Chapter Three: A Legal Framework for Regulating Contractors

Introduction

In the new world of privatized violence, an essential set of questions arises: What law regulates private contractors hired to perform military and security functions? Might international or domestic laws simply prohibit states from hiring private soldiers? Alternatively, assuming states do privatize, what laws exist to hold these actors in check? And finally, what accountability mechanisms can be used to enforce these laws, and how effective are they? This Chapter answers these questions in ways that may be surprising to some. Contrary to the claim often made that private military contractors inhabit a virtual regulatory void, I will argue that they are in fact subject to a broad legal and regulatory framework that seeks to control their behavior.

To be sure, international law does not forbid the use of such contractors, at least in most circumstances. Protocol I to the Geneva Conventions, drafted in the 1970s, does seek to punish mercenaries somewhat, by denying them prisoner-of-war status. But even this Protocol defines mercenaries narrowly and elsewhere both extends protections to indigenous guerillas and preserves the rights of foreign military forces fighting on their behalf—clearly reflecting post-colonial debate and biases regarding the use of mercenaries in struggles for liberation.

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2 For a detailed survey of international and regional instruments concerning mercenaries, see Laura A. Dickinson, (in Bassiouni).
4 Protocol I defines mercenary as a person who:
   - is specially recruited locally or abroad in order to fight in an armed conflict;
   - does, in fact, take direct part in hostilities;
   - is motivated to take part in hostilities essentially by the desire for private gain, and in fact, is promised by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
   - is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
   - is not a member of the armed forces of a Party to the conflict; and has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Id. These elements, in particular the motive requirement and the requirement that mercenaries must receive “compensation substantially in excess” of uniformed personnel, are difficult to prove, a point not lost on the U.S. representative at the diplomatic conference, who noted how easy it would be for any party to a conflict to avoid the impact of the Protocol. See Todd S. Milliard, Overcoming Post-Colonial Myopia: A Call To Recognize and Regulate Private Military Companies, 176 Mil. L. Rev. 1, 41-42 (2003).
The International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (drafted between 1980 and 1989) goes further because it imposes criminal liability on four categories of mercenaries: (1) anyone who “recruits, uses, finances, or trains mercenaries”; (2) a mercenary “who participates directly in hostilities or in a concerted act of violence”; (3) anyone who attempts to commit the offenses listed in (1) or (2); (4) accomplices. In addition, it imposes responsibilities on states not to “recruit, use, finance or train mercenaries.” Thus, the treaty seeks to impose an affirmative duty on states to prohibit, and perhaps prevent, mercenarism.

Nevertheless, the Mercenary Convention, like the Protocol, defines mercenary narrowly, requiring, for example, proof that the contractor was motivated by financial, rather than ideological, gain. Moreover, it is significant that, even with such limitations, the treaty took quite some time (until 2001) to enter into force—when Costa Rica became the twenty-second state to ratify it—and it still does not enjoy particularly widespread support. Likewise, though some countries, such as South Africa, forbid the use of military contractors as a matter of domestic law, such provisions are not common. And, of course, none of these provisions—international or domestic—would bar the use of contractors in the foreign aid context.

Although states are therefore unlikely to be barred from privatizing altogether, international humanitarian and human rights law, as well as domestic criminal and tort law, do place important limitations on contractors. And while this regulatory framework is more of an uneven latticework than a solid wall, I argue that the architecture is there, and it can potentially be used more aggressively in the future to better deter, punish, and compensate abuses. On the criminal side, the problem is not so much an absence of applicable law, but rather whether sufficient political will can be mobilized to actually enforce the laws that exist. On the civil side, although some important threshold questions remain unresolved, contractors may in fact be more subject to accountability through the tort system than are comparable governmental actors.

This Chapter is divided into three parts. Part One discusses the general international humanitarian and human rights law governing the use of force and prohibiting serious human rights abuses, and addresses the extent to which this law applies to private military contractors and can therefore be used to place limits on their behavior. Part Two surveys domestic law potentially applicable to private military contractors, focusing primarily on the United States. Part Three then analyzes how useful this international and

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6 Id. at art. 4.
7 Id. at art. 5.
8 The Convention defines a mercenary as anyone who:
   Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
   overthrowing a government or otherwise undermining the constitutional order of a State; or
   Undermining the territorial integrity of a State;
   Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
   Is neither a national nor a resident of the State against which such an act is directed
   Has not been sent by a state on official duty; and is not a member of the armed forces of the State on whose territory the act is undertaken.
   Id. at Art. 1(2).
domestic legal framework is actually likely to be in holding private actors to account. Using the contractor abuse story from Abu Ghraib as an example, I discuss the various possible means of subjecting these contractors to criminal or civil actions. I conclude that, although international criminal prosecution is unlikely, the legal framework for domestic criminal prosecution is in place if U.S. government officials are willing to use it. Moreover, domestic tort suits are a very real possibility. Thus, while the mechanisms of legal accountability over contractors could certainly be improved, we should not leap to the conclusion that the mere fact of privatization eviscerates all legal oversight. To the contrary, as we will see with regard to civil suits under ordinary domestic tort law, legal actions against contractors may sometimes have greater chances of success than similar suits against government or military actors.

I. General International Humanitarian and Human Rights Law Applied to Mercenaries

Despite the loopholes in the various treaties that seek to forbid (or criminalize) mercenarism outright, other bodies of international law do regulate the activities of private military companies and their employees. Specifically, international humanitarian law—which protects civilians during armed conflict and sets limits on the permissible use of force—and international human rights law—which protects the rights of individuals from certain serious abuses—both constrain mercenary activity in some circumstances. And though these bodies of law admittedly have gaps and uncertainties in their application to private military contractors, they do provide mechanisms for potentially reining in some of the worst abuses private contractors might commit.

A. International Humanitarian Law

International humanitarian law arguably restricts non-state actors as well as uniformed military personnel from committing atrocities, though the precise reach of this body of law over private military companies and their employees is unsettled. The most significant humanitarian law treaty regime, the four Geneva Conventions negotiated shortly after World War II\(^9\) and the two Additional Protocols,\(^10\) outlaws and criminalizes certain categories of abuse. More specifically, Common Article 3, a provision identical in each treaty, criminalizes numerous acts, whether committed in international or internal armed conflict,\(^11\) and provides that “all parties to the conflict” are bound to refrain from such

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acts. The provision thus clearly applies to non-state actors, which is not surprising given that the drafters of the provision constructed it with non-state guerrilla movements in mind. Moreover, Additional Protocol II explicitly applies to armed conflicts that “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Accordingly, non-state actors during internal armed conflict are clearly governed by this Protocol, at the very least.

Courts have also held that non-state actors may be held criminally and civilly accountable for committing war crimes. For example, in the proceedings at Nuremberg following World War II, the tribunal convicted several corporate managers for such crimes. The International Criminal Tribunal for the Former Yugoslavia has said in dicta that there is no “state action” requirement for war crimes, including torture, even though international human rights law defines torture as actions committed only by “official” actors. And in a civil suit brought against self-proclaimed Bosnian-Serb leader Radovan

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11 See, e.g., Geneva Convention I, art. 3 (“(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”).
12 Id. The list of crimes in common article 3, applicable to internal armed conflict, is shorter than those prohibited in international armed conflict, termed “grave breaches,” in each of the four conventions. See, e.g., Geneva Convention I, art. 50 (“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”); Geneva Convention II, art. 51 (same language as Geneva Convention I); Geneva Convention III, art. 130 (“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.”); Geneva Convention IV, art. 147 (“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”)
14 Protocol II, at art. 1.
15 Id. at art. 4; see also Junod, supra note 13.
Karadzic in U.S. court under the Alien Tort Statute,\textsuperscript{18} the court allowed the war crimes claim (among others) to proceed without requiring plaintiffs to show that Karadzic was a state actor, concluding that “private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law.”\textsuperscript{19}

Two other crimes that stand at the intersection of international humanitarian and human rights law, genocide and crimes against humanity, even more clearly apply to non-state actors. The Genocide Convention\textsuperscript{20} provides that “[p]ersons committing genocide ... shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”\textsuperscript{21} Likewise, the statute of the International Criminal Court designates certain acts as crimes against humanity so long as they are committed as part of a “widespread or systematic attack directed against any civilian population, with knowledge of the attack.”\textsuperscript{22} This provision therefore contains no “state action” requirement. Moreover, the statute elsewhere defines “attack” as a series of acts “pursuant to or in furtherance of a State or organizational policy.”\textsuperscript{23} Accordingly, as long as a non-state actor such as private military contractors are following some type of organizational policy, international law would prohibit them from committing a crime against humanity.

International humanitarian law thus exerts some control over private military contractors, at least as a formal matter. Moreover, even if a particular crime were interpreted not to apply to non-state actors directly, private military contractors might still face criminal liability if they were deemed sufficiently intertwined with the state so as to be considered governmental actors. On the other hand, it is less clear whether international humanitarian law could be used against the corporate entity as a whole, as opposed to individual employees.\textsuperscript{24}

\textbf{B. International Human Rights Law}

International human rights law also constrains private military contractors, though its effective reach in this context is perhaps more unsettled than that of international humanitarian law. This is because much of international human rights law contains “state

\textsuperscript{18} 28 U.S.C. 1350.
\textsuperscript{19} \textit{Kadic v. Karadzic}, 70 F.3d 232, 239-40, 243 (2d Cir. 1995).
\textsuperscript{20} The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, \textit{entered into force} Jan. 12, 1951, \textit{for the United States} Feb. 23, 1989 (hereinafter “Genocide Convention”). The convention defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births with the group;
(e) Forcibly transferring children of the group to another group.
\textit{Id.} at art. 2.
\textsuperscript{21} \textit{Id.} art. 4 (emphasis added).
\textsuperscript{23} \textit{Id.} (emphasis added).
action” requirements that ostensibly limit liability for abuses to state actors. For example, although the Torture Convention broadly defines torture as “intentionally inflicted” acts of “severe pain or suffering” for the purpose of obtaining information from, punishing, intimidating, or discriminating against the victim or third person,\textsuperscript{25} such acts must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”\textsuperscript{26} Similarly, many of the rights defined in the International Covenant on Civil and Political Rights (ICCPR)—such as the right to be free from summary execution,\textsuperscript{27} and to be imprisoned without charges\textsuperscript{28}—are generally conceived as rights only against misconduct by official governmental actors.

To be sure, states themselves may sometimes be deemed responsible for abuses committed by non-state actors, if those actors are sufficiently linked to the state. The ICCPR, for example, imposes obligations on states not only to “respect” but also to “ensure” the protection of human rights.\textsuperscript{29} Regional human rights treaties contain similar terms,\textsuperscript{30} which tribunals have interpreted to hold states liable for the actions of death squads and armed militias that are not technically state actors.\textsuperscript{31} Likewise, courts and tribunals have at times held states liable for the actions of companies that were effectively controlled by those states.\textsuperscript{32} The U.N.’s recent Draft Articles on Responsibility of States for Internationally Wrongful Acts aims to make these principles clear, asserting that the

\textsuperscript{25} Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85, 113-14 [hereinafter Torture Convention]. The complete definition of torture reads as follows:

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

\textit{Id.}

\textsuperscript{26} Id.

\textsuperscript{27} International Covenant on Civil and Political Rights, art. 7. The language of article 7(1) does not, it is true, refer specifically to governmental misconduct alone: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” Id. Yet because the treaty as a whole imposes obligations on states, id. at art. 2, commentators and courts have generally interpreted this provision as a protection against state execution without trial, rather than a general prohibition of murder by private parties. \textit{See, e.g., Kadie v. Karadzic, 70 F.3d 232, 243 (2d Cir. 1995) (“[S]ummary execution—when not perpetrated in the course of genocide or war crimes—[is] proscribed by international law only when committed by state officials or under color of law.”)}.

\textsuperscript{28} \textit{Id.} at art. 9.

\textsuperscript{29} ICCPR, supra note 27, at art. 2.

\textsuperscript{30} \textit{See, e.g.,} American Convention, art. 1 (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms.”) (emphasis added).

\textsuperscript{31} \textit{See} The Inter-American Court of Human Rights, Velasquez Rodriguez Case, Judgment of 29 July 1988.

\textsuperscript{32} \textit{See} McKesson Corp. v. Islamic Republic of Iran, 52 F.3d 346, 351-52 (D.C. Cir. 1995) (holding Iran responsible for corporation over which it exercised control); Foremost Tehran, Inc. v. Islamic Republic of Iran, 10 Iran-U.S. Cl. Trib. Rep. 228, 241-42 (1987) (holding the same); Maffezini v. Kingdom of Spain (Rectification and Award), ICSID Case No. ARB/97/7 (Nov. 13, 2000, Jan. 31, 2001) (translation in English) (holding Spain responsible for the acts of its state entity); \textit{Case Concerning Barcelona Traction, Light & Power Co. Ltd. (Belg. v. Spain)} (Second Phase), 1970 I.C.J. 4, 39, P 58 (Feb. 5) (“[V]eil lifting . . . is admissible to play . . . a role in international law.”).
“conduct of any State organ shall be considered an act of that State under international law,” and that a person’s conduct shall be attributed to the state if he or she is acting on the state’s instructions or under the state’s direction.33

At the same time, courts and tribunals have permitted cases to proceed against non-state actors under various theories that link those actors to the state, such as conspiracy or aiding and abetting.34 Indeed, some U.S. courts, in considering violations of international law brought under the Alien Tort Statute (ATS), have appeared to construe the state action requirements in international human rights law in a broader way than they would in considering claims of domestic constitutional rights that also have a state action requirement.35 These cases are perhaps only suggestive, as many of the decisions are unpublished and some of the suits have ultimately been settled out of court. Yet the discrepancy is particularly striking because, although these U.S. courts have used the U.S. constitutional test for measuring state action in the international law context, they seem to be applying that test in a way that is more likely to result in a finding of state action.

For example, in *Abdullahi v. Pfizer* Nigerian citizens brought an ATS suit against the pharmaceutical company Pfizer for using a new antibiotic drug Trovan to treat Nigerian children suffering from meningitis and other diseases.36 They alleged that Pfizer was essentially using Nigerian children (many of whom died) as subjects to test the drug’s effectiveness, and that these actions violated various provisions of the ICCPR.37 Although the court ultimately granted the defendants’ motion to dismiss on other grounds, the judge did conclude, in an unpublished decision, that plaintiffs had made sufficient allegations of state action.38 Specifically, the court applied the test from domestic constitutional jurisprudence that private activity can become actionable misconduct when the government “has so far insinuated itself into a position of interdependence with [the private actor] that

33 See, e.g., Draft Articles on Responsibility of States for Internationally Wrongful Acts, arts. 4, 8, in Int’l Law Comm’n, Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001) (stating that the “conduct of any State organ shall be considered an act of that State under international law,” and that a person’s conduct shall be attributed to the state if he or she is acting on the state’s instructions or under the state’s direction); see also, e.g., Jordan J. Paust, Human Rights Responsibilities of Private Corporations, 35 Vand. J. Transnat’l L. 801 (2002).

34 See, e.g., Doe I v. Unocal, 395 F.3d 932, 936 (9th Cir. 2002). Although the case ultimately settled out of court, the lawsuit is instructive. A group of Burmese citizens brought a class action under the Alien Tort Claims Act, 28 U.S.C. 1350 [hereinafter “ATS”] against U.S. and French corporations that built a pipeline in Burma. The ATS confers jurisdiction on the federal courts to consider “torts in violation of the law of nations” brought by non-citizens. 28 U.S.C. § 1350. Plaintiffs alleged that the military forces committed multiple violations of international human rights through their conduct including murder, rape, torture, and forced labor. *Unocal, supra*, at 936. The court concluded that the private corporations could be sued under a joint action approach if they were found to be willful participants in joint action with a state actor or its agents, here the Burmese military. In particular, there was “some evidence that Unocal could influence the army not to commit human rights violations, that the army might otherwise commit such violations, and that Unocal knew this.” In reaching this decision, the court found the standard for aiding and abetting under the circumstances to be “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.” Id. at 947.


36 *Abdullahi, supra* note 35, at *1-*3.

37 Id.

38 Id. at *5-*6.
[they] must be recognized as joint participant[s] in the challenged activity.” The court then reasoned that the Nigerian government constituted such a joint participant (assuming the complaint’s allegations were true) because it allegedly sent a letter to the FDA requesting that the agency authorize Trovan’s export, arranged for Pfizer’s accommodation in a Nigerian hospital, back-dated an approval letter to the U.S. government, and silenced Nigerian physicians critical of the test. This degree of government involvement would arguably fall short of state action in a domestic constitutional case applying the very same test. Indeed, in contrast to Abdullahi, the U.S. Supreme Court has held, in American Manufacturers Mutual Insurance Co. v. Sullivan, that the government entity must actually participate in the “specific conduct” in question for state action to be found. Knowledge of the activities and background assistance of the sort deemed sufficient in Abdullahi therefore appears to be insufficient to support a finding of state action in the domestic context.

In another decision from within the Second Circuit, also unpublished, the Southern District of New York permitted ATS claims to proceed against Shell Oil Co. and individual defendants alleging that Shell had instigated and supported a Nigerian government campaign of repression against the Nigeria’s Ogoni people. The Ogoni were protesting Shell’s activities in Nigeria. Plaintiffs’ complaint contained allegations of numerous international human rights violations, including torture, cruel, inhuman and degrading treatment, summary arrest and arbitrary detention, and interference with the right of peaceful protest, all of which the court concluded were claims that required a showing of state action. Unlike Abdullahi, the involvement of the Nigerian government was not in question, as the complaint alleged that Nigerian officials had directly tortured, attacked, and killed plaintiffs. Rather, the issue was whether Shell and its employees were sufficiently involved in the Nigerian government’s actions. Applying the state action test from U.S. constitutional law, the court explicitly rejected an interpretation of Sullivan that would have required actual corporate knowledge of, or participation in, each instance of abuse. Of course, these are both unpublished decisions, so U.S. courts’ approach to the state action doctrine in ATS cases is far from clear.

More broadly, the substantive scope of the ATS itself is in doubt. In 2004 the U.S. Supreme Court narrowed (though it did not eliminate) the types of international human rights violations that may be subject to suit under the ATS. In the wake of that decision, one district court recently dismissed torture claims against private contractors on the

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39 Id. at *5 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)). The court also cited Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (requiring a nexus “sufficiently close” so that the state’s exercise of “coercive power” or providing of “significant encouragement, either overt or covert” necessitates that the private actor’s choice “must in law be deemed to be that of the State”).

40 Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50-55 (1999) (concluding that that private insurance companies providing workers’ compensation benefits were not state actors even though the government created and closely regulated the workers’ compensation system and authorized benefits refusals prior to a hearing, because the government did not otherwise participate in the private insurers’ refusals to pay benefits).

41 Wiwa, supra note 35.

42 Id. at *1-2.

43 Id. at *1-2, *6.

44 Id. at *14 & n.15.

ground that the scope of the ATS only applies to “official” torture.\footnote{Ibrahim, 391 F. Supp.2d at 13-15.} Moreover, in a bizarre sort of “Catch-22,” the court ruled that, if the plaintiffs could show that the contractors were sufficiently tied to the state so as to render the actions “official,” the ATS claims would again be barred because then the suit would be tantamount to suing the government itself, thereby violating sovereign immunity. This reasoning will undoubtedly be tested in the future. After all, there is no reason to believe that the ATS state action inquiry and the sovereign immunity determination must necessarily be tied together in this manner. Indeed, just because a contractor is sufficiently linked to the government to overcome state action requirements does not necessarily transform the suit into one against the government itself. Thus, it is difficult to see why sovereign immunity is applicable. Finally, even if this reasoning is ultimately followed by other courts, it would not, in any event, bar claims based on other international law provisions, domestic statutes, or common law torts that do not require state action.

C. Domestic Law

In addition to international law constraints, domestic law also can impose obligations on private military contractors. Contractors are potentially subject both to the law of the country in which they are operating and the law of their home state. However, because contractors are often deployed to unstable regions, such as Iraq or the Balkans, the local law will often be unsettled, and local prosecutors or courts will likely be unable or unwilling to pursue either criminal or civil actions.\footnote{See Coalition Provisional Authority, Order 17, Status of the Coalition Provisional Authority, MNF, Certain Missions and Personnel in Iraq, § 2, http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf (“Unless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.”). In any event, the ability of Iraqi courts to function as a real check on abuses, even assuming they have jurisdiction, is also in question. See e.g., Robert F. Worth, 2 from Tribunal for Hussein Case Are Assassinated, N.Y. TIMES, Mar. 2, 2005, at A1.} Thus, as a practical matter the only viable form of domestic law enforcement is likely to be in the home country of the contractor firm or employee. Accordingly, because many (though by no means all) military contractor firms are U.S.-based, I will analyze the possibilities for criminal and civil suits in the United States, while recognizing that a complete picture would require analysis of the legal regimes of other countries as well.

1. Criminal Law

Contractors employed by the U.S. government may be subject to federal criminal law. Although the U.S. Supreme Court has historically prohibited military trials of U.S. civilians absent a declaration of war, contractors could be prosecuted in federal courts under the Military Extraterritorial Jurisdiction Act (MEJA).\footnote{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 noncapital offenses); Reid v. Covert, 354 U.S. 1, 40-41 (1957) (holding that civilians in time of peace are not triable by court-martial for capital offenses).} Indeed, Congress enacted

MEJA precisely because U.S. military courts were not an option for private actors, and the law specifically allows criminal charges to be brought against U.S. contractors working for the Defense Department. On the other hand, the statute does not apply to the many contractors who operate under agreements with other government entities, such as the CIA or the Department of Interior. The USA PATRIOT Act, however, closes this loophole to some extent by expanding the United States’ special maritime and territorial jurisdiction (SMTJ) to include any facilities run by the United States overseas. Thus, a prosecutor could bring charges against private military contractors mistreating detainees or others overseas if the abuse was committed within a U.S. facility. Indeed, a federal court recently convicted a private contractor working for the CIA for felony assault committed within the SMTJ, based on allegations that he abused detainees at a U.S. facility in Afghanistan. Finally, prosecutions are also possible under federal statutes that criminalize war crimes and extraterritorial torture, though these statutes require a sufficient nexus to state action.

Nevertheless, although there appear to be sufficient legal mechanisms for holding contractors criminally liable for abuses, the actual feasibility of criminal accountability is not a matter of law on the books, but rather law in action. This is because the same executive branch that may have authorized actions leading to abuse in the first place is then responsible for pursuing prosecutions. For example, stories abound that many case files concerning contractor abuses that occurred during the administration of George W. Bush are currently languishing in the US Attorneys’ Office for the Eastern District of Virginia because there is, not surprisingly, no political will within the Bush Justice Department to pursue the cases.

Overcoming this lack of political will is not easy. One possibility is to establish an independent office within the Justice Department to prosecute contractor abuse cases. The actual autonomy of even such a nominally independent office would always be precarious of course, particularly given that the Justice Department resides within the Executive Branch. Nevertheless, establishing such an office might be at least a step in the right direction. This Office could also be required to report regularly to Congress about its efforts, or lack thereof.

50 Id.
51 Indeed, some commentators have argued that the Administration has exploited this loophole by assigning tasks to contractors under agreements with agencies other than the Defense Department. See, e.g., Cherif Bassiouni, *Torture and the War on Terror: The Institutionalization of Torture under the Bush Administration*, 37 CASE W. RES. J. INT’L L. 389, 411-416 (2006).
52 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”). Some commentators have suggested that Congress enacted this provision in order to allow for simpler prosecutions of terrorist suspects accused of attacking U.S. installations overseas. See, e.g., John Sifton, *United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps*, 43 HARVARD J. LEGIS. 488, 506 (2006).
55 18 U.S.C. § 2340A. Ironically, the statutory amendments that expand the SMTJ to allow for a greater range of prosecution of domestic crimes committed overseas arguably limit the scope of torture prosecutions because such overseas abuse is no longer “extraterritorial.” See Bassiouni, *supra* note 51, at 411-16.
Another avenue is for the military to begin to pursue contractor cases under the United States Code of Military Justice (UCMJ). Congress recently amended the UCMJ to bring 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.” Senator Lindsay Graham quietly slipped the provision into the 2007 Defense Appropriations Authorization Act in order to impose the same standards on both contractors and troops and thereby provide “uniformity [with regard to] the commander’s ability to control the behavior of people representing our country.”

To be sure, this provision raises serious constitutional concerns because the U.S. Supreme Court, in a series of cases from the 1950s and 1960s, struck down a similar UCMJ provision purporting to confer military jurisdiction over civilians overseas. These decisions, however, did not squarely address the constitutionality of asserting military authority specifically over contractors serving with or accompanying armed forces in the field. Moreover, the current Supreme Court may be more likely to allow limited use of military jurisdiction for civilian contractors than in decades past, because the military justice system itself has been reformed during the intervening years and now more strongly resembles the regime applied in civilian federal courts, particularly with regard to the rights of the accused.

Assuming this new UCMJ provision withstands constitutional scrutiny, it might help rein in contractors by potentially subjecting them to court-martial both for crimes that would be prohibited under ordinary federal criminal law—such as murder and assault—and for malfeasance specific to the armed services, such as the failure to obey military commands. The provision thus could effectively bring contractors within military commanders’ authority, rather than leave them to the separate control of their contracting officers, as has been the practice. Under the previous framework, for example, a military commander could not order a security detail employee to hold his fire on civilians, but rather had to await contract officer approval. As few contract officerstravel to Iraq, let alone accompany the security employees on dangerous missions, such an arrangement is hardly ideal.

To be sure, even apart from the constitutional concerns, UCMJ jurisdiction poses some difficulties. One problem is that military courts could end up deciding cases involving the many foreign employees of security contractors working for the U.S. government. The Bush administration has not hesitated to subject non-citizen terrorism suspects to military courts, even ones that curtail the rights of the accused to a much greater extent.

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58 Jan. Wash. Post article.
59 Reid v. Covert, 354 U.S. 1 (1957) (holding unconstitutional the UCMJ’s provisions extending military court jurisdiction to civilian dependants during peacetime). Toth v. Quarles, 349 U.S. 949, (1955) (holding unconstitutional court-martial jurisdiction over a former service member for crimes committed while on active duty); Grisham v Hagan, 361 U.S. 278 (1960) (holding that civilian employees of the armed forces are not generally subject to UCMJ jurisdiction while overseas).
60 See, e.g., United States v. Scheffer, 523 U.S. 303 (1998). Indeed, in recent terrorism cases, the Court has cited the military justice system provided in the UCMJ favorably, in contrast to military commissions established to try terrorism suspects. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, No. 05-184 (2006).
But other countries may protest the imposition of military justice on their citizens, particularly when those citizens are not accused of terrorism. Additional challenges stem from the sometimes Byzantine nature of the military command structure. In certain instances, it may prove unjust to subject unschooled civilians to this authority. And of course the military is subject to political control from the executive branch, just as is the Department of Justice. In any event, the military has not yet attempted to exercise its new statutory authority to assert UCMJ jurisdiction over contractors, so only time will tell both whether the provision is deemed constitutional by the courts and, if so, whether it is ultimately effective in constraining contractor abuse.

2. Tort Law

Tort suits, brought by foreign or domestic victims of contractor abuse and alleging claims under the tort law of the contractors’ homestead are also a possibility. These suits may take a number of different forms. First, foreign victims of contractor activities may file suit, assuming domestic law provides them standing. Second, we may see suits brought by contractor employees against their employers. For example, one still-pending wrongful death action arises from the [infamous] murder and mutilation of four Blackwater employees in Fallujah, Iraq, and another alleges that Halliburton knowingly used one convoy as a decoy for a second, resulting in the deaths of at least six drivers, and injuries to eleven others. Third, domestic actors harmed by private contractors abroad may seek redress, as in the variety of wrongful death actions that have been brought by U.S. military personnel killed in accidents involving airplane and trucks driven by contractors.

Nevertheless, all three types of suits must potentially surmount two threshold obstacles. First, courts may refuse to hear such suits by invoking the political question doctrine. Yet, although courts have in fact dismissed suits against contractors on this ground, it may well be an inappropriate use of the political question idea. After all, the doctrine is only meant to exclude from judicial review “those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.” As one court held in refusing to dismiss a case against a contractor on political question grounds, “...
militaristic activities are within the province of the Executive... Tort suits are within the province of the judiciary, and that conclusion is not automatically negated simply because the claim arises in a military context, or because it bears tangentially on the powers of the executive and legislative branches." Thus, the political question doctrine seems to be a dubious rationale for dismissing tort suits against contractors.

A second obstacle is the doctrine of contractor immunity, which bars some suits against government contractors who commit torts. The precise scope of the contractor immunity doctrine, however, remains unresolved. At least one court has held that contractors can never invoke immunity to shield themselves from human rights claims. In addition, a plausible argument can be made that the doctrine only applies to procurement contracts for weapons and other materials, not to services contracts where the contractor exercises far more discretion.

Significantly, if these two procedural obstacles can be overcome, then contractors committing abuses are actually more amenable to civil suit than similarly situated government actors, whose claims to immunity are far stronger. Thus, the use of domestic tort claims to vindicate values of international human rights and humanitarian law appears to be an under-explored mechanism for holding contractors accountable.

C. **Holding Employees of CACI and Titan Accountable for Abuses at Abu Ghraib**

Of course, it is not enough to have norms in place that prohibit abuses by military contractors; there must also be adequate mechanisms for enforcement. Accordingly, I return to the story of prisoner abuse at Abu Ghraib recounted at the outset. By surveying the various possible avenues by which CACI and Titan employees may be held accountable for their role in the abuse, we will get a better sense not only of which legal regimes are applicable in theory, but also what the actual likelihood of accountability is in practice.

Perhaps the most obvious potential enforcement mechanism is direct criminal liability under international law. However, international criminal tribunals will probably never be able to handle more than a handful of the most egregious cases. Moreover, in many instances, there will simply be no realistic forum for imposing either civil or criminal liability on a private contractor (or even a government actor, for that matter) based on violations of international law.

For example, despite the magnitude of the violations committed at Abu Ghraib, there are few, if any, international, Iraqi, or transnational venues in which private contractors could be held criminally or civilly liable under international law. The International Criminal Court has no jurisdiction over Iraq. And, even if it did, under the

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73 For an interesting discussion of this issue, see Torture as Tort, Comparative Perspectives on the Development of Transnational Human Rights Litigation (Craig Scott ed., 2001).
74 Unless the Security Council authorizes a case to proceed, the ICC may exercise jurisdiction only when either the state in which the alleged crime occurred or the state of the nationality of the accused has consented to jurisdiction. ICC Statute, supra note 98, at art. 12(2). Neither the United States nor Iraq has
complementarity principle any domestic investigation or prosecution would defeat jurisdiction.\textsuperscript{75} No other international criminal tribunal has jurisdiction, either. Iraq could theoretically bring a complaint against the United States before the Human Rights Committee, the treaty monitoring body charged with monitoring implementation of the International Covenant on Civil and Political Rights.\textsuperscript{76} State-to-state complaints in such a venue are extraordinarily rare,\textsuperscript{77} however, and it seems unlikely that, given Iraq’s continuing dependence on U.S. support and aid, the Iraqi government would risk souring that relationship by bringing such a complaint at any point in the near future. A suit in the International Court of Justice, while conceivable, is unlikely for the same reason. With regard to Iraqi courts, although criminal or civil proceedings could theoretically be brought locally, the U.S. Coalition Provisional Authority granted immunity to U.S. and other foreign actors in Iraq.\textsuperscript{78} It is, of course, an open question whether such an immunity provision can effectively shield individuals from accusations of gross human rights violations. Regardless, the Iraqi legal system is not in any condition to consider such cases.

Finally, the prospects of a transnational suit in a third-party state are also slim. For example, though a group of Abu Ghraib victims filed an action for war crimes in Germany under that country’s universal jurisdiction statute,\textsuperscript{79} the statute requires approval from the chief German prosecutor before jurisdiction can be exercised, and the prosecutor declined to move forward with the case,\textsuperscript{80} most likely because of its politically sensitive nature.

Thus, we must turn to domestic venues for legal accountability. To begin with, the CACI and Titan employees could be criminally prosecuted in U.S. courts for violating international law norms that have been incorporated into U.S. law. Indeed, the domestic statutes criminalizing war crimes and torture are almost certainly applicable, given that a sufficient nexus to state action is not difficult to establish in the Abu Ghraib case. In addition, contractors are subject to prosecution for committing ordinary domestic crimes abroad. Thus, because Abu Ghraib was a U.S. facility, crimes such as assault, battery, or murder would be within the SMTJ.

However, the prosecution of military contractors under these provisions is unlikely because such cases would need to be brought by the same executive branch that authorized consented to jurisdiction. See Rome Statute Ratification Status, http://www.un.org/law/icc/statute/romefra.htm (last visited Sept. 20, 2005).

\textsuperscript{75} Under the complementarity regime, the ICC may not consider a case if a state with jurisdiction is investigating or prosecuting the case, unless that state is “unwilling or unable genuinely to carry out the investigation or prosecution.” ICC Statute, at art. 17.


\textsuperscript{77} See International Human Rights in Context 776 (Henry J. Steiner & Philip Alston eds., 2d ed. 2000) (noting that no interstate complaint has ever been brought under any of the UN treaty-body procedures).

\textsuperscript{78} See Coalition Provisional Authority, Order 17, Status of the Coalition Provisional Authority, MNF, Certain Missions and Personnel in Iraq § 2, http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with Annex_A.pdf (last visited Sept. 20, 2005) (“Unless provided otherwise herein, the MNF, the CPA, Foreign Liaison Missions, their Personnel, property, funds and assets, and all International Consultants shall be immune from Iraqi legal process.”).


the activities of these contractors in the first place. For example, because the Bush administration has been reluctant even to characterize abuses committed at Abu Ghraib as torture or war crimes, it has, not surprisingly, been reluctant to initiate prosecutions of contractors implicated in the abuse. And, as noted above, though numerous case files concerning abuse at Abu Ghraib have been opened, there appears to be no political will in the Bush Justice Department actually to pursue any such cases. It is, of course, possible that Congressional pressure may yet prompt some prosecutions, and the military might also now be able to try contractors who committed abuses (assuming such military jurisdiction over private contractors is ultimately deemed constitutional), but these possibilities so far remain unrealized.

As to domestic tort suits against CACI and Titan employees, the big question will be whether plaintiffs can overcome the threshold obstacles of sovereign immunity (for ATS claims), the political question doctrine, and contractor immunity. In the one published opinion to be issued so far in a civil suit arising from the Abu Ghraib incidents, the District Court for the District of Columbia specifically preserved the plaintiffs’ claims under domestic tort law, even as it dismissed the international law claims brought under the ATS on sovereign immunity grounds. Thus, civil suits relying on ordinary domestic tort law may ultimately be the most viable avenue to accountability. And, as discussed previously, such suits may actually be more viable than similar suits against government employees, who are protected by more robust immunity doctrines.

In the end, though the prospects are far from perfect, the potential for holding contractors legally accountable is more realistic than one might at first expect. Although international criminal accountability is unlikely, there are clear legal mechanisms for pursuing criminal actions in U.S. domestic courts, assuming there were political will to pursue prosecutions. In addition, if plaintiffs can defeat dubious applications of the political question and contractor immunity doctrines, then civil tort suits are also a viable alternative, and one that is not usually available against government actors who commit similar torts. Thus, although the avenues for legal accountability could certainly be improved, we should not assume that contractors necessarily inhabit a regulatory void where traditional legal mechanisms of accountability cannot reach.