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INSTITUTIONAL RESPONSIBILITY FOR
PRIVATE MILITARY AND SECURITY CONTRACTORS

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Abstract

This paper analyses issues of legal responsibility arising from the discernible trend among international organizations, including regional organizations, to use the services of Private Military and Security Contractors (PMSCs). It has been argued that suitably controlled and regulated use of PMSCs 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. While identifying the benefits to organizations that the greater use of PMSCs would bring, the paper recognizes that the use of PMSCs raises important concerns about human rights abuse and accountability. While wrongful actions of regular troops are attributable to governments, the test for private contractors is whether the government was in effective control of the conduct in question. The paper considers whether the effective control test is the most appropriate one for private contractors working directly for organizations or for troop contributing nations involved in institutionally mandated peace operations.

Institutional Responsibility for Private Military and Security Contractors

NIGEL D. WHITE*

1. The 'Inevitable' Rise of PMSCs

There is a discernible trend among states and international organizations, including regional organizations to use the services of Private Military and Security Contractors (PMSCs).¹ This trend has been recognized by the British government, which has increasingly relied upon PMSC's in the post-Cold War period. In the foreword to the 2002 Green Paper on 'Private Military Companies: Options for Regulation', the then Foreign Secretary Jack Straw stated that the massive military establishments of the Cold War were a thing of the past, and that 'States 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 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'.² Kevin O'Brien is even firmer on the growing role of PMSCs within UN peace operations when he writes that 'it is clear that the United Nations is moving towards a situation (particularly through DPKO) where PMSCs will be used in ever-greater capacities from their current existence as protectors and defenders of humanitarian aid operations in zones of conflict'.³ It has been argued that suitably controlled and regulated use of PMSCs 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.⁴ While identifying the benefits to organizations that the greater use of PMSCs would bring, Jack Straw also recognizes that the use of PMSCs raises 'important concerns about human rights, sovereignty and accountability'.⁵

PMSCs are attractive to governments for a number of reasons other than the official one given of cost-savings. Indeed this argument is not necessarily determinative as stated by Jack Straw. Within Europe there are a huge number of individuals serving in the armed forces of states (with over 200,000 each in Britain, France and Germany), but only a small fraction is rapidly deployable. Rather than employing PMSCs to play this role, one might legitimately ask whether it would be more cost-effective to spend defence budgets more sensibly to ensure military effectiveness - after all, we are already paying to maintain an inefficient army. Putting money to one side, the issue is as much one of ideology - the desire to outsource all services to the market is strong in the US and the UK, and it is no coincidence that these are the countries where the vast majority of PMSCs are based, though Russia and China are

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¹ H. Wulf, *Internationalizing and Privatizing War and Peace* (2005), 42.

² *Hansard* HC 577, 12 Feb. 2002, 4.

³ K.A. 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), 45.

⁴ J. Patterson, 'A Corporate Alternative to United Nations Ad Hoc Military Deployments', (2008) 13 *Journal of Conflict and Security Law* 215.

⁵ *Hansard* HC 577, 12 Feb. 2002, 4.

starting to develop their industries using a vast surplus of well-trained military professionals. Further, with the number of military interventions increasing there is pressure not only on resources but also democratic pressure to restrict the losses sustained by regular armed forces in foreign conflicts. Such democratic pressure and indeed democratic control is not the same for employees of PMSCs. MPs can criticise the government for losses of our serviced personnel, and indeed if reforms in the UK are carried out, Parliament will have a say on issues of deployment of British soldiers in the future, but the same democratic concern does not seem to apply to PMSCs. Though they are not considered to be mercenaries due to the narrow definition of what constitutes a mercenary in international law,⁶ employees of PMSCs are viewed by some with the same distaste since they are doing their jobs for financial reward.

Finally PMSCs are attractive to governments because unlike the regular armed forces for which the government bear 'automatic' responsibility, this is not the case for PMSCs employed by the government. The actions of PMSCs have to be attributed to the government if responsibility for wrongful acts is to ensue, and attribution under the traditional test of international law, occurs when there is 'effective control' of the acts of the PMSCs by the state or its agents. Though governments may be liable for a failure to control the action of the PMSCs if they, for example, commit human rights abuse, this is not the same as attributing the human rights abuse directly to the government. The issue is made even more complex if PMSCs play a role in UN, EU or NATO peace operations, which traditionally have been composed of troops from member states (troop contributing nations -TCNs) acting under the authority (sometimes command and control) of the organization.

It is with this issue of institutional responsibility and the test to be applied in international law that this paper is concerned. It argues that due to structural changes in the international legal order, with the rise in significance of non-state actors, the traditional test of effective control is inadequate for attribution to organisations such as the UN, NATO or the EU, and to insist upon such a test would be to allow international organizations to escape liability for injurious acts committed under their authority.

2. Non-State Actors in International Law

Given the traditional focus on the state as principal right holder and duty bearer in international law, the use of PMSCs 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 that 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 UN, EU and NATO providing authority for the deployment of operations,

⁶ See Art.1(1) of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989; which defines a mercenary as: 'any person who:

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

and PMSCs potentially providing at least some of the forces, the state though still important is no longer omniscient in the application of military measures.

Of course when injurious acts are committed by PMSCs, morally speaking responsibility lies with the actor – the individual and the company they work for, but while there are certain voluntary codes of practice and a growing literature on corporate social responsibility, corporations (including PMSCs) do not have the requisite level of autonomy to be subjects of international law and thereby to be responsible for internationally wrongful acts.⁷ Companies and individuals may of course be liable before the domestic courts of the host state, though until this year PMSCs in Iraq had immunity from local courts.⁸

In contrast to corporations, international organizations have reached the stage of objective legal personality making them responsible in their own right for breaches of international law. When PMSCs are used by organizations the issue is one of attribution and the paper draws on accepted institutional practice on peacekeeping to show that organizations can be responsible for the acts of PMSCs over which the organization exercises authority and control. The paper then uncovers the remedies that might be available to victims of PMSC abuse against the authorizing organization. Of course this does not discount remedies that might be available against the individual employee or contractor, or against the company, but given their limited status in international law, there are issues of whether such laws are applicable to them except in limited circumstances (such as under the Rome Statute on the ICC in the case of individuals suspected of committing war crimes, crimes against humanity or genocide).

3. The Responsibility of Organizations

Alongside states, 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 1949,⁹ 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’.¹⁰ Further, in 1999 the Court stated that immunity from local legal processes enjoyed by an organization does not absolve it from responsibility for its unlawful acts.¹¹ The process of codification started soon after, 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’.¹²

⁷ White and Macleod, ‘EU Operations and Private Military Contractors’. at 967-70, 977-84.

⁸ Coalition Provisional Authority Order 17, 27 June 2004, gave immunity to US Dept of Defense Contractors (approx 100,000 in Iraq). The Iraq/US SOFA of 17 Nov. 2008 states that ‘Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees’ (Art. 12(2)). This came into force on 1 Jan. 2009.

⁹ *Reparations for Injuries Suffered in the Service of the United Nations*, *Advisory Opinion*, [1949] ICJ Rep. 174 at 179.

¹⁰ *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *Advisory Opinion*, [1980] ICJ Rep. 73 at 89-90.

¹¹ *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.

¹² ILC Report on the Work of its Fifty-Fourth Session, UN Doc. A/57/10, 232 (ILC Report, 2002).

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.¹³ They also confirmed the 'objective' legal personality of organizations,¹⁴ 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.¹⁵ Though there has been a lack of clarity on the international legal personality of the 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.¹⁶ There is very little discussion of NATO's international legal personality, though the little that there is indicates that it possesses such.¹⁷

A rhetorical organization, one discussing matters and adopting recommendations, will not normally violate international law. In contrast an organization that is operational, with missions in the field, and with those missions performing functions such as peacekeeping and peacebuilding 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.¹⁸ 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'.¹⁹ Furthermore, it is clear that 'omissions are wrongful when an international organization is required to take some positive action and fails to do so',²⁰ 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*,²¹ 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 1927,²² but even by that date such an approach was not fully accurate given the existence of international organizations, principally the League of Nations, whose creation challenged the contractual model of international law.²³ 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

¹³ G. Gaja, First Report on Responsibility of International Organizations, UN Doc. A/CN.4/532, 26 March 2003, p.8 (Gaja, 2003).

¹⁴ Gaja, 2003, 11; ILC Report on the Work of its Fifty-Fifth Session, UN Doc. A/58/10 (2003), 33 (ILC Report, 2003), 42.

¹⁵ See generally G.I. Tunkin, 'The Legal Nature of the United Nations', (1966) 199 Hague Recueil, 1.

¹⁶ R.A. Wessel, 'Revisiting the International Legal Status of the EU', (2000) 5 European Foreign Affairs Review, 507.

¹⁷ C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations* (2nd ed., 2005), 72; H.G. Schermers and N.M. Blokker, *International Institutional Law* (4th ed., 2003) 995.

¹⁸ A. Orakhelashvili, *Peremptory Norms in International Law* (2006), 114.

¹⁹ G. Gaja, Third Report on Responsibility of International Organizations, UN Doc. A/CN.4/553, 13 May 2005, 4 (Gaja, 2005).

²⁰ Gaja, 2005, 3.

²¹ ILC Report on the Work of its Fifty-Fifth Session, UN Doc. A/58/10 (2003), 47 (ILC Report, 2003).

²² *The Case of the SS Lotus*, PCIJ Series A, No.10 (1927) at 18.

²³ A. McNair, 'The Functions and Differing Character of Treaties', (1930) 11 British Yearbook of International Law, 100 at 112; H. Lauterpacht, 'The Covenant as the Higher Law', (1936) 17 British Yearbook of International Law, 54.

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’.²⁴ Mainstream institutional lawyers agree with Amerasinghe stating that ‘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’.²⁵ 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’.²⁶ More precise analysis of the issue of attribution will occur 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 ‘governmental’²⁷ or ‘sovereign’,²⁸ 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 might be.²⁹ 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’.³⁰ With constitutional development comes institutional responsibility.

4. 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 to those on state responsibility, is that there is often a question of whether responsibility lies with organization or member states (or both).³¹ This issue becomes acute when considering institutionally mandated peace operations consisting of troops supplied by member states. In general terms for such peace operations the UN has only accepted responsibility for forces acting under its authority, command and control. This normally means that it accepts liability for unlawful acts done by peacekeepers 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).³²

Putting aside the issue of individual criminal responsibility, the issue of where responsibility lies for unlawful acts committed by peacekeepers normally involves a choice between 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

²⁴ ILC Report on the Work of its Fifty-Seventh Session, UN Doc A/60/10 (2005), 87-8 (ILC Report, 2005).

²⁵ Amerasinghe, *Principles of the Institutional Law of International Organization*, 400.

²⁶ Ibid.

²⁷ Gaja, 2003, 12.

²⁸ D. Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (2005).

²⁹ I. Brownlie, ‘The United Nations as a Form of Government’, in J.E.S. Fawcett and R. Higgins (ed.), *International Organization* (1974), 26-7.

³⁰ Gaja 2003, 15.

³¹ ILC Report, 2002, 232. See also ILC Report, Report of the Sixtieth Session (2008), UN Doc. A/63/10, 292.

³² I. Scobbie in R-J Dupuy (ed.), *A Handbook on International Organizations* (1998), 891. See also G. Gaja, Second Report on Responsibility of International Organizations, UN Doc. A/CN.4/541, 2 April 2004, 16-17 (Gaja, 2004).

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 then the issue must be considered solely from the perspective of corporate responsibility. With corporations not normally responsible under international law, 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 might 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 responsibility for the wrongful acts or omissions of peacekeepers under its command and control despite the fact that disciplinary competence and criminal jurisdiction over UN peacekeepers remains with the contributing state.³³ This illustrates the reality that the level of command and control exercised by the UN over peacekeepers is not complete or fully effective. This is added to 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.³⁴

The level of organizational control was a key issue in the *Behrami* case of 2007,³⁵ 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.³⁶ Though the Court's judgment is not without problems,³⁷ especially in not endorsing that contributing states as well as the UN could be responsible,³⁸ there are some benefits to recognizing that when the UN authorizes a force and furthermore does purport to exercise some control over it then 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'.³⁹ With UN commanded peace operations regularly being given Chapter VII mandates after the Brahimi Report of 2000, and national or multi-national commanded forces increasingly forming part of hybrid operations under a Chapter VII mandate it seems appropriate to revise the simple Cold War division of peacekeeping (for which the UN accepts responsibility) and coalitions (for which it does not). While coalitions of the type authorised in Korea and the Gulf (1991) subject to limited Security Council control, remain outside

³³ Gaja, 2004, 19.

³⁴ T. Thakur and D. Banerjee, 'India: Democratic, Poor, Internationalist', in C. Ku and H. Jacobson (eds.), *Democratic Accountability and the Use of Force in International Law* (2003), 176 at 198.

³⁵ *Behrami and Saramati v France, Germany and Norway*, ECHR Grand Chamber Decision as to Admissibility of Application No. 71412/01, and Application No. 78166/01.

³⁶ But see *ibid*, paras. 5-7, 126.

³⁷ *Ibid.*, para. 132.

³⁸ A. Sari, 'Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases', (2008) 8 *Human Rights Law Review*, 151 at 159. The ILC envisages shared responsibility in draft Articles 12-15, 25-29 and 51 of the articles on institutional responsibility – ILC Report 2008, 292-3.

³⁹ *Behrami* case, para.133.

any revised test of attribution, peacekeeping and peace operations (even with Chapter VII mandates) should be within unless it is shown that the level of control is inadequate.

The above argument would suggest that within peace operations acts of individuals or corporations can be attributed to the authorizing organization even if individuals' loyalties and duties lay 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 PMSCs, 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 of acts of individuals in relation to state responsibility in the *Nicaragua* case of 1986, reaffirmed in the *Bosnia v Serbia* decision of 2007.⁴⁰ In re-stating the 'effective control' test in the latter case the Court made it clear that while it was not necessary to show a relationship of 'complete dependence' with the state, it must be proved that the persons who performed the wrongful acts must have either acted in accordance with the state's instructions or under its effective control, and that these instructions were given or effective control exercised, 'in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the person or group of persons having committed the violations'.⁴¹

It is the latter point that distinguishes the test of 'effective control' from that of 'overall control' adopted by the ICTY where, in the words of the International Court, the Appeals Chamber took the view that the actions of the Bosnian Serbs could be attributed to the FRY on the basis of the overall control exercised by the FRY over the Bosnian Serbs without there being 'any need to prove that each operation during which acts were committed in breach of international law was carried out on the FRY's instructions, or under its effective control'.⁴² The International Court dismissed the 'overall control' test in the following terms:

The 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.⁴³

Consider a state that does not simply sponsor terrorists but is in overall control of them, knowing that they have committed atrocious acts against civilians and will do so again, but that state is not in effective control of the particular atrocious act in question. According to the now orthodox 'effective control' test state responsibility is not engaged.

There is no doubt that the effective control test has become central in the doctrine of international responsibility. It is interesting to note that in the recent Montreux document on PMSCs the 17 states involved adopted the Nicaragua/ILC test in relation to attributability for the wrongful acts of PMSCs.⁴⁴

⁴⁰ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, 1986 I.C.J. Reports, p. 14 at 62-4; *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 I.C.J. Reports paras. 401-7. But see A. Cassese, 'The *Nicaragua* and *Tadic* Tests Revisited in the Light of the ICJ Judgment on Genocide in Bosnia', (2007) 18 European Journal of International Law, 649 at 653-4, 663

⁴¹ *Bosnia v Serbia*, para. 400.

⁴² *Ibid.*, para. 402.

⁴³ *Ibid.*, para. 406.

⁴⁴ Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict. 17 Sept. 2008: which in part states:

'Although entering into contractual relations does not in itself engage the responsibility of Contracting

With the ILC seemingly endorsing the ‘effective control’ test in its draft articles on institutional responsibility, at least for the conduct of organs of states (including troop contingents) placed at the disposal of international organizations,⁴⁵ the ‘effective control’ test arguably seems to have become accepted as the method of attribution to international organizations as well as states. In this view the judgment of the ECtHR in *Behrami* is an aberration, a piece of judicial policy-making designed primarily to prevent the application of the ECHR to peace operations.⁴⁶

Nevertheless, the ‘overall control’ test in the *Tadic* case, or ‘the ultimate authority or control test’ in *Behrami*, arguably better reflects the realities of the growth of non-state actors in international law whether insurgents, terrorists⁴⁷ or PMSCs who may not necessarily be the agents of the state, but may well be under sufficient influence 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’.⁴⁸

Whatever the merits of the different approaches to state responsibility, it appears that in peacekeeping practice at least institutional responsibility is engaged when the institution is in overall control of 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 considering the attribution of acts or omissions of PMSCs to organizations the fact that the organization might 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 unclear. Its approach is not to adopt a test of attribution for acts of individuals in the sense of its own Article 8 of the 2001 articles on state responsibility, which provided 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 that breach international law but also its ‘agents’, interpreted to include ‘not only officials but also to other persons acting for’ the organization ‘on the

(Contd.) _____

States, the latter are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are:

- a) incorporated by the State into its regular armed forces in accordance with its domestic legislation;
- b) members of organised armed forces, groups or units under a command responsible to the State;
- c) empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorised by law or regulation to carry out functions normally conducted by organs of the State); or
- d) in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor’s conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor’s conduct)’.

⁴⁵ ‘The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct’, Art. 5 Draft Articles on the Responsibility of International Organizations, ILC Report 2004,110.

⁴⁶ K.M. Larsen, ‘Attribution of Conduct in Peace Operations: The Ultimate Authority and Control Test’, (2008) 19 European Journal of International Law, 509 at 531.

⁴⁷ Cassese, ‘Nicaragua and Tadic Revisited’, at 665-7.

⁴⁸ *Prosecutor v Tadic*, 15 July 1999, IT-94-1-A, para. 117.

basis of functions conferred by an organ of the organization'.⁴⁹ 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'.⁵⁰ This seems broad enough to include PMSCs employed by an organization to perform its functions.⁵¹ Further, the ILC interprets persons to include legal persons and other entities as well as natural persons, which would include companies offering security and military services.

Here, the ILC is offering a test of 'acting in performance of functions' for individuals working for organizations, yet, as already stated it adopts an 'effective control' test for state organs (including national contingents) put at the disposal of international organizations in draft Article 5. Add into this the ILC's recognition in Article 4(3) of the value of institutional practice which 'allows one to take account situations of factual control',⁵² which would arguably include the practice of the organization in accepting responsibility for the acts or omissions of peacekeepers and generally denying the attribution of conduct of troops acting in coalitions,⁵³ we have a confused picture.

While (arguably customary) practice on peacekeeping establishes that organizations accept responsibility for operations over which they have overall control, or in the words of Behrami, ultimate authority and control, this contradicts the orthodox test in state responsibility – that of 'effective control' – which, the orthodox view argues, should apply to other international legal persons such as organization.⁵⁴ The ILC makes a distinction between a state organ that is fully seconded to an organization where the conduct of that organ would be attributable to the organization; and an organ that still acts 'to a certain extent as an organ of the lending state' giving the example of military contingents placed at the disposal of the UN for a peacekeeping force – they are not fully seconded since the TCN retains disciplinary powers. In this case draft Article 5 applies and the applicable test is one of 'effective control' over the conduct in question. In adopting this test the ILC seems to rely upon an assumption that the UN 'in principle ... has exclusive control of the deployment of national peacekeepers in a peacekeeping force'.⁵⁵ Such an assumption is incorrect, not simply because discipline (the very method of controlling conduct, not simply punishing breaches) is with the national state, but also because national states will when necessary by-pass UN command and control. It is odd that the ILC uses the fact of TCN retention of disciplinary control as indicative that state contingents are not under the full control of the organization and yet assume that the organization has sufficient effective control over the force in question to be responsible for its wrongful acts.

While the above arguments may also be applied to states – and this is the thrust of *Tadic* – that a government should not be able to escape responsibility by acting through non-state actors over which it does not exercise effective control; it is contended that such arguments are even stronger in relation

⁴⁹ G. Gaja, Second Report on Responsibility of International Organizations, UN Doc. A/CN.4/541, 2 April 2004 (Gaja, 2004), 9. See also C. Tomuschat, 'The International Responsibility of the European Union, in E. Cannizzaro (ed.), *The European Union as an Actor in International Relations* (2002), 177 at 180

⁵⁰ ILC Report on the Work of its Fifty-Sixth Session, UN Doc. A/59/10 (2004), 95-99 (ILC Report, 2004).

⁵¹ ILC Report, 2004, 106.

⁵² Gaja, 2004, 29. See ILC 2004, 99 for Draft Article 4.

⁵³ ILC Report, 2004, 102.

⁵⁴ Larsen, 'Attribution of Conduct', 526.

⁵⁵ Commentary on Article 5 of the Draft Articles on Responsibility of International Organizations, ILC Report 2004, 110-11.

to the issue of institutional responsibility. Organizations do not have their own forces so there is no real situation in which they control their armed forces as a state does. We are starting out from different positions for state and organization. Organizations have to rely on troops from TCNs and personnel from PMSCs. In these circumstances organizations are unlikely to have control over all conduct performed under its authority and in its name, though there will normally be some level of control. Not to attribute responsibility in these circumstances would be to absolve organisations from the consequences of their decisions to authorize military operations where there is a strong likelihood of injurious acts occurring (though they may still be liable for lack of due diligence in failing to prevent or respond to the violations).⁵⁶ This is not to say that the others actors concerned – the TCNs or the corporations should not also bear some responsibility, but legal problems of suing corporations, and indeed factual problems of making the TCNs liable for the injurious acts of say French or Ukrainian troops in a UN or NATO operation, means that it is important that organizations take their share of responsibility.

In conclusion, where the UN, EU or NATO 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 UN 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 organizations 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 might 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.

5. Remedies

If the wrongful acts or omissions of PMSCs are attributable to the UN, as well as having an obligation to ‘perform the obligation breached’, to cease the breach and guarantee non-repetition,⁵⁷ 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’.⁵⁸ 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’.⁵⁹ The UN has paid compensation in a number of peacekeeping operations, but the evidence cited is largely from earlier forces especially the Congo in the early 1960s where ONUC was engaged in fighting with insurgents and mercenaries. It is difficult to gauge whether the UN has been consistent,⁶⁰ but there is no reason to assume that it (or other organizations such as

⁵⁶ See argument in relation to states by C. Lehnardt, ‘Private Military Companies and State Responsibility’, in Chesterman and Lehnardt (eds.), *From Mercenaries to Market*, 152-3.

⁵⁷ G. Gaja, Fifth Report on Responsibility of International Organizations, UN Doc. A/CN.4/583, 2 May 2007, 7 (Gaja, 2007).

⁵⁸ Gaja 2007, 11, Draft Article 34; ILC Report on the Work of its Fifty-Ninth Session, UN Doc. A/62/10 (2007), 203 (ILC Report, 2007).

⁵⁹ Gaja, 2007, 15; ILC 2007, 212 citing UN Doc. A/51/389, para.16.

⁶⁰ See analysis of practice in M.C. Zwanenburg, *Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Operations* (2004), 240-51.

the EU) will not compensate for damage caused by wrongs committed by PMSCs 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).⁶¹ 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 shows that victims of international wrongful acts committed by international organizations can obtain remedies,⁶² but access to 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 of whether the Convention applies outside the European legal space is subject to an on-going debate.⁶³ As regards non-legal mechanisms, the EU established an ombudsmen 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'.⁶⁴

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 PMSCs 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 UN or 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 immunity by the executive head, the organization is still obliged to provide alternative methods for settling the claim.⁶⁵ Immunity cannot be used to deny the right of access to remedies.

⁶¹ Draft Articles 37-40; Gaja, 2007, 16.

⁶² Judgment of the Court (Grand Chamber) of 3 September 2008 - *Yassin Abdullah Kadi, Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (Joined Cases C-402/05 P and C-415/05 P

⁶³ *Bankovic et al v. Belgium et al*, ECtHR Decision of 12 December 2001 (Appl. No. 52207/99).

⁶⁴ Art. 195 EC Treaty.

⁶⁵ Art. VIII, S. 29 Convention on Privileges and Immunities of the United Nations, 1946.

6. Conclusion

It is extremely difficult within the current international legal order to make companies that supply security or military services directly accountable for violations of international humanitarian law or human rights law when deployed as part of UN, EU or NATO authorized peace operation. 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 PMSCs and corporations generally to be subjects of international law and consequently directly be 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 justice. However, until this happens, and arguably still thereafter, it is contended that the wrongful acts or omissions of PMSCs should be attributable to organizations under whose authority they operate and who are under the overall control of the organization. It has been argued that this is the level of control that organizations' have exercised over peacekeepers 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 PMSCs. This will help to ensure an acceptable level of accountability for the acts of PMSCs operating under the authority of an international organization, pending the development of corporate responsibility and more effective corporate accountability on the international plane.