State Responsibility for Private Military and Security Companies

When is misconduct perpetrated by Private Military and Security Companies in armed conflicts attributable to the Contracting State?

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List of Abbreviations

AP	Additional Protocol
ASR	Draft Articles on Responsibility of States for Internationally Wrongful Acts
CIHL	Customary International Humanitarian Law
ECHR	European Convention on Human Rights
EO	Executive Outcomes
FRY	Federal Republic of Yugoslavia
GC	Geneva Convention
IAC	International Armed Conflicts
ICJ	International Committee of Jurists
ICJ	International Court of Justice
ICoC	International Code of Conduct
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
NGO	Non-Governmental Organisation
PMC	Private Military Companies
PMSC	Private Military and Security Companies
PSC	Private Security Companies
UNHRC	United Nations Human Rights Council
US	United States
VCLT	Vienna Convention on the Law of Treaties

1. INTRODUCTION

1.1. Overall topic and research question

The thesis deals with questions related to state responsibility for the misconduct of Private Military and Security Companies (PMSC) concerning breaches of International Humanitarian Law (IHL). The framework of state responsibility is built on the understanding of sovereign states as the main bearers of rights and obligations in international law, with the monopoly to exercise governmental military force. When derelictions are perpetrated by the national armed forces of a state, attribution of responsibility is relatively straightforward. States are, however, entering into contract with PMSCs to fulfil tasks formerly exclusively handled by national soldiers, including interrogation, detention, guarding, protection, and combat. Increased use of PMSCs challenges the traditional understanding of states as the unique executor of force and raises questions of state responsibility. Like national soldiers, PMSC personnel must act in compliance with primary obligations of IHL which the Contracting State is obliged to follow. The Contracting State contracts directly for the services of PMSCs to be used in armed conflicts where the State is a formal or a supporting party. The primary obligations of the State do not disappear when PMSC personnel is used instead of national armed forces. However, several examples illustrate that states who contract PMSCs fail to take the same measures of control over these groups than they would to control their own forces.

In 2005, dozens of civilians were brutally shot, hacked to death, or burned alive in their homes in Ivory Coast during the First Ivorian Civil War. Several investigations linked the murders to PMSC actors operating for Liberia[1], but neither the groups nor the Liberian State were held responsible for the violent actions. The lack of accountability and remedies for these violations illustrates the practical difficulties in constituting state responsibility for PMSC misconduct due to the absence of internationally legally binding instruments regulating the use of force by PMSCs in armed conflict. Based on this introduction, the thesis will review under which circumstances the Contracting State can be held responsible for breaches of primary obligations of IHL when perpetrated by PMSCs. The topic explores how the doctrine of attribution under state responsibility applies to states who outsource their military participation in armed conflict to private companies.

[1] UN General Assembly A/67/340 (2012), p. 4.

The research question asks whether the rules on attribution under the notion of state responsibility provides sufficient protection concerning misconduct perpetrated by PMSC actors participating in armed conflict, and if not, how this responsibility gap potentially can be closed in practice.

The relevance of the topic is displayed through international debate by scholars and practitioners in the UN Human Rights Council (UNHRC)[2], the International Commission of Jurists (ICJ)[3], and the International Committee of the Red Cross (ICRC).[4] Building on the latest report from the UN Working Group on Mercenaries, the UNHRC emphasised that the use of PMSCs in contemporary armed conflicts substantially increases the risk of IHL violations.[5] In response to the absence of internationally legally binding instruments regulating the use of PMSCs in armed conflict, two regulatory initiatives have been developed; the Montreux Document (2008) and the International Code of Conduct (2010). The documents were developed to raise the standards in the industry and provides valuable perspectives on how Contracting States may influence the private actors they deploy into conflict zones through due diligence and other preventive measures. The documents do not provide *lex specialis* rules concerning state responsibility, so the research question must be assessed in the light of the basic condition for attributing responsibility, to the extent they apply.

The thesis will give an overview of the general conditions for establishing state responsibility, and discusses if, and eventually how far, these conditions may give rise to responsibility for PMSC misconduct. In the following, an overview of the legal sources relevant to discuss the research question is introduced, and core concepts are defined. Chapter 2 gives an overview of the primary obligations of the State and looks closer at when the use of PMSCs may result in a "breach" of these obligations. Chapter 3 analyses the main condition of "attribution" and debates under which circumstances breaches of IHL perpetrated by PMSC actors may be attributed to the Contracting State. Chapter 4 summarises the discussion in the previous chapters in an attempt to answer the research question. In addition to discussing the rules on responsibility, Chapter 4.2. also proposes an alternative approach to ensure adequate protection of IHL obligations when faced with the potential responsibility gap between acts done by the state's armed forces and by PMSC personnel.

[2] UNHRC Report A/HRC/51/25 (2022).
[3] ICJ (2019).
[4] ICRC (2013).
[5] UNHRC Report A/HRC/51/25 (2022), p. 5-6.

1.2. Delimitation

While PMSCs may operate both inside and outside the scope of an armed conflict, the thesis will focus on actors operating in conflict zones where the rules of IHL apply. No remarks are given to when and how private actors may legally be used by states, and the thesis presupposes their legal participation. The primary obligations examined in chapters 2 and 4 relate to the legal framework of IHL, the so-called *"jus in bello"*. Attention will not be given to the laws regulating when and how armed conflicts occur, the so-called *"jus ad bellum".* The methodology, scope of application and the relevant parties differentiate between IHL and International Human Rights Law (IHRL). The latter framework will thus not be addressed due to the word limit. The rules on injury and state accountability through international settlements, remedies and compensation falls outside the scope of the thesis, as does the system of international criminal law and individual responsibility.

The thesis focuses on the two main conditions for constituting state responsibility, through the "breach" of a primary obligation and "attribution" of this breach to the Contracting State. A third condition could also be envisaged, namely the absence of grounds for freedom from liability, such as consent, force majeure, self-defence, and more. Grounds for exemption from liability are usually treated as exceptions to the terms, and not as part of the conditions themselves.[6] While the absence of reasons from freedom from liability and grounds for immunity is necessary to constitute state responsibility, these grounds will not be touched upon. The rules on aiding and assisting as an alternative approach to constitute state responsibility will not be touched upon in this thesis either.

The regime of IHL distinguishes between two main categories of armed conflicts; international and non-international armed conflicts. The distinction is important for several reasons, particularly related to determining which rules apply in different conflicts. The Geneva Conventions and their Additional Protocols distinguishes between the two categories in their scope of application, illustrating that not all rules of IHL apply to all conflict variations. The difference is shown in relation to the primary rules imposed on states, resulting in different duties for the state depending on the type of conflict occurring. While the division is very important in relation to complementing the primary obligations necessary to discuss the term "breach", it is not as relevant to the condition of "attribution". The situations where the legal scope differs, is highlighted throughout the thesis.

[6] This approach is taken by Ulfstein (2002), p. 134 and Cooper (2021), p. 19.

1.3. Methodology

1.3.1. Sources of International Humanitarian Law

International law is the body of law created through voluntarily interactions between sovereign states. As a subsection of the regime of international law, IHL refers to the rules regulating the conduct of war. The framework seeks to limit the effects of armed conflicts by protecting people who are not participating in the hostilities and by restricting and regulating the means and methods of warfare available to combatants. The peculiarity of the field grows from the fact that the regime must apply in violent and extraordinary situations where other institutions and legal frameworks are forced to give up to a large extent. The exceptional conditions the law applies to also require a distinctive way of constructing and interpreting the sources. The definite point of departure is, however, the general methodology applicable to all areas of general international law, interpreted in light of the special circumstances and considerations pertinent to situations of armed conflicts.

The general sources listed in Article 38 of the Statute of the International Court of Justice (ICJ) sets out three primary and two subsidiary sources of law in its first paragraph. The Court shall apply "international conventions" decided between sovereign states, cf. Article 38 (1) letter (a). A treaty is defined as an "international agreement between states in written form and governed by international law", cf. Article 2 (1) letter (a) of the Vienna Convention on the Law of Treaties (VCLT). Furthermore, the Court shall apply "international custom" as evidence of general practice accepted as law, cf. Article 38 (1) letter (b). The source points to the two notions necessary for a rule to constitute customary international law – the objective *state practice* and the subjective *opinio juris* expressed by that State.[7] When a rule is considered to be international custom, it binds all states including those who have not ratified any special treaty setting out the rights. The Court shall also apply the "general principles of law" recognised by civilised nations, cf. Article 38 (1) letter (c). The four fundamental principles of IHL, namely distinction, humanity, proportionality, and military necessity, are considered to outweigh the general principles of international law.[8] Finally, the Court shall apply "judicial decisions and teachings", of highly qualified publicists as subsidiary means of interpretation, cf. Article 48 (1) letter (d). These sources of law will be elaborated upon in the following part of this chapter in relation to the special framework of IHL.

[7] Hellestveit and Nystuen (2020), p. 39.
[8] Jia (2020), p. 258-282.

The four Geneva Conventions of 1949 (GC) and their Additional Protocols (AP) constitutes the fundamental framework of IHL and applies to all situations reaching the threshold of an "armed conflict". They are among the few treaties ratified by all states in the world and are considered to have status as international custom. As mentioned above, the rules differentiates in their scope of application between international and non-international armed conflicts. GC Common Article 2 regulates international armed conflicts (IAC) and is completed by the rules in API and APIII. GC Common Article 3 regulates non-international armed conflicts (NIAC) and is completed by APII. The term "Common Article" reflects that the articles are verbatim similar in all four Conventions. Treaty law relating to NIACs are significantly less comprehensive than the corresponding rules relating to IACs, which can create *lacunaes* in the practical coverage and protection of civilians.

As mentioned in part 1.1., the Montreux Document and the International Code of Conduct (ICoC) were developed to raise the standards within the industry and to secure effective compliance with the primary obligations of IHL for states who outsource their military participation to PMSCs. While providing valuable perspectives to the interpretation on how the primary obligations of IHL is to be understood when utilising PMSC personnel, the documents cannot be seen as more than pure codification of the general rules on state responsibility specifically adapted to the use of PMSCs. They do not provide any new regulations but rather strives to clarify the state of law.

International custom is of crucial importance in IHL to fill gaps left by inadequate treaty law. The necessity of the complementation is especially illustrated by the fact that the majority of armed conflicts the last 70 years have been of a non-international character, while the treaty law primarily regulates conflicts of an international character.[9] To facilitate for the use of international custom in practice, the ICRC published its study on Customary International Humanitarian Law (CIHL) in 2005, where it identified 161 rules of customary IHL applicable in both IACs and NIACs.[10] The study has been subject to some criticism by international scholars for attempting to be too overreaching without the necessary legal support or basis.[11] There is, however, no further need to address the criticism in relation to the small part of the study used in the following thesis.

[9] Harbom and Wallensteen (2009), p. 578.
[10] ICRC study on Customary International Humanitarian Law (2005).
[11] Yoram Dinstein is one of the critics (2006), p. 110.

International "jurisprudence" is a highly relevant source of international law, cf. Article 38 (1) letter (d). A natural consequence of state sovereignty is that states must submit themselves to international courts and voluntarily agree to give them the right to issue binding orders in concrete situations. The International Court of Justice (ICJ) serve as the most important court for general international law and also decides in matters related to IHL. While the decision of the Court have no binding force "except between the parties and in respect of that particular case", cf. ICJ Article 59, it is clear that jurisprudence from the Court carries further weight when expressing remarks on the interpretation of the treaties since the ICJ uses its own judgments as precedents in successive cases.[12] The lack of a special court for IHL on a global level makes jurisprudence from regional war tribunals a supplying source of interpretation. Although this jurisprudence may provide valuable perspectives beyond that case, it is important to keep in mind that considerations of IHL differentiate from other areas of international law, like international criminal law. One should thus act cautiously when deriving general rules from these tribunals to questions of IHL. In addition to the most commonly applies sources of law mentioned in this chapter, the practitioner needs to evaluate when other sources shall be given weight, since Article 38 is not exhaustive in its listing.[13]

1.3.2. Sources of State Responsibility

State responsibility constitutes a central institution in the system of general international law, and the framework governs the principles of when and how a state is held responsible for breaches of an international obligation. Scholars agree that two conditions must be met for a state to be held responsible; There must be a "breach" of a primary rule of the sovereign state, and the act or omission that led to that "breach" must be "attributable" to the state in question.[14] The framework does not in itself impose any primary obligations on the states, these needs to be identified by interpreting the applicable rules in different areas of law. To answer the research question of state responsibility for misconduct perpetrated by PMSCs in armed conflicts, the sources of IHL drawn up in part 1.3.2. constitutes the point of departure for identifying the primary obligations of the Contracting State. While the identification of primary obligations is not necessary to answer the research question *prima facie*, the introduction is essential to the concluding remarks in part 4.2.

[12] Hellestveit and Nystuen (2020), p. 43.
[13] Hellestveit and Nystuen (2020), p. 43.
[14] Matsui (1993), p. 5 and Feit (2010), p. 142-144.

The overall research question is related to the secondary rule of state responsibility by discussing the term *"attribution"* related to misconduct perpetrated by PMSC actors participating in armed conflict. The general rules on state responsibility have developed through international customary law but was codified to a large extent in 2001 by the International Law Commission (ILC) in their Draft Articles on Responsibility of States for Internationally Wrongful Acts (ASR).[15] The ASR is not a treaty but rather a proposal for a treaty that has been noted by the UN General Assembly who annexed the ASR into a UN Resolution in 2001.[16] It is widely accepted by scholars and legal practitioners that the ASR and its associated Commentaries, while not being a binding treaty *per se*, have received such widespread recognition that they can be said to provide the primary point of departure for questions of state responsibility.[17] The same understanding of the ASR as a legal point of departure has been illustrated and confirmed in jurisprudence from several international courts and tribunals. The International Court of Justice placed emphasis on the ASR in its decision in the *Congo* case[18], while the regional France-New Zealand Arbitration Tribunal referenced the articles in their *Rainbow Warrior* case on international state responsibility.[19]

1.3.3. Interpreting the rules of International Law

The 1969 Vienna Convention on the Law of Treaties (VCLT) is the most important source of interpretation in international law and is largely considered to express international custom.[20] As treaties are the central source of law, interpretation is largely focused on identifying the rule to which the states have voluntarily agreed to be bound. The importance of the treaty text in this context is expressed in the general rule of interpretation in VCLT Article 31 (1), stating that a treaty shall be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose". Article 32 considers resources such as the "preparatory work of the treaty and the circumstances of its conclusion" to be supplementary means of interpretation. The ICRC has also published updated Commentaries to each Geneva Convention and Protocol to provide interpretative guidance in practical situations.[21]

[15] ILC ASR (2001), p. 31 paragraph 1.
[16] Annexure to General Assembly Resolution 56/83 of 12 December 2001 and corrected by document A/56/49.
[17] Bosch (2008), p. 371 and Crawford and Pert (2020), p. 20.
[18] ICJ Armed Activities on the Territory of the Congo (2005).
[19] France-New Zealand Arbitration Tribunal Rainbow Warrior (1990).
[20] See Vienna Convention on the Law of Treaties Article 31-33.
[21] The Commentaries to the Convention and the Additional Protocol is found on the ICRC database.

1.4. The relevant parties in an armed conflict

1.4.1. The "Contracting State"

For every PMSC operating in a conflict zone, three states in general retain a significant capacity to influence their conduct and promote responsibility in cases of misconduct.[22] First; the state that hires the PMSC (the C*ontracting State)*, second; the state on whose territory the group operates (the *Territorial State*), and third; the state in which the PMSC is based or incorporated (the *Home State*). The Contracting State directly contracts for the services of PMSCs, including where a PMSC subcontracts with another PMSC.[23] While the question of state responsibility for PMSC misconduct may be raised in relation to all three of the influencing states mentioned, the word limit in the thesis presupposes a delimitation. On this basis, the thesis will solely focus on the obligations and responsibilities of the Contracting State, delimitating against the two other state actors.[24]

1.4.2. Private Military and Security Companies

1.4.2.1. Terminology

There is no unified legal definition of the term, but in order to understand who is considered to be a member of the industry and which actors will be affected by possible regulations, a functioning definition is necessary. It is essential to provide meaning to the term through a substantive analysis of the group's activities. Some scholars divide the sector into two categories: Private Military Companies (PMC) and Private Security Companies (PSC).[25] This division may be problematic, however, as there is no clear definition of the terms and the line between them is unclear in theory and practice. For the following discussion, it is preferable to adopt a single term to encompass the entire industry, and while both terms have been used by different scholars to enclose the different activities, they lack the necessary dimension to adequately encircle the wide range of activities.[26] The term "PMC" does not sufficiently convey the wide range of company services where the companies work for civilian clients instead of state militaries. While the term "PSC" sufficiently illustrates this civilian aspect, it does not convey the military nature of many of the companies and the fact that the companies usually operate in the context and in relation to armed conflict.

[22] Montreux Document (2008), p. 10.
[23] Montreux Document (2008), p. 10.
[24] State responsibility for the Territorial and the Home State is treated thoroughly in Tonkin (2011).
[25] This division is for example seen in Schreier and Caparini (2005), p. 2, 14.
[26] Tonkin elaborates on this critique and illustrates the points with practical examples in Tonkin (2011), p. 33-35.

The final terminological stand used in the literature represents a combination of the two approaches mentioned above. The ICRC uses the single term "Private Military and Security Companies (PMSC)" to encompass the entire industry without distinguishing between the companies falling within the category.[27] The same terminology is used in the Montreux Document[28] and by several scholars.[29] It reflects the traditional approach taken in IHL which focuses on the particular actors' activities, objectives, and structure rather than on the terminological label given to the group. This terminological approach also composes the classification used in the current analysis, utilising the term *"PMSC – Private Military and Security Companies"* to encompass the entire industry, and then proceed to the substantive analysis of the various activities in separate situations in 1.4.2.2.

1.4.2.2.Scope of activities

Just like any other business organisation, PMSCs are registered enterprises with a corporate body, a hierarchical structure, and a legal persona. They specialise in the provision of military skills, including combating operations, strategic planning, intelligence work, risk assessment, training, operational support, and technical skills.[30] The employees are usually former military and security personnel from special forces of military advanced countries, and they have had a strategic impact on the process and outcome of contemporary conflicts.[31] Their clients include a wide range of actors like States, international organisations, NGOs, and other businesses, and through complex financial ties are the companies often linked to other corporations outside the industry, like ArmorGroup and Vinnell.[32] Even with divergence in the companies' scope of activities and the markets they serve, there have been several attempts by international scholars to classify the firms based on the nature of their services. For the purpose of the current analysis, a broad categorisation will be sufficient to illustrate the diversity of PMSC services where violations of IHL may occur. For this purpose, Tonkin divides common PMSC activities into four illustrative categories; (1) offensive combat; (2) military and security expertise; (3) armed security; and (4) military support.[33] These four categories also constitute the further basis for the classification in this thesis.

[27] ICRC (2013).
[28] Montreux Document (2008).
[29] Tonkin (2011), Valdés (2022), Østensen (2013).
[30] Singer (2003), p. 8.
[31] Singer (2003), p. 9.
[32] Singer, p. 47 explains that the groups have been linked to Cloud Security with CSA Norway.
[33] Tonkin (2011), p. 37. This classification varies between scholars, see e.g., Schreier and Caparini (2005), p. 35.

First, the category of "offensive combat" encompasses only those individuals who are armed and who are contractually authorised to use their weapons for offensive attacks.[34] It includes, among other things, conventional fighters located at the frontline such as ground troops using machine guns in combat or air pilots dropping bombs on enemy targets. The South African firm Executive Outcomes (EO) was directly involved in the civil war of Angola and Sierra Leone as a military in offensive combat and helped to recapture lost areas and institutions through physical combat.[35]

Second, "military and security expertise" involves the provision of high-level technical or strategic support, collecting and analysing intelligence, supplying advice and training, and maintenance of technical weapon systems.[36] Through the growing sophistication of military equipment, the need for PMSC support to maintain complex weapon systems has increased as well, illustrated by the large number of contractors assisting the US in Iraq.[37] The second category encompasses PMSC actors who are involved in the interrogation of prisoners, such as the American firm CACI who was contracted by the US to provide several interrogators at the Abu Ghraib prison in Iraq.[38]

Third, "armed security" services involve the physical protection of people or property in conflict zones.[39] The American firm DynCorp's protection of the Afghan president Hamid Karzai[40], and the provision of site security in Iraq by American firms such as Vinnell, Global Risk, and British Erinys provide examples of typical services of armed security.[41] Another related activity sometimes performed by PMSCs is armed border and immigration control, like the Israeli firm White Snow conducted at the Erez Crossing between Gaza and Israel.[42] Armed security guards may also face combat-like situations, like the American firm Blackwater (now Academi) experienced in September 2007, when personnel from the firm injured 20 and killed 17 Israeli civilians in Baghdad when they were to secure a convoy to the American Embassy in the capitol.[43]

[34] Tonkin (2011), p. 40.
[35] Howe (1998), p. 310-314.
[36] Tonkin (2011), p. 45.
[37] Singer (2004), p. 4-5 estimated that over 20 000 actors were contracted by over 60 firms at the time of writing.
[38] Hearing of the Senate Select Committee on Intelligence: Annual Worldwide Threat Assessment (2008), p. 26.
[39] Tonkin (2011), p. 49.
[40] Beaumont, *The Guardian* (2002).
[41] Traynor, *The Guardian* (2003).
[42] Foundation for Middle East Peace (2006), p. 5.
[43] US Department of Justice (2008).

The last category, "military support" involves the provision of general logistics and other support services to military forces in conflict zones.[44] These services include transport, making of food, laundry services, the assembly and disassembly of military camps and bases, and the repatriation of bodies.[45] The practicality of this logistical support is, again, illustrated by the US army's Civil Augmentation Contract which paid out US$22 billion between 2003 and 2007 to private actors only in Iraq.[46] Although the military support services included in this category are not generally associated with the use of deadly force in itself, they are nonetheless crucial to the overall success of the Contracting States' military operations by serving as private enablers to public troops.[47]

Even though one may categorise the most common PMSC services in separate columns, many PMSCs operate across these categories. The wide range of services that PMSCs provide for the Contracting States in war zones illustrate how easily the actors may participate in quasi-military functions leading to potential breaches of IHL. These unclear factual situations make questions of state responsibility difficult to answer and adequate protection of civilians difficult to ensure.

1.5. Summarising the introductory points

Chapter 1 has introduced the essential definitions and methodology necessary to discuss the overall research question in the following thesis. Chapter 2 provides an overview of the structure of primary obligations in armed conflicts, laying down the foundation for the concluding part in Chapter 4. The chapter analyses the general conditions for "breaches" of international obligations, and how due diligence requirements influence this assessment. Chapter 3 analyses the secondary rules on state responsibility relating to the condition of "attribution". By illustrating the rules with practical examples, the chapter will critically discuss how to place typical PMSC misconduct under the rules of state responsibility. The chapter is essential to answer the research question of the thesis. Chapter 4 summarises the points made in chapter 2 and 3 and concludes *lex lata*. Finally, remarks are made on how a potential responsibility gap between state responsibility for the Contracting State in relation to misconduct perpetrated by national soldiers and misconduct perpetrated by PMSCs may be closed, providing substance to a discussion on the rules *lex ferenda.*

[44] Tonkin (2011), p. 51.
[45] Tonkin (2011), p. 51.
[46] US Congressional Budget Office (2008).
[47] Singer (2003), p. 97-98, 137.

2. VIOLATIONS OF PRIMARY RULES OF INTERNATIONAL LAW – "BREACH"

2.1. Introductory remarks

Contracting States may be seen as internationally responsible for misconduct perpetrated by PMSC actors in one of two ways; First, the private actor's misconduct may be directly *attributable* to the Contracting State by the virtue of their relationship, cf. ASR Article 2 (a), which is discussed in Chapter 3. Secondly, irrespective of the question of attribution, the State may incur responsibility if it fails to take certain positive actions in relation to the private actor, and this lack of action results in a *"breach"* of the Contracting State's primary obligations, cf. ASR Article 2 (b). Chapter 2 provides the point of departure for assessing how a Contracting State's failure to conduct due diligence with PMSCs may constitute state responsibility. The brief introduction in the following facilitates for the discussion on how to close a potential responsibility gap in Chapter 4.2.

As mentioned in part 1.1., the thesis presupposes that IHL applies in the situations addressed and that PMSC personnel is required to comply with the primary obligations growing from IHL. The chapter introduces the situation where PMSC actors, and not the state itself, commits violations of IHL. Although it is the prohibited PMSC activity that triggers the responsibility, is it really the State's own failure to take adequate measures of prevention or punishment which constitutes the "breach".[48] There are other primary obligations particularly directed towards the Contracting State instead of the individual actors, such as the Geneva Convention Common Article 1, which obliges the states to "respect and to ensure respect for" the Geneva Convention in all circumstances. These obligations will be touched upon further in Chapter 4.2. The overview given in Chapter 2 is, however, essential to understand the nature of the relevant breaches when discussing state responsibility for sovereign states on the basis of actions conducted by individual private actors.

2.2. Range of obligations

There is an internationally wrongful act of a State when conduct consisting of an "act or omission" constitutes a *"breach"* of an international obligation, cf. ASR Article 2 (b). The term "international obligation" is used to cover both treaty and non-treaty-based law, cf. PCIJ *Factory at Chorzów*[49]

[48] Tonkin (2011), p. 63.
[49] PCIJ Factory at Chorzów (1927).

and ICJ *Reparation for Injuries*.[50] The verbatim wording of the law creates the point of departure for assessing which obligations exist, and which acts (or lack of acts) will violate the obligations.[51] The ordinary meaning of an "act" refers to a deliberate movement, an understanding supported by the UN Secretary-General in the *Rainbow Warrior* case, where he held that a specific activity done deliberately is required for a rule of international law to be seen as violated.[52] "Omission" and passivity may also lead to responsibility where special circumstances indicated that active action was encouraged, but the state abstained from action, cf. *Consular Staff.*[53] The American Embassy in Tehran was attacked by natives, and the Iranian authorities became responsible for failing to take appropriate steps to intervene when they were aware of the situation and their own obligations.

2.3. Due Diligence obligations

Due diligence is understood as the degree of care that is reasonably expected or legally required in a situation.[54] Concerning state responsibility, due diligence imposes obligations of certain conduct on the Contracting State, and failure by the State to comply with certain standards triggers its responsibility in international law. Since the *Alabama Claims*[55], international tribunals have applied due diligence principles in cases of state failure to prevent or punish private misconduct, cf. *Youmans*[56]and ICJ *Congo.*[57] When scholars discuss States' obligations to take certain positive actions prescribed to them by international law, pedagogical reasons usually encourage a further distinction between *obligations of results* and *obligations of diligent conduct.* This distinction was also made in the ICJ *Genocide* case*,* where the Court stated that obligations of results require the State to guarantee that they will achieve a particular outcome, while obligations of diligent conduct require the State to employ all means reasonably available to them, to prevent the misconduct as far as possible.[58] The language of the primary obligation indicates whether a due diligence standard of conduct applies and whether that obligation requires a particular result or if reasonably best-effort attempts by the Contracting State will be seen as sufficient to fulfil the particular obligation.

[50] ICJ Reparation for Injuries Suffered in the Service of the United Nations (1949).
[51] In accordance with the general rules for interpretation in international law, cf. VCLT Article 31 (1).
[52] France-New Zealand Arbitration Tribunal (1986) paragraph 80.
[53] ICJ Consular Staff (1980).
[54] Gambarini, *Jus Mundi* (2022).
[55] Alabama Claims Arbitrations (1871).
[56] Youmans case (1926).
[57] ICJ Congo (2005).
[58] ICJ Genocide (2007) paragraph 430.

2.4. Obligations of results

An international obligation of result obligates the Contracting State to guarantee that a particular act will be performed to the standard required by international law. If the state fails to perform the act to the required standard, the state will incur responsibility for its failure. An illustrative example of an obligation of result can be found in the GCIV Article 49, which imposes the standards of treatment that a detaining state must meet in their internment. Practical examples of PMSC groups providing services to detaining facilities, especially allegations of torture and vile living conditions in the US-led Abu Ghraib prison in Iraq[59], reveal the necessity of the Contracting State's role in ensuring that governance of the facilities is done in coherence with international obligations. If the contractors fail to provide the internees with adequate care and nutrition, the Contracting State will be seen as responsible for its failure to ensure that the required standards of treatment were met.

2.5. Obligations of diligent conduct

International obligations of diligent conduct require states to exercise due diligence and to employ all reasonable and necessary means in order to, as far as possible, reach a specific result. The most pertinent obligations in this category are those which require states to prevent and punish particular private activities, illustrated, for example, by the ICJ *Genocide* case.[60] The ICJ could not find Serbia responsible for actually committing genocide because there was no agency relationship between the Serbian State and the Bosnian Serb Army. Nonetheless, the Court found Serbia responsible for failing to discharge its obligation to take positive steps to prevent genocide under Article 1 of the Genocide Convention.[61] The case illustrates how due diligence obligations can play a key role in establishing state responsibility in cases where the misconduct cannot be attributed to a state by the virtue of their relationship. The *Home Missionary Society Claim* case[62] illustrates that states are not obliged to do the impossible, as long as their measures have been reasonable. Great Britain imposed new tax laws on Sierra Leone, which created rebellions and led to attacks on all US Missions in the country. The Tribunal did not hold British authorities responsible by the rules of state responsibility, however, since they took every measure reasonably available to them to stop the riot. This illustrates the liberating power of due diligence obligations.

[59] Hersh, *The New Yorker* (2004).
[60] ICJ Genocide (2007).
[61] ICJ Genocide (2007), paragraph 425-450.
[62] Home Frontier and Foreign Missionary Society of the United Brethren in Christ (1920).

2.6. Summarising the points on due diligence obligations

By giving a brief introduction to the framework of primary obligations, Chapter 2 has provided the theoretical fundament necessary to understand the first condition of "breach" for constituting state responsibility. It illustrates how the Contracting State may be considered responsible for the "breaches" of primary obligations of IHL perpetrated by PSMC actors when the Contracting State has not acted as carefully in its diligent conduct as one could expect. While the points addressed in Chapter 2 are essential for the concluding remarks in Chapter 4, the following analysis in Chapter 3 goes back to the overall research question on "attribution". Usual situations of PMSC participation in armed conflict will be evaluated against the applicable sources of law in the field, to discuss when responsibility for the actions can be "attributed" to the State.

3. ACTS FOR WHICH THE STATE IS RESPONSIBLE – "ATTRIBUTABLE"

3.1. Introductory remarks

The thesis continues to presuppose that a primary obligation of IHL has been breached by a PMSC actor. The common circumstance is that the Contracting State cannot be seen as responsible for a "breach" in itself because the primary obligations do not imply any duty of due diligence. Due to the lack of well-developed regulations constituting international standards to control and train the PMSC actors as described in part 1.1. and 1.3.1, the question is whether the misconduct perpetrated by PMSC actors is "*attributable"* to the Contracting State by virtue of their relationship. The attribution of conduct is based on criteria determined by international law, and not on the mere recognition of a link of factual causality. This means that in addition to the practical relationship identified, the nature of that relationship needs to be regulated by law. States are only responsible for conduct committed by "state organs", and not as such for conduct committed by private actors, cf. PCIJ *Tellini*.[63] Private conduct may, however, give rise to responsibility if the conduct of the private actor is "attributable" to the Contracting State, cf. ASR Article 2 (a) and PCIJ *Phosphates in Morocco*[64]*, Corfu Channel*[65]*, Nicaragua*[66]*,* and the *Gabčíkovo-Nagymaros Project* case.[67]

To answer the research question, the following part will explore various grounds for attributing acts of PMSCs to the Contracting State when building upon different types of contracting relationships. The purpose is to specify and illustrate the conditions under which conduct is attributed to the State to determine state responsibility. Part 3.2. addresses the situation where a PMSC group is considered to be a "state organ" through incorporation into the states' armed forces *de jure* or *de facto*. Part 3.3. discusses questions of governmental authority and when such authority has been delegated to PMSC actors, and what happens when this authority is exceeded. Part 3.4. looks into the question of attribution when the breaches of the obligations have been conducted under state instruction, direction, or control. The full analysis will be accompanied by various theoretical frameworks and illustrational examples from contemporary armed conflicts.

[63] PCIJ Tellini (1923).
[64] PCIJ Phosphates in Morocco (1938).
[65] ICJ Corfu Channel (1949).
[66] ICJ Nicaragua (1986).
[67] ICJ Gabčíkovo-Nagymaros Project (1997).

3.2. PMSCs as a "state organ"

3.2.1. ASR Article 4

The conduct of any "state organ" shall be considered an act of that State under international law, cf. ASR Article 4 (1). The article states the long-recognised basic rule that the state is responsible for the conduct of its own organs, acting in that capacity, cf. *Moses*[68] and *Finnish Shipowners.*[69] The reference to a "state organ" is intended to have a broad scope extending to organs of government of whatever kind of classification, exercising whatever functions, and at whatever level in the state hierarchy, including those at the provincial or even local level.[70] No distinction is made for this purpose between legislative, executive, or judicial organs, cf. (1). In determining what constitutes an organ of a state for the purpose of responsibility, the internal law and practice of each state are of prime importance and provide the point of departure, cf. (2). While the internal status of the organs may be helpful, a state cannot avoid responsibility for the conduct of a body which does in fact act as one of its organs merely by denying it that status under its own law.[71]

Following the broad definition constructed, it is clear that the "armed forces" is a "state organ", cf. ICJ *Nicaragua*[72] and illustrated by GC Common Article 3. In other words, if PMSC actors are seen as a part of the Contracting States' "armed forces", the attribution of responsibility is easily determined through the basic rule in ASR Article 4, which will provide sufficient protection of IHL obligations. The Hague Convention (HC) IV expresses this customary law in Article 3, stating that a belligerent party is responsible for all acts committed by its "armed forces". The term "armed forces" is defined differently in international and non-international armed conflicts, but due to the word limit, the further discussion in chapter 3.2. is only related to the definition in NIACs. In IACs, Article 43 of API provides an international definition that focuses on the factual circumstances of the participation instead of their legal status in domestic law. The "armed forces" in NIACs, however, are defined by reference to an organ "which has that status in accordance with the internal law", cf. ASR Article 4 (2). The paragraph illustrates *de jure* state organs, entities that are legally made part of the state through domestic laws, regulations, and administration structure.

[68] Mexico-United States Mixed Claims Commission Moses Case (1871).
[69] Claim of Finnish shipowners against Great Britain in respect of the use of Finnish vessels during the war (1934).
[70] ILC Commentary to Article 4, paragraph 6.
[71] ILC Commentary to Article 4, paragraph 11.
[72] ICJ Nicaragua (1986), paragraph 220.

To prevent states from waiving responsibility or opting out of primary obligations, a notion of *de facto* state organs has developed through jurisprudence, cf. ICJ *Nicaragua*[73] and *Genocide*.[74] A state cannot avoid international responsibility for misconduct by a body that in reality acts as a state organ, by denying it that legal status under domestic law.[75] These *de facto* state organs are bodies that do not form a legal part of the state hierarchy but act in a manner that makes them, in reality, a part of the state hierarchy. The Court considered the issue of these *de facto* organs in ICJ *Nicaragua*, which raised the question of whether the US had violated international law by supporting the Nicaraguan *contras* in their rebellion against the Sandinistas. The judges held that a person, group, or entity that does not have the status of a state organ under domestic law may nonetheless be equated with a state organ if its relationship with the state is one of "complete dependence" and "complete control".[76] Since the Nicaraguan *contras* were not in this complete dependency in relation to the US, their actions could not be attributed to the US for responsibility.

The Court reiterated the same principle in *Genocide*, where the question was whether Serbia had committed genocide by killing Bosnian Muslims. After not finding the paramilitary group "the Scorpions" to be a Bosnian state organ *de jure*, the Court went on to assess whether they could be categorised as a *de facto* state organ acting on behalf of Serbian authorities. In this assessment, the Court substantiated that it is the underlying factual link that determines the status of the organ. However, the Court emphasised that the exceptional nature of this notion is solely applicable in situations where the entity is "merely the instrument" of the State so that its independence is "purely fictitious".[77] The question in the case was whether the relationship between Serbia on the one hand and the Bosnian Serb entity "the Republika Srpska" on the other, was so much of complete dependence on one side and control on the other as to render the Bosnian Serbs as *de facto* organs of Serbia. The Court found that the requirements of the test were not met under the available evidence, since the Bosnian Serbs retained a significant amount of autonomy from Serbia.[78] The judgments of *Nicaragua* and *Genocide* illustrate the high threshold for identifying groups who are not *de jure* state organs to the state by categorising them as *de facto* organs.

[73] ICJ Nicaragua (1986).
[74] ICJ Genocide (2007).
[75] ILC Commentary to Article 4, paragraph 11.
[76] ICJ Nicaragua (1986), paragraph 109-110.
[77] ICJ Genocide (2007), paragraph 391-393.
[78] ICJ Genocide (2007), paragraph 394.

3.2.2. PMSCs as personnel forming part of the Contracting State's armed forces

Examples from PMSC operations in Iraq and Afghanistan illustrate that incorporation of private contractors into the States' "armed forces" is not much likely in practice. Most contractors would fail to be included due to their independence and autonomy in the performance of their services.[79] Contractors providing "armed security" as bodyguards will usually not qualify as *de facto* state organs due to their independence.[80] The US contracted DynCorp personnel to provide bodyguard services to the Afghan president Karzai, exactly due to the company's long experience and high level of expertise which gave them autonomy in the planning and the performance.[81] Interrogators, on the other hand, will often be closely bound to the state through direct orders and instruction[82], just as the private CACI personnel working at the Abu Ghraib prison explained their acts of torture as done on direct orders from US military leaders.[83] Even if it is possible to envisage cases where private contractors only have fictitious independence in relation to the Contracting State, most companies would fail to be seen as a part of the "armed forces" due to their usual individual structure and high autonomy in the planning and the performance of the practical operations. This conclusion seems to be the leading understanding when focusing on PMSCs as a whole group.

Another perspective has been discussed by legal scholars and in the case law of the ICJ, where one could come to a different conclusion by focusing on the particular team of contractors performing the contract in question, rather than focusing on the PMSC as a whole.[84] Since PMSCs usually are global entities that recruit unique compositions of personnel to achieve the desired competence to suit various operations, the groups may be said to be "created" by the Contracting State for every individual operation. Tonkin argues that one can understand the relationship between the PMSC and the Contracting State in this manner since the actors usually leave directly from their Home State to the battlefield with the sole purpose to perform the individual contract.[85] With ICJ *Nicaragua* as a point of departure, Tonkin and Hoppe identify two distinct ways of contracting PMSCs which implies contrasting legal consequences in relation to attribution of responsibility.

[79] Tonkin (2011), p. 94, Hoppe (2008), p. 991.
[80] Hoppe (2008), p. 991.
[81] Beaumont, *The Guardian* (2002).
[82] Hoppe (2008), p. 991.
[83] Hersch, *The New Yorker* (2004).
[84] Tonkin (2011), p. 94, Hoppe (2008), p. 15-17.
[85] Tonkin (2011), p. 94.

Especially Hoppe distinguishes the situation of individually adjusting the contracted PMSC group to fit the relevant tender, from the situation where the PMSC group contracted is already set up with a certain structure that does not change from contract to contract.[86] In ICJ *Nicaragua* the Court noted that the Nicaraguan *contras* used by the US were not really "created" by the US for the specific operation, but instead had a prior existence and an independent cause that the US simply exploited for its own purposes.[87] In its paragraphs, the Court explicitly identified the lack of a "creation" by the Contracting State as a relevant factor in rejecting the status as a *de facto* US state organ for the Nicaraguan *contras*.[88] This criterion has been highlighted in legal scholarship and taken into account for opening the possibility for paramilitary groups (and PMSCs) to be seen as a *de facto* part of the Contracting States' executive organ and their "armed forces", given that the Contracting States have had enough influence on the creation of the group. A similar understanding is seen in *Congo,* where the Court was unable to find that Uganda had created the rebel group *AFDL*. The lacking identification of a "creating" responsibility was highly pertinent to the Court's conclusion that the *AFDL* did not constitute a Ugandan state organ *de jure* nor *de facto*.[89] The jurisprudence show, however, the need for further influence in the creation than the mere supply of money, weapons, or instructions, for the group to be considered a state organ.

The discussion above illustrates that when the contract between a PMSC group and the Contracting State effectively leads to the "creation" of a completely new team of contractors, the PMSC group can be seen as a *de facto* state organ as defined by the ICJ in *Nicaragua* and *Congo.* With the high thresholds applicable in the regular assessment of an individual group as a *de facto* state organ, are there, however, reasons to be reticent with the creation of new rules merely based on case law and legal scholarship. The fundamental principle of state sovereignty underscores the careful approach in expanding interpretations in international law because it would contradict the underlying criterion stating that only states have the authority to bind themselves to new law. The weight of international jurisprudence highlighted in Chapter 1.3.1. and 1.3.3., is not meant to be general in giving binding force to other parties or in other disputes than the particular cases debated. The source favours a restrictive interpretation in accordance with the treaty text, cf. VCLT Article 31.

[86] Hoppe (2008), p. 17.
[87] ICJ Nicaragua (1986), paragraph 107.
[88] ICJ Nicaragua (1986), paragraph 107-108.
[89] ICJ Congo (2005), paragraph 158-160.

There is, however, a legally admissible basis to argue that the Court has opened the door for expanding interpretation to remedy the unreasonable outcomes of overly strict regulations on the matter. Exactly the unreasonable consequences seemed to be the crucial argumentation for the expansion in both ICJ *Nicaragua* and *Congo*. In accordance with the fundamental considerations of IHL, good reasons favour a possible expansion of the responsibility rules to effectively secure sufficient protection of civilians and civilian objects during warfare. Changes in the rules on state responsibility requires consensus among sovereign states with profoundly variations in legal views and political interests, which makes it hard to adapt the governing rules to the practical reality of contemporary warfare. Even where the mentioned considerations give sufficient basis to extend the rules, several additional questions arise. Precisely where the line is to be drawn in relation to which influential capacity is considered necessary to constitute the "creation" of a new PMSC group is yet to be decided in state practice and jurisprudence. The important question is how far the rules can be stretched so that a private actor can impose responsibilities on a sovereign state.

3.3. PMSCs empowered by law to exercise governmental authority

3.3.1. ASR Article 5

When a PMSC is not considered to be a state organ or part of the "armed forces", its conduct may still be attributable to the Contracting State if it was *"empowered by the law of that State to exercise elements of the governmental authority"* provided that the entity is *"acting in that capacity in the particular instance"*, cf. ASR Article 5. The article is intended to encompass situations where former state corporations have been privatised but retain certain public or regulatory functions.[90] *Prima facie,* this would appear to be well suited to the situation where a state outsources public functions such as the military, the police, and the operation of detention centres to PMSC actors. The generic term "entity" is intended to have a broad scope of application and thus clearly includes private military and security firms.[91] Three requirements needs to be met for attribution of PMSC misconduct to the state pursuant to ASR Article 5; First, the operation must constitute the exercise of "governmental authority", Second, the actor must be "empowered by the law of that state" to exercise that activity, and third, the contractor must be "acting in the capacity of the governmental authority" when the misconduct is committed. Each criterion will be addressed in the following.

[90] ILC Commentary to Article 5, paragraph 1.
[91] ILC Commentary to Article 5, paragraph 2.

3.3.2. "Governmental authority"

The basic criterion in ASR Article 5 is that the activity must involve an exercise of *"governmental authority".* The term carries no international consensus, and the Commentaries to the Article do not attempt to identify the scope precisely. Certain functions appear to be commonly regarded as intrinsically public, and the Commentaries cite several such functions including policing, immigration and quarantine, detention, and discipline pursuant to a judicial sentence or prison regulations.[92] Beyond a certain limit, what is regarded as governmental depends on the particular society, its history, and its traditions.[93] In the absence of a list of state functions, it can be hard to distinguish between governmental and private acts, and the assessment needs to start with the particular facts of each concrete case. The Commentaries list three moments that helps the legal practitioner to assess practical situations, which Tonkin has used to develop an analytical framework to ease the assessment of whether the particular activity is public or private in nature.

To differentiate between state and private functions, scholar Hanna Tonkin has developed an analytical framework that can help in the practical assessment.[94] She states that a useful starting point for assessing whether a particular activity is inherently governmental is to ask whether that activity is one that a private individual also could perform without the government's permission.[95] Especially in relation to PMSC actors, Tonkin asks whether the activity is one that a PMSC could lawfully perform pursuant to a contract with a private client rather than a state.[96] The fact that a PMSC could not lawfully perform an activity for a private party tends to indicate that the activity is inherently "public" in nature and that it, therefore, entails governmental authority. The framework looks at three factors, which may assist in determining whether particular powers involve the exercise of authority. Of particular importance is, in addition to the content of powers, (1) the way the powers are conferred to an entity, (2) the extent to which the entity is accountable to the government for their exercise, and (3) the purposes for which they are to be exercised.[97] These three factors will be addressed in the following to discuss the status of typical PMSC activities and analyse whether they in general can be categorized as governmental authority.

[92] ILC Commentary to Article 5, paragraph 2.
[93] ILC Commentary to Article 5, paragraph 6.
[94] Tonkin (2011), p. 101.
[95] Tonkin (20119, p. 101.
[96] Tonkin (20119, p. 101.
[97] ILC Commentary to Article 5, paragraph 6.

In relation to the first factor, the instinctive assumption might be that the Contracting State would confer governmental authority on a private entity via statute rather than solely by contract or executive order. However, recent practice shows that many states empower these PMSCs to perform public functions, such as the operation of prisons in armed conflict, simply by concluding a contract, just like the US contracted the PMSC group CACI to provide interrogation services in Abu Ghraib prison.[98] This factor is hence of little use in assessing whether a PMSC activity entails governmental authority because they usually collect authority by private contracts. The second factor identified is more useful, taking into consideration the extent to which the entity is accountable to the government for its exercises. This requires an analysis of the relationship between the PMSC and the government, including diligent duties and oversight mechanisms, derived from the primary obligations discussed in Chapter 2. While this factor may give some guidance, it is precisely in those cases where the government fails to hold the PMSC accountable, that the *rationale* for the attribution of responsibility is the strongest. A state should not benefit from its failure to ensure adequate oversight mechanisms over a contracted PMSC group.

The third factor seems to be the most useful in assessing whether PMSC activities entail governmental authority, taking into consideration the "purpose" for which the authority is to be exercised. The weight given to the "purpose" of the different acts has a resemblance to the doctrine of state immunity under international law, which distinguishes between acts of a state in its sovereign capacity (which are immune from jurisdiction from other states), and acts performed in a private capacity (which are not immune from jurisdiction from other states).[99] The former category includes foreign and military affairs, the exercise of police powers, and the administration of justice, while the latter category comprises the commercial activities of the state.[100] While the doctrine of state immunity is not the further topic of the thesis, the distinction made between the legal consequences of a state's various acts is transferable to the similar distinction made by the ILC in relation to assessing whether an activity constitutes the exercise of "governmental authority". [101] One can apply similar considerations to the question of whether a PMSC is acting in a sovereign capacity or a private or commercial capacity on behalf of the Contracting State.

[98] Hurley, *Reuters* (2021).
[99] Tonkin (2011), p. 104, Šturma (2017), p. 12, UN Convention on Jurisdictional Immunities of States Art. 10 (2004).
[100] Tonkin (2011), p. 104, European Convention on State Immunity Article 7 (1972).
[101] The rules on State Immunity can be read about further in Crawford (1983) and Fox (2015).

There is widespread agreement that certain PMSC activities mentioned in Chapter 1.4.2.2., such as offensive combat, policing, detention, and immigration control, entail exercise of governmental authority within the scope of ASR Article 5.[102] The status of other activities, however, such as armed security, military advice, military training and intelligence collection and analysis, is less clear cut. These latter activities may not necessarily be governmental in their isolated nature but may entail governmental authority when viewed in light of the overall context and purpose. In addition to the purpose of the act, Tonkin highlights relevant factors in the general assessment, including the location of the PMSC activity (whether the acts take place inside or outside the scope of an armed conflict zone) and the people whom the activity is provided to benefit (whether it is the national military forces, government officials or private clients).[103] Against this background, one can claim that when PMSC actors have been contracted to perform certain guarding activities in an armed conflict to protect the military personnel and objects of a state, then the PMSC actors have been given sufficient governmental authority to be encompassed by ASR Article 5.

The question may be more difficult to answer when PMSC actors are hired to protect civilian officials of the Contracting State, such as high-level politicians or diplomats, instead of the Contracting States' national military personnel and soldiers. This was the situation in the Nisour Square Massacre in Baghdad in September 2007, where the American Blackwater employees killed 17 Iraqi civilians and injured 20 more while defending a US State Department motorcade.[104] Reports differ on what happened at Nisour Square that caused the group to open fire, but the majority of sources state that the Blackwater employees defending the convoy opened fire when one car continued to drive at the intersection after it was signalled to stop.[105] The PMSC actors operating at Nisour Square in Baghdad in 2007 provided protection services to American State officials in a convoy, which in isolation may be seen as an act of commercial security conduct. However, the overall context that the activity took place in suggests that it would be more accurate to categorise the PMSC service as provided in a military context and exercising governmental authority. The circumstances ruling was that US armed forces and US-contracted PMSC actors were operating in Iraq in the context of the non-international armed conflict in Iraq at the time.

[102] In coherence with ILC Commentary to Article 5, paragraph 2.
[103] Tonkin (2011), p. 107.
[104] US Department of Justice (2008).
[105] Henderson, *Tidings Media* (2021).

Good considerations also favour the conclusion that activities requiring "military-unique knowledge and skills" easily will be seen as services exercising "governmental authority".[106] There is some agreement in the literature that the conduct of contractors undertaking combat missions of detention and interrogation for a state in armed conflict or occupation is attributable to the Contracting State as exercise of governmental authority.[107] On the other hand, a PMSC that is hired by a state to guard the installations or personnel of a private company in a conflict zone would not be likely to fall within the scope of Article 5, exactly because the purpose of the activities is to protect civilian employees of another private firm rather than to protect high-level government officials visiting the theatre of conflict on state business.[108] In conclusion, a large proportion of PMSC activities conducted in contemporary armed conflict zones will in fact entail the exercise of governmental authority. This is not in itself sufficient to attribute the misconduct of PMSCs.

3.3.3. "Empowered by the law of the State"

When PMSC activities constitute the exercise of "governmental authority", the contractor must be *"empowered by the law of that state"* to exercise the particular authority for responsibility to be attributed back to the Contracting State pursuant to Article 5. The formulation of the term clearly limits the scope of the article to entities that are empowered by some internal legal framework of the Contracting State. The Commentaries emphasise that the scope constitutes a narrow category where the internal law in question must specifically authorise the conduct as an exercise of public authority; it is not sufficient that the law permits activity as part of the general regulation of the affairs of the community.[109] In line with the verbatim understanding of the term, it is clear that *"empowerment by law"* will encompass situations where the Contracting State enacts legislation specifically identifying and authorising a particular PMSC to exercise governmental authority. It is, however, important to clarify that the wording of the article does not limit the provision only to the legislative delegation of powers to a particular private entity. While having a narrow scope of material application, the article does not provide a basis for any antithetical interpretation of the condition, meaning that the state may empower the PMSCs by other means than solely by enacting specific laws empowering the entities to undertake functions entailing governmental authority.

[106] US Department of Defence (2006).
[107] Hoppe (2008), p. 992, Bosch (2008), p. 361. Tonkin (2011), p. 102-104.
[108] Tonkin (2011), p. 108.
[109] ILC Commentary to Article 5, paragraph 7.

Such a restrictive understanding of the criteria of "law" would undermine the considerations that the term has been included to allow for. The Commentaries explain that the formulation in Article 5 is deliberately used to distinguish the Article from situations under Article 8. Consequently, while the term "law" can be expanded to some extent, the condition cannot be interpreted to encompass direct or specific orders by the state which falls within the scope of Article 8. Article 5 would in all likelihood be satisfied if the state established a general legislative framework empowering a government agency to delegate its powers to a private company, which then contracted with another PMSC to perform sub-activities. This is the situation in countries where public functions are privatised. Article 5 would also apply to situations where the contract of hire authorised the PMSC to subcontract other companies to perform all or part of the work, provided that the subcontracted company exercised governmental authority pursuant to the subcontract.[110]

3.3.4. "Acting in that capacity"

The last criterion to be assessed for attributing private acts conducted by PMSCs to the Contracting State pursuant to Article 5 is that the PMSC must be *"acting in the capacity of the governmental authority"* at the time when the actor engages in the misconduct. The acts will not be attributable to the Contracting State if it has no connection with the official functions and is merely the conduct of private individuals, cf. *Caire*.[111] If a contractor raped a civilian woman outside a pub while he was off duty and out of uniform, that would not be attributable to the Contracting State under Article 5. If, on the other hand, an off-duty armed contractor shot a civilian woman whilst he was walking home from his shift in uniform and carrying his state-issued weapon, good considerations favour this act of injury to be attributable to the Contracting State.[112] Another consideration favouring this conclusion is that the negligence of responsibility in such situations will substantially increase the responsibility gap between misconduct perpetrated by national armed forces in their private capacity (which is attributable to the state) and the acts of PMSC actors in their private capacity (which is usually not attributable to the Contracting State).[113] To provide sufficient compliance of the rules of IHL and protection of civilians when PMSC actors are used on a regular basis in armed conflicts, the rules needs to be interpreted flexibly.

[110] See also Tonkin (2011), p. 111-112.
[111] Gustave Caire (France) v. United Mexican States (1929).
[112] See the same considerations expressed in Tonkin (2011), p. 112, Hoppe (2008), p. 992.
[113] See the responsibility gap between national armed forces and PMSC actors explained in Hoppe (2008), p. 992.

The legislative outcome will turn on the specific circumstances surrounding the contractor's misconduct. The discussion has shown that PMSC misconduct in many cases will be attributable to the Contracting State pursuant to the rule in Article 5. It illustrates the importance of this central rule in the analysis of state responsibility in the private security context. Some contractor misconduct, however, may fall outside the scope of Article 5 for one out of two reasons: Either because the contractor engages in the misconduct whilst off-duty and thus not acting in "that capacity" at the relevant time, or because the contractor engages in the misconduct whilst performing an activity that does not entail governmental authority in the first place. In cases where the misconduct cannot be attributed to the Contracting State pursuant to the rule in ASR Article 5, it may still be attributable pursuant to ASR Article 8, if the contractor is in fact acting under state instruction, direction, or control. This possibility will be debated further in Chapter 3.4.

3.3.5. Excess of authority or contravention of instructions, cf. ASR Article 7

Building upon the practical application of ASR Article 5, another question arises. What will happen if the entity that is empowered by internal law to exercise elements of the governmental authority, and is acting in its official capacity, acts in excess of the authority given? By stating that the US government authorised CACI to conduct the interrogations at Abu Ghraib prison, the further question of responsibility arises when the actors exceeds the authority given by the US by abusing the detainees as a form of interrogation method. Even if the internal law empowering CACI to provide interrogation services contains specific and elaborative provisions requiring the humane treatment of detainees, good considerations favour extended responsibility for the state in these situations. The rules on state responsibility for unauthorised or *ultra vires* acts of entities has its legal basis in ASR Article 7. The Commentaries to the ASR explains that the Contracting State cannot take refuge behind the notion that their actions ought not to have occurred or ought to have taken a different form.[114] Any other rule would contradict the basic principle in Article 3, and so the rule is now a firmly established expression of international custom supported by international jurisprudence, state practice, and legal scholarship, cf. *Caire*[115]and *Velásquez-Rodríguez.*[116] The issue to be addressed is whether the acts of the actors was performed in an *"official capacity"*.[117]

[114] ILC Commentary to Article 7, paragraph 2.
[115] Gustave Caire (France) v. United Mexican States (1929).
[116] Inter-American Court of Human Rights, Case of Velásquez-Rodrígues v. Honduras (1988).
[117] See the analysis on the criteria of «acting in an official capacity" under part. 3.3.4. above.

If the PMSC actors can be seen as acting in an *"official capacity"*, responsibility will be stated. The legal practitioner may draw the line between unauthorised but still "official" conduct on the one hand, and fully "private" conduct on the other, by surveying systematic or recurrent misconduct that the State ought to have known about.[118] The article works as a safety net for stating state responsibility for the misconduct of PMSC actors to the Contracting State because the PMSC actors rarely will be explicitly authorised to perpetrate misconduct by the Contracting State, cf. *Youmans*.[119] Several Americans was attacked by a mob of natives in Mexico, and sought refuge in a house. The mayor of the municipality unsuccessfully tried to quiet the mob, before finally ordering in the state troops to quell the rebellions. When the mob arrived at the scene of the riot, several members opened fire which killed several of the American citizens hiding in the house. Even though the Mexican government had not directly authorised the troops to kill the Americans, the State was seen as responsible since the troops were operating on the basis of its instructions. The fact that the troops exceeded the authority given to them, could not change the conclusion.

3.4. PMSCs acting under state instruction, direction, or control

3.4.1. ASR Article 8

Attribution of misconduct perpetrated by a private actor to the Contracting State due to the factual relationship between the parties is illustrated in ASR Article 8, widely supported by international jurisprudence, cf. *Zafiro*[120] and *Stephens.* [121] The Article deals with conduct carried out by private actors who is in fact *"acting on the instructions of, or under the direction or control of"* the Contracting State. Two main situations falls within the scope of the Article; First, where the PMSC is perpetrating misconduct while acting on the *"instruction"* of the Contracting state, and Second; where the PMSC is perpetrating misconduct while being under the *"direction or control"* of the Contracting State. The Article intently uses the terminology "person or group of persons", reflecting the fact that conduct covered by the Article may be that of a group lacking separate legal personality but acting on a *de facto* basis.[122] It does not matter for the assessment nor the conclusion whether the conduct of the private parties involves any form of "governmental authority".

[118] ILC Commentary to Article 7, paragraph 8.
[119] ILC Commentary to Article 14, paragraph 13, Youmans (1926), paragraph 116.
[120] Zafiro (1925).
[121] Stephens (1927).
[122] ILC Commentary to Article 8, paragraph 9.

3.4.2. State instructions

The first situation covered by the article is where the Contracting State "*instructs"* the private entity to carry out an act that directly conflicts with a primary obligation of that state. The nature and level of detail necessary for an order to be seen as an "instruction" is not apparent from the Article. It seems clear that the attribution of misconduct would be relatively straightforward where a state has contracted a PMSC group and directly instructed it to violate primary obligations developing from IHL. Under the more usual circumstances, however, the legal practitioner will need to interpret the concrete instructions given in the light of its context and purpose. The ICJ has pronounced that the state's instruction must have been given in "respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the group of persons having committed the violations", for a state's instruction to fall within the scope of the article, cf. *Genocide.*[123] It is not clear from the Court's judgment how narrowly the notion of an "operation" is to be read, but good considerations favour a factual assessment. Requiring a state to issue a specific instruction detailing the exact procedure on a micro-level would be too restrictive.

Another key question is how specific the instructions must be in order to fall within the scope of the article. The main question is if there must be any specific order directing how the particular wrongful act is to be performed, or if general instructions will suffice. Contextual logic suggests the latter, provided that the order in fact authorises the wrongful conduct.[124] Hoppe gives the example of a command to a PMSC actor to "get the prisoner to talk by any means necessary" as being sufficient to satisfy Article 8.[125] If a PMSC group is hired to perform interrogations at a detention centre and the Contracting State included a term in the contract instructing the company to use particular interrogation procedures that amounted to ill-treatment or torture in relation to European Convention on Human Rights (ECHR) Article 3[126], the scenario would fall within the scope of Article 8. In line with this interpretation, it would be too restrictive to require the State to issue a specific instruction detailing the procedure of interrogation for each detainee. The example mentioned in Chapter 1.4.2.2., about the CACI personnel operating in the Abu Ghraib prison is an illustrative example of typical situations where the personnel will receive wide instructions.

[123] ICJ Genocide (2007), paragraph 400.
[124] Tonkin (2011), p. 115, Hoppe (2008), p. 17.
[125] Hoppe (2008), p. 24. Supported by Tonkin (2011), p. 115.
[126] European Convention on Human Rights (1950) Article 3.

A more common scenario is where the Contracting State gives vague or ambiguous instructions which, although not unlawful *per se*, convey a lack of concern as to how the instructions are carried out. The Commentaries attempt to provide guidance where a state has authorised a particular act and the private actor then engages in actions going beyond the scope of authorisation, stating that such cases can be resolved by asking whether the unlawful or unauthorised conduct was "really incidental" to the mission or clearly went beyond it.[127] The notion of conduct that is "really incidental" do, however, little to clarify the situation in relation to vague or ambiguous instructions. Tonkin illustrates this practicality with the example of an instruction given to a PMSC security guard to shoot anyone who approaches looking "suspicious", which might be interpreted as an implicit authorisation to shoot indiscriminately and without warning, but it might equally be interpreted as an instruction to shoot those individuals who look like combatants.[128] The best way for the Contracting State to avoid responsibility under this rule would be to include detailed rules complying with IHL in the contract and to ensure that government representatives give clear and lawful instructions to PMSCs in the field. Having taken such action, the Contracting State would not incur responsibility if a contractor then carried out those instructions in an unlawful way.

3.4.3. State direction or control

The second situation in Article 8, is if PMSCs are acting under the *"direction or control"* of the Contracting State when carrying out the misconduct. In line with the verbatim understanding, the Commentaries emphasise that the conduct will be attributable to the State only if it directed or controlled the specific operation and the misconduct was an integral part of that operation.[129] The principle does not extend to conduct which was incidentally or peripherally associated with an operation and which escaped from the State's direction or control.[130] There is broad agreement in international law that responsibility can arise under state "direction", but there is disagreement as to exactly where the threshold lies for responsibility to arise based on the state's management over a private group. This first part of the second situation covered by ASR Article 8 is, however, relatively straightforward in practice. The Contracting State will also incur responsibility for the misconduct perpetrated by a PMSC actor if he was acting under the *"control"* of the state.

[127] ILC Commentary to Article 8, paragraph 8.
[128] Tonkin (2011), p. 116.
[129] ILC Commentary to Article 8, paragraph 3
[130] ILC Commentary to Article 8, paragraph 3.

There has been a lot of controversy around the degree of control required before actions can be said to have been controlled by the state. The ICJ considered this rule of attribution in *Nicaragua,* when assessing whether violations of IHL committed by individuals during the Nicaraguan war were attributable to the US. The Court distinguished between three categories of relevant individuals when assessing state responsibility. First, the acts of members of the US Government's Administration and members of the US armed forces were undoubtedly attributable to the US. Second, certain acts of Latin America Operatives were also attributable to the US because they had been given instructions by US officials and acted under their supervision[131], or because US officials had participated in the planning, direction, and support of specific operations.[132] In relation to the third category, the rebels fighting against the Nicaraguan government, the *contras*, the Court rejected Nicaragua's claim that all conduct of this group was attributable to the US. It was necessary to show that the US had *"effective control"* of the paramilitary operations where alleged violations were committed, for them to be attributable to the US, and the Court stated that a general dependence and support would be insufficient.[133]

This criteria of *"effective control"* developed in the *Nicaragua* case has later been challenged in jurisprudence from other international tribunals. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) introduced the term *"overall control"* in *Tadić*.[134] The Chamber had to determine whether Bosnian Serb Forces were in fact acting on behalf of the Federal Republic of Yugoslavia (FRY), such that the armed conflict was international in character and the more extensive rules of IHL applied. The Chamber dismissed the test of *"effective control"* developed in *Nicaragua* and established a more flexible threshold of *"overall control"*.[135] The standard of *"overall control"* goes beyond the mere financing and equipping of the forces and includes participation in the planning and supervision of military operations. It does not require the issuance of any specific orders or instructions to individual military actions.[136] Several decisions of the ICTY have used the more flexible and wide doctrine of *"overall control"* in successive cases when dealing with questions of state responsibility for the acts of private actors.

[131] ICJ Nicaragua (1986), paragraph 75-80.
[132] ICJ Nicaragua (1986), paragraph 86.
[133] ICJ Nicaragua (1986), paragraph 115.
[134] ICTY Appeals Chamber *Tadić* (1999).
[135] ICTY Appeals Chamber *Tadić* (1999), paragraph 117.
[136] ICTY Appeals Chamber *Tadić* (1999), paragraph 145.

It is, however, important to remember that the legal issues and the factual situation differentiated in *Nicaragua* and *Tadić*. While the ICJ *Nicaragua* dealt with questions of state responsibility, ICTY *Tadić* dealt with questions of individual criminal responsibility. As mentioned in Chapter 1.3., caution needs to be expressed when legal weight and influence are transferred from one tribunal to another where the fundamental considerations differs. The ILC Commentaries to ASR Article 8 seems to favour the test of *"effective control"* when evaluating state responsibility.[137] Another influential factor pulling towards the notion of *"effective control"* being the applicable threshold, is that since the *Tadić* decision, the ICJ has reaffirmed the test of *"effective control"* in both *Congo* and *Genocide.* Although the decisions of the ICJ are only binding to the relevant parties of the case, enormous weight is given to the jurisprudence of the Court, as mentioned in Chapter 1.3., to the extent that the *Genocide* case virtually can be taken to have settled the matter of the threshold of control growing from ASR Article 8. When concluded upon the use of the criteria of *"effective control"*, the consecutive question is how the threshold may be applied to the Contracting State's use of PMSCs, namely in relation to how broadly the notion of an "operation" is to be understood in the private security context. This will be discussed further in the following.

It is clear from *Nicaragua* that a Contracting State's structural control over a PMSC would not in itself suffice to establish attribution pursuant to Article 8, even if such control were "preponderant or decisive".[138] As mentioned in Chapter 3.2.2., most PMSCs are independent entities with the ability to enter into contracts with various public and private clients, resulting in the fact that the factors, such as the responsibility for training, financing and providing of weapons, would be even less significant for PMSC groups than for other armed groups such as the Nicaraguan *contras.* Yet, the element of *"effective control"* identified by the ICJ would be highly significant if exercised over a single PMSC operation, rather than over the entire company in itself. When looking at the relationship in this way, good considerations pull towards the fulfilment of the criteria of *"effective control"*, since the Contracting State usually will have a preponderant or decisive role in financing, organising, and planning the particular operation. The State will even supply and equip the PMSCs with the necessary material for the particular operations, in the majority of these situations.

[137] ILC Commentary to Article 8, paragraph 5.
[138] ICJ Nicaragua (1986), paragraph 115.

The contract will ordinarily set out the specific goals of the operation and may also detail how the contractors must be trained. When viewed in this way, a detailed contract of hire would appear to go a long way toward fulfilling the established criteria of *"effective control".*[139] Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not, as mentioned, extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the state's direction or control. Conduct can be attributed to the state under Article 8 if specific orders or a certain level of direction or control over the actor can be shown. Opposite to the *ultra vires* applicability of the rule in Article 5 in accordance with Article 7, the rule of attribution in Article 8 excludes responsibility for PMSC actions contrary to orders where the actor goes beyond the control of the Contracting State.[140] On the other hand, where the contract of hire is relatively broad in its scope and gives the PMSC a high degree of discretion in planning, organising and performing its activities, it seems to be necessary to focus on the other mechanisms available to the Contracting State to control PMSC misconduct in the field. There is support for the above argued understanding of ASR Article 8 in international legal scholarship.[141]

3.5. Summarising the points on attribution

Chapter 3 has illustrated that the increased use of PMSC actors in armed conflict situations raises a lot of questions of responsibility for the Contracting State. As illustrated in Chapter 3.2.2, it will be difficult for most PMSC participation to reach the threshold of incorporation into the armed forces of the Contracting State solely by looking at the factual relationship between the State and the actors. The rules on attribution for entities who are exercising elements of governmental authority analysed in Chapter 3.3. may in many cases actually encompass PMSC misconduct, except for when the actors engages in the misconduct while off-duty or if the service provided cannot be seen as "governmental authority". As mentioned under Chapter 3.4.3 it may also be difficult for PMSC misconduct to reach the threshold of effective control necessary to constitute state responsibility under Article 8, exactly due to the Contracting States lacking influence over the PMSC actors in their planning and performance of operations.

[139] See the same view in Tonkin (2011), p. 992.
[140] Hoppe (2008), p. 992.
[141] Tonkin (2011), p. 120.

4. CONCLUDING REMARKS

4.1. State responsibility for misconduct perpetrated by PMSC actors

The research question is "whether the rules on attribution provide sufficient protection concerning misconduct perpetrated by PMSC actors participating in armed conflicts, and if not, how the responsibility gap can be closed in practice". The question contains two parts which will be answered in the following. The thesis has attempted to shed light on some general situations where the Contracting State can be held responsible for breaches of IHL perpetrated by PMSCs according to the general rules on state responsibility in international law. The established rules on attribution of state responsibility in international law is not very fitting to the situations where PMSC actors is used by states instead of their national armed forces. A dynamic interpretation of the rules of attribution is required to avoid creating a legal vacuum where violations of IHL can occur with impunity. The PMSCs will not often be considered a part of the Contracting State's armed forces due to the independent nature and hierarchical structure of these groups. The requested expertise and wide knowledge of PMSCs makes them often directly participating in the planning and performance of their operations, instead of operating as a mere tool for the Contracting State. The Contracting State will, however, always face less responsibility for the misconduct of PMSC actors unless they are incorporated into the state's armed forces or has complete dependency on the State.

4.2. Primary obligations to the rescue?

Faced with the responsibility gap between the Contracting State's international responsibility for the misconduct perpetrated by their armed forces and misconduct perpetrated by PMSC actors, an alternative approach has been highlighted by scholars in recent years.[142] One possible remedy lies in the positive obligations of IHL introduced in Chapter 2 of this thesis. The Geneva Convention Common Article 1 outlines the general obligation for States to "respect and ensure respect for" the Conventions. ICRC argues that the article entails a duty of due diligence for Contracting States to prevent and repress breaches of the Convention by private actors and that it is applicable as an umbrella protection for situations occurring during armed conflict.[143] However, this interpretation has been met with explicit pushback from a number of states as well as scholars due to the potential

[142] Hoppe (2008) and Tonkin (2011) discusses this alternative approach.
[143] ICRC Geneva Convention Commentary to GC1 and its Common Article 1 (2016), paragraph 150.

far-reaching consequences it carries for states engaging in miliary operations through PMSC actors.[144] Especially the United States has been clear that although they wish to ensure and promote compliance with the rules of IHL, they do not agree with this legal interpretation of the ICRC.[145] Such clear stances on the primary obligations growing from IHL illustrates the difficult aspects of establishing and interpreting rules in international law introduced in Chapter 1.3. The fundamental sovereignty of states makes establishment and development of new and stricter rules through expanding interpretation of international law difficult to legitimise. However, the Montreux Document and the ICoC mentioned in Chapter 1.1. and 1.3.1. attempts to ensure better compliance with primary rules of IHL by providing recommendations for certain procedures and operations. The documents have gained some outreach by both states and PMSCs themselves, but they cannot be said to lay down any functional framework in constituting new obligations for states.

ICJ *Genocide* illustrates, as mentioned, the importance of primary obligations if the Contracting State cannot be seen responsible by the secondary rules of attribution. The Court could not find Serbia responsible for actually committing the genocide due to the lacking agency relationship between Serbia and the Bosnian Serb army. Nonetheless, the Court found Serbia responsible for failing to discharge its obligations to take positive steps to prevent genocide to occur which is stated in Article 1 of the Genocide Convention.[146] These primary rules are best suited to regulate the kinds of private military activity that is not desirable before the violations occur, and thorough regulations with wide support in the international community is essential to provide legal clarification. In a similar vein, GC Article 1 may give the Contracting State certain due diligence obligations to prevent and punish violations of IHL which can provide a pathway to constituting state responsibility independently of the attribution of particular PMSC misconduct to the state.

While the alternative approach given in Chapter 4.2. provides a possible remedy to close the current responsibility gap in Contracting State's responsibility for the misconduct of national armed forces and the misconduct of contracted PMSC actors, the debate clearly shows the lacking legal basis which requires further debate on and development of primary obligations.

[144] Wiesener and Kjeldgaard-Pedersen (2022).
[145] Wiesener and Kjeldgaard-Pedersen (2022), p. 138, US Department of Defense (2019).
[146] UN Convention on the Prevention and Punishment of the Crime of Genocide (1948).

4.3. Conclusion

The recent boom in private security raises concerns that states may be able to evade responsibility for violations of IHL simply by performing their military and security policy through private companies rather than through public governmental branches and national armed forces. Based on the arguments highlighted in this thesis, the general rules on attribution under the rules on state responsibility leaves a regulatory gap between the Contracting States responsibility for use of PMSC actors and use of national armed forces. If this apparent gap cannot be filled by other norms, the situation remains open to the strategic behaviour of states seeking to reduce their exposure to international responsibility. The rules on responsibility in international law would clearly be undermined if states were able to opt out of their primary obligations by solely participating in armed conflict through actors from Private Military and Security Companies.

Part 4.2. building upon Chapter 2, illustrates that clear international standards on how to take positive steps to prevent, punish and investigate PMSC misconduct in armed conflict could provide an alternative pathway to constituting state responsibility for the Contracting State. Exactly what these different standards of "due diligence" will require of the Contracting States must be interpreted in each particular case, but it is clear that for the notion of due diligence to be of any help, it needs to include an international standard of behaviour which is not to be deemed by a state's national law or individual state practice. The risk of incurring responsibility for PMSC misconduct provides the Contracting State with a significant incentive to carefully consider the functions that they outsource, providing better legal certainty and protection for civilians.

There will not be sufficient legal certainty for civilians in armed conflicts until state responsibility rules becomes more tailored towards actions carried out by PMSCs. With the ongoing international armed conflict which unfolds between Ukraine and the Russian Federation, several sources informs of the ongoing participation of PMSC actors.[147] This clearly illustrates that the questions of state responsibility for misconduct of PMSC actors will be a topic in the following legal process after the conflict and illustrate the importance of the research question debated in this thesis.

[147] Debusmann Jr., *BBC News* (2022) and Roushan, *Republic World* (2022).

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