How to Get Away with Murder (?) – A Review of State Responsibility as an Alternative Channel towards Accountability for PMCs' Human Rights Violations

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Bachelor of Political Science: International Relations and Organizations

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A Review of State Responsibility as an Alternative Channel towards Accountability for PMCs' Human Rights Violations

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"The world may not be ready to privatize peace."

- *Kofi Annan, 1998*

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1. Introduction

In May 2017, Private Military Company (PMC) 'Blackwater' founder Erik Prince proposed a change in the United States' (US) strategy in the war in Afghanistan. In an opinion commentary for the Wall Street Journal, Prince urges the White House to adopt a "centuries-old approach": the use of private military contractors to fill the void left behind by departed US soldiers (Prince, 2017, para. 7). The emerging trend of PMCs performing states' military functions abroad challenges the traditional notion of states' monopoly over the use of force (Leander, 2005). Yet, the use of private contractors in armed conflict is by no means a new phenomenon. It is indeed "centuries-old" and leads back to the use of mercenaries in the Middle Ages up until the age of decolonization in the twentieth century (Isenberg, 2009). Following grave human rights violations by Blackwater in the Abu Ghraib prison in Iraq (2003), the outsourcing of military functions to private contractors has received a substantial amount of media attention and public scrutiny. However, missing from the discourse around PMCs entirely are ways to hold them accountable for human rights breaches during armed conflict. While there is no empirical evidence that PMCs are more likely to engage in human rights violations than their public counterparts, there is a discrepancy in the way any misconduct is sanctioned. To this day, no private contractor involved in the Abu Ghraib prisoner abuse case was brought to justice (Arnpriester, 2017, p. 1195). Meanwhile, all US soldiers involved in the case were punished. This discrepancy between legal avenues available for the prosecution of members of the armed forces versus those available for prosecuting private contractors is alarming, especially considering states' increasing outsourcing of military functions to PMCs. Thus, any discussion about the significance of private military contractors ought to begin with the inescapable reality of an ambiguous international regulatory framework regarding PMC activities.

The following will first review the current state of legal frameworks on the regulation of PMCs. After establishing gaps in soft international law, the focus of analysis will be set on hard international law. The review of applicable channels will regard the doctrine of state responsibility as the most effective pathway towards accountability. State responsibility is outlined in the International Law Commission's (ILC) Draft Articles (hereafter: Draft Articles). The Draft Articles will provide the normative framework against which to assess whether the current state of international law sufficiently covers PMCs' (mis)conduct. Based on a case study of the 2007 Nisour Square Massacre, the research will conclude whether the Draft Articles may offer a channel towards accountability for human rights violations.

2. The Academic Debate

2.1 Outsourcing

The normative debate surrounding PMCs begins with the outsourcing of traditional state functions to private actors. Outsourcing here refers specifically to military functions, or parts thereof, being privatized and thus no longer carried out by national soldiers. Outsourcing to PMCs offers both economic and political benefits to states. Economically, private contractors offered an attractive solution to the void left behind by decreasing troop numbers in states' armies following the Cold War. Relying on PMCs allowed states to channel their resources more cost-efficiently in the subsequent Global War on Terror (Fulloon, 2015, p. 40). Politically, states may hire PMCs, rather than relying on the armed forces, to avoid defense budget- or parliamentary constraints (Lindahl, 2015; Renz, 2020). Additionally, relying on the private sector allows governments to evade responsibility by claiming 'plausible deniability' for any misconduct at the hands of PMC personnel (Renz, 2020, p. 3). Some scholars refer to this phenomenon as a 'tactical privatization', as outsourcing offers not only economic, but also political benefits to states (Singer, 2004, p. 522; Renz, 2020, p. 4).

The debate arising out of the outsourcing of state functions is two-sided. On the one hand, some scholars argue that private actors should be held accountable directly for human rights violations not just at the domestic, but also at the international level (Cockayne, 2008; Arnpriester, 2017). There is a range of soft international law instruments available, such as the 2008 Montreux Document and the 2010 International Code of Conduct for Private Security Service Providers (ICoC), aimed at holding PMCs accountable. On the other hand, some scholars contend that safeguarding human rights is the exclusive responsibility of states (Bosch, 2008; Lovewine, 2014). Thus, PMCs may contribute to protecting human rights by following soft international law, but states ultimately bear responsibility for any human rights breaches of the PMCs they hire. Here, the sufficiency of hard international law, precisely states' positive obligations and the doctrine of state responsibility, will be evaluated.

2.2 Review of Existing International Legal Avenues

2.2.1 Soft International Law

Under international law, there are currently no binding international conventions regulating PMC conduct during armed conflict. This reveals a potential 'legal gap' which may result in states outsourcing their military and security activities to private contractors to avoid accountability (Arnpriester, 2017, p. 1200). However, two transnational regulatory efforts are applicable directly to PMCs: The Montreux Document (2008) and the ICoC (2010). Both instruments fall under soft law, hence are legally non-binding to parties. The Montreux Document summarizes existing obligations of parties under International Humanitarian Law (IHL) and International Human Rights Law (IHRL); it does not establish any new obligations (White, 2012). Scholars argue that the Document's significance lies in this codification of existing obligations (White,

2012, p. 12; Arnpriester, 2017, p. 1224). Signatory states to the Document thereby publicly affirm that both IHRL and IHL apply also to PMCs (Charamba, 2020, p. 30). This symbolizes that in hiring PMCs, states have duties and obligations to ensure the protection of human rights (Charamba, 2020, p. 31).

The ICoC applies directly to PMCs as it provides human rights standards and codes of conduct that must be incorporated into the companies' internal structures (Charamba, 2020, p. 45). The significance of the ICoC is that it applies directly to the companies, not the states they are home to or hired by (White, 2012, p. 14). Shortly after the creation of the ICoC, the ICoC Association (ICoCA) was created in 2013 to oversee whether companies are complying with the standards and codes of conduct set out in the document. However, the ICoCA is composed of the PMCs themselves as well as industry representatives (Shah, 2014). Charamba (2020) argues that this might introduce a conflict of interest to what is intended to be a transparent oversight mechanism (p. 47). Further to this shortcoming, the most significant deficiency of the ICoC, much like the Montreux Document, is that it lacks any enforcement mechanisms (Shah, 2014, p. 2563). When PMCs fail to comply with the standards set out, the highest possible sanction is suspension or expulsion from the ICoCA (Charamba, 2020, p. 26). This is arguably not an appropriate punishment for private contractors committing severe human rights violations.

To sum up, existing soft law regulatory efforts are insufficient in providing clear accountability mechanisms for PMCs' human rights violations. Both are voluntary and legally non-binding and therefore represent more ethical obligations than firm channels of legal recourse. Arnpriester (2017) argues that it is their direct applicability to PMCs, not states, itself that makes these transnational regulatory efforts impotent in providing justice for victims of their human rights violations. Thus, the following will explore existing hard international law that holds states accountable indirectly for any human rights breaches committed by the PMCs they hire.

2.2.2 Hard International Law

Shortcomings of transnational regulations provide the rationale for looking more closely at IHRL and IHL. Generally, within the topic of PMCs in armed conflict, most scholars conduct a rather broad review of all existing legal frameworks regarding human rights violations (Kees, 2011; White, 2012; Moyakine, 2015). Nevertheless, these reviews provide a good starting point for filtering out the most effective legal avenue. Most scholars argue that within the international realm, IHL has the most potential for providing avenues of recourse for human rights violations during armed conflict (Tonkin, 2011; Moyakine, 2015). Under IHL and IHRL, states maintain positive obligations. States can be held accountable for failing to take appropriate measures to uphold these obligations. Positive obligations are distinguished in 'obligations of result' and 'obligations of diligent conduct'. The former represents states' obligations to take actions to meet standards codified in the 1949 Geneva Convention. These may include ensuring that PMCs respect the right to life

(Moyakine, 2015). However, most scholars maintain that obligations of diligent conduct are the most effective category of positive obligations through which states may be held accountable for failure to comply (Tonkin, 201, p. 63; Moyakine, 2015, p. 318). Due diligence obligations are comprised of the duty to *prevent* and the duty to *punish* (Moyakine, 2015, p. 323). The former implies that the state ought to take all necessary means to avoid misconduct, such as human rights violations by their PMC personnel. This may include appropriate vetting and licensing of PMCs, oversight, or the adoption of preventive regulations. The duty to punish means that the hiring state ought to sanction PMSCs for behavior that the preventative measures failed to avert. Sanctions may include prosecuting or adopting reactive legislation as punishment for any illegal conduct of the PMC (Tonkin, 2011, p. 70). However, empirical evidence shows that in practice, states rarely comply with these obligations (Moyakine, 2015). Hence, the following research will not focus on this channel of accountability. The discrepancy between states' obligations and their compliance with them does not aid in closing the legal gap surrounding PMC activities.

A different international legal framework is state attribution under the doctrine of state responsibility. Broadly, attribution entails attaching an act by the PMC to the hiring state (International Law Commission, 2001, p. 35). Consequently, if the act in question can be classified as a violation of obligations under IHL or IHRL, the state may incur responsibility for it. In practice, there are several criteria that both the PMC and the act in question must satisfy to establish state responsibility. Overall, the injured party must prove that there is a link between the hiring state and PMC to such an extent that the PMC may be considered an organ of the state or acting under governmental authority. Scholars maintain that the biggest obstacle towards accountability under state responsibility is the contested status determination of PMCs as either civilians or combatants of the hiring state (Moyakine, 2013; Arnpriester, 2017). In assessing attribution and state responsibility, most scholars merely summarize both and conclude that broadly, rules of attribution ought to be interpreted flexibly to assign responsibility to the hiring state. However, there appears to be a gap in literature, where current academia is heavily theoretical and fails to apply the doctrine to specific cases to establish whether it is generally possible to do so. Hence, the following research will center around applying the doctrine of state responsibility to a specific case of a human rights violation by a PMC.

2.3 Research Question

Arising from the review of shortcomings of soft international law applicable directly to PMCs, the following research will consider that it is the hiring state's responsibility to ensure that their PMCs comply with human rights standards. Considering the theoretical strengths, but practical weaknesses of positive obligations under international law, this research will look more closely at the doctrine of state responsibility. Thus, the following research question arises:

In what ways can the doctrine of state responsibility be applied to human rights violations committed by PMCs during armed conflicts?

The investigation of this research question may alter the way *jus in bello* has been interpreted traditionally. *Jus in Bello,* as codified under IHL, was designed to apply to states' conduct in armed conflict. Yet, with the emergence of non-state actors in hostilities, it is essential to expand this traditional, narrow understanding of IHL and evaluate whether non-state actors' activities may be attributable to states. If the research shows that IHL sufficiently covers the conduct of private persons, then concerns about states' tactical privatization of military activities might be overstated.

3. Relevant Concepts

The following provides a conceptualization of key terms used to investigate this paper's research question.

3.1 Private Military Companies: A Working Definition

The most-cited scholar within research on private military contractors is Peter W. Singer. Broadly speaking, the private military industry can be differentiated into three different types of companies: Military Provider Firms, Military Consulting Firms, and Military Support Firms (Singer, 2001, p. 201). However, only Military Provider Firms engage directly in hostilities. Therefore, the type of PMCs discussed in this paper will adapt Singer's definition of Military Provider Firms:

> *Military Provider Firms:* Frequently referred to as 'PMCs', as they are the only type of company in the privatized military industry that engages directly in combat. Military Provider Firms are often hired to function as "force multipliers", meaning they are employed alongside the client's forces (Singer, 2001, p. 201). The ICTY defines a low threshold to evaluate direct involvement in hostilities. The *Tadic* case maintains that the distinction between direct involvement or not is rather blurry and ought to be examined according to individual circumstances (ICTY, 1997). Alternatively, the International Committee of the Red Cross (ICRC) supports a narrower view of direct participation involving cases in which individuals point a weapon with the intention to fire (ICRC, 1977).

3.2 Hiring State Responsibility

Three states play a role in any PMC activity. First, the hiring state as the state that contracts the PMC. Secondly, the host state as the state in which the PMC operates. Third, the home state as the state where the company is based or incorporated. This thesis will investigate the possibility of holding the home/hiring state accountable for any human rights violations committed by the PMC. In the case study, the hiring state and home state are the same. However, to attribute PMCs' conduct to the hiring state, the private contractors must also be citizens of the hiring state. The focus is not on the host state, as states where PMCs are employed often do not have effective regulatory mechanisms available to ensure the provision of remedies

for victims of human rights violations (Chirwa, 2004). On the contrary, the home/hiring state has obligations under international law to ensure the safeguarding of human rights.

3.3 Non-international Armed Conflict

Non-international armed conflict is defined by the International Criminal Tribunal for the Former Yugoslavia (ICTY) as "protracted armed violence between governmental authorities and organized armed groups or between such groups *within* a state" (Prosecutor v. Dusko Tadic, 1995). The complementary IHL and IHRL govern non-international armed conflicts. PMCs are subject to those sources of law, as are all parties to an armed conflict (Singer, 2006). Non-international armed conflicts are subject to the Geneva Conventions I-IV, the Additional Protocol I and II to the Geneva Conventions, as well as the The Hague Conventions. Additional Protocol I relates to international armed conflicts; nonetheless, it is considered reflective of customary international law and thus also applicable to non-international armed conflicts (ICRC, 2005).

Within the limited scope of this paper, the focus is set on PMCs' violations of non-derogable human rights. Their status as *jus cogens* norms allows for the application of legal recourse against violations, regardless of whether states have consented to them via treaties. In this paper, the following *jus cogens* norm will be considered:

The prohibition of arbitrary deprivation of life

This non-derogable human right is codified under common Art. 3 to the Geneva Conventions as a violation of individuals' rights to humane treatment (ICRC, 1949).

4. Normative Framework

4.1 The Doctrine of State Responsibility

The evaluation of the research question warrants a normative framework, as opposed to a theoretical one. The 'legal gap' that PMCs operate in reveals a problem in the current state of international law. Therefore, the Draft Articles will provide the normative framework against which to assess whether state responsibility can close the 'legal gap' and establish liability for any human rights violations committed by PMCs.

International jurisprudence maintains that any breach of non-derogable human rights must be attributable (Germany v. Poland, 1927). Having observed the shortcomings in soft international law for holding PMCs accountable, it is paramount to consider an alternative. Therefore, the focus here is on attributing PMCs' human rights violations to the hiring state instead. States are generally not responsible for any misconduct by private actors; however, some circumstances may generate international responsibility for the state (Tonkin, 2011). These circumstances are codified under IHL and IHRL in the ILCs' Draft Articles on State

Responsibility. Since its publication in 2001, the doctrine has evolved into customary international law and, by 2012, had been referred to by international courts and tribunals over 150 times (Renz, 2020, p. 50). It further has been annexed by the United Nations General Assembly in Resolution 56/83.

The Draft Articles work in conjunction with states' obligations set out under IHL, such as the prohibition of the arbitrary deprivation of life. Therefore, the Draft Articles fall under secondary rules of state responsibility, as they set out the criteria for holding states liable for any wrongful acts or omissions, as well as the legal consequences for them (ILC, 2001, p. 31).

Two events may raise the international responsibility of states. First, any act of state organs that constitute a breach of an international obligation. Second, any failure to uphold an international obligation (hereafter: 'omission') may also impose liability on the state in question. Furthermore, founding state responsibility requires the presence of two additional elements. Under Art. 2 a), there must first be an 'act or omission' presented that may be attributable to a state. States are legal persons under international law but they themselves cannot 'act or omit'. Instead, states operate through their organs and representatives (Questions relating to Settlers of German Origin in Poland, 1923). This is what attribution entails- attaching an act or omission by a state organ to the state. Attribution itself does not determine the legality of any conduct. Instead, this is defined in the second element to state responsibility under Art. 2 b). Here, it is further clarified that any act or omission by state organs must constitute a breach of an international obligation to hold the state responsible for it. This is when the act or omission becomes an 'internationally wrongful act' (ILC, 2001, p. 31). As the focus of this paper is set on non-international armed conflicts, states' obligations are set out in common Art. 3 of the Geneva Conventions, the The Hague Conventions, as well as customary IHL.

Within the Draft Articles, there are several ways in which PMCs' violations of *jus cogens* norms is attributable to the hiring state. The following provides a brief synopsis of them, as they are elaborated on in more detail in the analysis. First, Art. 4 maintains that PMCs' misconduct is attributable to the hiring state when the PMC is integrated into the state's armed forces to such an extent that it can be considered a part of them (ILC, 2001, p. 40). Within the international community, this is the most contested avenue through which to assign responsibility. By virtue of being private contractors, PMCs are not considered a part of the hiring state's armed forces, as their incorporation would void all benefits of outsourcing. However, as established by the International Court of Justice (ICJ) *Nicaragua Case* (1986), private actors may be considered *de facto* state organs despite not being formally incorporated under domestic law (Tonkin, 2011, p. 86).

In cases where acts or omissions are not attributable under Art. 4, Art. 5 may provide an alternative way. Here, PMC (mis)conduct may be attributable when the PMC is "empowered by the law of the hiring state

to exercise elements of government authority" (ILC, 2001, p. 42). The crucial difference to attribution under Art. 4 is that here, PMCs do not have to be considered state organs in the traditional sense (i.e. incorporation into the state through domestic law) for their conduct to be attributable. Instead, it may be sufficient to demonstrate that the PMC was performing acts of government authority.

Lastly, under Art. 8, conduct is attributable if the PMC is acting under the hiring state's "instruction, direction, or control" (ILC, 2001, p. 47). Here, it is paramount to establish a direct link between the hiring state and the operations in question of the PMC. This link is established by first demonstrating that the PMC is acting on state instructions. However, states may evade responsibility by giving overly vague and unclear instructions to PMCs in an effort to maintain plausible deniability for any human rights violations that result from PMCs following state instructions (Tonkin, 2011, p. 115). Additionally, the PMC must be "acting under direction or control of the state". There are a number of different legal precedents outlining the threshold of control that the state needs to have over the entity in question for their conduct to be attributable. As this will be discussed in more detail in the analysis, it is sufficient to emphasize here that proving state control is extremely difficult. Renz (2020) argues that the hiring state needs to have supplied the PMC with very specific, practical support, and be in control of the specific operation in which the human rights violation occurred for attribution to hold (p. 138).

4.2 Theoretical Expectations

Arising from the above framework, the following tentative theoretical expectations will guide this research:

The doctrine of state responsibility offers an alternative channel for attributing human rights violations committed by PMCs to the hiring state.

5. Research Methodology

5.1 Research Design

This paper presents an exploratory study into the applicability of the Draft Articles to human rights abuses committed by private military contractors. Historically, the Draft Articles were designed to cover the activities of states, not private actors. Scholarship investigating their application to non-state actors is relatively recent and scarce. There is currently little scholarship applying state attribution to specific human rights violations at the hands of PMCs. Ergo, the following will explore this gap in literature on the basis of a case study into the 2007 Nisour Square Massacre in Baghdad, Iraq.

First, a summary of the case will be provided, highlighting the dynamic between the Blackwater employees and the US as the hiring state. The first question to consider in the event of a human rights violation is to

establish where the claimant may get jurisdiction over the perpetrator. The literature study has established that the Draft Articles provide the most effective channel of jurisdiction. The methodological approach adopted in this research is a combination of legal doctrinal research and an application to the case study. Legal doctrinal research indicates an evaluation of current positive international law (Draft Articles and state's obligations under IHL and IHRL) as either sufficient or insufficient in providing a channel of accountability for human rights violations (Gawas, 2017). Hence, the first part of the analysis will outline which Articles within the Draft Articles apply to non-state actors. Then, the selection within the Draft Articles will be traced and interpreted based on legal scholarship's commentary, state practice, and case law. This allows for the subsequent application of the selected Draft Articles to the case study.

5.2 Case Selection

The selection of a case for the analysis was restricted by the availability of data. The majority of data available PMCs' two biggest hiring states: the UK and the US (Charamba, 2020). Since the focus of this analysis is set on private military contractors operating in internal armed conflicts, most cases in the UK were excluded. Hence, the preliminary analysis set focus on the US as the hiring state. Iraq is considered the world's largest host state of private military contractors (Singer, 2006, p. 15). Iraq further stands out as a critical moment for the private military industry (Singer, 2007; Peters, 2021). The core problem in the US war in Iraq was the lack of national soldiers. Increasing the number of troops on ground would have provoked an outcry among the public who did not want to see their soldiers return home in body bags (Singer, 2007, p. 4). PMCs provided a solution to this at little political cost as their casualties are excluded from official death tolls, thus prompting less backlash on the government (Singer, 2007, p. 4). Data on the number of contractors in Iraq fluctuates widely, and Congress has no precise estimation of how many PMC employees are working for them. Researchers have estimated the number to be above 100,000 contractors from 2003-2008 (Singer, 2007; Elsea et al., 2008).

One of the most infamous PMCs operating in Iraq is the company 'Blackwater'. Founded in 1997 by former Navy Seal Erik Prince, the company has a long history of human rights violations (Fitzsimmons, 2015). As a Deputy Commander of the US Third Infantry Division responsible for the Baghdad area put it: "These guys run loose in this country (…). There is no authority over them, so you can't come down on them when they escalate force. They shoot people, and someone else has to do with the aftermath" (Singer, 2001, p. 254). Data released by the US State Department shows that in many of the cases where force is escalated, Blackwater employees fired first (see Table 1).

Table 1: Use of Force by Blackwater personnel			
Year	**Incidents in which Blackwater fired shots**	**Incidents in which Blackwater fired first**	**Confirmed Iraqi casualties**
2005	77	71	7
2006	61	53	3
2007	58	40	23
Total	196	164	33

Table 1 adapted from the Committee on Oversight and Government Reform (2007) to include Nisour Square incident with 17 casualties

The culture within Blackwater to proactively escalate force before assessing the threat level adequately may lead to an increased number of civilian casualties. Reports show that in the incidents where contractors fired shots between 2005-2007, more than half of the casualties were non-combatants (Fitzsimmons, 2015, p. 1077). Out of the 86 serious injuries resulting from Blackwater's escalation of force, 57% were non-combatants (Fitzsimmons, 2015, p. 1077). In comparison, another PMC hired by the US to assist in Iraq is DynCorp International. Out of the 54 incidents where DynCorp contractors fired weapons between 2005-2007, 27% resulted in non-combatant casualties and there was only one serious injury of a non-combatant (Fitzsimmons, 2015, p. 1077).

In reviewing the escalation of force by Blackwater personnel contracted by the US, one case in particular stands out: the 2007 Nisour Square Massacre. The following will provide a summary of the case and outline its relevance to this analysis.

6. Case Study Analysis

6.1 The Nisour Square Massacre

On September 16, 2007, a US embassy convoy guarded by Blackwater employees escalated force in Nisour Square, Baghdad. While Blackwater claims it was attacked first, the Iraqi government maintains that the company started randomly shooting at civilians (Singer, 2007, p. 253). A separate Federal Bureau of Investigation (FBI) report found no evidence that Blackwater employees were shot at first (NYT, 2007, para. 8). The incident left 17 Iraqi civilians dead and 24 to 27 seriously injured (Dam, 2013, p. 22). The machine guns and grenade launchers used by the four American Blackwater employees responsible were government-issued weapons and arguably indicate the use of excessive force in a public, civilian setting (Sizemore, 2007). A US military report found that all 17 killings were unjustified under rules regarding the use of lethal force, as Blackwater employees shot blindly at civilians fleeing the scene (NYT, 2007, para. 12)

Under the Geneva and The Hague Conventions, the intentional killing of civilians is considered a war crime attributable to the hiring state. Blackwater employees thus violated the non-derogable human right of the right to humane treatment by arbitrarily depriving civilians at Nisour Square of their lives. The Nisour Square incident is classified as a non-international armed conflict, as the Coalitional Provisional Authority (CPA) under the US and UK concluded with the transfer of power to the Iraqi Interim Government on June 28, 2004 (UNSC Resolution 1546). Hence, the US' obligations as Blackwater's hiring state are outlined in common Art. 3 to the Geneva Conventions and customary international law.

6.2 A Selection within the Draft Articles

The following will justify the chosen selection of Articles within the Draft Articles. Afterward, four Articles will be interpreted regarding their applicability to non-state actors through state practice and case law. Each individual Article will subsequently be assessed to evaluate the argument that the Draft Articles may be used to attribute conduct of PMCs to the hiring state.

For the investigation of this paper's research question, only Articles set out in Part One of the Draft Articles are relevant. Specifically, out of the five Chapters composing Part One, the analysis will draw only on Chapter II. The remaining Chapters within Part One were excluded for they do not apply to the scope of this analysis. To illustrate, Chapter III very broadly outlines breaches of international obligations, while this analysis focuses specifically on breaches of obligations under IHL or, Chapter IV outlines state responsibility for acts between states, not private actors.

6.3 Interpretation and Application to the Case Study

State responsibility is incurred when a link between the hiring state and an internationally wrongful act committed by a PMC can be established. How to determine whether an act or omission can be considered an act of the state is set out under Chapter 2 of the Draft Articles. To establish attribution is a normative endeavor. It is based on the specific criteria set out in the Draft Articles and their interpretation of it, not merely the existence of a link between a private actor and the state. Whether this link between Blackwater and the US as the hiring state can be established in the Nisour Square accident will be assessed based on the selection of Art. 4, 5, 7, and 8 of Chapter II of the Draft Articles.

Rules for attribution of internationally wrongful acts to a state maintain that acts of any private individual or company connected to the state through citizenship or residence may be attributable to it (ILC, 2001, p. 40). However, international law restricts attribution to only those acts of non-state actors that were exercised as part of a state organ or under the 'direction, instruction, or control' of the state. Therefore, attribution warrants a clarification of what constitutes a state organ. Art. 4 holds:

> *1. The conduct of any State organ shall be considered an act of that State under International Law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*
>
> *2. An organ includes any person or entity which has that status in accordance with the internal law of the State.*

Art. 4 thus refers to *de jure* state organs, i.e. those entities incorporated explicitly into the state under its domestic law. In the case of PMCs, this would entail their official incorporation into the state's armed forces. However, there are no specific steps prescribed for states to register individuals under their military. Thus, whether PMCs are incorporated *de jure* is a matter of states' respective internal laws as well as political will. In the case of PMCs, *de jure* incorporation would void all political benefits of outsourcing, so it is generally not state practice. However, there is an alternative way to incorporate private military contractors *de facto* into a state's armed forces. The definition of state organs is rather broad under Art. 4., thereby allows to consider a private entity acting in a capacity of a state organ to be considered as such *de facto*. Both the *Mallén* (United Mexican States v. USA, 1927) and *Caire* (France v. United Mexican States, 1929) set the legal precedent for this. The former established that conduct by private entities performed in an official capacity may be attributable to the state. Conversely, the *Caire* case excludes from this judgment any acts of private entities that were performed in a private setting. Additionally, it should be noted that under customary IHL, every person involved in armed conflicts ought to be categorized as either a combatant or a civilian. There is no in-between category that PMCs could fall under. However, *de facto* incorporation provides this sort of in-between status where PMCs are not officially recognized by the hiring state as part of its armed forces, but also cannot be considered civilians because they are actively engaged in hostilities. Legal scholarship offers an alternative criterion through which PMCs may be considered part of the hiring state's armed forces; when the PMC in question is hired through the state's Department of Defense (DoD) (Gillard, 2006, p. 525).

Blackwater, at the time of the Nisour Square incident, engaged directly in hostilities by firing their weapons. Therefore, they cannot be classified as civilians under IHL and, by implication, gain combatant status. However, the US did not incorporate Blackwater *de jure* into its armed forces. Instead, Blackwater was hired under the DoD's Worldwide Personal Protective Services (WPPS). This would indicate *de facto* incorporation. The *Mallén* case, establishing that conduct is attributable if the entity in question is acting as part of an official function, further supports the argument for *de facto* incorporation. Blackwater contractors were using government-issued weapons in an operation guarding an US embassy convoy. Hence,

Blackwater contractors acted in their official capacity and thus also satisfy the criterion established in the *Caire* case.

Art. 5 of the Draft Articles provides an alternative way to regard Blackwater as an organ of the US and holds that:

> *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*

The conduct of non-state actors is explicitly mentioned as possibly evoking attribution for the first time within the Art. 5. Attribution here is justified where the state in question extends governmental authority to the non-state actor through its internal law. Within Art. 5, there are three requirements for attribution. First, the act must constitute an 'exercise of governmental authority'. This generally holds by virtue of contractual agreements between the state and the private actor (Renz, 2020, p. 105). However, legal scholarship holds that founding governmental authority is easier for cases where private actors are contracted to operate in detention centers or prisons (Hoppe, 2008, p. 992). Second, the private actor must be 'empowered by the law of the hiring state to exercise that authority'. Generally, it is sufficient for states to have within their national law a framework allowing state organs to delegate powers to private entities (Tonkin, 2011). Third, the private entity must in fact be 'acting in the exercise of government authority', rather than in a private capacity. Overall, the ILC maintains that the scope of activities constituting governmental authority differs from state to state (2001, p. 15). US Congress defines functions that are inherently governmental as any activity that can "determine, protect, and advance the US' economic, political, territorial, property, or other interest (..)" (FAIR Act, 1998). It further states that any function that can "significantly affect the life, liberty, or property of private persons (..)" may be defined as a function detailing governmental authority (FAIR Act, 1998)

Evaluating whether the Nisour Square incident is attributable to the US follows a similar argument to attribution under Art, 4. Arguably, the US empowered Blackwater to exercise elements of governmental authority by incorporating the company into its WPPS contract. Tasks defined under the WPPS contract, such as protecting US embassy facilities and – persons, are usually carried out by the US' Diplomatic Security Service. Thus, outsourcing these functions to private entities indicates the second criteria under Art. 5 satisfied. Lastly, under Congress' definition of elements of governmental authority, Blackwater arguably protected the US' interests in Iraq by guarding US Ambassadors. Additionally, their shooting of

civilians at Nisour Square "significantly affected the life (..) of private persons". Therefore, their conduct at the time of the incident may constitute the exercise of governmental authority.

Art. 7 outlines attribution for cases where entities exercise governmental authority, even if their conduct is contrary to instructions given by the state. Therefore, any act performed *ultra vires* to instructions given by the state may still be attributable. Art. 7 reads:

> *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*

Art. 7 was drafted in response to state practice. The Spanish Government, in 1898, held that it is impossible to prove whether an entity did or did not act on orders from the state (ILC, 2001, p. 45). The ICRC argues further that an act performed by an entity empowered by the state should be attributable to it, regardless of whether the act was instructed by the state (2009, p. 553). Case law equally supports this interpretation. The Inter-American Court of Human Rights in the *Velásquez Rodriguez* case held that "a state is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority" (Velásquez Rodríguez v. Honduras, 1988). Similarly to Art. 4 and 5, an additional criterion for attribution under Art. 7 is that the act in question must have been performed in an 'official capacity'.

The exact instructions given to Blackwater at the time of the Nisour Square incident are classified. Hence, it is unclear whether the DoD authorized Blackwater employees to fire their weapons at the time of the incident. Under official US State Department policy, lethal force may be used only "in response to imminent threats of deadly force" (NYT, 2007). Blackwater employees contracted under the State Department may have acted on this policy of the use of force in response to an imminent threat at the time in question. However, the FBI report of the incident found no indication of an imminent threat at Nisour Square (NYT, 2007). Nonetheless, even if the US did not authorize Blackwater to use force, Article 7 may still provide for state attribution.

The preceding Articles were centered less around defining state organs, outside of differentiating between *de jure* or *de facto* incorporation under Art. 4. Art. 8 elaborates on the definition of 'state organs' and holds that:

> *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.*

Art. 8 deals specifically with acts of private persons. The exercise of governmental authority attributable under Art. 4, 5, and 7 does not apply here. Instead, acts may be attributable regardless of whether the entity in question is classified as a state organ. The content of Art. 8 is widely recognized under international jurisprudence and was set as a legal precedent under the *Zafiro* case (Great Britain v. US, 1925). Here, the US was held liable for the actions of crew members of the private merchant ship Zafiro contracted by the US. Art 8. thus facilitates attribution for cases in which states or their organs complement public forces through contracting private entities. At the same time, Art. 8 is arguably the most contested channel of attribution, for it establishes a 'standard of direction or control' for attribution. This standard holds a hard burden of proof, as the state needs to be shown to have explicitly ordered the conduct under which any breach of an international obligation occurred (Hoppe, 2008, p. 992). Different legal precedents regarding the control standard illustrate this difficulty. The ICJ, in the *Nicaragua* case, examined the degree of control necessary for acts to be attributable. Here, the issue was determining whether the activities of contras in Nicaragua would be attributable to the US. Despite having been involved in the planning and support of the contras, the ICJ judged that the US did not have 'effective control' over them for the US to be held responsible for their conduct (Nicaragua v. US, 1984). A much lower threshold for the degree of control was set by the ICTY in the *Tadic* case. Here, the ICTY explicitly referred to the Nicaragua case and dissented its test for 'effective control'. Instead, the ICTY argued that 'overall control' over an entity is sufficient to establish attribution. However, it was held that control must exceed simple financing or providing support. The state must further be directly involved in planning and overseeing the operations in question.

Under Art. 8, if the firing of arms at Nisour Square was authorized by the US, attribution would hold regardless of Blackwater employees being private individuals. However, claimants need to prove this state control. The US financed Blackwater operations, provided machine guns and grenade launchers, as well as planned the route the embassy convoy took on September 16 (Sizemore, 2007; NYT, 2007). However, similar elements were present in the *Nicaragua* case, yet the ICJ determined 'effective control' as not satisfied. Under the 'overall control' standard of the *Tadic* case, it needs to be demonstrated that the US financed and equipped Blackwater, and has been involved in the planning of the operation. As is argued above, all these elements would hold for the Nisour Square incident. However, to establish overall control, the US must also be proven to have supervised the operation directly. The lack of data available regarding the Nisour Square incident significantly restricts any judgment of whether this was the case that day.

However, US Ambassador to Iraq Ryan Crocker, stated shortly after the incident that the DoD did not have sufficient Diplomatic Security personnel in Iraq to staff every operation (Committee on Foreign Relations, 2007). Therefore, it is not clear whether state officials (Diplomatic Security Service) were present on September 16. Former Chief of Staff for the CAP in Iraq, Patrick Kennedy, stated that following Nisour Square, the DoD was to staff every Blackwater operation with a trained special agent from the State Department (Kennedy, 2007). In this case, attribution under Art. 8 would be more straightforward in the future, as state agents directly supplementing and leading Blackwater operations would arguably fulfill the 'overall control' requirement.

7. Conclusion

> "An exploratory paper like this one has no place for 'conclusions', but it does call for a few afterthoughts." (Robert Merton, 1973, p. 559)

This paper evaluated the research question: *In what ways can the doctrine of state responsibility be applied to human rights violations committed by PMCs during armed conflicts?* The foregoing analysis has confirmed theoretical expectations that the principle of state responsibility applies to human rights violations by private military contractors. However, the interpretation of the Draft Articles shows differences in how indisputable their application is.

Blackwater's employment under a DoD program, as well as employees acting in their official capacity at the time of the incident supports the argument that they may be considered *de facto* part of the US' armed forces. Thus, they can be considered *de facto* state organs with their conduct attributable to the US.

By virtue of Blackwater's contract with the DoD, the company was empowered to exercise authority. Whether this authority constitutes 'government authority' is contested. Following the US' own definition of functions of government authority, Art. 5 would hold. However, it is suggested here to define more in detail within the Draft Articles what government authority entails, to provide states with more unambiguous indication of when acts by PMCs may be attributable to them.

Art. 7 arguably provides the most clear-cut answer to whether the US can be held liable for Blackwater's misconduct at Nisour Square. If Blackwater was acting as a (*de facto)* state organ or under the exercise of governmental authority, then regardless of whether they were following instructions or not, their shooting of civilians would be attributable to the US.

Art. 8 is not as straightforward. It was advanced in this paper that the US did not satisfy all requirements of either the 'effective control' standards established in the *Nicaragua* case, nor the 'overall control' standard

advanced in the *Tadic* case. Understaffing of the DoD at the time of the incident suggests that the US did not have state agents present at the time of the incident, thus not fulfilling the direct supervision of operations required under the *Tadic* control standard. Some jurists evaluate the 'effective control' standard under Art. 8 and the *Nicaragua* case as too high. Therefore, this paper proposes a thorough review of the control standard set under Art. 8. If the control standard is not reflective of state practice, namely the increasing outsourcing of military functions to private actors, states may be able to evade responsibility which endangers the safeguarding of human rights in the future.

To conclude, the framework of state responsibility is demonstrated to be sufficiently capable of providing an alternative channel towards accountability. This finding implies that states may be less incentivized to outsource military functions for political reasons, as the discrepancy between holding national soldiers versus PMCs accountable may not be as severe as was argued by scholars before. However, the Draft Articles do not reflect entirely the change in the landscape of armed conflicts. Since their publication in 2001, the outsourcing of military functions to private actors has increased tremendously. Therefore, any vague or outdated formulations within the Draft Articles must be reviewed, especially regarding the control standard under Art. 8.

7.1. Limitations and Future Research

The scope of this research was set on whether acts of PMCs are attributable to the hiring state. Legal consequences, such as reparations, that flow from state attribution are set out in Part 2 of the Draft Articles but fall beyond the scope of this paper. Additionally, this research was heavily restricted by the availability of data. Sources not openly accessible might disprove the arguments advanced here. Therefore, more transparency, especially on part of the US, in publishing exact details of their PMC operation is paramount for future research.

A further limitation concerns the single case study. A comparative analysis would have resulted in more generalizable findings. However, elements of state attribution are so fact-specific that a comparative analysis might have overlooked details within each case. Additionally, the application to the case study is highly subjective. Another researcher might interpret data differently and reach a different conclusion.

Due to this research presenting an exploratory analysis, no attempt to generalize findings beyond this particular case study is intended. However, demonstrating that the Draft Articles apply to PMCs indicates a first step towards closing the legal gap that PMCs arguably operate in. Additionally, as stated in a recent report by the UN Working Group on the use of mercenaries, the clientele of PMCs increasingly diversifies, with actors such as Non-Governmental Organizations (NGOs) relying on PMCs more and more (Working Group on the use of mercenaries, 2020). Future research might explore this phenomenon. Additionally, demonstrating that state attribution is possible for private actors may also center future research around

other private actors such as Multinational Corporations (MNCs). Applying state attribution here may ensure that MNCs respect the human rights of people in countries where legal frameworks are incapable of providing remedies for human rights violations.

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