THE SECRETARY WILL DENY ALL KNOWLEDGE OF YOUR ACTIONS: THE USE OF PRIVATE MILITARY CONTRACTORS AND THE IMPLICATIONS FOR STATE AND POLITICAL ACCOUNTABILITY

by
Saad Gul[*]

This Article argues that the main issue regarding the use of private military contractors (PMCs) is that of accountability. It begins by exploring the status of mercenaries in international law, as reflected in various conventions, protocols, and state practice. It maintains that contrary to popular belief, the use of PMCs or mercenaries—no matter how defined—is not a violation of international law. However, their use has serious political implications at both the domestic and state levels because it obfuscates the issue of ultimate responsibility.

I. INTRODUCTION

Frankly, I'd like to see the government get out of war altogether and leave the whole feud to private industry.

-Major Milo Minderbinder, *Catch-22*[1]

In March 1994, Croatian Defense Minister Gojko Surak appealed to the United States for assistance in transforming his armed forces, then reeling from

[*] Law Clerk to The Hon. John C. Martin, Chief Judge, North Carolina Court of Appeals. JD Wake Forest University School of Law, BA Davidson College. I would like to express my appreciation to Professor George K. Walker of the Wake Forest University School of Law for his endless draft reviews. I would also like to thank Professor David Cole of Georgetown University Law Center, and Professor Beth Stephens of Rutgers for their helpful responses to my queries. I am also grateful to Amanda J. Austin, Elizabeth Newell, and the editorial staff of the Lewis & Clark Law Review for their suggestions. Any mistakes are my own. This article is dedicated to my father, Brig Gen ® Ahmed Salim, and the soldiers who have fought for our freedoms.

[1] P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 522 (2004).

stinging defeats at the hands of their Serb and Muslim foes.[2] His plea fell on sympathetic ears in Washington.[3] There was just one problem: a U.N. embargo tied the Pentagon's hands when it came to direct military aid.[4] In its stead, Washington suggested MPRI, a private military contractor (PMC) that offered tactical and strategic consulting services.[5] Due to the embargo, the MPRI contract was supposedly limited to non-strategic matters such as the role of the military in a democracy.[6]

A few months after the contract—officially termed the "Democracy Transition Assistance Program"—was implemented, the Croats unleashed Operation Lightning Storm, a multi-pronged assault integrating air, artillery, and fast moving infantry attacks against the Serbian stronghold of Krajina.[7] Analysts detected a strong American flavor to the offensive[8] and mocked MPRI claims that it had confined itself to lessons in democratic etiquette as disingenuous.[9]

Some experts saw the episode as a demonstration of the advantages of contracting: "without the involvement of a single American soldier or a single American dollar, the MPRI project strengthened Croatia's military and bolstered the [American] . . . strategic position in the region."[10] However, the enterprise was also fraught with potential pitfalls: violation of the UN embargo,[11] Croatian atrocities,[12] and unknown future consequences.[13]

---

[2] Matthew J. Gaul, *Regulating the New Privateers: Private Military Service Contracting and the Modern Marque and Reprisal Clause*, 31 LOY. L.A. L. REV. 1489, 1489 (1998).

[3] *Id*.

[4] *Id*.

[5] *Id*.

[6] *Id*. at 1489−90.

[7] *Id*. at 1493.

[8] Roger Cohen, *U.S. Cooling Ties to Croatia After Winking at Its Buildup*, N.Y. TIMES, Oct. 28, 1995, at A1 ("An American officer working for United Nations forces called the attack a textbook campaign. . . 'It was carried out on an unsophisticated level, but for me the evidence of American instruction was unmistakable. You don't just stumble on what the Croats have achieved.'").

[9] Tina Garmon, Comment, *Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act*, 11 TUL. J. INT'L & COMP. L. 325, 336 (2003). One expert, retired Marine Lieutenant Colonel Roger Charles, noted that "[n]o country moves from having a ragtag militia to carrying out a professional military offensive without some help . . . The Croatians did a good job of coordinating armor, artillery and infantry. That's not something you learn while being instructed about democratic values." *Id*. For its part, MPRI adamantly denied planning the offensive, its spokesmen noting that "they [the Croats] could have got . . . the battle plan just as well from Georgetown University as from MPRI." Gaul, *supra* note 2, at 1494.

[10] *Id*. at 1490.

[11] Garmon, *supra* note 9, at 336–37 ("[T]he United States broke a UN sanction when MPRI admitted to training Croatian forces and offering direct assistance to its forces. UN sanctions were further violated when Croatia transferred weapons received from MPRI to other regions of the former Yugoslavia. MPRI clearly played an active role not only in the Croatian offensive, but also in thwarting international sanctions imposed against the region, sanctions the U.S. *government* voted for in the UN Security Council and an embargo the U.S. military officially helped enforce.").

Perhaps the most fundamental repercussion though, was the minimal oversight by Congress or even the Pentagon[14] over robust military intervention potentially compromising American neutrality[15] in a geopolitically volatile region.[16] Given MPRI's denials, and Croatia's natural reticence, the extent of American culpability—and liability—for Operation Lightning Storm was nebulous at best.[17] Accountability was therefore impossible. Critics point to the MPRI contract as an example of a growing inclination on the part of the Pentagon to use private military contractors in lieu of American troops not only to obfuscate the question of ultimate responsibility at the state level, but also, critics charge, Congressional oversight at the domestic level.[18]

The issues highlighted by MPRI's contract with Croatia have continued to grow in the subsequent decade. Despite historical American antipathy toward mercenaries,[19] the United States has come to rely increasingly on PMCs, deploying at least 20,000 in Iraq, making them the second largest contingent in

---

[12] *Id*. at 336 ("During the assault, Serbian villages were sacked and burned, hundreds of civilians were killed, and more than one hundred thousand civilians were displaced.").

[13] Ken Silverstein, *Privatizing War*, NATION, July 28, 1997, at 14 ("Once you provide training there's no way to control the way that the skills you've taught are used.").

[14] *Id*. at 11−14. One expert noted "[i]f the D.O.D. was directly involved you'd have a whole network of Congressional offices providing oversight, even if it's not always sufficient. . . . When you turn these tasks over to a contractor, the only oversight comes from an overworked civil servant in the federal bureaucracy." *Id.*

[15] The tone of the literature makes clear that at least some experts view that American neutrality in the Balkans was indeed compromised. *See, e.g.*, Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1027 (2004) (noting that Washington was "intent on remaining *ostensibly* neutral") (emphasis added). *See also* Anja Miller, *Military Mergers: The Reintegration of Armed Forces After Civil Wars*, 25 FLETCHER F. WORLD AFF. 129, 138 (2001) (noting that PMCs made it possible for Washington to play favorites in the Balkans without "*overtly* abandoning their neutral stance") (emphasis added).

[16] Ljubica Z. Acevska, *Macedonia and the Balkans in the 21st Century*, 34 VAL. U. L. REV. 477, 478 (2000) ("It was stated at the beginning of this century that the Balkans create more history than they can endure. Unfortunately, this statement proved to be undoubtedly true. The Balkans are still burdened with ancient quarrels and historical disputes. During this troubled century, the Balkans initiated the two wars both earlier and at the end of this century, one world war and two major international interventions.").

[17] *But see* Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law*, 22 MICH. J. INT'L L. 85, 122 (2000) (noting "allegations that the Krajina Serbs were receiving assistance from the Serbian government").

[18] *See* John Barry, *From Drug War to Dirty War:* Plan Colombia *and the U.S. Role in the Human Rights Violations in Colombia*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 161, 191 (2002) (noting the "inclination of the U.S. to outsource its foreign policy adventures in Colombia and around the world to mercenary multinationals like DynCorp and Military Professional Resources International (MPRI) for the purpose of limiting exposure risks and accountability").

[19] *See* THE DECLARATION OF INDEPENDENCE para. 26 (U.S. 1776) (stating that at the time of the Declaration of Independence, the King of Britain, George III, was "transporting large Armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation").

that country.[20] This places the United States at the forefront of military outsourcing.[21]

Though PMCs such as North Carolina-based Blackwater International draw distinctions between their roles as "security" contractors and the military's war-making functions, the line is hazy at best.[22] Private contractors have fought off insurgent assaults on Coalition Authority Headquarters in Kut and Najaf.[23] In the most high profile incident of the Iraq war, four Blackwater employees were ambushed and killed in Fallujah during an escort mission.[24] Afghan President Hamid Karzai, perhaps the single most critical—and vulnerable—American ally in the War on Terror is guarded by private contractors, not U.S. troops.[25]

The major concerns regarding PMCs pertain not to logistical support missions, such as running mess-halls, but the outsourcing of combat functions.[26] Congress is not oblivious to the possible implications. Twelve senators co-signed a letter authored by Senator Jack Reed protesting that PMCs operate in a manner virtually indistinguishable from U.S. forces.[27] The senators were specially concerned that the contractors were not subject to "the rules that guide the conduct of American military personnel"[28] and that "[i]t would be a dangerous precedent if the United States allowed the presence of private armies operating outside the control of governmental authority and beholden only to those who pay them."[29]

This Article argues that the main issue regarding the use of PMCs is that of accountability. It begins by exploring the status of mercenaries in international law, as reflected in various conventions, protocols, and state

---

[20] James R. Coleman, Note, *Constraining Modern Mercenarism*, 55 HASTINGS L. J. 1493, 1503−04 (2004).

> The ubiquity of such firms in the single example of Iraq is surprising: Vinnell Corporation, a subsidiary of Northrop Grumman, the second largest defense contractor in the United States . . . has been given the contract to train the New Iraqi Army. Custer Battles with 1,300 employees in Iraq has a contract to guard the Baghdad airport. Dyncorp is receiving tens of millions of dollars to train the Iraqi police force. ArmorGroup has 800 security contractors working in Iraq. Erinys International employs some 14,000 contractors to provide security to Iraq's oil production facilities. Blackwater USA's "Global Elite Troops," who have engaged in combat in Najaf, are serving as bodyguards to Coalition Provisional Authority administrator L. Paul Bremer III.

Id.

[21] *Id*. at 1502.

[22] David Barstow, *Security Companies: Shadow Soldiers in Iraq*, N.Y. TIMES, Apr. 19, 2004, at A1.

[23] *Id*.

[24] *Id*.

[25] Michaels, *supra* note 15, at 1003.

[26] *Id*. at 1013. ("[E]xchanging gunfire with Iraqi insurgents, Serbian irredentists, and Colombian drug lords is a far cry from staffing the mess halls or even building Army helicopters.").

[27] Barstow, *supra* note 22.

[28] Coleman, *supra* note 20, at 1505.

[29] *Id*.

practice. It maintains that contrary to popular belief, the use of PMCs or mercenaries—no matter how defined—is not a violation of international law.[30] However, their use has serious political implications at both the domestic and state levels because it obfuscates the issue of ultimate responsibility.

The next section explores the historical American wariness toward private military activity. At the domestic level, the use of PMCs blurs the notion of military accountability, and makes its hard for Congress to exercise its oversight authority, particularly the power of the purse. As a general rule, the more attenuated the connection between official Washington and the PMC, the harder it is for Congress to perform its watchdog functions.[31]

The Article next evaluates the claim that the use of PMCs ostensibly shields the United States from complicity in their actions. It argues that while the United States may sometimes camouflage its role behind private contracts—the efficacy of such a disguise is open to question—it is also vulnerable to being drawn into a conflict or having its interests compromised because of PMC actions.

The Article then explores the liability of the United States[32] for the actions of U.S.-affiliated PMCs through the prism of customary norms and the analysis of the International Law Commission. The conclusion synthesizes the analysis into the potential implications of the use of PMCs for national security, and notes a recent case that highlights some of the potential pitfalls of a widespread adoption of the PMC approach.

II. INTERNATIONAL LAW

> *[I]t makes [no] sense to label as international law rules that many states will not obey and that very few states are willing to enforce against violators. If one were to accept this view, the world would soon witness repeated violations of rules that scholars insisted were legally binding. Thus, the discipline of international law would in effect be describing itself as ineffectual. . . .*[33]

---

[30] *See generally* Major Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1 (2003) (analyzing treaties and international practice to conclude that use of mercenaries and PMCs is legal under international law).

[31] Michaels, *supra* note 15, at 1008. ("Military privatization can be, and perhaps already has been, used by government policymakers under Presidents Bill Clinton and George W. Bush to operate in the shadows of public attention, domestic and international laws, and even to circumvent congressional oversight.").

[32] *See* Juan Carlos Zarate, *The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder*, 34 STAN. J. INT'L L. 75, 134 (1998) ("The United States has passed several legislative acts restricting the potential recruitment and enlistment of its citizens as mercenaries for foreign agents: the Neutrality Act of 1794; the Foreign Relations Act; the Immigration and Nationality Act; and the Foreign Agents Registration Act.").

[33] Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT'L L. 1, 9 (1988).

Though theoretically disfavored in international law,[34] mercenaries are ubiquitous. As Major Milliard notes, "[t]he sovereign's resort to mercenaries is as old as history itself."[35] However unpopular,[36] mercenaries have been traditionally accepted "if not by polite society, then by most states, their armies, and international law."[37] For example, the Geneva Convention Relative to the Treatment of Prisoners of War[38] does not sanction any criminal penalties against mercenaries.[39]

Part of the problem is that mercenary is a vague and amorphous term. Though there are several definitions of the term "mercenary," none of them is sufficiently accepted to constitute an international norm.[40] Then-Assistant Secretary of State William Schaufele told the House International Relations Committee that "[a] legally accepted definition of what constitutes a mercenary does not exist in international law."[41] The definitions that do exist are ungainly and virtually impossible to apply to any individual in practice—Professor Best argued that any mercenary who could not exclude himself from such definitions deserved to be shot—along with his lawyer![42]

---

[34] *See* Coleman, *supra* note 20, at 1493.

> [M]ercenarism is strongly disfavored under international law. The United Nations has concluded that mercenarism destabilizes sovereign nations and impedes the right of peoples to self-determination, and a consensus in favor of eradicating mercenarism has been manifest in positive and customary international legal developments since 1945. These efforts culminated in the Convention Against Mercenaries, which entered into force in 2001, and in the establishment in 2002 of the International Criminal Court, under the jurisdiction of which traditional mercenaries may be tried for war crimes, genocide, or crimes against humanity, indicating that, after millennia of unconstrained mercenarism, international legal mechanisms were finally taking shape to confront this problem decisively.

Id.

[35] Milliard, *supra* note 30, at 2.

[36] *Id*. ("[T]he profession of arms as conducted by professionals prepared to serve an alien master came to be regarded with such obloquy that it seemed almost to have sunk to the level of the supreme crime against mankind."). *See also* Marie-France Major, *Mercenaries and International Law*, 22 GA. J. INT'L & COMP. L. 103, 106–07 (1992).

[37] Milliard, *supra* note 30, at 7.

[38] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S 135 [hereinafter Geneva POW Convention].

[39] *Id*. art. 3 (mandating that all persons taking no active part in hostilities, including combatants who have stopped fighting, must be treated "humanely."). *See also* Ellen L. Frye, *Private Military Firms in the New World Order: How Redefining "Mercenary" Can Tame the "Dogs of War"*, 73 FORDHAM L. REV. 2607, 2664–65 (2005).

[40] Melysa H. Sperber, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 AM. CRIM. L. REV. 159, 194 (2003).

[41] *Id*.

[42] GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS 328 n.83 (1980). *See generally* Major, *supra* note 36.

For instance, Protocol I[43] defines a mercenary as an individual who: (i) fights (ii) abroad (iii) in combat (iv) motivated by private gain (v) paid (vi) substantially more than standing army combatants (vii) is not a national or resident of the state (viii) and neither a member of its armed forces nor on official duty from a third party's armed forces.[44] The U.N. Mercenary Convention[45] incorporates all these requirements, and adds yet more.[46] Though the United States is party to neither of these conventions, it does recognize that they embody customary international norms.[47] It is the stated policy of the United States to adhere to these conventions to the extent they reflect customary international law.[48] However, if these purported norms exist only as incoherent ramblings as reflected in the definitions above, the United States can respect them and still undertake PMC activity.

Analyzing these norms through the prism of Professor Best's analysis, it would be virtually impossible to find, let alone convict an individual for violating all the stated requirements. For example, "Citizenship is easily granted."[49] Croatia, to take but one instance, routinely granted commissions and citizenship to foreign fighters serving with its armed forces during the Balkan conflict.[50]

And while mercenary activity is theoretically frowned upon,[51] much of this is based on the post-colonial African experience. Prompted by their difficulties with soldiers of fortune such as Bob Denard, "Mad" Mike Hoare, and other mercenaries in post-colonial Africa,[52] the member states of the OAU drafted a

[43] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 47, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

[44] *Id*.

[45] International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, *opened for signature* Dec. 4, 1989, 2163 U.N.T.S. 96.

[46] *See id*. art. 1(2) (including a requirement that the mercenary's efforts be directed at overthrowing or undermining a government or its State's territorial integrity). This definition would exclude, for instance, virtually all PMC activity in Iraq.

[47] Abraham D. Sofaer (Legal Advisor, United States Department of State), *The Position of the United States on Current Law of War Agreements,* 2 AM. U.J. INT'L L. & POL'Y 460, 463–66 (1987).

[48] *Id*.

[49] Singer, *supra* note 1, at 533.

[50] *See also* Montgomery Sapone, *Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT'L L. J. 1, 39−40 (1999) ("The Croatian Army, for example, commissioned a number of foreign mercenaries as officers. Croatia's official position was that its military units did not include mercenaries, but volunteers of Croatian origin or descendants of Croatian immigrants, who by virtue of the principle of jus sanguinis should be regarded as Croats.").

[51] *See* Coleman, *supra* note 20, and Protocol I, *supra* note 43, art. 47.

[52] Singer, *supra* note 1, at 527 ("Mercenary units directly challenged a number of nascent state regimes in Africa, as well as fought against the U.N. in the course of the United Nations Operation in Congo (ONUC) from 1960 to 1964. The most notable of these were known by the nickname 'Les Affreux' ('The Terrible Ones')").

regional arrangement prohibiting private military activity.[53] The international community has been similarly Africa-centric: for instance, in 1967, prompted by the situation in the Congo, the Security Council condemned any state "permitting or tolerating the recruitment of mercenaries and the provision of facilities for them."[54]

Even in that instance, as Professor L.C. Green noted, it was important that the Council stopped short of condemning mercenaries, and designating their use a violation of international law: "All it was willing to do was call upon member States to take the measures they might consider necessary to prevent mercenaries from taking action against any State."[55]

The situation in Africa may have been a product of a particular phase in history.[56] That phase—the occasionally reluctant and protracted withdrawal of Western European powers from their Third World possessions—has long since passed, and many of the concerns it spawned seem anachronistic. For instance, Bob Denard last hit the headlines when he attempted to acquire several profitable nudist colonies—with fiscal, not military measures.[57] However, even in the post-colonial period the OAU effort[58] was riddled with exceptions, and never rose to the level of a customary norm, even within the continent of Africa. In many instances, African governments were privy to contracts for mercenary services, while deploring their use by opponents; they were thus in the position of apparently wanting to have their cake and eat it too. For instance, in November 1995, the Angolan government defended its contract with South African military contractor Executive Outcomes as self-defense.[59]

The Angolans may have had a point. A case can certainly be made that the inherent rights[60] of self-defense and territorial integrity under Articles 51 and

---

[53] Zarate, *supra* note 32, at 127. *See also* Paul W. Mourning, *Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries*, 22 VA. J. INT'L L. 589, 599 (1982).

[54] S.C. Res. 239, ¶ 2, U.N. Doc. S/INF/22 Rev. 2 (July 10, 1967). *See also* Major, *supra* note 36, at 107.

[55] L.C. Green, *The Status of Mercenaries in International Law*, 9 MANITOBA L.J. 201, 224 (1978). *See also* Major, *supra* note 36, at 106–07.

[56] LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 114 (2d ed. 2000) (noting that anti-mercenary measures in Article 47 of Protocol I were written to reflect political disapproval of mercenary use by European colonial powers, rather than as a norm of the law of armed conflict).

[57] Henri Quetteville, *French Mercenary is Behind Nudist Coup,* TELEGRAPH, Aug. 11, 2000, at A1.

[58] A number of mercenaries have been tried and sentenced, particularly in Africa, e.g. the mercenaries who invaded Guinea in 1970, the trial of Rolf Steiner in the Sudan in 1971, the trial of thirteen mercenaries in Angola in 1976, and the trial of mercenaries in the Seychelles in 1981. *See* Major, *supra* note 36, at 134.

[59] Sapone, *supra* note 50, at 2 ("The government called EO 'foreign military and industrial security specialists' hired on a cooperation basis and argued that the cooperation agreements and contracts signed with the Ministry of Defense were legal and in accordance with Article 15 of Presidential Decree No. 2/93 on military policy.").

[60] *See* Int'l Law Comm'n, Draft Articles with Commentaries on Responsibility of States for Internationally Wrongful Acts art. 21, *in Report of the International Commission on the Work of Its Fifty-Third Session*, ¶ 77, U.N. Doc. A/56/10 (2001) [hereinafter Draft

2(4) of the U.N. Charter includes the right to hire mercenaries.[61] Many commentators have argued that self-defense and Article 51 rights are now virtually tantamount to *jus cogens* norms.[62] International tribunals seem to be arriving at similar conclusions.[63] If Angola, a state at the forefront of the international movement to ban mercenaries can defend their use on the grounds of Article 51 self-defense, it is hard to take issue with the United States for use of PMCs. The PMCs that the United States uses are a far cry[64] from the background of caricatured wild-eyed desperados that triggered African efforts to outlaw mercenaries in the post-colonial context.[65]

There is plenty of additional evidence to buttress the argument that there is no emerging norm against mercenaries. Not only have states continued to hire and use mercenaries throughout the last few decades, but there have been few

Articles] (noting that Article 51 preserves a pre-existing paramount right to self-defense). These articles and commentaries are reprinted in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002).

[61] Dino Kritsiotis, *Mercenaries and the Privatization of Warfare*, 22 FLETCHER F. WORLD AFF. 11, 16 (1998) ("Furthermore, some countries, like Angola, may consider mercenaries an essential aspect of their self-defense machinery and one wonders whether this is precisely the kind of decision that Angola is entitled to make under its legal right of self-defense, guaranteed to all nations by Article 51 of the United Nations Charter.").

[62] LELAND M. GOODRICH ET AL., CHARTER OF THE UNITED NATIONS 342−53 (3d ed. 1969); THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 661–78 (Bruno Simma ed., 1994); 74 GEORGE K. WALKER, THE TANKER WAR 1980−88: LAW AND POLICY 120–129 (U.S. Naval War Coll. Int'l L. Stud. 2000). *See also* Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 ILSA J. INT'L & COMP. L. 767, 784 (1997); Thomas K. Plofchan, Jr., *A Concept of International Law: Protecting Systemic Values*, 33 VA. J. INT'L L. 197, 234−37 (1992).

[63] *See, e.g.*, Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 94, 100–01 (June 27) (holding a customary norm approaching *jus cogens* status for U.N. Charter Article 2(4) existed parallel to the Charter itself).

[64] *See* Eric Pape & Michael Meyer, *Dogs of Peace*, NEWSWEEK, Aug. 25, 2003, at 22. British Foreign Secretary Jack Straw noted "today's world is a far cry from the 1960s, when private military activity usually meant mercenaries of the rather unsavory kind involved in postcolonial or neocolonial conflicts." *Id. See also* Michaels, *supra* note 15, at 1019 n.44.

[65] Michaels, *supra* note 15, at 1022.

> Indeed, contemporary American outfits are not dyed-in-the-wool bands of ruthless warriors, but rather they are incorporated businesses often headed by retired generals and colonels who have traded in their fatigues for pinstripes and left the barracks for the Beltway. Their employees, in turn, are not a rag-tag lot pulled from the ranks of society's denizens like the French Foreign Legion of yesteryear, but are likewise often recruited from among the most decorated echelons of the American military establishment.

Id. The federal government has several tools to control undesired American PMC activity. *See, e.g.*, Arms Export Control Act, 22 U.S.C. § 2751 (2000); International Traffic in Arms Regulations, 22 C.F.R. § 120.8 (2004); Foreign Relations Act, 18 U.S.C. § 958 (2000). Yet the United States does not have a distinct ban on mercenaries. Frye, *supra* note 39, at 2633−36. Prosecutions for mercenary activity have been rare, if not non-existent. Larry Taulbee, *Myths, Mercenaries and Contemporary International Law*, 15 CAL. W. INT'L L.J. 339, 339−63 (1985). *Accord* Deven R. Desai, *Have Your Cake and Eat It Too: A Proposal for a Layered Approach to Regulating Private Companies*, 39 U.S.F. L. REV. 825, 871 (2005).

efforts to enact municipal laws to prevent citizens of a jurisdiction from becoming mercenaries.[66] The very paucity of conventions on mercenary use may constitute indicia that states do not consider it to be an unacceptable practice, and reserve the option to resort to them if circumstances so warrant.[67]

The main argument against mercenaries is that they strip states of their monopoly on violence.[68] So, for instance, Protocol I's definition of mercenaries does not include fighters affiliated with any state.[69] Much of the effort against them involves an effort to prevent free agents. Therefore, American PMCs that, as in Iraq, typically work under the auspices of states to stabilize nations and professionalize militaries are not the concern.[70] The issue only arises if the PMCs appear to be acting on their own behalf, or at the behest of non-state actors.

The role of the American state in underwriting the PMC use of force is evident in multiple ways in Iraq. Contractors, in any capacity, accompanying U.S. armed forces, become prisoners of war[71] when captured.[72] The head of at least one allied force, the Dutch Ministry of Defense, has stated that the United States is responsible for the actions of its contractors.[73] Analogous responsibilities under the International Law Commission's *Articles on*

---

[66] Zarate, *supra* note 32, at 80.

[67] Garmon, *supra* note 9, at 338 ("Generally, most States are reluctant to become signatories to international resolutions calling for a blanket ban on mercenarism because many expect to use or have used mercenaries.").

[68] Sapone, *supra* note 50, at 35 (analyzing how "States have . . . maintained a monopoly on the use of force," and how PMCs fit in against this legal backdrop).

[69] Protocol I, *supra* note 43, at art. 47(2)(e) (noting that a mercenary may not be a member of the armed forces of a Party to the conflict).

[70] Zarate, *supra* note 32, at 115.

[71] Whether mercenaries are in fact entitled to POW status is an open question, but in practice the answer seems be in the affirmative. *See* Frye, *supra* note 39, at 2641.

> Assuming one could determine who a mercenary is, it is still not clear how he ought to be treated if captured in combat….
>
> The 1949 POW Convention protects the rights of lawful combatants in international wars. The POW Convention, by its silence on the status of mercenaries, appears to include mercenaries in those afforded POW protection. The United States ratified the POW Convention, and thus presumably would confer POW status on a mercenary captured in combat.
>
> Article 47 of Protocol I explicitly revoked a mercenary's POW status…The United States has not ratified Protocol I, and in fact the U.S. Ambassador explicitly rejected Article 47 as not being part of customary international law . . . The U.N. General Assembly Resolutions purported to criminalize mercenarism while not explicitly denying POW status.

Id.

[72] Geneva POW Convention, *supra* note 38, art. 4(A)(4).

[73] Hans de Vreij, *Privatising the Iraq War*, RADIO NETHERLANDS, May 14, 2004, *available at* http://www.radionetherlands.nl/currentaffairs/region/middleeast/irq040514.html. *See also* Coleman, *supra* note 20, at 1538.

Responsibility of States for Internationally Wrongful Acts [74] are discussed in Part V, below.

These responsibilities have consequences, because oversight is nebulous at best.[75] Congressional oversight only kicks in if the contract exceeds $50 million, and though U.S. Embassies in the client country are charged with supervision, there is virtually none in practice.[76] The Arms Export Control Act[77] and relevant regulations[78] do require companies selling military services abroad to register with the Office of Defense Trade Controls and obtain a license for each contract.[79]

However, once abroad, PMCs can operate with virtual impunity, answerable to no code of criminal justice.[80] For instance, DynCorp employees ran sex-slave operations in Bosnia, including videotaped rapes.[81] "Given the vagaries of the contractors' legal status and the jurisdictional limitations of American criminal law, there was little the United States could do."[82]

---

[74] Draft Articles, *supra* note 60. Though a detailed analysis of the ILC's State Responsibility project is beyond the scope of this Article, for an excellent historical account and textual analysis, see CRAWFORD, *supra* note 60.

[75] Frye, *supra* note 39, at 2644 ("Although official government approval is required, confusion surrounds this process.").

[76] *Id*.

[77] U.S.C. § 2778(b) (2003).

[78] Department of State International Traffic in Arms Regulations (ITAR), 22 C.F.R. § 124.1(a) (1997).

[79] Gaul, *supra* note 2 at 1493.

[80] It is doubtful whether either military law, such as the Uniform Code of Military Justice (UCMJ) or federal criminal law provide appropriate coverage, though Congress has tried to close the gap with the War Crimes Act of 1996. *See* Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 231, 233 (2000).

> The UCMJ subjects to military law "[in] time of war, persons serving with or accompanying an armed force in the field." In United States v. Averette, however, the U.S. Court of Military Appeals held that the phrase "in time of war" meant "a war formally declared by Congress."

Id. The problem here is that World War II was the last occasion when Congress formally declared war, but U.S. forces have seen almost continuous combat since then. In these actions, the UCMJ does not appear to offer any jurisdiction. Furthermore, federal criminal law is "presumed not to enjoy extraterritorial application," and jurisdictional bases there are similarly limited. *Id*. However, the War Crimes Act of 1996 might provide the solution. *Id*.

> This act provides for federal criminal jurisdiction over members of the armed forces and U.S. nationals who commit war crimes either in the United States or abroad. Unlike Article 2 of the UCMJ, this statute is not predicated on a congressionally declared war. Further, the term "war crime" is broadly defined to include (1) grave breaches of the Geneva Conventions of 1949 and any protocol to which the United States is a party; (2) acts prohibited by specified provisions of the Hague Convention of 1907; (3) violations of common Article 3 of the Geneva Conventions, which article applies to noninternational armed conflict; and (4) the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.

Id.

[81] Michaels, *supra* note 15, at 1029.

[82] *Id*. But some commentators have argued that the Alien Tort Statute could provide civil remedies against such abuse. *See* Frye, *supra* note 39, at 2644. *See also* Phillip Carter,

Furthermore, as MPRI's experience in Croatia showed, even at the political level there is negligible political control or oversight once actual operations get underway in a foreign land.[83] This could lead to embarrassing situations for the United States if civilians captured abroad engaging in acts of war claim to be acting on behalf of the Pentagon, which in turn denies any affiliation.[84]

III. SPEAKING FOR—AND PAID FOR BY—THE UNITED STATES?

The lack of a clear reporting structure is a source of concern because substituting private contractors for military forces can constitute a procedural device that enables decision makers to escape[85] making the tough calls: "It's. . . about avoiding tough political choices concerning military needs, reserve call-ups and the human consequences of war."[86]

At the international level, the accountability problem is equally profound. By blurring state accountability, PMCs tend to undermine the enforcement of a basic principle of international law.[87] The element of state accountability is what distinguishes a lawful combatant from an unlawful one.[88] "The international community's fear of mercenaries lies in that they are wholly independent from any constraints built into the nation-state system."[89]

Commentators have noted that PMCs are dangerous precisely because they allow states to bypass mechanisms for state responsibility:

> In the post-Cold War era, the Security Council has reemerged as a, if not the, legitimate source for the authorization of military intervention in the name of collective security. Without the endorsement of the Security Council, any one nation's decision to intervene in the affairs of another sovereign state is subject to criticism and charges of illegality and illegitimacy. But although the Security Council attempts to regulate the

How to Discipline Private Contractors: What Consequences Do the Companies Involved in Abu Ghraib Face?, SLATE, May 4, 2004, http://slate.msn.com/id/2099954 (last visited Nov. 6, 2005).

[83] Gaul, *supra* note 2, at 1518 ("Assurances that the company will follow the rules are of little comfort when there is little or no oversight or enforcement after the project has begun.").

[84] Indeed, this has already happened. *See* Carlotta Gall, *Mercenaries in Afghan Case Get 8 to 10 Years in Prison*, N.Y. TIMES, Sept. 16, 2004, at A12.

[85] Michaels, *supra* note 15, at 1012. ("[O]utsourcing gives Washington freer rein by allowing the government to indemnify itself against casualties and other "sticky" political situations and therefore permits it broader license to purchase strategic outcomes.").

[86] Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL'Y REV. 549, 553 (2005).

[87] Zarate, *supra* note 32, at 122.

[88] *Id*.

[89] *Id*. *See also* H.C. Burmester, *The Recruitment and Use of Mercenaries in Armed Conflicts*, 72 AM. J. INT'L L. 37, 38 (1978) ("It is this essentially private, non-governmental nature of the intervention which seems to be the basic problem which is raised by the use of mercenaries.").

> behavior of nation-states and their national militaries, it (like international law more generally) has comparatively less influence over the activities of private agents.[90]

Not only do PMCs make it considerably easier to bypass the Security Council and evade restrictions, but they also gut the concepts of state responsibility and collective action.[91] While the United States has found this useful in certain instances, such as using MPRI to assist Croatia without technically violating the embargo, it also runs the risk of finding itself drawn into undesirable conflicts without[92] Security Council sanction precisely because of the loose regulation of PMCs at both the international and the domestic level.

While PMCs contracted for the United States should be bound by the same rules that bind the nation, their secrecy and loose regulation make ensuring this impossible. As recent experience across the globe, from Bosnia to Angola to Saudi Arabia shows, the monumental impact of these players in strategic equations is far too serious to shrug off with a "Who knows what lurks in the hearts of men?"[93]

Historically, there is little doubt that the Founders recognized that the nation could be held responsible for the armed actions of individuals within it.[94] Consequently, they granted powers to Congress and incorporated regulatory

---

[90] Michaels, *supra* note 15, at 1041.

[91] *Id*. at 1117−19.

> But the problem with contracting to avoid a Security Council veto is bigger than the mere issue of avoiding responsibility in any particular engagement: What is worse is that the nation would be turning its back on the legitimate collective security apparatus it helped found and promote, and would not even be doing so in a transparent way . . . to continue to operate outside its bounds, either via makeshift coalitions or private operations, while still purporting to respect the institution is to make a mockery of the Security Council and, moreover, to jeopardize the integrity of America's foreign policy.

Id.

[92] In certain situations, of course, the use of private contractors rather than American soldiers assuages political sensibilities on all sides. *Id*. at 1047−48.

> One need only consider the level of hostility shown toward U.S. GIs in countries with complicated histories of an American military presence, such as Japan, Saudi Arabia, and the Philippines, to appreciate that in some circumstances private contractors not wearing uniforms and not waving American flags may be much more effective agents of foreign policy than would soldiers, whose presence often invites anti-American sentiments.

Id. The problem is that the use of PMCs instead of U.S. troops can also lead to questions of Washington's commitment to a cause. Congressmen Tom Lantos and Henry Hyde opposed the privatization of Karzai's detail for this reason: "[T]he presence of commercial vendors [protecting Karzai] would send a message to the Afghan people and to President Karzai's adversaries that we are not serious enough about our commitment to Afghanistan to dispatch U.S. personnel." *Id*. at 1122.

[93] David Ray Papke, *Mr. District Attorney: The Prosecutor During the Golden Age of Radio*, 34 U. TOL. L. REV. 781, 787 (2003).

[94] Gaul, *supra* note 2, at 1510–11.

clauses into the Constitution to deal with the contemporary iterations of this exact problem.[95]

Indeed, at the contractual level, the United States is particularly fastidious regarding the authority of individuals to bind it.[96] The Supreme Court has upheld this practice.[97] Given the recognized value of carefully calibrated regulations in the contractual context, it is remarkable that few efforts have been made to restrict who can act for the nation in the context of military affairs. The liability issues can be overwhelming. At Abu Ghraib for instance, the United States would appear to be liable for the actions of the contractors that it employed.[98] Under the doctrine of command responsibility,[99]

[95] *Id*. ("James Madison noted that giving Congress the sole power to issue marque and reprisal letters was designed to ensure 'immediate responsibility to the nation in all those for whose conduct that nation itself is responsible.' If issuing a letter of marque and reprisal was an act of war, then the nation as a whole would face the consequences of that act, and the nation as a whole must approve it.").

[96] Major Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F. L. REV. 127, 138–39 (2004).

> [T]he Government practice of specifically designating only one person, the CO, as having exclusive actual authority for dealing with the administration of a contract avoids the chaos and lack of protection for those Government interests which would result if a contractor were allowed to rely on the authority of any one of dozens or potentially hundreds of Government "agents" who might have some relationship with the contract.

Id.

[97] Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947) ("Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.").

[98] Scott J. Borrowman, Sosa v. Alvarez-Machain *and Abu Ghraib—Civil Remedies For Victims of Extraterritorial Torts by U.S. Military Personnel and Civilian Contractors*, 2005 BYU L. REV. 371, 372 (2005) (arguing that under international law as well as *Sosa* and its progeny, the United States is responsible for the actions of its contractors who violate international law and urging compensation of victims under the Foreign Claims Act). U.S courts have long held that non-state actors are bound by the rules of the law of nations. *See, e.g.*, United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820); United States v. Furlong, 18 U.S. (5 Wheat.) 184, 196−97 (1820) (noting the early prohibitions in international law was the prohibition against piracy). They have reached similar conclusions in tort actions. *See, e.g.*, Sanchez-Espinoza v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985) (noting that the Alien Tort Statute reaches non-state action, and that the Alien Tort Statute "may conceivably have been meant to cover only private, nongovernmental acts that are contrary to a treaty or the law of nations").

[99] *See* W.J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 103, 123−24 (1995) ("The concept of command responsibility imposes personal criminal responsibility on a superior for international crimes committed by persons under his or her command or control."); L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 320 (1995) ("The concept of command responsibility . . . concerns the responsibility of a commander who has given an order to an inferior to commit an act which is in breach of the law of armed conflict or whose conduct implies that he is not averse to such a breach being committed"); Sonia Boelaert-Suominen, *Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War*, 41 VA. J. INT'L L. 747, 750 (2001) ("The

international law has long[100] held superiors to be responsible for the actions of their subordinates. The founding statutes for the International Criminal Tribunal for Rwanda, [101] the International Criminal Tribunal for the Former Yugoslavia[102] and the Rome Statute[103] establishing the International Criminal Court all reflect this long-standing principle. Indeed the Rome Statute specifically codifies these principles, for both civilian and military commanders, in its Article 28.[104] However, Article 28 only reflects a norm that

theory of liability that allowed the Prosecution to rely on the imputed responsibility of these four accused is known as 'command' or 'superior' responsibility. It is a doctrine in international law whereby a person in authority may, under certain circumstances, be held criminally responsible for acts committed by subordinates because of a failure to prevent them from committing such acts or a failure to punish them after the acts have been committed."); Mirjan Damaška, *The Shadow Side of Command Responsibility,* 49 AM. J. COMP. L. 455, 455 (2001) ("'Command responsibility' is an umbrella term used in military and international law to cover a variety of ways in which individuals in positions of leadership may be held accountable."); Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility and the Defense of Captain Rockwood*, 149 MIL. L. REV. 275, 286 (1995) ("Command responsibility is a legal doctrine whereby commanders, in some situations, may be held responsible for the unlawful conduct of their subordinates."); Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 89, 92 (2000) ("One type of individual criminal culpability is the doctrine of command responsibility, 'under which a commander incurs certain legal responsibility for the acts of his subordinates.'"); Timothy Wu & Yong-Sung (Jonathan) Kang, *Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L L. J. 272, 272 (1997) (the "customary international law doctrine of command responsibility may nevertheless hold superiors liable for their dereliction with respect to the duties that accompany their position."). *See generally* Sherrie L. Russell-Brown, *The Last Line of Defense: The Doctrine of Command Responsibility and Gender Crimes in Armed Conflict*, 22 WIS. INT'L L.J. 125, 128 n.13 (2004).

[100] *See* Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT'L L. 573, 573 (1999) ("In the bloody aftermath of World War I it became apparent that those in military or civilian authority provided a cornerstone for the good conduct of those under their command, and hence should carry some liability for their actions.").

[101] *See* Statute of the International Tribunal for Rwanda art. 6(3), *adopted* Nov. 8, 1994, 33 I.L.M. 1598 ("The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."). *See also* Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-95-54A-T, Judgment, ¶¶ 601–610 (Jan. 22, 2004); Catherine A. MacKinnon, *Prosecutor v. Nahimana, Barayagwiza, & Ngeze*, 98 AM. J. INT'L L. 325, 327 (2004); Coleman, *supra* note 21, at 1538.

[102] *See* Statute of the International Tribunal art. 7(3), *adopted* May 25, 1993, 32 I.L.M. 1192. The Statute of the International Criminal Tribunal for the Former Yugoslavia is an annex to the following report. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Resolution 808 (1993), delivered to the Security Council*, U.N. Doc. S/25704 (May 3, 1993) , *reprinted in* 32 I.L.M. 1159. *See also* VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995).

[103] *See generally* Rome Statute of the International Criminal Court, *adopted* July 17, 1998, 37 I.L.M. 999.

[104] *Id*. art. 28.

has been accepted in international law for at least a century.[105] The post-World War II trials[106] of German and Japanese leaders, civilian and military, were premised on this principle.[107]

How far this principle extends to the acts of apparent agents is still open to question. The International Criminal Tribunal for Yugoslavia seems inclined to the view that express authority over agents accused of crimes is not necessary.[108] Some observers have already warned that acceptance of such a norm would pose serious questions for the United States under the current laws of armed conflict.[109]

The pivotal concerns seem to be rooted not in the support or auxiliary functions performed by contract personnel—such functions have been routinely outsourced since General George Washington hired civilian wagon drivers to haul supplies for his forces[110]—but to the extent that PMCs are running *military* or combat functions, apparently independently of Congressional control or oversight. Paul Krugman summarized this view: "It's one thing to have civilians drive trucks and serve food; it's quite different to employ them as personal bodyguards to U.S. officials, as guards for U.S. government installations, and . . . as interrogators in Iraqi prisons."[111]

The constitutional concerns of privatization are hardly unique to the military arena,[112] but are of particular gravity since they pertain to the extremely sensitive area[113] of defense and foreign relations. Since mercenaries

[105] *See generally* Vetter, *supra* note 99.

[106] *See, e.g.*, U.N. War Crimes Comm'n, Case No. 21, Trial of General Tomoyuki Yamashita, 4 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 36–37 (1948), *reprinted in* 1–5 U.N. WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS (William S. Hein & Co., 1997).

[107] *See* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284; Charter of the International Military Tribunal for the Far East, at 11, Apr. 26, 1946, T.I.A.S. No. 1589. *See also* Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1, 78 (1973).

[108] *See* Prosecutor v. Karadzic & Mladic, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case No. IT-95-5-R61, IT-95-18-R61, ¶ 82 (July 11, 1996). *See also* Robert M. Hayden, *Biased "Justice": Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia*, 47 CLEV. ST. L. REV. 549, 568 (1999).

[109] Hayden, *supra* note 108, at 568 ("The view that the imposition on States of responsibility of 'de facto agents' should disregard 'legal formalities' would not only hold the U.S. responsible for the actions of the Contras in Nicaragua, but also for those of the Croatian Army in its 1995 offensives against Serbs in Croatia and Bosnia.").

[110] Douglas, *supra* note 96, at 130.

[111] Paul Krugman, *Battlefield of Dreams*, N.Y. TIMES, May 4, 2004, at A29.

[112] *See, e.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1371 (2003) ("[C]onstitutional law's current approach to privatization is fundamentally inadequate in an era of increasingly privatized government.").

[113] There is an argument that the Founders built additional safeguards concerning military affairs into the constitutional scheme precisely because they were aware of its unique nature about granting any actor too much free rein. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 12 ("[B]ut no Appropriation of Money to that [military] Use shall be for a longer Term than two Years").

can be hired through informal arrangements—and be paid "off the books"[114] in the form of concessions or other contracts, the privatization of war enables governments to evade responsibility for their actions by placing them behind a corporate veil.[115]

The use of innovative financial procedures to utilize PMC services in furtherance of U.S. foreign policy is particularly ominous, because Congress has often relied on its power of the purse to define the permissible parameters of the nation's policy, e.g. in Haiti, Somalia, the Balkans, and Rwanda.[116] Indeed, Congressional use of the appropriations power is one of the last meaningful constraints on virtually unbridled Presidential authority as Commander in Chief in the arena of military affairs—the utilization of financial smoke and mirrors to evade Congress effectively eviscerates this power.[117]

The use of contractors to escape legal constraints is hardly a recent innovation. During the Vietnam era, a Pentagon official described one contractor, Vinnell, as "our own little army in Vietnam," explaining that "we used them to do things we either didn't have the manpower to do ourselves, or because of legal problems."[118] Worse still, the ostensibly private status of PMCs means that they can be used to skirt Congressional mandates; the Pentagon used them in the Balkans to stage an end run around the Congressionally imposed cap on U.S. troop deployments in the region.[119] Similarly, the United States has been able to evade statutory prohibitions on offering military assistance to certain nations by routing such aid through PMCs.[120]

Congressional oversight becomes an even more distant prospect when PMC contracts are routed through a variety of channels, including the Commerce, Interior, and State Departments.[121] For instance, many of CACI's contractors at Abu Ghraib were funded through a Department of the Interior

[114] In Iraq, for instance, the CPA funded considerable PMC activity directly through oil sales, and consequently with virtually no appropriations review. Michaels, *supra* note 15, at 1075. *See also* Jackie Spinner & Ariana Eunjung Cha, *U.S. Decisions on Iraq Spending Made in Private*, WASH. POST, Dec. 27, 2003, at A1 (explaining how the CPA used Iraqi oil revenue and assets from the Hussein era to fund its operations with little Congressional oversight).

[115] Coleman, *supra* note 20, at 1493.

[116] Michaels, *supra* note 15, at 1059.

[117] John Hart Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093, 1105 (1990).

[118] William D. Hartung, *Mercenaries, Inc.: How a U.S. Company Props up the House of Saud*, THE PROGRESSIVE, Apr. 1996, at 26.

[119] Jonathan Turley, Commentary, *Soldiers of Fortune—At What Price?*, L.A. TIMES, Sept. 16, 2004, at B11. ("[W]hen Congress imposed a cap of 20,000 soldiers in Bosnia, the military simply hired 2,000 more private military contractors.").

[120] P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 210 (2004).

[121] Michaels, *supra* note 15, at 1068.

Contract for Information Technology Services.[122] With such bureaucratic sleights of hand, meaningful oversight is impossible. Even if technically legal, such actions serve to significantly dilute Congressional oversight of U.S. military activity around the globe.[123]

One prominent expert in the area of private security contracting, P.W. Singer, has gone so far as to argue that the current wave of combat privatization is driven by this desire for "plausible deniability" rather than any cost savings.[124] Indeed, the entire notion that outsourcing of governmental and military functions saves money is hotly disputed.[125] On the other hand, there is little doubt that private corporations are far better able to evade unwelcome Congressional or public scrutiny than the uniformed services.[126]

The starkest example of this relative corporate impunity is the recent prisoner mistreatment scandal at the Abu Ghraib prison in Iraq.[127] Much of the abuse appears to have been undertaken at the behest of interrogators[128] who were predominantly civilian contractors.[129] However, while the military has moved against uniformed personnel implicated in the abuses, the contractors who directed them have remained untouched, and many even remain at their jobs.[130]

IV. WASHING WASHINGTON'S HANDS OF PMC ACTIVITIES

Part of the appeal of using contractors is that it ostensibly allows the United States to retain its neutrality: companies such as MPRI are, after all, "beyond the ordinary military chain of command."[131]

---

[122] Editorial, *Contractors in Iraq Need Strict Oversight*, DENVER POST, June 20, 2004, at E6. *See also* Michaels, *supra* note 15, at 1068.

[123] Michaels, *supra* note 15, at 1068 ("This is . . . not to say Congress is unfailingly vigilant with respect to oversight of "public" military affairs, and entirely enfeebled with respect to overseeing military contractors. But while recognizing that the differences in congressional oversight are quantitative rather than qualitative, they are nevertheless important.").

[124] P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B3.

[125] *See, e.g.*, ELLIOTT D. SCLAR, YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION (2000) (arguing that the case over privatization is widely over-stated, and its costs deliberately downplayed by free market proponents).

[126] Gaul, *supra* note 2, at 1519 ("The Pentagon is obliged to respond to inquiries, if not always forthrightly, when U.S. troops are deployed abroad. Retired generals and private companies have far more leeway in evading questions from the press or Congress.").

[127] *See generally* Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42.

[128] Ariana Eunjung Cha & Renae Merle, *Line Increasingly Blurred Between Soldiers and Civilian Contractors*, WASH. POST, May 13, 2004, at A1.

[129] Schooner, *supra* note 86, at 555.

[130] John R. Crook, *Contemporary Practice of the United States Relating to International Law*, 99 AM. J. INT'L L. 262 (2005).

[131] Gaul, *supra* note 2, at 1493.

Whether this is a credible posture is open to question. Many contractors command credibility and thus clientele in the international security market precisely because their employees are retired high ranking national security officials. For instance, MPRI's roster includes General Carl E. Vuono, former Army Chief of Staff (and Colin Powell mentor), Gen. Crosby E. ("Butch") Saint, former head of U.S. forces in Europe and General Harry Soyster, formerly the head of the Defense Intelligence Agency.[132] SAIC, another contractor, includes former defense secretaries William Perry and Melvin Laird and former CIA directors John Deutch and Robert Gates on its board.[133] Other PMCs such as Blackwater USA, DynCorp, CACI, and Titan also boast of similar luminaries on their rosters.[134]

Furthermore, U.S. government operations seem to be inextricably intertwined with the conduct of many PMCs.[135] For instance, State and Defense Department assistance was crucial for MPRI in landing its contract with the Bosnian Government—U.S. officials negotiated the terms.[136] Similarly, the State Department has brokered a series of profitable contracts for Vinnell with the Saudi National Guard.[137]

In other cases, the nexus is even tighter.[138] The veteran statuses of some contractors who have died in combat entitle them to full military burials, confusing their role at the time of death.[139] The U.S. military has rendered direct assistance to PMCs in trouble.[140] They have also been the recipients of government largesse in other ways.

For instance, MPRI alone has received U.S. government largesse to the tune of at least $100 million in military equipment.[141] The U.S. government is

---

[132] Sapone, *supra* note 50, at 24–25.

[133] Michaels, *supra* note 15, at 1022–23.

[134] *Id*. at 1023.

[135] *Id*. ("Many of the major contracting firms have close connections not only to the Pentagon but also to Wall Street, and are actually divisions or subsidiaries of such prominent businesses as Northrop-Grumman, Booz Allen Hamilton, the Carlyle Group, and Bechtel.").

[136] Gaul, *supra* note 2, at 1504.

[137] *Id*.

[138] "We have seen an unprecedented level of contractors on the battlefield, with more than a division's worth of contractors working side-by-side with our soldiers. They too are our troops and we need to ensure that the policies and systems are in place to support and take care of our total force, which includes our contractors." *On Contracting in Iraq: Before the H. Comm. on Gov't Reform*, 108th Cong. (2004) (statement of Paul J. Kern, Commanding General, U.S. Army Material Command), *available at* http://reform.house.gov /UploadedFiles/Army%20Material%20-% 20Kern%20Testimony.pdf (last visited Oct. 26, 2005); *see also* Schooner, *supra* note 86, at 572.

[139] *See* Deborah Schoch et al., *Death Came Brutally to a Man Who "Never Quit*," L.A. TIMES, Apr. 3, 2004, at A1; Thomas J. Sheeran, *Two Slain Civilians Memorialized*, DESERET NEWS, Apr. 11, 2004, *available at* http://www.findarticles.com/p/articles/mi_qn4188/is_200 40411/ai_n11454405; Ronald D. White, *For Titan, Deaths Hit Close to Home*, L.A. TIMES, Apr. 19, 2004, at C1.

[140] Coleman, *supra* note 20, at 1504–05.

[141] Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 907 (2004).

also the referral source for many of the firm's foreign contracts.[142] In at least one case—Bosnia—foreign governments directed their payments for the PMC's services directly to the U.S. treasury.[143] Given this governmental-contractor nexus, it is hard to agree with commentators who argue that since "MPRI is outside the State, it can be used for sensitive operations without jeopardizing the U.S.'s neutral status."[144]

This refusal to accept a U.S.-avowed disassociation at face value certainly has domestic parallels.[145] In *Lebron v. National Railroad Passengers Corp*.,[146] the United States Supreme Court addressed Amtrak's claim that it was not bound by First Amendment restrictions since Congress had specifically indicated that it was not a government agency or establishment.[147] In an opinion by Justice Scalia, the majority held that a review of overall circumstances indicated that Amtrak was indeed a governmental entity and that "it is not for Congress to make the final determination of Amtrak's status as a Government entity."[148] If the highest court in the land[149] was not swayed by emphatic Congressional designations, it is likely that foreign states are going to be equally skeptical of Pentagon disavowals of PMC actions.[150]

Whether the use of PMCs to maintain a distance between official U.S. activities and certain situations is efficacious is open to question. The concerns in this area were highlighted by Vinnell's contract with the Saudi National Guard. While the U.S. military works directly with their Saudi counterparts, there was some squeamishness about working with the Saudi National Guard, the Praetorian Guard that keeps the House of Saud in power.[151] Congress was concerned enough about the policy implications of American involvement for the Senate Armed Services Committee to hold hearings, but eventually

---

[142] *Id*.

[143] Abigail Hing Wen, Note, *Suing the Sovereign's Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities*, 103 COLUM. L. REV. 1538, 1540 (2003).

[144] Sapone, *supra* note 50, at 25.

[145] Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 348 (2004).

[146] 513 U.S. 374 (1995).

[147] Guttman, *supra* note 145, at 348.

[148] *Lebron*, 513 U.S. at 392.

[149] Trial courts have found U.S. government complicity directly in the PMC context. *See* United States v. Elliott, 266 F. Supp. 318, 324 (S.D.N.Y. 1967) (noting that "government complicity would effectively bar prosecution").

[150] There might be a higher calling still. *See* MILNER S. BALL, THE WORD AND THE LAW 138 (1993) (arguing that judges "are not to follow the example of Pontius Pilate, whose washing of his hands has, for two thousand years, held central place as the condemnable paradigm of terminal leave from judgment").

[151] Gaul, *supra* note 2, at 1499.

permitted the contract to proceed.[152] The apparent motivation was to avoid direct American involvement in Saudi royal repression.[153]

The solution, however neat in theory, did not appease the opponents of the regime. In November 1995, the Guard's facilities were bombed, killing five Americans.[154] As one analyst explained:

> I don't think it was an accident that it was that office that got bombed. If you wanted to make a political statement about the Saudi regime you'd single out the National Guard, and if you wanted to make a statement about American involvement, you'd pick the only American contractor involved in training the guard: Vinnell.[155]

If the intention had been to sidestep the question of support to the Saudi government by routing military services through Vinnell, the idea failed. The bombers pierced the corporate veil.[156] In a similar vein, it is likely that foreign states will refuse to accept the plausible deniability of routing work through contractors. P.W. Singer explained that PMCs are seen as "an extension of government policy and, when operating in foreign lands, its diplomat on the ground," and can consequently implicate the governments behind them by their actions.[157]

The military ranks of many of the principals, and the revolving door between the highest levels of business and government, "begs the question of how 'private' these security companies really are."[158] It is widely reported that these former officials seem to handle myriad delicate matters for the government, "often in conjunction with the U.S. Central Intelligence Agency (CIA) and with presidential approval."[159] While useful for handling potentially unsavory or delicate but necessary tasks at arm's length,[160] the discreet operation of these private military companies and the nebulous nature of their ties to official Washington is a double-edged sword.[161]

In allowing official Washington to evade responsibility for actions for which it is responsible, but wishes to disavow, they also allow the possibility of

---

[152] Zarate, *supra* note 32, at 103–04.

[153] Gaul, *supra* note 2, at 1499 ("Authorizing Vinnell to train the Guard may be an effort to avoid the perception that the American military is propping up the royal family's autocratic regime.").

[154] Terry Atlas, *Terrorist Blast Points to Saudis' Vulnerability*, CHI. TRIB., Nov. 14, 1995, at 1.

[155] Gaul, *supra* note 2, at 1499.

[156] *Id*. ("As the bombing shows, however, dissident political groups in Saudi Arabia are not fooled.").

[157] SINGER, *supra* note 120, at 236. S*ee also* Michaels, *supra* note 15, at 1113.

[158] Garmon, *supra* note 9, at 335. *See also* Silverstein, *supra* note 13, at 17; Wayne Madsen, *Mercenaries in Kosovo: The U.S. Connection to the KLA*, THE PROGRESSIVE, Aug. 1999, at 29, 31.

[159] Garmon, *supra* note 9, at 335.

[160] Zarate, *supra* note 32, at 103–04 ("Allegations persist that since the Vietnam War, Vinnell has provided extralegal means of achieving U.S. security ends in Central America and the Middle East while avoiding the appearance of official U.S. involvement.").

[161] Most swords, of course, are.

implicating the United States in matters it genuinely has no concern with, and would just as soon be left out of. So, for instance, in permitting MPRI to contract with Croatia at a critical moment, the United States could continue to participate in the political process as a neutral, even as it aided a key new ally.[162] However, had MPRI been operating on its own, and American interests been at stake in the situation, the outcome would have been very different.

V. THE DOCTRINES OF STATE RESPONSIBILITY

Under international law, states bear some responsibility for the actions of affiliated but non-state entities.[163] Professor Cheng explains this idea through the notion of imputability:

> Imputability in international law is the juridical attribution of a particular act by a physical person, or a group of physical persons, to a State, or other international person, whereby it is regarded as the latter's own act. Imputability is a basic notion in the concept of State responsibility and is fundamentally linked with the juridical concept of the State in international law.[164]

Both the United States and United Nations have held states responsible for the conduct of non-state actors allegedly under the latter's control.[165] Indeed, they have sanctioned and taken action against nations who are complicit in the unlawful actions of non-state actors.[166] International tribunals have followed parallel reasoning to adopt identical conclusions.[167] At its most extreme, such complicity can lead to designation of a nation as a state sponsor of terrorism.[168] These sponsors are held accountable for the acts of their agents, despite disavowing the latter's actions. If the shoe were on the other foot—the subject of contention being the unlawful activities of American-affiliated PMCs—the United States could not rely entirely on disassociating itself from the acts of the latter.

---

[162] Zarate, *supra* note 32, at 108.

[163] Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Source of International Law*, 23 BERKELEY J. INT'L L. 137, 172 (2005) ("At the same time, these actors are not yet entirely free of the states with which they are associated.").

[164] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 180–81 (1987).

[165] *See* George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VAL. U. L. REV. 489, 505 (2003) (noting that the United Nations had imposed sanctions on Taliban-controlled Afghanistan for its refusal to bring terrorists to justice).

[166] *Id*.

[167] *See* Charles S. Stephens (Mex. v. U.S.), 4 R.I.A.A. 265, 267 (Gen. Claims Comm'n 1927) ("It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were 'acting for' Mexico.").

[168] *See* 50 U.S.C. app. § 2405(j)(1)(2000).

The International Law Commission drafted[169] the *Articles on Responsibility of States for Internationally Wrongful Acts,*[170] demarcating non-state actions that implicate state culpability.[171] The ILC decided that having the articles endorsed by the General Assembly[172] was a better approach than seeking to have them formally adopted.[173] It was feared that the process of seeking formal adoption might "result in the repetition or renewal of the discussion of complex issues" and endanger the delicately negotiated, balanced text of the ILC.[174]

Even without formal adoption, the articles have already been cited by the International Court of Justice, as well as other international tribunals, on a number of occasions.[175] The ILC's last Special Rapporteur on State Responsibility, Professor James Crawford, argues that "[t]his experience suggests that the articles may have long-term influence" even without a separate promulgation.[176] Though the binding nature of the ILC's work is open to debate,[177] it is at least extremely influential. [178] Article 8 holds a state responsible for the actions of a non-state actor, such as PMCs, if the actor is carrying out the instructions of, or operating under the direction or control of the state.[179] Several situations are outlined where such actions could be imputed to the state, such as:

---

[169] The ILC has "generally considered that its drafts constitute both codification and progressive development of international law." SUBIR GOSWAMI, POLITICS IN LAW MAKING (A STUDY OF THE INTERNATIONAL LAW COMMISSION OF THE UN) 162 (1986). *See also* David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority*, 96 AM. J. INT'L L. 857, 862 (2002) ("Draft conventions are the dominant working style of the ILC. It . . . is popular in part because it finesses the question of whether—at any given moment—the ILC is codifying the law or progressively developing it.").

[170] Draft Articles, *supra* note 60. Though a detailed analysis of the ILC's State Responsibility project is beyond the scope of this Article, for an excellent historical account and textual analysis, see CRAWFORD, *supra* note 60.

[171] CRAWFORD, *supra* note 60, at 74 ("The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom.").

[172] *Id*. at 58.

[173] Caron, *supra* note 169, at 858.

[174] CRAWFORD, *supra* note 60, at 59.

[175] *Id*.

[176] *Id*.

[177] Caron, *supra* note 169, at 864 ("But below the surface swirls a much more complicated debate involving often fundamentally different estimations of the capacity of the traditional formal lawmaking processes.").

[178] Int'l Law Comm'n, *Report of the International Commission on the Work of Its Fifty-Third Session*, ¶ 63, U.N. Doc. A/56/10 (2001) ("[T]he draft articles adopted on second reading were bound to be influential, just as the existing text had been widely cited and relied on by the International Court and other tribunals."). *See also* Caron, *supra* note 169, at 864. *See also* Stephen C. McCaffrey, *Is Codification in Decline?*, 20 HASTINGS INT'L L. REV. 639, 650–51 (1997).

[179] *See* Draft Articles, *supra* note 74, art. 8.

> Article 5: Conduct of persons or entities exercising elements of governmental authority[180]
>
> Article 7: Conduct in excess of authority or contravention of instructions[181]
>
> Article 9: Conduct carried out in the absence or default of official authorities[182]
>
> Article 11: Conduct acknowledged and adopted by a State as its own[183]
>
> Article 15: Conduct consisting of a series of actions or omissions[184]

Even though it can be assumed that the United States would never admit, ratify, or approve of harmful acts as outlined in Article 8,[185] the other clauses could be problematic. Part I, *supra*, shows how there is minimal oversight of PMCs in the United States, which might be a breach of Article 11.

The United States might be particularly vulnerable on Article 5.[186] For instance, with respect to MPRI operations in Croatia, the links between MPRI and official Washington led some European allies to openly question "how one would know if a MPRI employee was really a retired officer, or still active with the [Defense Intelligence Agency], and whether it made a difference in the end."[187] Legally of course, the distinction makes all the difference in the world—Article 5 holds the United States responsible if PMCs are exercising elements of governmental authority.[188]

The activities of individuals known to be close to the United States government—MPRI, for instance, boasts it offers "more generals per square foot than the Pentagon"[189]—raises questions about whether these companies are acting under color of state authority, and feeds into the wariness expressed by the Europeans above. The fact that allies profess skepticism over the independence of PMCs underscores the hazards presented by the thicket of this particular Article alone.

Ultimately, the notion of state responsibility rests on the idea that failing to curb a violation of international law itself constitutes a secondary violation.[190] If PMCs violate international law, the United States could be tainted by association or inaction. There is no talisman to designate what degree of culpability crosses an undefined threshold to constitute an unlawful degree of

---

[180] *Id*. art. 5.
[181] *Id*. art. 7.
[182] *Id*. art. 9.
[183] *Id*. art. 11.
[184] *Id*. art. 15(1).
[185] *Id*. art. 8.
[186] *Id*. art. 5.
[187] Frye, *supra* note 39, at 2621.
[188] *See* Draft Articles, *supra* note 60, art. 5.
[189] Michaels, *supra* note 15, at 1022.
[190] CRAWFORD, *supra* note 60, at 12–16.

association.[191] The degree of remoteness, like analogous issues in domestic law, is not one "which can be satisfactorily resolved by [a] search for a single verbal formula."[192] As Justice Cardozo once observed, "Life in all its fullness must supply the answer to the riddle."[193] Nevertheless, the stakes for the nation are too high to postpone action pending definition of the contours of an uncertain doctrine.

VI. CONCLUSION

> *The old proverb used to be that "War is far too important to be left to the generals." For international law in the 21st century, a new adage may be necessary: War is also far too important to be left to the C.E.O.s.* [194]

The potential for American embarrassment at the hands of private companies is hardly a new phenomenon. For instance, in the 1770s, with the nascent Republic fighting for its life against Britain, Congress authorized privateers to raid British shipping.[195] The situation swiftly escalated into a significant diplomatic crisis for the nation.[196] Not only did the privateers proceed to seize lucrative French and Swedish—and neutral—shipping, drawing howls of outrage from Europe, but they utilized neutral ports to do so, violating the treaty norms of the era.[197]

In the intervening centuries, the Westphalian system of respect for state sovereignty has[198] only become further entrenched.[199] The system is premised on a state monopoly on the lawful force—a premise reflected in both the United Nations Charter and the Geneva Conventions. In particular, Article 2(4) of the United Nations Charter prohibits the use or threat of force in international affairs "against the territorial integrity or political independence of any state."[200] The use of PMCs, perhaps anonymously, corrodes these central pillars of the international order.

The United States has not faced any problems so far, chiefly because its objectives have lined up with those of the private military companies. "When the government fails to ensure the alignment of profit and policy, however, a focus on servicing the customer may create incentives for the new privateers to

---

[191] *Id*. at 205.

[192] P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 466 (5th ed. 1995).

[193] Welch v. Helvering, 290 U.S. 111, 115 (1933).

[194] Singer, *supra* note 1, at 549.

[195] C. Kevin Marshall, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 976 (1997).

[196] *Id*.

[197] *Id*.

[198] SINGER, *supra* note 120, at 226.

[199] *See* R.R. PALMER & JOEL COLTON, A HISTORY OF THE MODERN WORLD 148 (7th ed. 1992) (explaining how the Treaty of Westphalia initiated the current state-centered system of international law).

[200] U.N. Charter art. 2, para. 4.

go beyond the terms of their licenses much like the rogue privateers of old."[201] Some have warned of the inherent dangers in using "hired guns" because of the inherent tensions PMCs experience between their loyalties to the United States and the clients who write the checks.[202]

Though the desire to limit American exposure is understandable, the efficacy of achieving this by outsourcing to PMCs is open to question. Will foreign actors really distinguish between the actions of "American" contractors and troops?[203] These dangers were highlighted in the bizarre trial of Jonathan Idema, a retired Army Captain and former Green Beret recently arrested in Kabul.[204] Clad in a combat uniform and shades, Idema insisted that he was acting for the United States, claiming contacts going all the way to Defense Secretary Donald Rumsfeld.[205] Afghan police raiding his Kabul home "reportedly found three men hanging from the ceiling while five others were found beaten and tied in a dark small room."[206]

Though vehemently denying that Idema was an operative for the United States,[207] Pentagon officials were forced to concede some unpalatable facts. They admitted that Idema had delivered at least one prisoner to American forces, sent messages and faxes to Pentagon officials, and participated in NATO raids in Afghanistan.[208] As Professor Jonathan Turley noted: "Idema's case highlights the increasingly fluid definitions of soldiers, contractors and freelancers. . . . It is not clear whether Idema was actually employed by the U.S., but clearly he is part of a radically expanded market for soldiers of fortune, a market fueled by U.S. dollars."[209]

The incident highlights the drawbacks of the "plausible deniability" doctrine—the apparent detachment between official U.S. and private contractor actions—which make PMC utilization such an attractive option for Washington. The same detachment, however, makes it hard for Washington to credibly deny its involvement with unsavory elements who may indeed be operating completely independently. If Congress does not step up scrutiny of PMC actions, it is safe to say that Jonathan Idema will not be the last mysterious mercenary claiming to act for the United States to step into the media floodlights.

---

[201] Gaul, *supra* note 2, at 1505.

[202] *Id*.

[203] Mark Thompson, *Generals for Hire*, TIME, Jan. 15, 1996, at 37 ("The desire to protect American troops is understandable, but will the Serbs really distinguish between them and MPRI trainers?").

[204] Declan Walsh & Kitty Logan, *FBI Accused of Concealing Link to Mercenary Jailer in Afghanistan*, THE GUARDIAN, Aug. 17, 2004, at 9.

[205] *Id*.

[206] Turley, *supra* note 119.

[207] *Id*.

[208] *Id*.

[209] *Id*.