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EU OPERATIONS AND PRIVATE MILITARY CONTRACTORS:
ISSUES OF CORPORATE AND INSTITUTIONAL RESPONSIBILITY

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Abstract

The European Union has developed its security competence since 1992, thus putting pressure on its Member States to provide troops for the increasing number of EU peace operations being deployed to different areas of the globe. But with national militaries being rationalized and contracted the EU will inevitably follow the lead of the US, the UK, and the UN and start to use Private Military Contractors to undertake some of the functions of peace operations. This article explores the consequences of this trend from the perspective of the accountability and responsibility of both the corporation and the institution when the employees of PMCs commit violations of human rights law and, if applicable, international humanitarian law.

Keywords

Law – Regulation – Human Rights – Security – Accountability – OECD – European Commission – European Parliament – Legal Personality

***EU Operations and Private Military Contractors:
Issues of Corporate and Institutional Responsibility***

NIGEL D. WHITE* AND SORCHA MACLEOD*

1. Introduction

This article will consider issues of international legal responsibility in the context of the potential use of private military contractors or companies (PMCs) in peace operations mandated by international organizations. Particular focus will be on the potential role of PMCs in EU peace operations to reflect the organization's growing competence as a regulator of PMCs and as a security actor. Though PMCs do not appear to have been used to any extent in the large-scale EU operations to date in Bosnia, the Congo, Chad/Central African Republic, and Kosovo,¹ there will be pressure to use them as Member States' armed forces contract while the EU's security competence and activities expands. Generally there is a discernible trend among international organizations, including regional organization, to use the services of PMCs.²

This trend has been recognized by the British government, which has increasingly relied upon PMCs in the post-Cold War period. In the foreword to the 2002 Green Paper on 'Private Military Companies: Options for Regulation', the Foreign Secretary, Jack Straw, stated that the massive military establishments of the Cold War were a thing of the past, and that '[s]tates and international organizations are turning to the private sector as a cost effective way of procuring services which would otherwise have been the preserve of the military'. Although PMCs are mainly used by governments, principally the US and the UK, the Foreign Secretary goes on to state that a 'further source of demand for private military services would be international organizations' enabling them to 'respond more rapidly and more effectively in crises'.³ Kevin O'Brien is even firmer on the growing role of PMCs within UN peace operations when he writes that 'it is clear that the United Nations is moving towards a situation (particularly through the Department of Peacekeeping Operations (DPKO)) where PMCs will be used in ever-greater capacities from their current existence as protectors and defenders of humanitarian aid operations in zones of conflict'.⁴ It has been argued that suitably controlled and regulated use of PMCs by the EU and other organizations would bring significant benefits, not only cost savings but a removal of the organization's dependence on voluntary and possibly poorly equipped contributions from Member States.⁵ While identifying the benefits to

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¹ See SC Res. 1484, 30 May 2003 (DRC); SC Res. 1525, 22 Nov. 2004 (Bosnia); SC 1778, 25 Sept. 2007 (Chad/CAR); SC Res. 1244, 10 June 1999 (Kosovo).

² H. Wulf, *Internationalizing and Privatizing War and Peace* (2005), at 42.

³ HC 577, 12 Feb. 2002, at 4.

⁴ O'Brien, 'What Should and What Should Not be Regulated?', in S. Chesterman and C. Lenhardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007), at 45.

⁵ Patterson, 'A Corporate Alternative to United Nations *Ad Hoc* Military Deployments', 13 *J Conflict and Security L* (2008) forthcoming.

organizations that the greater use of PMCs would bring, Jack Straw also recognizes that the use of PMCs raises ‘important concerns about human rights, sovereignty and accountability’.⁶

Given the traditional focus on the state as principal right holder and duty bearer in international law, the use of PMCs by international organizations does indeed raise complex issues of responsibility and accountability. There are conceptual difficulties in attributing legal responsibility to international organizations and the companies which provide military and security services. Although very different entities, international organizations and corporate entities are classified as non-state actors, and as such both represent challenges to the domination of the international legal order by sovereign states. International organizations acting in a collective security sphere challenge the traditional domination of the application of military force by states. The provision of security, potentially combat, personnel by private companies also challenges the domination of the state in military matters. With organizations such as the EU providing authority for the deployment of operations, and PMCs potentially providing at least some of the forces, the state, though still important, is no longer omniscient in the application of military measures.

This article will explore the inroads made by companies and organizations into the state monopoly on military force, by considering the accountability and responsibility of organizations and companies when there appear to have been breaches of international law by PMCs. For example, if an employee of a PMC working within an EU peace operation breaches the human rights of a detainee under the PMC’s control, how and by what means can the corporation and/or the organization be held liable for that breach? If there is potential liability are there mechanisms of accountability through which a victim can access remedies?

The issue of corporate accountability and responsibility is addressed in section 2, which shows that while avenues of corporate accountability may be developed, corporations (including PMCs) do not have the requisite level of autonomy to be subjects of international law and thereby to be responsible for internationally wrongful acts. In contrast section 3 reveals that international organizations have reached the stage of objective legal personality, making them responsible in their own right for breaches of international law. When PMCs are used by organizations the issue is one of attribution and the article draws on accepted institutional practice on peace-keeping to show that organizations can be responsible for the acts of PMCs over which they exercise authority and control. However, not all acts of PMCs working for organizations can be attributed to the source of authority; PMCs should themselves be held to account if they are not to escape the framework of international laws that they should respect. In section 4 the article turns to the issue of corporate social responsibility and the mechanisms of regulation that accompany this. Such regulation can work only within a strong institutional framework, and the article explores the strengths and weaknesses of international and European frameworks. Section 5 unearths the remedies that may be available to victims of PMC abuse, against the corporations themselves, or, where applicable, against the authorizing organization.

2. The Accountability and Responsibility of Corporations in International Law

It concludes that there is no reason in international law for any corporation, including PMCs, to avoid accountability for international law contraventions, in particular violations of human rights and, where applicable, international humanitarian law. International law has not yet developed, however, to the level of recognizing the responsibility of PMCs for internationally wrongful acts.

This section considers the accountability of corporations for breaches of international law. It is axiomatic that the status of ‘subject’ of international law was conventionally bestowed upon states which met the Montevideo Convention criteria for statehood, the most important of which was the exercise of sovereign power. According to Charlesworth and Chinkin this ‘establishes a model for full

⁶ HC 577, *supra* note 3, at 4.

international personality that other claimants for international status cannot replicate'.⁷ This is undoubtedly a truism; however, recent years have witnessed a move towards recognition of other entities as subjects of international law, in particular, international organizations. Unlike international organizations which are accepted on the international plane by virtue of an associated objective legal personality, corporations remain excluded. There is, however, no reason to suppose that corporate international legal personality is a distant pipe-dream. Starting with the *Reparations Case* in 1949 the international community has moved towards a position where international organizations are recognized as subjects of international law with associated rights and duties.⁸ The prevailing *status quo*, however, is that neither individuals nor corporations are subjects of international law and derive any meagre international legal personality from the will of their national states, reflecting the traditional Austinian position enunciated by the Permanent Court in the *Lotus* decision that 'international law governs relations between independent states ... [which] emanate from their own free will'.⁹

An Austinian analysis will elicit an enquiry as to where the power lies and will conclude that it rests solely with the state or law-maker. On this so-called voluntarist analysis, international law depends upon the engagement of states. Any imposition of international obligations is thus dependent upon state consensus. So, for example, individuals are recognized as subjects of international law under the Statute of the International Criminal Court, and as such bear responsibility for the commission of genocide, crimes against humanity, and war crimes.¹⁰ On the other hand, corporations have not been regarded traditionally as possessing international legal personality, and as such do not bear responsibilities under international law, in particular responsibility for human rights violations and, where applicable, violations of international humanitarian law. This limited role is reflected in the jurisprudence of the International Court of Justice which regards corporations as legal entities separate from their shareholders but which are capable of being protected only by virtue of diplomatic protection.¹¹ Such protection is not an automatic right; rather it is a discretionary power to be exercised by the state of nationality. This position has been reaffirmed recently by the Court in the *Case Concerning Ahmadou Sadio Diallo* decided in 2007.¹²

Thus the traditional Westphalian narrative of states as the sole subjects of international law with attendant rights and duties holds fast and a conservative view of international law prevails, rendering corporations ostensibly devoid of international legal constraint. Several anomalies in this approach can be identified, however, upon an examination of how corporations have historically and in more recent times been treated by states. It can be demonstrated that states have clearly considered corporations to be subjects of international law *or* at least capable of engaging international responsibility in a derivative manner.

First, on the basis of Royal Charters established as far back as the 17th century, the Dutch and British East India Companies exercised key elements of what would today be recognized as sovereign power. So, for example, these 'little republics' exercised various sovereign powers including, in the case of the British East India Company, 'the right to have its contracts treated as international treaties and the right to make war', as well as issuing currency, governing territories, and maintaining 'standing armies' which 'engaged in military action'.¹³ Max Huber in the *Islands of Palmas* arbitration concluded that 'the acts of the Dutch East India Company' in terms of 'occupying or colonizing the

⁷ H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (2000), at 124.

⁸ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174, at 179.

⁹ *The Case of the SS Lotus*, PCIJ Series A, No.10 (1927), at 18.

¹⁰ Art. 25 Statute of the International Criminal Court UN Doc./A.CONF.183.9*, 2187 UNTS (1998) 90.

¹¹ *Barcelona Traction Light and Power Company* [1970] ICJ Rep 3.

¹² [1997] Summary of Judgment, 24 May 2007.

¹³ Garrett, 'The Corporation as Sovereign', 60 *Maine L Rev* (2008) 129, at 133.

regions at issue in the present affair must, in international law be entirely assimilated to acts of the Netherlands State itself'. Furthermore he found that under the Treaties of Münster and Utrecht, the Dutch East and West India Companies 'were entitled to create situations recognized by international law', even to the extent of concluding conventions of a political nature.¹⁴

So the powers of the East and West India Companies were derived from and usually exercised on behalf of the sovereign state in question, and therefore to a certain extent they are based upon the traditional perception of international law as reflecting the will of states. Nevertheless, the powers awarded demonstrate a historical acceptance of corporations as actors on the international plane.

Secondly, states have recognized corporations as subjects of international law possessing obligations and responsibilities on the basis of international covenants. This is not a new phenomenon; in fact Wolfgang Friedmann in 1964 concluded that 'private corporations are participants in the evolution of modern international law'.¹⁵ An examination of several treaties reveals the truth of this assertion. For example, under the UN Convention on the Law of the Sea 1982 the restrictions relating to appropriation of the seabed apply to natural and juridical persons as well as states.¹⁶ Likewise Article 1 of the Convention on Civil Liability for Oil Pollution Damage 1969 provides that the owner of a ship (natural or legal person) will be held liable for pollution caused by that ship.¹⁷ More recently, Article 10 of the UN Convention against Transnational Organized Crime of 2000 makes reference to the liability of legal persons.¹⁸

So it is clear that the international community recognizes that private actors may incur international responsibility in some contexts; why not under human rights law and, where appropriate, international humanitarian law? There are several possible responses. Antonio Cassese posits an answer as to why '[s]tates have not upgraded [corporate entities] to international subjects proper'.¹⁹ Writing in 1986, he stated that:

Socialist countries are politically opposed to them and the majority of developing countries are suspicious of their power; both groups will never allow them to play an autonomous role in international affairs. Even Western countries are reluctant to grant them international standing; they prefer to keep them under their control – of course, to the extent that this is possible. It follows that multinational corporations possess no international rights and duties: they are only subjects of municipal and transnational law.²⁰

This is probably an accurate summary of the debate which has taken place within the international community over the past 35 years, but it is not the conclusion of the discussion. Andrew Clapham (in the context of the International Criminal Court) argues 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

¹⁴ *The Islands of Palmas Case (The Netherlands v. United States)*, 2 RIAA (1928) 829.

¹⁵ M. Kamminga, *Corporate Obligations under International Law*, Stakeholder submissions to the report of the High Commissioner for Human Rights on the Responsibilities of Transnational Corporations and related Business Enterprises with regard to Human Rights, available at: www2.ohchr.org/english/issues/globalization/business/docs/kamminga.doc, at 1, citing W. Friedmann, *The Changing Structure of International Law* (1964), at 230.

¹⁶ 1833 UNTS 397, Art. 137(1).

¹⁷ 973 UNTS 3.

¹⁸ 2225 UNTS 275. See also Clapham, 'On Complicity', in M. Henzelin and R. Roth (eds), *Le droit penal à l'épreuve de l'internationalisation* (2000), at 241, 261.

¹⁹ A. Cassese, *International Law in a Divided World* (1986), at 103.

²⁰ *Ibid.*

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.²¹

It is thus clear that corporations over the centuries have exercised sovereign power on behalf of the state *and* have been made subject to the provisions of international covenants. Any narrative which posits that international legal personality is the sole preserve of states is historically inaccurate. The political will, however, 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 of international law, but they *are* recognized as international actors who can and should be held to account for their wrongful acts.

3. The Responsibility of Organisations for PMCs

A. The Development of Institutional Responsibility

While international law has not yet clearly recognized corporations as subjects of the legal order capable on their own of bearing rights and duties, and thereby being directly responsible for their wrongful acts, another non-state actor – the inter-governmental organization – is established as a subject of international law, with separate will and personality, and with rights and duties on the international stage. With this status achieved the responsibility of organizations for breaches of international law is undeniable, at least in theory. Full recognition though has been a slow process. Though separate personality of the UN was confirmed by the International Court in 1949,²² it was not until 1980 that the Court made it clear that organizations were ‘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 a party’.²³ Further, in 1999 the Court stated that immunity from legal process enjoyed by an organization does not absolve it from responsibility for its unlawful acts.²⁴ The process of codification started soon afterwards, with the International Law Commission (ILC) making good progress towards a draft code of articles on institutional responsibility, deliberately using the 2001 Articles on State Responsibility as a model, the ILC declaring that ‘they should be regarded as a source of inspiration, whether or not analogous solutions are justified with regard to international organizations’.²⁵

In considering in general the international legal responsibility of organizations, the Special Rapporteur, Giorgio Gaja, and the ILC identified that responsibility attaches only to organizations with separate personality.²⁶ They also confirmed the ‘objective’ legal personality of organizations,²⁷ thereby rejecting the notion of secondary personality deriving from member states. Derivative personality seems to have been used in the past as a shield to protect the organization from taking full responsibility for its actions and also in an attempt to preserve the supremacy of the state as subject of international law.²⁸ Though there has been a lack of clarity on the international legal personality of the

²¹ 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* (2000), at 139, 190.

²² *Reparations case*, *supra* note 8.

²³ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion* [1980] ICJ Rep 73, at 89–90.

²⁴ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion* [1999] ICJ Rep 62, at 88.

²⁵ ILC Report on the Work of its Fifty-Fourth Session, UN Doc. A/57/10 (2002), at 232.

²⁶ G. Gaja, *First Report on Responsibility of International Organizations*, UN Doc. A/CN.4/532, 26 Mar. 2003, at 8.

²⁷ *Ibid.*, at 11; ILC Report on the Work of its Fifty-Fifth Session, UN Doc. A/58/10 (2003), 33 (ILC Report, 2003), 42.

²⁸ See generally Tunkin, ‘The Legal Nature of the United Nations’, 199 *Hague Recueil* (1966) 1.

EU since its creation in 1992, arguments that it has to borrow the personality of the European Community when acting on the international stage seem both outdated and inaccurate.²⁹

A rhetorical organization, one discussing matters and adopting recommendations, will not normally violate international law. In contrast an organization which is operational, with missions in the field, and with those missions performing functions such as peace-keeping and peace-building, will be bound by those general norms of international law that are customary as well as *jus cogens* – those peremptory rules of international law that could be said to underpin the international legal order – prohibiting gross violence on the international stage.³⁰ The ILC's Special Rapporteur recognized the applicability of the latter, stating that the failure of the UN to prevent genocide in Rwanda in 1994 constituted a breach of an international obligation. He stated further that 'difficulties relating to the decision-making process could not exonerate the United Nations'.³¹ Furthermore, it is clear that 'omissions are wrongful when an international organization is required to take some positive action and fails to do so',³² and that both states and organizations are under a duty to suppress and prevent the commission of genocide.

Though there is general recognition that institutions are bound by *jus cogens*,³³ there may still be doubt about whether organizations can be bound by customary law, which, after all, in the traditional ethos of international law is made by states for states. The flat-earth view of international law is exemplified by the Permanent Court's statement in the *Lotus* case of 1927,³⁴ but even by that date such an approach was not fully accurate, given the existence of international organizations, principally the League of Nations the creation of which challenged the contractual model of international law.³⁵ Though the ILC stated in 2005 that 'for an international organization most obligations are likely to arise from the rules of the organization' or the internal law deriving from the constituent treaty as developed by practice, it did concede that the same sort of obligations that apply to states can apply to organizations, namely 'a customary rule of international law, a treaty or a general principle within the international legal order'.³⁶ When considering how this would work in practice, Amerasinghe is clear:

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 force in the case of the UN.³⁷

It is worth noting that in his discussion of whose acts can be imputed to an organization, Amerasinghe writes about 'organs, servants, agents or independent contractors'.³⁸ More precise analysis of the issue of attribution will take place in the next section.

In sum, international organizations exercise functions in their own right on the international stage and possess powers identified by Gaja as 'legislative, executive or judicial', more generally

²⁹ Wessel, 'Revisiting the International Legal Status of the EU', 5 *European Foreign Affairs Rev* (2000) 507.

³⁰ A. Orakhelashvili, *Peremptory Norms in International Law* (2006), at 114.

³¹ G. Gaja, *Third Report on Responsibility of International Organizations*, UN Doc. A/CN.4/553, 13 May 2005, at 4.

³² *Ibid.*, at 3.

³³ ILC Report on the Work of its Fifty-Fifth Session, UN Doc. A/58/10 (2003), 47 (ILC Report, 2003).

³⁴ *Supra* note 9.

³⁵ McNair, 'The Functions and Differing Character of Treaties', 11 *BYBIL* (1930) 100, at 112; Lauterpacht, 'The Covenant as the Higher Law', 17 *BYBIL* (1936) 54.

³⁶ ILC Report on the Work of its Fifty-Seventh Session, UN Doc A/60/10 (2005), at 87–88 (ILC Report, 2005).

³⁷ C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2005), at 400.

³⁸ *Ibid.*

‘governmental’³⁹ or ‘sovereign’,⁴⁰ which can only be explained as evidence of a new international actor whose personality is not just a theoretical construct. Mainstream international legal literature contains many references to the development of this power no matter how imperfect it may be.⁴¹ In other words, it should no longer be seen as controversial. Furthermore, once it is accepted that organizations legitimately exercise a wide range of powers and functions it is ‘likely that the organization concerned will have acquired obligations under international law in relation to those functions, and the question of the existence of breaches may arise more frequently’.⁴² With constitutional development comes institutional responsibility.

B. Attribution to Organizations

One of the key issues that makes organizational responsibility more complex, and therefore will lead to some differences in the Articles on Institutional Responsibility when compared with those on State Responsibility, is that there is often a question whether responsibility lies with organizations or member states (or both).⁴³ This issue becomes acute when one considers institutionally mandated peace operations consisting of troops supplied by member states. In general terms for such peace operations the UN has accepted responsibility only for forces acting under its authority, command, and control. This normally means that it accepts liability for unlawful acts done by peace-keepers acting within their functions, but not for the acts of troops which are part of coalitions of the willing operating under a Security Council mandate but under the command and control of contributing state(s).⁴⁴

Putting aside the issue of individual criminal responsibility, the issue of where responsibility lies for unlawful acts committed by peace-keepers normally involves a choice between the organization and the contributing state. However, there is no reason why the same principles should not apply to private individuals or contractors employed by international organizations. This would indicate that in principle the organization should be responsible for unlawful acts committed by contractors acting under its authority, command, and control. If the contractors are not employed directly by the organization, but are employed by states contributing to an operation under UN authority, then the issue becomes more complex, but essentially comes down to who has authority, command, and control over the contractors in relation to the acts in question. If neither state nor organization has such control then, unless a less stringent test of attribution is to be used, the issue must be considered solely from the perspective of corporate responsibility. With corporations not normally responsible under international law and with the intrinsic weaknesses of self-regulation embodied in the development of corporate social responsibility (examined in the next section), it is essential that we consider the rules on attributability closely.

The test of authority, command, and control may appear a stringent one, and one that may not be sufficient to impute the actions of PMCs to organizations. In practice, though, the threshold for attribution does not appear as strict as the terminology implies. Authority, command, and control may exist formally, but in practice the level of control is less. For a start it is notable that the UN accepts

³⁹ Gaja, *supra* note 26, at 12.

⁴⁰ D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (2005).

⁴¹ Brownlie, ‘The United Nations as a Form of Government’, in J.E.S. Fawcett and R. Higgins (eds), *International Organization* (1974), at 13, 26–27.

⁴² Gaja, *supra* note 26, at 15.

⁴³ ILC Report, 2002, *supra* note 25, at 232.

⁴⁴ Scobbie, ‘International Organizations and International Relations’, in R.-J. Dupuy (ed.), *A Handbook on International Organizations* (1998), at 891. See also G. Gaja, Second Report on Responsibility of International Organizations, UN Doc. A/CN.4/541, 2 Apr. 2004, at 16–17.

responsibility for the wrongful acts or omissions of peace-keepers under its command and control despite the fact that disciplinary power and criminal jurisdiction over UN peace-keepers still belongs to the contributing state.⁴⁵ This illustrates the reality that the level of command and control exercised by the UN over peace-keepers is not complete or fully effective if we also consider the practice by national contingent commanders of referring controversial UN commands to their governments for approval before they act upon them.⁴⁶

The level of organizational control was a key issue in the *Behrami* case of 2007,⁴⁷ when the European Court of Human Rights identified that the failure to clear up cluster bombs in Kosovo in the period after Serb withdrawal in June 1999 was attributable to the UN, and not France as a contributing nation to the NATO force (KFOR) whose troops were deployed to the area in question. Though the UN administration of Kosovo (UNMIK) did have responsibility for mine clearance at the time of the explosion, it is doubtful whether it, and not France (or KFOR), was in control of the conduct in question or the area in which the bombs were located.⁴⁸ Though the Court's judgment is not without problems,⁴⁹ especially in its failure to recognize that contributing states as well as the UN could be responsible,⁵⁰ there are some benefits to recognizing that when the UN authorizes a force and furthermore does purport to exercise some control over it, it should bear or at least share responsibility, even though it was not in complete control over the act or omission in question. The Court stated that the key question was 'whether the Security Council maintained ultimate authority and control so that operational command was only delegated'.⁵¹ With UN commanded peace operations regularly being given Chapter VII mandates after the Brahimi Report of 2000, and nationally or multi-nationally commanded forces increasingly forming part of hybrid operations under a Chapter VII mandate, it seems appropriate to revise the simple Cold War division of peace-keeping (for which the UN accepts responsibility) and coalitions (for which it does not). While coalitions of the type authorized in Korea and the Gulf (1991) were subject to limited Security Council control and remained outside any revised test of attribution, peace-keeping and peace operations (even with Chapter VII mandates) should be within it unless it is shown that the level of control is inadequate.

The above argument would suggest that within peace operations acts of individuals can be attributed to the authorizing organization even if those individuals' loyalties and duties lie with another actor. Simply put, if an organization authorizes a peace operation and purports to exercise control over it, it should bear the responsibility for acts or omissions of individuals, whether troops drawn from contributing states or employees of PMCs working within that operation, if those acts or omissions violate norms of international law. The International Court of Justice has adopted a stronger test of attribution for acts of individuals in relation to states in the *Nicaragua* case of 1986, reaffirmed in the *Bosnia v. Serbia* decision of 2007.⁵² The 'effective control' test put forward in those cases can be

⁴⁵ *Ibid.*, at 19.

⁴⁶ Thakur and Banerjee, 'India: Democratic, Poor, Internationalist', in C. Ku and H. Jacobson (eds), *Democratic Accountability and the Use of Force in International Law* (2003), at 176, 198.

⁴⁷ App. Nos. 71412/01 and 78166/01, *Behrami and Saramati v France, Germany and Norway*, ECHR Grand Chamber Decision, 2 May 2007 (Admissibility).

⁴⁸ But see *ibid.*, at paras 5–7, 126.

⁴⁹ *Ibid.*, at para. 132.

⁵⁰ Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases', 8 *Human Rights L Rev* (2008) 151, at 159.

⁵¹ *Behrami* case, *supra* note 47, at para. 133.

⁵² *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment [1986] ICJ Rep 14, at 62–64; *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment [2007] ICJ Rep, at paras 401–407. But see Cassese, 'The *Nicaragua* and *Tadic* Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia', 18 *EJIL* (2007) 649, at 653–654, 663.

contrasted with the ‘overall control’ test in the *Tadic* case of 1999 before the ICTY. The latter, though, better reflects the realities of the growth of non-state actors in international law, whether insurgents, terrorists,⁵³ or PMCs who may not necessarily be the agents of the state, but may well be under sufficient influence of and control by a state or organization. Not to impute responsibility to the state or organization would enable those actors to escape ‘international responsibility by having private individuals carry out tasks that may or should not be performed by state officials’.⁵⁴

Whatever the merits of the different approaches, it appears that in peace-keeping practice institutional responsibility is engaged when the institution is in overall control of the conduct in question. The fact that peace operations consist of state contingents signifies that it is unrealistic to expect the UN to have effective control of the operation in all its aspects, since issues of national command get in the way of achieving that high standard. Thus when one considers the attribution of acts or omissions of PMCs to organizations, the fact that the organization may not exercise complete control over them should not necessarily be a bar to imputing responsibility.

The ILC’s approach to attribution in the case of organizations is not to adopt a test of attribution for acts of individuals in the sense of Article 8 of the 2001 Articles on State Responsibility, which provides that the conduct of individuals shall be attributed to a state if the individuals are ‘acting on the instructions of, or under the direction or control of, the State in carrying out the conduct’. Gaja’s interpretation is to the effect that the organization not only bears responsibility for the acts or omissions of its organs which breach international law but also its ‘agents’, interpreted to include ‘not only officials but also to other persons acting for’ the organization, ‘on the basis of functions conferred by an organ of the organization’.⁵⁵ This seems to extend to the work of sub-contractors working for an organization.

The ILC’s general test for attribution for institutions is found in draft Article 4, paragraph 1 of which states that ‘the 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’, and in paragraph 2 states that ‘agent’ ‘includes officials and other persons or entities through whom the organization acts’.⁵⁶ This seems broad enough to include PMCs employed by an organization to perform its functions. The ILC itself stated that the term ‘agent’ does not simply refer to officials but to any person ‘acting for the United Nations on the basis of functions conferred by an organ of the organization’.⁵⁷ Further, it interprets persons to include legal persons and other entities as well as natural persons, which would include companies offering security and military services.

The absence of an equivalent provision to Article 8 of the Articles on State Responsibility in the Draft Articles on Institutional Responsibility may be seen as leaving a lacuna into which PMCs could fall. It might be argued (though this is not the interpretation given above) that private contractors do not fit into the general rule of attributability in draft Article 4, and there is no separate provision for attribution of the conduct of individuals. The Special Rapporteur thought that the terms of draft Article 4 were broad enough to exclude the need for an equivalent provision to Article 8 on State Responsibility, concluding that the reference to the practice of the organization in defining the rules of the organization in draft Article 4.3 ‘allows one to take into account situations of factual control’.⁵⁸ Thus the practice of the organization in accepting responsibility for the acts or omissions of peace-

⁵³ *Ibid.*, at 665–667.

⁵⁴ *Prosecutor v. Tadic*, 15 July 1999, IT-94-1-A, at para. 117.

⁵⁵ Gaja, *supra* note 44, at 9. See also Tomuschat, ‘The International Responsibility of the European Union’, in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (2002), at 177, 180.

⁵⁶ ILC Report on the Work of its Fifty-Sixth Session, UN Doc. A/59/10 (2004), at 95–99.

⁵⁷ *Ibid.*, at 106.

⁵⁸ Gaja, *supra* note 44, at 29. See ILC Report 2004, *supra* note 56, at 99 for Draft Art. 4.

keepers and generally denying the attribution of conduct of troops acting in coalitions is accommodated by this provision.⁵⁹ By adopting this approach the ILC has avoided the need to try and codify such practice. Practice on peace-keeping may be pointed to as requiring the same standard to be applied to analogous individuals such as PMCs working alongside peace-keepers. Furthermore the ILC makes it clear that it sees no need for a similar provision to Article 8 of the Articles on State Responsibility since, if a person acts under the instructions or under the direction or control of an organization, he or she would be regarded as an agent within the definition of draft Article 4.2.⁶⁰

In conclusion, where the EU has authorized a peace operation and purports to exercise some, though not complete, control over it, the acts or omissions of troops and PMC employees should be attributable to the organization if they amount to breaches of human rights law or, if appropriate, international humanitarian law. This reflects the reality that organizations such as the EU do not exercise effective control over peace operations undertaken under their authority. Of course this does not mean that a higher standard of control is not desirable or achievable. Indeed, the EU or UN may be able to control PMCs more effectively by means of detailed contracts containing mechanisms of accountability than they can the contingents of member states. Even for those operations not under the overall control of the organization there may still be responsibility on the part of the organization, not for the violations in question but for the lack of due diligence in preventing or responding to such violations.⁶¹

4. Corporate Social Responsibility

The above analysis shows the possibilities of imputing acts of PMCs to organizations such as the EU, and this to a certain extent partially fills the gap left by the lack of direct international legal responsibility of corporations. However, the situation remains unsatisfactory for the victims of PMC abuse in the sense that it is still not possible to establish the liability of corporations directly for breaches of international law, making it necessary to consider alternative mechanisms of accountability under the developing idea of corporate social responsibility (CSR). Brief mention will be made of the OECD and UN initiatives, but the article will then focus on the EU's concern for this issue.

A. The OECD

One of the most important CSR instruments to emerge is the OECD's *Guidelines for Multinational Enterprises* (the Guidelines) which consist of voluntary recommendations regarding social and environmental standards. They are addressed to multinational enterprises (MNEs) based in OECD states, which in turn agree to promote observance of the Guidelines among MNEs⁶² and 'good practice' in the spheres of human rights, labour standards, and the environment.⁶³ The emphasis is on voluntary activities, self-regulation, and reporting mechanisms,⁶⁴ although the stress on labour and

⁵⁹ *Ibid.*, at 102.

⁶⁰ *Ibid.*, at 109.

⁶¹ See the argument in relation to states by Lehnardt, 'Private Military Companies and State Responsibility', in S. Chesterman and C. Lehnardt (eds), *From Mercenaries to Market* (2007), at 152–153.

⁶² For a general overview of the structure and workings of the Guidelines see OECD, *Guidelines for Multinational Enterprises*, Revision 2000 particularly the Commentary; see also Karl, 'The OECD Guidelines for Multinational Enterprises', in M.K. Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations* (1999), at 89.

⁶³ OECD Guidelines, *supra* note 62, I(1) and II(1) and (2).

⁶⁴ *Ibid.*, II(3), (6), and (7). Also Guideline III(1), (2), (3), and (4).

environment issues would tend to suggest that many PMC activities fall outside the scope of the Guidelines.

Although the Guidelines are non-binding, states *are* obliged to set up National Contact Points (NCPs) in order to implement and promote the Guidelines among *all* corporations operating in or from their territory, which would include PMCs.⁶⁵ So, for example, the UK NCP (the Department of Trade and Industry) held a stakeholder consultation regarding implementation of the Guidelines in response to criticism of its performance relating to alleged corporate misbehaviour in a conflict situation in the Democratic Republic of Congo.⁶⁶

Notwithstanding positive developments, the Guidelines are voluntary in nature and regarded as ‘supplementary’ to national laws, nor is there any compliance mechanism in place.⁶⁷ While individual corporations are permitted to make representations to the Committee on International Investment and Multinational Enterprises about Guideline matters relating to their own interests, ‘the Committee shall not reach conclusions on the conduct of individual enterprises’.⁶⁸ Unsurprisingly, NGOs are dissatisfied with the lack of an effective monitoring system.⁶⁹ While some are pushing for a general review of the Guidelines, the 2006 Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones represents important progress, as it applies to states which are ‘unable or unwilling to assume their obligations’ under international law and refers to the ‘positive contributions’ that corporations can make to ‘social progress’ among other things in such zones. Such a tool appears to bring PMCs firmly within the remit of the OECD. Notwithstanding the stakeholder participation approach utilized by the OECD, the fact remains that the Guidelines are voluntary in nature and limited in scope and that their value is predicated upon the effectiveness of the NCPs.

B. UN Global Compact

Within the UN the only functioning CSR project is the Global Compact (GC).⁷⁰ Kofi Annan established the GC in 1999 as a stakeholder network comprising corporate and civil society participants, all of whom work with the freestanding Global Compact Office and a variety of UN agencies.⁷¹ The architects of the GC have always emphasized its voluntary nature, stating that it is not a ‘regulatory instrument’ nor does it ‘police, enforce or measure the behavior or actions of companies’.⁷² Voluntarism dominates and so the GC seeks the ‘enlightened self-interest of companies, labour and civil society to initiate and share substantive action in pursuing the principles upon which the Global Compact is based’ to ensure ‘public accountability’ and ‘transparency’.⁷³ Corporations are encouraged to engage in ‘socially responsible business’ in order to establish and preserve ‘good social

⁶⁵ For a discussion of the OECD Guidelines and the NCPs see MacLeod, ‘Reconciling Regulatory Approaches to Corporate Social Responsibility: The European Union, OECD and United Nations Compared’, 13 *European Public L* (2007) 671; see the Guidelines’ Annex 1, ‘Structure of the National Contact Points’, at 20, 24.

⁶⁶ See http://globalwitness.org/media_library_detail.php/507/.

⁶⁷ The OECD Guidelines, *supra* note 62, Commentary, at 41, para. 2.

⁶⁸ Council Decision, June 2000, II(4).

⁶⁹ *Ibid.*, at 47, para. 4.

⁷⁰ See www.unglobalcompact.org and UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 of 26 Aug. 2003 respectively.

⁷¹ See further MacLeod, ‘The United Nations and Transnational Corporations: Challenging the International Legal Order’, in N. Boeger, R. Murray, and C. Villiers (eds), *Perspectives on Corporate Social Responsibility* (2008), at 64–84.

⁷² See www.unglobalcompact.org/AboutTheGC/index.html.

⁷³ *Ibid.* See H. Ward, *Corporate Responsibility and the Business of Law* (International Institute for Environment and Development Globalt Ansvar, Swedish Partnership for Global Responsibility) Report No 6, Sept. 2005, at 20–21.

reputation' and 'reduction of damaging criticism', as well as 'being more in touch with markets, customers and consumers'.⁷⁴

It is important to note that while the GC appears to adopt voluntarism wholesale, it has also adopted and maintained a participatory stakeholder approach. Corporations of all sizes and civil society representatives are involved. It has been successful in involving ostensibly large numbers of participants as there are currently 5,600 participants in the Global Compact, of which there are 4,300 corporate participants from 120 states.⁷⁵ The remaining participants are largely NGOs, with additional participants coming from UN agencies, business associations, labour organizations, and educational establishments. The GC has been particularly effective at harnessing UN 'inter-agency cooperation', and has brought together the International Labour Organization (ILO), the UN Environmental Programme (UNEP), the UN High Commissioner for Human Rights (UNHCR), and the UN Development Programme (UNDP). Establishing a truly collaborative network is important for engaging especially wide, indirect stakeholder participation.⁷⁶

The GC itself is composed of Ten Principles to which corporate participants are asked to adhere. They address human rights, labour standards, the environment, and corruption, but not international humanitarian law, and apply to corporations on a voluntary basis.⁷⁷ Corporations are asked to 'embrace, support and enact' internationally recognized standards in four key areas, and they agree to support and respect human rights as well as guaranteeing that they are not and will not be complicit in human rights violations.⁷⁸ The basic principles are derived from several key instruments, namely the Universal Declaration of Human Rights, the International Labour Organization's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on the Environment, and the UN Convention against Corruption. As the GC is not a legally binding regulatory instrument the Ten Principles are drafted in indistinct terms and obviously the GC cannot be enforced before a court. It is nonetheless important to note that the Ten Principles are founded on acknowledged international human rights norms. Furthermore, companies which commit to the GC are required to give further assurances that they will promote the Compact via corporate documentation, e.g. annual reports, mission statements, training programmes, and press releases. The nature of PMC activities demands that any regulatory attempt *must* make reference to both human rights and humanitarian law standards. A key omission, therefore, is any reference to international humanitarian law which consequently limits the relevance of the GC to PMCs.

In any event there are further general concerns about the GC's lack of enforcement mechanism which renders the GC open to abuse. Nevertheless corporate abuse of the GC logo resulted in improvements to the GC's integrity measures in relation to the use of the GC's name and logo.⁷⁹ While the GC does not impose binding standards upon transnational corporations (TNCs), significantly it acknowledges that the values it advocates among participant companies have their roots in existing international legal principles.⁸⁰

⁷⁴ 'The Global Compact and Human Rights', available at: www.globalcompact.org.

⁷⁵ See www.unglobalcompact.org/ParticipantsAndStakeholders/index.html.

⁷⁶ Global Compact Report 2002, on file with the authors, at 3.

⁷⁷ See www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html.

⁷⁸ United Nations Global Compact, 'The Ten Principles', available at: www.globalcompact.org.

⁷⁹ The Global Compact, 'Policy on the Use of the Global Compact Name and Logos', 9 Mar. 2005, available at: www.unglobalcompact.org/content/NewsDocs/gc_logo_pol.pdf. Corporations may not use the GC name or logo for promotional purposes, branding, or as a 'permanent graphical element of stationery', nor may there be any suggestion or implication that the GCO 'has endorsed or approved' any particular activity.

⁸⁰ See www.unglobalcompact.org/AboutTheGC/integrity.html. See also 'Policy on the Use of the Global Compact Name and Logos', *supra* note 79.

Despite its inherently voluntary nature there are a variety of mechanisms built into the GC to try to ensure compliance. So, for example, corporate participants are obliged to submit annual concrete examples of measures undertaken to comply with the Ten Principles. These examples must be posted on the GC website to ensure that there is an element of transparency in the process. At the initial 2001 pilot phase, of the 30 (non-PMC) corporate submissions none was deemed 'worthy of publication'.⁸¹ Various problems have led to the imposition of a 'concise template' in order to focus on the 'strictly factual elements of company experience'.⁸²

After the early teething problems, by 2007 the GC had registered its most successful quarterly reporting period, with 428 companies submitting a Communication on Progress, representing a 41 per cent increase on 2005.⁸³ Notwithstanding this development, the increasing number of non-compliant participant companies continues to give cause for concern. To begin with, the military, security, and defence sectors appear to be omitted from categories of participating companies. In total, there are currently 401 non-communicating companies, 510 inactive companies, and, rather alarmingly, 394 companies which have been permanently delisted.⁸⁴ This can be attributed directly to the combination of the voluntary nature of the GC and the lack of any concrete enforcement mechanisms. The GC has no weapons at its disposal to demand compliance with its voluntary reporting requirements, so companies may act with impunity. Nevertheless, the GC has responded positively to genuine stakeholder concerns about the high non-compliance rate, although time will tell whether or not it will have a positive impact on corporate behaviour. There is a risk that it will merely encourage transnational corporations to focus on the style, rather than the substance, of their submissions.

There seems to be a genuine desire to foster stakeholder participation in the process and recognition of the importance of 'high-level advocacy' especially in relation to conflict zones.⁸⁵ The general impact of the GC remains to be seen. What the GC experience demonstrates is that it is possible to operate a genuine stakeholder participatory approach to CSR. In other words, by involving civil society and by naming and shaming poor performers and promoting best practice through transparency mechanisms, the GC exhibits some positive regulatory approaches. Conflict prevention has been a GC issue since its inception, absent any reference to humanitarian law. It does not draw any distinctions between PMCs and other corporate actors *per se*, and in 2008 it set up the Conflict Prevention Working Group because it recognized that 'companies have an important role to play in contributing to security and development' in conflict areas.⁸⁶

C. The European Union

In comparison with the OECD and the UN, the EU has been slow to engage with the general CSR project and does not offer any accountability mechanism in the traditional sense, despite its stated aim to be a 'pole of excellence' in the field. Furthermore there is almost no reference to corporations operating in a conflict zone, let alone PMCs, although it would be logical to conclude that PMCs would be covered by general CSR provisions.

⁸¹ NGO Letter to Kofi Annan Recommending Redesign of Global Compact, 29 Jan. 2002, available at: www.globalcompact.org. See also Global Compact Report 2002 at 18–19.

⁸² GC Report 2002, *supra* note 76, at 19. For the latest Communications on Progress see: www.unglobalcompact.org/CommunicatingProgress/index.html.

⁸³ See www.unglobalcompact.org/NewsAndEvents/news_archives/2007_01_30.html, Press Release, 'Record Quarter for Companies Communicating on Progress', New York, 30 Jan. 2007.

⁸⁴ As at 19 June 2008: see www.unglobalcompact.org/NewsAndEvents/news_archives/2008_01_28.html.

⁸⁵ *Ibid.*, at 13 and 6. See, e.g., the Global Policy Dialogue on the Role of Business in Zones of Conflict, available at: www.unglobalcompact.org/Issues/conflict_prevention/index.html, at 13.

⁸⁶ See www.unglobalcompact.org/Issues/conflict_prevention/index.html.

Much of the early EU CSR impetus came from the desire to improve corporate environmental performance rather than the protection of human rights or humanitarian law, for example, the EU Ecolabels project, and the Eco-Management and Audit Scheme (EMAS).⁸⁷ All of the early attempts encouraged CSR among European enterprises on a purely voluntary basis, a theme which subsists to this day. There was no reference to humanitarian law, PMCs, or conflict situations.

The Göteborg Summit agenda included a consideration of the role of companies within society and within the context of a 'sustainable development strategy' for Europe, and the upshot was the publication in 2001 of the European Commission's 'Green Paper on Corporate Social Responsibility'.⁸⁸ Its stated aim was to stimulate debate about CSR within the European context rather than 'making concrete proposals for action' and it sought views from all stakeholders.⁸⁹ The Commission has always relied upon a business-oriented definition of CSR, describing it as a 'concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis'.⁹⁰ It is not surprising that this approach has found little favour with NGOs and trade unions, particularly in relation to monitoring and compliance.⁹¹ They backed a 'regulatory framework' which established 'minimum standards' and ensured 'a level playing field', which conversely was not well received by the business community.⁹²

Another criticism levelled against the Green Paper concerned the intense focus on the 'business case', with little consideration for the interests of the wider constituency of stakeholders. This is a recurring criticism of the Commission's attitude to CSR. Critics also argued that the Commission's definition of CSR is flawed.⁹³ In particular, it is not clear *what* the Commission is seeking to protect through the adoption of CSR. The reference to a wide variety of international legal instruments, such as the Universal Declaration on Human Rights, ILO Conventions, and the UN Convention on the Rights of the Child, has caused much confusion while there is *no* reference to any humanitarian law standards. There is, however, clear conflict between those who want regulation and those who do not, and the debate is framed in those terms.

The Commission's response failed to address these issues and is largely couched in terms of voluntarism with no attempt to clarify the definition of CSR, including its extension to humanitarian law principles.⁹⁴ There is, however, clear backing for the OECD Guidelines on Multinational Corporations, which may impact positively upon the operation of the OECD NCPs (as discussed above) and result in deeper cooperation.⁹⁵ Further, utilizing the OECD's Guidelines as well as the ILO's Conventions encourages convergence between codes of conduct emanating from different regulatory regimes, by providing 'a common minimum standard of reference'. In addition, two practical proposals were made: first, a proposal to establish an EU Multi-Stakeholder forum on CSR

⁸⁷ See the EU Eco-label Homepage, available at: http://europa.eu.int/comm/environment/ecolabel/index_en.htm.

⁸⁸ European Multistakeholder Forum on CSR, Final Results & Recommendations (2004), 2, available at: http://circa.europa.eu/irc/empl/csr_eu_multi_stakeholder_forum/info/data/en/CSR%20Forum%20final%20report.pdf.
European Commission Green Paper Promoting a European Framework for Corporate Social Responsibility, COM(2001)366. Final responses were invited from interested parties and submitted by 31 Dec. 2001.

⁸⁹ *Ibid.*, at 23.

⁹⁰ *Ibid.*, at 6.

⁹¹ See, e.g., Submission from Amnesty International on the Green Paper, available at: http://europa.eu.int/comm/employment_social/soc-dial/csr/pdf2/091-NGOINT_Amnesty-international_int_011219_en.htm (§ 1 Definition of CSR).

⁹² Commission Communication concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, COM(2002)347, at 4.

⁹³ *Ibid.* See also the individual responses of the NGOs and trade unions to the Green Paper.

⁹⁴ Commission Communication concerning Corporate Social Responsibility, *supra* note 92.

⁹⁵ *Ibid.*, at 13–14.

(EMS forum) with ‘the aim of promoting transparency and convergence of CSR practices and instruments’;⁹⁶ and, secondly, and of particular relevance to PMCs, a proposal that the EMS forum should consider the integration of CSR into all EU policies, including employment and social affairs policy, enterprise policy, environmental policy, consumer policy, and public procurement policy.⁹⁷ The Business Contribution Communication also specifically addresses external relations policies. It advocates the promotion of CSR in line with the ‘Communications on the EU role in promoting human rights standards and democratisation in third countries’.⁹⁸ This promotion of CSR includes ‘the use of bilateral dialogue with Governments’ and ‘trade incentives’, as well as ‘engaging directly with multinational enterprises’, and significantly it engages the governments of third party countries.⁹⁹

Nevertheless, the European Parliament was particularly critical of the Commission reporting that it was ‘frozen out of the process in a way that is unacceptable: the Commission Communication was effectively written before the Parliament’s response to the Green Paper had been absorbed’.¹⁰⁰ In addition, various reporting committees contradicted the Commission’s approach by supporting certain mandatory rules. For example, the Committee on Industry, External Trade, Research, and Energy (CIETRE) demanded a ‘Global Convention on Corporate Accountability’ on the basis that ‘world society has a right to accountability in terms of environmental, social and human rights from transnational corporations and . . . SMEs’.¹⁰¹ Especially significant in relation to PMCs is the attempt by the Committee on Development and Cooperation to establish the extraterritorial scope of EU CSR standards by asking the Commission to ‘create an agency which would be responsible for introducing a system for assessing and monitoring observance of international and national standards on CSR and the environment by EU companies operating in developing countries’.¹⁰²

In essence the Commission’s position has not altered from its 2001 Green Paper position, to the annoyance of many stakeholders. While in the past NGOs and trade unions wanted the EU to create a concrete legal CSR framework, with all that such a framework would entail, their current position has changed. Now these stakeholders are seeking a combination or third way approach to CSR.¹⁰³ From their perspective, the key limitation of the EMS report is the failure to recommend any form of monitoring or compliance procedure. A letter from the NGOs to the Commission and Council commented on the necessary steps for future progress:

Taken together, the recommendations, if they are fully implemented by the relevant actors, will help to generate a significant advance. For that to happen, it will be necessary to develop them into a proper framework that complements the voluntary commitment of a steadily growing number of companies with proactive and consistent public policies to create the right enabling environment and ultimately to ensure accountability by all companies.¹⁰⁴

⁹⁶ *Ibid.*, at 17. The EMS Forum was established in 2002 and reported in 2004.

⁹⁷ Communication on Corporate Social Responsibility, *supra* note 92, at 21–22.

⁹⁸ European Commission, The European Union’s Role in Promoting Human Rights and Democratisation in Third Countries, COM(2001)252.

⁹⁹ Communication on Corporate Social Responsibility, *supra* note 92, at 22–23.

¹⁰⁰ European Parliament Committee on Employment and Social Affairs, Report on the Communication from the Commission concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development, COM(2002)347-2002/2261(INI), 12 A5-0133/2003, 28 Apr. 2003.

¹⁰¹ *Ibid.*, at 16.

¹⁰² *Ibid.*, at 22.

¹⁰³ For an overview of the NGO position see the European Coalition for Corporate Justice (ECCJ) Advocacy Briefing, ‘Corporate Social Responsibility at EU Level: Proposals and Recommendations to the European Commission and the European Parliament’, Nov. 2006, at 4ff, available at: www.corporatejustice.org/spip.php?article75&lang=eng.

¹⁰⁴ Letter from Anne-Sophie Parent, President, Social Platform, *et al.*, to Commissioner Liikanen *et al.* (29 June 2004), available at: http://psicondec.rediris.es/RSC/legalissues_corporate.pdf.europa.eu.int/comm/enterprise/csr/documents/29062004/ngocs.pdf.

Clearly this would be applicable to PMCs.

Finally, after numerous delays, the Commission published a second Communication in 2006 entitled 'Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility' (the Pole of Excellence Communication).¹⁰⁵ NGOs were extremely concerned by what they perceived as the increasing marginalization of CSR as well as their exclusion from the consultation process.¹⁰⁶ In their view corporate attitudes seemed to favour the minimal impact of CSR.¹⁰⁷ The Commission did reinstate the EMS at a late stage, and, after intense lobbying, via the Poles of Excellence Communication.¹⁰⁸

Rather than seeking the imposition of strict legally binding instruments, NGOs are now seeking the establishment of compromise regulatory mechanisms. They have recommended, among other options, mandatory social and environmental reporting, redress mechanisms, extra-territorial application of human rights and labour standards, and a duty of care upon companies and their directors regarding social and environmental impacts.¹⁰⁹ The justification for this is that voluntary initiatives gain credibility when they are supported by 'effective legal safeguards'.¹¹⁰ To this end, the NGOs have proposed some alternative regulatory CSR mechanisms such as independent monitoring and verification, and multistakeholder initiatives as a means of achieving transparency.¹¹¹ Of course such mechanisms will function only within a strong EU regulatory framework. The Commission could easily build on the 'naming and shaming' approach embraced by the Global Compact or adopt a state-based system in the vein of the OECD. Such approaches appear to be supported by the European Parliament citing the weaknesses of self-regulation.¹¹²

Since 2001 the Commission's CSR strategy has been consistently censured on the basis, first, that there has been an unjustifiable reliance upon voluntarism and, secondly, that the interests of stakeholders have been marginalized and in some cases ignored. That said, the website of the Directorate General for External Trade describes CSR as

not a substitute, but a complement to hard law. As such it must not be detrimental to public authorities' task to establish binding rules, at domestic and/or at international level, for the respect of certain minimum social and environmental standards. The focus of the debate in this respect has now moved on from a simple dichotomy between voluntary and binding instruments, towards the overarching challenge of devising reporting tools and verification mechanisms to ensure proper compliance with CSR commitments.¹¹³

Notwithstanding such views, the EU remains a regulatory wasteland for bringing corporations to account for their behaviour in relation to both human rights and humanitarian standards. At this point in time, the UN and the OECD offer more viable options for the regulation of PMCs.

¹⁰⁵ COM(2006)136, 22 Mar. 2006.

¹⁰⁶ ECCJ Advocacy Briefing, *supra* note 103, at 1, 3, and 4: '[a] multistakeholder approach ... has been abandoned outright'.

¹⁰⁷ Letter from the NGO UNICE, 26 Nov. 2001, Responses to the Green Paper, at 5, available at: www.ec.europa.eu/employment_social/soc-dial/csr/csr_responses.htm.

¹⁰⁸ *Ibid.*, at 4. See also Press Release, 'Europe sees progress on Corporate Social Responsibility', IP/06, Brussels, 8 Dec. 2006.

¹⁰⁹ *Ibid.*, at 3–4.

¹¹⁰ *Ibid.*, at 3.

¹¹¹ ECCJ Advocacy Briefing, *supra* note 103, at 6.

¹¹² European Parliament Resolution on Corporate Social Responsibility: A New Partnership, A6-0471/2006, adopted 13 Mar. 2007.

¹¹³ See http://ec.europa.eu/trade/issues/global/csr/index_en.htm

5. Remedies

Following from the above evaluation of both the hard and soft responsibility of organizations and PMCs, the article will turn to consider the remedies available against the EU if a breach of human rights or humanitarian law is attributable to the organization, and against the PMC if no attribution can be made.

A. *Against the EU*

If the wrongful acts or omissions of PMCs are attributable to the EU, as well as having an obligation to ‘perform the obligation breached’, to cease the breach, and guarantee non-repetition,¹¹⁴ the draft Articles on Institutional Responsibility provide that the ‘responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act’; and further that ‘injury includes any damage, whether material or moral, caused by the internationally wrongful act of an organization’.¹¹⁵ Gaja gives an example of the statement of the UN Secretary General on the applicability of international humanitarian law to UN forces ‘when they are engaged as combatants in situations of armed conflict’ which will entail the international responsibility’ of the UN, and ‘its liability in compensation for violations of international humanitarian law committed by members of United Nations forces’.¹¹⁶ The UN has paid compensation in a number of peace-keeping operations, but the evidence cited is largely from earlier forces, especially the Congo in the early 1960s where the UN peacekeeping operation was engaged in fighting with insurgents and mercenaries. It is difficult to gauge whether the UN has been consistent,¹¹⁷ but there is no reason to assume that it (and the EU) will not compensate for damage caused by wrongs committed by PMCs under its authority and control.

Forms of reparation can include restitution (to re-establish the position which existed before the wrongful act was committed), compensation (covering any financially assessable damage, including loss of profits), satisfaction (which may take the form of an expression of regret or a formal apology).¹¹⁸ Though remedies are in principle available access to them is limited. The hit or miss forum shopping by victims (as in *Behrami*) is not satisfactory. There needs to be an increase in access to remedies, whether judicial, legal, or non-legal. The *Kadi* case before the European Court of Justice may show that victims of international wrongful acts committed by international organizations can obtain remedies and the 2008 opinion of the Advocate General argues for an even stronger approach,¹¹⁹ but access to the European Courts is not guaranteed. If the complainants are from non-EU countries but in territory under the control of an EU operation, then responsibility for human rights abuses committed by EU forces or contractors employed by them may arise according to a number of European Court of Human Rights cases, though the question whether the Convention applies outside

¹¹⁴ G. Gaja, Fifth Report on Responsibility of International Organizations, UN Doc. A/CN.4/583, 2 May 2007, at 7.

¹¹⁵ *Ibid.*, at 11, Draft Art. 34; ILC Report on the Work of its Fifty-Ninth Session, UN Doc. A/62/10 (2007), at 203 (ILC Report, 2007).

¹¹⁶ Gaja, *supra* note 114, at 15; ILC 2007, *supra* note 115, at 212 citing UN Doc. A/51/389, at para. 16.

¹¹⁷ See the analysis of practice in M.C. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Operations* (2004), at 240–251.

¹¹⁸ Draft Articles 37–40, ILC 2007, *supra* note 114, at 197; Gaja, *supra* note 114, at 16.

¹¹⁹ Opinion of Poares Maduro AG in Case C–402/05 P, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, delivered on 16 Jan. 2008.

the European legal space is subject to an on-going debate.¹²⁰ As regards non-legal mechanisms, the EU established an ombudsman's office in 1992, 'empowered to receive complaints from any citizen of the Union concerning instances of maladministration in the activities of Community institutions or bodies'.¹²¹

In general terms institutions do not have consistent or systematic mechanisms for claims to be made against them and remedies granted to those who have suffered loss as a result of a wrongful act committed by the organization or by its agents or those employed by it. Regional courts apart, there is no international court that will countenance claims brought by victims of abuse, though it is possible that the activities of PMCs may well be subject to the scrutiny and criticism of the various treaty bodies created by human rights instruments, possibly as a result of an individual complaint. The World Bank Inspection Panel, created in 1993, is a useful model that could be adopted to deal with the responsibility of the EU in its security operations. Matters of serious international concern should be subject to more general inquiries, such as those conducted by the UN into its failings in the Rwandan genocide of 1994 and Srebrenica in 1995, but these should be followed up by the establishment of claims commissions enabling individuals to have access to justice.

Finally the jurisdictional immunity of organizations before national courts should not be interpreted by the organization as giving it absolute immunity from local courts, but only a restrictive or functional immunity, so that only acts committed in the course of performing the functions designated to them by the organization should give immunity to organizations, their agents, and any contractors working for them. Violations of customary human rights law or humanitarian law cannot be justified as being part of an organization's functions, and so immunity should not be claimed. Even if immunity is still applicable and there is no waiver of it by the executive head, the organization is still obliged to provide alternative methods for settling the claim.¹²² Immunity cannot be used to deny the right of access to remedies.

B. Against PMCs

Given that PMCs are not directly responsible under international law for the wrongful acts of their employees, it is necessary to consider briefly whether they offer remedies as an aspect of the growing recognition of their corporate social responsibility.

It is clear, however, that traditional legal remedies in the form of formal regulatory and compliance mechanisms simply do not exist in the CSR context. There is, however, as has been seen, a fragmented and piecemeal collection of alternative mechanisms strewn across a number of international and regional organizations as well as individual states. It is what UN Special Representative for Business and Human Rights John Ruggie has described as a 'kaleidoscopic' approach to corporate governance.¹²³

So how might the different mechanisms be utilized to bring PMCs account? It is only very recently that there has been focus on PMCs and conflict situations, and the options are limited. Voluntarism on the one hand is self-evidently open to abuse. On a positive note, the British Association of Private Security Companies instituted a voluntary code of conduct amongst its members, as did its US

¹²⁰ App. No. 52207/99, *Bankovic et al. v. Belgium et al.*, ECtHR Decision of 12 Dec. 2001. International Law Association, Draft Report on Compensation for Victims of War, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1018>; F. Francioni (ed.), *Access to Justice as a Human Right* (2007), esp. Ch. 3, Ronzitti, 'Access to Justice and Compensation for Violations of the Law of War'.

¹²¹ Art. 195 EC Treaty.

¹²² Art. VIII, s. 29: Convention on Privileges and Immunities of the United Nations, 1946.

¹²³ 'Protect, Respect and Remedy: a Framework for Business and Human Rights', A/HRC/8/5 (2008).

counterpart, the International Peace Operations Association (IPAO).¹²⁴ Under the IPAO Code there is what is described as an enforcement mechanism. It is in fact a monitoring system, and the IPAO is silent as to how many complaints have been lodged, or indeed how many have been successful or unsuccessful. The IPAO has also started offering training courses on CSR and humanitarian law to PMCs. Less positive again, however is the fact that Blackwater USA withdrew from the IPAO after its council initiated an independent review into whether the company's processes and procedures were in accordance with the Code of Conduct.¹²⁵

There are, however, signs of increasingly joined-up thinking on the part of stakeholders. So, for example, the OECD and the UN have been working collaboratively on approaches to commercial activities in the DRC.¹²⁶ Likewise stakeholders are making more effective use of existing mechanisms. A case in point is the complaint lodged by the NGO Global Witness under the Specific Instance Procedure with the UK's National Contact Point regarding labour and human rights abuses by Afrimex, a British company operating in the DRC.¹²⁷ The PMC-specific Swiss Initiative is another example of a collaborative project, this time between the Swiss Government and the International Committee of the Red Cross. It limits itself, however, to consideration of the responsibility of states to promote and protect humanitarian law rather than the responsibility of corporations.

Furthermore, the UN Working Group on Mercenaries has a mandate to receive individual communications regarding human rights abuses, but if the complaint is against a corporation, it is brought to the attention of the home state. Opinions are also transmitted to the home state. Finally, the most recent report of the UN Special Representative on the issue of human rights and transnational enterprises does little to advance the issue of remedies.¹²⁸ The report emphasizes that it is the state's duty to protect against human rights abuses and that corporations have an obligation to *respect* human rights standards, relying upon the 'court of public opinion' to bring them to account.

6. Conclusion

It is extremely difficult within the current international legal order to make companies which supply security or military services directly accountable for violations of international humanitarian law or human rights law when deployed as part of EU or UN authorized peace operations. Furthermore, the development of corporate social responsibility by means of soft international and European law does not guarantee any improvement, and this situation will persist until voluntary regulation is matched to a strong institutional framework providing accountability for abuses. Of course it would be desirable for PMCs and corporations generally to be subjects of international law and consequently directly subject to obligations. Indeed, the establishment of other non-state actors with legal personality shows that there is no conceptual impediment to recognizing corporations as subjects of international law; it simply reflects a lack of political will. Furthermore, a strengthening of corporate social responsibility and the development of effective remedies within this would improve victims' chances of access to

¹²⁴ The British Association of Private Security Companies (BAPSC) makes specific reference to human rights standard throughout its Charter, but it also more generally requires members to comply with international law and international humanitarian law: see www.bapsc.org.uk/key_documents-charter.asp. IPAO members are encouraged to adhere to a variety of international instruments including, *inter alia*, the Universal Declaration on Human Rights, the Geneva Conventions, and the Convention Against Torture: http://ipoaonline.org/php/index.php?option=com_content&task=view&id=205&Itemid=172.

¹²⁵ IPAO Press Release, 12 Oct. 2007, available at: http://ipoaonline.org/php/index.php?option=com_content&task=view&id=156.

¹²⁶ See, e.g., UK Department for International Development (DFID), 'Democratic Republic of Congo: Country Plan', May 2008, available at: <http://www.oecd.org/dataoecd/32/50/40692153.pdf>.

¹²⁷ See http://globalwitness.org/media_library_detail.php/507/.

¹²⁸ *Supra* note 123, at para. 51.

justice. However, until this happens, and arguably still thereafter, it is contended in this article that the wrongful acts or omissions of PMCs should be attributable to organizations under whose authority they operate and which are under the overall control of the organization. It has been argued that this is the level of control that organizations have exercised over peace-keepers in peace operations where it is accepted that the acts of soldiers can be attributed to the institution, and that this level should be recognized as applicable to PMCs. This will help to ensure an acceptable level of accountability for the acts of PMCs operating under the authority of an international organization such as the EU, pending the development of corporate responsibility and more effective corporate accountability on the international plane.