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PRIVATE MILITARY COMPANIES AND STATE RESPONSIBILITY

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ABSTRACT

This paper discusses the circumstances under which the misconduct of PMCs might engage the responsibility of their state sponsors under international law. It is argued that the fear that PMCs might be used by Western governments to conduct “foreign policy by proxy” is only partially warranted: from an international law perspective, states cannot evade responsibility merely by hiring a private actor to carry out certain functions. The conduct of PMCs is, under certain circumstances, attributed to the state, making that state responsible for any violation of international law committed by PMC personnel. Even where no such attribution exists, the state might still be responsible for lack of due diligence to adequately regulate and control PMC conduct. Thus, claims of a “vacuum” in international law are overstated, although the growing significance of PMCs in conflict zones and changing warfare challenge a legal system premised on the assumption that states are the primary actors on the international plane. An inherent limit is the fact that factual power relationships between the PMC, the host state, and the exporting state remain unaddressed on the international level. Relying on the responsibility of states alone is thus a necessary but insufficient tool for addressing the problems accompanying the expanding role of PMCs.

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PRIVATE MILITARY COMPANIES AND STATE RESPONSIBILITY

Chia Lehnardt

One of the principal differences between private military companies (PMCs) and mercenaries is the fact that the activities of PMCs are often sanctioned openly, in one way or another, by states. States hire, licence, or permit the activities of PMCs, as these entities augment or even replace functions that have traditionally been performed by states. Through such legal arrangements, PMCs provide services that such states are either unwilling or unable to provide: offering security, military advice and training, interrogation of prisoners, and, in extreme cases, combat forces.

Indeed, one of the greatest concerns about the expanding role of PMCs is that military capacities are developed outside the state and put into practice in an inherently volatile setting. While there is no empirical evidence that PMCs are more likely to engage in misconduct than their public counterparts, PMCs can, of course, violate interests protected by international law. Understandably, discussion typically focuses on alleged and proven wrongdoing by PMC employees — charges levelled against PMCs include abuses of prisoners,¹ sex trafficking,² violating UN arm embargoes,³ indiscriminate shootings at civilians,⁴ and assistance in carrying out so-called “extraordinary renditions”⁵. Troubled by these developments, it is frequently asserted that there is a legal vacuum in which those firms operate,⁶ with many commentators

¹ Both the Taguba Report and the Fay Report found that three employees of CACI Int. and Titan Inc. were implicated in the abuses at Abu Ghraib; MG Antonio M. Taguba, *Article 15-6 Investigation at the 800th Military Police Brigade* (henceforth Taguba Report), available at <http://news.findlaw.com/nytimes/docs/iraq/tagubarpt.html>, and MG George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade* (August 2004) at 7, 47-48, available at <http://files.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> (henceforth Fay Report).

² Jamie Wilson and Kevin Maguire, “American Firm in Bosnia Sex Trade Row Poised to Win MoD Contract”, *Guardian*, 29 November 2002.

³ House of Commons, Foreign Affairs Committee, “Second Report Sierra Leone”, HC 116-I (February 1999) (about Executive Outcomes’ operations in Sierra Leone); Antony Barnett and Patrick Smith, “US Accused of Covert Operations in Somalia”, *Observer*, 10 September 2006 (alleging that an US PMC, Select Armor, prepared undercover operations in Somalia against the Supreme Islamic Courts Council in support for the transitional government with the knowledge of the CIA and in violation of the UN arms embargo).

⁴ Jonathan Finan, “Security Contractors in Iraq under Scrutiny after Shootings”, *Washington Post*, 10 September 2005.

⁵ European Parliament, Temporary Committee on the Alleged Use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, Working Document No. 4 on the Flights Operated by the CIA in Europe, PE 374.340v01-01, June 2006, available at www.europarl.europa.eu.

⁶ Peter Singer, “War, Profits and the Vacuum of Law: Privatized Military Firms and International Law”, *Columbia Journal of Transnational Law*, vol. 42 (2004), p. 521; Thomas Catan, “Private Armies March into a Legal Vacuum”, *Financial Times*, 10 February 2005.

emphasizing the need to address the lack of accountability of contractors. Surprisingly little attention, however, has been paid to another dimension of the problem. Since these incidents are either tacitly or explicitly sanctioned by governments and have resulted from the transfer of functions from the public to the private sector, the question of accountability is also very much one of accountability of the state. An important question in the discussion on accountability is therefore: When does the hiring state, the host state, or the exporting state bear international responsibility for the conduct of PMCs?⁷

The fact that PMCs are often staffed by former military personnel and retain tight links to a certain state is often assumed to mean that such entities will be wary of acting against the interests of that state, or that it will act in a state's interest for commercial reasons.⁸ Some writers even speak of "foreign policy by proxy" or "covert wings of governments".⁹ Similarly, PMCs seek to dispel suspicions by arguing that they will work only for legitimate governments.¹⁰ Nevertheless, what states perceive to be in their interest is not necessarily in line with international law; nor do "legitimate" governments always act in accordance with international law. If PMCs are a convenient tool to pursue foreign policy ends without the appearance of state involvement, the incentive for states to use PMCs to circumvent international obligations — or to save the costs for abiding by them — is apparent.

It is frequently assumed that the transfer of functions to PMCs involves a transfer of responsibility as well. First, there appears to be little efforts to maintain effective control over

⁷ Exceptions are Christian Schaller, "Private Sicherheits- und Militärfirmen in bewaffneten Konflikten: Völkerrechtliche Einsatzbedingungen und Kontrollmöglichkeiten", SWP Studie 2005/S24, available at www.swp-berlin.org; University Centre for International Humanitarian Law, "Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions", available at www.ucihl.org/communication/Private_Military_Companies_report.pdf, and the intergovernmental process initiated by the Swiss government in collaboration with the ICRC, see http://www.eda.admin.ch/sub_dipl/e/home/thema/psc/init.html.

⁸ Foreign and Commonwealth Office, "Private Military Companies: Options for Regulation", HC 577, February 2002, para. 45 (henceforth FCO Green Paper); Juan Carlos Zarazate, "The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder", *Stanford Journal of International Law*, vol. 34 (1994), p. 149. A prominent counterexample is the closing of Baghdad airport in September 2005 over disputes over pay; Patrick Cockburn, "Baghdad Airport Closed by 'Unpaid' UK Security Firm", *Independent*, 12 September 2005.

⁹ Thomas Adams, "The New Mercenaries and the Privatization of Conflict", *Parameters*, vol. 29 (2) (1999), pp. 103, 110; Kevin O'Brien, "PMCs, Myths and Mercenaries: The Debate on Private Military Companies", *Royal United Services Institute for Defense Studies*, vol. 1 (2000), p. 145. See also FCO Green Paper (footnote 7 above), para. 50.

¹⁰ "We're the Good Guys These Days", *Economist*, 29 July 1995.

their activities.¹¹ The US General Accounting Office (GAO) has pointed to a significant lack of oversight on the part of the hiring agencies over PMCs in Iraq.¹² During the occupation, no US agency kept track even of the number of PMCs operating on the ground.¹³ Elsewhere, legislators frowning on the idea of commercial firms performing military activities have contributed to a continuing absence of formal control mechanisms: in Britain, another major PMC-exporting country, debate on regulation has been stalled because of the indignation with which parliamentarians received the FCO's Green Paper outlining options for regulation.¹⁴ Secondly, on those occasions where it has been alleged that international obligations have been violated, governments have explicitly or implicitly denied any responsibility for such wrongdoing, not on the basis that no breach of international law has occurred, but because any connection to the perpetrators is denied.¹⁵ Thirdly, although the domestic enforcement of international obligations is often a necessary means for fulfilling them, misconduct of contractors is rarely prosecuted through the state,¹⁶ whether this is a consequence of confusion as to whether and how existing legal regimes apply or indeed of a sense that, once private firms are in play, the point at issue is not the conduct of the state. Abu Ghraib provides a stark illustration of the different responses to violations of international law depending on whether the misconduct was carried out by state organs and PMCs: none of the contractors named in the Taguba and Fay Reports as "directly or

¹¹ See P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca: Cornell University Press, 2003), p. 152.

¹² GAO, "Military Operations — Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans", GAO-03-695, June 2003, p. 20, available at <http://www.gao.gov>. See also Taguba Report, Findings and Recommendations (Part II), para. 30; Steven L. Schooner, "Contractor Atrocities in Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government", *Stanford Law & Policy Review*, vol. 13 (2005), p. 549.

¹³ US Congressional Research Service, "Private Security Contractors in Iraq: Background, Legal Status, and Other Issues", May 2004, p. 2; Caroline Holmqvist, "Private Security Companies — The Case for Regulation", SIPRI Policy Paper No. 9, January 2005, p. 24.

¹⁴ A member of the Commons Foreign Affairs Select Committee found it "breathtaking in the extreme" that the Foreign Minister "should even contemplate giving such companies a veneer of respectability", Paul Waugh/Nigel Morris, "'Mercenaries as Peace-keepers' Plan under Fire", *Independent*, 14 February 2002.

¹⁵ See, e.g., "Arms to Africa Affair", see House of Commons, Foreign Affairs Committee, "Second Report Sierra Leone" (footnote 3 above), para. 52; MPRI's provision of military training to the Croatian force enabling the US to appear neutral, Zarazate, "The Emergence of a New Dog of War" (footnote 7 above), p. 92; Clive Walker and David Whyte, "Contracting Out War?", *International & Comparative Law Quarterly*, vol. 54 (2005), p. 661-662.

¹⁶ The only case known to the author is one prosecution for alleged abuse: A security contractor who worked for the CIA in Afghanistan got charged for involvement in the beating death of a detainee. The charge is brought under the Patriot Act. Section 804 of the Act, later codified as 18 USC Section 7(9), which provides jurisdiction over crimes committed by or against any US national on lands or facilities designated for use by the United States government, Department of Justice; US Department of Justice Press Release of 17 June 2004, available at www.usdoj.gov.

indirectly responsible for the abuses” has been charged with any crime,¹⁷ whereas their counterparts from the Army and the Marines have been sentenced to prison time by military courts.¹⁸ As a result, the implicated contractors face trial only after the Iraqi victims had filed a class action on the basis of tort law.¹⁹

As private commercial actors emerge as significant military actors serious questions are raised about the viability of a legal system premised on the assumption that states conduct war, provide internal and external security, and organize their military. This conceptual discord might explain the current tendency to dismiss international law as largely irrelevant²⁰ and to move on to discuss voluntary instruments or contracts as the more promising means to regulate the use and conduct of PMCs.

This chapter seeks to shift the focus back to the traditional focus of international lawyers: the responsibility of the state. This is not to suggest that viewing the issue through the lens of state responsibility alone will adequately address accountability and control problems. The weak enforcement of state obligations is well known, and other mechanisms, such as contract law, may provide more effective tools to enforce international values, as Laura Dickinson shows in chapter twelve. While it is true that PMCs occupy an uncertain position in international law, however, speaking of a “legal vacuum” ignores the numerous state obligations that apply in the environment in which PMCs operate. The mere fact that a state conducts its policies through proxies, rather than through state organs, does not render international law inapplicable. The existence of and consequences following from a breach of an international obligation are determined by principles of state responsibility, whose underlying conceptual premise is that states are the primary actors on the international plane. The question, then, is to what extent the law of state responsibility can reflect the quantitative and qualitative shift in the activities of PMCs — if it fails to take account of the altered military landscape, the capacity of international

¹⁷ GAO, “Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers”, GAO-05-737, 28 July 2005, p. 21, footnote 18.

¹⁸ Peter Spiegel, “No Contractors Facing Abu Ghraib Abuse Charges”, *Financial Times*, 9 August 2005.

¹⁹ *Saleh et al. v. Titan Corporation et al.*, Case No. 04 CV 1143 R (NLS), class action filed in the US District Court for the Southern District of California (transferred in June 2006 to the District Court for the District of Columbia), available at www.ccr-ny.org.

²⁰ See, e.g., GAO, “Actions still needed for improving the use of Private Security Contractors”, GAO 06-865T, 13 June 2006 p. 4, 16, suggesting that “no ... international standards exist for establishing private security provider and employee qualifications.”

law to regulate the impact of both state and non-state actors on international security, conflict resolution, and human rights is gravely diminished.

International law and the concept of state responsibility, while state-centred, allows some flexibility to address accountability of states for the misconduct of PMCs. The ability of this approach to regulate military affairs, however, is hamstrung by weak enforcement and its very nature as a state-centred concept, which does not endeavour to address actual power-relationships between states and non-state actors. Relying on the responsibility of states alone is thus a necessary but insufficient tool for addressing the problems accompanying the expanding role of PMCs.

State responsibility for conduct of private actors

The concept of state responsibility is based on a distinction between public and private conduct. In principle only the “internationally wrongful act of a State entails the international responsibility of that State.”²¹ Only conduct attributable to the state is an “act of state”.²² Since the state as an abstract construct does not act as such but through its officials and authorities, the presumption is that the acts of state organs are the acts of states.²³ This includes the acts of members of the armed forces of a state. In most cases contractors are not part of the armed forces. State responsibility can be generated also by private conduct, however. Under exceptional circumstances, private acts are attributed to the state; where no such attribution exists the state can still be internationally responsible if it failed to take appropriate measures to prevent the violation of international law, or to ensure that the wrongdoer makes suitable reparation or is punished. These possibilities will be considered in turn.

Private conduct that is state conduct: a question of attribution

The deliberate use of private proxies in international relations as a means to conduct foreign policy is not new. Mercenaries were used by former colonial powers to destabilize established governments; states in the Cold War relied on private groups as a more or less covert means to pursue foreign policy goals hoping they would escape both domestic and international scrutiny.

²¹ ILC Articles on State Responsibility, art. 1 (henceforth ILC Articles).

²² ILC Articles, art. 2(a).

²³ International Court of Justice (ICJ), *LaGrand (Germany v. United States)*, Judgment, 27 June 2001, ICJ Reports 2001, para. 81; ILC Articles, art. 4.

This section will discuss the circumstances under which courts have attributed conduct of private actors to a state, and subsequently assess to what extent the developed principles apply to PMC conduct. Relevant for present purposes are the cases in which private conduct is deemed as state conduct because the private actor has been authorized by the state to exercise governmental powers,²⁴ or where the state has instructed, controlled or directed the private conduct.²⁵

Attribution de iure: the exercise of elements of “governmental authority”

Courts have attributed private conduct to the state where the private entity was authorized to exercise elements of governmental authority. The focus is on the nature of the activity involved; not decisive is the public or private character of the entity that exercises that function and its link to the state.²⁶ The commentary of the International Law Commission (ILC) on its Articles on State Responsibility notes that the principle is, in fact, meant to address the phenomenon of public corporations that have been privatized yet continue to exercise public functions, as well as para-statal entities exercising “state functions”.²⁷ The rationale behind this attribution is that a state cannot evade its responsibility simply by transferring its functions to a private entity. This principle is dictated by logic and well acknowledged in international law:²⁸

when, by delegation of powers, bodies act in a public capacity, e.g., police an area ... the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.²⁹

²⁴ ILC Articles, art. 5 reads: “The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.” See also Report of the Special Rapporteur on Extrajudicial Summary and Arbitrary executions, UN Doc E/CN.4/2005/7, para. 70.

²⁵ ILC Articles, art. 8 (see below).

²⁶ Robert Ago, “First Report on State Responsibility”, YILC 1971 II (1), para. 191.

²⁷ James Crawford, *The International Law Commission’s Articles on State Responsibility — Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2003), art. 5, para. 1.

²⁸ Report of the Commission to the General Assembly, YILC 1974 II (1) Chapter III, para. 17.

²⁹ German government, League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the preparatory Committee, Vol.III: Responsibility of States for Damage caused in their territory to the Person or Person of Foreigners (Doc.C. 75.M.69.1929.V.), p. 90 (cited in ILC Commentary, art. 5(4)).

This attribution occurs regardless of whether the non-state actor has exceeded its competences or contravened instructions.³⁰

While the principle underlying this rule is obvious, its application is difficult for two reasons. The conceptual reason is that attribution hinges on the vague notion of governmental authority. The practical reason is that it is difficult to determine what PMC activities can be attributed to the state due to the uncertainty surrounding the range and nature of services offered by PMCs.

There is no international consensus as to what constitutes the exercise of governmental authority. In the context of state immunity, the complexity and perhaps impossibility of determining the precise scope of inherently “sovereign”, “governmental”, or “public” activities is well known.³¹ Understandings of these concepts are not only different in different societies, but also in constant flux: in 1971 the former ILC Special Rapporteur Robert Ago referred in this context to private persons driving vehicles used to carry troops to the front, but also “postal communications” alongside “military functions” and “volunteers” supporting an insurrectional movement in a neighbouring country.³² It is doubtful whether today these assessments would be shared. More useful is considering the content of a state obligation itself. For example, if an occupying power is obliged to “restore and ensure” public order and safety in the occupied territories,³³ it could be argued that international law thereby assumes that this responsibility entails the exercise of governmental authority. Such wording is not conclusive, however, as other provisions might impose an obligation on the state to “ensure” the enjoyment of the right to education or employment, yet it is clear that providing the same does not constitute an intrinsic state function.³⁴

The ILC endeavoured to give some guidelines noting that the content of the delegated powers, the way in which they were conferred, the purpose for which they are to be exercised, and the extent to which the non-state entity is accountable to government for their exercise are of particular relevance.³⁵ These criteria are, however, only of limited use. The first criterion — content of the competence in question — is essentially circular. Similarly, it is unclear how the

³⁰ *Yeager v. Iran*, 17 Iran-USCTR 92, 110-111 (1987-IV); ILC Articles, art. 7.

³¹ See James Crawford, “International Law and Foreign Sovereigns: Distinguishing Immune Transactions”, *British Yearbook of International Law*, vol. 54 (1983), p. 83, 89-90.

³² First Report on State responsibility, UN Doc A/CN.4/217/ADD2, paras. 189-190.

³³ Annex to Hague Convention IV, Regulations Respecting the Laws and Customs of War on Land, art. 43.

³⁴ University Centre for International Humanitarian Law, “Expert Meeting” (footnote 6 above), p. 19.

³⁵ ILC Commentary, art. 5, para. 6.

means by which the power was transferred should affect its classification as governmental: can it have an impact on the classification of a competence whether it was granted through contract, order, or statute? Furthermore, taking into account the extent of accountability to government as a pertinent factor would result in undesirable consequences. Where a PMC has been authorized to interrogate prisoners but is not held accountable by the government, it would appear that its misconduct would not be attributed to the state and consequently the state is not responsible for it. Consequently, the state would have no incentive to hold the PMC accountable — a result that would undermine one of the rationales of attribution of private conduct to the state.

The criterion of the purpose for which the transferred competences are exercised seems to be more useful and is echoed in attempts of different US government agencies to circumscribe the notion of “governmental authority” or “governmental function”. Well before the use of contractors in conflict zones became a prominent issue, the GAO and the US Office of Management and Budget (OMB) purported to define “governmental functions” in order to facilitate determination which functions are appropriate for outsourcing. Similarly to the ILC, both agencies found no definition but placed emphasis on the purpose of the conferred powers: The GAO referred to the “basic principle ... that the government should not contract out its responsibilities to serve the public interest or to exercise its sovereign powers”.³⁶ The OMB counts an activity as a governmental function “that is so intimately related to the public interest that it must be administered by government employees”.³⁷ Of course, the very fact that responsibilities related to military operations, previously regarded as core state functions, are

³⁶ GAO Report, “Government Contractors — Are Service Contractors Performing Inherently Governmental Functions?”, GAO-GGD92-11, November 1991, p. 4.

³⁷ See OMB Circular A-76 (revised), 29 May 2003, available at www.whitehouse.gov/omb, stating that only “commercial activities should be subject to the forces of competition” and that government agencies “shall perform inherently governmental activities with government personnel.”(...)”These activities require the exercise of substantial discretion in applying governmental authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements. An inherently governmental activity involves: ... (2) determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contracts management, or otherwise; (3) significantly affecting the life, liberty, or property of private persons(...)”. However, an “activity may be provided by contract support where the contractor does not have the authority to decide on the course of action, but is tasked to develop options or implement a course of action, with agency oversight.” The Department of Defense was authorized to determine the applicability of this circular in times of war and military mobilization and has apparently decided against it, see Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge: Cambridge University Press, 2005), p. 115. The US DoD aims at outsourcing as many activities as possible except for “core government” or “mission critical functions”, the first being defined as “directly related to war fighting”, see *Quadrennial Defense Review Report*, September 2001, p.53, available at www.defenselink.mil/pubs/qdr2001.pdf.

now performed by private firms indicates that pinning down the precise degree of public interest in a given activity an equally insurmountable task.

In the absence of a definition, some guidance might be drawn from court findings and discussions in the ILC. The ILC commentary in fact refers to private security firms acting as prison guards, qualifying detaining and disciplining individuals as exercising elements of governmental authority.³⁸ Other examples are powers related to immigration control or quarantine, or the identification of property for seizure.³⁹ The Iran-United States Claim Tribunal had to deal with the issue of attribution of conduct of para-statal forces, such as the Komitehs and Islamic Revolutionary Guards before they were formally recognized by the Islamic Republic of Iran, in a number of cases. In both *Rankin v. Iran*⁴⁰ and *Yeager v. Iran*,⁴¹ detention and subsequent expropriation were regarded as the exercise of governmental powers, as was the seizure of property in *Hyatt v. Iran*.⁴²

As can be seen from the ILC Commentary and the above cases, although there is little prospect of a clear definition of the concept of governmental authority some activities are arguably so commonly regarded as “core governmental functions” that their performance by PMCs can be said to constitute the exercise of governmental authority. Among them are law enforcement, engaging in combat, seizure of money, detention and interrogation, expropriation, and border and immigration control. Consequently, the conduct of CACI and Titan at Abu Ghraib, of Executive Outcomes and Sandline International in Angola, Sierra Leone, and Papua New Guinea, and of the contractors guarding the Erez crossing in Gaza⁴³ would be attributed to the states that hired them.

Yet even with such a tentative list it is difficult to establish whether the activities in which PMCs are actually engaged correspond to the exercise of governmental authority. With regard to combat, it is not clear whether this is an activity undertaken by PMCs. From the perspective of the hiring governments and the industry it is clearly not. The care with which the Coalition Provisional Administration (CPA) in Iraq avoided even the appearance of PMCs engaging in “military” or even “offensive” activities was notable. It stated in 2004 that the PMCs

³⁸ See also Gregory Townsend, “State Responsibility for Acts of De Facto Agents”, *Arizona Journal of International & Comparative Law*, vol. 14 (1997), pp. 635.

³⁹ ILC Commentary, art. 5, para 2.

⁴⁰ *Rankin v. Iran*, 17 Iran-USCTR 135 (1987-IV).

⁴¹ *Yeager v. Iran*, 17 Iran-USCTR 92, 101 (1987 — IV).

⁴² *Hyatt International Corporation v Iran*, 9 Iran-USCTR 72 (1985 — II).

⁴³ “Erez Crossing Will Be Operated by Private Company Starting Thursday”, *Haaretz*, 18 January 2006.

with which it had direct contracts provided services that “are defensive in nature”: “personnel security for senior civilian officials, non-military site security (buildings and infrastructure), and non-military convoy security.”⁴⁴ In the same vein, the US Department of Defense claims that “PSCs are not being used to perform inherently military functions”⁴⁵ and that contractors are utilized to free up troops for offensive combat operations — not to perform such operations themselves. The Sierra Leone or Angola scenario where firms have acted as force multipliers or even fought the war on behalf of the governments is thus explained as an aberration. Indeed, very few firms today appear to be willing to engage directly in combat operations.⁴⁶

Such claims are difficult to verify. There are reports of PMC personnel actively engaging in combat as commonly understood.⁴⁷ With regard to all other activities, the lack of clarity of mandate might result in PMCs taking on activities not explicitly foreseen in their contracts. Ambiguous and open-worded contracts that lend themselves to liberal interpretation by both contract parties, combined with disregard for internal policies and lack of oversight, facilitate this kind of mission creep.⁴⁸ In one instance, a firm was contracted for assistance in law enforcement; on the ground the mandate translated into participating in raids carried out by the Iraqi police.⁴⁹

Furthermore, although it may now be unlikely that a PMC is contracted to fight a war on behalf of or alongside a national army, many conflicts do not correspond to this model of “war”. PMC employees operating in an environment where they may be fired upon by non-state actors who may indiscriminately attack both military and non-military targets⁵⁰ frequently contradict the assertions of government officials. Private contractors described their activity in Iraq as “working in and amongst the most hostile parts of a conflict or post-conflict scenario”;⁵¹

⁴⁴ US Congressional Research Service, “Private Security Contractors in Iraq” (footnote 12 above), p. 3.

⁴⁵ Daniel Bergner, “The other Army”, *New York Times Magazine*, 14 August 2005, p. 32.

⁴⁶ However, Patrick Toohey, vice president for government relations at Blackwater, described how his employees “fought and engaged every combatant with precise fire” and “conducting a security operation”, David Barstow et al., “Security Companies: Shadow Soldiers in Iraq”, *New York Times*, 19 April 2004.

⁴⁷ Singer, *Corporate Warriors* (footnote 10 above), p. 208.

⁴⁸ Schooner, “Contractor Atrocities at Abu Ghraib” (footnote 11 above), p. 564; Holmqvist, “Private Military Companies” (footnote 12 above), p. 25; see also chapter twelve in this volume by Laura Dickinson.

⁴⁹ Renae Merle, “DynCorp took part in Chalabi raid”, *Washington Post*, 4 June 2004.

⁵⁰ PMC personnel have become an explicit target of Al Qaeda, “Australians Targeted in Baghdad Blasts: al-Qaeda”, *Sidney Morning Herald*, 26 October 2005.

⁵¹ Michael Battles, co-founder of the PMC Custer Battles, cited in David Barstow et al., “Security Companies: Shadow Soldiers in Iraq” (footnote 45 above).

“Security in a hostile fire area is a classic military mission”.⁵² It is likely that this is a more realistic description of their work in low-intensity conflicts, such as Iraq or Colombia, where without a clear frontline protecting individuals or buildings can easily slide into participating in the hostilities. Contractors guarding reconstruction projects or escorting supply convoys through hostile territory are as much in the battlefield as US troops. Even providing security for food delivery can result in being drawn into combat situations, as the death of four Blackwater employees in Fallujah, Iraq, illustrated.⁵³ The distinction between security and military, defensive and offensive operations appears therefore rather artificial.⁵⁴ The use of sophisticated weapon systems is another change in warfare that adds to this haziness and might require rethinking the notion of combat. Contractors are hired to maintain and operate those systems that can have as much impact on the battlefield as troops fighting on the ground, thus being equally “mission critical”.⁵⁵

The ambiguities surrounding both the notion of governmental authority and the nature of activities of PMCs make it difficult to apply a principle of attribution based on the performance of governmental functions.⁵⁶

Attribution de facto: control and instructions

Where the conduct in question cannot be said to constitute the exercise of governmental authority, or where no authorization exists, private conduct is also attributed to the state when it is carried out on the instructions of the state or where the private actor is under the state’s direction or control.⁵⁷ A state hiring a firm and instructing it to abuse prisoners or arresting insurgents is a fairly clear-cut case. Much more complex is the situation in which no such instructions exist, but where the state played a role in the preparation and in the implementation

⁵² Senator Jack Reed, member of the US Armed Service committee, in a letter to Defense Secretary Rumsfeld, cited in David Barstow et al., “Security Companies: Shadow Soldiers in Iraq” (footnote 45 above).

⁵³ David Barstow, “Iraqi Escorts Lured US Contractors into Ambush, Security Firm Says”, *New York Times*, 10 April 2004.

⁵⁴ See also FCO Green Paper (footnote 7 above), para. 11. According to a bid proposal, the contractor will have to “direct fire by mortars and rockets, individual suicide bombers, and employment of other weapons of mass destruction ... in an unconventional warfare setting,” Walter Pincus, “More Private Forces Eyed for Iraq; Green Zone Contractor Would Free US Troops for Other Duties”, *Washington Post*, 18 March 2004.

⁵⁵ Singer, *Corporate Warriors* (footnote 10 above), p. 90.

⁵⁶ For a different conclusion see University Centre for International Humanitarian Law, “Expert Meeting” (footnote 6 above), p. 20.

⁵⁷ ILC Articles, art. 8 reads: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of person is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”

of the operation by directing or controlling it. When the ILC drafted the article laying down the principle of attribution by virtue of control, direction, or instructions it meant to address those cases where the state supplements its actions by recruiting private actors acting as “auxiliaries” without integrating them in the state apparatus,⁵⁸ though it also noted that mere recruiting is not sufficient: a “real link” between the private group or person and the state is required.⁵⁹ The extent to which the state must “control” the private actor and its operations is, however, subject to debate.

The International Court of Justice considered this question in 1986 in the *Nicaragua* Case:

What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government. Here it is relevant to note that in May 1983 the assessment of the Intelligence Committee ... was that the *contras* ‘constitute(d) an independent force’ and that the ‘only element of control that could be exercised by the United States’ was ‘cessation of aid’. Paradoxically this assessment serves to underline, *a contrario*, the potential for control inherent in the degree of the *contras*’ dependence on aid. Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf ... even the general control of the respondent State with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.⁶⁰

⁵⁸ ILC Commentary, art. 8, para. 2.

⁵⁹ ILC Commentary, art. 8, para. 1.

⁶⁰ ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment (Merits), 27 June 1986, ICJ Reports 1986, paras. 109-115.

Consequently, from the ICJ’s perspective, “effective control” had to be established, which Judge Ago, in his Separate Opinion, specified as involving specific instructions to commit a particular act or to carry out a particular task of some kind.⁶¹ Even though the Court acknowledged that the Contras were dependent on US funding, the lack of control on the part of the United States over the specific operations prevented the judges from attributing their activities to the United States. Under this reading, if a state hired a PMC but did not exercise control over all its operations, even if the PMC would have to discontinue an operation upon cessation of payment, their conduct would not be deemed as attributable to the hiring state, less so to the exporting state.

An obvious issue in this context is that PMC personnel hired by US agencies in Iraq fall outside the military chain of command unless they enter a US military facility.⁶² The relationship between PMCs and the military is described as one of “informal coordination”, consisting of regular meetings to share information and coordinate and resolve conflicts in operations. Contractors have reportedly erected unauthorized checkpoints and claimed to have the power to detain and confiscate identity cards, apparently without the knowledge of the commander in the theatre.⁶³ In some cases, the control relationship is reversed: according to the Fay Report, the contractors implicated in the Abu Ghraib abuses might have “supervised” governmental personnel.⁶⁴ Contract officers, who have the competence to administer the contracts between the hiring US agency and the firm, appear to be rarely on site.⁶⁵ PMC personnel would thus not be deemed as acting on behalf of the United States.

Even less can PMCs be said to act on behalf of a state if the only connection is the fact that a license has been granted. Three key exporting states — the United States, South Africa, and Israel — operate licensing regimes controlling the commercial export of military services.⁶⁶ Yet systematic post-licensing verification mechanisms are lacking — even the US licensing regime as the most sophisticated one fails to adequately monitor PMCs once a licence is issued.⁶⁷ Without any systematic monitoring and oversight mechanism there is very little control

⁶¹ *Ibid.* paras. 188-189.

⁶² Army Field Manual 3 — 100.21, “Contractors on the Battlefield”, (Chapter 1, “Military of Contractor Employees”), available at <http://www.globalsecurity.org/military/library/policy/army/fm/3-100-21/chap1.htm>; GAO, “Actions Needed to Improve Use of Private Security Providers”, GAO-05-737, July 2005, pp. 20-21.

⁶³ “The Baghdad Boom: Mercenaries”, *Economist*, 27 March 2004.

⁶⁴ See Fay Report (footnote 1 above), p. 51.

⁶⁵ Fay Report (footnote 1 above), p. 52.

⁶⁶ See chapter nine in this volume by Marina Caparini.

⁶⁷ See Avant, *Market for Force* (footnote 36 above), p. 147.

over PMC conduct; not even a minimum of control exists where a licensing regime is absent in the first place, as is the case in Britain.

In 1997 the ICTY revisited the question of attribution by virtue of control. In *Tadic*, the Trial Chamber admitted that the *Nicaragua* test was a “particularly high threshold test” but ultimately applied a similarly restrictive method along the lines of the ICJ.⁶⁸ Its decision, however, was overturned by the Appeals Chamber, which was less favourably disposed towards the ICJ approach. The judges dismissed the, in their view, overly strict test and established a more flexible approach according to which requirements could vary under different circumstances.⁶⁹ Where the private actors in question are organized and hierarchically structured — as opposed to a single private individual — more lenient guidelines apply according to which “overall control” over the group would suffice for attribution of conduct of individuals:

Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State ... has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to the group.⁷⁰

If the issuing of specific orders or its direction over individual operations is not required, PMC conduct can be attributed more readily to both the exporting or hiring state, depending on the role played in the planning and financing of their activities.

It might be argued that the Appeal Chamber’s more flexible approach is a response to the increasing significance of non-state actors in international law. Some support for this assumption can be found in its reasoning as to why the ICJ test was too strict. The judges reconfirmed the rationale for attribution of conduct of de-facto agents, which is

to prevent States escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that

⁶⁸ ICTY, Trial Chamber, *Prosecutor v Tadic*, Judgement, 5 July 1997, IT-94-1-T, paras. 588, 605, 606.

⁶⁹ ICTY, Appeals Chamber, *Prosecutor v Tadic*, Judgement, 15 July 1999, IT-94-1-A, para. 117

⁷⁰ *Ibid.* para. 137.

individuals actually participating in the government authority are not classified as State organs under national legislation and therefore do not engage State responsibility.⁷¹

However, the circumstances of the case and the reason why the court examined the question of attribution caution against reading too much into the decision for present purposes. The Chamber addressed this issue in order to determine the existence of an “international conflict” for the purpose of establishing jurisdiction. Recently, the ICJ reaffirmed its own *Nicaragua* approach.⁷²

On the other hand, the difference between the *Nicaragua* scenario and the situation in which PMCs operate in conflict zones with the consent of the respective government might justify a departure from the ICJ test. Both the *Nicaragua* and the *Congo* cases dealt with “mercenary” or “volunteer” groups that intruded foreign territory without the knowledge and then against the will of the “host” state. If the private actor operates without the knowledge and acceptance of the “host” state, or if the hiring or exporting state is different from the state where the private actors carry out their activities, the potentially increased difficulty of directing the tactics or course of an operation and the lack of permanent territorial control⁷³ might necessitate proof of a greater degree of control over the conduct of those groups.

The latter appears to have been an important factor in the deliberations of the ICTY Appeals Chamber:

Of course, if, as in *Nicaragua*, the controlling State is *not the territorial State* where the armed clashes occur, or where at any rate the armed units or groups perform their acts, more and compelling evidence is required to show that the State is genuinely in control of the units and groups not merely by financing and equipping them, but also by generally directing or helping plan their actions ... Where the controlling State is the adjacent State with territorial ambitions on the State where the conflict is taking place, and the

⁷¹ *Ibid.* para. 117.

⁷² ICJ, *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 9 December 2005, ICJ Reports 2005, para. 160.

⁷³ As opposed to formal sovereignty: “Physical control of a territory and not sovereignty or legitimacy of title, is the basis of state liability for acts affecting other states”, ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports 1971, para 118. See also ECtHR, *Loizou v. Turkey*, Judgment (Merits), 28 November 1996, appl. no. 40/1993/435/514, para. 56.

controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold.⁷⁴

According to the Appeals Chamber, the extent of control required decreases with the increasing proximity of the controlling state to the territory where the private conduct takes place, as it then can be more readily presumed that the controlling state can produce effects outside its own territory. This would suggest that where PMCs are hired by the state on whose territory they operate or by the state present in the territory where they operate (as was the case in Iraq), only overall control over the firm as such through the state is required; depending on the proximity of the exporting state to the host state a greater degree of control is necessary. The appropriateness of relying on the criterion of proximity alone is open to question: physical distance is certainly not conclusive as to the degree of control actually exercised if the controlling state has sophisticated means of communication at its disposal enabling it to control the course of an operation. However, the reference to the motivation of the controlling state (territorial ambition) might point to the more general idea that the fact that the government of the host state knows and approves of the presence of PMCs makes it easier for the controlling government to direct the private conduct. This is even more so where the hiring state is also the host state. Therefore, there is some basis for the view that the degree of control required for the purposes of attribution may vary according to the circumstances of the situation.⁷⁵

Private conduct is private conduct but still gives rise to state responsibility: a question of due diligence

Where conduct of PMC personnel is not attributed to the state, it might still be taken into account in determining state responsibility if it is accompanied by certain actions or omissions on part of the state, as confirmed by the International Court of Justice in the *Corfu Channel* case. Although it was not certain whether mines laid in Albanian waters and damaging British vessels were laid by Albanian officials or by private individuals, the ICJ found that since “nothing was attempted by the Albanian authorities to prevent the disaster”, these “grave omissions involve the

⁷⁴ ICTY, Appeals Chamber, *Prosecutor v Tadic* (footnote 68 above), paras. 138 — 140.

⁷⁵ See ILC Commentary, art. 55, para. 2.

international responsibility of Albania.”⁷⁶ Similarly, the ICJ held Iran responsible for the hostage taking at the US embassy in Tehran for, inter alia, failure to take appropriate steps either to prevent the militants from invading the Embassy or to persuade or compel them to withdraw.⁷⁷ In other words, if the state fails to show due diligence in attempting to prevent or respond to the violation of international law, it is not the private conduct itself but its omission or insufficient effort to prevent or respond to it that might generate its international responsibility.⁷⁸ However, an omission or failure to take certain action as such is not relevant for the purposes of state responsibility. There must be, at a minimum, a conventional or customary obligation to endeavour to control private conduct.

Here a note of caution must be made. The concept of due diligence has been discussed primarily in the context of injuries to aliens, in very few instances with regard to diplomatic and consular relations⁷⁹ and the law of neutrality.⁸⁰ In the context of environmental and space law the required conduct is often specified in the respective treaty.⁸¹ The lack of jurisprudence in other fields of law cautions against an assumption that this is a general principle of international law.⁸² For example, Article 1 of the Geneva Conventions and the First Additional Protocol establishes a positive obligation for states “to ensure respect” for international humanitarian law, but it could be argued that it is related merely to an overall policy, rather than imposing specific obligations on states to train or instruct PMCs.⁸³

However, on the basis of Article 43 of the Hague Regulations the ICJ recently found Uganda, as the occupying power in the Ituri district in the Democratic Republic of the Congo, responsible for its “lack of vigilance in preventing the violation of human rights and international humanitarian law and not to tolerate such violence by a third party.”⁸⁴ The matter is also fairly established in the case law of human rights bodies. Conventions oblige states to “ensure”,

⁷⁶ *The Corfu Channel Case (United Kingdom v. Albania)*, Judgment (Merits), 9 April 1949, ICJ Reports 1949, pp. 4, 23. See also *Noyes (United States) v. Panama*, 22 May 1933, RIAA vol. VI, pp. 308, 311.

⁷⁷ *United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, Judgment, 24 May 1980, ICJ Reports 1980, para. 63.

⁷⁸ See *Alabama Claims* arbitrations (United States-Britain, Claims Arbitration, 1872, summarized in Herbert W. Briggs, *The Law of Nations* (New York: Appleton-Century-Crofts, 1947), pp. 866-871.

⁷⁹ *Tehran Hostages Case* (footnote 76 above); Robert Ago, *Fourth Report on State Responsibility*, UN Doc A/CN.4/264, in YBIL 1972 II 97, para. 65.

⁸⁰ *Alabama claims* (footnote 77 above).

⁸¹ See, e.g., Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).

⁸² But see Robert Ago, *Fourth Report on State Responsibility*, UN Doc A/CN.3/264, para. 145.

⁸³ University Centre for International Humanitarian Law, “Expert Meeting” (footnote 6 above), p. 44.

⁸⁴ ICJ, *Case Concerning Armed Activities in the Territory of the Congo* (footnote 71 above), para. 178.

“protect”, or “secure” rights.⁸⁵ These obligations have been interpreted as requiring states to take positive steps in order to prevent the violation of rights through private actors.⁸⁶ In doing so, it was recognized that a concept solely focusing on public authorities as potential violators of human rights would result in a significantly diminished protection. This problem is particularly underscored in the case of “disappearances”, where it is often difficult to establish whether state organs or private individuals are responsible for the abduction, and if the latter is the case, what relationship that individual has with the state. This issue was explicitly addressed by the Inter-American Court of Human Rights in the *Velasquez Rodriguez* case, where the Court found that the disappearance of Velasquez Rodriguez gave rise to Honduras’ responsibility although it could not be determined whether he had disappeared at the hands of or with the acquiescence of Honduran officials,⁸⁷ not “because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”⁸⁸ Human rights protection would similarly lose meaning if states could evade responsibility by shifting responsibilities to the private sector. Therefore, the European Court of Human Rights held that “the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals”.⁸⁹

Of course, this begs the question just what diligence is due — the mere fact that a positive obligation interests protected by international law through a positive obligation have been violated by private actors does not suffice in itself to generate international responsibility. Although the existence of the concept is not disputed, a clear-cut definition has not emerged so far and is probably impossible to articulate.⁹⁰ Rather, the precise degree will vary according to the circumstances⁹¹ and the level of protection provided by applicable norms.⁹² However, it is

⁸⁵ See, e.g., International Covenant on Civil and Political Rights, art. 1(2); American Convention on Human Rights, art. 1; European Convention on Human Rights, art. 1.

⁸⁶ See for the following August Reinisch, “The Changing International Framework for Dealing with Non-state Actors”, in Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford: Oxford University Press, 2005), pp. 79-80.

⁸⁷ Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras*, Judgment, 29 July 1988, Ser. C, No. 4, para. 148, available at <http://www.corteidh.or.cr>.

⁸⁸ *Ibid.* para. 172

⁸⁹ ECtHR, *Costello Roberts v. United Kingdom*, Judgement, 23 February 1993, appl. no. 13134/87, para. 27; see also *Osman v. UK*, Judgement, 28 October 1998, appl. no. 87/1997/871/1083.

⁹⁰ Francisco V. Garcia Amador, “Second Report on State Responsibility”, YILC 1957 II, p. 104.

⁹¹ Alwyn V. Freeman, “Responsibility of States for Unlawful Acts of their Armed Forces”, 88 *RdC 1955 II*, p. 278.

possible to determine factors to be taken into account, such as the risk of violation of international law, which would be assessed, inter alia, on the basis of what private actors are in play — whether, for instance, they are armed or not, as well as the protected group.⁹³

What this suggests is that where PMC personnel act in violation of human rights or international humanitarian law, their conduct can generate the responsibility of the host or the hiring state for failure to prevent or adequately respond to such conduct even if it is not clear what role state organs have played in the specific operation.⁹⁴ Furthermore, the state must in principle be able to exercise its authority over the private actor. This is at least the case in its own territory and if it occupies another state.⁹⁵ Consequently, the host state or the occupying power might be internationally responsible for failing to exercise due diligence with regard to PMCs. The exporting state is under an obligation to prevent actions of the PMC directed against the territorial integrity of another state,⁹⁶ less clear, however, is whether this principle also applies where the PMC is hired or its presence accepted by the other state. While one might argue that this is desirable and possible in theory, it is important to note that to date no court has found a state to be responsible for failing to control its companies or nationals abroad under such circumstances.

Manifestations of failure to exercise due diligence may be found in domestic legislation that proves inadequate to secure and protect rights: where domestic legislation does not take into account the obligation to “secure to everyone within its jurisdiction the rights and freedoms defined ... in the Convention” and this results in a violation of those rights and freedoms,⁹⁷ or in the lack of oversight, adequate training and background vetting of PMC personnel.⁹⁸ If the lack

⁹² For instance, the protection afforded to diplomatic agents and mission is particularly high, see Art. 22 II and 29 of the Vienna Convention on Diplomatic Relations and Art. 31 III and 40 of the Vienna Convention on Consular Relations; *Tehran Hostages Case* (footnote 76 above), paras. 61-62; Art. 10 of the Harvard School’s 1929 draft.

⁹³ Astrid Epiney, *Die voelkerrechtliche Verantwortlichkeit von Staaten fuer Rechtswidriges Verhalten im Zusammenhang mit Aktionen Privater* (Baden-Baden: Nomos-Verlag, 1992), p. 249.

⁹⁴ With regard to human rights obligations of the state that is not the host state, however, it must be established that those rights apply outside the territory of the hiring or exporting state. For the European Convention of Human Rights see United Kingdom Court of Appeal, *Al-Skeini and others v. Secretary of State for Defence*, Judgment, 21 December 2005.

⁹⁵ ICJ, *Case Concerning Armed Activities in the Territory of the Congo* (footnote 71 above), paras. 172, 178, 179.

⁹⁶ Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), chapters 20, 21, 24; UN G.A. Res. 2625 (XXV), 24 October 1970 (Friendly Relations Declaration).

⁹⁷ ECtHR, *Young, James and Webster v. United Kingdom*, Judgement, 13 August 1981, appl. no. 7601/76; 7806/77, para. 49.

⁹⁸ See Fay Report (footnote 1 above), p. 49; Schlesinger, Final Report of the Independent Panel to Review DoD Operations, available at www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf.

of adequate response is a consequence of deficient execution of an existing legal regime or the lack of competence of authorities to prosecute, this might result in international responsibility as well.⁹⁹

Conclusion

The above analysis demonstrates that there is no legal vacuum in which PMCs operate. States are internationally responsible where PMC engage in law enforcement or interrogation of prisoners, or where their conduct is controlled by a state. Where states do not directly control PMCs but rather give a quiet nod to risk prone or abusive conduct, the same reasons why their conduct is not attributed to the state for lack of control can generate state responsibility for lack of due diligence at least on the part of the host or the hiring state. At present, it appears that the diligence shown with regard to PMCs in conflict zones falls significantly short of what is required under international law. It is open to question whether states are willing to implement an effective oversight and monitoring system: costs are considerable and might raise the costs for retaining PMCs to such an extent that the economic rationale of retaining PMCs services is called into question.¹⁰⁰ The fact that the US government responded to the communications and coordination problems in Iraq between PMCs on the one hand and between PMCs and the Coalition Forces on the other by hiring yet another PMC¹⁰¹ suggests that prospects are rather bleak.¹⁰²

A second finding of the analysis is that considerable uncertainties remain. The question of what does — or should — constitute governmental functions is unlikely to be resolved in the near future; according to the ICJ, the degree of control necessary to establish state responsibility is a high one and would essentially require a structure allowing the hiring or host state to control the course of the operation. Yet a departure from this test might be justified in certain situations. Indeed, in coping with the changing role of PMCs, at least in the short term, a repositioning of the public-private parameters that determine state responsibility for private conduct might be the most viable solution. Within the limitations set by the state-centeredness of international law, there is room for manoeuvring by lowering the threshold for attribution, and increasing due

⁹⁹ *Neer (United States) v. Mexico*, 15 October 1926, RIAA vol. IV, pp. 60-61.

¹⁰⁰ See Fay Report (footnote 1 above), p. 52; Singer, *Corporate Warriors* (footnote 10 above), p. 153.

¹⁰¹ Tracey Boles, “Dog of War builds Pounds 62m business on Iraq”, *Sunday Times*, 5 February 2006.

¹⁰² See also GAO, Statement of William Solis, Director Defense Capabilities and Management, “Rebuilding Iraq: Actions Still Needed to Improve the Use of Private Security Providers”, June 2006.

diligence requirements where the private activity is inherently risk prone, or fundamental rights at stake.

Of course, shifting conceptual boundaries will not render international law a sufficient tool to regulate the use and conduct of PMCs. The enforcement problems of international law are well known. PMCs thrive in weak and failing states, which have little bargaining power and are unlikely to be in a position to monitor and restrict PMC conduct, or to enforce the responsibility of another hiring state. Even where states are willing and in principle able to monitor the activities of PMCs, the private nature of PMCs provides them with means of protection from scrutiny not available to public actors, such as arguments of privacy and client confidentiality. Issues of extraterritorial jurisdiction compound the problem.

An inherent limit is the very nature of state responsibility as a state-centred concept: PMCs are outside its radar even where they are allowed to reverse control relationships vis-à-vis the state, as outlined by James Cockayne in chapter eleven. It does not endeavour to address the responsibility of PMCs as such, nor do the consequences of state responsibility directly target actors other than the state: as a result, the public-private divide underpinning the concept of state responsibility does not reflect the convoluted relationships between the exporting, the hiring, the host state, the PMC and its non-state clients. This is particularly problematic where PMCs do not merely implement policy or concrete decisions, but shape them.¹⁰³ Suppose a PMC, authorized or even sent by a Western government, advises a war-torn country or trains its military. While it might act as a proxy of the exporting state, it is conceivable that vis-à-vis its client the roles are reversed, either because of its superior expertise or because of conditions set by the exporting government. Particularly troubling is the possibility that the decision over the use of force, although formally in the hands of the states, is essentially made by the firm. For instance, even where state agents pull the trigger or push the button, if the identification of the target depends to a large extent on the PMC contracted to gather intelligence, holding the state responsible alone addresses only one dimension of the problem, or indeed obscures the real issue.¹⁰⁴ By definition the law of state responsibility does not consider the roles of private and public actors in the

¹⁰³ See Anna Leander, “The Power to Construct International Security: On the Significance of Private Military Companies”, *Millennium*, vol. 33 (2005), pp. 803, and her chapter three in this volume.

¹⁰⁴ In 2003, two AirScan employees helped the Colombian military bombing a village killing 18 civilians by identifying potential targets, Christian Miller, “US Pair’s Role in Bombing Shown”, *Los Angeles Times*, 16 March 2003.

decision -making process; merely re-interpreting it will not suffice to take into account the potentially crucial impact of private commercial interests on state conduct.

While acknowledging these limits of international law, this chapter argues that in considering a regulatory framework for dealing with PMCs more attention must be paid to the responsibility of states. Failure to do so would ignore an important dimension of the phenomenon: PMCs go where their presence is either requested or accepted by the state. Some states have an interest in retaining PMCs as a flexible tool by which their continuing influence in regions that are not of immediate strategic relevance is ensured, or where sending uniformed military is politically unpalatable, and in keeping the costs for doing so low. Perhaps more importantly, ignoring the law of state responsibility is to dismiss the central role of states in the context of force and might ultimately result in an abdication of responsibility for peace, international security and the protection of the individual. The monopoly of states to control violence is a consequence of the realization that governance through states is the most effective means to place limits on the use of force. Viewed in this light, in the context of military affairs the state-centeredness of the concept of state responsibility might be seen not as a reflection of its failure to keep pace with changes in the military landscape, but as an institutionalization of this insight.