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Humanitarian Law: Private Military Companies and Emerging Jurisprudential Issues

Miebaka Nabiebu[1], Michael Takim Otu[2], Amarachukwu Onyinyechi Ijiomah[3]
[1,3]Department of Jurisprudence and International law, University of Calabar, Nigeria
[2]Department of Private and Property Law, University of Calabar, Nigeria
Email: mdlaw2004@yahoo.com[1]

ABSTRACT

The private military industry emerged in the initial years of the twentieth century, driven by three factors: the end of the Cold War; transformations in the nature of warfare that blurred the lines between soldiers and civilians; and a general trend towards privatisation and outsourcing of government functions worldwide. The dominance of State authority over the military is now under stress, and the professional and private elements—in the form of private military companies (PMCs)—are gaining ground. As the PMSCs become omnipotent and omnipresent, it becomes more difficult to hold the State accountable for its military activities. To further complicate the issue, the present international humanitarian law (IHL) does not consider PMCs as soldiers or supporting militias since they are not part of the defence force and often consist of a large number of people of different nationalities. Due to the above, this paper investigates Private Military companies and emerging Jurisprudential issues under international humanitarian law. This work discussed the emergence of private military companies, mercenaries, and combatants as war prisoners and the human rights violations perpetrated by PMSC personnel. This work used the US-based *Black Water,* CACI, L-3 Services, and DynCorp, the South African Meteoric Tactical Systems, as well as the Russian Wagner Group contractors, as case studies. This work also draws some lessons from the Iraq, Afghanistan, Somalia, And Ukraine conflicts. This work shows that Human rights violations perpetrated by PMSC personnel are rampant and often violate international humanitarian law. This work proposes that framers of international humanitarian laws should propose laws that will regulate the use of PMCs in conflict situations.

Keywords: Private military companies (PMCs); international humanitarian law (IHL); Human rights violations; private military industry.

INTRODUCTION

The idea of regulating war is not a novel one. The present 'law of war, which is embodied under the umbrella term "international humanitarian law (IHL)," denotes the binding international norms that govern armed conflict between nations, civil war combatants, and conflicts among States and non-State belligerents (Muller¸2004). The law of war, or law of

armed conflict, was traditionally referred to as jus in bello. The term 'international humanitarian law' has gained prominence only since the early 1960s.

The two major streams of IHL are the "Hague Law," which regulates weaponry and the selection of military targets, and the "Geneva Law," which outlines the treatment of prisoners of war (POWs), detainees, civilians, and humanitarian aid workers. IHL attempts to restrict the use of force through specific rules applicable separately for land, aerial, and naval warfare (Forsythe & Rieffer-Flanagan, 2016). The credit for laying down a strong foundation for the development of the principles governing the treatment of prisoners of war goes to the Hague peace conference. The Conventions on the Laws and Customs of War on Land of 1899 and 1907 contained specific provisions on the treatment of prisoners (Mangku¸ 2021). The experience of the First World War was instrumental in the inclusion of a Prisoner-of-War Code in one of the two 1929 Geneva Conventions, which in turn was developed after the Second World War. The Third Geneva Convention of 1949 relating to the treatment of prisoners of War remains in force to date. In addition, there is a fourth Geneva Convention and two additional protocols from 1977 as the instruments encompassing the norms of contemporary international humanitarian law.

PMCs engaged in situations of armed conflict are bound by international humanitarian law. The status of the employees of private military companies in an armed conflict is determined by international humanitarian law on a case-by-case basis according to the nature of the functions they are performing. Several international initiatives have been undertaken to clarify, reaffirm, or develop international legal standards in order to regulate their activities so as to ensure their compliance with standards of conduct required under the IHL and other human rights instruments. Hence, the present work attempts to trace out the origin, growth, and development of both the law of war (the IHL) and the PMCs.

EVOLUTION OF INTERNATIONAL HUMANITARIAN LAW

A lack of consensus is visible with regard to the evolution of the "law of war" or "law of armed conflict," usually referred to as "international humanitarian law." The expositions of the international lawyers exhibit vicissitudes: Sometimes the origin and development of the law are located in a long history of codes of warfare that straddle different times and cultures, and sometimes the contribution of Henry Dunant, who was instrumental in the creation of the International Committee of the Red Cross (ICRC) and the Geneva Conventions, is emphasised. The term "international humanitarian law" emerged in the 1960s, replacing the traditional phrase 'jus in bello, through the convergence of a wide range of different players and interests, giving birth to a new branch of law encompassing a plethora of humanitarian principles (Alexander¸2015).

The 1977 Additional Protocols to the Geneva Conventions set the framework for this emerging field (McClelland, 2003). Nevertheless, the sanctity of 'international humanitarian law' remained a bone of contention for almost two decades, as the international community was hesitant to accept the principles and authority of the Protocols. However, at the end of the 20th century, the authority of Additional Protocol I came to be accepted by practitioners of international humanitarian law. Consequently, the term 'international humanitarian law' acquired the status of a comprehensive term to denote the laws of war. These developments reflect a paradigm shift that has been accomplished in the international scenario—a shift from state sovereignty' to 'humanitarianism.' Today, the term 'international humanitarian law' is used to denote the laws governing the 'conduct of warfare.' The ICRC, which has a close nexus with international humanitarian law, describes it as a part of international law that specifically protects persons who are not or are no longer taking part in hostilities, the sick and wounded,

prisoners, and civilians, and that defines the rights and obligations of the parties to a conflict in the conduct of hostilities.

Broadly speaking, international humanitarian law is a part of public international law that seeks to moderate the conduct of armed conflict and mitigate the suffering that it causes. It is quite interesting to note that international lawyers maintained that traditionally 'international humanitarian law' denoted the 'Geneva' part of the law of warfare, which had a humanitarian focus, as opposed to the 'Hague' law, which was more concerned with the methods of warfare (McClelland, 2003). However, both "are so intertwined and so overlapping that they can be said to be two sides of the same coin." Thus, 'international humanitarian law' comprises the totality of the rules of international law that concern armed conflict, whether customary, conventional, Hague, or Geneva. Way back in 1956, the ICRC named its commission at the New Delhi Conference the 'International Humanitarian Law Commission, thereby making an early use of the term 'international humanitarian law.'

However, the Battle of Solferino in 1859 and the initiatives of Henry Dunant cannot be ignored in this context (Burkle, 2019). In order to mitigate the suffering of the injured soldiers, Henry Dunant founded the Red Cross movement. This has become 'a promoter and custodian of the humanitarian idea and the primary initiator for its transition into international humanitarian law.' Further, he was the man behind the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field in 1864, which ignited the Geneva tradition of humanitarian law. Although earlier approaches to the laws of war were not identical with the modern version, they also shared 'humanitarian' values and contributed a lot to the shaping and reformulation of the law as seen today. The terms 'international humanitarian law' and 'laws of war' are often used interchangeably, obliterating the dichotomy between them. As said earlier, there exists another view that regards international humanitarian law as a history of oppression and imperialism.

Some International lawyers portray a history wherein military needs exposed civilians to the violence of war and legitimised their suffering. To substantiate their view, they enlist a series of facts. For instance, the Declaration of Saint Petersburg, 1868, proved to be a futile attempt. The Hague Conventions of 1907, by leaving military necessity untouched, rendered civilians more vulnerable (Burkle, 2019). The Nuremberg Tribunal also helped to legitimise unbridled conduct in war. This negative account places the contemporary understanding of international humanitarian law in a long continuum with other codes of warfare and stretches international humanitarian law into the past. Advocates of international humanitarian law claim that a principle of international humanitarian law is well established if it is considered part of a long tradition. Alternatively, placing international humanitarian law in a long history makes it easier for those who are eager to attack to draw connections with a tradition of oppression.

In this way, histories of international humanitarian law not only reflect but also help to shape the current understanding of the field. Prior to the 1960s, the terms 'laws of war' and 'laws of armed conflict' were used to denote de facto and internal conflicts. The laws of war were the 'rules of the Law of Nations respecting warfare,' which contained two contradictory principles: (i) 'a belligerent is justified in applying any amount and any kind of force which is necessary for the realisation of the purpose of war, namely, the overpowering of the opponent;' and (ii) unnecessary forms of violence—violence that is not essential for the defeat of a belligerent—are not permitted. The former reflects the concept of military necessity, and the latter embodies the principle of humanity. The view that the rules of war must reconcile with these 'contradictory' principles of humanity and military necessity dominated throughout the initial part of the century.

Thereafter, the law of war came to be recognised as an attempt to strike a balance between the needs of war and the standards of civilization. There were rules that prevented

truly sadistic or wanton acts, including the use of poisoned weapons. However, the majority of the rules failed to safeguard even the minimum standard of civilization. Thus, during the initial decades of the 20th century, commentators considered the humanitarian principles of the rules of war as a weaker thread of the law of war. The important developments during this phase include the Paris Declaration; the St. Petersburg Declaration, which prohibited poisonous weapons; the Geneva Conventions of 1864 and 1906, which offered protection to wounded and sick soldiers; and the Hague Conventions of 1899 and 1907 (Willmott¸ 2004). Out of these documents, the Geneva Conventions contained the most authoritative humanitarian provisions. Nevertheless, their purview was confined to their subject matter. Similarly, even though the Hague Peace Conferences had originally promised a more comprehensive attempt at the prevention or humanization of war, their outcome was also limited.

At the beginning of the 1990s, the status of the Protocol remained uncertain. However, by the end of the decade, the Protocol had come to be accepted as customary law and a general embrace of the humanitarian values of international humanitarian law (Lutz & Sikkink, 2000). After the Gulf War, controversies over the status of the Protocol dwindled, and the Cold War positions lost relevance. Instead, the international legal community focused more on the ethnic conflicts in Yugoslavia and Rwanda. Emphasis was given on the attempts of the UN Security Council to respond to these events: authorising peacekeeping operations, setting up ad hoc tribunals for Rwanda and Yugoslavia, and laying the groundwork for an International Criminal Court. These conflicts paved the way for the establishment of an institutional environment to enforce IHL. The work of the academics and practitioners that dominated the 1990s was concerned with the victims of warfare, crimes against humanity, sexual violence, and genocide. The plight of the victims of landmines was also a burning issue during this period.

In their discussions on these issues, the international lawyers used a humanitarian vocabulary, and they were open to human rights values quite contrary to their predecessors. Although the controversies relating to the status of the Protocol remained dormant through these years, they were awakened when the North Atlantic Treaty Organisation (NATO) intervened in Kosovo in 1999. Unlike the commentators on the Gulf War, when civilians were killed, the lawyers did not condemn the inadequacy of the law but attributed the failure of NATO to apply the law properly as the major cause (Koskenniemi, 2002). In other words, the lawyers did not suggest better laws but called for better adherence to the law. In this way, international humanitarian law came to be recognised as the prestigious and respected regime of the law of war.

THE EMERGENCE OF PRIVATE MILITARY COMPANIES

All historical sketches relating to the emergence of private military companies attempt to establish a relation between the PMCs and mercenaries; considering the similarities between them. For instance, both employ foreign nationals and offer military services in consideration of money. In 1294 BC, mercenaries were used extensively by Ramses II (Janaby¸2015). Similar trend was visible during the tenure of King David (1010-973 BC) also. Mercenaries constituted one-third of the army of Alexander the Great that invaded Persia in 334 BC; and formed the majority of Caesar's cavalry in 50 BC (Durschmied¸2014). Six hundred years later mercenaries were used widely in the Justinian East Roman Army. Quite interestingly, the Mercenary War occurred after the First Punic War (264–341 BC) as a result of nonpayment of mercenary's salaries. This reflects the large size of the army hired at that time by the Empire (Durschmied¸2014).

During the Norman Conquest, mercenaries were used extensively by Duke William. The Roman period also, especially during the Punic War, witnessed a flourishing mercenary sector.

The corporate nature of mercenaries can be traced to Harold's Norse mercenaries, fought beside the Byzantine Empire in 1032 (Janaby¸2016). They subsequently formed the mercenary Varangina Guard. However, the first private military organizations were formed in Western Europe during the feudal period. The first among them named "free companies" were formed by the unemployed former soldiers who were compelled to form companies on account of scarcity of money or housing. Their function was confined to offering support and protection to their groups, who were travelling together in search of work and to take part in combat. They were loyalty only to their particular unit, rather than to their country, and they structured themselves to be ready to face any military forces. They fought the battle of Brignais against the king of France in 1362, who had tried to wipe them out.

In Italy, many groups of mercenaries ('condottiere') who provided the armed forces for most Italian cities during the Renaissance period were established. In England, many 'free companies' were established between 1300 and 1450 (Janaby¸2016). They marked their presence till the end of the sixteenth century. In France, there was an attempt to find an alternative to the 'free companies' by establishing a standing army. These 'free companies' were consequently abolished. The remaining mercenary companies were forced to go elsewhere. The concept of the nation-state that gained ground after the peace pact of Westphalia in 1648 paved way for the creation of national armies (Janaby¸2016). However, this development did not affect the existence of the private colonial companies that offered their services to protect territories and trade. Some historians believe that private military companies were formed in Europe during the seventeenth and eighteenth centuries as a sequel to the proliferation of overseas trade. This trade, especially with India, was a very risky one in terms of distance to be covered as well as time for completion of the journey. This compelled the merchants to transform themselves to joint-stock enterprises, which enabled them to face risks together. The consent of the States concerned in the form of a "charter" permitted such companies to employ their own security forces to accompany. These forces came to be described as an embryonic form of PMCs.

Serious concerns relating to the expanding role of these private armies impelled some sovereigns to hire individual mercenaries and integrate them into their own national armies, or to hire an army from another ruler. By the end of the eighteenth century, such hiring was very common. Moreover, private firms named "Sea Dogs" played an important role in naval warfare as their ships were used by States in hostilities. As said earlier, the expanding role of the individuals and ad hoc mercenaries forced some States to restrict their activities during the twentieth century. In this period, the privatization of war shifted from companies to individual ex-soldiers named mercenaries. These entities affected the post-colonial African regimes as well. Consequently, African countries took initiatives to regulate mercenary activities by proposing the introduction of Article 47 of Additional Protocol to the Geneva Conventions 1949, the Organization of African Unity Convention for the Elimination of Mercenaries, 1972 and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989.

The termination of the Cold War also helped to increase the activities of the PMCs. Many States adopted a policy of reduction in their national armed forces. At the same time, this period witnessed a significant increase in defense spending more on the cost of the PMCs' contracts, which were found to be an alternative to a large standing army. These national trends reflect State tendencies in relying PMCs to carry out sovereign functions in dangerous areas.

MERCENARIES AND COMBATANTS AS WAR PRISONERS

Who are "mercenaries"? Who are "combatants"? Who are "civilians"? These questions often invite scholarly debates and discussions. The existing international legal regime does not

recognise PMCs or their personnel as a distinctive category. In the absence of their recognition as a 'distinctive category' under international humanitarian law, one has to draw inferences by reference to other categories: combatants, mercenaries, and civilians. The IHL recognises only three categories as subjects of the law of war for the purpose of conferring rights and responsibilities in relation to armed conflicts. The existing law does not recognise PMCs or their personnel as a specific category. The scholars often use the terms 'civilian contractors' and 'mercenaries' interchangeably to represent PMCs. However, it is to be noted that these terms have three different connotations, though they exhibit certain similarities. PMCs denote private juristic persons having natural persons under their disposal to be hired for security services. On the other hand, civilian contractor is a generic term used to refer to any individual with a profit motive, either from such PMCs or any other private source, engaged in hostilities or providing logistical support in armed conflicts. However, 'mercenaries' indicate only those who engage in hostilities for private gain without being part of the armed forces of a party to the conflict.

The Additional Protocol I to the Geneva Conventions, 1977(APGC77) defines 'mercenary' as "any person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party; (d) is neither a national of a party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a party to the conflict; and (f) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces" (Demy, 2009, p. 54).

Thus, mercenaries form a category distinct from that of combatants or civilians. They are hired to take part in hostilities merely for monetary gain, without any substantial link to the conflict situation. However, an individual acquires the status of a mercenary, provided that: (i) He must have been employed to fight in an armed conflict; (ii) He must have directly engaged in hostilities; and (iii) He shall neither be a national nor a member of the armed forces of the Parties to the conflict nor a member of the armed forces of any third State. On the face of the record, the provisions of Additional Protocol I to the Geneva Conventions, 1977, seem to be applicable to civilian contractors. However, it is not so: as per (a) and (b) of the definition referred to above, only those individuals recruited to fight in an armed conflict and having direct participation in it are 'mercenaries. Those who have no direct participation in the hostilities are not mercenaries (Cameron¸2006). The ground reality is that PMC employees predominantly engage in logistical support services, including the guarding of prisoners, imparting training to military personnel, supplying food, and managing weapons.

Under the Protocol, civilian contractors cannot be held accountable as mercenaries for any activity during these activities. The third Geneva Convention requires that a captured soldier shall be 'a lawful combatant' and a 'protected person' entitled to the status of a prisoner-of-war until facing a trial in a competent tribunal. In accordance with the provisions of the Protocol or the applicable municipal law, the domestic tribunal may decide whether he is a mercenary. Even if he becomes an unlawful combatant, he must be treated with humanity and shall not be denied the right to a fair and regular trial. If, after a trial, he is found to be a mercenary, he can be treated as a common criminal and may face execution. As mercenary soldiers may not qualify for the status of POWs, they are denied repatriation.

One can find a similar but wider definition of 'mercenaries' in the UN Convention against the Recruitment, Use, Financing, and Training of Mercenaries, 1989. According to this definition, a mercenary is also "any person who: (a) Is specially recruited locally or abroad for

the purpose of participating in a concerted act of violence aimed at: (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or (ii) Undermining the territorial integrity of a State; (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation; (c) Is neither a national nor a resident of the State against which such an act is directed; (d) Has not been sent by a State on Official duty; and (e) Is not a member of the armed forces of the State on whose territory the act is undertaken" (Krahmann, 2012, p. 32).

The UN Convention brought under the umbrella of 'mercenaries those individuals who are recruited to overthrow a Government or undermine the territorial integrity of a state. Moreover, unlike the Protocol of 1977, under the United Nations Convention, "direct participation in hostilities" is not a pre-requisite to establishing the status of mercenary. Therefore, under the United Nations Convention, the purpose for which an individual is recruited, rather than the actual commission of the act, is decisive. Many critics have pointed out that the United Nations Convention of 1989 as well as the Geneva Conventions Additional Protocol of 1977 are designed to encompass the activities of mercenaries in post-colonial Africa and fail to address the use of private military companies by sovereign States.

A 'combatant' is someone who is legally entitled to participate directly in hostilities during an armed conflict. The Additional Protocol to the Geneva Conventions of 1977 does not define combatants; instead, it declares that the members of the armed forces of a party to the conflict (other than medical personnel and chaplains covered under the Third Convention) are combatants. The armed forces of a Party to a conflict consist of all organised armed forces, groups, and units that are under a command responsible to that Party for the conduct of their subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party (Roberts¸1985). Such armed forces shall be subject to an internal disciplinary system that, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict, and the combatants shall have the right to participate directly in hostilities. Therefore, the status of a combatant depends on his integration and membership in the armed forces of a party to the conflict.

The Additional Protocol of 1977 further mandates that, whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces, it shall so notify the other Parties to the conflict (Kalidhass, 2014). However, any member of the organised armed forces, groups, or units may be considered a combatant if such an armed group or unit is under a command responsible for enforcing compliance with the rules of international law. By virtue of this provision, even a civilian who is integrated into the armed organisation of a party becomes a member of the armed forces and remains a combatant throughout the hostilities. Such a provision is wide enough to cover not only the regular armed forces of a Party to the conflict but also the civilian contractors who form part of such armed forces. However, the status of the employees of the PMCs who are engaged in hostilities depends on their integration and incorporation into the regular armed forces of a party to the conflict.

The Geneva Convention of 1949 also contains indirect passive references about the status of combatants while recognising the status of prisoners of war during armed conflicts. Members of the armed forces of a Party to the conflict as well as members of militias or voluntary forces forming part of such armed forces who have fallen into the power of the enemy are considered prisoners of war under the Convention. By attributing prisoner of war status to members of the regular armed forces, the Convention recognises such persons as combatants. Combatant status may thus depend upon the membership of the armed forces of a party to the conflict or the incorporation into the State's armed forces according to its municipal law.

The Convention further provides that combatant status may also be conferred on members of militia or voluntary forces who are not integrated into regular armed forces if they

fulfil the following criteria: (i) being commanded by a person responsible for his subordinates; (ii) having a fixed distinctive sign recognisable at a distance; (c) carrying arms openly; and (d) conducting their operations in accordance with the laws and customs of war. Therefore, to acquire the status of combatants, the militia or other voluntary forces must belong to a party to the conflict and fulfil the four criteria stated above. However, when parties to the conflict engage civilian contractors to fight on their behalf in hostilities, such PMC personnel will easily be considered combatants, provided they fulfil these four criteria.

The terms 'civilian contractors,' 'mercenaries, and 'private military companies' are often used interchangeably. However, as seen in the discussion hitherto, these terms indicate three different things, though overlapping cannot be ruled out. PMCs indicate private 'artificial' persons that have natural persons under their disposal for being contracted for security services; civilian-contractor, on the other hand, is a generic term to refer to any individual, either from PMCs or any other private source, engaged in hostilities or providing logistical support in armed conflicts for profit. However, 'mercenaries' indicate only those who engage in hostilities for private gain without being part of the armed forces of a party to the conflict.

Today, PMCs are engaged in all kinds of activities ranging from combating to guarding and protection, detention and interrogation, technical and intelligence assistance, and so on, ensuring their presence in pre-, during, and post-conflict situations. Their involvement is perceived both in armed as well as non-armed conflicts, and their usage becomes indispensible in times of war as well as peace in the contemporary international scenario. Since the end of the Cold War, the usage of PMCs has increased day by day. Even international organisations like the United Nations use PMCs for their peacekeeping missions, followed by different regional organisations, including the European Union. PMCs are multifaceted and complex entities operating worldwide in different situations as 'private entities carrying out public works.' However, it has become very difficult to determine their nature and to bring them within the straightjacket of the international legal framework. To give effect to the Constitutional philosophy as well as the international obligations, various jurisdictions forbid their citizens from fighting in foreign wars unless they are under the control of their own national armed forces. Against this backdrop, it seems that, for conferring rights and responsibilities to the PMCs so as to make them accountable for their intentional acts or omissions, determination of their status under international law is the pre-requisite, keeping in mind the fact that the present IHL recognises only three categories—combatants, mercenaries,' and civilians—as subjects of the IHL for the purpose of conferring rights and responsibilities in relation to armed conflicts.

HUMAN RIGHTS VIOLATIONS PERPETRATED BY PMSC PERSONNEL

The approach of the PMSC personnel, their convoys of armed vehicles, their conduct in traffic, and their use of lethal force are matters of grave concern. For instance, the employees of the US-based firm *Black Water* were involved in the shooting incident that took place on September 16th, 2007 in Baghdad, wherein seventeen civilians were killed and more than twenty were wounded. This incident was not the first one involving Black Water. Despite the fact that the terms of the contracts allowed only defensive use of force, in over eighty percent of the shooting incidents, the forces of the company fired the first shots (Kadhim, 2012). In another incident in Baghdad on October 9, 2007, the employees of Unity Resources Group (URG), protecting a convoy, shot and killed two Armenian women. The family of one of the deceased was denied even compensation, compelling the dependents to file a suit in the US (Kadhim, 2012). The same company was involved in the shooting of a 72-year-old Australian Professor in March 2006 as he approached an intersection being blocked for a convoy. The deceased, who drove through the city every day, allegedly sped up his vehicle as he approached the guards and did not heed warnings to stop, including hand signals, flares, warning shots into

the body of his car, and floodlights. It is interesting to note that the incident occurred in broad daylight at about 10:00 a.m. (Kadhim, 2012).

Allegations of torture, cruel, inhuman, or degrading treatment, assault and battery, and intentional infliction of emotional distress are frequently raised against PMSC employees. For instance, the United States-based corporations CACI and L-3 Services, which were responsible for interrogation and translation services, were alleged to have tortured Iraqi detainees at Abu Ghraib (Weissbrodt & Heilman, 2011). Seventy-two Iraqi citizens, who were formerly detained at military prisons in Iraq, sued L-3 Services, Inc., for torture and physical and mental abuse during their detention (Weissbrodt & Heilman, 2011). The defendants argued that the suit must be dismissed in toto because they were immune under the laws of war, because the suit raised non-justiciable political questions, and because they possessed derivative sovereign immunity. They further sought dismissal of the State law claims on the basis of government contractor immunity, premised on the notion that plaintiffs cannot proceed on State law claims that arose out of combatant military activities. However, the United States District Court rejected these contentions and awarded compensation.

Since 1991, the United States Department of State has contracted DynCorp, a private company, to supply services for an air-spraying programme against narcotics in the Andean region (Gómez del Prado, 2011). In accordance with the contract, DynCorp provided the essential logistics for the Anti-drug Office of Colombia's activities, in tune with three main objectives: eradication of cultivations of illicit drugs, training of the army and personnel of the country, and dismantling of illicit drug laboratories and illicit drug-trafficking networks. An NGO report indicated the dreadful consequences of the spraying on the inhabitants of the frontier region. One-third of the forty-seven women in the study showed cells with genetic damage. The study demonstrated that when the population is exposed to fumigations, the risk of cellular damage can increase and that, once permanent, the cases of cancerous mutations and important embryonic alterations increase, prompting a rise in abortions. The annual report (2009) of DynCorp International, which refers to the civil suits concerning the spraying of narcotic plant crops and plaintiffs, testifies to these apprehensions of the NGO (Gómez del Prado, 2011).

The attempted coup d'état perpetrated in Equatorial Guinea in 2004 is a glaring example of the link between the phenomenon of mercenaries and PMSCs as a means of violating the sovereignty of States (Mamouri, 2016). The mercenaries involved in this case were mostly former directors and personnel of Executive Outcomes, a PMSC. The team included security guards who were still employed by PMSCs. Two of them were employees of Meteoric Tactical Systems, which provides security to diplomats from Western Embassies in Baghdad. It also included a security guard who had previously worked for the PMSC "Steele Foundation" and had given protection to President Aristide of Haiti and conducted him to the plane that took him to exile (Mamouri, 2016). The persons involved in the attempted coup were arrested in Zimbabwe, and Equatorial Guinea itself was the place where the coup was intended to take place to overthrow and replace the existing government to get the rich resources of oil. Those arrested included a British citizen and a South African.

A number of reports reveal the crucial roles played by private security guards in some of the most sensitive activities of the Central Intelligence Agency (CIA), including the arbitrary detention and clandestine raids against insurgents in Iraq and Afghanistan; involvement in CIA rendition flights; and joint covert operations. Employees of PMSC have been involved in the taking of detainees from "pick-up points," transporting them on rendition flights, and delivering them to "drop-off points," as well as in the construction, equipping, and staffing of the CIA's "black sites." In May 2007, the American Civil Liberties Union sued a subsidiary company of Boeing on behalf of five people who were kidnapped by the CIA and disappeared in overseas

prisons kept by US secret services. The five people were tortured during their arbitrary detention (Chwastiak, 2015).

In 2005, many Chileans received military training at the army base in Honduras. The instructions included anti-guerrilla tactics such as deactivation of explosives and mortars and ways to avoid them. They had entered as tourists and were illegally in Honduras (Mamouri, 2016). They used high-caliber weapons and had been contracted by a subsidiary of Triple Canopy. They became part of a group that also included many Hondurans recruited and trained in Honduras. Triple Canopy had been awarded a contract by the United States Department of State. Consequently, they were smuggled into Iraq. The majority of them were engaged as security guards at fixed facilities in Iraq. They had been contracted by Your Solutions Honduras SRL, a local agent of Your Solutions Incorporated, registered in Illinois, United States of America, which in turn had been subcontracted by Triple Canopy, based in Chicago. Some of the Chileans are presently working in Baghdad, providing security to the Embassy of Australia under a contract with Unity Resources Group (URG) (Mamouri, 2016).

In its African strategy, the Kremlin is motivated foremost by a desire to thwart U.S. policy objectives, almost irrespective of their substance. In recent years, Wagner Group contractors have been deployed across the Middle East and Africa, including to Syria, Yemen, Libya, Sudan, Mozambique, Madagascar, the Central African Republic, and Mali, focusing principally on protecting the ruling or emerging governing elites and critical infrastructure (Kozhanov, 2021). In 2017, for example, the Wagner Group deployed some 500 men to put down local uprisings against the government of Sudan's dictator Omar al-Bashir. As payment, Prigozhin received exclusive rights to gold mining in Sudan, channelled through his M-Invest company. Before his overthrow in April 2019, Bashir offered a naval base on the Red Sea to Moscow (Ramani, 2021). In the Central African Republic (CAR), the Wagner Group has been propping up the weak government of President Faustin-Archange Touadéra, whose writ extends little beyond the capital, against various rebel groups since 2018. Its arrival in the CAR coincided with a Prigozhin-linked company being awarded diamond and gold mining licences (Pokalova, 2023). The Russian security company has been widely accused of perpetrating severe human rights violations and harassing peacekeepers, journalists, aid workers, and minorities. Wagner's presence puts the CAR government at odds with the United Nations and Western governments, which increasingly demand that the CAR end its dealings with the Russian company or risk losing their assistance. In December, the European Union suspended its military training mission in the country. Among the Wagner Group's latest worrisome Africa deployments is Mali, where Islamist militants remain potent and governance is poor and unaccountable.

As of January 2023, there were an estimated 50,000 fighters from the Wagner Group in Ukraine fighting for Russia. Around 40,000 of the fighters are believed to be convicts, according to Pokalova (2023), which could lead to more allegations of human rights abuses. Satellite images have captured a Wagner burial site, illustrating the grim chances for convicted fighters on the front lines.

Despite their involvement in grave human rights violations, not even a single PMSC or employee of these companies has been penalised. During litigation, 'government contractor defence,' 'political question doctrine, and 'derivative immunity' arguments are constantly invoked by the PMSCs and their personnel to escape penal liability. PMSCs seek the benefit of these defences to argue that they were operating under the exclusive control of the Government of the States when the alleged acts were committed and therefore cannot be held liable for their actions.

LESSONS FROM IRAQ, AFGHANISTAN, SOMALIA, AND UKRAINE

The Iraq, Afghanistan, and Ukraine experiences proved that "defensive" PMSC actions can also lead to excessive use of force and similar PMSC misconduct (Casiraghi & Cusumano, 2023). The US-based Black Water, which performed services in Iraq and Afghanistan, provides the best example. Though their service contract in Iraq was to provide "defensive services," most of the shooting engagements involving its employees in Iraq between 2005 and 2008 were self-initiated (Coito, 2013). PMSC operations in the maritime domain also raise concerns similar to those identified in Iraq and Afghanistan regarding danger to the inhabitants. For instance, PMSC personnel operating in Iraq were "accused of indiscriminately firing and of shooting to death an unknown number of Iraqi citizens who got too close to their heavily armed convoys." In Iraq, Afghanistan, and Ukraine, hostilities were fought under uncertain circumstances where combatants and civilians were difficult to separate (Smith et al., 2023). Similarly, the employees of the PMSCs involved in counter-piracy operations in the Gulf of Aden were also confronted with difficulty distinguishing between pirates and innocent fishermen. Somali fishermen can easily become targets, as their vessels are often difficult to distinguish from pirate vessels. PMSC employees also face a fisher-by-day and fighter-by-night phenomenon. Somali fishermen peacefully fishing one day may be pirates the very next day using the same boats.

Furthermore, some Somali fishermen indirectly offer material support to pirates. This phenomenon caused confusion as to who is a legitimate military target and who must be protected against direct attack in Iraq and Afghanistan as well. However, compared to hostilities fought on land, the nature of the maritime environment insulates counterpiracy operations from the general public, thus reducing dangers. Indeed, such differences distinguish PMSC operations in Iraq, Afghanistan, and the Gulf of Aden. Nonetheless, there are significant parallels between the challenges facing PMSCs in Iraq and Afghanistan in the so-called ‘war on terrorism and in the counter-piracy context. Both raise questions about the legal status of conflicts between States and diffuse armed networks with international operations.

The employment of PMSCs in Iraq and Afghanistan increased exponentially with the expanded outsourcing of U.S. government services (Krahmann, 2013). Consequently, forty cents of every taxpayer dollar spent on federal programmes now goes to private contractors. The issues relating to private security employment in Iraq came into the public domain only on March 31, 2004, when the tactical mistakes of Black Water in Fallujah led to the deaths of four employees, whose bodies were dragged through the streets before being hung on display (Bina, 2004). Media reports on these gruesome deaths incited a heated congressional debate over the future of PMSCs in U.S. military operations. Within four years, Black Water employees in Iraq were dismissed for "improper conduct," including one who shot the Iraqi Vice President’s bodyguard. Such misconduct ultimately led Robert Gates, the US Secretary of Defence, to acknowledge that PMSCs operated "without any supervision or coherent strategy; without conscious decision about what we will and won’t allow contractors to do" (Bina, 2004, p. 64). In 2009, the Iraqi government refused to reissue Black Water’s licence, and Black Water was ousted from operations in Iraq. In a clear attempt to shield the company from the conduct of its past, Black Water changed its name to "Xe" (Koenig, 2021).

PMSCs, including DynCorp, Combat Support Systems, and Anteon Corporation, now compete for business in the private military market. Contracts awarded to ill-performing PMSC firms undermine the free market theory that the "fittest" market actors should survive (Vernon, 2021). A striking example is that of DynCorp. The company’s site supervisor in Bosnia videotaped himself raping two young women, and other DynCorp employees allegedly obtained illegal weapons, forged passports, and participated in other "immoral acts." Despite these offences, all of which avoided criminal prosecution, the U.S. government awarded DynCorp a contract worth $250 million for the training of Iraqi police forces (Vernon, 2021).

Considering the adverse impact of the activities of PMSCs on the enjoyment of human rights, the 'Working Group on Mercenaries' reports to the UN Human Rights Council and General Assembly stressed the need for a legally binding instrument that regulates and monitors their activities, both at municipal and international levels. The resolution to constitute an open-ended intergovernmental working group has been the product of lengthy negotiations in the UN Human Rights Council, led by South Africa, in order to address the concerns of the Western Group as well as those of the United States. The resolution was adopted by a majority of 32 in favour, 12 against, and 3 abstentions (Ferdinand, 2014). Four out of the five members of BRICS (Brazil, Russia, China, and South Africa), the African Group, the Organisation of the Islamic Conference, and the Arab Group supported the initiative.

STATE RESPONSIBILITY FOR THE CONDUCT OF PMSCS: INTERNATIONAL NORMS

Like soldiers, PMSC personnel can violate International Humanitarian Law (IHL) and Human Rights Law (HRL). Hence, in light of the provisions of the International Law Commission (ILC), the responsibility of States for the conduct of their soldiers has to be compared with that of the contractors they hire. States can be internationally responsible either through the attribution of an action or omission to a State agent or when the conduct triggers a positive obligation that the State fails to meet. Under the ILC provision, it will suffice to show that the person in question was indeed a 'soldier' to establish the responsibility of the State for his conduct. It is immaterial whether he is supposed to engage in combat, provide protection, or conduct interrogation. Taking into account the customary international law expressed in Article 3 of the Hague Convention of 1907 and Article 91 of Additional Protocol I of 1977, the arguments that the person in question did not act in his capacity as a soldier or has contravened instructions will not provide a defence in international law. On the other hand, unless absorption of the personnel into the national army can be proved, attribution of the conduct of the contractor to a State requires a much more complex factual inquiry. Unqualified responsibility can only be established for the conduct of organs of the State, as laid out in Article 4, or de facto organs, as explained by the International Court of Justice in the Bosnia Genocide case (Milanović, 2008).

The contractors providing personal protection will not qualify as de facto organs due to their independence in planning their operations. In the case of combat, coordination or reversed power dynamics are more visible than subordination. Alternatively, all conduct by a person shall be attributed to the State if that person is acting in the capacity of the State and exercising governmental control. Applying these provisions, the 'victim' State has to prove the conduct, the empowerment by law, and that the person acted in a governmental capacity. Thus, off-duty conduct would give rise to responsibility for a national soldier but not for a contractor. There is growing consensus among scholars that the conduct of contractors engaged in combat missions, detention, or interrogation for a State in armed conflict is attributable to the hiring State as an exercise of governmental authority. In the case of guarding and protection services, this becomes a question of fact that depends upon the "content" and "purpose" of the functions suggested in the ILC Commentaries (Melzer & Kuster, 2019). Conduct can be attributed to the State only if a particular level of direction or control over the actor can be shown. However, there shall be no responsibility for ultra vires actions. Where it can be proven that the State specifically ordered the conduct that gave rise to the violation of International Humanitarian Law or Human Rights Law, responsibility will arise (Melzer & Kuster, 2019). The conduct of contractors providing certain services, like guarding and protection, will not give rise to State responsibility. Physical control over such contractors is often lacking, and their independence in

planning and execution will not meet the test. In any event, where clear and legal rules of engagement are not complied with, the responsibility of the hiring State will not lie with it.

THE HIRING STATE'S DUTIES UNDER INTERNATIONAL HUMANITARIAN LAW (IHL)

In international armed conflicts, the positive obligations of the State can narrow the gap between responsibility for national armed forces and contractors in several ways. Under the IHL, States have to vet and train contractors they hire, issue clear rules of engagement conforming to the IHL, and ensure that violations are reported (Hoppe, 2008). Off-duty conduct violating the rights of civilians under IHL may still give rise to State responsibility under the Fourth Geneva Convention establishing basic guarantees for the protection of civilians, under which "protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practises, and their manners and customs. They shall at all times be humanely treated and shall be protected, especially against all acts of violence or threats thereof and against insults and public curiosity" (Lawson & Bertucci, 1996, p. 584). This provision imposes a duty on the hiring State to regulate the exercise of coercive services and minimise violations.

Responsibility will arise where the hiring State fails to exercise due diligence and protect the civilian victim. Regarding prisoners of war, the hiring State will be responsible for any violation of international humanitarian law by its private contractors. Allowing contractors to operate a prisoner of war camp without military oversight would also be a violation of IHL. Similarly, in the case of the occupation of territories, the hiring State has an obligation to ensure that all contractors providing coercive services are not unsupervised when they are off-duty. However, in non-international armed conflict, the reach attributed to the basic guarantees of the protection of civilians varies; the study conducted by the Red Cross suggests that it cannot go beyond the rules of attribution. Further, the International Court of Justice has specifically identified only the encouragement of violations as giving rise to additional responsibility beyond attribution. Neither Common Article 3 nor Article 4 of Additional Protocol II ground further positive obligations regarding the wounded, sick, and shipwrecked, as well as medical and religious personnel. Apropos detainees in non-international armed conflict, unlike the third Geneva Convention, there is no express prohibition on extending detention facilities under civilian control. Positive obligations of the hiring State under IHL are necessary to narrow the responsibility gap.

The gap closes in international armed conflict with respect to interrogation contractors in POW camps, but the off-duty conduct of combat and guarding and protection contractors would still be regulated only by the general duties to vet, train, instruct, report, and prevent known ongoing violations (Brooks, 2006). In occupation, the off-duty conduct of contractors may give rise to the responsibility of the hiring State where it failed to exercise due diligence in vetting, training, instructing, and supervising them. In non-international armed conflict, only the general duties discussed above could narrow the gap, exposing the State to a substantially lower responsibility risk as compared to the conduct of its national soldiers.

CONCLUSION

Human rights violations perpetrated by PMSC personnel are rampant, even in the maritime domain. Almost all jurisdictions forbid their citizens from fighting in foreign wars unless they are under the control of their own national armed forces. Quite interestingly, while the acts committed by agents of the government are considered human rights violations, the

same acts perpetrated by PMSCs are mere "business as usual." The atrocities committed by PMSCs are indications of the threat posed to the foundations of democracy itself by the privatisation of inherently public functions. In this context, the note of caution expressed by President Eisenhower made in 1961 warning against the growing danger of a military industrial complex, is worth mentioning: "we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military industrial complex. The potential for the disastrous rise of misplaced power exists and will persist. We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defence with our peaceful methods."

Five decades later, Donald Rumsfeld, also in his speech in the Department of Defence, warned the militaries of the Pentagon against "an adversary that poses a threat, a serious threat, to the security of the United States of America (Bendrath et al., 2007). Anyhow, the United Nations Human Rights Council's recommendations are really laudable, and if properly implemented, they may act as a panacea for the present issues haunting the international community. With regard to the state's responsibility for the acts of a soldier vis-à-vis the attribution of private conduct, a responsibility gap becomes evident: In the absence of incorporation of the contracted personnel into the State's armed forces and the complete dependence of the contractor on the State, the State has only a limited responsibility for the acts of those other than its soldiers. This gap exists between the responsibility of the hiring State and the off-duty conduct of contractors not part of the armed forces or exercising elements of governmental authority, such as interrogation and combat contractors, and the ultra vires or uncontrolled conduct of other contractors exercising coercive services, such as those providing guarding and protection services.

To reduce this gap, which in turn prevents the States from exploiting it to minimise their international responsibility, authors have stressed the role of positive obligations of States with respect to contractors' conduct. By analysing these obligations, it can be shown that these positive obligations under IHL reduce this gap to a greater extent.

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