INTERNATIONAL RESPONSIBILITY FOR THE ACTIONS OF PRIVATE MILITARY AND SECURITY COMPANIES

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Abstract:*The rapid spread and diversification of the services offered by private military and security companies has drawn the attention of the international community, particularly in view of their involvement in combat operations and the violations of international law committed by their personnel. This necessitates a discussion of international responsibility for the actions of these companies, which is the focus of our current research. Our research will specifically focus on the responsibility of the state that contracts these companies.*

Keywords*: Military companies, security companies, international responsibility.*

INTRODUCTION:

Armed conflicts have given rise to private military and security companies that provide services to states, including training, consultancy and, in some cases, participation in combat operations. These companies have become a key factor in determining the outcome of conflicts in favour of the party that employs them. Their significant involvement in armed conflicts has led to numerous violations of international law by their personnel, prompting us to question the international responsibility for these companies' actions.

Our study will focus on the responsibility of states that contract with private military and security companies. We will take an analytical approach, examining relevant international texts. The research is divided into two sections. The first section addresses the nature of private military and security companies, and the efforts of states to regulate their operations. The second section discusses the responsibility of the contracting state with these companies.

SECTION ONE: THE NATURE OF PRIVATE MILITARY AND SECURITY COMPANIES AND EFFORTS BY STATES TO REGULATE THEIR OPERATIONS

In this section, we will define private military and security companies, explore the reasons for their emergence and highlight notable examples, such as Blackwater. We will also discuss national and international efforts to regulate these companies' operations.

Subsection One: Definition of Private Military and Security Companies and Reasons for Their Emergence

This subsection will present definitions of private military and security companies from international reports and documents, alongside scholarly perspectives on them and the reasons for their emergence.

Firstly: Definition of private military and security companies

Scholars have differing views on this concept, resulting in multiple definitions. The discourse extends beyond defining these entities to distinguishing between them, whereas international reports and documents tend to provide a unified definition for both.

A. Scholarly perspectives on the concept of security and military companies

Scholars have adopted various methodologies regarding definitions. Some differentiate between the two based on the type of services provided and proximity to the battlefield, while others base their classifications on the nature of the contracting parties.

A private security company is defined as follows: 'those companies that provide defensive security services to protect individuals and property.[1]'

Professor Doug Brooks defines it as: 'Companies that offer passive preventive security services in areas of intense conflict.[2]'

Professor Goddard defines it as: 'Registered civilian companies that specialise in executing commercial service contracts for national and foreign units, with the aim of protecting individuals, as well as humanitarian and industrial facilities, in accordance with applicable national laws.[3]'

It is also characterized as: "A company that provides various services in the field of security and defense to governments, international organizations, and private institutions, also referred to as security and defense service firms.[4]" The users of security companies are termed "contractors" due to the nature of the contractual obligation that binds them to the company, which is essentially a kind of subcontracting where the company contracts with the government and then engages these users under that agreement.

As for private military companies, some argue that they differ significantly from private security companies, with the former primarily focused on offensive actions to preempt threats[5], while the latter have defensive functions to counter dangers. They are defined as: "Companies that provide a range of military services to clients, seeking to exert military influence in the field and participating in operations."

Professor Goddard describes them as: "Registered civilian companies specializing in military training contracts, including educational programs, simulations, and rapid support operations such as logistical support and the development of military capabilities, particularly for special forces in control, communications, intelligence, and the provision of military equipment for national and foreign units."

Professor Doug Brooks defines them as follows: 'Companies that offer impactful services such as military training and offensive military operations for both states and international organisations such as the United Nations.[6]'

Professor Ortiz defines them as: 'Multinational commercial enterprises that provide services involving the systematic use of force through military means, or the transfer or enhancement of capacity, to clients.[7]'

Professor Singer, one of the first to study and analyse the phenomenon of private military and security companies, defines them as follows: 'Commercial companies specialising in providing professional services closely related to warfare, representing an evolution of the practice known as mercenarism.' They can offer services such as providing military skills, conducting tactical combat operations, strategic and operational planning, logistical support, capacity training and technical assistance.

B. The definition of private military and security companies in international reports and documents:

Unlike scholars, who tend to differentiate between the two, international reports and documents often regard private military and security companies as two sides of the same coin.

1- Hamza Hlongat, "Responsibility for the Actions of Private Military and Security Companies in Light of International Humanitarian Law Provisions," 1st Edition, Zain Legal Publications, Beirut 2017, p. 22.

2- Doug Brooks, "Messiahs or Mercenaries? The Future of International Private Military Services,"International Peacekeeping, Vol. 7, No. 04-12/2000, p. 129.

3- BennoudiaNasira, "Private Military and Security Companies and the Basis of State Responsibility for the Actions of Their Employees,"Academy Journal of Legal Research, Vol. 11, No. 04, 2020, p. 541.

4- Hamza Hlongat,previous reference, p. 28.

5- Hamza Hlongat,previous reference, p. 28.

6- Doug Brooks,Messiahs or Mercenaries? The Future of International Private Military Services, op. cit., p. 129. BennoudiaNasira, previous reference,p. 543; Hamza Hlongat, previous reference,p. 29.

7- Carlos Ortiz,"The Private Military Companies: An Entity at the Center of Overlapping Spheres of Commercial Activity and Responsibility," in Thomas Jager and Gerhard Kummel (Eds.):Private Military and Security Companies: Challenges, Problems, Pitfalls and Prospects,VerlagfürSozialwissenschaften, 2007, p. 60.

- BennoudiaNasira, previous reference,p. 543; Hamza Hlongat, previous reference,p. 29.

A report by the Geneva Centre for the Democratic Control of Armed Forces, published in March 2006, describes private military companies as commercial entities that offer specialised services relating to wars and conflicts. These services include combat operations, strategic planning, intelligence gathering, operational and logistical support, training, and the procurement and maintenance of military weapons and equipment[1]. The report indicates that private military companies operate in the military sector and private security companies in the security sector. However, it is challenging to distinguish between the roles of these companies, as no company exclusively specialises in one sector; both types provide services in the military and security fields[2].

In a later report to the General Assembly in 2008, the UN Special Rapporteur on mercenaries defined these companies as follows: 'Companies that provide all types of assistance and training in the fields of security and consultancy services, including non-military logistical support.' This includes armed security guards and personnel involved in defensive or offensive military activities, as well as security activities in situations of armed conflict or post-conflict environments.[3]'

The Montreux Document, resulting from a joint initiative by the Swiss government and the International Committee of the Red Cross, defined these companies as follows:

The Montreux Document, resulting from a joint initiative by the Swiss government and the International Committee of the Red Cross, defined these companies as follows: 'Private commercial entities that provide military or security services, regardless of how they describe themselves'. These services include guarding and protecting individuals and property, such as convoys, buildings and other locations, as well as maintaining and operating weapon systems, detaining prisoners and advising or training local forces and security personnel.[4]'

The draft international convention on private military and security companies, presented to the UN working group on the use of mercenaries as a means of violating human rights and obstructing the exercise of the right of peoples to self-determination, defines such companies as follows: 'Legally constituted companies that provide military and/or security services for a fee through individuals and/or legal entities.[5]'

Based on the above, a private military and security company can be defined as follows: 'An organisation established under the legislation of a state party to provide paid military and security services through individuals and legal entities operating under a special licence.' These services include military operations, strategic and intelligence planning, logistical support, training, technical support and other activities involving the use of non-harmful technical means for the protection of the legitimate interests and rights of their clients. Security services include guarding property and individuals, implementing security procedures,

1- BennoudiaNasira, previous reference,p. 544; Abu Ajeeb, "Meeting on Mechanisms and Means of Protecting Humanitarian Work Between Theory and Practice," Scandinavian Institute of Human Rights, 2004, p. 51, available at:
https://sihr-fr/wp-content/uploads/2017/10/Mechanisms-and-measures-of-protection–between-theory-and-practice.pdf

2- Abu Ajeeb,previous reference, p. 51.

3- Report of the Special Rapporteur on the Issue of Mercenaries to the United Nations General Assembly, December 29, 2008, p. 04.

4- Montreux Document on international legal obligations and good practices for states related to private military and security companies during armed conflict, issued on September 17, 2008. Available at:
https://www.montreuxdocument.org/pdf/document/ar.pdf

5- See the Draft Convention on Private Military and Security Companies, Human Rights Council, 15th Session, dated October 5, 2010, Document No. A/HRC/15/25.

managing information, and other activities involving the use of non-harmful technical means to protect the legitimate interests and rights of clients[1].

Second: reasons for the emergence of private military and security companies

The emergence of these companies was largely a result of the demobilisation of numerous armies following the end of the Cold War, including the Red Army and the East German army[2]. The downsizing of the US military, which was reduced by 60% compared to previous levels, also contributed to the rise of these companies[3]. This created a substantial surplus of military personnel and expertise that needed to be utilised to support and protect US influence in various regions of the world[4].

The strategy of relying on private military and security companies has been adopted by the Pentagon, focusing on the privatization of many tasks previously undertaken by the U.S. military. This approach alleviates the burden of numerous responsibilities from the armed forces[5].

Some argue that the privatisation of security and military tasks is not a new phenomenon, with examples dating back to the 17th century.

However, some argue that the privatisation of security and military tasks is not a new phenomenon, with examples dating back to the 17th century. For instance, the British East India Company, established in 1602, employed mercenaries from Britain, Germany, and Sweden, as well as local units. In 1749, the company used its military forces to help a local prince in Tanjore regain his throne[6].

However, others contend that the trend towards privatising military and security tasks has arisen from the diminishing role of the state in providing public services, particularly those related to security. Failures in bureaucratic and political responses to threats have led states to rely on private military and security companies in the belief that these firms can respond to threats more flexibly than government forces[7].

The proliferation of non-international armed conflicts in many countries has further facilitated the growth of military companies[8]. For example, in 1993, the Angolan government hired the South African company 'Executive Outcomes' to secure oil fields in the Soyo region and diamond mines in Luondo, which were controlled by the rebel group UNITA. Executive Outcomes played a military support role for the Angolan government in its struggle against UNITA until a peace agreement was reached in Lusaka in 1994[9].

Subsection Two: Major Private Military and Security Companies

There are no accurate statistics indicating the number of private military and security companies worldwide[10], but notable examples include: Blackwater, Global Risk Strategies, Executive Outcomes, Aegis, Vinnell Corporation, Meteoric Tactical Solutions and Wagner[11].

We will focus on two prominent companies: Blackwater and Wagner.

1- Khadija Arsan,"Security Companies in Light of International Humanitarian Law," Damascus University Journal of Economic and Legal Sciences, Vol. 28, No. 01, 2012, p. 493.

2- Majid Hussein Ali Al-Jumaili, "Private Security Companies," Dar Al-Fikr Al-Jami'i, Alexandria, 1st Edition, 2016, p. 64.

3- Hamza Hlongat, previous reference,p. 38.

4- Majid Hussein Ali Al-Jumaili, previous reference, p. 64.

5- The same reference, p. 29; Hussein Ali Al-Jumaili, previous reference, p. 69-70.

6- Hamza Hlongat, previous reference, p. 39.

7- The same reference, p. 39.

8- The same reference,p. 40.

9- Majid Hussein Ali Al-Jumaili,previousreference,p. 65, 66.

10- Hamza Hlongat,previous reference, p. 45, 46.

11- Mohammed Khalfan Al-Sawafi, "The Growing Role of Private Military and Security Companies: Blackwater and Wagner as Case Studies," 09/11/2024, on the site: Trends for Research and Consulting at: www.trendsresearch.org

Firstly, Blackwater:

Blackwater is one of the most well-known private military and security companies and played a significant role in Iraq. It engaged in combat operations against resistance forces and helped to enforce the US occupation of Iraqi cities[1].

Founded in 1997 by a former U.S. Marine officer, the company received numerous security contracts from the U.S. government, particularly in Iraq in 2003[2]. Since mid-2004, the value of contracts signed with the U.S. State Department alone has exceeded $750 million[3].

Blackwater operates worldwide and has invested heavily in building a strong army. It currently employs 2,300 personnel across nine countries and has a reserve force of 21,000 soldiers on standby. Blackwater also operates 20 aircraft, including military helicopters, and boasts a large military facility spanning 2,800 acres near the Great Dismal Swamp in North Carolina[4].

Due to its history of violations, the company has changed its name twice, first to Xe Services in 2009 and then to Academi in 2011. Despite its personnel causing damage to the U.S. image in the Middle East, Blackwater has continued to secure major contracts from U.S. government agencies. Its mercenaries have been implicated in numerous massacres in Iraq, including the infamous Nisour Square massacre[5].

Second: the Wagner Group.

The group gained widespread notoriety for its involvement in conflicts in Syria, Libya and Ukraine, to name a few. It participated in the fight against ISIS, recruiting mercenaries from around the world to secure facilities in Syria after 2014. Many of these mercenaries were killed in US airstrikes near oil fields previously occupied by ISIS in Syria.

The Malian government in West Africa called upon the Wagner Group to provide security against Islamic extremist groups. The group's arrival in Mali influenced France's decision to withdraw its forces from the country in 2021. While the Malian government claims that the Russians present are military trainers, there is clear evidence that Wagner fighters are actively involved in military operations alongside Malian forces. The United Nations has accused Wagner elements in Mali of torture and rape[6].

SECTION TWO: NATIONAL AND INTERNATIONAL EFFORTS TO REGULATE THE OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES

There have been numerous national and international efforts to regulate and legalise the operations of private military and security companies. Below, we outline some of the most significant of these efforts.

Subsection One: National Efforts to Regulate the Operations of Private Military and Security Companies

Some countries have enacted legislation to regulate these companies' activities and define their operational scope. For instance, South Africa and the United States have passed legislation governing the establishment and operation of such companies. Most European countries have also adopted regulatory frameworks that set out the conditions for private security companies to operate within their borders.

However, many countries experiencing armed conflict lack such regulatory frameworks.

1- Maher Jamil Abu Khawat, "The Legal Status of Mercenaries and Employees of Private Security Companies During Armed Conflicts,"Journal of Studies in Sharia and Law Sciences Vol. 39, No. 01, 2012, p. 168.

2- Leila Nicola, "The Dangers of Private Security Companies: Blackwater and Wagner as Models," 20/07/2023, Al-Mayadeen Network, available at:
www.almayadeen.net

3- Abbas Walid,"Military and Security Companies and Their Responsibility for Violations of General International Law,"Algeria University Annals,Vol. 34, No. 03, 2020, p. 143.

4- Abbas Walid, previous reference, p. 142, 143.

5- Leila Nicola, previous reference

6- Jamal Fourar Al-Aidi, "Mercenaries in Light of International Law: The Russian Wagner Model,"Algeria Annals 1, Vol. 37, No. 03, 2023, p. 212.

However, many countries experiencing armed conflict lack such regulatory frameworks. An exception is Sierra Leone, where licensing is required under Section 19 of the National Security and Public Intelligence Act of 4 July 2002[1]. Additionally, on 26 June 2004, the Coalition Provisional Authority issued Memorandum No. 17, which outlined the registration conditions for private military and security companies wishing to provide security services in Iraq[2]. The Kurdistan Regional Government also set out guidelines regarding the acceptance of these companies in Iraqi Kurdistan on 7 December 2004[3].

Subsection Two: International Efforts to Regulate the Operations of Private Military and Security Companies

Countries have relied on private military and security companies, and some international organisations, such as the United Nations, have employed them to facilitate peacekeeping operations in conflict areas[4].

Consequently, the UN has started to seek a legal regulatory framework for these companies' activities through some of its agencies. The International Committee of the Red Cross is also involved in this effort[5], prioritising ensuring that these companies and their personnel respect international law, particularly international humanitarian law, even though it is not focused on employing them[6].

Firstly: The efforts of the United Nations

From the UN's perspective[7], there is a specific connection between mercenaries and private military and security company personnel, particularly with regard to the nature of their activities. However, this does not imply that they are the same, and each category must be treated separately[8].

To this end, the General Assembly has sought to establish a new definition of mercenaries that aligns with the evolving activities of non-state actors in armed conflicts[9]. The rapporteur of the General Assembly committee monitoring mercenary and private military and security company activities stated that the goal is to advise UN member states on monitoring mercenary activities that threaten governments, endanger the safety and territorial integrity of states, and violate human rights worldwide. However, it was acknowledged that not all specialised security personnel should be classified as mercenaries[10].

1- Majid Hussein Ali Al-Jumaili,previous reference, p. 115, 116.
2- Hamza Hlongat,previousreference,p. 91.
3- Khadija Jawad Mohammed Al-Mukhtar, "The Legal Organization of International Private Security Companies: A Study in Public International Law," 1st Edition, Zain Legal Publications, Beirut 2018, p. 183.
4- Majid Hussein Ali Al-Jumaili, previous reference p. 172.
5- The Secretary-General's report in accordance with paragraph 30 of decision No. 1546 of 2004, Document No. S/2005/585, 2005, p. 16.
6- Khadija Jawad Mohammed Al-Mukhtar, previous reference, p. 73.
7- The mercenary according to Article 01/01 of the United Nations Convention is any person:
- (a) who is specifically recruited to fight in an armed conflict.
- (b) whose primary motivation for participating in hostilities is a desire for personal gain and is promised by a party to the conflict material compensation that is substantially greater than that promised to combatants of similar rank and functions in the armed forces of that party.
- (c) who is not a national of a party to the conflict or resident in territory controlled by a party to the conflict.
- (d) not a member of the armed forces of a party to the conflict.
- (e) not sent by a state that is not a party to the conflict on an official mission as a member of its armed forces.
8- Khadija Jawad,the same reference p. 75.
9- The committee held three meetings at the European headquarters of the United Nations in Geneva to discuss this: See this framework: Mustafa Ahmad Abu Khair, "International Private Military and Security Companies," 1st Edition, Iterak Publishing, Cairo 2008, p. 256.
10- See the United Nations Convention Against the Recruitment, Use, Financing, and Training of Mercenaries, opened for signature in 1989, and entered into force on November 20, 2001, adopted by the General Assembly at its 44th session by resolution No. 34 of 1989.

At the third meeting, held in Geneva in 2004, to discuss traditional and new forms of mercenary activities as a means of violating human rights and obstructing the exercise of the right to self-determination, states were urged to find a new definition for mercenaries that incorporated a new element: 'mercenary companies'[1].

Additionally, in its resolution 15/26 of 2010[2], the Human Rights Council established an open-ended international governmental working group to explore the possibility of creating a regulatory framework encompassing the monitoring and oversight of these companies' activities and holding them accountable. Following this, 60 private security companies signed the 'International Code of Conduct for Private Security Service Providers' in November 2010[3].

By 2012, the number of companies that had signed the code had increased to 464. The code emphasises the following principles:

- Respect, protection and remedy.

- The responsibility of signatory companies to uphold human rights.

- The establishment of an independent management and oversight mechanism, although its mandate has yet to be defined[4].

This code is based on the Montreux Document, which outlines the legal obligations and best practices of states in relation to the operations of private military and security companies during armed conflict. It was published on 17 September 2008. The Montreux Document is the first international framework to outline applicable international law concerning the activities of private military and security companies in conflict zones. Its aim is to enhance respect for international humanitarian law and international human rights law[5].

Secondly, the efforts of the International Committee of the Red Cross (ICRC)

The ICRC has shown considerable interest in the issue of private military and security companies. In its 2003 report, the ICRC highlighted a new trend that challenges the traditional classification of participants in armed conflicts. This trend is characterised by an increasing reliance on civilians by armed forces, who are now contracting civilians for tasks that were once purely military[6]. The ICRC also noted the use of private security companies. This prompted the ICRC's legal department to investigate the legal status of these companies' employees, questioning whether they are mercenaries, combatants or civilians.

Emanuela Chiara Giard, a professor in the ICRC's legal department, stated that 'each case must be considered individually, and in most cases, from a purely legal perspective, they fall outside the definitions and conditions outlined in Article 47 of Additional Protocol I of 1977 to the 1949 Geneva Conventions and other relevant treaties', effectively denying them the label of mercenaries. While the ICRC does not intend to take a position on the legality of these companies, it emphasises that the privatisation of military and security functions should not lead to violations of international humanitarian law[7].

1- See Document E/CN-4/2005/23 by the Human Rights Commission, 61st session on January 18, 2005

2- See Human Rights Council Resolution No. 15/26 of 2010

3- United Nations General Assembly 67th session, item 81 of the provisional list Security Council Document No. A/64/63-S/2012/76 issued on February 16, 2012

4- See Document No. A/67/63-S/2012/76, previous reference p. 93.

5- See Document No. A/67/63-S/2012/76, previous reference p. 93.

6- International Humanitarian Law and Challenges of Contemporary Armed Conflicts, excerpt from the report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, Geneva December 2003, available at:
www.icrc.org

7- The International Committee of the Red Cross intends to expand its connections with private military and security companies, publication via the site:
www.icrc.org/ard/resources/documents/miss/63th2x.khshktm

The ICRC's role has been distinguished by its call for the establishment of a framework to regulate the conduct of private military and security companies, with two main objectives:

1. Ensuring respect for international humanitarian law. This involves making it clear to these companies what their obligations are.

2. Ensuring understanding of the ICRC's mission. It is crucial that these companies understand and recognise the ICRC's mission to protect individuals affected by armed conflicts[1].

CHAPTER TWO: THE RESPONSIBILITY OF THE CONTRACTING STATE WITH PRIVATE MILITARY AND SECURITY COMPANIES

Having discussed the definition of private military and security companies, as well as national and international efforts to regulate their operations, this section will address the responsibility of the contracting state for the actions of employees in these companies, and the judicial body before which liability claims can be pursued.

SECTION ONE: THE RESPONSIBILITY OF THE CONTRACTING STATE FOR THE ACTIONS OF EMPLOYEES IN PRIVATE MILITARY AND SECURITY COMPANIES.

This responsibility depends on two scenarios: when the state integrates these companies' employees into its armed forces and when the state employs these companies' employees without integrating them into its forces. We will examine these scenarios below.

Subsection One: Responsibility of the Contracting State for the Actions of Employees as Part of the Armed Forces

It is established that a state party to an armed conflict is liable for all actions carried out by its armed forces during that conflict. This principle is affirmed by Article 3 of the 1907 Hague Convention concerning the laws and customs of war on land, which states that a warring party that violates the aforementioned regulations is obliged to provide compensation as required and is responsible for all acts committed by individuals belonging to its armed forces[2].

Article 91 of Additional Protocol I of 1977 states that any party to a conflict that violates the provisions of the agreements or this protocol must pay compensation and is responsible for all acts committed by individuals belonging to its armed forces[3].

These provisions form the basis for state responsibility in cases where individuals considered to be part of its armed forces commit violations of these agreements[4].

Article 4 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts clarifies that the phrase 'any organ of the state' does not refer only to central government bodies[5], high-level officials or individuals responsible for the state's foreign relations. Rather, it extends to include all government organs,

1- Emmanuela-ChiareGillard,Business Goes to War: Private Military/Security Companies and International Humanitarian Law," IRRC, Vol. 88, No. 863, September 2006, p. 111.

2- See Article 03 of the Hague Convention, Laws and Customs of War on Land, 1907

3- See Article 91 of the Additional Protocol I of 1977.

- Carsten Hoppe, "Passing the Buck: State Responsibility for Private Military Companies,"European Journal of International Law, 2008, Vol. 19, No. 5, p. 10.

- Majid Hussein Ali Al-Jumaili,previousreference,p. 135.

4- Hamza Hlongat, previous reference, p. 91.

5- Article 04 of the Draft Articles on State Responsibility for Internationally Wrongful Acts states that: "The conduct of any organ of the state shall be considered an act of that state under international law, whether the organ is exercising legislative, executive, judicial, or any other functions, regardless of the position it holds in the organization of the state, whether as an organ of the central government or a regional unit of the state."

regardless of their type, classification or the functions they perform, including those at regional or local levels[1].

The International Court of Justice emphasised this principle in its 1999 advisory opinion on the immunity of a special rapporteur of the Human Rights Committee from legal proceedings. It stated that any action taken by any organ of the state should be considered as being taken by the state itself, indicating that this is a customary rule[2].

Based on the above, if the contracting state considers the employees of these companies to be part of its armed forces, applying the designation of combatants or considering them to be members of militias or volunteer units that form part of these forces, then the contracting state is held liable for the actions of these employees as they are affiliated with an organ over which the state exercises some degree of control[3].

Based on the above, if the contracting state considers these companies' employees to be part of its armed forces, applying the designation of combatants or considering them to be members of militias or volunteer units that form part of these forces, then the contracting state is held liable for these employees' actions, as they are affiliated with an organ over which the state exercises some degree of control[4].

Paragraph seven of the Montreux Document of 2008 further affirms that the contracting state bears responsibility for violations of international humanitarian law, human rights law or any other rules of international law by private military and security companies, especially when these companies have been registered by the concerned state as part of its regular armed forces in accordance with its national legislation, or as members of armed forces or organised groups under state command[5].

Therefore, if the contracting state considers employees of private military and security companies to be part of its armed forces, it is fully responsible for their actions and bears international liability for any damages they may cause.

Subsection Two: Responsibility of the Contracting State for the Actions of Employees Not Part of its Armed Forces

It is challenging to determine the responsibility of a Contracting State that engages with private military and security companies for the actions of their employees, when these employees are not part of the Contracting State's armed forces[6]. However, this responsibility can be established based on general rules regarding state liability. The state may be liable for these actions if they constitute violations of international humanitarian or human rights law and if these actions can be attributed to the state in one of the following scenarios:

Scenario One applies if these employees are authorised by the state's law to exercise certain elements of governmental authority. This means that the private military and security companies are officially empowered by the state's laws to perform tasks that are usually within the state's jurisdiction.

Scenario Two applies if it can be proven that the companies are acting under the instructions, guidance or supervision of the contracting state[7]. We will address this below, as well as the responsibility of the contracting state for the actions of private security company employees due to a lack of due diligence.

1- Majid Hussein Ali Al-Jumaili, previous reference, p. 136. Hamza Hlongat,previousreference,p. 92.
2- Majid Hussein Ali Al-Jumaili, previous reference, p. 136.
3- Hamza Hlongat,previousreference,p. 94.
4- See paragraph 7 of Part 1 of the Montreux Document of 2008, Taiba Jawad Muhammad al-Mukhtar, op. cit., pp. 429, 430.
-Faisal Iyad Faraj Allah, State Responsibility for Violations of Private International Military and Security Companies in Light of International Humanitarian Law, Al-Halabi Legal Publications, 1st ed. 2013, p. 16.
5- Hamza Hlongat,previousreference,p. 94.
Maher Jamil Abu Khawat, The Legal Status of Mercenaries and Private Security Company Employees During Armed Conflicts, Studies in Sharia and Law, Al-Majdal 39, Issue 1, 2012, p. 172.
6- Majid Hussein Ali Al-Jumaili, previous reference, p. 137,138.
7- Hamza Hlongat,previousreference,p. 95.

Firstly: Empowerment of Private Military and Security Companies to Exercise Elements of Governmental Authority

Article 5 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts emphasises that, under international law, actions taken by individuals or entities that are not organs of the state can still be considered acts of the state, provided that the state's law grants them the authority to exercise certain governmental functions and they act in that capacity in the specific instance[1].

The text indicates that actions not performed by state organs can still grant the right to exercise governmental authority and attribute those actions to the state[2].

Commentary from the International Law Commission on this text highlights the intention to address the phenomenon of quasi-state entities, which have increased significantly and now exercise certain elements of governmental authority on behalf of state organs. The text also aims to address cases where companies that were previously under state control continue to perform public or regulatory functions after privatisation.

Furthermore, the commentary notes that the term 'entity' encompasses bodies empowered by domestic law to exercise elements of governmental authority. These can include government companies, quasi-governmental entities and various types of public agencies, as well as private companies, provided they are authorised by the relevant state's laws to perform public functions usually carried out by state bodies, and provided these actions relate to the exercise of relevant governmental authority[3].

Professor James Crawford[4] argues that the aforementioned entities can include government companies, quasi-public entities and public agencies of all types, as well as, in certain cases, private companies. While these entities are not state organs, state law may empower them to exercise elements of governmental authority[5].

The Montreux Document also affirms this principle in its seventh paragraph[6].

Based on this, a contracting state is responsible for the actions of private military and security company employees that violate international humanitarian or human rights law, even if these employees are not part of the state's armed forces. This applies when these employees are authorised under the internal laws of that state to perform certain tasks within the jurisdiction of the state's governmental authority. This can be inferred if employees of these companies participate in military operations alongside the state's armed forces in an armed conflict in which the state is a party, since military action is an element of governmental authority. This applies provided that the private military or security company is authorised under the law of the contracting state to carry out these tasks within the scope of governmental authority and provided that the employees of this company act as if they are fulfilling certain governmental functions[7].

Second: Actions of Private Military and Security Companies Based on Instructions from the Contracting State or Under Its Supervision

In this scenario, if it can be demonstrated that the company and its employees acted based on the instructions of the contracting state, or under its guidance, supervision, or control, then the contracting

1- See Article 5 of the articles on State responsibility for internationally wrongful acts. Faisal Iyad Faraj, op. cit., p. 164.

2- Hamza Hlongat,previousreference,p. 96.

3- See the commentary on the text of Article 5 of the draft articles of document A/56/10, p. 92, Paragraph 2, Supplement No. 10, Majid Hussein, op. cit., p. 139.

4- Professor of International Law, Lauteracht Centre for International Law Research, University of Cambridge.

5- Huda Longat Hamza, op. cit., p. 96.

6- It states: (7- In particular, if private military and security companies "C" are authorized to exercise certain prerogatives of governmental authority if they act in this capacity, i.e., are officially authorized under the law and legislation to perform tasks normally undertaken by state agencies), see the 2008 Mentor Document.

7- Majid Hussein Ali Al-Jumaili, op. cit., pp. 139, 140.

state is held accountable for the actions of the company's employees. This principle is affirmed by Article 8 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, which, according to the comments of the International Law Commission, outlines two situations:

1. First situation: The individual acts in their personal capacity based on instructions from the state.

2. Second situation: When the individual acts in their personal capacity based on guidance from the state, or under its supervision and control[1].

The Montreux Document also reflects this principle in paragraph "d" of practice "07", which states that states contracting with private military and security companies are responsible if these companies are acting based on the state's instructions, guidance or supervision[2].

A pertinent question arises regarding the degree of control that the state must exercise for the actions to be attributed to it.

A pertinent question arises regarding the degree of control that the state must exercise for actions to be attributed to it.

... In the 1986 case concerning military and paramilitary activities in Nicaragua, the International Court of Justice found the United States responsible for the 'planning, directing and supporting' of the Contras. However, the Court rejected Nicaragua's broader claim that all actions of the Contras should be attributed to the U.S. based on its funding and control. Instead, the Court concluded that the U.S. had exercised sufficient oversight to justify treating the Contras as acting on its behalf. The Court determined that effective control over military and paramilitary operations must exist for international responsibility to arise.

By contrast, in the case of Prosecutor v. Tadić in 1999, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia emphasised that international law requires a state to exercise oversight over individuals for their actions to be attributable to the state. However, the degree of oversight required can vary based on the factual circumstances of each case, and international law does not necessitate a high degree of control in every instance[3].

This suggests that the court adopted a standard of general oversight rather than strict actual control over these entities. The Court noted that, while international law requires a state to exercise some level of oversight for actions to be attributed to the state, the degree of oversight may differ based on the specific circumstances of each case[4].

Consequently, a state that contracts private military and security companies is responsible for the actions of these companies' employees that violate international humanitarian law and human rights law[5], even if these employees are not part of the state's armed forces, provided it can be shown that these employees acted based on instructions from the state under its general oversight[6].

Thirdly, the responsibility of the contracting state for the actions of employees of private security companies due to a lack of due diligence.

A contracting state that employs a private military or security company can be held liable for the actions of its employees, even if these actions cannot be attributed to the state itself. In this case, the basis for

1- James Crawford, "Articles on State Responsibility for Internationally Wrongful Acts," Lauterpacht Centre for International Law, University of Cambridge, 2017, available at: https://legal.un.org.
2- Khadija Jawad Mohammed Al-Mukhtar, previous reference, p. 172.
3- Hamza Hlongat, previous reference, p. 99. Maher Jamil Abu Khawat, previous reference, p. 172.
4- Hamza Hlongat, previous reference, p. 99.
5- Maher Jamil Abu Khawat, previous reference, p. 172.
6- The same reference, p. 172.

liability stems from the state's failure to fulfil its international obligations, and its lack of due diligence in ensuring that the employees of these companies respect international humanitarian and human rights law[1].

International humanitarian law imposes a fundamental obligation on states that are parties to its agreements to respect this law[2], as emphasised by Article 1 common to the four Geneva Conventions[3]. Articles 39 and 144 of the Third and Fourth Geneva Conventions[4], respectively[5], and Article 83 of Additional Protocol I further reinforce this obligation[6].

Therefore, under international law, the state is required to prevent acts of violence and punish those responsible, regardless of whether the perpetrators are independent parties or state-affiliated individuals.

The due diligence standard is endorsed by many international documents and declarations as a measure for determining states' compliance with their obligation to protect human rights. The UN General Assembly's 1993 Declaration on the Elimination of Violence Against Women, for example, stipulates that states must exercise due diligence to prevent, investigate and punish acts of violence against women according to national laws, regardless of the perpetrator[7].

The Inter-American Court of Human Rights has also adopted the due diligence standard, as evidenced by its ruling in the Velásquez Rodríguez v. Honduras case in 1988. This clarified that due diligence involves the reasonableness and seriousness of the measures taken by the state[8]. A state cannot be held responsible if it has taken reasonable measures to prevent human rights violations, even if these measures do not yield satisfactory results[9].

The Montreux Document affirms that the contracting state has an obligation to ensure that private military and security companies adhere to international humanitarian and human rights law[10].

Consequently, the state can be held liable for the actions of employees of private military and security companies that violate international humanitarian and human rights law. This is not based on attributing those actions to the contracting state, but rather due to the state's failure to fulfil its obligations and its lack of due diligence in preventing these violations. This includes failing to enact legislation and codes of conduct for these companies to follow during armed conflict and failing to educate them and their employees about their obligations under international humanitarian and human rights law[11].

SECTION TWO: THE JUDICIAL BODY FOR LIABILITY CLAIMS

This section of the research discusses the judicial bodies to which liability claims can be submitted.

Subsection One: Litigation before the International Court of Justice (ICJ).

The ICJ has jurisdiction to consider the liability of private military and security companies for violations of public international law, including international humanitarian law, by referring to certain court precedents.

1- Madjid Hussein Ali Al-Jumaili,previousreference,p. 143.
2- Common Article 1 of the Geneva Conventions states that:
3- Article 39 of the Third Geneva Convention states that:
4- Article 144 of the Fourth Geneva Convention states that:
5- Article 83 of Additional Protocol I states that:
6- See the text of Article 87 of Additional Protocol I. Majid Hussein Ali Al-Jumaili, op. cit., p. 144.
7- See the 1993 Declaration on the Elimination of Violence against Women. Ha Longat Hamza, op. cit., p. 102.
8- See the judgment of the Inter-American Court of Human Rights.
9- Ha Longat Hamza, op. cit., p. 102
10- The Montreux Document on International Legal Obligations and Good Practices of States Relevant to the Operations of Private Military and Security Companies during Armed Conflict, 17 September 2008, states: (3- The Contracting State has an obligation, within the limits of its powers, to ensure that the private military and security companies it contracts comply with international humanitarian law, in particular with the following:
A- Ensuring the quality of private military and security companies and their personnel.
11- Majid Hussein Ali Al-Jumaili, op. cit., p. 145.

For example, in 1986, the ICJ examined the dispute between the United States and Nicaragua regarding the U.S.'s military and paramilitary activities in Nicaragua[1].

In its ruling, the ICJ established that the United States was responsible for violating the principle of non-intervention in Nicaragua's internal affairs by training and arming the Contras, and assisting them in carrying out military and paramilitary activities against Nicaragua. The court also noted that US aircraft had violated Nicaraguan airspace and attacked its facilities and ports[2].

The court affirmed that even though the U.S. involvement in organizing, equipping, training, funding, and providing ammunition to the Contras was significant, it was not sufficient on its own to attribute the actions of the Contras directly to the United States. The court determined that general oversight was not enough evidence to conclude that the U.S. ordered or compelled unlawful actions, as the Contras could have committed these acts outside of U.S. control. To establish legal responsibility for the U.S., there must be proof of effective control over the military and paramilitary operations during which those violations occurred[3].

Thus, the ICJ recognized the United States' responsibility for its support to the Contras but did not attribute the actions of the Contras themselves to the U.S. except in a few specific instances based on actual participation and instructions provided by the state. The court concluded that general dependency and support were insufficient to justify attributing these actions to the state[4].

Given this analysis by the ICJ in the case of U.S. military and paramilitary activities in Nicaragua, similar reasoning could apply if Iraq were to bring a case against the United States concerning the actions of military and security companies in Iraq. The court could consider the case based on the fact that both Iraq and the United States are parties to the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, which states in Article 9 that: "Disputes between the contracting parties relating to the interpretation or application of the present Convention, including those relating to the responsibility of a State for genocide or for any of the acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties.[5]"

Article 9 is significant as it grants Iraq the right to file a claim against the United States for the responsibility arising from the actions of private military and security companies that constitute serious violations of international humanitarian law. The actions of Blackwater in the Nisour Square incident in Baghdad serve as a prime example of such violations[6].

Iraq possesses a range of evidence and legal grounds enabling it to approach the ICJ with a claim against the United States for its failure to prevent private military and security companies from violating international humanitarian law. Notably, Iraq was in a state of international armed conflict at the time of the Nisour Square incident. Blackwater violated the principle of distinction between civilians and military personnel while under U.S. oversight and control, thereby incurring liability under Article 8 of the Draft Articles on State Responsibility[7].

1- Abbas Walid, op. cit., p. 146.

2- - Ben OudaNasira, op. cit., p. 557.

- Dailier Patrick, Alain Pellet, International Public Law, Nguyen Quoc Dinh, 5th edition – G-D-J- DELTA 1994, p. 739.

3- Ben OudaNasira, op. cit., p. 558. For more details on the issue of military and paramilitary activities, see:

- Military and paramilitary aclivités in and againts Nicaragua, (Nicaragua V. United States of Seucrica Merits, I.C.J., Reports 1986, on the website: https://www.icj.org/.

4- Ben OudaNasira, op. cit., p. 558. Obaid Mahmoud Musa, The International Court of Justice and Its Role in Developing the Rules of International Criminal Law, Dar Amjad for Publishing and Distribution, Amman 2017, p. 163.

5- See Article 9 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted and opened for signature, ratification, or accession by General Assembly resolution 260 A (III) of 9 December 1948, entry into force 12 January 1951.

6- Abbas Walid, op. cit., p. 147.

7- H.H. Longat Hamza, op. cit., pp. 158, 159.

Subsection Two: Litigation before the International Criminal Court (ICC)

In addition to the international responsibility arising from the actions of private military and security companies mentioned above, it is possible to prosecute employees of these companies under certain conditions. This specifically applies if the crimes were committed in the territory of a state party to the Rome Statute of the ICC; if the victim is a national of a state party to the Statute; or if the accused employee is a national of a state party to the Statute.

The ICC may also have jurisdiction if the United Nations Security Council refers a situation to the Court under Chapter VII of the UN Charter or if the ICC Prosecutor's investigations reveal the involvement of employees from private military and security companies contracted by states parties in international crimes.

This framework enables the prosecution of individuals associated with private military and security companies for serious offences, including war crimes and crimes against humanity, thereby holding them accountable under international law[1].

CONCLUSION:

The basis for holding the state responsible for the actions of private military and security company employees hinges on how these employees are classified. State responsibility may be direct if these employees are considered part of the state's armed forces, or indirect if the state is found to have failed to exercise due diligence.

However, proving the relationship of control and direction between the state and these companies is often difficult.

In light of these companies' egregious violations of international law, particularly international humanitarian law, several recommendations can be proposed to mitigate such violations:

1. Enact comprehensive national legislation: This would ensure that employees of these companies are held accountable for violations of international law.

2. Establish international legislation: This would regulate and oversee the operations and activities of private military and security companies.

3. Encourage states to monitor activities. States should be urged to closely monitor these companies' activities when contracting them.

4. Create an international mechanism: Create an international mechanism to register private military and security companies worldwide and oversee their activities.

5. Draft an international agreement. Adopt the obligations set out in the Montreux Document in this area.

These measures aim to enhance accountability and ensure that violations of international law are addressed effectively.

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