



**Private Military and Security Companies  
State Sponsorship, Use of Force Violations  
and  
International Human Rights**

**June 2007**



## **Introduction**

This is the second in a series of three papers discussing the privatization of warfare and the impact on the human security of affected, civilian populations.

The wars in Iraq and Afghanistan brought in their wake a sharp rise in the outsourcing of security and military tasks by Western governments to private corporate entities. These private entities, referred to herein as private military and security companies ("PMSCs"), often perform multiple functions in conflict areas and war zones on behalf of the contracting state.<sup>1</sup> These functions include combat and combat support, strategic consulting, training of security forces, intelligence gathering, the protection of critical infrastructures and convoy escort.<sup>2</sup> The number of employees working for PMSCs in Iraq is now estimated to number 48,000.<sup>3</sup>

As a result, PMSCs have become independent players in the market for force, liable to instigate human rights violations in the cause of their operations.<sup>4</sup> In its Annual Report of 2006, Amnesty International USA notes that civilians working for private military contractors in Iraq and Afghanistan are alleged to have committed serious incidents of abuse, including assault, torture and sexual abuse.<sup>5</sup> International press reports have revealed hundreds of incidents of civilian contractors shooting at Iraqi civilians.<sup>6</sup>

This raises questions about the responsibility of states supporting the conduct of PMSCs, contracted by them. According to a basic principle in international law, states cannot discharge their international obligations by hiring private entities, i.e. PMSCs.<sup>7</sup> Thus, "[a] failure by the [PMSC] to comply with the states' obligations will not absolve the latter of their responsibility."<sup>8</sup>

The purpose of this analysis is to demonstrate the various options that exist under international law for holding states responsible for the conduct of PMSCs. Much of the discussion centers on the obligations of states under international human rights law and international humanitarian law. Attention shall also be given to the difficulties faced by individuals who wish to invoke state responsibility. The discussion concludes with an evaluation of the compatibility of the privatization of warfare in reflection of a fundamental principle of international law: the prohibition on the 'use of force'.

## **State Responsibility for Acts of PMSCs: General Rules of Engagement**

### The Concept of State Responsibility under International Law

The law of state responsibility manages the conditions and legal consequences of international wrongful conduct by states. Conduct may be wrongful if it breaches an international obligation of the state. In the context of PMSCs, states' obligations often concern the duty to abstain from human rights violations and violations of international humanitarian law in conflict areas.<sup>9</sup>

The Permanent Court of International Justice – the predecessor of the International Court of Justice – defined state responsibility in the *Chorzow Factory* case (1927) as a principle of international law involving an "obligation to make reparation for any breach of an engagement".<sup>10</sup> According to the Court, "reparation is the indispensable

complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself."<sup>11</sup>

The International Law Commission of the United Nations (the "ILC"), an authoritative body charged upon its establishment in 1946 with the task of furthering the progressive development and codification of international law<sup>12</sup>, has attempted to codify the international rules on state responsibility. Its Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") were developed over a period of several decades and finally adopted in 2001.<sup>13</sup> They are secondary rules of international law which apply to violations of all primary rules.<sup>14</sup> As the ILC Articles are mostly based on existing case law and state practice, its contents generally reflect international customary law<sup>15</sup> and as such have a legally binding effect.<sup>16</sup>

While the ILC Articles are mainly concerned with the inter-state consequences of violations,<sup>17</sup> the ILC has confirmed that the rules on state responsibility may also apply towards persons or entities other than states, *albeit* with a more limited scope.<sup>18</sup>

#### Attribution of Acts of PMSCs to a State

Article 1 of the ILC Articles stipulates the basic principle, "[e]very internationally wrongful act of a State entails the international responsibility of that State." There is an internationally wrongful act of a state, when conduct consisting of an *action* or *omission*:

- (a) Is attributable to the state under international law; and
- (b) Constitutes a breach of an international obligation of the state.<sup>19</sup>

It follows that state responsibility can arise also in the context of actions or omissions of private actors; decisive is whether their actions or omission can be *attributed* to a state. Thus, under certain conditions, a state may be held liable for a breach of international law – such as human rights violations – by PMSCs.<sup>20</sup> There has to be a link between the state and the wrongful act.<sup>21</sup>

The ILC Articles envision several scenarios in which acts of PMSCs may be attributed to the state – a ground for state responsibility: (i) PMSCs operating as state organs, which is covered by article 4 of the ILC Articles; (ii) PMSCs exercising elements of governmental authority addressed by article 5 of the ILC Articles; and (iii) PMSCs directed or controlled by a state addressed by article 8 of the ILC Articles. Each scenario will be briefly discussed below.

#### i. PMSCs Operating as State Organs

*"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 a State."* – Article 4 of the ILC Articles

Where PMSCs are considered members of the armed forces of a state, they will constitute a state organ within the meaning of article 4 of the ILC Articles. Their acts may then be attributed to the state. Article 43 of the First Additional Protocol to the

Geneva Conventions<sup>22</sup> provides a list of requirements which help to determine whether PMSCs constitute the "armed forces" of a state. These requirements include whether its employees are placed under a command responsible to a party of the conflict and subject to an internal disciplinary system. As PMSCs generally operate outside the military chain of command<sup>23</sup>, the requirements can not be satisfied in most cases, precluding application of article 4 of the ILC Articles. However, a recent amendment to the U.S. Uniform Code of Military Justice, which allows for private contractors who violate the rules of engagement to be court-martialed<sup>24</sup>, may arguably lead to a different conclusion. Similarly, it may be argued a contract concluded between a PMSC and a state hiring the PMSC could be sufficient to bring the PMSC under a command responsible to the state.<sup>25</sup> If such arguments are indeed accepted, then PMSC possibly constitute state organs<sup>26</sup>, the acts of which may be attributed to the state under this article 4.

ii. PMSCs Exercising Elements of Government 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 of the ILC Articles

The crucial requirement for application of article 5 of the ILC Articles is the conduct of the PMSC or its employees constituting the exercise of governmental authority. In addition, the PMSC or its employees be empowered by the law of a specific state to exercise this authority. Of course, the main question here is what constitutes the exercise of governmental authority.<sup>27</sup> While PMSCs operating detention centers or are engaged in interrogation of prisoners are likely to perform intrinsic state functions<sup>28</sup>, this is less accurate when they are engaged in the protection of critical infrastructures such as oil fields. In general, many obligations imposed by the logistics of war on states to undertake activities, such as running a POW camp, often constitute military functions and as such entail elements of governmental authority.<sup>29</sup> At the same time, obligations under the Geneva Conventions requiring the state to provide services to protected persons – such as the duty to ensure provision of food and medical supplies<sup>30</sup> – may often not require governmental authority.<sup>31</sup> These activities – and the delivery of humanitarian aid in general – are often conducted by the United Nations and non governmental organizations (NGOs) who in any case cannot be considered actors for the state but rather advocates for the local citizens.

While the precise meaning of being "empowered by the law of a state to carry out a function" is disputed, it does not necessarily refer to the existence of a specific law empowering each PMSC to undertake functions with entitled governmental authority. Rather, the existence of an internal law in a state allowing for the delegation of governmental authority may, arguably, be sufficient.<sup>32</sup>

In an expert meeting on private military contractors, organized by the University Centre for International Humanitarian Law in Geneva, it was generally agreed PMSCs hired by states will often be covered by article 5, "as military operations are functions which are inherently governmental."<sup>33</sup>

iii. PMSCs 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."* – Article 8 of the ILC Articles

Article 8 reflects the principle that acts by private actors may be attributed to a state if it can be proved such actors were acting on the instructions of, or under the direction and control of, that state. For application of this article 8, it does not matter whether the conduct involves public functions or governmental authority; what is required is proof of state authorization.<sup>34</sup> This state authorization may be given on different levels.<sup>35</sup> Of course, authorization given by a lower ranking official – even though attributable to a state - may serve the state to deny involvement on an official level and avoid accountability.

The first situation covered by Article 8 addresses private actors engaging in unlawful conduct "*on the instructions of*" a state. According to the ILC, "most commonly cases of this kind will arise where "State organs" supplement their own action by recruiting or instigating private persons or groups who act as "auxiliaries" while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as "volunteers" to neighboring countries, or who are instructed to carry out particular missions abroad."<sup>36</sup> In the context of PMSCs, such instructions may come in the form of a contract between a state and a PMSC or 'rules of engagement'.<sup>37</sup> *Lawful* instructions given by a state to a PMSC shall generally not engage state responsibility when the instructions are carried out by the PMSC in an internationally *unlawful* way.<sup>38</sup> However, "the vaguer the instructions are, the more likely it is that the conduct of the [PMSC], including international wrongful acts, will be within those instructions, thus giving rise to [s]tate responsibility."<sup>39</sup>

The second situation involves a more general situation where private actors operate under a state's *direction or control*. Only in exceptional circumstances may the unlawful conduct of a private actor be attributed to a state on this basis. The leading judgment regarding the extent of control a state must exercise over private individuals in order for their acts to be attributable to that state is the case of *Nicaragua v. United States of America*.<sup>40</sup> The International Court of Justice (ICJ) had to answer the question whether the United States, because of its financing, organizing, training, supplying and planning of the operations of organized military and paramilitary groups of Nicaraguan rebels (the *contras*) in Nicaragua, was responsible for violations of international humanitarian law committed by those rebels. The Court decided a high degree of control was needed for this to be the case; a general situation of dependence and support would be insufficient to justify attribution of the unlawful conduct to the state.<sup>41</sup> According to the Court, legal responsibility would arise only if it could be proved the United States "had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."<sup>42</sup> In other words, it was necessary to prove the United States had specifically "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law".<sup>43</sup>

The high threshold of control as indicated by the ICJ in the case of *Nicaragua v. United States of America* has been slightly softened by the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the case of *Prosecutor v Tadic*,<sup>44</sup> the ICTY replaced the test of "effective control" by one of "overall control". Thus, the ICTY determined the acts of a military or paramilitary group may be attributed to a state, if the state wields "overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity".<sup>45</sup> It is however not necessary that a state issues specific orders or instructions relating to illegal acts.<sup>46</sup> Still, even under this lower threshold of control, it may be difficult to attribute the unlawful conduct of private actors to a state under this article 8.<sup>47</sup>

In the end, article 8 deals mostly with cases where PMSCs are hired by states to assist them in the discreet execution of their foreign policy, thus creating a cover of plausible deniability.<sup>48</sup> While international law provides the legal parameters for state responsibility, attribution may not always be easy to establish – enabling states to continue using these entities while evading accountability.

#### Recognition: PMSC Subcontracts

In the situation where a PMSC subcontracts with another PMSC, the conduct of the subcontracted PMSC may still be attributed to the state under articles 4, 5 and 8 of the ILC Articles. This is self-evident where state instructions allow for subcontracting. But even when subcontracting is prohibited – and therefore *ultra vires* – attribution of acts by the subcontracted PMSC to the state remains a possibility. Article 7 of the ILC Articles states:

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

It follows that, where an act of a PMSC is attributable to a state pursuant to articles 4 or 5 of the ILC Articles, such state shall also be responsible for *ultra vires* conduct by the PMSC. Such *ultra vires* conduct may include the subcontracting by a PMSC of all or part of its work to another PMSC in contravention of state instructions.<sup>49</sup>

At the same time, where an act of a PMSC is attributable to a state pursuant to article 8 of the ILC Articles, and the act of subcontracting is considered *ultra vires* (in violation of a contract between the state and the PMSC), the state shall not be responsible for the acts of the subcontracted PMSC,<sup>50</sup> unless the state subsequently adopts such acts of a subcontracted PMSC as its own.<sup>51</sup>

In other words, where a state contracts a PMSC to operate a detainment center – an intrinsic state function covered under article 5 – and such PMSC subcontracts with another PMSC, the State will be responsible for any unlawful conduct (such as torture) by such subcontractor, regardless of whether the first PMSC was permitted to subcontract in the first place. On the other hand, where a state contracts a PMSC to guard an oil field – not an intrinsic state function – and such PMSC subcontracts with

another PMSC, the State will not be responsible for any war crimes committed by the subcontractor, if subcontracting was prohibited by the state.

### **State Responsibility for Acts of PMSCs: Due Diligence**

Where the actions of PMSCs cannot be attributed to a state, the state may nevertheless incur responsibility for its failure to exercise due diligence with respect to the activities of a PMSC.<sup>52</sup> Indeed, states who hire PMSCs may have a duty to take all due care that these PMSCs act in compliance with international law.<sup>53</sup> The concept of due diligence both in the context of international human rights law ("IHRL") and international humanitarian law ("IHL") shall be briefly discussed below.

#### The Concept of Due Diligence under IHRL

States have an obligation to *respect and protect* human rights.<sup>54</sup> This obligation is not only applicable in times of peace but also during armed conflicts.<sup>55</sup> The obligation to *respect* human rights means states are prohibited from arbitrarily interfering with human rights.<sup>56</sup> State responsibility may arise not only where violations of human rights are committed by states themselves, but also where such violations are committed by a third party, whose acts can be attributed to the state. This has been discussed above.

At the same time, due diligence is an important obligation of the state to *protect* human rights. This obligation means a state "has to protect all persons from acts of third parties that could impair the enjoyment of their human rights".<sup>57</sup> It imposes a duty on the state to prevent, investigate and punish human rights violations by private parties.<sup>58</sup> Thus, even where violations of human rights by private parties cannot be attributed to a state, the state can ultimately be held responsible because it did not act to prevent such violations from taking place. The state failed to exercise due diligence and therefore incurs liability. For example, the failure by the United States to prosecute the civilian contractors of Titan Corp and California Analysis Center Incorporated (CACI)<sup>59</sup> – implicated in incidents of torture and abuse at Abu Ghraib prison in Iraq – appears to constitute a lack of due diligence.

The obligation to *protect* human rights – i.e. the duty to exercise due diligence – requires states to take the following steps with regard to PMSCs hired by them:

- (i) To take all reasonable measures to prevent human rights abuses.<sup>60</sup> It could be argued this imposes on states the obligation to provide rules of engagement and to determine criteria for the PMSC as to whom it may employ.<sup>61</sup>
- (ii) To adopt legislative and other measures to fulfill their human rights obligations.<sup>62</sup> This may include regulation of the private military and security industry as a whole, or segments of it.<sup>63</sup>
- (iii) To investigate human rights violations and to prosecute members of PMSCs who commit serious international crimes, such as war crimes.<sup>64</sup>
- (iv) To provide an effective remedy and access to justice for victims.<sup>65</sup>

Of course, the due diligence test is flexible and the extent of its application will have to be considered case by case. It appears when a PMSC operates in a conflict zone – where it may pose a threat to life or human dignity – the state's obligation of due

diligence is greater.<sup>66</sup> The same is true for the outsourcing of military tasks by a state to a PMSC with a dubious human rights record.<sup>67</sup>

Peter Singer, an expert on U.S. private military contractors, relates the story of DynCorp International LLC (DynCorp), a private company based in the United States, whose employees had been accused in previous operations of "engaging in perverse, illegal and inhumane behavior [and] purchasing illegal weapons, women, forged passports and [committing] other immoral acts."<sup>68</sup> DynCorp was sued in 2001 by Ecuadorian peasants – following DynCorp's involvement in the fumigation of coca plants along the Colombian-Ecuadorian border – for allegedly using highly toxic herbicides, causing major health problems and even death among local people as well as environmental damage.<sup>69</sup> Also, employees of DynCorp have allegedly been involved in rape and sex trafficking – including girls as young as 12 – in Bosnia.<sup>70</sup> More recently, employees of DynCorp, hired to protect Afghan leader Hamid Karzai, were accused of "aggressive behavior".<sup>71</sup> Now the company was hired by the U.S. government to help rebuild the Iraqi police system after the toppling of Saddam Hussein for a contract worth of US\$250 million.<sup>72</sup> Surely, such irresponsible behavior on behalf of the United States government will easily fail the due diligence test. But even worse, what message does the United States convey to the Iraqi people, when hiring a PMSC with a dubious human rights record? How is this to be interpreted by ordinary Iraqis, other than a disdain for their own human rights? Surely, resentment towards the United States – who proclaims to bring democracy and respect for human rights – will increase as a result of Iraqis now being exposed to a company with a clear track record of human rights violations.

#### The Concept of Due Diligence under IHL

A similar concept of due diligence appears to exist under international humanitarian law.<sup>73</sup> IHL is applicable in situations amounting to armed conflict.<sup>74</sup> Common Article 1 of the Geneva Conventions<sup>75</sup> requires states to "*respect and to ensure respect for the present Convention in all circumstances.*" This requirement may, arguably, point to an obligation of result, meaning when a state hires a PMSC to operate in an armed conflict on its behalf, the state shall automatically be held responsible for *any* violations of IHL by such PMSC, regardless of which tasks the state assigned to it.<sup>76</sup>

In any case, the exercise of due diligence in the context of IHL requires a state to prevent violations of IHL and to prosecute and punish such violations if they occur."<sup>77</sup> This may impose the following obligations on states who hire PMSCs:

- (i) To ensure employees of PMSCs are properly trained for their missions and fully aware of their obligations under IHL.<sup>78</sup>
- (ii) To ensure that PMSCs operate according to clear rules of engagement incorporating the state's obligation under IHL.<sup>79</sup>
- (iii) To suppress violations of IHL.<sup>80</sup> The Geneva Conventions require states to enact any legislation necessary to provide effective penal sanctions for grave breaches of the Geneva Conventions, to bring to justice persons alleged to have committed grave breaches, and in general, to take measures necessary for the suppression of all acts contrary to the Geneva Conventions.<sup>81</sup> In other words, states "must establish mechanisms for holding [PMSCs] and their staff accountable should they commit violations of IHL."<sup>82</sup>



Furthermore, it can be argued states have an obligation to prevent employees of PMSCs to engage in combat operations, as it is unlawful for civilians to take a direct part in hostilities.<sup>83</sup> Indeed, one of the main purposes of IHL is the protection of the civilian population. For that reason, a distinction is made between combatants and civilians with respect to international armed conflicts. Combatants have the right to participate directly in hostilities, but they themselves may also be the object of attack. Civilians on the other hand may not participate in hostilities<sup>84</sup>, but "enjoy general protection against dangers arising from military operations."<sup>85</sup>

As a result of this distinction, combatants cannot be prosecuted for lawful acts of war in international armed conflicts; such protection is however not extended to civilians participating in hostilities – they can thus suffer penal consequences under relevant national laws even if they respected IHL.<sup>86</sup> It has been argued "states that knowingly use military subcontractors [civilians] in combat roles are participating in a criminal act, and by extension are responsible in international law for the consequences of those subcontractors' acts."<sup>87</sup> Indeed, a state's reliance on PMSCs' direct participation in hostilities during armed conflicts is directly contradicting the rationale behind IHL, pointing to a lack of due diligence.<sup>88</sup>

### **State Responsibility in Practice: Enforcement**

The discussion demonstrates how under public international law and under certain conditions, states who hire PMSCs may be held responsible for violations of international human rights law and/or international humanitarian law, committed by PMSCs. According to the general rules on state responsibility, as incorporated in the ILC Articles, the liability of a state may arise through the attribution of the conduct of a PMSC to such state, or as a result of a failure by the state to exercise due diligence in trying to prevent violations of international law.

A state which is responsible for a breach of its international obligations is required to provide full reparation for the injury. According to the ILC Articles, this may take the form of *restitution, compensation and/or satisfaction*.<sup>89</sup> The International Law Commission clarifies that the ILC Articles do not deal with the possibility of the invocation of state responsibility by persons or entities other than states.<sup>90</sup> This implies, under the general (secondary) rules of state responsibility, individuals do not have the right to enforce international law; only states can bring an action against another state for violations of international law.<sup>91</sup> In practice, the likelihood of one state bringing a claim against an offending state on behalf of victims of violations of international law<sup>92</sup> committed by PMSCs is not very high; the rules of international diplomacy and state immunity<sup>93</sup> often prevent a state from doing so.<sup>94</sup> As Thürer and MacLaren notes, "the [ILC Articles] are dependent on states accepting responsibility for and on prosecuting the misconduct of [PMSCs] but do not address actual power-dynamics either between states or between states and [PMSCs]. Accordingly, relying on state responsibility alone is likely to continue to be ineffective in addressing problems arising from the growing role of [PMSCs]."<sup>95</sup>

At the same time, the ILC recognizes "[i]n cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of

any State."<sup>96</sup> Many human rights instruments indeed provide an individual complaint procedure for individuals who want to enforce their rights on an international level.<sup>97</sup> However, this option may not always be available to victims of human rights violations in certain conflict areas. For example, the First Optional Protocol to the International Covenant on Civil and Political Rights allows for individual communications (complaints) against a state under whose jurisdiction the alleged violation took place. A victim of human rights abuses in Afghanistan or Iraq is probably precluded from using this procedure against the United States because the United States does – arguably – not have jurisdiction over either state, especially following the transfer of sovereignty back to the Afghan and Iraqi government. He cannot file a complaint against his own state either, as neither Iraq nor Afghanistan is a signatory to the Optional Protocol.<sup>98</sup> In any case, the "views" of the Human Rights Committee – responsible for monitoring the implementation of the Covenant and examining the communications – are in principle not binding upon states.<sup>99</sup>

An example of the implementation of state responsibility in national legislation is the U.S. Foreign Claims Act, which permits claims by foreign nationals for damage to property, injuries or death caused by non-combat activities of U.S. military personnel abroad. Claims under this Act are resolved administratively by claims commissions and local commanders without the need for litigation. The American Civil Liberties Union (ACLU) recently made public hundreds of claims for damages under this Act by surviving Iraqi and Afghan family members of civilians killed or injured by Coalition Forces in Iraq and Afghanistan.<sup>100</sup> According to the ACLU, of the 496 files released, "164 incidents resulted in cash payments to family members. In approximately half of the cash payment cases, the United States accepted responsibility for the death of the civilian and offered a "compensation payment". In the other half, U.S. authorities issued "condolence" payments, which are discretionary payments capped at \$2,500 and offered "as an expression of sympathy" but "without reference to fault".<sup>101</sup> The rather "inconsistent method of adjudication" and over reliance on the "combat exclusion" – meaning injury, death or property damage caused during a combat action shall not be compensated - points to an arbitrary process in which the average payment for loss of life is slightly more than \$4,200.<sup>102</sup>

By comparison, the 9/11 Victims Compensation Fund awarded an average of \$1.8 million per family of each victim.<sup>103</sup> As one commentator notes, "[d]o we really believe Iraqi lives are worth that much less than those of Americans?" Obviously, the lack of proper compensation "breeds even more resentment in the Middle East and further damages U.S. credibility abroad".<sup>104</sup>

As PMSCs are not part of the U.S. military, victims of human rights violations by PMSCs cannot claim damages against the U.S. government under the Foreign Claims Act. In Iraq and Afghanistan, compensation pay-outs to victims of "mistaken shootings" by PMSCs are often left to the companies' discretion,<sup>105</sup> thus enabling states to evade their responsibility and making it more difficult for victims to obtain any form of justice from the U.S. government.

Then, what are the legal options available to the victims to obtain justice from a foreign state which is – allegedly – responsible for the unlawful conduct of a PMSC?

The right to a remedy<sup>106</sup> for victims of violations of international human rights law and international humanitarian law has been acknowledged in several international instruments and regional conventions.<sup>107</sup> Even so, the enforcement of this right can be problematic. Individuals may not always be able to bring claims against states for breaches of IHRL or IHL, either in domestic or international courts.

The problem here is procedural, i.e. individuals often do not have standing in courts to enforce their rights against states.<sup>108</sup> According to Gillard, legal adviser of the International Committee of the Red Cross,

*"it is often difficult to enforce [the responsibility of states] as a matter of practice both before international tribunals, because of the absence of a body with compulsory jurisdiction and the unlikelihood that another state would commence proceedings and before national courts, where proceedings may be thwarted by the non-self executing nature of IHL in certain states or assertions of sovereign immunity."<sup>109</sup>*

Even if international law is "directly applicable in a given legal system and the rules concerned are self-executing" or domestic law provides a foreign national with a private right of action<sup>110</sup>, is it really realistic to expect an Iraqi victim of torture committed by a member of a PMSC to sue the United States in an American court?

In general, victims of human rights violations by PMSCs have to overcome many obstacles to file a claim against a foreign state. They will need the financial means to pay for representation – whether in the United States or in another state depending on which government is held responsible; they may have to deal with a huge language barrier. They will have to prove the "unlawfulness" of the PMSCs conduct under the circumstances of violent conflict. Evidence of such wrongful act committed by a PMSC may be extremely difficult to gather, especially where such acts took place in the theatre of operations.<sup>111</sup> Also, it may often not be possible to determine "what is proper and improper behavior in conflicts".<sup>112</sup> In addition, they will have to establish a link between the conduct of the PMSC and the government held responsible. In the case of torture of prisoners during interrogation, the link may not be too difficult to establish, since interrogation is an intrinsic state function. However, the Ecuadorian victims of DynCorps' fumigation activities may have a harder time proving this link and attributing DynCorp's human rights abuses to the U.S. government.

And last but certainly not least, we should consider the trauma haunting an Iraqi victim of torture at the hands of employees of a PMSC – and imagine the psychological burden for this person to present his case in a foreign country under full press coverage; this may be enough in itself to prevent him from ultimately filing a claim.

Seen in this light, the concept of state responsibility and the individual right to a remedy may often be disappointing in its implementation. Many victims are unable to obtain any form of reparation – let alone full justice – from a state to which the unlawful conduct of a PMSC may be attributed. This will negatively impact their sense of safety and protection from violence, i.e. their human security.<sup>113</sup> The resulting feelings of injustice and resentment among the local populations are an important contributing factor to anti-Western sentiment.

## **Critical Analysis: PMSCs and the Prohibition of ‘Use of Force’**

Perhaps, PMSCs should not be engaged in military operations – which are likely to draw them into combat – in the first place. Indeed, there appears to be broad agreement that PMSCs should not take part in direct combat operations.<sup>114</sup> This is not to say that PMSCs should not operate in conflict areas. At least some of their current tasks, such as providing humanitarian aid and security related services, may be well performed by private entities. In fact, they are often hired by international organizations – including the United Nations – and foreign governments to secure embassies and embassy personnel. They may also be well equipped to provide support and logistics activities, such as catering and the construction and maintenance of military bases.<sup>115</sup> But there is an intrinsic problem with the outsourcing of *military* tasks – which may entail the ‘*use of force*’ and the ‘*direct participation in hostilities*’ – to private companies. Indeed, the contracting of PMSCs by states to perform military operations on its behalf may violate a fundamental principle of international law: the ban on the ‘use of force’ in international relations.

The ban on the ‘use of force’ means that states are not allowed to use force against another state. According to article 2(4) of the UN Charter, "[A]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The UN's *Friendly Relations Declaration* of 1970<sup>116</sup> gives an interpretation of this prohibition on the use of force and views any threat or ‘use of force’ against the territorial integrity or political independence of any state as inconsistent with the purposes of the United Nations. It furthermore calls on states "to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another state."<sup>117</sup> Hence, the Swiss Federal Council concludes in its report on private security and military companies, "[s]tates may not violate the ban on the use of force and the obligation of non-intervention either with their own forces or through the use of private security companies."<sup>118</sup> Similarly, states may not use PMSCs to interfere in matters within the domestic jurisdiction of another state.<sup>119</sup>

Where states use PMSCs in military operations in third countries, they may be violating the prohibition on the ‘use of force’. In 2001, the United States contracted several American PMSCs to combat Colombia's role in the cocaine trade, simultaneously aiding the Colombian government to conduct counter-insurgency operations.<sup>120</sup> According to one report, "Colombia's PMSC-supported civil war has left hundreds of thousands of people displaced, and thousands dead in political violence every year."<sup>121</sup> Of course, responsibility should always be assessed in the light of the "complicated relationships between the contractors and the host, hiring and home states"<sup>122</sup> and this principle should also be applied here. But without denying Colombia's own share in this humanitarian disaster, it can be argued that the United States bears at least some responsibility for the deadly results.

In the end, how are PMSCs different from proxy militias, such as the Janjaweed in Sudan – who assist the Sudanese government in the "discreet" execution of their

foreign policy? Granted, these militias may be more driven by ideology and political conviction as opposed to the profit making interests of PMSCs and their employees, but all of them ultimately serve the interests of the state in providing a cover of plausible deniability for involvement in military operations.

Also in Iraq and Afghanistan, the operations of PMSCs are inconsistent with the purposes of the United Nations and the original mission of the U.S. military to invade Iraq to enable regime change. The 'use of force' by PMSCs and their lack of accountability in Iraq – where the U.S. government granted immunity within the Iraqi legal process to all non-Iraqi military personnel and PMSC employees for acts performed within the terms of their contracts<sup>123</sup> – may be regarded as unlawful interference within the domestic jurisdiction of Iraq.

The order to grant immunity was issued by the head of the Coalition Provisional Authority, Paul Bremer the day before handing over power to the Iraqi government in June 2004.<sup>124</sup> According to the Washington Post, "[t]he issue of immunity for U.S. troops is among the most contentious in the Islamic world, where it has galvanized public opinion against the United States in the past. A similar grant of immunity to U.S. troops in Iran during the Johnson administration in the 1960s led to the rise of Ayatollah Ruhollah Khomeini, who used the issue to charge that the shah had sold out the Iranian people."<sup>125</sup> Khomeini believed the measure "reduced the Iranian people to a level lower than that of an American dog."<sup>126</sup>

What gave the United States the right to issue such an order? And in general, why do the United States, Great Britain and other states continue to contract these PMSCs to operate in Iraq even following the transfer of sovereignty to the Iraqi government?

Granted, this Iraqi sovereignty "is still largely theoretical, given the challenges posed to it by the insurgency and its lack of resources."<sup>127</sup> As noted by Isenberg, senior analyst with the British American Security Information Council (BASIC), "from the viewpoint of the [PMSC] sector, doing business with the relevant Iraqi ministries is extremely difficult, if not entirely ridiculous."<sup>128</sup> This dubious practice of utilizing PMSCs for military operations in Iraq by the United States and its allies is thus prolonged, and so is their interference with Iraqi sovereignty. As a result, the credibility of the "sovereign" Iraqi government among its own population is also seriously compromised.

Amnesty International concluded in its 2006 Annual Report the "reliance of the United States government on private military contractors in Iraq and Afghanistan had helped create virtually rules-free zones sanctioned with the American flag and firepower."<sup>129</sup> The United States claims it is interested in bringing democracy to Iraq, yet it fails in ensuring justice – an essential element of democracy and the rule of law – for victims of human rights violations at the hands of PMSCs. At the same time, the Iraqi government collaborates with the United States and essentially sanctions the operations of PMSCs – thereby at least sharing responsibility for the acts of torture and murder committed at the hands of these private entities. How will Iraqi citizens trust the installation of a democratic process if the "messengers" themselves do not follow the rules of the game?

An important consequence of the "lawless" situation thus created is its negative impact on the human security of the local populations. In general, Western states can hire PMSCs to perform any kind of military task anywhere in the world – and PMSCs can operate freely – with only very limited accountability either of the PMSCs or of the hiring state. Victims of human rights abuses committed by PMSCs will have a hard time getting any form of retribution for their suffering. The difficulty this creates for state building efforts in post-conflict areas – such as Iraq and Afghanistan – is the topic of a separate paper.

- 
- <sup>1</sup> Schreier, F. and Marina Caparini. 2005. *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*. Occasional Paper No. 6. Geneva: Geneva Centre for the Democratic Control of Armed Forces (DCAF), 30.  
<http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=18346&nav1=4> (accessed April 23, 2007)
- <sup>2</sup> Ibid, 17-33.
- <sup>3</sup> Cameron, L. 2007. International Humanitarian Law and the Regulation of Private Military companies. *Conference on "Non-State Actors as Standard Setters: The Erosion of the Public-Private Divide"*. Basel Institute on Governance. February 8-9, 2007, 1.  
<http://www.baselgovernance.org/fileadmin/docs/pdfs/Nonstate/Cameron.pdf> (accessed June 12, 2007). According to the Washington Post, there are about 100,000 U.S. government contractors operating in Iraq, but this number also includes contractors who are responsible for reconstruction only. Merle, R. 2006. Census: 100,000 contractors in Iraq – Number is 10 times that in first Gulf War, far more than previous estimate. *The Washington Post*, December 5.  
<http://www.msnbc.msn.com/id/16047618/from/RSS/> (accessed May 3, 2007)
- <sup>4</sup> War on Want. 2006. *Corporate Mercenaries: The threat of private military and security companies*. November 2006, 8. <http://www.waronwant.org/download.php?id=488> (accessed April 23, 2007).
- <sup>5</sup> Amnesty International USA, Annual Report 2006: Overview.  
<http://www.amnestyusa.org/annualreport/2006/overview.html> (accessed May 4, 2007). See for example Miller, T.C. 2005. Private Security Guards Operate with Little Supervision. *Los Angeles Times*, December 4. <http://www.globalpolicy.org/security/issues/iraq/reconstruct/2005/1204supervision.htm> (accessed June 12, 2007)
- <sup>6</sup> Ibid.
- <sup>7</sup> Gillard, E.C. 2006. Private Military/Security Companies: the Status of their Staff and their Obligations under International Humanitarian Law and the Responsibilities of States in Relation to their Operations. *PMC/PSC Workshop. Swiss Initiative. January 16-17, 2006*, 8.  
<http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0016.File.tmp/PMS-CsPraesentationen-PrivateMilitarySecurityCompanies.pdf> (accessed May 4, 2007). See also Report by the Swiss Federal Council on Private Security and Military Companies of December 2, 2005, 47.  
<http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0021.File.tmp/PMS-CsBerichtBundesrat.en.pdf> (accessed April 28, 2007)
- <sup>8</sup> Gillard, 8.
- <sup>9</sup> Droege, C. 2006. Private Military and Security Companies and Human Rights – A rough sketch of the legal framework. *PMC/PSC Workshop. Swiss Initiative. January 16-17, 2006*, 2.  
<http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0015.File.tmp/PMS-CsPraesentationen-PrivateMilitarySecurityCompanies-humanrights.pdf>. (accessed April 28, 2007)
- <sup>10</sup> See Chirwa, D.M. 2004. The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights. *Melbourne Journal of International Law*, 5:1, 4.  
[http://mjil.law.unimelb.edu.au/issues/archive/2004\(1\)/01Chirwa.pdf](http://mjil.law.unimelb.edu.au/issues/archive/2004(1)/01Chirwa.pdf) (accessed May 20, 2007)
- <sup>11</sup> *Case Concerning the Factory at Chorzów, Claim for Indemnity, Merits (No. 13)*, [1928] PCIJ (Series A – No. 17), 29. [http://www.icj-cij.org/pcij/serie\\_A/A\\_17/54\\_Usine\\_de\\_Chorzow\\_Fond\\_Arret.pdf](http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf) (accessed May 26, 2007)
- <sup>12</sup> Wallace, R.M.M. 1992. *International Law*. Second Edition. London: Sweet & Maxwell, 31. See also Klabbers, J. 2002. *An Introduction to International Institutional Law*. Cambridge University Press, 218.
- <sup>13</sup> [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf) (accessed May 25, 2007)

- 
- <sup>14</sup> Sassòli, M. 2002. State Responsibility for Violations of International Humanitarian Law. *IRRC*, 84: 401, 402.  
[http://www.icrc.org/Web/eng/siteeng0.nsf/3e02cd6224ce0af6012568b20048a62f/bfb98c391c49e4ffc1256bfa002a6082/\\$FILE/401\\_434\\_Sassoli.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/3e02cd6224ce0af6012568b20048a62f/bfb98c391c49e4ffc1256bfa002a6082/$FILE/401_434_Sassoli.pdf) (accessed May 23, 2007).
- <sup>15</sup> Report by the Swiss Federal Council, 48.
- <sup>16</sup> Article 38(1)(b) of the Statute of the International Court of Justice.
- <sup>17</sup> Sassòli, 402.
- <sup>18</sup> International Law Commission, Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Commentaries"). Text adopted by the International Law Commission at its fifty-third session, in 2001, 214.  
[http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) (accessed May 25, 2007). According to the ILC, "state responsibility extends, for example, to human rights violations and other breaches of international law where the primary beneficiary of the obligation breached is not a State. However, while Part One [of the ILC Articles] applies to all the cases in which an internationally wrongful act may be committed by a State, Part Two has a more limited scope. It does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State. In other words, the provisions of Part Two are without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State (...)." (para. 3 on article 28).
- <sup>19</sup> Article 2 of the ILC Articles.
- <sup>20</sup> Chirwa, 9-10.
- <sup>21</sup> Chirwa, 5.
- <sup>22</sup> Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts ("First Additional Protocol"). Please note that, while the First Additional Protocol has been ratified to date by 167 countries, the United States is among its notable exceptions. Most of its provisions will however also apply to the United States, as they have become part of international customary law. See for example the Statement by Ms. Anna Sotaniemi, Legal Adviser, Permanent Mission of Finland to the United Nations, on behalf of the European Union, UN 61<sup>st</sup> Session, Sixth Committee (Legal Affairs), Agenda Item 75: Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts, New York, October 18, 2006. [http://www.europa-eu-un.org/articles/en/article\\_6382\\_en.htm](http://www.europa-eu-un.org/articles/en/article_6382_en.htm) (accessed May 21, 2007)
- <sup>23</sup> Schreier and Caparini, 66.
- <sup>24</sup> Singer, P.W. 2007. The Law Catches Up to Private Militaries, Embeds. *Defense Tech*, January 3. <http://www.defensetech.org/archives/003123.html> (accessed May 3, 2007)
- <sup>25</sup> University Centre for International Humanitarian Law ("UCIHL"). 2005. *Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions*. Geneva: International Conference Centre. August 29-30 2005, 11.  
[http://www.ucihl.org/communication/private\\_military\\_contractors\\_report.pdf](http://www.ucihl.org/communication/private_military_contractors_report.pdf) (accessed May 20, 2007)
- <sup>26</sup> See for example Värk, R. 2006. State Responsibility for Private Armed Groups in the Context of Terrorism. *Juridica International XI: 184*, 189-190. [http://www.juridica.ee/get\\_doc.php?id=1026](http://www.juridica.ee/get_doc.php?id=1026) (accessed June 12, 2007)
- <sup>27</sup> UCIHL, 16-18.
- <sup>28</sup> Chirwa, 6.
- <sup>29</sup> UCIHL, 17.
- <sup>30</sup> Article 55 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 ("Fourth Geneva Convention")
- <sup>31</sup> UCIHL, 17-18.
- <sup>32</sup> Ibid, 18.
- <sup>33</sup> Ibid, 18.
- <sup>34</sup> Chirwa, 6.
- <sup>35</sup> The authorization is attributable to the state if given by: (a) the government; (b) any political sub-division of the state; or (c) any organ, agency official employee or other agent of its government or of any sub-division acting within the scope of their employment. See Wallace, 169.
- <sup>36</sup> ILC Commentaries, 104.
- <sup>37</sup> UCIHL, 19.
- <sup>38</sup> ILC Commentaries, 108.
- <sup>39</sup> UCIHL, 19.

- 
- <sup>40</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J Reports 1986*, p. 14. <http://www.icj-cij.org/docket/files/70/6503.pdf> (accessed May 21, 2007)
- <sup>41</sup> See also ILC Commentaries, 106.
- <sup>42</sup> *Nicaragua v. United States of America*, para. 115.
- <sup>43</sup> *Ibid*, para. 115.
- <sup>44</sup> *Prosecutor v. Tadic*, IT-94-1-A, ICTY Appeals chamber, Judgment, 15 July 1999. <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf> (accessed May 21, 2007)
- <sup>45</sup> *Ibid*, para. 131 and 137.
- <sup>46</sup> *Ibid*, para. 145.
- <sup>47</sup> Chirwa, 7.
- <sup>48</sup> War on Want, 10.
- <sup>49</sup> UCIHL, 6.
- <sup>50</sup> UCIHL, 6, 20.
- <sup>51</sup> Article 11 of the ILC Articles ("Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.")
- <sup>52</sup> UCIHL, 33-40.
- <sup>53</sup> McDonald, A. 2004. Guns 'n Butter for Hire: Some Legal Issues Concerning Private Military Companies. *Conference on Privatisation of Warfare. Clingendael Institute. June 2, 2004*, para. 3.7. <http://www.ikv.nl/docs/200409091531239981.doc?&username=gast@ikv.nl&password=9999&groups=IKV> (accessed April 22, 2007)
- <sup>54</sup> Droege, 2. See for example article 2 of the International Covenant on Civil and Political Rights of 16 December 1966. <http://www.ohchr.org/english/law/pdf/ccpr.pdf> (accessed May 26, 2007). See for an interpretation of article 2 of the ICCPR, Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004. [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument) (accessed May 26, 2007).
- <sup>55</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996*, p. 226, para. 25 ("[t]he Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war"). <http://www.icj-cij.org/docket/files/95/7495.pdf> (accessed May 23, 2007)
- <sup>56</sup> Droege, 2.
- <sup>57</sup> *Ibid*, 3.
- <sup>58</sup> UCIHL, 6, 36.
- <sup>59</sup> War on Want, 14.
- <sup>60</sup> Droege, 3.
- <sup>61</sup> UCIHL, 35.
- <sup>62</sup> Droege, 3.
- <sup>63</sup> UCIHL, 38.
- <sup>64</sup> UCIHL, 7, 39.
- <sup>65</sup> Droege, 3; UCIHL, 7.
- <sup>66</sup> UCIHL, 37.
- <sup>67</sup> *Ibid*, 37.
- <sup>68</sup> Singer, P.W. 2004. War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law. *Colombia Journal of Transnational Law*, 42: 521, 524-525. <http://www.brookings.edu/dybdocroot/views/articles/fellows/singer20040122.pdf> (accessed April 23, 2007)
- <sup>69</sup> <http://www.globalexchange.org/getInvolved/corporateHRviolators.html>. DynCorp was hired by the United States government to spray coca fields in Colombia as part of the controversial "Plan Colombia". However, DynCorp also ended up spraying farmers on the Ecuadorian side of the border, who did not cultivate illegal crops and were not supposed to be targeted. See <http://www.laborrights.org/> (under Current Projects – Litigation – DynCorp). Assistant Secretary of State Rand Beers intervened in the case immediately, informing the judge the lawsuit posed "a grave risk to US national security and foreign policy objectives." See <http://www.corpwatch.org/article.php?list=type&type=18>.
- <sup>70</sup> <http://www.globalexchange.org/getInvolved/corporateHRviolators.html>. While many of the DynCorp employees suspected of illegal activities were forced to resign, none were prosecuted, since



---

they enjoyed immunity from prosecution in Bosnia. See also

<http://www.corpwatch.org/article.php?list=type&type=18>.

<sup>71</sup> <http://www.corpwatch.org/article.php?id=11574>.

<sup>72</sup> Singer, *supra* note 68, 525.

<sup>73</sup> The existence of a due diligence principle under IHL and its application to PMSCs is accepted by the International Committee of the Red Cross ("ICRC"). The ICRC suggests with regard to state parties to a conflict, "[a]s regards damages which may be caused by private individuals, i.e., by persons who are not members of the armed forces (nor of any other organ of the State), legal writings and case-law show that the responsibility of the State is involved if it has not taken such preventive or repressive measures as could reasonably be expected to have been taken in the circumstances. In other words, responsibility is incurred if the Party to the conflict has not acted with due diligence to prevent such acts from taking place, or to ensure their repression once they have taken place." Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, para. 3660.

<http://www.icrc.org/ihl.nsf/COM/470-750117?OpenDocument> (accessed May 23, 2007). Similarly, the International Court of Justice confirmed in a recent case that the responsibility of an occupying state is "engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory...". *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, I.C.J. Reports 2005, No. 116, para. 179. <http://www.icj-cij.org/doctet/files/116/10455.pdf> (accessed May 23, 2007)

<sup>74</sup> The meaning of 'armed conflict' has been clarified by the International Criminal Tribunal for the former Yugoslavia (ICTY). In the case of *Prosecutor v. Tadic*, the Appeals Chamber held that "[a]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Prosecutor v. Tadic*, IT-94-1, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> (accessed May 23, 2007)

<sup>75</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 ("First Geneva Convention"), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 ("Second Geneva Convention"), Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 ("Third Geneva Convention"), Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 ("Fourth Geneva Convention").

<sup>76</sup> UCIHL, 44-45.

<sup>77</sup> Sassòli, 411-412.

<sup>78</sup> McDonald, para. 3.7.

<sup>79</sup> UCIHL, 41, 61.

<sup>80</sup> *Ibid.*, 42.

<sup>81</sup> See article 49 of the First Geneva Convention, article 50 of the Second Geneva Convention, article 129 of the Third Geneva Convention, article 146 of the Fourth Geneva Convention, and article 85 of the First Additional Protocol.

<sup>82</sup> Gillard, 9.

<sup>83</sup> McDonald, para. 3.7. See regarding the direct participation of civilians in hostilities Kalshoven, F. and L. Zegveld. 2001. *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, Third Edition, Geneva: ICRC, 96-99. See also UCIHL, 63.

<sup>84</sup> According to an ICRC report, "civilians directly participating in hostilities could be prosecuted under domestic law regardless of whether they had respected the laws of armed conflict". International Committee of the Red Cross, *Direct Participation in Hostilities under International Humanitarian Law*, Geneva, September 2003. [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf) (accessed May 25, 2007)

<sup>85</sup> Article 51(1) of the First Additional Protocol.

<sup>86</sup> ICRC report, *supra* note 84.

<sup>87</sup> McDonald, para. 3.7.

<sup>88</sup> See also Cameron, 10.

<sup>89</sup> Article 34 of the ILC Articles. Restitution is the obligation to re-establish the situation which existed before the wrongful act was committed (article 35 of the ILC Articles). It is the primary form of reparation, as it erases the consequences of the wrongful act. See *Case of Comingersoll S.A. v. Portugal*

---

(Application no. 35382/97), *European Court of Human Rights, Judgment*, 6 April 2000, para. 29. <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=comingerso&sessionid=10242097&skin=hudoc-en> (accessed May 24, 2007). (According to the Court, "a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach".) Restitution could include the restoration of liberty and enjoyment of human rights. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles and Guidelines"), adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005, para. 19. <http://daccessdds.un.org/doc/UNDOC/GEN/N05/496/42/PDF/N0549642.pdf?OpenElement> (accessed May 24, 2007) Where breaches of international law committed by PMSCs concern grave violations of IHL or IHRL, such as war crimes, restitution is often not possible. The state may then be compelled to compensate for the damage caused by the wrongful act (and for which it is responsible). See article 36 of the ILC Articles. The payment of compensation may be the most appropriate form of reparation when restitution is not possible. The obligation to compensate requires causality between the wrongful act and the damage incurred. When a PMSC commits a violation of a human rights norm, such as the right to life or the prohibition of torture, such causality shall not be difficult to establish. It may be more difficult to calculate the financial damage incurred in the case of loss of life or torture. Satisfaction is mostly symbolic and may consist in an acknowledgement of the breach, an expression of regret or a formal apology (article 37 of the ILC Articles). In addition to the general rules on reparation as contained in the ILC Articles, international human rights law and international humanitarian law also contain specific provisions regarding the obligation to make reparation for international wrongful acts. See article 131 of the Third Geneva Convention, article 148 of the Fourth Geneva Convention, and article 91 of the First Additional Protocol. See also for example article 41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that where the internal law of a state party allows only partial reparation to be made, "the Court shall, if necessary, afford just satisfaction to the injured party." <http://www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> (accessed May 24, 2007). Similarly, article 91 of the First Additional Protocol states a "party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation." See also article 3 of the Hague Convention (IV) Respecting the Laws and Customs of War on Land of 1907. The obligation to make reparation under IHL is probably not limited to compensation alone, but may also include satisfaction, restitution and rehabilitation (medical and psychological care as well as legal and social services) as well. See Basic Principles and Guidelines, para. 15-23. See furthermore article 9(5) of the International Covenant on Civil and Political Rights which provides "[a]nyone who has been a victim of unlawful arrest or detention shall have an enforceable right to compensation."

<sup>90</sup> ILC Commentaries, 234.

<sup>91</sup> Chirwa, 10.

<sup>92</sup> UCIHL, 51-52.

<sup>93</sup> Wallace, 115-118.

<sup>94</sup> Article 41 of the International Covenant on Political and Civil Rights may serve as an example. This article contains an optional provision for the filing of a communication by one state party against another for not fulfilling its obligations under the Covenant. Steiner and Alston note as of January 2000, this optional provision had not been utilized, even though by that time 47 states had made the necessary declaration under article 41. Steiner, H.J. and P. Alston. 2000 *International Human Rights in Context: Law, Politics, Morals*. Oxford: University Press, 739.

<sup>95</sup> Thürer, D. and M. MacLaren. 2007. Military Outsourcing as a Case Study in the Accountability and Responsibility of Power. In *The Law of International Relations – Liber Amicorum Hanspeter Neuhold*, ed. Reinisch A. & U. Kriebaum. 347-369. Netherlands: Eleven International Publishing, 360.

<http://www.ivr.uzh.ch/istthuerer/forschung/FSNeuholdt.pdf> (accessed June 13, 2007)

<sup>96</sup> ILC Commentaries, 234-235.

<sup>97</sup> Chirwa, 10.

<sup>98</sup> <http://www.ohchr.org/english/countries/ratification/5.htm> (accessed June 19, 2007)

<sup>99</sup> Steiner and Alston, 739.

<sup>100</sup> <http://www.aclu.org/natsec/foia/29316prs20070412.html> (accessed June 14, 2007)

<sup>101</sup> Ibid. See also Jamail, D. and A. Hamed. 2006. Another US Cover-Up Surfaces in Iraq. *Inter Press Service*, June 13.

<http://www.globalpolicy.org/security/issues/iraq/attack/consequences/2006/0613samarra.htm> (accessed

---

June 14, 2007). See furthermore Von Zielbauer, P. 2007. Confusion and discord in U.S. compensation to civilian victims of war. *International Herald Tribune*, April 12.

<http://www.iht.com/articles/2007/04/12/news/abuse.php/> (accessed June 14, 2007)

<sup>102</sup> Campaign for Innocent Victims in Conflict (CIVIC). 2007. *Adding Insult to Injury: US Military Claims System for Civilians*.

<http://www.civicworldwide.org/storage/civic/documents/civic%20military%20claims%20white%20paper.pdf> (accessed June 14, 2007)

<sup>103</sup> See also <http://thegroundtruth.blogspot.com/search/label/compensation> (accessed June 14, 2007)

<sup>104</sup> Ibid.

<sup>105</sup> Thompson, H. 2006. Iraq Occupation Makes Possible Record Profits for British Private Military Contractor. *Global Policy Forum*, February 28.

<http://www.globalpolicy.org/security/issues/iraq/contract/2006/0228contractor.htm> (accessed June 14, 2007)

<sup>106</sup> The right to a remedy includes the right to (i) an equal and effective access to justice; and (ii) adequate, effective and prompt reparation for harm suffered. See Basic Principles and Guidelines, *supra* note 89, para. 11.

<sup>107</sup> See for example article 8 of the Universal Declaration of Human Rights, article 2(3) of the International Covenant on Civil and Political Rights, article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, article 91 of the First Additional Protocol, article 75 of the Rome Statute of the International Criminal Court, article 25 of the American Convention on Human Rights and article 13 of the European Convention.

<sup>108</sup> See also Sassòli, 419.

<sup>109</sup> Gillard, 9.

<sup>110</sup> Sassòli, 419.

<sup>111</sup> UCHL, 58.

<sup>112</sup> Singer, *supra* note 24.

<sup>113</sup> [http://www.humansecurityreport.info/HSR2005\\_HTML/What\\_is\\_HS/index.htm](http://www.humansecurityreport.info/HSR2005_HTML/What_is_HS/index.htm) (accessed May 4, 2007)

<sup>114</sup> War on Want, 9, 17.

<sup>115</sup> Cameron, 9.

<sup>116</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations 2625 (XXV) of 24 October 1970.

<http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement> (accessed May 25, 2007)

<sup>117</sup> Similarly, the International Court of Justice states that "a state will breach the international law principle of non-intervention against another state by organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state." *Nicaragua v. United States of America*, *supra* note 40, para. 191.

<sup>118</sup> Report by the Swiss Federal Council, 45.

<sup>119</sup> Cottier, M. 2006. Relevant International Legal Standards: Overview, Use of Force, Mercenaries. PMC/PSC Workshop. *Swiss Initiative. January 16-17, 2006*.

<http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0018.File.tmp/PMS-CsPraesentationen-RelevantInternationalLegalStandardsOverview.pdf> (accessed May 4, 2007).

Enrique Ballesteros, former Special Rapporteur of the Commission on Human Rights, compared modern-day PMSCs to mercenaries and concluded that "[t]he mere fact that it is a Government that recruits mercenaries, or contracts companies that recruit mercenaries, in its own defence or to provide reinforcements in armed conflicts does not make such actions any less illegal or illegitimate (...) Under no circumstance may they [governments] use the power conferred on them to carry out acts that impede the self determination of peoples, to jeopardize the independence and sovereignty of the State itself or to condone actions that may do severe harm to their citizens' lives and security." Enrique Bernales Ballesteros (Special Rapporteur pursuant to Commission resolution 1998/6). Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. E/CN.4/1999/11, 13 January 1999, para. 36.

<http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/ab78acfb0828505780256737003f82a4> (accessed May 26, 2007)

<sup>120</sup> War on Want, 11. See also Bigwood, J. 2001. DynCorp in Colombia: Outsourcing the Drug War. *Corpwatch*, May 23. <http://www.corpwatch.org/article.php?id=672> (accessed May 27, 2007)

<sup>121</sup> War on Want, 11.

<sup>122</sup> Thürer and MacLaren, 360.

---

<sup>123</sup> Coalition Provisional Authority Order Number 17 (revised), *Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq*. CPA/ORD/27 June 2004/17.

[http://www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf) (accessed April 29, 2007).

<sup>124</sup> See also Wright, R. 2004. U.S. Immunity in Iraq Will Go Beyond June 30. *Washingtonpost.com*, June 24. <http://www.washingtonpost.com/wp-dyn/articles/A757-2004Jun23.html> (accessed May 14, 2007).

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Isenberg, D. 2006. A government in search of cover: PMCs in Iraq. *Conference on "Market Forces: Regulating Private Military Companies"*, *Institute for International Law and Justice, New York University School of Law, March 23-24*, 11. <http://www.basicint.org/pubs/Papers/pmcs0603.pdf> (accessed June 19, 2007)

<sup>128</sup> Ibid, 11.

<sup>129</sup> International U.S.A., Annual Report 2006: Statement of Larry Cox, Executive Director, May 23, 2006.

[http://www.amnestyusa.org/2006/Statement\\_Larry\\_Cox\\_Executive\\_Director\\_Amnesty\\_International\\_USA/page.do?id=1101439&n1=2&n2=18&n3=782](http://www.amnestyusa.org/2006/Statement_Larry_Cox_Executive_Director_Amnesty_International_USA/page.do?id=1101439&n1=2&n2=18&n3=782) (accessed April 29, 2007)

