

Article

Private Military Companies (PMCs) and International Criminal Law: Are PMCs the New Perpetrators of International Crimes?

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ABSTRACT

The extensive use of private military companies (PMCs) in conflict areas in the last 30 years has raised concern in the academic community regarding the participation of private companies in the conduct of war. For example, academics incite issues of legitimacy, the role of the state and the legal status of PMCs especially when they take a direct part in the hostilities. In this context, PMCs have been often accused of committing serious crimes during their involvement in the hostilities. The important question regarding their possible criminal activity is whether these serious crimes fall into the category of international law and more specifically international criminal law. This article examines firstly, whether PMCs actually commit serious crimes and secondly, if these crimes constitute violations of international law, namely, international crimes.

Introduction

Since the late 1980s the use of private military companies (PMCs) has been a common practice by states,¹ international organisations and multinational companies. For example, DynCorp participated in a counter-narcotics strategy in Colombia under the name 'Plan Colombia' in 1999² and has also trained the security forces in Afghanistan from 2002

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¹There are two types of states regarding the use of PMCs: the 'state-producer' and 'state-consumer'.

'State-producer' refers to the strong Western states where the majority of the PMCs have their headquarters. 'State-consumer' refers to the weak or failed states of periphery which use the PMCs in order to strengthen their military force. By the use of PMCs, the 'state-producer' usually profits from the conflict of the 'state-consumer' in order to achieve its political or financial goals. In this process PMCs are the tools of the strong states. See Stella Ageli, unpublished Phd Thesis, *State-corporate crime and private military companies: an approach from the viewpoint of supranational criminology*, Panteion University of Social and Political Sciences, Athens, Greece, 2014.

²Bigwood J. (2001) 'DynCorp in Colombia: Outsourcing the Drug War' at <http://www.corpwatch.org/article.php?id=672>, (accessed 5 March 2016).

until now.³ The UN has also used private security companies during its peace missions worldwide⁴ since the 1990s. Private armies were also present in Libya after the ‘Arab Spring’⁵ and finally media reports support that PMCs act in Syria and Ukraine.⁶ However, the military companies that have triggered the most criticism are those which ‘sell’ purely military services⁷ to conflict states and take direct part in hostilities. This type of PMC is hired by weak states, which are usually in civil war, and they need military reinforcement so as to confront the opposing groups. In this case the PMC has a key role in the outcome of the conflict because it strengthens one conflicting party against the other.

Despite the extensive use of PMCs in conflict areas and their participation in hostilities, their actions remain mainly secret. In most cases the conflict party that hires a PMC will not inform the opposing party. Moreover, during a conflict, “private military personnel have an ambiguous legal status which has resulted in an almost complete absence of legal prosecution”⁸ when they act illegally. This has the consequence that their action is unencumbered and uncontrollable. In this context PMCs have been often accused of committing serious human rights violations and violations against international law,⁹ namely, international crimes.

The participation of the PMC in the conduct of war, civil or not, and the allegations of possible violations against international law by them challenge the traditional theory of international law, which argues that only states and its institutions can carry out a war and violate the laws of war. In this sense, a new type of perpetrator has emerged, that of a PMC to commit international crimes. For that reason this article intends to examine two important questions: first, whether PMCs actually commit serious crimes and second, if they do, are these crimes against international law and more specifically against international criminal law? The aim of this article is to investigate whether the possible illegal acts of PMCs constitute international crimes.

For that purpose, section I of this article studies three examples of PMC activity in order to detect possible illegal behaviour. These three PMCs have been selected because they

³Giustozzi, A. (2007). ‘The Privatizing of war and security in Afghanistan: future or dead end?’ *The Economics of Peace and Security Journal*, 2:1, pp.30-34. See also Pierre-Arnaud Chouvy, *Opium: uncovering the Politics of the poppy*, Harvard University Press 2010, p.115.

⁴See United Nations General Assembly 68thSession A/68/339.

⁵José Luis Gómez del Prado, Chair-Rapporteur of United Nations Working Group on the use of mercenaries, stated in a press release in April 2011 about the situation in Libya and Cote d’Ivoire, “mercenaries still pose a serious threat to human rights”. See at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10923&LangID=E>, (accessed 5 March 2016).

⁶See ‘Ukrainian Nazis Pay Private Military Company Academy (former Blackwater) for training’, *Global Research*, 3 January 2015, at: <http://www.globalresearch.ca/ukrainian-nazis-pay-private-military-company-academi-formerly-blackwater-for-training-russian-report/5422667> (accessed 7 March 2016). See also ‘Who will Profit the Wars in Iraq and Syria?’, *Huffington Post*, 2 October 2014 at: <http://www.commondreams.org/views/2014/10/02/who-will-profit-wars-iraq-and-syria>, (accessed 7 March 2016).

⁷PMCs are divided into three categories according to the type of services they provide (military support firms, military consulting firms and military provider firms). In practice, this distinction is not confirmed because there are companies that offer several and different types of military assistance. See S.Ageli, unpublished PhD Thesis, *State-corporate crime and private military companies: an approach from the viewpoint of supranational criminology*, Panteion University of Social and Political Sciences, Athens, Greece, 2014.

⁸C. Lehnardt ‘Individual Liability of Private Military Personnel under International Criminal Law’, *The European Journal of International Law*, (2008) Vol.19, No 5, 1015-1034.

⁹*Angola: between war and peace. Arms trade and human rights abuses since the Lusaka Protocol*, Human Rights Watch, 1996-8.

satisfy the following requirements: firstly, they are multinational companies; secondly, they offer a wide range of services; thirdly, they operate in conflict zones; fourthly, although their contracts regard training services they take direct part in hostilities and fifthly, they are linked to wrongdoings and scandals. These criteria allowed these specific PMCs to commit the serious violations that we will examine below. Section II analyses two basic international crimes—war crime and genocide—and examines whether the illegal actions of the PMCs constitute any of these two crimes.

Before we proceed to our analysis it would be quite helpful if we focused on the term ‘*taking direct part in the hostilities*’ as we will encounter it in all of our cases. What does it really mean? That question is a very important issue for International Humanitarian Law and International Criminal Law. The Geneva Conventions 1949 do not clarify what ‘taking direct part in hostilities’ means, resulting in the term including everything from ‘a support to war operations’ to ‘involvement/active role in war operations’.¹⁰ On the other hand, the Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, describes clearly what ‘direct’ means. Thus, “direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces”¹¹. On the contrary, the International Criminal Tribunal for the former Yugoslavia (ICTY) stated, “it is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual’s circumstances, that person was actively involved in hostilities at the relevant time”¹².

As far as concerning PMCs and what ‘direct part’ means, *it depends mainly on the kind of service the private army provides*.¹³ For example, “a private contractor defending military personnel or military objectives from enemy attack directly participates in hostilities. His or her actions are indistinguishable from the quintessential duties of combat personnel”.¹⁴ “On the other hand, defending any personnel or property against looters or others (including lawful combatants) engaged in criminal activity or war crimes does not comprise direct participation”.¹⁵ Likewise, “any attack by civilians on military personnel or military objectives constitutes direct participation so long as there is a nexus between the attack and the armed “conflict”.¹⁶ Finally, private armies which “engage in tactical level planning or approval are directly participating in hostilities because military operations could not occur but for that planning”.¹⁷

I. Private Military Companies

I.1 Executive Outcomes

¹⁰ N.M. Schmitt, ‘Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees’, *Chicago Journal Of International Law* 2005, 5:2, pp.511-546, p.532.

¹¹ See Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 par.1944 at:

http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf, (accessed 6 March 2016).

¹² *Prosecutor v. Tadic*, Final Judgment, Case No.IT-94-1-T, Trials Ch., 7 May 1997, para.616.

¹³ S. Bosch, ‘Private security contractors and international humanitarian law. A skirmish for recognition in international armed conflicts’, *African Security Review* 2007, 16:4, p.46.

¹⁴ Schmitt 2005, p.538.

¹⁵ *Ibid.*

¹⁶ *Idem.* p.534.

¹⁷ *Idem.* p.543.

Executive Outcomes (EO) was the first PMC incorporated into South Africa after the end of the Cold War and at the end of the apartheid era in 1989.¹⁸ The company, founded by Eben Barlow¹⁹, acted mainly in Africa, where it took advantage of the African states' political and military instability in order to promote its own interests.²⁰ Its involvement in the Angolan civil war shows the consequences of the PMC's actions.

In 1990 the civil war in Angola intensified between state forces of MPLA (*Movimento Popular de Libertação de Angola*) and rebel group UNITA (*União Nacional pela Independência Total de Angola*). By 1993 UNITA had occupied the majority of Angolan territory including the oil-producing region Soyo,²¹ where the British oil company, Heritage Oil, was operating. It was the damage suffered by the government and the oil companies that led Antony Buckingham—founder of Heritage Oil—to bring the government of Angola into contact with EO. “There is general suspicion that EO was not only fighting mercenary battles in Angola, but was defending their corporate interest in oil and diamonds”.²² The contract between the two parties was signed in September of 1993 and referred to the reinforcement of the state military forces, MPLA.²³ EO's remuneration²⁴ was USD \$40 million in 1993, USD \$95 million in 1994 and USD \$1.8 million per month between 1995 and January 1996.²⁵

The operations of EO in Angola and the key role the company played in the outcome of the war drew the attention of the international community. EO trained about 5000 soldiers and 30 pilots²⁶. The Angolan government regained the oil producing regions and obtained the advantage against the rebels. Executive Outcomes provided high-level military training and effective methods for the extermination of the opponent.

EO also maintained two fighting units that were active in frontline conflict with UNITA troops. Without the backing of EO, the Angolan government most likely would have been brought to the bargaining table proposal. In the months prior to the procurement of EO's services, the government had been involved in negotiations with UNITA. After hiring EO, the government made a commitment to a military solution.²⁷

It is commonplace for EO to take active part in the hostilities by the side of the MPLA,²⁸ and researchers note that during the conflict, between 1992 and 1994, 500,000 civilians

¹⁸ For details on the history of Executive Outcomes see K. Pech, in J. Cilliers & P. Mason, *Peace, Profit or Plunder?: The privatization of security in war-torn African societies*, Pretoria: Institute for Security Studies 1999, p. 81; J. Harding, ‘The Mercenary Business: “Executive Outcomes”’, *Review of African Political Economy* 1997-71, p. 87; A.F. Musah & K. Fayemi, *Mercenaries: An African Security Dilemma*, London: Pluto Press 2000.

¹⁹ Eben Barlow was a retired Lieutenant Colonel in the South African Special Forces and the former Europe Director of the shadowy South African Civil Cooperation Bureau in the 1980s.

²⁰ Harding 1997, pp.87-97.

²¹ K. A. O' Brien in Musah & Fayemi 2000, p. 51.

²² J. Selber & K. Jobarteh 2002, p.93.

²³ S. Cleary in Cilliers & Mason 1999, p. 156.

²⁴ There are reports that Angola also offered to EO oil and diamond concessions. See Pech in Cilliers & Mason 1999, p. 86.

²⁵ O' Brien in Musah & Fayemi 2000, p. 52.

²⁶ *Angola: between war and peace. Arms trade and human rights abuses since the Lusaka Protocol*, Human Rights Watch, 1996-8.

²⁷ J. Selber & K. Jobarteh, ‘From Enemy to Peacemakers: The Role of Private Military Companies in sub-Saharan Africa’, *Medicine and Global Survival* 2002-7, p.93.

²⁸ G. Cleaver, ‘Subcontracting military power: The privatization of security in contemporary Sub-Saharan Africa’, *Crime, Law & Social Change* 2000-88, pp. 131-49; C. Kinsey, ‘Problematizing the Role Of Private Security Companies in Small Wars’, *Small Wars and Insurgencies* 2007-18, pp. 584-614; O'

have died,²⁹ blaming EO for this.³⁰ “The increased scale of death has been attributed to the increased technological sophistication and the superior killing efficiency of the private security force, Executive Outcomes”.³¹ Reports of international NGO *Human Rights Watch*³² and *UN Working Group on the Use of Mercenaries*³³ argue that EO participated in the hostilities during the civil war in Angola and in cooperation with MPLA committed attacks against civilians. But, according to article 8 (2)(e) of the ICC Rome Statute (1998) the act of “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” is considered a war crime.³⁴ Therefore, we will later test the hypothesis of whether the behaviour of EO in Angola constitutes this specific crime.

I.2 Military Professional Resources Incorporated (MPRI)

MPRI was created in 1987 by eight American former senior military leaders. MPRI offers a wide range of professional services to both public and private customers, most notably the U.S. Department of Defence, the U.S. Department of State, the U.S. Department of Justice, the U.S. Department of Homeland Security, law enforcement organisations, foreign governments, government agencies and commercial businesses but only with the US government’s permission.³⁵ The close relationship of MPRI with the US government resulted in certain cases that MPRI acted as a tool of foreign policy for the US interests (companies as proxies).³⁶ The most characteristic of MPRI’s activities was its operation in Croatia in 1995.

After the death of Tito and with the fall of communism throughout Eastern Europe, the Yugoslav federation began to unravel. Croatia held its first multi-party elections since Second World War in 1990. Long-time Croatian nationalist Franjo Tudjman was elected President, and one year later, Croatians declared independence from Yugoslavia. Conflict between Serbs and Croats in Croatia escalated, and one month after Croatia declared independence, war erupted. While the Croatian army was weak and inexperienced, Serbs had the support of the Serb-controlled Yugoslav People's Army (JNA). Therefore, Serbs dominated at the beginning of the war, conquering one third of Croatian territory.³⁷The

Brien in Musah & Fayemi 2000; Harding 1997; Pechin Cilliers & Mason 1999; Cleary in Cilliers & Mason 1999.

²⁹ J. Selber & K. Jobarteh 2002; S. Cleary in Cilliers & Mason 1999, p. 146; S. Fandrych in M. Basedau & A. Mehler, *Resource Politics in Sub-Saharan Africa* 2005, p.82; C. Dietrich, ‘Power Struggles in the Diamond Fields’ in J. Cilliers & C. Dietrich, *Angola’s War Economy. The Role of Oil and Diamonds*. Pretoria: Institute for Security Studies 2000, pp. 173-194; Commission on Human Rights 15th Session E/CN.4/1994/23, pp.18-19.

³⁰ Ibid.

³¹ J. Selber & K. Jobarteh 2002, p.93.

³² *Angola: between war and peace. Arms trade and human rights abuses since the Lusaka Protocol*, Human Rights Watch, 1996-8.

³³ Commission on Human Rights 15th Session E/CN.4/1994/23.

³⁴ See details in ICC Rome Statute 1998 at: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 8 June 2015).

³⁵ See official webpage of MPRI, at: www.mpri.com (accessed on 18 June 2015).

³⁶ D. Isenberg, *Soldiers of Fortune Ltd: A Profile of Today’s Private Sector Corporate Mercenary Firms*, Washington: Center for Defense Information Monograph 1997; K. Silverstein, *Private Warriors*, London: Verso Books 2000; T. K. Adams, ‘Private Military Companies: Mercenaries for the 21st Century’, *Small Wars & Insurgencies* 2002-2, pp. 54-67; D. Shearer, ‘Private military force and challenges for the future’, *Cambridge Review of International Affairs* 1999-1, pp. 80-94; D. Avant, *The Market for Force: The Consequences of Privatizing Security*, Cambridge: Cambridge University Press 2005; B. Yeoman, ‘Soldiers of Good Fortune’, *Mother Jones* 2003-3, pp. 38-43, 92-3.

³⁷ K. Mulaj, ‘A recurrent tragedy: Ethnic cleansing as a tool of state building in the Yugoslav multinational setting’, *Nationalities Papers* 2006-34, pp.21-50.

Croats, realising the weaknesses of their army, requested the US government's support but the US government could not provide any aid to them because of the 1991 UN embargo "on all deliveries of weapons and military equipment".³⁸ However, the US government proposed MPRI to the Croats since in that way US would gain an ally in the region, would restrain Serbs, and would serve its own political interests³⁹ without US military commitment.

The contract between MPRI and the Croatian government was signed in September of 1994 and according to MPRI officials was "simply to teach the Croats Western military principles and tactical training was not included in the plan".⁴⁰ Nevertheless, in August 1995, several months after the presence of MPRI in Croatia, the Croatian army launched a lightning offensive in order to recapture the Serb-held enclaves of Croatia.⁴¹ More specifically, 'Operation Storm' in Krajina region against the Serbs on 4th of August was considered the largest ethnic cleansing operation in the war⁴² and was characterised as genocide. Serbian villages were looted, burnt and destroyed, hundreds of civilians were killed and about 200,000 people⁴³ were displaced. The Croats defeated the Serbs in less than 36 hours and in four days re-conquered all the territories that had been lost in the previous four years of war.⁴⁴

The remarkable evolution of the Croatian army after its cooperation with MPRI caused the class-lawsuit in 2010⁴⁵ against the firm by a group of Serbs who lived in Krajina until 'Operation Storm'. The lawsuit accused them of 'complicity in genocide', military equipping of the Croatian Armed Forces, training the Croatian Officers and developing the plan for 'Operation Storm'. MPRI was linked to 'Operation Storm'⁴⁶ as the attack techniques were reminiscent of the American way of war. Specifically, it used new warfare techniques called the *AirLand Battle Doctrine*⁴⁷, a doctrine developed by the US Army after its involvement in the Vietnam War and applied for the first time in the 'Desert Storm' operation during the first Gulf War in 1990.⁴⁸ It is worth noting that Carl Vuono, Vice President of MPRI at that time, was one of the United States Army's Generals who planned and implemented the AirLand Battle doctrine in the Gulf War⁴⁹. The use of high technology weapons evolved in the technical doctrine of AirLand Battle were implemented by the Croatian Army, thus referred to as the AirLand Battle 2000

³⁸UN Security Council 3009th Meeting, Resolution S/RES/713, 25 September 1991.

³⁹J. Gilliers & I. Douglas in Gilliers & Mason 1999, p. 115.

⁴⁰L. Peterson, 'Privatizing Combat, the New World Order', *The Centre for Public Integrity* 2002, at: <http://projects.publicintegrity.org/bow/report.aspx?aid=148> (accessed 21 June 2015).

⁴¹Ibid. See also Avant 2005.

⁴²Silverstein 2000, p.167.

⁴³The number of refugees is not accurate as different sources give different information. Yet, researchers estimate that the number is about 200,000 – 300,000 people.

⁴⁴Avant 2005, p.103.

⁴⁵ See details: United States District court Northern District of Illinois Eastern Division, 2010 at <http://www.veritas.org.rs/wp-content/uploads/2011/08/tuzba-usa.pdf> (accessed 6 March 2016).

⁴⁶ See Avant 2005; D. Shearer, 'Private military force and challenges for the future', *Cambridge Review of International Affairs* 1999-1, pp.80-94; Silverstein 2000; Yeoman 2003; Gilliers & Douglas 1999; Isenberg 1997.

⁴⁷D. Skinner, 'AirLand battle doctrine' *Centre For Naval Analysis* 1998, <http://www.cna.org/sites/default/files/research/5500046300.pdf>, (accessed 6 March 2016).

⁴⁸R. Lock-Pullan, 'How to Rethink War: Conceptual Innovation and AirLand Battle Doctrine', *Journal Of Strategic Studies* 2005 28:4, pp.679-702.

⁴⁹M. Dakovic & B. Miseljic, 'How 'Operation Storm' Destabilized the Balkans', *Independent Center for Geopolitical Studies JUGOISTOK* 2001 Belgrade, Serbia., <http://www.antiwar.com/orig/dakovic3.html>, (accessed 6 March 2016).

Doctrine.⁵⁰ There are reports in local media that a week prior to the operation there was a secret meeting between American and Croatian high-rank army officers at Brioni Island in the Adriatic.⁵¹ Among them was the Croatian Army General and architect of 'Operation Storm' Varimar Cervenko.⁵² Finally there are researchers who support that MPRI planned and directed the whole operation from the island Krk in Adriatic.⁵³ British and French UN personnel reported that MPRI executives were seen on the battlefield.⁵⁴

Those who studied MPRI's actions concur that MPRI not only trained the Croatian army, but also took active part in the actualisation of 'Operation Storm'.⁵⁵ MPRI refused any involvement in 'Operation Storm' and insisted on the procurement of counselling services to the Croatian government.⁵⁶ Is there any real difference between '*counsel*' of how a military operation should be and '*taking direct part*' in it? We cannot separate the military training of a private army to a state army from the evolution of the latter. These two are not irrelevant. The kind of training provided is an integral part of the trainees' activity. There is strong cooperation between the two in order to achieve goals, and to maximize the capacity and efficiency. Hence not taking direct part in hostilities does not mean there is a lack of accountability. If the military personnel of a private army is in a distant area from the battlefield and instructs its trainees on how to fight, does it mean that it has no responsibility for the crimes committed? Moreover, how can it be proved that private soldiers of MPRI were not on the battlefield? How could someone separate Croat soldiers from MPRI's personnel? Someone could think of the different military uniforms. But how can we be sure that they did not wear the same military uniforms so as not to be detectable? Therefore we realise once again that the meaning of taking direct part in hostilities is rather complex.

I.3 Blackwater

The Blackwater Lodge & Training Centre was founded on December 26 1996, in North Carolina by billionaire Eric Prince, a former USA Navy officer⁵⁷ in order to provide training support to military and law enforcement organisations. Blackwater was the company that received the most contracts from the US government in Iraq. The total estimated cost for Blackwater task orders in Iraq from 2005 until 2008 was USD \$1,014,189,271.⁵⁸ The services provided by Blackwater to the US government were divided into three broad categories:⁵⁹

⁵⁰ Ibid.

⁵¹ Silverstein 2000 p. 173 & Singer 2003 p.127.

⁵² Ibid.

⁵³ M. Dakovic, & B. Miseljic 2001.

⁵⁴ B. Vankovska (2002), *Privatization of Security and Security Sector Reform in Croatia*, at: http://www.academia.edu/1267876/Privatisation_of_Security_and_Security_Sector_Reform_in_Croatia (accessed 2 March 2016), p.19.

⁵⁵ Singer 2003, p.127; Silverstein 2000, p.173; Avant 2005, p.103; Vankovska 2002, p.19.

⁵⁶ Avant 2005, pp.106-110.

⁵⁷ Jeremy Scahill, *Blackwater: The Rise of the world's most powerful mercenary army*, New York City: Nation Books 2007, p.37.

⁵⁸ See SIGIR Report, *Joint Audit of Blackwater Contract and Task Orders for Worldwide Personal Protective Services in Iraq*, June 2009, p.7, at: <http://www.expose-the-war-profiteers.org/archive/government/2009-1/20090600.pdf> (accessed 18 June 2015).

⁵⁹ Singer 2003, p.6.

- a) Guard strategic installations. For example, the facilities of the transitional government's Coalition Provisional Authority (CPA) as well as the 'Green Zone'⁶⁰ in Baghdad's city centre;
- b) Guards officials and the allied forces;
- c) Guard convoys of military vehicles, a service that proved quite dangerous because it turned out to be the main means of resistance by the rebels with which they set ambushes on the roads.

However, Blackwater gained quite a negative image due to the aggressive action that eventually developed in Iraq. The incident that caused the intense reaction by not only Iraq's government, but also US Congress, was the shootings by Blackwater's employees against Iraqi civilians at Nisour Square in west Baghdad, on Sunday September 16th, 2007 (Baghdad's 'bloody Sunday').⁶¹

On Sunday, September 16th 2007, a heavily armed Blackwater convoy carrying US officials entered Nisour Square. Since occupation, Iraqi police had orders "to stop traffic in order to make room for US VIPs, protected by heavily armed private soldiers, to blaze through".⁶² Thus, when the Blackwater convoy entered the intersection the Iraqi traffic cops stopped the traffic. But, according to witnesses, an Iraqi driver ignored police directives and passed the intersection.⁶³ Blackwater's personnel who had already "got out of their vehicles and took positions on the street, began to fire in the direction of the car, killing its driver. Soon more shots were fired, killing a woman holding an infant sitting in the passenger seat. After the family was shot, a type of grenade or flare was fired into the car, which set it ablaze. Numerous civilians were also killed as the shooting continued".⁶⁴ Iraqis said, "The Blackwater forces fired shots randomly as they withdrew from the square".⁶⁵ "Iraqi officials have given several death counts, ranging from 8–20, with perhaps several dozen wounded".⁶⁶ Blackwater guards told investigators that they believed that they were being fired on, although the investigations of the FBI, the American Army and Iraq⁶⁷ concluded that "there was no enemy fire"⁶⁸ and the shootings were unjustified.⁶⁹

⁶⁰ The 'Green Zone' is the most common name for the International Zone of Baghdad. It is a 10-square-kilometre (3.9 sq. mi) area in the Karkh district of central Baghdad, Iraq. It was the governmental center of the Coalition Provisional Authority and remains the center of the international presence in the city. Prior to the invasion in 2003, the Green Zone was a heavily fortified zone in the center of the Iraqi capital that served as the headquarters of successive Iraqi regimes. It was also the administrative center for the Ba'ath Party.

⁶¹ M. Welch, 'Fragmented power and state-corporate killings: a critique of Blackwater in Iraq', *Crime, Law & Social Change* 2009-51, p.355.

⁶² Scahill 2007, p.3.

⁶³ L. Fadel, J. Neff & H. Kadhim, 'Iraq threatens action against U.S. security firm', *McClatchy Newspapers*, 17 September 2007, at: <http://www.mcclatchydc.com/2007/09/17/19804/iraq-threatens-action-against.html> (accessed 21 June 2015).

⁶⁴ Welch 2009, p.355.

⁶⁵ Scahill 2007, p.3.

⁶⁶ Welch 2009, p.355.

⁶⁷ D. Isenberg, *Shadow Force: Private Security Contractors in Iraq*, Santa Barbara: Greenwood Publishing Group, Inc. 2009, p.79.

⁶⁸ Welch 2009, p.355.

⁶⁹ J. Risen, '3 Blackwater Guards Called Bagdad Shootings Unjustified', *The New York Times*, 16 January 2010, at: http://www.nytimes.com/2010/01/17/world/middleeast/17blackwater.html?_r=1 (accessed 21 June 2015).

In general, Blackwater was involved in several unjustified shootings against Iraqi civilians. A US Congress Committee, which investigated Blackwater's activities from 2005 until 2007, revealed that:

Blackwater's use of force in Iraq was frequent and extensive, resulting in significant casualties and property damage. Blackwater was legally and contractually bound to only engage in defensive uses of force to prevent 'imminent and grave danger' to themselves or others. In practice, however, the vast majority of Blackwater weapons discharges were pre-emptive, with Blackwater forces firing first at a vehicle or suspicious individual prior to receiving any fire.⁷⁰

In particular, "Blackwater personnel have participated in 195 incidents in Iraq from January 1, 2005, through September 12, 2007, that involved firearms discharges by Blackwater personnel".⁷¹ "In over 80 per cent of these incidents Iraqis were injured or killed".⁷² "This is an average of 1.4 incidents per week. In 32 of those incidents, Blackwater personnel were returning fire after an attack, while on 163 occasions (84% of the shooting incidents), Blackwater personnel were the first to fire".⁷³ The main characteristic of these incidents was that "Blackwater shots were fired from a moving vehicle and Blackwater did not remain at the scene to determine if their shots resulted in casualties",⁷⁴ a fact that indicates they acted undisturbed, like snipers. Finally, when Blackwater's performance is compared to that of the other two State Department contractors, DynCorp and Triple Canopy, reports reveal that Blackwater participated in more shooting incidents than the other two companies combined. From 2005 through 2007, Blackwater fired weapons in 168 incidents, compared to 102 for DynCorp and 36 shooting incidents for Triple Canopy. Blackwater also fired first at a higher rate than its counterparts. Blackwater also inflicted property damage more often than the other two companies combined.⁷⁵ Blackwater's acts in Iraq violate International Criminal Law and could constitute a war crime according to article 8(2)(e) of the ICC statute.⁷⁶

So far we have studied three characteristic examples of PMCs' unlawful actions. Next we will examine the elements of two basic international crimes, specifically war crimes and the crime of genocide, in order to test whether the illegal activity of the PMCs falls under this category of serious crimes.

II. Private Military Companies and International Crimes

II.1 War Crimes

Article 8 of International Criminal Court divides war crimes in four categories⁷⁷:

⁷⁰Hearing before the Committee on Oversight and Government Reform House Of Representatives 110th Congress First Session, p.181, at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:45219.pdf(accessed 21 June 2015).

⁷¹ Ibid.

⁷²M. Pitzke, 'White-Collar Mercenary under Fire', *Spiegel Online International*, 10 March 2007, at: <http://www.spiegel.de/international/world/blackwater-hearing-white-collar-mercenary-under-fire-a-509264.html> (accessed 21 June 2015).

⁷³Hearing before the Committee on Oversight and Government Reform House Of Representatives 110th Congress First Session, p.181, at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:45219.pdf (accessed 21 June 2015).

⁷⁴Idem, p.182.

⁷⁵ Ibid.

⁷⁶See ICC Statute, 1998, at: http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 8 June 2015).

⁷⁷Ibid.

- 1) Article 8(2)(a) Grave breaches of the Geneva Conventions of 12 August 1949;
- 2) Article 8(2)(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law;
- 3) Article 8(2)(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949;
- 4) Article 8(2)(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.

II.2 Elements of Crime

According to article 8(1) of ICC, an act can be characterised as a ‘war crime’ in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.⁷⁸ There are three common elements to all war crimes: 1) armed conflict, 2) nexus between crime and conflict and 3) awareness of the armed conflict.⁷⁹ The first two elements regard the objective elements of an offense, while the third one regards the subjective elements of an offense.

Existence of an Armed Conflict

As far as concerning the existence of an armed conflict, the important question is when a disturbance can be characterised as an armed conflict. In the case of an international conflict, the states should declare war in order for international criminal law to enter into force. In case of an internal conflict, a “certain threshold of intensity and organisation must be met, in order to distinguish armed conflict from mere internal disturbances”.⁸⁰ It was the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* case that has clarified the issue. In particular the ICTY ruled that: “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”.⁸¹ The concept of internal armed conflict has been also discussed in the International Criminal Tribunal for Rwanda (ICTR) in the *Akayesu* case where the judges explained “an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organisation of the parties to the conflict”.⁸² Therefore, it is clear that internal unrest, sporadic acts of violence and other similar acts of violence do not constitute an internal armed conflict.⁸³ Conflict parties should be able to plan and contact military operations.

Regarding the beginning and the end of an armed conflict, “international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal

⁷⁸Ibid.

⁷⁹W. A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone*, Cambridge: Cambridge University Press 2006, p.229.

⁸⁰Ibid.

⁸¹*Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No.IT-94-1, Appeals Ch., 2 October 1995, para.70.

⁸²*Prosecutor v. Akayesu*, Judgment, Case No. ICTR 96-4-T, T. Ch. I, 2 September 1998, para.625.

⁸³Idem, para. 620.

conflicts, a peaceful settlement is achieved”.⁸⁴ Moreover, according to article 6, paragraph 2 of the IV Geneva Convention of 1949, an armed conflict could cease without a peace agreement but with the general close of military operations.⁸⁵

The element of the armed conflict is especially important when it concerns privates. Antonio Cassese, the first president of the ICTY, points out that the crimes of privates during an armed conflict are just crimes of the common criminal law of the country where the crime took place if the element of the armed conflict cannot be composed.⁸⁶ Cassese’s comment is essential for our discussion, namely the possible commission of crimes by PMCs’ employees. Provided that the crimes of PMCs’ employees take place during an armed conflict then one of the elements of a war crime is constituted.

The Nexus with the Armed Conflict

In order for a crime to be characterised as a war crime, it should be related to the armed conflict, as not all crimes in an armed conflict are war crimes.⁸⁷ The Appeals Chamber of the ICTY in the *Kunarac et al.* case asserted that “the armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it”.⁸⁸

Furthermore:

In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.⁸⁹

In the Elements of Crimes of the International Criminal Court (ICC)⁹⁰ it is clear that the requisite for a crime to be characterised as a war crime is to take place ‘in the context of and to be ‘associated with’ an armed conflict.⁹¹

The word ‘context’ refers to the geographic and temporal parameters of the armed conflict, specifically the crime to be committed during the armed conflict and on the armed conflict territory.⁹² The ICTY specified that “there is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war”.⁹³ “The laws of war”, the ICTY continues, “apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under

⁸⁴*Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No.IT-94-1, Appeals Ch., 2 October 1995, para.70.

⁸⁵ See 1949 IV Geneva Conventions relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 6, para. 2.

⁸⁶A. Cassese, *International Criminal Law*, Oxford: Oxford University Press 2003, p.49.

⁸⁷Schabas 2006, p.236.

⁸⁸*Prosecutor v. Kunarac et al.*, Judgment, Case No.IT 96-23/1-A, Appeals Ch., 12 June 2002, para.58.

⁸⁹Idem, para. 59.

⁹⁰ See the Elements of Crimes ICC at: <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (accessed 8 June 2015).

⁹¹ Idem, p. 14.

⁹²Cryer et al. 2007, p.238.

⁹³*Prosecutor v. Kunarac et al.*, Judgment, Case No.IT 96-23/1-A, Appeals Ch., 12 June 2002, para.57.

the control of a party to the conflict, whether or not actual combat takes place there”.⁹⁴ Hence, the ICTY accepts that a criminal act can occur in a moment and at a place irrelevant from the battlefield, yet this particular act can be related to the armed conflict. “It would be sufficient”, for the ICTY, “that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict”.⁹⁵ Finally, in the *Tadic* case the ICTY concluded that “the only question, to be determined is whether the offences were closely related to the armed conflict as a whole”.⁹⁶

Regarding the term ‘associated with’ there is a particular connection between the perpetrator’s act and the armed conflict.⁹⁷ The Appeals Chamber of the ICTY clarified the question in the *Kunarac et al.* case. Particularly, the ICTY concentrated on whether the armed conflict “played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed”.⁹⁸ The ICTY concluded that “if it can be established, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict”.⁹⁹ For the ICTY “what ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment—the armed conflict—in which it is committed”.¹⁰⁰

Awareness of the Armed Conflict

The third element of a war crime is the awareness of the armed conflict, namely that it should be established that the perpetrator is aware of the factual circumstances which constitute an armed conflict. According to article 30 of the ICC Statute,¹⁰¹ paragraph 2 of the General Introduction of Elements of Crimes of ICC¹⁰² and the Introduction of Article 8 in Elements of Crimes of ICC,¹⁰³ the material elements of war crimes are committed with intent and knowledge. These two elements operate cumulatively and require a perpetrator’s will and knowledge that the consequences will occur in the ordinary course of events.¹⁰⁴ In addition, “as to the awareness of the factual circumstances that make a situation an armed conflict and as to the proof of the nexus, the views were divided into two groups”.¹⁰⁵ The majority supports that the “mental requirement should be ‘knew or should have known’”.¹⁰⁶ Besides, for some academics the element of awareness is of theoretical significance¹⁰⁷ because they argue that “in most situations it would be so

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ *Prosecutor v. Tadic*, Opinion and Judgment, Case No. IT 94-1-T, T. Ch. II, 7 May 1997, para.573.

⁹⁷ Cryer et al. 2007, p.238.

⁹⁸ *Prosecutor v. Kunarac et al.*, Judgment, Case No.IT 96-23/1-A, Appeals Ch., 12 June 2002, para.58.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ See ICC Statute, 1998, at: http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 8 June 2015).

¹⁰² See Elements of Crimes of ICC, p. 1, at: <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (accessed 8 June 2015).

¹⁰³ Idem, p.13.

¹⁰⁴ E. Symeonidou-Kastanidou et al., *War Crimes. The international obligations of Greece and the necessary adjustment measures*, Athens: Nomiki Vivliothiki 2006, p.224.

¹⁰⁵ K. Dörmann, ‘War Crimes Under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes’, *Max Planck Yearbook of United Nations Law* 2003-7, p.362.

¹⁰⁶ Ibid.

¹⁰⁷ Cryer et al. 2007, p.240.

obvious that there was an armed conflict that no additional proof as to awareness would be required”.¹⁰⁸ The other group supports that “no mental element is required at all”.¹⁰⁹

Dörmann articulates that:

This picture gives at least some guidance in determining the requisite degree of knowledge. There are no indications that the prosecutor must prove a higher degree of knowledge than that which is reflected in the majority view. Moreover, it appears that generally proving the nexus objectively will be sufficient. In such circumstances, an accused cannot argue that he or she did not know of the nexus.¹¹⁰

The ICTR in the *Akayesu* case concluded that regarding the perpetrator’s status, the commission of war crimes by only state armed forces is not a prerequisite for the establishment of a war crime.¹¹¹ The ICTR explained that also privates can be perpetrators of war crimes provided that they have a “special relationship with one party to the conflict”.¹¹² This assumption could be used as a tool for the establishment of the crimes that PMC employees commit, providing that a contract between the party to the conflict and the PMC proves that ‘special relationship’.

Angola, Executive Outcomes, and War Crimes

As already mentioned, EO acted in the Angolan civil war from September 1993 until December 1995. During this period, EO was accused of committing, in cooperation with the state army, attacks against civilians, which resulted in the death of 500,000 civilians. In addition, the company was accused of active participation in hostilities and its decisive role in the intensification of the conflict due to the training the company provided to the states armed forces. Next we will examine whether the activities of EO in Angola could be characterised as war crimes, specifically under article 8(2)(e) of ICC Statute.

Starting with the first element—the existence of an armed conflict—we will study if the acts of EO satisfy the requirements. We noted earlier that an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state. There was an armed conflict in Angola between the state forces of MPLA and the rebel group of UNITA. There was such intensity and organisation of the two parties to the conflict that they were both able to conduct military operations resulting in the existence of a civil conflict. Hence, EO acted during an armed conflict, thereby satisfying the first requirement.

Regarding the nexus with armed conflict we mentioned that a war crime should be committed in the context (temporal/geographical) and associated with the armed conflict (perpetrator’s action/armed conflict). EO did take active part in the hostilities in the territory of Angola, namely where the armed conflict took place. There was a special relationship between perpetrator’s action and the armed conflict because it was the existence of the armed conflict which provided the opportunity for the perpetrator to commit the crime. If it were not for the Angolan civil war, EO would not be able to act in this particular country. Another important issue concerning the commission of a crime by a PMC employee is under which legal status the perpetrator acts. Is he regarded a private

¹⁰⁸Dörmann 2003, p.362.

¹⁰⁹Idem, p.363.

¹¹⁰ Ibid.

¹¹¹*Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4, Appeals Ch., 1 June 2001, para.444.

¹¹² Ibid.

or a member of the Angolan armed forces? The ICTR¹¹³ has concluded that individuals can also commit war crimes, as long as there is a liaison or a relationship with the conflict parties. In that case, EO was directly related to the Angolan government since it was the Angolan government which hired the company in order to strengthen its army. Thus the requirement of the nexus with the armed conflict is satisfied.

The third element of a war crime is the awareness of the armed conflict. It is obvious that EO's employees were aware of the armed conflict as they took active part in the hostilities. Nevertheless, it should be proven that there was intent and knowledge of the consequences of their actions. Our research showed that EO offered a high standard of training to the state army of Angola and effective methods of extermination of the opponent. These two particular factors indicate the element of intent and knowledge of the consequences. According to reports¹¹⁴ EO introduced a new way of warfare, whose aim was the extermination of the enemy, and the enemy was not trained to counter this new way of warfare. EO knew the inability of the enemy to react and the consequences of this new mode of war, which was the large number of civilian deaths.¹¹⁵ Consequently, all the above show that the requirement of awareness and intent is satisfied.

Another issue that needs to be stressed for our discussion is that war crimes are also considered to be the 'actions against persons who do not take part or do not take part more in the hostilities'. In particular, articles 8(b)(i) and 8(e)(i) of the ICC Statute imply that "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities" constitutes a war crime.¹¹⁶ EO committed such actions against civilians with the cooperation of Angolan army.

The implementation of elements of war crimes on the EO case proves that the actions of the company and its employees during its presence in Angolan civil war satisfy all the requisite requirements. Therefore, we can allege that EO and its members did commit war crimes in Angola.

Iraq, Blackwater, and War Crimes

Blackwater was involved in several shootings against civilians during its presence in Iraq that culminated in the massacre in Nisour Square. Here, we will examine if the offenses of members of Blackwater can be characterised as war crimes.

The first criterion of the 'existence of the armed conflict' is satisfied since there was use of armed force between states initially (US-Iraq) and protracted armed violence between governmental institutions and organised armed groups afterwards.

Concerning the element of 'connection with the armed conflict', it is obvious that Blackwater's offenses occurred during the armed conflict and took place at the territory of the conflict. In the case of shots being fired at civilians in Nisour Square, this did not happen at the time of hostilities. However, the criterion of 'connection with the armed conflict' is also satisfied while as we mentioned earlier, international criminal law

¹¹³ *Prosecutor v. Musema*, Judgment and Sentence, Case No. ICTR 96-13-A, T. Ch. I, 27 January 2000, paras. 274-5. See also *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4, Appeals Ch., 1 June 2001, para. 444.

¹¹⁴ See *Angola: between war and peace. Arms trade and human rights abuses since the Lusaka Protocol*, Human Rights Watch, 1996-8. See also United Nations' Report-Commission on Human Rights E/CN.4/1994/23, pp. 18-19.

¹¹⁵ *Ibid.*

¹¹⁶ See ICC Statute, 1998, at: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 11 June 2015).

recognises that this criterion applies to the entire region which is under the control of a belligerent party, regardless of where hostilities are taking place even if it is far from the battlefield.¹¹⁷ Also, there is a specific connection of the act of the perpetrator to the armed conflict because the conflict played a decisive role in the ability of the offender to carry out the act. As in the case of Angola with EO, if there was no armed conflict, Blackwater could not operate in Iraq. The legal status of the offender does not matter since international jurisprudence accepted that individuals may commit war crimes, provided that they have a link with one of the warring parties. Blackwater had a contract with the state forces in Iraq and with agencies of the US government, such as the Ministry of Defence and Ministry of Foreign Affairs. Thus, Blackwater satisfies the requirements for the element 'connection with the armed conflict'.

Although, the criteria of intent and knowledge are difficult to prove, our study showed that even if the employees of Blackwater had no intention to injure or kill civilians, the employees had at least knowledge of the armed conflict, a fact necessary to the constituent elements of the crime. Therefore, according to the same reasoning we used in the case of EO, similarly here we can conclude that Blackwater personnel did commit war crimes during their presence in Iraq.

II.3 Genocide

In this section we are going to examine thoroughly the crime of genocide and its elements in order to inspect whether the behaviour of MPRI in Croatia constitutes this particular crime.

Article 6 of ICC Statute¹¹⁸ holds that 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

II.4 Elements of Crime

The ICTR has played an important role in the interpretation of the provisions of the Convention on the crime of genocide. The ICTR convicted and sentenced many of the officers who were responsible¹¹⁹ for the mass killings of civilians during the Rwanda

¹¹⁷ *Prosecutor v. Kumarac et al.*, Judgment, Case No.IT 96-23/1-A, Appeals Ch., 12 June 2002, para.57.

¹¹⁸ See ICC Statute, 1998, at: http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 11 June 2015).

¹¹⁹ See *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4, Appeals Ch., 1 June 2001; *Prosecutor v. Kambanda*, Judgment & Sentence, Case No. ICTR-97-23-S, Appeals Ch., 4 September 1998; *Prosecutor v. Rutaganda*, Judgment & Sentence, Case No. ICTR-96-3-T, T. Ch.I, 6 December 1999; *Prosecutor v. Serushago*, Sentence, Case No. ICTR-98-39-S, T. Ch.I, 5 February 1999; *Prosecutor v. Musema*, Decision on the Prosecutor's Motion for Leave to Amend the Indictment, Case No. ICTR-96-13-T, Appeals Ch., 6 May 1999.

genocide in 1994.¹²⁰ That is the reason why the ICTR's jurisprudence is considered important for the crime of genocide. As far as concerning the ICTY, its jurisprudence is poor because despite the fact that genocide was in many indictments, there was only one sentence for the crime of genocide¹²¹ since there was a hesitation, on behalf of the judges, as to whether the incidents in former Yugoslavia constituted genocide.¹²² So, according to the ICTR's jurisprudence the crime of genocide consists of two elements: a) the mental element, namely "a special intent or *dolus specialis* to destroy, in whole or in part, a national, ethnical, racial or religious group, as such"¹²³ (subjective elements of crime), and b) the material element, namely killing and/or causing serious bodily or mental harm to members of the group¹²⁴ (objective elements of crime). Both elements have one thing in common, namely the extermination of the protected group.

Protected Group

The initial decisions of the ICTR indicated that the court had difficulty in defining Tutsi as a national, ethnic, racial or religious group.¹²⁵ For that reason, the judges used an expanded definition of the term;¹²⁶ specifically, they referred to "'stable' groups, existing in a permanent fashion and the membership of which is determined by birth, with the exclusion of the more 'mobile' groups which one joins through individual voluntary commitment, such as political and economic groups".¹²⁷ Thus, the ICTR thought that Tutsi "did indeed constitute a stable and permanent group and were identified as such by all".¹²⁸ However, the judges did not subsequently use this expanded definition of the 'group'.¹²⁹ In a subsequent decision, the ICTR considered that "an ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self-identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others)".¹³⁰

The ICTY expressed a totally different view which considered that "a group's cultural, religious, ethnical or national characteristics must be identified within the socio-historic context which it inhabits"¹³¹ and the chamber "identifies the relevant group by using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics".¹³² International criminal courts interpreted the term of the 'group' based on the subjective perception of the perpetrator and of the victim of the 'group' as they play a critical role in the commission of the crime of genocide.¹³³ Therefore, the chamber argues that the

¹²⁰G. Prunier, *The Rwanda crisis: history of genocide*, New York: Columbia University Press 1995.

¹²¹*Prosecutor v. Krstić*, Judgment, Case No.IT-98-33-T, T. Ch. II, 2 August 2001, para.653.

¹²²L. J. van den Herik, *The contribution of the Rwanda Tribunal to the development of international law*, Leiden: Brill Academic Pub2005, p.96.

¹²³*Prosecutor v. Akayesu*, Judgment, Case No.ICTR-96-4-T, T. Ch.I, 2 September 1998, para.498.

¹²⁴ See ICTR Statute, 1994, art. 2, at: <http://www.unictr.org/en/documents> (accessed 12 June 2015).

¹²⁵Schabas 2006, p. 168.

¹²⁶ *Ibid.*

¹²⁷*Prosecutor v. Akayesu*, Judgment, Case No.ICTR-96-4-T, T. Ch.I, 2 September 1998, para.511.

¹²⁸*Idem*, para. 702.

¹²⁹Schabas 2006, p.168.

¹³⁰*Prosecutor v. Kayishema & Ruzindana*, Judgment, Case No.ICTR-95-1-T, T. Ch. II, 21 May 1999, para.98.

¹³¹*Prosecutor v. Krstić*, Judgment, Case No.IT-98-33-T, T. Ch. II, 2 August 2001, para.557.

¹³² *Ibid.*

¹³³*Prosecutor v. Kajelijeli*, Judgment and Sentence, Case No.ICTR-98-44A-T, T. Ch. II, 1 December 2003, para. 811.

“determination of the categorised groups should be made on a case-by-case basis, by reference to both objective and subjective criteria”.¹³⁴

Objective Elements

The objective elements of the crime of genocide are: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group; e) forcibly transferring children of the group to another group.¹³⁵ All these acts are examined in detail in the ICC Elements of Crimes.¹³⁶

Subjective Elements

The subjective elements of the crime of genocide are: a) intent to destroy a group and b) in whole or in part. The crime of genocide can be constituted only when “the acts are committed with *dolus specialis* excluding other forms of intent or negligence”.¹³⁷ It is this element of specific intent (*dolus specialis*) that “distinguishes this specific crime from other crimes”.¹³⁸

The ICTR acknowledged the difficulty to prove the *dolus specialis*¹³⁹ and the main reason was “the absence of a confession from the accused”.¹⁴⁰ Therefore, “his intent can be inferred from a certain number of presumptions of fact”.¹⁴¹

The court considered that:

It is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.¹⁴²

The ICTR also stated that the specific intent of the crime of genocide “may be inferred from a number of facts such as the general political doctrine”¹⁴³ and “this intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group”.¹⁴⁴

¹³⁴ Ibid.

¹³⁵ See ICC Statute, 1998, art. 6 at: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf (accessed 11 June 2015).

¹³⁶ At: <http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (accessed 18 June 2015).

¹³⁷ M. Maroyda, *The international responsibility for violations of international humanitarian law: the state and individual responsibility in motion*, Athens: Sakkoulas Ant. N. 2006, p.239.

¹³⁸ A. Giokaris & P. Pazartzis, *National and international criminal repression of international crimes*, Athens: Sakkoulas Ant. N.2008, p.218.

¹³⁹ *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, T. Ch.I, 2 September 1998, para.523.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Idem, para. 524.

¹⁴⁴ Ibid.

The ICTR in the *Kayishema & Ruzindana* case “suggested that the necessary element of intent could be inferred from sufficient facts such as the number of group members affected”.¹⁴⁵ The ICTR also pointed out that “the number of victims from the group is also important”.¹⁴⁶ Moreover, the court claimed that “although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organization”,¹⁴⁷ and underlined that “it is unnecessary for an individual to have knowledge of all details of the genocidal plan or policy”¹⁴⁸ in order for the specific intent to be proven. In the *Bagilishema* case, the ICTR ruled that “the accused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action”.¹⁴⁹ In general, the ICTR, in order to prove the specific intent of the crimes committed during the genocide in Rwanda, took into consideration the specific statements of accused persons, their social position and the general pattern of behaviour during the civil war and the general content of the genocide.¹⁵⁰ Finally, the ICTY in the *Krstic* case added that “attacks on the cultural and religious property and symbols of the targeted group as well ... may legitimately be considered as evidence of an intent to physically destroy the group”.¹⁵¹

The term ‘in whole or in part’ inevitably refers to a quantitative aspect. The ICTR suggested “that ‘in part’ requires the intention to destroy a considerable number of individuals who are part of the group”¹⁵² and stressed that “there is no numeric threshold of victims necessary to establish genocide. The Prosecutor must prove beyond a reasonable doubt that the perpetrator acted with the intent to destroy the group as such, in whole or in part. The intention to destroy must be, at least, to destroy a substantial part of the group”.¹⁵³ Therefore, you do not need a large number of victims to establish the crime of genocide; simply the intention that this number contributes to the eradication of this group ‘in whole or in part’¹⁵⁴ suffices.

The ICTY clarified further the term ‘in part’ as it decided that the killing of 8,000 Bosnian Muslim men (not old men or children) in Srebrenica in July 1995 was an act of a genocide because all the victims constituted an important part of the group.¹⁵⁵ The court stated that the “Bosnian Serb forces knew, by the time they decided to kill all of the military aged men, that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica”.¹⁵⁶ Hence, the crucial element here is the impact that killing even a part of a group can have on the survival of the group as a whole.¹⁵⁷

¹⁴⁵*Prosecutor v. Kayishema & Ruzindana*, Judgment, Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999, para.93.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Idem*, para. 94.

¹⁴⁸ *Ibid.*

¹⁴⁹*Prosecutor v. Bagilishema*, Judgment, Case No. ICTR-95-1A-T, T. Ch. I, 7 June 2001, para.63.

¹⁵⁰L. J. van den Herik, *Contribution of the Rwanda Tribunal to the Development of International Law*, Leiden: Brill Academic Pub 2005, p.113.

¹⁵¹*Prosecutor v. Krstic*, Judgment, Case No. IT-98-33-T, T. Ch. II, 2 August 2001, para.580.

¹⁵²*Prosecutor v. Kayishema & Ruzindana*, Judgment, ICTR-95-1-T, T. Ch. II, 21 May 1999, para.97.

¹⁵³*Prosecutor v. Semanza*, Judgment, Case No. ICTR-97-20-T, T. Ch. III, 15 May 2003, para.316.

¹⁵⁴Herik 2005, p. 118.

¹⁵⁵*Prosecutor v. Krstic*, Judgment, Case No. IT-98-33-T, T. Ch. II, 2 August 2001, para. 85.

¹⁵⁶*Idem*, para. 595.

¹⁵⁷Giokaris & Pazartzis 2008, pp. 219-20.

Croatia, MPRI, and Genocide

In this section we will examine whether the actions of MPRI in Croatia constitute the crime of genocide according to the above analysis of the elements of this particular crime. Firstly, we should prove if the Serbs of Krajina can be regarded as a 'protected group'. The ICTY's and the ICTR's jurisprudence indicate that Serbs of Krajina are a 'stable' group since they "belong to it automatically, by birth, in a continuous and often irremediable manner".¹⁵⁸ Likewise, they "share a common language and culture".¹⁵⁹ Finally, important to the definition of the 'group' is "the stigmatisation of the group, notably by the perpetrators of the crime".¹⁶⁰ The Serbs of Krajina in Croatia were 'stigmatised' by the Croats as a group and that was the main cause for the accomplishment of 'Operation Storm'. So, the Serbs of Krajina were a 'protected group'.

As far as concerning the objective elements of the crime, 'Operation Storm' resulted in the killing of a large number of Serbs and thousands of Serbs were forcibly relocated from their houses because the Croats' intentions were to 'clean' the area. Thus, 'Operation Storm' satisfies the objective elements of the crime of genocide.

We will review again the international jurisprudence so as to prove the element of the specific intent. The attacks of the Croatian army, in collaboration with MPRI against Serbs were systematic, intense and had only targeted areas where Serbs lived.¹⁶¹ In the *Akayesu* case the ICTR stated that "the scale of atrocities ... and the fact of deliberately systematically targeting victim on account of their membership of a particular group, while excluding the members of other groups"¹⁶² indicate the *dolus specialis* of an act. Moreover, the ICTR suggested that the existence of a plan can satisfy the element of the *dolus specialis*.¹⁶³ In the case of MPRI, researchers have confirmed that a few days prior to 'Operation Storm', MPRI executives had met with high-rank Croatian military officers to discuss the details of the operation.¹⁶⁴ Therefore, the specific intent is proven. Finally, another clue that proves the *dolus specialis* requirement¹⁶⁵ is the fact that the Croatian army destroyed many of the Serbs' orthodox churches.¹⁶⁶

The study of the elements that constitute the crime of genocide applied in the case of MPRI shows that the company's combatant members committed, in collaboration with the Croatian army, the crime of genocide during 'Operation Storm' in August of 1995.

III. Conclusion

In the last 30 years, private companies have acquired an important role in policy-making, a function that traditionally belonged to the state. In some Western countries even war (privatisation of war) became an area of business activity and therefore a profitable sector.

¹⁵⁸*Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, para. 511.

¹⁵⁹*Prosecutor v. Kayishema & Ruzindana*, Judgment, Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999, para. 98.

¹⁶⁰*Prosecutor v. Krstic*, Judgment, Case No. IT-98-33-T, T. Ch. II, 2 August 2001, para. 557.

¹⁶¹ *Ibid.*

¹⁶²*Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-T, T. Ch. I, 2 September 1998, para. 523.

¹⁶³ *Prosecutor v. Kayishema & Ruzindana*, Judgment, Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999, para. 94.

¹⁶⁴ See Silverstein 2000, p. 173; Singer 2003, p. 127.

¹⁶⁵*Prosecutor v. Krstic*, Judgment, Case No. IT-98-33-T, T. Ch. II, 2 August 2001, para. 580.

¹⁶⁶C. Savich, 'US-Croatia War Crimes. Krajina: Largest Act of Ethnic Cleansing since The Holocaust', at: <http://www.globalresearch.ca/index.php?context=va&aid=20492> (accessed 18 June 2015).

In this context, private armies were developed, namely commercial enterprises, which 'sell' military services usually in fragile states facing a crisis i.e. a civil conflict. This article examined the behaviour of the PMCs in conflict areas because its aim was to detect any possible violations and afterwards to test whether these violations fall under the category of International Criminal Law.

We studied three representative cases of private armies' actions the last two decades. Specifically, Executive Outcomes in Angola and MPRI in Former Yugoslavia in mid-1990s and Blackwater in Iraq in early 00s. These companies were chosen because they were multinational companies that operated globally, they provided a variety of services, they acted in conflict areas, they sometimes took direct part in hostilities, and they were related to illegal behaviour and 'scandals'. Our analysis proved that all three PMCs committed serious violations during their presence in these conflict areas. The illegal acts we detected concerned violations against international law and international criminal law like war crime and genocide. After the analysis of these two international crimes and its elements we concluded that the violations of the PMCs and its members constituted war crimes—article 8(2)(e) ICC Statute—in the case of EO and Blackwater and the crime of genocide—article 6 of ICC Statute—in the case of MPRI.

However, the illegal action of PMCs and their personnel raises some important questions concerning the science of public international law. We must bear in mind that traditional theory of international law considers that perpetrators of international crimes can only be states and their agencies. This article demonstrated that PMCs could actually be the new perpetrators of international crimes. But how does international law treat these new actors of international crimes? Are there any rules or provisions of international law, which provide for the unlawful conduct of private soldiers? These are very important questions that the science of International Law must consider.

In conclusion this article did not mean to demonize or to exclude the use of PMCs in general. In addition the use of PMCs, for example, in peace operations by the UN is a positive side of this industry. This article wanted merely to exhibit a different scope of the PMCs behavior and to reveal the consequences of their possible illegal actions.