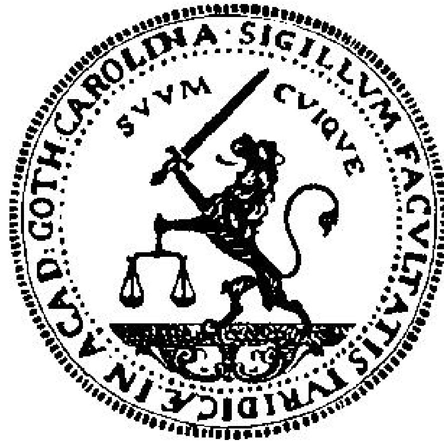

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The Buck Stops Where?

Private Military Companies in Armed Conflict and Viable Paths to Accountability for Violations of International Humanitarian Law

LAGF03

Bachelor Thesis, Master of Laws Program
15 higher education credits

Supervisor: Jur. Dr. Santa Slokenberga

Fall semester of 2019

ABBREVATIONS

PMC	*Private Military Company*
IHL	*International Humanitarian Law*
NGO	*Non-governmental Organization*
ICJ	*International Court of Justice*
ICRC	*International Committee of the Red Cross*

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ABSTRACT

"The buck stops here", as was the wording on the famous sign on President Truman's desk, should remind us today - as it reminded all Americans of the virtues of accountability and responsibility in 1953 - that any office or person that holds influence over the lives of others needs to be able to be held accountable for their actions. Today, Private Military Companies - or PMCs for short - are deployed worldwide both beside regular armed forces and on their own to assist with all kinds of tasks, both on and off the battlefield. This paper sets out to combat the problem with PMC accountability in relation to the statutes of International Humanitarian Law - henceforth referred to as IHL - and the role of international law, as well as national law, in successfully litigating these organizations.

"The buck stops here". Så stod det skrivet på det lilla plakatet på president Trumans skrivbord. Detta budskap, lika allmängiltigt idag som 1953, borde verka som en påminnelse om värdet av ansvar och möjligheten till utkrävande av detsamma från alla instutioner och personer med inflytande över människors liv och välmående. Privata militära aktörer är idag aktiva över hela världen och är involverade i en myriad av operativa uppgifter, både på slagfältet och utanför. Målet med denna uppsats är att tackla problematiken kring att kunna hålla privata militära aktörer ansvariga för handlingar som brutit mot internationell rätt. Uppsatsen kommer även beröra den internationella rättens, likväl som den nationella rättens, roll när det kommer till processföring kring dessa brott mot den internationella rätten.

1. INTRODUCTION

There are several types of non-state actors that operates within the realms of armed conflict. The Red Cross, Amnesty, and other NGOs are all great examples of this. Together with states and individuals, these organizations are all part of an international system of accountability in relation to acts that warrants criminal and state responsibility for violations of IHL.[1]

Private militaries, or mercenary corps as they more commonly have been referred to throughout history, is not conceptually something new. States, large corporations and private individuals has for as long as there has been a recorded history relied on privately owned and managed groups of operatives to execute geopolitical strategies and command political power. What is unique with this new generation of PMCs, however, is the sheer scale of operations and their exclusionary legal status in combination with their geopolitical importance and influence.[2]

Issues of responsibility and accountability in connection to PMC operations first arose when PMCs entered into the greater world of geopolitics as international actors.[3] This world – traditionally thought of as reserved to states and political coalitions - now not only opened up to PMCs, but actively welcomed their arrival. As traditional warfare – as it had been understood up until the early to mid-20th century – slowly gave way to the dogmas of New Wars, the means by which you wage war had to change with it.[4]

In the same way as ships-of-the-line turned into aircraft carriers and the once almost theatrical uniforms of 19th century European armies with their sparkling colors and grand detailing turned camouflaged, the large conscript-based armies that

[1] Kolb (2015), p. 194
[2] Singer (2004), p. 522
[3] Avant, de Nevers (2011), p. 88
[4] Kaldor (2013)

dominated battlefields in the beginning of the century turned into smaller, professional units, tailored to the needs of a new kind of warfare. This, along with realism being challenged by neoliberalism as the primary ideology for understanding peace and conflict during the second half of the century, led to more and more energy being put towards "outsourcing" duties previously falling within states' competency to international organizations like the United Nations and other similar entities.[5]

Eventually, this led to a decline in states' involvement in the implementation of their foreign policy. This trend can be exemplified by looking at the constitution of Coalition forces in the 2003 invasion of Iraq. During this operation alone, Coalition personnel was buoyed by nearly 20.000 PMC employees. As post-9/11 conflicts have come and gone, states have more and more come to rely on third parties and privately owned corporations to achieve operational success on the battlefield and secure peace and stability post-conflict.[6]

1.1 Purpose

This paper aims to explore the convoluted legal reality of corporate accountability stemming from actions undertaken by PMCs within the confines of armed conflict. Furthermore, this paper will try to explain the shortcomings of IHL, as it relates to the litigation and suppression of PMC violations of IHL, and analyze what legal means are the most likely to lead to an improved system of holding PMCs to account for violations of IHL.

[5] Kaldor (2013)
[6] Singer (2004)

1.2 Delimitations

With regard to the somewhat limited confines of this paper, it will focus solely on the litigation of PMCs corporate entities. Furthermore, the possible attributability of purely international legal bodies such as the ICJ, will not be discussed.

1.3 Perspective and method

The questions posed throughout this paper will be answered in accordance with legal dogmatics[7]. In doing so, the aspiration is to show the current state of affairs within this specific legal area as well as point to certain weaknesses and how they could – at least theoretically – be amended. The paper will also be taking a criticizing stance towards the current legal regimes that is IHL and point to both the legal and societal ramification resulting from its shortcomings.

1.4 Materials and the current state of area-specific research

The legal challenges of regulating PMC operations are widely recognized amongst both scholars and practitioners, and the area is known to a legal and political quagmire. The amount of literature on the subject is therefore rather limited and understandably vague on specifics. This paper is therefore largely based on articles from career academics within the field of public international law as well as actual case law from the U.S., as it is the country where the majority of PMC-related lawsuits are settled.

[7] Kleineman (2013)

1.5 Disposition

This paper is divided into six chapters. Chapter 1 provides the reader with a brief introduction to both the paper as such as well as the concept of PMCs and their role in the 21st century. Chapter 2 dwells deeper into the challenges and obstacle relating to litigating PMCs. Chapter 3 and 4 lends additional information, discusses viable solutions to aforementioned challenges and obstacles as well as analyze how these solutions could be successfully implemented, respectively. Chapter 5 offers the reader a summary of the paper whilst chapter 6 contains the list of references used in writing this paper.

2. PMCs IN ARMED CONFLICT AND VIOLATIONS OF IHL

2.1 Differentiating between individuals and corporate entities

Victims of alleged violations of IHL has from time to time succeeded in pursuing legal means against state actors or single individuals acting as agents of states. One example of this can be found in the 2014 guilty verdict of four former PMC guards in the case of the infamous 2007 Nisur Square shooting that left 17 Iraqi civilians dead and four wounded. The four guards - all U.S. citizens - were sentenced in the U.S., under the statutes of U.S. domestic law for violations of IHL, committed whilst working overseas alongside U.S. forces in Iraq.[8]

The four guards were brought in front of a U.S. court – despite the fact that they were not members of the U.S armed forces – as they were regarded as subject to

[8] Sullivan (2019)

U.S. law per the nature of their employment as auxiliaries to the Department of Defense and the U.S. military in Iraq.[9]

The answer to the question as to why the quest for justice was not extended to the guards' employer – a PMC called Blackwater – can found in a bit of legal convenience; namely that corporations lack legal status under international law. This means that PMCs are in essence not liable on an organizational level for violations of international humanitarian law.[10]

2.2 Legal status of PMCs

This legal ambiguity is worrying enough on its own, and gets even more concerning seeing as the belligerents in new wars more and more has come to be comprised by PMC forces, carrying out a wide variety of duties both on and off the battlefield.[11]

What is interesting, however, is that individual PMC soldiers, i.e. the firm's employees, at any given point during an active operation are designated a specific legal status. This designatory process has proven essential to the regulatory process of PMC behavior in armed conflict.[12] Any discussion regarding accountability for violations of IHL by a PMC employee has to start off with the determination of that individual's legal status. These discussions are in turn naturally based around whether or not that individual PMC should be labeled as a mercenary, as being designated with mercenary status implies different rights and legal status for the designee, depending on the nature of the conflict and its belligerents.[13] This process of correctly and accurately designate a legal status to an actors in an armed conflict

[9] Grant (2018)
[10] White, MacLeod (2008), p. 986
[11] Singer (2004), pp. 522-523
[12] Cameron (2006), p. 574
[13] Cameron (2006), p. 578

that is suspected of an IHL violation is however not reprised when it comes to the PMCs corporate entities.

This status as non-legal entities omits corporations from being litigated, in essence preemptively absolving them from any wrongdoing. This means that they can act bolder and be more reckless than any other entity operating under the rules of jus in bello. If this is allowed to continue, state actors as well as private persons are likely to continue to rely extensively on PMCs as a mean to circumvent IHL whenever operational convenience so dictates.[14]

In his 2004 article, P.W. Singer alludes to a legal vacuum, or an undefined set of regulatory tools as the culprit when explaining the impossibility of designating legal statuses to PMCs.[15] There is, however, more to the problem.

2.3 IHL and the struggle of implementation and suppression

Their command structures, vast array of operational capabilities and line of work naturally places PMCs in the international arena as major players in any armed conflict where they are involved, and beyond simply being a supplier of personnel, they could well be said to represent quasi-state actors.[16] The fact that actors as powerful as this are omitted from being held to account for violations of IHL is a major liability for the world's confidence in the international community and its ability to hold bad actors to account for their actions.

However, this omission is not due to bad legislation or lack of regulatory instrument. Instead, the problem lies in the inability to implement the provisions of IHL in an effective manner and in the lack of suppressive means available.

[14] Ageli (2016), pp. 28-29
[15] Singer (2004), p. 521
[16] Singer (2004), p. 532

Regulatory instruments such as the *Montreux Document* and the implementation of suppressive means through domestic courts are good examples of possible actions that could be taken to combat the problems laid out in this paper. As will be discussed further below, more often than not it is not legal obstacles but the lack of political will that accounts for much of the lackluster regulatory and suppressive action.[17]

2.4 The Montreux Document

The best example of a regulatory instrument targeted at these issues is the Montreux Document. The brainchild of the Swiss government and the ICRC, the Montreux Document sets out to reaffirm states' obligations under IHL as it synthesizes legal obligations and customary law into a set of good practices for national implementation of said law.[18] Most notably, the Document's statements 5, 11, 16, and 20 focuses on the state-specific obligation to hold PMCs personnel accountable, whilst statement 7 explains that the conduct of PMCs, in certain circumstances, are attributable to the state that initiated the employ of said PMC. In these scenarios, the state must assume responsibility for any wrongdoing on the part of the PMC.

However, the Montreux Document also acknowledges the practical difficulties with accountability and suppression, as statement 7 of the document declares that "such circumstances are the exception, rather than the rule, since states are generally speaking not responsible for the acts and omissions of private companies[...]."[19]

Statement 22 of the document elaborates further on the topic of accountability for corporations, and especially PMCs:[20]

[17] Kolb (2015), p. 196
[18] The Montreux Document (2008), p. 5
[19] The Montreux Document (2008), p. 35
[20] The Montreux Document (2008), p. 35

“*As companies, PMCs per se are not bound to respect international humanitarian law, which is binding only to parties to a conflict and individuals, not corporate entities. Nor are PMCs directly bound by human rights law, which is only binding on states.*”

Statement 22 continues:[21]

“[I]nsofar as those bodies of law are integrated into national law and made applicable to companies, PMCs are nonetheless obliged to uphold them. The same holds true [...] for all national law [...] and of course for any specific regulations om PMCs that might be in place”

Here, the Montreux Document acknowledges not only the legitimacy of IHL, but also the issues with accountability and suppression inherent in its application on PMC violations by suggesting that the implementation of IHL statutes into national law in such a fashion so that they also targets corporations would indeed make the provisions of IHL equals to those of other national legislation targeting corporations and their actions.

2.5 National implementation of international law

2.5.1 Domestic courts

The pursuit for effective means of suppression following IHL violations – unattainable at the international level – has led the issue to be pushed down to the national level. This means that domestic courts are expected to handle complex, transnational issues involving international law in relation to an alleged violation that could have taken place somewhere where the court has little, if any, investigatory possibilities and viable evidence is hard to secure.

[21] The Montreux Document (2008), p. 35

In his 2004 article in the Columbia Journal of Transnational Law, P.W. Singer lays out three major problems with this process of referring responsibility to the national level:

1. **The organizational structures of PMCs**

   PMCs have a unique ability to transform themselves in order to circumvent legislation and prosecution.[22] Executive Outcomes, a South Africa-based PMC, was in the 1990s asked if they were concerned by the country beginning to strengthen the legislation surrounding PMCs. The founder, Eden Barlow, simply explained that he was not, telling reporters: "three other African countries have offered us a home and a big European group has even proposed buying us." PMCs can also simply take on a new corporate structure or name when they are legally challenged,[23] as demonstrated by the notorious PMC Blackwater when they recently became Academi.

2. **Risk for violations of the non-intervention principle**

   One of the great risks with applying domestic legal regimes to international problems stems from the extraterritorial nature of such enforcement, which means that the applying state runs the risk of violating the other state's sovereignty by inserting their own national law and jurisdiction outside of the home country.[24] Take for example Blackwater's immunity in Iraq, which they gained from the Iraqi government post-invasion. Even if another state would have had an interest in pursuing legal action against Blackwater, they would have found domestic Iraqi legal institutions not able to do anything about it - either forcing the to-be prosecuting state to drop all ideas of legally challenging Blackwater, or forcing them to violate the non-intervention principle.

3. **The lack of PMC-specific domestic legislation**

[22] Singer (2004), p. 535
[23] Singer (2004), p. 535
[24] E.g., United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990)

The vast majority of domestic laws across the globe either ignores matters relating to PMCs entirely or defers them to the international level,[25] thus very successfully creating a somewhat infuriating catch-22 situation.

2.5.2 U.S. tort litigation

It should be noted that out of the two avenues available under most states' domestic law, neither criminal or civil litigation has lacked an abundance of legal, procedural, political or practical obstacles.[26] There is, however, an example of a domestic legal system that has proven to be more useful in litigating PMCs for IHL violations, and that is the U.S. tort litigation system. In the U.S., tortious liability may be established for any act that causes damage and any victim can single-handedly file a claim without having to depend on a prosecutor to take up their case, circumventing many of the political obstacles and somewhat leveling the playing field.[27]

As to what makes the U.S. tort system unique, there are two major pieces of legislation that is worthy of further investigation; the *Alien Tort Claims Act* – shortened as ACTA – which is serves as the basis upon which cases can be put in front of a U.S. judge by a foreign victim[28], and the *Federal Tort Claims Act* - or FTCA for short - which is a unique piece of legislation that enables tort suits to be aimed directly against the federal government, something that up to the point of the law's inception was impossible.

2.5.2.1 The ACTA

[25] Singer (2004), p. 536
[26] Ryngaert (2008), p. 1052
[27] Ryngaert (2008), p. 1053
[28] Ryngaert (2008), p. 1036

The ACTA has increasingly been used by victims of corporate activities overseas.[29] There is no reason why victims of PMC abuses abroad could not also use this legislation for the same purpose, since U.S. federal courts has considered such claims to be viable.[30]

The ACTA has one very unique provisions that makes it ideal for victims of PMC abuses, namely that it enables non-US citizens to enter a lawsuit as a plaintiff in order to pursue reparations for violations that has not taken place inside of the United States.[31] However, not unlike the situation on the international level, procedural and substantive issues riddles the litigation process when private individuals bring tort litigation against PMCs.

Still, the ACTA provides potentially viable roads to litigation that most other domestic legal systems lack. For example, it could be said that whilst corporations do not directly bear duties under international law, and thus cannot be held responsible under the ACTA, some violations may rise to the level of peremptory norms, which are binding for any actor per Section 1 of the ACTA. And while the often-complicated corporate structure of the PMC might allow for some evading of responsibility, the ACTA opens up avenues for litigation of parent corporations in the home state, as stated in section 2 of the ACTA

Also, whilst doctrines relating to judicially constraint – particularly immunity for government contractors – may indeed prove to be daunting tasks to overcome for any party pursuing successful litigation, per sections 5 and 6 of the ACTA, the fact that a PMC is working on behalf of the U.S. government alone is not to be equated to uniquely federal interests being at stake, as will be elaborated on below.[32]

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[29] E.g. Londis, "The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence", 57 Maine Law Review, (2005). 141
[30] Dickinson, "Contract as a tool for Regulationg Private Military Companies", Chesterman and Lehnardtm supra note 1. 217, 236
[31] Ryngaert (2008), p. 1037
[32] Ryngaert (2008), p. 1037

2.5.2.2 The FTCA

The FTCA authorizes plaintiffs to bring civil lawsuits against the United States federal government 1) for money damages, 2) for injury to or loss of property, or personal injury or death caused by a federal employee's negligent or wrongful act or omission while acting within the scope of his office or employment, and 3) under circumstances where the United States, if a private person, would be liable to the plaintiff in accordance with the law of the place where the act or omission occurred. As such, the FTCA is a vehicle for individuals that have been victimized by wrongful government actions to seek compensation.[33]

However, whilst the FTCA only authorizes tort lawsuits against the United States itself – and as a result shields federal employees from personal liability[34] – it does enable victims of PMC abuses to hold to account any PMCs that operates on behalf of the U.S. government.

2.6 Military exceptions and the FTCA

Within the FTCA there are several exceptions to the general rule of liability for the U.S. federal government. This paper, however, will focus on only one: The *Combatant Activities Exception*, U.S.C. § 2680(j).

The Combat Activities Exception preserves state immunity for the U.S. government in relation to any claim arising from the combatant activities of the military or naval forces, or the Coast Guard, during a time of war. This exception is cited in a number of landmark tort cases lodged against the United States as a reason for dismissal of the plaintiff's claims.[35]

[33] Lewis (2019), p. 5
[34] Lewis (2019), p. 7
[35] *Inter alia,* Boyle v. United Techs Corp

One of these cases is Boyle v. United Tech's Corp, wherein the defendant was not in fact part of the regular U.S. armed forces, but a military contractor. The ruling in this case came down in favor of the defendant and related to the death of a U.S. Marine helicopter copilot who drowned due to an alleged defect escape hatch design. The case hinged on whether or not the error could be attributed to the defendant directly or if indeed the PMC had manufactured the escape hatch - it being faulty notwithstanding - in accordance to instructions provided by their contract with the Federal Government, thus freeing the defendant from any wrongdoing.[36]

The judgement in this case has since been revisited many times in subsequent trials and serves as the basis for the judgement in a case that is of specific interest in relation to the litigation of PMCs, namely Ibrahim v. TitanCorp.

In this case, the defendant was accused of having aided in torture as well as other war crimes during their time at the infamous Abu Ghraid prison where they served alongside regular U.S. forces.[37]

2.7 Legal reasoning in Ibrahim v. TitanCorp and the political aspect of prosecuting PMCs

Leaning against the precedent rendered in Boyle v. United Tech's Corp., the judge in Ibrahim v. TitanCorp explained that for state law to be preempted by federal law, two things had to be at hand: 1) uniquely federal interests had to be at stake, and 2)

[36] Boyle v. United Techs Corp. (1988), section I
[37] Ibrahim v. TitanCorp (2007), memorandum & Saleh v. TitanCorp (2009), memorandum

the application of state law would produce a significant conflict with federal policies.[38]

The federal interest was in this case embodied by the aforementioned Combat Activities Exception, which prompted the judge to argue that a special test had to be conducted to determine whether any preemptive action taken by the court would commensurate with any and all federal interests relating to the case. By referencing the military's need to function properly over its enemies' possibility to call individual service members into account - as stated in the Combat Activities Exception - the PMC was cleared of any wrongdoing.[39]

In Ibrahim v. TitanCorp, it is clear how a private company managed to utilize a legal provision designed to give the federal government some leeway when conducting military operations overseas. This argument was successful because the U.S. military claimed that they regarded the PMC units accused of wrongdoing as integrated into their own ranks to such a degree that they were to be seen as being under the direct control of U.S. military command structures, and as such should be included in the aforementioned exception, thus drawing attention to the political sensitivity of the situation.

2.8 Politics and corporations' legal status

In their article *EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility*, White and MacLeod notes that whilst there are no specific reasons why corporations would be exempt from accountability under international law, the law itself has yet to develop to a level where it recognizes the corporate responsibility of PMCs for violations of IHL.[40]

[38] Ibrahim v. TitanCorp (2007), subsection B, Legal Framework paragraph 1
[39] Ibrahim v. TitanCorp (2007), subsection B, Legal Framework paragraph 5-8
[40] White, MacLeod (2008), p. 967

The relatively slow development of this particular area of international law could justifiably be ascribed to political reasons. Within international law states acts as both the legislator and the enforcer, making it possible for states to avoid suppression for certain violations when the political fallout from doing so presents itself as too daunting.

However, beyond the scope of who holds political sway over whom, it is axiomatic that subject status under international law – as it was originally intended – was solely bestowed upon states that met the criteria for statehood in the Montevideo Convention.[41] When making this distinction, the most important criteria within the Montevideo Convention was set out to be the exercise of sovereign power, which is something that other non-states claimants for international status cannot replicate.[42]

Although recent years has seen a shift away from this hardline stance to a more lenient approach, where international organizations are now being accepted on the international plane, corporations still remain excluded. An international legal personality for corporations is on the way, however. Despite cases like Saleh v. TitanCorp, wherein the court brushed aside the argument that Titan – a corporation hired by the U.S. government – acted under color of law, and thus could incur direct liability under international law on equal terms with an individual or a state actor,[43] international law – such as the *Reparations Case* of 1949 - continuously builds a plethora of prejudicing case law for ultimately moving towards corporations being accepted as subjects of international law with associated rights and duties.[44]

[41] White, MacLeod (2008), p. 967
[42] White, MacLeod (2008), p. 968
[43] Saleh v. TitanCorp., 436 F Supp. 2d 55, 58 (DDC 2006) (holding that 'there is no middle ground between private action and government action, at least for purposes of the Alien Tort Statute').
[44] White, MacLeod (2008), p. 968

In summary, the law itself does not bear the bulk of responsibility for corporations being exempt from accountability. Instead, the legal status of corporations and the possibility for suppression under IHL does.[45]

3. DISCUSSION

3.1. Amending the shortcomings of IHL

In his book *Advanced Introduction to International Humanitarian Law*, Robert Kolb argues that the main reason as to why IHL does not work as intended lies in its implementation.[46] According to Kolb, the problem can be divided into three subcategories; 1) *prevention*, 2) *control*, and 3) *suppression*. For this particular paper, we only have to concern ourselves with number 3: suppression.[47]

The notion of suppression entails all possible actions that can be taken *ipso facto,* after the fact, i.e. once a violation of IHL has been committed. These violations are usually classified into *simple violations* and *grave violations*, i.e. war crimes. Once this is done, the matter of legal consequences for the perpetrator can be brought forward.[48] Here, IHL further separates individual criminal responsibility from states' civil responsibility, meaning that the law differentiates between violations adherent only to the actions of an individual and those that can be attributable to a state.[49]

IHL does not, however, provide any guidelines for attributing violations to corporate entities. To understand this shortcoming, Kolb focuses, *inter alia,* on the political aspect of the system and how the overall lackluster guidelines for judicial

[45] White, MacLeod (2008), p. 968
[46] Kolb (2015), p. 187
[47] Kolb (2015), p. 194
[48] Kolb (2015), p. 195
[49] Kolb (2015), p. 195

implementation of means of suppression within IHL has come to place that power almost entirely in the hands of political strife. This has led to a situation where there are close to no predicating case law to fall back on, which has left the suppression process by and large up to political players whom are all but free to make agreements and create *inter partes* law amongst themselves.[50]

This dysfunctional relationship between the law, its implementation, and suppression of violations thereof suits PMCs very well. This is mostly due to the fact that a majority of PMCs operates on behalf of state actors and often enjoys partial protection by the hiring state.[51] If State A, for example, employs a PMC to conduct a series of sensitive mission as a protection-detail for a high value asset, and the PMC whilst carrying out that mission violates any statue of IHL, it is self-evident why State A would be very unwilling to seek legal action against said PMC.

3.2 Holding corporations to account for violations of IHL

3.2.1 Implementation of international judiciary bodies

In his 2008 article in the European Journal of International Law, Cedric Ryngaert makes a case for the establishing of extraterritorial courts in the conflict zone itself to better combat PMC violations. The UK for example, deploys something called Standing Civilian Courts along with its armed forces abroad.[52]
These courts already have the capacity to bring before them any civilian who is employed in the service of any relevant body of the forces or any part or member thereof, or accompanies the said body or any part thereof.[53] The Standing Civilian Court, however, does not have the jurisdiction over the prosecution of human rights abuses, nor does it have the capacity to prosecute corporate entities. The Standing

[50] Kolb (2015), p. 196
[51] Percy (2006), p. 9
[52] Ryngaert (2008), p. 1047
[53] Ryngaert (2008), p. 1047

Civilian Court is evidence of a functioning extraterritorial court, and albeit it not being aimed at targeting PMCs violations of IHL, it could very well be used as a model for just that.

Singer similarly argues in favor of the establishment of international judicial bodies. In his 2004 article in the Columbia Journal of Transnational Law, Singer contends that the right for states to defend themselves – as established in Article 51 of the UN Charter – provides states with an array of unspecified measures to protect themselves from attack.[54] As this freedom rules out any real opportunity to outlaw PMCs, or in any other way prohibit their employ with states, any attempt along those lines would more likely be in contravention with the provisions of the UN Charter. Singer therefore proposes the establishment of an international body that would fall under auspices the UN Secretary General's Special Rapporteur on Mercenarism.[55] The duties of this body or office would - according to Singer – be to audit PMCs, thus making them a sanctioned business much akin to other pre-approved companies that are allowed to work for the UN in non-military capacities.[56] This would enable for an official review of any contracts between a PMC and a hiring party, creating a hindrance for PMCs to go to work for especially unsavory clients with agendas that would be contrarian to public good and in violation with IHL.[57]

3.2.2. Implementation of IHL into domestic law

The vast majority of the world's courts of law are housed in the national level, so maybe the failure of IHL to establish legal status and proper accountability for corporations are conversely best remedied there too? After all, since we concluded above that the major problem with accountability is related to the means of

[54] Singer (2004), p. 544
[55] Singer (2004), p. 545
[56] Singer (2004), p. 545
[57] Singer (2004), p. 546

suppression, – or lack thereof – there is value in looking into regulation issues relating to IHL at a national level, since we know that national courts are comfortable with the issue of suppression.

However, deferring the issue of determining PMCs legal status and the suppression of IHL violations to the national level comes with three fundamental problems.[58]

The first problem stems from the organizational form of the standardized PMC. As global businesses with small infrastructure, PMCs have the ability to transform in order to escape prosecution, something that is also commonly done.[59] PMCs are also notable shape-shifters, meaning that they are prone to take on a new corporate structure or name as soon as they are legally challenged on a corporate level.[60]

The second problem arises when national courts becomes embattled in the extraterritorial nature of suppression that often arises in cases involving PMCs and their operations.[61] As most PMC operations takes place in weak or even failing states, where the means of the state in which the PMC operated at the time the violation was allegedly committed are usually too wherewithal or outright inadequate to either monitor nor prosecute the PMC, any true means of suppression usually has to be extraterritorial.[62] Apart from the obvious issues relating to such a practice, issues gathering evidence among others, there is also the added dimension of neo-colonial criticism and the potential violations of state sovereignty.[63]

The third and final problem is ironically the exact opposite to the one encountered at the international level; namely that the vast majority of national laws and ordinances either ignore the issues surrounding PMCs, defers the matter to the

[58] Singer (2004), p. 534
[59] Singer (2004), p. 535
[60] Singer (2004), p. 535
[61] Singer (2004), p. 535
[62] Singer (2004), p. 535
[63] United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990)

international level, or fails entirely in both defining and regulating the industry.[64] This may result in a situation where a violation under international law due to the lack of legislative initiative in the PMCs home state per default falls under the jurisdiction of the host state, which in turn might be unable or unwilling to prosecute for reasons stated above.

3.2.3 Forcing states and contracting parties to agree on IHL provisions prima facie

If the most notable flaw of IHL is the negligence of corporations' legal status, the runner-up would most certainly have to be the process of determining which exact reiteration of human rights law that should apply to each unique case. In her 2006 article, Lindsey Cameron argues that it would be of great value to have states ensure that any PMCs registered in or operating out of their jurisdiction would be trained in IHL.[65]

Furthermore, a minimum standard should be established for what could be expected in the way of regard for IHL on the part of a PMC operating in a conflict zone. Cameron argues the importance of reaching a clear understanding of which laws and legal standards that should be applied in the regulatory process in order to improve the monitoring process and the chance of holding PMCs to account for their actions.[66]

Cameron highlights the importance of states to hold these corporations to account, as the establishment of international legal instruments and costumery law is a lengthy process that – even if more in-depth laws are adopted in the end – will eventually lead back to the inevitable conclusion that the success of failure of any such legal regime will depend on the possibility of effective means of suppression.

[64] Singer (2004), p. 537
[65] Cameron (2006), p. 597
[66] Cameron (2006), p. 597

Grounding the means of suppression on the national level reduces the risk for accountability to be lost in the haze of jurisdictional process.

4. ANALYSIS

4.3 Viable solutions

Since the reason for corporations being exempt from accountability is twofold, with one part being political and one legal, there is not going to be one simple solution to amend the situation.

The political fix has to combat to possibility for states to shield PMCs through loopholes in national law that allows for corporations to be exempt from accountability, like the Combat Activities Exception in the U.S, whilst the legal fix has to address corporations' legal status, jurisdiction and issues relating to suppression of violations of IHL.

4.3.1 Self-regulation

As discussed by Cameron in her 2006 article, a successful increase in accountability for PMCs through suppression for violation of IHL would by all indications most likely stem from self-regulatory actions, built on an international code of minimum human rights obligations and undertaken by the PMCs themselves when entering into agreements with a contracting party.[67]

Such a system, built on self-regulation, would be able to establish a contractual relationship between PMC and the contracting party, ideally a state actor, which

[67] Cameron (2006), p. 597

would instill a mutual understanding of – and agreement on – the provisions of IHL that needs to be respected by the PMC whilst carrying out their duties on behalf of their employer. Furthermore, an arrangement like this would mean that any breaches of IHL would, in addition to a violation of international public law, also constitute a contractual violation, thus opening the PMC up for civil litigation in national courts, where the possibilities for successfully holding the violating party to account at least theoretically should be increased.

4.2.2 Direct state responsibility

If PMCs cannot effectively self-regulate, the next level of regulatory action would have to originate from the national level. The major issues with relying on national courts to regulate international actors and violations of international law are – as previously stated – those relating to jurisdiction and suppression. In this regard, most states lack sufficient PMC-specific regulation, which more often than not forces domestic courts to refer the any case involving PMCs and alleged violations of IHL back to the international level where – as we now know – there is no legal body capable of addressing these needs for a judicial process.

4.2.3 Accountability through criminal or civil procedure

If neither the PMCs themselves, or the states in which they are registered and/or operate cannot effectively regulate and control the actions and consequences of PMC operations, the next alternative remedy is to try and push litigation through the national systems of criminal or civil procedure. However, when relying on national courts to regulate international actors and violations of international law, it reveals the difficulty of handling issues of jurisdiction and suppression relating to alleged violations of non-domestic law that originates from an overseas territory.

4.2.3.1 The U.S. tort litigation system

There are, however, ways to work around this problem. To illustrate one such way, this paper focused on the relative success of plaintiffs in the U.S. tort litigation system. This focus on the U.S. is warranted as much of the international concern over PMCs originates from the absence of sufficient U.S. accountability[68] in areas combatting PMC violations of IHL. The U.S. system of tort litigation is nevertheless a good starting point to use as a framework of reference for other countries in their pursuit of viable transnational litigation of PMCs.[69]

Ibrahim v. TitanCorp illustrates well the sheer complexity of litigating PMCs through civil procedure. However, the mere existence of these cases shows that the notion of PMCs as untouchable entities under international law increasingly is being dispelled with. However, it is generally accepted that if a violation such as the one depicted in Ibrahim v. TitanCorp arises to a jus cogens violation or a violation of a peremptory norm on international law, corporations may indeed incur direct responsibility under international law.[70] This reasoning implies that the ACTA potentially may only be actionable in cases of jus cogens violations.

4.2.4 International regulatory forces

The issues previously raised regarding jurisdictional concerns over state sovereignty when judiciary bodies in a PMCs home state wants to litigate alleged violations in the host state could be eased if international law authorized, or even obliged, states to exercise jurisdiction over particularly offences.[71] For grave breaches of the Geneva Conventions where the perpetrator is an individual, there are rules in place that state how said perpetrator should either be prosecuted by the

[68] Ryngaert (2008), p. 1036
[69] Ryngaert (2008), p. 1036
[70] Ryngaert (2008), p. 1038
[71] Ryngaert (2008), p. 1041

host state or extradited. As state practices adherent to this *aut dedere aut judicare* obligation is uneven, to say the least, the question arises as whether there are some comparable regulations aimed at the PMCs themselves, as opposed to only their employees.[72]

Normally, the state on whose territory the PMC abuse has occurred will not protest against the home state's judiciary stepping in and handling the prosecution over the alleged violation, but relocating the authorization – and perhaps even the actual prosecution – to an extraterritorial body could well ease many of the legal and political concerns adherent to these processes.

To this end, the potential establishment of extraterritorial courts by the PMCs home state and/or host state could mean a reduction of both evidentiary and jurisdictional problem.[73] Those positively inclined to the idea cites the UK Standing Civilian Court as both an example of where extraterritorial courts has worked as well as a potential framework for a similar construct aimed specifically at litigating PMC violations. The most common argument in favor of the practice are the increased chance for swift and accurate justice, as the courts would be located much closer to the crime scene.[74] On a more negative note, critics of the practice claims that extraterritorial courts are nothing more than western colonialism made anew, and that these courts would not have much of an impact anyway since some states – the U.S. among others – does not allow for individual citizens to be tried by such courts due to constitutional due process guarantees.[75]

[72] Ryngaert (2008), p. 1041
[73] Ryngaert (2008), p. 1048
[74] Ryngaert (2008), p. 1048
[75] Ryngaert (2008), p. 1048

5. CONCLUSION

To amend the problems with accountability for PMCs both the political aspect and the legal aspect must be considered. The possibility for states to shield PMCs through exceptions in national law must be limited to a bare minimum. Alas, this is no easy task as what has to be balanced against the individual's right to seek reparations for violations of IHL is matters of often dire importance to the state. The legal matters that has to be addressed concerns corporations' legal status, jurisdiction and issues relating to suppression of violations of IHL. Here, corporations' status under international law must be equated to that of states and international organizations, clear jurisdictional lines must be drawn, and extraterritorial courts implemented if possible.

Improvements along these lines should be able to aid in the suppression of PMC violations as there will be less of a legal grey area for these corporations to hide in and a much more clearly defined system of accountability to administrate means of suppression with increased legitimacy.

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