

Article

# Determining the Status of Private Military Companies under International Law: A Quest to Solve Accountability Issues in Armed Conflicts

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Abstract

Private Military Companies are one of the newest non-state actors in the international scene operating around the globe in different situations as private entities carrying out public works. But their role and responsibility is unknown in international law. To hold them accountable for any violation of legal rules during armed conflicts it is essential to determine their legal status under international law. In the absence of their recognition as a distinctive category of persons under international humanitarian law, inferences could be drawn by reference to other defined categories of persons, namely, combatants, mercenaries and civilians. Based on such inferences the present article examines accountability related issues for any contravention, by civilian-contractors, during armed conflicts.

## Introduction

Private Military Companies (PMCs) are those entities who provide armed security services as private business activity for profit.<sup>1</sup> They are one of the newest armed non-state parties operating in unstable states and conflict situations coming from an unusual source of private sectors as opposed to the traditional source of military personnel from public sectors like government or state owned armed forces in inter-state or intra-state conflicts.<sup>2</sup> This new species of actors and their activities are neither

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<sup>1</sup> The terms 'civilian-contractors' and 'mercenaries' are often used as synonyms to Private Military Companies, but these terms indicate three different things though overlapping with one another. PMCs indicate private corporate entities that have natural persons under its disposal for being contracted for security services. Civilian-contractor is a generic term to refer any individual, either from PMCs or any other private source, engaged in hostilities or providing logistical support in armed conflicts for profit. Mercenaries indicate only those who engage in hostilities for private gain without being part of the armed forces of a party to the conflict. These terms are clearly elaborated under section 2 of this article.

<sup>2</sup> Lindsey Cameron, 'Private Military Companies: Their Status under International Humanitarian Law and its Impact on their Regulation', *International Review of the Red Cross* 2006-863, p. 573.

uniform nor regulated directly by the existing rules of international law. They engage in all kinds of activities starting from combating to guarding and protection, detention and interrogation, technical and intelligence assistance, and so on ensuring their presence in pre, during and post conflict situations. Their involvement is perceived both in armed as well as non-armed conflicts and their usage becomes unavoidable in times of war as well as peace in the contemporary international scenario.<sup>3</sup>

Since the end of cold war the usage of Private Military Companies are increased day by day.<sup>4</sup> Even international organizations like the United Nations uses PMCs for its peacekeeping operations followed by different regional organizations including the European Union. PMCs are multifaceted, complex and operating around the globe in different situations as private entities carrying out public works. However, this fact makes it difficult to determine the nature of PMCs and to bring them within the straight-jacket of international legal framework.<sup>5</sup> To confer rights or to hold them accountable for violation of legal rules, it is indispensable to determine their status under international law.

This article is structured as follows: section II deals with definitional aspects of mercenaries, combatants and civilians to determine whether PMC personnel fall under any of the defined categories of international humanitarian law. Section III analyses accountability related issues for PMC activities in armed conflicts. It majorly focuses on the following issues: Against whom responsibilities may lie—either against PMC or against the individual who committed the crime, or against the hiring state or the home state of the PMC and its personnel? What kind responsibility may arise, either civil, criminal or both? And how far PMC and its personnel are subjects of international law to be adjudicated before international courts and tribunals? Finally, section IV ends with concluding remarks.

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<sup>3</sup> For instance, during 2003 Iraq-United States armed conflict more than a hundred thousand PMC personnel were directly working for the United States Department of Defence for various purposes—including, running mess halls, constructing military bases, supply of armed guards for military bases, train soldiers at camp, providing bodyguard service to VIPs, etc. Similarly, during 2008-2009 the presence of civilian-contractors in Afghanistan represents more than half of the total American force present in the territory. Further, PMCs trained military personnel in the former Yugoslavia, built camps for displaced persons in Macedonia during the Kosovo conflict, actively engaged with the government of Angola and Sierra Leone to fight rebels when their own national forces had failed to stop war, and recently the US Central Intelligence Agency (CIA) engaged with PMC to work in South America in its war on drugs. See Cameron 2006, *supra* note 2. PMCs also provide security services for private corporations primarily oil and diamond industry in Africa.

<sup>4</sup> Scholars and critics argue that the post-cold war era witnessed a surge in the use of PMCs and privatized methods of waging wars. See Anna Leander, *Eroding State Authority? Private Military Companies and the Legitimate Use of Force*, Rome: Centro Militare di Studi Strategici 2006; Alyson J.K. Bailes, Keith Krause and Theodor H. Winkler, *The Shifting Face of Violence*, Geneva: Geneva Centre for the Democratic Control of Armed Forces 2007.

<sup>5</sup> Based on the nature of their activities, Singer classifies PMCs into three different groups, namely, (i) Military Provider Firms supplying direct tactical military assistance, (ii) Military Consulting Firms that provide strategic advice and training, and (iii) Military Support Firms that provides logistics, maintenance and intelligence service to armed forces. See Perter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, New York: Cornell University Press 2003.

## II. Definitional Aspects

Four Geneva Conventions and its Additional Protocols as well as the Hague Conventions recognise only three defined categories of persons—namely combatants, mercenaries and civilians—as subjects of international humanitarian law to confer rights or to impose responsibilities in relation to armed conflicts. The existing rules and principles do not recognise PMCs or its personnel as a distinctive category. However, inferences should be drawn from the definitional aspects of combatants, mercenaries and civilians, in order to determine the legal status of civilian-contractors in international law.

### II.1. Mercenaries

Mercenaries are hired soldiers or security personnel, who take part in hostilities merely for monetary or other material gain with no other substantial link to the conflict situation. They are neither combatants nor civilians but recognised as a distinctive category under international humanitarian law. Article 47 (2) of the Additional Protocol I to the Geneva Conventions 1977 defines mercenaries as follows:

A mercenary is any person who:

- a) is specially recruited locally or abroad in order *to fight in an armed conflict*;
- b) does, in fact, take a direct part in the hostilities;
- c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- e) is not a member of the armed forces of a Party to the conflict; and
- f) has not been sent by a state which is not a Party to the conflict on official duty as a member of its armed forces (emphasis added).

To be a mercenary a person must have been recruited to fight in an armed conflict and must have directly engaged in hostilities. They should neither be nationals nor members of armed forces of the Parties to the conflict; nor a member of armed forces of any third state. Though the provision seems to capture the essence of civilian-contractors and their activities within the ambit of mercenaries, it only partially does so. For instance, in accordance with sub-paragraph (a) and (b) mercenaries are only those who are “recruited... to fight in an armed conflict” and “does, in fact, take a direct part in the hostilities”. However, those who do not directly participate in hostilities will not be considered as mercenaries. In practice PMC personnel predominantly engage in logistical support services and for the purpose other than direct participation in hostilities, like, guarding prisoners, training military personnel, food supply, weapons management, and so on. If anything goes wrong in any of these non-hostile activities, civilian-contractors cannot be held accountable as mercenaries under the Additional Protocol I.

Apart from Additional Protocol-I two other international conventions specifically deal with mercenaries, namely, the UN Convention against the Recruitment, Use,

Financing and Training of Mercenaries 1989 and the OAU Convention for the Elimination of Mercenarism in Africa 1977. Both conventions define mercenaries in similar terms as defined in Article 47(2) of the Additional Protocol-I, but expand the definition by adding further terms. For example, Article 1 paragraph 2 of the UN Convention expands the definition by providing that:

A mercenary is also any person who, in any other situation:

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

The UN Convention covers also those persons who are recruited to overthrow a Government or to undermine the territorial integrity of a state within the meaning of mercenaries. Unlike Additional Protocol-I, the UN convention does not require “direct participation in hostilities” as condition precedent to determine the status of a person as mercenary. In accordance with the Convention, it is not the actual commission of the act but the purpose for which a person is recruited determines the status of a person as mercenary, even if he/she has not involved in the activity for which he/she was recruited. On the other hand, the OAU Convention defines mercenarism in addition to the definition of mercenaries. Article 1(2) of the Convention declares that:

The crime of mercenarism is committed by the individual, group or association, representative of a State or the State itself who with the aim of opposing by armed violence a process of self-determination stability or the territorial integrity of another State, practises any of the following acts:

- a) Shelters, organises, finances, assists, equips, trains, promotes, supports or in any manner employs bands of mercenaries;
- b) Enlists, enrolls or tries to enrol in the said bands;
- c) Allows the activities mentioned in paragraph (a) to be carried out in any territory under its jurisdiction or in any place under its control or affords facilities for transit, transport or other operations of the above mentioned forces.

The crime of mercenarism can be committed by any individual, group or state—when they engage with mercenaries in any manner with intention to disturb a self-determination process or the territorial integrity of a state by armed violence. In accordance with this definition, ‘mercenaries’ and ‘mercenarism’ are two different things unrelated with each other. Being part of mercenaries or any activities carried out by a mercenary does not constitute a crime of mercenarism, rather it constitutes a distinctive crime. Similarly, those who engage in the crime of mercenarism need not

necessarily be mercenaries. A mere reading of paragraph 3 of the Article makes this difference clear, where it provides that “[a]ny person, natural or *juridical* who commits the *crime of mercenarism*... commits an Offence considered as a crime against peace and security...” (emphasis added). As per the provision the crime of mercenarism can be committed even by a juridical person, but a juridical person cannot be a mercenary to physically engage in hostilities. The UN Convention on Mercenaries also supports this view by recognising two different crimes under two different provisions. On the one hand, Article 2 of the Convention declares that “[a]ny person who recruits, uses, finances or trains mercenaries... commits an offence for the purposes of the Convention” and thereby condemns the act of *mercenarism*. On the other hand, Article 3 condemns the act of being a *mercenary* by providing that “[a] mercenary... who participate directly in hostilities or in a concerted act of violence... commits an offence for the purpose of the Convention”. However, the OAU Convention on Mercenarism undermines this clear distinction and provides a confusing view under Article 4 that “[a] *mercenary is responsible both for the crime of mercenarism and all related offences*, without prejudice to any other offence for which he may be prosecuted” (emphasis added). How can a mercenary be criminally held accountable for mercenarism is unclear under the OAU Convention.

Recognising the difference between mercenaries and mercenarism plays a vital role in determining accountability issues in relation to PMCs and their activities in armed conflicts. For instance, Article 3 of the UN Convention condemns mercenaries only when they directly participate in hostilities or in a concerted act of violence. It is not an offence to be a mercenary. To the contrary, PMC as an entity could be held accountable for the crime of mercenarism under Article 2 for recruiting or training mercenaries.

It is pertinent to note that not all PMC personnel are mercenaries but only those who take direct part in hostilities without being part of armed forces of the parties to the conflict. Article 47(1) of the Additional Protocol-I deprives such persons “the right to be a combatant or a prisoner of war”, considering the shameful nature of mercenary activities. They are the only subjects under international humanitarian law without any legal protection. Once mercenaries are deprived the status of combatants and prisoner of war, they are liable for criminal prosecution even for those activities which are legal if they are done by combatants. For example, taking part in hostilities is perfectly legal for combatants but not for mercenaries. On the other hand, those who provide logistical support for armed forces may enjoy prisoner of war status. Similarly, once PMC personnel are incorporated into the armed forces of a Party to the conflict, then such civilian-contractors will be considered as combatants and not mercenaries. Being a mercenary itself is an offence but being a PMC personal is not an offence under humanitarian law. However, the concept of ‘mercenaries’ does not offer much to determine the status of private military companies.

## II.2. Combatants

Combatant is someone who is legally entitled to take direct part in hostilities during an armed conflict. The status of Combatant under international humanitarian law is determined in two ways, namely, (i) by reference to membership in the armed forces (Article 43 of the Additional Protocol-I); and (ii) by reference to members entitled for

prisoner of war status (Article 4 of the Geneva Convention (III) relative to the Treatment of Prisoners of War).

(i). Article 43 of the Additional Protocol-I defines the composition of the armed forces of a party to the conflict and declares that members of such armed forces are combatants. For instance, paragraph 2 of the Article provides that “[m]embers of the armed forces of a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants.. [and] they have the right to participate directly in hostilities” (emphasis added). The provision does not directly define combatants, rather by reference to members of the armed forces of a party to the conflict. Hence, the status of a combatant depends on his integration and membership in the armed forces of a party to the conflict. Paragraph 1 of Article 43 lists out the members of the armed forces who can be considered as combatants as follows:

The armed forces of a Party to a conflict consists of *all organized armed forces, groups and units* which are *under a command responsible* to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, ‘inter alia’, shall enforce *compliance with the rules of international law* applicable in armed conflict (emphasis added).

Further, Article 43(3) continues with the list that:

Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

However, any member of the organised armed forces or groups or units may be considered as combatant, if such armed group or unit is *under a command responsible* and *enforces compliance with the rules of international law*. In accordance with this provision, even civilians who are integrated into an armed organisation of a party become members of the armed forces and remain as combatants throughout the duration of the hostilities. Such a provision is wide in its ambit to cover not only the regular armed forces of a Party to the conflict but also the civilian-contractors who form part of such armed forces. However, the status of PMC personnel who engage in hostilities depends on their integration and incorporation into the regular armed forces of a party to the conflict.

(ii). Guidelines for determining the status of combatants could also be found in the Geneva Convention (III) relative to the Treatment of Prisoner of War 1949. The Convention majorly deals with prisoner of war status and not about conduct of hostilities. Hence, the status of combatant is not expressly defined under the Convention but impliedly included in Article 4A(1) and 4A(2) of the Convention while recognising the status of prisoner of war during armed conflicts. Article 4A(1) provides that prisoners of war include the following persons, if they fall into the power of the enemy:

*Members of the armed forces* of a Party to the conflict as well as *members of militias* or *volunteer corps* forming part of such armed forces (emphasis added).

By conferring prisoner of war status for members of the regular armed forces, the provision implicitly recognise such persons as combatants in armed conflicts. The status is also extended to the “members of militias [and] volunteer corps” implicitly recognising them as combatants—once they form part of the armed forces of a party to the conflict. Similar to the criteria discussed above under Article 43 of the Additional Protocol-I, Combatant status may be determined either by looking at the membership of the armed forces of a party to the conflict or by ascertaining whether an individual has been incorporated into a state’s armed forces according to the law of the state. It raises a question as to whether civilian-contractors who engage in hostilities could be classified as combatants if they are integrated or incorporated in to the armed forces of a party to the conflict.

On the other hand, Article 4A(2) of the Convention provides that combatant status may also be conferred on members of militia or voluntary force, who are not integrated or incorporated in to regular armed forces, but fulfils specific criteria as follows:

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- a) that of being commanded by a person responsible for his subordinates;
- b) that of having a fixed distinctive sign recognizable at a distance;
- c) that of carrying arms openly;
- d) that of conducting their operations in accordance with the laws and customs of war.

To determine the status of combatants mainly two things to be noted here: (i) the requirement of the first paragraph—i.e. the militia or other volunteer corps including resistance movements must “belong to a party to the conflict”, and (ii) the fulfilment of other four criteria—i.e., commanded by a person responsible for his subordinates, having a fixed distinctive sign, carrying arms openly, and conduct operations in accordance with laws and customs of war. However, when parties to the conflict engage civilian-contractors to fight on their behalf in hostilities, then such PMC personnel will easily be considered as combatants, provided they fulfil other four criteria mentioned above.

### II.3. Civilians

The *raison d'être* of humanitarian law itself is to protect civilians in armed conflicts and to mitigate the effects of war on civilians and civilian objects. The purpose is served majorly by making a distinction between civilians and civilian objects that cannot be the object of attack, on the one hand and combatants and military objects that can be the legitimate targets of attack, on the other. It is the fundamental duty of both the parties to an armed conflict to distinguish between combatants and civilians

while engage in hostilities. In this regard Article 50 of the Additional Protocol-I provides guidelines as to the determination of civilians as follows:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. *In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.*
2. ...
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character (emphasis added).

The provision does not directly define civilians, rather puts forth a negative definition that civilians are those individuals who do not fall under any categories of combatants recognised as such in Article 4A(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of the Additional Protocol-I. The ICRC Commentary on the Additional Protocols observes that “the Protocol adopted the only satisfactory solution, which is that of a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces or placed *hors de combat*”.<sup>6</sup> This exclusionary approach generates confusion in determining the status of civilians in armed conflicts. For instance, Article 47 of the Additional Protocol-I is not explicitly excluded in the above provision and hence it is possible that mercenaries may fall within the category of civilians.

The involvement of PMC personnel in armed conflicts further aggravates the situation in relation to the determination of the status of civilians. The nature of PMC personnel is not static under international humanitarian law - they can either be combatants, civilians or mercenaries depending on their activities in armed conflicts and their affiliation with the parties to the conflict. When PMC personnel are integrated into an armed force to engage in hostilities they will be considered as combatants; those who provide only logistical supports for armed forces (under Article 4A(4) and (5) of the Third Geneva Convention) are considered as civilians and not as combatants; and those who engage in hostilities but without being part of the armed forces of a party to the conflict are considered as mercenaries. In such a case it is difficult to differentiate mercenaries from other combatants or civilians—and that too, when mercenaries engage in hostilities without following the rules of war, like, having a fixed distinctive sign, carrying arms openly, and so on. But in accordance with Article 50(1) of the Addition Protocol-I, when there is a doubt that whether a person is mercenary or civilian then he shall be considered as civilian.

In the absence of a clear legal status, a person may pretend to be civilians while still engaged in subversive activities against enemy forces or may use the civilian population as human shields in armed conflict, paving the way for indiscriminate armed attack on the civilian population and render the *raison d'être* of humanitarian law as futile. Though paragraph 3 of Article 50 declares that the presence of non-civilians within the civilian population “does not deprive the population of its civilian character”, its observation cannot be ensured in practice on the ground that it may deny a conclusive victory over opponents. It is not yet certain whether mercenaries do form part of civilians, in the absence of their explicit exclusion from the definition

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<sup>6</sup> See ICRC Commentary on the Additional Protocols, p. 610, Section 1913.

of civilians under Article 50 of the Additional Protocol-I. But when ‘mercenaries’ are considered as a distinctive category of persons under international humanitarian law, apart from combatants and civilians, then it would be certain that they do not form part of civilians under Article 50. Even then the problems like, distinguishing mercenaries from civilians, presence of mercenaries within civilian population, using civilians as human shield, indiscriminate attack on civilians, etc., cannot be ruled out. Therefore, the increased use of PMC personnel may sow confusion in armed conflicts indirectly affecting the protection available to general civilian population.<sup>7</sup>

However, PMC personnel may either fall under the category of combatants, mercenaries or civilians, depends on the nature of their activities and affiliation, and they are not outside the scope of the international humanitarian law.

### III. Accountability Issues

In the backdrop of the above discussion, PMC personnel will fall either under the category of combatants, civilians or mercenaries and hence, they too have rights and obligations under International Humanitarian Law. Performing the same tasks as state armed forces, the PMCs may also violate the norms of international law like any other members of regular armed forces—ranging from participation in war crimes and crime against humanity to abuse of prisoners and indiscriminate attack on civilians (Lehnardt 2008: 1015-1016). But unlike state armed forces, civilian-contractors occupy a relatively ambiguous legal status, which leads to an almost complete absence of legal prosecution even when the accusations of wrongdoing arguably amounts to international crime. The incidents at Abu Ghraib prison in Iraq in 2004 provides a stark example supporting the assumption that the use of PMC personnel can result in an accountability gap, where the military personnel were subjected to court martial and were found guilty for abuse of detainees and were sentenced to prison. But none of the employees of two PMCs implicated in the abuses were charged with any crime.<sup>8</sup>

The role of PMC personnel in gross human rights violations and in violating the laws of war in armed conflicts are well established facts in the international scenario. For instance, abuse of prisoners at Abu Ghraib, unprovoked shootings and attacks on civilians during US-Iraq conflict in 2004, role of South African PMC in Sierra Leone in carrying out indiscriminate air strikes to kill rebels as well as civilians, after being told by their employees that it was impossible to distinguish between civilians and rebels, and so on.<sup>9</sup>

The present section of the article attempts to address the accountability issues for the PMC activities in armed conflicts from victims’ point of view. Major issues in such situations may include: (i) Is there any remedy for victims of PMC activities under humanitarian law?; (ii) Against whom such remedies may lie—either against PMC or against its personnel or against the hiring state or against the home state of the PMC and its personnel?; (iii) Will the remedy be civil, criminal or both?; (iv) Which forum

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<sup>7</sup> Idem, p. 590.

<sup>8</sup> Chia Lehnardt, ‘Individual Liability of Private Military Personnel under International Criminal Law’ *European Journal of International Law* 2008-5, p. 1016.

<sup>9</sup> Idem, pp. 1016-1017.

will have jurisdiction over such issues—either the state where the conflict occurs or the hiring state or the home state of the PMC or its personnel?; and (v) whether PMCs are subjects of international law to sue or be sued directly before domestic or international courts and tribunals? In relation to the first issue, the answer will be in positive based on the fundamental legal doctrine of *ubi jus ibi remedium*. But against whom such remedies lie brings us to the question of accountability in armed conflicts. Some of these issues will elaborately be discussed under the following grounds.

### III.1. Hiring State Responsibility

The four Geneva Conventions and its Additional Protocols on the one hand and the Hague Conventions on the other collectively consist of most of the rules regulating armed conflicts. All these rules are now form part of customary international law binding every other state. Some of its norms are of *jus cogens* in nature and impose *erga omnes* obligations in international law. Though non-member states may not be responsible for specific obligations found in different provisions, they still be bound by general obligations recognised in such conventions. In accordance with Common Article 1 of Geneva Conventions 1949 “[t]he High Contracting Parties undertake *to respect and to ensure respect* for the present Convention[s] in *all circumstances*” (emphasis added). The word “all circumstances” entices a broader interpretation to cover every possible situation in armed conflicts, including where violation occurs due to non-state parties hired by any parties to a conflict. Hence, the hiring state is responsible for wrongful acts done by PMC personnel.

Further, customary international law enshrined in Article 3 of the Fourth Hague Convention 1907 provides that “A belligerent party which violates the provisions of the said Regulations shall... be liable to pay compensation. *It shall be responsible for all acts committed by persons forming part of its armed forces*” (emphasis added).<sup>10</sup> As a result, when an individual, including PMC personnel, form part of the armed forces of a state then the state shall be responsible for his/her conduct as it would be for the acts of its soldiers.

The International Law Commission’s Draft Articles on State Responsibility for Internationally Wrongful Acts 2001 requires a special mention in this regard. Article 4(1) of the Draft Articles provides that “[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions.” Further, Article 4(2) provides that the term “organ” means “any person or entity which has that status in accordance with the internal law of the State”. However, when civilian-contractors undertake combat mission, detention or interrogation for a state in armed conflicts, then such activities shall be attributable to the hiring state as exercise of governmental authority and hence, hiring state is responsible for the acts of PMC personnel.<sup>11</sup> Moreover,

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<sup>10</sup> The same principle is also reiterated in Article 91 of the Additional Protocol-I, which provides that “[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”

<sup>11</sup> Carsten Hoppe, ‘Passing the Buck: State Responsibility for Private Military Companies’, *European Journal of International Law* 2008-5, pp. 991-992.

Article 8 of the Draft Articles on State Responsibility goes one step further and provides that,

[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact *acting on the instructions of, or under the direction or control of,* that state in carrying out the conduct (emphasis added).

The PMC personnel need not function as an organ of a state to hold hiring state responsible, but if they merely act on the instructions or under the direction or control of a state “in carrying out [a] conduct” then such conduct shall be attributed to the state. When PMC personnel act in violation of international law, the hiring state incurs responsibility for such internationally wrongful acts.<sup>12</sup>

Similar responsibility may also arise for international organisations when they engage PMC personnel to carry out any activities on their behalf. Responsibility of international organisations for the acts of PMC personnel is itself a distinctive area of research and this paper touches only to a minimal. International organisations are non-state actors with legal personality to sue and be sued on the international stage. Though the legal personality of the United Nations Organisation was confirmed by the International Court of Justice in 1949,<sup>13</sup> but it was not until 1980 when the Court recognised that “[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties”.<sup>14</sup> Further, in 1999 the Court made it clear that “the question of immunity from legal process is distinct from the issue of compensation for any damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity”.<sup>15</sup> Scholars are also of the opinion that organisations could internationally be held responsible for the wrongful acts of its agents. For instance, Amerasinghe puts forth his view as follows:

There are situations in which organizations would be responsible under customary international law for the acts of their servants or agents, when they are acting in the performance of their functions, or of persons or groups acting under the control of organizations, such as armed forces in the case of the UN.<sup>16</sup>

In case of peace operations, the UN has accepted responsibility in number of situations including its responsibility during the Congo peacekeeping operation in

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<sup>12</sup> Nigel D. White & Sorcha MacLeod, ‘EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility’, *European Journal of International Law* 2008-5, pp. 965-988; see also Cedric Ryngaert, ‘Litigating Abuses Committed by Private Military Companies’, *European Journal of International Law* 2008-5, pp. 1035-1053.

<sup>13</sup> *Reservations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, [1949] ICJ Rep. 174, at 179.

<sup>14</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, Advisory Opinion 20 December 1980, [1980] ICJ Rep. 73, at 89-90.

<sup>15</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion of 29 April 1999, [1999] ICJ Rep. 62, at 88.

<sup>16</sup> C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, New York: Cambridge University Press 2005, p. 400.

1960. But the United Nations accepts liability only for forces acting under its authority, command, and control, and not for the acts of troops that are part of coalitions of the willing operating under a Security Council mandate and under the direct command and control of contributing states.<sup>17</sup>

International Law Commission's Draft Articles on the Responsibility of International Organisations 2004 recognises the responsibility of international organisations for the wrongful acts of its agents. Article 6(1) of the Draft Articles provides that “[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered as an act of that organization under international law, whatever position the organ or agent holds in respect of the organization”. This seems broad enough to include the activities of PMC personnel employed by international organisations to perform any functions. Same inferences could also be drawn for regional organisations like European Union or NATO to hold them internationally responsible for the acts of civilian-contractors engaged by such organisations.

### III.2. Individual Criminal Responsibility

In accordance with Article 4A(1) (2) (3) and (6) of the Third Geneva Convention as well as Article 43 of the Additional Protocol-I, any individuals who form part of the armed forces of a party to the conflict are combatants. In case of any wrongful acts, they can criminally be held responsible for their acts. But when PMC personnel are hired for functions other than participating in hostilities are considered neither *de jure* nor *de facto* members of the armed forces; nor they be considered as mercenaries in the absence of their direct participation in hostilities; but simply they fall under the category of civilians. How far civilians are bound by the norms of international humanitarian law is yet to be answered with certainty. However, the International Criminal Tribunal for Rwanda (ICTR) Trial Chamber in the *Akayesu Case*<sup>18</sup> held that,

[t]he duties and responsibilities of the Geneva Conventions and the Additional Protocols... will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de-facto* representing the Government, to support or fulfil the war efforts.<sup>19</sup>

Here, it is not clear that what is meant by “*de-facto* representing the Government”. In accordance with the above observation of the Trial Chamber, the PMC personnel who are not hired to fight in war will fall under the category of civilians on the ground that they are neither instructed to commit crime, nor sufficiently controlled by the hiring state, nor carry out services involving the exercise of “public authority”. In such a case, whether IHL binds individuals as individuals or as state agents is still a

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<sup>17</sup> Iain Scobbie, ‘International Organizations and International Relations’, in René Jean Dupuy (ed.) *A Handbook on International Organizations*, Leiden: Martinus Nijhoff Publishers 1998, p. 891.

<sup>18</sup> *Prosecutor vs. Akayesu*, Judgement, Case No. ICTR-96-4-T, T.Ch. I, 2 September 1998.

<sup>19</sup> *Idem*, para. 681.

matter of uncertainty. However, in the *Musema Case*<sup>20</sup> the ICTR Trial Chamber took a broader approach, by reference to post-World War II judgements, and established that even civilians can be held responsible for violations of international humanitarian law committed in an armed conflict. In the words of the Trial Chamber that,

it is well-established that the post-World War II Trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where they have a link or connection with a Party to the conflict. The principle of holding civilians liable for breaches of the laws of war is, moreover, favoured by consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, *which is to protect war victims from atrocities* (emphasis added; footnote omitted).<sup>21</sup>

This straightforward approach of holding any individual criminally responsible for wrongful conduct, irrespective of his/her status, ensures at the least a criminal remedy for the victims of armed conflicts. The Rome Statute of the International Criminal Court 2002 is also based on such an approach at the international scene. Article 25(2) of the Statute provides that “[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute”. But jurisdiction of the Court does not extend to every other crime, rather limited to some of the most serious crimes of concern of the international community as a whole, namely, the crime of genocide; crimes against humanity; war crimes; and the crimes of aggression.<sup>22</sup> In such cases, the Statute does not make any distinction between individuals as combatants, mercenaries, or civilians.

Further, the Statute also recognises the principle of command responsibility or superior responsibility. Article 28 of the Statute provides that, a commander or any other superior is criminally responsible for crimes committed by subordinates, as a result of his/her failure to exercise proper control over such subordinates. On this ground, the director, manager, or commander of PMC may criminally be held responsible for the violation of international humanitarian law by their subordinates. However, criminal responsibility enforced by the Court is in addition to and in no way affects the responsibility of states under international law.<sup>23</sup> Despite all these, some PMC personnel like those involved in Abu Ghraib incident enjoy impunity. It is not because of the legal vacuum in international law, as Cameron observes, it is purely the result of an apparent lack of political will to prosecute.<sup>24</sup>

### III.3. Corporate Responsibility of PMCs

There is no reason in international law for any corporation, including PMCs, to avoid accountability for violating international law in general, and Human Rights or Humanitarian Law in particular. But international law is not yet developed to the level of recognising the responsibility of PMCs for internationally wrongful acts. Though corporations and entities are not recognised as subjects of international law,

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<sup>20</sup> *Prosecutor vs. Musema*, Judgement and Sentence, Case No. ICTR-96-13-A, T.Ch. I, 27 January 2000.

<sup>21</sup> *Idem*, para. 274.

<sup>22</sup> Article 5 of the Rome Statute of the International Criminal Court 2002.

<sup>23</sup> Article 25(4) of the Rome Statute of the International Criminal Court 2002.

<sup>24</sup> Cameron 2006, *supra* note 2, p. 594.

they have been exercising rights and responsibilities under international law in a derivative manner. For example, during 16<sup>th</sup> and 17<sup>th</sup> centuries the so called East-India Companies ranging from Dutch, English and French have exercised delegated sovereign authority through Royal Charter issued by their respective sovereign powers. In *Islands of Palmas Arbitration*, it was recognised that under “the Treaty of Munster and consequently also the Treaty of Utrecht... the [Dutch] East and West India Companies were entitled to create situations recognized by international law... [and conclude] conventions, even of a political nature”. This establishes the fact that corporations have been subjects of rights and responsibilities, despite their non-recognition as subjects under international law.

Numerous international conventions have recognised the responsibility of corporations despite their non-cognition as subjects under international law. For instance, the United Nations Convention on the Law of the Sea 1982 imposes restrictions relating to appropriation of seabed and its resources that apply to both natural as well as juridical persons; Article 1 of the Convention on Civil Liability for Oil Pollution Damage 1969 holds accountable the owner of a ship, whether natural or legal person, for pollution caused by the ship; and Article 10 of the UN Convention Against Transnational Organized Crime 2000 makes reference to the liability of legal persons. However, Andrew Clapham rightly argued before the ICC that,

as long as we admit that individuals have rights and duties under customary International Human Rights Law and International Humanitarian Law, we have to admit that legal persons also have the necessary international legal personality to enjoy some of these rights and conversely be prosecuted or held accountable for violations of their international duties.<sup>25</sup>

In fact, as mentioned above, it is the political will that has not yet crystallized to allow corporations to be accepted as legal persons on the international plane and be held directly responsible for their violations in international law. Since Second World War it has been accepted that individuals may be held criminally responsible for acts committed by corporate entities, but how far PMC itself can criminally be held accountable is not yet certain. Though imposing corporeal punishment on PMC as a legal person is not practical, their criminal conviction will make it easier for the victims to seek compensation before criminal or civil courts.

Appointment of UN Special Representative on Human Rights and Transnational Corporations is one indication of the increased awareness about potential negative impact of corporate business conduct on human rights around the world, and it contributes to the development of the notion of corporate criminal responsibility in international crimes. Yet, no international tribunal has jurisdiction to prosecute legal persons as such for international crimes. The Preparatory Committee of the International Criminal Court had discussed proposals to provide the Court with competence to exercise jurisdiction over corporate entities in addition to individuals but it has not yet been materialised.<sup>26</sup>

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<sup>25</sup> Andrew Clapham, ‘The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court’, in M. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law*, The Hague: Kluwer Law International 2000, p. 190.

<sup>26</sup> Lehnardt 2008, *supra* note 7, p. 1033.

On the other hand, transnational litigation against PMCs in domestic courts of their Home countries may also provide a viable remedy for victims. However, problem may arise as to the corporate structure of PMCs. For instance, corporations may set up foreign subsidiaries, as separate legal entities overseas, and thereby evade its legal personality and consequent responsibilities for the abuses committed by its subsidiaries or their employees from being attributed to the parent Corporation. Nevertheless, in a corporate configuration the parent company should incur direct legal responsibilities for the overseas abuse by its foreign subsidiary, if violations of its duty of care (i.e. negligence) could be established or if its subsidiary acted merely as its agent.<sup>27</sup> Accountability of the parent corporation is more important because of the fact that, it is the parent corporation that will often be the targets of victims considering the financial viability of the parent corporations.

Another possible solution to ensure accountability for the acts of PMCs in armed conflicts could be that requiring states to add human rights clause while signing contracts to engage PMC personnel. This is could be a legitimate requirement imposed on states, on the ground that PMCs never act unabated, rather, it always work for a client i.e. states in the present case.<sup>28</sup>

#### IV. Conclusion

International law is not facing a situation of *non-liquet* to ensure accountability for the activities of private military companies during an armed conflict. Based on the nature of their activities and affiliation civilian-contractors may either be classified as combatants, mercenaries, or civilians. Corresponding to their determined status PMC personnel are entitled for rights and liable for responsibilities under international humanitarian law. The recent development of international criminal law goes one step further to hold any individual, irrespective of their status, accountable for serious violation of human rights or humanitarian law. The two major works of the International Law Commission, namely, Draft Articles on State Responsibility for Internationally Wrongful Acts 2001 and Draft Articles on the Responsibility of International Organisations 2004, are valuable additions to the accountability regime ensuring remedies for victims of armed conflicts. Holding accountable PMCs as a corporate entity is the only uncertainty facing international law, and that too due to lack of political will among states.

As far as the jurisdictional aspects over the activities of PMC personnel are concerned, the International Criminal Court is a permanent forum to hold individuals directly accountable for genocide, crimes against humanity, and war crimes.<sup>29</sup> Domestic legal systems of states may also provide for extraterritorial jurisdiction over international crimes committed by or against their nationals. The US War Crimes Act, Alien Tort Claims Act, Indian Penal Code, etc., are good examples in this regard. The concept of universal jurisdiction further empowers domestic courts to exercise jurisdiction over international crimes, even without any substantial link to the crime. The principle of *aut dedere aut judicare* facilitates domestic courts in this

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<sup>27</sup> Ryngaert 2008, supra note 11, p. 1039.

<sup>28</sup> Idem, p. 1040.

<sup>29</sup> Art. 17(1) of the Rome Statute of the International Criminal Court 2002.

regard by obliging territorial states to investigate and prosecute the alleged perpetrators or to extradite such persons for prosecution to any other interested state. Sometimes, Private Military Companies themselves appoint their criminal tribunals to punish their employees, including managers, directors, and commanders, for violating peremptory norms of international law; or confer jurisdiction on the domestic courts of the hiring state by inserting human rights clause in the hiring-contracts. Moreover, in case of gross human rights violations the UN Security Council may also establish international criminal tribunals, under Chapter VII mandate of the UN Charter, to prosecute the perpetrators. The International Criminal Tribunal for former Yugoslavia 1993, the International Criminal Tribunal for Rwanda 1994, and the Special Court for Sierra Leone 2002, etc., are such examples.