Enforcement of International Law Obligations concerning Private Military Security Corporations

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The responsibility of non-state entities for breaches of international law raises novel and difficult questions, and could… [give] rise to significant controversy.[1]

Abstract

This article considers the possibility of holding states responsible for wrongful acts committed by private military security corporations. The use of juridical entities in conflict zones present difficulties for accountability where they commit offences and breach international obligations. The Blackwater killings of Iraqi civilians in 2007 and the prospects of holding the corporate entity or the State accountable are utilised as a focal point for discussion. This article concludes that greater thought is required if victims are to be assured of genuine redress for wrongs.

I INTRODUCTION

States can be held responsible for the wrongful actions of corporate entities when those wrongful actions can be established to be an act of the state in accordance with secondary rules of attribution. Though state responsibility is determined through rules of customary international law, the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* ('*DARS*') provide detail on the circumstances in which this can occur.[2] Though the *DARS* do not represent binding treaty law, existing only as an annexure to *General Assembly Resolution 56/83*,[3] they

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[1] James Crawford, 'The ILC's Articles On Responsibility Of States For Internationally Wrongful Acts: A Retrospect' (2002) 96(4) *American Journal Of International Law* 874, 888.

[2] See, eg, International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, *Report of International Law Commission on the work of its Fifty-Third Session*, UN GAOR, 56th sess, UN Doc A/56/10 (24 October 2001), 26–143 ('*DARS*').

[3] The articles are annexed to GA Res. 56/83, (12 December 2001) commending the articles 'to the attention of Governments without prejudice to the question of their future adoption

nevertheless have considerable influence for the ongoing creation of customary international law. This is because the lengthy gestation period in developing the DARS has led to the articles being influential in international fora.[4] A state breach of a primary international obligation[5] or dereliction of due diligence is required before state responsibility is triggered.[6] Sometimes the exact nature of a primary international obligation imposed by a treaty may itself be ambiguous.[7]

The existing obligation and attribution regime raises the question: when corporate entities operate transnationally, should they hold primary obligations for wrongs under international law, or is attribution of their wrongful conduct to the State a sufficient deterrent for the corporation and recompense for the victim? By focusing on a particular type of non-state actor ('NSA'), namely, private military and security corporations ('PMSCs') providing military and security forces for states in fragile environments, an examination of this issue is possible.[8] The *Montreux Document* provides a working definition of PMSCs as:

> [P]rivate business entities that provide military and/or security services, irrespective of how they describe themselves.[9]

Military and security services include, in particular:

> ...armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of

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or other appropriate action.' [3]. See generally, Daniel M Bodansky and John R Crook, 'Symposium on the ILC's State Responsibility Articles: Introduction and Overview' (2002) 96(4) *American Journal of International Law* 773.

[4] Crawford above n 1, 889. But *cf* David D Caron, 'The ILC Articles on State Responsiblity: The Paradoxical Relationship between Form and Authority' (2002) 96(4) *American Journal of International Law* 857, 867–869.

[5] See, Ian Brownlie, *Systems of the Law of Nations: State Responsibility, Part 1* (Clarendon Press, 1983) 53–85, 66, for a list of primary obligations that could be breached, or 'causes of action'.

[6] *DARS* art 2(b). Due diligence exists for states in regard to private individuals in international human rights law (IHRL), see the Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [8].

[7] See, for instance, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep43 ('*Genocide Judgment*') the ICJ judges varied in their approach to the obligation regarding genocide.

[8] See, eg, Chia Lehnardt, 'Individual Liability of Private Military Personnel under International Criminal Law ' (2008) 19(5) *European Journal of International Law* 1015; Simon Chesterman, 'Oil And Water: Regulating The Behaviour Of Multinational Corporations Through Law' (2004) 36 *International Law and Politics* 307.

[9] The Swiss Government and the ICRC, 'Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict' (17 September 2008) ('*Montreux Document*') accepted by 42 states including the US, UK, EU, Iraq and Afghanistan.

> weapons systems; prisoner detention; and advice to or training of local forces and security personnel.[10]

The increasing use of PMSCs within the international order, particularly since the Afghanistan and latest Iraq wars, has prompted considerable attention in this area. The UN Human Rights Office of the High Commissioner for Human Rights set up the Open-ended Intergovernmental Working Group on Private Military and Security Companies ('IWG on PMSCs') to consider the possibility of elaborating an international regulatory framework for the activities of PMSCs.[11] The aim is to provide a draft UN Convention, to address the behaviour of both states and PMSCs.[12] Alongside, and somewhat in the alternative, the Swiss International Committee for the Red Cross (ICRC) activated discussions with seventeen states that resulted in the 2008 *Montreux Document* 2008.[13] This document restates existing pertinent hard law obligations, in treaty and custom, as well as soft law codes of practice as they relate to PMSCs.[14] It does not engage with the theoretical or ideological questions surrounding the use of PMSCs, but rather pragmatically focuses on the obligations of contracting, territorial, and home states. Subsequently, in 2010, the Geneva Centre for the Democratic Control of Armed Forces ('DCAF') produced an International Code of Conduct ('ICoC').[15] The ICoC is a 'soft law'

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[10] Ibid.

[11] UN Human Rights Office of the High Commissioner for Human Rights, *Open-ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies*, 22nd sess, UN Doc A/HRC/22/L.29 (18 March 2013), which established the IWG on PMSCs to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies.

[12] ''Report of the Working Group on the use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination', 65th sess, UN Doc A/65/325 (UN General Assembly 25 August 2010) sets out a Draft Convention ('*Draft Convention on the Regulation, Oversight and Monitoring of PMSCs*'). See also, J. Chris Haile, 'New U.N. Draft International Convention On The Regulation, Oversight And Monitoring Of Private Military And Security Companies' (2009) 6(9) *International Government Contractor* 69.

[13] See, *Montreux Document*, above n 9.

[14] Ibid; See further, James Cockayne, 'Regulating Private Military And Security Companies: The Content, Negotiation, Weaknesses And Promise Of The Montreux Document' (2008) 13(3) *Journal of Conflict & Security Law* at 401:'[V]ariously described by its drafters as a 'bible', 'compendium', 'toolkit', 'milestone' and 'stepping stone', the Montreux Document provides the clearest statement to date of the legal norms and business, administrative and regulatory practices that shape the relationships between states and PMSCs.'

[15] The *International Code of Conduct for Private Security Service Providers* convened by the Swiss Federal Department of Foreign Affairs Directorate of Political Affairs, DCAF and Geneva Academy of International Humanitarian Law and Human Rights 2012: The Conduct for Private Security Service Providers ('ICoC'), provides guidelines the

document for observance by industry members that agreed to accept responsibility for their conduct in areas such as basic human rights, use of force and detention practices. This code provides for the establishment of an oversight body as agreed to by all interested parties.[16] The latter two instruments may well complement any legal convention that is yet to evolve.[17]

The IWG on PMSCs and the ICRC approach this issue from very different ideological perspectives. White points out the IWG consider PMSCs from the classical position of the desire of the international community to control the use of force.[18] The ICRC, operating from a position of discretion, does not seek to comment on this aspect. Rather, it accepts the use of PMSCs as part of the new landscape in which market forces and the contractual state has seen PMSCs as a useful addition to their arsenal.[19] Therefore, states that have supported this evolving industry (such as the UK and US) tend to favour the soft regulation approach established under the ICRC initiatives.

Self-regulation has been preferred by PMSCs, with a number adopting this approach.[20] However, other than market deterrence through public loss of credibility, soft law holds no direct coercive enforcement capability.[21] It does not engage international responsibility *stricto sensu*. Soft law does, however, signify emerging concerns of the international community. In that sense, soft law instruments can portend possibilities for future customary or treaty law developments.[22]

The developments discussed have focus on the future and do not address the issues that have arisen in major conflicts such as Afghanistan and

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effectiveness of which is dependent on the uptake and desire to enforce it. These guidelines are available at <www.icoc-psp.org>.

[16] Ibid.

[17] See, *Draft Convention on the Regulation, Oversight and Monitoring of PMSCs*, UN Doc A/65/325.

[18] Nigel D White, 'The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention' (2011) 11(1) *Human Rights Law Review* 133, 134.

[19] See also Stephanie M Hurst, ''Trade In Force': The Need For Effective Regulation Of Private Military And Security Companies' (2011) 84 *Southern California Law Review* 447.

[20] *ICoC*, above n 15. See, eg, International Peace Operations Association <http://www.ipoaonline.org/> a US-based trade association of 53 PMSCs at April 2013 who pledge to follow their Code of Conduct; British Association Of Private Security Companies <http://www.bapsc.org.uk>, a trade association of UK PMSCs providing security services internationally; Private Security Company Association Of Iraq (PSCAI) <http://www.pscai.org>, an industry-actor coordination mechanism formed by PMSCs in Iraq to fill a vacuum left by the dissolution of the Coalition Provisional Authority's Private Security Company Working Group in June 2004.

[21] See, eg, Cedric Ryngaert, 'Litigating Abuses Committed By Private Military Companies' (2008) 19(5) *European Journal of International Law* 1035, 1038–39.

[22] Antonio Cassese, *International Law* (Oxford University Press, 2nd ed, 2005).

Iraq, where the consequences of the expanding use of PMSCs in areas such as combat defence have not been thought through or sufficiently debated in the public arena prior to their use.[23] The International Commission of Jurists in its submission to the IWG on PMSCs in 2012 concluded:

> [d]espite the level of progress through law and jurisprudence, international law does not provide for detailed rules to govern/regulate and guide State's actions to regulate PMSCs so as to prevent violations, investigate alleged violations and provide remedy avenues when rights are violated.[24]

In the broader context, numerous responses to the issues have occurred internationally.[25] In 2002, the Bellagio Conference looked at financial resource flows to conflict zones in order to create an international regime that curtailed economic gain from conflict.[26] Corporate regulation more widely has been raised by the Global Compact.[27] Within the UN Framework, 'Protect, Respect and Remedy' developed under John Ruggie's mandate as the UN Special Representative of the Secretary-General for Business and Human Rights.[28] The business community and states roundly rejected earlier attempts to impose direct international obligations on corporate entities, reinforcing the classic state-based

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[23] For a discussion of the various roles and range of services provided by PMSCs, see E L Gaston, 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement' (2008) 49(1) *Harvard International Law Journal* 221.

[24] International Commission of Jurists submission to the IGWG on PMSCs, 13-17 August 2012, 11.

[25] See, Centre Universitaire de Droit International Humanitariare (CUDIH), 'Expert Meeting On Private Military Contractors: Status And State Responsibility For Their Actions' (University Centre For International Humanitarian Law, 29-30 August 2005) <http://www.adh-geneva.ch/docs/expert-meetings/2005/2rapport_compagnies_privees.pdf> ('*Expert Meeting*'); Foreign Affairs Committee of the House of Commons, 'Green Paper: Private Military Companies: Options for Regulation' (House of Commons, February 12 2002) ('Green Paper'); UK Defence Select Committee's sixth Report, 2005; James Cockayne et al, *Beyond Market Forces Regulating the Global Security Industry* (International Peace Institute, 2009); International Commission of Jurists (ICJ), 'Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes: Corporate Complicity & Legal Accountability' (2008) <http://www.unhcr.org/refworld/docid/4a78423f2.html>; International Federation for Human Rights, *Corporate Accountability for Human Rights Abuses - A Guide for Victims and NGOs on Recourse Mechanisms* (2010) <http://www.fidh.org/IMG/pdf/guide_entreprises_uk-intro.pdf>.

[26] International Peace Academy, 'Policies and Practices for Regulating Resource Flows to Armed Conflict' (Paper Presented at IPA Conference, Bellagio, Italy, 21–23 May 2002).

[27] UN Global Compact (2000) <www.unglobalcompact.org/>.

[28] The Special Representative presented the 'Protect, Respect and Remedy' framework to the Human Rights Council in June 2008 <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework>.

approach to international law.[29] Ruggie followed more closely the traditional approach of imposing obligations directly on states to regulate the corporate world, which has been generally accepted, with the subsequent development of Guiding Principles.[30]

In all these developments, analysis has focused on where current international legal principles provide coverage and where they could improve. States are looked to for assurance that their primary obligations under international law are met by holding PMSCs accountable at the national level. The United States has argued at the IWG on PMSCs that '[a] new international law on activities of private military and security companies was not needed, what was needed was the better implementation of existing norms'.[31] While PMSCs may contend they are attempting to uphold standards by dismissing errant employees, this does not satisfy a demand for corporate observance of International Human Rights Law ('IHRL'), International Humanitarian Law ('IHL') and International Criminal Law ('ICL'). This article considers how the rules of attribution may engage state responsibility for breach of primary obligations to help achieve coverage of PMSC activity.

The pace with which states have moved to establish a new international convention has been slow. This raises the question – why? Those states following the new marketised approach to governing, in which previously core government functions are devolved to private entities, no longer dwell on the established mechanisms designed to structurally protect the system by controlling the use of force through the state's monopoly over violence. Millard suggests states' use of corporate entities 'makes it quicker, more efficient, easier and clinically more appealing to governments than hiring individual contractors'.[32] The concern in this article is not the individual liability of PMSC employees, but rather the liability of the juridical entity itself. When it comes to the challenge of corporate liability as opposed to individual liability, progress is slow.

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[29] See, Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 55th sess, UN Doc No E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2013). Business was strongly opposed to the 2003 Draft Norms. See further, Pini Pavel Miretski and Sascha-Dominik Bachmann, 'The UN 'Norms On The Responsibility Of Transnational Corporations And Other Business Enterprises With Regard To Human Rights': A Requiem' (2012) 17(1) *Deakin Law Review* 5.

[30] UN Office of The High Commissioner For Human**,** *Guiding Principles on Business and Human Rights* (United Nations, 2011) <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

[31] Human Rights Council, '*Draft Resolution - Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies*', 22nd sess, UN Doc A/HRC/22/L.29 (18 March 2013).

[32] Todd S Millard, 'Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies' (2003) 176 *Military Law Review* 1, 1.

The focus in this article, as outlined by Part I, is on PMSCs as corporate juridical entities. It assesses the effectiveness of enforcement of international obligations through operationalization and implementation of state responsibility for wrongful acts of corporate entities and accountability through state action in enforcement at the national level. The Blackwater Nisor Square incident of 2007 is used as a focal reference in Part II. Part III discusses the existing State responsibility for PMSCs as contained in the *DARS*, which provides a starting point for considering how responsibility can occur through the classic state system and its effectiveness given that primary obligations applicable to PMSCs as legal entities are mostly non-existent. Part IV concludes that enforcement of international obligations in regards to PMSCs activities is not assured, with more creative thought requiring acknowledgment of the fundamentally different ideological views at play.

II THE BLACKWATER SCENARIO

Blackwater Corporation was a US registered corporation based in Moyock, North Carolina, contracted in 2007 to the US State Department to provide security in Baghdad, Iraq. Blackwater has since transformed in name and ownership and currently operates as Academi.[33] The CEO of Blackwater, Erik Prince, is no longer associated with Academi. The former US Attorney General, John Ashcroft, is now an advisor to the company.[34] The infamous Nisor square incident on 16 September 2007 involved Blackwater employees killing Iraqi civilians.

Blackwater was contracted to provide personal security to US diplomats, an activity acknowledged as acceptable under the *Montreux Document.*[35] In 2007, one of Blackwater's Tactical Support Teams received a call for assistance. They travelled to a roundabout in a convoy of four heavily-armoured trucks carrying weaponry ranging from sniper and assault rifles to machine guns and destructive devices including grenade launchers.

[33] Jason Ukman, 'Ex-Blackwater Firm gets a Name Change, Again', *The Washinton Post* (Washington, DC), 12 December 2011. Initially Forte Capital Advisors and Manhattan Partners acquired the corporation in December 2010 transforming it into Xe Services LLC providing protective security services.

[34] See, Jeremy Scahill, 'A Very Private War' *Guardian* (London), 1 August 2007: 'The man behind this empire is 38-year-old Erik Prince, a secretive, conservative Christian who once served with the US Navy's special forces and has made major campaign contributions to President Bush and his allies. Among Blackwater's senior executives are J Cofer Black, former head of counterterrorism at the CIA; Robert Richer, former deputy director of operations at the CIA; Joseph Schmitz, former Pentagon inspector general; and an impressive array of other retired military and intelligence officials…Blackwater executives boast that some of their work for the government is so sensitive that the company cannot tell one federal agency what it is doing for another' [17]; Suzanne Simons, *Master of War: Blackwater USA's Erik Prince and the Business of War* (Harper Perennial, 2010).

[35] *Montreux Document*, above n 9, Part VI, 23.

The defendants opened fire on unarmed civilians, including a traffic policeman at the scene.[36] At least fourteen civilians (not insurgents) were killed and another twenty wounded.[37] The Blackwater defendants claimed they acted in self-defence. Their contract agreement was to provide defence and their rules of engagement according to their signed employment contract stated in part:

> The *touchstone* of the Embassy Baghdad policy *regarding the use of deadly force is necessity*. The use of deadly force must be objectively reasonable under all the circumstances known to the individual at the time . . . The *necessity to use deadly force arises when all other available means of preventing imminent and grave danger to a specific individual or other person have failed or would be likely to fail*. Thus, employing deadly force is *permissible when there is no safe alternative* to using such force and without the use of deadly force, the individual or others would face imminent and grave danger. The Mission Firearms Policy also recognises that *the reasonableness of a belief or decision must be viewed from the perspective of the individual on the scene*, who may often be forced to make split second decisions.[38]

The State Department internal investigators and FBI investigators took over a year to gather the evidence.[39] The territorial state, Iraq, was keen to sanction the company and exclude all PMSCs operating in Iraq.[40] However, due to the *Coalition Provisional (CPA) Order 17* providing an immunity agreement between Iraq and the US for PMSCs this was not possible. Iraq requested the US Government end its contract with Blackwater and that Blackwater pay compensation to the victims' families. The US has not incurred any responsibility for wrongful action in relation to any obligations regarding the incident. Iraqi victims and the victims' families have brought a number of private civil claims domestically in the US, against Blackwater under the unique *Alien Tort*

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[36] *United States v Ridgeway*, Factual Proffer in Support of Guilty Plea (2008) [8]–[11] <http://www.justice.gov/opa/documents/us-v-ridgeway.pdf>.

[37] *United States of America v Slough*, 677 F. Supp. 2d 112, 116 (DC Cir, 2009); *United States of America v Slough*, 679 F. Supp. 2d 55, 'Government's Omnibus Response To Defendants' Motions For Immediate Pre-Trial Release', 4 (DC Cir, 2010).

[38] *United States v Ridgeway*, Factual Proffer in Support of Guilty Plea (2008) [6] <http://www.justice.gov/opa/documents/us-v-ridgeway.pdf> (emphasis added).

[39] Federal Bureau of Investigation, 'FBI Investigating Alleged Blackwater Shooting in Iraq' (2 October 2007) *FBI National Press Office* <http://www.fbi.gov/news/pressrel/press-releases/fbi-investigating-alleged-blackwater-shooting-in-iraq>.

[40] 'Blackwater: We Will Leave Iraq if US Orders It', *International Herald Tribune* (Paris), 30 January 2009: 'Blackwater has been operating in Iraq without a formal license since 2006. The State Department extended Blackwater's contract for a year last spring, despite widespread calls for it to be expelled because of the shootings'; See, Michael S Schmidt and Eric Schmidt, 'Flexing Muscle, Baghdad Detains US Contractors', *New York Times* (New York), 15 January 2012, [17].

Statute ('ATS').[41] Blackwater, some five years later has settled the lawsuits for an undisclosed sum, leaving an uncertain outcome on where legal liability lay.[42]

Unrelated to the Nisor Square killings, the US government initiated criminal proceedings against Blackwater and its transformed companies, XE and Academi. These included charges for violations of the *Arms Export Control Act* and the *Foreign Corrupt Practices Act*. These matters settled in 2012 with a non-prosecution agreement between Academi and the Departments of Justice and State. The company admitted facts outlined in a bill of information and undertook to pay a $7.5 million fine and a $42 million settlement.[43]

In confirming the agreement, US District Court Judge Flanagan noted that:

> [f]or an extended period of time, Academi/Blackwater operated in a manner which demonstrated systemic disregard for US government laws and regulations [and it] should serve as a warning to others that allegations of wrongdoing will be aggressively investigated.[44]

Such a statement suggests that a PMSC may well be accused of operating a corporate criminal culture.[45] Nevertheless, the deferred prosecution agreement enables Academi to resolve matters based on the conditions contained in the contract with the government. These efforts are monitored during a period of supervision. None of this deals with any criminal action against Blackwater, the corporation, in relation to the PMSC activity in the Nisor Square killings or attribution to the US state for wrongful actions of Blackwater.

Despite the US Congress having been assured that PMSCs could be held legally accountable, the incident demonstrates the US was inadequately prepared. Various legislative changes were required, including changes in

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[41] *Judiciary Act*, ch 20, 1 Stat. 73, 77 (1789). This Act was reactivated in the 1980's with over 200 court actions having arisen. Five cases against Blackwater were consolidated *In Re Xe Services Alien Tort Litigation* 665 F Supp. 2d 569 (ED Va, 2009) dealing with 64 plaintiffs, Defendant's included 11 business entities collectively referred to as XE and the CEO Eric Prince.

[42] Ibid.

[43] Federal Bureau of Investigation, 'Academi/Blackwater Charged and Enters Deferred Prosecution Agreement' (7 August 2012) <http://www.fbi.gov/charlotte/press-releases/2012/academi-blackwater-charged-and-enters-deferred-prosecution-agreement>.

[44] *Slough*, 677 F. Supp. 2d 112, 116 (DC Cir, 2009).

[45] See further, Megan Donaldson and Rupert Watters, "Corporate Culture' As A Basis For The Criminal Liability Of Corporations', *Report for UN Special Representative of the Secretary-General on Human Rights and Business* (2008) <http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>.

the Uniform Code of Military Justice ('UCMJ')[46] and the *Military Extraterritorial Jurisdiction Act* ('MEJA'), in order to address loopholes in legal coverage.[47] Criminal charges were finally brought in December 2008 against five individual Blackwater employees, in US courts.[48] *United States v Slough* (*'Slough'*)[49] is yet to result in any criminal conviction of the individuals accused. Four employees are charged jointly with thirty-five counts including voluntary manslaughter; attempt to commit manslaughter; and using and discharging a firearm during and in relation to a crime of violence.[50]

The outcome of the criminal prosecution has been made difficult by evidentiary hurdles created by investigative failures. Statements taken from nineteen Blackwater employees at the time by the State Department offered immunity from loss of employment and prosecution.[51] Initially a single judge of the District Court, Urbina J, dismissed the charges based on the US *Constitution*'s Fifth Amendment safeguards against self-incrimination.[52] However, the Government appealed the decision, and in 2011 in *Slough*,[53] the US Court of Appeals unanimously reversed the

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[46] 10 USC Sec 80, Article 2(a)(10). The Act inserting this amendment to the UCMJ was the The John Warner *National Defense Authorization Act* for Fiscal Year 2007 (P.L. 109–364) s 552; See, Memorandum from Robert M. Gates, Secretary of Defense, *UCMJ Jurisdiction over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared and in Contingency Operations* (10 March 2008) <www.fas.org/sgp/othergov/dod/gates-ucmj.pdf>.

[47] 18 USC §§ 3261; Stephanie N Kang, 'Private Security Companies: A Lack of Accountability' (2004) *The UCI Undergraduate Research Journal* 35, 41: 'Although Blackwater employees were implicated for the Nisor Square shootings, the *Patriot Act*, the *MEJA*, and the UCMJ all failed to provide effective accountability measures to convict security contractors involved in the shootings'; Glenn R Schmitt, 'Amending the Military Extraterritorial Jurisdiction Act of 2000: Rushing to Close an Unforeseen Loophole' [2005] (6) *The Army Lawyer* 41.

[48] Eugene Robinson, 'A Whitewash for Blackwater?' *Washington Post* (Washington, DC), 9 December 2008: 'Prosecutors did not file charges against the North Carolina-based Blackwater firm …or any of the company's executives. The whole tragic incident is being blamed on the guards'.

[49] *Slough*, 677 F. Supp. 2d 112 (DC Cir 2009); *United States of America v Slough*, 679 F. Supp. 2d 55 (DC Cir, 2010).

[50] *Slough*, 677 F. Supp. 2d 112 (DC Cir 2009); *United States v Ridgeway*, Factual Proffer in Support of Guilty Plea (2008) [8]–[11] <http://www.justice.gov/opa/documents/us-v-ridgeway.pdf>.

[51] Ibid; The Justice Department dismissed charges against the defendant, Nick Slatten, conceding that key testimony relied on his compelled statement. See further, James Vicini, 'US Court Dismisses Iraqi Contractor Torture Case' *Reuters* (online), 11 September 2009 <http://uk.mobile.reuters.com/article/worldNews/idUKTRE58A4QT20090911?ca=rdt>.

[52] Guy Adams, 'Iraq outraged as Blackwater case is Dropped', *The Independent* (London), 2 January 2010.

[53] *United States of America v Slough* (DC Cir, No 10-3006, 22 April 2011). See Mike Scarcella, 'Appeals Court Reinstates Blackwater Manslaughter Case in D.C.' on *The BLT: The blog of Legal Times* (22 April 2011)

District Court decision and the US Supreme Court supported this.[54] *Slough* demonstrates the obstacles the US, as one of the largest state users of PMSCs, had domestically in adequately investigating and enforcing sanctions against the individual perpetrators of serious crimes. Holding the corporation accountable for the employee's actions or its own conduct is even more vexed.

What is clear from the Blackwater event is that the US, as one of the recent users of PMSCs in fragile and conflicted environments, was not in a position to address satisfactorily criminal actions of PMSCs. This raises the question of the responsibility of states under international law for PMSCs actions.

III WHAT RESPONSIBILITIES DO STATES HAVE FOR PMSCS?

Considering the position of PMSC employees separate from the juridical entity itself demonstrates the difficulty in dealing with these individuals. Although a grey area, individual PMSC employees are generally not considered part of a military chain of command, and as such, may avoid obligations under the *Geneva Conventions.*[55] Employees of PMSCs are subject to the terms of their employment contract, which is usually governed by the law of the contracting state, and possibly the law of the territorial state, unless an indemnity operates.[56] The *Coalition Provisional Authority Order No. 17 ('CPA Order 17')* resulted in Blackwater employee's in the Nisor Square incident being exempt from the application of the territorial state's criminal law. The practice of obtaining immunity from territorial state law only exacerbates accountability issues.[57] The US refusal to participate in the International

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<http://legaltimes.typepad.com/blt/2011/04/appeals-court-reinstates-blackwater-manslaughter-case-in-dc.html>.

[54] See Ryan Devereaux, 'Blackwater Guards lose bid to appeal charges in Iraqi Civilian Shooting Case', *The Guardian* (London), 5 June 2012.

[55] See, eg, *United States of America v Ali*, 71 MJ 256 (CAAF, 2012). See further, Kristen McCallion, 'War for Sale! Battlefield Contractors in Latin American & the 'Corporatization' of America's War on Drugs' (2005) 36(2/3) *University of Miami Inter-American Law Review* 317, 328 arguing PMSCs are 'private extension[s] of the US military'.

[56] See National Authorities of Iraq, 'Status of the Coalition Provisional Authority, MNF – Iraq, Certain Missions and Personnel in Iraq, *Coalition Provisional Authority Order No. 17*, revised 27 June 2004 <http://www.refworld.org/docid/49997ada3.html> ('*CPA Order 17*').

[57] Ian Traynor, 'The Privatization of War: $30 Billion Goes to Private Military, Fears Over 'Hired Guns' Policy', *Guardian* (London), 10 Dec 2003 [34]: Dyncorp was given the contract to train the Bosnian police force. 'However a number of its employees were implicated in a sex slave scandal, with girls as young as 12 years old, for which the employees allegedly were dismissed but were never prosecuted and with no apparent adverse repercussions for the company, who have trained the Haitian police, and Afghan police.'; Australian police served in Papua New Guinea under the *Joint Agreement on*

Criminal Court ('ICC') by actively enlisting states to sign 'Article 98 agreements' prohibiting the surrendering of US war crime suspects also does not bode well for state responsibility for the upholding of ICL, IHL and IHRL obligations in regard to non-state actors where the US is involved.[58]

The reality presents a number of considerations that may undermine the incentives for states to regulate PMSCs. These include the drive by incorporating home states to avoid placing extra regulatory burdens on corporations, as this has direct implications for the tax revenue of the state.[59] Aligned with this, territorial states are often weak states, with poor regulatory and financial controls, keen to attract investment. Hence, they may be tempted to maintain low standards. By minimising human rights commitments, a race to the bottom occurs.[60] Other considerations for contracting states include being able to conduct covert foreign policy, force enlargement, and a desire not to dissuade future commitment by PMSCs to the state's activities.[61]

Despite this, some international lawyers claim the existing law can cover PMSC employees.[62] However, there is debate and disagreement, making the probability of actually holding PMSC employees accountable unlikely in practice.[63] The difficulties experts have with the responsibility to comply with ICL, IHL and IHRL as regards PMSC employees does not bode well for successful law enforcement. However, if these issues can be answered satisfactorily, it may then be possible that at least PMSC employee's actions can be dealt with via criminal sanctions or even military discipline laws that implement the *Geneva Conventions* at the state level.

Enhanced Cooperation between Papua New Guinea and Australia, signed 30 June 2004, [2004] ATS 24 (entered into force 13 August 2004) in which Australia sought immunity for its own government agency. This agreement was held to breach the Papua New Guinea Constitution in *Supreme Court Reference No 3 of 2011* [2012] 4 *Law Reports of the Commonwealth* 490 (Supreme Court of Papua New Guinea).

[58] Carl Bloggs, 'Outlaw Nation: the Legacy of US War Crimes' in Carl Bloggs (ed) *Masters of War. Militarism and Blowback in the Era of American Empire* (Psychology Press, 2003) 191, 194. See also, Butch Bracknell, 'The US and the International Criminal Court: An unfinished debate', *Los Angeles Times* (Los Angeles), 26 May 2011.

[59] Carlos M. Vázquez, 'Direct vs. Indirect Obligations of Corporations Under International Law' (2005) 43(3) *Columbia Journal Of Transnational Law* 927.

[60] See Surya Deva, 'Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should "Bell the Cat"?' (2004) 5(1) *Melbourne Journal of Internaional Law* 37.

[61] See, eg, Simon Chesterman and Angelina Fisher (eds), *Private Security, Public Order. The Outsourcing of Public Services and Its Limits* (Oxford University Press, 2009).

[62] See *Expert Meeting*, above n 25, 64.

[63] Ibid.

However, this does not address the liability of the juridical person, the PMSC. If criminal and other sanctions against individuals have minimal prospect of success, it is likely to be even more difficult with PMSCs. The *DARS* provide a starting point for considering the difficulties with state responsibility as a solution, as they establish the terms on which state obligations internationally may arise for the activities of PMSCs. It is important to keep in mind in this discussion that the *DARS*, while in places providing progressive development, are generally only representative of customary international law and provide no more than a reference for jurists and the possibility of further development of international law.[64] The controversy and difficulty in finalising the *DARS* meant compromise was the reality, as the international regime requires state agreement.[65]

Liability for wrongful action first requires the existence of primary international obligations to be clearly established. Once such an obligation exists, the secondary rules of attribution as developed in the *DARS* can attach a legal regime for enforcement. Articles 4, 5, 8 and 9 are the key articles of the *DARS* which provide the secondary rules by which NSA actions can be attributed to states such that the state might incur responsibility for the wrong. The question of state responsibility will arise for any actions of the state's 'armed forces', as an organ of the state under *DARS* article 4, or as exercising government functions under *DARS* article 5.[66] Further, *DARS* article 8 can come into effect if the PMSC is operating under the direction or control, or on the instructions of the state, irrespective of the nature of the function performed.[67] Key difficulties include, whether PMSCs are part of the armed forces, and what state authorisation they have, or indeed what degree of state control over their actions is evident. What is required to satisfy direction, control, or instructions is open to interpretation and therefore remains uncertain as a discussion of each of the relevant *DARS* provisions now demonstrates.

A *Article 4: Conduct of Organs of a State*

Article 4 of the *DARS* provides the starting point for a well-recognised principle by which States are held responsible for the conduct of any state organ.[68] Organ includes 'person or entity'.[69] The military is such an

[64] See, eg, Bodansky and Crook, above n 3; Andrea Gattini, 'Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Artciles of State Responsibility' (1999) 10(2) *European Journal of Internaional Law* 397.
[65] See, eg, Edith Brown Weiss, 'Invoking State Responsibility In The Twenty-First Century' (2002) 96(4) *The American Journal Of International Law* 798.
[66] *Expert Meeting*, above n 25, 5: '…it was the considered opinion of the experts that not all duties on states under the Geneva Convention (GC) would require the operation of governmental authority in accordance with the *DARS*.'
[67] Ibid 6.
[68] See, eg, *Claims of Italian Nationals Resident in Peru* (1901) RIAA vol XV 395 at 399.

organ as is an individual if deemed by the internal domestic law to be part of the military. An entity, which holds a separate legal personality such as a PMSC, is not generally considered an organ of the State,[70] unless the State was, for instance:

> [t]o formally incorporate a PMSC into its armed forces by adopting domestic legislation which places the PMSC under the command of the State's armed forces. Where a State incorporates paramilitary or law enforcement agencies into its armed forces, the State is required under Article 43(3) [Additional Protocol 1] to notify the other parties to the conflict that it has done so.[71]

Although some argue PMSCs are an extension of the military,[72] an important consideration often not addressed is the purpose of PMSCs. If they are to become part of the State's armed forces, then why are they not just, the State's military, but instead PMSCs?[73] As noted above in Pt III States have reasons for outsourcing to PMSCs and these benefits may be lost if PMSCs effectively just become part of a State's armed forces.[74] It is not satisfactory that a state can choose to label PMSCs, as its 'armed forces' for certain purposes and then not for others, as it suits the state.

However, *United States v Ali ('Ali')*[75] established such a connection, in order to confirm court-martial jurisdiction over an independent contractor working for a US corporation. The majority in the Court of Appeal for the Armed Forces ('CAAF'), accepted Ali, a dual Iraqi-Canadian national employed by L-3 Corp as an interpreter, was an integral part of the war fighting effort, and within the definition of 'land and naval forces' for the purposes of court-martial discipline. Although the Court did not accept that this also extended to Ali an entitlement to the Bill of Rights'

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[69] DARS art 4(2).
[70] *Oil Fields of Texas v Iran* (1982) 9 Iran-US CTR 347; *Phillips Petroleum v Iran* (1989) 21 Iran-USCTR 79; *Petrolane v Iran* (1991) 27 Iran-USCTR 64 [21]. See also, *Expert Meeting*, above n 25, 9–12.
[71] *Expert Meeting*, above n 25, 'While the experts disagreed as to exactly what a State would need to do in order to comply with the 'command' and 'disciplinary system' requirements of Article 43(1) *AP I* and the possible 'incorporation' requirement of Article 43(3) AP I , all ultimately agreed that a PMSC could qualify as a State's armed forces under Article 43(1) AP I, and its members qualify as combatants under Article 43(2) AP I, if these requirements were fulfilled.' 12; Also note Article 13 GC I and Article 4 GC III; See further, Ottavio Quirico, 'War Contexts: The Criminal Responsibility of Private Security Personnel' (European University Institute Working Papers, No AEL 2010/3, Academy of European Law, 2010).
[72] See McCallion, above n 55.
[73] *Expert Meeting*, above n 25, 11: '… currently, PMCs do not lie within the military chain of command. The current US field Manual, for example, specifies that all contractors are outside the military chain of command'.
[74] See, eg, Deva, above n 60.
[75] 71 MJ 256 (CAAF, 2012).

protections,[76] the CAAF decision leaves open wider questions of whether Ali could then also be classified as a State agent for the purposes of attracting State responsibility.

The next hurdle in article 4 is determining whether the NSA behaviour breaches an international obligation. Blackwater was contracted to provide defensive protection detail to government officials and in the process committed criminal offences. While this is not the same as government providing backing to militia groups engaged in international crimes, such as in the *Genocide Judgment*,[77] even this case demonstrates the difficulty in attributing actions of entities or organs to the state. The *Genocide Judgment* considered whether alleged acts of genocide committed by paramilitary and militia groups during the Serbia and Montenegro conflict with Bosnia and Herzegovinian in 1992 were breaches of the *Genocide Convention*[78] attributable to the Federal Republic of Yugoslavia. The ICJ did not find the hurdle required by article 4 an easy one. The Court found difficulty not only in determining the exact nature of the state's obligations under the *Genocide Convention* but also set a very high standard before NSA actions could be attributed to the state. What actions can amount to genocide was strictly interpreted and applied, with only one of the several notorious massacres occurring in the Bosnian and Serbian conflict qualifying.[79]

In considering attribution based on *DARS* article 4, 'conduct of organs',[80] the ICJ stated there was nothing which could justify a conclusion the acts committed by the NSAs (the Republika Srpska, VRS and the paramilitary militia known as the 'Scorpions') were acts perpetrated by 'persons or entities' enjoying the status of organs of the state of the Federal Republic of Yugoslavia ('FRY').[81] The ICJ reinforced the strict test of 'complete dependence' that was set forth in its 1986 Judgment in *Nicaragua v United States of America*[82] noting the high standard imposed in that decision before State responsibility was activated:

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[76] Ibid.

[77] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43. ('*Genocide Judgment*').

[78] *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ('*Genocide Convention*').

[79] *Genocide Judgment* [2007] ICJ Rep 43 [297], [376].

[80] Ibid [385].

[81] Ibid [386]: '…the Republika Srpska, nor the VRS were *de jure* organs of the FRY, since none of them had the status of organ of that State under its internal law.'

[82] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 ('*Nicaragua*').

> …persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, *provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument*.[83]

To suggest Blackwater was a corporate entity completely dependent on, or an instrument of, the US is too great a stretch. If the PMSC is not a state organ within article 4 then the next level of attribution possible is found in article 5 where the test is also set at a high level before a state can be held responsible.

B *Article 5: Conduct of Persons or Entities Exercising Elements of Governmental Authority*

Article 5 covers non-organs of State, which are nevertheless empowered by State law to exercise governmental authority in regard to the particular act in question. This extends to entities such as corporations. However, the term 'exercise elements of governmental authority' is open to interpretation. No list defining what constitutes 'governmental authority' exists.[84] As governments engage in outsourcing government functions, resorting to an accepted understanding of what is 'governmental' may become more difficult.[85] Government functions also vary between states based on cultural and historical differences. This means certainty regarding responsibility for conduct cannot be assured prior to undertaking the conduct.

However, certain core activities such as policing, and military combat are generally considered matters of government authority.[86] Support activities often now outsourced to PMSCs, such as interpretation, laundry and food preparation services may be more problematic. Some argue that where a primary international obligation requires a particular function occur, it justifies it being categorised as a government function.[87] Other experts, however, suggest this would be too wide, as not all *Geneva Convention* requirements, for instance, are considered an exercise of government authority.[88]

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[83] *Genocide Judgment* [2007] ICJ Rep 43 [391]–[393] (emphasis added).
[84] See, White above n 18, 135. The *Draft Convention on the Regulation, Oversight and Monitoring of PMSCs* attempts this in article 1(1).
[85] See *Expert Meeting*, above n 25, 16. But cf, for instance the US response in the *Federal Activities Inventory Reform Act of 1998*, Pub. L No 105-270, § 2(a), 112 Stat. 2382 requiring identification of 'non- inherently governmental functions' federally before private contracting.
[86] *Expert Meeting*, above n 25, 17; See, eg, *Maffezini v Spain* (*Decision on Objections to Jurisdiction*) (2000) 16 ICSID Review 212.
[87] *Expert Meeting*, above n 25, 16–17.
[88] Ibid 17.

The second requirement of article 5 is that the authority must be 'empowered by the law of the State'. This is open to narrow interpretation, requiring a specific law to be passed or more generally, encompassing government powers to delegate. The latter view is preferred given Crawford's commentary that the 'usual and obvious' empowerment is through 'delegation or authorization by or under a law of the state'.[89] As such, a contract between a government authority and a PMSC may be sufficient in regard to the second criteria.

Experts agree that this is the most likely article to attract state responsibility for PMSC actions.[90] Blackwater was providing security for diplomats in a foreign state in which there was ongoing conflict. However, whether policing and security functions can be considered an exercise of government authority any longer is difficult to discern, as PMSCs become the accepted norm. Whether the state could be held responsible is dependent on the answer to this question.

An important difference to note for article 5 attribution is that strict liability applies to actions of an entity whose conduct is attributable under the article, including actions beyond its authority. This is not the case with article 8, where activity beyond instructions, or outside the control and direction of the state, cannot be attributed to the state.[91] However, where proof of carrying out governmental authority is difficult to establish, resort to article 8 may provide an alternative.

C *Article 8: Conduct Directed or Controlled by a State*

Where a NSA does not qualify as an organ of the State, because it operates with some independence it may still be said to be acting on the instructions of the State or under State direction or control.[92] Ambiguity is presented by the words 'the instructions of, or under the direction or control of' in article 8. The Commentary to the article provides some clarification, stating:

> [m]ost commonly cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as 'auxiliaries' while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specially commissioned by that State

[89] James Crawford, Special Rapporteur, *First Report on State Responsibility*, UN Doc A/CN.4/490/Add.6 (24 July 1998) 154.
[90] *Expert Meeting*, above n 25, 18.
[91] See *DARS* art 7. But cf *Prosecutor v Tadić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [121] ('*Tadić*'): 'This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper'.
[92] See, *DARS* art 8; *Genocide Judgment* [2007] ICJ Rep 43 [397]–[398].

> and not forming part of its police or armed forces, are employed as auxiliaries or are sent as 'volunteers' to neighbouring countries, or are instructed to carry out particular missions abroad.[93]

Instructions may be found in the contract for services and Rules of Engagement specified by the government agency instructing the PMSC. However, the test is narrow, demanding specific instructions to commit the actual wrong. In the *Genocide Judgment*, the ICJ, having ruled out attribution under *DARS* article 4 based on the heightened requirement of 'total dependence' of NSAs on the respondent State, then considered whether state responsibility could apply under *DARS* article 8. The ICJ adopted the test established in *Nicaragua* concerning the actions of the Contras, which again placed the requirement at a high level:

> [i]n this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of 'complete dependence' on the respondent State; it has to be proved that they *acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this 'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions* taken by the persons or groups of persons having committed the violations.[94]

The ICJ applied the *Nicaragua* standard of 'effective control' in the *Genocide Judgment* stating:

> The rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed lex specialis. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, *wholly or in part, on the instructions or directions of the State, or under its effective control*.[95]

The *Genocide Judgment* took 14 years before final determination, showing that establishing State responsibility for NSA actions is almost

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[93] International Law Commission, 'Commentaries to Draft Articles on the Responsibility of States for Internationally Wrongful Acts', *Report of International Law Commission on the work of its Fifty-Third Session*, UN GAOR, 56th sess, UN Doc A/56/10 (24 October 2001), 104.

[94] *Genocide Judgment* [2007] ICJ Rep 43 [400] (emphasis added); *Tadić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [115], citing *Nicaragua*: 'The Court went so far as to state that in order to establish that the United States was responsible … it was necessary to prove that the United States had specifically 'directed or enforced' the perpetration of those acts.'

[95] *Genocide Judgment* [2007] ICJ Rep 43 [401]. See *Tadić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [109], [112].

insurmountable. Despite the close ties and funding by the FRY, evidence of specific involvement by the State in the specified conduct was required and, in circumstances of conflict, found nearly impossible to establish. Certainly, a State using PMSCs distances itself in a way that places this hurdle between the State and any responsibility for NSA actions, even if the State benefits from these actions. The ICJ justified limiting the control required for the application of article 8 to 'specific instructions, control, or direction' as to do otherwise, the Court decided, would considerably and unreasonably expand the responsibility of States.[96] For this reason, the ICJ rejected the ICTY Appeal Chamber's lesser standard of 'overall control', provided in *Tadić*.[97]

The *Genocide Judgment* is not without critics.[98] The strong dissenting judgments alone raise some important considerations.[99] Vice President Al-Khasawnch, in dissent, argued:

> the Court's rejection of the standard in the *Tadic* case fails to address the crucial issues raised therein - namely that different types of activities, particularly in the ever evolving nature of armed conflict, may call for subtle variations in the rules of attribution. … When, however, the shared objective is the commission of international crimes, to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold. The inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore… [100]

[96] *Genocide Judgment* [2007] ICJ Rep 43 [406].

[97] *Tadić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [100]. See further Alberto Alvarez-Jimenez, 'International State Responsibility For Acts Of Non-State Actors: The Recent Standards Set By The International Court Of Justice In Genocide And Why The WTO Appellate Body Should Not Embrace Them' (2008) 35(1) *Syracuse Journal of International Law & Commerce* 1, 14–15.

[98] See Dermot Groome, 'Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?' (2007) 31(4) *Fordham International Law Journal* 911.

[99] See, eg, *Genocide Judgment* [2007] ICJ Rep 43 (Judge Skotnikov; Judges Ranjeva, Shi and Koroma).

[100] *Genocide Judgment* [2007] ICJ Rep 43 (Vice-President Al-Khasawneh). See also, '*Mapiripán Massacre*' *v. Colombia* (2005) Inter-Am Ct HR (ser C) 134, [123]: 'The Court determined, that the actions of the paramilitary group engaged Colombia's international responsibility because the Colombian Army had cooperated and co-ordinated with the private paramilitary group … and because of its omission in preventing the crimes from being committed.'

Given the ICJ *Genocide Judgment*, any likelihood of Blackwater's actions in Nisor Square being attributable to the US under article 8 *DARS* is just not possible.[101]

The ICTY Appeals Chamber in *Tadić*[102] did not find the *Nicaragua* test persuasive, instead developing a less onerous standard for article 8.[103] Referring to article 8 *DARS* the Chamber stated:

> [s]tates are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.[104]

The Appeals Chamber was set the task to consider:

> the conditions under which armed forces fighting against the central authorities *of the same State* in which they live and operate may be deemed to act on behalf of another State. In other words, the Appeals Chamber will identify the conditions under which those forces may be assimilated to organs of a State other than that on whose territory they live and operate.[105]

The impact of the determination of this question was that a State could ultimately be held responsible for the activities of the NSA if the conflict was determined to be international in nature and a degree of control existed, but not at the heightened level required by the ICJ in the *Genocide Judgment*. As IHL was found not to lay down a measure by which control could be determined, the Chamber in *Tadić* looked to the general international law of State responsibility.[106] The judgment

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[101] *Genocide Judgment* [2007] ICJ Rep 43 [414]: 'The acts constituting genocide were not committed by persons or entities which, while not being organs of the FRY, were empowered by it to exercise elements of the governmental authority (Art. 5), nor by organs placed at the Respondent's disposal by another State (Art 6), nor by persons in fact exercising elements of the governmental authority in the absence or default of the official authorities of the Respondent (Art 9) ; finally, the Respondent has not acknowledged and adopted the conduct of the perpetrators of the acts of genocide as its own (Art. 11).'

[102] *Prosecutor v Tadić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999).

[103] Ibid. [115].

[104] Ibid. [117].

[105] Ibid. [91].

[106] Ibid. [98]: 'International humanitarian law does not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under

contended that the question of control needed in order to find a NSA to be a de facto organ of a State were the same whether under IHL or the customary international law of State responsibility.[107] The lesser test outlined by *Tadić* in relation to forces that constitute a 'military organisation' as the court concluded the Bosnian Serb armed forces were, was an 'overall control' by State authorities. While this was to go beyond mere financing and equipping to include 'participation in planning and supervision of military operations', it did not require control in the form of 'the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law'.[108]

The Chamber was of the view it could still be possible to regard armed groups and private individuals as a de facto organ of the State despite not having official State status through internal law. The degree of control needed for this varied. If it was a single individual or a non-military organised group, then specific instructions for the specific action were required from the State to engage its responsibility.[109] If however, it was the action of a subordinate armed force, militias or paramilitary units, control need only be overall and no proof of specific instructions was required.[110]

It may be possible to argue that Blackwater was paid for, or financed directly by the State, as it was contracted to the State Department to provide security to government diplomats, a task commonly assigned to the police force or military personnel. However, on the second limb of the *Genocide* test, the connection would fail as Blackwater employees actions at Nisor Square could not be shown to be specifically coordinated or supervised by the State. However, if the *Tadić* test of 'overall control' was considered, perhaps US responsibility for Blackwater's actions would be possible. As a security provider for government officials in a conflict zone, the claim may stretch to the US based on overall control. However, the State did not have a clear line of command control, a factor which provides an ongoing difficulty for the military working in conflict

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the control of a State, that is, as acting as *de facto* State officials. Consequently, it is necessary to examine the notion of control by a State over individuals, laid down in general international law, for the purpose of establishing whether those individuals may be regarded as acting as *de facto* State officials.'

[107] Ibid. [104].

[108] Ibid. [145].

[109] Ibid. [132].

[110] Ibid. [131]. The Appeals Chamber at [127] cited *Yeager v. Iran* (1987) 17 Iran-US CTR 92: 'Under international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary 'Komitehs' or 'Guards' and at the same time deny responsibility for wrongful acts committed by them.' [146] …the Claims Tribunal stressed that 'they were performing the functions of customs, immigration and security officers' [148].

zones alongside PMSCs.[111] Ultimately, this argument is rendered moot by the ICJ's explicit rejection of the *Tadić* standard.

Tadić asserts the realism that the law of State responsibility gives States incentive to ensure juridical persons act in a socially responsible manner,[112] in order to avoid any gaps in accountability.[113] The *DARS*, however, presents legal niceties that provide only a thin measure for achieving real outcomes for the consequences of illegal actions by PMSCs. Developing a system of secondary rules for international wrongs of PMSCs demands more, requiring the idealism referred to by Oppenheim,[114] mixed with the pragmatic realism demanded by power politics. This political reality provides lessons to be learned from the more than fifty years it took to develop the *DARS*. Given the controversial position of PMSCs, as NSAs, this could indicate an even more fraught process in attempting to apply direct international obligations to PMSCs. Given the case-by-case nature of determining state responsibility,[115] it is unlikely that creating specific attribution rules for PMSCs would provide any greater assurance of coverage.

D *Other Possible Concerns*

Two further areas of concern arise: one, the incentive for PMSCs to comply with international law; and two, the access to a remedy and direct compensation for victims. First, if victims could rely on state responsibility for PMSC actions, the corporate entity still holds no direct internationally enforceable accountability for their involvement. As a juridical entity, even if they have a corporate criminal culture, they rarely face prosecution, even domestically. So what is the incentive for PMSCs to comply with IHL or IHRL?

IHRL may provide a better answer than IHL. Due diligence in IHRL requires certain general principles be observed, even where the conduct cannot be attributed to the State, such as those set out in the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*

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[111] Charles Brown, 'Control of Private Security Contractors by the Joint Force Commander' (Paper presented to Faculty of the Naval War College, Newport, Rhode Island, 23 April 2008).

[112] See Patrick Macklem, 'Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction' (2005) 7(4) *International Law FORUM du droit international* 281.

[113] *Tadić* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [119], [123].

[114] Lassa Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 *American Journal of International Law*, 356.

[115] International Law Commission, 'Commentaries to Draft Articles on the Responsibility of States for Internationally Wrongful Acts', *Report of International Law Commission on the work of its Fifty-Third Session*, UN GAOR, 56th sess, UN Doc A/56/10 (24 October 2001), 107.

and the UN Framework 'Protect, Respect and Remedy'.[116] They impose obligations on States regarding enforcement of human rights standards, criminal justice and reparation. These obligations include requirements regarding information about rights, access to justice, a prompt and effective remedy, participation in criminal proceedings, protection against retaliation, intimidation, and observance of privacy. States are required to ensure that the offender provides restitution and, in the event the offender does not, the principles place an onus on the state to set up a compensation fund.[117] In the case of the Nisor Square killings, as noted, some victims received an undisclosed settlement as compensation from Blackwater because of their private civil suit under the ATS. However, the US has not been required to make reparation or compensation to Iraq or Iraqi civilians.[118]

A second concern is, even if there were reparation for wrongs, these are between States and often this does not deliver a satisfactory remedy to individuals.[119] The *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of IHRL and Serious Violations of IHL* contain an obligation in Principle IX establishing a duty to provide satisfaction, restitution, rehabilitation and compensation.[120] A question then arises whether 'satisfaction' can oblige a State to ensure corporate criminal sanctions are possible in order for victims to see 'justice' done. If States are bound to establish a legal regime that can hold juridical persons (such as PMSCs) to account, can a State be held responsible if they do not succeed in this?

Reparations from states require a breach of a primary obligation before there is responsibility for wrongful actions. State responsibility has not provided a resolution in the Blackwater incident. Where armed employees of PMSCs are introduced by a State into a conflict area, and the PMSC's actions involve criminal conduct but the wrong cannot be

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[116] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, 96th plen mtg, 40th sess, UN Doc A/RES/40/34 (29 November 1985). UN Framework, 'Protect, Respect and Remedy', above n 28.

[117] White, above n 18, 149.

[118] See *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of victims of international Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 91 *('API')*.

[119] See, eg, *Jurisdictional Immunities of the State* (*Germany v. Italy*) *(Judgment)* [2012] ICJ Rep 99; *Genocide Judgment* [2007] ICJ Rep 43. See further, Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85(851) *International Review of the Red Cross* 529.

[120] See *DARS* art 1; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005 A/RES/60/147 . See also International Criminal Tribunal for the Former Yugoslavia, *Rules of Procedure and Evidence*, Doc No IT/32/Rev. 44 (adopted 10 December 2009) art 85, the term 'victim' is broadly defined.

attributed to the State, it goes unaddressed. PMSCs cannot be directly liable for reparation under IHL.[121] In such situations, the victims of PMSCs illegal actions have little recourse to compensation or reparations. Thus, relying on retrospective case-by-case determinations of State responsibility reinforces uncertainties. Business needs certainty in advance to operate profitably. This is a minimum requirement for legal order.[122]

Compensation in the Blackwater event was only available in the shadow of the ATS requiring injured aliens to establish federal subject matter jurisdiction in the US for a violation of the law of nations. The civil tort action enabled the victims to pursue private compensation against the corporation.[123] However, as it stands, actions against corporations under the US ATS are in uncertain waters. The seminal case of *Kadić v Karadžić*[124] in the US Court of Appeals for the Second Circuit relied on international norms as imposing liability on private actors for breach of customary international law. This case influenced subsequent ATS jurisprudence.[125] At most, this jurisprudence supports a claim that in the US private corporations of any State may be brought before the courts by private individuals for civil claims in international torts where these involve *jus cogens* breaches.[126] However, post *Kiobel v Dutch Petroleum* (‘*Kiobel*’),[127] this is more uncertain. Ku points out that the ATS jurisprudence prior to *Kiobel* was based on thin self-referential precedent that came to a halt when the US Court of Appeals for the Second Circuit had to address the question whether private corporations could be liable

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[121] See, *Experts Meeting*, above n 25, 55. International humanitarian law instruments are silent as to who are the beneficiaries of reparation for violations of international humanitarian law. They only address the *responsibility* to compensate. See, Gillard above n 119, 536.

[122] See, eg, Joseph Raz, 'The Rule of Law and its Virtue' (1977) 93(2) *Law Quarterly Review* 193.

[123] See further, Julian Ku, 'The Curious Case of Corporate Liability Under The Alien Tort Statute: A Flawed System of Judical Lawmaking' (2011) 51(2) *Virginia Journal of International Law* 353.

[124] 74 F 3d 377, 378 (2nd Cir, 1996).

[125] See, eg, *Presbyterian Church of Sudan v Talisman Energy*, 244 F Supp 2d 289, 314 (SD NY, 2003) (‘*Talisman I*’); *Presbyterian Church of Sudan v Talisman Energy Talisman II*, 374 F Supp 2d 331 (SD NY, 2004) (‘*Talisman II*). *Doe v Unocal*, 110 F Supp 2d 1294, 1303 (CD Cal, 2000); *Estate of Rodriquez v Drummond*, 256 F Supp 2d 1250, 1258 (ND Ala, 2003); *In Re Agent Orange Product Liability Litigation*, 373 F Supp 2d 7, 58 (ED NY, 2005).

[126] See Ku, above n 123.

[127] *Kiobel v Royal Dutch Petroleum*, 569 US 10-1491 US . Prior to *Kiobel* the US Supreme Court in *Sosa* v *Alvarez-Machim* 542 US 692 (2004) [731]–[732] required a stricter standard for customary international law norms before the *ATS* could be invoked to create potential corporate liability.

under international law in *Kiobel.*[128] The Court determined there was little precedent supporting such a claim for civil liability.

The unusual ATS legislation of 1789 has presented complex dilemmas for US judges looking to respect the domestic separation of powers, a federal system and precedent-based case law, yet at the same time demanding consideration of international customary law norms requiring courts to look beyond the comfort of their jurisdictional border. These actions are now becoming limited where corporate activity is concerned, and in the specific Blackwater actions did not succeed in a court order but resulted in a private settlement. Such a position in which the contracting state has agreed to be responsible for oversight of PMSCs really demands more certain criteria for redress. It raises the question: has there been a wrongful action by the US in failing to deal with the corporations' possible internationally criminal behaviour and if so, should the US be held responsible under State responsibility for this?

The ICJ, in the *Genocide Judgment*, considered the State's obligation under the *Genocide Convention* in which Article 1 required 'the duty to prevent genocide and the duty to punish its perpetrators' The ICJ, seeing these as two distinct obligations, found the FRY had not fully met these obligations. The Court found the 'prevent and punishment' obligation to be 'one of conduct not one of result', meaning an attempt to prevent and/or punish, even though unsuccessful, was enough.[129] In finding that FRY failed to prevent the genocide – making it internationally responsible – the court took account of the information FRY had of 'the climate of deep-seated hatred which reigned between the Bosnian Serbs and the Muslims in the Srebrenica region'[130] and influence through its close links with the NSA perpetrators which was reinforced by earlier related court orders.[131] The failure of FRY to cooperate with the ICTY in handing over the perpetrators was considered a breach of FRY's state obligations as 'a Member of the United Nations'.[132]

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[128] See Ku, above n 123, 376. But cf Anita Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20(1) *Berkeley Journal of International Law* 91.

[129] *Genocide Judgment* [2007] ICJ Rep 43 [427]–[430]

[130] Ibid [438].

[131] Ibid [435].

[132] Ibid [449] 'the Court has jurisdiction to declare a breach of Article VI insofar as it obliges States to co-operate with the 'international penal tribunal', the Court may find for that purpose that the requirements for the existence of such a breach have been met. One of those requirements is that the State whose responsibility is in issue must have 'accepted [the] jurisdiction' of that 'international penal tribunal'; the Court thus finds that the Respondent was under a duty to co-operate with the tribunal concerned pursuant to international instruments other than the Convention, and failed in that duty.'

This raises questions in regard to Blackwater. While the Nisor Square incident is not in the nature of a breach of the *Genocide Convention*, which also does not apply to juridical persons, it is conceivable, given the nature of the Iraq and Afghan environments, that a potential for attacks on civilians by PMSCs could fall within this category. Should this place an obligation on the contracting state to maintain greater vigilance and oversight of PMSCs it has invited into the conflict zone?

Morally, given the literature against the use of PMSCs in the Iraq and Afghan wars, an affirmative answer could be given to the question.[133] However, legalities in enforcing such an obligation create much more doubt. It is likely the US with its domestic criminal prosecution in *Slough*[134] may satisfy State obligations, irrespective of any result.[135] However, what of Blackwater, or now Academi, the corporation? Even if the US could bring a criminal action against Blackwater in relation to the Nisor Square deaths, it is likely that any sanctions would result in the US practice of non-prosecuting agreements entered into with corporations as they did with the *Arms Control Act* prosecutions.[136] This is not likely to satisfy the victims.

In the end, the Iraqi victims remain without criminal redress some seven years after the incident. This is unfortunately common. The mass victims in Bosnia and Herzegovina and WWII show, through cases such as the *Genocide Judgment* and *Germany v Italy*[137] that any victim compensation is mostly an aspirational notion with State responsibility, having often ambiguous criteria, set at a very high threshold providing a significant impediment.[138] The *Genocide Judgment* in the end was largely unsuccessful in establishing State responsibility for the actions of Republika Srpska, and the VRS, with no direct compensation made to victims or their families. On the question of reparation, the ICJ in the *Genocide Judgment* found there was not a sufficient causal link with the wrongful conduct of the NSAs to justify financial compensation.[139]

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[133] See, eg, Lehnardt above n 8; Danwood Mzikenge Chirwa, 'The Doctrine Of State Responsibility As A Potential Means Of Holding Private Actors Accountable For Human Rights' (2004) 5(1) *Melbourne Journal of International Law* 1; Carsten Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies' (2008) 19(5) *European Journal of International Law* 989.

[134] *United States of America v Slough* (DC Cir, No 10-3006, 22 April 2011).

[135] See *Expert Meeting*, above n 25, 39–40.

[136] See, eg, Donaldson and Watters, above n 45.

[137] *Genocide Judgment* [2007] ICJ Rep 43; *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* [2012] ICJ Rep 99.

[138] See, eg, Rudolf Dolzer, 'The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? - Lessons after 1945' (2002) 20(1) *Berkeley Journal of International Law* 296.

[139] *Genocide Judgment* [2007] ICJ Rep 43 [462], [469].

States are inherently reluctant to proceed against other States.[140] In the case of Iraq, a State with a newly established political system installed by the US, it is unlikely Iraq would hold the US to account and yet, reparation is a key aspect of enforcement. However, while individuals may have a moral right to compensation or reparation, this is not certain legally and whether they have a right to bring an enforceable claim is even less clear.[141] The duty for a state to make reparation for IHL violations in international armed conflict is a duty applicable under customary international law.[142] Generally, states pursue reparation from other states through a negotiated peace deal,[143] although State practice may challenge this continued presumption.[144] It would appear States are not obliged under IHL to enable claims to be made against PMSCs.[145] The problem is that states may, in the end, provide no direct compensation to the actual victim of a breach and general compensation agreed between States may not reflect the overall claims being made. The result is that claims for compensation are left in an unsatisfactory state.

IV CONCLUSION

Overall, the response to PMSCs is piecemeal and unsatisfactory. Rather than engaging in discussion on the rights and wrongs of PMSCs, the ICRC has focused on regulation and the education of IHL in such

[140] Ibid [406] being an exceptional example.
[141] *Expert Meeting*, above n 25, 49.
[142] State reparation is required by the following: *Hague Convention Respecting the Laws and Customs of War on Land (IV)*, opened for signature 18 October 1907, 187 CTS 227 (entered into force 26 January 1910) art 3; *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 131; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 148; *AP I* art 91.
[143] Ibid; *Expert Meeting*, above n 25, fn 86..
[144] See, eg, Jurisdictional Immunities of the State (Germany v. Italy, Greece Intervening) I.C.J. Reports 2012, 99; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep I.C.J. Reports 2004, 136 [153], [163]. Reparation must be made to the victims of IHL violations themselves; See also international agreements such as the Class Action Settlement Agreement of 26 January 1999 (between Swiss banks and Holocaust survivors in US District Court for the Eastern District of New York) <http://www.swissbankclaims.com/index.asp>; See, Gillard, above n 119; The United Nations Compensation Commission (UNCC) was established to address claims arising out of Iraq`s invasion and occupation of Kuwait. See *Letter Dated 21 September 1992 from the President of the Governing Council of the United Nations Compensation Commission Addressed to the President of the Security Council*, UN Doc S/24589 (28 September 1992) [33].
[145] See *Expert Meeting* above n 25, 55. While cases have been bought, they have all been unsuccessful: *In Re Holocaust Victim Assets Litigation*, 105 F Supp 2d. 139, 142-143 (ED NY, US 2000); *Burger-Fischer v. Degussa AG*., 65 F Supp 2d 248, 278 (D NJ, 1999) US and *In Re Nazi Era Cases Against German Defendants Litigation*, 129 F Supp. 2d 370, 378 –380 (D NJ, 2001) US.

organisations.[146] The IWG on PMSCs, tasked with elaborating an international regulatory framework for PMSCs had its work extended by two years on the 22 March 2013 and is yet to propose a solution.[147] It has noted in its latest report that both the *Montreux Document* and the *ICoC* do not cover the field adequately and an overarching Convention is still required.[148]

When clear laws regulating accountability fail in their application to the military, it does not engender confidence that the legal system will ensure PMSCs are accountable.[149] While some mechanisms may be in place to address accountability, there appears to be a lack of will to enforce the laws. If the international recognition of the sovereignty of the individual at the apex of the project for respect of human rights is not taken seriously by states through enforcement of their responsibilities, it will likely lead to the state being overtaken in this regard.[150] Failure to grasp the ideological tensions underlying this needs serious attention. Some demands for this to be addressed may well come from NSA involvement, including from PMSCs.

This article has addressed the *DARS* and the obligations of States for PMSC actions. The *Genocide Judgment*, in demonstrating the difficulties associated with holding the state accountable for alleged acts of genocide by militia, portends the even greater difficulty in holding States accountable for any international crimes committed by PMSCs, where engaging the services of PMSCs in conflict zones is becoming an increasingly 'accepted' practice. While the existing law may stretch to cover employees of PMSCs (although with its own difficulties) it does not adequately deal with the PMSC as a juridical person. Attribution of PMSC actions to the State is not currently effective. The international community has shown its ability to provide a mechanism for enforcement of criminal sanctions against an individual at the ICC. With PMSCs potential use of force and ability to engage in actions that can lead to

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[146] International Committee of the Red Cross, 'The ICRC to expand contacts with private military and security companies' (4 August 2004) International Committee of the Red Cross <http://www.icrc.org/web/eng/siteeng0.nsf/html/63HE58>.
[147] *IWG on PMSCs*, above n 11.
[148] *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, 68th sess, Agenda Item 68, UN Doc A/68/339 (20 August 2013), [65]–[66].
[149] See, eg, Thomas Wayde Pittman and Matthew Heaphy, 'Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court ' (2008) 21(1) *Leiden Journal of International Law* 165; Craig Stockings (ed), *Anzac's Dirty Dozen: 12 Myths of Australian Military History* (University of New South Wales Press, 2012); Jeff Stein, 'Onetime Blackwater Affiliate Scores US Contract', *The Washington Post* (online), 7 January 2011 <http://voices.washingtonpost.com/spy-talk/2011/01/blackwater-linked_firm_scores.html>.
[150] Kofi Annan, 'Two Concepts of Sovereignty', *The Economist* (London), 18 September 1999, [4].

offences considered *jus cogens*, special control mechanisms are called for. Enforcement of international law against NSAs such as PMSCs remains an area clearly in need of attention and reform in order to provide consistency and certainty in approach.