

PRIVATE MILITARY COMPANIES & INTERNATIONAL LAW: BUILDING NEW LADDERS OF LEGAL ACCOUNTABILITY & RESPONSIBILITY

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Abstract: The Private Military Company (“PMC”) is a relatively new and growing phenomenon. An urgent and ongoing problem facing courts and policy makers is the accountability of PMCs. This article proposes new approaches to developing accountability by examining the potential of two well-established doctrines: command responsibility and state responsibility.

I. INTRODUCTION

Despite the enduring history of hired military services, they have often been regarded with distrust.¹ In the late eighteenth century George Washington, America’s First President and a decorated five-star Army General warned that, “Mercenary Armies . . . have at one time or another subverted the liberties of almost [sic] all the Countries they have been raised to defend . . .”² More than a century and a half later, in 1961, the United States President Dwight Eisenhower—a former four star Army General—cautioned, “[i]n the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.”³

Several decades later, Eisenhower’s statement has changed from a prophecy to the unsettling reality in which we currently find ourselves. After the demise of the active Soviet military threat in

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¹ See NICCOLO MACHIAVELLI, *THE ART OF WAR* 12–14 (Ellis Farnsworth trans., Perseus Press 1995) (1521).

² *Reid v. Covert*, 354 U.S. 1, 24 n.43 (1955) (omissions in original) (quoting 26 *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES* 388 (John C. Fitzpatrick ed., 1944)).

³ President Dwight D. Eisenhower, Farewell Address (Jan. 17, 1961), available at http://avalon.law.yale.edu/20th_century/eisenhower001.asp (last visited Nov. 15, 2009).

the 1980's, many Eastern and Western military powers, including the United States, the remaining sole superpower, embarked on an ambitious program to downsize and privatize the military. In addition to the influx of large numbers of unemployed soldiers, the global marketplace also experienced an enormous release of weaponry into the channels of commerce.⁴ Corporate entities were quick to seize the opportunities offered by government privatization initiatives. In an interesting or perhaps inevitable illustration of the free market ideal, there was a rapid proliferation of new PMCs while existing ones broadened their range of services to harness the surplus expertise. Three primary factors fueled the growth of the private military industry: (1) large scale reduction of military forces after the Cold War, which created a surplus of trained military personnel without jobs; (2) the policy shift to privatizing government services whenever possible; and (3) an increase in regional conflicts.⁵

Traditionally, the right to amass extensive resources for war required the scrutiny, approval and accountability of government and, indirectly, the populace. The PMC, however, allows use of extensive resources to be expended without accountability. Concerns about PMCs, "like concern about mercenaries, pirates, and terrorists, stem from the inherent violence of their profession combined with a lack of control over and accountability for their actions[.]"⁶ particularly where they are viewed as acting outside national legal regimes. Matters are not helped by the fact that governments' use of PMCs is rarely transparent; in most cases, it is deliberately opaque and easily veiled from public and parliamentary view.

Although in some forms they resemble mercenaries, contemporary PMCs have developed a sophisticated business model and a modus operandi compatible with the needs and strictures of the post-Cold War, state-based international system. This sophistication has permitted them to gain both implicit and explicit legitimacy. One of the many significant distinctions between the PMC and the traditional "soldier of fortune" is that unlike the sporadic or casual mercenary whose participation may be seen as a form of

⁴ PETER W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 53-54 (2003).

⁵ Nelson D. Schwartz & Noshua Watson, *The Pentagon's Private Army*, *FORTUNE*, Mar. 17, 2003, at 100, 103, available at 2003 WLNR 13891324.

⁶ Juan C. Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 *STAN. J. INT'L L.* 75, 77 (1998).

slippage in the regulation of the battlefield but unlikely to significantly alter the course of the battle, the corporate form and organization of PMCs allows the amassing of resources for conducting warfare, thus placing PMCs in a position to significantly impact outcomes on the battlefield.⁷

Many examples of contemporary PMC involvement in traditional military activities abound around the globe and highlight the significance and extent of these battlefield contractors. While some involvements may be less controversial, others are highly contentious, particularly where PMCs are used as a substitute for political processes or engage in activities that breach international law and violate human rights. For example, PMCs in Colombia provided a whole range of services, from flying Blackhawk helicopters in “drug eradication missions”⁸ on behalf of the U.S. government to manning surveillance aircraft in the Colombian government’s military campaign against guerrilla rebels. Executive Outcomes, a South Africa-based PMC, used fuel air explosives in Angola, which is a highly effective but particularly torturous weapon.⁹ Turning to the Middle East, it was the use of PMC personnel by California Analysis Center Incorporated (“CACI”) in interrogations that resulted in the most widely publicized incident of misconduct of the many reported PMC misdeeds—the Abu Ghraib prisoner scandal.¹⁰ In western countries the use of PMCs in the ongoing global “War on Terror” manifests in the practice labeled “extraordinary rendition,” involving the transfer of individuals to countries that harbor no qualms about using all manner of process and procedure, including torture and extra-judicial detention and incarceration to “extract information.”¹¹

Each of the foregoing cases/incidents violate various international norms including the Convention Against Torture (“CAT”)¹²

⁷ For purposes of this article, the term PMC will refer exclusively to those companies providing potentially violent services.

⁸ Adam Sherman, *Forward unto the Digital Breach: Exploring the Legal Status of Tomorrow’s High-Tech Warriors*, 5 CHI. J. INT’L L. 335, 337 (2004).

⁹ Peter W. Singer, *Corporate Warriors: The Rise and Ramifications of the Privatized Military Industry and its Ramifications for International Security*, 26 INT’L SECURITY 186, 214 (2001).

¹⁰ See *infra* Part IV.D.

¹¹ America has used private contractors to transport detainees to countries known to practice torture. See SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* 54–57 (2004).

¹² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at 197, U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter CAT].

and the 1949 Geneva Conventions¹³ prohibiting governments and their militaries from taking such actions. However, the ambiguous legal status and amorphous character of PMCs under existing international law offers leeway for countries to not only bend but breach their international legal obligations, thus tearing at the very fabric of the international legal order.¹⁴ These examples of PMC personnel presence and activity in conflicts and the government trend of increasing reliance on civilian contractors to perform military operations means that this anomaly will become more and more typical, and performance to date presents critical problems for the implementation of international human rights laws and humanitarian norms.

There are three potential approaches in controlling the conduct of violent conflict “hot war” which have bearing on the international regulation of PMCs. These are: the applicability of national laws with extra-territorial reach, whether dealing with humanitarian law violations or mercenaries; the laws pertaining to state responsibility for private actors; and the laws dealing with the conduct of war as contained in various international conventions. National laws with few exceptions tend to refrain from claims of territorial jurisdiction and, more specifically, a lack of extant extra-territorial legal frameworks dealing with PMCs. International law provisions which deal with the presence and activity of mercenaries do not embrace PMCs because they attempt to deal with profit motivated persons and are ineffective as they focus generally on regulating the violent behavior of nation-states and their national militaries. International avenues fail to pursue lines of accountability that embrace the activities of private agents and particularly the modern PMC, a creature that was never in their contemplation at the time of drafting. This said, international law is not silent on a number PMC sanctioned and supplied goods and services, and accordingly, it may be that these problems can be addressed pres-

¹³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T.S. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T.S. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T.S. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

¹⁴ Laura A. Dickinson, *Government For Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 152–53 (2005).

ently with the doctrines of state responsibility and command responsibility.

This Article focuses on the state and command doctrines as an avenue of accountability in light of ineffective national law and also international humanitarian law, calling for *modus vivendi*, and explores that theme in the context of relevant principles of international law, existing jurisprudence as well as in the context of the appropriate provisions of international instruments. The authors, however, readily acknowledge that the utility of these doctrines in building a legal platform for the control of PMCs can be difficult for three reasons: first, what constitutes “governmental authority” is a shifting sand; second, the wide array of PMC services on offer are often difficult to categorize when viewed on an operational continuum; and third, that bugaboo of all law international and municipal law—political will.

II. FROM INDIVIDUAL MERCENARY TO CORPORATE MILITARY: THE RISE OF THE PMC

Though recently there has been a marginalization of mercenaries and a dissipation of their significance in warfare, it was only in the course of the twentieth century that the mercenary was finally vilified and outlawed. This was primarily owing to a new kind of soldier of fortune emerging in the 1950's—*independent mercenaries*, commonly referred to as “wild geese” or “*les affreux*” (“the dreaded ones”).¹⁵ These soldiers of fortune who infested Africa from the 1950's to 1970's were generally individual adventurers without corporate or national backing who sought excitement as well as money in troubled corners of the earth.¹⁶ They were motley collections of self-seekers operating outside the state system. Similar to their predecessors a hundred years earlier, these new soldiers of fortune appeared where there had been a breakdown of internal order and offered a source of instant military force and expertise.¹⁷ They plied their trade predominantly in post-colonial Africa rising into prominence on the heels of the turbulent decolonization era where they complicated already difficult situations. They presented significant threats to many fledgling, newly independent

¹⁵ Zarate, *supra* note 6, at 87.

¹⁶ CHRISTOPHER WRIGLEY, *THE PRIVATISATION OF VIOLENCE: NEW MERCENARIES AND THE STATE* (Mar. 1999), <http://www.caat.org.uk/resources/publications/mercenaries-1999.php>.

¹⁷ Zarate, *supra* note 6, at 82.

African states. The sensationalized images of these mercenaries—daring, dangerous, and destabilizing—fueled distrust toward hired private military services.¹⁸ This distrust had merit in light of the fact that, on the one hand, some European powers employed them to hinder and even thwart liberation movements, while on the other hand unpopular African governments used them to consolidate their authority.¹⁹

The soldier of fortune was vilified despite the historic acceptance of commodified violence in the form of mercenaries because they were seen as illegitimate in contrast to legitimate “appropriate” state violence,²⁰ particularly as the State had moved away from accepting the commodification of violence. As Juan Carlos Zarate notes, “These independent mercenaries, hired outside the constraints of the twentieth century Nation-State system and seemingly motivated solely by pecuniary interests, were seen as a shocking anachronism.”²¹ Ironically, it was during this same period, while individual mercenaries were being outlawed, that organized corporate actors, early PMCs, began their genesis providing support services to military efforts; these PMCs focused primarily on support services such as logistics and other non-core traditional military activities such as trucking, port operation and construction.²² However, even in this early use of PMCs, the U.S. and U.K. governments were not averse to utilizing them whenever personnel shortages or operational convenience dictated for “overt and covert military missions.”²³ For example, during the Vietnam War the U.S. Department of Defense (“DoD”) hired civilian contractors to provide traditional military activities, including trucking, port operation and construction.²⁴ By 1969, PMCs in Vietnam had 9,000 civilian employees and annual contracts totaling \$236 million

¹⁸ Deven R. Desai, *Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Military Companies*, 39 U.S.F. L. REV. 825, 830 (2005).

¹⁹ See generally Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, G.A. Res. 3103, at 142, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (1973).

²⁰ Herbert M. Howe, *The Privatization of International Affairs: Global Order and the Privatization of Security*, 22 FLETCHER F. OF WORLD AFF. 1, 22 (1998).

²¹ Zarate, *supra* note 6, at 87.

²² Desai, *supra* note 18, at 831.

²³ Deborah Avant, *Privatizing Military Training*, FOREIGN POL’Y IN FOCUS, May 1, 2002, available at <http://www.fpif.org/pdf/vol7/06ifmiltrain.pdf> (last visited Nov. 15, 2009).

²⁴ Desai, *supra* note 18, at 831.

awarded by the United States Army Procurement Agency of Vietnam.²⁵

The PMC trend picked up dramatically in the 1990's. Within three years of the end of the Cold War, worldwide military forces shrank by seven million, creating a huge surplus of unemployed military personnel.²⁶ Displaced military personnel and increased underutilized military personnel meant retired members of Special Forces and general combatants were readily available, making the hiring of robust, effective privatized armies an easily achieved reality.²⁷ Further, the main suppliers of Cold War weapons, the former Member States of the Soviet Union and its satellite nations, suddenly no longer needed them. In particular, German reunification resulted in "essentially a huge yard sale of weaponry, where nearly every weapon in the East German arsenal was sold, most of it to private bidders at cut-rate prices."²⁸ This arms sale was not limited to light weapons such as grenades, machine guns, and land mines but included high-ticket items like missile systems and tanks. This increased access to weapons by non-state corporate entities meant that governments began to lose their monopoly on the means of warfare.

The post-Cold War reduction and sell off of firepower coincided with the neo-liberal privatization trend and, as noted, corporate entities were quick to move in and capitalize on the opportunities offered by government privatization initiatives. At the heart of the privatization initiatives (generally in Western countries) was an imperative to streamline government, which included cutting military costs. The net result was the world's major powers—traditional actors in regional and intrastate conflicts during the Cold War bipolar era—decreased their interference in many conflicts.²⁹ The consequence was that geopolitical power gradually diffused leaving power vacuums affording PMCs a golden opportunity to proliferate and fill the same.³⁰

²⁵ See Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233, 235 (2003).

²⁶ See David Isenberg, Center for Defence Information, Monograph, *Soldiers of Fortune Ltd: A Profile of Today's Private Sector Corporate Mercenary Firms* (Nov. 1997).

²⁷ BENEDICT SHEEHY, JACKSON MAOGOTO & VIRGINIA NEWELL, LEGAL CONTROL OF THE PRIVATE MILITARY CORPORATION 14 (2008).

²⁸ *Id.* at 13.

²⁹ Zarate, *supra* note 6, at 76.

³⁰ Tina Garmon, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325 (2003).

PMCs rapidly drew together the surplus troops and tools and began offering a wide range of military and security services. The shifting geopolitical paradigm was particularly evident in weak third-world countries where governments increasingly sought private military resources to fulfill or augment their security needs.³¹ Drawing considerable attention to the PMC phenomenon is the highly significant and strategic use of PMCs by the United States in its invasion and occupation of Iraq.³²

It is self-evident that there has been dramatic growth in the PMC industry since the end of the Cold War, but it is important to note that a sizable amount of that growth has resulted from the invasion of Afghanistan and Iraq. In Iraq alone, armed private security personnel have increased from approximately 20,000 in 2004³³ to 48,000 in 2007.³⁴ The size and operational significance of the PMC contingent is such that it rivals some of the world's major military powers. By comparison, Canada, a major supporter of the United States' invasion of Afghanistan, and the fifteenth most powerful military in the world has an active standing military of 62,000 personnel.³⁵ Australia, home of the twenty-first most powerful military worldwide and a member of the "Coalition of the Willing" that supported the U.S. invasion of Iraq and its ongoing occupation—has a standing military of 53,000.³⁶

This growth in the strength of PMCs challenges the state-based international legal system's three hundred year control over military power. PMCs now stand in a position to threaten global order with military force that is even less accountable and controllable than traditional state militaries.³⁷ There is little doubt that the privatization of forces affects the role of the state both nationally and multilaterally in the regulation of violence and, thus, one of the basic features of statehood. The failure to have direct regulation of violence means that the State's monopoly over military

³¹ David Shearer, *Outsourcing War*, 112 *FOREIGN POL'Y* 68, 70 (1998).

³² The use of PMCs in Iraq is discussed with specific reference to the Abu Ghraib incident later in this Article. See *infra* Part III.D.

³³ DAVID ISENBERG, BRITISH AMERICAN SECURITY INFORMATION SERVICE, *A FISTFUL OF CONTRACTORS: THE CASE OF A PRAGMATIC ASSESSMENT OF PRIVATE MILITARY COMPANIES IN IRAQ* 29 (2004), available at <http://www.basicint.org/pubs/Research/2004PMC.pdf>.

³⁴ Jeremy Scahill, *A Very Private War*, *THE GUARDIAN*, Aug. 1, 2007, available at <http://www.guardian.co.uk/uk/2007/aug/01/military.usa>.

³⁵ GlobalFirePower.com, Canada Military Strength Statistics, http://www.globalfirepower.com/country-military-strength-detail.asp?country_id=Canada (last visited Oct. 9, 2009).

³⁶ GlobalFirePower.com, Australia Military Strength Statistics, http://www.globalfirepower.com/country-military-strength-detail.asp?country_id=Australia (last visited Oct. 9, 2009).

³⁷ Howe, *supra* note 20, at 7.

force is fragmented. In turn, the foundations of its authority shake as PMCs increasingly shoulder military responsibilities that once belonged to the State.

Through one set of lenses, the rise of the post-Cold War PMC may be seen as a success for the globalized free market place: “[PMCs] represent a reconstituted form of organized corporate mercenarism that is responding to the need for advanced military expertise.”³⁸ PMCs support numerous military operations throughout the world and act as crucial components of the military in enhancing the capabilities of countries both in the Third World and in the West. Within the military establishment of countries of all sizes thousands of PMC personnel operate communications systems, maintain military aircraft, fix weapons systems, link troops to command centers, train national armies, and although they are loathe to admit it, actually fight at the “the tip of the spear”—that is, the frontline battlefield. In this regard, through the lenses of politics and international relations, PMCs are now in a position to amass unchecked power to affect conflict resolution, world economic stability, and geo-strategic negotiations.³⁹

Although the rights and duties that exist between military actors and the government are clear, those between the governments and PMCs constitute a legal gray zone. In many instances, the government’s relationship with contractors substantially reduces the potential for the government to observe international legal obligations. The fundamental problem is that command and control, which is so essential for traditional military operations in a theatre of conflict, is unclear for PMCs and its personnel. Often, local military commanders are unaware of and unable to control the daily actions of PMCs in their zones of responsibility. As one former Special Forces veteran said of the role of PMCs in Iraq, “[t]he military really can’t tell you [the PMCs] how to do your job—they can advise you, but they really have no control over you.”⁴⁰ On April 9, 2004, twenty-five men in a Kellogg Brown & Root (“KBR”) convoy became casualties of such coordination problems.⁴¹ The ambiguity of who was in command and the problems stemming

³⁸ See Zarate, *supra* note 6, at 81–82.

³⁹ Garmon, *supra* note 30, at 327.

⁴⁰ Peter W. Singer, *Outsourcing the War*, BROOKINGS INSTITUTION, Apr. 16, 2004, http://www.brookings.edu/articles/2004/0416defenseindustry_singer.aspx#.

⁴¹ T. CHRISTIAN MILLER, *BLOOD MONEY: WASTED BILLIONS, LOST LIVES, AND CORPORATE GREED IN IRAQ* 135–48 (2006).

therefrom have been identified by military analysts and jurists alike. PMC analyst, Peter Singer, notes that:

By ignoring the well-thought-out doctrine on civilians' role in warfare, contractors now operate in a legal no man's land, beyond established boundaries of military or international law. The reality of the fact is that since contractors do not fall within the formal military hierarchy, they are generally self-policing entities.⁴²

It is unsurprising that some PMC activities alarmed not only the populations of sending and receiving states, but also officials with the military by their ever increasing role in the prosecution of war. Although there are numerous issues pertaining to the operational, contractual and rules-governing operations of PMCs, the multi-billion dollar legal question is: given the inadequacy of national laws governing PMCs, can either or both of the international law doctrines of state responsibility and command responsibility offer a potential avenue for regulation?⁴³

III. STATE RESPONSIBILITY: SNARING GOVERNMENTAL & PMC DUPLICITY

A. General Principles: State and Non-State Actors

It is a customary and "well-established rule of international law"⁴⁴ that breaches of international law committed by institutions or individuals classified as state organs will trigger state responsibility.⁴⁵ A relevant example is state responsibility for all the conduct by its armed forces. State responsibility is the norm regardless of whether the forces stay within or exceed their authority.⁴⁶ Further, States hold responsibility for acts performed privately;⁴⁷ this

⁴² Singer, *supra* note 40.

⁴³ This is particularly true given the extra-territorial nature of certain offenses, which generally eviscerates the power any existing municipal laws and holds at arms length toothless domestic guidelines.

⁴⁴ Difference Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62 (Apr. 29).

⁴⁵ See Draft Articles on the Responsibility of States for Internationally Wrongful Acts art. 4, G.A. Res. 56/83, at 43, U.N. GAOR 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Dec. 12, 2001).

⁴⁶ *Id.* at art. 7.

⁴⁷ International humanitarian law documents render the state liable for private acts of its armed forces. This would include, for example, an assault by a soldier while on leave in occupied territory. See The Hague Convention (IV) Respecting the Laws and Customs of War on Land

is a *lex specialis*—a special law—that creates an exception to the usual legal rule of responsibility.⁴⁸ This exception is based on the universally accepted principle that States owe non-derogable obligations to other States and often to the world at large, especially in the area of international criminal and human rights law.⁴⁹ The doctrine of state responsibility thus creates responsibility by the state for international wrongs, such as breaches of international customary or treaty law (primary rules) and allows for legal consequences (secondary rules).⁵⁰

There are two approaches to state responsibility. These approaches are whether to treat non-state actors as de facto government agents or whether to focus on the specific tasks delegated to the non-state actors. We examine each in turn.

B. De Facto Agents

Generally, the conduct of non-state actors such as private persons or corporations is not attributable to the State. States are not responsible for the actions of its private citizens unless some form of connection exists to serve as a basis for imputation of liability for those parties to the state. In other words, although typically private actors are not part of the international law regime, in a variety of situations international decision makers have connected private entities' action to those of state agents to result in attribution to the State. The state responsibility doctrine recognizes that a State may breach its international obligations through a range of actors, not necessarily limited to those who are the State's obvious agents.

art. 3, Oct. 18, 1907, T.S. No. 539, 2 A.J.I.L. Supp. 90, available at <http://www.icrc.org/ihl.nsf/385eco82b509e76c41256739003e636d/1d1726425f6955aeca125641e0038bfd6>; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 91, June 8, 1977, 1125 U.N.T.S. 3, available at <http://www.icrc.org/IHL.nsf/FULL/470?OpenDocument> [hereinafter Additional Protocol I] (A party to the conflict "shall be responsible for all acts by persons forming part of its armed forces.").

⁴⁸ See Marco Sassoli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT'L REV. RED CROSS 401, 406 (2002) (citing British Claims in the Spanish Morocco (Spain v. U.K.), 2 R. INT'L ARB. AWARDS 615, 645 (1925)).

⁴⁹ CLAIRE DE THAN & EDWIN SHORTS, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS 15 (2003).

⁵⁰ Responsibility of States for Internationally Wrongful Acts arts. 1, 2, G.A. Res. 56/83, U.N. GAOR, 53d Sess., Supp. No. 10, U.N. Doc. A/56/10 (June 9, 2001), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (last visited Oct. 9, 2009).

The doctrine of state responsibility arising from de facto agents depends primarily on the link that exists between the State and the person or persons who actually commit unlawful acts. State responsibility requires some form of relationship between the persons and the government of the state purportedly responsible. International Humanitarian Law holds individuals with recognized position of authority and those with de facto power accountable. A State is responsible for its de facto agents and may be responsible for violations of international law perpetrated by private actors where those private actors are considered its de facto agents.⁵¹

C. Delegation

A second approach to state liability is found in the *International Law Commission's Articles on State Responsibility*.⁵² State responsibility in this view comes from a state's decision to delegate "governmental authority." The test here is not on the *nature of the party*—whether public or private—carrying out the particular task; rather, the test focuses on the *nature of the task* being carried out. Private actors can be regarded as special types of state actors because they are carrying out tasks or functions that are arguably of a public and thus governmental nature.⁵³ Because some PMCs activities are very closely linked to the public interest—the information to be extracted by interrogators is supposed to save soldiers and counter an insurgency—it stands to reason that the actors carrying them out should be considered state actors for the purpose of applying human rights norms.⁵⁴ Of particular note in this regard is specific state liability under Article 5 of the 2001 Convention on the Responsibility of States for Internationally Wrongful Acts for "persons or entities exercising elements of government's authority."⁵⁵ It seems incontrovertible that private persons or private entities engaged in government sponsored military activities or

⁵¹ See Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶¶ 117–18 (July 15, 1999).

⁵² JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY — INTRODUCTION, AND TEXT COMMENTARIES* 42–43 (2003).

⁵³ For example, extracting information from prisoners and prisoners of war for military purposes in a confined environment—a prison—thus serving a public need.

⁵⁴ See Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169 (1995).

⁵⁵ *Report of the International Law Commission to the General Assembly on the Work of its Fifty-third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 42, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

services are anything other than de facto government agents. Indeed, the 2001 International Law Commission commentaries suggest such a result.⁵⁶ Although they are ostensibly private actors, PMC employees may in certain circumstances be sufficiently connected to a State such that their actions can be deemed de facto actions of the State.

D. Private Persons Acting under Direction/Control of State –“Quasi-State Actors”

The test for attributing the actions of non-state actors to a state remains somewhat unclear. In the *Nicaragua Case*, the International Court of Justice (“ICJ”) considered the responsibility of the United States for the actions of various non-state actors in Nicaragua during the 1980’s.⁵⁷ In order to impute the acts of the non-state actors to the United States, the ICJ required the United States to have “effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”⁵⁸ The strict test effectively required the United States to have financed and coordinated or supervised the acts of the private actors. In addition, it required the United States to have issued specific instructions concerning the commission of the unlawful acts.⁵⁹

The ICJ found a sufficient nexus existed between the United States and certain individual Latin American operatives, or Unilaterally Controlled Latino Assets (“UCLAs”). The UCLAs carried out tasks in Nicaragua, such as the mining of ports, and although not officially agents of the United States, they operated under the instructions of U.S. military and intelligence personnel and received payment. The United States was responsible for the acts of the UCLAs because it provided payment, supervision⁶⁰ and specific instructions.⁶¹ Ultimately, however, the ICJ held that the link was *insufficient* for the *Contras*’ acts to be imputed to the US.⁶² According to the Court, even if the United States generally con-

⁵⁶ *Id.*

⁵⁷ Military and Paramilitary Activities (Nicar. v U.S.), 1986 I.C.J. 14 (June 27).

⁵⁸ *Id.* at 65.

⁵⁹ *Id.* at 61.

⁶⁰ *Id.* at 48–51.

⁶¹ *Id.* at 48.

⁶² *Id.* at 65. However, the court did agree that U.S. support for the *Contras* was in principle a breach of the prohibition on the threat or use of force against the political independence and territorial integrity of a state. See U.N. Charter art. 2, para. 4.

trolled the Contras and the Contras were highly dependent on the United States, the Contras' acts would not necessarily be attributable to the United States.⁶³ This "all or nothing" approach to state responsibility demanded a high level of proof; in its absence, the U.S. government escaped all responsibility for the Contras' actions.⁶⁴ This decision was criticized for its "painstaking examination" of specific acts—an approach still reflected in Article 8 of the International Law Commission's Articles on State Responsibility, which demands proof of state authorization for each and every act of the private actors before conduct can be attributed to the State.⁶⁵

Unsurprisingly, the "effective control" formulation in the *Nicaragua Case* attracted criticism when the matter next came up for consideration in another international judicial tribunal. In the *Tadic Case*,⁶⁶ the International Criminal Tribunal for the former Yugoslavia ("ICTY") Appeals Chamber found the test, "unconvincing . . . [given] . . . the very logic of the entire system of international law on state responsibility."⁶⁷ In order to find that the Serb militia operating in Bosnia and Croatia constituted part of the armed forces of Serbia, the Appeals Chamber preferred an "overall control" test.⁶⁸ It considered that the acts of an armed group are attributable to a State provided the State "has a role in organizing coordinating or planning the military actions of the military group."⁶⁹ Notably, this standard does not require control of the group's particular operations and, in light of past cases and scholarly writings, is more sensible and legally sound.

Although the exact standard required for attribution of private actors remains uncertain, and the difference between the two tests may turn out to be "negligible,"⁷⁰ it is clear that the touchstone of the *Nicaragua* and *Tadic* approaches is that States must *direct or control* private actors: supporting, encouraging or condon-

⁶³ *Id.* at 61–63.

⁶⁴ Mark Gibney, Katarina Tomaševski & Jens Vensted-Hansen, *Transnational State Responsibility for Violations of Human Rights*, 12 HARV. HUM. RTS. J. 267, 287 (1999).

⁶⁵ Scott M. Malzahn, Note, *State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility*, 26 HASTINGS INT'L & COMP. L. REV. 83, 101–02 (2002); Keith Highet, *Evidence, the Court, and the Nicaragua Case*, 81 AM. J. INT'L L. 1, 41–42 (1987).

⁶⁶ See *Tadic*, Case No. IT-94-1-A, *supra* note 51.

⁶⁷ *Id.* at para. 116.

⁶⁸ *Id.* at para. 120.

⁶⁹ *Id.* at para. 137.

⁷⁰ DE THAN & SHORTS, *supra* note 49, at 19.

ing their actions is insufficient.⁷¹ If actors are of a military nature, it is significantly easier to attribute a group's acts to the State.⁷² This brings us to the question: if the State is complicit with a corporate entity by contracting with it, can the actions of its private employees be linked to the State and thus trigger the operation of international law? Undoubtedly, international law may hold a state responsible for violations of international law, as well as the individual perpetrators. In this fashion, if the State were the responsible body for the actions of PMCs, international law could hold the State and any of its responsible officials liable for international offenses and punish the individual perpetrators. As Professor Steven Ratner explains, "State (or quasi-state) action elevates violations of human rights to the international plane."⁷³

E. Specific Application: Prosecution of the Corporation and Its Agents for Human Rights Abuse

Under international law, responsibility attaches principally to the State as a subject for human rights abuses by personnel, officers or entities under its direction and control. However, post-World War II elaborations of human rights law have expanded the obligations to cover private individual actors so that they may be held accountable for offences such as war crimes, crimes against humanity and torture. Various treaties codify these standards.⁷⁴ A peculiar problem emerges, however, when States act through private corporate entities. By and large these corporations remain unrecognized as subjects of international law.⁷⁵ Small steps have been taken to attach international liability to companies. For example, in the 1950's, American courts tried various German industrialists for their complicity in Nazi war crimes as the "flesh-and-

⁷¹ Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHI. J. INT'L L. 83, 89 (2003).

⁷² The Chamber also noted that the actions of private groups who are not connected to the military are only attributable to a state if "specific instructions concerning the commission of that particular act had been issued," by the State, or the State, "publicly endorsed" or approved ex post facto the conduct. See Tadic, Case No. IT-94-1-A, *supra* note 51, ¶ 137.

⁷³ Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 446 (2001).

⁷⁴ See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

⁷⁵ Nicola Jägers, *The Legal Status of the Multinational Corporation under International Law*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 262 (Michaelk Addo ed., 1999).

blood” persons existing behind the corporate veil.⁷⁶ In the process, the courts considered the illegal activities and breaches of corporate duty committed by the companies.⁷⁷ The corporation, however, is viewed as a private actor and remains untouched by international law. This fact stymies the flow of liability to the company and its principals for the actions and offences of contractors and employees.

In this context, we can reconsider the highly contested classical proposition that, because companies are not subjects of international law, their activities are not liable under international law for abuses of international law.⁷⁸ State complicity in PMC activities bridges the gap between private corporations’ responsibility and international law—the State being the juridical entity attracting juridical attention and liability by way of its agent, the PMC. The PMC is executing government authority by engaging in activity that under both municipal and international law is the exclusive province of the State. State recognition of the PMC as a private person is irrelevant to the consideration of the state’s liability for PMC actions undertaken on behalf of the State. Based on this logical and practical linearity, it is neither too far fetched nor indefensible to argue that on a legal continuum, the State as a corporation with all its actors—from directors to employees to contractors—would share liability.

The Human Rights Committee (the predecessor to the Human Rights Council), the body that supervises compliance by States with the International Covenant on Civil and Political Rights (ICCPR),⁷⁹ has in the past concluded that serious physical abuse with the intent of extracting information from a detainee is a breach of the prohibition of torture under Article 7.⁸⁰ Significantly, the Human Rights Committee has concluded on a number of occasions that a State “is not relieved of its obligations under the

⁷⁶ See, e.g., *United States v. Krauch*, 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, NUREMBERG, OCTOBER 1946–APRIL 1949: THE IG FARBEN CASE (1952), available at http://www.loc.gov/tr/frd/Military_Law/pdf/NT_war-criminals_Vol-VIII.pdf.

⁷⁷ Ratner, *supra* note 73, at 477–88.

⁷⁸ See *id.*

⁷⁹ International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, 21 U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Mar. 23, 1976) [hereinafter ICCPR].

⁸⁰ See, e.g., *DeBazzano v. Uruguay*, Commn’c No. 5/1977, U.N. Doc. CCPR/C/7/D/5/1977 (Aug. 15, 1979); *Esthella v. Uruguay*, Merits, Commn’c No. 74/1980, U.N. Doc. CCPR/C/18/D/74/1980 (Mar. 23, 1983); *Muteba v. Zaire*, Commn’c No. 124/1982, U.N. Doc. CCRP/C/22/D/124/1982 (Jul. 24, 1984); *Cabal v. Australia*, Commn’c No. 1020/2001, U.N. Doc. CCPR/C/78/D/1020/2001 (Sept. 19, 2003).

ICCPR when some of its functions are delegated to other autonomous organs.”⁸¹

The observations of the Human Rights Committee are bolstered further by the Committee against Torture, the body entrusted with the supervision of CAT.⁸² Notwithstanding the strict division between “torture” as defined in Article 1 of CAT and other ill treatment, the Committee has concluded that the combination of certain techniques used during interrogation, including hooding, violent shaking, and sleep deprivation, amount to torture.⁸³ Of importance with regard to state responsibility is Article 16 of CAT which asserts explicitly: “Each State Party shall undertake to prevent in any territory under their jurisdiction other acts of cruel, inhuman or degrading treatment or punishment [other than acts defined as torture in Article 1] when [they] are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”⁸⁴

Evidence points to state responsibility as an effective solution to corporate accountability where international law is violated. The weaknesses and deficiencies of domestic and international mechanisms, and the status of corporations as objects rather than subjects of international law, make a strong case for state responsibility, particularly in light of States deliberately seeking to exploit this situation. In general, we proffer that there are sufficient connections between PMCs and states to engage state responsibility and allow liability to flow to both the home and contracting State. These connections include shared personnel and close participation in military operations. Countries, particularly in the West, appear to use PMCs as quasi-state agents and are therefore complicit in PMC behavior. This complicity is evidenced by the fact that States have developed systems of oversight, licensing and control of PMCs, although these systems are rarely managed effectively or utilized honorably. The recalcitrant attitude of States often renders articulated regulated systems and processes useless.

State complicity in PMC activities can and should serve as a trigger for operationalizing international law. This, in light of the extremely serious nature of the PMCs’ breaches of international

⁸¹ See *Cabal v. Australia*, *supra* note 80, ¶ 7.2.

⁸² CAT, *supra* note 12, art. 1.

⁸³ See Office of the High Commissioner for Human Rights, Comm. Against Torture, Concluding Observations of the Committee Against Torture: Israel, ¶ 257, U.N. GAOR, 52nd Sess., Supp. No. 44, U.N. Doc. A/52/44 (May 9, 1997).

⁸⁴ CAT, *supra* note 12, at art. 16, para. 1.

customary law by violent means, forms the very basis for the argument underpinning lifting the protective cover of the corporate veil. Given that the breaches are tortious and that courts are more receptive to pleas to pierce the veil in tort actions, this important remedy should be given serious consideration.

Having reviewed the doctrine of state responsibility as one potential avenue for control of the PMC, we turn now to the second, command responsibility.

IV. COMMAND RESPONSIBILITY: A NEW AVENUE FOR AN ESTABLISHED DOCTRINE

A. General Principles of Command Responsibility

Command responsibility is generally concerned with the accountability of superiors for war crimes committed by their subordinates. It is a doctrine steeped in military culture and was once unique to the military hierarchy. Although post-World War II military tribunals, both national and international, were the definitive launch pads for modern command responsibility, the doctrine has echoed through centuries of history. Over two thousand years ago, during the time of Sun Tzu, a commander's liability could flow from allowing troops to commit crimes, giving improper orders, and failure to control or punish troops.⁸⁵ Western expressions of these principles foreshadowing the modern doctrine are discernable in the seventeenth century work of Hugo Grotius—the “father of international law”—whose seminal works were, among other matters, preoccupied with universal rules for state behavior.⁸⁶

Historically, the doctrine could be broadly defined as the “responsibility of military commanders for war crimes committed by subordinate members of their armed forces or other persons subject to their control.”⁸⁷ This extant definition is today comple-

⁸⁵ W. H. Parks, *Command Responsibility for War Crimes*, 62 *MIL. L. REV.* 1, 2–4 (1973).

⁸⁶ Grotius wrote, for example: “The State or the Superior Powers are accountable for the Crimes of their Subjects, if they know of them, and do not prevent them, when they can and ought to do so.” L. C. Green, *Command Responsibility In International Humanitarian Law*, 5 *TRANSNAT'L L. & CONTEMP. PROBS.* 319, 321 (1995) (quoting H. GROTIUS, *DE JURE BELLI AC PACIS [ON THE LAW OF WAR AND PEACE]* (1625)).

⁸⁷ Stuart E. Hendin, *Command Responsibility and Superior Orders in the Twentieth Century - A Century of Evolution*, 10 *MURDOCH U. ELECTRONIC J. L.* 1, para. 4 (2003), available at <http://>

mented by developments that extend the doctrine to both military and non-military superiors, touching individuals within the military hierarchy and government, and even extending to the general populace.

The modern advancement of command responsibility has occurred in sudden, seismic shifts, typically lurching forward in close connection with some of history's worst atrocities. A major impetus for its development followed from the international military tribunals at Tokyo and Nuremberg after the terrible events of World War II. Recently, the jurisprudence of the ad hoc war crimes tribunals created in response to the surge of war crimes in the former Yugoslavia and Rwanda reinvigorated the doctrine. Command responsibility, like other areas of the laws of war, continues to evolve to fit shifting patterns. Despite its explicit recognition under domestic and international law, the precise application of command responsibility to corporate and civilian superiors remains inchoate, and it is unclear how it could apply to complex scenarios involving soldiers and civilian security personnel such as the military-PMC-private contractor nexus.

The 1982 invasion of the Sabra and Shatila refugee camps near Beirut sparked serious debate concerning the application of the doctrine in relation to civilian/political leaders.⁸⁸ In that situation, Lebanese Phalangist militia forces trained, paid, equipped, and, to a degree, under the control of Israel, were permitted by Israel to enter the Sabra and Shatila refugee camps near Beirut where they massacred several hundred Palestinian refugees. Following the massacre, the Israelis established the Kahan Commission to assess the responsibility of various Israeli commanders and political figures for the massacre.⁸⁹ The Commission rejected the argument that the political leadership possessed no knowledge that the camps were being entered and concluded that certain political leaders, once informed of the entry into the camps, failed to fulfill their duties to inquire about the circumstances.⁹⁰

In the 1990's, the issue of the duty of superiors in light of whether they held military or civilian positions was addressed judi-

www.murdoch.edu.au/elaw/issues/v10n1/hendin101.html (quoting XI Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 1259 (1948)).

⁸⁸ W.J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 *DUKE J. COMP. & INT'L L.* 103, 120-23 (1995).

⁸⁹ *Id.* at 121.

⁹⁰ Final Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut 1983, 22 *I.L.M.* 473 (1983).

cially with the establishment of the ad hoc international criminal tribunals. In the *Celebici Case*, the ICTY held unequivocally that command responsibility extends not only to military commanders but also to individuals in non-military positions of superior authority.⁹¹ In this regard, it is clear that under the existing international law doctrine of command responsibility political, paramilitary and bureaucratic superiors may be held liable for a failure to control their subordinates, as well as for acts they have themselves committed.⁹² Although the doctrine in various forms has existed for millennia with regard to military personnel, it has only recently become a doctrine of international law that extends to encompass civilian persons.

B. Embedding Command Responsibility in International Law

It was not until the aftermath of World War II and the decisions of the post-World War II tribunals that the doctrine of command responsibility became embedded in international law. At that time, no treaty codified command responsibility; there was no substantial body of interpretive jurisprudence for the tribunals to draw upon and neither of the tribunals' charters, the International Military Tribunal at Nuremberg ("Nuremberg Tribunal") and the International Military Tribunal for the Far East ("Tokyo Tribunal"), explicitly articulated the doctrine. The decisions were therefore based on the laws of war as they were held to exist in customary international law. Following the atrocities of World War II, the victorious Allies pursued and prosecuted war criminals, but, importantly, only among the defeated. The most significant and highest profile criminal trials were those conducted by the Nuremberg and Tokyo Tribunals. These were supplemented by various tribunals established under Control Council Law No. 10.⁹³ The post-World War II trials were a turning point for international law

⁹¹ See *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment, ¶ 363 (Nov. 16, 1998), available at <http://www.icty.org/case/mucic/4> (follow hyperlink to 16 Nov. 1998 Judgment).

⁹² Jackson Nyamuya Maogoto, *Presiding Over the Ex-President: A Look at Superior Responsibility in Light of the Kosovo Indictment*, 7 *DEAKIN L. REV.* 173-99 (2002); see also Jackson Nyamuya Maogoto, *Superior Orders Defence in International Law*, in *RETHINKING INTERNATIONAL CRIMINAL LAW: THE SUBSTANTIVE PART* (Olaoluwa Olusanya ed., Europa Publishing 2007).

⁹³ Allied Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, Official Gazette: Control Council for Germany 50-55 (1946).

and state sovereignty. The Tribunals demonstrated unprecedented enthusiasm for expanding the enforcement of individual responsibility for international crimes and were determined to try any high-ranking public officials or military officers regardless of their status, with the important exception noted *supra* that only members of Axis forces were prosecuted for the loosely defined war crimes.⁹⁴

Nevertheless, in practice, the post-World War II tribunals demonstrated a willingness to apply command responsibility to civilian superiors, including senior politicians and even leading industrialists,⁹⁵ with vigor equal to its application of the doctrine to military commanders. Many of these cases were premised on the principle of *de facto* control: in other words, that people are responsible for those under their power, whether they are serving a military or civilian function.⁹⁶ The lingering criticisms of the tribunals for selective prosecutions and their vacillating nature, however, make these cases a mere “guide for establishing that civilian leaders can be held culpable for certain acts of subordinates.”⁹⁷ Eventually, in 1977, the international community enacted Additional Protocol I to the Geneva Conventions of 1949 to explicitly articulate command responsibility and provide some clarity to the doctrine on the international plane.⁹⁸

Additional Protocol I⁹⁹ was the first international treaty to codify the doctrine of command responsibility.¹⁰⁰ The Protocol filled a troublesome lacuna in codified law and purported to express

⁹⁴ The Nuremberg Charter, for example, specified that acting in an official capacity for government did not relieve individuals of responsibility. See Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Charter of the International Military Tribunal art. 7, Aug. 8, 1945, 82 U.N.T.S. 280 [hereinafter Nuremberg Charter]; Jackson Nyamuya Maogoto, *WAR CRIMES AND REALPOLITIK: INTERNATIONAL JUSTICE FROM WORLD WAR I TO THE 21ST CENTURY* 99 (2004).

⁹⁵ At the Nuremberg trials non-governmental civilians such as the directors of manufacturing works were convicted of war crimes based on their superiority to the criminal perpetrators. Fredrich Flick, for example, a prominent steel industrialist, was held to have had “knowledge and approval” of criminal enslavement of civilians and prisoners of war. See *Prosecutor v. Delalic*, Case No. IT-96-21-T ¶ 363 (Nov. 16, 1998), available at <http://www.un.org/icty/celebici/trialc2/jugement/part1.htm>.

⁹⁶ Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 1 (1999).

⁹⁷ Fenrick, *supra* note 88, at 117–18.

⁹⁸ See generally Geneva Convention I, II, III, & IV, *supra* note 13.

⁹⁹ See Additional Protocol I, *supra* note 47.

¹⁰⁰ *Id.*

the customary law of command responsibility.¹⁰¹ Article 86, paragraph 2, clearly sets a standard of actual or constructive knowledge: superiors can be responsible for a breach of the Geneva Conventions by subordinates if the superiors “knew, or had information which should have enabled them to conclude in the circumstances at the time” that the subordinate was committing or was going to commit the breach.¹⁰² In such an instance, a superior must take “all feasible measures within their power to prevent or repress the breach.”¹⁰³ Article 87, paragraph 1, extends the duty of military commanders to include not only forces under their command, but also “other persons under their control,” thus rendering military commanders responsible for the actions of civilians under their control.¹⁰⁴

Additional Protocol I¹⁰⁵ has had a significant influence on the codification of command responsibility in the statutes establishing the extant international criminal tribunals—the ICTY¹⁰⁶ and the International Criminal Tribunal for Rwanda (ICTR).¹⁰⁷ The influence of the Protocol has also spilled over into the statute of the International Criminal Court (“ICC”), the world’s first permanent international penal tribunal. In order to prosecute the perpetrators of the humanitarian catastrophes in the former Yugoslavia and Rwanda adequately, the statutes of these Tribunals encode the command responsibility doctrine. Article 7, paragraph 3, of the ICTY and Article 6, paragraph 3, of the ICTR statute house these provisions in an almost identical manner.¹⁰⁸

Under the provisions of the extant ad hoc international criminal tribunals, even if a superior did not order or participate in the crime of a subordinate, he or she may be personally liable for that

¹⁰¹ Matthew Lippman, *Humanitarian Law: The Uncertain Contours of Command Responsibility*, 9 *TULSA J. COMP. & INT’L.* 1, 52 (2001).

¹⁰² Additional Protocol I, *supra* note 47, art. 86, para. 2.

¹⁰³ *Id.*

¹⁰⁴ Hendin, *supra* note 87, para. 137.

¹⁰⁵ See generally Additional Protocol I, *supra* note 47.

¹⁰⁶ See S.C. Res. 808, ¶ 2, U.N. Doc. S/25704 (Feb. 22, 1993) (The Statute of the International Criminal Tribunal for the Former Yugoslavia formed the appendix to the Secretary-General’s report.).

¹⁰⁷ On November 8, 1994, the Security Council adopted Resolution 955 creating the International Criminal Tribunal for Rwanda, with its Statute as the resolution’s annex. Statute of the International Criminal Tribunal for Rwanda art. 6, para. 3, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), available at <http://www.ictt.or/ENGLISH/basicdocs/statute/2009.pdf>.

¹⁰⁸ Compare The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* art. 7, ¶ 3, U.N. Doc. S/25704 (May 3, 1993) [hereinafter The Secretary-General Report] with S.C. Res. 955, *supra* note 107, art. 6, ¶ 3.

crime if he or she “knew or had reason to know” that the subordinate was about to commit the crime, or had done so and he or she fails to take “necessary and reasonable” steps to prevent it or fails to punish the perpetrator once it has been committed.¹⁰⁹ “Necessary and reasonable” replaces “all feasible measures within their power” standard in the Additional Protocol I.¹¹⁰ “Knew or had reason to know” also parallels the Additional Protocol I standard of knowledge. This should be understood as having the same meaning as the phrase, “had information enabling them to conclude,” used in Additional Protocol I.¹¹¹ The “had reason to know,” standard means that commanders who are in possession of sufficient information to be on notice of subordinate criminal activity cannot escape liability by declaring their ignorance, even if such ignorance of the specific crime is amply established.¹¹² This standard creates an objective negligence test which takes into full account the circumstances at the time. Absence of knowledge is no defense if the superior did not take reasonable steps to acquire such knowledge, which in itself is criminal negligence.¹¹³ Although this standard rejects a presumption of knowledge, it nonetheless also rejects pleas of ignorance even if they are genuine. This raises a duty to know,¹¹⁴ rebuttable only through evidence acquired by due diligence because it is a commander’s duty to be apprised of facts within his or her other command.¹¹⁵

In drafting and adopting the ICC Statute, the international community shed further light on the status of command responsibility by accomplishing the challenging task of defining a standard of command responsibility culpability for the Court. Article 28 of the ICC Statute is the most recent expression of the doctrine. The

¹⁰⁹ The actual text of Article 7, paragraph 3, of the Secretary General’s Report Pursuant to paragraph 2 of Security Council Resolution 808 reads:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

¹¹⁰ Compare The Secretary-General’s Report, *supra* note 108, art. 7, ¶ 3, with Additional Protocol I, *supra* 47, art. 86, para. 2.

¹¹¹ Additional Protocol I, *supra* 47, art. 86, para. 2.

¹¹² See Delalic, Case No. IT-96-21-A, *supra* note 95, ¶ 387.

¹¹³ See *id.* ¶ 388.

¹¹⁴ *Id.*

¹¹⁵ See United States v. Pohl, 5 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUREMBERG, OCT. 1946–APR. 1949: THE POHL CASE 980–84, 989 (1952), available http://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-V.pdf.

text of the Article articulates the established elements to the command responsibility doctrine. These are:

- i. The existence of a superior/subordinate relationship;
- ii. The superior knew or had reason to know that the criminal act was about to be or had been committed; and
- iii. The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.¹¹⁶

This Article sets a rather clear and comprehensive test which appears to apply to civilian and soldier alike.

C. Should Command Responsibility Embrace Civilians?

It is important to note that some commentators see serious problems with a definition of command responsibility that encompasses civilians, particularly non-government civilians, citing the intrinsically military nature of the command responsibility doctrine.¹¹⁷ Despite their objection, however, it is now clear that the doctrine also applies to civilian superiors. Civilians in the military chain of command—for example, civilian heads of state or government—are indisputably subject to the coalescing command responsibility standards outlined above.¹¹⁸ The doctrine also applies to other civilian leaders, although the civilian doctrine is a mere “skeleton” that should be fleshed out so as to clearly include civilians engaged in military activity. In this regard, Additional Protocol I created an opening to civilian responsibility by referring to “superiors” in Article 86 in contrast to Article 87’s later limiting specification of “military commanders.”¹¹⁹ Still, Article 87 does specify that the responsibility of such commanders does extend to “other persons under their control.”

The International Committee of the Red Cross (“ICRC”)—the “guardian” of the Geneva Conventions¹²⁰ and their Additional Protocol I—points out in its influential commentaries that Addi-

¹¹⁶ Rome Statute of the International Criminal Court art. 28, U.N. Doc. A/CONF.183/9 (July 17, 1998), available at [http://untreaty.un.org/cod/icc/statute/english/rome_statute\(e\).pdf](http://untreaty.un.org/cod/icc/statute/english/rome_statute(e).pdf).

¹¹⁷ See, e.g., Lou Ann Bohn, *Proceeding with Caution under Article 28: An Argument to Exempt Non-Governmental Civilians from Prosecution on the Basis of Command Responsibility*, 1 EYES ON THE ICC 1 (2004).

¹¹⁸ Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT’L L. 89, 103 (2000).

¹¹⁹ Additional Protocol I, *supra* note 47, arts. 86–87.

¹²⁰ See generally Geneva Conventions, *supra* note 13.

tional Protocol I allows command responsibility of civilians because “[t]he concept of a superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.”¹²¹ Although some commentators remain unconvinced that the sole occurrence of “superior” lends enough credence to this theory,¹²² ICTY and ICTR judges have used identical reasoning in their interpretation of similar ICTY and ICTR statutes.¹²³ Both civilians and military individuals can incur criminal responsibility under command responsibility based on de jure or de facto authority.¹²⁴ In such cases, the courts will focus on the requisite degree of authority necessary to establish individual criminal culpability present in each individual case.¹²⁵

The enthusiasm for the civilian standard, however, continues to waver. For instance, the ICTR has remained reluctant to express a general rule by which command responsibility would apply to civilians and has often applied the doctrine reluctantly.¹²⁶ The ICTY has taken a less hesitant approach, unequivocally holding that the command responsibility doctrine applies to military and civilian superiors.¹²⁷ It is noteworthy that the ICC Statute does explicitly include civilian superiors, albeit with a higher threshold of mens rea. The test for civilians requires them as non-military superiors to have known or “consciously disregarded information which clearly indicated that the subordinates were committing or about to commit crimes.”¹²⁸

¹²¹ ICRC COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1013 (Yves Sandoz, Christopher Swinarski & Bruno Zimmermann eds., 1987).

¹²² See Bohn, *supra* note 117, at 1.

¹²³ See, e.g., Delalic, Case No. IT-96-21-T, *supra* note 95, at para. 360. Where the ICTY concluded that post-World War II the eschewal of the word “commander” in favor of the broader “superior,” led inevitably to the conclusion that “[a]rticle 7(3) extends . . . also to individuals in non-military positions of superior authority.” *Id.* at ¶ 363 (emphasis added).

¹²⁴ *Id.* at ¶ 354.

¹²⁵ C. A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-first Century*, 51 KAN. L. REV. 77 (2002).

¹²⁶ For example, the Rwandan mayor, Akayesu, attracted criminal culpability only for his *direct* role aiding and abetting genocide, as the Chamber found an insufficient subordinate/superior relationship between Akayesu and the Interahamwe (the armed local militia who perpetrated the crimes). This was despite Akayesu’s considerable de facto authority over the perpetrators and his status as the most powerful person in the village. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (ICTR Sept. 2, 1998), available at <http://www.un.org/ictt/english/judgements/akayesu.html>.

¹²⁷ Delalic, Case No. IT-96-21-T, *supra* note 98, at para. 363.

¹²⁸ Rome Statute of the International Criminal Court, *supra* note 116, at art. 28, paras. 1(a), 2(a).

D. Abu Ghraib: Case Study for State and Command Responsibility

1. Facts

One recent case which illustrates the combined potential of the state and command responsibility doctrines comes from Iraq. On April 28, 2004, the program *60 Minutes II* aired photographs depicting detainees in Iraq's Abu Ghraib prison suffering gross abuse at the hands of American military personnel.¹²⁹ As the scandal unfolded, it became evident that the United States military had hired private personnel from the PMCs, CACI and Titan Corporation, to interrogate prisoners.¹³⁰ The personnel were hired under a standing "blanket purchase agreement" between the Department of the Interior and CACI.¹³¹ An investigation by the United States Army Inspector General found that eleven out of thirty-one CACI contract interrogators (thirty-five percent) did not have any "formal training in military interrogation policies and techniques."¹³² This lack of appropriate training and instruction is a general criticism of the PMCs, as illustrated in the revelation by one of the interrogators that "cooks and truck drivers" were hired because the private company was "under so much pressure to fill slots quickly."¹³³

A confidential ICRC report released without ICRC consent discloses some of the interrogation methods used there, including allegations that:

prisoners were kept naked in empty cells at Baghdad's Abu Ghraib prison; that male prisoners there were forced to wear women's underwear; that prisoners were beaten by coalition forces, in one case leading to death; and that coalition forces fired on unarmed prisoners multiple times from watchtowers, killing some of them.¹³⁴

¹²⁹ Rebecca Leung, *Abuse of Iraqi POWs By GIs Probed*, CBS NEWS, Apr. 28, 2004, <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>.

¹³⁰ *Interior Dept. halts Iraqi interrogator contracts*, Associated Press, May 25, 2004.

¹³¹ Ellen McCarthy, *CACI Contracts Blocked: Current Work in Iraq Can Continue*, WASH. POST, May 26, 2004, at A18.

¹³² U.S. DEP'T OF THE ARMY, THE INSPECTOR GENERAL, *DETAINEE OPERATIONS INSPECTION* 87 (2004).

¹³³ Hersh, *supra* note 11, at F3.

¹³⁴ David S. Cloud et al., *Red Cross Found Widespread Abuse of Iraqi Prisoners — Confidential Report Says Agency Briefed U.S. Officials On Concerns Repeatedly*, WALL ST. J., May 7, 2004, at A1.

In light of Abu Ghraib, a number of military and governmental agencies have conducted investigations.¹³⁵ The abuses are now well-documented and acknowledged to be violations of international law.¹³⁶ The investigations into Abu Ghraib documented a number of deaths with many more deaths still under investigation.¹³⁷ Several of these deaths appear to be the result of torture.¹³⁸

Common Article 3 of the Geneva Conventions of 1949 forbids cruel treatment and torture, as well as other “outrages upon personal dignity,” such as humiliating and degrading treatment, in armed conflicts as recognized by the ICTY.¹³⁹ Additionally, Article 13 of Geneva Convention III and Articles 27 and 32 of Geneva Convention IV, together with Article 76 of Geneva Convention IV, mandate that prisoners of war, as well as other detainees must at all times be treated humanely. Article 13, in conjunction with Article 130 of Geneva Convention III, stipulates that acts of commission or omission perpetrated by the “Detaining Power” (in this case the United States), which are harmful to the health and life of prisoners of war, amount to a grave breach of the Geneva Conventions.¹⁴⁰ Antenor Hallo de Wolf notes:

¹³⁵ See, e.g., MAJOR GENERAL ANTONIO M. TAGUBA, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004), available at <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html> [hereinafter TAGUBA REPORT]; MAJOR GENERAL GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE (2004), available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> [hereinafter the FAY REPORT]; THE HONORABLE JAMES R. SCHLESINGER, ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS (2004), available at <http://fl1.findlaw.com/news.findlaw.com/wp/docs/dod/abughraibrpt.pdf>. [hereinafter SCHLESINGER REPORT]; *Mistreatment of Iraqi Prisoners: Hearing of S. Armed Serv. Comm.*, 108th Cong. (2004) <http://www.washingtonpost.com/wp-dyn/articles/A8575-2004May7.html>.

¹³⁶ See, e.g., FAY REPORT, *supra* note 135, at 15. As Stephen Cambone, Undersecretary of Defense, told the U.S. Senate Armed Services Committee Hearing on the Treatment of Iraqi Prisoners: “[w]hat took place in the prison, we have all said, exceeded the regulations, laws and laws of war, convention of the Geneva Convention and everything else.” *Allegations of Mistreatment of Iraqi Prisoners: Hearing before S. Armed Serv. Comm.*, 108th Cong. (2004), available at <http://www.nytimes.com/2004/05/11/politics/11WEB-ATEX.html?ei=5070&en=1946df341ab10a2d&ex=1237435200&pagewanted=1>.

¹³⁷ The SCHLESINGER REPORT, *supra* note 135 (confirming five detainee deaths as a result of interrogation; twenty three more deaths are still under investigation).

¹³⁸ Gwen Ifill, Scott. Horton & John A. LeMoyne, *PBS Newshour: Accounting for Abuse* (PBS television broadcast Aug. 25, 2004).

¹³⁹ YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 24 (2004); see also *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 153 (Dec. 10, 1998); *Prosecutor v. Kunarac*, Case Nos. IT-96-23-T and IT-96-23/1-T, Judgment, ¶ 497 (Feb. 22, 2001); see also JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 318 (2005).

¹⁴⁰ Geneva Convention III, *supra* note 13; Geneva Convention IV, *supra* note 13.

In light of the nature of the abuses that took place in Abu Ghraib prison . . . there can be little doubt that these abuses amount to torture and other cruel treatment as defined . . . [by the ICTY] as understood by common article 3 to the Geneva Conventions, article 13 of Geneva Convention (III), and articles 27 and 32 of Geneva Convention (IV), and thus a “grave breach” of these two conventions.¹⁴¹

The abuses committed in Abu Ghraib also amount to human rights violations, particularly with respect to normal detainees who are not prisoners of war. The most important rights at stake under these circumstances are: (1) the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment under both Article 7 of the ICCPR¹⁴² and Article 1 of the CAT; and (2) the right of a person to receive humane treatment while deprived of his liberty as protected by Article 10 of the ICCPR.¹⁴³ Similarly, Article 2, paragraph 2, of the CAT provides that no exceptional circumstances—whether a state of war, threat of war, internal political instability or any other public emergency—may be invoked as a justification of torture.¹⁴⁴

Not only were civilian employees directly involved in much of the abuse, the abuse was alleged to have been, “requested, encouraged, condoned, or solicited” by non-military intelligence personnel.¹⁴⁵ Although the breaches can give rise to employees’

¹⁴¹ Antenor Hallo de Wolf, *Modern Condottieri in Iraq: Privatizing War from the Perspective of International and Human Rights Law*, 13 *IND. J. GLOBAL L. STUD.* 315, 338 (2006).

¹⁴² ICCPR, *supra* note 79, at art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

¹⁴³ According to the Human Rights Committee:

[T]he text of article 7 [of the ICCPR] allows of no limitation. The Committee also reaffirms that, even in situations of public emergency such as those referred to in article 4 of the [ICCPR], no derogation from the provision of article 7 is allowed and its provisions must remain in force. The Committee likewise observes that no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons, including those based on an order from a superior officer or public authority.

Human Rights Committee, General Comment No. 20 on Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at 151, para. 3, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004).

¹⁴⁴ See CAT, *supra* note 12, at art. 2, para. 2.

¹⁴⁵ FAY REPORT, *supra* note 135, at 104; see *Intelligence Officer Counters England: Private at Abu Ghraib prison portrayed as disobedient, bawdy*, ASSOCIATED PRESS, Aug. 4, 2004 (Private Lyndie England claimed she was ordered to use humiliation to get Iraqi detainees to talk.); see also R. Jeffrey Smith, *Soldiers Vented Frustration, Doctor Says; Psychiatrist Studied Interviews With Guards Accused of Abusing Iraqi Detainees*, WASH. POST, May 24, 2004, at A18 (Specialist Charles Graner’s lawyer also claimed that Graner abused detainees on orders from military intelligence officials.).

personal liability, the breaches by the employees must also be attributable to the PMC itself and to the contracting state. In this way, it can be said that the employees and PMCs acted as individuals *and* as actors of the State, and, hence, that command responsibility can attach to the PMC and the State via the doctrine of military chain of command.

2. Corporate Actors in the Chain of Command

Individuals implicated in the abuse at Abu Ghraib were employees of two PMCs: CACI provided employed interrogators and Titan provided employed linguists. They formed part of the special Joint Interrogation and Debriefing Centre (“JIDC”) military intelligence unit at Abu Ghraib, which was set up for the purpose extracting intelligence from detainees. Employees implicated in human rights violations are directly connected to PMCs. However, unlike the Nicaraguan Contras who operated for the United States behind a smoke screen of detachment, the PMCs, and hence their employed contractors, have the closest type of connection with the United States: they were under an actual contract to work for the U.S. government.

These contracts, like typical PMC contracts, are not simply agreements for the provision of a standard commercial service. If this were the case, liability for offences committed by employees would simply trace to the company through the standard doctrine of vicarious liability for employee acts. These contracts coordinate PMCs with the government by integrating PMCs, military personnel, and resources to achieve strategic outcomes. The contracts insert the PMC into the military operation as both a buttress and a bridge. It buttresses the military by providing support in the form of instruction and supervision for lower level military personnel in the PMC’s sphere of influence. And, the PMC provides a bridge of information between the Army and detainees. Thus, the PMC both receives orders from the military hierarchy above and provides instruction and supervision to military below. CACI’s work orders, for example, were funded by the U.S. Army even though they were awarded through the Department of the Interior.¹⁴⁶ The contract for interrogation services specifies that CACI employees are to be “directed by military authority” and that “the contractor

¹⁴⁶ See McCarthy, *supra* note 131.

[PMC] is responsible for providing supervision of all contractor personnel.”¹⁴⁷

The contractors employed by the PMCs were classified as military intelligence personnel.¹⁴⁸ Then U.S. Secretary of Defense Donald Rumsfeld testified before the Senate Armed Services Committee that civilian contractors in Iraq are “responsible to military intelligence who hire them, and have the responsibility for supervising them.”¹⁴⁹ Contract personnel were also managed by a “contracting officer,” who was a member of the military.¹⁵⁰ The contracts and information from the official investigations make clear that contractors and their employees at Abu Ghraib were officially under the control of the U.S. military. In this regard, Antenor Hallo de Wolf notes:

Delegating the interrogation of prisoners and prisoners of war to these contractors has been made possible through official U.S. military guidelines and policy. This privatization has also been endorsed and affected through the signing of official contracts with these companies. Additionally, the interrogation of prisoners and prisoners of war can be regarded as an intrinsic and inherent task of the state, due to the fact that these tasks or functions require military knowledge and skills that are essential for attaining their goals . . . and that these tasks also require extensive familiarity with international legal standards in the field of international humanitarian law and human rights.¹⁵¹

A key problem identified by the *Fay Report* was the lack of “credible exercise of appropriate oversight of contract performance” exercised by the responsible contracting officers.¹⁵² Poor and inefficient performance characterized this task of supervision and control, though this in no way alters the fact that the United States was officially responsible for directing and controlling the private actors. In Abu Ghraib, private contractor employees had effectively been assimilated into the U.S. military and could no longer realistically be categorized as private actors.

Arguably, PMCs and their employees occupying positions of authority and influence may also be liable for command liability

¹⁴⁷ Ellen McCarthy, *CACI Defense Contracts Hazy on Civilian Authority: Language Reserves Direction for Military*, WASH. POST, July 29, 2004, at E05.

¹⁴⁸ See, e.g., FAY REPORT, *supra* note 135 (classifying the contractors as part of the military intelligence personnel).

¹⁴⁹ *Allegations of Mistreatment of Iraqi Prisoners*, *supra* note 136.

¹⁵⁰ FAY REPORT, *supra* note 135, at 48.

¹⁵¹ Hallo de Wolf, *supra* note 141, at 344–45.

¹⁵² FAY REPORT, *supra* note 135, at 52.

for failing to act to prevent the crimes that occurred. The primary challenge is that civilian employees appear to be outside the normal, traditional, juridical chain of command. This complicates the process of proving that a superior-subordinate relationship existed between them and the military actors. While *de jure* command is inapplicable owing to the location of the PMC employees in the official military hierarchy, the well-established *de facto* command doctrine is certainly relevant.

PMC employees' control over the military perpetrators appears to have been effective and, hence, *de facto*. Major General Taguba explained to the Senate Committee that although contractors "were not in any way supervising any soldiers . . . those who were involved, looked at them as competent authority."¹⁵³ Command responsibility is enlivened further by the use of subordinates with inadequate training.¹⁵⁴ It is significant that an Assistant Secretary of the Army, Patrick T. Henry, strongly counseled against the use of private contractors in intelligence roles in 2000, explaining:

The contract administration oversight exerted over contractors is very different from the command and control exerted over military and civilian employees. Therefore, reliance on private contractors poses risks to maintaining adequate civilian oversight over intelligence operations.¹⁵⁵

From the *Taguba* and *Fay Reports*, one can infer that the U.S. military apparatus was aware that private contractors were being used for translation and interrogation purposes: in fact, it would appear to have been policy.¹⁵⁶ The United States, however, appears to have neglected to adopt sufficient precautions and supervisory mechanisms to monitor and restrain the activities of these private actors despite several U.S. military personnel purposely striving to create a suitable environment for extracting information from the detainees.

¹⁵³ *Allegations of Mistreatment of Iraqi Prisoners*, *supra* note 136 (statement of Antonio Taguba, Major General, USA Deputy Commanding General for Support).

¹⁵⁴ Bantekas, *supra* note 96.

¹⁵⁵ Memorandum from Patrick T. Henry, Assistant Secretary of the Army (Manpower and Reserve Affairs) to Assistant Deputy Chief of Staff for Intelligence 2 (Dec. 6, 2000).

¹⁵⁶ See the press release issued by CACI, confirming that the company had indeed supplied contractors for interrogation purposes in Iraq. Press Release, CACI International Inc., CACI Interrogator Contract with the U.S. Army to Continue (May 25, 2004), http://www.caci.com/about/news/news2004/05_25_04_2_NR.html (last visited Aug. 1, 2007).

V. CONCLUSION

The emergence of PMCs and their formidable financial and military capabilities does not fit into the paradigm of the State as an entity bearing a monopoly over military force. Commenting on the decentralization of State control over the use of force, Montgomery Sapone notes: “[t]his change in military relationship between States and private entities suggests that some States no longer exert explicit control over military technology or manpower. Military skill is becoming increasingly privatized and commodified.”¹⁵⁷ The dangers of the privatization of force and concerns regarding the dangers of excessive and arbitrary use of force finally materialized on a large and well-publicized scale in the recent invasion of Iraq, where PMCs are engaged heavily in a wide range of operations from transport of supplies to interrogation of prisoners. The central claim that private punishment, policing, and military corporations violate human rights and international law obligations more often than public punishment, policing, and military institutions¹⁵⁸ found practical manifestation in the various scandals that engulf the military operation in Iraq as it did in earlier controversies.¹⁵⁹

Taking the Abu Ghraib scandal as a test scenario, the authors argue that although command responsibility finds its clearest application in the case of standard military hierarchies, it can extend responsibility for the crimes beyond the impugned soldiers to private military personnel instructing them to the PMC acting under contract with the State. State responsibility is triggered by the non-derogable duty of protecting human rights. In this instance, the PMC, although a private person at law, acted as agent for the United States and exercised governmental authority both over the soldiers who personally committed the war crimes at the instigation of PMC personnel and over the prison itself. In doing so, the PMC has activated international law against its principal—the United States—for complicity in acts that violate international law. Persons, whether military or civilian, implicated in the Abu Ghraib

¹⁵⁷ Montgomery Sapone, *Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 *WESTERN J. INT’L L.* 5, 19–20 (1999).

¹⁵⁸ Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, And Military Force in Liberal States*, 36 *CONN. L. REV.* 879, 984 (2004).

¹⁵⁹ See, e.g., David Kassebaum, *A Question of Facts: The Legal Use of Private Security Firms in Bosnia*, 38 *COLUM. J. TRANSNAT’L L.* 581, 602 (2000); Zarate, *supra* note 6, at 93–103.

prison atrocities should and ought to be held individually and corporately responsible for their crimes under international law.

The heavy reliance on PMCs has contributed to increased private contractor presence on the battlefield. Many states, small and large, now rely on them for long-term support for major defense systems.¹⁶⁰ With technologically advanced systems requiring PMCs to be responsible for long-term support, military establishments are losing the capacity to manage and generate the ability to maintain key components of war including not only command systems but also military communication systems and surveillance apparatus.¹⁶¹ PMCs are thus becoming the key supporting actors of military operations and now stand in a position to threaten global order with military force that is less accountable and controllable than state militaries.¹⁶² Signs of the decline of the nation-state and the growing role of private military companies are symptoms of a large, dangerous challenge to the aspirations of order in the world, an order represented by the system of nation-states and the rule of law.¹⁶³

Fundamentally, the real risk of gross misbehavior by PMCs is not their operations in their home states—predominantly Western countries—but rather in the execution of contracts they have in weak or failing States. Local authorities in such areas often have neither the power nor the wherewithal to challenge these firms. With the PMC industry growing dramatically in size and influence, the need for analysis, discussion, and an innovative policy response is now acute. Any proposed response to the PMC phenomenon must take into account the changing international conflict paradigm where economic resources translate into military might as never before,¹⁶⁴ and where non-state actors can finance war as readily as states.¹⁶⁵

¹⁶⁰ See U.S. DEP'T OF DEFENSE, REGULATION 5000.2-R, MANDATORY PROCEDURES FOR MAJOR DEFENSE ACQUISITION PROGRAMS (MDAPS) AND MAJOR AUTOMATED INFORMATION SYSTEM (MAIS) ACQUISITION PROGRAMS (2002), available at <http://www.ncca.navy.mil/resources/dod5000-2-R-new.pdf>.

¹⁶¹ Gordon L. Campbell, *Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend Upon Them* (unpublished paper presented before the Joint Services Conference on Professional Ethics, Jan. 27–28, 2000), available at <http://www.usafa.edu/isme/JSCOPE00/Campbell00.html>.

¹⁶² Howe, *supra* note 20, at 7.

¹⁶³ John Oldham McGinnis, *The Decline of the Western Nation States and the Rise of the Regime of International Federalism*, 18 *CARDOZO L. REV.* 903, 905 (1996); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

¹⁶⁴ See P.W. Singer, *The Ultimate Military Entrepreneur*, *MIL. HIST. Q.*, Spring 2003, 6, 6.

¹⁶⁵ Singer, *Corporate Warriors*, *supra* note 9, at 186, 209.

The urgent necessity in this rapidly unfolding state of affairs is that of forming some means of legal control and accountability for the PMC and its actors. In this article we have attempted to demonstrate how the doctrines of state responsibility and command responsibility combined may achieve just such ends.