-of-the-spear typology away from the front line the labeling of a function as intrinsically governmental becomes more difficult, requiring a rigorous application of the Maffezini factors to the particular case.

PMFs must also be empowered by the State to exercise their functions if attribution is to occur. At the very least it is apparent that States permit PMFs to engage in organized violence.\textsuperscript{247} The ‘empowerment’ of PMFs by the State ordinarily takes place by way of a

\textsuperscript{242} Michaels, \textit{supra} note 27 at 1004, 1031; Minow, \textit{supra} note 54 at 1005, 1014-1015; Hing Wen, \textit{supra} note Error! Bookmark not defined. at 1539, 1547; Schooner, \textit{supra} note 64 at 555; Dickinson, \textit{supra} note 7 at 137, 147-148; Newell and Sheehy, \textit{supra} note 8 at 77; Fricchione, \textit{supra} note 10 at 738.

\textsuperscript{243} See below, ‘Section V: Private Military Firms and State Responsibility: Case Studies,’ Case Study One.

\textsuperscript{244} James Kwok, \textit{Armed Entrepreneurs}, \textsc{Harvard International Review}, Apr. 1, 2006.

\textsuperscript{245} Commentaries, \textit{supra} note 190 at 92; Minow, \textit{supra} note 54 at 1016.


\textsuperscript{247} Kassebaum, \textit{supra} note 8 at 593.
contract. This may be issued as a one-off or as part of a series of ‘task-orders’ under an umbrella contract. In certain jurisdictions and for certain services, a license from the government is required. If these acts are to constitute empowerment for the purposes of Article 5, a broad reading of that provision must be adopted. It is rare, it seems, for specific legislation to be passed by a State empowering the PMF to perform its functions.

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249 Attribution is made problematic, however, where the PMF is not working for the government but for a private company in a war zone.
Article 8

Article 8 will only become relevant where the PMF is not empowered by law to exercise elements of governmental authority (that is, if it does not come within Article 5). The text of Article 8 states:

Conduct directed or controlled by a State

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

This head of attribution has been notoriously difficult to comprehend, and is subject to a number of competing interpretations.

However, put simply, Article 8 deals with two circumstances in which there is a specific factual relationship between the entity engaging in the conduct and the State. These are: (1) Where the entity acts on the instructions of the State in carrying out the wrongful act; and (2) Where the entity is under the State’s direction or control.

The Commentary to the Article is explicit in requiring the ‘instructions’ given to be to carry out the particular mission or wrongful act. It is not satisfied if direct instructions are not given. This is apparent from the State Practice that lies at the foundation of this element of Article 8.

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250 Expert Meeting on Private Military Contractors, supra note Error! Bookmark not defined. at 22.
252 Commentaries, supra note 190 at 103-104.
253 Id at 104.
254 Expert Meeting on Private Military Contractors, supra note Error! Bookmark not defined. at 23.
255 All of the State Practice referred to in the Commentaries to the Articles relates to specific instructions to commit the wrongful act in question, such as sabotage.
The second method of attribution under Article 8 is when the entity is under the direction or control of the State. There is competing jurisprudence on the correct test for control.

In the Nicaragua v USA case, the International Court of Justice (ICJ) suggested the ‘effective control’ test. The Court found that the conduct of the contra rebels in Nicaragua was not attributable to the United States, despite the extensive support provided to them by the US. While displaying a certain ‘paucity of legal reasoning’, the Court suggested that, in order for attribution to be established, it must be shown that the State ‘had effective control of the military or paramilitary operations in the course of which the alleged violations were committed’. Mere funding, organizing, training, supplying and equipping of a group by the State is not sufficient to establish State Responsibility.

However the International Criminal Tribunal for the former Yugoslavia (ICTY), in the subsequent Prosecutor v Tadic decision, has suggested the ‘overall control’ test. The Appeals Chamber argued that, with regards to organized and hierarchically structured groups, it was sufficient that the State ‘wields overall control over the group, not only by equipping and financing…but also by coordinating or helping in the general planning of its military activity.’ Such groups, with a structure, a chain of command and a set of

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257 Separate Opinion of Judge Ago, in ibid at 189.
258 Id at 115.
259 Id at 115.
261 Tadic, supra note 260 at §120.
262 Id at §131, 137.
rules as well as the outward symbols of authority are subject to the authority of the head of the group and therefore specific supervision is not required.\textsuperscript{263} The Nicaragua test, the Appeals Chamber argued, was at variance with state practice in regard to hierarchically organized groups.\textsuperscript{264} It seems uncontroversial that if the Tadic test were to apply, PMFs would satisfy the definition of being an ‘hierarchically-organized group’.

While the Commentaries suggest that the two tests should operate concurrently,\textsuperscript{265} the reasoning in Tadic is unconvincing. Much of the ‘state practice’ that the Appeals Chamber relies on to support the broader test is distinguishable in that it relates to situations in which there was an absence of State authority, rather than the overall direction and control by the State.\textsuperscript{266} Conversely, state practice conforms with a narrow reading of control.\textsuperscript{267}

This was confirmed by the International Court of Justice in 2007 in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). In considering the Tadic test, the court said:

> On the other hand, the ICTY presented the “overall control” test as equally applicable under the law of State responsibility for the purpose of determining as the Court is required to do in the present case when a State is responsible for acts committed by paramilitary units,

\textsuperscript{263} \textit{Id} at §104.
\textsuperscript{264} \textit{Id} at §124-145.
\textsuperscript{265} The commentaries notes that ‘the Tribunal’s mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law’: Commentaries, supra note 190 at 106-107. While this is undoubtedly true, the Appeals Chamber in Tadic makes it clear that is dealing with the same rules as the Court in Nicaragua. Irrelevant of the different factual contexts, it says, ‘logically, these conditions must be the same’ in both cases: Tadic, supra note 260 at §104.
\textsuperscript{266} See Yeager, supra note 215 and Stephens (1927) RIAA vol IV 265 (Stephens). In the former the Court explicitly stated that the case could fall under either of what is now Article 8 or Article 9, and that a presumption was established that Iran did not rebut: Yeager, supra note 215 at §43.
\textsuperscript{267} Ago, Third Report, supra note 196 at 100.
armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.268

Thus if a group, such as a PMF is not exercising governmental authority, it is necessary to look at the exact factual circumstances to see if attribution is appropriate under Article 8.

First, it is important to consider the way in which the ‘instructions’ head of attribution may be considered in vague and general contracts with PMFs. That is, where a contract does not specify the manner in which an act is to be performed, it may be interpreted as sanctioning any means of performance which the contractor sees fit.269 It is in the interests of States, therefore, to ensure that all contracts with PMFs contain clear rules of engagement.270

When employing PMFs, States will not ordinarily have ‘effective control’ over their actions. That is, they do not have a hands-on role directing specific operations of the PMF.271 The level of control would be consistent with the instructions given, and therefore actions outside the scope of those instructions would not be attributable.

The Tadic ‘overall control’ test, however, would suggest otherwise. If the ‘overall control’ test were to be adopted, ‘theatre control’ may be enough to ground attribution, even for PMFs that are employed by a private concern. While this would have important consequences when considering the actions of firms, such as Blackwater, when they are carrying out security functions for private actors and not the State, the test now seems to lack support in state practice and judicial opinion.

269 Expert Meeting on Private Military Contractors, supra note Error! Bookmark not defined. at 23.
270 Id at 24.
271 Private Warriors, supra note Error! Bookmark not defined.
**Acts outside the scope of authority**

Having analysed attribution under both Article 5 and Article 8, it is important to note a key difference between them. If conduct is attributed to the State under Article 5, the State will be liable for all acts of that entity, even if those acts were outside of its authority. In such cases, under Article 7 of the Draft Articles, attribution to the State will still occur provided that entity was acting in its ‘official capacity’ when the conduct in question took place.\(^\text{272}\) If attribution occurs under Article 8, however, any action that was not within the State’s instructions or its effective control will not be attributable.

**Article 9**

The text of Article 9 states:

*Conduct carried out in the absence or default of the official authorities*

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The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact 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.

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Article 9 has emerged to deal with ‘exceptional’ cases where a person or entity exercises governmental authority in the absence of any actual authority to do so. These cases occur only rarely, such as during ‘revolution, armed conflict or foreign occupation’.\(^\text{273}\) In *Yeager v Iran*, therefore, the Iran-US Claims Tribunal found that the Revolutionary Guard, in ‘maintaining’ law and order and immigration control, were acting ‘in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object.’\(^\text{274}\)

\[^{272}\text{Caire (1929) RIAA Vol V 516 at 531; Maal (1903) RIAA Vol X, 730 at 732-733; La Masica (1916) RIAA Vol XI 549 at 560; Youmans (1916) RIAA Vol IV 110 at 116; Mallen (1925) RIAA Vol IV 173 at 177; Way (1928) RIAA Vol IV 391 at 400; Stephens, supra note 266 at 267-268; Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, supra note 160 at 435.}\
\[^{273}\text{Commentaries, supra note 190 at 109.}\
\[^{274}\text{Yeager, supra note 215 at §43.}]*
Therefore while there must be both ‘governmental authority’ and ‘the absence of default’ of official authorities,’ the circumstances must also be such ‘as to call for the exercise’ of that authority. This represents a normative constraint on the application of the Article. That is, it must be deemed necessary in the circumstances.275

It would appear unlikely, due to the profit motive that defines PMFs, that they will engage in functions without governmental authorization. This could be the case, however, if they were hired by a private group in cases of revolution or civil war. In such cases, much will depend on the nature of functions being exercised.

As the Commentaries and the literature emphasize, however, it is very difficult to determine the general application of rules of attribution.276 ‘It is a matter of appreciation in each case’ whether State Responsibility will be made out.277 As a result, we now turn to three specific case studies to analyse if attribution would occur.

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275 Commentaries, supra note 190 at 110.

276 Brownlie, STATE RESPONSIBILITY, supra note 172 at 136; Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, supra note 157 at 431.

277 Commentaries, supra note 190 at 107.
Section V: Private Military Firms and State Responsibility: Case Studies

Three case studies will be examined, each relating to a ‘category’ of PMF based on the tip-of-spear typology. These are:

1. Military provider firm: Executive Outcomes in Sierra Leone
2. Military consultant firm: MPRI in Croatia
3. Military support firm: KBR in Iraq

Case Study One: Executive Outcomes in Sierra Leone

Background

In April 1995, absolute anarchy reigned in Sierra Leone.\(^{278}\) The government’s military, under the command of Valentine Strasser’s National Provisional Ruling Council (NPRC), was in disarray and was fighting a losing battle against the rebel Revolutionary United Front (RUF) forces.\(^{279}\) As the RUF closed to within 20 kilometres of the capital, Freetown, diplomatic personnel and Western civilians rapidly departed.

Having been refused help from the United Kingdom, the United States and the United Nations, the beleaguered government turned to a Private Military Firm, Executive Outcomes.\(^{280}\) The initial one-year contract was purportedly to train and advise the NPRC forces,\(^{281}\) however it soon became apparent to outside observers that EO was also conducting combat operations.\(^{282}\) In a little under a month the government was able to

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\(^{278}\) Singer, CORPORATE WARRIORS, supra note 5 at 3.


\(^{280}\) Singer, CORPORATE WARRIORS, supra note 5 at 113.

\(^{281}\) LANSANA FOFAÑA, Sierra Leone Banking on Hired Guns, INTER PRESS SERVICE, May 17, 1995.

\(^{282}\) We’re the good guys these days, THE ECONOMIST, Jul. 29, 1995.
announce ‘spectacular victories’ against the RUF.\textsuperscript{283} During the initial operation to clear the capital alone EO inflicted several hundred losses and over 1,000 desertions on the RUF force.\textsuperscript{284} EO proceeded to drive the rebels out of the Kono mining area,\textsuperscript{285} and then quickly destroyed the RUF’s jungle stronghold. Having been effectively defeated, the RUF agreed to negotiate and in February 1996 multiparty civilian presidential elections were held. Further operations were conducted against the RUF following their withdrawal from the democratic process, eventually leading to the Abidjan peace agreement in November 1996.\textsuperscript{286} One of the conditions of the agreement was that the government terminate its contract with EO.

The proximate history of Sierra Leone before, during, and after, the involvement of EO is one defined by violence and disorder. However it cannot be denied that, during the period of its involvement, EO created a relative lull in anarchic conditions, and created conditions of temporary stability.

Through the lens of State Responsibility, it would appear that during this time EO operated as a \textit{de facto} agent of the State of Sierra Leone.

\textbf{Part of the Broader Apparatus: Application of Article 4 and Article 5}

EO cannot be said to have been an ‘organ’ of Sierra Leone, within the definition of Article 4. As has been seen, a corporation possesses a separate legal entity to the State. In this case Executive Outcomes was a private company incorporated and headquartered in

\begin{footnotes}
\item[283] Christo Johnson, \textit{Sierra Leone rebels still active despite army triumphs}, \textsc{Reuters News}, Jul. 12, 1995;
Rod MacJohnson, \textit{End in sight for Sierra Leone war: South African commander}, \textsc{Agence France-Presse}, Jul. 20, 1995.
\item[284] Singer, \textsc{Corporate Warriors}, \textit{supra} note 5 at 113.
\item[286] van Maanen, \textit{supra} note 279.
\end{footnotes}
South Africa.\textsuperscript{287} No internal law of Sierra Leone made EO employees officially part of the State’s armed forces, as had occurred during Sandline’s involvement in Papua New Guinea.

It is likely, however, that EO would be seen as an entity empowered by Sierra Leonean law to exercise elements of governmental authority. This would create State Responsibility for its actions under Article 5.

The first question, therefore, is whether EO was exercising elements of governmental authority. As has been seen, when considering this question it is necessary to look at both structural and functional factors.

Structural factors look to the ownership or control of the State over the entity. Sierra Leone did not own any of the capital of EO. Indeed, EO was merely one subsidiary within a larger South African firm, Strategic Resources Corporation.\textsuperscript{288} As such it was part of a wider corporate umbrella and a number of questions have been raised as to the independence of the company’s military operations from larger transcontinental mining concerns.\textsuperscript{289} The subject of EO’s ties with mining and exploration companies such as Branch Energy, DiamondWorks and Heritage Oil & Gas has created considerable controversy.\textsuperscript{290}

Similarly, there is doubt as to how much actual control the Sierra Leonean government exercised over the continuing activities of EO. While van Maanen maintains that contracts were governed by the strict understanding that EO employees were ‘subject to

\textsuperscript{287} Singer, \textit{CORPORATE WARRIORS}, \textit{supra} note 5 at 104.

\textsuperscript{288} \textit{Id} at 104-105.

\textsuperscript{289} van Maanen, \textit{supra} note 279.


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the operational chain of command of government armed forces’, the United Kingdom government voiced concerns that it was EO who was controlling the NPRC’s armed forces, not the other way around. To describe the NPRC as ‘supervising’ EO would appear fanciful.

The ‘structural test’ to determine governmental functions, however, is not determinative. It is also necessary to look at the functions of the entity, and whether they were ‘inherently’ or ‘usually’ governmental in nature.

First, we must pin down exactly what functions EO was contracted to perform, and what functions it did in fact perform. The NPRC insisted at the time of signing of the contract with EO that it was ‘purely to train our soldiers’, and that EO would ‘not take part in combat’. This is supported by comments of EO founder and spokesman Eben Barlow. However EO spokesmen later conceded that the ‘intelligence, logistics, communications, strategic planning and operational command’ of the Sierra Leonean Army was being run by EO as part of ‘on-the-job’ training for Sierra Leone’s officers. Furthermore, it is apparent that ‘training’ easily morphed into direct involvement. Other accounts suggest EO’s direct combat involvement was overt and sustained.

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291 van Maanen, supra note 279.
294 The services that EO offered generally are outlined on its old website. This remains available via http://web.archive.org, searching for ‘www.eo.com’.
295 Fonfana, supra note 281.
297 Kiley, supra note 292.
298 We’re the good guys, supra note 282.
299 Van Nierkerk, supra note293; Corcoran, supra note 285; van Maanen, supra note 279; Singer, CORPORATE WARRIORS, supra note 5 at 4.
of these activities EO employees wore uniforms provided by the Sierra Leone government.  

Some critics question whether EO was really acting on the NPRC’s behalf, asserting that it was more likely the tool of commercial mining interests. However, EO’s contract went much further than this. Its activities combined both the training and restructure of Sierra Leone’s armed forces as well as the undertaking of specific operational plans, including evicting the RUF from Freetown, the stabilization of the Sierra Rutile diamond mining area and the location and neutralization of the RUF headquarters.

It is apparent, therefore, that these military activities come within the list of governmental functions already established by the case law. Indeed, the performance of offensive combat operations would appear to be at the core of this list.

It is also necessary that EO was empowered by the law of Sierra Leone to perform these functions. As there was no legislature to speak of under Strasser’s Ruling Council, it is apparent that there could be no specific legislative act authorizing EO’s activities. However, both NPRC representatives and Strasser himself appeared to have given the operation their full support. As a result, the contract between Sierra Leone and EO should be considered a sufficiently empowering act to make out the requirement under Article 5.

*Subcontracting of functions*

During the operations in Sierra Leone, one of EO’s major tactical advantages was the ability to call on air support. Singer has stated that the air support supplied in EO

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300 Singer, *Corporate Warriors*, supra note 5 at 114.
301 Montague, *supra* n290 at 230.
302 van Maanen, *supra* note 279.
303 Fofana, *supra* note 281.
operations often came from the firm ‘Ibis Air’, who would be subcontracted by EO.\textsuperscript{304} If this was the case, the relevant question would be whether the subcontracted firm has still been ‘empowered by law’ to undertake the governmental function. If the broader approach to empowerment is adopted, this would appear to be the case if the initial contract envisages or permits the delegation of functions.\textsuperscript{305}

**Degree of Control: Application of Article 8**

As has been noted above, it is likely that the functions performed by EO would be considered governmental in nature, and therefore a consideration of Article 8 would not be necessary.

Although the contents of the contract are not public, they would come within the scope of ‘instructions’ under Article 8. However, it is worthwhile to point out that if this were not the case it would be very difficult, on these facts, to make out attribution due to the ‘direction or control’ of the State of Sierra Leone. It does not appear that the NPRC or the Sierra Leonean Army had any ‘effective control’ over specific operations conducted under the leadership of EO, as required by the ‘effective control’ test.

However, as Article 8 is intended to be applied to situations that do not come within the scope of Article 5, it is both unnecessary and inappropriate to rigorously apply it to these facts. At noted above, attribution under Article 5 is important to establish, as, otherwise, any conduct by EO that was outside the scope of the contract (such as, arguably, the indiscriminate killing of civilians) would not be attributable to Sierra Leone.

**Absence of State Authorities**

The state of quasi-anarchy that existed in Sierra Leone during the time of EO’s involvement may suggest the applicability of Article 9. The facts, it could be said, are

\textsuperscript{304} Singer, CORPORATE WARRIORS, supra note 5 at 105.

\textsuperscript{305} Expert Meeting on Private Military Contractors, supra note Error! Bookmark not defined. at 22.
similar to those of the *Yeager* case, in which it was found that the Revolutionary Guard engaged in operations that ‘the…Government must have had knowledge and to which it did not specifically object.’ However, the contract between the NPRC and EO suggests the application of this Article will be unnecessary.

**Case Study Two: MPRI in Croatia**

**Background**

In 1991 the fledgling army of Croatia received a series of stinging defeats at the hands of the Serbian forces in the former Yugoslavia. These were compounded by defeat at the hands of the Bosnian Muslims in 1993. In early 1995, 30% of Croatia’s territory was occupied by foreign troops. In March 1994, with the situation showing no signs of improvement, the Croatian defense minister appealed to the United States for military assistance, pleading that the Croatian military wanted ‘to follow the model of the United States’.

The United States was sympathetic. A basic policy goal of the US during the Balkans conflict was to attempt to effect an ‘endgame’ by strengthening the Croatian forces and allying them with the Bosnians in order to balance Serbian power. The latter part of this policy had been achieved with the signing of the Washington Agreement in September 1994, which ended the war between the Croats and the Muslims. It remained, however, to transform the amateur Croatian army into a modern fighting force.

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306 *Yeager, supra* note 274.
307 *Gaul, supra* note 122 at 1489.
310 *Gaul, supra* note 122 at 1490.
311 *Singer, CORPORATE WARRIORS, supra* note 5 at 125.
312 *Id* at 125.
However the hands of the United States were tied. A 1991 UN Arms Embargo prohibited the sale of military services or weapons to the warring parties. Pentagon officials therefore referred the Croatian Minister to Military Professional Resources Inc (MPRI). However the arms embargo also applied to private entities and therefore MPRI was similarly prevented from providing any direct aid in military planning and advice. As a result, MPRI signed a contract with Croatia that provided for the creation of a Democracy Transition Assistance Program (DTAP). The program provided for classroom instruction in democratic principles and civil military relations.

The US State Department approved the contract and granted MPRI a license under the *Arms Export Control Act* under the strict proviso that it would not undertake any ‘direct military planning or advice on strategy to the Croatian army’. Indicative of the elasticity of the AECA, the contract did not reach the required threshold to mandate Congressional approval.

The program officially began in April 1995. Barely four months later, the Croatian Army launched a massive offensive, ‘Operation Storm’, which utilized integrated air, artillery and rapid infantry movements to take the Serbian forces completely by surprise. The Croatians rapidly retook the Krajina region, and sent the Serbs into full retreat. Subsequent UN indictments allege it amounted to a ‘criminal conspiracy’ to drive as

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313 Gaul, *supra* note 122 at 1489.
315 Cohen, *supra* note 309.
316 Gaul, *supra* note 122 at 1489.
318 Cohen, *supra* note 309.
319 Note that MPRI’s volume of business for 1996 was only $24 million, the AECA threshold requiring at least $50 million in a single contract: Thomas K Adams, *The new mercenaries and the privatization of conflict*, PARAMETERS, Jul. 1, 1999.
320 Gaul, *supra* note 122 at 1490.
321 Singer, *CORPORATE WARRIORS*, *supra* note 5 at 126.
many as 200,000 ethnic Serb citizens out of Croatia. The commander of the attack, Croatian General Ante Gotovina, is currently awaiting trial before the International Criminal Tribunal for the Former Yugoslavia in the Hague.

Following the success of the operation, the influence of MPRI immediately came under the spotlight. MPRI spokesman politely dismissed allegations that their involvement had gone beyond tuition in democratic principles, and had extended to specific instructions on tactics, strategy and maneuvers. Observers remained unconvinced, suggesting that Croatia’s battlefield prowess could not have come without MPRI help.

The existence of US State Responsibility for the acts of MPRI in Croatia would have major consequences, both political and legal. First, it would mean that if the allegations of MPRI’s additional assistance are correct, the US breached the 1991 UN arms embargo. Secondly, it would raise the question of the responsibility of both MPRI and the United States for the alleged human rights abuses that took place during Operation Storm. In addition, the United States ‘claim of neutrality’ while furthering its foreign policy

323 Help from America?, DER SPIEGEL (Germany), Jan. 23, 2006.  
326 Gaul, supra note 122 at 1494; Cohen, supra note 309.  
327 DAVID ISENBERG, SOLDIERS OF FORTUNE LTD: A PROFILE OF TODAY’S PRIVATE SECTOR CORPORATE MERCENARY FIRMS (1997); Singer, CORPORATE WARRIORS, supra note 5 at 126-127; Peter Slevin, Former US Generals Helping Bosnians Build a New Army, THE SEATTLE TIMES, Jul. 18, 1996; Barry Yeoman, Soldiers of good fortune: they fly helicopters, guard military bases, and provide reconnaissance. They’re private military companies--and they’re replacing U.S. soldiers in the war on terrorism, MOTHER JONES, May 1, 2003.  
328 Raymond Bonner, War Crimes Panel Finds Croat Troops “Cleansed” the Serbs, NEW YORK TIMES (US), Mar. 21, 1999.
through ‘private channels’, would be proved hollow and meaningless. Direct participation could not longer be denied.

**Part of the Broader Apparatus: Application of Article 4 and Article 5**

For the purposes of this discussion of State Responsibility, it will be assumed that MPRI did engage in direct tactical instruction, an assertion that is far from non-contentious.

As noted in relation to Executive Outcomes, MPRI cannot be classified as an organ of the United States. Our central question, therefore, is whether the acts of MPRI can be attributed to the United States under Article 5. Once again, it is necessary to show that the activities engaged in were ‘governmental’ in nature and that MPRI itself was ‘empowered’ by United States law to engage in those acts.

In determining the nature of functions as ‘governmental’, both structural and functional factors must be considered. Structural factors look to the ownership or control of the State over the entity. Since 2000, MPRI has been a subsidiary of L-3 Communications, a company listed on the New York Stock Exchange. The US Government has no ownership interest in the company. MPRI is now owned, therefore, by institutional investors (often foreign) who are often concerned far more with the firm’s profit margin than US strategic interests. Similarly, none of the structural control factors point to US involvement. The Board of MPRI consists of an astounding list of former US Generals and commanders. However, no current member of the US armed forces or government serves on the Board of MPRI. Similarly, MPRI was established privately, for private

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328 Zarate, *supra* note 29 at 104, 105, 108.
330 Singer, *CORPORATE WARRIORS*, supra note 5 at 133.
331 *Id* at 133.
332 *Id* at 134.
333 Zarate, *supra* note 29 at 104, fn 196.
purposes,\textsuperscript{335} rather than by any act of State.\textsuperscript{336} There does appear to be some level of supervision by the US government, and it is apparent that MPRI feels generally required to stay within US policy bounds.\textsuperscript{337} Its personnel, too, remain indoctrinated in US armed forces policy.\textsuperscript{338} However there is no official accountability, as has led to attribution in other cases.\textsuperscript{339}

If the acts of MPRI are to be considered ‘governmental’ it must be by looking to the nature of these functions. The act in question is the advising of the Croats on battlefield strategy, tactics and weapons.\textsuperscript{340} Such activities would be integral to the \textit{Croatian} state, but it is less clear whether they would be seen as intrinsic functions of the \textit{United States}. For this to be the case it would need to be argued that the acts amounted to the pursuit of US foreign policy.\textsuperscript{341} That is, the strengthening of the Croatian forces was integral to US policy in the region, a policy that the United States could not carry out personally because of the arms embargo. The performance of the Croatian contract by personnel including Lt. Gen James Chambers (ret’d) and Gen John Seawall (ret’d), who had recently worked in the Balkans while still part of the official armed forces, suggest that these were functions integral to United States interests.\textsuperscript{342} Indeed, a specific intention on the part of the US to use MPRI as an instrument of State policy,\textsuperscript{343} despite the contract being between Croatia and MPRI, could lead to a finding of imputability for the purposes of international law.

MPRI would also need to be ‘empowered’ by the United States to carry out its foreign policy. It is possible that the granting of the license by the US State Department to MPRI

\begin{itemize}
  \item \textsuperscript{335} Singer, \textit{CORPORATE WARRIORS}, \textit{supra} note 5 at 119-120.
  \item \textsuperscript{336} Contrast Oil Fields, \textit{supra} note 197 at 351; Hyatt, \textit{supra} note 214 at 94.
  \item \textsuperscript{337} Graham, \textit{supra} note 324; Paul Harris, \textit{Military Advising is Growth Industry}, \textit{INSIGHT MAGAZINE}, Aug. 26, 1996.
  \item \textsuperscript{338} Bayles, \textit{supra} note 325.
  \item \textsuperscript{339} Oil Fields, \textit{supra} note 197 at 351; Hyatt, \textit{supra} note 214 at 94; Maffezini, \textit{supra} note 214 at §83.
  \item \textsuperscript{340} To reiterate, MPRI denies this: Graham, \textit{supra} note 324.
  \item \textsuperscript{341} Mark Thompson, \textit{Generals for hire}, \textit{TIME}, Jan. 15, 1996.
  \item \textsuperscript{342} Singer, \textit{CORPORATE WARRIORS}, \textit{supra} note 5 at 121.
  \item \textsuperscript{343} See Maffezini, \textit{supra} note 214 at §86.
\end{itemize}
to perform the contract, under the AECA, could be characterized as an empowering act. That is, it would have been impossible for MPRI to enter into the contract with the Croatian government, had it not been given authorization to do so by the United States. Once again, this would rely on an expansive reading of the ‘empowerment’ requirement in Article 5.

In providing direct training and advice, was MPRI acting outside its license?

The license granted by the State Department to MPRI strictly prohibited the direct training of Croatian forces. If the conduct of MPRI could be *prima facie* attributed to the US under Article 5, therefore, would the fact that MPRI had operated outside of its ‘scope of empowerment’ mean that the US would not bear State Responsibility for those acts? It is highly likely that MPRI would still be seen as ‘cloaked with governmental authority’ for the purposes of Article 7 if it acted beyond its license. In any event, it may be that tacit permission was given to go beyond the contract by the Pentagon, which would widen the scope of the empowerment.

Degree of Control: Application of Article 8

The application of Article 8 will depend on evidence of the specific facts that led to MPRI carrying out the activities in question. It is apparent that as the contract was between Croatia and MPRI, rather than with the United States, no general or specific instructions were given via this route. From the facts available it does not appear that MPRI was under the ‘effective control’ of the US in carrying out its specific operations.

Dual responsibility

The MPRI/Croatia scenario raises the possibility that both Croatia and the United States could be responsible for the acts of MPRI. The principles relating to joint responsibility

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344 Petrolane, *supra* note 197 at 92.
345 Gaul, *supra* note 122 at 1494.
of States in international law are as yet indistinct. The Draft Articles suggest that joint liability can exist. In any event, more facts would be needed for this issue to warrant further consideration.

Attribution of MPRI’s conduct in Croatia to the United States would encounter a series of hurdles. It may be, therefore, that despite the ‘cozy’ relationship between the parties, formal State Responsibility at international law could not be established.

Case Study Three: Kellogg Brown and Root in Iraq

Background

‘The battlefield-contractor genie is well and truly out of the bottle.’ Kellogg Brown and Root (KBR), a wholly owned subsidiary of US giant Halliburton, is one of the largest firms in the logistical support sector. In Iraq it provides an astounding range of services to the US military, from feeding US troops, to delivering mail to building barracks and doing laundry. As an example, when constructing Camp Anaconda in Iraq, KBR was required to create an infrastructure of roads, sewage and power, both housing and work buildings, helicopter airfields, a detention centre and a variety of Camp security facilities.

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346 Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, supra note 160 at 440.
347 Draft Articles, supra note 157, Article 47.
348 Peter Jennings, acting director of Australian Strategic Policy Institute, as quoted in Geoffrey Barker, Combat-zone contracts in firing line, AUSTRALIAN FINANCIAL REVIEW, Mar. 31, 2005.
349 Singer, CORPORATE WARRIORS, supra note 5 at 136-137.
KBR undertakes its duties under the US Army’s LOGCAP (Logistics Civil Augmentation Program), which encompasses logistical work for all US military operations worldwide. KBR first won the LOGCAP contract in 1992, lost the general contract to DynCorp in 1997, and then recovered the LOGCAP III contract in 2001 (the present contract expires in 2011). LOGCAP creates a continual overarching contractual relationship between the US Army and KBR, with a series of no-bid ‘task orders’ or ‘work orders’ signed intermittently depending on specific requirements. These types of contract are termed ‘cost-reimbursement, indefinite-delivery/indefinite-quantity contracts’, and are designed for situations in which uncertainty exists over the duration or extent of a particular operation.

It is estimated that KBR has already earned US$15 billion for its work in Iraq under LOGCAP. In 2004, KBR also won the Contracts for Logistics Support (CONLOG) from the United Kingdom government, estimated to be worth £12 million. The workforce under these combined programs is estimated to be in the order of 100,000. Logistical support for the US Army under LOGCAP is unrelated to other contracts issued by the US Government for reconstruction work in Iraq. It is estimated that these contracts are worth another US$8 billion to KBR.

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353 Singer, *Corporal Warriors*, *supra* note 5 at 138, 144, 146.


355 Singer, *Corporal Warriors*, *supra* note 5 at 140.


357 Barker, *supra* note 348.


359 These contracts include the “Restore Iraqi Oil” (RIO) Contract: *Halliburton could get $1.5 bln more Iraq work – Army*, [REUTERS NEWS](http://www.reuters.com/), Feb. 26, 2005.
Halliburton and KBR have been plagued by claims of over-charging and mismanagement for work carried out under LOGCAP.\footnote{Sue Pleming, Report criticizes Halliburton Iraq logistics deal, REUTERS NEWS, Jul. 22, 2004; David Phinney, Contractors’ improper billing plagues Iraq effort, FEDERAL TIMES, Jun. 21, 2004. LOGCAP task orders from 2001 thru Spring 2003 can be accessed at \url{http://www.halliburtonwatch.org/about_hal/LOGCAP.xls}.} Extensive sub-contracting has also led to systemic accountability and service quality problems.\footnote{David Phinney, Contract Quagmire in Iraq, CorpWatch, undated, www.corpwatch.org.} We deal here, however, not with this ‘military contractual dilemma’,\footnote{Singer, The Private Military Industry and Iraq, supra note 48 at 12.} but with the responsibility of the US government with respect to these contractors in international law.

**Part of the Broader Apparatus: Application of Article 4 and Article 5**

As we progress away from front-line services and down the tip-of-the-spear typology, the nature of PMF activities as ‘governmental’ becomes harder to establish.

In this case, KBR is wholly owned by Halliburton.\footnote{However not for much longer. In April 2006 Halliburton announced that it would be selling a 20% stake in KBR to the public: Daniel Gross, Lament of the Profiteer: Why Halliburton wants the Iraq war to end, SLATE Apr. 24, 2006, \url{http://www.slate.com/id/2140504/}. The prospectus, as filed with the United States Securities and Exchange Commission, is available at \url{http://www.sec.gov/Archives/edgar/data/1357615/000119312506080149/ds1.htm#rom71894_4}.} Halliburton is renowned for its links to current US Vice-President Dick Cheney, has a market capitalization of almost US$21 billion and is almost entirely owned by institutional shareholders.\footnote{Singer, CORPORATE WARRIORS, supra note 5 at 138.} While it has been favoured as the primary contractor for US military contracting, it has repeatedly butted-heads with the government on billing problems including inflating costs.\footnote{Griff White, Halliburton’s Higher Bill, WASHINGTON POST (US), Jul. 6, 2005.} Other critics suggest a much greater level of integration between KBR and the Pentagon.\footnote{Dan Baum, Iraq: Nation Builders for Hire, NEW YORK TIMES MAGAZINE, Jun. 22, 2003.} On the whole, however, structural factors indicate that KBR is not exercising governmental authority.
The functions performed by KBR may suggest otherwise. KBR’s logistical support activities may be characterized as so closely related to military functions, and so vital to military operations, as to come within the scope of tasks that are intrinsically ‘governmental’. The Expert Meeting of UCHIL suggested that ‘everything a [PMF] would do in a war zone would have to constitute a [governmental] function’. While this may cast the net too wide, it is plain that the construction and maintenance of a military base is a ‘military function, since only military personnel or persons authorized by the military can even be present.’\footnote{367} The same would not apply to the functions performed by KBR under general reconstruction contracts.

It is also necessary that KBR be ‘empowered by law’ to perform these functions. In this case, the LOGCAP contract, under the management of the US Army Materiel Command, should be sufficient to constitute empowerment. The US Department of Defence is mandated to carry out the LOGCAP program by US Defense Appropriations Law, and the US Army acts as its Executive Agent in this respect.\footnote{368} The provision of outsourcing possibilities as an operational contingency, far from being discretionary, is required by law.

The requirement of empowerment becomes problematic, however, when task orders issued by contracting officers go beyond the scope of the original contract. A Report by the US General Accounting Office recently found this had occurred in relation to a task order issued to KBR under LOGCAP to develop emergency plans for dousing possible oil well fires. GAO officers have commented that such plans are ‘clearly unrelated’ to the scope of the contract.\footnote{369} That is, in such cases the PMF may not be empowered to

\footnote{367} Expert Meeting on Private Military Contractors, supra note Error! Bookmark not defined. at 19.


\footnote{369} Phinney, Contractors’ improper billing plagues Iraq effort., supra note 360.
perform the function as the contracting officer has not properly been delegated authority to make the empowerment.

The consequences of attribution under Article 5 are important. If this occurs, any act undertaken by a KBR employee in their ‘official capacity’, regardless of whether it may be outside the scope of their authority, will be attributable to the United States. This will not be the case if attribution only occurred due to instructions or control, as below.

**Degree of control: Application of Article 8**

The acts of KBR will be attributable to the United States where the US has instructed KBR to perform such acts under the contract. That instruction need only come from an official of the United States, such as an Army Officer, and so task orders going beyond the scope of the contract would be included.

It is apparent, however, that the LOGCAP contract contains detailed requirements relating to subcontracting and other practices, and so when these requirements are not complied with there can be no attribution under Article 8.

Once the contract has been awarded, there appears to be no involvement by the US Army in the specific operations of KBR. As the logistical support it provides is integral to Army operations, however, it is apparent that the US must participate in the planning and direction of KBR operations. While this would come within the ‘overall control’ test espoused in *Tadic*, it would appear that this test has now been discredited.

Thus if, as suggested above, the correct test is that of “effective control”, attribution in the case of KBR’s activities in Iraq will depend on the nature of the empowerment and the scope of the instructions.

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370 Phinney, Blood Sweat & Tears, *supra* note 358.
371 For a discussion of this problem generally see Gaul, *supra* note 122 at 1518.
Section VI: State Practice

The final question to consider, therefore, is whether the possible outcome of State Responsibility for the acts of PMFs is in accordance with state practice. As noted above, the ILC Draft Articles are not binding on States, and therefore if the outcomes they produce conflict with the practice of states in their interactions with each other, the Articles must make way to that practice.

While evidence on this issue is sparse and not directly on point, a number of situations indicate that States are beginning to recognize their possible liability for the acts of PMFs.

United Kingdom

The elected government of Ahmad Tejan Kabbah in Sierra Leone was ended in May 1997, when a military junta headed by Col Johnny Koroma took power in a violent coup. As killings and human rights abuses worsened, the United Nations imposed an arms embargo on the tiny West African State.372

Following the embargo, Sandline, under the leadership of Tim Spicer, shipped £6 million of Bulgarian guns and ammunition to Sierra Leone in support of forces loyal to the exiled elected leader.373 When the United Kingdom Customs authorities began investigations into the alleged breach of the embargo, Spicer claimed that Sandline had Foreign Office approval to export the arms to the legitimate, if exiled regime374 via a ‘license from the British government’.375

373 British Customs investigate Sierra Leone arms deal allegations, BBC NEWS, May 3, 1998.
Sandline cited a string of civil servants at the Foreign Office and Ministry of Defence who were allegedly aware of the covert military operation. After much embarrassment for the British government, Spicer was eventually vindicated, with the Select Committee on Foreign Affairs finding that Foreign Office officials did know of the shipment, and that it was possible their tacit approval amounted to a ‘license’ to export.

At international law, the question would be whether the United Kingdom had breached the embargo by permitting an export, rather than because the actions of Sandline would be attributed to it due to the ‘oral license’. However, the affair, and the debate following it, demonstrate a growing consciousness of the possible repercussions that may arise out of interactions with PMFs. As a result the UK Green Paper, which made recommendations on reform to the regulation of the PMF industry, suggested that PMFs be prohibited from wearing any uniform or insignia which resembled that of an official British regiment or division. This could only be intended, it can be inferred, to ensure PMFs were not seen as agents of the United Kingdom.

South Africa

The enactment of the *Regulation of Foreign Military Assistance Act 1998* and then the *Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 2006* in South Africa mirrored these concerns. The operations of Executive Outcomes were seen to hinder the foreign relations of the South African

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378 The Green paper outlines six options for regulation: a ban on military activities abroad; a ban on recruitment for military activities abroad; a licensing regime for military services; registration and notification; a general license for PMFs; and self-regulation via a voluntary code of conduct: UK Green Paper, *supra* note 16 at 22-26.
government due to the fact that EO sourced the majority of its personnel from the country.\footnote{SA Minister ‘Kader Asmal’, as quoted in Emma Thomasson, \textit{South African votes to ban mercenary activity abroad}, REUTERS, Feb. 26, 1998.}

Mercenary activities, said the Chair of the National Conventional Arms Control Committee, were counterproductive to ‘nation-to-nation’ relations.\footnote{\textit{S Africa bans mercenary activities}, XINHUA NEWS AGENCY, Feb. 27, 1998.} Operating out of South African territory, they were seen as an ‘embarrassment’ to President Nelson Mandela at a time when South Africa was marketing itself as a symbol for ‘democracy and good governance.’\footnote{\textit{South Africa: Mercenaries Barred}, INTER PRESS SERVICE, Jun. 3, 1998.} Domestic and international pressure suggested, therefore, that South Africa had responsibility for the acts of PMFs operating out of its territory.\footnote{David Shearer, \textit{Outsourcing war}, FOREIGN POLICY, Oct. 1, 1998.}

\section*{United States}


Before handing over power to the newly elected Iraqi government in July 2005, the CPA established Memorandum 17, a notice that called for all private security companies operating in Iraq to register for a license by June 1 and established an oversight committee led by Iraq’s Ministry of the Interior.\footnote{Private Warriors, \textit{supra} note 125.}

Furthermore, in June 2004 the Deputy Secretary of State, Richard Armitage and Deputy Secretary of Defense Paul Wolfowitz, proposed guidelines for all US contractors working in Iraq. This was followed in October 2005 by the Pentagon’s release of a directive on the
roles of functions of contractors on the battlefield. The document clarifies the legal status of civilian contractors and provides detailed criteria for when contractors are permitted to carry weapons in Iraq. Those weapons must only be used in self-defense.\textsuperscript{386}

Similarly, companies that contract with the Pentagon are required to follow a set of rules known as the Defense Acquisition Regulation Supplement (DFARS).\textsuperscript{387} This contains a section on ‘Contractor Standards of Conduct’ which now holds contractors working overseas accountable under US and international law as well as those of the host country.\textsuperscript{388}

While there may be a myriad of political and historical reasons behind the actions of these governments, they do indicate that there is a growing realization of the damage that can be caused to a State by its association with the improper actions of a Private Military Firm.

\textsuperscript{386} Isenberg, The Good the Bad and the Unknown, \textit{supra} note 29 at 15.

\textsuperscript{387} The DPARS is available at \url{http://www.acq.osd.mil/dpap/dars/dfars/index.htm}.

\textsuperscript{388} Private Warriors, \textit{supra} note 125.
Section VII: Conclusion

The solid black uniforms of Erinys employees in Iraq contrast sharply with the combat fatigues of US Marines. The accents, too, are distinctive and eclectic. This superficial difference, however, masks a complex underlying relationship. A web of contracts, licenses, instructions and controls bind Private Military Firms to their employers, their hosts and their homes.

State’s must come to realize, it would seem, that despite a different uniform or personnel of a different nationality, firms that perform government functions or operate under State instructions are often acting on the State’s behalf. As de facto State agents, they carry a State’s reputation, and its obligations, along with them. From the KBR employee at the Camp Anaconda Subway franchise, to the disillusioned ex-Marine paying off debts with danger money, these are the many faces for which a State may bear responsibility.

‘Tactical privatization’, therefore, relies upon misconceptions concerning a State’s responsibility for those it employs and empowers. An analysis of the connections between States and PMFs under international law indicates that the costs of war have not been cleaned away, they have merely been swept under the carpet.

Where controls are absent and accountability lax, the probability of human rights abuses exponentially increases. If State Responsibility is made out, it is the State who will bear the burden of these abuses. Regulation is not merely normatively desirable, therefore, but a practical political necessity.

Recognizing the possibility of State responsibility for PMF actions and abuses will not solve every problem associated with their rapid rise to prominence. Lax standards and procedures by contractors, webs of convoluted and badly drafted subcontracts, poor billing procedures and poor treatment of personnel will all continue.
Private Military Firms + State Responsibility

State Responsibility demonstrates, however, that the State itself can no longer hold these problems at arms-length. While we should lament the lack of direct obligations on non-state actors, such as PMFs in international law, we should not let States off the hook. In doing so we forget the status of States as the fundamental actor in international law, and we overlook a finding that may motivate states to reign in wayward companies.

States may continue to repudiate this responsibility. The difference in uniform, however, means nothing to Iraqi insurgents, Colombian rebels or Bosnian refugees. As the use of PMFs increases, so must the probability of human rights violations or improper conduct and with it the growing plausibility of State liability.