

Outsourcing responsibility for torture:

Ending Impunity for PMSCs and their employees in the U.S.

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Abstract: The scenario where a Private Military Security Contractor (PMSC), who is hired by the U.S. government, tortures abroad forms the outset of this thesis. This scenario happened before, in Abu Ghraib (Iraq) and resulted in a general absence of any litigation of the perpetrators before either U.S. or Iraqi courts. How can the impunity PMSCs and their employees enjoy in the U.S. be decreased? This human rights-focused research on the basis of sketched scenario is therefore structured around the unacceptable impunity for torture. It investigates which international human rights legislation is applicable and how it should pose obligations upon PMSCs with specific attention to the value and enforceability of the prohibition of torture. This thesis focuses on who is responsible and to what extent, in particular how redress can be obtained by the tortured victim before U.S. courts. In fighting this impunity, U.S. jurisprudence concerning the torture cases that took place in Iraq will thoroughly be analysed. This finally results in propositions of a double dualistic regulatory framework for PMSCs in prohibiting and preventing the crime of torture.

Keywords: Private Military Security Companies, prohibition of torture, Abu Ghraib, Human Rights, United States of America, globalisation, redress, *Al Shimari v CACI*, *Kiobel*, immunity, extraterritoriality

I. Introduction

In this Thesis the scenario where a private military contractor as employee of an U.S. Private Military & Security Company (PMSC) conducts acts of torture abroad, is taken as outset. In the aftermath of Abu Ghraib, the Report of Major General Taguba stated that employees of PMSCs contracted by the U.S. “were either directly or indirectly responsible for the abuse at Abu Ghraib.”¹ The inconsistent jurisprudence around their accountability is a highly debated and topical issue in the U.S., shown by *Al Shimari v CACI*, which is a recently decided lawsuit before the Fourth Circuit Court of Appeals brought by four Iraqi torture victims against the US-based PMSC CACI.² It affirms that CACI directly participated in war crimes, including torture, while it was providing services in execution of their contract at the Abu Ghraib prison. The Fourth Circuit stated before that the U.S. Alien Tort Claims Act (ATCA) could not be used for violations occurring outside the U.S. and that Iraqi law applied, meaning the barring of common law claims. This composed reason enough to take the case to appeal.

The U.S. jurisprudence relating to PMSCs could be influenced by the U.S. Supreme Court case *Kiobel v Royal Dutch Shell Petroleum Co.* This case seems to close the door for federal court jurisdiction over international corporations providing services abroad, and for using the ATCA to solve this impunity of corporations in the U.S.. Unfortunately, this jurisprudential development also closes the door when it comes to Human Rights violations by these international corporations. The general phenomenon is even more apparent when these Human

¹ Art 15-16 Taguba Report (2004) 48.

² *Suhail Najim Abdullah, Al Shimari, Taha Yaseen, Arraq Rashid, Salah Hasan Nusaif Al-Ejaili, Asa’ad Hamza Hanfoosh Al-Zuba’e v CACI Premier Technology Inc, Timothy Dugan, L-3 Services*, App No 13-1937 (4th Cir 2014)

Rights violations include the worst crimes - as the crime of torture is considered to be - and are committed by 'guns for hire' of the PMSC industry.³ It is legitimate to address this vacuum for the crime of torture where PMSC are involved in, with a critical legal Human Rights reflection on and analysis of possible existing international or national instruments that can be applied to U.S. private military contractors who torture overseas.

From a Human Rights perspective, this impunity for torture is surely unacceptable. How pressing the problem is, can be shown by alluding to the worldwide phenomenon of PMSCs and the privatised security industry they represent. Every PMSC plays indeed a role in a larger, transnational oriented picture. The wave of controversy around PMSCs and their conduct puts them in the spotlights for creating legal and political problems. Follow-up question is how to counter this impunity which U.S. contractors, together with their PMSCs, enjoy on the national and international level by using national and international mechanisms to prosecute perpetrators of torture? Representing the global trend, the focus will lie with the U.S. since it is the home and hiring state of the majority of PMSCs in overseas conflict zones. Regarding the global 'privatizing war' - phenomenon, what mechanisms exist -or not exist- in the U.S. that allow for this impunity to take place? Why is it so difficult in the U.S. to bring those perpetrators to trial? Several parts make up for this problematic. Subjects of research are Non-State Actors (NSA), applicable legal means, responsibility, redress before U.S. courts and propositions for regulating acts of torture by PMSCs. It is important to frame abovementioned questions in the context of the research subjects since it allows to familiarise oneself with the International Human Rights problematic.

This Master Thesis is carried out by a critical legal approach, and is complemented with case study research. For orientation purposes, the different players in the 'privatised war'-field will first be discussed, along a theoretical analysis of the international scene they are placed in. Concepts as NSA and PMSC will be explained, a definition of PMSC will be set up, the crime of torture and its constitutive elements in international and national sources will also be researched. Little attention is given to the rise and role of PMSC and the gravity of the U.S. in the industry today. Lastly, the existing regulatory framework for PMSCs will be explained. Soft law, the treaty process, self-regulation and Corporation Social Responsibility (CSR) are elements of this non-fulfilling framework.

Once the actors are identified, it is necessary to question what legal means exist through which the PMSCs are bound by International Human Rights Law (IHRL). What (direct) obligations have PMSCs and their contractors under IHRL? This will be researched by analyzing the legal framework connecting the international with the domestic level. An emphasis will be put on legislation in relation to torture that could provide grounds for prosecuting PMSCs and contractors. Little attention will be given to legislation of criminal nature since the U.S. case law demonstrates that civil claims are more problematic in practice.

On the basis of the legal framework developed above, one needs to ask who bears the responsibility for the crime of torture and to what extent. This leads to an identification of gaps in the U.S. responsibility which result in the impunity of private military perpetrators and their PMSCs. Little attention is given to determining state responsibility; however the link between the state and PMSCs will be mentioned. Consequently, does this connection mean that the U.S. bears an obligation under IHRL to provide for mechanisms of redress for torture victims? And if they do not, do they violate IHRL? After identifying the main responsibility-related problems, this part provides for general approaches to counter these problems. The extraterritorial appliance of the mentioned legal instruments and universal (criminal or civil) jurisdiction are some of the proposals. Lastly, could the concept of corporate (social) responsibility provide for an answer under IHRL?

The accountability for torture is a subsequent issue to address, which is related to litigation for human rights abuses in the U.S. In light of national and international mechanisms in place that condemn torture, the domestic efforts made by the U.S. courts to ensure redress for the victims of torture and their attempts to hold contractors accountable for their actions, will be defined. The main question is how U.S. jurisprudence can help to

³ Participants in the PMC industry include a number of well-known corporations such as Blackwater Consulting USA, Dyncorp, Executive Outcomes, CACI,...

bring PMSCs before court? The individual options for justice in the U.S. will be developed on the basis of how to sue American private military contractors, who tortured abroad, in the U.S.. In limiting the scope of the answer to recent civil claims brought before U.S. Courts, one arrives at *Al Shimari v CACI* before the U.S. Court of Appeals, which originates from the initial torture abuses that took place in Abu Ghraib prison. *Kiobel* seemed to close the door for usage of the ATCA by victims of human rights violations, and yet, the chances of *Al Shimari v CACI* in the post-*Kiobel* era will be investigated. The placement of the U.S. approach in international context concludes this part.

In closing, propositions will be made to regulate the conduct of PMSCs abroad regarding the crime of torture. This includes assessments of to which extent these approaches can become *lex ferenda* and which value they can bring to the debate on the liability of contractors who torture. The focus will lie with the existing soft law of the Montreux Document and the self-regulating International Code of Conduct for Private Security Service Providers. Each of them could serve as basis for strengthening the prohibition of torture in practice, since that is what the solution should hold. A new proposal based on a double dualistic approach to improve the prestige and enforcement of the torture prohibition for PMSCs and their personnel when exercising contracted services abroad concludes this section.

It is expected to find firm international prohibiting standards of torturous acts in international legal documents that can build up a human rights responsibility frame with obligations for states, corporations and contractors. In case of the U.S. and its national translation of those standards, there are obvious signs to withdraw from such a responsibility in both domestic law and jurisprudence. The aim is to prove that the gaps the U.S. has found in IHRL are hypothetical and the suggestions could turn the tide. The preference goes to a double dualistic approach to these responsibility gaps, an approach that allows to embed on the international as well as the national level, against PMSC as well as individual contractors in cases of torture and that is implemented and enforced by both international and national players. Time will tell what this could mean in the global context of the Private Military Industry.

II. Non-state actors in international context

A. Orientation through concept explaining

Relevant to this research regarding torture is the commitment of the crime by Non-State actors (NSA), since their conduct is not subject to the same degree of scrutiny as that of states.⁴ By connecting it with the process of globalisation and the impact on the development of international law (IL), the practice of NSA can no longer be excluded from an assessment of that law.⁵ Thus, it is important to establish the content of concepts that are used.

1. Non-State actors

Contrary to before, when NSA remained in the shadows of the IL doctrine, nowadays a number of NSA are a force to be reckoned with.⁶ This is partly the reason why the International Human Rights (IHR) regime has to take the accountability of all major actors and their roles into account when creating a more effective framework than the one currently existing. States seem to accept the legal personality of NSA if and to the extent that it contributes to the effectiveness of political relations, the functioning of their particular policy or the de-

⁴ Lutz Oette and Carla Ferstman, 'Not only the state: torture by Non-State actors. Towards enhanced protection, accountability and effective remedies; Redress seeking reparation for torture survivors' in *The Redress Trust* [2006] 14.

⁵ Bas Arts, Math Noortmann and Bob Reinala, *Non-State Actors in International Relations* (Ashgate Publishing Ltd 2001) 74.

⁶ Philip Alston, *Non-State Actors and Human Rights* (Oxford University Press 2005) 5.

velopment of the global system as a whole.⁷ From a legal perspective, IL still prefers and presumes a monopolization of force by state actors, leaving no effective way to deal with NSA who commit human rights (HR) abuses, e.g. PMSCs.⁸

Although much discussed in the literature, the definitions or descriptions of NSA differ widely.⁹ Since there exists no general definition with the appropriate international authority in IL,¹⁰ a first characteristic is that they lack an official status under IL. This makes a practical formulation of NSA necessary. Propositions of encompassed actors are civil society organisations, private companies, armed groups, de facto regimes, private security companies,¹¹ multinational corporations, etc. Some of those players clearly belong to the category of NSA that has been responsible for HR violations, including torture.¹² Another definition of NSA includes all actors "that are not states or representatives of states, yet that operate at the international level and are potentially relevant to international relations."¹³ Both the size- and the multinational-requirement are considered to be helpful in underlining the link with international politics.¹⁴

For purposes of this thesis, the reliance on traditional patterns of international relations and the restrictive set of requirements are not resulting in a comprehensive 'description' of the primer actors. Although this defining-urge is not necessary or helpful,¹⁵ yet an attempt will be made to define NSA. JOSSELIN and WALLACE put forward some elements in their literature, which uphold this comprehensive goal. NSA include all organisations that: a) Are largely autonomous from central government funding and control; b) Are operating as or participating in networks which extend across the boundaries of two or more states, thus engaging in 'transnational' relations; c) Are acting in ways which affect political outcomes, either within one or more states, or within international institutions, either as their primary objective or as one aspect of their activities.¹⁶

In noting the relevant characteristics,¹⁷ firstly the diversity and the potential to cover a wide range of actors can be mentioned. Second, the focus lies on those actors who orient their activities in a transnational sphere. Third, this definition can be multi-interpretable which enriches the debate. The open-ended character of this definition will allow IL to create a more limiting policy aside, which justifies to bring PMSCs under the heading of NSA.

2. Categorisation

As for the function and the distinctive characteristic, Private Military Companies (PMCs) represent the firm through which cooperation between the military and civilians has taken its course.¹⁸ According to some litera-

⁷ Arts, Noortmann and Reinala (n 5) 74. Private Military & Security Company (PMSC).

⁸ Nathaniel Stinnett, 'Regulating the Privatization of war: How to stop Private Military Firms from committing Human Rights Abuses' (2008) 28 BC Int'l & Comp L Rev 1, 211.

⁹ Alston (n 6) 14; Bas Arts, 'Non-State Actors in Global Governance' (2003-2004) <http://www.coll.mpg.de/pdf_dat/2003_04online.pdf> accessed on 16.01.2015; Andrew Clapham, *Human Rights obligations of Non-State Actors* (Oxford University Press 2006) 35; Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (Cambridge University Press 2012) 33-34.

¹⁰ Oette (n 4) 14.

¹¹ Nils Rosemann, 'The Privatisation of Human Rights Violations - Business' impunity or corporate Responsibility? The case of human rights abuses and torture in Iraq' (2005) *Non-State actors and International law* 5, 77, 78.

¹² Oette (n 4) 14.

¹³ Alston (n 6); Bas Arts, 'Non-State Actors in Global Governance' (2003-2004) 5 <http://www.coll.mpg.de/pdf_dat/2003_04online.pdf> accessed on 16.01.2015; James Cockayne, 'Taming the dogs of war: the strategic logic of the professionalization of Private Military and Security Companies' (30 April 2008) in Conference of the A.E. Havens Centre for the Study of Social Structure and Social Change, *The Privatization of Security and Human Rights in The Americas: Perspectives from the Global South* (University of Wisconsin-Madison 2008) <<http://www.havenscenter.org/privatemilitaryconference2008>> accessed on 6.01.2015.

¹⁴ Cockayne (n 13) 5.

¹⁵ Alston (n 6) 14.

¹⁶ *ibid* 16.

¹⁷ *ibid* 16.

¹⁸ Joery Matthys, *Private Security Companies and Private Military Companies. A comparative and Economical Analysis* (Maklu 2010) 210.

ture Private Security Companies (PSCs) are distinct from the Private Military Companies (PMCs).¹⁹ A second important difference is between PMC or PSC and mercenaries. PMSCs do not like being associated with mercenaries since they are surrounded by a sphere of illegality²⁰ but it is nevertheless clear that the historical roots of such companies do lie there.²¹ The concepts of mercenaries, PMCs, PSCs, the importance of defining their activities and common characteristics with a concluding definition will respectively be at hand below.

a. Mercenaries

One can say that PMC are clearly no present-day-mercenaries, proved by the blurring attempts to define a mercenary as well as a PMSC.²² In a largely accepted, non-legal description of the term, mercenaries refer to a foreign, independent and profit-motivated fighter. Legally, the use of mercenaries is prohibited by U.N. Resolution²³ and addressed in an International Mercenary Convention.²⁴ Those two legal instruments contain a common U.N. definition which describes a mercenary as any person who:

- "(a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Is motivated to take part in the 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 rank and functions in the armed forces of that party;
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) Is not a member of the armed forces of a party to the conflict, and
- (e) Has not been sent by a State which is not a party to the conflict or on official duty as a member of its armed forces."

The description shows that a flawed focus is put on the motivation of the individual. It identifies mercenaries not by reference to what they do, but why they do it.²⁵ Moreover, paragraphs (d) and (e) create further loopholes: when a foreign individual is hired by a state, (d) can be avoided by granting the individual citizenship, or (e) can be circumvented by temporarily enrolling the individual in its national military forces. The combination of these flaws and loopholes makes excluding individuals who by common sense qualify as mercenary, very easy. The human rights concerns should be focused on issues of corporate accountability rather than on a list of specific criteria in IL an individual should fulfil.²⁶ The suggestions to expand the definition of mercenaries are met with creating new forms of regulation and accountability for PMCs and PSCs.²⁷

b. Private Military Company

The 'active' PMCs or Private Military Firms (PMF) can be defined as actors which are "profit driven organisations that trade in professional services intrinsically linked to warfare"²⁸ and have stepped in to fulfil the demands of the global security market.²⁹

¹⁹ Eg Simon Chesterman and Chia Lehnardt, *From mercenaries to market. The rise and regulation of private military companies* (Oxford University Press 2010) 3; Tonkin (n 9) 1.

²⁰ Clapham (n 9) 299.

²¹ Matthys (n 18) 210.

²² Chesterman and Lehnardt (n 19) 39; Benjamin A Neil, 'Are private Military Firms the answer to the expanding global crisis?' (2011) 10 *International Business & Economics Research Journal* 2, 13, 14.

²³ GA Resolution 63/164 (2009) UN Doc A/RES/63/164

<<http://www.worldlii.org/int/other/UNGARsn/2008/238.pdf>> accessed on 16.01.2015.

²⁴ UN Convention against the recruitment, use, financing and training of Mercenaries (1989), 75. Entered into force on 20 October 2001 and ratified by 32 states.

²⁵ Tonkin (n 9) 29-30.

²⁶ Clapham (n 9) 300.

²⁷ *ibid* 301.

²⁸ Neil (n 22) 13; Peter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press 2008) 101-118; Stinnett (n 8) 211.

²⁹ Stinnett (n 8) 211.

SINGER³⁰ described the companies who can be categorised under PMF as engaging in military operations where most PSCs traditionally would not operate. He defines PMCs as “corporate bodies that specialise in the provision of military skills – including tactical combat operations, strategic planning, intelligence gathering and analysis, operational support, troop training, and technical assistance.”³¹ Yet, the most open description reads: “Corporate entities that provide military expertise and other professional services essential to combat and warfare.”³² Following the TIP-OF-THE-SPEAR TYPOLOGY,³³ we orient PMCs at the tip of the spear since they offer services on a battlefield’s frontline.³⁴ These may contain engagement in direct combat as well as command and control functions designed to change the strategic environment in which they operate.³⁵

c. Private Security Company

On the other side of the spear, the ‘passive’ Private Security Companies (PSC) are situated.³⁶ This category is more controversial since they have elements of both PMF and PMC, but no typical characteristics of their own. PSCs do not typically engage in direct combat and do not focus on providing logistics, support and supplies, although some of these services may be included within their broader contract.³⁷ Even though their skills are tactical in nature, they are not aimed at shifting the strategic landscape in which they operate.³⁸ They are active in technical support, transportation, boarder monitoring and civilian law enforcement.³⁹

d. Importance of defining activities

The goal of making these distinctions is to clarify the often blurred line between mercenaries, PSCs, and PMCs. For this reason, defining the intended activity of the corporate entity is crucial in approaching the issue of regulation. But, one can also argue that this division is problematic as there is no clear definition of the two concepts and the line between them.⁴⁰ Obvious is that a company can perform different services under different contracts. For these reasons and for general convenience, it is preferable to adopt a single term that covers the whole industry since both actors can commit torture. Further in this thesis will be referred to PMSCs (Private Military Security Company), as including both PMCs and PSCs, which is in line with the single term usage of ICRC that contains the entire industry without distinction.⁴¹ The UN Special Rapporteur on the use of Mercenaries⁴² and the 2008 Montreux Document⁴³ also support this terminology.

Most of the PMSCs are registered corporate bodies who deal with a lack of uniform approach.⁴⁴ In a global industry, these corporations constitute a service-oriented business that is generally capital-intensive with lim-

³⁰ Author of “Corporate Warriors: the rise of the privatized Military Industry”, most prominent political scientist, specialised in the PMC industry taking into account all of his academic work; Neil (n 22) 13.

³¹ Peter Singer, ‘Corporate Warriors: the rise of the privatized Military Industry and its ramifications for international Security’ (2002) 26 *International Security* 3, 186.

³² J Spear and Fafo Institute for Applied International Studies, ‘Fafo Report 531 – Market forces: political economy of private military companies’ (2006) 531 <<http://www.fafo.no/pub/rapp/531/531.pdf>> accessed on 16.01.2015.

³³ A Stanger and M E Williams, ‘Private military Corporations: benefits and costs of outsourcing Security’ (2006-2007) 2 *Yale Journal of International Affairs* 1, 4, 6. Created by P. Singer.

³⁴ *ibid.*

³⁵ Tonkin (n 9) 38. Examples thereof are Executive Outcomes and Blackwater (now Xe).

³⁶ *ibid.*; Gaston (n 39) 226. According to the Tip-of-the-spear-typology.

³⁷ Matthys (n 18) 211-112.

³⁸ Tonkin (n 9) 38.

³⁹ *ibid.*; E L Gaston, ‘Mercenarism 2.0? The rise of the modern private security industry and its implications for international humanitarian law enforcement’ (2008) 49 *Harv Int'l L J* 1, 221, 226. Company examples of this category are Dyncorp or MPRI.

⁴⁰ Tonkin (n 9) 33.

⁴¹ Cf www.icrc.org.

⁴² HRC Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (2010) UN Doc A/HRC/15/25 <<http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf>> accessed on 16.01.2015.

⁴³ Cf Section II.C and VI.

⁴⁴ Arts, Noortmann and Reinala (n 5) 74.

ited infrastructure.⁴⁵ The clients of PMSCs go from states, NGOs, international organisations to corporations.⁴⁶

In connecting the PMSC-concept with the TIP-OF-THE-SPEAR TYPOLOGY, it seems logical to divide the activities performed by PMSCs, instead of the entities themselves.⁴⁷ Concluding, we can list common characteristics⁴⁸ that represent elements of a PMSC definition:

- PMSCs cover an increasing demand created by globalisation.
- PMSCs provide a temporary, contractual established and wide range of services.
- PMSCs maintain a highly specialised military and security expertise.
- PMSCs offer many economic, military, and political benefits that are not ordinarily found in existing armies.
- PMSCs are hierarchically organised into incorporated and registered business who trade and compete openly on the international market.
- PMSCs can be separated within according to whether or not they change the strategic environment in which they operate.

One can argue that PMSC are obviously to be considered as a category of NSA, affirming the approach to treat PMSCs as NSA. However an important and not-clear-stated element of the created definitions is the link between PMSCs activities and the state or the level of official involvement. Further, it will be argued that this link is important to regulate the conduct of PMSCs relating to torture since they fulfil foremost state functions. However, it is crystal-clear that PMSCs are not 'present-day-mercenaries'.

3. The concept of torture

Determining which definition of torture applies to the acts of NSA goes to the core of the meaning of torture when applied to such actors, and plays an important role in framing the legal responses.⁴⁹ Torture, which differs from cruel, inhuman or degrading treatment or punishment in grade of intensity,⁵⁰ is widely condemned by general legal standards, at the least by all major international and regional documents that promote and protect HR: the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), European Convention on Human Rights (ECHR), EU Charter of Fundamental Rights, American Convention on Human Rights (ACHR), African Convention on Human and Peoples' Rights (ACHPR), UN Convention Against Torture (CAT), inter-American Convention to Prevent and Punish Torture (IACPPT), etc. The prohibition of torture is also implemented in the UN system through the Human Rights Treaty bodies, including the Human Rights Committee (HRCm), the Committee Against Torture (CmAT) and the Subcommittee on the Prevention of Torture and other Cruel Inhuman or Degrading Treatment or Punishment. In addition, the UN Human Rights Council's (HRC) special procedures may investigate and report on allegations of torture, with the Special Rapporteur on 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' as the most prominent example. Enforcement is available through regional Human Rights tribunals, as the European Court on Human Rights (ECtHR), the Inter-American Court of Human Rights (IACtHR) and the African Court on Human and Peoples' Rights (ACoHPR). Aside from all the instruments at hand, the definition of torture is still very much contested.⁵¹ First the regional legal standards will be discussed, followed by, national attempts in the U.S. to define the crime of torture. The treaty bodies and jurisdictional institutions are mentioned where they are relevant for framing the concept of torture. The value of these international and regional prohibitions will be assessed in Section III.

⁴⁵ Tonkin (n 9) 37.

⁴⁶ *ibid* 37-39.

⁴⁷ Singer (n 31) 91; Tonkin (n 9) 41-53.

⁴⁸ Chesterman and Lehnard (n 19) 38-39; Singer (n 31) 188-189; Stinnett (n 8) 211; Tonkin (n 9) 30-36. As upheld in this thesis.

⁴⁹ Oette (n 4) 16. And if NSA even can commit the crime of torture?

⁵⁰ The exact division between the two concepts is outside the scope of this thesis.

⁵¹ Oona Hathaway, Aileen Nowlan and Julia Spiegel, 'Tortured Reasoning: The Intent to Torture Under International and Domestic Law' (2012) 52 *Va J Int'l L*, 791, 794.

a. Relevant regional sources - general

In the search for a definition of the crime of torture, regional jurisprudence by human rights tribunals is helpful to bring elements in for establishing a concept. The ECtHR holds the opinion that torture, as a specific terminology, has its own discrete legal implication. According to the ECtHR the drafters of the ECHR intentionally mentioned "torture" and "inhuman or degrading treatment" separate for the reason to make a clear distinction between them.⁵² Aside from this expression the Court has never tried to define exactly what the term includes,⁵³ although it has identified the elements that characterise a treatment or punishment as torture with focus on the minimum level of severity⁵⁴ and unnecessary physical force.⁵⁵ The IACHR, in interpreting the crime of torture set forth in art. 5 of the ACHR, is guided by the specific IACPPT.⁵⁶ Art. 2 of that IACPPT defines torture as: "any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose" Also understood to include "...the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish." In comparison with the European⁵⁷ and Inter-American systems, Africa does not have a specific convention on torture and its prohibition. The question of torture is examined on the same level as the other human rights violations. Both the ACtHPR and the ACoHPR support on the above-mentioned ACHPR in cases dealing with torture and reaffirm the art. 1 CAT definition.⁵⁸

b. Specific documents - international

Aside from the description of torture upheld by the UN GA as "an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment",⁵⁹ the Convention against Torture (CAT) provides for the clearest definition. CAT states in art. 1 that 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 or 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.** (...)."60

This provision on the prohibition of torture is non-derogative since art 2. CAT explicitly states that a situation of war cannot be invoked as a justification of torture.⁶¹ The CAT identifies the following three elements that, if combined, constitute torture: 1) intentional infliction of severe pain or suffering, 2) for a specific purpose, 3) and a clear connection with State authorities. It seems that under the CAT definition, a certain degree of official involvement is needed for acts,⁶² which bring severe pain or suffering that is intentionally inflicted for any of the specified purposes, committed by NSA. If no degree of official involvement exists, should these acts

⁵² Eg *Dikme v Turkey* App no 20869/92 (ECtHR, 11 July 2000).

⁵³ Hathaway, Nowlan and Spiegel (n 51) 834.

⁵⁴ *Ireland v The United Kingdom* App no 5310/71 (ECtHR 18 January 1978); *Wainwright v. United Kingdom* App no 12350/04 (ECtHR, 26 September 2006).

⁵⁵ *Selmouni v. France* App No 25803/94 (ECtHR, 28 July 1999).

⁵⁶ Commission on Human Rights, The right to a remedy and reparation for victims of violations of international human rights and humanitarian law - Note by the High Commissioner for Human Rights (10 November 2003) UN Doc E/CN.4/2004/57 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/170/98/PDF/G0317098.pdf?OpenElement>> accessed on 16.01.2015, 7.

⁵⁷ Cf the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe, 2002.

⁵⁸ Art 5 ACHPR.

⁵⁹ GA Resolution 3452 (XXX) Declaration on the protection of all persons from being subjected to torture and other cruel, inhuman and degrading treatment or punishment (9 December 1975) UN Doc A/RES/30/3452 (XXX), art 1.

⁶⁰ Emphasis added.

⁶¹ Art 2.2. CAT; Tonkin (n 9) 146.

⁶² Hathaway, Nowlan and Spiegel (n 51) 829.

by NSA then not be qualified as torture? The urge for defining other actors aside from the state in international legal discourse, is being fed by the need to build up the assumption that the state is still the central actor.⁶³ Based on this assumption, can all those other entities only be identified in terms of their relationship to the state? This is partly illustrated by the definition of torture as we take the "acting in an official capacity" into consideration.

The discussed definitions vary slightly between the different international documents, but they generally cover any act which causes severe physical and/or mental pain or suffering; are intentionally or deliberately inflicted; are applied in the pursuit of a certain purpose (confusion, information, intimidation, discrimination...) and include state responsibility since a public official or other persons acting in an official capacity must be involved.

Torture within the scope of this thesis is defined as the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; for such purposes as obtaining information or a confession, punishing him, or intimidating or repress him or for any reason based on discrimination of any kind. It explicitly includes conduct by a private entity which would constitute torture if committed by a public official. The question whether anti-torture legislation is applicable to NSA, and PMSCs in particular, is subject of Section 3.

c. U.S. national level

Torture is defined in countless instruments and there is no single, consistent definition of the crime.⁶⁴ The United States (U.S.) acceded to the CAT, but in its reservations made upon ratification, the U.S. focused on what the Senate understands as constitutive elements of the crime of torture. In order to be labelled as torture an act requires a specific intent to "inflict severe physical or mental pain or suffering" where "mental pain or suffering refers to prolonged mental harm caused by or resulting from", inter alia, "the intentional infliction or threatened infliction of severe physical pain or suffering" or "the threat of imminent death" of the victim or a third party.⁶⁵ In further limiting the application of this definition, the U.S. mentions that the description of art. 1 CAT is "to apply only to acts directed against persons in the offender's custody or physical control." Concerning the level of official involvement, the U.S. understands that the term 'acquiescence' requires that "the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity." The U.S. definition seems to be very narrow⁶⁶ and since states cannot make treaties to contract around *ius cogens* norms,⁶⁷ the U.S. obligation under the CAT norm against torture should be unchanged by its reservations, understandings and declarations to the CAT.

There exists significant⁶⁸ domestic jurisprudence interpreting torture in the context of the Alien Tort Claims Act (ATCA).⁶⁹ The U.S. Supreme Court addressed the definition of torture in *Sosa v. Alvarez-Machain*, in which it found that a single detention for less than one day did not violate a well-defined norm of customary international law against torture, and therefore could not be found to be torture.⁷⁰ *Sosa* refers to the UDHR and the ICCPR, but is silent on the CAT.⁷¹ A second U.S. attempt to interpret the prohibition of torture is represented by the Torture Victim Protection Act (TVPA).⁷²

⁶³ Alston (n 6) 4.

⁶⁴ Joshua A Decker, 'Is the United States Bound by the Customary International Law of Torture? A proposal for ATS Litigation in the War on Terror' (2005)2006 6 Chi J Int'l L 2, 803, 821.

⁶⁵ CAT, Reservation by the US (21 October 1994), II.1 (a). This altered definition is codified by 18 USC., §2340 (2000).

⁶⁶ Decker (n 64) 822.

⁶⁷ Vienna Convention on the Law of Treaties (23 May 1969) art 53. US is not a party to this convention, but the principle should be apply just the same. Cf Section III.

⁶⁸ Hathaway, Nowlan and Spiegel (n 51) 820.

⁶⁹ Alien Tort Claims Act (24 September 1789). Or "Alien Tort Statute." Cf Section III.

⁷⁰ *Sosa v Alvarez-Machain* (2004) 542 US 692, 738. Further: *Sosa*.

⁷¹ *ibid* 734-736.

⁷² Torture Victim Protection Act (12 March 1991). Further: TVPA.

Torture under the TVPA is defined as a specific intended crime⁷³ similar to that of the CAT, yet with different focus: "Any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering ... whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind."⁷⁴

As conclusion, the U.S. follows at first sight international standards set forth in the relevant IL documents for the content of the global condemned crime of torture. These documents are considered by the U.S. as upholding a customary law prohibition of torture, though the U.S. attempts to narrow this definition down were possible.

A. The rise of PMSCs

Although not the focus of this thesis, the historical development of the PMSCs and the industry they are active in might be useful to comprehend the existing consensus of a regulatory framework, rather than abolish these NSA.⁷⁵ This part also includes an estimation of the U.S. its role in the privatized war-market, and some reasons will be given for the national emphasis on U.S. Lastly, an attempt is made to frame the context of the global industry where the PMSCs are active in.

1. Emergence of PMSCs

There is no need to proof that a 'mercenary' bears negative connotation since the end of the '90s,⁷⁶ which resulted in the restriction of the organized private armies by the international community in the twentieth century.⁷⁷ Yet, PMSCs instead of mercenaries, are subject of this research since they are different from these soldiers of fortune and can be considered as the embodiment of evolution made by private actors in warfare.⁷⁸

Some scholars state that there are four generations of PMSCs which represent the current global phenomenon.⁷⁹ The first generation was mainly centred on individuals, mercenaries, rather than companies. Their activities fell in a grey zone between legal and illegal.⁸⁰ The second generation of PMSCs was more skilled and tried to give more credence to the industry. Since they could be considered as real companies then, the assumption is that they showed a higher level of professionalism.⁸¹ The third generation expanded to even more skilled employees attracted from the field outside of what we generally consider the military context.⁸² The reason for that is to provide better client-services by attracting those specialists that fit the needs of that client. The fourth and last generation focuses on the academic level.⁸³ This development is still ongoing since PMSCs are just now main subject of academic debate and research. It can be said that all four generations are still operative despite the evolution of the industry and its establishment as a respectable player.⁸⁴ The abovementioned elements of evolution were accompanied by the excessive boom of the Private Military industry itself.⁸⁵

⁷³ Hathaway, Nowlan and Spiegel (n 51) 821.

⁷⁴ TVPA §3 (b) (1).

⁷⁵ Tonkin (n 9) 17-27.

⁷⁶ Stinnett (n 8) 213.

⁷⁷ Cockayne (n 13) 7; Singer (n 28) 37.

⁷⁸ Stinnett (n 8) 214.

⁷⁹ Matthys (n 18) 212 -213; Sarah Percy, 'Regulating the private security industry: a story of regulating the last war' (2012) 94 *International Review of the Red Cross* 887, 941, 944 (talks about 'phases').

⁸⁰ Percy (n 79) 945-946.

⁸¹ *ibid* 950.

⁸² Public relations are for example in high demand.

⁸³ Singer (n 28) 35-37.

⁸⁴ Matthys (n 18) 214.

⁸⁵ Rosemann (n 11) 77.

2. The U.S. in the privatised-war market

The reason for a national emphasis on the U.S. is because of them being the home and hiring state of the majority of PMSCs in overseas conflict zones.⁸⁶ The U.S. makes the most extensive use of the privatized military industry, as the U.S. strategy considers PMSCs as an opportunity and not a threat.⁸⁷ A reason for this can be the close link between U.S.-based PMSCs and the U.S. government, where these PMSCs act in line with the national interest. States generally permit the activities of commercial military entrepreneurs, as long as they remain aligned with the interests of that state.⁸⁸ The government in turn provides also market incentives since it is a significant customer of the PMSC services and the maintenance of those contracts can even stimulate U.S. corporations to comply with U.S. foreign policy.⁸⁹ Concerning the deployment of PMSCs in armed conflicts, U.S.-based PMSCs constitute the largest share of the global market with a very high percentage of their revenues coming from U.S. government contracts.⁹⁰

3. Global phenomenon

There exists no doubt about the enormous impact transnational business enterprises have on the modern worlds' global picture of privatisation and outsourcing of security.⁹¹ This dynamic military service market constituted in the beginning of a limited number of companies offering a limited number of military specialties, and expanded to a whole industry that provides a wide range of sophisticated and expert services.⁹²

As PMSCs are essentially following the standard business techniques for market engineering used by other types of firms, this business also responds to the marketplace demands.⁹³ In sum, well known reasons for the global growth of the PMSCs industry are:⁹⁴ the demobilization of former Cold War troops, the availability of globalised transport, marketing technologies, new techniques to facilitate the global organization, the popularity of privatization of government services in Western democracies, the lower military budget of the states, new threats and security demands.⁹⁵

As the private military industry became more globalised, it had to redesign itself as well.⁹⁶ The business opportunities allowed networks of military contractors to be developed into a worldwide corporatisation of private military forces.⁹⁷ These networks were first represented in corporate form in the Western democracies, allowing the extension of corporatisation to the developing countries and countries in transition to democracy. The results are corporatized joint ventures between government officials and commercial military and security entrepreneurs throughout Africa, Russia, South-Eastern Europe, Latin-America and Asia.⁹⁸ The role of PMSCs fulfils now an important function in the global security market.⁹⁹

The context of privatisation in general, privatization of the security services and the globalisation, expanded

⁸⁶ Thomas Jäger and Gerhard Kümmel, *Private Military and Security Companies. Chances, Problems, Pitfalls and Prospects* (VS Verlag für Sozialwissenschaften 2007) 48-51; Singer (n 28) 14.

⁸⁷ Deborah Avant, *The Market of Force. The consequences of Privatizing security* (Cambridge University Press 2010) 146; Singer (n 28) 15. The US Defence Department (DoD) entered into more than 3.000 contracts with US-based firms, estimated at a contract value of more than \$300 billion.

⁸⁸ Cockayne (n 13) 3.

⁸⁹ Tonkin (n 9) 26-27.

⁹⁰ Avant (n 87) 147-148; Tonkin (n 9) 36. Eg in Iraq alone private contracts between 2003 and 2007 were awarded to US military companies of \$85 billion; which represented a continuous trend in 2010 when contractors represented 54% of the DoD's workforce in Iraq and Afghanistan.

⁹¹ David Forsythe, *Human Rights in International Relations* (Cambridge University Press 2012) 278; Rosemann (n 11) 82.

⁹² Supra II.A.2.

⁹³ Singer (n 28) 83.

⁹⁴ Jäger and Kümmel (n 86) 44-45; Cockayne (n 13) 15.

⁹⁵ Rosemann (n 11) 83.

⁹⁶ Cockayne (n 13) 2.

⁹⁷ ibid 16.

⁹⁸ ibid 15.

⁹⁹ Stinnett (n 8) 215.

the de facto roles played by PMSCs in national and international affairs.¹⁰⁰ As the 'dogs of war' benefit from globalization, the lines between economics and warfare were, and never will be, clear-cut.¹⁰¹ In the future, organised crime will not be located only in the public sphere. This does not necessarily mean that PMSCs will act in private sphere alone, since they provide one of the most publically and semi-official military service: the use of force.

This Section was to underline the need to establish a global-oriented framework which acknowledges the rights and responsibilities of all actors, and protects the principles upon which the International Human Rights regime is based. If not, this regime will carry no credibility and will prove itself to be irrelevant in relation to torture cases, let alone HR issues.

B. Identification of existing regulatory frameworks for PMSC

The previous sections showed the growth of NSA and their status of a force to be reckoned with. This is partly the reason why the International Human Rights (IHR) regime has to take the accountability of all major actors and their roles into account when creating a more effective framework.¹⁰² If not, this would result in escaping IHR norms. The following part will describe elements of the existing regulatory framework consisting of international soft-law, together with self-regulation by the private military industry. Each of the proposed documents its development, content and added value will be assessed. Yet, first an overall international legislative development created by the Open-ended Working Group on PMSCs will be mentioned. This part will not elaborate on Corporate Social Responsibility (CSR), although it certainly serves its purposes. Different international and regional organisations¹⁰³ sought to create regulatory systems that could be applied to business under this CSR-heading. But, since the broad concept covers business as such, this approach seems too general and non-concrete to regulate torturous conduct by PMSCs.

1. Intergovernmental Open-ended Working Group on PMSCs

On the first of October 2010, the UN Human Rights Council (HRC) adopted a resolution¹⁰⁴ by which it established an Open-ended Intergovernmental Working Group (IGWG) to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of PMSCs. The HRC entrusted this IGWG with the mandate to "consider (...) inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability, taking into consideration the principles, main elements and draft text as proposed by the Working Group on the use of mercenaries as a means of violating human rights (...)"¹⁰⁵

The 'draft text' in the mandate refers to the one developed by the Working Group on the use of Mercenaries within their mandate to "monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of Human Rights (...) and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities".¹⁰⁶ During the past five years, the Working Group on the use of Mercenaries has been studying emerging issues, manifestations and trends regarding PMSCs, which resulted in this Draft of

¹⁰⁰ Alston (n 6) 18.

¹⁰¹ Cockayne (n 13) 1; Singer (n 28) 39.

¹⁰² Stinnett (n 8) 218.

¹⁰³ Francesco Francioni and Natalino Ronzitti, *War by contract - Human Rights, Humanitarian law and Private Contractors* (Oxford University Press 2011) 344.

¹⁰⁴ HRC Resolution 15/26: Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies (7 October 2010) UN Doc A/HRC/RES/15/26 <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/804_unhrcresolution_/804_unhrcresolution_en.pdf> accessed on 16.01.2015.

¹⁰⁵ *ibid* para 4.

¹⁰⁶ HRC Resolution 7/21 (18 December 2008) UN Doc HRC/7/21 <http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_21.pdf> accessed on 16.01.2015.

a possible Convention on PMSCs for consideration by the HRC.¹⁰⁷ The IGWG discussed the Draft Convention in their first session.¹⁰⁸

The establishment of both working groups is a positive development on the global level; nevertheless, no international legally binding document exists that strictly regulates the conduct of PMSCs. It provides a good opportunity as platform for dialogue, since all UN Member and Observer States, Intergovernmental organisations and NGOs can and may attend both the Working Group sessions. These working-groups and the Montreux Document, will both be subject of Section VI its in-depth analyses, since they provide for realistic solutions of regulation and can be used to the maximum of their capacities.

2. International soft-law: the Montreux Document

Another recently launched policy initiative at aiming to improve the international regulation of the PMS-industry is the Montreux Document.¹⁰⁹ The Montreux Document was produced in 2008 by seventeen states¹¹⁰ as a result of an initiative launched jointly by the ICRC and Switzerland and contains a set of guidelines of good practice for states and the industry. It seeks to provide interpretive guidance on the legal obligations of States related to PMSCs in the absence of a clear applicable treaty or provision.¹¹¹

In doing so, it makes reference to existing international legal obligations. However, it does not create new duties and remains a non-binding legal document, which can constitute a very low-cost solution for the states. The document consists of two parts. Part I sets out the understanding of the existing obligations states, PMSCs and their personnel have under IL in relation to PMSCs in armed conflict. Part II covers a set of recommendations for 'good state practices' related to operations of PMSCs. According to Montreux, regardless of their status, personnel of PMSCs and the PMSC itself must comply with both IHL and IHRL.¹¹²

This proposal chooses to regulate the existence of PMSCs in situations of armed conflict, an approach which has garnered significant governmental approval,¹¹³ rather than to prohibit their participation. It is therefore more likely to achieve governmental acceptance and recognition, especially by countries in which the PMSC industry already is established.¹¹⁴ As said, proposals for the maximum use of Montreux its capacities, will be covered in Section VI.

3. Instruments of self-regulation

a. Codes of Conduct initiated by corporations

The Codes of Conduct (CoC) cover a variety of initiatives, coming from 'ethical codes', 'private regulation', to 'private codes of conduct' or 'voluntary principles'.¹¹⁵ All of them represent the idea that PMSCs willingly

¹⁰⁷ HRC Report (n 42).

¹⁰⁸ HRC Working Group on the use of Mercenaries, Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council (13 May 2011) UN Doc A/HRC/WG.10/1/2 <<http://daccess-dds-y.un.org/doc/UNDOC/GEN/G11/131/83/PDF/G1113183.pdf?OpenElement>> accessed on 16.01.2015. Further: Draft Convention.

¹⁰⁹ GA Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict (6 October 2008) UN Doc A/63/467-S/2008/636 <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/801_emontreux_en_/801_emontreux_en.pdf> accessed on 16.01.2015. Further: The Montreux Document or Montreux.

¹¹⁰ The seventeen states were Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the UK, Ukraine and the US.

¹¹¹ Montreux, 5. Foreword by Seger and Spoerri.

¹¹² Montreux, para 22.

¹¹³ Tonkin (n 9) 129-130; Fifty states currently support the Montreux Document. See Participating States of the Montreux Document, Swiss Federal Department of Foreign Affairs.

¹¹⁴ J C Hansen, 'Rethinking the regulation of private military and security companies under international humanitarian law' (2011-2012) 35 *Fordham Int'l L J* 3, 735.

¹¹⁵ Francioni and Ronzitti (n 103) 363.

submit themselves to regulation that is not (only) imposed by a public body outside the industry.

Much is written about the voluntary approach's assets, and one can argue that it is better than nothing. Although these voluntary codes of conduct, from time to time identified under CSR,¹¹⁶ could not be powerful enough to regulate the whole PMSC industry on its own. These agreements should represent the bare minimum on which the actors agree upon, the lowest common-denominator as to say.¹¹⁷

It is questionable if this 'bare minimum' is sufficient enough to regulate the outsourcing of the use of force. Additionally, the unavoidable danger exists that voluntary codes of conduct have little impact on the actual behaviour of PMSCs. Moreover, a multiplication of voluntary rules can create fragmented regulation of the same industry, what, in its turn, damages the PMS industry its predictability and equal competition.

b. International Code of Conduct for Private Military Service Providers

After creating soft-law instruments, PMSCs themselves began to complete a parallel International Code of Conduct for Private Security Service Providers (ICoC) that would shed some light on the appropriate behaviour of PMSCs. Several multi-stakeholder meetings were held and this resulted in the signing of the ICoC in 2010.¹¹⁸

Similar to the Montreux Document, the ICoC is two-folded, reminding the companies on the one hand of their obligations under IHRL, and indicating best practices on the other hand. Since the ICoC is more directed at companies rather than states,¹¹⁹ one can argue this to be a significant accomplishment in the slow and difficult process of creating an international regulatory framework. The provisions seem to be more encouraging to adopt minimum standards of behaviour in relation to a range of human rights issues, which the ICoC upholds a high standards for. The consequences for those companies who fail to adopt the code or to uphold the standards will be found in the ICoC.¹²⁰ Thus, PMSCs are often initiating regulation since they benefit from the resulting good business and drive 'bad companies' out of the industry.

As conclusion, stating that soft-law instruments, the voluntary approach and self-regulation, failed to fit the expected shoe, is oversimplifying the problem. Indeed they have a questionable legal value, are non-binding, and create problems of enforceability. Though, the shoe might be too big in the first place. In other words, attempts to regulate private actors who use force resulted in inadequate regulatory instruments. In turn, this string of inadequate regulation has encouraged the perception that the problem is too difficult to regulate and resulted in various types of voluntary regulations. An important step, yet insufficient. Section VI uncovers proposals for combining the existing approaches that would fit the shoe.

C. Conclusion

The PMSCs are considered to be a category within NSA. Reasons for that include the shared autonomously from governments funding and control, their action network across state boundaries which results in transnational relations and them being initiators of political outcomes within states or within international institutions. The U.S. legislation confines perpetrators of torture to state actors, while this thesis argues that NSA can commit torture.

The PMSCs do not represent 'present-day-mercenaries,' but do incorporate PMCs and PSCs. Although both can be differentiated from each other, the focus lies with their provided activities and their common characteristics. To sum up, PMSCs cover an increasing demand created by globalisation, they provide a temporary and wide range of services, they maintain a highly specialised military and security expertise, they are organised into incorporated business and they can be internally separated according to whether or not they change the strategic environment in which they operate.

¹¹⁶ *ibid* 362.

¹¹⁷ Percy (n 79) 955.

¹¹⁸ 208 Company Headquarters have signed the ICoC, with a total of 708 companies <<http://www.icoc-psp.org/>> accessed on 16.01.2015.

¹¹⁹ Percy (n 79) 954.

¹²⁰ *ibid*.

In defining the crime of torture, definitions vary slightly between the different international documents, but they generally cover any act which causes severe physical and/or mental pain or suffering; is intentionally or deliberately inflicted; is applied in the pursuit of a certain purpose and included state responsibility. The U.S. seems at first sight to follow international standards set forth in IL documents, though they attempt to narrow the definition of torture down were possible.

The rise of PMSCs taken together with the global privatisation of war, resulted in a market that needs a global-oriented framework that acknowledges the rights and responsibilities of all the actors, and protects the principles upon which the IHR regime is based. This international regulatory framework is currently formed by the Intergovernmental Working Group who considers the possibility of an international binding Convention on PMSCs. Additionally, international soft-law initiatives occurred, embodied by the Montreux Document. The existing general Codes of Conduct, representing the voluntary initiatives, fragmentise the regulation of the PMSC-industry. Yet, this fragmentation could be avoided by the International Code of Conduct for Private Security Service Providers (ICoC). Thus, a non-fulfilling framework currently stands, which will be subject of Section VI that assesses the opportunities and contains some proposals for combining the existing approaches to maximise their capacity, especially focused on torture by PMSCs.

III. Applicable legal means

Now the actors are identified, it is necessary to question the legal means through which PMSCs are bound by International Human Rights Law (IHRL) in condemning torturous conduct. What (direct) obligations under IHRL rest on PMSCs and their contractors? It will be researched by analysing the different overall legal propositions incorporating the prohibition of torture, and by assessing their scope, application and value. This doing so, by connecting international legislation prohibiting torture with the domestic U.S. legislation. The expectation is to find a clear nexus between both. Although not the main focus, this critical legal analysis requires relying on case law of HR bodies and national U.S. case law where necessary. Only short attention will be given to criminal law, since the domestic civil claims are the most problematic in the U.S.. Additional, international criminal law will not make up for a separate section.

A. International legislation

4. General legal instruments

On global level can torture be considered as an issue of IL, as the crime of torture is prohibited in several provisions, both international and regional.¹²¹ These general international and regional legal instruments with respective provisions will be provided and assessed in an overview. This overview is followed-up by an analyses of the value of specific legislation focusing on the crime of torture by several international (treaty)bodies as the Human Rights Committee (HRCm) that monitors the implementation of the ICCPR. Additional, there is the Convention Against Torture (CAT) and the jurisprudence of its aligning Committee Against Torture (CmAT). In each legal instrument, elements relating to PMSCs will be searched for.

a. International sources - general

Art. 5 UDHR upholds an explicit general prohibition to torture and states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This provision is literally adopted by the ICCPR in its art. 7. An identical, prefabricated prohibition is used on global level, which represents the highest standard actors in IL are comfortable with and have agreed upon.

¹²¹ UDHR, ICCPR, ECHR, ACHR, ACHPR, etc.

The Human Rights Committee (HRCm) repeatedly criticised the United States on its prohibition of torture.¹²² The HRCm expressed its concern about the lack of comprehensive legislation criminalising all forms of torture and the inability of torture victims to claim compensation¹²³ due to the existence of broad doctrines of legal privilege and immunity in the U.S..¹²⁴ The recommendations of the HRCm include prohibiting acts committed by 'public officials or other persons *acting on behalf of the State, or even by private persons*'.¹²⁵ Ideally, one can interpret this wording as covering NSA, or PMSCs at the least.

b. Regional sources – general

Regionally, the ECHR provides a general prohibition of the crime of torture. Art. 3 repeats the international standards by stating it in absolute terms, therefore are (domestic legal) limitations not allowed.¹²⁶ Concerning the America's, the ACHR covers in its art. 5 i.a. the physical integrity and human dignity of persons combined with a general explicit prohibition to prevent any infringements of those concepts by torture. Art. 5 ACHR: "1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." On the African continent¹²⁷ the ACHPR applies, more specifically for the crime of torture is art. 5. It states: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." In sum, the regional instruments display their more specific approach in prohibiting torture and put the relation between torture and the infringement of human dignity or physical integrity forward.¹²⁸ The core purpose of the articles attempts to protect those two last concepts.

c. Direct and horizontal human rights obligations for PMSCs?

As established in Section II, and by adopting an action-focused definition of the crime, NSA can commit torture. Subsequently, as a matter of IHRL, does there rest a legal obligation on NSA not to commit torture? The collection of international standards, although applicable to states, can in parallel be applied to NSA in search of direct and horizontal prohibitions on torture by NSA. This is especially the case when the Private Military Industry itself¹²⁹ declared its commitment by creating regulatory initiatives to comply with the international standards.

Obligations on PMSCs – The relevant question is whether or not NSA are more than indirect beneficiaries of HR norms which are directly addressed to states? Consequently, the debate can go both ways. But, do those numerous voluntary Codes of Conduct of PMSCs create enough direct obligations to conclude that NSA could be the direct addressees of HR standards?¹³⁰ Additional, does the fact that PMSCs benefit from the IHR system correlate with the application of direct HR obligations or private duties?¹³¹

¹²² Infra III.B.

¹²³ HRC Concluding observations on the fourth report of the United States of America (23 April 2014) UN Doc CCPR/C/USA/CO/4 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fCO%2f4&Lang=en> accessed on 16.01.2015, para 12.

¹²⁴ Infra Section IV.A.

¹²⁵ HRC (n 123).

¹²⁶ Aisling Reidy, 'The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights' (2002) Council of Europe Human Rights Handbooks 6, 19.

¹²⁷ 53 African countries have signed and ratified, only South Sudan did not <<http://www.achpr.org/instruments/achpr/ratification/>> accessed on 16.01.2015.

¹²⁸ Especially Reidy (n 126) 19.

¹²⁹ Cf Section II.C.

¹³⁰ August Reinisch, 'The changing International Framework for dealing with Non-State Actors' in Alston Philip (ed.), *Non-State Actors and Human Rights* (Oxford University Press 2005) 37, 70.

¹³¹ Question posed in John H. Knox, 'Horizontal Human Rights Law' (13 September 2007) 2 <http://works.bepress.com/john_knox/1> accessed on 16.01.2015.

One can easily argue that it is not possible under current IHRL to hold private actors as private military contractors or their companies directly accountable for HR violations.¹³² The reason for this is that NSA¹³³ are no party to international HR treaties. Moreover, it is the general rule¹³⁴ that HR treaties only contain obligations for states, and not individuals. Initially, these obligations are only meant to work on a vertical basis. The direct horizontal application of HR has not yet been accepted.¹³⁵ Additional to this, NSA are not subject of HR protection systems created by various universal and regional HR conventions.¹³⁶

Moreover, regarding treaties and U.S. PMSCs, the additional problem of CAT its self-executing character rises, what the U.S. upholds to be non-existent.¹³⁷ Thus, the IHRL system offers prima facie no direct protection against, nor accountability of PMSCs as NSA. This lacuna is created because IHRL mainly addresses the relationship between states and individuals and bases itself upon state responsibility.¹³⁸ It upholds clearly the principle that states are still the main subjects in IL. NSA, in contrast, do not acquire responsibility as an entity in context of general IL.

Yet, on the other hand, NSA should and could indeed be bound by IHRL.¹³⁹ It has been argued that several HR instruments emphasise the duty and responsibility of individuals and groups to protect HR.¹⁴⁰ As example the Preamble of the UDHR and the ICCPR can be given, but this has not given rise to the creation of concrete obligations. In addition, several states see the possible application of IHRL to NSA as "diluting the focus from the distinct nature of HR violations as acts involving state officials and engaging state responsibility,"¹⁴¹ torture as being a prime example.

The reasoning in favour of a human rights compliance could be a 'contemporary' reading of the relevant HR instruments, which shows that NSA are also addressees of HR norms.¹⁴² This in addition to a possible legally binding future for Codes of Conduct can make up the basis for concluding that PMSCs, as NSA, have gained to some extent international legal personality. When following this reasoning, PMSCs with their quasi-legal personality, can be subject to direct international HR norms.

These mentioned arguments underline that there exists a vivid and actual debate on whether or not direct obligations rest on PMSCs to comply with HR standards. Though, it clearly did not result in a full-closing legal responsibility yet. It was the aim to emphasize the important role direct HR duties can have, rather than criticise the current debates. Thus, for purpose of this thesis, assumption will be made that PMSCs are not direct addressees of HR standards and do not carry a full international legal personality.

5. Specific legal instruments

First, case law of the CmAT on basis of CAT will be analysed in relation to the United States, the crime of torture and the possible influence of the cases where American PMSCs were involved in.¹⁴³ Second, an assessment of the CAT prohibition of torture and whether or not it ascertains *ius cogens* or Customary International Law (CIL), is included. This section ends with a short word on the international criminal responsibility which the crime of torture can bring upon the perpetrator.

¹³² Antenor de Wolf, 'Modern Condottieri in Iraq: Privatising war from the Perspective of International and Human Rights Law' (2006) 13 Ind J Global Legal Stud 2, 315, 325; Oette and Ferstman (n 4) 61; Reinisch (n 130) 82.

¹³³ In the Section II hypothesises that PMSCs are NSA.

¹³⁴ Oette and Ferstman (n 4) 35.

¹³⁵ De Wolf (n 132) 346.

¹³⁶ Reinisch (n 130) 68.

¹³⁷ HRC (n 123) para 4.

¹³⁸ De Wolf (n 132) 346; Oette and Ferstman (n 4) 35.

¹³⁹ Oette and Ferstman (n 4) 35.

¹⁴⁰ *ibid*; Reinisch (n 130) 69 ff.

¹⁴¹ Cf HRC Report of the Inter-Sessional Open-Ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (10 March 2005) UN Doc E/CN.4/2005/66 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/128/31/PDF/G0512831.pdf?OpenElement>> accessed on 16.01.2015, para 31; Oette and Ferstman (n 4) 36.

¹⁴² de Wolf (n 132) 347.

¹⁴³ Abu Ghraib (Iraq).

a. CmAT case law on the basis of CAT

Concerning the specific legislation, the CAT forms the most prominent legal source. It places a direct and active obligation on State Parties to take "effective legislative; administrative, judicial or other measures to prevent the acts of torture" within their respective territories and to incorporate the crime of torture as defined in the CAT¹⁴⁴ into their national criminal systems.¹⁴⁵ The United States adopted, in relation to the art. 5 CAT obligation, implementing legislation concerning jurisdiction over extraterritorial acts of torture by U.S. citizens.¹⁴⁶

The non-derogability position the U.S. upholds on the prohibition of torture, is commented upon.¹⁴⁷ The CmAT expressed its concern about the absence of a clear legal provision in the U.S. ensuring that derogation from the torture prohibition does not occur under any circumstances. Thus, an effective translation of the absolute prohibition on torture in the U.S. domestic law, without any possible derogation, is needed.

The CmAT noticed the incapacity of the U.S. to govern a situation like Abu Ghraib in either Iraq or Afghanistan, although the CmAT not explicitly referred to a 'Private Military & Security Company'.¹⁴⁸ It was diplomatic enough to only express its concern about torture by 'certain members of the State party's military or civilian personnel'.¹⁴⁹ With reason, the CmAT also mentioned the insufficient sentences as result of the little amount of investigations and prosecutions.¹⁵⁰

The subject of PMSCs got touched upon by the CmAT, when it highlighted torture by U.S. PMSCs, and subsequently pressured the U.S. to take and describe steps how it will ensure prompt and effective investigation into any allegation of torture by PMSCs and prosecute the alleged perpetrators.¹⁵¹

In relation to redress and compensation¹⁵² the CmAT is of the opinion that the treaty obligation of art. 14 CAT is not met by the current U.S. system. On the basis of that article, every victim of torture within the U.S. has the legal right to redress and an enforceable legal right to fair and adequate compensation from the alleged offender. The Committee mentions hereby the difficulties victims have to face and the limited number that eventually succeeded to file a claim, especially under the Alien Tort Claims Act.¹⁵³ Full redress, compensation providing and rehabilitating mechanisms should indeed be in place.¹⁵⁴

Reply by the U.S. - The U.S. in turn brought its Report¹⁵⁵ before the CmAT, prepared by the U.S. Department of State (DoS), with main assistance from the U.S. Department of Justice (DoJ) and the U.S. Department of Defence (DoD). The report makes mention of the national criminal law context in the U.S. It proclaims that all acts of torture are offences under criminal law in the United States,¹⁵⁶ but underlines that the precise man-

¹⁴⁴ Cf Section II.

¹⁴⁵ Respectively art 2.1 and art 4 CAT.

¹⁴⁶ *Infra* III.B.3.; CmAT General Comment in consideration of reports submitted by State Parties - United States of America (9 February 2000) UN Doc CAT/C/28/Add.5 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/406/56/PDF/G0040656.pdf?OpenElement>> accessed on 16.01.2015.

¹⁴⁷ CmAT (n 146) paras 19 ff.

¹⁴⁸ CmAT General Comment in consideration of reports submitted by State Parties - United States of America (25 July 2006) UN Doc CAT/C/USA/CO/2

<<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsuLMmIdNURtE47fFHU%2bcDW3DsBM%2b%2bgDNfgwCjkmL9ezVYdT9BnWQhYqd%2f%2bJbAz43KUrnRFNvIU7JtfrneaXfrxzVII57eBhtoOUK12BVOZ>> accessed on 16.01.2015.

¹⁴⁹ *ibid* para 26.

¹⁵⁰ *ibid*.

¹⁵¹ Periodic Report of the United States of America to the Committee Against Torture (Third to Fifth Periodic Reports) (12 August 2013) UN Doc CAT/C/USA/Q/5 <<http://www.state.gov/documents/organization/213267.pdf>> accessed on 16.01.2015, para 24.

¹⁵² Art 14 CAT. Obligation to ensure a legal system through which the victim of an act of torture can obtain redress and upholds an enforceable right to compensation.

¹⁵³ CmAT (n 148) para 28.

¹⁵⁴ CmAT General Comment in consideration of reports submitted by State Parties - United States of America (9 February 2000) UN Doc CAT/C/28/Add.5 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/406/56/PDF/G0040656.pdf?OpenElement>> accessed on 16.01.2015, para 278.

¹⁵⁵ CmAT (n 151).

¹⁵⁶ *ibid* para 8.

ner in which State Parties to CAT fulfil this accomplishment, constitutes a matter of domestic law. According to the U.S., that the CAT does not hold a requirement to satisfy its obligations through criminal laws at the federal level only. Concluding, the U.S. reaffirms its finding that every act of torture within the meaning of CAT is criminalised under federal and/or state law.¹⁵⁷ The latter observation brings in differentiation in the approach towards torture. Concerning the CmAT its comments on the inadequate possibilities for victims to obtain redress and compensation, the U.S. states that its legislation provides some avenues for seeking redress in cases of torture. A detailed list of available criminal and civil actions was cited,¹⁵⁸ which mentions possible national legislation to rely on when bringing a PMSC before the U.S. court.¹⁵⁹

b. Qualification of the prohibition of torture as *ius cogens*

Ius cogens is the classification of a peremptory norm in IL from which no derogation by the international community of states is allowed.¹⁶⁰ The provision prohibiting torture is generally accepted to be such an *ius cogens* norm.¹⁶¹ CIL derives from what is been considered as custom, as it is the product of a general and consistent practice of states on the one hand, and opinion juris (the requirement that states conform to this custom out of a sense of legal obligation) on the other hand.¹⁶²

A partial reason for the assumption of the *ius cogens* value is a list¹⁶³ of outstanding characteristics the CAT shows. Firstly, it condemns torture regardless of the circumstances.¹⁶⁴ Secondly, the principle of compulsory universal application is upheld in CAT, by making torture an extraditable offence within any State Party.¹⁶⁵ Thirdly, the CAT excludes the 'Superior Orders'-plea by stating that orders of a superior officer or public authority cannot be raised as a defence by a person charged with torture.¹⁶⁶ And lastly does CAT obligate states to increase the public awareness concerning the prohibition of torture.¹⁶⁷ Thus, since the torture prohibition levels up to *ius cogens*, it should also be considered as CIL as all *ius cogens* norms are in se provisions of CIL.¹⁶⁸

In the recent case of *Belgium v. Senegal*,¹⁶⁹ the International Court of Justice (ICJ) even examined and clarified the nature of State obligations in the context of the CAT. When violations of CIL norms, as the IHR norm of the prohibition of torture is considered to be, occurred State Parties to the CAT have the obligation to ensure "...that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity..."¹⁷⁰ One can argue that this judgement establishes the prohibition of torture as CIL and ensures the obligation of the state to prevent and address the impunity PMSCs or individual contractors enjoy when committing acts of torture abroad. Since the U.S. has ratified the CAT, it is clear that under IL the U.S. not only has the authority but also the obligation to provide for a forum in order that these international standards are justified.

The CmAT seems to affirm the ICJ statement, when it observed the U.S. Federal Court jurisprudence on this topic, and came to the finding that the right to be free from torture is an accepted norm of CIL.¹⁷¹ Generally, U.S. courts refer to the CAT for guidance in determining whether there exists a CIL norm which prohibits torture. The international legal scholars agree that there is at least an international custom against torture.¹⁷² The CAT played thus a significant role in the U.S. courts their development of IHRL.

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid* para 147.

¹⁵⁹ *Infra* Section V.

¹⁶⁰ Art 53 Vienna Convention on the Law of Treaties (23 May 1969); de Wolf (n 132) 340-341.

¹⁶¹ For the first time: *Prosecutor v Furundžija* (ICTY, 10 December 1998) 213.

¹⁶² Decker (n 64) 816.

¹⁶³ Selected from Johan van der Vyver, 'Torture as a crime under international law' (2003) 67 *Alb L Rev* 2, 427, 430 ff.

¹⁶⁴ Art 2.2 CAT.

¹⁶⁵ Art 5 CAT; van der Vyver (n 163) 431.

¹⁶⁶ Art 2.3. CAT.

¹⁶⁷ Art 10 CAT.

¹⁶⁸ Decker (n 64) 817.

¹⁶⁹ *Belgium v Senegal* (ICJ, 20 July 2012) Questions Concerning the Obligation to Prosecute or Extradite.

¹⁷⁰ *ibid*, para 68. Emphasis added.

¹⁷¹ CmAT (n 154) para 61-63.

¹⁷² Decker (n 64) 819-821.

In this context, one can ask if it would be too far to link the possibility of direct HR obligations to the *ius cogens* value of the prohibition against torture. If the violated human right can appropriately create an obligation on the PMSC concerned, is it not right that this PMSC can be held accountable for its crime? In this sense, the right can be justified independent of any link to the state or public function.¹⁷³

International Criminal Court - Concerning international criminal responsibility of PMSCs and their employees who committed torture abroad, the U.S. is up till today no party to the Rome Statute of the International Criminal Court.¹⁷⁴ A fact that is regrettable and repeatedly asked to reconsider by some specific international monitoring bodies, as CmAT.¹⁷⁵ U.S. in its turn, made clear that it is not considering becoming party to the Rome Statute.¹⁷⁶

B. National legislation

After establishing the international legal framework where the U.S. has to comply with and problem areas are identified, the national legislation of the U.S. is at hand. Justification for this focus is represented by firstly, following the state of origin-doctrine¹⁷⁷ in the scenario of a U.S. PMSC contractor torturing abroad and, secondly, when we take the U.S. as home and hiring state of several PMSCs into account. In mentioning the national legal basis an individual can rely on to prosecute PMSCs and their contractor, this section is divided into Military Statutes, Civil Acts and domestic Criminal Law of the United States. Only the Uniform Code of Military Justice (UCMJ) and the Military Extraterritorial Jurisdiction Act (MEJA) will make up for the Military Justice System. The civil claims will be researched under the Alien Tort Claims Act (ATCA) and the Torture Victim Protection Act (TVPA). This section ends with the criminal dimension to the U.S. legal context. First, the U.S. Constitution is shortly addressed.

6. Eighth Amendment U.S. Constitution

The Eighth Amendment to the United States Constitution provides the strongest and clearest¹⁷⁸ national protection against torture since it explicitly prohibits "cruel and unusual punishments," what torture at the least constitutes to. The application of this prohibition is almost waterproof because it is directly applicable to actions of the Federal Government, the states and localities.¹⁷⁹ Nevertheless, technical legal limitations exist, since the Eighth Amendment protections only apply to 'punishments', which means the treatment of individuals that have been convicted and are therefore in custody of the Government.¹⁸⁰

7. Military Justice System

a. Military Extraterritorial Jurisdiction Act

Since 2000 can the Military Extraterritorial Jurisdiction Act (MEJA)¹⁸¹ be found in Title 18 of the U.S. Constitutional Code concerning criminal offences committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the U.S.¹⁸² The MEJA is applicable to American military contractors living abroad. The Act its 2004 Amendment considered the, aside from civilian employees, the in-

¹⁷³ See also Clapham (n 9) 441. Further development thereof in Section IV.

¹⁷⁴ UN Treaty Collection, Status of Rome Statute on 16 January 2015.

¹⁷⁵ CmAT (n 148) para 39.

¹⁷⁶ CmAT (n 151) para 254.

¹⁷⁷ US courts will refrain from examining the validity of acts of foreign governments where those acts take effect within the territory of the foreign State.

¹⁷⁸ CmAT (n 154) para 103.

¹⁷⁹ Through the Fourteenth Amendment to the US Constitution.

¹⁸⁰ *Ingraham v Wright*, 430 US 651 (1977).

¹⁸¹ Military Extraterritorial Jurisdiction Act (22 November 2000) Further: MEJA.

¹⁸² Title 18 US Constitution, para 3261.

clusion of other civilian contractors or federal employees who support the armed forces overseas.¹⁸³ Unfortunately, the effective scope and influence of MEJA can be questioned. Firstly, its scope is limited to felony offences. Meaning, the conduct happening outside the U.S. has to constitute an act punishable by imprisonment for more than one year, and must be within the territorial jurisdiction of the United States, while the offender was subject to the UCMJ accompanying the Armed Forces outside the U.S.¹⁸⁴ Secondly, the effect of MEJA is debated since it has proven to be almost mythical in application to the private military contractor- industry. The reason for this, some find in the fact that the MEJA was never designed to apply to military or security missions or even in context of conflict zones.¹⁸⁵ Moreover, circumvention by PMSCs occurs by contracting with other departments than the DoD.¹⁸⁶

b. Uniform Code of Military Justice

The Uniform Code of Military Justice¹⁸⁷ (UCMJ) makes up for the authority of military law in the United States. Relevant is the 2007 small but significant amendment Congress made to the 1950 original. The 2007 Defence Bill places civilian contractors accompanying the Armed Forces in the field under the UCMJ by defining the UCMJ to include civilians, not just in times of war but also in contingency operations.¹⁸⁸ The value of this change can be debated.

On the one hand, it can be seen as the single biggest legal development for the private military industry since it holds potential for some legal status and accountability of a business that has expanded past the laws. Additional to this, one can say that the debate has changed from denial of the private military industry its role to acceptance.¹⁸⁹ Yet, on the other hand, a less positive view would downplay the added value of the interpretation and implementation of the new UCMJ in practice. Subsequently, to who would be the amended UCMJ be applicable? Only to contractors directly hired by the Department of Defence (DoD), or also to contractors of other agencies working in the same (war)zones, or should even third party nationals fall within the scope of UCMJ? The latter demonstrates the broadest view, and is supported by the importance to define whether or not these contractors are operating in an area that is part of an overall U.S. military mission.¹⁹⁰ Thus, the link should be 'working for an U.S. military mission'. In anyway, with the expansion of the UCMJ, a military officer or the DoD can now legally speaking have authority over contractors.

Relating to the crime of torture, the UCMJ does not explicitly mention a prohibition on this, although it does punish "cruelty and maltreatment"¹⁹¹ by every person subject to Chapter 47. This can cover torture since not all the Eighth Amendment cruel and unusual punishments level up to torture, but every torture crime can be qualified as a cruel and unusual act.¹⁹² A reasoning that the U.S. Supreme Court also upholds in determining whether a particular punishment is 'cruel and unusual'.¹⁹³

The UCMJ and the MEJA provide thus in context of national military justice for a confusing framework. Can there still be spoken of lacuna in the U.S. legal order? Indeed, the UCMJ, whose legal strength was originally to be improved with the creation of MEJA in the first place, underwent the amendment of being applicable to U.S. military and to civilians accompanying the forces overseas. As said, MEJA was intended to fill the gap the UCMJ

¹⁸³ *ibid* para 3267.

¹⁸⁴ *ibid* para 3261, A (1) and (2).

¹⁸⁵ Cf Peter Singer, 'Frequently Asked Questions on the UCMJ and its applicability to Private Military Contractors' (12 January 2007) 4 <<http://www.brookings.edu/research/opinions/2007/01/12defenseindustry-singer>> accessed on 16.01.2015. Its origin was a family abuse case at US base in Germany.

¹⁸⁶ Ingrid L Price, 'Criminal liability of civilian contractors in Iraq and Afghanistan' (2013) 2 *Stan J Int'l L* 49, 491, 493-494.

¹⁸⁷ Uniform Code of Military Justice (5 May 1950). Further: UCMJ.

¹⁸⁸ Art 2 (10) UCMJ, para 802 as amended by the 2007 Defense Bill. "Persons subject to this chapter".

¹⁸⁹ Singer (n 185) 2.

¹⁹⁰ *ibid* 3-4.

¹⁹¹ Art 93 UCMJ, para 893.

¹⁹² Eighth Amendment to the US Constitution: "Excessive bail shall not be required, (...), nor cruel and unusual punishments inflicted."

¹⁹³ *Furman v Georgia*, 408 US 238 (1972). In pointing out that the punishment must not by its severity be degrading to human dignity, especially torture.

had left open. Still, it ignored civilians serving in the U.S. military operations outside the U.S. itself by only mentioning those who work directly for the U.S. DoD on their military facilities. The contractors working for another U.S. agency, like the Central Intelligence Agency or the DoJ can, but might not, fall under the UCMJ. It is still a fact that the crimes in Abu Ghraib resulted only in minor sentences after a selective prosecution, although CmAT expressly reminded the U.S. of art. 12 CAT, that obligates to investigate promptly and impartially.¹⁹⁴ The international opinion, as from HRCm, prefers dealing with detainees who are held in military facilities within the ordinary criminal justice system of the U.S., rather than through military commissions and its military justice system.¹⁹⁵ This is why the civil and criminal national legislation is analysed below.

8. Civil claims

The civil HR claims against companies can be based upon several U.S. jurisdictional statutes. Because of the topic, only the Alien Tort Claims Act and the Torture Victims Protection Act will be mentioned. With the first application of the Alien Tort Claims Act¹⁹⁶ in cases of human rights violations occurring outside the United States and the subsequent revival of the ATCA, comes the understanding of the context the TVPA was conducted in. Both of these acts are currently used in the U.S. courts against multinationals accused of participating in HR violations outside the U.S.¹⁹⁷ No extensive case-law analyses in connection with PMSCs is given here, reference for this goes to Section V.

a. Under the Alien Tort Claims Act

The ATCA, originally enacted as part of the 1789 Judiciary Act, provides essentially¹⁹⁸ that the federal courts "shall have original jurisdiction of any civil action by an alien or a tort only, committed in violation of the law of nations or a treaty of the United States."¹⁹⁹

As result of this provision, federal district courts are granted jurisdiction in civil actions by aliens for violations of the 'law of nations,' what includes torture. The origins of this statute remain unclear,²⁰⁰ which led to the 2004 U.S. Supreme Court assumption from its history that "Congress intended the ATCA to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations".²⁰¹ Further to be understood as "including ... a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries".²⁰² This consequently carries out an international flavour. Whatever the reason,²⁰³ the effects of the Act today remain very real, as corporations find themselves in the role of defendants facing lawsuits.

One of the criteria that must be fulfilled if a torture-case is to be successfully litigated under the ATCA, is proof that the harm plaintiffs suffered was committed in violation of the 'law of nations' or 'a treaty of the United States.' If there is not a treaty available, or the CAT specifically would not suffice, the benchmark on the jurisdictional issue is whether the alleged conduct violates the law of nations.²⁰⁴ An international tort claim must satisfy the following guidelines:²⁰⁵

- There is a recognisable 'universal' consensus of prohibition against the act. *In casu*: torture is a globally legal convicted crime according to universal consensus.
- There are sufficient criteria to determine whether a given action amounts to the prohibited act and

¹⁹⁴ CmAT (n 146) para 231.

¹⁹⁵ HRC (n 123) para 21. By referring to art 7, 9, 10 and 14 ICCPR.

¹⁹⁶ *Filartiga v Pena-Irala* (1980) 630 F.2d 876 (2d Cir.).

¹⁹⁷ Clapham (n 9) 253.

¹⁹⁸ Hathaway, Nowlan and Spiegel (n 51) 820.

¹⁹⁹ Alien Tort Claims Act (24 September 1789) para 1350. Further: ATCA.

²⁰⁰ Clapham (n 9) 252; Daniel E Lee and Elisabeth J Lee, *Human Rights and the Ethics of Globalization* (Cambridge University Press 2010) 210.

²⁰¹ *Sosa v Alvarez-Machain* (2004) 542 US 692, 25.

²⁰² *ibid.* 20.

²⁰³ D Lee and E Lee (n 200) 210.

²⁰⁴ *Filartiga v Pena-Irala* (1980) 630 F.2d 876 (2d Cir.) 880.

²⁰⁵ *Forti v Suarez-Mason* 672 F Supp 1531 (ND Cal 1987), 1539-1540.

thus violates the norm. *In casu*: to constitute torture, the CAT poses several requiring conditions.²⁰⁶

- The prohibition against it is steadfast and therefore binding at all times upon all actors. *In casu*: torture is to be considered as *ius cogens*.

U.S. Courts have been gradually refining the list of possible violations of the 'law of nations', resulting in the statement that the law of nations constitutes to CIL.²⁰⁷

Additionally, *ius cogens* norms are the strongest norms recognised within the law of nations.²⁰⁸ The Vienna Convention on the Law of Treaties defines *ius cogens* norms as "peremptory norm(s) of general international states."²⁰⁹ Examples of that include torture according to the U.S. jurisprudence.²¹⁰ In *Filártiga*²¹¹ the 2nd Circuit Court restated that torture had been recognised as a violation of the law of nations and was therefore actionable under the ATCA.²¹² Forti stated that torture constitutes a cognisable violation of the law of nations under the ATCA.²¹³ In *re Estate* made mention that it is appropriate to rely on international law to give torture victims the right to enforce causes of action under the ATCA that occurred outside the U.S.²¹⁴ Thus, the prohibition of torture being *ius cogens*, makes that violations thereof are litigable violations of 'the law of nations' under the ATCA.

b. Under the Torture Victim Protection Act

The Torture Victim Protection Act (TVPA) of 1991 is created to carry out obligations of the United States under its international agreements related to the protection of human rights.²¹⁵ This doing so by specifically providing an action for damages to victims who suffered torture at the hands of any person acting under actual or apparent authority or colour of law of any foreign nation.²¹⁶

The interconnection between the TVPA and the ATCA starts with the reason why Congress enacted the TVPA. The aim of the law was codifying the holding of *Filártiga* by introducing it into the TVPA since it is useless for victims of torture to prohibit an act without providing a method of remedy.²¹⁷ Additionally, some parallels of prohibition can also be drawn between the use of the ATCA in *Filártiga* and the clear language of the TVPA. By providing an unambiguous statutory remedy, the assuming goal was to make it easier for victims of torture to achieve civil redress.²¹⁸

Prima facie this seems a very useful legal ground to rely on when victims of torture abroad bring a private military contractor by civil action before a U.S. court since the right to claim damages is not limited to nationals. It encloses any individual who is tortured by officials of a foreign nation. The TVPA is even several times identified by the U.S. itself as a clear avenue in search of redress.²¹⁹ Moreover, its wording allows a parallel reasoning for PMSCs and their employees. The TVPA creates a cause²²⁰ of action against "any individual who, under actual or apparent authority ... of any foreign nation"; meaning that private military contractors hired by

²⁰⁶ Art 1 CAT.

²⁰⁷ *Doe v Islamic Salvation Front (ISF)* 993 F Supp 3, 10 (DDC 1998). Further: *Doe*; van der Vyver (n 163) 435.

²⁰⁸ D Lee and E Lee (n 200) 213.

²⁰⁹ Art 53 Vienna Convention on the Law of Treaties (23 May 1969).

²¹⁰ D Lee and E Lee (n 200) 213; Hathaway, Nowlan and Spiegel (n 51) 820.

²¹¹ *Filártiga v Pena-Irala* (1980) 630 F.2d 876 (2d Cir) 876.

²¹² *ibid* 878.

²¹³ *Forti v Suarez-Mason* 672 F Supp 1531 (ND Cal 1987), 1541.

²¹⁴ *In re Estate of Ferdinand E Marcos*, 25 F.3d 1467 (9th Cir 1994) 600.

²¹⁵ Cf ICCPR, CAT, [...]

²¹⁶ TVPA, §2(a)(1). Codified by 28 US Constitution (2000) para 1350.

²¹⁷ Emily M Martin, 'Torture, Inc.: Corporate Liability under the Torture Victim Protection Act' (2010-2011) 31 *N Ill U L Rev*, 175, 179; 76. Beth Stephens, *International Human Rights Litigation in U.S. Courts* (Martinus Nijhoff Publishers 2008) 76.

²¹⁸ Martin (n 217) 179 and 196.

²¹⁹ CmAT List of issues prior to the submission of the fifth periodic report of (20 January 2010) UN Doc CAT/C/USA/3-5

<<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsuLMmIdNURtE47fFHU%2bcDW39nbH%2bbk%2bVuWmMczIMBTNZIzV9N8o73cfSHMXiNulbTVnZ2NAExEh%2bAI3xvEWMrSA%2ba%2fSPOi1G05yDf5cEvX1d>> accessed on 16.01.2015, para 147.

²²⁰ Hathaway, Nowlan and Spiegel (n 51) 821.

the U.S. to provide for government functions and the use of force, or even non-U.S. contractors could fall within the scope of this phrase. Nevertheless, one has to keep in mind the overall limitation of U.S. legislation that limits perpetrators of torture to state actors,²²¹ additional to how the TVPA can create liability for corporations.²²²

9. Domestic criminal law

The Torture Convention Implementation Act (TCIA) constitutes the domestic criminal context in the U.S. regarding torture. The TCIA is part of Title 18 of the United States Code, which is the criminal and penal code of the federal government. The perpetrator of a torture crime outside the United States awaits the possibility of a fine or imprisonment not more than 20 years, or both. If the result of his actions is the death of the victim, this punishment can be death or long life imprisonment.²²³

As said, ratified the U.S. the CAT in 1990 and enacted subsequently the domestic instrument of ratification by the TCIA.²²⁴ This clearly illustrates the intention to bring U.S. criminal code into conformity with the CAT.²²⁵

There are two elements to comment upon here. First, the fact that the United States of America is a federal republic consisting of 50 states and a federal district. Since criminal law in the U.S. can be enacted by both the federal government and the States, no fully identical criminal code exists for the entire country and all 50 states have their own penal codes (statutes). On this result the CmAT observed that, even with differences in naming and defining from jurisdiction to jurisdiction, it is clear that acts constituting torture falling within the CAT should be criminally prosecutable in every jurisdiction within the U.S.²²⁶ This, due to art. 3 CAT obligations of setting torture as a criminal offence in domestic criminal law. Yet, noteworthy is that no federal statute specifically prohibits torture, or directly implements the core provisions of the CAT, something that also is remarked upon by the CmAT.²²⁷

C. Conclusion

As expected, a clear link between international legislation and domestic U.S. legislation prohibiting acts of torture was found. However, the re-statement of the absolute prohibition of torture differs from level to level and from instrument to instrument.

The legal framework, whether general or specific; international or regional; provides for a strong and rigid prohibition. However, up to this point, it is not accepted that NSA as PMSCs would carry direct horizontal HR obligations themselves. Subsequently, an assessment of the value of the torture prohibition was made in order to contribute an alternative. In general, the ICJ, the doctrine and U.S. courts widely agree on the minimal value of an international custom against torture, although only the ICJ goes that far in stating this regardless of who 'the author' of torturous conduct might be. Yet, the prohibition of torture, based on CAT and its CmAT, bears even *ius cogens* value. A possible avenue was thus created for torture victims to underpin their claims before court against PMSCs, since the U.S. clearly has to provide for a forum in order to uphold this international standard.

Several civil and criminal national Acts are relevant for victims of torture. Yet, all of them have limitations concerning their scope. While the MEJA its significant influence or its appliance in the context of the private military contractor-industry is questioned, the expanded UCMJ has the potential to provide for a closure of the

²²¹ Supra Section II.

²²² Cf *Doe* (n 207) 245. In explaining that the clear language of the TVPA imposes liability only on those who act under actual or apparent governmental authority, not private groups.

²²³ TVPA, para 2340A – Torture.

²²⁴ TVPA, para 2340.

²²⁵ Hathaway, Nowlan and Spiegel (n 51) 807-808; van der Vyver (n 163) 434.

²²⁶ CmAT (n 219) para 100-102.

²²⁷ *ibid* para 178.

accountability gaps relating to an overall U.S. military mission. International preference goes to the ordinary criminal justice system, rather than the patched-up U.S. Military Justice System. Under the ATCA, violations of the *ius cogens* norm against torture constitute a violation of 'the law of nations', making it actionable before court. Shown by both the ATCA and TVPA, civil laws are present that provide for possible avenues to state claims by victims of torture occurring outside the U.S.

Regarding the domestic criminal context, represented by TCIA, a prohibition on torture was found, yet not explicitly in any federal statute and not uniformly presented since no identical criminal code exists. The remaining question is which claims (civil or criminal) are the most successful in bringing PMSCs and their employees before court. Although there could be a narrow way to accountability of PMSCs and their employees for torturous conduct, the general lack of full, clear-cut and solid accountability makes one wonder about the consequent responsibility these actors also might be avoiding. Section IV will discuss the presence of gaps in the responsibility PMSCs and their contractors carry.

IV. Gaps in the U.S. responsibility picture: impunity of PMSC and their contractors for torture

The above developed legal frameworks make room for questioning the responsibility: who bears responsibility for the crime of torture committed by PMS contractors abroad and to what extent? This Section will identify obstacles embodied by different interpretations on extra-territoriality of HR conventions and the U.S. doctrine of immunities that torture victims are confronted with, when tracing back the responsibility. These obstacles result in domestic impunity the contractor and his PMSC enjoy before the U.S. courts. Intertwined in this part, some alternative approaches are provided that could be applied in the outlined scenario.

A. Identifying the gaps in PMSCs their responsibility

In order to provide meaningful and relevant approaches that could counter the lack of responsibility, one has to identify the problem first. As illustrated in previous Sections, is the United States bound by international agreements and the *ius cogens* prohibition of torture. The U.S. has the obligation to prohibit and prevent torture, and to provide for necessary means that ensure the protection of and redress for victims of the crime of torture (in essence: to respect, protect and fulfil). Thus, a legitimate question is whether the U.S. violates IHRL when outsourcing responsibility for torture to PMSCs, who themselves enjoy impunity for the crime of torture?²²⁸ This question resulted from two kinds of responsibility gaps which gave way for approaches to these shortcomings, also twofold.

The first deficit relating to responsibility covers the outsourcing to PMSCs. In general, if a state makes use of outsourcing, those actions accordingly lose their link with the state. Thus, actions by the hired PMSCs are in theory not attributable to the home/hiring state, which leaves the victims of their wrongful conduct behind. In the hypothesis of this thesis both the home- and hiring state are the U.S. Although little attention will be given to determining state responsibility, the specific link between governmental functions and PMSCs is addressed. In further creating state and corporate responsibility, awarding a quasi-official status to the outsourced PMSCs can be mentioned as countering approach. Then, the actions and conduct of PMSCs could be directly attributable to the hiring state, this resulting in violation by the U.S. of its obligation to respect, protect and fulfil HR under the ICCPR and the CAT. Additionally, the extra-territorial enforceability of the international legal conventions the U.S. is a State Party to, is at stake. The jurisprudence of respectively the HRCm and the CmAT will prove that the U.S. leaves a gap behind with its opposition on extra-territorial enforcement of the prohibition of torture. The establishment of extraterritorial jurisdiction could be an approach to counter this lack of responsibility. Some proof will be found that the international as well as the domestic legal instruments are present

²²⁸ Since focus lies elsewhere, a detailed answer is outside the scope of this thesis.

which provide for a strong web of extraterritorial jurisprudential accountability for the crime of torture.

A second option contains the domestic obstacles for a territorial state (e.g. Iraq) to enforce the *ius cogens* prohibition of torture and fulfil their own obligations under IHRL,²²⁹ because the home/hiring state awards specific legal immunities to the outsourced PMSCs in the territorial state. This proves the bad faith of U.S. since it has the national legislation in place which incriminates the crime of torture and includes either civil or criminal responsibility,²³⁰ and which can be extended to domestic NSA operating abroad. Additionally, the U.S. chooses to obstacle the development of a tort theory, which recognises that HR obligations, wherever committed, might trigger legal responsibility. The U.S. questions the appropriateness of the extraterritorial litigation and grants a special status to corporations regarding their liability for HR violations. To counter these specific acts of bad faith by the U.S., an abolishment of the domestically created legal immunities could follow, or some kind of corporate responsibility under IHRL could be created. The latter is meant to cover the responsibility to respect HR, not the imposition of direct obligations under IHRL.²³¹

The described reasoning allows the research of respectively the practice of opposition the U.S. upholds to extraterritorial applicability of HR treaties relating to torture (ICCPR and CAT) and the policy of immunities in the U.S. for PMSCs. These two aspects leave gaps behind that can be overhauled. The subjects of research are the establishment of an extraterritorial jurisdiction, and the concept of corporate (social) responsibility. This reasoning leaves out the individual criminal responsibility of the private military contractor who committed acts of torture,²³² international criminal law and state responsibility to certain extent.

B. Extraterritoriality as understood by the U.S.

10. Extraterritorial application of relevant HR conventions

Extraterritoriality can generally be considered two-ways: as creating responsibility of states for the activities of their state agents operating outside the national borders and as creating responsibility of states to protect HR beyond their national territory.²³³ This Section views extraterritoriality in the latter meaning since PMSCs are not considered as state agents, with exception of part C.3. of Section IV. This part will research the U.S. interpretation of ICCPR and CAT extraterritoriality.

a. The ICCPR

The importance of the question whether or not ICCPR is extraterritorial applicable and whether or not the U.S. agrees with this, covers the central criterion of assessing the U.S. obligations under the ICCPR: if the Covenant does not apply to the U.S. actions outside U.S. territory, the highly contested allegations surrounding the activities in Afghanistan and Iraq could be not governed by the Covenant's terms.²³⁴

The Human Rights Committee (HRCm) defended its first position on the extraterritorial appliance of the IC-CPR stating that if States Parties take actions on a foreign territory which violate the rights of persons subject to their sovereign authority, it would be contrary to the purpose of the Covenant if they could not be held responsible.²³⁵ The U.S. on the other hand highlighted from the start²³⁶ its disagreement with the statement of

²²⁹ Iraq has ratified the CAT on 7 June 2011.

²³⁰ ATCA, TVPA and TCIA as discussed with relevant provisions in Section III.B.

²³¹ Supra Section III.A.1.

²³² Cf Section III.B.4.

²³³ Steven R Ratner, 'Corporations and Human Rights: A theory of legal responsibility' (2001) Yale L J 111, 443, 162.

²³⁴ Colette Connor, 'Recent Development: The United States' Second and Third Periodic Report to the United Nations Human Rights Committee' (2008) 49 Harv Int'l L J Harvard International Law Journal 2, 509, 518.

²³⁵ Manfred Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary* (Engel 2005) 43-44.

²³⁶ HRC Third Periodic Reports of States Parties Due in 2003: United States of America (28 November 2005) UN Doc CCPR/C/USA/3 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CPR%2fC%2fUSA%2f3&Lang=en> accessed on 16.01.2015.

the HRCm.²³⁷ According to the U.S., the ICCPR only applies to state actions against individuals who are both in the state's territory and under its jurisdiction,²³⁸ whereas the HRCm took the position that it applies outside the state party's territory in certain limited situations.²³⁹ In its most comprehensive interpretation²⁴⁰ of art. 2.1. ICCPR,²⁴¹ the HRCm made clear that the Covenant bears extraterritorial applicability and that the two elements of the key phrase 'within the state party's territory' and 'subject to its jurisdiction' are to be interpreted distinctively.²⁴² Thus, it made the ICCPR also applicable to persons outside the state territory but within a State Parties' jurisdiction, which was again opposed by the U.S.²⁴³ The HRCm²⁴⁴ continues to regret the position the U.S. upholds despite the contrary interpretation of art. 2.1 ICCPR supported by the Committee's established jurisprudence and state practice.²⁴⁵ Consequently, the U.S. should legally acknowledge the extraterritorial application of the Covenant under certain circumstances.²⁴⁶

The HRCm continuously expresses the opinion that the U.S. interpretation is defective, since they refuse to address serious allegations of violations of the rights protected under the Covenant²⁴⁷ and are involved in several extraterritorial situations with HR implications.²⁴⁸ Some criticism towards the authorization of enhanced interrogation techniques on detainees, as well as the access to judicial review was expressed by the HRCm.²⁴⁹ The consensus within the HRCm on the point of extraterritorial applicability of the ICCPR is remarkable.²⁵⁰

b. The CAT

The CAT and its extraterritorial scope are, contrary to ICCPR, largely accepted.²⁵¹ This is due to the nature of the HR that it seeks to protect and due to its wording. The aim of the CAT is to strengthen the existing *ius cogens* prohibition of torture²⁵² by a number of supporting measures²⁵³ and setting out more detailed obligations for state parties.²⁵⁴ The territorial scope seemed to be understood broadly, as exceeding the state's national borders to include territories under its factual control.²⁵⁵

On the extraterritorial applicability of the CAT, the CmAT stated that 'any territory' in art. 2.1. includes "all areas where the State Party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law."²⁵⁶ It is the unambiguous opinion of the CmAT that State Parties have the obligation to prevent torture in their own national territory, as well as in other places where they exercise effective control. This could be a response to the recent challenges relating to 'war on terror' and extra-

²³⁷ *ibid* para 3.

²³⁸ *ibid* para 110.

²³⁹ HRC General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant (26 May 2006) UN Doc CCPR/C/21/Rev.1/Add.13 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement>> accessed on 16.01.2015.

²⁴⁰ Gondek (n 248) 232.

²⁴¹ HRC (n 239).

²⁴² *ibid* paras 10 and 12.

²⁴³ HRC Third Periodic Reports of States Parties Due in 2003: United States of America (28 November 2005) UN Doc CCPR/C/USA/3 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CPR%2fC%2fUSA%2f3&Lang=en> accessed on 16.01.2015, para 5.

²⁴⁴ HRC Concluding observations on the fourth report of the United States of America (23 April 2014) UN Doc CCPR/C/USA/CO/4 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CPR%2fC%2fUSA%2fCO%2f4&Lang=en> accessed on 16.01.2015, para 4.

²⁴⁵ *ibid*.

²⁴⁶ *ibid*.

²⁴⁷ HRC (n 243) para 3.

²⁴⁸ Michal Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Human Rights Research 2009) 231.

²⁴⁹ Connor (n 234) 520.

²⁵⁰ Gondek (n 248) 243.

²⁵¹ *ibid* 247.

²⁵² Art 1.1. CAT. As established in Section III.

²⁵³ Gondek (n 248) 248.

²⁵⁴ Cf art 2.1. CAT basis: "to take legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."

²⁵⁵ CAT, Preamble.

²⁵⁶ CmAT General Comment No. 2 on the implementation of Article 2 by State Parties (24 January 2008) UN Doc CAT/C/GC/2 <<http://www.refworld.org/docid/47ac78ce2.html>> accessed on 16.01.2015, para 16.

territorial military activities of the states.²⁵⁷ Relating to the U.S., attention grew from 2004 on because of the condition of detention and interrogation in Guantánamo Bay, at Bagram prison in Afghanistan, and in Abu Ghraib in Iraq.²⁵⁸ Nevertheless, the U.S. again holds a restrictive position on applicability of the CAT outside its territory. To the CmAT, U.S. stated the rejection of the concept that 'de facto-control' equated to 'territory under its jurisdiction'.²⁵⁹

Jurisdiction under ICCPR and CAT - Jurisdiction under the ICCPR is understood as the exercise of power or control over a person, rather than over a territory.²⁶⁰ The HRCm justifies this statement by using the standard "when the person is under power and effective control of the armed forces of a state party."²⁶¹ Thus, extending the application to cases where the state has power over individuals.²⁶² The CmAT confirmed the application of the CAT by the U.S. in 'any territory under its jurisdiction'²⁶³ and recommended the U.S. to undertake measures to eradicate all forms of torture therein.²⁶⁴

11. Extraterritorial jurisdiction on the national U.S. level

The outline on applicability and jurisdiction, together with the vague concepts of 'under power and effective control of the armed forces' and 'any territory under its jurisdiction,' leaves much room for discussion. The U.S. domestic level is now at hand, where either the TCIA or ATCA may contain a way to extraterritorial jurisdiction.

a. CAT jurisdiction translated by TCIA on national level

Art. 5(2) CAT is the clearest tie to extraterritorial jurisdiction in the Convention. It contemplates universal criminal jurisdiction over torture by requiring states to prosecute suspected torturers found within their territory.²⁶⁵ Additional, art. 14(1) CAT provides that "each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation."²⁶⁶ The article does not explicitly specify whether a state must provide an enforceable right to compensation for any victim within its territory regardless of where the torture took place or the nationality of the victim. However, such an interpretation seems to be consistent with the text, as it would promote the purpose of the CAT to

²⁵⁷ Gondek (n 248) 248.

²⁵⁸ *ibid*, 252; CmAT Second Periodic Report of the United States to the CmAT (6 May 2005) UN Doc CAT/C/48/Add.3/Rev.113

<<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsnQY8F0WHVitaW NyngB7kYHxFNNJVuRuYn-So3y7jK5KszPeor1Mwams6IgJW05G515PRvX%2fTybewqcR9pgaXvt2jxDH33cAId75MqaRk9NaLkpVcV6Y%2bWif dPGHYeTCZw%3d%3d>> accessed on 16.01.2015.

²⁵⁹ CmAT Consideration of the Second Periodic Report of the United States of America - Summary record of the 703rd meeting (12 May 2006) UN Doc CAT/C/SR.703

<<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsuIqL9rS46HZRO nmdQS5bM6%2fW42j1X8RlcsilEJfIz9NQUFA7FixK9OpCGNaWi5C07aH45zWtd9%2fT949W47MxTDYywr2%2fVV %2bibJBOyPTcs>> accessed on 16.01.2015, para 60.

²⁶⁰ Gondek (n 248) 233.

²⁶¹ *Delia Saldias de Lopez v Uruguay* App No 52/1979 (HRC Communication, 29 July 1981) UN Doc CCPR/C/OP/1 <http://www1.umn.edu/humanrts/undocs/html/52_1979.htm> accessed on 16.01.2015, para 12.3.

²⁶² Corinna Seiberth, *Private Military and Security Companies in International Law – A challenge for Non-binding norms: The Montreux Document and the International Code of Conduct for Private Security Providers* (Intersentia 2013) 77.

²⁶³ CmAT General Comment in consideration of reports submitted by State Parties, United States of America (25 July 2006) UN Doc CAT/C/USA/CO/2

<<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsuLMmIdNURtE47f FHU%2bcDW3DsBM%2b%2bgDNfgwCjkmL9ezVYdT9BnWQHqYqd%2f%2bJJbAz43KUrnRFNvIU7JtfRneaXfrx2VII57 eBhtoOUK12B VOZ>> accessed on 16.01.2015, paras 13 and 26.

²⁶⁴ In the 2006 report, mention was made of acts of torture committed by members of US military or civilian personnel in Iraq and Afghanistan, and the regret of CmAT that no prosecutions have been initiated at that time.

²⁶⁵ Art 5. CAT.

²⁶⁶ Art 14(2) CAT.

bring tortures to justice.²⁶⁷ The United States upholds the contrary view that a private right of action for damages under art. 14 will only be given for acts of torture committed in the territory “under the jurisdiction of that State Party.”²⁶⁸ Nevertheless, by implementing the CAT through enacting the TCIA, a cause of action and criminal remedies were created for torture victims.²⁶⁹ The TCIA authorizes the exercise of jurisdiction over conduct without a traditional jurisdictional link with the U.S. itself. It prescribes the exercise of universal criminal jurisdiction by U.S. courts to bring perpetrators of torture committed outside the U.S., irrespective of the nationality of the victim.²⁷⁰ Thus, one can conclude that the TCIA let the CAT allow for exercising the universal criminal jurisdiction over torture.²⁷¹

b. Creation of universal civil jurisdiction by ATCA

The revival of the ATCA can be seen as the best example of the exercise of extraterritorial jurisdiction in protection of HR.²⁷² Currently debated is whether this extraterritorial jurisdiction is a prescriptive or an adjudicative one. When states adopt legislation with an extraterritorial jurisdictional scope of application, they generally allow their domestic courts to adjudicate on claims based on that legislation.²⁷³ Thus, they give ‘adjudicative jurisdiction’ the meaning of authorizing the courts to entertain suits by extraterritorial enforcement. ‘Prescriptive jurisdiction’ on the other hand, is the authority to make and apply laws to persons or things by using extraterritorial regulation.²⁷⁴ The mainstream view is that there exists no general obligation under IHRL that is imposed on states to exercise extraterritorial jurisdiction (understood here as a combination of adjudicative and prescriptive jurisdiction).

The international responsibility of states may be engaged when a NSA conducts actions under the instructions of or under the direction or control of that state.²⁷⁵ Alas, this is the exception to the negative principle. Hence the absence of a clear obligation for states to control private actors who operate outside their national territory and to ensure that these actors will not violate the HR of others. As alternative, the application of national laws was extended to the domestic NSA operating abroad to prevent some avoidance strategies by NSA, which could be based on the revival of the ATCA.

The usage of the ATCA is founded on a tort theory that recognises that HR violations, wherever committed, may trigger legal responsibility.²⁷⁶ A requirement can be found in the literature for the extraterritorial jurisdiction to have, since only a specific justification would legitimise its existence under IL.²⁷⁷

Traditionally, a state’s territory was considered as the basis for jurisdiction which provides for enough justification. Thus, if one aims to extend the territorial jurisdiction, some jurisdictional connections need to be made which in this case is justified by the ATCA. From the U.S. standpoint this jurisdictional connection covers activities that are universal condemned and are in general interest to be suppressed.²⁷⁸ For the crime of torture, the first criterion is fulfilled since the prohibition of torture holds *ius cogens* value which underlines the universality of the prohibition. Secondly, there seems to be a shared interest in the current cases of extraterritorial prose-

²⁶⁷ Donald Donovan and Anthea Roberts, ‘The Emerging of Universal Civil Jurisdiction’ (2006) 100 Am J Int’l L 142, 142, 148.

²⁶⁸ US, Understanding attached to the ratification of CAT (27 October 1990) 492. About art 14.

²⁶⁹ TVPA, §1350; Donovan and Roberts (n 267) 149.

²⁷⁰ TCIA, §2340A(a)-(b); in declaring that the US will have jurisdiction over both a national of the United States and also people in the US even if they are not a United States national; Van der Vyver (n 163) 434.

²⁷¹ Donovan and Roberts (n 267) 149.

²⁷² Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press 2010) 170; Reinisch (2002), 55. Since 1980.

²⁷³ De Schutter (n 272) 162.

²⁷⁴ Anthony Colangelo, ‘Adjudicative versus prescriptive jurisdiction, translating historical intent, and a brief universal jurisdiction rejoinder’ (20 July 2012) <<http://www.scotusblog.com/2012/07/response-adjudicative-versus-prescriptive-jurisdiction-translating-historical-intent-and-a-brief-universal-jurisdiction-rejoinder/>> accessed on 16.01.2015; Donovan and Roberts (n 267) 142.

²⁷⁵ De Schutter (n 272) 162.

²⁷⁶ Reinisch (n 130) 56.

²⁷⁷ *ibid.*

²⁷⁸ Cf Third Restatement of the Foreign Relations Law of the United States (14 May 1986) para 404 (a).

cution of HR violations, for preventing these HR infringements in general. The phrase to be understood in the meaning of 'infringements by states and by NSA,' since the primary national legal instrument²⁷⁹ covers the incrimination of torturous acts which then leads to criminal or civil responsibility. Regardless of whether torture is committed within or outside the territory of the U.S., this responsibility rises. Additionally, a general interest to suppress the act of torture is the silver thread through all the international HR documents that contain a prohibition on torture²⁸⁰ to which the U.S. has committed to. Thus, ATCA provides for a strong basis to the extraterritorial civil jurisdiction.

The ATCA grants original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."²⁸¹ This provision with prescriptive jurisdiction can reinforce international HR norms.²⁸² The ATCA seems to expand federal jurisdiction to cover private individuals' tort lawsuits arising under IL. It creates even a kind of universal civil jurisdiction,²⁸³ since the international legal principle of 'universal jurisdiction' allows states to suspend traditional boundaries for prosecutions of certain IL violations.²⁸⁴ Aside from the academic controversies around the concept of universal civil jurisdiction,²⁸⁵ the granting of the extraterritorial jurisdiction by ATCA creates a mechanism to enforce IHRL.

This is most welcome since enforcement of IHRL remains underdeveloped²⁸⁶ and obstacles to effective national courts occur. Some illustrations of the obstacles that rise when applying the legitimate tort theory are the legal status of corporations (see further) and the question of appropriateness of extraterritorial litigation.

Concluding, the U.S. seems to behave rather contrarily: it is restrictive in interpreting the scope of its international legal obligations but, at the same time, provides an alternative that can be seen and hence is used as a forum for bringing extraterritorial cases of to court. The TCIA and the ATCA provide for sufficient ground to substantiate the extraterritorial jurisdiction- principle when posing civil or criminal actions that are founded on torture.²⁸⁷

C. State responsibility for conduct of PMSCs and contractors

Although state responsibility is not the main focus, still some elements will be brought up embodied in the relevant Draft Articles on State Responsibility.

Attribution of unlawful PMSC conduct to the state – Literature agrees on the fact that states do have a responsibility: to respect, to protect and fulfil.²⁸⁸ General principles²⁸⁹ exist according to which violations of HR that are committed by private actors can trigger the responsibility of the state, be it the home state, the hiring state or the host state. The ways that engage the responsibility of the state for HR violations committed by private entities are twofold. Firstly, the violation can be attributed to the state, and second, when the state (U.S. *in casu*) does not provide for the necessary mechanisms for victims of torture in order to fight impunity.²⁹⁰ The U.S. themselves should be aware of their responsible role to play in the global PMSCs phenomenon.²⁹¹

²⁷⁹ Through ATCA, Cf TCIA.

²⁸⁰ UDHR, ICCPR, CAT, etc.

²⁸¹ ATCA, para 1350.

²⁸² Schuman (n 285) 1281.

²⁸³ Contra: Curtis A Bradley, 'Universal Jurisdiction and U.S. Law' (2001) 2 U Chi Legal F, 323, 326.

²⁸⁴ Third Restatement of the Foreign Relations Law of the United States (14 May 1986) para 404. Criticised as lacking citation to any authority, cf Bradley (n 283) 343.

²⁸⁵ Jacob Schuman, 'Developments in the Law – Extraterritoriality' (2011) 124 Harv L Rev, 1226, 1282-1283.

²⁸⁶ Ibid, 1283.

²⁸⁷ Van der Vyver (n 163) 435.

²⁸⁸ Robin White and Claire Ovey, *The European Convention on Human Rights* (Oxford University Press 2010) 143-166.

²⁸⁹ Alston (n 6), 10; Francioni and Ronzitti (n 103) 153; Jäger and Kümmel (n 86) 388 and 390.

²⁹⁰ Further reading about state responsibilities: Francioni and Ronzitti (n 103) 152-154.

²⁹¹ Alston (n 6), 10; Clapham (n 9) 263; Oette and Ferstman (n 4) 42.

Since PMSCs carry a private character, this bars the recognition as a state organ.²⁹² Consequently, any part of a PMSC its conduct would not be attributable to the state according to art. 4 ILC Draft Articles.²⁹³ Thus, two other ways of attribution are relevant. First, if the PMSC exercises elements of 'governmental authority' and is authorized to exercise these governmental powers.²⁹⁴ Although art. 5 ILC Draft Articles does not identify the scope of 'governmental authority', the question remains whether or not PMSCs generally are exercising government authority.²⁹⁵ Second way to attribute responsibility is in cases where the state has instructed, controlled, or directed the private conduct.²⁹⁶ While considering art. 8 ILC Draft Articles,²⁹⁷ one can argue that a contract entailing detailed instructions on services to be provided by the PMSC could give a status of 'semi-official' to the PMSC in question and create state accountability for their conduct.²⁹⁸ The academic consensus is that states cannot absolve themselves from their responsibilities under IHRL by contracting out certain duties to private companies since a state with authority over military contractors remains responsible under IHRL for the contractor's actions.²⁹⁹

D. Outsourcing responsibility for torture: impunity in the U.S.

This section covers the impunity the PMSCs and their personnel enjoy in the U.S. for acts they committed abroad, thus, referring to the ability to act without negative consequences. Subsequently, this impunity results in immunity in practice, and comprises the meaning of a legally granted freedom from prosecution.

1. Attempts to secure impunity in the U.S.

a. Immunity from civil claims before domestic U.S. courts

The answer to the question what the consequences are of the failure of a legal mechanism that allows impunity, points again in the direction of the ATCA. The U.S. federal government has sovereign immunity, unless it is waived.³⁰⁰ When passing the ATCA, Congress listed thirteen exceptions to the general amnesty.³⁰¹ This piece of federal legislation bars inter alia suits against the federal government for "any claim arising out of the combatant activities of the military (...), during time of war."³⁰²

The so called 'combat activities exception'³⁰³ is just one of the exceptions covered by this paragraph where case law has further developed a doctrine for, yet under the heading of product liability for civil contractors. The basic test for shielding contractors is whether there are "unique federal interests" at stake.³⁰⁴ A court thus has to determine whether the application of the state tort law would produce a 'significant conflict' with federal

²⁹² Hence the Section II conclusion of being NSA.

²⁹³ ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (9 August 2001) Further as: ILC Draft Articles. Chesterman and Lehnard (n 19) 143.

²⁹⁴ Art 5 ILC Draft Articles; *ibid*.

²⁹⁵ Detailed analyses is beyond the scope of this Thesis.

²⁹⁶ Art 8 ILC Draft Articles.

²⁹⁷ "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

²⁹⁸ Jäger and Kümmel (n 86) 390.

²⁹⁹ Alston (n 6) 10; Francioni and Ronzitti (n 103) 152-154; Jäger and Kümmel (n 86) 388. Meaning that the US cannot outrun its international legal obligations to ensure that hired contractors treat their prisoners properly.

³⁰⁰ Spencer R Nelson, 'Establishing a practical solution for tort claims against Private Military Contractors: Analyzing the Federal Tort Claims Act's "Combatant activities exception" via a Circuit split' (2012-2013) 23 Civil Rights J 1, 109, 111.

³⁰¹ 28 US Constitution, (2006) para 2680.

³⁰² Cf 18 US Constitution (2006) para 2680(j).

³⁰³ Nelson (n 300) 109; Cedric Ryngaert, 'Litigating abuses Committed by Private Military Companies' (2008) 19 Eur J Int'l L 5, 1035, 1050.

³⁰⁴ *Boyle v United Technologies Corporation*, 487 US 500 (1988) paras 507-513.

interests.³⁰⁵ If yes, the combat activities exception is activated; if not, the contractor enjoys no immunity and can be sued. In time, this immunity is extended to government contractors on the ground that imposing liability on such contractors "would create a duty of care where the combatant activities exception is intended to ensure that none exists".³⁰⁶ Hence, the usage of the ATCA exceptions to bar claims against private military contractors.³⁰⁷

One can question the relevance of this doctrine of government contractor immunity in relation to suits against PMSCs, since these cases do not specifically entail product liability.³⁰⁸ Nevertheless, in the recent domestic cases against PMSCs Titan³⁰⁹ and CACI,³¹⁰ who were allegedly involved in the mistreatment of prisoners at the Abu Ghraib prison, the court granted ATCA immunity to the PMSCs.³¹¹ It held that, after the application of the doctrine, there were "uniquely federal interests" involved since the activities were "both necessary to and in direct connection with the actual hostilities."³¹²

With regard to employees of Titan, the Court applied the unique federal interest doctrine in questioning whether or not they were under the exclusive direction and control of the military chain of command.³¹³ The District judge of Columbia stated that Titan employees were indeed, therefore barred from the suit because of a legitimate usage of the government contractor immunity under the ATCA.³¹⁴ For the employees of CACI, the court came to a different decision when applying the exclusive operational control test, holding that they were both under the control of the military and the company. Therefore the supervisors retained some authority independent from the military, which resulted in the absence of granting immunity to the employees and the company.³¹⁵ The developed 'exclusive operational control'-test could be a fine criterion when ruling in similar cases.

Nevertheless the Court of Appeals stated a different opinion when revising the judgment towards CACI, and affirming the Titan decision.³¹⁶ The Court rejected the used 'exclusive operational control'-test since it does not protect the full measure of the federal interest embodied in the combatant activities exception.³¹⁷ The Court of Appeals' approach underlines that the scope of the 'unique federal interest'-concept is broader than the 'exclusive operational control'-test.

More recent, in *Al Quraishi v. Al Nakhla and ors.*,³¹⁸ some Iraqi detainees brought an ATCA claim against the PMSC L-3³¹⁹ and a contractor, where the District Court refused to follow the abovementioned Court of Appeals

³⁰⁵ *ibid* para 507.

³⁰⁶ *Koohi v US*, 976 F2d 1328 (9th Cir 1992) 1337.

³⁰⁷ Kathryn Johnson, 'Shields of war: defining military contractors' liability for torture' (2012) 61 Am U L Rev, 1417, 1424.

³⁰⁸ Ryngaert (n 303) 1050; Stinnett (n 8) 659.

³⁰⁹ Titan Corporation. Acquired by L-3 Communications and previous named "Titan Group".

³¹⁰ CACI International Incorporated.

³¹¹ *Ilham Nassir Ibrahim et al v TITAN Corp et al*, 391 FSupp2d 10 (DDC, 2005) Further: *Ibrahim v Titan* (2005); *Saleh et al v Titan Corp*, App No 08-7008 (DC, 11 September 2009) Further: *Saleh v Titan* (2009).

³¹² *Ibrahim v Titan Corp*, 556 F Supp2d 1 (DDC 2007) 4 and 10. Further: *Ibrahim v Titan* (2007).

³¹³ *Ibrahim v Titan* (2007), 6; Avery Fellow, 'Judge Throws Out Blackwater Charges', in *Courthouse News Service* (4 January 2010) <<http://www.courthousenews.com/2010/01/04/23311.html>> accessed on 16.01.2015; Ryan Larose, 'Jurisdiction over American Private Military Contractors: the illusion of a loophole in the law and the reality of no oversight' (2012) *Buff Hum Rts L Rev* 18, 223; Charlie Savage, 'Judge Drops Charges From Blackwater Deaths in Iraq' in *New York Times* (31 December 2009) <<http://www.nytimes.com/2010/01/01/us/01blackwater.html?r=0>> accessed on 16.01.2015. This being contrary to criminal proceedings, as in the case of Blackwater at the Nisour Square incident on 16th of September 2007 and the subsequent proceeding on basis of MEJA. The Defense's arguments against extending jurisdiction over PMSCs focused around the fact that their contract employment supported State, not Defense, and therefore MEJA should not apply because of the contract with DoS. With comparing the DoD and the DoS, and the loophole in MEJA's jurisdictional reach over contractors not connected to DoD, suggested that courts did not have jurisdiction over the defendants. These arguments prove that in contrast to civil ATCA jurisprudence, the link with DoD is by all means kept as limited as possible in order to argue for non-applicability of MEJA. While the governmental 'combat activities exception' requires a strong link with 'federal interests'. However, the District found in favour of prosecution.

³¹⁴ *Ibrahim v Titan* (2005); *Saleh v Titan* (2009).

³¹⁵ *Ibrahim v Titan* (2005), 10.

³¹⁶ *Saleh v Titan* (2009).

³¹⁷ *Ibid* 15.

³¹⁸ *Al Quraishi v Nakhla*, PJM 08-1696 (DM, 29 July 2010) Further: *Al Quraishi v Nakhala*.

³¹⁹ Formerly Titan Corporation.

reasoning and decision.³²⁰ It stated that the combatant activities exception was not meant to apply to all contractors as Congress had not designed the legislation in such terms.³²¹ Quite predictable was the reversion of this decision by the Court of Appeal.³²² Yet, when relying on the non-unanimous decision and the strong dissenting opinion, it seems that the subject of the combatant activities exception is far from settled.³²³

b. Immunity from liability in host states' courts

The Coalition Provision Authority (CPA) Order No. 17 is an additional source for immunity since it shielded the PMSCs from suit in Iraqi courts. The Order No. 17 was unilaterally established in June 2004 and expired 31st of December 2008 with the simultaneous ceasing of the UN Mandate that was established by the Security Council Resolution 1511.³²⁴ The Order No. 17 states expressly: "(...) the MNF (Multinational Force), the CPA, Foreign Liaison Missions, their Personnel, (...), and all International Consultants shall be immune from Iraqi legal process." Thus, the non-Iraqi PMSCs and their non-Iraqi employees were granted immunity from Iraqi laws.³²⁵ Consequently, no litigation before an Iraqi forum against the misconduct of PMSC employees in Iraq was possible, although that Iraq might have been the appropriate and logical forum for that.³²⁶

c. Responsibility of the state when granting immunities

As the previous parts illustrate, both the PMSCs and their personnel are often granted immunity from jurisdiction of the host and the contracting state. As alternative, the granting of immunity to private contractors could under certain circumstances constitute a separate violation of HR provisions by the state. In the case of blanket immunities, this seems all the more appropriate.³²⁷ States still have the obligation to prosecute and punish the alleged wrongdoers since State Parties cannot absolve themselves from their obligations under a treaty (be that CAT or ICCPR) by contracting out core state activities which involve the use of force and the detention of persons to the commercial private security sector.³²⁸ Thus, the U.S., by affording immunity from its justice system while providing no alternative avenue, violates its positive obligation to keep the U.S. legislation in compliance with the HR standards.³²⁹

E. Corporate (social) responsibility

Some attempts have been made to address the general international rights and duties of corporations concerning HR.³³⁰ Currently there are no IHR legal obligations for PMSCs to comply with HR and the corporations escape accountability even on domestic level, as illustrated by abovementioned shortcomings. With this lack of justice and compensation for the HR violations, IHRL has to fill the gap and some legal theories could initiate new approaches. The mentioning of theories is justified by the fact that unclear doctrines of corporate liability are an obstacle in bringing the PMSCs to court and for creating successful transnational tort litigation against

³²⁰ *Al Quraishi v. Nakhala*, 739. Referring to *Ibrahim v Titan Corp* (2007), concerning the decision on CACI.

³²¹ *Al Quraishi v. Nakhala*, 739. "...in no sense did it suggest that all of the FTCA exceptions should be incorporated into government contractor immunity."

³²² *Al Quraishi v L-3 Services Inc*, App No 10-1891 (4th Cir, 21 September 2011). It based itself on the *Al Shimari* decision of the Fourth Circuit in 2013 denying the applicability of the ATCA to violations occurring outside the US This case is now pending before the Fourth Circuit Court of Appeals. Cf Section V.

³²³ Ryngaert (n 303) 1051; Stinnett (n 8) 661.

³²⁴ Kristine A Huskey, PRIV-WAR Report-The United States of America - 'The American Way: Private Military Contractors & U.S. Law After 9/11 An Update' (1 October 2010) in National Reports Series No 03/10 <file:///C:/Users/Lisa/Downloads/SSRN-id2184090.pdf> accessed on 16.01.2015, 21.

³²⁵ Section 2, 1 CPA Order No 17.

³²⁶ Jäger and Kümmel (n 86) 660-661.

³²⁷ Francioni and Ronzitti (n 103) 168.

³²⁸ HRC Concluding observations on the fourth report of the United States of America (23 April 2014) UN Doc CCPR/C/USA/CO/4 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CPR%2fC%2fUSA%2fCO%2f4&Lang=en> accessed on 16.01.2015, para 347. ICCPR art 7 and 10 as example.

³²⁹ Francioni and Ronzitti (n 103) 169.

³³⁰ Alston (n 6) 3; Clapham (n 9) 513 ff; Ratner (n 233) 443.

them.³³¹ One of the new approaches could be the liability of the PMSC itself, but can the concept of corporate (social) responsibility provide answer to the U.S. practice of impunity?

2. Corporate responsibility

NSA, such as PMSCs, are traditionally not considered as duty-bearers under IL.³³² Nevertheless, voices appear to attribute some responsibility to NSA, since the denial of rights and remedies for victims of HR abuses by NSA would be inappropriate.³³³

Several propositions by scholars for theories of corporate responsibility are justified by the assumption that a corporation is less than a state but more than an individual, thus needs specific regulating norms.³³⁴ When a private entity acts, in some way on behalf of the state, it is as liable as the state would be for its violations of HR. Subsequently, this theory needs to determine when acts of private individuals are so closely linked with the state to make them liable.³³⁵ A contract, the subsequent payment, the use of force on demand or the exercise of previous exclusive governmental functions could underpin this statement. Then, the responsibility for private military businesses could be similar to the state responsibility, even more so when PMSCs are considered to be semi-officials.

In the case of torture,³³⁶ reliance on a link with the state is appropriate since one of the CAT constitutive elements is a 'public official or other person acting in an official capacity'.³³⁷ Torture under CAT is a crime in need of some state involvement, making a connection with the government a necessary factor for the derivation of company responsibility. Also, since NSA do not carry direct horizontal HR obligations,³³⁸ the engagement of the state is needed. For the purpose of U.S. PMSC, this should not be a problem since they generally act on behalf of the U.S., are hired by the U.S., exercise state powers, act on the basis of governmental contracts closed with U.S. representatives,³³⁹ or accompany official military forces. This enumeration consequently justifies the statement in this thesis that PMSC can commit torture.

3. Corporate social responsibility

Since PMSC as private entities can pose a threat to the human dignity, a contemporary notion of HR should envisage duties on them as well. In search of some valid approaches, one finds opportunity in the broadly termed concept of corporate social responsibility (CSR).³⁴⁰ These CSR principles emerged in the wake of globalisation and the subsequent widespread growth of commercial military services together with the global reach of the private military business.³⁴¹ The concept indicates a responsibility of a corporation towards society that can be defined as "abiding by the laws, regulations and customs of a country, (...), to human rights in general."³⁴² With the appointment of JOHN RUGGIE as Special Representative on Business and Human Rights with a man-

³³¹ Ryngaert (n 303) 1053.

³³² Supra Section III; Ryngaert (n 303) 1038; HRC Report of the Special Representative of the UN Secretary General to the UN Human Rights Council on the issue of human rights and transnational corporations and other business enterprises (9 February 2007) UN Doc A/HRC/4/035 <<http://business-humanrights.org/sites/default/files/media/bhr/files/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf>> accessed on 16.01.2015, para 44.

³³³ Commission on Human Rights, The right to a remedy and reparation for victims of violations of international human rights and humanitarian law - Note by the High Commissioner for Human Rights (10 November 2003) UN Doc E/CN.4/2004/57 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/170/98/PDF/G0317098.pdf?OpenElement>> accessed on 16.01.2015, para 13.

³³⁴ Ratner (n 233) 463-465, 495.

³³⁵ *ibid* 495 – 504.

³³⁶ In this alinea: in meaning of art 1 CAT.

³³⁷ Art 2 (1) CAT.

³³⁸ Cf Section II.

³³⁹ Dep of Justice, Dep of Defense, etc.

³⁴⁰ Other voluntary, non-binding initiatives under the CSR heading is eg the UNs Global Impact; Francioni and Ronzitti (n 103) 345; Seiberth (n 262) 118.

³⁴¹ Cf Section II; Francioni and Ronzitti (n 103) 344.

³⁴² Jäger and Kümmel (n 86) 255.

date to identify issues around business & HR and to search for solutions, the development of CSR benefitted in a structural way. RUGGIE posed the benchmark standard of 'Protect, Respect and Remedy',³⁴³ wherein each element supports the others in achieving sustainable progress.³⁴⁴

According to this Ruggie Framework, the primary duty to protect HR rests with the states but businesses do have a basic responsibility to respect HR. Plus, it requires the establishment of an adequate and appropriate remedy for HR abuses, which fulfils the dual functions of punishment and redress.³⁴⁵ Thus, companies are obligated to respect HR.³⁴⁶ The private military market itself seems willing to consider HR complicit behaviour within market value,³⁴⁷ since the corporate self-restriction resulted in Codes of Conduct and the mentioned CSR. The PMSC industry has recently attempted to implement the Ruggie Framework through the ICoC, as a self-imposed commitment.

The Ruggie Framework constitutes thus merely a baseline³⁴⁸ and an indicator of the aim for practical tactics to develop CSR further.

F. Conclusion

The narrow U.S. interpretation became clear regarding the extraterritoriality principle of both the ICCPR and the CAT. This is contradicted and continuously criticised by the jurisprudence of the HRCm and CmAT. Yet, the CAT's extraterritorial jurisdiction is translated on the national U.S. level by both criminal and civil legislation, providing avenues for victims to bring PMSCs who tortured them abroad before the U.S. courts. The translated criminal instrument is embodied by the TCIA that allows the exercise of universal criminal jurisdiction over torture by the CAT. On the civil side, the national instrument represented by the ATCA, adds an extraterritorial applicability to the prohibition of torture. Where the U.S. is restrictive in interpreting the scope of its international legal obligations, it provides for legal alternatives that are justifiably used as forum for extraterritorial cases of cases before U.S. courts. The TCIA and the ATCA hereby provide substantial ground to underpin the extraterritorial jurisdiction-principle when posing civil or criminal claims that are founded on torture.

Although states cannot absolve themselves from their responsibilities under IHRL by contracting out certain duties to private companies, the outsourcing in the sketched scenario included ultimately the outsourcing of the responsibility for torture itself. This because of immunities the U.S. government granted from civil claims before domestic courts and from liability in the host state's courts. The former includes the ATCA, connected with the currently used jurisprudential doctrines of the 'combat activities exception' and the 'unique federal interest'. A clear, unique governmental interest should be present in order for a PMSC to obtain the combat activities exception, and thus enjoy immunity before U.S. courts. While a clear governmental connection is desired by defendants in civil claims, this is by all means kept reduced in criminal claims under MEJA. Because of immunity from liability in host state's court, no litigation before Iraqi courts for the misconduct of PMSC employees in Iraq took place. The U.S., by affording immunity from its justice system when providing no alternative avenue, violates its obligation to keep U.S. legislation in compliance with HR standards.

³⁴³ HRC Protect, Respect and Remedy: A framework for business and human rights - Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (7 April 2008) UN Doc A/HRC/8/5 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/128/61/PDF/G0812861.pdf?OpenElement>> accessed on 16.01.2015. Hereinafter: Ruggie Framework.

³⁴⁴ Ruggie Framework, para 9.

³⁴⁵ Francioni and Ronzitti (n 103) 347.

³⁴⁶ HRC Report of the Special Representative of the Secretary-General on the issue of human rights and transitional corporations and other business Enterprises - John Ruggie, Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (21 March 2011 UN Doc A/HRC/17/31 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/121/90/PDF/G1112190.pdf?OpenElement>> accessed on 16.01.2015; Seiberth (n 262) 118.

³⁴⁷ Rosemann (n 11) 96.

³⁴⁸ UN Preliminary Work Plan Mandate of the Special Representative on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (10 October 2008).

In addressing general international rights and duties of corporations concerning HR, corporate responsibility was mentioned that demands the determination of the level of official involvement in order to hold private military businesses liable.³⁴⁹ In turn, this might lead to a responsibility similar to the state. CSR on the other hand, still has to be developed by some practical tactics where the Ruggie Framework constitutes a basis for. Some concerns remain about the abovementioned initiatives and principles, which are included in Section VI by the proposed options to bring PMSCs before U.S. Courts.

V. Redress in the U.S. for the tortured victim: how can U.S. jurisprudence help to bring PMSCs before Court?

A subsequent problem is the accountability for torture, which relates to litigation of HR abuses committed abroad by U.S. PMSCs. In this Section the domestic efforts made by the U.S. courts to ensure redress for the victims of torture and to hold contractors accountable for their conduct, will be discussed. In limiting the scope of included jurisprudence to civil claims before U.S. courts and focusing on a current case, one arrives at Al Shimari v CACI brought before the Court of Appeals.³⁵⁰ The significance of this case lies with the little amount of people that are held accountable for the abuses at Abu Ghraib.³⁵¹ This appeal case addresses responsibility and accountability of those corporate entities that conspired with high level U.S. marshals who ordered them to undertake the torturous abuse.³⁵² First, a short analyses of the relevant ramifications of the landmark Kiobel case³⁵³ will be presented only to be followed by an overview of the jurisprudential history that resulted in Al Shimari v CACI. From this case, the plaintiffs' opposition in first instance, the subsequent judgement and the appellant brief are discussed. The placement of U.S. developed jurisdiction in international context closes this part.

A. Relevant ramifications of *Kiobel*

There exists no case with more intense (media) interest,³⁵⁴ juridical debate, academic disputes,³⁵⁵ and legal analyses³⁵⁶ as *Kiobel* has in its short existence. In order to comprehend post-*Kiobel* developments, one has to be familiar with the relevant legal consequences *Kiobel* encouraged regarding the ATCA and the development of U.S. HRL. The following *Kiobel* ramifications draw attention: extraterritorial application of the ATCA and the 'touch and concern' -doctrine, which both lead down to a road of uncertainty.

Bright line rule against extraterritorial application – In *Kiobel*, the presumption against extraterritorial application was applied to the ATCA.³⁵⁷ Since the relevant conduct took place within the territory of a foreign

³⁴⁹ A contract, the subsequent payment, the use of force on demand, [...] were given examples.

³⁵⁰ *Suhail Najim Abdullah, Al Shimari, Taha Yaseen, Arraq Rashid, Salah Hasan Nusaif Al-Ejaili, Asa'ad Hamza Hanfoosh Al-Zuba'e v CACI Premier Technology Inc, Timothy Dugan, L-3 Services*, App No 13-1937 (4th Cir, 30 July 2014) Further: *Al Shimari v CACI*, 2014.

³⁵¹ Only some military personnel who directly participated in the atrocities and lower level soldiers.

³⁵² Baher Azmy, 'A date with justice for victims of Abu Ghraib' (23 April 2014) <<http://iissonline.net/a-date-with-justice-for-victims-of-abu-ghraib/voorzitter-center>> accessed on 16.01.2015.

³⁵³ *Kiobel et al v Royal Dutch Petroleum Co et al*, 569 US ____ (2013) Further: *Kiobel*. In making the presumption against extraterritoriality applicable to ATCA claims.

³⁵⁴ Cf CCR press, 'Judge Rejects Last Ditch Attempt by Shell to Stop Human Rights Trial' (26 May 2008) <<http://ccrjustice.org/newsroom/press-releases/judge-rejects-last-ditch-attempt-shell-stop-human-rights-trial>> accessed on 16.01.2015; Max Planck Institute, 'The Kiobel Judgment of the US Supreme Court and the Future of Human Rights Litigation in Civil Courts' (4 July 2013) <<http://www.mpi.lu/news-and-events/upcomingevents/detail/detail/understanding-kiobel/>> accessed on 16.01.2015; R Samp, 'Supreme Court Observations: *Kiobel v. Royal Dutch Petroleum & the Future of Alien Tort Litigation*' (18 March 2013) <<http://www.forbes.com/sites/wlf/2013/04/18/supreme-court-observations-kiobel-v-royal-dutch-petroleum-the-future-of-alien-tort-litigation/>> accessed on 16.01.2015.

³⁵⁵ David Stewart and Ingrid Wuerth, 'Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute' (2013) *107 Am J Int'l L* 3, 601.

³⁵⁶ Ibid; Andrew Clapham, *Human Rights obligations of Non-State Actors* (Oxford University Press 2006); Johnson (n 307); Odette Murray, David Kinley and Chip Pitts, 'Exaggerated rumours of the death of an alien tort? Corporations, human rights and the remarkable case of *Kiobel*' (2011) *12 Melbourne J of Int'l L*, 1-38.

³⁵⁷ *Kiobel* (n 353) [3-14] (Opinion of the Court)

sovereign and the foreign defendants had no more than a “corporate presence” in the U.S.,³⁵⁸ the presumption was not overcome.³⁵⁹ This led to the unanimous decision that the claims lack sufficient connection with the U.S.. The presumption is considered as particularly fierce in order to “protect against unintended clashes between our laws and those of other nations which could result in international discord.”³⁶⁰

Creating the ‘touch and concern’-doctrine - When applying the presumption against extraterritoriality to the *Kiobel* facts, the Court concluded that this presumption could be overcome.³⁶¹ It declared that cases brought under the ATCA must “touch and concern” U.S. territory with “sufficient force” to “displace” the presumption against extraterritoriality.³⁶² Additionally, a second consideration was upheld since the Court reasoned that corporations are often “present” in many countries.³⁶³ Thus, some kind of U.S. connection or presence might suffice to pose claims arising from torts abroad, which could displace the presumption. Yet, the Court did not provide detailed guidance on the factors that would realise this displacement. It did however recognise that ATCA causes of action are to be evaluated on a case-by-case basis.³⁶⁴

Creation of uncertainty - The U.S. Supreme Court injected uncertainty³⁶⁵ into an otherwise well-settled doctrine relating to the scope of ATCA.³⁶⁶ In pre-*Kiobel* times, one could assume that corporations are subjects of litigation for alleged infringements of the ‘law of nations’ under the ATCA.³⁶⁷

However, the Court adapted this line of reasoning by concluding that corporations should not be sued under the ATCA. Thus, the doctrine used this uncertainty as leeway for a debate around the Supreme Courts’ inability to distinguish between requirements for legal responsibility and that what is necessary to invoke ATCA jurisdiction.³⁶⁸ Contributing to the uncertainty is the increasing quantity of the issues that are being litigated in the lower courts,³⁶⁹ additional to the already existing dissimilarities in the interpretation of *Kiobel* by those courts.³⁷⁰

The Supreme Court could have provided clarity with *Kiobel*, but it did not. As a result, the lower courts remain divided over issues as corporate liability, the ATCA interpretation, the law of nations and extraterritoriality. In achieving some uniformity, an Act of Congress could clarify the purpose and objectives of the ATCA.³⁷¹

B. *Al Shimari v CACI*: jurisprudential history

Al Shimari v CACI is a case decided³⁷² before the Fourth Circuit Court of Appeals. The relevant judgments that comprise the jurisprudential background of this case on appeal, are the two Virginia District Court opinions in *Al-Quraishi v L-3 Services, Inc.*³⁷³ and *Al Shimari v CACI International, Inc.*³⁷⁴ Both cases involved suits brought by Iraqi citizens who claimed to have been held and tortured by the U.S. military with the aid of government contractors³⁷⁵ and were filed against American military contractors.³⁷⁶ Both also addressed the ability of federal courts to review U.S. government contractors’ misbehaviour abroad.³⁷⁷ The panel of judges en banc concluded i.a. that state tort actions against military contractors are pre-empted by important federal inter-

³⁵⁸ *ibid* [14], [21]

³⁵⁹ *ibid* [1], [14].

³⁶⁰ *Ibid* [10]; Stewart and Wuerth (n 355) 606.

³⁶¹ *Kiobel* (n 353) [6] (Breyer concurring)

³⁶² *Kiobel* (n 353) [14] (Opinion of the Court); [1] (Alto concurring), [1] (Breyer concurring).

³⁶³ *Kiobel* (n 353) [4] [6] [14] (Opinion of the Court).

³⁶⁴ *Ibid* [3].

³⁶⁵ Scott E Albright, ‘Corporate tort liability under the Alien Tort Statute post-Kiobel’ (2013) 21 U Miami Bus L Rev, 281, 325. About corporate ATCA liability.

³⁶⁶ Cf contra: Stewart and Wuerth (n 355) 602.

³⁶⁷ *Filartiga v Pena-Irala* (1980) 630 F2d 876 (2d Cir); *Sosa* (n 70), 729; *Doe* (n 307); Stewart and Wuerth (n 355) 601.

³⁶⁸ Murray, Kinley and Pitts (n 356) Eg whether or not corporations can violate norms of IL.

³⁶⁹ Stewart and Wuerth (n 355) 603. US conduct in aiding and abetting violations occurring elsewhere.

³⁷⁰ Murray, Kinley and Pitts (n 356), 33. The first victim of doctrinal chaos.

³⁷¹ Albright (n 365) 284 and 326.

³⁷² Oral arguments were heard on 18 March 2014. Decided on 30 July 2014.

³⁷³ *Al-Quraishi v L-3 Services Inc* (4th Cir DCV, 21 September 2011. Further as: L-3 Services. Vacated sub nom: *Al Shimari v CACI Int’l Inc*, App No 09-1335 (4th Cir, 11 May 2012) (en banc).

³⁷⁴ *Shimari v CACI Int’l, Inc* (4th Cir D Va, 11 May 2012) (en banc). Further as: L3-Services & CACI (en banc).

³⁷⁵ L-3 Services (n 373) 202; L-3 Services & CACI (n 374) (en banc) 414.

³⁷⁶ L-3 Services & CACI (n 374)(en banc) 13.

³⁷⁷ *Ibid* 414-415; L-3Services (n 373) 202.

ests.³⁷⁸

However, the District Court en banc decision also clarified that the contractor defences do not rise to the level of immunity from suit, yet without elaborating on the content of 'contractor defences'.³⁷⁹ It seems that the doctrines of immunity and pre-emption are intertwined as a result of the federal interests at stake in military contractor litigation.³⁸⁰

Although the acts of torture in this case lie at the heart of the HR protection ATCA was designed to enforce, the case was dismissed.³⁸¹ This being reason for the plaintiffs to file twice a reinstatement of their ATCA claims of torture,³⁸² which were dismissed.³⁸³ Following this, plaintiffs filed for appeal with the Fourth Circuit Court of Appeals Virginia.³⁸⁴

C. Taking chances to survive *Kiobel*

The majority tends to believe that *Kiobel* marks the end of ATCA litigation for human rights abuses committed outside the U.S.³⁸⁵ Nevertheless, some seem hopeful that the alien civil torts are not dead yet and that *Al Shimari* is the case that could survive the established *Kiobel*-doctrine.³⁸⁶ Their opinion is shared by the Centre for Constitutional Rights (CCR)³⁸⁷ in representing the plaintiffs³⁸⁸ or appellants³⁸⁹ before either the District Court Virginia and the Fourth Circuit Court of Appeal against CACI³⁹⁰ as defendant/appellate.³⁹¹ This part will further cover the Opposition CCR filed at first instance and the Appellant Brief in appeal, who both make a strong case for surviving *Kiobel*.

1. Plaintiffs' Opposition before the District Court

The CCR provides in its Opposition³⁹² a clear view on *Kiobel's* rejection of a bright line rule against extraterritorial application. The CCR assumes that a categorical bar prohibiting the Court from recognising any otherwise cognisable ATCA claim when the alleged violation would occur "outside the United States", was not the majority opinion in *Kiobel*.³⁹³ Secondly, the CCR states that *Kiobel* did not question the application of ATCA to corporations and under what circumstances the ATCA could be applied to their conduct committed abroad. The CCR hereby averted the focus on highly contested liabilities for corporations. Only two claims which the Plaintiffs built their claim on are mentioned below: the presumption against extraterritorial application of the ATCA, and the 'touch and concern'-doctrine.

³⁷⁸ L-3 Services & CACI (n 374)(en banc) 417.

³⁷⁹ Cf The application of the doctrines of collateral order jurisdiction, sovereign immunity and federal pre-emption to military contractors' actions overseas. Further reading: Johnson (n 307) 1420-1423.

³⁸⁰ Johnson (n 307) 1431.

³⁸¹ L-3 Services & CACI (n 374) (en banc). Remanding to the District Court.

³⁸² Amongst others: war crimes and cruel, unusual and degrading treatment.

³⁸³ CACI filed their motion to dismiss plaintiffs' ATCA claims on 24 April 2013.

³⁸⁴ On 29 October 2013. Oral arguments were heard on 18 March 2014.

³⁸⁵ Cf FJZCabot, 'Kiobel and the question of extraterritoriality' (2013) Huri-age. Consolider-Ingenio 2, 1-12; Murray, Kinley and Pitts (n 356); Stewart and Wuerth (n 355).

³⁸⁶ Ia R Steinhardt, 'The ATS after Kiobel' (31 January 2014) <<http://www.asil.org/blogs/ats-after-kiobel>> accessed on 16.01.2015.

³⁸⁷ CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change. See: <http://ccrjustice.org/about>. Terms 'CCR', 'plaintiffs', 'appellants' are used as synonyms since CCR legally represents the victims.

³⁸⁸ Suhail Najim and Abdullah Al Shimari.

³⁸⁹ Suhail Najim Abdullah Al Shimari, Taha Yaseen Arraq Rashid, Salah Hasan Nusaif Al-Ejaili and Asa'ad Hamza Hanfoosh Al-Zuba'e.

³⁹⁰ CACI Premier Technology, Inc.

³⁹¹ Together with Timothy Dugan, L-3 Services, Inc.

³⁹² filed on 3 May 2013 in *Al Shimari v CACI Premier Technology, Inc* (n 350) Further: Plaintiffs' Opposition.

³⁹³ Plaintiffs' Opposition (n 392) 4.

a. Presumption against extraterritorial application of the ATCA

According to CCR, *Kiobel's* presumption against extraterritorial application does not apply to the alleged torts in Abu Ghraib over which the United States exercised exclusive authority and control,³⁹⁴ because the conduct occurred when the U.S. exercised "complete jurisdiction and control" over Iraq. Of particular relevance is the U.S.-controlled CPA and its Order 17, which placed Abu Ghraib under the "exclusive authority, and control" of the CPA.³⁹⁵ An "international discord" between the U.S. and Iraq seems not possible for the CCR, since at the time of the relevant conduct the contractors were subject to liability by U.S. domestic law.³⁹⁶

b. The *Kiobel* 'Touch and concern'- doctrine

Even if the presumption against extraterritorial application applies, this might be denied under the 'touch and concern'-doctrine of *Kiobel* as mentioned above. The CCR therefore sums up elements to justify why this case sufficiently 'touches and concerns' the U.S. to displace the presumption,³⁹⁷ concluding its enumeration that CACI's conduct in the U.S. is indeed sufficient for displacing it.³⁹⁸

As said, this reasoning allows arguing that the U.S. Supreme Court in *Kiobel* at least recognised that there exist connections to the U.S.,³⁹⁹ which are so strong, that U.S. courts have to provide victims with forms of redress for IL violations. Hence, the unacceptable denial by the U.S. to provide an avenue of redress. The CCR shares this opinion in stating that the doctrine was meant to address "claims for which the U.S. would be held responsible for providing redress in the view of the international community".⁴⁰⁰

2. Memorandum Opinion of the District Court

The District Court judge, relying on *Kiobel*, dismissed the case⁴⁰¹ "because the acts giving rise to their tort claims occurred exclusively in Iraq, a foreign sovereign".⁴⁰²

Subsequently, the ATCA does not provide jurisdiction over plaintiffs' claims which involve conduct occurring exclusively outside the territory of the U.S.⁴⁰³ On the Common Law claims brought by the plaintiffs, the Court applied a choice of law-analyse that resulted in an application of Iraqi law to Al Shimari's claims.⁴⁰⁴ The plaintiffs' failure to state a claim under Iraqi law was then an easy step in deciding to grant CACI's motion to dismiss.⁴⁰⁵ The court even concluded that CACI was immune from lawsuits "for claims arising from acts related to its contract or performed in connection with military combat operations".⁴⁰⁶

3. Appellant Brief before the U.S. Court of Appeal

The Abu Ghraib torture survivors, again represented by the CCR, appealed the decision challenging the courts' dismissal. Also in response to the Memorandum Opinion, six amici briefs were submitted⁴⁰⁷ supporting

³⁹⁴ *ibid* 11.

³⁹⁵ Section 9 CPA Order 17, 9.

³⁹⁶ Plaintiffs' Opposition (n 392) 15 and 17; Section 4.1-4.2 CPA Order 17, 4.

³⁹⁷ Plaintiffs' Opposition (n 392) 19-20: The torts were committed on territory and in a detention facility over which the US exercised plenary legal and political authority; CACI is a US corporation, with US headquarter, protected by US laws, entered into contract with the US Government.

³⁹⁸ Plaintiffs' Opposition (n 392), 20-25.

³⁹⁹ US corporation, in contract with US government, US run prison, conspiracy with US contractors.

⁴⁰⁰ Plaintiffs' Opposition (n 392), 28.

⁴⁰¹ *Suhail Najim Abdullah, Al Shimari, et al, v CACI International, Inc, et al* (DV, June 2013) Further: Memorandum Opinion.

⁴⁰² Memorandum Opinion (n 401) 13-14.

⁴⁰³ *ibid* 19.

⁴⁰⁴ *ibid* 24.

⁴⁰⁵ *ibid* 29.

⁴⁰⁶ *ibid* 26.

⁴⁰⁷ By retired military officers, former UN Special Rapporteurs on Torture and the current Rapporteur Juan Méndez, etc. (9 November 2013).

the plaintiffs' appeal of the case. All argued that *Al Shimari* is permitted under *Kiobel*, and that IL requires the U.S. to provide a forum for accountability and redress concerning the abuses at Abu Ghraib.⁴⁰⁸

The plea of plaintiffs/appellants is built around two⁴⁰⁹ pillars: first, the CCR states that the District Court erred in dismissing plaintiffs' ATCA claims under *Kiobel*.⁴¹⁰ This argument covers concepts as the failure of the District Court to apply the Supreme Court's 'touch and concern'-test⁴¹¹ and the displacement of the *Kiobel* presumption because the claims do fall within the focus and objects of the ATCA.⁴¹² Their second argument consists of contesting the District Courts' dismissal of the plaintiffs' Common Law claims.⁴¹³

a. First pillar: Dismissal of ATCA claims

The incorrect reading of the presumption against extraterritorial application by the District Court when imposing a categorical rule prohibiting recognition of any claim arising out of conduct abroad, can be reversed.⁴¹⁴ Moving on to the core focus of the ATCA, plaintiffs allude to its provision of jurisdiction over civil claims by aliens for core IL violations, thus ensuring accountability for grave IL violations committed by U.S. subjects.⁴¹⁵ According to CCR, the claims *in casu* do lie at the core of the ATCA concerns and present no risk of international discord⁴¹⁶ because of two apparent differences with the *Kiobel* facts. First, the claims concern territory over which the U.S. exercised plenary legal and political control at the time the torts were committed.⁴¹⁷

Moreover, it tries to prove that the diminishment by the District Court of the legal significance of U.S. control over Iraq and Abu Ghraib is simply incorrect.⁴¹⁸ Second difference with *Kiobel* is the inclusion of universally recognised norms against a U.S. defendant and no risk of "international discord".⁴¹⁹ Consequently, adjudicating claims against U.S. domiciled CACI would benefit also U.S. international obligations and interest.⁴²⁰ The plaintiffs' claims do 'touch and concern' U.S. territory with sufficient force to displace the *Kiobel* presumption.

b. Second pillar: *Al Shimari* Common Law claims

The District Court dismissed also all of Plaintiffs' common law claims, thus effectively immunising CACI from liability. The CCR is of the opinion that the District Court made the wrong choice-of-law analysis, resulting in the application of no law at all.⁴²¹

In explaining its reasoning, CCR refers to the purpose of Iraqi law (in the form of CPA Orders issued by the U.S. government) if it would apply. Its purpose would be anything but creating blanket immunity for contractor misconduct. Instead, CPA Orders dictate that in exchange for immunity from jurisdiction of Iraqi tribunals, contractors are subject to the laws of their "Parent State".⁴²²

Likewise, the plaintiffs contest the District Courts interpretation of the 'Combat Activities' exception in CPA Order 17, which they find too broad and in contradiction with the court's prior ruling and U.S. law.⁴²³ It can be said that the District Court correctly identified the CPA Order 17 as the key to the choice-of-law doctrine, but

⁴⁰⁸ Mohammad Abushehab, 'The fight for Justices Continues: Six Amici Submitted briefs to the Court in Support of the Abu Ghraib torture survivors' (26 November 2013) <<http://ihrib.org/fight-justice-continues-amici-submitted-briefs-court-support-abu-ghraib-torture-survivors/>> accessed on 16.01.2015.

⁴⁰⁹ Relevant for this thesis.

⁴¹⁰ Brief for Plaintiffs-Appellants to the US Court of Appeals Fourth Circuit, in *Al-Shimari v CACI* (n 350) (29 October 2013) 17. Further: Appellant Brief.

⁴¹¹ Appellant Brief (n 410) 21.

⁴¹² *ibid* 26-34.

⁴¹³ *ibid* 40.

⁴¹⁴ Appellant Brief (n 410) 21-22.

⁴¹⁵ *ibid* 26-27.

⁴¹⁶ *Kiobel* (n 353)[2] [4] (Opinion of the Court).

⁴¹⁷ Appellant Brief (410) 29-30.

⁴¹⁸ *ibid* 32-34.

⁴¹⁹ *ibid* 35-36.

⁴²⁰ *ibid* 37.

⁴²¹ Appellant Brief (n 410) 47.

⁴²² *ibid* 47-48. Cf Section 2.4 of CPA Order 17, 4. Consistent with jurisdictional principles.

⁴²³ Appellant Brief (n 410) 50-51. Cf Section IV: the combat activities exception is not meant to apply to all contractors as Congress did not design the legislation in such terms.

wrongfully interpreted the CACI acts as falling under “combat activities”, and thus providing immunity from civil claims before domestic U.S. Courts.⁴²⁴ Lastly, the CCR focuses on how the District Court generalised the narrow immunity from Iraqi law for actions regarding contractual disputes.⁴²⁵

Indeed, the District Court took into consideration that CACI’s conduct was a result of performing its mere contractual duty, and decided therefore they should enjoy immunity from suit.⁴²⁶

D. Conclusion

From the above sketched jurisprudential analyses, concerns remain on how the inconsistent interpretation by U.S. courts of an identical argument covering the combat activities exception still exists⁴²⁷ and whether *Kiobel* is not being interpreted too freely, which reduces the clarity of cases where a U.S. actor is involved who commits a tort in violation of the law of nations abroad. The Supreme Court indeed has firmly re-stated that the U.S. should not become a “safe haven” for torturers.⁴²⁸ Still, the lower courts seem not able to interpret *Kiobel* in its human rights legacy correctly. Their decisions since *Kiobel* confirm that ‘foreign-cubed’ cases against corporations must be dismissed. But, because they carry the responsibility for defining the elements of the ‘touch and concern’-test, one can expect that Courts of Appeals in general will generate jurisprudential conflicts.⁴²⁹ The dismissal by the District Court of Virginia illustrates already a very narrow and formalistic reading of the *Kiobel* decision.

The ATCA is not fully able to offer some measure of justice to Abu Ghraib torture survivors, since it seems a non-resolved and deliberately vague issue. Crimes of this severity, perpetrated by a U.S. PMSC, must be re-dressable by U.S. courts. And yet, there seems no jurisprudential change underway. This leaves the door open for repetition of conduct and impunity, keeping the ghost of Abu Ghraib alive instead of confronting it.

Can *Al Shimari* survive in the post-*Kiobel* era? – From what is discussed, the U.S. District Court of Appeal seemed not likely to decide in favour of the appellants’ claims under the ATCA. Nevertheless, in a broader jurisprudential view, cases as *Al Shimari* could survive the *Kiobel* reasoning to a certain extent. In the hypotheses that lower courts would simply apply the created ‘touch and concern’-doctrine, and assess in good faith the significant links with the U.S., rather than overestimate the presumption against extraterritoriality or try to overly interpret the doctrine in clear cases with an extra territorial element, a survival could be likely. Yet, In addition to the *Al Shimari* case, several other long-running ATCA cases remain undecided after *Kiobel*.⁴³⁰

The decision in *Al Shimari* of 30 July 2014 seems to agree with abovementioned criticism and comply with the proposed prospects. The judgement criticises the language and terminology which is used in the *Kiobel* majority opinion and which obstructs a fact-based analysis of ATCA claims in search of substantial ties to the U.S.⁴³¹ The judgement also denounces the mechanical appliance of the presumption against extraterritorial application.⁴³² The Court of Appeal thus correctly concludes that the plaintiffs their ATCA claims ‘touch and concern’ the territory of the U.S. with sufficient force to displace the presumption against extraterritorial application.⁴³³ And this conclusion based on CACI’s status as U.S. corporation, the U.S. citizenship of CACI’s employees, the issued contracts by the Department of Interior and Congress’ intents through the TVPA and ATCA to

⁴²⁴ Appellant Brief (n 410) 50. Cf Section V.

⁴²⁵ Appellant Brief (n 410) 54-55.

⁴²⁶ Memorandum opinion (n 401) 3 and 26.

⁴²⁷ Cf Section IV, concerning the link between immunities and the government as it fits best.

⁴²⁸ Plaintiffs’ Opposition (n 392) 25 and 27; *Kiobel* (n 353) [13] (Breyer concurring) Also: *Sosa* (n 70), 732; the domestic legal criminalisation of torture with extraterritorial reach by the TVPA and the TCIA.

⁴²⁹ Steinhardt (n 386).

⁴³⁰ *Cardona, et al v Chiquita Brands Int’l, et al* (11th Cir 2014) No 12-14898; *Kivalina v Exxon Mobil Corp, et al*, US Supreme Court, No 12-1072; *In re: South African Apartheid Litigation*, (SDNY, 28 August 2014) No 02-md-01499.

⁴³¹ *Al Shimari v CACI* (n 350) 21-22.

⁴³² *ibid*, 25.

⁴³³ *ibid* 30.

avoid U.S. becoming a safe haven for torture perpetrators.⁴³⁴ The District Court judgement was vacated and the Court of Appeals remanded the case to the same District Court. There, the case is now considered for additional discovery. Briefing on legal questions about the scope of plaintiffs' Alien Tort Statute Claims were added,⁴³⁵ as well as the viability of CACI's asserted immunity to suit under the political question doctrine.⁴³⁶ The defendants' filed motion to dismiss the case for lack of subject-matter jurisdiction asserts that Plaintiffs' claims raise political questions the judiciary cannot answer. This new development places the focus on other legal qualifications and justifies the appliance of another doctrine, partly because CACI still doubts the factual grounds of the case. One can question the true relevance for the Abu Ghraib victims to obtain redress, since the ATCA is proven to be counterproductive and insufficient to do so. Oral arguments containing the political questions doctrine will be held in January 2015. A second outcome, which holds the preference, would be when Congress clarified the focus and purpose of the ATCA, since courts cannot patch up this lacuna for ages.

E. Scope of judgement in international context

It is important to frame this civil tort litigation on HR violations by PMSCs committed abroad in international context. Important, not only because torture survivors have a legitimate claim to justice, but also because these cases have wide implications beyond the *Al Shimari* situation. If there are no consequences for these HR violations, courts might come to the conclusion that 'anything goes if you are a private military contractor'. A hint of this slippery slope was present in the District Courts' reasoning that immunity came to the ones who are exercising their contractual duty.⁴³⁷

The ATCA is usually perceived as the best example of extraterritorial jurisdiction resulting from extending the national legislation with HR relevant provisions to NSA operating abroad.⁴³⁸ But, some obstacles in practice still occur for the general tort theory which recognises that HR violations, wherever committed, may trigger legal responsibility. These obstacles include questions as whether extraterritorial litigation is appropriate and the conformity around the special status of corporations. Inconsistent policy⁴³⁹ seems to make up for the main reason why extraterritoriality is still a problem in the U.S., and jurisprudence clearly does not help,⁴⁴⁰ it even increases the uncertainty. Significant is that the U.S. itself makes mention of the flawed ATCA and the flawed jurisprudence in proving its compliance with obligations of international documents.⁴⁴¹ One could wrongfully assume that the U.S. does have an adequate mechanism in place by which it upholds its obligations to punish torturous acts.

Prominent question lingers why the jurisprudential shoe still not fits the ATCA-foot? If torture victims cannot obtain redress, how can they file a claim for redress against the U.S. PMSC who tortured them abroad? If the domestic level fails, one has to search for other instruments to hold PMSCs accountable for their torturous conduct abroad. The next Section will therefore discuss the Montreux Document, together with the International Code of Conduct and assess if these recent initiatives in the global PMSC scene are sufficient in reaching the goals of establishing responsibility.

⁴³⁴ *ibid*, 27.

⁴³⁵ Plaintiffs' Memorandum on the elements of their claims under the Alien Tort Statute (E D Va, 5 November 2014) and Defendant CACI Premier Technology Inc's Memorandum on the elements of plaintiffs' Alien Tort Statute Claims (E D Va, 14 November 2014) in *Al Shimari v CACI* (n 350) No 1:08-CV-00827-GBL-JFA.

⁴³⁶ Defendant CACI Premier Technology Inc's Memorandum on the elements of plaintiffs' Alien Tort Statute Claims (E D Va, 21 November 2014); Plaintiffs' Memorandum in opposition to defendant CACI Premier Technology's motion to dismiss (E D Va, 19 December 2014) and Reply of defendant CACI Premier Technology Inc in support of motion to dismiss for lack of subject-matter jurisdiction (E D Va, 2 January 2015) in *Al Shimari v CACI* (n 350) No 1:08-CV-00827-GBL-JFA.

⁴³⁷ Memorandum opinion (n 401) 3 and 26.

⁴³⁸ Seiberth (n 262) 268-269.

⁴³⁹ Cf Section IV.

⁴⁴⁰ Illustrated by *Al-Shimari v CACI*.

⁴⁴¹ Eg CmAT General Comment in consideration of reports submitted by State Parties, United States of America (9 February 2000) UN Doc CAT/C/28/Add.5 <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/406/56/PDF/G0040656.pdf?OpenElement>> accessed on 16.01.2015, para 51. Remedies.

VI. Propositions to regulate conduct of PMSC abroad regarding the crime of torture: *lex ferenda*?

The propositions that could become lex ferenda regarding acts of torture by PMSCs abroad will be presented by an analysis and assessment of the existing instruments that were created by and for the PMSC industry: the Montreux Document and the ICoC. This will be followed by propositions for regulation based on a double dualistic approach that aims at improving the prestige and the enforcement of the prohibition of torture applicable to PMSCs and their personnel when they exercise their contracted services abroad.

A. Existing instruments: Montreux & ICoC

The focus lies on international soft law, represented by the existing 2008 Montreux Document (Montreux) and the 2010 International Code of Conduct (ICoC) as self-regulating instrument.⁴⁴² The ICoC is the follow-up process to Montreux,⁴⁴³ creating a complementary nexus between both. This is underlined by the fact that Montreux focuses on the state duty to protect, whilst the Code addresses corporate responsibility of PMSCs to respect IHRL and to ensure that their employees comply with IHRL. The Preamble of the ICoC prescribes this and affirms the corporate responsibility of Signatory Companies to respect as expressed in the Ruggie Framework.⁴⁴⁴ Each of these instruments will be analysed on their level of reinforcement regarding the prohibition of torture and their effectiveness regarding the punishment of (U.S.) PMSCs who torture in particular. The expected outcome is a strong re-statement with yet some issues regarding applicability and effectiveness occurring.

1. General comparison of scope and concepts

Corporations – The ICoC is applicable to the activities of ‘Private Security Companies and other Private Security Providers’ (collectively named PSCs⁴⁴⁵) that have signed and agreed to operate in compliance with the Code’s principles and standards.⁴⁴⁶ The notion PSC covers “any company whose business activities include the provision of Security Services either on its own behalf or on behalf of another, irrespective of how such a company describes itself.”⁴⁴⁷ The ‘Private Military and Security Providers’ (PMSCs), who appear in Montreux are “private entities that provide military and/or security services, irrespective of how they describe themselves.”⁴⁴⁸

Services – In comparing the ICoC ‘security services’ with the Montreux ‘military and security services’, a difference emerges. According to Montreux, PMSCs’ services include, “in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.”⁴⁴⁹

As defined in the ICoC, security services consist of “guarding and protection of persons and objects, such as convoys, facilities, designated sites, property or other places (whether armed or unarmed), or any other activity for which the Personnel of Companies are to carry or operate a weapon in the performance of their duty”.⁴⁵⁰ Since the States set the limits for outsourcing in Montreux,⁴⁵¹ the ICoC reflects more an industry perspective that includes the focus on armed or unarmed services.

Application – Montreux is limited to armed conflict, where the ICoC applies in a much wider range of set-

⁴⁴² Cf Section II.

⁴⁴³ ICoC, para 2 explicitly refers to the Montreux Document.

⁴⁴⁴ ICoC, paras 2-4.

⁴⁴⁵ ICoC, para 1.

⁴⁴⁶ ICoC, Section B and para 13.

⁴⁴⁷ ICoC, Section B.

⁴⁴⁸ Montreux, para 9 (a), 9.

⁴⁴⁹ *ibid.*

⁴⁵⁰ ICoC, Section B.

⁴⁵¹ Montreux, para 9; Seiberth (n 262) 131.

tings, including pre-, during- and post conflict situations.⁴⁵² This raises the debate about the wide scope of their action radius;⁴⁵³ nevertheless could the broad applicability of the ICoC outweigh the narrow scope of Montreux.

General conduct in compliance with IHRL – In both documents, be it at state responsibility level or at the Signatory Company level, some HR principles are reflected in the HR catalogue. Montreux categorises this under the obligations states should endorse to ensure respect for IHRL and mentions the good practices of particular relevance for the protection of HR.⁴⁵⁴ Similarly, the ICoC addresses their general conduct by incorporating HR principles that reflect areas of potential adverse PMSC influence. The Code is founded on the principle⁴⁵⁵ that companies and their personnel have to “treat all persons humanely and with respect for their dignity and privacy”.⁴⁵⁶

Conclusion – Even though the ICoC builds upon the foundations of Montreux,⁴⁵⁷ there is no uniform use of terminology and the ICoC does not fully cover the same detailed services of Montreux. The services not appearing in the ICoC could nevertheless fall under ICoC’s category of “any other activity for which Personnel of Companies are required to carry or operate a weapon in the performance of their duties.”⁴⁵⁸ This lack of terminological uniformity could be derived from the negative connotation the PMSC-label still holds derived from the mercenary-like military companies active in the 1990s.⁴⁵⁹ Regardless of the great difference in action radius between the two documents, some built in HR principles are present that need to be respected.

2. Relevant provisions

a. Specific provisions relating to torture

Montreux does not carry a specific provision focused on torture, although it makes recommendations to ensure HR compliance based on the good practices.⁴⁶⁰ The document restates international legal obligations of the states to investigate, or prosecute persons suspected of having committed crimes under IL.⁴⁶¹ These ‘crimes under IL’ include explicitly torture, posing a post-crime obligation on states regarding torturous acts of PMSCs. The ICoC on the other hand, specifically regulates conduct of personnel that is covered by the absolute⁴⁶² prohibition of torture. The Code explicitly requires that Signatory Companies and their personnel abstain from engaging in conduct that falls under the ban of torture.⁴⁶³ Remarkably are the constitutive elements of torture under the ICoC, since it includes the conduct by a private entity which would constitute torture if it was committed by a public official. Thus, this definition avoids the controversial debate regarding the necessary level of official engagement. In accordance with IHRL,⁴⁶⁴ the prohibition is formulated in absolute terms, allowing no exceptions justified through extraordinary circumstances.⁴⁶⁵

⁴⁵² Cf ICoC, Section B. Definition of ‘Complex Environments’.

⁴⁵³ Seiberth (n 262) 164. Due to lack of control and accountability for HR abuses by PMSCs.

⁴⁵⁴ Montreux, GPs 13, 38, 36. Including, labour law, anti-discrimination, welfare standards, etc.

⁴⁵⁵ Seiberth (n 262) 168.

⁴⁵⁶ ICoC, para 28.

⁴⁵⁷ *ibid* para 2.

⁴⁵⁸ *ibid* Section B.

⁴⁵⁹ Seiberth (n 262) 59 ff; David A Wallace, ‘International Code of Conduct for private Security Service Providers, Introductory Note’ (2011) 50 Int’l L Materials 1, 89, 90.

⁴⁶⁰ Montreux, 16.

⁴⁶¹ Montreux, Part I, 6, 12, 17, 21.

⁴⁶² Cf its *ius cogens* value Section III.

⁴⁶³ ICoC, para 35.

⁴⁶⁴ Art 5 UDHR, art 7 ICCPR, CAT, [...]

⁴⁶⁵ ICoC, para 36. Cf contractual obligations, superior orders, [...]

b. Compliance, accountability and remedies

With respect to the HR of victims of the unlawful PMSC conduct, Montreux seeks to ensure that adequate remedies exist and that the victims can claim reparation.⁴⁶⁶ To guarantee that PMSCs provide for compensation, Montreux recommends taking into account the financial and economic capacity of the company, including the ability to pay for potential liabilities, when granting licences or authorisations.⁴⁶⁷ Apart from clear individual criminal liability recommendations, Montreux suggests furthermore that the states⁴⁶⁸ should provide for a civil liability or otherwise require PMSC personnel, or their clients to provide reparations to victims of their unlawful conduct.⁴⁶⁹ Nevertheless, the possibility of a civil claim does not necessarily lead to accountability for this wrongful conduct.⁴⁷⁰ The proposed contractual sanctions of termination, financial penalties, dismissal of the perpetrator and the passing on to investigative authorities, could provide for some alternatives when torture occurs.⁴⁷¹ The ICoC in turn makes mention of effective remedies that the Signatory Companies have to offer when the reporting procedure after unlawful conduct is initiated.⁴⁷² Further, compliance and accountability are only generally mentioned,⁴⁷³ what can be considered as a result of industry self-regulation. Lastly, Montreux suggests that the effects of immunity and jurisdiction over the PMSCs still ensure some civil, criminal and administrative remedies for misconduct.⁴⁷⁴

3. Evaluation of existing instruments: shortcomings?

What was most welcome in both initiatives is the represented multilevel approach⁴⁷⁵ by interlinking the state duties, with corporate responsibilities, and contractor compliance with IHRL. Regarding to the prohibition of torture specifically, one can conclude that a minimal standard for conduct of PMSCs is present, yet the implementation remains ineffective.⁴⁷⁶ This does not change the fact that righteous attention is given to post-crime reparation and compensation. Also, it seems that Montreux assumes the criminal liability depending on international criminal law and considers the civil liability as bonus. Should one draw the subsequent conclusion that international consensus⁴⁷⁷ supports criminal, instead of civil, claims for torture by the PMSCs abroad? How powerful the incorporated reinforcement of the torture prohibition in both documents turns out to be, depends on how the instruments proof to be effective overall.

Montreux – The Montreux Document clarifies hard law obligations of states by referring to IHL, IHRL and the Articles on State Responsibility; however it lists these duties in a general manner, without detailing provisions. Because of its narrow scope, Montreux is insufficient in giving guidance on the existing IL which is applicable to PMSCs.⁴⁷⁸ It would have been more effective if Montreux referred to HR treaties or made mention of the extraterritorial application of IHRL. Further, the concept of good practices holds potential to improve oversight and accountability, in the hypotheses that states chose to implement them. The efficiency is curtailed by the willingness and arbitrariness of states in deciding which recommendations they will implement in their domestic legislation.⁴⁷⁹ This results in non-consistent and non-uniform state practices.⁴⁸⁰ Moreover, the serious

⁴⁶⁶ Montreux, Explanatory Comments, 34; and GPs 7, 33, 61.

⁴⁶⁷ Montreux, GPs 7, 33, 61. Making the request of CACI to the plaintiffs in *Al Shimari* (n 350) for remuneration of the Courts costs even more disgracing.

⁴⁶⁸ For hiring state (GP 20a), as well as Territorial states (GP 50a) and Home states (GP 72a).

⁴⁶⁹ Montreux, GPs 20 c), 50 a), 72 a).

⁴⁷⁰ Section V.

⁴⁷¹ Montreux, GP 20.

⁴⁷² ICoC, para 67.

⁴⁷³ *ibid* paras 7 and 8.

⁴⁷⁴ Montreux, GPs 22 a) b), 51 a) b), 73 a) b).

⁴⁷⁵ Jamie A Williamson, 'Guarding the Guards: The regulation of Private Military and Security Contractors' (2013-2014) *The Business and Human Rights Review* 3, 26.

⁴⁷⁶ Wallace (n 456) 89.

⁴⁷⁷ Cf The Montreux participating states.

⁴⁷⁸ Seiberth (n 262) 157.

⁴⁷⁹ Montreux, part II, 6.

⁴⁸⁰ Seiberth (n 262) 267.

lack of any mechanism to foster compliance and supervision makes one conclude that Montreux is only reaffirming existing applicable IL and not prohibiting torturous acts by PMSCs abroad.

ICoC – The ICoC is considered to be detailed and comprehensive as it unifies and incorporates core HR principles recognised by the industry. Clearly this acknowledges that PMSC can have a negative impact on HR, hence the need for preventing it.⁴⁸¹ Yet, the purely soft-law foundations of the Code make that it remains a non-binding self-regulatory instrument.⁴⁸² Of great benefit was the establishment of an independent mechanism for governance and oversight, based on the Charter for the Oversight Mechanism of the International Code of Conduct for Private Security Providers ('Articles of Association').⁴⁸³ This is the founding document of the ICoC Association (ICoCA) which operates from September 2013 on.⁴⁸⁴ Main tasks and competences of the ICoCA lie with certification attesting,⁴⁸⁵ HR monitoring⁴⁸⁶ and supporting fair and accessible remedy procedures.⁴⁸⁷ The ICoC and its accompanying ICoCA compose a relatively new process and are still in the stadium of first developments what in turn makes the potential of the Code and its oversight mechanism uncertain.⁴⁸⁸ Thus, the ICoC might be a better alternative to address torturous conduct by PMSCs since corporations are addressed whereas they not carry direct obligations under IHRL.⁴⁸⁹ It will depend on how the ICoCA as oversight mechanism will deal with situations of torture by PMSCs abroad, how strict it will enforce the absolute prohibition and if it constitutes a priority, to see if the affirmation by the ICoC can be translated into practice.⁴⁹⁰ An assessment of the ICoC in the context of the U.S. specifically follows below.

B. Improvements to the enforcement of the prohibition of torture applicable to contractors

Second part of this Section covers suggestions to improve the enforcement of the prohibition of torture by PMSC personnel. It introduces a double dualistic approach, meaning that regulating efforts should link international level with the national level; additional to coordinating efforts in combining soft law with hard law. The first duality of the approach is thus represented by a coordinating and complementing interplay between the international and national instruments that can be used for enforcing the prohibition of torture on PMSCs. Be it soft law instruments or an international convention, those should not overlook the importance of a domestic connection. Regardless of their contractual functions, PMSC personnel should be obliged to comply with IHRL,⁴⁹¹ making it of essential importance that States -through strong national enforcement and regulatory mechanisms- and PMSCs -through oversight and adoption of best practices- create a rule-of-law-friendly environment. This combination of state obligations and corporate responsibilities makes up for the second duality of the approach. No attention is given to HR due diligence, although compliance with the prohibition of torture could make up for an essential element of reference.

⁴⁸¹ Cf the Ruggie Framework.

⁴⁸² ICoC, para 14.

⁴⁸³ Drafted in February 2013 by PMSCs, Civil Society Organisations and states.

⁴⁸⁴ Up to date 6 governments, 140 private security companies and 13 civil society organisations make up for the members of the ICoC Association <<http://www.icoca.ch/index.html>> last accessed 16 January 2015.

⁴⁸⁵ Art 11 Articles of Association.

⁴⁸⁶ *ibid* art 12.

⁴⁸⁷ *ibid* art 13.

⁴⁸⁸ Seiberth (n 262) 267.

⁴⁸⁹ Cf Section III.

⁴⁹⁰ ICoCA did not provide any guidance yet since the procedures of its mandate functions (certification, monitoring and complaints process) are currently being developed by the Board of Directors in several meetings (most recently 12-14 February 2014).

⁴⁹¹ Williamson (n 472) 28.

1. International level

a. Soft law

As assessed above, the ICoC seems more likely to improve PMSC compliance with the prohibition of torture. Yet, the danger exists that industry self-regulations gain a more business perspective and diminish the scope of IHRL to suit better the needs of the PMSC industry.⁴⁹² Thus, soft law initiatives as Montreux and ICoC are to be complemented with hard law instruments. For the ICoC, this means depending on emerging corporate practice complemented with continuous state support.⁴⁹³ Then, it has the possibility to become an accepted set of internationally applicable standards going beyond self-regulation. But, as mentioned, a great deal depends on how the ICoCA will exercise oversight and control in practice. Even though the ICoC was brought by the industry and for the industry, such international industry regulation⁴⁹⁴ can never absolve states from their IHRL obligations to protect individuals from HR violations by PMSCs.⁴⁹⁵

b. UN Draft Convention

Abovementioned reasoning makes one turn to the UN Draft Convention⁴⁹⁶ that is currently in development as a complementary hard law instrument representing state obligations under IHRL. The approach of combining hard- with soft law seems to be relevant and supported by many states as debates within the UN Draft Convention its accompanying Intergovernmental Working Group (IGWG) illustrate.⁴⁹⁷ IGWG's first session after receiving its broader mandate, has been rescheduled,⁴⁹⁸ making an assessment of progress or on the IGWG's view to implement and enforce the prohibition of torture impossible.

In the hypotheses that the UN Draft Convention will be concluded with a HR catalogue, how should an absolute prohibition on torture be incorporated? It constitutes indeed a core human right and is considered to be *ius cogens*.⁴⁹⁹ First, a clear definition of the crime of torture must be included, or reference has to be made to existing instruments.⁵⁰⁰ The latter holds the preference since the creation of a new concept of torture would not be free from criticism. The Code attempts to counter criticism of being business biased by taking a multi-stakeholder approach.⁵⁰¹ In essence, caution is required and the difference with mercenaries should be apparent.⁵⁰² Second, a clear and absolute prohibition of torture should be stated. Again, reference can be made to IHRL instruments that obtained global support.⁵⁰³ Third, the UN Draft Convention should grant a clear mandate for oversight and enforcement of this prohibition to either a PMSC industry organ or make use of the effective existing mechanisms that strictly apply the provision and can pose sanctions. The former could point to the ICoCA, yet with high safeguards relating to their independency, effectiveness and overall acceptance by the PMSC industry.⁵⁰⁴

Though, arguments against an international convention as single solution include the prior need to reinforce existing specific PMSC initiatives. Assessing the impact of Montreux and ICoC before launching new initiatives

⁴⁹² Human Rights Council, Report of the Intergovernmental Working Group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies (24 December 2012) UN Doc A/HRC/22/41 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/AHRC22_41_English.pdf> accessed on 16.01.2015, paras 27 and 42. Further: IGWG; Reinisch (n 130) 52; Seiberth (n 262) 179-180.

⁴⁹³ Seiberth (n 262) 266.

⁴⁹⁴ Ibid 257. Overall reasoning.

⁴⁹⁵ IGWG (n 489) para 25.

⁴⁹⁶ Cf Section II.C.

⁴⁹⁷ IGWG (n 489) paras. 30, 40-46 and 61-74.

⁴⁹⁸ To 21st-25th of July 2014 instead of 16th-20th December 2013. No documents thereof were available yet.

⁴⁹⁹ Cf Section III.

⁵⁰⁰ Eg Art 1 CAT.

⁵⁰¹ Seiberth (n 262) 259.

⁵⁰² IGWG (n 489) para 22-23

⁵⁰³ Cf Section II; art 5 UDHR; art 7 ICCPR.

⁵⁰⁴ Meaning that Signatory Companies become the rule.

which might result in a convention with only a few ratifications, enjoys preference.⁵⁰⁵ Embodying legally binding results by applying a double dualistic approach, a set of coordinated international regulations implemented through national law or an international framework convention coordinating national instruments,⁵⁰⁶ for both States and the PMSC industry, is needed.

2. National level

Although reinforcement of the prohibition of torture is present in PMSC regulatory instruments, it is mostly represented in soft law, hence depending on the willingness of states and corporations. Even if a monitoring mechanism is foreseen, questions remain about their effectiveness. Further, the IGWG correctly noted that criminal accountability for abuses committed by PMSC personnel was not ensured by the existing initiatives. Moreover, jurisdictional difficulties arose from the transnational nature of the private security business.⁵⁰⁷ Addressing these difficulties is the exclusive task of states by taking legislative measures. Thus, in implementing the overall framework, a national link needs to be present to strictly apply and to be translated into domestic legislation accompanied by jurisdiction of the courts. Montreux and ICoC with its oversight mechanism are to be considered as initiatives which complement national regulations, resulting in an increasing role of governments in this multifaceted approach.⁵⁰⁸

a. Using contracting and licensing in prohibiting torture

In recalling art. 5 of the Draft Articles, a connection with licenses and contracts could be made. Regarding conduct of persons or entities exercising elements of governmental authority, the required "empowerment by law" of a person or entity, which is not an organ of the state, could give rise to state responsibility. In a non-stringent application of the Draft Articles, government authorisation through license or contract should satisfy the requirement for empowerment.⁵⁰⁹ Thus, both licenses and contracts, distributed by governments as hiring states, can provide for a more individual and specific reinforcement of the prohibition of torture by PMSCs since states are responsible for ensuring it.

Contract - Neither Montreux, nor the ICoC require that States contract only with companies that should sign and adhere to the Code. Since both documents cannot be invoked before a court unless they have been integrated into a contract or into national legislation, the good practices and recommendations should be included in the contract, and make it part of national private contract law.⁵¹⁰ The sanctions for non-compliance with the prohibition of torture could cover determination of the contract, pecuniary compensation, dismissal of the alleged perpetrator or one could bring this breach of contract before domestic courts under private contract law.⁵¹¹

Licensing - There is a general consensus⁵¹² that a national regulatory regime should at the minimum include a strong state licensing regime for the services PMSCs provide.⁵¹³ In the licensing agreement with the government, standards could be set out that companies are expected to meet which should incorporate an absolute prohibition on torture in exercising the licensed activities abroad.

⁵⁰⁵ IGWG (n 489) para 48.

⁵⁰⁶ *ibid* para 40; Cockayne (n 13) 14 and 31.

⁵⁰⁷ IGWG (n 489) para 32.

⁵⁰⁸ *ibid* para 29.

⁵⁰⁹ Oliver Jones, 'Implausible Deniability: State Responsibility for the actions of Private Military Firms' (August 2008) <http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=oliver_jones> accessed on 16.01.2015, 44.

⁵¹⁰ IGWG (n 489) para 31.

⁵¹¹ Simon Chesterman and Chia Lehnardt, *From mercenaries to market. The rise and regulation of private military companies* (Oxford University Press 2010) 220-221.

⁵¹² Thomas R Mockaitis, *Soldiers of misfortune?* (Strategic Studies Institute and U.S. Army War College Press 2014) 50-51; Williamson (n 472) 31.

⁵¹³ Nathaniel Stinnett, 'Regulating the Privatization of war: How to stop Private Military Firms from committing Human Rights Abuses' (2008) 28 BC Int'l & Comp L Rev 1, 211.

The criminalisation by State Parties to the CAT of the crime of torture in their national legislation⁵¹⁴ supports these licensing standards and provides for a clear sanction possibility when the prohibition on torture is violated.⁵¹⁵ Yet, licensing as tool for holding PMSCs responsible for their torturous conduct can only be effective when room and capacity for post-license monitoring are present. Monitoring clears out situations of license withdrawal by the government in case of non-compliance.⁵¹⁶ Yet, the U.S. Government has not touched upon the possibility to improve accountability by requiring the PMSC to establish credible complaint and monitor mechanisms which allow victims of PMSC conduct to bring complaints.⁵¹⁷

b. In the case of the United States

The chances that the U.S would sign and agree to an international binding Convention seem nevertheless to be very small. In view of the U.S., no 'one size fit all' solution can be recognised since different approaches are perceived. The U.S. itself emphasised that first a stock of existing initiatives should be taken and that reviewing state practices at the national level is needed.⁵¹⁸ Consequently, because of the U.S. opinion towards a binding Convention, the soft-law and self-regulation instruments must hold the capacity to regulate responsibility and liability of PMSCs regarding acts of torture abroad. The Montreux Document is currently⁵¹⁹ joined by 50 states that support the document. The United States was strongly involved with the 16 other countries in the development of the document,⁵²⁰ making the principles incorporated in Montreux seemingly accepted by the U.S. itself. With regard to the ICoC, there are currently 60 United States PMSCs who have signed the code, on a total of 708 Signatory Companies.⁵²¹ Thus, there seems to be a relative common ground in the opinion of the industry to comply with certain principles of IHR, yet it all depends on the alignment of the U.S. Signatory Companies with the ICoC in practice.

The ICoC its translation of some HR guarantees could not correspond with the scope and interpretation of IHR guarantees by the CmAt or ICJ.⁵²² In the case of the U.S., this forms an accurate criticism as the U.S. narrows down the international prohibition of torture where possible and confines it to state actors.⁵²³ Regarding accountability for HR violations of PMSCs specifically, the U.S. indicated that the PMSC staff could be held criminally accountable in the U.S. for offences committed outside U.S. territory under MEJA and UCMJ.⁵²⁴ It stated as well that state common law and federal statutes in the U.S. allowed for private parties to bring suits against PMSCs, which in practice is hindered by many jurisdictional and jurisprudential obstacles.⁵²⁵

C. Conclusion

This exposition pleads for a regulatory framework that is applicable to PMSCs who commit(ed) torture by upholding a double dualistic approach. This includes a complementary and reinforcing function of hard law as well as of soft law instruments, accompanied by a coordinated interplay between the international level and domestic translations thereof.

Generally, Montreux and the ICoC differ from each other in areas of terminology, services and application. Yet, built in HR protection principles are present who need to be respected. In relation to torture, Montreux and

⁵¹⁴ Art 4 CAT.

⁵¹⁵ Stinnett (n 8) 222; Cf Section III.

⁵¹⁶ Francioni and Ronzitti (n 103) 138; Williamson (n 472) 21.

⁵¹⁷ Cockayne (n 13) 18. Making states accountable.

⁵¹⁸ IGWG (n 489) para 63.

⁵¹⁹ Cf <<http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html>> accessed 16.01.2015.

⁵²⁰ Montreux, 9 (preface), 32, 41.

⁵²¹ Cf <<http://www.icoc-ppsp.org/ICoCSignatoryCompanies.html>>, together with <http://www.icoc-ppsp.org/uploads/Signatory_Companies_-_September_2013_-_Composite_List-1.pdf> (both accessed 16.01.2015).

⁵²² Seiberth (n 262) 180-181.

⁵²³ Cf Section II.A.3 and Section III.

⁵²⁴ IGWG (n 489) para 51.

⁵²⁵ Cf Section V.

its state focus seem not able to bring satisfactory results. A possibility is improving Montreux to explicitly address torture in its recommendations and obliging states to incorporate a core of good practices where the prohibition of torture is part of. The explicit incorporation, additional to creating an oversight mechanism that is currently absent. On the corporate side, the ICoC has more potential to deal with torture by PMSCs because of its oversight body (ICoCA) and the inclusion of a specific provision for the prohibition of torture. Subsequently, the Code could gain normative character beyond self-regulation by its incorporation into PMSC contracts, making it part of domestic private contract law. Yet, the danger exists that the ICoC would lead a 'life on its own', detached from all existing guarantees that the prohibition of torture is being complied with,⁵²⁶ resulting in insufficiency of soft law. The future could hold an international binding convention when the UN Draft Convention on PMSCs is concluded with an integrated strong torture provision that fulfils some conditions. An efficient enforcement mechanism is a necessary addition, which could be embodied by a generally accepted ICoCA. A coordinated interplay with the national level needs assistance, which would benefit the domestic enforcement of the prohibition of torture to PMSCs to commit torture abroad. This can be realised by incorporating torture prohibiting standards in the contract or in the license process, with strict oversight and monitoring. The U.S. context seems to complicate the practical translation of these regulatory initiatives, either by the government opinion against a binding convention, or a fragmented interpretation of the prohibition of torture.

VII. General Conclusions

In the international field of 'privatised war', it is clear that PMSCs can be considered as NSA since they act autonomously from governments and have an action network across state boundaries. In addition to that, PMSCs do not represent 'present-day-mercenaries' since they carry different characteristics. The corporately organized PMSCs cover an increasing demand, provide for temporary and wide ranged services, and maintain a highly specialised military and security expertise. Concerning the crime of torture, it was established that NSA can commit torture, while researched U.S. legislation confined perpetrators of torture to only state actors. In defining the constitutional elements of the crime the comparison of international and regional documents showed that slight differences exist, though all covered any act which causes severe physical and/or mental pain or suffering; is intentionally or deliberately inflicted; is applied in the pursuit of a certain purpose and includes state responsibility. At first sight, the United States adapted the international standards, yet it narrowed this definition down were possible. Thus, instead of blind staring on the specific level of state involvement, the focus when deciding whether an act constitutes to torture should lie with the act or conduct itself, rather than with the actors who commit the crime.

The rise of PMSCs taken together with the global privatisation of war conceived a market that is clearly in need of a global-oriented framework. This framework should acknowledge the rights and responsibilities of all actors involved and should protect the principles upon which the international human rights regime is based. The Intergovernmental Working Group on international binding Conventions, soft-law initiatives as the Montreux Document, general Codes of Conduct and the International Code of Conduct for Private Security Service Providers (ICoC) currently represent the regulatory framework of the industry. Due to their fragmentation, differences in scope, their lack of enforceability, low capacity and scattered focus of these representing instruments, this regulatory framework is dissatisfactory.

Concerning the legal means through which PMSCs are bound by International Human Rights Law (IHRL), an expected clear link was found between international and domestic U.S. legislation prohibiting torturous conduct. The legal foundation, whether general or specific; international or national, provides for a solid and established prohibition on torture. However, up to this point, it is not accepted that NSA as PMSCs would carry direct horizontal HR obligations themselves. Subsequently, in assessing the value of the torture prohibition as such, doctrine and U.S. courts agree on the minimal value of an international custom against torture. According to the ICJ, this norm of customary international law includes acts of torture conducted by any 'author'. Thus, not con-

⁵²⁶ Cf ICCPR and CAT.

fining perpetrators of torture to states necessarily, but extending it to officers, contractors and PMSCs. Yet, based on CAT and its CmAT, the prohibition on torture carries even *ius cogens* value. Thus, under international law, the U.S. not only has the authority but also the obligation to provide a forum in order that these international standards may be vindicated since the U.S. has the obligation to avoid impunity for those 'actors.' Several civil and criminal U.S. laws were found, that are pertinent for victims of torture. The MEJA and UCMJ, with their respective limited appliance, represent the failure of U.S. its patch-up actions to the Military Justice System. This is why the international preference goes to the ordinary criminal justice system when handling cases of PMSC misconduct. Both civil (ATCA and TVPA) and criminal (TCIA) legislation are in place where torture victims of PMSCs acting abroad can base their claims on. The *ius cogens* value of the prohibition of torture additionally increases chances of an actionable violation before U.S. courts. Although there exists a theoretical probability to hold PMSCs and their employees accountable for torturous conduct, the general lack of full, clear-cut and solid liability makes the consequent responsibility avoidable, and translates into impunity these actors enjoy.

A first deficit of responsibility is represented by the very narrow U.S. interpretation regarding the extraterritoriality principle of both the ICCPR and the CAT. Yet, the CAT's extraterritorial jurisdiction is translated on national U.S. level in both criminal and civil legislation. The TCIA embodies the criminal instrument and allows exercise of universal criminal jurisdiction over torture by the CAT. On the civil side, the ATCA provides the torture prohibition with an extraterritorial applicability. The TCIA together with the ATCA hereby create substantial ground to underpin the extraterritorial jurisdiction-principle when posing civil or criminal claims founded on torture. Although states cannot absolve themselves from their responsibilities under IHRL by contracting out certain duties to private companies, it gives way to a second gap in assigning responsibility for torture. The reason for this is because of the immunities from civil claims granted by the U.S. government before its domestic courts and from liability in host state's courts. The former includes the ATCA, connected with jurisprudential doctrines of 'combat activities exception' and the 'unique federal interest', which should be present to obtain the combat activities exception. The U.S., by affording immunity from its justice system while providing no alternative avenue, violates its positive obligation to keep U.S. legislation in compliance with HR standards.

In search of redress for the tortured victim, the U.S. jurisprudence showed an inconsistent interpretation of the identical argument that is built around the combat activities exception. *Kiobel* seems to be interpreted too freely; and the lower courts seem not able to correctly assess *Kiobel* its human rights legacy. Because these lower courts carry the responsibility for defining the elements of the 'touch and concern'-test, one can expect that Courts of Appeals in general will generate jurisprudential conflicts. The dismissal by the District Court of Virginia illustrates already a very narrow and formalistic reading of the *Kiobel* decision. The chances of *Al Shimari* to survive in a post-*Kiobel* era seem to be very small. Nevertheless, in a broader jurisprudential view, cases as *Al Shimari* could survive the *Kiobel* reasoning to a certain extent, if lower courts would apply in good faith the essence of the 'touch and concern'-doctrine. This is something that is recently illustrated by the judgement in *Al Shimari*. Yet, a general jurisprudential change to mend the deliberately vague ATCA application is definitely needed. Alternatively, the repetition of torturous conduct and its subsequent impunity would result in keeping the ghost of Abu Ghraib alive, rather than confronting them.

As expected is the ATCA perceived in the international context as an example of extraterritorial jurisdiction resulting from extending national legislation with HR relevant provisions to NSA operating abroad. In practice, obstacles occur to establish this general tort theory which recognises that HR violations, wherever committed, may trigger legal responsibility. One could thus wrongfully assume that the U.S. upholds its obligations to punish torturous acts. In reality however, as illustrated by the *Al Shimari* appeal, the U.S. domestic level fails to fulfil these obligations. Consequently, when searching for other instruments to hold PMSCs accountable for their torturous conduct abroad, a double dualistic regulatory approach that assigns responsibility and creates clear liability for them should be applied. This framework adopts a complementary and reinforcing purpose of both hard law as soft law instruments; accompanied by a coordinated interplay between the international level and domestic translations thereof.

In relation to the prohibition of torture, Montreux is not able to bring satisfactory results to the establishment of responsibility. This could be improved by addressing torture in its recommendations and obliging states to incorporate a core of good practices which include this prohibition. This, additional to the creation of a necessary oversight mechanism. On the corporate side, the ICoC could bring clear responsibility and accountability for torture to PMSCs because of its ICoCA oversight body and the inclusion of a specific provision relating to the prohibition of torture. Subsequently, the Code could gain normative character beyond self-regulation by its incorporation into PMSC contracts, making it part of domestic private contract law. Yet, the danger exists that the ICoC would lead a 'life on its own', resulting thus in insufficiency of soft law alone. This makes one turn to the UN Draft Convention on PMSCs that might integrate a strong provision of torture. Yet, given the negative U.S. opinion on the Draft Convention, it seems very unlikely that a binding convention will hold the solution in U.S. context.

Still, an efficient enforcement mechanism for oversight and monitoring is necessary and could be embodied by a largely accepted ICoCA. A coordinated interplay with the national level benefits the domestic enforcement of responsibility and increases chances to hold PMSCs accountable for torture committed abroad. Therefore that the creation of a regulatory framework which will bring redress for victims of torturous conduct by (U.S.) PMSCs and their personnel abroad, needs a double dualistic approach.

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