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IMMUNITY *VERSUS* ACCOUNTABILITY FOR PRIVATE MILITARY AND
SECURITY COMPANIES AND THEIR EMPLOYEES:
LEGAL HURDLES OR POLITICAL SNAGS?

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Abstract

The aim of this paper is to analyze to what extent different kind of immunities may bar legal proceedings instituted against PMSCs and their employees. The first part of the paper is devoted to the setting of the legal background on international law rules on immunity which may be applicable, in certain cases, to PMSCs and their employees. The second part of the paper addresses the issue of immunity of PMSCs employees from criminal jurisdiction taking into account existing case-law. The conclusion is that, in most cases, immunity of private contractors from criminal jurisdiction seems not to depend on the application of immunity rules but, for a large part, from the combination of a lack of applicable rules to exercise criminal jurisdiction and a lack of political will to proceed. As to civil proceedings, the most relevant obstacle that has prevented courts from exercising their jurisdiction over PMSCs and their employees (mainly in US case-law) is the so-called “political question doctrine”, that has been invoked in most relevant civil suits and has been accepted by some courts and rejected by some others. The author of this paper is of the opinion that such a doctrine (and similar ones) was crafted to protect the exercise of governmental functions and should be narrowly interpreted. In particular, there should be no bar on judicial review when international human rights law violations occur, since the governments themselves are bound to ensure respect for these rules and shall foster a culture of accountability for their officials and for private contractors they have decided to hire.

Immunity versus Accountability for Private Military and Security Companies and their Employees: Legal Hurdles or Political Snags?

MICAELA FRULLI*

1. Introduction

Private military and security companies (PMSCs)¹ and their employees may, in principle, be subject to the law and jurisdiction of the country in which they are operating. Unlike States and their officials they are not beneficiaries of customary international rules establishing sovereign immunity, on the one hand, and functional or personal immunity from criminal, civil and administrative jurisdiction on the other. However, as recent practice clearly shows, PMSCs and private individual contractors have been granted different kinds of immunities covering the performance of very sensitive tasks on foreign soil.

In the first place, these subjects have been granted immunity from the jurisdiction of the Host State in which they are deployed both by special legislative measures or by means of specific agreements between the State that hired them (the Hiring/Contracting State, which in many cases is their State of nationality, e.g., their Home State) and the Host State.² In addition, they have also been granted immunity from the jurisdiction of the Hiring/Contracting State by virtue of their contract and, more frequently, by the application of judicially created doctrines such as the “political question doctrine” or other statutory defenses applied, for instance, by national courts in the United States.

It is therefore important, as a first step, to set the legal framework by briefly recalling the most important customary and conventional international rules on immunity of State officials and international personnel from jurisdiction, to ascertain whether they may also cover private contractors performing certain functions on behalf of a State. It is worth stressing that PMSCs as such and not only their employees often invoke immunity from the civil jurisdiction both of the Host and of the Hiring/Contracting State claiming that they discharge certain duties on behalf of the State which engaged them.

Although immunity may be invoked to cover acts committed in violation of both internal and international law rules, the focus of this paper is specifically on cases where immunity issues were raised to shield PMSCs or their employees allegedly implicated in human rights violations.

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¹ In this paper the expression Private Military and Security Companies (PMSCs) covers all kinds of private companies providing services in the military or security field.

² In this paper Host State is the State where the PMCs are operating, the Hiring State is the State which contracted the private employees and the Home State is the State of nationality of the contractors.

2. Setting the Legal Framework: Different Kind of Immunities Based on a Variety of Legal Grounds

A. *Functional Immunity from Jurisdiction Accruing to State Officials and International Personnel*

Under customary international law, State officials are entitled to different types of immunity from foreign jurisdiction. In general, two kinds of immunities are recognized: the so-called functional immunity (or *ratione materiae*), and personal immunities (or *ratione personae*).³

According to the prevailing position among international lawyers, functional immunity from the jurisdiction of foreign States covers activities performed by every State official in the exercise of his/her official functions and it survives the end of office. The underlying rationale is that official activities are performed by State organs on behalf of their State and, in principle, must be attributed to the State itself.⁴ From this perspective, the ultimate *raison d'être* of functional immunity is the protection of the sovereign equality of States enshrined in the Latin *dictum* "*par in parem non habet iudicium*".⁵

Functional immunity is granted as well to international personnel, in particular to the officials of international organizations: for example, this kind of immunity is provided for by the *Convention on the Privileges and Immunities of the United Nations* of 1946.⁶ The rule on functional immunity of UN personnel is considered to have acquired the status of customary international law and similar rules

³ Personal immunities - which only accrue to a few categories of State organs by virtue of the special relevance of their official positions (diplomatic agents, heads of states, heads of governments and ministers of foreign affairs) - cover every act performed by those who are entitled to enjoy this type of immunity, but they last only until the State organs concerned remain in office. The principle inspiring these rules is commonly identified as "functional necessity", and often expressed with the Latin formula *ne impediatur legatio* or *ne impediatur officium*. Personal immunities include inviolability, that is to say immunity from arrest and detention, absolute immunity from criminal jurisdiction and immunity from civil jurisdiction (with very limited exceptions). These immunities are not likely to come into play as far as private contractors are concerned. Therefore, it does not seem appropriate to dwell at length with their content.

⁴ "Since a state manifests its legal existence only through acts performed by human beings in their capacity as organs of the state, that is to say, through acts of state, the principle that no state has jurisdiction over another state must be interpreted to mean that a state must not exercise jurisdiction through its own courts over acts of another state, unless the other state consents. Hence the principle applies not only in case a state as such is sued in a court of another state, but also in case an individual is the defendant or the accused and the civil or criminal delict for which the individual is prosecuted has the character of an act of state. Then the delict is to be imputed to the State not to the individual.", H. Kelsen, *Principles of International Law*, London, 1952, p. 235. See also G. Dahm, *Völkerrecht*, vol.I, Stuttgart, 1958, pp. 225, 237, 303., 325; M. Bothe, "Die strafrechtliche Immunität fremder Staatsorgane", in *ZaÖRV*, 1971, p. 246 ff.; M. Akerhust, "Jurisdiction in International Law", in *BYIL*, 1972-1973, p. 241 ff.; H. Fox, *The Law of State Immunity*, Oxford, 2002, *passim*.

⁵ See also the position taken by the ICTY Appeals Chamber in *Blaškić*: "[C]ustomary international law protects the internal organization of each sovereign State: it leaves it to each sovereign State to determine its internal structure and in particular to designate the individuals acting as State agents or organs. Each sovereign State has the right to issue instructions to its organs, both those operating at the internal level and those operating in the field of international relations, and also to provide for sanctions or other remedies in case of non-compliance with those instructions. The corollary of this exclusive power is that each State is entitled to claim that acts or transactions performed by one of its organs in its official capacity be attributed to the State, so that the individual organ may not be held accountable for those acts or transactions. The general rule under discussion is well established in international law and is based on the sovereign equality of States (*par in parem non habet imperium*)", *Prosecutor v. Blaškić*, Appeals Chamber Judgment No. IT-95-14-AR 108 bis, 29 October 1997, paras. 41 e 42.

⁶ 1 U.N.T.S. 15, 13 February 1946. The *Convention on the Privileges and Immunities of the United Nations* gives a comprehensive picture of privileges and immunities granted to international personnel, and many subsequent agreements are modelled on its provisions. As to functional immunity from jurisdiction, according to Article V, Section 18, letter (a) officials of the United Nations "shall be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity".

may be found in many other conventions and headquarters agreements amongst States and other international organizations.⁷

Most authors affirm that functional immunity accrues, as a general rule, to every organ acting on behalf of a State, the only exception being the commission of serious international crimes entailing individual criminal liability.⁸ However, according to other scholars, the scope of functional immunity is more limited: functional immunity from jurisdiction is enjoyed only by some categories of State officials on different legal grounds (customary or conventional)⁹ and covers solely activities performed within the limits of the mandate specifically bestowed on these organs.¹⁰ One of the most relevant examples supporting the latter hypothesis is that of consular agents. According to Article 43 of the UN Convention on Consular Immunities, consular agents enjoy immunity from the jurisdiction of the receiving State only for “acts performed in the exercise of consular functions”.¹¹ As a consequence, acts allegedly performed in an official capacity, but falling outside the consular functions as defined in the convention itself, are not covered by functional immunity. A number of cases in front of national courts confirm such a restrictive interpretation of the rule.¹² The logic of such a strict interpretation is well explained in a *Memorandum* submitted to the District Court of Pennsylvania by the US State Department (concerning the position of a Yugoslav consular agent indicted in *US v. Bijedić*): “Therefore, considering all the facts of a particular case, an act that substantially deviates from a course of action appropriate to the performance of the function would not be an act performed in the exercise of that function.”¹³

The same approach has been adopted by national judges in cases concerning different categories of State officials: several courts refused to recognize functional immunity of State organs who exceeded the limits of their mandate, thus acting *ultra vires* and abusing of the powers conferred on them.¹⁴ This trend in the case-law of various States seems very important in light of the fact that it developed in the domain of civil jurisdiction; that is to say in cases where the rules on State immunity might also apply and where there is – according to the prevailing opinion - a substantial overlap between the immunity of the State and the immunity of its officials. In these cases, the judges have considered the question of the functional immunity of the State organ as separate from the issue of State immunity and they have decided whether or not to grant functional immunity to the single State official not only taking into

⁷ See, for example, Article 22 of the *Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory*, signed in 1954 and entered into force in 1955, available on the website of UNESCO at the following page: <http://unesdoc.unesco.org/images/0012/001255/125590e.pdf>

⁸ See for instance A. Cassese, *International Criminal Law*, 2nd ed., Oxford, 2008, p. 302 ff.

⁹ See extensively P. De Sena, *Diritto internazionale e immunità funzionale degli organi statali*, Milano, 1996.

¹⁰ See M. Frulli, *Immunità e crimini internazionali*, Torino, 2007, pp. 23-60.

¹¹ Art. 43, para. 1: “Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions”.

¹² See for instance the decision of the Supreme Court of New Zealand in *L. v. The Crown*, in *ILR*, vol. 68, p. 175; see also the decision of the Genova Tribunal (6 May 1970) and of the Italian Court of Cassation (29 February 1972) in *Rissmann* (reprinted respectively in *Rivista di diritto internazionale*, 1971, p. 702 and in *IYIL*, 1976, p. 339). For other cases see M. Frulli, *Immunità*, cit., *passim*. As a comment to one of these cases a distinguished expert stressed that: “the consul who assist a minor without respecting the laws of the receiving state acts outside the limits of his proper functions; and his actions cannot be covered by functional immunity”, L. Condorelli, “Consular Immunity”, in *IYIL*, 1976, p. 341.

¹³ *Government's Memorandum of law in response to defendant's motion to recognize the applicability of consular immunity*, 21 March 1989, p. 30, available on Lexis-Nexis

¹⁴ See for instance *Chiudian v. The Philippine National Bank and Daza*, US Court of Appeals, Ninth Circuit, 29 August 1990, part 4, § IV, available on *Lexis-Nexis*. See also *Jaffe v. Miller*, High Court of Justice (17 September 1990) and Ontario Court of Appeals (17 June 1993), available on *Lexis-Nexis*. For a comment on these and other cases see M. Frulli, *Immunità*, cit., pp. 50-55.

account the public or private nature of the activity concerned (as if the respondent was the State itself) but also evaluating whether the State official involved had acted within the limits of his/her mandate.

From this viewpoint, it may be contended that the main reason underlying the bestowal of functional immunity on State officials would not be anymore (or not in the first place) the protection of State sovereignty, but the necessity to ensure the accomplishment of activities that are crucial for peaceful and stable relations amongst States, that is to say a “functional necessity” rationale. And there is no doubt that a restrictive interpretation of the rules on functional immunity would be more consonant with the values protected by the same rules.

The same is true, *a fortiori*, for functional immunity accruing to officials of international organizations. In this respect, it is interesting to quote the example of the NATO Status of Forces Agreement (NATO SOFA), which establishes that NATO officials, on missions for the Organization “shall be immune from legal process in respect of words spoken or written and of acts done by them in their official capacity and *within the limits of their authority*”,¹⁵ thus confirming the strictly functional rationale underlying this kind of immunity.

As jurisdictional immunities granted to private contractors may be classed mainly as functional ones, the perspective described above may prove useful for discussing the rationale, content and application of rules conferring some form of functional immunity to private contractors.

B. Immunities Granted on the Basis of SOFAs to State Officials and Contracted Personnel

State officials, both military and civilians, may enjoy immunity from the Host State’s criminal, civil and administrative jurisdiction in cases where an international agreement is concluded. For our purposes it is important to take into account Status of Forces agreements (SOFAs), which have become one of the most relevant international sources of immunity for private contractors. In fact, at least in recent practice, PMCs employees are often included under the scope of these agreements and must be treated accordingly.

SOFAs may be concluded on a temporary or on a permanent basis to regulate standing military (and in some cases civilian) presence on the soil of a foreign country.¹⁶ They may be negotiated on a bilateral basis or in a multilateral context, such as when regulating the presence of visiting forces standing abroad in the framework of an international organization: this is the case, for instance, of NATO forces stationed in the territory of foreign States.¹⁷

SOFAs are based on the assumption that the presence of foreign personnel is in the interest of the Host State as well as of the Sending State. Each SOFA is unique because this kind of agreement is negotiated on a case-by-case basis (except those concluded in a multilateral negotiation), but some of their common features may be inferred from current practice. These agreements establish the legal framework pursuant to which armed forces operate within a foreign country and deal with all issues that are necessary to “ordinary” affairs, such as wearing of uniforms, carrying of weapons, income and sales taxes, labour claims and so on. More importantly here, SOFAs regulate the exercise of criminal and civil jurisdiction over personnel of the sending State, thus granting some form of immunity from

¹⁵ Emphasis added, see article XVIII, letter a) of the *Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff* (1951), available on the website of NATO, at www.nato.int.

¹⁶ For a complete overview of legal issues related to SOFAs see D. Fleck (ed.), *The Handbook of the Law of Visiting Forces*, Oxford, OUP, 2001.

¹⁷ See *Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff* (1951), cit. *supra* note 15.

the Host State jurisdiction to personnel stationed abroad (more and more frequently including private contractors).¹⁸

Actually, on careful reading of a variety of SOFAs, the word “immunity” does not always appear. Most often other terms are used, making reference to the division of jurisdictional competences between the Host and the Sending States. Most SOFAs recognize the right of the Host government to exercise “primary jurisdiction”: this means that the Host State exercises jurisdiction in all cases in which foreign personnel violate the laws of the Host State, with two exceptions generally applying only in criminal cases. According to most agreements, the Sending State has primary jurisdiction when the offense is committed by a national of the Sending State against another national of the Sending state (“*inter se*” cases), and when the offense is committed by the nationals of the Sending State in the performance of official duty. Hence, a “functional” principle – recalling that underlying immunity granted to State officials in different contexts - is used here to grant primacy of jurisdiction to the Sending State, and not immunity, in a technical sense, although the application of these rules generally entails a *de facto* immunity from the jurisdiction of the Host State for certain categories of offenses.¹⁹

In any case, SOFAs generally provide for concurrent jurisdiction between the Sending and the Receiving States, apart from exceptional cases where jurisdiction of the Host State has been virtually excluded.²⁰ One relevant example of SOFAs conferring exclusive criminal jurisdiction to the Sending State over its nationals (including over private contractors)²¹ is the SOFA concluded between the US and Afghanistan.²²

¹⁸ It interesting to note, for example, that when the NATO SOFA was signed, there was no mention of contractors as a category of personnel. In some cases however, supplemental agreements have been concluded (for instance between Italy and the United States) and acknowledged the category of “technical representatives”, which include private contractors acting under the supervision of the US Department of Defense who perform work in Italy on more than a temporary basis. This agreement is based on the model of the Supplementary agreement to the NATO Sofa regulating the presence of allied forces stationed permanently in the Federal Republic of Germany, signed in 1973, which included contractors. On the agreement between Italy and the United States, see M. McCormick, “Accrediting DoD Contract Technical Representatives in Italy without Reinventing the Wheel”, Defense AT&L: March-April 2005, available at <http://www.per.hqusaureur.army.mil/CPD/DocPer/Italy/Defense%20AT&L%20Magazine%20Mar-Apr%2005.pdf>.

¹⁹ See for instance Art. VII of the NATO Sofa, which establishes in detail the sharing of jurisdiction between the sending and the receiving State. Some form of functional immunity stems from Art. VII, par. 3, letter a) which reads : “In case where the right to exercise jurisdiction is concurrent the following rules shall apply: The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent; ii) offences arising out of any act or omission done in the performance of official duty”. It is worth noting, however, that the rule was not elaborated as an “immunity rule”, but it clearly aims at establishing a division of jurisdictional competences.

²⁰ See for instance the controversial extension of wide immunities to all US military and civilian personnel contained in the SOFA concluded between the USA and East Timor in 2002, see Art. 1 : “United States military and civilian personnel of the United States Department of Defense who may be present in the Democratic Republic of Timor-Leste in connection with humanitarian and civic assistance, ship visits, military training and exercises and other agreed activities shall be accorded a status equivalent to that accorded to the administrative and technical staff of the Embassy of the United States of America under the Vienna Convention on Diplomatic Relations of April 18, 1961”, available at <http://www.etan.org/news/2002a/11sofa.htm#Full%20text>. Members of the administrative and technical staff of embassies enjoy full immunity from criminal jurisdiction of the receiving State, unless they are nationals of the same State. Article 37, par. 2, Vienna Convention Diplomatic Relations of April 18, 1961 .

²¹ With respect to PMSCs employees it seems important to underline that immunity may be granted on a contractual basis, but as long as an international agreement exist, the latter must be considered as the proper legal basis for granting immunity from jurisdiction.

²² *Agreement regarding the status of United States military and civilian personnel of the U.S. Department of Defense present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises and other activities*. Effected by exchange of notes at Kabul September 26 and December 12, 2002 and May 28, 2003. Entered into force May 28, 2003. Excerpts from an unofficial copy available at: <http://caaflog.blogspot.com/2008/02/is-that-afghan-sofa-i-see.html>): According to the SOFA: “The Government of

The agreements concluded between the UN, the contributing States and the Host State with respect to the deployment of UN peacekeeping operations are also called SOFAs.²³ These agreements usually provide for immunity from legal process in respect of words spoken and acts performed by them in their official capacity for all members of the UN peacekeeping operation,²⁴ including locally recruited personnel. As to military members of the military component of PKOs, they shall be subject to the exclusive criminal jurisdiction of the contributing State over any crime committed in the Host country, that is to say they enjoy absolute immunity from local criminal courts.²⁵

Functional immunity may be granted to private contractors as well, since it is not unusual that the United Nations or other international organizations hire independent contractors to provide personnel for peacekeeping operations or other international missions carried out by States under a UN Security Council authorization.²⁶ This was explicitly the case, for instance, of functional immunity from legal process granted by UNMIK to KFOR (the NATO Security Force) contractors in Kosovo.²⁷

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Afghanistan recognizes the particular importance of disciplinary control by United States military authorities over United States personnel and, therefore, Afghanistan authorizes the United States Government to exercise criminal jurisdiction over United States personnel. The Government of Afghanistan and the Government of the United States of America confirm that such personnel may not be surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state without the express consent of the Government of the United States.” Un personnel is elsewhere defined as including contractors. See also, for another example, T.I.A.S., *Agreement on Military Exchanges and Visits Between The Government of the United States of America and The Government of Mongolia*, agreement dated June 26, 1996.

²³ See the Model Status-of-Forces Agreement for Peacekeeping Operations, UN Doc. A/45/594 (9 October 1990).

²⁴ Art. 46: “All members of the United Nations peace-keeping operation including locally recruited personnel shall be immune from legal process in respect of words spoken or written and all acts performed by them in an official capacity. Such immunity shall continue even after they cease to be members of or employed by the United Nations peace-keeping operation and after the expiration of the other provisions of the present agreement.”

²⁵ Art. 47, b) : “Military members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in the Host country”.

²⁶ It is important to stress that some Companies took the view that the 1946 Convention, in particular article VI devoted to Experts on Mission for the United Nations, cover contractors hired by a State but sent in a mission within the framework of a UN-authorized operation. This view is not to be shared because it clearly extends privileges and immunities clearly beyond the limits agreed by the States., see D. P. Oulton, F. Lehman (Electronic Systems Center), “Deployment of U.S. Military, Civilian and Contractor Personnel to Potentially War Hazardous Areas from a Legal Perspective”, *The DISAM (Defense Institute o Security and Assistance Management) Journal*, Summer 2001, p. 15 ff.

²⁷ On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, UNMIK Reg. No. 2000/47 (Aug. 18, 2000), in particular the following sections: “Section 4. Contractors. 4.1 UNMIK and KFOR contractors, their employees and sub- contractors shall not be subject to local laws or regulations in matters relating to the terms and conditions of their contracts. UNMIK and KFOR contractors other than local contractors shall not be subject to local laws or regulations in respect of licensing and registration of employees, business and corporations.

4.2 KFOR contractors, their employees and sub- contractors shall be immune from legal process within Kosovo in respect of acts performed by them within their official activities pursuant to the terms and conditions of a contract between them and KFOR.

Section 5. Duration of Immunity from Legal Process

The immunity from legal process provided by the present regulation to UNMIK and KFOR personnel including their locally recruited personnel as well as KFOR contractors, their employees and sub-contractors shall continue after UNMIK and KFOR's mandate expires or after such entities and/or personnel are no longer employed by UNMIK or KFOR.

Section 6 Waiver of Immunity

6.1 The immunity from legal process of KFOR and UNMIK personnel and KFOR contractors is in the interests of KFOR and UNMIK and not for the benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any UNMIK personnel in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interest of UNMIK. In relation to personnel of the Institution-building and Reconstruction components, any waiver of immunity shall be carried out in consultation with the heads of those components.

6.2 Requests to waive jurisdiction over KFOR personnel shall be referred to the respective commander of the national element of such personnel for consideration.

C. Immunities Granted Pursuant to Internal Laws or Judicially Created Doctrines

In addition, immunity of private contractors may be granted through the adoption of domestic legislative acts *ad hoc*, such as the well-known CPA order n. 17 which conferred immunity to private contractors operating in Iraq from June 2004 to December 2008,²⁸ since it was not officially repealed by Iraqi authorities after the transfer of authority and remained in force until 31 December 2008, date of expiry of the United Nations mandate for the US-led multinational force.

An overview of existing case-law suggests that immunities are invoked by PMSCs and their employees exercising certain functions on foreign soil on behalf of a State also on the grounds of internal doctrines crafted by national courts, such as the political question doctrine, or of other statutory defences, which were actually applied by US courts to render cases involving private military companies and their employees non-justiciables.²⁹ In these cases, the lack of accountability of private contractors does not always derive from the application of an immunity rule, but from the decision to give priority to policy considerations.

In other cases, on a more specific level, an internal law triggered the conclusion of bilateral agreements granting immunity, *inter alia*, to private contractors from the jurisdiction of the International Criminal Court (ICC). Obviously, the competence of the ICC would be operating only in cases where serious international crimes have been committed and according to the jurisdictional criteria set forth by its Statute.³⁰ As is well-known, however, the US tried to oust ICC jurisdiction over their nationals employed on foreign soil (not only State officials, but also US citizens, including private contractors) and adopted the *American Service-Members' Protection Act (ASPA)*³¹ which allows US nationals to participate in peacekeeping or multinational forces only on condition that they are immune from ICC jurisdiction either through UN Security Council's resolutions or through bilateral agreements signed with the Host State.³² The latter agreements have been concluded with a large number of States (102 States, both parties and non-parties to the ICC Statute)³³ and provide for the obligation not to surrender or transfer to the ICC US officials, employees, personnel or nationals who are present on the territory of the other party without the express consent of the US. Regrettably they were concluded, at least with a certain number of States, under the threat of the stemming of US military aid, according to the ASPA, and they jeopardised the possibility for the ICC to proceed against private contractors hired by the US and employed in "contingency operations" for the

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6.3 Requests to waive the immunities of KFOR contractors set forth in section 4 of the present regulation shall be referred to the respective commander of the national element with which the KFOR contractors has contracted.

²⁸ Coalition Provisional Authority Order Number 17 (Revised), Status of The Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, 27 June 2004, § 4 (3), available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. See *infra*, sub-paragraph 3. 1 for a more detailed analysis.

²⁹ See K. A. Huskey; S. M. Sullivan, "The American Way: Private Military Contractors & U.S. Law After 9/11", PRIV-WAR, National Report Series, 02/08 (December 2008), available at www.priv-war.eu.

³⁰ As it is well known, the ICC can generally exercise jurisdiction only in cases where the accused is a national of a State party, the alleged crime took place on the territory of a state party, or a situation is referred to the court by the United Nations Security Council.

³¹ See *2002 Supplemental Appropriations Act for Further Recovery from and Response to Terrorist Attacks on the United States*, paras. 2001–2015 (to be codified at 22 U.S.C. paras. 7421–7432). ASPA was passed as Title II of this Legislation and became law on 2 August 2002. The text is available at <http://www.state.gov/t/pm/rls/othr/misc/23425.htm>. The ASPA refers to "covered United States persons; covered allied persons; and individuals who were covered United States persons or covered allied persons".

³² For a detailed analysis see *infra* paragraph 3.

³³ For agreements in force for the US as of January 1, 2009, see <http://www.state.gov/documents/treaties/122730.pdf>. For a full account of bilateral agreement see the website of the American coalition for an international criminal court, at http://www.amicc.org/usinfo/administration_policy_BIAs.html.

performance of very sensitive tasks (that are at the moment a very elevated number) in case that they are suspected of having committed serious international crimes.

D. A de facto Blanket Immunity for PMCs and their Employees?

Depending on the variety of arguments and rules briefly recalled above, both PMCs and their employees have thus far practically escaped criminal and civil liability for offenses (including international law violations) committed on foreign soil.

An attempt at critically appraising the application of immunity rules to private contractors against the more general background of jurisdictional immunities accruing to States and their officials is therefore appropriate with a view to see which are the most convincing arguments to overcome the relevant hurdles – at least the legal ones – and provide for accountability of PMSCs and their employees. In addition, making reference to the existing case-law (which is basically US case-law), it is important to ascertain whether immunity was granted by virtue of the rules described in the previous paragraphs or whether a factual immunity stemmed from legal loopholes and lack of political will to proceed against private contractors.

3. Immunity from Criminal Jurisdiction

Usually, a crime committed by an individual falls under the laws of the nation where the crime has been committed. However, PMSCs operate with increasing frequency in conflict or crisis situations where special rules are applicable: as recalled above, the immunity of contractors from the criminal jurisdiction of the Host State may result from internal law or from a specific agreement (usually a SOFA) between the Host State and the Hiring/Contracting State of the contractors.

The most oft-cited example concerning immunity from jurisdiction of the Host State granted to private contractors through a domestic act is the provision inserted in Iraqi Coalition Provisional Authority's Order n.17, issued by Paul Bremner in June 2004,³⁴ just before the transfer of authority to the Iraqi Interim Government. Reference was often made to this order as granting blanket immunity to contractors operating in Iraq. However, the relevant provisions clearly states that immunity from Iraqi legal process concerns only acts performed by contractors "pursuant to the terms and conditions of a contract or any sub-contract thereto".³⁵

This wording recalls the formula that is habitually used to describe functional immunity of State officials or international organizations' personnel performing their functions on foreign soil. As we have seen, these organs enjoy immunity from the jurisdiction of the receiving States for acts accomplished in the exercise of their official functions. The interpretation of this rule should be, as argued above, a stringent one: functional immunity should cover only acts performed in the regular course of duty and not in excess of power. *A fortiori*, this line of reasoning should apply to immunity from legal process provided for private contractors, since the aim of any such provision cannot be the protection of the contractors themselves.

³⁴ Coalition Provisional Authority Order Number 17 (Revised), Status of The Coalition Provisional Authority, MNF-Iraq, Certain Missions and Personnel in Iraq, 27 June 2004, § 4 (3), available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf

³⁵ If we compare this section with Section 2 of the same Order, relating to immunity from Iraqi legal process granted to MNF, CPA and Foreign Liaison Mission Personnel and International Consultants, we can see that in the latter case one could speak of blanket immunity. In any case, Section 5 of the Order concerns the waiver of immunity, which may be expressly granted, in writing, by the relevant Sending State.

As a consequence, any violation of the laws of the Host State apparently committed under an official or contractual cloak, but actually in abuse of authority, shall not be covered by jurisdictional immunity. More specifically, any serious breach of the laws of war, such as the killing of civilians that took place in the notorious incident of 2007 involving Blackwater,³⁶ should be automatically excluded from the range of acts performed pursuant to contract. Other violations amounting to international crimes, such as those occurring at Abu Ghraib, that may be considered acts of torture or inhuman or degrading treatments, should not be covered at all by provisions granting jurisdictional immunity to contractors. As recalled above, it is unanimously held that functional immunity can never be invoked as a justification by those individuals suspected of international crimes, not even by high-ranking State officials.³⁷ It would indeed be contrary to current international law to construe any functional immunity rule (be it provided by an agreement or *a fortiori* by contract) as impeding the exercise of jurisdiction and thus the prosecution of those suspected of one of these crimes. It must be added that, both the Geneva Conventions of 1949 and the 1984 United Nations Convention against Torture - that are very widely ratified - establish an obligation for States to prosecute those responsible for war crimes and torture respectively, through the *aut dedere aut iudicare* rule. State parties to these treaties (and one could argue even States that are not parties to these agreements since it may be contended that the obligation to prosecute these crimes may be considered to have acquired a customary nature) may not elude the respect of such an obligation by applying uncertain immunity rules or by construing existing immunity rules in a very broad manner in order to avoid proceeding against those suspected of such serious crimes. In addition, it is worth recalling that both treaties provide as well for the universal jurisdiction principle, which means that third States as well could prosecute those suspected of these crimes without having to take into account any functional immunity.

In simple terms, in cases where some form of immunity is provided for contractors, it would be advisable, as a minimum standard, to expressly restate that it does not cover international crimes and to clearly establish which State will exercise criminal jurisdiction over the most serious offenses.

For lesser offenses, a strict interpretation of provisions such as that inserted in CPA Order 17 described above allows for the exercise of criminal jurisdiction of the Host government if relevant acts are performed outside the scope of contract/mandate, as happened in certain cases to State officials brought to trial before foreign courts for acts performed outside the scope of their official mandate.³⁸

The problem could be - and has been - the readiness of the local State to exercise jurisdiction over these cases. To continue with the same example, only very recently has Iraq tried to repeal the immunity granted to private contractors by CPA Order 17 (namely after the Blackwater scandal) and, as a result of this stand, the SOFA concluded at the end of 2008 - that is to say at the expiry of the United Nations mandate- between the US and Iraq, which entered into force in January 2009, grants no immunity from Iraqi law to private contractors.³⁹ The new SOFA specifically grants Iraq "the primary right to exercise jurisdiction over United States contractors and United States contractor employees." This means that, beginning in 2009, private contractors hired by the United States and operating in Iraq will be subject to the Iraqi Penal Code and the Iraqi Law on Criminal Proceedings, even when they are performing acts pursuant to the terms of their United States government contracts.⁴⁰ This recent example sets a very important precedent, taking into account the fact that the

³⁶ G. Pinzauti, "The Blackwater Scandal: Legal Black Hole or Unwillingness to Prosecute Private Military Contractors?", in *Italian Yearbook of International Law*, 2008, pp. 125-142.

³⁷ See A. Cassese, *International Criminal Law*, cit., p. 302 ff.

³⁸ See *supra*, para. 2A.

³⁹ The text of the agreement in its official English version may be found at the following web page: http://graphics8.nytimes.com/packages/pdf/world/20081119_SOFA_FINAL_AGREED_TEXT.pdf

⁴⁰ However, according to the National Report on the UK (N.D.White; K.Alexander, "The Regulatory Context of Private Military and Security Services in the UK", PRIV-WAR, National Report Series, 01/09 (January 2009), available at www.priv-war.eu) it is not clear whether UK contractors in Iraq still benefit from immunity. On the website of the UK

presence of PMSCs in Iraq is still very considerable. Hopefully, it will give a strong signal towards the emerging of a culture of accountability of PMSCs and their employees and could be the first step in inverting a trend that, up until now, has been a trend of averting criminal prosecutions.

In a more general perspective, in cases where a SOFA provides that jurisdiction be shared between the Host State and the Hiring/Contracting State of the contractor and gives primacy to the latter, the Hiring/Contracting State shall exercise criminal jurisdiction, because from a legal point of view there should be no room for the application of any immunity rule based on internal law. In particular, it would be advisable to insert, in SOFAs as well, a specific provision dealing with the most serious international crimes and defining the State that is bound to exercise criminal jurisdiction in that respect.

However, in a large number of cases, immunity of contractors from the criminal jurisdiction of the Hiring/Contracting States seems not to depend on the application of immunity rules but, for a large part, from the combination of a lack of applicable rules to exercise criminal jurisdiction and a lack of political will to proceed.

As many of the accurate national reports prepared for the PRIV-WAR project clearly point out, most States have until now regulated only certain aspects concerning the functioning of PMSCs and their employees and there are still large gaps in existing domestic legislation. The same is true as far as international regulations are concerned.

The US example is again very useful to see how difficult it may prove to fill the legal voids in order to permit the exercise of criminal jurisdiction over private military contractors. Traditionally, private contractors could not be brought to trial under the military justice system because the Supreme Court held that civilians may not be subject to Courts-martial absent a declaration of war by Congress.⁴¹ More recently, Congress passed new legislation amending the Uniform Code of Military Justice (UCMJ) in order to place military contractors “serving with or accompanying an armed force in the field” under the jurisdiction of military courts, not only during a time of declared war but also during “contingency operations”.⁴² The guidelines for the application of the new legislation were issued only in March 2008.⁴³ The first and only prosecution of a private contractor under the UCMJ ended with a guilty plea in June 2008. An Iraqi working as an interpreter for a contractor supporting the U.S.

(Contd.) _____

Ministry of Defence it is reported that: “ UK forces have the sound legal basis they need to complete their tasks in Iraq in 2009. A Resolution providing the necessary jurisdictional immunities was passed by the Iraqi Council of Representatives and then ratified by the Iraqi Presidency Council on 27 December 2008. A Memorandum of Understanding has since been signed by the Iraqi and British governments, which formally invites UK forces to complete their specific tasks” . This information appears on a facts-sheet available at the following page: <http://www.mod.uk/DefenceInternet/FactSheets/OperationsInIraqAboutTheUkMissionInIraq.htm>. To the best of the author’s knowledge, no official text of the Memorandum has been made public. Therefore it is not clear which kind of immunities accrues to UK officials and contractors operating in Iraq.

⁴¹ See *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 248 (1960) (prohibiting military jurisdiction over civilian dependents in time of peace, regardless of whether the offense was capital or noncapital); *Grisham v. Hagan*, 361 U.S. 278, 280 (1960) (holding civilian employees committing capital offenses not amenable to military jurisdiction); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 283-84 (1960) (expanding *Grisham* to include non-capital offenses); *Reid v. Covert*, 354 U.S. 1, 40- 41 (1957) (holding that civilians in time of peace are not triable by courts-martial for capital offenses). As quoted by L. Dickinson, “Accountability of Private Security Contractors under International and Domestic Law”, *ASIL Insight*, vol.11, issue 31, 26 December 2007.

⁴² Section 552 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364) (FY07 NDAA), amending 10 U.S.C. § 802(a)(10)..

⁴³ See Secretary of Defense Memorandum, UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations (March 10, 2008), available at the following address: <http://www.dtic.mil/whs/directives/corres/pdf/sec080310ucmj.pdf>.

military in Iraq was sentenced to five months of confinement after pleading guilty in connection with a stabbing of a co-worker.⁴⁴

Federal criminal prosecution may be exercised over private contractors under the Military Extraterritorial Jurisdiction Act (MEJA),⁴⁵ which was enacted precisely because private actors could not be brought in front of courts-martial. Under MEJA, US contractors working for the Department of Defense (DoD) or in support of a DoD mission may be charged for offenses committed abroad. However, many contractors are employed by other Departments⁴⁶ or by the CIA for example. Some commentators argued that the latter choice was a deliberate option to take advantage of this legal loophole.⁴⁷ The US Congress considered expanding the statute to cover contractors working under any federal agency in or in close proximity to, an area where the Armed Forces are conducting a contingency operation, but the MEJA Expansion and Enforcement Act of 2007 adopted by the House of Representatives in October 2007 has not become law.⁴⁸ Until now there's only one case of a conviction of a private contractor under MEJA.⁴⁹

Another attempt at closing legal loopholes was made with the US PATRIOT Act of 2001, which expanded the United States' Special Maritime and Territorial jurisdiction (SMTJ) to include US-operated facilities overseas.⁵⁰ Through this extension a federal district court convicted a private contractor – hired by the CIA – accused of mistreatment of detainees in a US base in Afghanistan.⁵¹ In cases of serious international crimes, prosecution could be possible, but not likely, under the War Crimes Act of 1996⁵² or the Extraterritorial Torture Statute.⁵³

Analogous problems (hopefully less likely for international crimes but for “ordinary” crimes) may arise with other States for want of adequate legislation. Just to give another example, a problem may arise if contractors hired by a certain State are nationals of another State: according to the National

⁴⁴ See a report on the case at <http://militarytimes.com/forum/showthread.php?t=1565608>. Alaa “Alex” Mohammad Ali, the contractor employed by the US, was a dual citizen of Iraq and Canada, but the Iraqi and Canadian governments declined to prosecute. The Department of Justice also declined to prosecute the case, probably because the individual was not a US citizen. The new UCMJ provision, however, allowed the U.S. military to plug the hole in the system by ensuring that the perpetrator was held accountable.

⁴⁵ Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 18 U.S.C. §§ 3261-3267 (2004 Supp.)

⁴⁶ Notorious Blackwater contractors, for instance, are hired by the US Department of State.

⁴⁷ See M. C. Bassiouni, “Torture and the War on Terror: The Institutionalization of Torture under the Bush Administration”, *Case Western Reserve Journal of International Law*, 2006, 389-425, spec. p. 411-416.

⁴⁸ See L. Dickinson, “Accountability” cit, *passim*.

⁴⁹ Ahmed Hasan Khan, was prosecuted and convicted to 41 months’ imprisonment under the Military Extraterritorial Jurisdiction Act (MEJA) for possession of child pornography while he was employed as a civilian contractor in the Abu Ghraib prison in Baghdad. United States Attorney’s Office, Eastern District of Virginia, “Military Contractor Sentenced for Possession of Child Pornography in Baghdad”, 25 May 2007 (available at: <<http://www.usdoj.gov/usao/vae/Pressreleases/05-MayPDFArchive/07/20070525khanr.html>). See G.Pinzauci, op.cit., p. 127.

⁵⁰ See USA PATRIOT Act of 2001 § 804 (amending 18 U.S.C. § 7 to include “the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States” as well as “residences in foreign States . . . used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities”).

⁵¹ See Department of Justice, United State Attorney, Eastern District of North Carolina, “David Passaro Sentenced to 100 months imprisonment: First American Civilian Convicted of Detainee Abuse during the Wars in Iraq and Afghanistan”, 13 February 2007, available at: <<http://charlotte.fbi.gov/dojpressrel/2007/ce021307.htm>

⁵² 18 U.S.C. § 2441 (2000 & Supp. II 2002).

⁵³ 18 U.S.C. §§ 2340 and 2340A. However, at present only one case has been brought under this Statute, the one against Charles ‘Chuckie’ Taylor, Jr. (the son of Liberia’s former dictator), for torture committed in Liberia. See Human Rights Watch brief at http://www.hrw.org/sites/default/files/related_material/HRB_Chuckie_Taylor.pdf.

report of the Netherlands, Dutch criminal law applies abroad only to Dutch nationals.⁵⁴ In other cases, it may even be more difficult to apply criminal law abroad. As recalled in the UK report, English criminal law is largely based on the territorial principle meaning that the offence must be committed in the UK. Only a small number of offences when committed abroad can be prosecuted based on the British nationality of the offender. A British soldier (but apparently not a private contractor hired by the UK) is subject to military law while abroad and this may include a large element of English criminal law.⁵⁵

In sum, it does not seem the scant practice of prosecuting private contractors – even those suspected of having committed serious violations of international law – may be imputed to immunity rules. On the contrary, existing rules do not provide any blanket immunity and if correctly interpreted they cannot shield PMSCs' employees from their criminal liability. Immunity rules may of course be improved and crafted in more detail, however it seems that in the first place, attempts should be made at clarifying the rules concerning the exercise of criminal jurisdiction in every situation where PMSCs are widely employed on foreign soil.

4. Private Contractors and the International Criminal Court

Unfortunately, recent practice showed that private contractors might be involved in grave human rights violations amounting to serious international crimes and giving rise to individual criminal liability on the international level. As a matter of fact, in cases where an individual private contractor is suspected having committed an international crime under the jurisdiction of the International criminal court (ICC) and where the conditions of admissibility apply,⁵⁶ this person could be indicted

⁵⁴ .G den Dekker, "The Regulatory Context of Private Military and Security Services in the Netherlands", PRIV-WAR, National Report Series, 01/08 (December 2008), available at www.priv-war.eu.

⁵⁵ See N..D.White; K.Alexander, "The Regulatory Context of Private Military and Security Services in the UK", PRIV-WAR, National Report Series, 01/09 (January 2009), available at www.priv-war.eu.

⁵⁶ "Article 17: Issues of admissibility. 1.Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
- (d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

by the ICC. It must be recalled that, according to the ICC Statute, neither international nor internal law rules granting any form of immunity may be invoked before the Court itself.⁵⁷

However, as briefly mentioned above, the US has adopted specific legislation to bar the jurisdiction of the ICC over its nationals, which triggered both the adoption of UN Security Council resolutions and the conclusion of bilateral immunity agreements amongst the US and a large number of States with a view to excluding the possibility of surrender of US citizens to the ICC. These developments may lead to the practical impossibility for the ICC of prosecuting individual contractors hired by several States and therefore to a *de facto* immunity of private contractors hired by these States or nationals of these States from the jurisdiction of the ICC.⁵⁸

Following the enactment of the ASPA, the US delegation managed to secure the adoption of resolutions 1422, 1487, 1497 and 1593 by the UN Security Council. Resolution 1422 suspended the exercise of the ICC jurisdiction over officials and personnel from States contributing to a UN peacekeeping operation, but not parties to the ICC Statute, for a 12-months period. The adoption of this resolution was a compromise reached under the US threat of exercising their veto power in order to block the creation or renewal of peacekeeping operations.⁵⁹ Resolution 1422, severely criticized by many authors, suspended the ICC jurisdiction but interestingly did not prevent UN member States from prosecuting the crimes under the Rome Statute before their national tribunals.⁶⁰ As a consequence, whereas a private contractor hired by a State and employed within the framework of a peacekeeping operation would commit a crime under the ICC jurisdiction in the territory of a State party to the Statute, the latter State could and actually shall exercise its criminal jurisdiction. However, if the territorial State proves unwilling or unable to prosecute the suspects – that is to say if the existence of the conditions of admissibility is verified - then the ICC could not step in and exercise its jurisdiction. The deferral established by Resolution 1422 was renewed for another 12-months period by resolution 1487.⁶¹

With resolutions 1497 and 1593, adopted at a later stage, the Security Council moved a step further. Resolution 1497, which authorized the deployment of a Multinational Force in Liberia, provided that

⁵⁷ “Article 27: Irrelevance of official capacity. 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.

⁵⁸ For a general overview of the US policy aiming at barring the ICC jurisdiction see M. Roscini, “The Efforts to Limit the International Criminal Court’s Jurisdiction over Nationals of Non-Party States: A Comparative Study”, *The Law and Practice of International Courts and Tribunals*, 2006, pp. 495–527.

⁵⁹ See Resolution n. 1422 of 12 July 2002, para. 1 of which provided that “consistent with the provisions of Article 16 of the Rome Statute, [...] the ICC, if a case arises involving current or former officials or personnel from a contributing State not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case unless the Security Council decides otherwise”.⁸ The deferral of investigations and prosecutions could be renewed for further 12 months under the same conditions on 1 July of each year “as long as may be necessary” (para. 2). See C. Stahn, “The Ambiguities of Security Council Resolution 1422 (2002)”, in *EJIL*, 2003, pp.85-104

⁶⁰ See Resolution n. 1422 of 12 July 2002, para. 1 of which provided that “consistent with the provisions of Article 16 of the Rome Statute, [...] the ICC, if a case arises involving current or former officials or personnel from a contributing State not a party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case unless the Security Council decides otherwise”.⁸ The deferral of investigations and prosecutions could be renewed for further 12 months under the same conditions on 1 July of each year “as long as may be necessary” (para. 2). See C. Stahn, “The Ambiguities of Security Council Resolution 1422 (2002)”, in *EJIL*, 2003, pp.85-104.

⁶¹ A proposal for a resolution providing for a further renewal was withdrawn by the US in June 2004, because of the opposition of the majority of the members of the Security Council and probably due to the Abu Grahیب scandal in Iraq.

“current or former officials or personnel from a contributing state, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State”.⁶² It is interesting to note that this provision concerns both UN peacekeepers and officials or private contractors acting within the framework of a multinational force conducted by States upon a UN Security Council’s authorization. A similar provision was inserted in resolution 1593 by which the UN Security Council referred the situation of Sudan to the ICC Prosecutor.⁶³ Through the adoption of these provisions, the Security Council prevented not only the exercise of the ICC jurisdiction over nationals of States not parties to the Statute, but it also barred the exercise of jurisdiction by the territorial State, the national State of the victims, not to mention the State which would be entitled to exercise universal jurisdiction. In the latter scenario, had a contractor hired by the US or by another State not party to the ICC Statute committed a serious international crime in Liberia, for instance, he or she might be tried only by its national courts, with all the limits and pitfalls already shown above. It is worth emphasizing that these resolutions do not provide for the obligation of the national State to investigate or prosecute, thus leaving room for a *de facto* absolute immunity of the officials or employees, including private contractors (and even simple citizens in the case of Resolution 1593) of States not parties to the ICC Statute that are suspected of having committed one of the most serious international crimes.⁶⁴

It has been argued by several commentators that the UN Security Council acted *ultra vires*, and misinterpreted the powers conferred upon him by Article 16 of the ICC Statute. Unfortunately, however, many States approved the resolutions thus allowing some room for impunity for State officials and private contractors belonging to State not parties to the ICC Statute and permitting the creation of a inequitable difference amongst peacekeepers. The difference, it is worth underlining, does not relate exclusively to the serious crimes falling under the jurisdiction of the ICC. With respect to these crimes, the provisions mentioned here have the effect of barring the ICC jurisdiction, but Resolution 1497 and resolution 1593 provided for the exclusive jurisdiction of the contributing State with regard to “ordinary” offences as well, which renders those employed by some States in specific situations almost “untouchable”.

The resolutions mentioned here prevented the ICC jurisdiction only with regards to alleged crimes committed in the framework or related to UN Peacekeeping operations or multinational operations conducted by the States on UN Security Council authorization. At the same time, the US launched a campaign for the conclusion of bilateral immunity agreements (BIAs) to exempt its nationals from the ICC jurisdiction in all kinds of different situations. These agreements have been concluded, as mentioned above, both with States parties and non-parties to the ICC Statute. The BIAs concluded with States non-parties establish, on a reciprocal basis, the obligation not to surrender or by any means or with any purpose transfer each other’s nationals, officials, employees or military personnel to the ICC or to any other entity or third country, or to expel them to a third country, for the purpose of

⁶² Adopted august 1 2003, para. 7. According to some scholars, the term “exclusive” jurisdiction should be interpreted as meaning “primary” jurisdiction, according to the *aut dedere aut iudicare* rule. In other words: if the State of nationality of a suspect requests extradition, the *forum deprehensionis* State must meet the request, but if the State of nationality does not investigate or prosecute the case, the jurisdiction of any other competent state would be restored. See S. Zappalà, “Are Some Peacekeepers Better Than Others? UN Security Council Resolution 1497 (2003) and the ICC”, *Journal of International Criminal Justice*, 2003, p. 676.

⁶³ According to para. 6 of Resolution 1593, “nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State”.

⁶⁴ See the comments of G. Gaja, “Immunità squilibrate dalla giurisdizione penale in relazione all’intervento armato in Liberia”, *Rivista di diritto internazionale*, 2003, p. 763.

surrender to or transfer to the ICC, without the expressed consent of the State of nationality or of employ. The prohibition to surrender or transfer “by any means” and “for any purpose” is very broad and it means that it would impossible to transfer to the ICC even a person who must be heard as a witness.⁶⁵ BIAs concluded with States parties to the ICC do not lay down reciprocal obligations but asymmetrically set forth the obligation for these States not to surrender or transfer to the ICC: “Current or former Government officials, employees (including contractors), or military personnel or nationals” belonging to the US.

According to the US administration, these agreements meet the requirements of Article 98 (2) of the ICC Statute, which reads:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The preparatory works of the ICC Statute, however, indicate that the provision was crafted in order to cover SOFAs or extradition agreements concluded by States parties to the ICC Statute.⁶⁶ Both these kinds of agreements may be reconciled with the ICC Statute because - as already shown above - they do not provide for immunities, but they aim at establishing a division of jurisdictional competence between the Sending and the Receiving States.⁶⁷ In any case, as we have suggested above, States parties to SOFAs may not elude their obligation to prosecute the most serious international crimes which may never be covered by any kind of functional immunity.

On the contrary, the BIAs are too far from these characteristics to be considered as consistent with the ICC statute. Their aim is to exempt from the ICC jurisdiction not only those covered by SOFAs (which in many cases are only military and civilian State officials), but every single citizen, the nationality link being sufficient. What is even more troubling is the fact that BIAs do not provide, as already pointed out with respect to resolutions 1497 and 1593, for the obligation to prosecute those suspected of international crimes, and that in most of these agreements the US “has expressed its intention to investigate and to prosecute *where appropriate* acts within the jurisdiction of the International Criminal Court alleged to have been committed by its officials, employees, military personnel, or other nationals”, leaving it at the discretion of the US to evaluate whether it is or not appropriate to investigate and prosecute and creating an unacceptable risk of impunity. In conclusion, the ICC would not restrain itself in front of one of these agreements and, should it be the case, it would most likely interpret them as not covered by Article 98.⁶⁸ With respect to States parties to the

⁶⁵ See M. Fornari, “Corte penale internazionale, Stati Uniti e *impunity agreements*”, *La Comunità internazionale*, 2003, p. 255; see also M. Roscini, “The efforts”, cit., p. 510.

⁶⁶ See D. Scheffer, “Article 98(2) of the Rome Statute: America’s Original Intent”, *Journal of International Criminal Justice*, 2005, pp. 333–353; J.Crawford, P.Sands and R.Wilde, *In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute, Joint Opinion*, for the Lawyers Committee on Human Rights, p. 18, available at <http://www.iccnw.org/documents/SandsCrawfordBIA14June03.pdf>; M. Roscini, “The efforts”, cit., p. 513. Some authors believe the SOFAs are not covered by Article 98, (2), because they do not provide for the consent by the sending state before the surrender of an accused, but the only define the jurisdiction of the sending and receiving states, see D. Fleck, “Are Foreign Military Personnel Exempt from International Criminal Jurisdiction Under Status of Force Agreements?”, *Journal of International Criminal Justice*, 2003, p. 656.

⁶⁷ S. Wirth, “Immunities, Related Problems, and Article 98 of the Rome Statute”, *Criminal Law Forum*, 2001, pp. 455–456

⁶⁸ According to a recent article the ICC could decide to interpret those BIAs in a restrictive manner as applying only to State officials and not to private actors. Consequently, private contractors would be vulnerable to the ICC jurisdiction. See A. Bolletino, “Crimes Against Humanity in Colombia: The International Criminal Court’s Jurisdiction Over the May 2003 Attack on the Betoyes Guahibo Indigenous Reserve and Colombian Accountability”, *Human Rights Review*, 2008, pp.508-511. However, this interpretation seems inconsistent with rules on treaty-interpretation, that do not allow much room for

ICC Statute that entered a BIA, they shall incur international responsibility for violating part 9 of the Statute, which contains the obligations for States parties to cooperate with the ICC, including obligations relating to the transfer or surrender of suspects to the ICC.⁶⁹ States parties that signed a BIA shall incur international responsibility for assuming conflicting treaty obligations, in violation of the Vienna Convention on the Law of Treaties.⁷⁰

The problem remains, in any case, with States not parties to the ICC Statute that stipulated BIAs with the US and thus did create a high risk of impunity for the most serious crimes allegedly committed respectively by their nationals and by US nationals. Unfortunately, contractors are definitely covered by these agreements and it may reveal very difficult to prosecute them even for the most serious international offenses committed in the territory of one of the States who signed a BIA.

5. Immunity from Civil Jurisdiction

Immunity of private contractors from the civil jurisdiction of the Host State may be granted on the same basis previously taken into account when examining immunity from criminal jurisdiction: it may be provided through a domestic act or, more often, through a SOFA between the Host and the Sending State, or Hiring/Contracting State in the case of private contractors. In any case, as we have already seen, in these contexts immunity is not absolute (actually is usually granted on a more limited basis compared with immunity from criminal jurisdiction) and in cases where some form of functional immunity is granted, it is based on the assumption that the Sending/Hiring State shall exercise jurisdiction over his officials or employees where appropriate. Consequently, it often occurs that immunity – based on different legal grounds - is not invoked before a foreign civil tribunal but in front of the courts of the Hiring/Contracting State of the private individual contractor or PMSCs that are sued for an international or a tort law violation.

Actually, it is worth underlying that, given the fact that PMSCs' employees do not usually have adequate economic resources to compensate the victims, civil proceedings are brought directly against the PMSCs themselves. In fact, in a number of countries - chiefly common law countries - foreign plaintiffs are allowed to bring claims against private actors before the tribunals of the Contractors' Hiring State even for tort violations committed abroad.⁷¹ However, in many cases, PMSCs have tried to invoke some form of immunity based on the justification that they acted on behalf of the government that hired them in performing functions that are shielded from sovereign immunity.

Available case-law that deal with the issue is again essentially US case-law where claims may be brought mainly under the Alien Tort Statute (ATCA), the Federal Tort Claims Act (FTCA), and the Torture Victims Protection Act (TVPA). Reference can be made to the PRIV-WAR National report on the USA, which gives an excellent, detailed overview of existing case-law pointing also at the "immunity arguments" presented therein.⁷²

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interpretation where the expressions used are literally clear and BIAs do expressly include contractors. It is therefore more appropriate to argue for their inconsistency with the ICC Statute.

⁶⁹ H.G. Van der Wilt, "Bilateral Agreements Between the United States and States Parties to the Rome Statute: Are They Compatible with the Object and Purpose of the Statute?", *Leiden Journal of International Law*, 2005, p.100.

⁷⁰ See M. Roscini, *The efforts*, cit., p.518.

⁷¹ In these countries, civil proceedings may have some advantages also as a means of redress for criminal offenses since they require a less rigorous standard of proof and liability may be easier to prove. However, civil proceedings conducted in a totally separate manner from criminal proceedings may not occur in civil law countries where most systems provide for the adhesion system (*constitution de partie civile*) meaning that the civil proceedings for the claim of damages have to be connected to the criminal proceedings.

⁷² See K. A. Huskey; S. M. Sullivan, "The American Way: Private Military Contractors & U.S. Law After 9/11", PRIV-WAR, National Report Series, 02/08 (December 2008), available at www.priv-war.eu.

Following the line of reasoning developed above, it is interesting to note that the FTCA provides a remedy for torts committed by the government or government employees who are acting within the scope of their employment.⁷³ A functional rationale may be found here as well, even if framed in a different perspective, since the Government must respond when state officials (or individual contractors) acted within their mandate and within their scope of employment. Actually, the FTCA does not expressly address the liability of contractors acting on behalf of the federal government, but it served as a basis for civil suits against PMSCs. On the other hand, it is interesting to note, as well, that the FTCA provides for two limitations to the immunity's waiver: claims resulting from exercise of the "discretionary function"⁷⁴ and claims "arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war."⁷⁵ Both exceptions have been invoked as justifications to apply immunity to PMSCs and their employees and to pre-empt tort actions against them.⁷⁶

It is not the purpose of this paper to analyze existing case-law in-depth. Instead reference is made in this respect to the PRIV-WAR National Report on the US and to relevant legal literature that have carefully examined all the cases and called attention to the immunity exceptions raised therein. It seems instead particularly interesting, for our objectives, to focus on the political question doctrine and on the arguments it raises because the very same arguments could be exported in other systems and may be successfully deployed in order to hinder accountability of PMSCs and their employees.

6. The Political Question Doctrine and other "Governmental" Defences

The non-justiciability of "political acts" or "governmental acts" is recognized in many legal systems, albeit with some differences in denomination and meaning. Actually, the doctrine was first elaborated in France (*actes de gouvernement*) and later exported to the United Kingdom, under the "royal prerogative" label, as well as to the United States, where it is commonly referred to as the "political question" doctrine.⁷⁷ By way of this self-restraint doctrine, courts may decline to consider claims concerning actions taken by their Government in circumstances where the exercise of governmental discretion is deemed essential to protect constitutional or political interests.

This doctrine has been invoked in many civil suits against PMSCs and their employees in the United States - hence our choice to label this jurisdictional hurdle as the "political question doctrine" - and has been accepted by some courts and rejected by some others. The most recent decision is the Order issued by a District court of Virginia which denied CACI's motion to dismiss claims brought by foreign detainees for multiple violations of US and international law, including acts of torture. The Court rejected, at this stage, a variety of justifications brought by CACI, including non-justiciability

⁷³ 28 U.S.C., paras. 2674 and 2979 (2005).

⁷⁴ 28 U.S.C. §2680(a) (2005).

⁷⁵ 28 U.S.C. §2680(j) (2005).

⁷⁶ The so-called "government contractor defense" (GCD) has been judicially crafted and exists as a part of federal common law: its aim is to protect a contractor from tort liability when the latter acted specifically pursuant to government instructions. The doctrine has been applied since 1940, in different forms by different district courts, however its scope was specified by the U.S. Supreme Court in 1988 in *Boyle v. United Technologies* (*Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988)). Part of its rationale derives from the same concerns underlying the political question doctrine, which as well has been invoked to grant immunity to private contractors. Attempts have been made at expanding the scope of the GCD linking it to the "combat activities exception".

⁷⁷ For a general overview, see E.Lauterpacht (ed.), *Individual Rights and the State*, in *Foreign Affairs, An International Compendium*, London/New York, Collier, 1977. With regard to the United States, see T. M. Franck, *Political Questions/Judicial Answers, Does the Rule of Law apply to Foreign Affairs?*, Princeton, Princeton University Press, 1992; N. Mourtada-Sabbah; B.E.Cain (eds.), *The Political Question Doctrine and the Supreme Court of the United States*, Lanham, Lexington Books, 2007.

by virtue of the political question doctrine. After having carefully reviewed the factors of the Baker test,⁷⁸ the Court reversed the “embarrassment argument” and held that:

“While it is true that the events at Abu Ghraib pose an embarrassment to this country, it is the misconduct alleged and not the litigation surrounding that misconduct that creates the embarrassment. This Court finds that the only potential for embarrassment would be if the Court declined to hear these claims on political questions grounds. Consequently, the Court holds that Plaintiffs' claims pose no political question and are therefore justiciable.”⁷⁹

A short review of existing US case-law indicates that a crucial question in evaluating whether the political question doctrine is applicable to civilian contractors on the battlefield is the specific contractor's relationship to the military and the actual military operation in question. It has been made clear by several courts that the political question doctrine will not bar judicial scrutiny only because there is some kind of nexus between the contractor and the military. More specifically, the court for the Eleventh Circuit ruling in *McMahon v. Presidential Airways* asserted that in order to apply the political question doctrine to private contractors and their companies, the nexus between the contractor and the military must be linked to “core military decisions, including [military] communication, training, and drill procedures.”⁸⁰ In other cases, such as *Ibrahim v. Titan*, the judges made clear that an action for damages against private contractors does not interfere with the conduct of foreign policy or the disposition of military power.⁸¹

In cases where this argument was accepted, the judges relied on the fact that affirming jurisdiction would have required the court to pronounce on questions to be left to the legislative or executive branches, “or that the court would have to substitute its judgment for that of the military, and as such would have evinced a lack of respect for the political branches”⁸² It is interesting to note that the US Government did not make clear its position with respect to the application of the political question doctrine to cases involving PMSCs and made no statement of interest in any of these cases. More specifically, it is not clear whether a private actor, albeit performing functions by virtue of a contract with a Government, may properly raise a political question to bar judicial review of his actions.

⁷⁸ The Baker test has been elaborated by the US Supreme Court in *Baker v. Carr* and thereafter applied as a standard test in cases where the political question is raised by the defendants. These are the elements of the Baker test: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

⁷⁹ *Al Shimari v. CACI*, District Court of Virginia, Order denying in part motion to dismiss by CACI, 18 March 2009, available at <http://ccrjustice.org/files/3.18.09%20Al%20Shimari%20decision.pdf>. *Al-Shimari v. CACI* is a federal lawsuit brought by four Iraqi torture victims against private US-based contractor CACI International Inc., and CACI Premier Technology, Inc. It asserts that CACI participated directly and through a conspiracy in torture and other illegal conduct while it was providing interrogation services at the notorious Abu Ghraib prison in Iraq. After the decision CACI filed a motion for appeal, see the website of the Center for Constitutional Rights at <http://ccrjustice.org/ourcases/current-cases/al-shimari-v.-caci-et-al>.

⁸⁰ *McMahon v. Presidential Airways, Inc.*, Court of Appeals, 11th Circuit, 2007, available on Lexis-Nexis. See see J. Addicott, “Political Question Doctrine and Civil Liability for Contracting Companies on the Battlefield”, *The Review of Litigation*, 2008, pp.343-364.

⁸¹ *Ibrahim v. Titan*, US District Court, District of Columbia, 12 August 2005, available at <http://uniset.ca/other/cs6/391FSupp2d10.html>

⁸² See K. A. Huskey; S. M. Sullivan, “The American Way: Private Military Contractors & U.S. Law After 9/11”, *PRIV-WAR*, National Report Series, 02/08 (December 2008), available at www.priv-war.eu.

From a more general perspective, it may not be excluded that the non-justiciability arguments could emerge with respect to acts performed by contractors before the courts of different countries, as in the US.

However, it seems that several factors should limit the application of the political question doctrine, particularly in cases involving human rights violations. In the first place, the fact that the defendant is not a State actor has not generally been considered as a bar to the application of the doctrine by US Courts, but it could well represent an obstacle before other national courts. In principle, a correct application of this doctrine should be limited to cases potentially involving scrutiny of pivotal political decisions, such as, for example, the decision to participate in a military operation on foreign territory, which pertains to the main State organs, namely Parliament or the Executive. It cannot be applied, by default, to all activities undertaken in the framework of a military operation or in combat or war-like situations, but it should be called in question only when the judiciary run the risk of intruding in crucial political decisions. *A fortiori* it should not be applied to acts performed by private actors whose activities cannot automatically be ascribed to the State only because they have been performed in a war-like situation, for instance, and excluded as such by judicial review.

In particular, it seems very difficult to raise this argument at least with respect to specific situations or specific incidents, such as those that involved US contractors in Abu Ghraib or in the Blackwater incident. If specific acts, even if undertaken in application of governmental directives (which in the case of torture would be very difficult to demonstrate), violates international humanitarian law or infringes fundamental human rights of individuals, they should be subject to judicial review both in cases where they were performed by State actors and, all the more so, in cases where they were carried out by private contractors. As was proposed by a resolution of the *Institut de droit international*, adopted in 1993,⁸³ national courts “when called upon to adjudicate a question related to the exercise of executive power, should not decline competence on the basis of the political nature of the question if such exercise of power is subject to a rule of international law” (Article 2).⁸⁴

In conclusion, it may be suggested that the judiciary be extremely prudent in applying the political question doctrine to claims based on international law violations, which in many cases result as well in violation of fundamental rights granted by the Constitution of various countries. Usually, military operations are not constitutionally left to the discretion of political or military organs and national courts should have the possibility to review Government actions and determine whether they are consistent with customary international rules or, on the contrary, they have exceeded the authority granted to the executive branch by the Constitution or through the Constitution.

A survey of US case-law, as accurately done in the US Report, indicates that a number of other statutory or common law defenses have been raised by private contractors to avoid judicial scrutiny. As already anticipated, it is not the purpose of this paper to dwell in depth on these specific cases, however, it is interesting to make the following remarks.

⁸³ Resolution adopted on 7 September 1993, see 65 (II) *Annuaire de l'Institut de droit international* (1994), 318-323.

The question was addressed in more general terms also in the *Preliminary Report (Rapporteur, Prof. Conforti)*. In reviewing the ‘political question’ doctrine as an obstacle to the application of international law by national judges, the *Rapporteur* underlined the strong need to establish the conditions under which the exception of the ‘political question’ doctrine should be rejected. He indicated precisely two conditions: (i) the existence of a precise and complete international obligation and (ii) the non-existence of an authorization on the part of the legislative branch. See the *Preliminary Report* in 65 (I) *Annuaire de l'Institut de droit international* (1993), pp.327-339. In other words, national judges should not be prevented from reviewing their Government’s action when there is an international obligation to be respected and when the Parliament did not expressly authorized the Government’s conduct.

⁸⁴ The suggestion relating to the role of national judges is reflected in the *Final Report* accompanying the text adopted. It is worth quoting a passage which perfectly suits the matter discussed here: “It was held in the Commission that if it is ‘absurd’ for a court to stop a war, this does not mean that a court cannot grant compensation (...) we think one can reasonably propose that the courts have the power to decide on compensation for damages caused to private persons as a consequence of a war or of a use of force contrary to international law. For the *Final Report*, see 65 (II) *Annuaire*, cit., p. 437.

In the first place, many of these defences were crafted to protect the exercise of governmental functions and should be narrowly interpreted: the guiding criterion should be that immunity may be applied to the behaviour of a state official or a private contractors only if he/she acted within the scope of its mandate. In addition, to strike a proper balance between the protection of political and military interests and the right of victims to seek compensation and redress, PMSCs and their employees should be “immunized” only when the judiciary risks interfere in crucial political and military decisions and only in cases where private actors acted under complete supervisions and control of the military or of a governmental department.

In particular, it seems that there should be no bar on judicial review when international human rights law violations occur, since the governments themselves are bound to ensure respect for these rules and shall foster a culture of accountability for their officials and for private contractors they have decided to hire.