


Summer 2006

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## Recommended Citation

Hallo de Wolf, Antenor (2006) "Modern Condottieri in Iraq: Privatizing War from the Perspective of International Human Rights Law," *Indiana Journal of Global Legal Studies*: Vol. 13: Iss. 2, Article 1.  
Available at: <http://www.repository.law.indiana.edu/ijgls/vol13/iss2/1>

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# Modern *Condottieri* in Iraq: Privatizing War from the Perspective of International and Human Rights Law

ANTENOR HALLO DE WOLF\*

## INTRODUCTION

The publication in April 2004 of the shocking photos depicting Iraqi prisoners that had allegedly been abused by U.S. military personnel took world opinion by surprise. The question was raised how this could have happened and whether U.S. military personnel were properly trained in the basic rules of international humanitarian law and human rights. The surprise became even greater after it became known that not only military personnel had been involved in the abuse, but also contractors of private military and security companies. As a way of compensating for the relatively small numbers of regular army personnel involved with handling and processing detainees, the U.S. Army apparently contracted two private military and security companies to provide support for translation and interrogation duties. The presence of private military and security companies (PMSCs) in Iraq had already been the focus of discussion following the shocking pictures of the burnt bodies of four PMSC contractors who had been ambushed by insurgent militia in the troubled city of Falluja while escorting a convoy at the beginning of April 2004. The apparent complicity of the personnel of PMSCs in the abuse scandal at Abu Ghraib fueled further controversy about the wisdom of utilizing their services. Almost two years after the Abu Ghraib incident was widely discussed in the media, there is no clear picture regarding the role of PMSC personnel in the abuse scandal or their potential responsibility for the human rights violations that took place.

The use of PMSCs in military conflicts is a phenomenon that, in spite of being current, is not new. Employees of PMSCs such as Sandline International, a British company that recently ceased its activities, and MPRI, an American corporation providing a variety of security- and military-related services, have

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been employed in various armed conflicts around the world with varying degrees of success. The large-scale use of these companies during and following the invasion of Iraq in 2003 has, however, focused the world's attention on this controversial topic thus leading to the question whether war is being privatized.

The delegation or contracting out of what would appear to be "typical" or essential state tasks and activities (the use of force in times of war, the provision of security, and the custody and interrogation of prisoners of war and common prisoners) to private companies is already contentious. This approach becomes even more questionable when it appears that these companies, or their employees, are responsible for, or have been involved in, the violation of rules of international humanitarian law and human rights. To what extent is the state responsible for the conduct of employees of these companies? Are these companies legally accountable for these actions under international law? What are the remedies available to the victims of abuses perpetrated by these companies or their employees? This last question is of special importance due to the fact that the Iraqi judicial system is probably not yet in the position to function normally to provide an objective, impartial, quick, and efficient way of adjudicating disputes. Moreover, the United States has successfully negotiated and obtained immunity for its citizens, including private contractors, against criminal prosecution in Iraq for their activities in that country.<sup>1</sup>

This article attempts to clarify these questions and provide an overview of the relevant applicable rules of international law. Following a general overview of the privatization of military and security services and tasks, this article will analyze whether the use of PMSCs is contrary to international law. It will then describe the presence of these companies in Iraq, including the alleged violations of international humanitarian law and human rights in Abu Ghraib prison. This will be followed by an attempt to examine the responsibility of the United States for violations committed by PMSC contractors. Finally, an analysis of the available remedies for the victims of these abuses will be provided in light of the international legal obligations of the United States.

## I. IS WAR BEING PRIVATIZED?

Can contracting out military tasks to private companies be considered a type of privatization? There is no unambiguous and agreed-upon definition of priva-

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1. See *infra* Part VI—Legal Remedies Available to Victims.

tization. Many scholars disagree on a concrete definition for the term; sometimes it is easier to point to situations that might indicate that privatization is taking place or has actually occurred. This is due to the fact that privatization can take many forms, facets, and techniques.<sup>2</sup> In spite of the lack of a formal definition for privatization, what most characterizes privatization is the reallocation of public ownership, assets, functions, services, management, or tasks to private hands. For the purposes of this article, privatization is defined as the deliberate and policy-based transfer of certain public functions, tasks, or services from the state to private actors who then carry them out.<sup>3</sup>

Privatization can occur through the transfer of ownership, through the delegation of management, through contracting out, or through deliberate withdrawal from a public-delivered task with the intention of letting private actors take over. With regard to the subject at hand, privatization would entail a transfer of military tasks, services, and functions normally carried out by a state's armed forces. It must be emphasized that the above-noted definition does not cover the public procurement or acquisition of projects and material in the private market. Public procurement and acquisition are not controversial, and governments all around the world make use of these tools.

Contracting out or delegating tasks that had previously been carried out exclusively by national armed forces, although not a new phenomenon, has gathered enormous momentum in the last thirty years. Among the reasons cited for the increasing reliance on private companies to provide military tasks and services are the reduction of military budgets in a number of Western countries and

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2. See Paul Starr, *The Meaning of Privatization*, in *PRIVATIZATION AND THE WELFARE STATE* 15, 16 (Sheila B. Kamerman & Alred J. Kahn eds., 1989) (discussing the difficulty of coming up with a proper definition of privatization); Terence C. Daintith, *Legal Forms and Techniques of Privatisation*, in *LEGAL ASPECTS OF PRIVATISATION* 50, 50 (1993); Wouter Devroe, *Privatisering en verzelfstandiging: Een verkenning vanuit Europees en nationaal economisch recht* (2000) (dissertation, Katholieke Universiteit Leuven), available at <http://www.law.kuleuven.ac.be/jura/37n3/devroe.htm>.

3. A Council of Europe Recommendation defines privatization as "the total or partial transfer from public to private ownership or control of a public undertaking so that it ceases to be a public undertaking" and "the transfer to a private person of an activity previously carried on by a public undertaking or public authority, whether or not accompanied by a transfer of property." Recommendation No. R (93) 7 of the Committee of Ministers to Member States on Privatisation of Public Undertakings and Activities, 500th Meeting (Oct. 18, 1993), available at <http://www.coe.int/defaultEN.asp> (follow "Committee of Ministers" hyperlink; then follow "Documents A-Z index" hyperlink; then "Recommendations of the Committee of Ministers to Member States" hyperlink; then set "1993" as the Search period and search for Reference/keyword "(93) 7").

the desire to cut costs. This has spurred governments to search for alternatives by which certain military tasks can be carried out for a fraction of the cost and in a more efficient way.<sup>4</sup> This initially involved contracting out certain logistical aspects of running an army, such as building military bases, the preparation and delivery of meals for military personnel, and the maintenance and repair of military equipment and weaponry.

More recently, however, tasks that could be considered part of the core responsibilities of the armed forces are being contracted out to private companies. These may include training soldiers, providing armed convoys in conflict situations, providing security for buildings, industrial installations, and high-profile persons,<sup>5</sup> and in some cases, direct participation in combat activities. The U.S. company MPRI, for example, recruits experienced former Army personnel that are then contracted out to provide training to military forces, develop military doctrine, provide assistance for peacekeeping and humanitarian operations, or to assist in the war against terrorism.<sup>6</sup> The United States Department of Defense already has many years of experience in actively contracting with various companies for the provision of these tasks and services.<sup>7</sup>

The demand for contracting out military tasks has also fueled the supply of private military companies. The demobilization of military personnel resulting

4. See P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 53 (2003); Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1, 8 (2001). Some commentators, however, have pointed out that the efficiency and cost reduction expectations were not at the top of the priority list of reasons to contract out certain military tasks to private companies in the United States, nor have all the expected efficiency and cost gains been realized. See Ann R. Markusen, *The Case Against Privatizing National Security*, Presented at a Meeting of the International Political Science Association (March 20, 2001), *reprinted in* 16 GOVERNANCE 471, 472–80 (2003).

5. The security of the former head of the American-established Iraqi Provisional Authority, Paul Bremer III, was entrusted to an American PMSC. See Patrick Radden Keefe, *Iraq: America's Private Armies*, N.Y. REV. BOOKS, August 12, 2004, at 48 (reviewing P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003)). Afghan leader Hamid Karzai is continuously escorted by private security guards. See, e.g., *DynCorp's Assignment: Protect Afghan Leader*, WASH. POST, Dec. 2, 2002, at E1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A61827-2002Dec1?language=printer>.

6. The website of MPRI contains a list of the various activities which the company carries out. See MPRI: Capabilities, <http://www.mpri.com/site/capabilities.html> (last visited Feb. 12, 2006).

7. The website of DynCorp, another American PMSC, has examples of the various and diverse activities that are currently being carried out and for which they are currently recruiting personnel. See DynCorp International: Careers, <http://recruiting.dyn-intl.com> (last visited Feb. 12, 2006).

from the end of the Cold War encouraged many former soldiers to offer their expertise and experience to PMSCs or create companies of their own. Additionally, a number of developing countries are resorting more frequently to the use of PMSCs, in the absence of well-trained armed forces, to deal with internal conflict.<sup>8</sup>

The operation of Executive Outcomes (EO), a South African PMSC, in Sierra Leone in 1995<sup>9</sup> caused a serious debate about deploying PMSCs in armed conflicts. It raised questions about their use as a cheap alternative to traditional peacekeeping and the necessity of regulating their activities. At the request of the House of Commons, the British Minister of Foreign Affairs, Jack Straw, prepared a "Green Paper" describing the different options for regulation of PMSCs, as well as the possible scenarios in which these companies could be used, and noting the arguments for and against their use.<sup>10</sup> Although the Green Paper was meant to stimulate debate on the use of PMSCs, the position taken by Straw and the response to the Green Paper from the House of Commons appeared to indicate that, at least from the perspective of the British government, the use and deployment of PMSCs in conflict situations could be a positive development, as long as their activities are carefully regulated.<sup>11</sup>

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8. In 1995, the government of Sierra Leone contracted the now-defunct South African company Executive Outcomes (EO) to engage in offensive operations against the rebel group, Revolutionary United Front (RUF). See DAVID SHEARER, *PRIVATE ARMIES AND MILITARY INTERVENTION* (Int'l Inst. for Strategic Studies, Adelphi Paper No. 316, 1998). In 1996, the government of Papua New Guinea resorted to contracting the services of Sandline International, a British PMSC that has also recently closed down its operations, in order to deal with an insurrectional movement on the island of Bougainville. Sandline's military expedition was terminated, however, before it really began, following protests from the Papuan Army that pressured the government, at the last minute, to rescind the contract with Sandline. See generally Tim McCormack, *The 'Sandline Affair': Papua New Guinea Resorts to Mercenarism to End the Bougainville Conflict*, 1 Y.B. INT'L HUMANITARIAN L. 292 (1998).

9. In general, EO's operation in Sierra Leone was considered successful. EO achieved what the regular army of Sierra Leone could not: It managed to pacify and restore order in the chaotic region where RUF rebels operated. EO's operation brought some stability and a (temporary) peace that paved the way for the first democratic elections in Sierra Leone. See Herbert M. Howe, *Private Security Forces and African Stability: The Case of Executive Outcomes*, 36 J. MOD. AFR. STUD. 307, 313–17 (1998). The country's relapse into chaos after EO's departure can be considered evidence of the importance of the presence of these companies in conflict regions, or, on the other hand, evidence of the failure on their part to bring actual stability in those conflicts.

10. See FOREIGN AND COMMONWEALTH OFFICE, *PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION*, 2001-2, H.C. 577, at 9–26.

11. See FOREIGN AFFAIRS COMMITTEE, *PRIVATE MILITARY COMPANIES*, 2001-2, H.C. 922, at 41–43, available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmfaff/922/92202.htm>.

These developments lead to the conclusion that the use of PMSCs in armed conflict is a particular type of privatization: the deliberate and policy-based transfer of public tasks to private actors. It must be noted, however, that most of the privatization initiatives in the military field are focused on the delegation of support and logistical tasks that were previously carried out by national armed forces. This type of privatization does not appear to be controversial, and many armies around the world have taken steps to privatize these tasks. There is, however, an increasing tendency to contract out certain tasks that involve coercion and the lethal use of force. This was the case in Sierra Leone and Papua New Guinea; due to a perceived lack of capacity, expertise, experience, and professionalism in their own armed forces, the governments of these countries hired PMSCs for offensive operations.<sup>12</sup> Additionally, countries such as the United States have chosen to contract out certain "lighter" military tasks, which can also involve the lethal use of force, in order to allow their own armed forces to concentrate on the heavier and more earnest offensive tasks. These tasks include providing for the security of important buildings or installations in conflict areas, protecting political figures, escorting convoys, interrogating prisoners, and providing intelligence and physical support to the militaries of a number of countries in counter-insurgency operations against guerrillas or terrorists.<sup>13</sup> This type of privatization is more controversial due to the fact that the state monopoly on the use of lethal force is, to a certain extent, being transferred to private entities, sometimes without any clear form of regulation.

## II. IS THE USE OF PMSCs IN ARMED CONFLICT CONTRARY TO (INTERNATIONAL) LAW?

The deployment of individuals who seek financial remuneration for their activities but do not belong to the armed forces of countries participating in war operations or armed conflict is not a new phenomenon. Mercenaries have participated in armed conflicts since ancient times.<sup>14</sup> The status of mercenaries and

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12. Admittedly, contractors of PMSCs in Iraq have officially been authorized to use (lethal) force only for self-defense.

13. The United States has deployed employees of MPRI in Colombia to assist in the fight against extreme left-wing guerrillas and drug lords. See SINGER, *supra* note 4, at 206–07.

14. The Greeks and Romans used mercenary battalions in their military campaigns. The Swiss free companies also frequently offered their services during conflicts in Europe. The *condottieri*, who were particularly active during the Renaissance in Italy, are also worth mentioning here. For a more complete description of mercenary activities throughout the ages, see ANTHONY MOCKLER, *THE MERCENARIES* (The Macmillan Co. 1970) (1969).

other private entities participating in armed conflicts has, however, become the subject of discussion at the international and national level. In the following paragraphs, the status of PMSCs under international and national law will be discussed before examining their use in the Iraqi conflict. In particular, attention will be paid to the question whether the deployment of PMSCs conflicts with international or national law.

#### *A. PMSCs and International Law*

International humanitarian law, including the 1907 Hague regulations on warfare and the Geneva Conventions of 1949, does not prohibit the deployment of private armies or mercenaries in armed conflicts and does not impose major restrictions on the use of private actors that support or accompany conventional armed forces.<sup>15</sup> However, these participants are obligated to abide by the rules of international humanitarian law, and civilians, even if they are allowed to accompany the armed forces, are not allowed to actively participate in the fighting: A civilian who "aids, abets, or participates in the fighting is liable to punishment as a war criminal under the laws of war."<sup>16</sup>

Due in part to the cruel behavior of mercenaries in several decolonization conflicts in Africa during the 1960s and 1970s, many countries agreed that it was necessary to effectively prohibit mercenaries' activities. This led to the inclusion

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15. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, § A(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, stipulates that the "[p]ersons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany" are also entitled to prisoner-of-war status when captured. *See also* Convention Respecting the Laws and Customs of War on Land (IV) art. 13, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631. These provisions entail, however, that this category of persons (which would include personnel of PMSCs) are not authorized, in principle, to actively participate in the hostilities. Doing otherwise would make this category of persons legitimate targets for the opposing parties of the conflict. *See* Steven J. Zamparelli, *Contractors on the Battlefield: What Have We Signed Up For?*, A.F. J. LOGISTICS, Fall 1999, at 11, 16–17. With regard to mercenaries, *see* Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (V) art. 17, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654, which indicates that mercenaries do not violate international law by taking part in foreign conflicts. Once a mercenary from a neutral state joins a party to the conflict, he cannot use neutrality as a defense. *See* Bohunka O. Goldstein, *Mercenarism*, in 1 INTERNATIONAL CRIMINAL LAW 439, 445 (M. Cherif Bassiouni ed., 2d ed. 1999).

16. The Hostages Trial: Trial of Wilhem List and Others, in 8 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 58 (1949).



of article 47 of the First Additional Protocol to the Geneva Conventions (Protocol I) and the drafting of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries (International Convention), which entered into force in 2001. Article 47 of Protocol I does not actually prohibit the deployment of mercenaries, but it does deny them prisoner-of-war status.<sup>17</sup> Under this provision, mercenaries have less protection than the regular personnel of armed forces and other lawful combatants. In contrast to Protocol I, the International Convention prohibits the use of mercenaries in armed conflicts and brands their activities as criminal.<sup>18</sup>

It has been claimed that PMSCs and their personnel are the modern variant of mercenaries.<sup>19</sup> The question that arises here is whether these companies and their contractors truly qualify as mercenaries under international humanitarian law. Both Protocol I and the International Convention provide a cumulative list of requirements that have to be met in order to brand someone as a mercenary.<sup>20</sup>

17. Thus, mercenaries are branded as unlawful combatants. Knut Ipsen, *Combatants and Non-Combatants*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS* 65, 69 (Dieter Fleck ed., 1995) (citing Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]).

18. "Any person who recruits, uses, finances or trains mercenaries, as defined in article 1 of the present Convention, commits an offence for the purposes of the Convention." International Convention Against the Recruitment, Use, Financing and Training of Mercenaries art. 2, Dec. 4, 1989, 2163 U.N.T.S. 75 [hereinafter International Convention Against Mercenaries]. Additionally, the International Convention Against Mercenaries obliges states to prohibit these activities and make them punishable with appropriate penalties. International Convention Against Mercenaries, *supra*, art. 5.

19. See, e.g., Montgomery Sapone, *Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT'L L.J. 1, 2 (1999).

20. International Convention Against Mercenaries, *supra* note 18, art. 1, reads:

1. A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces [*sic*] of that party;
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

I submit that PMSCs and their personnel do not meet one or more of the requirements necessary to qualify as a mercenary. Although these companies and their contractors operate with the objective of obtaining monetary compensation for their services, they are not being used to overthrow governments or undermine the constitutional order of the state. PMSCs are actually being employed to support governments in power. In fact, executives representing these companies claim that they only work for legitimate governments and assert that doing otherwise would actually be bad business.<sup>21</sup> Additionally, it can easily be maintained that these companies, or their personnel, are not actually taking part in offensive combat activities and that their contracts are usually limited to providing logistical support and protecting buildings and people.<sup>22</sup> Furthermore, the state contracting the personnel of these companies can temporarily allow them to join its armed forces or send them on official duty as permitted by article 1, paragraph 2(d) of the International Convention. As a result, the personnel of these companies do not

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- (d) Is not a member of the armed forces of a party to the conflict; and
  - (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. A mercenary is also any person who, in any other situation:

- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
  - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
  - (ii) Undermining the territorial integrity of a State;
- (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
- (c) Is neither a national nor a resident of the State against which such an act is directed;
- (d) Has not been sent by a State on official duty; and
- (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

The definition of mercenary in article 47 of Protocol I is practically equal to the one found in article 1 of the International Convention Against Mercenaries, but the former does not contain the provisions of paragraph 2. Protocol I, *supra* note 17, art. 47.

21. Nevertheless, it would appear that some firms have provided aid to rebel factions and anti-government dissidents. See SINGER, *supra* note 4, at 11.

22. As a number of incidents in Iraq reveal, it is precisely in these types of situations that PMSC personnel can easily be exposed to combat situations. Thus, their participation in actual hostilities cannot be ruled out. Moreover, this shows how problematic the definition of mercenary can be under article 47 of Protocol I and article 2 of the International Convention Against Mercenaries.

fulfill one or more of the cumulative criteria required by article 47 of Protocol I or the International Convention, and thus do not qualify as mercenaries.<sup>23</sup>

Even one of the most fervent and skeptical critics of PMSCs, the former U.N. Special Rapporteur on Mercenaries, Enrique Ballesteros, has implicitly acknowledged that it is necessary to distinguish these companies and their personnel from actual mercenaries.<sup>24</sup> Ballesteros nevertheless believes that these companies should not hire real mercenaries for their contracts and that the activities of PMSCs should be regulated at the national and international level.<sup>25</sup>

Aside from the difficulties of applying the provisions of Protocol I and the International Convention in practice to the activities of PMSCs, there is an additional problem of whether international law can apply to these entities. The United States and the United Kingdom, the countries in which most of these companies have their statutory seats or operate, are either not parties to both instruments, or have not ratified them. It is doubtful whether article 47 of Protocol I and the International Convention reflect the status of international customary law with regard to the position of mercenaries. The low number of ratifications of the International Convention is an indication of this; only twenty-six coun-

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23. See generally David Kassebaum, Note, *A Question of Facts—the Legal Use of Private Security Firms in Bosnia*, 38 COLUM. J. TRANSNAT'L L. 581, 594–97 (2000) (arguing that MPRI's provision of training and logistical support to the army of the Bosnian Federation are not the type of activities that mercenaries usually carry out). See also SINGER, *supra* note 4, at 44–47. The British Foreign Office's Green Paper concludes that these companies cannot easily be equated to typical mercenaries. FOREIGN AND COMMONWEALTH OFFICE, *PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION*, 2001-2, H.C. 577, at 9.

24. See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation: Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, ¶ 67, U.N. Doc. E/CN.4/2004/15 (Dec. 24, 2003) (prepared by Enrique Bernales Ballesteros).

25. In 2004, Ms. Shaista Shameem took over the mandate as Special Rapporteur on Mercenaries from Mr. Ballesteros, who had been in charge of the mandate since its creation in 1987. In her most recent report to the U.N. Commission on Human Rights, the new Rapporteur stated that she will explore “whether licensing and regulation of genuine private security companies, such as through strong national legislation or an international registration mechanism, could serve to identify clear lines of accountability for bona fide companies.” U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation: Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 2, U.N. Doc. E/CN.4/2005/14 (Dec. 8, 2004) [hereinafter *Mercenaries and Human Rights*] (prepared by Shaista Shameem).

tries had ratified the Convention at the time of this writing, with no great military power among the ratifying countries.

Other than the provisions regarding mercenarism, there are currently no other rules of international law that prohibit or limit the activities of PMSCs. There are "soft-law" instruments that attempt to impose human rights obligations on the conduct of multinational corporations providing security services. For example, in 2003 the U.N. Sub-Commission on the Promotion and Protection of Human Rights adopted a resolution containing a number of norms on the responsibilities of multinational corporations with regard to human rights.<sup>26</sup> In particular, paragraphs three and four of the resolution provide some guidance with respect to the obligations of PMSCs. These paragraphs specify that companies have to abstain from violations of international humanitarian law and human rights violations, such as torture and extrajudicial executions.<sup>27</sup> Although the resolution is not legally binding for either states or companies, it does show a development that acknowledges and attempts to identify the responsibilities of multinational corporations under international law. Currently, however, multinational corporations are very limited subjects of international law and do not have legally binding human rights obligations.<sup>28</sup>

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26. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Promotion and Protection of Human Rights, *Economic, Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

27. *Id.* ¶¶ 3–4. Paragraphs 3 and 4 read as follows:

3. Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.

4. Security arrangements for transnational corporations and other business enterprises shall observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate.

*Id.* ¶¶ 3–4.

28. See generally NICOLA M.C.P. JÄGERS, *CORPORATE HUMAN RIGHTS OBLIGATIONS: IN SEARCH OF ACCOUNTABILITY* (Intersentia, School of Human Rights Research Series Vol. 17, 2002) (describing the extent to which international human rights law is binding on corporations); *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) (discussing the liability of multinational corporations for violating international legal standards).

It is worth noting that an arbitral tribunal instituted to adjudicate the dispute between Papua New Guinea and Sandline International, following the failed attempt to deploy the company's personnel in that country, ruled in favor of Sandline without questioning the company's status under international law or the company's activities.<sup>29</sup> In early 1997, Sandline International signed an agreement<sup>30</sup> with the Deputy Prime Minister of Papua New Guinea to provide military personnel for conducting offensive operations on the island of Bougainville against a separatist movement. On the eve of the operation's deployment, Sandline's personnel were arrested and their equipment confiscated by Papua New Guinea's national defense forces.<sup>31</sup> The arrests were made following a military uprising in protest against the agreement between Papua New Guinea and Sandline. Following the arrests, the Prime Minister of Papua New Guinea suspended the agreement with Sandline and announced a judicial inquiry to establish the facts concerning the agreement.<sup>32</sup> Although the judicial inquiry did not question Sandline's effective engagement under the agreement, Papua New Guinea suspended the agreement, claiming the agreement had been frustrated since its performance had become impossible.<sup>33</sup>

In accordance with the agreement's arbitration clause, which allowed the parties to seek international arbitration under the U.N. Commission on International Trade Law (UNCITRAL) rules in case of a dispute, Sandline brought the case before an arbitral tribunal. The tribunal was seated in Cairns, Australia, on both parties' agreement. Sandline claimed that Papua New Guinea was obligated to pay \$18 million for the deployment of Sandline's personnel and equipment in that country, in addition to \$18 million that had already been paid in advance to the PMSC. Papua New Guinea argued that the contract was illegal under its national constitution, which prohibited the raising of unauthorized forces, and that those who signed the agreement on behalf of that country lacked the capacity to do so. Referring to other international arbitral awards, the tribu-

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29. See *Sandline Int'l Inc. v. Papua N.G.*, 117 I.L.R. 552 (Arb. Tribunal 1998); *Papua N.G. v. Sandline Int'l Inc.*, 117 I.L.R. 565 (Sup. Ct. Queensl. 1999) (Australia); *PNG Pays Up to Mercenaries*, BBC NEWS ONLINE, May 1, 1999, <http://news.bbc.co.uk/1/hi/world/asia-pacific/333234.stm>.

30. The text of this agreement was originally available at Sandline's website, <http://www.sandline.com> (last visited April 16, 2004) (on file with author). However, Sandline has since announced the closure of its activities, and the agreement is no longer available from the website.

31. See *Sandline Int'l*, 117 I.L.R. at 556.

32. *Id.*

33. *Id.*

nal concluded that, since the agreement between Papua New Guinea and Sandline was an international contract, the former "cannot rely upon its own internal laws as the basis for a plea that a contract concluded by it is illegal."<sup>34</sup> With regard to Papua New Guinea's argument that the officials who entered the agreement did not have approval to do so, the tribunal first answered that, on the grounds of international state responsibility, a state is liable for the conduct of its organs, even if they acted without authorization.<sup>35</sup> The tribunal then pointed to the doctrine of preclusion and observed that "a party may not deny the validity of a contract entered into on its behalf by another if, by its conduct, it later consents to the contract."<sup>36</sup> Because (a) the agreement was closed by the Deputy Prime Minister of Papua New Guinea and had the approval of the Prime Minister, the Minister of Defense, and other national organs, and (b) the question of illegality under national law was not raised at the time of the agreement with Sandline, the arbitral tribunal decided that a valid contract had been concluded between both parties.<sup>37</sup> The arbitral tribunal did not question the legal status of Sandline under international law or the international legal validity of the contract and Sandline's activities. In fact, it concluded that even if the agreement was illegal under national law, this did not have any bearing on international law. The arbitral tribunal observed that

[t]he agreement was not illegal or unlawful under international law or under any established principle of public policy. A political decision having been made by PNG [Papua New Guinea] to enter into it, its execution by a person with apparent authority to bind the State gave rise to a valid contract in the eyes of international law.<sup>38</sup>

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34. *Id.* at 561. The arbitral tribunal further observed that "[i]t is a clearly established principle of international law that acts of a State will be regarded as such even if they are *ultra vires* or unlawful under the internal law of the State." *Id.*

35. *Id.*

36. *Id.* at 562.

37. *Id.*

38. *Id.* at 563. Furthermore, the tribunal observed that Papua New Guinea had already participated in the performance of the agreement and had even made an advance payment of \$18 million to the PMSC and facilitated the entry of Sandline and the equipment into the country with the purpose of carrying out the agreement. This precluded Papua New Guinea from claiming that the agreement was illegal. *Id.*

In the end, the arbitral tribunal rejected Papua New Guinea's arguments and concluded that it was liable to Sandline for its failure to perform the terms of the contract.<sup>39</sup> Sandline was thus entitled to recover \$18 million from Papua New Guinea, plus interest. From this award it may be concluded that PMSCs are seen currently as international economic actors in the same vein as normal multinational corporations. However, the services they render make it even more necessary to regulate their activities.

### *B. PMSCs and National Law*

Generally speaking, no national legislation exists that would prohibit the activities of PMSCs. A number of countries, however, have adopted legislation to restrict or control their business operations and conduct. South Africa, for example, adopted a law requiring the authorization of the South African government for each contract a PMSC signs involving a local or international operation.<sup>40</sup> The United Kingdom also recently adopted legislation in an attempt to regulate the activities of private security and guardianship companies.<sup>41</sup> Although this legislation is aimed at regulating the activities of these companies at the national level, it can nevertheless provide some guidelines for regulating the activities of PMSCs that provide security and surveillance services abroad.

In the United States, PMSCs that wish to do business with other governments need to request authorization in advance from the State Department, the Department of Defense, and the House of Representatives when the contracts deal with the supply of weapons.<sup>42</sup> According to Peter W. Singer, Senior Fellow in Foreign Policy Studies at the Brookings Institution, this procedure has not been applied in a consistent and uniform way, and there appears to be no follow-

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39. *Id.* ¶ 12, at 563.

40. Regulation of Foreign Military Assistance Bill, 1997, Bill 54-97 (GA) (S.Afr.), available at <http://www.gov.za/gazette/bills/1997/b54-97.pdf>.

41. See Private Security Industry Act, 2001, c. 12 (Eng.), available at <http://www.hms0.gov.uk/acts/acts2001/20010012.htm#aofs>. See generally Clive Walker & Dave Whyte, *Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom*, 54 INT'L & COMP. L. Q. 651 (2005) (discussing this act and the regulation of private military and security services in the United Kingdom).

42. According to Peter W. Singer, contracts amounting to less than \$50 million do not necessarily have to be reported to the U.S. House of Representatives. P.W. Singer, Essay, *War, Profits and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 539 (2004).

up to monitor what happens with the contracts afterward.<sup>43</sup> In an effort to regulate the contracting out of military and security tasks to PMSCs, the Department of Defense and the U.S. Army have adopted a number of guidelines. These include regulations that dictate how Army officials must deal with contractors either for acquisition purposes or when the contractors accompany the force during “operations-other-than-wartime and wartime operations.”<sup>44</sup> The Department of Defense and the U.S. Army consider contracting out to these companies to be a “force multiplier of combat service support,”<sup>45</sup> meaning that the contracting of PMSCs can be useful by offering support and taking certain tasks out of the hands of the armed forces, allowing them to concentrate in the more hardcore military tasks.

It is worth noting that although the U.S. armed forces consider the privatization of a number of military tasks to be an acceptable policy, these guidelines nevertheless place some limits on privatization. Army Regulation 715-9 states, for example, that the employees of PMSCs executing contracted-out tasks have to follow general orders and “force protection rules.”<sup>46</sup> Furthermore, these guidelines explicitly note that the support offered by PMSC contractors are not deployed to replace the military-force structure but to augment it.<sup>47</sup> This means that PMSC contractors may only be used to perform selected combat-support activities but may not be used to perform activities that could jeopardize their status as civilians accompanying the force.<sup>48</sup> Also, they are not allowed to command, supervise, administer, or control army personnel, or to wear military uniforms.<sup>49</sup> Finally, these guidelines only allow the use of force by PMSCs and their

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43. *Id.* at 538–39.

44. See DEP’T OF THE ARMY, ARMY REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE 1 (1999) [hereinafter *CONTRACTORS ACCOMPANYING*], available at [http://www.army.mil/usapa/epubs/pdf/r715\\_9.pdf](http://www.army.mil/usapa/epubs/pdf/r715_9.pdf). See also DEP’T OF THE ARMY, PAMPHLET 715-16, CONTRACTOR DEPLOYMENT GUIDE (1998), available at [http://www.army.mil/usapa/epubs/pdf/p715\\_16.pdf](http://www.army.mil/usapa/epubs/pdf/p715_16.pdf). These guidelines have been taken over in DEP’T OF THE ARMY, ARMY FIELD MANUAL NO. 3-100.21, CONTRACTORS ON THE BATTLEFIELD (2003) [hereinafter *CONTRACTORS ON THE BATTLEFIELD*], available at [www.osc.army.mil/gc/files/fm3\\_100x21.pdf](http://www.osc.army.mil/gc/files/fm3_100x21.pdf).

45. JOINT CHIEFS OF STAFF, JOINT PUB 5-00.2, JOINT TASK FORCE PLANNING GUIDANCE AND PROCEDURES, at VIII-11 (1999). Accord Joseph R. Perlak, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 MIL. L. REV. 92, 108 (2001).

46. *CONTRACTORS ACCOMPANYING*, *supra* note 44, ¶ 2-1(e), at 10.

47. *Id.* ¶ 2-3(a), at 11.

48. *Id.* ¶ 3-3, at 15.

49. *Id.*



contractors for self-defense purposes.<sup>50</sup> In spite of these clear restrictions, and as we will see further below, it would appear that PMSC contractors have nevertheless been put in positions that allowed them to issue commands or supervise the activities of military personnel, especially during interrogations at Abu Ghraib prison.

Beside the limitations noted above, the glossary attached to Army Regulation 715-9 appears to provide a further limitation on the tasks or functions that are to be contracted out to PMSCs. These limits apply to tasks that involve an inherent government function, which are defined to be those functions that are

necessary for the sustainment of combat operations, that are performed under combat conditions or in otherwise uncontrolled situations, and that require direct control by the military command structure and military training for their proper execution . . . . This includes functions performed exclusively by military (active and reserve) who are trained for combat and the use of deadly force, where performance by a contractor or civilian would violate their non-combatant status under the Geneva Conventions or represent an inappropriate risk to military operations.<sup>51</sup>

Other military functions that are considered to be inherently governmental, and thus apparently not subject to privatization, are

[f]unctions that require knowledge and skills acquired primarily through military training and current military experience for the

50. See *CONTRACTORS ON THE BATTLEFIELD*, *supra* note 44, ¶ 6-3, at 6-1.

51. *CONTRACTORS ACCOMPANYING*, *supra* note 44, at 21. The regulation further adds that a key criterion to identify an inherently governmental military function is "whether the proper execution of the function under combat conditions has to be ensured, or safeguarded, through strict military command and extensive military training." *Id.* The notion of inherently governmental functions would appear to have been borrowed from the Federal Activities Inventory Reform Act of 1998, which defines an "inherently governmental function" as "a function that is so intimately related to the public interest as to require performance by Federal Government employees." Federal Activities Inventory Reform Act of 1998 § 5(2)(A), Pub. L. No. 105-270, 112 Stat. 2382. The Federal Activities Inventory Reform Act was enacted in order to categorize all activities performed by government personnel as either commercial or inherently governmental to determine whether government personnel should perform commercial activities and thus determine whether the U.S. government can better rely on the private sector for the delivery of these commercial activities.

successful performance of the prescribed duties. . . . In all cases, such functions must require the kind of expertise that can only be derived from first-hand military experience—through the command of military forces or by participating in or conducting military operations, tactics, or systems operations. The required knowledge and skills must be more substantial than familiarity with military administrative procedures or similar capabilities reasonably attained by civilian employees or possessed by retired military personnel. This includes functions that (through example) reinforce the integrity of the military command structure, acculturate military standards and conventions, or that otherwise serve to safeguard government responsibilities with regard to the appropriate use of deadly force and proper military conduct during war.<sup>52</sup>

Although these regulations also explicitly acknowledge the necessity of strictly monitoring contract performance and overseeing the quality of the services by PMSCs, they nevertheless are ambivalent with regard to how this supervision is to be achieved. Army Regulation 715-9, for example, states that contractor employees are not under the direct supervision of military personnel in the chain of command.<sup>53</sup> This means that PMSCs themselves have to perform the necessary supervisory and management functions over their employees. Nevertheless, the responsibility of monitoring the contractual performance of PMSC personnel rests on a so-called “contracting officer” or its representative who then “shall communicate the Army’s requirements and prioritize the contractor’s activities within the terms and conditions of the contract.”<sup>54</sup> Whether this type of supervision will be sufficient to prevent eventual abuses by PMSC contractors is debatable. In addition, this type of supervision may not be adequate for monitoring compliance with contracts and adherence to international humanitarian law, as well as human rights norms, when PMSCs are deployed in conflicts where the U.S. Army is not directly operating. This was evident in Bosnia in 2001 when two employees of the American PMSC DynCorp, providing police assistance to the international presence in that country on behalf of the

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52. CONTRACTORS ACCOMPANYING, *supra* note 44, at 21.

53. *Id.* ¶ 3-2(f), at 14.

54. *Id.* ¶ 3-3(b), at 15.

United States, were accused of committing statutory rape, abetting prostitution, and accepting bribes. DynCorp pulled these contractors out of the country before they could be arrested and prosecuted.<sup>55</sup>

### *C. Status of PMSCs: Some Observations*

In sum, there is currently no rule of international law that prohibits the deployment of PMSCs or the privatization of military tasks and services as long as the personnel employed by these companies and states are not mercenaries.<sup>56</sup> However, in light of the special activities they carry out, offering services that may include the coercive use of lethal force, it is not unreasonable to conclude that their international status is somewhat uncertain, and it would seem that some form of regulation is necessary.<sup>57</sup> National efforts to regulate this business sector are initial steps toward improved monitoring of the activities of PMSCs. It is also worth noting that states themselves recognize that there can be certain limits to the privatization of military tasks. However, given the fact that many of these companies operate abroad, either directly or through subsidiary corporations, and often under contract with other governments, national regulation may not be sufficient. In view of the events in Iraq, discussed below, it would even appear that national regulations covering PMSC personnel accompanying their own national forces are insufficient to control the conduct of PMSCs. International regulation becomes even more indispensable due to the perceived

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55. See Singer, *supra* note 42, at 538.

56. See International Convention Against Mercenaries, *supra* note 18, art. 2 (stating that "[a]ny person who recruits, uses, finances or trains mercenaries . . . commits an offence for the purposes of the Convention"); Dino Kritsiotis, *Mercenaries and the Privatization of Warfare*, FLETCHER F. WORLD AFF., Summer/Fall 1998, at 11, 19.

57. The current Special Rapporteur on Mercenaries, Ms. Shaista Shameem, has observed that:

[t]he nature and degree of accountability of these organizations and their employees is uncertain, paving the way for impunity for a range of acts which would otherwise be criminal. Also, the legal status of private actors offering military services internationally is unclear, thus rendering the actor vulnerable to national legislation, often deficient where it exists, and thereby to improvised procedures in the case of perceived breaches. The uncertainty derives from the current inability of international law to accommodate actors whose attributes include international scope and private motive, and whose role may include either individual or corporate involvement in military operations.

*Mercenaries and Human Rights*, *supra* note 25, ¶ 46.

necessity of delegating more military tasks to private actors in order to allow the real military to concentrate on their core business. In addition, it is not unthinkable that the deployment of PMSCs under certain circumstances could be a viable option to boost international peacekeeping operations, especially when states' unwillingness to participate in such operations creates a shortage of traditional peacekeeping troops. The absence of clear international rules regarding the privatization of military tasks is problematic. This problem is compounded when this type of privatization includes the delegation of tasks that could comprise the lethal use of force.

### III. THE PRESENCE OF PMSCs IN IRAQ

During the Persian Gulf War of 1991, the U.S. armed forces already made use of PMSCs to provide support for the military effort to repel the Iraqi army from Kuwait. The recent invasion and occupation of Iraq prompted the United States to make even further use of these companies. Until 2004, it was estimated that there were as many as four thousand employees of PMSCs active in Iraq.<sup>58</sup> Most of these companies have been deployed for security and guarding purposes. The British company Erinys was contracted, for example, to protect oil installations and pipelines from armed assaults and sabotage by insurgents.<sup>59</sup> Although it would appear that these companies have not been deployed for offensive military operations, a number of contractors of PMSCs have been regularly caught up in situations involving the lethal use of force.<sup>60</sup> Other companies have been contracted to provide translation and interrogation services in a number of Iraqi prisons.<sup>61</sup> The best-known example is the presence of contractors of two PMSCs, CACI International and the Titan Corporation, in the infamous Abu Ghraib

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58. See *7 U.S. Security Contractors Killed in Iraq*, CNN.com, Apr. 21, 2005, <http://www.cnn.com/2005/WORLD/meast/04/21/iraq.contractors/>.

59. See Erinys: Signature Project, <http://www.erinysinternational.com/Experience-SignatureProject.asp> (last visited Jan. 19, 2006).

60. See, e.g., Edward Wong & James Glanz, *2 Pipeline Blasts Halt Oil Exports at Top Iraq Port*, N.Y. TIMES, June 16, 2004, at A1 (describing how PMSC contractors in Iraq had to defend themselves against attacks by insurgents by throwing grenades at their attackers).

61. In fact, a report dealing with detainee operations in Iraq observes that interrogation contractors were deployed to conduct interrogations "at locations throughout the battlespace [*sic*]." INSPECTOR GEN., DEP'T OF THE ARMY, *DETAINEE OPERATIONS INSPECTION 33* (July 21, 2004), available at <http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/index.html>.

prison.<sup>62</sup> CACI, a company that specializes in information technologies and network applications for “defense, intelligence and e-government” purposes, was contracted to provide interrogators for Abu Ghraib. Titan, a company that delivers information and communication services to the U.S. armed forces, was assigned to provide translation services and interpreters to the same facility.

#### IV. VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS IN ABU GHRAIB BY CONTRACTORS OF PMSCS

Prior to the publication of the shocking photographs depicting the abuses at Abu Ghraib, the U.S. Army was already investigating the facts and circumstances that led to the controversial situation. Following confidential reports of the International Committee of the Red Cross regarding alleged physical abuses of prisoners at Abu Ghraib prison, Major General Antonio Taguba was appointed in January 2004 to lead an investigation of these allegations at the request of the highest-ranking army officer in Iraq, Lieutenant General Ricardo Sánchez. Taguba finished his investigation at the beginning of March 2004. His conclusions led to the dismissal of Brigadier General Janis Karpinski, who had command over the military personnel working at Abu Ghraib.<sup>63</sup>

Taguba’s report identified the various problems plaguing Abu Ghraib. He found that, in general, there was a lack of sufficient and adequately trained personnel with adequate knowledge of international humanitarian law and human rights.<sup>64</sup> Taguba divided his report into three sections describing the problems at

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62. See ANTONIO M. TAGUBA, DEP’T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004) [hereinafter TAGUBA REPORT], available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf). U.S. Secretary of Defense Rumsfeld and a number of high-ranking generals at the Department of Defense confirmed the presence of contractors from both companies during a hearing at the U.S. Senate, on May 7, 2004, following the publication of the infamous photographs and reports of abuses of detainees in Abu Ghraib prison. *Testimony on Allegations of Mistreatment of Iraqi Prisoners Before the S. Comm. of the Armed Services*, 108th Cong. (2004) (statement of Lance Smith, Lt. Gen., Cent. Command Deputy Commander, U.S. Army), available at <http://www.dod.gov/speeches/2004/sp20040507-secdef0443.html>.

63. In March 2005, Brigadier General Karpinski was apparently given an administrative reprimand, making her the only senior officer that has been officially berated for the abuses to date. See Josh White & Bradley Graham, *Senators Question Absence of Blame in Abuse Report*, WASH. POST, Mar. 11, 2005, at A17.

64. This finding was later verified by a report by the Army Inspector General, which concluded that 35% of the contract interrogators used to offset a shortage of interrogators lacked formal training in military interrogation policies and techniques. See DETAINEE OPERATIONS INSPECTION, *supra* note 61, at 87. It would appear that training in these policies, techniques, and the Geneva Conventions started in May 2004, following the reported abuses in Abu Ghraib. See *id.* at 88.

Abu Ghraib. In each of these sections, he briefly noted the degree of participation by CACI and Titan contractors in the abuses.

The first section of the investigation's findings described the grave prisoner abuse that has been widely described in the media. This included punching, slapping, and kicking detainees; videotaping nude male and female detainees; forcibly arranging detainees in various sexually explicit positions for photographing; forcing nude male detainees to wear women's underwear; forcing groups of male detainees to masturbate while being photographed and videotaped; arranging nude male detainees in a pile and then jumping on them; and positioning a nude detainee on a box, with a sandbag on his head, and attaching wires to his fingers, toes, and penis to simulate electric torture.<sup>65</sup> The abuses were determined on the basis of the photographs and videos made by the prison personnel and on the basis of conversations with detainees and witnesses, including one interpreter from Titan. This particular contractor is also considered to be one of the suspected participants responsible for the abuses.<sup>66</sup> Notably, Taguba did not mention anything about the actual participation of this contractor in his conclusions and recommendations regarding the abuses and does not provide any recommendations for punishment for his participation.<sup>67</sup>

The second section of the Taguba report described the unclear situation and the lack of accountability within Abu Ghraib. Taguba noted that there was insufficient supervision over the activities of CACI's and Titan's personnel inside the prison. Additionally, he mentioned that these contractors had easy and unsupervised access to the section of the prison where the detainees were being held. Due to the fact that these contractors did not wear any uniforms, they were difficult to distinguish from normal detainees. Taguba, therefore, recommended limiting the access of PMSCs' contractors throughout the prison and providing them with uniforms in order to make them easily distinguishable from detainees.<sup>68</sup>

The third section of the report is dedicated to describing the general policy within the prison, as well as the inadequate training of personnel and the dubious standards that were applied in the prison, which probably led to the prisoner

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65. TAGUBA REPORT, *supra* note 62, ¶¶ 6, 8, at 16–18.

66. *Id.* at 17.

67. Several of the suspects, members of the military police who were depicted in the photographs and who were mentioned by name in the report, have already been subject to court-martial. *Woman Soldier Admits Iraq Abuse*, BBC NEWS ONLINE, May 2, 2005, <http://news.bbc.co.uk/2/hi/americas/4504833.stm>.

68. See TAGUBA REPORT, *supra* note 62, ¶ 14, at 33.

abuses. According to the report, one CACI interrogator allegedly allowed and encouraged physical abuse by the military police in the prison to facilitate interrogations.<sup>69</sup> The report did not specify whether this particular contractor was also involved in committing the abuses himself. Taguba, however, suspects that this contractor, together with another CACI employee, was either directly or indirectly responsible for a number of abuses. This led Taguba to recommend the termination of these individuals' contracts and an investigation to determine the full extent of their culpability.<sup>70</sup>

On the heels of the Taguba report, other independent investigations of the Abu Ghraib incident were published in the summer of 2004. Reports by the U.S. Army Inspector General<sup>71</sup> and by an independent panel set up by the U.S. Secretary of Defense, Donald Rumsfeld,<sup>72</sup> corroborate to a great extent the findings of the Taguba report regarding the abuses that took place at Abu Ghraib prison. Both reports go briefly into the role of PMSC contractors in the interrogation procedures at the prison. Although the reports do not make any specific conclusions regarding the role of individual contractors in the abuses, they do point to the lack of proper training for these contractors with respect to the legal and legitimate ways of conducting interrogations according to U.S. Army and international humanitarian law standards. Additionally, the reports conclude that there was insufficient supervision over the activities of these contractors.<sup>73</sup>

At the request of Lieutenant General Sánchez, and in view of the findings of the Taguba report, another investigation of the abuses at Abu Ghraib, the Fay report, appeared during the summer of 2004.<sup>74</sup> This report went further than the above-mentioned reports and described in good detail forty-four individual cases of prisoner abuse and humiliation or degradation in the prison. According to the report, individual contractors of CACI and Titan were directly involved

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69. *Id.* ¶ 11, at 48.

70. *Id.* ¶ 13, at 48.

71. DETAINEE OPERATIONS INSPECTION, *supra* note 61.

72. INDEPENDENT PANEL TO REVIEW DoD DETENTION OPERATIONS, FINAL REPORT (2004), *available at* <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.

73. The Independent Panel's report concludes, nevertheless, that the contracting out of PMSC should continue, with due regard to the recommendations of the Panel (these include having a stricter selection of the personnel being hired, improving their training, and furthering the supervision of their activities). *Id.* at 69.

74. GEORGE R. FAY, DEP'T OF THE ARMY, ARMY REG. 15-6, INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE (2004) [hereinafter FAY REPORT], *available at* <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>.

in four of these abuse cases. In one case, the Fay report observed that a preponderance of evidence supported the fact that one of the CACI contractors “grabbed a detainee (who was handcuffed) off a vehicle and dropped him to the ground [and] then dragged him into an interrogation booth and as the detainee tried to get up, [the CACI contractor] would yank the detainee very hard and make him fall again.”<sup>75</sup> Another CACI contractor was suspected of encouraging physical abuse of an Iraqi detainee by military personnel, failing to prevent further abuse, intimidating other prisoners with dogs, and placing a detainee in an unauthorized stress position.<sup>76</sup> A Titan contractor was suspected of failing to report detainee abuse that she apparently witnessed,<sup>77</sup> while another Titan contractor who also failed to report or stop the abuse was suspected of actively participating in the abuse. This particular contractor was apparently present during the abuse of the detainees depicted in the various photographs and allegedly hit and cut the ear of a detainee, resulting in an injury requiring stitches. He is also suspected of having raped a young detainee.<sup>78</sup>

#### *A. Violations of International Humanitarian Law*

The findings of the Taguba report and other more recent investigations<sup>79</sup> beg the question whether these events amount to violations of international humanitarian law and of human rights. I submit that a number of the abuses committed against Iraqi prisoners of war amount to violations of international humanitarian law. 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. The Inter-

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75. *Id.* at 131.

76. According to the report, the detainee was placed “in a dangerous position where he might fall back and injure himself.” *Id.* at 132. The contractor was also suspected of failing to prevent this detainee from being photographed. *Id.*

77. *Id.* at 133.

78. *Id.*

79. In addition to the Inspector General’s report and the Fay report, the Naval Inspector General, Vice Admiral Albert T. Church III, was directed by Secretary of Defense Rumsfeld to conduct a comprehensive review of the interrogation operations of the Department of Defense (the Church Report). An executive summary of the Church Report was presented March 2005 and devoted some paragraphs to the issue of contractor interrogation, observing that there were “very few instances of abuse involving contractors.” ALBERT T. CHURCH, III, EXECUTIVE SUMMARY 17 (2005), available at <http://www.pentagon.gov/news/Mar2005/d20050310exe.pdf>.



national Criminal Tribunal for the Former Yugoslavia (ICTY) has held in the *Furundzija* case that the prohibition of torture constitutes *jus cogens*, a peremptory norm of international customary law.<sup>80</sup> In the *Kunarac* case, the ICTY “defined torture as the intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, in order to obtain information or a confession, or to punish, intimidate or coerce the victim or a third person . . . .”<sup>81</sup> Additionally, according to article 13 of Geneva Convention (III) and articles 27 and 32 of Geneva Convention (IV), together with article 76 of Geneva Convention (IV), prisoners of war, as well as other detainees, must at all times be humanely treated.<sup>82</sup> Moreover, 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.<sup>83</sup> The United States is party to all these conventions.

In light of the nature of the abuses that took place in Abu Ghraib prison—heavy physical and sexual abuses, intimidations with or without the use of dogs, and other denigrating treatment—there can be little doubt that these abuses amount to torture and other cruel treatment as defined in the *Kunarac* case and 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.

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80. 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, Judgement, ¶ 153 (Dec. 10, 1998).

81. Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement, ¶ 497 (Feb. 22, 2001); *see also* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 318 (2005).

82. The prison population inside Abu Ghraib varies from common criminals to former soldiers and suspected terrorists. Seymour M. Hersh, *Torture at Abu Ghraib*, *NEW YORKER*, May 10, 2004, at 42.

83. Geneva Convention Relative to the Treatment of Prisoners of War arts. 13, 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. *See also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Geneva Convention on Civilians*] (defining grave breaches as acts committed against persons protected by the Convention and which involve *inter alia* “wilful [*sic*] killing, torture or inhuman treatment, including biological experiments, wilfully [*sic*] causing great suffering or serious injury to body or health”). Grave breaches may lead to international criminal responsibility of those suspected of committing the breaches and could lead them to trial by a national (or international) court.

*B. Violations of Human Rights*

The abuses committed in Abu Ghraib prison also amount to human rights violations, in particular with respect to normal detainees who are not prisoners of war. The most important rights at stake under these circumstances are the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment found in article 7 of the International Covenant on Civil and Political Rights (ICCPR)<sup>84</sup> and article 1 of the Convention Against Torture (CAT),<sup>85</sup> and the right of a person to humane treatment while deprived of his liberty as protected by article 10 of the ICCPR.<sup>86</sup> Most importantly, according to article 4, paragraphs 1 and 2 of the ICCPR, article 7 of the ICCPR is nonderogable, even in times of armed conflict.<sup>87</sup> Similarly, article 2, paragraph 2 of the CAT

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84. International Covenant on Civil and Political Rights art. 7, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

85. "Torture" is defined as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment art. 1, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

86. "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." ICCPR, *supra* note 84, art. 10.

87. 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 Covenant [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.

International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 3, at 151 (General Comment No. 20 on

provides that “[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”<sup>88</sup> The United States is party to both the ICCPR and the CAT, although it has ratified these conventions with a number of reservations and declarations that may limit their application in a number of ways.<sup>89</sup> These rights and freedoms have also been laid down and further developed in other “soft-law” instruments that are geared toward protecting the rights and dignity of persons who have been deprived of their liberty.<sup>90</sup>

The Human Rights Committee (Committee), the body that supervises compliance by states with the ICCPR, has observed that articles 7 and 10 of the ICCPR are each other’s complement and that the obligations ensuing from article 7 are of special importance for the application of article 10.<sup>91</sup> Violations of article 7 will often coincide with violations of article 10. The Committee has not given a precise definition of torture and cruel and degrading treatment. It has, however, observed that the distinction between an acceptable punishment or treatment and punishment that can be regarded as torture will depend on “the nature, purpose and severity of the treatment applied.”<sup>92</sup> Additionally, the Com-

Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004) [hereinafter *General Comments*]; see also *id.* at 184 (General Comment No. 29 on Article 4: Derogations During a State of Emergency).

88. Convention Against Torture, *supra* note 85, art. 2(2); see also *id.* art. 2(3) (prohibiting the justification of torture on the basis of an order by a superior officer).

89. For information on these reservations and declarations, which relate, *inter alia*, to the definition of torture found in article 7 of the ICCPR and article 1 of the CAT, as well as the lack of self-executability of the rights in the Conventions, see Multilateral Treaties Deposited with the Secretary-General: Part I, Chapter IV, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/chapterIV.asp> (last visited May 22, 2005).

90. For the most relevant instruments, see Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); G.A. Res. 55/89, U.N. Doc. A/RES/55/89 (Dec. 4, 2000); G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988); FIRST UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS, STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS, U.N. Sales No. 1956.IV.4 (1956), available at <http://www.ohchr.org/english/law/pdf/treatmentprisoners.pdf>; G.A. Res. 45/111, U.N. Doc. A/RES/45/111 (Dec. 14, 1990).

91. See *General Comments*, *supra* note 87, ¶¶ 2, 5, at 150–51 (General Comment No. 20 on Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment); *id.* ¶ 3, at 153 (General Comment No. 21 on Article 10: Human Treatment of Persons Deprived of Their Liberty).

92. *General Comments*, *supra* note 87, ¶ 4, at 151 (General Comment No. 20 on Article 7: Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment).

mittee observed that the prohibition of torture as understood in article 7 relates not only to acts that cause physical pain but also to "acts that cause mental suffering to the victim."<sup>93</sup> In the Committee's eyes, the prohibition must also extend to "corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure."<sup>94</sup> In the past, the Committee has 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.<sup>95</sup> The Committee concluded that the following treatments amount to torture: blindfolding which results in physical harm; hooding; forcing someone to sit up straight, night and day, for one week; and threatening that person with torture.<sup>96</sup> Cruel treatment in detention is also considered to be a violation of both articles 7 and 10 of the ICCPR.<sup>97</sup>

Articles 1 through 4 of the CAT only speak of torture and do not automatically cover other acts of ill treatment.<sup>98</sup> This means that not all acts of cruel, inhuman, or degrading treatment necessarily amount to torture.<sup>99</sup> This, however,

93. *Id.* ¶ 5, at 151.

94. *Id.*

95. See International Covenant on Civil and Political Rights, Human Rights Comm., *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 74/1980), U.N. Doc. CCPR/C/18/D/74/1980 (Mar. 23, 1983) [hereinafter *Estrella*]; International Covenant on Civil and Political Rights, Human Rights Comm., *View of Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 161/1983), U.N. Doc. CCPR/C/31/D/161/1983 (Nov. 2, 1987).

96. See International Covenant on Civil and Political Rights, Human Rights Comm., *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 159/1983), (Oct. 27, 1987), available at [http://www.bayefsky.com/html/149\\_uruguay159vws.php](http://www.bayefsky.com/html/149_uruguay159vws.php); International Covenant on Civil and Political Rights, Human Rights Comm., *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 612/1995), U.N. Doc. CCPR/C/60/D/612/1995 (Aug. 19, 1997); see also NIGEL S. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 94 (2d ed. 1999).

97. See International Covenant on Civil and Political Rights, Human Rights Comm., *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 5/1977), U.N. Doc. CCPR/C/7/D/5/1977 (Aug. 15, 1979); International Covenant on Civil and Political Rights, Human Rights Comm., *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights* (Communication No. 124/1982), U.N. Doc. CCPR/C/22/D/124/1982 (July 24, 1984). For a more in-depth treatment of the rights of people in detention with regard to torture, see RODLEY, *supra* note 96.

98. RODLEY, *supra* note 96, at 50.

99. *Id.*

does not mean that states have no further obligations with respect to these acts. According to article 16 of the CAT, states have to prevent in any territory under their jurisdiction such acts if 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. Notwithstanding this strict division between torture as defined in article 1 of the CAT and other ill treatment, the Committee Against Torture, the body entrusted with the supervision of the CAT, has concluded that the combination of certain techniques used during interrogation, including hooding, violent shaking, and sleep deprivation, amount to torture.<sup>100</sup>

The abuses committed at Abu Ghraib were meant to extract information from the detainees by inflicting physical and psychological pain and by sexually intimidating and denigrating them.<sup>101</sup> This is documented by the Taguba and Fay reports, which note that the contractors boasted of creating the right environment to extract the information, even if this entailed physical and mental abuse of the prisoners.<sup>102</sup> It is thus possible to conclude that these abuses amount to torture as understood by article 7 of the ICCPR and article 1 of the CAT, as well as a violation of article 10 of the ICCPR.

#### V. IS THE UNITED STATES RESPONSIBLE FOR THE ALLEGED VIOLATIONS COMMITTED BY PMSCs OR THEIR STAFF?

On the basis of the Taguba and Fay reports it can be argued that a number of CACI and Titan contractors, through commission or omission, directly contributed to violations of common article 3 to Geneva Conventions (III) and (IV) and article 76 of Geneva Convention (IV) as well as violations of articles 7 and 10 of the ICCPR and article 1 of the CAT. This leads to the following question: Is

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100. 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).

101. See generally PENTAGON WORKING GROUP, WORKING GROUP REPORT ON DETAINEE INTERROGATIONS IN THE GLOBAL WAR ON TERRORISM: ASSESSMENT OF LEGAL, HISTORICAL, POLICY, AND OPERATIONAL CONSIDERATIONS (2003), available at <http://www.cdi.org/news/law/pentagon-torture-memo.pdf>; Memorandum from Department of Defense to Commander, Joint Taskforce 170 (October 11, 2002), <http://www1.umn.edu/humanrts/usdocs/guantanamo/d20040622doc3.pdf>.

102. For example, one of the CACI interrogators allegedly told a detainee, "You see that dog there, if you do not tell me what I want to know, I'm going to get that dog on you." FAY REPORT, *supra* note 74, at 132.

the United States responsible for violations of international humanitarian law and human rights committed by private parties in Iraq?<sup>103</sup>

#### *A. State Responsibility under International Law*

According to international customary law, the state is responsible for acts of commission or omission, that entail a breach of an international obligation of the state and which are attributable to it under international law.<sup>104</sup> Are the abuses possibly perpetrated by PMSC contractors attributable to the United States? The responsibility of the United States for the conduct of its own soldiers and officers is clear. States are always responsible for their own breaches of international obligations and for those breaches committed by an organ of the state or its agents.<sup>105</sup>

The responsibility of the United States for the acts of CACI and Titan contractors is not so evident, however, because here we are dealing with acts committed by private entities. The state, in principle, is not responsible for the acts of private actors. Notwithstanding this general rule, breaches of international obligations committed by private actors while exercising governmental authority or other public tasks which have been delegated to them by law, or carried out under the state's supervision or orders, are also attributable to the state.<sup>106</sup> The International Court of Justice (ICJ) has concluded that this is especially the case

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103. International and regional supervisory mechanisms for human rights, such as the U.N. Human Rights Committee, the European Court of Human Rights (ECtHR), and the Inter-American Court and Commission for Human Rights, have come to the conclusion that obligations ensuing from human rights treaties are also applicable on states that possess effective control over the territory of another state, such as, in this case, the United States in Iraq. The United States has claimed that the ICCPR is not applicable extraterritorially. The Human Rights Committee, however, has taken the opposite view. For a more extensive discussion on this extraterritorial application of human rights obligations, see Fons Coomans & Menno T. Kamminga, *Comparative Introductory Comments on the Extraterritorial Application of Human Rights Treaties*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 1, 3–4 (Fons Coomans & Menno T. Kamminga eds., 2004). One of the best-known examples in this context is *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 26 (1995).

104. See Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, annex, arts. 1, 2, U.N. Doc A/RES/56/83/Annex (Dec. 12, 2001). Although the Articles on the Responsibility of States, as drafted by the U.N. International Law Commission and as adopted for further consideration by the U.N. General Assembly, are not legally binding, many of its provisions are considered to be rules of international customary law.

105. *Id.* art 4.

when a state has “effective control” over the activities of these actors.<sup>107</sup> The ICTY has also ruled that:

[P]rivate individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as *de facto* State organs. [note omitted] In these cases it follows that the acts of such individuals are attributed to the State, as far as State responsibility is concerned, and may also generate individual criminal responsibility.<sup>108</sup>

In addition, a state is also responsible if it has not taken the necessary measures to prevent breaches of its international obligations committed by private actors. This due diligence obligation requires that the state act diligently and promptly to prevent, investigate, and punish the harmful conduct of private actors.<sup>109</sup>

#### *B. U.S. Responsibility for PMSCs in Iraq*

With regard to responsibility for the conduct of CACI and Titan contractors, I submit that 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 (namely, seeking accurate and reliable information from individuals in military detention) and that these tasks also require extensive familiarity with international

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106. *Id.* arts. 5, 8. See also JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 100, 110–12 (2002); I IAN BROWN-LIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY* 159–61 (1983); Giuseppe Sperduti, *Responsibility of States for Activities of Private Law Persons*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 216, 217–18 (Rudolf Bernhardt ed., 2000).

107. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 115, at 64–65 (June 27).

108. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, ¶ 144 (July 15, 1999).

109. See *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, ¶¶ 61–69, at 30–33 (May 24). The Inter-American Court of Human Rights took a similar position in the leading *Velásquez Rodríguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C), No. 4, ¶ 171, at 153–54 (July 29, 1988).

legal standards in the field of international humanitarian law and human rights. These functions can be regarded as core activities of the U.S. armed forces. As we have seen, Army Regulation 715-9 clearly regards these types of activities as inherently governmental activities, which in principle should not be delegated. This leads to the conclusion that the abuses committed by contractors performing these officially delegated tasks can be considered breaches committed in the exercise of public powers, namely, those that belong to the core activities of the U.S. armed forces.

It can also be argued that the United States incurs responsibility for these abuses indirectly because it did not take the necessary measures to prevent them. From the Taguba and Fay reports, one can infer that the U.S. military apparatus was aware that these contractors were being used for translation and interrogation purposes (in fact, it would appear to have been policy).<sup>110</sup> 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. Moreover, the Taguba report observed that several U.S. military personnel purposely strove to create a suitable environment for extracting information from the detainees and that the contractors of CACI and Titan actively contributed to this goal with the approval of the military personnel responsible for the interrogations. This has been confirmed by the Fay report. Although these contractors did not belong to the military hierarchical structure, the United States exercised "effective control" over the conduct of the CACI and Titan contractors through the contracts that regulated the relations between the Department of Defense and these companies. At the first sign of trouble, the United States should have ended the contracts with CACI or Titan, or at the very least have removed the contractors from the premises. By allowing PMSC personnel to carry out prisoner interrogations with the purpose of extracting military intelligence, the United States created a situation in which these personnel together, or in complicity with official U.S. Army personnel, were in a position to commit abuses.

In addition, the violations of humanitarian law in Abu Ghraib by CACI and Titan contractors could lead to the individual criminal responsibility of the perpetrators, and possibly of the companies they were working for. This could open the possibility of criminal prosecution and claims for damages under the domes-

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110. Additionally, 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), *available at* [http://www.caci.com/about/news/news2004/05\\_25\\_04\\_2\\_NR.html](http://www.caci.com/about/news/news2004/05_25_04_2_NR.html).



tic law of the country of origin of both the contractors and the companies. Under current international human rights law, however, it would not be possible to hold these private actors accountable for violations of articles 7 and 10 of the ICCPR and article 1 of the CAT. This is due to the fact that human rights treaties contain obligations for states, not individuals. The ensuing obligations are in principle only meant to work on a vertical basis, and the direct horizontal application of human rights has not yet been accepted.<sup>111</sup> As a result, victims of human rights violations can only bring claims against the state.

On the other hand, these 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 nature (e.g., extracting information from prisoners and prisoners of war for military purposes in a confined environment—a prison—thus serving a public need).<sup>112</sup> U.S. military guidelines, as we have seen above, appear to consider the tasks carried out by these contractors to be inherently governmental since they require knowledge and skills acquired primarily through military training. Because these activities are also very closely linked to the public interest—the information to be extracted was supposed to help save U.S. sol-

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111. Indirect horizontal application is, of course, possible; the state can be held accountable for human rights violations committed by private individuals if it has failed to take the necessary steps to prevent these violations, protect the victims, and prosecute the perpetrators. See Aharon Barak, *Constitutional Human Rights and Private Law*, in HUMAN RIGHTS IN PRIVATE LAW 13 (Daniel Friedmann & Daphne Barak-Erez eds., 2001). Additionally, it is worth noting that several international human rights monitoring bodies have acknowledged that the various treaties' rights may also impose positive obligations on states to adopt measures designed to secure or ensure these rights "even in the sphere of the relations of individuals between themselves." *X & Y v. Netherlands*, 91 Eur. Ct. H.R. (ser. A) at 11 (1985); see also *Velásquez Rodríguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C), No. 4, at 156–58. For a comprehensive treatment of the horizontal applicability of human rights norms with regard to companies and multinational enterprises, see JÄGERS, *supra* note 28, at. 40–44.

112. The 1998 Human Rights Act, which incorporates the rights found in the European Convention on Human Rights into the legal order of the United Kingdom, stipulates that it is unlawful for public authorities to act in a way that is incompatible with the European Convention's rights. Human Rights Act, 1998, c. 42, § 6(1) (Eng.). It defines a public authority as "any person certain of whose functions are functions of a public nature." *Id.* § 6(3). Section 6(5) states that "[i]n relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private." *Id.* § 6(5). Following the introduction of the Human Rights Act, a number of courts have cautiously started to consider the application of these provisions to private actors carrying out functions, tasks, or services in the highly privatized United Kingdom. For an example of a recent case where a private actor was deemed to be a public authority for the purposes of Section 6(3)(b) of the Human Rights Act, see *Hampshire County Council v. Graham Beer*, [2003] EWCA Civ. 1056.

diers and counter the Iraqi insurgency—and have been made possible through publicly sanctioned military guidelines that allow these activities to be contracted out, it stands to reason that the actors carrying them out can also be considered state actors for the purpose of applying human rights norms.<sup>113</sup> In such a situation, international human rights norms could be directly (and vertically) applicable to PMSCs and their contractors.

In any case, the Human Rights Committee has concluded on a number of occasions that a state “is not relieved of its obligations under the Covenant when some of its functions are delegated to other autonomous organs.”<sup>114</sup> In the context of an individual complaint by two Mexican nationals who were placed in a privatized Australian prison pending their extradition to Mexico, the Committee considered that “the contracting out to the private commercial sector of core State activities which involve the use of force and the detention of persons does not absolve a State party of its obligations under the Covenant, notably under articles 7 and 10 which are invoked in the instant communication.”<sup>115</sup> Consequently, the Committee found that Australia was accountable under the ICCPR (and its Optional Protocol) for the treatment of inmates in the prison run by a private company.

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113. This proposition is very similar to the state action doctrine, which has been recognized—not without some legal controversy—by the U.S. Supreme Court in cases such as *Marsh v. Alabama*, 326 U.S. 501 (1946); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); and *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978). In light of the nature of the functions exercised by these contractors and their close relationship with public actors (to the point of aiding and abetting U.S. military personnel in the abuse at Abu Ghraib), it may well be argued that the public function test and the nexus test, as applied by the U.S. Supreme Court, are also applicable to the present situation. For a comprehensive overview of the state action doctrine with regard to privatization and constitutional rights, see Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169 (1995).

114. U.N. Human Rights Comm., *Communication No. 273/1989, B.d.B. et. al. v. The Netherlands (Decision of 30 March 1989, adopted at the thirty-fifth session)*, U.N. GAOR, 44th Sess., Supp. No. 40 at 291, U.N. Doc. A/44/40 (Sept. 29, 1989); accord U.N. Human Rights Comm., *Communication Nos. 298/1988 and 299/1988, G. and L. Lindgren and L. Holm and A. and B. Hjord, E. and I. Lundquist, L. Radko and E. Stahl v. Sweden (views adopted on 9 November 1990, fortieth session)*, U.N. GAOR, 46th Sess., Supp. No. 40 at 253, 260, U.N. Doc. A/46/40 (Oct. 10, 1991); International Covenant on Civil and Political Rights, Human Rights Comm., *Views of the Human Rights Committee under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (Communication No. 1020/2001)*, ¶ 7.2, U.N. Doc. CCPR/C/78/D/1020/2001 (Aug. 29, 2003) [hereinafter *Communication No. 1020/2001*]; *Costello-Roberts v. U.K.*, 247 Eur. Ct. H.R. 50, 58 (1993).

115. *Communication No. 1020/2001*, *supra* note 114, para. 7.2.

In light of the above considerations—including the apparent accountability of the state for the conduct of privatized entities (presently, PMSCs and their personnel); the lack of direct horizontal application of human rights norms to the conduct of private actors; and the view of the Human Rights Committee's conclusions with respect to the state's obligations—the following question is of crucial importance: What are the available legal remedies for the victims of violations possibly committed by PMSCs in Iraq?

## VI. LEGAL REMEDIES AVAILABLE TO VICTIMS

Under international human rights law, states are obligated to provide a remedy when rights are violated. International and regional human rights instruments guarantee the right to a legal remedy and the effective access to a fair hearing by competent judicial authorities.<sup>116</sup> These rights are guaranteed under article 2, section 3 of the ICCPR.<sup>117</sup> For the purposes of the present discussion, it is useful to first distinguish which legal remedies are in any case *not* available to the victims of the violations allegedly perpetrated by CACI and Titan contractors. The most evident forum for the victims to present complaints for the abuses would be an Iraqi court of law. The victims could then attempt to hold the contractors accountable for the abuses either through a criminal or civil proceeding. This forum, however, is not available currently because the U.S.-led Coalition Provisional Authority (CPA) issued an order immediately following the occupation of Iraq awarding PMSCs and their personnel immunity from the "Iraqi legal process with respect to acts performed by them pursuant to the terms and

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116. DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 14–15 (1999).

117. Each State Party to the ICCPR undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.

ICCPR, *supra* note 84, art 2(3).

conditions of a Contract or any sub-contract thereto.”<sup>118</sup> According to this order, the sending state of the contractors can waive the contractors’ immunity and thus open the door for eventual legal proceedings against them.<sup>119</sup> A trial in Iraq is nevertheless impossible without the explicit permission of the sending state (in this case, the United States, which until now has not issued any waiver for the abuse cases).<sup>120</sup>

What about international legal remedies? If the conduct of the contractors amounts to war crimes, the International Criminal Court (ICC) would be the most obvious judicial organ to hear any complaints in this regard. The victims could approach the prosecutor of the ICC to request an investigation and eventual prosecution of those implicated. However, it would appear unlikely that the CACI and Titan contractors could be prosecuted due to the fact that neither the United States nor Iraq has ratified the ICC Statute, and, additionally, that the

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118. COALITION PROVISIONAL AUTHORITY, STATUS OF THE COALITION PROVISIONAL AUTHORITY, MNF-IRAQ, CERTAIN MISSIONS AND PERSONNEL IN IRAQ § 4(3), CPA Order No. 17 (Revised) (June 27, 2004) [hereinafter CPA Order 17], *available at* [http://www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_\\_Rev\\_\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf). Section 4(3) stipulates further that,

[n]othing in this provision shall prohibit MNF Personnel from preventing acts of serious misconduct by Contractors, or otherwise temporarily detaining any Contractors who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Sending State. In all such circumstances, the appropriate senior representative of the Contractor’s Sending State in Iraq shall be notified.

*Id.* The CPA originally issued the order in June of 2003. In the meantime, the administration of Iraq was officially transferred to an Iraqi interim government on June 28, 2004. Although CPA Order 17 was slightly altered, the immunity remained in force. According to article 26 of the Law of Administration for the State of Iraq for the Transitional Period, all the orders issued by the CPA will remain in effect until they are amended or rescinded by the Iraqi transitional government. Law of Administration for the State of Iraq for the Transitional Period, art. 26(C) (2004), *available at* <http://www.law.case.edu/saddamtrial/documents/TAL.pdf>. CPA Order 17 pays particular attention to PMSCs: They are obliged to comply with all “CPA Orders, Regulations, Memoranda, and any implementing instructions or regulations governing the existence and activities of Private Security Companies in Iraq, including registration and licensing of weapons and firearms.” CPA Order 17, *supra*, § 4(2).

119. See CPA Order 17, *supra* note 118, § 5.

120. Even if a trial in Iraq would be possible, there remains the question whether the Iraqi judicial system is currently capable of dealing with cases like these and whether it could guarantee fair and impartial trials.

United States successfully managed, by means of article 16 of the ICC Statute,<sup>121</sup> to force through the U.N. Security Council immunity from prosecution by the ICC until June 30, 2004. If the conduct of the contractors qualifies as a violation of articles 7 or 10 of the ICCPR and article 1 of the CAT that either directly or indirectly can be attributed to the state, then, in theory, individual complaints could be submitted to the supervisory bodies of these conventions: the Human Rights Committee and the Committee Against Torture. This avenue is also barren, however. Though the United States and Iraq are both parties to the ICCPR and the CAT, they have not ratified the optional individual complaint mechanisms of these conventions.<sup>122</sup> An appeal to the ICJ is also fruitless because only states can file a complaint before the ICJ, and then only if states have accepted the jurisdiction of the ICJ through the means stated in article 36 of the ICJ's statute. The United States has not done so.

Given that the international and Iraqi legal remedies are not accessible to victims, only U.S. remedies remain available for them. There are a number of possibilities that are not mutually exclusive. First, the victims could press for criminal prosecution of the contractors on the grounds of Coalition Provisional Authority Order Number 17 and a number of U.S. criminal statutes. An alternative option would be for the victims to sue the alleged perpetrators and their companies for committing an intentional tort, such as assault and battery.

The first option, filing criminal charges against the contractors, could take place on the grounds of a number of criminal statutes in the United States. The 1996 War Crimes Act<sup>123</sup> makes it possible to bring U.S. civilians to court and prosecute them for grave breaches as defined in articles 130 of Geneva Convention (III) and 147 of Geneva Convention (IV). They can also be prosecuted for

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121. Article 16 of the ICC Statute states that "[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, *Rome Statute of the International Criminal Court*, art. 16, U.N. Doc. A/CONF.183/9 (2002); see also S.C. Res. 1422, U.N. Doc. S/RES/1422 (July 12, 2002); S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003). This resolution was not prolonged in June 2004, partly due to the Abu Ghraib scandal.

122. Another possibility would be to file a complaint through another state that is party to these conventions. The state complaint mechanism has, however, not been utilized out of diplomatic considerations.

123. 18 U.S.C. § 2441 (2000).

violations of common article 3 of the Geneva Conventions, regardless of where these were committed. Assuming that the actions committed by the CACI and Titan contractors amount to grave breaches as defined in both conventions, or a violation of common article 3 of the Geneva Convention, a U.S. prosecutor would have enough grounds for instituting criminal proceedings.

In addition to the War Crimes Act, the recently adopted Military Extraterritorial Jurisdiction Act (MEJA)<sup>124</sup> provides another means for bringing charges against Titan or CACI contractors. The increasing use of privatization and the contracting of military tasks to PMSCs and civilians have caused U.S. legislators to enact laws that permit the prosecution of private actors who commit crimes while accompanying the armed forces abroad.<sup>125</sup> The crimes involved should be punishable by at least a one-year prison sentence. Prior to enactment of the MEJA, U.S. military law prevented prosecution of private individuals accompanying the armed forces.<sup>126</sup> The MEJA requires that the contractors work for the Department of Defense.<sup>127</sup> Contractors working for other governmental organizations fall outside the scope of this law. This would mean that CACI and Titan contractors could not be prosecuted if it turns out that the CIA hired them. This, however, should not pose much of a problem, because it is possible to prosecute contractors working for the CIA on the basis of other criminal statutes.<sup>128</sup> The

124. 18 U.S.C. §§ 3261–3267 (2000).

125. See Andrew D. Fallon & Theresa A. Keene, *Closing the Legal Loophole? Practical Implications of the Military Extraterritorial Jurisdiction Act of 2000*, 51 A.F.L. Rev 271 (2001).

126. The Uniform Code of Military Justice (UCMJ) is only applicable to American armed forces personnel and makes it possible to prosecute military personnel that are guilty of cruelty and maltreatment. See 10 U.S.C. § 893 (2000). The UCMJ, however, opens the possibility of court-martialing civilians that are in service of the armed forces or accompany them during military operations if they are “guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders.” *Id.* This possibility, however, is only available in the case of violations committed during a war that has been declared as such by the U.S. House of Representatives, a circumstance that has not occurred since World War II. See 10 U.S.C. § 802(a)(10) (2000). Nevertheless, former armed forces personnel can be prosecuted if they are still entitled to pay. 10 U.S.C. § 802(a)(4) (2000). A good number of PMSC contractors are former or retired U.S. armed forces personnel. See Fallon & Keene, *supra* note 126, at 273.

127. Military Extraterritorial Jurisdiction Act, 18 U.S.C. § 3267(1)(A)(i)(I) (Supp. IV 2004); see also Fallon & Keene, *supra* note 126, at 274.

128. See Richard A. Oppel, Jr. & Ariel Hart, *Contractor Indicted in Afghan Detainee’s Beating*, N.Y. TIMES, June 18, 2004, at A1; Indictment, United States v. Passaro, No. 5:04-CR-211-1 (E.D.N.C., June 17, 2004), available at <http://www.cdi.org/news/law/cia-contractor-indictment-passaro.pdf>. The contractor in question has been indicted on grounds of assault with a dangerous weapon resulting in serious bodily injury. 18 U.S.C. §§ 113(a)(3), 113(a)(6) (2000).

MEJA's major drawback is that the victims are at the mercy of U.S. prosecutors' willingness to start a criminal trial against the contractors.<sup>129</sup> It is worth noting that, to date, there have been no prosecutions against any of the contractors involved in the Abu Ghraib abuses under the MEJA.

A second option would be for the victims to sue the CACI and Titan contractors or the companies themselves under the Alien Torts Claims Act (ATCA). This statute, adopted in 1789, allows foreign individuals to sue others before a U.S. court for violations of the law of nations if these violations amount to a tort.<sup>130</sup> Since the *Filartiga v. Peña-Irala* decision,<sup>131</sup> this statute has been frequently invoked by victims of human rights violations committed outside the United States by a variety of actors ranging from former dictators and military personnel to U.S. and foreign multinational corporations. Use of the ATCA, however, has had mixed results, and reliance upon it is often fruitless for a variety of reasons, which will be discussed further below. The victims of the contractors in Abu Ghraib could, nevertheless, argue under the ATCA that these contractors acted under the color of U.S. law, since the government consented to the contracting out of military interrogation services, and that they violated articles 7 and 10 of the ICCPR as well as article 1 of the CAT. Failure to argue action under color of U.S. law may lead to a dismissal of the claim, as recently occurred with a lawsuit filed against CACI and Titan, detailed below.

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129. Joseph R. Perlak has identified another potential hurdle in the practical application of the MEJA. Suspects need to be detained by military personnel, who may not be inclined to do so if the reliance on PMSC contractors to fulfill certain essential tasks is high and there is no prospect of immediate replacement. Perlak, *supra* note 45, at 137. In addition to this, Andrew D. Fallon and Captain Theresa A. Keene have observed that the application of the MEJA would require establishing a close nexus between the suspects and the United States. If the United States wishes to extend its criminal law extraterritorially, U.S. nationality would in most cases be sufficient to establish such a nexus. Fallon & Keene, *supra* note 126, at 282–83. This could have consequences for cases where suspects are PMSC contractors who are not U.S. nationals.

130. An extensive discussion of the ATCA, which appears to apply, indirectly and extraterritorially, international human rights norms for tort actions outside of the United States is beyond the scope of this article. For more information in this regard, see Michael Swan, *International Human Rights Tort Claims and the Experience of United States Courts: An Introduction to the US Case Law, Key Statutes and Doctrines*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* 65 (Craig Scott ed., 2001).

131. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). In this case, the family of a Paraguayan man who had been tortured to death in Paraguay by Peña-Irala (a member of the police force of that country) successfully sued for damages in the United States for this action under the ATCA.

The benefit of using the ATCA is the prospect of financial compensation for damages that a successful tort action can accomplish in the United States. Conversely, litigating in the United States, and even more so under the ATCA, can be a long, time-consuming, and financially prohibitive affair. On top of this, victims have to file the suit in the United States, thus raising a difficult barrier for victims without any connections in the United States or for victims whose cases are not picked up by activist lawyers or organizations.

Another complication could be reliance by PMSCs on the so-called government contractor defense. Under the government contractor defense, government contractors may claim protection from liability for deaths or injuries that result from design defects in products manufactured in strict accordance with government specifications.<sup>132</sup> This defense has been used to fend off claims involving contractors performing public-works projects, but has also been extended to contractors supplying services or material to the U.S. armed forces.<sup>133</sup> One of the rationales for upholding the government contractor defense with regard to military contracts has been that holding military contractors or suppliers liable for defective designs that have been approved by the U.S. government would unduly subject military decisionmaking to judicial review.<sup>134</sup> In a recent decision regarding a claim by Vietnamese victims of the use of the chemical compound known as Agent Orange in the Vietnam War, a U.S. district court observed that “[h]olding the government contractor defense inapplicable to claims such as plaintiffs’, which essentially challenge military judgments made by the president, would effectively invite all of the United States’ past and future enemies to sue a wide variety of military contractors based on such presidential decisions in United States courts.”<sup>135</sup> This observation notwithstanding, the district court concluded that the government contractor defense does not apply to violations of human rights and norms of international law.<sup>136</sup> In the end, how-

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132. Marshall S. Turner & Alan N. Sutin, *The Government Contractor Defense: When Are Manufacturers of Military Equipment Shielded from Liability for Design Defects?*, 52 J. Air L. & Com. 397, 397–98 (1986).

133. *Id.* at 399–420.

134. *Id.* at 443–44.

135. *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7, 86 (E.D.N.Y. 2005). The Vietnamese victims claimed that the manufacturers of Agent Orange, which was used to defoliate the jungles of North Vietnam by the U.S. military during the Vietnam War and which resulted in various cases of sickness, cancer, and other complaints more than ten years after its use, were responsible under the ATCA and under international law.

136. *Id.* at 91.



ever, the district court ruled against the Vietnamese plaintiffs on the grounds that the use of herbicides by the United States in the Vietnam War did not violate international law.

A final complication of using the ATCA would be that various U.S. judges confronted by ATCA claims have reasoned that the cases are better heard in the country where the alleged violation took place on the grounds of the principle of *forum non conveniens*.<sup>137</sup> Although it is highly probable that a judge confronted with a case against a contractor for abuses in Abu Ghraib will not rely on *forum non conveniens* due to the fact that there is currently no alternative venue in Iraq (or anywhere, for that matter), the possibility cannot be completely ruled out. If a judge did determine that *forum non conveniens* is relevant, such a decision would in effect result in an exclusion of adequate legal remedies—given that current U.S. contractors enjoy immunity from the Iraqi legal system (except when this immunity is waived by the proper U.S. authorities)—and thus breach the United States' legal obligations under international law.<sup>138</sup>

At the time of this writing, two lawsuits have been filed under the ATCA against CACI and Titan, as well as against a number of their contractors. In July 2004, a lawsuit was filed on behalf of several victims against CACI and Titan for the abuses in Abu Ghraib before a district court in the District of Columbia.<sup>139</sup> Shortly thereafter, a lawsuit targeting a number of individual contractors named in the Taguba and Fay reports was filed before a district court in southern California. The lawsuit against CACI and Titan has already reached a decision at the district court level,<sup>140</sup> and will briefly be discussed in the following paragraph. The lawsuit against the individual contractors, however, is still in its pre-

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137. See, e.g., *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

138. As previously noted, under article 2(3), the ICCPR obliges states to ensure an effective remedy for violations of the rights guaranteed by that treaty and that victims have access to competent judicial authorities. ICCPR, *supra* note 84, art. 2(3).

139. See *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005). The complaint for damages claims, *inter alia*, that a number of (mostly unidentified) Titan and CACI contractors were involved in various instances of abuse resulting in significant physical injury, emotional stress and, in one case, wrongful death. *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 12–13 (D.D.C. 2005). Plaintiffs rely on a number of international legal instruments including the above-mentioned Geneva Conventions, and articles 7 and 10 of the ICCPR. See also Press Release, CACI International, Inc., CACI Rejects Lawsuit as Slandorous and Ludicrous: Frivolous Suit Based on False Statements Without Merit (July 27, 2004), available at [http://www.caci.com/about/news/news2004/07\\_27\\_04\\_NR.html](http://www.caci.com/about/news/news2004/07_27_04_NR.html).

140. See *Ibrahim*, 391 F. Supp. 2d 10.

liminary phase, although a motion to transfer the action to another district court (in eastern Virginia) has been granted.<sup>141</sup>

With regard to the first lawsuit, the plaintiffs asserted claims, under the ATCA, government-contracting laws, and the common law of assault and battery, wrongful death, false imprisonment, intentional infliction of emotional distress, conversion, and negligence. The defendant companies moved to dismiss the claims, arguing, among other things, lack of jurisdiction and the nonapplicability of the ATCA to the case because “the law of nations” does not cover torture by nonstate actors. In addition, the companies claimed that plaintiffs’ common law tort claims may be preempted by the government contractor defense. In August 2005, the district court of the District of Columbia granted a motion to dismiss all of the claims against CACI on the grounds of lack of jurisdiction since the company is incorporated in the Netherlands.<sup>142</sup> With respect to the ATCA claim, the district court, citing previous ATCA case law,<sup>143</sup> held that, although acts of torture violate international law, the latter does not reach private, nonstate conduct of this sort unless it is claimed that the private actors were acting “under the color of state authority.” It would appear that during the proceedings, one of the plaintiffs made such a claim, but it was later withdrawn. With regard to the government contractor defense put forward by CACI and Titan, the district court decided not to accept the defendants’ arguments entirely until they were able to produce better evidence. Finally, the court decided to allow the remaining common law claims, allowing the plaintiffs to amend their complaint. As of the time of this writing (December 2005), the case was still pending.

In sum, although international legal remedies are not available for the victims of Abu Ghraib, they could attempt to employ U.S. legal remedies. However, this will probably not be easy for the victims because they will be dependent upon the expediency and willingness of U.S. prosecutors to bring the case before a criminal court. Whereas civil legal remedies appear to be readily available for filing suits against PMSCs and their contractors, and victims have already done so, they face long and expensive judicial procedures—including several legal hurdles such as a

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141. See *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152 (S.D. Cal. 2005).

142. *Ibrahim*, 391 F. Supp. 2d 10.

143. See *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985). Both of these cases held that, although acts of torture violate international law (or the “law of nations” as used in both cases), international law as such does not cover nonstate conduct.

possible reliance on the government contractor defense (although admittedly this should not pose much of a problem). There is also the additional, albeit remote, possibility that a judge may decide not to deal with the case on the grounds of *forum non conveniens*. Finally, as the abovementioned cases against CACI and Titan illustrate, judges may consider certain aspects of international law nonapplicable to private actors such as PMSCs, thus making it difficult to claim that these actors have violated international legal norms, such as human rights. In order to facilitate these claims and avoid such pitfalls as encountered by the victims in the lawsuits against CACI and Titan, I suggest that victims should attempt to establish a concrete link between PMSCs and the state, emphasizing, among other things, the delegation of a public function to a private actor.

### CONCLUSION

We have seen that the status of PMSCs is not altogether unambiguous. It is difficult to argue that these actors are mercenaries, in light of the convoluted definition provided by the applicable international instruments. It is also clear that the privatization of military and security tasks and services is a controversial topic. However, this privatization is a trend that cannot be easily stopped, taking into account the developments in a number of countries, including the reduction of military budgets. States will actively seek ways to delegate tasks formerly performed by military personnel that can be cheaply carried out by private companies. This may be reasonable, and it is certainly arguable that the privatization of certain military tasks and services, such as logistical support, appears to be less problematic. However, it becomes more complicated when states contract out tasks that potentially involve the lethal use of force. Without sufficient and strict regulation and monitoring at the national and international level, the activities of PMSCs can lead to situations such as those that we have witnessed in Iraq. This does not mean, however, that states that choose to privatize these tasks are not responsible for the conduct of these companies. As we have seen, under international law the state is fully responsible for the conduct of PMSCs that carry out state functions or tasks. Therefore, states have the obligation to ensure that PMSCs can be brought to justice and held accountable for their conduct if such conduct violates the state's international legal obligations. Additionally, states have an obligation to provide victims of human rights violations committed by PMSCs or their contractors with access to effective judicial remedies that bring relief to the victims' plights.