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LITIGATING ABUSES COMMITTED BY  
PRIVATE MILITARY COMPANIES

Cedric Ryngaert



**EUROPEAN UNIVERSITY INSTITUTE, FLORENCE**  
**ACADEMY OF EUROPEAN LAW**

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## **Abstract**

One of the main tools for 'socializing' private military contractors (PMCs) is litigation. The threat of litigation may encourage contractors to set up their own corporate social responsibility and accountability mechanisms with a view to preventing them being hauled before courts. The article identifies the jurisdictional opportunities and pitfalls of criminal (public law) and civil/tort (private law) litigation against PMCs in domestic courts. The focus lies on litigation for human rights abuses, with special emphasis on US proceedings, the US being the home and hiring state of the majority of PMCs active in overseas conflict zones. It is argued that, because the chances of success of tort litigation are, in fact, rather limited in the US, given the many procedural obstacles, the criminal law avenue may prove to be more promising, if at least prosecutors show more leadership in bringing cases. Also at a deeper accountability level, criminal litigation may be preferable on the ground that criminal punishment sends a stronger accountability and deterrence signal than a mere money judgment.

## **Keywords**

Law – Regulation – Human Rights – Security – Accountability – Socialisation – Civil-military Relations



# *Litigating Abuses Committed by Private Military Companies*

CEDRIC RYNGAERT\*

## 1. Introduction

One of the main tools for ‘socializing’ private military companies (PMCs) is litigation.<sup>1</sup> It could indeed be argued that, faced with the threat of public and private law litigation in relation to PMC abuses, PMCs will increasingly set up their own corporate social responsibility and accountability mechanisms. In an ideal scenario, PMCs may in due course be able successfully to police (monitor) and punish (impose disciplinary sanctions) through self-regulatory mechanisms. Litigation mechanisms may then have been pushed out of the job, and merely fulfil a subsidiary enforcement role. For the time being, however, with a PMC sector that is by and large insufficiently regulated, litigation may prove to be a potent disciplinary tool.

This article sets out to identify the jurisdictional opportunities – and pitfalls – of criminal (public law) and civil/tort (private law) litigation in domestic courts, gaps in civil and criminal jurisdiction having been identified as the primary ‘grey’ area in the law relating to PMCs.<sup>2</sup> The emphasis will lie on litigation in the courts of the home or hiring state of the PMC. Such litigation may be the only viable avenue, since an adequate territorial forum may often not be available: the courts of the territorial state may not be functioning, or PMCs may be entitled to immunity from jurisdiction in the territorial state.<sup>3</sup> Because the PMC is mainly a US phenomenon, as it is primarily the US which has hired PMCs (for the stabilization and reconstruction of Iraq in particular), and because of the public interest dimension which civil litigation traditionally has in the United States,<sup>4</sup> the focus will be on litigation in US courts. This focus on the United States is all the more warranted because much international concern over PMCs originates in the apparent absence of adequate US accountability mechanisms for PMC abuses (allegedly) committed in Iraq.<sup>5</sup> While the analysis uses US litigation as its framework of reference, it could nevertheless be applied to transnational litigation against PMCs in any other forum, where similar problems of enforcement and jurisdiction could arise.<sup>6</sup>

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\* Lecturer in international law, Utrecht University and Leuven University. The research for this paper was carried out as part of the PRIV-WAR project. The paper was presented at a symposium organized by the *European Journal of International Law* in conjunction with the PRIV-WAR project at the European University Institute in June 2008 and published in 19 *EJIL* (2008) 1035. Email: c.ryngaert@law.uu.nl.

<sup>1</sup> Cockayne, ‘Make or Buy? Principal-Agent Theory and the Regulation of Private Military Companies’, in S. Chesterman and C. Lehnardt (eds), *From Mercenaries to Market* (2007), at 196, 213–216 (observing, *inter alia*, that ‘the key factor in transforming PMC regulation may turn out to be litigation’, that litigation is one of three major factors ‘likely to drive regulatory harmonization in the coming years’, and that ‘proxy action by third parties may help make PMCs – and their state clients – socially responsible’).

<sup>2</sup> Centre Universitaire de Droit International Humanitaire (CUDIH), Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions, Geneva, 29–30 Aug. 2005, at 58, available at: [www.adh-geneve.ch/evenements/pdf/colloques/2005/2rapport\\_compagnies\\_privees.pdf](http://www.adh-geneve.ch/evenements/pdf/colloques/2005/2rapport_compagnies_privees.pdf).

<sup>3</sup> E.g. Iraq, Coalition Provisional Order no. 17, available at: [www.cpa-iraq.org/regulations/20040627\\_CPAORD\\_17\\_Status\\_of\\_Coalition\\_Rev\\_\\_with\\_Annex\\_A.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev__with_Annex_A.pdf).

<sup>4</sup> Stephens, ‘Translating *Filartiga*: a Comparative and International Law Analysis of Domestic Legal Remedies for International Human Rights Violations’, 27 *Yale J Int’l L* (2002) 1, at 12–14.

<sup>5</sup> Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situations’, 88 *Int’l Rev Red Cross* (2006) 491, at 519 (referring to the absence of criminal prosecutions).

<sup>6</sup> E.g., Gillard, ‘Business Goes to War: Private Military/Security Companies and International Humanitarian Law’, 88 *Int’l Rev Red Cross* (2006) 525, at 527–528 (referring to a global enforcement vacuum, and the difficulties of bringing legal proceedings for violations of international humanitarian law committed by PMCs).

As is well-known, US federal courts have served as fora for foreign torts in violation of international law, international human rights in particular, on the basis of the Alien Tort Claims Act (ATCA).<sup>7</sup> Since the 1990s, victims have increasingly used the ATCA against corporations in relation to their overseas activities.<sup>8</sup> Victims of PMC abuses abroad could well piggyback on this trend, and file a tort claim with a US federal court. Such claims against PMCs are considered to be viable,<sup>9</sup> and have indeed been filed, notably in the District Court for the District of Columbia.<sup>10</sup> Victims of alleged PMC abuses have also filed common law tort claims for wrongful death and fraud, as opposed to violations of international law, in US courts.<sup>11</sup>

The ATCA presents itself as a promising avenue for claims against PMCs, because the statute does not require that the violation have occurred in the US or that the plaintiff or defendant be a US citizen.<sup>12</sup> In practice, however, tort litigation against PMCs may be riddled with procedural and substantive problems. The analysis below will highlight the problems encountered by plaintiffs in such litigation, but will also identify the opportunities. While, for instance, it could be argued that corporations may not directly bear duties under international law, and could therefore not be held responsible under the ATCA, some violations may rise to the level of peremptory norms which *are* binding on any actor (Section 2). Also, while the complicated corporate structure of PMCs may allow the PMC to evade its responsibility, there are options to hold the PMC's parent corporation liable in the home state on the basis of failing in its duty of care *vis-à-vis* the other entities of the corporate group (which may have committed the abuses proper) (Section 3). Furthermore, a number of doctrines of jurisdictional restraint, in particular the political question doctrine and the defence of government contractor immunity, may prove to be daunting obstacles to successful litigation (Sections 6–7). However, the fact of a PMC working for the government does not necessarily raise political questions or impinge on uniquely federal interests.

This article does not limit itself to examining the role which tort litigation could play in socializing PMCs. It also looks at the exercise of criminal jurisdiction by the home or hiring state, not over the PMCs themselves, but over the employees who committed the abuses. Regrettably, criminal prosecutions have rarely been brought, for a variety of reasons, in particular political constraints and

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<sup>7</sup> 28 USC § 1350.

<sup>8</sup> E.g., Londis, 'The Corporate Face of the Alien Tort Claims Act: How an Old Statute Mandates a New Understanding of Global Interdependence', 57 *Maine L Rev* (2005) 141. A leading corporate ATCA case is the case brought against the US corporation Unocal in relation to its activities in Burma/Myanmar. *Doe I v. Unocal Corp.*, 963 F Supp 880 (CD Cal. 1997); *National Coalition Government of the Union of Burma v. Unocal*, 176 FRD 329 (CD Cal. 1997); *Doe v. Unocal Corp.*, 27 F Supp 2d 1174 (CD Cal. 1998), aff'd 248 F 3d 915 (2001); *Doe I v. Unocal Corp.*, 110 F Supp 2d 1294 (CD Cal. 2000); *Doe I v. Unocal Corp.* 395 F 3d 3932 (9th Cir. 2002).

<sup>9</sup> Dickinson, 'Contract as a Tool for Regulating Private Military Companies', in Chesterman and Lehnardt, *supra* note 1, at 217, 236; Mongelard, 'Corporate Civil Liability for Violations of International Humanitarian Law', 88 *Int'l Rev Red Cross* (2006) 665, at 688–689.

<sup>10</sup> *Saleh et al. v. Titan Corp.*, 353 F Supp. 2d 1087 (DDC 2004); *Ibrahim et al. v. Titan Corp.*, 391 F Supp. 2d 10 (DDC 2005).

<sup>11</sup> *Nordan v. Blackwater Security Consulting, LLC*, 382 F Supp. 2d 801 (EDNC 2005); *Fisher v. Halliburton*, 390 F Supp. 2d 610 (SD Tex. 2005); *Johnson v. Halliburton*, No : EDCV05-265 (CD Cal., filed 29 Mar. 2005). These cases were brought by PMC employees against their employer. It may be noted, however, that in the *Saleh* and *Ibrahim* cases, which related to violations of third parties' rights, the plaintiffs also filed common law claims (assault and battery, wrongful death and survival, intentional infliction of emotional distress, and negligence): *Saleh et al. v. Titan Corp.*, *Saleh et al. v. Titan Corp.*, Case 1:05-cv-01165-JR, DDC 11 June 2007, at 2. After the court's dismissal of the ATCA-based claims, only the common law-based claims are still viable as we write. It is noted that, while ATCA claims can be brought by foreigners against other foreigners ('universal jurisdiction'), common law claims cannot: *ibid.*, at 20 (holding that 28 USC § 1332 'does not confer jurisdiction over suits by a group consisting of only foreign persons against another foreign person', in the case of CACI NV, incorporated in the Netherlands).

<sup>12</sup> Under the US Supreme Court's standard of *International Shoe Co v. Washington*, 326 US 310, 315 (1945), minimum contacts of the defendant with the US suffice for personal jurisdiction to obtain.



evidentiary problems. In fact, however, abuses committed by PMC employees, whether those abuses qualify as war crimes or not, could be prosecuted under at least four US penal statutes (Section 4). What is needed for these statutes to be effective is political leadership, and some practical measures relating to investigation and prosecution. In this context, it could be contemplated to bring criminal prosecutions in courts established by the PMC's hiring state in the conflict zone (extraterritorial courts). This may reduce the practical problems of taking evidence overseas (Section 5).

## **2. Corporate Human Rights Obligations under International Law**

Pursuant to the ATCA, victims may bring an action against a PMC for a tort committed in violation of international law. The problem is, however, that non-state actors, such as PMCs, are traditionally not considered as duty-bearers under international law.<sup>13</sup> Logically, therefore, they cannot commit a violation of international law. If PMCs, or their employees engage in acts of torture, they may not violate the international prohibition on torture, as only state agents can commit torture under international law.<sup>14</sup> This was recently confirmed in the ATCA cases brought by a number of plaintiffs against the PMC Titan.<sup>15</sup> In one of those cases, the court brushed aside the argument that Titan, being a corporation hired by the government, acted under colour of law, and could thus incur direct liability under international law.<sup>16</sup>

It is generally accepted, however, that, if the violation rises to the level of a violation of *jus cogens* or a peremptory norm of international law (e.g. the prohibition of genocide, war crimes, crimes against humanity), individuals or corporations may incur direct responsibility under international law.<sup>17</sup> This implies that only claims relating to *jus cogens* violations that are allegedly committed by PMCs may be actionable under the ATCA.

## **3. Corporate Structure**

In transnational litigation against PMCs, additional problems may arise as a result of the corporate structure of the PMC. The PMC may set up foreign subsidiaries – these are separate legal entities – overseas, and thereby evade its legal responsibility: the principle of separate legal personality prevents abuses committed by those subsidiaries or their employees from being attributed to the parent

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<sup>13</sup> E.g. Report of the Special Representative of the UN Secretary General (SRSG Report), J. Ruggie, to the UN Human Rights Council, on the issue of human rights and transnational corporations and other business enterprises, 9 Feb. 2007, A/HRC/4/035, at 14, para. 44 ('[i]t does not seem that the international human rights instruments ... currently impose direct legal responsibilities on corporations').

<sup>14</sup> This is explicitly stated in Art. 1 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (stating that '[f]or the purposes of this Convention, the term "torture" means any act ... inflicted by or at the instigation of or with the consent or acquiescence of a *public official or other person acting in an official capacity*') (emphasis added). See also the US Torture Convention Implementation Act, 18 USC § 2340(1) ('"torture" means an act committed *by a person acting under the color of law*') (emphasis added).

<sup>15</sup> *Ibrahim et al. v. Titan Corp.*, 391 F Supp. 2d 10, 14 (DDC 2005) ('the question is whether the law of nations applies to private actors like the defendants in the present case. The Supreme Court has not answered that question (*Sosa v. Alvarez-Machain*, 124 S Ct 2739, 2766, n. 20 (2004)) but in the DC Circuit the answer is no' – citing *Tel-Oren v. Libyan Arab Republic*, 726 F 2d 774, 791–795 (DC Cir. 1984); *Sanchez-Espinoza v. Reagan*, 770 F 2d 202 (DC Cir. 1985)).

<sup>16</sup> *Saleh et al. v. Titan Corp. et al.*, 436 F Supp. 2d 55, 58 (DDC 2006) (holding that 'there is no middle ground between private action and government action, at least for purposes of the Alien Tort Statute').

<sup>17</sup> SRSG Report, *supra* note 13, paras 19–32. See also the ATCA cases of *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F Supp 2d 289, 305–306 (SDNY 2003); *Kadic v. Karadzic*, 70 F 3d 232, 241–242 (2d Cir. 1995).

corporation.<sup>18</sup> It is the parent corporation (incorporated in the forum) that will often be targeted by victims, since domestic jurisdiction will ordinarily not obtain over the foreign subsidiary in view of the latter's insufficient nexus to the forum, and since the victims tend to eye up the parent's assets located in the forum rather than the subsidiary's foreign (and often less valuable) assets.

Nonetheless, in a corporate configuration of a domestically incorporated parent and a foreign subsidiary which allegedly committed the abuses, the parent could incur direct legal responsibility for overseas abuses if violations of its duty of care (negligence) could be established, or if its subsidiary was merely its agent. In one of the US tort cases against PMCs, *Saleh v. CACI*, the plaintiffs relied on both negligence and agency to establish the liability of CACI International for the torts committed by its subsidiary CACI-PT.<sup>19</sup> Reliance on the parent corporation's duty of care has a number of advantages. A corporation's violation of its duty of care may be easier to prove than the criminal offence which was eventually committed (e.g. torture or murder).<sup>20</sup> Moreover, as I have argued elsewhere, reliance on negligence claims, in combination with universally accepted human rights standards, may ease concerns over the extraterritorial reach of a state's laws, as the parent's negligence has a direct territorial nexus.<sup>21</sup> Additionally, negligence claims may carry the promise of turning contractual, or even voluntary corporate commitments into hard legal tort obligations. In interpreting a PMC's duty of care, the judge may consider the PMC's contract with the hiring state, or the PMC's own code of conduct, as the standard of care which it has set for itself.<sup>22</sup> If the contract or the code of conduct refers to the company's respect for norms of human rights and humanitarian law throughout all its operations, those international law norms may be indirectly enforced through the vehicle of negligence, despite PMCs not incurring direct obligations under international law.<sup>23</sup>

It could be objected that the risk of those contractual or voluntary commitments hardening into enforceable legal norms could discourage PMCs from entering into contracts or from adopting codes of conduct. This risk should not be overstated, however, as it should not be forgotten that for a contract to be signed, it takes two to tango. The PMC never acts alone: it always works for a client. Such a client – the PMC's contracting party – may, and in the case

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<sup>18</sup> Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law', 42 *Columbia J Transnat'l L* (2003–2004) 521, at 536; Walker and Whyte, 'Contracting Out War?: Private Military Companies, Law and Regulation in the United Kingdom', 54 *Int'l Comp LQ* (2005) 651, at 687.

<sup>19</sup> *Saleh et al. v. Titan Corp. et al.*, 436 F Supp 2d 55, 59 (DDC 2006) ('plaintiffs have thrown together a number of claims that sound in negligence (knew or should have known, allowed employees to design illegal interrogation, failure to prevent or stop, etc., . . . ) or agency (CACI International "controlled" CACI-PT and acquired it to meet its own strategic goals . . .), none of which, even if proven, would "pierce the corporate veil" so as to make the corporate parents of CACI-PT liable for the torts of CACI-PT').

<sup>20</sup> Compare, in relation to violations of a duty of care by the military, Gaston, 'Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement', 49 *Harvard Int'l LJ* (2008) 221, at 247.

<sup>21</sup> Wouters and Ryngaert, 'Litigation for Overseas Corporate Human Rights Abuses in the European Union: the Challenge of Jurisdiction', forthcoming in *George Washington Int'l L Rev* (2008).

<sup>22</sup> It should be noted, however, that courts may also resort to an analysis of the contract so as to *limit*, rather than expand, the liability of the PMC. In the *Titan* case, for instance, the District Court relied on the contract between the US Army and Titan ('Statement of Work'), in conjunction with the Army Field Manual, in order to ascertain whether Titan's interpreters were under the direct command and exclusive operational control of the military chain of command. As this was indeed the case, Titan was considered to enjoy government contract immunity, and Titan's motions for summary judgment were granted: *Saleh et al. v. Titan Corp.*, *Saleh et al. v. Titan Corp.*, Case 1:05-cv-01165-JR, DDC, 11 June 2007, at 10–21.

<sup>23</sup> Also Dickinson, *supra* note 9, at 236 (submitting that enforcement of human rights values in litigation becomes more feasible through tort or contractual claims); Cockayne, *supra* note 1, at 207–208 (stating that 'voluntary norms are not "linked" to state enforcement power', and that 'many PMC codes of conduct . . . offer lip service to corporate social responsibility without teeth', but adding that they may get teeth when they 'incorporate existing control mechanisms', such as the Geneva Conventions).

of a state, it could be argued, *should*,<sup>24</sup> make the signing of the contract dependent on the inclusion of a human rights clause or on the adoption of a human rights code of conduct. Even if a PMC were to contract with a client which does not set high standards, it would still amount to sound business strategy for the PMC to commit itself to upholding human rights, since the absence of any human rights or humanitarian commitments risks tarnishing its reputation, with the attendant loss of future contract opportunities.<sup>25</sup>

#### **4. Extraterritorial Jurisdiction**

The violations which we are concerned with typically take place overseas. Litigating claims relating to extraterritorial violations in the PMC's home or hiring state raises a number of conceptual and practical questions. A first conceptual question relates to the sovereignty of the state where the violations have occurred: if a state exercises its jurisdiction over events which have occurred in another state, it risks unjustifiably interfering in the other state's domestic affairs, and thus violating the principle of non-intervention.<sup>26</sup> More particularly, as PMCs often play a vital role in post-conflict reconstruction in countries such as Iraq and Afghanistan, these countries may have an interest in shielding PMCs from litigation, *a fortiori* from litigation in foreign courts which they cannot control, for fear of compromising reconstruction plans.<sup>27</sup> This abstract concern over jurisdictional overreach is not entirely borne out in practice, however.<sup>28</sup> The US PMC Blackwater, for instance, was threatened with suspension of its licence by the Iraqi Government after the deaths of 17 Iraqis in an incident involving Blackwater staff guarding US officials in Baghdad in September 2007;<sup>29</sup> its contract was renewed in April 2008 only after the concerns of the Iraqi Government had been met.<sup>30</sup> It should be noted that PMCs such as Blackwater remain shielded from prosecution under Iraqi laws in matters relating to their contracts under Coalition Provisional Authority Order no. 17,<sup>31</sup> so that only litigation in the US, as the 'sending state', may in fact be a viable avenue.

##### **A. International Law Obligation or Authorization**

Sovereignty concerns will be eased if international law authorizes, or even obliges, states to exercise jurisdiction over particular offences. This is the case for grave breaches of the Geneva Conventions:

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<sup>24</sup> It could be argued that the state hiring a PMC may incur responsibility under international law for the abuses committed by the PMC if the state fails in its due diligence obligations *vis-à-vis* the PMC. See also Droege, 'Private Military and Security Companies and Human Rights: a Rough Sketch of the Legal Framework', Swiss Initiative on PMCs/PSCs, Workshop in Kusnacht, 16–17 Jan. 2006.

<sup>25</sup> Compare Singer, *supra* note 18, at 545 (arguing that a PMC's corporate social responsibility commitments are a means to respectability and market domination).

<sup>26</sup> *Ibid.*, at 536 (pointing out that 'few issues are more troublesome than an attempt by one state to exercise legal powers within another state's sovereign territory'); interview with Bearpark, 88 *Int'l Rev Red Cross* (2006) 449, at 455 (expressing concern over a home state 'legislating events that happen overseas').

<sup>27</sup> E.g., Hays Parks, 'The Perspective of Contracting and "Headquarters" States', Swiss Initiative on PMCs/PSCs, Workshop in Kusnacht, *supra* note 24., at 7 (submitting that the exercise of jurisdiction by home or hiring states 'could have a potential negative effect on Iraqi reconstruction').

<sup>28</sup> E.g., interview with Bearpark, *supra* note 26, at 454 (pointing out that the activities of PMCs may go against the wishes of the host state).

<sup>29</sup> Christian Science Monitor, 18 Sept. 2007, available at: [www.csmonitor.com/2007/0917/p99s01-duts.html](http://www.csmonitor.com/2007/0917/p99s01-duts.html).

<sup>30</sup> BBC News, 5 Apr. 2008, available at: <http://news.bbc.co.uk/2/hi/americas/7331972.stm>. The Iraqi opposition cried foul, however, accusing the Iraqi Government of caving in to US pressure: *ibid.*

<sup>31</sup> CPA Order 17, at para. 4 (stating that 'contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts' without the permission of the sending state, with the sending state being defined in para. 1(5) of CPA Order 17).

any state (in whose territory they could be found) should either prosecute or extradite the presumed perpetrators of such breaches.<sup>32</sup> State practice as to this *aut dedere aut judicare* obligation is, however, uneven: states may not have adequately implemented the relevant provision of the Conventions,<sup>33</sup> or, if they have, state prosecutors may in practice have hardly acted upon their mandate to prosecute grave breaches. Questions arise, moreover, as to the applicability of the obligation to the PMCs themselves, as opposed to their employees.<sup>34</sup> The better argument probably is that the obligation does not extend to corporations, as these are not criminally liable in a number of states.

Also with respect to the exercise of jurisdiction over PMC abuses which cannot be characterized as crimes to which an *aut dedere aut judicare* obligation applies, sovereignty concerns will normally be overcome. The state on whose territory the PMC abuse has occurred will ordinarily not protest against the hiring state's prosecution of the alleged perpetrator of the abuse. The presence or absence of foreign protest is an important parameter in order to determine the legality of a state's jurisdictional assertion.<sup>35</sup> Even when the hiring state exercises jurisdiction over its foreign contractors, and a classic ground of jurisdiction could not be identified, protest is unlikely to arise, given the strong nexus which the hiring state has with its contractors – the nexus or interest requirement being the other salient parameter in order to determine jurisdictional lawfulness.<sup>36</sup>

## **B. Domestic Law Authorization**

The main jurisdictional hurdle to a finding of (extraterritorial) jurisdiction is municipal rather than international. Although allowed to under international law, states may not have conferred on their courts the necessary jurisdiction over extraterritorial violations to prevent impunity from arising. The problem should not be overstated, of course, since many states provide for active personality jurisdiction, i.e. jurisdiction based on the nationality of the offender, over certain crimes.<sup>37</sup> In the US, however, the scope of the active personality principle is fairly limited.<sup>38</sup> This is problematic, because

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<sup>32</sup> Common Arts 49, 50, 129, and 146 of Geneva Conventions I, II, III, and IV. For war crimes other than grave breaches, the exercise of universal jurisdiction may be permissive and not obligatory. Art. 5.2 of the UN Torture Convention also requires states to exercise universal jurisdiction over presumed offenders if it does not extradite them, yet the scope of the Convention is limited to acts of torture committed by state agents (Art. 1). Contractors may not be characterized as state agents.

<sup>33</sup> E.g. the United States: 18 USC § 2441(b), which provides for US jurisdiction over war crimes only if the perpetrator or the victim is a member of the Armed Forces of the United States or a national of the United States.

<sup>34</sup> CUDIH, *supra* note 2, at 46.

<sup>35</sup> C. Ryngaert, *Jurisdiction in International Law* (2008), at 33.

<sup>36</sup> *Ibid.*, at 31.

<sup>37</sup> E.g., the English Offences Against the Person Act 1861 s. 9, which provides for active personality jurisdiction over murder. The exercise of active personality jurisdiction may extend to less serious crimes, although in that case it will often be subject to the requirement of criminalization in both the state of nationality and the territorial state. E.g., Art. e 5, 1, 2° of the Dutch Criminal Code; Art. 7 of the Preliminary Title of the Belgian Code of Criminal Procedure.

<sup>38</sup> Historically, US active personality jurisdiction applied to crimes which threatened the very existence of the fledgling nation, such as treason (Act for the Punishment of Certain Crimes Against the United States, ch. 9, of 30 Apr. 1790), the crime of engaging in diplomatic correspondence with foreign governments (Act of 30 Jan. 1799, ch. 1, 1 Stat 613, codified as amended at 18 USC § 953 (1988) (Logan Act)), and, later, failure to register for military service (50 USC app. § 453 (1982) (Military Selective Service Act of 1982) and trading with the enemy (50 USC app. §§ 1–39, 41–44 (1982) (Trading with the Enemy Act of 1917)). In the 20th century, the range of offences subject to active personality jurisdiction was extended to 'international offenses', i.e. offences covered by an international treaty, such as hostage-taking (Hostage Taking Act of 1984, 18 USC § 1203(b)(1)(A) (1988)), biological weapons terrorism (18 USCA § 175 (West Supp. 1991)), torture (Torture Convention Implementation Act, 18 USC § 2340), and war crimes (18 USC Section 2441(d)). Some common crimes were also made subject to active personality jurisdiction, e.g. 26 USC § 78201 (1988) (tax evasion), 18 USC § 1621 (1988) (perjury), 18 USC § 793–794 (1988) (espionage), 18 USC § 1082(a) (1982) (gambling).

many PMC abuses may precisely involve US nationals. The problem may be even more acute with regard to PMC abuses committed by non-nationals, but employed by or accompanying the armed forces of the hiring state. The Dutch Advisory Council on International Affairs, for instance, signalled the insufficiency of Dutch criminal law in this respect,<sup>39</sup> but its concerns received short shrift from the Government.<sup>40</sup>

In the United States, domestic law authorization is actually rather satisfactory. For one thing, a number of specific US statutes relating to armed conflicts provide for US criminal jurisdiction over offences committed by US nationals. If the offence could be characterized as a war crime, US criminal jurisdiction over US nationals could readily be established under the 1996 War Crimes Act.<sup>41</sup> The War Crimes Act does not apply to abuses committed by US employees of PMCs that do not amount to war crimes as defined by US law, however. Many PMCs' abuses will indeed not be war crimes, or prosecutors may face difficulties in proving the charge of war crimes.<sup>42</sup> Yet, if committed at US facilities overseas which qualify as part of the special maritime and territorial jurisdiction of the US, US military jurisdiction obtains over such 'lesser' abuses.<sup>43</sup> This jurisdictional provision is useful for prosecuting abuses committed by PMCs' employees in US detention facilities, as illustrated by the conviction in 2007, on the basis of this provision, of David A. Passaro.<sup>44</sup> So far, this has been one of the few convictions of a PMC employee for abuses committed in Afghanistan or Iraq.

It is notable that the US nationality is not required under various US military statutes for prosecution to be initiated. US prosecution of PMC employees, both US *and foreign nationals*,<sup>45</sup> is, for instance, possible under the Military Extraterritorial Jurisdiction Act (MEJA)<sup>46</sup> and the Uniform Code of Military Justice (UCMJ).<sup>47</sup> Under the MEJA, federal jurisdiction obtains over offences committed by persons who are 'employed by or accompanying the armed forces' overseas that would be punishable by imprisonment for more than one year if committed within the special maritime or territorial jurisdiction of the United States.<sup>48</sup> PMCs hired by the US, and their employees, may be characterized

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<sup>39</sup> Dutch Advisory Council on International Affairs, *Employing Private Military Companies. A Question of Responsibility*, advisory report no. 59, Dec. 2007, at 18–19, English version available at: [www.aiv-advies.nl/ContentSuite/upload/aiv/doc/webversie\\_AIV\\_59eng\(1\).pdf](http://www.aiv-advies.nl/ContentSuite/upload/aiv/doc/webversie_AIV_59eng(1).pdf).

<sup>40</sup> Reaction of the Government to the Advisory Council's report, 25 Apr. 2008, at 11, available at: [www.aivadvies.nl/ContentSuite/template/aiv/adv/collection\\_single.asp?id=1942&adv\\_id=2583&page=regeringsreacties&language=NL](http://www.aivadvies.nl/ContentSuite/template/aiv/adv/collection_single.asp?id=1942&adv_id=2583&page=regeringsreacties&language=NL) (English translation not yet available) (dismissing the Council's proposal to expand grounds for extraterritorial jurisdiction over civilian contractors).

<sup>41</sup> The term 'war crime' is defined in 18 USC c 2441(c).

<sup>42</sup> Gaston, *supra* note 20, 246 (highlighting, on the basis of an interview with an official involved in the *Passaro* case (*infra* note 44), the additional burden of proof in war crimes trials in relation to the nature of the conflict and the status of the victim, e.g. as a prisoner-of-war).

<sup>43</sup> 18 USC § 7(9). The special maritime and territorial jurisdiction is defined as (A) the premises of United States diplomatic, consular, military, or other US Government missions or entities in foreign states, including the buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of those missions or entities, irrespective of ownership; and (B) residences in foreign states and the land appurtenant or ancillary thereto, irrespective of ownership, used for the purposes of those missions or entities or used by US personnel assigned to those missions or entities.

<sup>44</sup> Passaro was sentenced to 100 months for the assault on a detainee in Afghanistan on one count of felony assault resulting in serious bodily harm, and six months on the three remaining counts of misdemeanour simple assault: *United States v. Passaro*, No. 5:04-CR-211-1 (filed EDNC, 17 June 2004), available at: <http://charlotte.fbi.gov/dojpressrel/2007/ce021307.htm>.

<sup>45</sup> It may be noted that in many other states, jurisdiction will extend only over offences perpetrated by their own nationals: Gaston, *supra* note 20, at 240–241.

<sup>46</sup> 18 USC §§ 3261–3267 (2000).

<sup>47</sup> 10 USC §§ 801–946.

<sup>48</sup> 18 USC § 3261.

as persons ‘employed by or accompanying the armed forces’.<sup>49</sup> The scope of the MEJA is limited, however. Obviously, it does not apply to PMCs which do not accompany the US armed forces, but serve other clients, such as international organizations, private corporations, journalists, non-governmental organizations, or other states’ armed forces. This is in fact a problem that haunts all state regulatory efforts, and that is not easy to remedy.<sup>50</sup> Additionally, the MEJA does not apply to PMC employees who are nationals of or ordinarily resident in the host nation.<sup>51</sup> This excludes Iraqi and Afghan PMC employees who work in their own state. Finally, it only applies to Department of Defense (DOD) contractors (including subcontractors at any tier), employees of such (sub)contractors, and, in case of employment, to contractors from other federal agencies and ‘any provisional authority’, to the extent that their employment is related to the support of DOD missions overseas.<sup>52</sup> This implies that contractors working for other US agencies, e.g. the CIA, do not fall under the MEJA.<sup>53</sup> The MEJA has been successfully applied in a case against a civilian contractor working for the DOD in Baghdad, who was sentenced to 41 months in prison for possession of child pornography in 2007.<sup>54</sup> However, lack of DOD implementation of the MEJA and prosecutorial passivity undercut the potential force of the MEJA.<sup>55</sup>

The Uniform Code of Military Justice (UCMJ) could be another promising tool for prosecuting PMC abuses. Somewhat similar to the MEJA, the UCMJ applies to ‘persons serving with, employed by, or accompanying the armed forces outside the United States’.<sup>56</sup> The scope of UCMJ was recently widened: it no longer applies only in time of declared war, i.e. a war declared by Congress, but also to ‘contingency operations’.<sup>57</sup> This makes it possible that abuses committed in the course of operations conducted in the framework of the global war on terror could also be prosecuted under the UCMJ.<sup>58</sup> The major impediment to successful prosecutions of PMC abuses under the UCMJ is, however, that presumed offenders are not tried by civilian courts, but by military courts (courts martial). A military trial of a PMC employee, who ordinarily qualifies as a civilian, is likely to be challenged on constitutional grounds because of lack of due process guarantees.<sup>59</sup> International human rights law

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<sup>49</sup> 18 USC § 3267.

<sup>50</sup> Gaston, *supra* note 20, at 247, 248 (observing that ‘regulation may only reach those [PMCs] directly contracted by states’, and instead proposing enhanced internal controls by PMCs).

<sup>51</sup> 18 USC § 3267(1)(c) and (2)(c).

<sup>52</sup> 18 USC § 3267(1) and (2).

<sup>53</sup> An expansion of the scope of the MEJA was proposed by bill HR 369 (Price) – Transparency and Accountability in Military and Security Contracting Act of 2007. The bill covers contractors ‘while employed under a contract (or subcontract at any tier) awarded by any department or agency of the United States, where the work under such contract is carried out in a region outside the United States in which the Armed Forces are conducting a contingency operation’.

<sup>54</sup> See [www.usdoj.gov/usao/vae/Pressreleases/05-MayPDFArchive/07/20070525khannr.html](http://www.usdoj.gov/usao/vae/Pressreleases/05-MayPDFArchive/07/20070525khannr.html).

<sup>55</sup> Isenberg, ‘A Government in Search of Cover. Private Military Companies in Iraq’, in Chesterman and Lehnardt (eds), *supra* note 1, at 82, 92.

<sup>56</sup> Art. 2(a)(11) UCMJ.

<sup>57</sup> To that effect, Art. 2(a)(10) UCMJ was amended by Section 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (PL 109-364) (‘FY07 NDAA’). See for criticism of the previous limited scope of the MEJA Isenberg, *supra* note 55, at 93.

<sup>58</sup> A ‘contingency operation’ is defined in 10 USC § 101(a)(13) as ‘an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force’.

<sup>59</sup> Compare *Reid v. Covert*, 354 US 1 (1957) (holding that Art. 2(11) of the Uniform Code of Military Justice cannot constitutionally be applied, in capital cases, to the trial of civilian dependants accompanying members of the armed forces overseas in time of peace); Congressional Research Service (CRS), Report for Congress, Private Security Contractors in Iraq: Background, Legal Status, and Other Issues, 11 July 2007, Order Code RL32419, at 21.

may also militate against such a trial.<sup>60</sup> This implies that even zealous military prosecutors may have to back down in the face of the overriding due process rights of PMC employees.<sup>61</sup>

Quite clearly, the United States has not yet found the statutory silver bullet to bring PMC employees to account for abuses committed overseas.<sup>62</sup> It has been demonstrated that prosecutions of PMC employees for overseas abuses could be based on several statutes, but that almost no prosecutions have in fact been brought. It is hardly conceivable that, in view of the sheer number of PMCs active in Iraq, no abuses have occurred, so that the absence of prosecution is attributable to other factors. Prosecutorial reticence may be informed by due process concerns over the military prosecution of civilian contractors, but, so it seems, mainly by political reasons (a desire to protect the sorely needed services of PMCs in conflict zones in which the US has a stake), and practical problems.

### **C. Practical Problems**

Possibly the main practical challenge to the exercise of jurisdiction over PMC abuses is the difficulty of obtaining evidence overseas.<sup>63</sup> Evidentiary problems have complicated, and even made impossible, many a suit or prosecution in relation to foreign events.<sup>64</sup> However, practice shows that cooperation between the forum state and the territorial state, where most of the evidence is ordinarily located, may go a long way to making extraterritorial litigation successful.<sup>65</sup> Nevertheless, even if evidence can be obtained through cooperation, the costs of gathering and producing evidence may be prohibitively high. While the extra costs of sending investigative commissions could be kept to a minimum if the PMC's hiring state were present in the territorial state, the costs of staging a successful trial will tend to spiral: witnesses will have to be flown in, many documents will have to be translated, and prosecutors and attorneys may have to spend additional man-hours to come to grips with a subject-matter with which they are not familiar. In civil trials, these costs will normally be borne by the parties, which renders a successful outcome of such trials even more unlikely. For the PMC's hiring state, however, the cost factor does not appear to be a valid excuse for not urging prosecutors to

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<sup>60</sup> CUDIH, *supra* note 2, at 60; Droege, *supra* note 24, at 6 (with references to relevant case law in n. 14).

<sup>61</sup> In favour of courts-martial jurisdiction over PMC abuses, however, is Peters, 'On Law, Wars, and Mercenaries: the Case for Courts-martial Jurisdiction over Civilian Contractor Misconduct in Iraq' [2006] *Brigham Young U L Rev* 367.

<sup>62</sup> This panoply of statutes makes it rather unclear on what legal basis a prosecution for PMC abuses should best rest. See also Isenberg, *supra* note 55, at 88.

<sup>63</sup> Walzer, 'Mercenary Impulse. Is There an Ethics that Justifies Blackwater?', *The New Republic*, 12 Mar. 2008; Cockayne, *supra* note 1, at 200.

<sup>64</sup> The prosecution of Passaro, the PMC employee convicted of abuses in Afghanistan (*supra* note 40) was in fact possible only because 'the key Afghan witness was willing and able to travel to the United States, and other witnesses who could testify as to the body ... were U.S. citizens who could be subpoenaed': Gaston, *supra* note 20, at 216, information obtained through an interview with an official involved in the Passaro prosecution.

<sup>65</sup> E.g., the prosecution of the 'Butare Four' in Belgium for their participation in the Rwandan genocide: Reydam, 'Belgium's First Application of Universal Jurisdiction in the "Butare Four" Case', 1 *J Int'l Criminal Justice* (2003) 428. The prosecution of Rwandan criminals in Belgium was facilitated by the presence of Belgian military personnel in Rwanda at the time of the genocide, and in particular by the cooperation of the Rwandan government, which had overthrown the extremist Hutu regime held responsible for the 1994 atrocities. Rwandan cooperation was crucial for the prosecution of Rwandan criminals in Belgium in terms of field and cultural knowledge and the possibility of taking evidence in the witnesses' language. Rwandan police officers assisted Belgian judges and investigators under Rwandan procedure. Taking evidence in the original language limited subsequent challenges to the translation: Vandermeersch, 'Prosecuting International Crimes in Belgium', 3 *J Int'l Criminal Justice* (2005) 400, at 412-413.

See also the prosecution of Zardad for crimes of torture committed in Afghanistan by the Central Criminal Court London: *R v. Zardad*, 5 Oct. 2004. In the *Zardad* case, witnesses testified via live video-link from Afghanistan, a procedure which guaranteed the defendant's right to cross-examination. Zardad was also entitled to legal aid, which enabled his lawyer to supervise the prosecution's investigative work in Afghanistan: Human Rights Watch, *Universal Jurisdiction in Europe: The State of the Art*, xviii, No. 5(D), June 2006, at 100.

initiate criminal proceedings against PMC employees suspected of having committed abuses. Any non-action in the face of abuses of international law risks engaging the international responsibility of the hiring state.<sup>66</sup>

Another major practical impediment to extraterritorial litigation against PMCs is the problem of detecting PMC abuses. If abuses cannot be detected or the perpetrators cannot be identified, obviously, no civil suit or criminal prosecution can be brought. As PMCs often conduct their operations in far-flung conflict zones with weak governments or social control and little media attention, the problem of detection should not be underestimated.<sup>67</sup> Although (sub)contractors working for the US Department of Defense (DOD) may be required to report any reportable incident,<sup>68</sup> there is little evidence of contractors actually complying with that obligation. Moreover, the government itself may be falling far short of its own obligations of monitoring PMC activities.<sup>69</sup> It has even been argued that the lack of monitoring, and the attendant shielding of contractors from accountability, may be a deliberate strategy of the government.<sup>70</sup> In order to remedy the problem of insufficient monitoring, it has been proposed to task embassy personnel with increased supervision of the activities of the PMCs hired by the government,<sup>71</sup> and to hire more ‘contracting officer’s representatives’ – these are the government supervisors of contracted work.<sup>72</sup> The increased monitoring costs could possibly be borne, at least in part, by the PMCs themselves,<sup>73</sup> although obviously, to the extent that PMCs are hired by states, those costs will be passed on to the government. Whatever the practical solution, while the same level of detection of abuses as in a purely domestic context may not be feasible, there is a strong legal case for requiring that a state which has effective control or even decisive influence over foreign territory where PMCs are active, put in place effective mechanisms for detecting PMC abuses.<sup>74</sup>

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<sup>66</sup> Compare CRS, *supra* note 59, at 17 (arguing that impunity for abuses committed by civilian contractors accompanying the US armed forces may arise, even though the US, as the hiring state, may have a duty to investigate and prosecute such abuses).

<sup>67</sup> Singer, *supra* note 18, at 536; Walker and Whyte, *supra* note 18, at 661.

<sup>68</sup> DOD Directive 2311.01E of 9 May 2006 (cancelling DOD Directive 5100.77), defining a reportable incident as any ‘possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict’.

<sup>69</sup> Isenberg, *supra* note 55, at 87 (citing the scandal at the US-run prison of Abu Ghraib, where at least 37 interrogators from PMCs worked). Under-monitoring may be caused or exacerbated by the existence of different principals of the PMC (e.g. the hiring state and its different entities, the territorial state, the PMC’s home state ...), who all have an incentive to allow some other principal to bear the transaction costs of monitoring and sanctions (i.e. the problem of free-riding): Cockayne, *supra* note 1, at 211–212.

<sup>70</sup> *Ibid.*, at 206.

<sup>71</sup> Swiss Federal Department of Foreign Affairs, Expert Meeting of Governmental and Other Experts on Private Military and Security Companies, 13–14 Nov. 2006, Montreux, Switzerland., Chair’s Summary, 22 July 2007, at 6. Singer, *supra* note 1, at 539 (‘U.S. embassy officials in the contracting country are charged with general oversight, but no official actually has a dedicated responsibility to monitor the firms or their activities’).

<sup>72</sup> It has been noted, however, that the number of contracting officer’s representatives has actually *decreased* over the last few years, even if the number of PMCs has exponentially risen: CRS, *supra* note 59, at 29. A recent bill has proposed that the FBI establish a ‘Theater Investigative Unit’ for each contingency operation in which covered contract personnel are working to investigate suspected misconduct. Additionally, the Department of Justice Inspector General should report to Congress within 30 days of enactment on the investigation of abuses alleged to have been committed by contract personnel: bill HR 2740 (Price) – MEJA Expansion and Enforcement Act of 2007.

<sup>73</sup> Cockayne, *supra* note 1, at 206.

<sup>74</sup> Compare Gaston, *supra* note 20, arguing, at 237, that ‘[b]ecause they have fewer incentives to establish the same rigorous accountability and oversight measures that they use for their professional militaries and that may prevent many international humanitarian law violations’, but at the same time proposing, at 243, ‘an [international humanitarian law] principle requiring states that used nonstate actors as complements to military operations to establish oversight and control mechanisms that would ensure their compliance with international and domestic laws to the extent possible’.



## 5. Extraterritorial Courts

So far, it has been analysed how extraterritorial *jurisdiction* by national courts, with an emphasis on the courts of the PMC's home and hiring state, could be exercised over abuses committed by PMCs. This section will turn its gaze toward the establishment of extraterritorial *courts* by the PMC's home or hiring state, in the host state, i.e. where the abuses are committed. The advantage of setting up extraterritorial courts in the conflict zone itself, close to the crime scene, is that evidentiary problems could be reduced to a minimum, thereby allowing for swift justice.

Extraterritorial courts already exist: the United Kingdom deploys Standing *Civilian Courts* with its armed forces abroad,<sup>75</sup> where the armed forces have permanent bases (Germany, Cyprus). These courts could offer an abstract model for bringing PMC employees to justice, as these courts have the mandate to bring to justice any civilian 'who is employed in the service of that body of the forces or any part or member thereof, or accompanies the said body or any part thereof'.<sup>76</sup> It is not entirely clear, however, whether all PMCs hired by the armed forces could be characterized as civilian contractors within the purview of the Standing Civilian Courts. And, of course, employees of PMCs who do not work for the armed forces are not subject to the jurisdiction of those courts.<sup>77</sup> The number of offences over which the Standing Civilian Courts have jurisdiction is, moreover, limited: the jurisdiction of the Courts extends only to minor offences over which a UK magistrates' court has jurisdiction,<sup>78</sup> and the punishments which it may award are limited to imprisonment for a term not exceeding six months and a fine not exceeding £5,000.<sup>79</sup> Over major human rights abuses, accordingly, the Standing Civilian Courts do not have jurisdiction.

In spite of the jurisdictional limitations of the UK Standing Civilian Courts, they provide some inspiration for trying PMC employees; given such courts' (possible) proximity to the crime scene, they increase the chances of efficient and successful prosecutions of PMC abuses,<sup>80</sup> all the more so if enforcement agencies commit themselves to more thorough monitoring of PMC conduct in the conflict zone.<sup>81</sup> For some states, the US in particular, however, extraterritorial courts may not be a feasible alternative, because the trial of civilians by such courts may fall foul of constitutional due process guarantees.<sup>82</sup> Nonetheless, the Deputy Secretary of Defense instructed US military commanders on 25 September 2007 to conduct on the ground 'the basic UCMJ pretrial process and trial procedures currently applicable to the courts-martial of military service members'.<sup>83</sup>

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<sup>75</sup> The Standing Civilian Courts were created by the Armed Forces Act 1976 c. 52. Pursuant to s. 6(2)(3), '[i]f the court administration officer thinks it expedient in the interests of justice, he may, after consultation with the Judge Advocate General or his deputy, direct the court to sit at such place outside its area and outside the United Kingdom for such purpose and upon such terms, if any, as he thinks fit'. Also Standing Civilian Courts Order, 1997, UK SI No. 172; Standing Civilian Courts Order (Amendment), 1997, UK SI No. 1534.

<sup>76</sup> Armed Forces Act 1976, s. 6(1), in conjunction with Army Act 1955, c. 18, s. 209(1).

<sup>77</sup> It has been proposed to remedy this limitation, and to widen the Standing Civilian Courts' jurisdiction to include all PMCs' employees performing a military function: CUDIH, *supra* note 2, at 59.

<sup>78</sup> Armed Forces Act 1976, s. 7.

<sup>79</sup> *Ibid.*, s. 8(1).

<sup>80</sup> The average period between an offence being committed and the date of a trial in a subsequent Standing Civilian Court of the Army is 8 months for first hearing (a guilty plea) and 10 months for second hearing (not guilty plea). For Royal Air Force (RAF) Standing Civilian Courts, this is 6 months for first hearing and 9 months for second hearing: UK HC, Written Answers, 2 Feb 2000, Col: 592W, available at: [www.parliament.the-stationery-office.co.uk/pa/cm199900/cmhansrd/vo000202/text/00202w03.htm](http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmhansrd/vo000202/text/00202w03.htm).

<sup>81</sup> *Supra* sect. 3(c), *in fine*.

<sup>82</sup> *Supra* sect. 3(b).

<sup>83</sup> Deputy Secretary of Defense, 'Management of DOD Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States', 25 Sept. 2007, available at: [www.aschq.army.mil/gc/files/DepSecDef%20Memo%20Mgt%20of%20Contractors%2025Sep07.pdf](http://www.aschq.army.mil/gc/files/DepSecDef%20Memo%20Mgt%20of%20Contractors%2025Sep07.pdf).

Although the establishment of extraterritorial courts may conjure up images of Western colonialism and imperialism, it should be kept in mind that the rationale of courts set up to try PMC abuses differs from the rationale of the Western extraterritorial courts that were not uncommon until the early twentieth century. Whereas the latter were set up, often under unequal treaties between Christian and non-Christian states, to shield Christian nationals from suit in ‘barbarous’ courts,<sup>84</sup> the former are – or rather, should be – established to prevent impunity for abuses, impunity which is at a risk of arising from the weakness, or even absence, of competent territorial courts. In practice, of course, unequal power relationships between ‘sending states’ (e.g. the United States) and ‘host states’ (e.g. Iraq) may spawn agreements or orders of which the primary aim appears to be shielding persons from prosecution rather than preventing impunity.<sup>85</sup>

## 6. Political Question Doctrine

Prosecutors will ordinarily bring criminal cases against PMCs or their employees only if such cases do not jeopardize the political and foreign policy objectives of the political branches. This prosecutorial cautiousness may, as noted in Section 4, harm the interests of justice. Civil cases, however, are typically brought by private plaintiffs who have no interest whatsoever in protecting the political branches from embarrassing suits. This means that the *courts* may be called on to rely on a doctrine of restraint so as to limit the political fall-out of entertaining civil claims. In the United States, this doctrine is known as the ‘political question doctrine’.<sup>86</sup> In ATCA cases, the doctrine is routinely invoked by defendants.<sup>87</sup> Because the activities of PMCs are often closely linked to the war effort and the combat operations of the United States, which are in essence political acts,<sup>88</sup> political questions may easily arise in litigation against PMCs. However, disputes connected to ‘combat’ and involving PMCs are not automatically non-justiciable under the political question doctrine.<sup>89</sup> They may clearly *be* justiciable if the defendant PMC’s actions violated US policy; this will normally be the case in fact.<sup>90</sup> The doctrine might nevertheless be applicable if some official complicity of the state in the acts of the defendant could be established.<sup>91</sup> Plaintiffs may therefore be well-advised to steer clear of arguments that the state is complicit in the PMC’s abuses. However, while they may avoid application of the political question doctrine by arguing that the PMC or its employees committed the abuses without any state involvement, their claims risk being dismissed under ATCA for failure to state a claim, on the ground that private actors cannot violate the law of nations.<sup>92</sup> For plaintiffs in ATCA cases, this is a veritable Catch 22.

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<sup>84</sup> On such treaties with China see, e.g., G.W. Keeton, *The Development of Extraterritoriality in China* (1928). Extraterritoriality in China was abolished from 1930 onwards. On the legal consequences of the abolition see Wright, ‘Some Legal Consequences if Extraterritoriality is Abolished in China’, 24 *AJIL* (1930) 217.

<sup>85</sup> In view of the poor record of US prosecutions of abuses committed by PMCs, or of US service-members for that matter, CPA Order 17, which was not revoked by the Iraqi Government and which immunizes contractors from suit in Iraqi courts, could arguably be qualified as such an order.

<sup>86</sup> See the seminal case of *Baker v. Carr*, 369 US 186 (1962).

<sup>87</sup> E.g. *Sarei v. Rio Tinto PLC*, 221 F Supp. 2d 1116, 1181–1182 (CD Cal. 2002).

<sup>88</sup> Clausewitz indeed famously described war as ‘the continuation of politics (*Politik*) by other means’: C. von Clausewitz, *On War* (ed. and trans. M. Howard and P. Paret, 1993), Bk I, Chap. I, Sect. 24.

<sup>89</sup> *Ibrahim et al. v. Titan Corp.*, 391 F Supp 2d 10, 15 (DDC 2005) ([a]n act for damages arising from the acts of private contractors and not seeking injunctive relief does not involve the courts in “overseeing the conduct of foreign policy or the use and disposition of military power”), citing *Luftig v. McNamara*, 373 F 2d 664, 666 (DC Cir. 1967).

<sup>90</sup> *Ibrahim et al. v. Titan Corp.*, *supra* note 89, at 16.

<sup>91</sup> *Saleh et al. v. Titan Corp.* 436 F Supp 2d 55, at 58 (‘the more plaintiffs assert official complicity in the acts of which they complain, the closer they sail to the jurisdictional limitations of the political question doctrine’).

<sup>92</sup> Sect. 1.

## 7. Government Contractor Immunity

Closely linked to the political question doctrine is the doctrine of government contractor immunity. The US Federal Tort Claims Act bars suits against the federal government for ‘any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war’.<sup>93</sup> The courts have extended this immunity of the government to government *contractors* on the ground that imposing liability on such contractors ‘would create a duty of care where the combatant activities exception is intended to ensure that none exists’.<sup>94</sup> The salient test for shielding contractors from suit is whether ‘uniquely federal interests’ are at stake.<sup>95</sup>

The question now arises whether the doctrine of government contractor immunity is also applicable to suits against PMCs. Traditionally, the doctrine was invoked in cases involving design defects attributable to the contractor.<sup>96</sup> PMCs, however, provide protection, staff checkpoints, train and advise the government’s forces, maintain weapons systems, interrogate suspects, gather intelligence, and sometimes participate in hostilities, but ordinarily they do not manufacture products for which they could incur liability under product liability law. It is therefore submitted in the literature that the doctrine of government contractor immunity does not apply to suits against PMCs.<sup>97</sup>

In the recent US case against the PMC Titan in relation to abuses committed by the linguists it provided for interrogation of detainees in Iraq, however, the court did apply the doctrine, found that ‘uniquely federal interests’ were at stake, and barred the suit.<sup>98</sup> It held that Titan’s contract linguists functioned as soldiers in all but name; ‘it was the military, and not Titan, that exerted operational control’ over them.<sup>99</sup> In the parallel case against the PMC CACI, which provided interrogators, in contrast, the court found that the PMC employees were ‘subject to a dual chain of command, with significant independent authority retained by CACI supervisors’.<sup>100</sup> Because no ‘uniquely federal interests’ were accordingly at stake in the case against CACI, CACI was, unlike Titan, not entitled to immunity.

After Titan, clearly, the doctrine of government contractor immunity may prove to be a major hurdle to claims against PMCs over whose activities the state exercises control.<sup>101</sup> It may be noted that, rather

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<sup>93</sup> 28 USC § 2680(j).

<sup>94</sup> *Koohi v. US*, 976 F 2d 1328, at 1337 (9th Cir. 1992).

<sup>95</sup> *Boyle v. United Technologies Corporation*, 487 US 500, at 507–513 (1992) (ruling that the court must determine whether the application of state tort law would produce a ‘significant conflict’ with federal policies or interests).

<sup>96</sup> *Ibid.* (barring suit against a private corporation building helicopters for the US Marine which allegedly defectively designed the helicopter’s co-pilot emergency escape-hatch system); *Koohi, supra* note 94 (barring suit against civilian makers of a weapons system used in an accidental shooting down of a civilian aircraft).

<sup>97</sup> *Dickinson, supra* note 9, at 237.

<sup>98</sup> *Ibrahim et al. v. Titan et al.*, Civil Action No. 04-1248 (JR) and *Saleh et al. v. Titan et al.* (Civil Action No. 05-1165), 11 June 2007, at 18–21.

<sup>99</sup> *Ibid.*, at 21.

<sup>100</sup> *Ibid.*, at 22.

<sup>101</sup> In a slightly similar case, also involving allegations of violations of international humanitarian law and human rights law, the US Court of Appeals for the Second Circuit, applying the doctrine, has recently barred claims against producers of the defoliant Agent Orange, used by the US during the Vietnam War. In so doing, it reinforced the idea that the possible use of the contractors’ products and services by the state in a manner inconsistent with international human rights or humanitarian law does not preclude application of the defence of government contractor immunity: *In Re Agent Orange Prod. Liab. Litig.*, 05-1760 cv, 2nd Cir., 22 Feb. 2008, with the Court stating at 51 (slip op.): ‘Considerations of the validity of [military] objectives and the reasons for which the military seeks them are far beyond the competence of this Court. Our determination as to the protection of a military contractor must be made using the same principles regardless of the nature of the military conflict in which they are pursued, or the extent to which it is controversial or enjoys popular support.’ The Second Circuit overturned the District Court’s decision in *In re Agent Orange Prod. Liab. Litig.*, 373 F Supp. 2d 7, at 85–90 (EDNY 2005), which held that the government contractor defence should apply to

ironically, a state actually incurs responsibility under international law for acts in violation of international law committed by non-state actors which receive instructions from the state, or over which the state exercises control.<sup>102</sup> By failing to bring PMCs instructed by the US Army to account, on the ground that ‘uniquely federal interests’ bar suits against PMCs, the international responsibility of the US may be said to be engaged.

## 8. Liability Doctrines

This article has mainly devoted its attention to jurisdictional and procedural issues surrounding transnational litigation against PMCs and their employees. Substantive issues of liability of corporations and their directors are, however, also bound to arise in litigation against PMCs.<sup>103</sup> For instance, do directors or managers of PMCs bear command or superior responsibility for the acts of PMC employees? Pursuant to this ground of criminal responsibility, which is firmly established in international criminal law, a commander or any other superior is criminally responsible for crimes 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’.<sup>104</sup> It should be ascertained whether the categories of command and superior responsibility could readily be extrapolated to PMCs, which are not states nor the typical armed groups for which this ground of responsibility was developed. Another question which needs answering is whether command or superior responsibility, or the doctrine of joint criminal enterprise for that matter, also applies to violations which could not be characterized as violations of international criminal law.<sup>105</sup>

The doctrine of joint criminal enterprise, alongside the doctrine of aiding and abetting (complicity), may in fact be singularly appropriate as a doctrine of holding PMCs and their leaders accountable. As Cockayne has submitted, ‘social’, ‘enterprise’, or ‘relational’ models may indeed be more useful than the classic hierarchical command models as PMC liability doctrines.<sup>106</sup> When war is privatized, power is no longer exercised top-down, but rather horizontally and through social influence. PMCs may conspire with their clients to commit or tolerate abuses, they may give assistance to abuses by states, or they make look the other way when abuses are committed, although they had the social power to prevent them. However, it exceeds the scope of this article to develop fully the argument based on relational liability.<sup>107</sup>

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

federal common law claims based on norms of international humanitarian law. Supporting the District Court’s decision, however, is Dickinson, ‘Tort Liability for Military Contractors’, 7 Oct. 2007, available at: <http://balkin.blogspot.com/2007/10/tort-liability-for-military-contractors.html>.

<sup>102</sup> Art. 8 of the ILC Arts on Responsibility of States for Internationally Wrongful Acts (2001).

<sup>103</sup> The liability of the employees who directly committed the abuses is of course less problematic: Clapham, *supra* note 5, at 518 (‘[t]here is no need to formulate elaborate arguments about conspiracy and complicity in the present context; the individuals themselves may be accused of the direct commission of international crimes’).

<sup>104</sup> Art. 28 of the Statute of the International Criminal Court.

<sup>105</sup> Compare Milanovic, ‘An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon’, 5 *J Int’l Criminal Justice* (2007) 1139 (highlighting the potential problems posed by applying the international law doctrines of command responsibility and joint criminal enterprise to domestic crimes in the Special Tribunal for Lebanon).

<sup>106</sup> Cockayne, ‘The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law’, 88 *Int’l Rev Red Cross* (2006) 459, at 488.

<sup>107</sup> It may suffice here to refer to Cockayne’s observation that codification, by PMC stakeholders, of the relevant liability doctrines in a PMC context is required, lest the liability doctrines risk being ‘skewed towards criminal justice perspectives’: *ibid.*, at 489.

## 9. Concluding Observations

It has been submitted that, in order to come to grips with abuses committed by PMCs, ‘a substitution of legal tools of accountability from public law (criminal law, [human rights law] and humanitarian law) to contract and torts law’ is likely.<sup>108</sup> A move away from formal international legal instruments has also been advocated.<sup>109</sup>

In this article, private and public law accountability mechanisms have been explored. Opportunities for both criminal and civil litigation have been found. At the same time, however, obstacles – whether legal, procedural, political, practical, or otherwise – to successful litigation seem to abound. This is most obvious in the field of criminal law. Some violations do not amount to crimes over which the hiring state can exercise extraterritorial jurisdiction, concerns over the sovereignty of foreign nations may arise, criminal trials of civilian contractors under military law may prove illegal, corporations may not be held criminally liable,<sup>110</sup> and state prosecutors may not be particularly keen on initiating prosecutions against PMCs contributing to the war effort.

In view of those obstacles, it is not surprising that the gaze of the accountability advocates has turned to tort law. Tortious liability may be established for any act that causes damage (although for courts exercising extraterritorial jurisdiction some restrictions are likely to be imposed), and tort litigation (which results in damages rather than imprisonment) may be considered as less intrusive than criminal litigation. Additionally, the lesser involvement of the state renders tort litigation distinctly attractive to victims, who can single-handedly file claims with a court without being dependent on a willing prosecutor to take up their claim.<sup>111</sup>

Tort litigation is not free from obstacles, however. While tort proceedings may allow victims to reach the courts more swiftly than criminal proceedings (the progress of which may largely depend on the action of government prosecutors), in practice, final judgments on the merits in tort proceedings against PMCs are in extremely short supply or even non-existent. This is attributable to the dismissal, on procedural grounds, of many claims during the pre-trial stage, and, in the event that the judge does not grant the defence’s motions to dismiss, to out-of-court settlements which the corporate defendant enters into with the plaintiffs for fear of being ruined by the astronomical damages often awarded by (US) courts. As far as the procedural obstacles to successful litigation against PMCs are concerned, it is notable that the idea that ‘war is an inherently ugly business for which tort claims are simply inappropriate’,<sup>112</sup> including tort claims brought against PMCs, has gained more ground recently, especially after the *Titan* litigation. In order for their case to go forward, plaintiffs will have to establish that the PMC operated at arm’s length from the military command structure. Even if plaintiffs prevail with respect to the government contractor defence, however, the court may still declare there to be a political question because of the involvement of the government in the abuse. In

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<sup>108</sup> Walker and Whyte, *supra* note 18, at 687 and 689.

<sup>109</sup> Dickinson, *supra* note 9, at 237

<sup>110</sup> Robinson, ‘Corporate Culture as a Basis for the Criminal Liability of Corporations’, Feb. 2008, paper submitted within the mandate of the UN Special Representative of the Secretary-General on Business and Human Rights, available at: [www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf](http://www.reports-and-materials.org/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf) (noting that Brazil, Bulgaria, Luxembourg, and Slovakia do not recognize criminal liability for corporations, and that Germany, Greece, Hungary, Mexico, and Sweden apply administrative instead of criminal penalties to corporate wrongdoing). This also explains, at least partly, why the International Criminal Court has jurisdiction over only natural persons (Art. 25.1 of the Rome Statute of the International Criminal Court).

<sup>111</sup> I have discussed some advantages of tort *vis-à-vis* criminal human rights litigation elsewhere, so I have limited myself to giving a rough overview here: Ryngaert, ‘Universal Jurisdiction over Gross Human Rights Violations’, 38 *Netherlands Ybk Int’l L* (2007) 1, at sect. 2. It may be noted, in passing, that the less intrusive character of tort litigation may also stem from the fact that the involvement of the state is limited to a judge hearing tort claims in a fairly passive manner, whereas in criminal cases the state, personified by the public prosecutor, is a fully-fledged party to the case.

<sup>112</sup> *Ibrahim et al. v. Titan Corp.*, *supra* note 89, at 18.

tort cases under the ATCA, if no political question can be discerned, the case may in fact already have been aborted at an earlier stage on the ground that the alleged violation did not amount to a violation of international law, or that private corporations are no duty-bearers under international law. And with respect to the improbable cases that, against all odds, eventually reach the trial phase, unclear corporate liability doctrines may still spoil the party.

Clearly, the path toward a successful outcome of transnational tort litigation against PMCs may be blocked by many procedural obstacles. Those obstacles are in fact so manifold that, so far, more criminal convictions against PMC employees have been pronounced than civil damages have been awarded to the victims of PMCs' abuses. It should, moreover, not be forgotten that a criminal conviction may send a stronger accountability signal, and may prove to have more deterrent effect than the mere pecuniary sanction of civil damages. Arguably, the demise of public law sanctions is announced too soon. Admittedly, civil suits are the only viable avenue for irregularities that do not qualify as criminal offences; money damages may also have some deterrent effect, and duty of care failures may more easily be established. Yet for the worst PMC abuses, criminal prosecution may be warranted. Pressure should accordingly be piled on states to make sure that the new dogs of war are kept on a tight penal leash.