Private Security, Public Order

The Outsourcing of Public Services and Its Limits

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The responsibility of states

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In March 2008, Mr José Luis Gómez del Prado, President of the Working Group on the Use of Mercenaries as Means of Violating Human Rights and Impeding the Rights of Peoples to Self-determination, made the following appeal to governments:

> Keeping in mind the difficulties experienced by war-torn States in regulating and controlling private military and security companies, a considerable part of the responsibility falls upon States from which transnational companies export military and security services. We therefore call upon States where exporting companies are registered to regulate and oversee private military and security companies; not to grant immunity to their personnel; and to investigate and bring to justice those security guards who may have committed crimes and human rights violations in Iraq or in other places.[1]

The relationship between governments and private military and security companies (PMSCs) can take a number of forms. PMSCs can be registered in one state and provide services to another state, for example, by assisting the armed forces of that other state in the performance of their duties, whether on the territory of that state or on the territory of a third state. Alternatively, PMSCs may be providing services to the armed forces of the state in which they are incorporated, whether at home or abroad. They may also be recruited by private actors, particularly corporations in need of better security than that which can be provided by the state on the territory of which they operate.[2] Following upon the suggestion of Gómez del Prado, this chapter examines a question which is raised in a subset of those situations, where a PMSC operates in a state other than that of its nationality, referred to here as its 'home state'.[3]

[1] José Luis Gómez del Prado, President of the Working Group on the use of Mercenaries as Means of Violating Human Rights and Impeding the Rights of Peoples to Self-determination, Statement before the Human Rights Council, 7th session, 10 March 2008, Geneva.

[2] For an attempt to stipulate the principles to be observed in such a situation, see See Bureau of Democracy, Human Rights, and Labor, US Department of State, Voluntary Principles on Security and Human Rights (2000), available at <http://www.voluntaryprinciples.org> (adopted at the initiative of the governments of the United States and Britain, companies in the extractive and energy sectors, and non-governmental organizations).

[3] For the criteria for the determination of the nationality of a legal person, see the discussion of the active personality principle below.

The chapter asks whether, under international law, the home state of a PMSC is obliged to control that company; whether that state must allow its courts to adjudicate claims filed against such a company or its employees for any violations of human rights or of international humanitarian law; and, if these duties do exist, how they may be implemented taking into account the sovereignty of the state on the territory of which the PMSC operates (the 'host state'). Whether or not they are 'transnational corporations' in the classic meaning of the expression,[4] companies operating across jurisdictions can only be effectively controlled if the home state contributes to the efforts of the host state at regulating their activities. This is particularly true as regards PMSCs. These companies typically operate in conflict and weak governance zones, where the regulatory apparatus is weak or nonexistent and therefore unable to effectively prevent abuses of human rights by private actors. The role of the home state of PMSCs is therefore crucial in order to ensure that there is no impunity for these abuses.

In rather exceptional situations, the employees of a PMSC may be considered as organs of the state whose armed forces they assist. That would be the case, for instance, when they form part of such armed forces within the meaning of Article 4(A)(1) of the Third Geneva Convention[5]—that is, when they constitute armed forces, a militia or a volunteer corps within the official armed forces. In such cases, and quite independently of the question of whether the Geneva Conventions apply, their acts are those of the state of whose armed forces they form a part: there is no doubt that the state may be responsible for such acts under international law. However, the employees of PMSCs will not be considered agents of the state if they form an independent militia, as in the situation envisaged by Article 4(A)(2) of the same Convention, or if they are 'civilians accompanying the armed forces without being members thereof' under Article 4(A)(4).[6] In these far more frequent situations, the question of state responsibility appears in a totally different light. For, in the current state of international law, it is only under narrowly defined conditions that private persons or entities—persons or entities who are not state organs according to the internal law of the state concerned—may engage the responsibility of that state.

[4] Transnational corporations are traditionally defined as corporations which own, control, and manage assets in a state other than their country of origin. See Peter Muchlinski, *Multinational Enterprises and the Law* (London: Blackwell, 1995) 12. Private military and security companies, which are the focus of this paper, may fall under this definition. In most cases however, the 'transnationalisation' of their activities does not result in the establishment of an investment nexus between the company, headquartered or incorporated in one state, and another state where it operates: instead, services are provided in that other state's territory, simply by the posting of employees in that state, often for short-term missions.

[5] Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 UNTS 135, entered into force 21 October 1950 (Third Geneva Convention).

[6] PMSCs recruited in order to provide surveillance of civilian infrastructures, for instance, would fall under this category.

What are these conditions? In certain rare instances, a private person or entity may be under the 'complete dependence' of the state. It may then be treated as a de facto state agent.[7] Apart from that hypothesis, the Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001 by the International Law Commission (ILC)[8] (hereinafter 'Articles on State Responsibility'), identify essentially four instances where the acts of a private actor may be attributed to the state for the purposes of engaging its international responsibility. Such attribution may occur where the private entity 'is empowered by the law of that State to exercise elements of the governmental authority [provided that entity] is acting in that capacity in the particular instance' (Article 5); where the private entity 'is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct,' which may give rise to international responsibility (Article 8); where the entity 'is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority' (Article 9); and, finally, conduct which is not attributable to a state under any of the preceding doctrines 'shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own' (Article 11).

This seems relatively meagre, especially insofar as PMSCs are most often hired by private entities, and not governments, which limits the usefulness of the ground of imputation referred to in Article 8.[9] However, if we move from the realm of general international law to the province of international human rights law, not one, but two distinct obligations of the state appear to be at stake: apart from the obligation not to commit any violation of the human rights which that state is internationally bound to respect—which then leads to the question of whether the behaviour of the PMSC is imputable to the state of origin, according to the principles of state responsibility—a second and distinct obligation is the positive obligation of the state to adopt measures that protect human rights from the threats posed by the acts of private actors, including PMSCs. These two obligations ought to be clearly distinguished from one another. By definition, the failure to protect human rights (that is, the failure to comply with the latter of these obligations) consists of an omission on the part of state organs—whether legislative, executive, or judicial—and no question of

[7] This is discussed further below.

[8] Report of the International Law Commission on the Work of Its Fifty-Third Session, 2001, UN Doc A/56/10.

[9] It has been stated by a member of the International Committee of the Red Cross that 80% of the contracts of PMSCs are in fact with non-state entities. See Emanuela Gillard, 'The Position Under International Humanitarian Law', in Marc Vuijlsteke and Peter Stroobarts (eds), *Proceedings of the Bruges Colloquium: Private Military/Security Companies Operating in Situations of Armed Conflict* Collegium No 36 (2007) 32, available at <http://www.coleurop.be/file/content/publications/pdf/Collegium%2036.pdf>.

attribution is raised. Just as a state may be responsible for failing to adopt the measures that could have reasonably been expected to prevent a loss of life under its jurisdiction, without the implication that the act of any particular murderer will be attributed to the state, so can the state be responsible for failing to control the private contractor effectively, without it being necessary to attribute to the state the acts of that private entity.[10] If the notion of 'imputability' is invoked in this context, it should be treated as little more than a metaphor: what is meant is simply that the behaviour of the private entity has brought to light a failure of the state itself, in that it did not do enough to prevent the behaviour from occurring.

Thus, in order to identify any responsibility of the home state in controlling the behaviour of the employees of a PMSC, we need to ask whether the behaviour of that corporation can be attributed to the state and, if it cannot, whether the state is under an obligation to protect human rights that are affected by the acts of that corporation. Whether we follow the first or the second branch of this alternative affects the way we think about the other issues related to identifying the contours of such state responsibility. The next section discusses conditions under which the acts of PMSCs may be attributed to a state. The subsequent section then examines the scope of states' obligations to protect human rights outside their national territory by virtue of extraterritorial jurisdiction.

Attribution to the state

The international law of state responsibility defines restrictively the conditions under which persons or entities who are not state organs according to the internal law of the state concerned[11] may engage the responsibility of that state. Our concern here is to clarify the kind of relations which may exist between a state and a PMSC justifying imputing to the former the acts of the latter.[12] As regards PMSCs, both the state which the PMSC assists and the state under the jurisdiction of which the PMSC is registered could potentially be found liable where the PMSC:

[10] See Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law', *Modern Law Review*, vol 70 (2007) 618.

[11] As mentioned above, the employees of PMSCs which are integrated into the armed forces of the state should be considered as organs of that state, which is therefore responsible for their conduct.

[12] For earlier attempts in doctrine, see McCorquodale and Simons, 'Responsibility Beyond Borders', 598–625; Danwood Mzikenge Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights', *Melbourne Journal of International Law*, vol 5, no 1 (2004); Chia Lehnardt, 'Private Military Companies and State Responsibility', in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007) 139.

(1) is under the 'complete dependence' of the state;

(2) is empowered by the law of the state to exercise elements of governmental authority and acts under those powers in the particular instance concerned; or

(3) is in fact acting 'on the instructions of, or under the direction or control of', the state in carrying out the conduct that allegedly gives rise to international responsibility, as stipulated in Article 8 of the Articles on State Responsibility.

All three grounds of attribution may be invoked in order to impute the acts of the PMSC to the state that has hired the services of the company, or to the state where it is registered, depending on the circumstances of each case.

Two other grounds of attribution should be mentioned. First, where the PMSC 'is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority',[13] its acts may be attributed either to the territorially sovereign state, whose failure to fulfil its functions leads to the void which private actors seek to fill, or to the foreign state that deployed its armed forces on a portion of the territory and acquired the status of an Occupying Power.[14] Secondly, as recalled by Article 11 of the Articles on State Responsibility, conduct that in principle is not attributable to a state 'shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own'. While this doctrine has a solid foundation in general international law,[15] it too will have only a marginal role to play in the kinds of situations we are concerned with here, since it requires that the state authorities approve of the abuses committed by the corporation and encourage it to perpetuate them. In what follows, we leave aside these subsidiary doctrines of attribution, and focus instead on the three doctrines of attribution that are most relevant to the situation of PMSCs.

Complete dependence

Where a private person or entity is under the 'complete dependence' of the state, it may be treated as a de facto state agent. This proposition was put forward by

[13] Articles on State Responsibility, n 8 above, art 9.

[14] This is without prejudice to the direct liability of such private actors, which could be engaged in such situations. See 'Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones', Organisation for Economic Co-operation and Development, adopted 8 June 2006, available at <http://www.oecd.org/dataoecd/26/21/36885821.pdf> (guiding companies' behaviour in such circumstances).

[15] *United States Diplomatic and Consular Staff in Tehran (United States v Iran)*, ICJ Reports 1980, 3.

the International Court of Justice (ICJ) in the *Bosnian Genocide* case, where it noted that

> persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in 'complete dependence' on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.[16]

Although this position goes beyond the previous case law of the ICJ, it nevertheless was seen as a compromise position in the context in which it was put forward. In 1999, the International Criminal Tribunal for the former Yugoslavia (ICTY) had used an 'overall control' test in order to decide whether the Bosnian Serbs were parties to an international armed conflict for the purposes of applying certain provisions of international humanitarian law. The ICTY had asked what degree of state control was required under international law over organized military groups for the application of such provisions of international humanitarian law to be justified. According to the ICTY, in order for an armed conflict to be considered 'international', it is required that a state 'wields overall control over the [private group waging war], not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity'; however, the ICTY considered that 'it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law'.[17]

While it does not go as far, the 'complete dependence' test referred to by the ICJ in the *Bosnian Genocide* case nevertheless constitutes a departure from the strict doctrine adopted in *Nicaragua v United States* (and subsequently reaffirmed in Article 8 of the Articles on State Responsibility).[18] Indeed, the 'complete dependence' test allows the attribution of acts by a private entity to a state even though it might be impossible to identify any instructions given by the state to that entity, or any direction or control exercised by the state, in the particular instance concerned.[19] This doctrine thus could be relied upon if it

[16] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ('the *Bosnian Genocide* case'), ICJ Reports 2007, paras 391–4, particularly para 392.

[17] *Prosecutor v Tadic*, International Criminal Tribunal for the former Yugoslavia, 15 July 1999, IT-94-1-A, para 120.

[18] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ Reports 1986, para 115.

[19] See also, for a similar criterion, European Court of Human Rights, *Ilascu and ors v Moldova and Russia*, App No 48787/99, 8 July 2004, paras 393–4.

could be proven that a particular PMSC constitutes a mere façade used by the state in order to pursue its interests. It would not be sufficient to demonstrate that the PMSC has been supported by the state, for instance, through insurance guarantees or diplomatic efforts in support of the bids of the company. It would need to be shown that the state is in fact acting through the company that lacks any will of its own, and whose commercial interests, for instance, are secondary to the interests of the state which its activities serve. Attribution of violations of international law to the state whose armed forces the PMSC assists may occur, for example, when the 'private' contractor is a mere fiction behind which that state seeks to shield itself from accusations of committing such violations directly through its armed forces, as through the use of paramilitary forces closely linked to the state apparatus.[20]

Empowered by law

In addition to the circumstance of being under 'complete dependence' of a state, attribution of PMSC acts to the state may be justified where the private entity 'is empowered by the law of that State to exercise elements of the governmental authority [provided that entity] is acting in that capacity in the particular instance'.[21] This provision ensures that the state will not escape liability by privatizing certain public or regulatory functions.[22] Although what constitutes 'governmental' functions will depend on a set of circumstances, including 'the particular society, its history and traditions',[23] it seems that even under the narrowest understanding of such functions, they should comprise law enforcement activities and the activities of the armed forces. Functions related to the maintenance of law and order may thus be considered to constitute elements of governmental authority for which the state should be held responsible even if it has chosen to delegate these functions to private entities. The acts of PMSCs whose agents are authorized to bear arms and use them in self-defence or in defence of private property or to arrest individuals and bring them to the police should therefore be seen as attributable to the state that chose to delegate such powers to the companies.

[20] See, eg, Maria McFarland Sánchez-Moreno, esq., 'Hearing Testimony, United States House of Representatives Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight, Subcommittee on the Western Hemisphere and the House Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, and Subcommittee on Workforce Protections', 28 June 2007, available at <http://edlabor.house.gov/testimony/062807MariaMcFarlandTestimony.pdf>; Human Rights Watch, 'The "Sixth Division": Military-paramilitary Ties and US Policy in Colombia', September 2001, available at <http://www.hrw.org/reports/2001/colombia/>; *'Mapiripán Massacre' v Colombia*, Series C, No 132, Inter-American Court of Human Rights, 15 September 2005 (testimony of Federico Andreu Guzmán).

[21] Articles on State Responsibility, n 8 above, art 5.

[22] James Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) 100.

[23] Ibid. 101.

There is one important limitation to this principle, however. In order for the private entity's acts to be attributed to the state, the entity must have been explicitly empowered to exercise elements of governmental authority. Thus, a PMSC would not engage the liability of the state if it is simply acting in accordance with the general regulations which, in that state, define the conditions in which private citizens may use arms or which define the conditions for self-defence. For instance, where PMSC forces hired by corporations have used excessive force or intimidation against trade unionists or local communities—a pattern of abuse which is sadly common[24]—this could reveal a failure by that state to protect the rights of populations under its jurisdiction,[25] but this does not imply that the acts of those forces should be treated as if they were those of the state itself. On the other hand, for its acts to be attributable to the state, it is sufficient that the private entity has been explicitly delegated elements of governmental authority, whether or not this delegation of powers was effectuated through formal legislation defining their scope and conditions of exercise. As an illustration, the United States is responsible for the torture, intimidation, and humiliation of detainees by private contractors at the Abu Ghraib prison in Iraq, even in the absence of delegating legislation.[26]

Acting on instructions, or under direction or control

Another instance that allows for attribution of a private entity's actions to the state is where the private entity 'is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct' (Article 8). The rule has its origin in *Nicaragua v United States* where the Court considered that despite the strong support provided by the United States to the contras, the acts of the latter could only be attributed to the former if it could be proved that

[24] For instance, it has been reported that companies in Indonesia's pulp and paper industry have employed private gangs who intimidate or assault members of neighbouring communities. Human Rights Watch, 'Without Remedy: Human Rights Abuse and Indonesia's Pulp and Paper Industry' (2003). It has also been reported that private security forces have been involved in the use of excessive force against striking workers in China's heavy industries. Human Rights Watch, 'Paying the Price: Worker Unrest in Northeast China' (2002). Private security forces have also been involved in repressing protesters demonstrating against the exploitation of oilfields in Nigeria. Human Rights Watch, 'The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' (1999).

[25] On the obligation to protect human rights, see the section entitled 'Due diligence' below.

[26] Human Rights Watch, 'By the Numbers: Finding of the Detainee Abuse and Accountability Project' (2006); on the failure of the US to effectively combat the impunity of private contractors working in Iraq and Afghanistan, see Human Rights First, 'Private Security Contractors at War. Ending the Culture of Impunity' (2008). Therefore, the jurisdictional gaps in the Military Extraterritorial Jurisdiction Act should be filled, beyond the improvements of the Ronald W Reagan National Defence Authorization Act for FY 2005. US Congress, Military Extraterritorial Jurisdiction Act, PL 106–523, 18 USC § 3261, 114 Stat 2488 (22 November 2000); Ronald W Reagan National Defence Authorization Act for FY 2005, PL 108–375, 39 WCPD §1081, 118 Stat 1811(2004), amended by 18 USC §3267 (Supp IV 2004).

the United States 'had effective control of the military or paramilitary operations in the course of which the alleged violations were committed'.[27] It follows from this rule that however strongly a company is supported by the state, and however close its connections to the state may be, the conduct of the company will be attributable to the state only if the state controls the company's conduct in a specific instance.[28] This could be the case, for instance, if specific interrogation techniques are prescribed to be performed by private contractors under the agreement between them and the state, or if private contractors are encouraged, under rules of engagement agreed with the state, to commit violations of international humanitarian law or to use force disproportionately.

The question whether the acts of a corporation may be attributed to a state under the doctrine codified in Article 8 of the Articles on State Responsibility is entirely distinct, however, from the question of whether the state should exercise jurisdiction over the corporation—in other words, to regulate and adjudicate the conduct of the corporation in order to protect human rights. The next section examines the obligation to protect human rights as another, distinct source of state obligations.

Due diligence

In principle, the territorially competent state on whose national territory PMSCs operate—the host state—is obliged to effectively control their activities.[29] A state may fail to discharge this obligation, however. In so-called 'weak governance zones', the governmental apparatus may not be functioning, resulting in the host government being unable to exercise its authority effectively. The failure of the host state to control a PMSC may also be deliberate: the state may be itself the prime violator of human rights, and the PMSC present on its territory may be useful to the state (whether it acts under its direction or under those of another entity, for instance a private corporation) as an accomplice in the repression of the local communities.[30] When the host state is unable or unwilling to effectively protect the rights of its population against the acts of a

[27] *Nicaragua v United States*, n 18 above, para 115.

[28] Crawford, *State Responsibility*, n 22 above, 112–13.

[29] See, eg, *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Comm No 155/96, African Commission on Human and People's Rights (2001); *Velàsquez Rodrígueze*, Series C, No 4, Inter-American Court of Human Rights (1988); see also Stephanie Farrior, 'State Responsibility for Human Rights Abuses by Non-State Actors', *Proceedings of the American Society of International Law*, vol 92 (1998) 299.

[30] Occasionally, the degree of collaboration between the private agents and the armed forces of the state may be such that the failure of the state to effectively protect the rights of populations under its jurisdiction will be almost indistinguishable from its active implication in the violations committed, for instance, by paramilitary groups. See, eg, *'Mapiripán Massacre' v Colombia*, n 20 above, para 123.

PMSC registered abroad, is the home state under a duty to act? This question requires examining whether the obligation of states to protect human rights may apply to violations committed outside their national territory and whether states may seek to influence situations located outside their national territory, particularly by the exercise of extraterritorial jurisdiction, in order to discharge their obligation to protect human rights.

The extraterritorial obligation to protect human rights

The home state of a private corporation may be under an obligation to protect human rights even outside its territory to the extent that it may adopt measures compatible with the Charter of the United Nations in order to control such a corporation whose conduct might threaten or violate human rights. Although occasionally based on the human rights treaties to which the states concerned have acceded, such extraterritorial obligations to protect may also be derived from general international law, particularly under Article 56 of the UN Charter, and general principles of law. Such obligations to protect human rights outside the state's national territory are not limited to situations of foreign occupation; nor do they presuppose that the foreign state necessarily exercises effective control on a person or property, as has sometimes been asserted in judicial opinions.[31] A restrictive view of the situations in which the extraterritorial obligation to protect may be imposed fails to see that 'jurisdiction' may extend not only to situations over which the state exercises 'effective'—or physical—control, but also to any situation which, within the limits of international law, a state may influence. This includes all situations which a state may reach by exercising extraterritorial jurisdiction, by adopting legislation seeking to affect behaviour abroad (prescriptive extraterritorial jurisdiction), or by giving its courts the power to adjudicate situations having occurred abroad (adjudicative extraterritorial jurisdiction).

Indeed, as members of the United Nations, all states have pledged to 'take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55' of the UN Charter, which imposes on the United Nations a duty to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. The law of the UN Charter is not limited territorially any more than customary international law or the 'general principles of law recognized by civilized nations' mentioned in Article 38(1)(c) of the Statute of the ICJ [32] as

[31] See, eg, *The Queen (on the application of Mazin Mumaa Galteh Al-Skeini and ors) v The Secretary of State for Defence* [2005] All ER (D) 337, paras 48–53 (London Court of Appeal, Civ Div) (distinguishing 'effective control of an area' and 'state agent authority' as two distinct grounds justifying the extraterritorial reach of the European Convention on Human Rights, in order to extend its requirements to the behaviour of the British armed forces in Iraq).

[32] 3 Bevans 1179; 59 Stat 1031; TS 993; 39 AJIL Supp 215 (1945).

sources of international law—both of which, arguably, may be seen to include at a minimum a core set of the rights explicated in the Universal Declaration of Human Rights.[33]

States should be considered bound to contribute to the aims of the UN Charter and to respect human rights, either as customary international law or as general principles of law, in all their activities, regardless of whether these activities affect the human rights of their own population or affect the enjoyment of human rights abroad. Any proposition that human rights obligations would only apply between a state's authorities and the population of that state would place human rights apart from other norms of general public international law: just as a state has no right to allow the use of its territory to cause environmental damage on the territory of another state,[34] it should not allow a company domiciled under its jurisdiction to operate abroad in a way which causes violations of human rights. In the *Corfu Channel* case, while accepting that an activity cannot be imputed to the state by reason merely of the fact that it took place on its territory, the ICJ nevertheless noted that 'a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation.'[35] Where the state knew or ought to have known that activities unlawful under international law (that is, activities that would constitute a violation of international law if they were imputed to the state in question) are perpetrated on its territory and cause damage to another state, the first state is expected to take measures to prevent them from taking place or, if they are taking place, from continuing.[36] Ian Brownlie comments on this basis that the state 'is under the duty to control the activities of private persons within its State territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another State'.[37]

This section explores the implications that follow for the authorities of the home state, defined as the state where a PMSC is registered and from which, therefore, it operates. By agreeing to a PMSC being incorporated under its laws, is a state accepting a responsibility to ensure that it complies with human rights wherever it develops its activities? There are strong arguments to suggest that the only limits to the obligation of states to protect human rights that may be

[33] See, eg, Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989) 93; Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', *Australian Yearbook of International Law*, vol 12, no 82 (1988–9).

[34] *United States v Canada* ('the *Trail Smelter* case'), 3 RIAA 1905 (1941) (arbitration); as regards environmental damage, see *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 (Dissenting Opinion of Judge Weeramantry).

[35] *United Kingdom v Albania* ('the *Corfu Channel* case'), ICJ Reports 1949, 18. [36] Ibid.

[37] Ian Brownlie, *System of the Law of Nations: State Responsibility* (Oxford: Clarendon Press, 1983) 165. See also Nicola Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Antwerpen-Oxford-New York: Intersentia, 2002) 172.

threatened by the activities of private actors operating across borders—for instance, PMSCs providing services in foreign states—are those imposed by international law itself, insofar as the law restricts the possibility for any state to exercise extraterritorial jurisdiction. The scope of these limits, however, has been long contested.[38] The following subsection seeks to summarize the debate. It concludes that there is no obstacle to require the states where the PMSC is registered to discharge its obligation to protect human rights by regulating the activities of that company, wherever it operates.

Discharging the obligation to protect by exercising extraterritorial jurisdiction

The use of extraterritorial jurisdiction to impose criminal or civil liability is one way in which states may influence the behaviour of companies operating overseas. Other means by which a state can fulfil its obligation to protect human rights include the use of non-binding tools, such as inserting clauses in public procurement schemes referring to human rights obligations, imposing reporting and other obligations on publicly listed or government-certified companies, and including conditions in project financing agreements with export credit agencies. Reliance on such incentives does not pose any question of extraterritoriality per se. Such incentives do not prescribe a certain form of conduct. They simply encourage companies to act according to certain norms if they wish to benefit from certain advantages (or not to be denied certain advantages) in their relationships with the state. In that sense, they do not constitute the exercise by the state of its extraterritorial jurisdiction at all.

Even within the notion of extraterritorial jurisdiction itself, a distinction should be made between adjudicative and prescriptive extraterritorial jurisdiction. A state may attribute to its jurisdiction a power to adopt decisions that concern situations having arisen abroad (adjudicative extraterritorial jurisdiction). This occurs either where criminal procedures may lead to convictions for acts committed abroad or where civil courts declare themselves competent to adjudicate proceedings that relate to extraterritorial situations. Alternatively, a state may adopt legislation intended to have an extraterritorial effect—that is, establishing norms governing persons, property, or conduct outside the national territory (prescriptive extraterritorial jurisdiction). It may, for instance, provide that certain forms of behaviour will constitute offences, wherever they take place, and decide that it may seek to prosecute such offences if the person suspected of having committed such offences is found on the national territory, or to request the extradition of that person.

[38] See, eg, Bernard H Oxman, 'Jurisdiction of States', in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law*, vol 3 (Amsterdam: Elsevier Science Publishers, 1997) 55–60.

These two forms of extraterritorial jurisdiction are not necessarily entailed with one another, and there is no necessary logical connection between them. They are nevertheless related where criminal proceedings are concerned, since the criminal law of the state in which proceedings are brought—the 'forum state'—will necessarily be applied, although in most cases under a condition of double criminality. In contrast, where civil proceedings concern extraterritorial situations, the applicable law will be either the law of the forum state or the law of the host state, depending on the rules relating to conflicts of laws contained in the private international law of the forum state. In sum, how the question of extraterritoriality arises will differ depending on the nature of the proceedings concerned:

Civil liability	Criminal liability
A1: Extraterritorial adjudicative jurisdiction with application of the foreign law (application of the *lex loci delicti*)	B1: Extraterritorial prescriptive and adjudicative jurisdiction with requirement of double criminality
A2: Extraterritorial adjudicative and prescriptive jurisdiction: application of the law of the forum to extraterritorial situations	B2: Extraterritorial adjudicative and prescriptive jurisdiction without requirement of double criminality

While the situations A1 and B1 are genuine forms of exercise of extraterritorial jurisdiction, they are not problematic under international law, and specifically under the principle of the sovereign equality of states and its corollary, the prohibition against interference with other states' domestic affairs. Indeed, in both these situations, the forum state has recourse to extraterritorial jurisdiction in order to give effect to the laws of the territorially competent host state—in fact, ensuring that its organs will serve the implementation of those laws. In contrast, the exercise of extraterritorial jurisdiction in situations A2 and B2 deserve a more detailed discussion.

The legal doctrine is divided on the question of whether such forms of extraterritorial jurisdiction are authorized under international law where a state seeks to regulate situations abroad by imposing forms of civil liability on actors for their behaviour outside the national territory (A2), or by extending the scope of application of its criminal laws to situations having occurred abroad without imposing a condition of double criminality (B2). Some authors take the view that, as long as they stop short from sending their organs abroad, states are free to exercise extraterritorial jurisdiction by adopting legislation that seeks to regulate behaviour in other states and by allowing their jurisdictions to adjudicate cases related to such behaviour.[39] That was the position adopted by judge ad hoc Van den Wyngaert in her dissenting opinion to the 2002 judgment of the ICJ in

[39] Patrick Dailler and Alain Pellet, *Droit international public* (7th edn; Paris: LGDJ, 2002) 506.

the *Arrest Warrant* case.[40] Indeed, in the 1927 *Lotus* case, the Permanent Court of International Justice had expressed the view that states were in principle free to regulate matters situated outside their national territory, unless specific rules of international law prohibited such exercise of extraterritorial jurisdiction.[41] However, *Lotus* is a particularly weak precedent to build upon. The statement commonly quoted was *obiter dicta*, at a time when the idea of state sovereignty was at its apex in international law. In addition, even if we agree to take the passage as authoritative then and as still reflecting the current state of international law, the question of which rules might impose certain prohibitions against adoption of extraterritorial legislation would remain open.

The mainstream view rejects the thesis of an absolute freedom of states to exercise extraterritorial jurisdiction in the absence of specific prohibitions. Instead, it insists on extraterritorial jurisdiction having to be justified by the existence of at least some connection between the state exercising such jurisdiction and the situation concerned. Two of the classical bases justifying the exercise of extraterritorial jurisdiction are relevant to the question of whether a state may seek to regulate the conduct of PMSCs operating outside its national territory.[42] First, the nationality of both the offender and the victim may form the basis for extraterritorial jurisdiction. Under the active personality principle in particular, a state may enact legislation which will apply to its nationals even as regards their conduct abroad.[43] Indeed, it has been extended beyond nationality to permanent residency in certain recent statutes.[44] Secondly, under the principle of universality, certain particularly heinous crimes may be

[40] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* ('the *Arrest Warrant* case'), ICJ Reports 2002, Dissenting Opinion of Judge Van den Wyngaert, para 19.

[41] *The Case of the SS 'Lotus' (France v Turkey)*, PCIJ Reports 1928, Series A, No 10, 18–19 ('Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion, which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable').

[42] In addition to the two bases for extraterritorial jurisdiction detailed here, it is generally admitted that a state may exercise jurisdiction with respect to persons, property or acts abroad which constitute a threat to the fundamental national interests of the state; and that it may seek to influence, by the adoption of legislation which has an extraterritorial reach, activities which have a substantial, direct, and foreseeable effect upon or in its national territory. See *Restatement (Third) of the Foreign Relations Law of the United States*, vol 2 (St. Paul, MN: American Law Institute, 1987) ss 402(1)(c) and 403(1)).

[43] Under the *passive* personality principle, a state may seek to protect its nationals abroad by the adoption of extraterritorial legislation. However, invocation of this principle has been met with some suspicion, as it could serve as a means to circumvent the rules of the exercise of diplomatic protection, the normal means through which a state may seek to protect its nationals under another state's jurisdiction.

[44] 'Extraterritorial Criminal Jurisdiction', Report prepared by the Select Committee of Experts on Extraterritorial Jurisdiction established by the European Committee on Crime Problems (CDPC) (Council of Europe, 1990), 13.

prosecuted by any state, acting in the name of the international community, where the crime meets with universal reprobation.

Reliance on the active personality principle may be particularly useful where the conduct of a PMSC operating overseas is concerned, especially if such conduct is considered a criminal offence by the laws of the host state. Indeed, just as the exercise of extraterritorial criminal jurisdiction on the basis of the active personality principle is justified as regards natural persons by the fact that states normally refuse to extradite their own nationals, the exercise of extraterritorial jurisdiction over legal persons will be all the more justified where the host state, on the territory of which the PMSC has committed criminal offences, is unable to prosecute that company effectively, for instance because the imposition of certain sanctions requires the cooperation of the home state of the company targeted. Indeed, even if a state were to convict a foreign PMSC, the under-developed character of international judicial cooperation in criminal matters, made even more problematic by the diverging approaches the different states have about the question of the criminal liability of legal persons, may make it difficult for such a conviction to be recognized and enforced in the home state of the PMSC. It might therefore be argued that by adopting legislation seeking to regulate the conduct of 'its' companies wherever they operate, the home state enhances the effectiveness of the criminal laws of the host state: far from constituting a form of interference with domestic affairs of the host state, it therefore may be seen instead as a means of international cooperation.

In order to rely on the active personality principle to justify extraterritorial jurisdiction, one must be able to define the 'nationality' of the legal person. In the *Barcelona Traction* case, the ICJ seemed to reject that the nationality of a corporation could follow from the nationality of shareholders at least as regards the determination of nationality.[45] But that proposition—based on the view that a distinction ought to be maintained between the legal situation of the corporation and that of the shareholders—was stated only for the specific purposes of the exercise by a state of its right to diplomatic protection.[46] Whether it will be determinative beyond that field remains to be seen.[47] In addition, aside from the question whether the nationality of a company can be determined as following from that of its shareholders (or controlling 'parent'), we are clearly witnessing an extension of the conditions under which a state may be authorized to exercise extraterritorial jurisdiction where it seeks to influence the behaviour of companies controlled by companies of its nationality.[48]

[45] *Case Concerning the Barcelona Traction, Light & Power Co. (Belgium v Spain)* ('the *Barcelona Traction* case'), ICJ Reports 1970, 3.

[46] Ibid. at 184.

[47] On the relevance of *Barcelona Traction* beyond the exercise of diplomatic protection, see the doubts expressed by Stanley D Metzger, 'Nationality of Corporate Investment Under Investment Guaranty Schemes—The Relevance of Barcelona Traction', *American Journal of International Law*, vol 65 (1971) 532.

[48] See, eg, *Restatement (Third) of the Foreign Relations of the United States*, American Law Institute, 1987, s 414.

International law does not impose any particular mode of determination of the 'nationality' of the corporation. The determination of the nationality of the company through the place of incorporation remains the dominant mode of determination of the nationality of the corporation in a large number of states, including the United States and Britain, the advantage of this approach being that it contributes to legal certainty, since the results when applying these criteria are highly predictable.[49] Yet, it has increasingly been criticized as inadequate. The links between the corporation and the state under the laws of which it has been established may be extremely weak,[50] particularly in the current modes of organization of multinational corporations. Lower communication and transportation costs, as well as the abandonment of regulations relating, for instance, to the nationality of the directors or the location of shareholder and director meetings, have relegated the place of incorporation to little more than a legal fiction, or to the choice, by the company's board of directors, of a regulatory regime, without this corresponding to any genuine link between the company and the state of incorporation.[51]

One risk resulting from this disconnect is the effect equivalent to the phenomenon of 'flags of convenience' flown by vessels, who choose under which 'flag' to register on the basis, *inter alia*, of the regulatory framework to which they will be subjected.[52] The danger is that states may register companies under their laws, perhaps for the purpose of taxing their benefits, but neglect their duty to regulate those companies effectively, as might be required under contemporary conceptions of international solidarity between states. In other terms, one question raised by the use of the place of incorporation as determinative of the nationality of the corporation in a context where this might not correspond to reality,[53] is that of an obligation imposed on states to regulate the activities of their nationals that goes beyond their liberty to do so.[54] Unless we impose on the state under the laws of which a company is incorporated that it effectively regulates the activities of that company, we run the risk of 'relocations of convenience', by companies seeking to operate under the laws of a 'home state'

[49] Yitzhak Hadari, 'The Choice of National Law Applicable to the Multinational Enterprises', *Duke Law Journal* (1974) 1.

[50] M Tedeschi, 'The Determination of Corporate Nationality', *Australian Law Journal*, vol 50 (1976) 521.

[51] See generally Linda A Mabry, 'Multinational Corporations and US Technology Policy: Rethinking the Concept of Nationality', *Georgetown Law Journal*, vol 87 (1999) 563.

[52] See, eg, Emeka A Duruigbo, *Multinational Corporations and International Law. Accountability and Compliance Issues in the Petroleum Industry* (Ardsley: Transnational Publishers, 2003) 28–40; R Tali Epstein, 'Should the Fair Labor Standards Act Enjoy Extraterritorial Application? A Look at the Unique Case of Flags of Convenience', *University of Pennsylvania Journal of International Business Law*, vol 13 (1993) 653.

[53] Note that under the Convention on the Law of the Sea there must exist a genuine link between the vessel and its flag state. Convention on the Law of the Sea (1982), 1833 UNTS 396, art 91(1).

[54] On the duties of control imposed on the flag state under the Convention on the Law of the Sea, see ibid. art 94.

imposing on them only low levels of regulation. This argument may be particularly important in the debate over the control of PMSCs. These companies often operate in weak governance zones or in conflict zones. It is thus vital that they be effectively controlled by their state of origin, since the host state often will not be able, or willing, to exercise such control.

The principle of universality constitutes a second important basis for the exercise of extraterritorial jurisdiction for regulation of PMSC activities. Certain particularly heinous crimes may be prosecuted by any state, because they are met with universal reprobation. Genocide, war crimes, crimes against humanity, torture, and forced disappearances—all of which are international crimes for which treaties impose the principle *aut dedere, aut judicare*—belong to this category.[55] In prosecuting these crimes, states are not seen to act in their interest; they act as agents of the international community. Indeed, states are obliged to establish their jurisdiction over such crimes, wherever they are committed and whatever the nationality of the perpetrators or the victims, insofar as those accused of such crimes are found on their national territory. This is an obligation to exercise both prescriptive and adjudicative extraterritorial jurisdiction, which, although stated in the relevant treaties as regards war crimes, torture, and forced disappearances, is widely considered to belong to customary international law.

This ground of extraterritorial jurisdiction is of limited usefulness as regards the obligations of states to control PMSCs. The category of 'international crimes' is much narrower than the full range of human rights abuses which PMSCs could commit in the course of their activities. In addition, the instruments or customary norms defining certain forms of behaviour as international crimes[56] only impose on the states an obligation to provide in their legislation for the possibility of prosecuting a person for war crimes or torture committed outside their national territory in the event the suspected perpetrator of an international crime is found on their territory: they do not require that the states parties assert a 'pure universal jurisdiction' (that they establish their jurisdiction over these international crimes even where

[55] See the *Arrest Warrant* case, n 39 above, para 46 (joint separate opinion by Judges Higgins, Kooijmans, and Buergenthal) (citing Cherif Bassiouni, *International Criminal Law*, vol 3 (2nd edn; New York: Transnational Publishers, 1999) 228); Theodor Meron, 'International Criminalization of Internal Atrocities', *American Journal of International Law*, vol 89 (1995) 576.

[56] These are the Convention on the Prevention and Punishment of the Crime of Genocide, signed in New York, 9 December 1948, UNTS, vol 78, p 277; Geneva Convention Relative to the Treatment of Prisoners of War, signed in Geneva on 12 August 1949, UNTS, vol 75; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, signed in Geneva on 12 August 1949, UNTS, vol 75; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, signed in Geneva on 12 August 1949, UNTS, vol 75; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, signed in Geneva on 12 August 1949, UNTS, vol 75; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); and the International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc A/HRC/1/L.10 (2006) 32.

the suspected perpetrator is not present on the national territory).[57] As noted by President Gilbert Guillaume in his individual opinion appended to the judgment of the ICJ in the *Arrest Warrant* case, a review of the international texts establishing the principle *aut dedere, aut judicare* shows that 'none of these texts has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the state in question. Universal jurisdiction *in absentia* is unknown to international conventional law'.[58]

In addition, none of the instruments implementing the principle of universality was drafted with legal persons in mind. It would therefore not be plausible to derive from these instruments an obligation, for instance, for states where a company is incorporated to launch an investigation against that company, leading possibly to the imposition of effective sanctions, if it appears on the basis of reliable information that the company had taken part in the commission of international crimes.[59] Moreover, while the international crimes discussed above call, per definition, for sanctions of a criminal nature, not all states have accepted the concept of criminal liability for corporate bodies.

The *aut dedere aut judicare* principle established for perpetrators of international crimes may nevertheless have implications for legal persons, including PMSCs. The principle was imposed in order to ensure that natural persons who perpetrate international crimes will not be allowed to seek impunity because of the obstacles facing their extradition. But the implication seems to be unavoidable that the imposition by a state of certain sanctions (for instance, the confiscation of assets or the imposition of financial penalties) against a corporation 'present' under that state's jurisdiction, even when the corporation is not considered to have the 'nationality' of the forum state under its law, should be considered allowable, if it is determined that the corporation has indeed committed or been complicit in an international crime. It should not matter that the crime was committed abroad and is not connected in any way to the forum state except by the 'presence' of the corporation on its territory. In addition, the principle *aut dedere, aut judicare* in fact is simply one dimension of a broader

[57] As noted by Judges Higgins, Kooijmans and Burgenthal, the so-called 'universal jurisdiction' as exercised, for instance, according to the principle *aut dedere, aut judicare* stipulated in art 5 of the 1984 Convention against Torture in reality is but a modality of the exercise by a state of its territorial jurisdiction, 'albeit in relation to acts committed elsewhere'. See the *Arrest Warrant* case, n 39 above, joint separate opinion of Judges Higgins, Koojimans, and Burgenthal, para 41.

[58] Ibid, separate opinion of President Guillaume, para 9.

[59] It would be tempting to say that, since legal persons are not, as such, subject to extradition, a state on the territory of which a corporation is 'present' through its assets or its business activities is under an obligation to prosecute that person if reliable indications exist that it may have taken part in the commission of international crimes. This temptation should be resisted, since it would stretch the reading of the treaties discussed above far beyond the intentions of their drafters. As argued immediately below, this is without prejudice, however, of the existence of an obligation to take certain measures vis-à-vis the corporation for its operations abroad, which may imply its criminal, civil or administrative liability, where the ability of the host state to effectively combat international crimes committed on its territory in which the corporation has been involved is limited due to the failures of international cooperation.

obligation of states to cooperate internationally in combating international crimes. The Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity adopted by the UN General Assembly in 1973, for instance, state explicitly that 'States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose'; and that they shall 'assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them'.[60] Similar references to the obligation of international cooperation are found in the Preamble to the Statute of the International Criminal Court,[61] which notes that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation', and that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

What are the implications of this requirement of international cooperation, if we take into account the difficulties the host state may encounter in holding criminally liable a PMSC operating within its territory, but based in a foreign jurisdiction? Due to the obstacles to international legal cooperation in criminal matters, the risk is high that PMSCs will be left unpunished even in cases where they face prosecution under the laws of the host state. Indeed, the execution of sanctions imposed on the company may require, in order to be effectively imposed, the cooperation of the home state (for example, in instances where there is a need for judicial winding-up order or placement under judicial supervision). But such cooperation is rendered extremely problematic by the fact that states have widely diverging approaches as regards not only the principle of criminal liability of corporations, but also the nature of the legal sanctions applicable to offences committed by corporations. Such divergences may constitute an obstacle to inter-state cooperation in this area. The exercise by the home state of extraterritorial jurisdiction may be seen to compensate, in this respect, for the obstacles facing the territorial (host) state in the effective imposition of criminal liability on the foreign PMSC operating within its borders. Such exercise of extraterritorial jurisdiction is in the interest of international solidarity, rather than in the selfish interest of the state concerned: it is therefore a form of extraterritorial jurisdiction which is in principle easier to justify.[62] Moreover, the exercise of extraterritorial jurisdiction in these circumstances may be seen as a derivative of the obligation of international cooperation

[60] UN Doc A/9030 (1973) paras 3–4.

[61] Rome Statute of the International Criminal Court, signed in Rome, 17 July 1998, UNTS, vol 2187, p 3.

[62] See 'Extraterritorial Criminal Jurisdiction', n 43 above.

in the punishment of persons guilty of international crimes, at least in situations where the host state on the territory of which such crimes have been committed is unable to effectively engage the criminal liability of the PMSC involved.

Conclusion

This chapter has examined the conditions under which the acts of PMSCs may be imputed to a state. It illustrated that apart from the special case in which PMSCs are so closely integrated into the armed forces of a state that they ought to be treated as state agents, such an attribution could be justified in three situations. First, if it can be proven that a particular PMSC, in fact, constitutes a mere fiction which the state uses in order to pursue its interests, it should be considered under the 'complete dependence' of the state and its acts, therefore, treated as though they were the acts of the state itself. Secondly, if a state chooses to exercise elements of its governmental authority, particularly in relation to law enforcement, by delegating the exercise of such powers to a private entity, it must accept responsibility for the way such delegated powers are exercised. Thirdly, a particular behaviour of the private entity may be attributed to the state in situations where the private entity 'is in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct'. The two latter doctrines especially may be useful to impute to the state having hired the services of the PMSC the acts of PMSC employees. To the extent the PMSC is hired to perform duties which are normally of a governmental nature—a notion that includes the maintenance of law and order, the surveillance of prisons, or the interrogation of detainees—the second doctrine ensures that the state does not evade its international obligations by privatizing certain public functions. And even if that doctrine fails, for instance, because the 'public function' is being exercised by a private company without any express delegation to that effect, the third doctrine may at least allow the imputation to the state of the specific acts that are adopted by the private agents under its supervision.

For PMSCs that do not work for governments, but are instead hired by private corporations, the above doctrines will be of limited use. The responsibility of states, then, is to discharge their obligation to protect the rights that could be violated by the acts of PMSCs. In principle, this should be primarily a responsibility of the host state. However, where the host is unwilling or unable to do so, the home state of the PMSC should accept that it has a responsibility to effectively control the PMSC. The exercise of extraterritorial jurisdiction constitutes one tool in this regard; the use of incentives, such as selective public procurement schemes, reporting obligations, or conditionalities imposed on the support of export credit agencies, may constitute other alternatives. Such forms of extraterritorial control, for the benefit of the population of the state where the PMSC is present, may help the host state itself to better comply with its

obligations under international law. While, ideally, we would need to make progress towards the definition of a multilateral framework defining the respective responsibilities of the host state and of the home state in controlling the compliance of PMSCs with certain universal values, in the interim, there is no other way out of impunity.