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INDIVIDUAL LIABILITY OF PRIVATE MILITARY PERSONNEL UNDER  
INTERNATIONAL CRIMINAL LAW

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**Abstract**

The article examines the present status of private military personnel under international criminal law. Perpetrators of international crimes are frequently integrated into a hierarchically structured collective, such as an army or police force. The system of order and obedience essential to the functioning of these entities, the existence of which underlies a number of principles of international criminal law, cannot be simply presumed to exist within a private military company (PMC) or between a PMC and the hiring state. As a consequence, the private nature of the company may become an issue, particularly when one considers the capacity of their personnel to commit war crimes or to incur superior or command responsibility. The article also considers problems of implementation and jurisdiction and touches briefly on the question of corporate criminal responsibility of the PMC itself. It will be argued that, in theory, international criminal law can be an efficient part of the legal regime governing the use and conduct of private military companies, although many of the legal issues discussed remain to be tested.

**Keywords**

Law – Regulation – Human Rights – Security – Accountability – Civil-military Relations – Implementation – Knowledge



# *Individual Liability of Private Military Personnel under International Criminal Law*

CHIA LEHNARDT\*

## 1. Introduction

Performing the same tasks as state militaries places private military company (PMC) personnel at risk of violating norms of international law just like public armed forces. It therefore comes as little surprise that private military personnel have been implicated in incidents possibly violating the laws of war, ranging from participation in war crimes and crimes against humanity,<sup>1</sup> through the abuse of prisoners,<sup>2</sup> to shooting indiscriminately at civilians.<sup>3</sup> International humanitarian law (IHL) is, in an exception to the rule that international law addresses states only, also directed at individuals. By criminalizing the violation of a subset of primary rules found in international humanitarian law,<sup>4</sup> international criminal law purports to deter the commission of offences against persons protected by the laws of armed conflict. In theory, it might therefore form an important part in the governance regime regulating the use and conduct of private military contractors.

Unlike state armed forces, however, private military personnel occupy a relatively ambiguous legal status, which has resulted in an almost complete absence of legal prosecution where there have been accusations of wrongdoing that arguably amounts to international crime. Thus, while there is no empirical evidence that private military personnel are more likely to engage in misconduct than their state counterparts, one of the greatest concerns voiced in the discussion on PMCs is the apparent impunity with which they conduct their business. The aftermath of the incidents at Abu Ghraib, Iraq, in 2004 provides a stark example supporting the assumption that the use of PMC personnel can result in an accountability gap – while the military officers found by a military investigation to have participated in the abuse of detainees were subjected to court martial and sentenced to prison, none of the employees of two PMCs implicated in the abuses were charged with any crime.<sup>5</sup>

In spite of the uncertainty surrounding the legal position of PMC employees, it is possible that the different responses to violations of law are a problem of enforcement, rather than a problem of applicable law. The purpose of this article is to map the present status of individual responsibility of private military personnel under international criminal law. Section 2 discusses issues of substantive law which may become relevant in the context of PMCs. Section 4 considers the various modes of

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<sup>1</sup> Bonner, 'War Crimes Panel Finds Croat Troops "Cleansed" the Serbs', *New York Times*, 21 Mar. 1999.

<sup>2</sup> Fay, 'AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 68-95' (2004).

<sup>3</sup> Johnston and Broder, 'F.B.I. Says Guards Killed 14 Iraqis Without Cause', *New York Times*, 7 Nov. 2007; Finer, 'Security Contractors in Iraq under Scrutiny after Shootings', *Washington Post*, 10 Sept. 2005.

<sup>4</sup> See Bothe, 'War Crimes', in A. Cassese, P. Gaeta, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court. A Commentary* (2002), at 387, 388.

<sup>5</sup> Spiegel, 'No Contractors Facing Abu Ghraib Abuse Charges', *Financial Times*, 9 Aug. 2005.

participation which can trigger the criminal accountability of private military personnel – direct responsibility, complicity, and superior responsibility – before turning to questions of enforcement and jurisdiction in Section 5. Lastly, the question of corporate criminal accountability of the company itself is considered.

## 2. Private Military Personnel and War Crimes

Private military contractors have been accused of having committed or assisted in various crimes against civilians and detainees. Apart from the abuse of prisoners at Abu Ghraib, PMC employees hired as security guards have killed civilians in Iraq in unprovoked shootings<sup>6</sup> and participated in attacks against civilians in Colombia.<sup>7</sup> In Sierra Leone, officers of the now defunct South African PMC Executive Outcomes reportedly ordered their employees carrying out air strikes against rebels to ‘kill everybody’ after being told by their employees that it was impossible to distinguish between civilians and rebels.<sup>8</sup>

### A. Private Military Personnel as Perpetrators of War Crimes

War crimes were originally conceived as a concept relating to the armed forces fighting in a war. However, PMCs hired to conduct offensive military operations are the exception rather than the rule. The fact that PMC employees hired for functions other than war fighting are, in principle, neither *de jure* nor *de facto* members of the armed forces, but civilians,<sup>9</sup> does not pose an obstacle as such. Nonetheless, the question is whether any civilian is bound by IHL norms. The International Criminal Tribunal for Rwanda (ICTR) Trial Chamber opined in the *Akayesu* case that additional conditions apply:

The duties and responsibilities of the Geneva Conventions and the Additional Protocols ... will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts.<sup>10</sup>

It is not clear what is meant by ‘*de facto* representing the Government’. To the extent that it is understood to mean that civilians can be perpetrators of war crimes only if their acts can be attributed to a party to the conflict a large number of PMC employees would be excluded: PMC personnel who are not hired to fight a war, and as a consequence are civilians, and who are neither instructed to

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<sup>6</sup> See generally Human Rights First, ‘Private Security Contractors at War. Ending the Culture of Impunity’ (2008), at 6.

<sup>7</sup> Miller, ‘US Pair’s Role in Bombing Shown’, *Los Angeles Times*, 16 Mar. 2003.

<sup>8</sup> Rubin, ‘An Army of One’s Own’, *Harper’s*, Feb. 1997; Dickinson, ‘Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability under International Law’, 47 *William and Mary L Rev* (2005) 137, at 153.

<sup>9</sup> Schaller, ‘Private Security and Military Companies under the International Law of Armed Conflict’, in T. Jäger and G. Kümmel (eds), *Private Military and Security Companies. Chances, Problems, Pitfalls and Prospects* (2006), at 345; see also Doswald-Beck, ‘Private Military Companies and International Humanitarian Law’, in S. Chesterman and C. Lehardt (eds), *From Mercenaries to Market. The Rise and Regulation of Private Military Companies* (2007), at 123. Despite some academic opinion to the contrary, the fact that PMC personnel might end up taking part in the hostilities is not a precondition for combatant status, but a consequence thereof (for a different view see, e.g., Boldt, ‘Outsourcing War – Private Military Companies and International Humanitarian Law’, 47 *German Ybk Int’l L* (2004) 502, at 512). In any case, where the hiring state has designated PMC personnel as civilians accompanying the armed forces (Art. 4(4) of Geneva Convention (GC) III) or it is otherwise clear that they are not authorized to take part in the hostilities, there is no room for any deviating interpretation of their status. Moreover, only PMC personnel hired by states can be combatants. PMCs hired by NGOs or companies can only qualify as civilians.

<sup>10</sup> ICTR Trial Chamber, *Prosecutor v. Akayesu*, ICTR-96-4, judgment, 2 Sept. 1998, at para. 631; ICTR Trial Chamber, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1, judgment and sentence, 21 May 1999, at paras 174–176.



commit the crime, nor sufficiently controlled by the hiring state, nor carry out services involving the exercise of 'public authority'.<sup>11</sup> In the absence of specific instructions to commit the crime and sufficient control by the state over the PMCs much would hinge on the last criterion. The interrogation of prisoners of war or the guarding of military bases falls into the category of 'holding public authority'; less clear is whether that is true for providing close security to, for example, diplomats or other civilian individuals in Iraq. Given that security guards shooting at civilians has been at the centre of many incidents, the question whether these individuals have been violating the laws of war in doing so is of significant relevance.

Whether IHL provisions are binding on individuals as individuals and not as state agents is to some extent still a matter of uncertainty.<sup>12</sup> The ICTR Appeals Chamber found that 'international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of common Article 3 under the pretext that they did not belong to a specific category'.<sup>13</sup> Similarly, in the *Musema* case the ICTR Trial Chamber appears to interpret its ruling in *Akayesu* more broadly, arguing that excluding certain persons from the scope of war crimes law on the basis that they did not belong to a certain category would be at odds with the fact that international humanitarian law is addressed to anyone who is in a position to violate it.<sup>14</sup> In doing so, the ICTR relied heavily on the case law in the wake of the Second World War to demonstrate that Article 3 of Geneva Conventions I–IV and the Additional Protocol II bind civilians regardless of any links to the belligerent party.<sup>15</sup> Yet it is notable that those precedents dealt with plunder, slavery, or murder of allied deported civilians or prisoners of war.<sup>16</sup> Therefore, while it is arguable that on the basis of these rulings those prohibitions apply to any civilian as a matter of customary law, it would be difficult to assert the same for the rules concerning the treatment of civilians.<sup>17</sup> At most, these precedents could support the proposition that it is neither the legal status of the defendant nor the IHL provision in question which is decisive. Although not

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<sup>11</sup> On the question of attribution of PMC conduct see Hoppe, 'The Contribution of Positive Obligations to State Responsibility for PMSCs, with Special Emphasis on the Duty to Prevent Human Rights Violations', this issue; Lehnardt, 'Private Military Companies and State Responsibility', in Chesterman and Lehnardt, *supra* note 9, at 143; University Centre for International Humanitarian Law, *Report on Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions* (2005).

<sup>12</sup> This question is generally discussed in the context of the so-called nexus requirement: see in particular ICTR Appeals Chamber, *Prosecutor v. Akayesu*, IT 96-4, judgment, 1 June 2001, at para. 444, and *infra* section B.

<sup>13</sup> See *ibid.*, at para. 443.

<sup>14</sup> ICTR Trial Chamber, *Prosecutor v. Musema*, ICTR-96-13, judgment, 27 Jan. 2000, at para. 270.

<sup>15</sup> *Ibid.*, at para. 270.

<sup>16</sup> International Military Tribunal, *United States v. Krauch and 22 others (I.G. Farben Case)*, 10 L Reps of Trials of War Criminals (LRTWC) (1947) 1; International Military Tribunal Nuremberg, *United States v. Flick*, judgment, 9 LRTWC 1; General Tribunal of the Military Government of the French Zone of Occupation in Germany, *France v. Roehling et al.*, XIV Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 (1952) 109; British Military Court Hamburg, *United Kingdom v. Tesch and other (Zyklon B Case)*, 1946, 1 LRTWC 93; British Military Court Essen, *United Kingdom v. Heyer and others (Essen Lynching Case)*, judgment, 22 Dec. 1945, 1 LRTWC (1947) 88; US Military Commission Wiesbaden, *US v. Klein and six others (Hadamard Case)*, judgment, 15 Oct. 1945, 1 LRTWC (1947) 46. See R. Provost, *International Human Rights and Humanitarian Law* (2002), at 85.

<sup>17</sup> In favour of the position that all IHL norms bind all individuals regardless of any links to a party to the conflict are E. David, *Principes de droit des conflits armes* (3rd edn, 2002), at paras 1.195, 4.65; Boed, 'Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda', 13 *Criminal Law Forum* (2002) 293, at 316–317; Provost, *supra* note 16, at 98; L.C. Green, *The Contemporary Law of Armed Conflict* (2000), at 286. See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2005), at para. 16.26.1; J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law* (2005), at 573; Kreß, 'War Crimes Committed in Non-International Conflict and the Emerging System of International Criminal Justice', 30 *Israel Ybk on Human Rights* (2001) 103, at 123. It is, of course, possible for domestic criminal law to consider any act committed by civilians a war crime which, as a matter of international law, would not be seen as such.

explicitly declared a requirement, the defendants in those post-World War II cases had some factual relationship with the Nazi regime in one way or another. Indeed, it is conceivable that a court would interpret Article 3 of Geneva Conventions I–IV or Article 48 of Additional Protocol I as addressing not only state agents *stricto sensu*, but more generally individuals with a factual link to the state which is party to the conflict.<sup>18</sup> The question, then, would be under what circumstances such factual link could be said to exist.<sup>19</sup> PMC employees hired by a party to the conflict to carry out services have such a link to that party, whether these services amount to exercising public authority or not. By contrast, no such link exists if a PMC is hired by an oil company or an NGO. Accordingly, while the actions of private military personnel employed by entities not party to the conflict can constitute only ordinary offences under domestic criminal law, it could be argued that private military personnel guarding detainees and military objectives, and perhaps PMC employees providing security to diplomats, can, in principle, commit war crimes.<sup>20</sup> The issue then would turn on the question whether the act was in any way related to the armed conflict, and therefore a war crime as distinct from an ordinary crime.<sup>21</sup>

### **B. The Nexus Between the Act and the Armed Conflict**

Not every crime committed during armed conflict is a war crime. The latter is shaped by or dependent upon the environment in which it is committed, the armed conflict.<sup>22</sup> Provided the PMC operates in an armed conflict,<sup>23</sup> an additional prerequisite for the commission of a war crime is that ‘the act, which could well be committed in the absence of a conflict, was perpetrated against the victim(s) concerned because of the conflict at issue’.<sup>24</sup> The existence of the armed conflict must have played ‘a substantial part in the ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed’.<sup>25</sup> This is the case if the conduct is ‘closely’<sup>26</sup> or ‘obviously’<sup>27</sup> related to the armed conflict.

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<sup>18</sup> ICTY Trial Chamber, *Prosecutor v. Kunarac et al.*, IT-96-23, judgment, 22 Feb. 2001, at para. 407. See the similar wording of Art. 4A(2) of GC III, which requires for the purposes of combatant status that the individual ‘belongs to a Party to the conflict’. The ICTY Appeals Chamber found that this criterion required control over the individual by a party to the conflict: ICTY Appeals Chamber, *Prosecutor v. Tadic*, IT-94-1, judgment, 15 July 1999, at para. 95. Given the purpose of the provision the better view is that it merely necessitates a factual link: J. de Preux, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (1960), at 53. However, since Art. 4 of GC III grants rights to individuals, it is doubtful whether it can be relied on as an argument supporting the imposition of obligations.

<sup>19</sup> Further support for this position can be found in the wording of Art. 8 of the ICC statute, which arguably does not limit the scope of perpetrators, although the wording (‘within the established framework of international law’) could also be interpreted to refer to the question whether civilians are bound by IHL. See K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (2003), at 391.

<sup>20</sup> G. Werle, *Principles of International Criminal Law* (2005), at para. 850. See also ICTY Trial Chamber, *Prosecutor v. Tadic*, IT-94-1, judgment, 7 May 1997, at para. 573.

<sup>21</sup> See Schmitt, ‘Humanitarian Law and the Direct Participation in Hostilities by Private Contractors or Civilian Employees’, 5 *Chicago J Int’l L* (2004) 511, at 539.

<sup>22</sup> ICTY Appeals Chamber, *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1A, judgment, 12 June 2002, at para. 58.

<sup>23</sup> The determination of the existence of an armed conflict and its characterization can be an additional source of uncertainty. PMCs operate in both non-international and international armed conflicts. While the ICC Statute expressly recognizes that war crimes can be committed also during a non-international conflict (Art. 8(2)(e) and (f)), as a matter of customary international law the criminal nature of breaches of common Art. 3 of GC I–IV and of Additional Protocol II is less established than in the context of international armed conflicts. Yet the ICTY Appeals Chamber in the *Tadic* case held that customary international law imposes criminal responsibility for ‘serious violations of common Art. 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict’: ICTY Appeals Chamber, *Prosecutor v. Tadic*, IT-94-1, decision on the defence motion for interlocutory appeal on jurisdiction, 2 Oct. 1995, at paras 87–93. See also J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* (2005), ii, at 551.

<sup>24</sup> ICTY Trial Chamber, *Prosecutor v. Aleksovski*, IT-95-14/1, judgment, 25 June 1999, at para. 45.

<sup>25</sup> ICTY Appeals Chamber, *Prosecutor v. Kunarac et al.*, *supra* note 22, at para. 58; ICTY Trial Chamber, *Prosecutor v.*

Such an obvious nexus could be readily established if the act were committed in the course of fighting or during the takeover of a locality.<sup>28</sup> The requirement is therefore met if the crime was committed by PMC employees hired, in fact, to fight a war alongside or in place of armed forces, like Executive Outcomes or Sandline International in Sierra Leone and Angola. The temporal aspect is to be understood much more broadly, however. Since war crimes law purports to criminalize the violation of rules of the laws of war, the latter is the crucial reference for the determination of the scope of the prohibition. Consequently, the nexus does not necessarily require that the offence be directly committed:

whilst fighting is actually taking place, or at the scene of combat. Humanitarian law continues to apply in the whole of the territory under the control of one of the parties, whether or not actual combat continues at the place where the events in question took place ... the requirement ... is satisfied if ... the crimes are committed in the aftermath of the fighting, and until the cessation of combat activities in a certain region, and are committed in furtherance or take advantage of the situation created by the fighting.<sup>29</sup>

Therefore, neither the temporal nor the geographical aspect alone can exclude security guards shooting at civilians or PMC personnel employed in detention facilities outside the theatre of combat from the scope of war crimes.

Further factors to be taken into account when establishing the existence of the required nexus include the status of the victim – whether the victim was a non-combatant or a member of the opposing or belligerent party – the fact that the act objectively serves the ultimate goal of a military campaign, or the fact that the crime is committed as part of or in the context of the employee's official duties.<sup>30</sup> However, the crime need not 'be part of a policy or practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of the war or in the actual interest of a party to the conflict'.<sup>31</sup> On that basis, if security guards hired by a government involved in an armed conflict kill civilian bystanders in an unprovoked shooting the required nexus is arguably established: in such cases, the specific danger to which civilians are exposed in an armed conflict with a large presence of heavily armed PMC personnel materializes.<sup>32</sup> An analogous reasoning applies to PMC personnel abusing prisoners in a detention facility in a war zone.

### **3. Private Military Personnel and Crimes against Humanity**

As distinct from war crimes, crimes against humanity can be committed both in peacetime and in armed conflict.<sup>33</sup> The perpetrator need not be a member of the state or organization involved in the

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*Vasiljevic*, IT-98-32, judgment, 29 Nov. 2002, at para. 25.

<sup>26</sup> ICTY Appeals Chamber, *Prosecutor v. Tadic*, *supra* note 18, at para. 70; ICTY Trial Chamber, *Prosecutor v. Tadic*, *supra* note 20, at para. 573.

<sup>27</sup> ICTY Trial Chamber, *Prosecutor v. Delalić et al.*, IT-96-21, judgment, 16 Nov. 1998, at para. 193.

<sup>28</sup> *Ibid.*

<sup>29</sup> ICTY Trial Chamber, *Prosecutor v. Kunarac et al.*, *supra* note 18, at para. 568; also ICTY Trial Chamber, *Prosecutor v. Tadic*, IT-94-1, *supra* note 20, at para. 573.

<sup>30</sup> ICTY Appeals Chamber, *Prosecutor v. Kunarac et al.*, *supra* note 22, at para. 59; ICTR Appeals Chamber, *Prosecutor v. Rutaganda*, ICTR-96-3, judgment, 26 May 2003, at para. 569.

<sup>31</sup> ICTY Trial Chamber, *Prosecutor v. Tadic*, *supra* note 20, at para. 573; ICTY Trial Chamber, *Prosecutor v. Blaškić*, IT-95-14, judgment, 3 Mar. 2000, at para. 70. For a different view see ICTY Trial Chamber, *Prosecutor v. Akayesu*, *supra* note 10, at para. 640.

<sup>32</sup> But see A. Bouvier and M. Sassòli, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law* (2005), at 215.

<sup>33</sup> Art. 5 ICTY Statute stipulates that crimes against humanity must be committed 'in armed conflict'. This nexus has been

crime, but can include all persons who act to implement or support the policy of the state or the organization.<sup>34</sup> On the other hand, in addition to the commission of murder, illegal imprisonment, torture, enforced disappearance, etc.,<sup>35</sup> the crime requires a ‘widespread or systematic practice’.<sup>36</sup> ‘Widespread’ refers to the large-scale nature of the attack and the number of victims; ‘systematic’ to the organized nature of acts of violence and the improbability of their random occurrence.<sup>37</sup> The participation of MPRI in ‘Operation Storm’ in Croatia in 1995 might have constituted such a crime.<sup>38</sup> Another possible case of application is the so-called practice of ‘extraordinary rendition’. In 2004, it was revealed that the US government, with the collusion of a number of EU Member States, had frequently illegally abducted, arrested, and/or transferred into custody of US officials and/or, using private companies, transported prisoners to other countries for interrogation which, in the majority of cases, involved incommunicado detention and torture.<sup>39</sup>

#### 4. Forms of Participation

Apart from committing a crime as an individual by fulfilling the requirements of an international crime in his own person,<sup>40</sup> a PMC employee may also become criminally liable jointly with others, as an accomplice, or under the principle of superior responsibility. When considering these various modes of participation, the role of MPRI in the Croatian military ‘Operation Storm’ in 1995 against Serb forces may serve as an illustration. The Croatian army drove 100,000 Serbs from Croatia, regained territory that had been held by Serb rebels for four years, and in the process targeted mostly civilians. In terms of numbers, it was the largest single ‘ethnic cleansing’ of the war. MPRI maintains that its involvement was limited to the provision of human rights training. Several commentators believe that there was evidence that someone referred to as ‘the American general’, assumed to be one of the retired American generals on MPRI’s payroll, had planned the operation. In the end, the precise form of MPRI’s contribution remains uncertain.<sup>41</sup> Depending on the factual circumstances it is possible that MPRI personnel were responsible for committing the crimes jointly with the Croatian army, for encouraging or ordering the crimes, for aiding and abetting it, or under the principle of superior command responsibility.

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described by the Appeals Chamber as ‘obsolescent’, as there is ‘no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity’: ICTY Appeals Chamber, *Prosecutor v. Tadic*, decision on the defence motion for interlocutory appeal on jurisdiction (*supra* note 23), at para. 140.

<sup>34</sup> Werle, *supra* note 20, at para. 667.

<sup>35</sup> See Art. 7 ICC Statute.

<sup>36</sup> See Art. 3 ICTR Statute, Art. 7(1) ICC Statute, Art. 18 ILC Draft Codes of Crimes against the Peace and Security of Mankind (1996).

<sup>37</sup> ICTY Appeals Chamber, *Prosecutor v. Kunarac et al.*, *supra* note 22, at para. 94.

<sup>38</sup> See ICTY Trial Chamber, *Prosecutor v. Gotovina, Čermak and Markač*, IT-06-90-PT, witness testimony, 26 June 2003, at 23121, available at [www.un.org/icty/transe54/030626IT.htm](http://www.un.org/icty/transe54/030626IT.htm).

<sup>39</sup> Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, ‘Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report’, 7 June 2007; Mayer, ‘The C.I.A.’s Travel Agent’, *The New Yorker*, 30 Oct. 2006; S.M. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (2004), at 51.

<sup>40</sup> See Art. 25(3)(a) ICC Statute.

<sup>41</sup> ICTY Trial Chamber, *supra* note 38

**A. PMC Personnel Committing, Encouraging, or Assisting in the Commission of International Crimes**

If there was a common plan, design, or purpose formed with MPRI personnel on the basis of which the Croatian army conducted Operation Storm it is irrelevant whether MPRI employees were, in fact, present at the site or participated in the execution of the common plan;<sup>42</sup> nor is it relevant that MPRI personnel and Croatian troops were not part of the same unit.<sup>43</sup> In either case they would be individually responsible. Rather, a significant and causal contribution to the accomplishment of the crime is crucial; this can consist of any kind of assistance, such as contributions at the planning stage.<sup>44</sup> Even if the Croatian army had committed excesses during Operation Storm which went beyond the framework of the common plan created by MPRI and the Croatian army, MPRI employees would be criminally responsible if these excesses had been the ‘natural and foreseeable consequence’ of the plan’s execution.<sup>45</sup>

If the crimes are not executed according to a common plan, but private military personnel still contribute to their commission, they may become criminally responsible under international law for encouraging the commission of or aiding and abetting an international crime. These forms of participation are particularly relevant for those PMCs whose main field of activity is ‘advising’ or ‘training’ state armies. The PMC employee may induce<sup>46</sup> or even order<sup>47</sup> members of armed forces to commit an international crime. An order presupposes a typically military relationship of subordination between the person giving the order and the person receiving it.<sup>48</sup> Such will be rare, although it might have been the case at Abu Ghraib, where the army investigation report found that PMC employees were ‘supervising’ military personnel.<sup>49</sup> If MPRI personnel, however, ‘prompted’ the Croatian army to commit the war crimes during Operation Storm, they are responsible for instigating the crime.<sup>50</sup>

With regard to individual criminal responsibility for aiding and abetting the international criminal tribunals have developed a fairly clear standard. The *Tadic* Appeal Chamber judgment set out the requirements as follows:

The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime ... and this support has a substantial effect upon the perpetration of the crime ... the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.<sup>51</sup>

While the definition appears to be fairly straightforward, there remain controversies about the precise ambit of liability for aiding and abetting, primarily because the law on the required degree of

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<sup>42</sup> Eser, ‘Individual Criminal Responsibility’, in Cassese, Gaeta, and Jones, *supra* note 4, at 767, 791.

<sup>43</sup> ICTY Appeals Chamber, *Prosecutor v. Tadic*, *supra* note 18, at para. 227.

<sup>44</sup> *Ibid.*, at para. 196.

<sup>45</sup> ICTY Trial Chamber, *Prosecutor v. Stakic*, IT-97-24, judgment, 31 July 2003, at para 436.

<sup>46</sup> See Eser, *supra* note 42, at 796; Art. 25(3)(b) ICC Statute.

<sup>47</sup> A. Cassese, *International Criminal Law* (2003), at 194; ICTY Statute, Art. 7(1), ICTR Statute, Art. 6(1), Art 129(1) of GC III, Art. 146(1) of GC IV; Art. 25(3)(b) ICC Statute.

<sup>48</sup> Werle, *supra* note 20, at para. 357.

<sup>49</sup> Fay Report, *supra* note 2.

<sup>50</sup> See ICTY Trial Chamber, *Prosecutor v. Krstić*, IT-98-33, judgment, 2 Aug. 2001, at para. 601; ICTY Trial Chamber, *Prosecutor v. Kvočka et al.*, IT-98-30/1, judgment of 2 Nov. 2001, at para. 243; ICTY Trial Chamber, *Prosecutor v. Naletilić and Martinović*, IT-98-34, judgment, 31 Mar. 2003, at para. 60; ICTR Appeals Chamber, ICTR Trial Chamber, *Prosecutor v. Akayesu*, *supra* note 10, at para. 482.

<sup>51</sup> ICTY Appeal Chamber, *Prosecutor v. Tadic*, *supra* note 18, at para. 229; ICTY Trial Chamber, *Prosecutor v. Krnojelac*, IT-97-25, judgment, 15 Mar. 2002, at para. 88; Art. 25(3)(c) ICC Statute.

participation is still unsettled. Although the act need not constitute an indispensable element, an act is substantial if ‘the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed’.<sup>52</sup> Even acts which are not necessarily considered significant may trigger the criminal responsibility of PMC employees, as the term ‘substantial’ has been interpreted as meaning ‘any assistance which is more than *de minimis*’.<sup>53</sup> Of course, the further one goes down the chain of acts which contributed to the commission of the crime, the more difficult it is to establish the ‘substantial’ nature of any assistance. Nonetheless it is likely that a number of acts contributing to international crimes would be considered as satisfying the definition of aiding and abetting. If it is accepted that providing weapons to the perpetrator would qualify the individual as an aider and abettor,<sup>54</sup> it is conceivable that MPRI personnel providing the Croatian army with the ‘know-how’ to conduct a successful illegal military operation would be equally regarded as such. Similarly, PMC personnel identifying civilian targets which are attacked by state forces, or acting as prison guards in a detention facility in which detainees are abused or tortured, could be seen as aiding the crime.<sup>55</sup>

As to *mens rea*, it is notable that the ICC Statute sets a higher standard of knowledge than the ICTY and ICTR by providing that the conduct was ‘for the purpose’ of assisting and abetting.<sup>56</sup> If the ICC standard were adopted, the prosecution of PMC personnel providing weapons or instructions to war criminals might be more difficult, as the defence could argue that, although the PMC personnel knew that their instructions would be used to commit war crimes or crimes against humanity, their purpose was not to assist in the commission of international crimes but to make a profit.

### **B. Responsibility of PMC Personnel as Commanders and Superiors**

From an IHL perspective, the principles of responsible command and superior responsibility are instrumental for the enforcement of the laws of armed conflict.<sup>57</sup> Under the principle of superior responsibility, superiors are criminally responsible for war crimes committed by their subordinates: if superiors ‘look the other way’, their omission is a serious potential danger, and therefore the basis for criminal responsibility if they culpably violate the duties of control assigned to them.<sup>58</sup> This could be

<sup>52</sup> ICTY Trial Chamber, *Prosecutor v. Tadic*, *supra* note 20, at para. 688.

<sup>53</sup> See Ambos, ‘Article 25’, in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court – Observer’s Notes, Article by Article* (1999), at 481; R. Cryer, H. Friman, D. Robinson, and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (2007), at 311. Moreover, there is no such requirement in Art. 25(3)(c) of the ICC Statute.

<sup>54</sup> ICTR Appeals Chamber, *Prosecutor v. Ntakirutimana*, ICTR-96-10, judgment, 13 Dec. 2004, at para. 530; Art. 25(3)(c) ICC Statute.

<sup>55</sup> *Ibid.*, at para. 532.

<sup>56</sup> Art. 25(3)(c).

<sup>57</sup> US Supreme Court, *United States v. Yamashita*, 4 LRTWC (1947) 1, at 15; ICTY Trial Chamber, *Prosecutor v. Hadžihasanović et al.*, IT-01-47, decision of 12 Nov. 2002, at para. 174.

<sup>58</sup> Referring to Nuremberg and Tokyo case law, Art. 86(2) of Additional Protocol (AP) I, and Art. 12 Draft Code of Crimes against Peace and Security of Mankind (UN Doc. A/51/10), the ICTY held that the principle of superior responsibility is established as a matter of customary law in ICTY Appeals Chamber, *Prosecutor v. Blagojević & Jokic*, IT-02-60, judgment, 9 May 2007, at para. 281; ICTY Appeals Chamber, *Prosecutor v. Delalić et al.*, IT-96-21, judgment, 20 Feb. 2001, at para. 195; ICTY Trial Chamber, *Prosecutor v. Kordić et al.*, IT-95-14/2, judgment, 26 Feb. 2001, at para. 441. Art. 86(1) AP I reads: ‘[t]he fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach’. The question whether the principle applies also to non-international conflicts was discussed in the *Hadžihasanović* Case. Both the Trial Chamber and Appeals Chamber found that superiors in non-international conflicts could become responsible, albeit with arguments primarily pertaining to military commanders: ICTY Trial Chamber, IT-

of some relevance with regard to the criminal liability of PMC supervisors or even members of PMC senior management.<sup>59</sup>

### 1. Superior–Subordinate Relationship

A key factor in determining superior responsibility is the existence of a superior–subordinate relationship. Historically the principle of superior responsibility has been intimately linked to the military hierarchy: most cases involving superior responsibility concerned the criminal responsibility of military leaders (command responsibility). Since PMC personnel, in principle, are not part of the formal command structure of the state forces they are hired to support, they do not have *de jure* authority as commanders. However, since the principle is predicated upon the existence of ‘the actual possession, or non-possession, of powers of control over the actions of subordinates’,<sup>60</sup> the concept has been extended to non-military contexts where the superior effectively acts as a military commander.<sup>61</sup> So can a senior employee of a PMC act *de facto* as a commander over private military personnel committing the crime?

Whether someone is the superior of another person depends on the effective control he can exercise over that person’s conduct. The PMC superior must have ‘the material ability to prevent and punish’<sup>62</sup> the commission of the crime. For example, substantial influence is insufficient,<sup>63</sup> as is control that may effectively exist between one person over another of completely equal status.<sup>64</sup> In general, while the supervisory authority of non-military superiors does not necessarily need to be exercised through the same power of sanction as that of military commanders,<sup>65</sup> it must be comparable to or as effective as command authority within a military organization.<sup>66</sup>

Control in a non-military context is more limited than in a military setting because in the latter superiors operate within a structure of hierarchy and a system of obedience, and are responsible for their subordinates’ activities 24 hours a day during operations. Moreover, a military commander has recourse to a military code or a disciplinary system in exercising control over his subordinates.<sup>67</sup> For these reasons, establishing a superior–subordinate relationship within an ordinary company can be inordinately difficult. Nonetheless, PMCs are not ordinary companies. It has often been observed that the corporate culture within PMCs and their functioning resemble those of armed forces, as the companies are often led and staffed by former troops and military commanders. Moreover, the very services PMCs provide require an organization which is more hierarchically structured than would

(Contd.) \_\_\_\_\_

01-47, decision, 12 Nov. 2001, at paras 87–88.

<sup>59</sup> The question also arises for military commanders who are supervising the theatre of operation in which PMCs operate. Art. 87(1) AP I addresses ‘military commanders with respect to members of the armed forces under their command and other persons under their control’. On the question of superior responsibility of the person organizing the contract see Doswald-Beck, *supra* note 9, at 136.

<sup>60</sup> ICTY Trial Chamber, *Prosecutor v. Delalić et al.*, *supra* note 27, at para. 370.

<sup>61</sup> *Ibid.*, at para. 355; ICTY Trial Chamber, *Prosecutor v. Aleksovski*, *supra* note 24, at paras 75, 78.

<sup>62</sup> ICTY Trial Chamber, *Prosecutor v. Delalić et al.*, *supra* note 27, at paras 377–378.

<sup>63</sup> ICTY Appeals Chamber, *Prosecutor v. Delalić et al.*, *supra* note 58, at para. 266.

<sup>64</sup> *Ibid.*, at para. 303.

<sup>65</sup> ICTY Trial Chamber, *Prosecutor v. Aleksovski*, *supra* note 24, at para. 78.

<sup>66</sup> See Art. 28(2)(b) ICC Statute; ICTRY Trial Chamber, *Prosecutor v. Aleksovski*, *supra* note 24, at para. 78; ICTY Appeals Chamber, *Prosecutor v. Delalić et al.*, *supra* note 56, at para. 378; ICTY Appeals Chamber, *Prosecutor v. Blaškić*, IT-95-14, judgment, 29 July 2004, at para. 67; ICTR Trial Chamber, *Prosecutor v. Semanza*, ICTR-97-20, judgment, 15 May 2003, at para. 402; ICTR Trial Chamber, *Prosecutor v. Ntagerura et al.*, ICTR-99-46, judgment, 25 Feb. 2004, at para. 628.

<sup>67</sup> E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (2003), at 184.

normally be the case with a company. It is therefore likely that the supervisory authority of senior PMC personnel in the field is very similar to that exercised by military commanders. In addition, while they cannot rely on the same disciplinary system, they have the ability to punish a crime by submitting a report to a competent state authority, thereby triggering an investigation. Therefore, while the establishment of a superior–subordinate relationship in Nuremberg and before the *ad hoc* Tribunals required the establishment of additional factors demonstrating the equivalence of civilian control to military command, the position of a PMC employee overseeing and directing lower-ranked PMC employees might be seen more readily as a functional equivalent to the position of military commanders. The position of the PMC superior in that case may be analogized to that of a semi-military official, making it more likely that he is viewed as having the required degree of control, as he would be considered as effectively acting as a military commander. This argument applies *a fortiori* to those PMCs contracted, in fact, to fight in a war.

The same reasoning would obviously not apply to senior management members of the PMC who are not present in the field, as their factual relationship with PMC employees is different from the relationship between the PMC employee and his immediate superior. Here, additional factors satisfying the requirement of control are required. *De facto* control over the actions of subordinates, in the sense of the factual ability to prevent or punish criminal conduct, is crucial in the end.<sup>68</sup> A manifestation of the first is, for example, the factual possibility of preventing the crime through the issuing of orders.<sup>69</sup> Evidence of the latter can be the factual possibility and expectation of transmitting reports to the appropriate authorities and civilian authority and, in the light of the position of the PMC superior, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures.<sup>70</sup>

Could a member of the PMC senior management be responsible on that basis, given his competence to appoint or remove PMC employees from their positions, and given that his report to state authorities is likely to trigger an investigation? The ICTR convicted the director of a tea company for precisely these reasons, considering these factual possibilities as evidence of his legal and financial control over his employees.<sup>71</sup> However, it is doubtful whether the mere fact that PMC personnel are bound in an employment capacity is sufficient.<sup>72</sup> If it is accepted that effective control in the sense of being in a position to prevent the crime is indispensable for the establishment of a superior–subordinate relationship, the better view is that the mere competence to appoint or dismiss employees constitutes control too remote for the purposes of superior responsibility.<sup>73</sup> While the absence of a direct and individualized relationship between senior PMC personnel and the PMC employee committing a crime does not hinder the establishment of *de facto* control,<sup>74</sup> *de jure* authority over the subordinate alone is insufficient. Whether legal control amounts to effective control is determined primarily by reference to his *de facto* capacity. If PMC senior management has the material ability to issue instructions which are routinely implemented by PMC personnel on the ground that a superior–subordinate relationship

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<sup>68</sup> ICTY Trial Chamber, *Prosecutor v. Delalić et al.*, *supra* note 27, at paras 354, 378; ICTR Trial Chamber, *Prosecutor v. Semanza*, *supra* note 66, at para. 402; ICTY Trial Chamber, *Prosecutor v. Kordić et al.*, *supra* note 58, at paras 414–415.

<sup>69</sup> ICTY Trial Chamber, *Prosecutor v. Hadžihasanović*, *supra* note 58, at para. 85; Nybondas, ‘Civilian Responsibility in the Kordić Case’, 50 *Netherlands Int’l L Rev* (2003) 59, at 64; Williamson, ‘Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda’, 13 *Criminal Law Forum* (2002) 365, at 368.

<sup>70</sup> ICTY Trial Chamber, *Prosecutor v. Aleksovski*, *supra* note 24, at paras 77, 78.

<sup>71</sup> ICTR Trial Chamber, *Prosecutor v. Musema*, *supra* note 14, at para. 880. In a third case concerning the medical director of a hospital the ICTR found there was not sufficient evidence to establish effective control: ICTR Trial Chamber, *Ntakirutimana & Ntakirutimana*, IT-96-10 & IT-96-17, judgment, 21 Feb. 2003, at paras 434, 821.

<sup>72</sup> See, however, ICTR Trial Chamber, *Nahimana et al.*, IT-99-52, judgment, 3 Dec. 2003, at para. 976.

<sup>73</sup> *Ibid.*, at paras 567, 970, and 972; ICTY Trial Chamber, *Prosecutor v. Delalić*, *supra* note 27, at para. 377.

<sup>74</sup> ICTR Appeals Chamber, *Nahimana et al.*, IT-99-52, judgment, 28 Nov. 2007, at para. 785.



can be established.

## 2. Failure to Take Measures

The concept of superior responsibility is based on an omission on the part of the superior. Omissions are legally relevant only if there is a specific duty to act. Thus, the PMC superior must have failed to take necessary and reasonable measures to prevent or punish the offences he knew or culpably ought to have known about.<sup>75</sup> The measures to be taken depend on the nature of the control exercised by the superior and what measures are within his powers.<sup>76</sup> In determining what measures are within his powers it is not the rules of the company or of the contract between the employee and the PMC which are decisive: '[o]therwise these rules would negate the force of the concept of superior responsibility'.<sup>77</sup> Rather, the relevant standard is international humanitarian law. The wording of Article 87(1) of Additional Protocol I to the Geneva Conventions, which is frequently referred to in this context,<sup>78</sup> limits the scope of the provision to military commanders.<sup>79</sup> Article 86(2) of Additional Protocol I does not establish,<sup>80</sup> but presupposes, the duty of non-military superiors to prevent and punish, which in turn is established as a matter of general principles of international law.<sup>81</sup> Measures to be taken include preventive measures such as providing adequate training to PMC personnel, ensuring that operations are planned in accordance with IHL, and making sure a reporting system is in place so that the superior is informed of violations of IHL.<sup>82</sup> In addition, before a specific crime is completed, the PMC superior must issue orders to prevent the specific crime and ensure their implementation. If the crime has already been committed he must initiate an investigation into the matter or alternatively submit the matter to appropriate prosecutorial organs.<sup>83</sup> Simply dismissing the PMC employee accused of an international crime is, by these standards, insufficient.

## 3. Knowledge Requirement

While the establishment of a superior-subordinate relationship may generally be more difficult with regard to civilian superiors than with regard to military commanders, the requirement as such is the same for both military and civilian settings. The question whether PMC personnel supervising PMC employees in the field or on a management level should be equated to military commanders becomes relevant, however, when it comes to the mental element of superior responsibility.

According to the ICC Statute, the *mens rea* requirement is stricter for civilian superiors. As distinct from the requirement for military commanders, its Article 28 stipulates that negligence is insufficient. A civilian superior must have either known or 'consciously disregarded information which clearly

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<sup>75</sup> The two types of liability are separate: a superior's failure to prevent the commission of the crime by a subordinate where he had the ability to do so cannot simply be remedied by subsequently punishing the subordinate for the crime: ICTY Trial Chamber, *Prosecutor v. Orić*, IT-03-68, judgment, 30 June 2006, at para 326; *Prosecutor v. Blaškić*, *supra* note 31, at para. 336.

<sup>76</sup> ICTY Trial Chamber, *Prosecutor v. Delalić et al.*, *supra* note 27, at para. 395.

<sup>77</sup> *Ibid.*; Bantekas, 'The Contemporary Law of Superior Responsibility', 93 *AJIL* (1999) 573, at 592.

<sup>78</sup> Fenrick, 'Art. 29', in Triffterer (ed.), *supra* note 53, at para. 9.

<sup>79</sup> An analogous application to civilians is impermissible: Nerlich, 'Superior Responsibility under Article 28 ICC Statute', 5 *J Int'l Criminal Justice* (2007) 665, at 671.

<sup>80</sup> For a different view see Bantekas, *supra* note 77, at 591.

<sup>81</sup> B. Burghardt, *Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straftatsystem* (2008), at 192.

<sup>82</sup> Fenrick, *supra* note 78, at para. 9.

<sup>83</sup> ICTY Trial Chamber, *Prosecutor v. Orić*, *supra* note 75, at para. 331; Art. 28 ICC Statute.

indicated that the subordinates were committing or about to commit such crimes'.<sup>84</sup> This suggests a significantly reduced duty of a PMC superior to remain informed within his domain.<sup>85</sup> He must have wilfully ignored information within his actual possession compelling the conclusion that criminal offences are being committed or about to be committed,<sup>86</sup> and not just failed in his duty of vigilance and allowed the acts to happen. On the basis of the principles reflected in the ICC Statute, a PMC supervisor or manager, if considered a civilian for the purposes of superior responsibility, can exonerate himself more easily as he will not be responsible if he can show that he was not 'wilfully blind' to the planned crime. By contrast, the knowledge requirement for military commanders who 'either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit' international crimes imposes a stricter duty of vigilance. According to the ICC Statute, however, this standard also applies to a person 'effectively acting as a military commander'.<sup>87</sup> The term has been interpreted as including 'police officers in command of armed police units, persons responsible for paramilitary units not incorporated into the armed forces'.<sup>88</sup> Thus the question is whether PMC supervisors or members of PMC senior management should be seen as effectively acting as military commanders.

While the *mens rea* standard established by the ICC Statute for military commanders is in line with customary international law,<sup>89</sup> the ICC *mens rea* for civilian superiors appears to be different from that established by the *ad hoc* Tribunals.<sup>90</sup> The adoption of different rules in Article 28 of the ICC Statute was as a result of opposition to the extension of superior responsibility to civilians, which made it necessary to compromise and restrict the scope of the duties imposed on civilian superiors.<sup>91</sup> Whether a court would follow that distinction or apply the test for military commanders to PMC personnel

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<sup>84</sup> Art. 28 ICC Statute reads: '[i]n addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: 1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: a) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and b) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution'. 2. With respect to superior and subordinate relationships not described in paragraph a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: a) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; b) the crimes concerned activities that were within the effective responsibility and control of the superior; and c) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution'.

<sup>85</sup> Vetter, 'Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)', 25 *Yale J Int'l L* (2000) 89, at 123.

<sup>86</sup> ICTY Trial Chamber, *Prosecutor v. Delalić et al.*, *supra* note 27, at para. 387.

<sup>87</sup> Art. 28(1)(a).

<sup>88</sup> Fenrick, 'Article 28', in Triffterer (ed.), *supra* note 53, at 521; Nybondas, *supra* note 69, at 79.

<sup>89</sup> ICTY Trial Chamber, *Prosecutor v. Delalić*, *supra* note 27; Art. 7(3) ICTY Statute, Art. 86(2) AP I. See, however, Cryer *et al.*, *supra* note 53, at 324, 325.

<sup>90</sup> ICTR Trial Chamber, *Kayishema & Ruzindana*, *supra* note 10, at para. 227, referred to Art. 28 ICC Statute in arguing for a separate knowledge standard for civilian superiors. In *Musema*, *supra* note 14, at paras 147, 148 the ICTR Trial Chamber abandoned that distinction. ICTY Appeals Chamber, *Prosecutor v. Delalić et al.*, *supra* note 58, at para. 240, leaves this question explicitly open. But subsequent cases assume the requirement is the same, e.g., ICTY Trial Chamber, *Prosecutor v. Kordić et al.*, *supra* note 58, at para 430: 'no distinction should be made between the knowledge required in relation to military and civilian superiors'. See also ICTY Trial Chamber, *Prosecutor v. Krnojelac*, IT-97-25, judgment, 15 Mar. 2002, at para. 94; *Prosecutor v. Brđjanin*, IT-99-36, judgment, 1 Sept. 2004, at para. 282; ICTY Trial Chamber, *Prosecutor v. Orić*, *supra* note 75, at para. 320.

<sup>91</sup> UN Doc. A/CONF.183/C.1/SR.1, at paras 67–83.

remains to be seen. The latter in any case is less likely with regard to PMC senior management not present in the field. Moreover, even if the same test were to be applied to PMC personnel, the evidence required to demonstrate knowledge might still vary depending on the position of authority of the superior.<sup>92</sup>

## **5. Problems of Implementation and Jurisdiction**

If it is theoretically possible to hold private military personnel accountable for an international crime, an appropriate forum must be found to hear the case. The ICC is a permanent forum in which individuals can be held directly accountable for genocide, crimes against humanity, and war crimes. However, as it is premised on the principle of complementarity<sup>93</sup> and only cases that are of ‘sufficient gravity’ are admissible,<sup>94</sup> it is unlikely that cases against private military personnel will be adjudicated on in The Hague. Therefore, if criminal responsibility can be established, the site of enforcement will, in general, be domestic criminal courts.

International crimes are seen to be directed against the interests of the international community as a whole. It follows that crimes which are not grave breaches of the Geneva Conventions or Additional Protocol I are subject to non-compulsory universal jurisdiction, meaning that any state can give itself jurisdiction over such crimes irrespective of the nationality of the perpetrator, where the crime was committed, or whether any other link with the prosecuting state can be established.<sup>95</sup> Moreover, international law not only allows states to prosecute international crimes, but even makes it mandatory to do so under certain circumstances. International crimes which amount to grave breaches of the Geneva Conventions or Additional Protocol I are subject to mandatory universal jurisdiction.<sup>96</sup> The *aut dedere aut judicare* principle obliges the custodial, national, and territorial state to investigate and prosecute or extradite persons suspected of having committed grave breaches of the Geneva Conventions<sup>97</sup> and Additional Protocol I<sup>98</sup> irrespective of the nationality of the alleged perpetrator or place where the crime was committed. Grave breaches in that sense include wilful killing, torture, or inhuman treatment, wilfully causing great suffering or serious injury to body or health, and unlawful deportation,<sup>99</sup> crimes which arguably have been committed by PMC personnel in the context of past international armed conflicts. The obligation to investigate or extradite persons suspected of grave breaches, however, is one that has rarely been put into practice.<sup>100</sup>

The practical effect of the duty to prosecute on the part of the state of commission is particularly limited. In practice weak states – where PMCs conduct much of their business – are likely to be reluctant to exercise jurisdiction on political grounds. It may well be that the state is dependent on the presence of PMCs for the provision of security, as is arguably the case in Iraq where PMC employees have outnumbered coalition troops on the ground since 2007.<sup>101</sup> This factual dependence severely

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<sup>92</sup> ICTY Trial Chamber, *Prosecutor v. Kordic et al.*, *supra* note 58, at para. 428.

<sup>93</sup> Art. 1 ICC Statute.

<sup>94</sup> Art. 17(1) ICC Statute.

<sup>95</sup> I. Brownlie, *Principles of Public International Law* (6th edn, 2003), at 303, 565. For the applicability of universal jurisdiction for war crimes in non-international armed conflict see Kreß, *supra* note 17, at 169.

<sup>96</sup> Arts 49, 50 GC I; Arts 50, 51 GC II; Arts 129, 130 GC III; Arts 146, 147 GC IV; Art. 85(1) AP I. This obligation, according to the Customary International Humanitarian Law Study, also exists under customary law: Henckaerts and Doswald-Beck, *supra* note 17, at 607.

<sup>97</sup> ICTY Appeals Chamber, *Prosecutor v. Blaškić*, *supra* note 66, at para. 29.

<sup>98</sup> Arts 85, 11, 86, 88 AP I.

<sup>99</sup> Art. 147 GC IV.

<sup>100</sup> See Henckaerts and Doswald-Beck, *supra* note 17, ii, at 3894.

<sup>101</sup> Miller, ‘Private Contractors Outnumber US Troops in Iraq’, *Los Angeles Times*, 4 July 2007.

compromises any prospect of the host government enforcing criminal law against PMCs. For the same reason, the host state may agree to grant immunity to PMC personnel from its jurisdiction. An example is the Coalition Provisional Authority (CPA) Order No. 17 providing immunity to both coalition troops and contractors from Iraqi civil and criminal proceedings.<sup>102</sup> Although provisions have been made for the inapplicability or waiver of this immunity<sup>103</sup> these have never been used, and although of course the sending state retains jurisdiction over PMC personnel,<sup>104</sup> prosecutions have been virtually non-existent. Such immunity agreements, in any case, cannot cover grave breaches of the Geneva Conventions committed in an international conflict, as the obligation to investigate and to prosecute such cases is mandatory under international law.

Generally criminal law enforcement mechanisms of the home state or sending state have been either unsuitable or under-used, resulting in effective impunity of PMC personnel. Domestic legal systems may provide for extraterritorial jurisdiction with respect to international crimes committed by or against their nationals, and a few rely on 'universal jurisdiction' to extend their laws regardless of nationality links. The US War Crimes Act<sup>105</sup> is an example of the first category. It can be used, for example, against PMC employees abroad provided they hold US citizenship. Although the abuses at Abu Ghraib are arguably chargeable offences under the Act it has not been used against PMC employees. This lack of enforcement illustrates that even if suitable legislation exists, actual prosecution depends on national authorities being willing and equipped with sufficient resources to address international crimes committed by PMC employees abroad. The inclusion of PMC personnel in the scope of the US Uniform Code of Military Justice may mitigate enforcement problems, although its efficiency and constitutionality remain to be tested.<sup>106</sup> Yet, extension of the contract between the US State Department and Blackwater while investigations into the Nisour Square shootings were still under way<sup>107</sup> illustrates the factual dependency on PMCs which potentially provides a strong disincentive to enforce criminal law against PMC employees. Such conflicts of interest can be life-threatening where investigators dispatched to the crime scene are protected by the very PMC whose employees are under investigation.<sup>108</sup>

When considering enforcing international criminal law through domestic courts, conceptual differences in criminal legal systems have to be taken into account. States will often rely on ordinary criminal law to cover crimes under international law, for example under the definitions of murder or deprivation of liberty. Moreover, certain concepts may not even exist in domestic criminal law. Superior responsibility is a creation of international criminal law, and not many states have adopted it

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<sup>102</sup> CPA, Order No. 17 (revised): Status of the Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, 27 June 2004; CPA, Order No. 100: Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority, 28 June 2004, sect. 3(8). The US and Afghanistan have reportedly concluded a similar agreement. Following the killing of 17 civilians by PMC employees, the Iraqi parliament announced it would rescind the Order. At the time of writing, it appears that the issue is being discussed between Iraq and the US in the context of the new Status of Forces Agreement.

<sup>103</sup> CPA Order No. 17 (revised), sect. 5.

<sup>104</sup> Sect. 4(7).

<sup>105</sup> 18 USC § 2441 (a) (2006). The War Crimes Act does not criminalize all international crimes. For example, it does not cover assaults not resulting in serious bodily injury and offensive acts upon people within US custody or control not rising to the statutory definition of cruel or inhuman treatment in § 2441 (d).

<sup>106</sup> Uniform Code of Military Justice (UCMJ), 64 Stat. 109, 10 USC ch. 47. According to Art. 2 the UCMJ now applies to 'persons serving with or accompanying an armed force in the field' 'in time of declared war or a contingency operation'. On the constitutional problems see Quigley, 'Civilian Contractor Charged with Assault under Military Law', American Forces Press Service, 6 Apr. 2008.

<sup>107</sup> US State Department, On-the-Record Briefing With Acting Assistant Secretary of State for Diplomatic Security Gregory B. Starr, 4 Apr. 2008.

<sup>108</sup> Meek, 'Blackwater to Guard FBI Team Probing it', *New York Daily News*, 3 Oct. 2007.

in their domestic criminal legislation.<sup>109</sup> In such cases the responsibility of PMC supervisors and senior management may be found on the basis of complicity or instigation, although the sentence may then not reflect the specific circumstances in which the crime was committed.

## **6. Corporate Criminal Responsibility of PMCs**

An area of particular interest for present purposes, although not pertinent to the individual responsibility of PMC personnel, is that of corporate criminal liability. Since World War II it has been accepted that individuals may be held accountable for acts committed by corporate entities. But can the PMC itself be held liable? Prosecution of the company itself as opposed to individual employees can be desirable for a number of reasons. The prosecution of the company can be appropriate if the organizational structure makes it difficult to establish the criminal responsibility of a particular individual. Moreover, it can be more advantageous for compensation purposes: the criminal conviction of the PMC can make it easier for the victim to seek compensation before criminal or civil courts, and it might be less problematic actually to receive financial compensation, given the company's assets.

The appointment of a UN Special Representative on Human Rights and Transnational Corporations is one indication of an increased awareness of the potential and actual effects of business conducted by companies in conflicts around the world, which contributes to the development of the notion of corporate criminal responsibility in international crime. Yet no international tribunal has jurisdiction to prosecute legal persons as such for international crimes. The ICC preparatory committee had discussed proposals to provide the Court with competence to exercise jurisdiction over corporate entities in addition to individuals. As the Court's jurisdiction is predicated on the principle of complementarity<sup>110</sup> and national criminal legal systems vary in their approaches to corporate criminal responsibility, it was impossible to reach consensus in time.<sup>111</sup> This, of course, does not exclude the establishment and enforcement of PMC liability on the domestic level.<sup>112</sup> If there is a provision prescribing criminal corporate responsibility, and should a court decide to hear a case against a PMC, a conceptual problem will be the establishment of corporate fault, particularly of *mens rea*. Apart from the costly discovery of corporate records indicative of knowledge on the part of the PMC, it would possibly require to prove that headquarters in Washington or Virginia were aware of crimes committed in Iraq or Colombia, or whether the commission of these crimes was foreseeable.<sup>113</sup>

## **7. Conclusion**

Perpetrators of international crimes are frequently integrated into a hierarchically structured collective, such as an army or police force. The system of order and obedience essential to the functioning of these entities, the presumption of which underlies a number of principles of international criminal law, cannot be readily assumed to exist within a PMC or between a PMC and the hiring state. In the absence of relevant case law with regard to the responsibility of private military personnel for international crimes the legal issues discussed here are yet to be tested. Whether, eventually, international criminal law becomes an efficient part of the legal regime governing the use and conduct

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<sup>109</sup> An example is the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*, VStGB), §§ 4, 13, 14, reprinted in Werle, *supra* note 20, at 428.

<sup>110</sup> Art. 1 ICC Statute.

<sup>111</sup> Art. 25(1) ICC Statute. For the discussions in Rome see UN Doc. A/CONF.183/C.1/SR.1, at paras 32–66; UN Doc. A/CONF.183/C.1/SR.23, at para. 3; A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), at 246.

<sup>112</sup> For a survey of 16 states see Ramasastry and Thompson, 'Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law' (2006), available at: [www.fafo.no/liabilities](http://www.fafo.no/liabilities).

<sup>113</sup> Garmon, 'Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable under the Alien Torts Claims Act', 11 *Tulane J Int'l & Comp L* (2003) 325, at 351.

of PMCs therefore remains to be seen. The above analysis demonstrates that past and possible future wrongdoings on the part of private military personnel can in principle amount to crimes punishable under international criminal law. Yet the fact that most crimes committed by PMC personnel have been brought before courts not by prosecutors and not before criminal courts, but by victims before civil courts on the basis of tort law,<sup>114</sup> suggests that, if at all, the enforcement of international criminal law against PMC employees is not considered a priority. This is regrettable. Acknowledging the possibility of criminal responsibility and actual enforcement of such responsibility would stimulate the concern of PMC employees and management for the respect for the laws of armed conflict.<sup>115</sup>

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<sup>114</sup> *Estate of Himoud Saed Abtan, et al. v. Blackwater Lodge and Training Center, Inc., et al.*, Case No. 1:07-cv-01831 (RBW); US District Court for the District of Columbia, *Ibrahim et al. v. Titan Corp., Saleh et al. v. Titan Corp. and CACI*, Civil Action No. 05-1165 (JR).

<sup>115</sup> See Roehling, in B.V.A. Roehling and C.F. Rueter (eds), *The Tokyo Judgement, The International Criminal Tribunal for the Far East, 29 April–12 November 1948* (1977), i, at XVI.