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Guns for Hire

A Study of The Possibilities of Attributing
Unlawful Conduct of PMSCs to a Hiring State
under International Law

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Contents

SUMMARY	1
SAMMANFATTNING	2
ABBREVIATIONS	3
1 INTRODUCTION	4
1.1 Background	4
1.2 Purpose and Research Questions	5
1.3 Perspective, Methodology and Material	5
1.4 Delimitations.....	6
1.5 Previous Research.....	6
1.6 Structure	7
2 DEFINING PMSCS	8
2.1 Terminology.....	8
2.2 Relevant Characteristics of PMSCs	8
3 THE LAW ON ATTRIBUTION	10
3.1 State Organs and Entities Exercising Governmental Authority	11
3.1.1 Article 4.....	11
3.1.2 Article 5.....	13
3.1.3 A Note on Article 7.....	15
3.2 Groups That Are Instructed, Directed or Under the Control of a State	15
3.2.1 The ‘instruction’ and ‘direction’ criteria.....	16
3.2.2 The ‘control’ criteria	17
4 CASE STUDIES	21
4.1 Executive Outcomes in Sierra Leone	21
4.2 Blackwater Shooting at Nisour Square	22
5 ANALYSIS AND CONCLUSION	24
5.1 Analysis	24
5.2 Conclusion.....	26
BIBLIOGRAPHY	27

Summary

The aim of the thesis is to present the possibilities of attributing the unlawful conduct of a Private Military and Security Company (PMSC) to a hiring State. It focuses on relevant provisions of the ILC Draft Articles on State Responsibility (ARSIWA) as the main legal framework on State responsibility. The thesis also presents the relevant characteristics of PMSCs that contribute to the assessment of these entities under the law of attribution.

A legal dogmatic method is employed to examine how the relevant Articles of ARSIWA should be interpreted and how they subsequently apply to PMSCs. The thesis adopts an international perspective throughout. The interpretation of the legal framework on State attribution is based on the secondary sources of law – case law and legal literature – which have been used extensively in the thesis.

The lack of monitoring and transparency prevailing in PMSCs makes it difficult to draw far-reaching conclusions that may apply universally for all PMSCs. This also seems to be the reason why, despite relatively extensive research on the subject, no specific regulation of PMSC has yet been introduced in international law. The possibility to attribute PMSCs violations of international law to a hiring State is a beneficial starting point to prevent the risk of impunity. The thesis found that while different provisions of ARSIWA may be applicable to PMSCs under varying circumstances, the most relevant Articles applicable to these entities are Articles 5 and 8 ARSIWA. The definition of ‘elements of governmental authority’ and the suitable test for degree of control have been the main point of discussion. Claims that there are ‘gaps’ in the legal framework is not entirely accurate. The thesis concluded that there are uncertainties regarding certain provisions of ARSIWA in relation to PMSCs that causes inefficient assessments.

Sammanfattning

Syftet med uppsatsen är att presentera möjligheter att hänföra en PMSCs (Private Military and Security Company) överträdelser av internationell rätt till en anlitande Stat. Uppsatsen fokuserar på relevanta bestämmelser i ARSIWA som det huvudsakliga rättsliga ramverket för statsansvar. Uppsatsen presenterar även definitionen av PMSCs och relevanta egenskaper rörande dess arbetsätt och organisation.

En rättsdogmatisk metod tillämpas för att undersöka hur de relevanta artiklarna i ARSIWA bör tolkas och tillämpas på PMSCs. I den löpande analysen presenteras både *de lege lata* samt förs en normativ diskussion *de lege feranda*. Tolkningen av ramverket för statsansvar baseras på de sekundära rättskällorna praxis och doktrin, och som därmed haft omfattande tillämpning i uppsatsen.

Bristen på övervakning och transparens som råder inom PMSCs gör det svårt att dra långtgående slutsatser som kan tillämpas universellt på alla dessa typer av entiteter. Trots relativt omfattande forskning på ämnet verkar denna brist på insyn vara en av orsakerna till att någon specifik reglering av PMSCs ännu inte uppstått på den internationella rättens område. Möjligheten att hänföra PMSCs överträdelser av internationell rätt till en anlitande stat är en fördelaktig utgångspunkt för att förhindra risken straffrihet för stater. Uppsatsen fann att de mest relevanta artiklarna i relation till PMSCs är Artiklarna 5 och 8 i ARSIWA. Till skillnad från viss tidigare forskning, visar uppsatsen att det inte är helt korrekt att påstå att det finns ”luckor” i det rättsliga ramverket. I stället dras slutsatsen att det råder viss osäkerhet kring tillämpningen av vissa bestämmelser i ARSIWA till PMSCs, vilket leder till ineffektiva bedömningar.

Abbreviations

API	Additional Protocol I to the Geneva Conventions
ARSIWA	ILC Draft Articles on State Responsibility
GCs, GC IV	Geneva Conventions, Geneva Convention IV
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal of former Yugoslavia
IHL	International humanitarian law
ILC	International Law Commission
PCIJ	Permanent Court of International Justice
PMF	Private Military Firm
PMSC	Private Military and Security Company
UN	United Nations
UNGA	United Nations General Assembly

1 Introduction

1.1 Background

Although the process of hiring private forces in times of war is not a new phenomenon, the last two decades have witnessed an increase in the employment of Private Military and Security Companies (PMSCs) participating in areas of conflict.¹ The most recent example of this is the PMSC Wagner. After the full-scale Russian invasion of Ukraine in February 2022, the role of the Wagner group in the war and its affiliations with the Russian Federation has become a main point of scrutiny in both news outlets and international law forums.² Although there exists no comprehensive evidence of PMSCs being more likely to behave unlawfully, the increased use and employment of PMSCs reinforces the importance of addressing certain legal aspects concerning these entities. Violations of international law may engage both individual criminal responsibility and State responsibility, however, to hold a State accountable for the actions of persons or groups requires some form of attribution to that State.³ State attribution has most notably been addressed in the *Nicaragua*⁴, *Tadić*⁵ and *Bosnia Genocide*⁶ cases, however, there seems to be discrepancies regarding the interpretation of the legal framework. The difficulties in affirming the status of PMSCs affect the possibilities of attribution which may lead to a perception that such entities are able to operate outside the scope of international law.⁷

¹ The Montreux Document (2009), p. 5; Moyakine (2015), p. 47; Tonkin (2011), p. 1–5.

² Kim (2022), What is the Wagner group? *The New York Times*; UN Regional Information Centre for Western Europe (2022). The UN and the war in Ukraine: Key information. *United Nations*. 9 March 2022.

³ Article 2(a) ARSIWA.

⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Judgment), ICJ Reports 1986, p. 14 [cit. *Military and Paramilitary Activities in and against Nicaragua*].

⁵ *Prosecutor v. Duško Tadić* (Judgment in Sentencing Appeals), ICTY, 2000 [cit. *Prosecutor v. Duško Tadić*].

⁶ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)* (Judgment), ICJ Reports 1996 p. 595 [cit. *Bosnia Genocide*].

⁷ Moyakine (2015), p. 2; Jones (2009), p. 241.

1.2 Purpose and Research Questions

The purpose of the thesis is to present legal possibilities of attributing internationally unlawful acts committed by a PMSC to its hiring State under the rules of international law. The thesis focuses on the requirements for attribution according to relevant provisions in Article 4, 5 and 8 of ILC Draft Articles on State Responsibility (ARSIWA). The research question to be answered by the thesis is:

What are the legal possibilities for attributing the unlawful conduct of a PMSC to a hiring State under Articles 4, 5 and 8 ARSIWA?

1.3 Perspective, Methodology and Material

The thesis employs a legal dogmatic method to determine *de lege lata* (the law as it is). The continuous analysis of the thesis also engages in a normative discussion *de lege feranda* (the law as it ought to be). In accordance, the continuous analysis of the thesis is presented with an international and developmental perspective.

The legal dogmatic method involves reconstructing a legal rule by examining how this rule should be understood in a specific context. This analyzation and systematization of legal questions involves studying the main sources of law.⁸ The main sources of international law are treaties, customary international law, and general principles.⁹ The subsidiary means for determining international law constitutes of previous judgments of the Courts and the teachings of highly qualified publicists.¹⁰ Although this list is not exhaustive nor hierarchical, it provides guidance in identifying applicable rules of international law.¹¹ The thesis studies the ILC Draft Articles on State responsibility (ARSIWA) as the main legal framework on State responsibility. ARSIWA is also considered to be a codification of customary

⁸ Kleineman (2013) in Nääv and Zamboni (eds.), p. 21; 25–26.

⁹ Article 38 ICJ Statute.

¹⁰ Article 38 ICJ Statute.

¹¹ Crawford & Pert (2020), p. 37.

international law.¹² Guidance and interpretations of the law on State responsibility have been gathered from commentaries issued by the International Law Commission (ILC). Additionally, the thesis relies extensively on case law and scholarly literature to present various perspectives and legal arguments regarding State responsibility for the conduct of PMSCs under international law.

1.4 Delimitations

To engage State responsibility for violations of international law, Article 2 ARSIWA expresses the requirement of both attributability and the existence of a breach of an international obligation.¹³ The evaluation of State attributability should be established first¹⁴ and the thesis excludes an examination of the existence of a breach of an international obligation.

The context of the thesis does not include neither situations of States placing a PMSC at the disposal of another State, nor the of absence of governments or the establishment of a new Government or State by the PMSC. Accordingly, the thesis excludes the examination of Articles 6, 9 and 10 ARSIWA. Article 11 ARSIWA has been excluded due to space limitations.

1.5 Previous Research

The increased occurrences of States hiring PMSCs to participate in conflicts has led to a growing number of scholars taking an interest in examining these entities in different areas of international law. There exists a deficit of rules regulating private entities that operate on an international level. In addition to scholars, the UN Human Rights Council has also recognized¹⁵ that there are gaps in legislation at both an international and national level regulating the activities of PMSCs. Authors and experts agree that the study of PMSCs

¹² Crawford (2013), p. 43.

¹³ Article 2 ARSIWA.

¹⁴ *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Judgment), ICJ Reports 1980 p. 3, para. 29.

¹⁵ UN Human Rights Council (2011), UN Doc. A/HRC/WG.10/1/2.

under international law is a timely subject that requires further reflection and perspective.

1.6 Structure

The thesis will commence with a definition of the concept of ‘Private Military and Security Company’ (PMSC) and the relevant traits of such entities for the assessment of applicable international law. Subsequently, the purpose and function of the law of attribution according to ARSIWA will be presented. The thesis will proceed with a continuous analysis of the relevant Articles on attribution and the possibilities of applying the provisions on PMSCs. Two case studies will be presented as part of the final exposition of the thesis. The thesis concludes with a short analysis and final conclusions on the content presented in the thesis continuous analysis.

2 Defining PMSCs

2.1 Terminology

The nature and functions of PMSCs complicates the establishment of a general definition for these entities.¹⁶ Peter W. Singer uses the term ‘private military firms’ (PMFs), which he defines as ‘corporate bodies that specialize in the provision of military skills – including tactical combat operations, strategic planning, intelligence gathering and analysis, operational support, troop training, and military and technical assistance’.¹⁷ Singer employs his ‘Tip-of-the-Spear Typology’ to categorize PMFs based on the tasks and operations they perform. The typology acknowledges three distinct categories. Firstly, Military Provider Firms are PMFs that partake in tactical combat, usually consisting of combat troops, commanders, or specialists.¹⁸ Secondly, Military Consultant Firms offer services consisting of ‘strategic, operational and/or organizational analysis’.¹⁹ They may provide training and advice on military structure and operations. Thirdly, Military Support Firms offer non-lethal military services including transportation, logistics and supply, but also technical support and intelligence. Singer expresses it as ‘secondary tasks not part of the overall core mission of the client’.²⁰

Several authors and organizations have in more recent publications adopted the term PMSC to address the entities described by Singer. For this reason, the thesis employs the term PMSCs which should be understood as a term encompassing all three categories established by Singer.

2.2 Relevant Characteristics of PMSCs

Tonkin recognizes two main traits possessed by most PMSCs causing issues with evaluating these entities under international law.²¹ Firstly, hiring States

¹⁶ Moyakine (2015), p. 78–79.

¹⁷ Singer (2003), p. 8.

¹⁸ Singer (2003), p. 92.

¹⁹ Singer (2003), p. 95.

²⁰ Singer (2003), p. 97.

²¹ Tonkin (2011), p. 23–28.

experience an increasing lack of control over the PMSCs activities. The ‘screening, selection and training’ of personnel are at the hands of the PMSC. Intricate relations between individual contractors and PMSCs cause further issues for the hiring State with maintaining control.²² Secondly, there is a general lack of transparency regarding the internal organization and operations of PMSCs. As Tonkin expresses, transparency is vital for providing information to both citizens and governments allowing for them to take adequate action. This affects the States capacity of effectively monitoring and overseeing the conduct of the PMSCs.²³

²² Tonkin (2011), p. 23–24.

²³ Tonkin (2011), p. 27–28.

3 The Law on Attribution

The ILC adopted the Articles on State Responsibility (ARSIWA) at its fifty-third session in 2001.²⁴ Although the Articles have not yet been concluded in a treaty, they are considered as codifications of customary international law, thereby constituting the main legal framework on State responsibility in international law which courts and tribunals apply extensively.²⁵

The ARSIWA provides secondary rules in international law seeking to address general issues regarding State responsibility.²⁶ Article 1 ARSIWA states that States are responsible for every internationally wrongful act committed by it.²⁷ An internationally wrongful act, according to Article 2 ARSIWA, is every conduct consisting of an action or omission which is (a) attributable to that State and which (b) constitutes a breach of an international obligation of that State.²⁸

Chapter II of the first part of ARSIWA provides a universally applicable set of rules for what constitutes an act that is attributable to the State. These rules correspond to the requirement in Article 2(a) ARSIWA and must be met to engage the responsibility of a State for breaches of international law. The element of attribution in State responsibility has been described as the ‘subjective’ element.²⁹ Attributability is established through assessing whether specific unlawful conduct of an individual or group can be determined as being the actions of the State itself. The ILC Commentaries on ARSIWA expresses that although the State is a legal person and an organized entity, the acts of the State, naturally, will always be the result of an act by a human being or group.³⁰ The Articles 4, 5 and 8 ARSIWA enable State attribution for the acts of State organs, or through determining legal, functional, and factual links between persons or a group and the State.

²⁴ Crawford (2013), p. 41–42.

²⁵ Crawford (2013), p. 43.

²⁶ ILC Commentaries, general commentary para. 1.

²⁷ Article 1 ARSIWA.

²⁸ Article 2 ARSIWA.

²⁹ ILC Commentaries on Article 2 ARSIWA, para. 3.

³⁰ ILC Commentaries on Article 2 ARSIWA, para. 5.

3.1 State Organs and Entities Exercising Governmental Authority

3.1.1 Article 4

As expressed by the PCIJ in the advisory opinion in *German settlers in Poland*, the State can only act ‘by and through their agents and representatives’³¹. Article 4 holds that all acts committed by organs of the State is attributable to that State, expressing the most general form of responsibility for the State under ARSIWA. It is not limited to a set group of governmental authorities and is meant to be applicable on all organs of State.³²

It may be of interest to examine whether the personnel of a PMSC constitute parts of the State armed forces.³³ The same examination can be done both in the context of an IAC and NIAC as the assessment is narrowed down to the requirements laid down in Article 43 AP I.³⁴ The status of the PMSC personnel as higher or lower does not affect State attribution, which would mean that a temporary membership of the personnel in the States armed forces does not preclude attributability.³⁵ A States armed forces consists of all military personnel *under a command that is responsible* to a Party to the conflict.³⁶ It is common for PMSCs to be organized with their own chain of command and disciplinary systems and therefore operate outside the command of the armed force of States.³⁷ A States possibility of establishing effective ways of supervising and monitoring the conduct of the PMSCs may also be lacking.³⁸

³¹ *German Settlers in Poland* (Advisory Opinion), PCIJ Series B No. 6, para. 22.

³² ILC Commentaries on Article 4 ARSIWA, paras. 6–7.

³³ Moyakine (2015), p. 229–231; Jones (2009), p. 262–263; University Centre for International Humanitarian Law (2005), *Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions*.

³⁴ Vierucci (2011), p. 247.

³⁵ ILC Commentaries on Article 4 ARSIWA, para. 7.

³⁶ Article 43 AP I.

³⁷ The Montreux Document (2009), p. 36.

³⁸ Moyakine (2015), p. 175.

Regarding militias and other volunteer groups, an *incorporation* of the group into the States armed forces is required.³⁹ The requirement of incorporation of a PMSC into the States armed forces ultimately poses the biggest challenge to establish a relationship of complete dependence between the PMSC and the State. This is based on the view that States hire PMSCs with the purpose of ‘outsourcing’ military power because they are unwilling to claim the same responsibility they hold for the conduct of the regular armed forces. By simply omitting to formally incorporate a PMSC into the regular armed forces according to domestic law, a State evades the possibility of engaging attributability under the Article 4 ARSIWA. However, authors have discussed the possibility of determining certain circumstances that support the existence of an ‘informal incorporation’ of PMSCs into the States armed forces. Cameron and Chetail claim that a sole contract between a PMSC and a State generally is not sufficient to claim an incorporation of a PMSC into the State armed forces⁴⁰, as has also been confirmed in the Montreux Document⁴¹. There are however two circumstances which the authors claim may have the effect of incorporation. The first instance may be if the domestic law of the State provides that a contract shall have the effect of incorporation, such as that the employment of persons into the armed forces of the State shall be done on the basis of such a contract. Secondly, if the PMSC personnel are labelled as members of the armed forces (or any other State organ) in the content of the contract itself, this may give the contract the effect of incorporation.⁴²

A State organ *de jure* requires that the entity is complicit with the domestic laws of the State and that the official capacity of the entity is expressed in those laws. This is a product of the right of States to produce its own laws in accordance with the principle of State sovereignty. Under Article 4 ARSIWA, international law recognizes the national definition of ‘State organ’ and will

³⁹ Article 43 AP I; University Centre for International Humanitarian Law (2005), *Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions*, p. 14.

⁴⁰ Cameron & Chetail (2013), p. 138–140.

⁴¹ The Montreux Document (2009), p. 7.

⁴² Cameron & Chetail (2013), p. 139.

grant this definition legal effect in the assessment of attributability.⁴³ The main trait that PMSCs act in the capacity of a private corporation with a distinct legal personality separate from the State, indicates that they cannot qualify as State organs *de jure*.⁴⁴ This is clearly also true for PMSCs that are expressly illegal in the domestic laws of the State. However, a State cannot evade responsibility by simply invoking its national laws. Attributability of the acts of *de facto* State organs to the State is based on a close relationship of *complete dependence* between the entity and the State. In the *Bosnia Genocide* case, the ICJ expressed this as looking beyond the legal status of the group to determine a factual relationship between a group and the State.⁴⁵ The *de facto* organ should merely be an instrument of which the States acts through.⁴⁶

3.1.2 Article 5

Entities that do not constitute an organ of the State, but which is empowered by the domestic law of the State to exercise elements of governmental authority fall under the provision of Article 5 ARSIWA. The term ‘entity’ entails, *inter alia*, public corporations, semi-public entities, public agencies, and private companies, as long as the entity is authorized by domestic law to exercise some form of governmental authority.⁴⁷ This indicates that the relevant criterion for attribution under Article 5 is the nature of the PMSCs actions, not the fact that it is a private corporation. The motive of this provision is to prevent States from evading responsibility by outsourcing its functions to a private corporation, a motive also acknowledged by the ILC.⁴⁸ Only acts regarding governmental authority are covered by the Article, not personal or commercial acts.⁴⁹ The decisive criterion for the attribution of

⁴³ Cameron & Chetail (2013), p. 137.

⁴⁴ Moyakine (2015), p. 231.

⁴⁵ *Bosnia Genocide*, para. 391.

⁴⁶ *Bosnia Genocide*, para. 391.

⁴⁷ ILC Commentaries on Article 5 ARSIWA, para. 2.

⁴⁸ Lehnardt (2007) in Lehnardt and Chesterman (eds.), p. 17; ILC Commentaries on Article 5 ARSIWA, para. 1.

⁴⁹ ILC Commentaries on Article 5 ARSIWA, para. 5.

PMSCs under Article 5 ARSIWA are ‘empowerment’ and ‘governmental authority’.⁵⁰

Article 5 ARSIWA gives no explanation as to the definition of ‘governmental authority’. The ILC Commentaries explains that the notion may vary between States due to differences in its history, traditions, and societal structures.⁵¹ A test that may be of guidance in establishing whether an entity exercises elements of governmental authority was suggested by the Tribunal in the *Maffezini v. Spain* arbitration.⁵² Firstly, one must examine the States control or level of ownership of the corporation, which immediately will be difficult to establish for a PMSC with no State ownership. However, the Tribunal also expressed that this requirement is not decisive; it is also necessary to examine whether the corporation performs functions that are ‘essentially’ State functions.⁵³ This notion of ‘essential’ State functions was reiterated in the ILC Commentaries, as functions which the State normally carries out itself.⁵⁴ The Commentaries also gives a number of examples of functions that would involve the exercise of governmental authority, such as PMSCs contracted to act as prison guards, powers of police, detention and discipline and immigration control.⁵⁵ As expressed at the Expert Meeting on Private Military Contractors, this list is ‘neither a definition of what constitutes an intrinsic State function nor an exhaustive list’.⁵⁶ In situations of armed conflict, several experts in the Expert Meeting on Private Military Contractors agreed that obligations outlined in the GCs involve various activities, many of which are considered military functions. These military functions constitute elements of governmental authority as defined in Article 5 ARSIWA. However, some obligations in the GCs does not constitute elements of governmental

⁵⁰ ILC Commentaries on Article 5 ARSIWA, paras. 3; 6.

⁵¹ ILC Commentaries on Article 5 ARSIWA, para. 6.

⁵² International Centre for Settlement of Investment Disputes (ICSID), *Emilio Agustín Maffezini v. The Kingdom of Spain*, Decision on Jurisdiction (English Translation), ICSID Case No. ARB/97/7, 25 January 2000, p. 31–33 [cit. *Maffezini v. Spain*].

⁵³ *Maffezini v. Spain*, p. 31–33.

⁵⁴ ILC (1974), UN Doc. A/9610/Rev.1, 282, para. 18.

⁵⁵ ILC Commentaries on Article 5 ARSIWA, para. 2.

⁵⁶ University Centre for International Humanitarian Law (2005), *Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions*, p. 16.

authority: the experts agreed on excluding duties found in GC IV ‘relative to the protection of persons’.⁵⁷

A strict interpretation of the requirement of empowerment holds that States domestic legislation must expressly allow the State to delegate governmental authority to PMSCs to hold the State responsible for the acts committed by the PMSC.⁵⁸ However, this would also implicate that States could outsource governmental tasks to a PMSC, then evade responsibility for all conduct by the group by omitting to regulate the outsourcing in domestic law. By introducing a broader interpretation of ‘domestic law’, it is possible to include also other forms of empowerment from the State onto a PMSC.⁵⁹ Crawford agrees with this notion; he interprets the expression of ‘empowered by the law of that State’ placing focus on the specific delegation of the State rather than the legality under domestic law.⁶⁰ The requirement of empowerment would thereby be met when, for example, the authorization is carried out through a contract or license issued by the hiring State.⁶¹

3.1.3 A Note on Article 7

Article 7 ARSIWA enables the attribution of acts by organs of the State and entities exercising elements of governmental control also for *ultra vires* and personal acts, i.e. when such entities commit unlawful acts contrary to State instructions or when the acts are carried out outside the authority of this entity.⁶² This entails that if a PMSC successfully qualifies under Article 4 or 5 ARSIWA, even acts as described under Article 7 ARSIWA committed by the PMSC will be attributable to the State.

3.2 Groups That Are Instructed, Directed or Under the Control of a State

⁵⁷ University Centre for International Humanitarian Law (2005), *Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions*, p. 18–19.

⁵⁸ Moyakine (2015), p. 241.

⁵⁹ Moyakine (2015), p. 241; Jones (2009), p. 268.

⁶⁰ Crawford (2013), p. 129–130.

⁶¹ Jones (2009), p. 268.

⁶² ILC Commentaries on Chapter II ARSIWA, para. 8.

Entities that do not fall under the provisions of Article 4 or 5 ARSIWA may engage attributability as non-State actors under Article 8 ARSIWA. The Article focuses on the factual relationship between the conduct of the PMSC and the State under three circumstances; if the PMSC is acting under the State's instruction, direction, or control.⁶³ In courts and tribunals, the latter two have repeatedly been interpreted as one cohesive requirement, but the Commentaries state that the provision should be interpreted as consisting of three separate, non-cumulative criteria.⁶⁴ In all three cases, there must be a connection between the unlawful act committed by the group and the measure taken by the State.⁶⁵

3.2.1 The 'instruction' and 'direction' criteria

The ILC Commentaries expressively states that the purpose of the Article is to enable attribution of acts committed by private groups to the State who do not form, for example, the States armed forces but are employed and instructed by it to act as 'auxiliaries' in a particular operation.⁶⁶ The assessment of a States direction or instructions to a PMSC are relatively clear because it requires a demonstration of explicit directions or instructions. Relevant circumstances can easily be identified through providing sufficient evidence of such specific instructions issued by the State; two examples may be incorporating instructions into the contract between the State and the PMSC, or else issuing instructions during the ongoing operation. The States instructions must be given specifically to each operation where violations occur – it is not sufficient that the State generally oversees the overall actions of the individuals or groups involved in the violations.⁶⁷ The States direction of a PMSC is linked to the existence of an actual subordinate relationship between the State and a PMSC; the ILC Commentaries holds that a factual relationship must be determined between the two parties for attributability.⁶⁸

⁶³ ILC Commentaries on Article 8 ARSIWA, para. 1.

⁶⁴ ILC Commentaries on Article 8 ARSIWA, para. 7.

⁶⁵ ILC Commentaries on Article 8 ARSIWA, para. 7.

⁶⁶ ILC Commentaries on Article 8 ARSIWA, para. 2; Crawford (2013), p. 145–146.

⁶⁷ *Bosnia Genocide*, para. 208.

⁶⁸ ILC Commentaries on Article 8 ARSIWA, para. 1.

It becomes clear that instructions issued by a State to a PMSC directing it to commit unlawful acts will engage the responsibility of that State.⁶⁹ The question arises whether States can also be responsible for acts committed outside the scope of given lawful instructions; more specifically, what consequences arise when the PMSC executes an unlawful act while carrying out a lawful instruction? The ILC Commentaries provides that an evaluation can be done of whether the unlawful conduct connected to a lawful instruction is *incidental* or if it *clearly goes beyond* the lawful instruction.⁷⁰ An incidental misconduct that achieves the goals of the mission of a lawful instruction can be attributed to the State. Accordingly, attribution is not possible if the misconduct of the PMSC clearly goes beyond the lawful instruction that was issued by the State.

3.2.2 The ‘control’ criteria

For the assessment of a PMSC acting under the control of a State, it must be determined that the unlawful conduct of the group was controlled by the State, and the conduct must form an integral part of the specific operation.⁷¹ In contrast to the ‘instruction’ and ‘direction’ criteria, unlawful acts committed by PMSCs going against the lawful instruction of a State can still engage attribution if the State exercises control over the group.⁷² The question of what degree of control is required has been addressed extensively in case law.

3.2.2.1 The *Nicaragua* case

In the *Nicaragua* case from 1986⁷³, Nicaragua invoked the State responsibility of the US for violations committed by the *contras* by reason of the relationship between the group and the US.⁷⁴ The ICJ considered the *contras* alleged breaches of IHL within their specific operations as attributable to the US under Article 8 ARSIWA. The Court found that

⁶⁹ ILC Commentaries on Article 8 ARSIWA, para. 7.

⁷⁰ ILC Commentaries on Article 8 ARSIWA, para. 8.

⁷¹ ILC Commentaries on Article 8 ARSIWA, para. 3.

⁷² ILC Commentaries on Article 8 ARSIWA, para. 8.

⁷³ *Military and Paramilitary Activities in and against Nicaragua*, para. 106.

⁷⁴ *Military and Paramilitary Activities in and against Nicaragua*, para. 114.

regarding these operations, the US had exercised only general control over the group:

United States participation, even if preponderant or decisive, in the *financing, organising, training, supplying, and equipping* of the *contras*, the *selection of its military or paramilitary targets*, and the *planning* of the whole of its operation, is still insufficient in itself.⁷⁵ (emphasis added)

Through this statement the Court established the requirement of ‘effective control’. The Court’s reasoning was largely based on its view that the violations of IHL were not committed under such direction and enforcement by the US that it could be established that the *contras* were unable to commit the acts without the control of the US. A State needs to exercise ‘effective control’ over every operation (involving the misconduct) executed by the PMSC.

To meet the ‘effective’ requirement, the degree of control exercised over a PMSC must be more extensive than ‘general’. Although the Court did not exclusively explain how to establish the degree of ‘effective’, some guidance may be found in the Court’s reasoning regarding the attribution of the acts committed by the Unilaterally Controlled Latino Assets (UCLAs). The UCLAs had carried out the task of executing attacks on several targets in Nicaragua, while US military personnel had ‘*participated in the planning, direction, support, and execution* of the operations’ (emphasis added).⁷⁶ Authors agree⁷⁷ that States providing this ‘practical support’ to a misconduct committed by a non-State actor when carrying out a specific operation could constitute such ‘effective control’. An adequate degree of State oversight and monitoring of a PMSC must be made possible for providing effective control.⁷⁸ Therefore, a contractual agreement between a PMSC and a State cannot solely constitute the sufficient level of control as required under Article 8 ARSIWA.⁷⁹

⁷⁵ *Military and Paramilitary Activities in and against Nicaragua*, para. 64.

⁷⁶ *Military and Paramilitary Activities in and against Nicaragua*, para. 86.

⁷⁷ Crawford (2013), 259; Cameron & Chetail (2013), p. 213.

⁷⁸ Lehnardt (2007) in Lehnardt and Chesterman (eds.), p. 150.

⁷⁹ Lehnardt (2007) in Lehnardt and Chesterman (eds.), p. 150.

3.2.2.2 The *Tadić* case

The ICTY was an international criminal tribunal established by the UN with the purpose of prosecuting perpetrators of war crimes committed during the Yugoslav Wars. The question of State responsibility did not constitute a main task for the ICTY in its capacity as a criminal tribunal, however, in the *Tadić* case the notion of ‘control’ was addressed in the process of establishing the Courts jurisdiction by distinguishing an IAC and a NIAC.⁸⁰

The Appeals Chamber expressed that the ‘effective control’ test applied in the *Nicaragua* case was contrary to the ‘logic’ of the law on State responsibility.⁸¹ It argued that the purpose of attributability under the Article 8 ARSIWA is to prevent States from evading responsibility by claiming that individuals exercising governmental authority do not constitute an organ of that State. The level of control exercised by the State may vary depending on the facts of the case at hand.⁸² The Appeals Chamber claimed that a non-organized group required specific instructions from the State to engage State responsibility, whereas for ‘organized and hierarchically structured groups’, only the requirement of ‘overall control’ was necessary.⁸³ Therefore, the Chamber claimed, sufficient control exists when a State ‘has a role in organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group’.⁸⁴

Judges of the *Tadić*-case reasoned that an application of the higher threshold of the ‘effective control’ test was deemed ineffective and contrary to the purpose of the rules of attribution.⁸⁵ Judge Shahabuddeen criticized this reasoning in a Separate Opinion. He argued that the *Nicaragua* case addressed purely the question of State responsibility, while the question addressed in the *Tadić* case was whether the Federal Republic of Yugoslavia was using force

⁸⁰ *Prosecutor v. Duško Tadić* (Judgment in Sentencing Appeals), para. 578.

⁸¹ *Prosecutor v. Duško Tadić* (Judgment in Sentencing Appeals), para. 121.

⁸² *Prosecutor v. Duško Tadić* (Judgment in Sentencing Appeals), paras. 108–109.

⁸³ *Prosecutor v. Duško Tadić* (Judgment in Sentencing Appeals), para. 109.

⁸⁴ *Prosecutor v. Duško Tadić* (Judgment in Sentencing Appeals), para. 119.

⁸⁵ *Prosecutor v. Duško Tadić* (Separate Opinion of Judge Shahabuddeen), paras. 123–136.

through the Army of Republika Srpska against Bosnia-Herzegovina.⁸⁶ Accordingly, the question of the use of force through a non-State entity by a State is not equal to the question of State responsibility for violations of IHL, and therefore assessment of these two questions cannot be carried out in the same way.⁸⁷

3.2.2.3 The *Bosnia Genocide* case

The case regarded the attribution of acts of genocide committed in Srebrenica to the State of Serbia-Montenegro. The ICJ rejected the earlier notion of ‘overall control’ established in the *Tadić* case. The Court claimed that the arguments of the ICTY were unpersuasive since the jurisdiction of the tribunal only extended to individual criminal responsibility and the ‘overall control’ test was in that case applied in the context of establishing an IAC.⁸⁸ It claimed that when resolving two issues that are different in nature, the same test will not be applicable.⁸⁹

⁸⁶ *Prosecutor v. Duško Tadić* (Separate Opinion of Judge Shahabuddeen), para. 17.

⁸⁷ *Prosecutor v. Duško Tadić* (Separate Opinion of Judge Shahabuddeen), para. 18.

⁸⁸ *Bosnia Genocide*, para. 403.

⁸⁹ *Bosnia Genocide*, para. 405.

4 Case Studies

4.1 Executive Outcomes in Sierra Leone

Executive Outcomes (EO) is a PMSC that signed a one-year contract with the government of Sierra Leone in April 1995 to aid in the fight against the rebel Revolutionary United Front (RUF) forces. The contract hired EO to train and advise the governments military (NPRC), however, it was reported that the group also conducted combat operations.⁹⁰ Singer holds that EO is the one of the clearest examples of a military provider firm.⁹¹ The initial operation of the EO to clear the capital of Sierra Leone resulted in several hundred fatalities and over 1 000 desertions on the RUF.⁹² The EO continued its fight against the rebel group, driving it out of the Kono mining area and destroying its jungle stronghold. The operations culminated through the governments signing of a peace agreement on the condition that the contract with the EO be terminated sooner than agreed.

As a private corporation, EO was a separate legal entity from the State and could thereby not constitute a *de jure* organ of Sierra Leone. It had not through any internal law officially been incorporated as part of the armed forces of Sierra Leone.⁹³ Regarding the structural and functional traits of the EO, no capital of the corporation was owned by Sierra Leone. The UK government also voiced concerns that the NPRC seemed to be under the control of EO, raising doubts around the actual degree of control exercised by the government over EO.⁹⁴ The ‘overt and sustained’ direct combat involvement of the group would constitute a clear example of governmental functions as established in case law, with the contract between the government and EO constituting an act of empowerment.⁹⁵

⁹⁰ Jones (2009), p. 275. *See also* Sam Kiley, Sierra Leone Faces Aid Cut Over Apartheid Soldiers, *TIMES* (U.K.), July 16, 1995.

⁹¹ Singer (2003), p. 111–113.

⁹² Singer (2003), p. 113.

⁹³ Jones (2009), p. 274.

⁹⁴ Jones (2009), p. 275–276.

⁹⁵ Jones (2009), p. 275–276.

4.2 Blackwater Shooting at Nisour Square

During the invasion of Iraq by the US and UK in 2004, the Blackwater Security Consulting (now Constellis) was contracted by the US Department of State to provide security services.⁹⁶ After receiving reports of an explosion at Nisour square, Blackwater team Raven 23 took positions with the task of protecting another Blackwater team escorting a US embassy convoy. Shots were fired when Raven 23 incorrectly perceived an approaching vehicle as an offensive attack, resulting in the death of 17 Iraqi civilians and another 20 being left injured. There were no apparent instructions given by the US Department of State as the hiring entity to Blackwater Security Consulting to engage in the unlawful acts. Neither does there exist any evidence that the US had authorized any instructions or directed the PMSC to initiate the shooting.⁹⁷ The question remains of whether the US as a State exercised a certain degree of control over the group and its operation, which would engage State attributability. During the conflict in Iraq, there has been a vast amount of PMSCs employed in the country, most of which worked in coordination with the US forces, but lacked a relationship of ‘command and control’.⁹⁸ Only PMSCs entering the installations of the US military were obliged to follow the authority of its commanders.⁹⁹ Although it is clear that the US did not exercise ‘effective control’ over the Raven 23 team, the organized and hierarchically structured nature of the Blackwater corporation may indicate that the test of ‘overall control’ may be effective. This requires that the US participated in the organizing, coordinating, or planning of Blackwater operations while also financing, training, equipping, and providing other forms of operational support.¹⁰⁰ The lack of sufficient information available to the general public surrounding the contractual agreement between Blackwater and the US government makes it difficult to completely prove whether the US had financed, equipped and trained the

⁹⁶ Moyakine (2015), p. 277.

⁹⁷ Moyakine (2015), p. 277.

⁹⁸ US Government Accountability Office (2005), *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers*, p. 20–21.

⁹⁹ Moyakine (2015), p. 279; US Government Accountability Office (2005), *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers*, p. 21.

¹⁰⁰ *Prosecutor v. Duško Tadić* (Judgment in Sentencing Appeals), para. 119.

Blackwater group and, more specifically, the Raven 23 team. In some cases, the US may have had a role in the organizing, coordinating, and planning of Blackwater operations, and that the US in those instances may have had ‘overall control’ over the group. However, the factual circumstances of the Nisour shooting indicates that the Raven 23 team acted on its own initiative at Nisour square without any prior organization, coordination, or planning by the US.

5 Analysis and Conclusion

5.1 Analysis

The thesis has examined the possibilities of attributing breaches of international law committed by PMSCs to the hiring State under the provisions of ARSIWA. The presented Articles are applicable under varying circumstances and impose different requirements on PMSCs to engage attribution to the hiring State. Article 4 ARSIWA imposes a high threshold on the factual circumstances regarding the relationship between the PMSCs and the hiring State. The thesis shows that the notion of ‘State organ’ has a close connection to the State’s apparatus and its legal system. Both formal and informal incorporation into the armed forces of the State requires, on the most basic level, a willingness from the State to take on the responsibility of the conduct of the PMSC. When considering the relatively unique aspect of Article 4 being that international law gives actual legal effect to a State’s own definition of ‘State organ’, it becomes clear that determining a PMSC as such cannot be done without the State itself having already granted, or else being prepared to grant it, this status.

Attribution under Article 5 ARSIWA has its advantages as it shifts the focus from the PMSCs in their capacity as a private entity and instead focuses on the nature of its actions. The thesis has shown that the broader interpretation of ‘empowerment’ would be more realistic for PMSCs. Regarding ‘governmental authority’, it is far from unreasonable to conclude that several military functions exercised in armed conflict may constitute an exercising of governmental authority. This was also demonstrated in the case study of EO in Sierra Leone. Despite the lack of consensus in international law on the definition of ‘governmental authority’, the task becomes relatively uncomplicated through assessing PMSCs on a case-by-case basis. By studying the history, traditions and societal structures of the hiring State and comparing to the functions carried out by the PMSC, one should have the ability to conclude whether the PMSC can qualify under Article 5 ARSIWA as exercising elements of governmental authority. States must implement the

required measures to ensure that the hired PMSCs exercise these elements of governmental authority in compliance with international law to avoid unlawful conduct. To what extent States are willing to, for example, establish new ways of supervising PMSCs is an open question as it entails considerable costs.

Although the ‘effective control’ test seems to have been the preferable theory regarding attributability under Article 8 ARSIWA in earlier case law, the question remains whether the threshold of ‘effective’ is the most suitable for PMSCs. It may be argued that the ICJs rejection of the ‘overall control’ test was unpersuasive because it was based solely on the authority of the Court, while neglecting to prove that the degree of ‘effective’ constituted customary international law through State practice and *opinion juris*. The ICTYs distinction between unorganized and organized and hierarchically structured groups clearly illustrated that the required degree of control may vary according to different factual circumstances, something which the ICJ failed to address. Such varying circumstances may in themselves indicate that there is a close relationship between the State and the PMSC. Alleged acts of genocide would be an example of this as it requires a form of unity and common goal, and in such cases, the threshold of the ‘effective control’ test may be considered too high.

The two tests required to engage attributability under Article 8 ARSIWA advocate different, but equally important, principles of international law. As the ICTY argued, too strict requirements may not comply with the purpose and functions of the law on attribution. It increases the risk of impunity of States for breaches of international obligations by allowing for an ‘outsourcing’ of State functions, which would undermine the regulatory framework of ARSIWA. It should be noted that this view is a more pragmatic one of international law from the perspective of *de lege feranda*. Providing a possibility of a lower threshold of control regarding PMSCs would be favourable also when considering the difficulties faced by States in establishing effective means of monitoring and supervising of PMSCs. However, lowering the bar for attribution may have negative implications on

the principle of State sovereignty in international law. The high threshold for the sufficient degree of control according to the *Nicaragua* test assures legal certainty in international law while upholding the essential principle of State sovereignty. The extensive requirements assure that only the evident cases will engage State responsibility under international law.

The thesis suggests that there are possibilities of attributing PMSCs to States, and therefore the view of some scholars that there are ‘gaps’ in the legal framework is not entirely true. While it is important that the law on attribution takes account of the complicated organisational properties of entities such as PMSCs, it ultimately seems there is an inefficiency in the application of the law on State attribution is ineffective rather than an absence of applicable rules. The UN Human Rights Councils draft on a convention regarding PMSCs shows a step in a promising direction as this would aid in clarifying the definitions and legal situation surrounding PMSCs while encouraging the international community to take responsibility for these entities. It must be taken into account that the feasibility of such a convention is based on the willingness of the States according to the basic principle of State consent in international law.

5.2 Conclusion

In international law, impunity for States for unlawful acts committed by PMSCs should be prevented. In conclusion, and as an answer to the research question, it is possible to attribute PMSCs' unlawful acts to hiring States under the provisions of ARSIWA, with the Articles 5 and 8 allowing for the most relevant evaluations. However, the assessment of attribution as it stands right now is ineffective. The thesis shows that two of the reasons for this is the ambiguity and complexity that prevails when assessing PMSCs under the provisions of ARSIWA. Through further study of the PMSCs and clarification and developments in this area of international law, the attribution of PMSCs to hiring States will become more effective.

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