

The State Responsibility for International Humanitarian Law Violations and Human Rights Abuses Committed by Private Military and Security Companies

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Abstract

The primary concern of this paper is the scope of International Law to address the state responsibility and private contractors' accountability for human rights violations, especially during conflict situations. The presence of Private Military and Security Companies (PMSCs), in armed conflicts motivated debate and research on the subject. PMSCs have a controversial position under International Law and on several occasions, it has been said that companies and employees have no legal status and no obligations. However, PMSCs do have a legal status under International Humanitarian Law (IHL). Depending on their legal status, private contractors will have a relationship with a state and different international obligation will rise both for state and individual. When PMSCs' employees breach an obligation under IHL they must face certain consequences, such as a trial on an ad hoc tribunal or on the International Criminal Court. The use of private contractors on the battlefield highlights the idea that states could outsource military and security functions to avoid and transfer international responsibilities arising from wrongful acts. Therefore, the issue of international responsibility must be addressed in order to spell out that this idea is in fact inaccurate. The discussion addresses the question of who can be responsible for human rights violations. This paper is divided in three parts: first, searches to discuss the state responsibility doctrine and the due diligence principle; second, focuses on individual criminal responsibility of PMSCs employees emphasizing the superior criminal responsibility and third, discusses the issue of corporations' international responsibility.

Keywords: State Responsibility, Superior Criminal Responsibility, due Diligence, Draft Articles on State Responsibility for Internationally Wrongful Acts

Introduction

The primary concern of this chapter is the scope of international humanitarian law (IHL) to address the state responsibility and private contractors' accountability for human rights violations, especially during armed conflict situations. The active presence of Private Military and Security Companies (PMSCs), in the armed conflicts motivated debate and research on the subject. Since the 1990s, the number of companies developing activities in armed conflicts increased considerably. In fact, the Afghanistan war and the Iraq war become notorious for the heavy reliance of the US government on PMSCs' services.

Private military and security companies have a controversial position under international law and on several occasions, it has been said that companies and employees have no legal status and therefore no obligations. In recent years, scholars have been discussing whether or not PMSCs operates on a "legal vacuum" and if there is a gap on international law. However, PMSCs do have a legal status¹ under IHL with rights and obligations (CALAZANS, 2011).

Depending on their legal status, the private contractor will have a relationship with a state and different international obligation will rise both for state and individual. For instance, under the

¹The definition for PMSCs provided by the Montreux Document of 2009, item 9 (a) on the Preface seems to be more appropriate because it defines private contractors generically, without being tied to a strict delimitation between military and security companies: "PMSCs are business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel".

International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts (DASR) Article 4, PMSCs incorporated among the armed forces will be considered state organs and therefore, states are responsible for their misconduct. PMSCs' employees will be criminally responsible when committing war crimes or crimes against humanity. Nevertheless, enforcement of the existing law and oversight over PMSCs activities has been very limited. The discussion here will focus on the questions of who can be legally responsible for violations and abuses of human rights law and international humanitarian law.

This paper is divided in three parts. The first part searches to discuss the state responsibility doctrine. The second part focuses on individual criminal responsibility of PMSCs employees emphasizing the superior criminal responsibility. The third part addresses the issue of corporations' international responsibility.

State Responsibility Under the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts

Articles 4, 5, and 8 of the International Law Commission's Draft Articles on Responsibility of State for Internationally Wrongful Acts (DASR) are specifically relevant when attributing the conduct of PMSCs employees to the hiring state (CLAPHAM, 2006, p. 241-244). Article 4 deals with the conduct of any state organ; Article 5 regards the persons or entities exercising elements of governmental authority and Article 8 handles with the conduct of persons or groups under the directions and control of a state (CRAWFORD, 2005).

PMSCs as State Organs Under Article 4

States are liable for the conduct of its organs and have been for more than a century. "State organ covers all the individual or collective entities which make up the organization of the State and act on its behalf. It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State" (CRAWFORD, 2005, p.94). Private contractor operating within the structure of the State or making up the state's organization are state organs. Therefore, seems logical that PMSCs employees constituting the armed forces of a state, under the auspice of Article 4 A (1-2) of the Third Geneva Convention of 1949 are considered state organs for the purpose of state responsibility.

Furthermore, the state will be responsible for wrongful acts committed by PMSCs employees in their personal capacity, when they are officially incorporate on the armed forces, conforming with Article 91 of the First Additional Protocol of 1977 and Article 3 of the Hague Convention (IV). Under Article 5 of the DASR, states will be responsible for the conduct of PMSCs employees not constituting the armed forces, only during the exercise of their official capacity, this is the case of PMSCs employees under Article 4 A (4) of the Third Geneva Convention of 1949. Some authors defend that the state's lack of accountability for off-duty conduct of private contractors not part of the armed forces is a gap of in the state responsibility doctrine. However, the provisions of IHL and HRL may fulfill this gap (HOPPE, 2010; LEHNARDT, 2009).

PMSCs employees categorized as states' armed forces within the meaning of Article 43 of First Additional Protocol of 1977 might also be considered state organs under Article 4 of DASR. When they are not, the conduct of private contractors will be attributable to the state in accordance with article 5 of DASR, that is also the case of other militias and volunteer corps belonging to a party to the conflict of Article 4 A (2) of the Third Geneva Convention of 1949, because these entities are fighting an international armed conflict on behalf of state and that is one example of exercising elements of governmental authority. The Montreux Document reaffirms the position that violations committed by PMSCs employees exercising elements of governmental authority will be attributed to the state. The conduct of PMSCs employees falling under the civilians accompanying the armed forces category of Article 4A (4) of the Third Geneva Convention of 1949 may also trigger the state responsibility under Article 5 of DASR.

Exercising Elements of Governmental Authority Under Article 5

Article 5 brings two requirements to justify the application of attribution rules: (1) "exercise elements of governmental authority" and (2) the person or entity must be "empowered by the law of that state". The text of Article 5 is vague and brings no explanation of what means "elements of

governmental authority”. Crawford comments that the article address entities such as “public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the state to exercise functions of a public character”(CRAWFORD, 2005, p. 13).

Some examples of intrinsic state functions that may be performed by private companies are the police functions, the power of detention and discipline when hired as prison guards and powers in relation to immigration control or quarantine (CRAWFORD, 2005, p. 100). The interpreters and interrogators of prisoners in Abu Ghraib performed by Titan Corp and CACI respectively constitute exercise of governmental authority.² In this respect, an expert during the Expert Meeting on Private Military Contractors on August 2005, pointed out that States are under the obligations imposed by the Third Geneva Convention to run a prisoner of war camp, since this is an intrinsic State function, even if this task have been privatized.

There is neither a definition of governmental authority under international law nor an exhaustive list of what are all intrinsic state functions. Nevertheless, Professor Lehnardt defends the idea of “core functions” that could be considered as being governmental (LEHNARDT, 2009). In other words, military functions impose the exercise of governmental authority in the auspice of Article 5, even if the State privatize some of these functions, the state responsibility will be triggered by the conduct of private contractors.

The Interpretations of Article 8: The Effective Control Test and the Overall Control Test

Article 8 is only relevant when there is no law empowering the entity to exercise governmental authority, but still exists a factual relationship between the state and the entity or person committing the wrongful act. The reading of Article 8 shows two circumstances under which a factual relationship between a State and a PMSC leads to state responsibility: (1) the entity or person must receive instructions from the state to commit the wrongful act; (2) the control or direction of the state over the entity or person must be established.

The first circumstance is only fulfilled if instructions are given to commit the wrongful act in a particular mission. The state will be responsible only if it directed the company to commit the violation, but if the state hired the PMSC to perform a lawful service, and while performing the contract the private contractors commits a violation, then the state will not be responsible (GILLARD, 2006).

The jurisprudence has different approaches of interpretation regarding the second circumstance of “control or direction”. On the one hand, the ICJ in the *Nicaragua v. United States of America* case defends the idea of “effective control” in order to establish the attribution. It must be clear that a state “had effective control of the military or paramilitary operations in the course of which the alleged violations were committed”.³ The court found that United States was not responsible for the conduct of the *contras* in Nicaragua and funding, organizing, training, supplying and equipping of the group was not sufficient evidence to trigger state responsibility. For instance, in the *Ibrahim v. Titan* case the judge considered that Titan employees that committed the wrongful acts in Abu Ghraib prison were under the exclusive direction and control of the military chain of command.⁴ In the case of CACI the control of military over the employees were not exclusive, but still would satisfy the “effective control” test.

On the other hand, the ICTY in the *Prosecutor v. Dusko Tadić* case states that an “overall control” is enough to establish the relationship between a state and a group in order to justify the responsibility of a state. According to the court hierarchically organized groups do not require supervision and the criterion of ICJ on Nicaragua case contradict the logic of the doctrine of state responsibility, state practice and *opinio juris*. The Appeals Chamber defended that the purpose of Article 8 was exactly to prevent states avoiding responsibility by hiring PMSC.

The comments on ILC’s Articles suggest that both approaches have equal authority (CRAWFORD, 2005, p.110-112) with two standards of control. The first, with a higher threshold is the

²See *Ilham Nassir Ibrahim et al. v. Titan et al.*, United States District Court for the District of Columbia, 05-cv-01165-JR (2007) and *Saleh et al. v. Titan et al.*, United States Court of Appeals for the District of Columbia Circuit, No. 08-7008 (2009).

³Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, I.C.J Reports, Judgment of June 27,1986, at. 115, p.65.

⁴*Ibrahim v. Titan*, p.12.

effective control test of ICJ in Nicaragua case, which can be used for acts performed by individuals. The second standard is the overall control test of ICTY in Tadić case, which is relevant for organized armed groups and hierarchical groups, such as PMSCs, military or paramilitary units. Find state responsibility for the conduct of PMSCs personnel under the former is more difficult than the latter (CASSESE, 2007, p. 657).

The Individual Criminal Responsibility of PMSCs Employees

The increasing presence of private contractors performing services that were previously developed by state's armed forces in conflict areas raises the question of their legal status, but also about their individual criminal responsibility for violations of international rules. Private Military and Security Companies employees in some occasions have been implicated in incidents, which violated IHL and constituted abuses of HRL. For instance, the widely known abuse of detainees in Abu Ghraib prison; the shooting of civilians without a apparent reason in Iraq and the participation in other war crimes and crimes against humanity during the cleansed of Serbs by Croat Troops (LEHNARDT, 2008).

The principle of individual criminal responsibility determinates that individuals can be held directly responsible for crimes committed under international law (O'SHEA, 2011, p.1-6). Under the customary law, piracy, crimes against peace and crimes against humanity are some example of crimes that raises the individual criminal responsibility. Under international treaty law, for instance, the individual criminal responsibility is attributed by the Convention on the Prevention and Punishment of the Crime of Genocide of 1948; International Convention on the Suppression and Punishment of the Crime of Apartheid; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Slavery Convention.

In the Tadić case, the ICTY established two elements triggering the individual criminal responsibility. First, a person cannot be held accountable for crimes committed by other persons, confirming that under the modern international criminal law the notion of collective responsibility is not recognized (CASSESE, 2008, p.33). Second, only a particular conduct, act or omission leading to a breach of criminal rules can raise individual liability. Therefore, if a person is somehow involved in a violation of a criminal rule, he or she is deemed accountable.

Superior Criminal Responsibility

The principle of command or superior responsibility originally addressed the superior-subordinate relationship among the members of the armed forces. However, the ICTY and ICTR jurisprudence suggests that this rule evolved to include also commanders in civilian settings, i.e., the case of PMSCs managers and senior employees. According to this rule,⁵ superiors are criminally responsible for the wrongful acts and violations committed by their subordinates (CASSESE, 2008). The superior responsibility is triggered when three elements are fulfilled⁶: (i), superior-subordinate relationship, *de jure or de facto*; (ii), knowledge of the crime and, (iii) failure to take the necessary measures to avoid or punish the crime.⁷ These elements are relevant to find the criminal responsibility of PMSCs managers and senior employees for the wrongful acts of other private contractors; military commanders with private contractors under their control; and PMSCs employees supervising military personnel (FRULLI, 2010). PMSCs superiors exercising *de facto* control over military personnel or other private contractors can be criminally liable under the principle of superior responsibility. Additionally, military commanders with civilians under his/her authority will be also liable as if the subordinate was military.

The International Criminal Responsibility of Corporations

International law has not yet recognized the international responsibility of corporations for wrongful acts. However, there is no reason for PMSCs to avoid the consequences for human rights abuses and IHL violations (WHITE, 2009).

The classical approach under public international recognizes only states that fulfil the criteria of the Montevideo Convention as subjects of international law (CLAPHAM, 2008). The international society recognizes other entities as subjects of international law with associated objective legal

⁵The principle of superior responsibility is a customary international law rule.

⁶Prosecutor v. Oric, Case No. IT-03-68-T, judgment, para. 293, June 30, 2006.

⁷See Article 86 and Article 87 of First Additional Protocol of 1977.

personality, that is the case of international organizations. Nevertheless, legal persons such as corporations remain excluded.⁸

Although corporations have not yet achieved the status as subjects of international law, historically corporations have been treated differently, for instance, the case of the English and Dutch East India Companies, which used to exercise elements of state power, i.e. standing armies and governing territories. This example illustrates that historically corporations have been accepted as important actors on the international society.

Furthermore, there are international conventions⁹ addressing corporations that recognize their obligations and responsibilities as participants of the international society. Therefore, in several situations the international law recognizes the international responsibility of corporations, but how about human rights law and international humanitarian law?

While there are number of competent tribunals, such as *ad hoc* tribunals and the ICC to try and convict individuals for international crimes, there is no international organ with competence to try corporations (CLAPHAM, 2008). The Rome statute does not provide jurisdiction to the ICC to try corporations for breaches of international criminal law. Nevertheless, where the national courts have jurisdiction over violations of international law committed by corporations, the gap is fulfilled.

It is clear that PMSCs can be held accountable under the United States Alien Tort Claims, if they are providing services, which constitutes violations of crimes such as genocide, slavery, crimes against humanity and war crimes. However, only in rare occasions a company has been sued before the US Courts for a direct action. In most cases, the corporation is accused to abet a state in the violation of international law.

Final Remarks

The ILC Draft Articles have a key role to play on state responsibility related to PMSCs employees' misconduct. Article 4, 5 and 8 of the ILC Draft Articles combined with the Geneva Conventions of 1949 are specifically relevant to establish the relationship between companies' employees and the state. PMSCs are considered a state organ under Article 4 when they have a formal relationship with the state, i.e. when private contractors are officially incorporated on the armed forces.

Article 5 is applied for private contractors exercising elements of governmental authority, empowered by a national law. The provision is vague and brings no explanation on the meaning of elements of governmental authority. In order to determinate whether or not the conduct of PMSCs employees can be included under the article, is necessary first to question if the function indeed requires governmental authority to be carried out, and second if the internal law of the state empowered the corporation to perform such function. Article 8 addressing the companies exercising elements of governmental authority without the national law is the most controversial provision. It must be proved the instructions, directions and or control of the state over the company. Two different approaches have been developed on international level by international courts: the effective control test and the overall control test. According to the ICJ, it must be clear that a state had effective control of the military or paramilitary operations in the course of which the alleged violation was committed, in other words, the state must have effective control over the actions of the employees. The ICTY defends the idea of "overall control".

PMSCs they can be held directly responsible for crimes committed under international law. Some situations that can trigger individual criminal responsibility are: direct participation in hostilities without the status of combatants, assistance or encouraging a crime; a person that has the duty to supervise and control the actions of its subordinates fails on his/her duty. The principle of command or superior responsibility originally addressed the superior-subordinate relationship among the members of the armed forces. However, the ICTY and ICTR jurisprudence suggests that this rule evolved to include also commanders in civilian settings, i.e., the case of PMSCs managers and senior employees.

Regarding the corporate accountability, while there are a number of competent tribunals to trial individuals for international crimes, there is no international organ with competence to trial

⁸Article 25 Statute of International Criminal Court, UN Doc./A. CONF. 183.9. 2187 UNTS (1998) 90.

⁹UN Convention on the Law of the Sea of 1982, 1833 UNTS 397, Article 137 (1); UN Convention against transnational organized crime of 2000, Article 10, 2225 UNTS 275, liability of legal persons.

corporations. The national law is a viable answer to address the issue of corporate criminal responsibility and to promote their accountability for misconduct.

References

- Calazans, Érika L. B. The Legal Status of Private Military and Security Companies Employees Under International Humanitarian Law. *Anuário brasileiro de direito internacional*, v. VI, p. 149-180, 2011.
- Cassese, Antonio. *International Criminal Law*, Oxford University Press: Second Edition, Oxford, New York, 2008, 455p.
- Clapham, Andrew. Extending international criminal law beyond the individual to corporations and armed opposition groups. *Corporate criminal liability: new developments in international criminal law*. In: *Journal of International Criminal Justice*, no. 6, 2008, pp. 899-926.
- Crawford, James. *First Report on State Responsibility*, Special Rappouter, UN Doc. A/CN.4/490/Add.6, 1998.
- Doswald-Beck, Louise; VITÉ, Sylvain. Private military companies under international humanitarian law. In: Chesterman, Simon; Lehnardt, Chia (eds.) *From mercenaries to market: the rise and regulation of private military companies*. Oxford University Press, Oxford, 2007, first edition, pp. 115-138.
- Frulli, Micaela. Exploring the applicability of command responsibility to private military contractors. In: *Journal of Conflict & Security Law*, Oxford University Press, 2010, vol. 15, no. 3, pp. 435-466.
- Gillard Emanuela Chiara. Business goes to war: private military/security companies and international humanitarian law. In: *International Review of Red Cross*, vol. 88, n. 863, September 2006, pp.525-572.
- Hoppe, Carsten. Passing the buck: state responsibility for private military companies. In: *European Journal of International Law*, 2008, vol. 19, no. 5, pp.989-1014.
- Human rights obligations of non-state actors in conflict situations. *International Review of the Red Cross*. Volume 88, number 863, September 2006, p. 491-523.
- Lehnardt, Chia. Individual liability of private military personnel under International Criminal Law. In: *The European Journal of International Law*, vol. 19, No. 5, 2008, pp. 1015-1034.
- Lehnardt, Chia. Private military companies and state responsibility. In: CHESTERMAN, Simon; Lehnardt, Chia (eds.). *From Mercenaries to market: the rise and regulation of private military companies*. Oxford University Press, Oxford, New York, First Edition, 2007, pp.139-157.
- O'Shea, Andreas. Individual criminal responsibility. In: *Max Planck Encyclopedia of Public International Law*. Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, 2011, pp.1-6.
- The International Law Commission's Articles on State Responsibility: introduction, text and commentaries. Third Printing, Cambridge University Press, 2005, Cambridge, 387p.
- The Nicaragua and Tadic Testes Revisited in Light of the ICJ Judgment on Genocide in Bosnia. In: *The European Journal of International Law*, Vol. 18, No. 4, 2007, pp.649-668.
- White, Nigel D. Institutional responsibility for private military and security contractors. *EUI Working Papers, AEL* 2009, n. 26, Academy of European Law, PRIV-WAR project, 12p.