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THE USE AND REGULATION OF PRIVATE MILITARY COMPANIES

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PHD IN LAW

UNIVERSITY OF SUSSEX

APRIL, 2017

STATEMENT

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

I also confirm that part of Chapter 2 on the East India Company has been published in 2016 *Legal Issues Journal*, Vol. 4 (1) as an article "Companies of Past and Present. Lessons from the East India Company on the Use and Regulation of Private Forces Today"

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UNIVERSITY OF SUSSEX

KATERINA GALAI LAW AND INTERNATIONAL SECURITY

THE USE AND REGULATION OF PRIVATE MILITARY COMPANIES

ABSTRACT

My research investigates the use and regulation of private military companies (PMCs) in international law. This legal research adopts a critical method of historical sociology to accommodate changing modes of governance. By exploring historical patterns of the use of private force I analyse the effectiveness and applicability of contemporary attempts to regulate PMCs.

There are numerous overlapping forms of regulation that attempt to govern PMC conduct. The key gap, identified by analysing relevant bodies of international and domestic law, is the lack of a corporate liability mechanism strong enough to tackle grave international crimes committed by PMCs and the challenges posed by the corporate veil.

By assessing the prevailing form of governance and the role that private security plays in state policy, it becomes clear that states are the main PMC clients who rely on companies for providing security services. Meanwhile the industry treats military activity just like any other commodity that can be self-regulated by the free market. In order to close the gap of PMC impunity, an international legal response is required that can target PMCs as companies and to invoke criminal corporate responsibility.

This is why I develop a corporate criminal responsibility approach that has the potential of addressing the legal gap in PMC regulation. I argue that due to the military nature of their activity, PMCs are different to other companies as they took on a portion of state functions that requires a proportionate legal response in terms of responsibility.

Transnational nature of PMC activity signals the need for these companies to be recognised as actors on the international level and acquire international legal personality. Finally, I explore the possibility of invoking criminal corporate responsibility through international criminal law as it offers the most tailored approach of regulating a changing governance.

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Introduction

From medieval to early modern history, private soldiers have dominated the security landscape. Their existence was fundamental to the waging of the wars between feudal lords, dynastic monarchies, and the *condottieri* of Italian city-republics. Then, as early as the fifteenth century, mercenaries were identified by Machiavelli as a threat to republican ideals and good governance.¹ They were also more expensive than the emerging citizen conscripts, putting a financial strain on the large-scale belligerent demands of sixteenth- and seventeenth-century monarchies. However, only when a mercenary could be juxtaposed against a national citizen army was the use of private force gradually decreased as an element of state military power. Even then, this trend was prevalent only amongst the sovereign states of continental Europe, while their overseas empires enjoyed an exemption from legal and normative regulation, raising mass colonial armies on behalf of the empires.

Modern mercenaries, or private military contractors, largely inherited their unenviable reputation from their counterparts in the latter half of the twentieth century, when mercenaries were criminalised by the Geneva Conventions in the context of decolonisation and attempts to overthrow emerging governments.² Today, with the largest private security company, G4S, employing over 620,000 people globally,³ private providers dispose of vast resources and are being actively used to perform various security functions across the world. Private military companies (PMCs) can be hired by individual states to deliver a multitude of services and support functions in a foreign operation.⁴ PMCs have also been hired by the UN for

¹ Machiavelli, N.: "The Discourses" in Machiavelli, N. (ed. Wootton, D.): *Selected Political Writings*, Hackett Publishing Company Inc., Cambridge, 1994, p. 140.

² The Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts, Protocol I, Article 47 (2), June 1977.

³ See www.g4s.com/en/Who%20we%20are/Our%20people/Our%20employees/.

⁴ Scahill, J.: *Blackwater: The Rise of the World's most Powerful Mercenary Army*, Serpent's Tail, London, 2007; Shearer, D.: "Private Armies and Military Intervention" 1998, Vol. 38 (316), *The Adelphi Paper* 316;

peacekeeping purposes;⁵ moreover, they can be contracted out by other companies to protect extraction facilities abroad.⁶ While the growth of the private military industry can be observed in the media and through general privatisation trends,⁷ it can be problematic to obtain comprehensive data about PMC activity. Unlike national armies and official governmental agencies, PMCs are more obscured because they are not subject to the Freedom Information Act or similar legislative tools that impose transparency. Government enquiry into the private military industry is also limited with little reporting or regulation of the industry.⁸

The thesis does not focus on International Humanitarian Law (IHL) because the majority of private military activity would fall through the net proving IHL a weak regulatory mechanism. For instance, IHL extends over state military forces, mercenaries who meet all six Additional Protocol I (AP I)⁹ criteria, and those contractors who have been properly incorporated into national armies or government bodies. However, since the AP I definition is narrow and there have been very few instances of integrating PMCs into state military,¹⁰ most private military actors would fall outside of the remit of IHL.¹¹

Howe, H. M.: "Private Security Forces and African Stability: The Case of Executive Outcomes" 1998, Vol. 36 (2), *The Journal of Modern African Studies*, pp. 307-331.

⁵ Ostensen, A. G.: "UN Use of Private Military and Security Companies: Practices and Policies", The Geneva Centre for the Democratic Control of Armed Forces, SSR Paper 3, 2011, available at: <http://www.dcaf.ch/Publications/UN-Use-of-Private-Military-and-Security-Companies-Practices-and-Policies>; Colonel Russell, D. W.: *Understanding the Application of Army's Logistics Civil Augmentation Program (LOGCAP)*, U.S. Army War College, Carlisle Barracks, Pennsylvania, 1997.

⁶ Paying for Protection. The Freeport Mine and the Indonesian Security Forces, A Report by Global Witness, July 2005; Arduino, A.: *Security Privatisation with Chinese Characteristics: The Role of Chinese Private Security Corporations in Protecting Chinese Outbound Investments and Citizens*, Policy Report, S. Rajaratnam School of International Studies, June 2015.

⁷ Cropley, E. and Lewis, D.: "Nigeria drafts in foreign mercenaries to take on Boko Haram" 12 March 2015, Reuters, available at: <http://uk.reuters.com/article/uk-nigeria-violence-mercenarys-idUKKBN0M80VT20150312>; Arduino, A.: *Security Privatisation with Chinese Characteristics. The Role of Chinese Private Security Corporations in Protecting Chinese Outbound Investments and Citizens*, Policy Report, S. Rajaratnam School of International Studies, June 2015.

⁸ McFate, S.: *The Modern Mercenary: Private Armies and what they Mean for the World Order*, OUP, Oxford, 2014, p. 9.

⁹ AP I definition is analysed on p. 27.

¹⁰ E.g.: Sandline International and Executive Outcomes whose personnel were enrolled as "Special Constables" on an assignment to Papua New Guinea in 1997.

¹¹ For private military conduct under IHL see: Cameron, L. and Chetail, V.: *Privatizing War: Private Military and Security Companies under Public International Law*, CUP, Cambridge, 2013.

Furthermore, IHL provides a framework of international armed conflict where PMCs are rarely seen to operate partially due to the nature of their activity and partially due to their civilian status. What this means is that in order for IHL to apply as a relevant regulating body of law, PMCs would have to be incorporated into state forces and act as part of national armies during an armed conflict. PMC contractors bear criminal responsibility as individuals, regardless of their status under IHL and its reach does not extend to corporations.

In the current legal context, my enquiry aims to investigate whether PMCs could offer a viable solution to address existing international security issues and if their current regulation under international law (IL) is fitting to perform this function. The issue of PMC regulation has engaged considerable debate amongst legal and political scholars, policy makers, and the international community. Because of this focus, a wide range of possible responses have emerged, varying between industry attempts at self-management through voluntary norms and non-binding standards,¹² to numerous approaches that critique private force, offering solutions grounded in ethics¹³ and human rights.¹⁴ PMC regulation, current and developing, can be broadly divided between the ‘responsibilisation’ and criminalisation approaches. Although the soft norms of ‘responsibilisation’ are aimed at raising standards and PMC respect for human rights, they run the risk of creating a veneer of false legitimacy while lacking legal enforcement and any tangible mechanisms for delivering justice. The proposed criminalisation efforts, on the other hand, are state-centric and are likely to create a dissonance and polarisation between the states in the two opposing regulatory camps, namely those actively using PMCs and the ones condemning

¹² Such as: International Code of Conduct for Private Security Providers; The Montreux Document; American Society for Industrial Security (ASIS) International; International Organisation for Standardisation (ISO/PAS 28007:2012); OECD Guidelines for Multinational Enterprises, etc.

¹³ Percy, S.: *Mercenaries: The History of a Norm in International Relations*, Oxford University Press, Oxford, 2007; Pattison, J.: “Deeper Objections to the Privatisation of Military Force”, 2010, Vol. 18 (4), *The Journal of Political Philosophy*, pp. 425-447; Tesón, F.: “Humanitarian Intervention: Loose Ends”, 2011, Vol. 10 (3), *Journal of Military Ethics*, pp. 192-212; Alexandra, A., Baker D.-P. and Caparini, M. (eds): *Private Military and Security Companies: Ethics, Policies, and Civil-Military Relations*, Routledge Military Studies, New York, 2008.

¹⁴ Such as the efforts of the UN Working Group on Mercenaries and the UN Intergovernmental Group on Business and Human Rights.

them as a modern form of mercenarism. The multitude of existing and emerging regulations concerning PMCs demonstrates the numerous unsuccessful attempts at tackling this issue.

But why is there a need for regulation? And what are existing approaches to private military activity trying to achieve? On the one hand, PMCs are seen to endanger the state monopoly on force by offering a private route to the acquisition of an armed and militarily trained force. On the other hand, not only do governments permit the existence of PMCs, they have been eagerly incorporating privatised violence into state policy since the 1980s, through privatisation and outsourcing, a strategic framework inspired by neoliberal ideas. I argue that, if properly regulated, private military resources can be used to supplement state forces. The value of my research lies in the method that I develop to evaluate the relationship between the prevailing form of governance and the contemporary security landscape. It is not enough simply to focus on the solution without assessing the type of governance to which this regulation is being added, and the questions as to who will execute it and in what way. The latest UN efforts in the form of a Draft Convention,¹⁵ for example, go straight from the problem of PMC activity to a solution based on state-centric criminalisation, entirely disregarding the process of its implementation and the likelihood of its efficacy.

Thinking critically about historical forms of state and military allows us to identify regulation in previously unsuspected places. There is very little historically informed literature in IL on PMCs, as most approaches treat this subject as an entirely new area of study. All these approaches produce temporary or incomplete regulatory frameworks as they fail to take into consideration the question of constantly changing governance structures. By reflecting on the relevance of contemporary developments in a historical context, I seek to understand why the use of private security is becoming important and how it can be governed.

¹⁵ Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies, 13 July 2009.

The role of mercenaries in European state formations and subsequent conquests between fourteenth-century feudalism and the 'long nineteenth century', followed by the shift towards the privatisation of security introduced by neoliberalism and the new wars erupting at the end of the Cold War, will all be assessed in terms of military history. While a historical analysis provides the context for the use of private military forces by different types of states both in the past and today, the legal treatment of this relationship (between the state and military force) is the primary concern of my research. However, without the historical analysis, I would be lacking insight that allows me to draw broader conclusions about the suitability and efficacy of existing and future regulation.

My project contributes to existing work in the field by exploring the relationship between form of governance and type of military force. The aim is to identify patterns that occur throughout the military history of private force and that could be used to assist in the analysis of future legal issues in the regulation of force. By drawing on historical sociology and the history of war, I develop a novel IL account of the question of PMC regulation. This will help to contextualise the private military sector as an inherent form of force used by states, rather than a new phenomenon, therefore raising questions about its legitimacy and regulation. The overall methodology used in this interdisciplinary research can be described as applied or integrated. By using IL and historical sociology I draw insights from these disciplines to answer the legal question of PMC regulation and to reveal how different institutional practices can illustrate patterns and repetitions across centuries.¹⁶

Applying a socio-historical approach demonstrates that the policy of the use and regulation of violence is not legally neutral; instead it is shaped by the various expressions of power and is articulated through the language of legitimacy. The concept of legitimacy is expressed through norms and has the ability to drive policy. Drawing on a critical legal approach, I use the concepts

¹⁶ See Chapter 2 in Dorsett, S. and McVeigh, S.: *Jurisdiction*, Routledge, Abingdon, 2012, pp. 10-29.

of power and legitimacy to explain legal aspects of the regulation of private violence. I evaluate the relationship between form of government and military force in order to understand the normative ground for state choice of type of military power. This mechanism is set out to demonstrate patterns that occur throughout history, and that could be applied to address future legal issues in PMC regulation. By deconstructing the overlapping regulations in the realm of private security, I reveal the legal gap that arises from the lack of a strong norm of corporate responsibility. PMC impunity is fortified through the absence of any recognised international legal personality for corporations, while simultaneously creating a veneer of legitimacy of being a properly incorporated company.

Numerous cases brought against corporations¹⁷ often demonstrate a negative outcome for the claimants, or, in the best-case scenario, the company is forced to pay damages and settle, avoiding criminal charges. Even the most infamous and notorious modern-day incident, involving the massacre of seventeen Iraqi civilians at Nisour Square by Blackwater employees, resulted in the imprisonment of four American contractors, while the company settled out of court and the PMC's former director Erik Prince continues to work in the industry, providing his services in China and Libya.¹⁸ State responsibility also fell through the net, as the contract between Blackwater and the US Department of State was not sufficient to establish proof of direct control and attribute the private conduct of the PMC to the United States. In all the variety of international legal norms and regulations, only individual criminal responsibility was invoked for the crime committed within the parameters of a state operation outsourced to a company.

In order for regulation to fulfil its purpose and deliver justice, it needs to be applied to the entire supply chain of private security, and implemented at a level that is less likely to generate impunity. An effective regulation of private military actors also needs to take account of the

¹⁷ *Al Shemari et al. v. CACI et al., Arias v. DynCorp, Arias v. DynCorp, Kiobel v. Royal Dutch Petroleum.*

¹⁸ Cole, M. and Scahill, J.: "Erik Prince in the Hot Seat" 24 March 2016, *The Intercept*, available at: <https://theintercept.com/2016/03/24/blackwater-founder-erik-prince-under-federal-investigation/>.

historical context. By assessing the prevailing form of governance and the role that private security plays in state policy, it becomes clear that states are the main PMC clients and they rely on companies for the provision of security services. Subsequently, due to their bias and reliance on private security providers, states are arguably not the best placed actors to carry out the regulation of PMCs. Neither is the industry, as it tends to treat military activity just like any other commodity that can be self-regulated by the free market. In order to close the gap of PMC impunity, an international legal response is required that has the capacity to act beyond the state and invoke criminal corporate responsibility.

By examining the questions of the use and regulation of PMCs, my thesis seeks to identify the main source of impunity, namely the lack of a strong norm of corporate responsibility and, particularly, international criminal liability for corporations. This is why I develop a corporate criminal responsibility approach that has the potential to address the legal gap in PMC regulation. I argue that, due to the military nature of their activity, PMCs are different to other companies. In past decades, they took on a portion of state functions that required a proportionate legal response in terms of responsibility. The transnational nature of PMC activity signals the need for these companies to be recognised as actors on the international level and to acquire international legal personality. Finally, I explore the possibility of invoking criminal corporate responsibility through international criminal law as it offers the most tailored approach to adapt to a changing governance.

Chapter Outline

Where does a norm against the use of private military force come from and what makes it a norm? Why were mercenaries used historically and why has their popularity fluctuated throughout the centuries? I start by exploring different forms of governance and by tracing the state's choice of security resources, their allocation and distribution, as well as the formation of norms behind this choice.

My enquiry is focused on the ability of existing PMC regulation to adequately control private force and its capacity to deliver justice in the event of PMC misconduct. In other words, can existing IL effectively regulate PMCs and does it fit the current governance system? The contemporary legal analysis¹⁹ answers the first part of the question by examining regulatory bodies, ranging from voluntary industry-driven self-regulation, to IL and the human rights regime, to the framework provided by company, contract, and tort law. The latter part of this question, however, is addressed first, through a historical examination of private violence and its deployment in interstate belligerent conduct from the fourteenth century to the present day. By breaking through the customary notions of public and private I seek to attain a much wider scope for analysis, and to adopt a more meaningful and informed approach when analysing contemporary challenges in IL posed by the use of private force.

The first chapter lays out the methodology, key definitions, and legal concepts used throughout the thesis. It also provides a brief literature review of the core accounts used to construct my approach. It introduces the concepts of state, power and legitimacy, mercenaries, private military contractors, and regulation, and explains the meaning of those terms in the context of this research. *Chapter 1* asks the important question about the responsibility of individuals, corporations, and state entities in the event of gross offences committed by PMCs. Questions of responsibility are explored in further detail in *Chapter 5* in order to identify legal gaps that can lead to PMC impunity.

Chapter 2 provides a socio-historical analysis of the different forms of governance between the fourteenth and nineteenth centuries. This chapter focuses on tracing the changing relationship between forms of governance and the military power that they use. It analyses the shift from vassals serving multiple feudal lords and private armies to a move towards a professional standing army in the absolute monarchies of continental Europe, to mercenaries and the

¹⁹ Conducted in *Chapter 5*.

unconsolidated militaries of Italian city-states, as well as contrasting models of *levée en masse* of the early nation-state of Revolutionary France, to the outsourced colonial army of the English East India Company. *Chapter 2* begins to crystallise the normative patterns of shifting conflict paradigms and military structures, a process that is further developed in the following two chapters.

Chapter 3 continues the historical analysis into the twentieth century by drawing on the changing nature of war and tracing IL's response to mercenaries in the context of decolonisation and proxy warfare. The re-emergence of private force is juxtaposed with the total centralisation of military resources at the beginning of the twentieth century, particularly during the period of the two World Wars. *Chapter 3* uses the *Nicaragua case* to demonstrate that the IL of the twentieth century is largely politicised. Despite the codification of provisions relating to mercenaries under the Geneva Conventions and active anti-mercenary movements, it will be argued that relevant treaties and norms have failed to achieve universality in their relevance and applicability.

Furthermore, the failure to criminalise the act of mercenarism, coupled with the spread of neoliberal ideas and the changing paradigm of new wars, has led to the rise of private military companies at the end of the twentieth century, which is the focus of *Chapter 4*. In this chapter I argue that the emerging form of governance from the 1980s onwards, so-called neoliberalism, completes the cycle of different models scrutinised in previous chapters. With its characteristic small government, privatisation, and outsourcing trends, the neoliberal state resembles a contemporary model of the fragmented sovereignty of feudalism, albeit within an entirely different historical context. The changes that the state undergoes in the process of pursuing neoliberal policy also affect the security landscape of this period and are carried through into the present day. Along with the normalisation of private security in terms of government policy comes the end of the Cold War and the change in conflict paradigm from large scale interstate

tensions to far more ambiguous internal ethnic struggles, powered by the growing private security market and the absence of the US-Soviet balance of power. Both strong and weak states have promoted privatisation and the outsourcing of security; in the former, this was a result of neoliberal policies, while the latter had little choice in the absence of strong existing military structures. Ethnic wars in Bosnia and Sierra Leone demonstrated the nature of the 'new wars' as well as the other side to the use of private military resources.

I use the example of the *Tadic case* to highlight the extraordinary progress which the International Criminal Tribunal for the former Yugoslavia (ICTY) has made in establishing individual criminal responsibility and joint criminal enterprise, while simultaneously leaving open questions about attribution of authority on a corporate and state level. I conclude *Chapter 4* with an analysis of PMC classification. By working through the taxonomy of PMCs I define the scope for analysis of contemporary PMC regulation under existing and emerging bodies of law. This chapter considers what makes PMCs problematic under IL and how their corporate and military nature challenges current regulation. Failure to criminalise the act of mercenarism allowed for the incorporation of PMCs as legitimate businesses. Meanwhile extensive privatisation and outsourcing made room for private providers in the security sector, and changed the perception of normality and legality in private security.

Chapter 5 explores both the impunity of PMCs and the different types of liability that they are subject to. It focuses on the contemporary legal regulation of PMCs and the role of international legal institutions in shaping normative conditions in favour of and against their use. I explore contemporary problems posed by the overlapping regulation of PMCs and the limitations that derive from the existence of different bodies of law in their efforts to invoke individual, corporate, and state responsibility. Existing and emerging regulatory initiatives and their potential for efficacy are analysed, taking into consideration the public/private allocation of security resources, based on the mode of governance and the trends identified in chapters 2, 3,

and 4. The purpose of *Chapter 5* is to navigate through the complex channels of existing regulation and to identify key legal gaps that lead to PMC impunity.

After analysing individual liability for PMC contractors and existing provisions for state responsibility, I examine the limitations to corporate liability for PMCs. I identify the sources of corporate impunity in the procedural and territorial limitations of domestic criminal legal systems, as well as in the corporate status of PMCs. I then analyse the limitations of international regulation and the effects of polarisation between the criminalisation and ‘responsibilisation’ approaches. This chapter identifies key loopholes in PMC regulation created by limitations to corporate liability and lack of criminalisation of mercenarism. These cannot be addressed by existing mechanisms of individual criminal liability, or the loose norms around state responsibility. International criminal liability for corporations, on the other hand, can provide potential opportunities to effectively handle private military activity and associated corporate offences.

The final chapter explores why we need corporate criminal liability for PMCs internationally and offers potential future legal responses for its implementation. This chapter builds upon the historical and legal arguments developed throughout the thesis in order to provide recommendations for a more effective and tailored regulation of the private military space, while consciously avoiding the drawbacks linked to the mode of governance and future security trends.

Chapter 1

Legal Theory and Concepts

This chapter sets the scene by presenting the key notions through which the ideas of this thesis are articulated. It outlines the scope of my research and equips the reader with the necessary theoretical framework to follow the historical narrative and engage with it from a critical legal angle. I start by asking historical and theoretical questions about the definitions of state, sovereignty, and the norms which govern the mode and regulation of violence, exposed by the two broader concepts of power and legitimacy.

This chapter is organised in four parts. Parts 1 and 2 focus on the theory and concepts that govern the changing conflict paradigm, norms, and international legal responses to private military forces, analysed in chapters 2, 3, and 4. Part 1 establishes historical and theoretical definitions of a state, its structure and integrity, and the norms that govern the mode and regulation of violence. Drawing on the approach of historical sociology based on the work of Michael Mann and Charles Tilly, I introduce the concepts of power and legitimacy that are used throughout *Chapter 2* to articulate the use of private violence in different forms of governance. Part 2 examines definitions of mercenaries and private military companies proposed by the leading regulatory bodies in international law (IL) and security, including the Geneva Conventions, the UN General Assembly, the UN Working Group on Mercenaries, the Montreux Document, and the International Code of Conduct. Parts 3 and 4 bring together the legal theory and concepts of regulation, and scrutinise the three facets of responsibility that arise from the use of private military forces, providing the framework for chapters 5 and 6.

Part 1: Methodology and Definitions

State

I base my approach on the methodological constructs that can be found in Mann,²⁰ Weber,²¹ Tilly,²² and Dorsett and McVeigh.²³ These critical approaches highlight the evolving nature of states, authority, law, and economic power, and the way these shifts influence the relationships between the concepts from a socio-historical perspective. Through a critical lens, all four accounts demonstrate the inherent presence of notions such as state, sovereignty, jurisdiction, etc., going beyond accepted definitions. My socio-historical approach is built upon this critical debate, and seeks to establish normative patterns by examining the relationship between different types of governance and the type of military power it deployed.

The starting point of my discussion is the concept of a state: not a modern state, or a nation-state, not a democratic or an authoritarian one, but a state as an entity and an actor. Max Weber views the state as a “the agency that guarantees security” especially in times of external danger.²⁴ According to Weber, “a society is organised as a state where there is a successful monopolisation of the exercise of legitimate violence. [...] ‘[T]he state’ is simply whatever agency it is that discharges that function.”²⁵ This definition is a starting point as it extends beyond the fixed notion of a ‘nation-state’ and allows for a more critical approach in examining the exercise of legitimate violence.

²⁰ Mann, M.: *The Sources of Social Power, Vol. II The Rise of Classes and Nation-States, 1760-1914*, CUP, Cambridge, 1993; Mann, M.: *The Sources of Social Power, Vol. III Global Empires and Revolutions, 1890-1945*, CUP, Cambridge, 2012; Mann, M.: *The Sources of Social Power, Vol. IV Globalizations, 1945-2011*, CUP, Cambridge, 2013.

²¹ Weber, M.: *The Vocation Lectures*, Hackett Publishing Company, Cambridge, 2004; Gerth, H. H. and Wright Mills, C. (eds): *From Max Weber: Essays in Sociology*, Routledge, London, 1993.

²² Tilly, C.: *Coercion, Capital, and European States, AD 990-1990*, Basil Blackwell, Oxford, 1990; Tilly, C.: *The Formation of National States in Western Europe*, Princeton University Press, Princeton, 1975.

²³ Dorsett, S. and McVeigh, S.: *Jurisdiction*, Routledge, Abingdon, 2012.

²⁴ Gerth and Wright Mills, *supra*, p. 177.

²⁵ Geuss, R.: *History and Illusion in Politics*, CUP, Cambridge, 2001, p. 15.

Michael Mann's definition of the state is much influenced by Weber, whereby the state is understood as a set of institutions and personnel with a territorially demarcated area over which it exercises a degree of authority and legitimacy, backed by military power.²⁶ For Mann, the concepts of territory and centrality are closely linked, representing political relations that radiate to and from a centre, to cover a particular territory. The state, therefore, "does not wield an analogous resource to ideological, economic, and military power. [...] It alone is inherently centralised over a delimited territory over which it has binding powers."²⁷ There can be various degrees to which a state is centralised. Although I agree with Mann's assessment from a structural standpoint,²⁸ I propose to envisage a state as an empty shell or, as Geuss puts it, "merely an agency operating and exercising powers in a certain way."²⁹ It is exactly this starting position of neutrality that I strive to adopt when analysing and defining the state – a form of authoritative governance that fluctuates throughout history. I echo Hegel's philosophical argument, whereby "a sick or demented human being who may be incapable of leading a universal life is still a human being",³⁰ meaning that a state is still considered to be a state even if it is unsuccessful in pacifying its population or its institutions are weak.

For Charles Tilly, states are "coercion-wielding organisations that are distinct from households and kinship groups and exercise clear priority in some respects over all other organisations within substantial territories."³¹ Tilly's definition of a state, therefore, also operates outside of the narrow concept of a nation-state, and includes city-states, empires, theocracies, and many other forms of government. Along the same methodological lines, in their analysis of the plurality of jurisdictional forms of authority, Dorsett and McVeigh consider earlier forms of state and authority that predated the modern nation-state. The purpose of such an approach is to

²⁶ Mann, 1993, *supra*, p. 55

²⁷ *Ibid.*, p. 56.

²⁸ Structural, as opposed to functional; what a state *is*, rather than what it *does* or *ought to do*.

²⁹ Geuss, *supra*, p. 43.

³⁰ *Ibid.*

³¹ Tilly, *supra*, p. 1.

shift focus away from the dogma of the Westphalian state in favour of a more intricate analysis of “jurisdiction as a practice of authority and the creation of lawful relations.”³²

Power and Legitimacy

All the above-mentioned accounts make no distinction between public and private violence, leaving it open for states to establish the boundaries of legitimacy over the power they possess. The concepts of power and legitimacy are the two conditions through which Weber defines the state. In other words, first is the mandatory adherence to the rules by all members of a designated group of people, and second is the successful monopoly of the legitimate use of violence.³³ Adherence to the rules can be labelled as the legitimacy of a state, and the monopoly of violence can be understood through the concept of power. Together power and legitimacy form the notion of sovereign authority, and are consistently applied throughout this thesis, serving as a theoretical background.

I draw upon Geuss’s reflection on authority to frame the concepts of power and legitimacy. Although he differentiates between epistemic, natural, *de jure*, and *de facto* authority, the latter two are of particular interest to me. *De facto* political authority is concerned with factual control of certain people over a certain area; it is likely to contain “a strong element of compulsion of the threat of use of physical force.”³⁴ Power can be understood in various ways. Geuss argues that it would be a mistake to think that because Hitler was not able to get what he wanted (lasting hegemony over Central Europe), he did not have much power.³⁵ On the other hand, simply because the monarchs of absolute monarchies conquered the desired territories, it does not mean they had high administrative power. Power is a versatile notion that is omnipresent throughout history; it manifests itself at all times through one form or another. Mann

³² Dorsett and McVeigh, *supra*, p. 32.

³³ Geuss, *supra*, Chapter 3, “The Concept of the State”.

³⁴ *Ibid*, p. 40.

³⁵ *Ibid.*, p. 23.

differentiates between despotic and infrastructural power, whereby despotic power refers to the distributive power of the ruling class over civil society, and infrastructural power describes the state's institutional capacity to penetrate its territories and implement decisions.³⁶ To contextualise infrastructural power, one can take the example of early medieval empires who had enormous military capacity but only limited administrative authority.³⁷ Mann argues that effective infrastructural power increases collective state power and enables civil society to control the state through intelligent and efficient representation.³⁸ Grounded in the relationship between despotic and infrastructural power, Mann's two dimensions of state power reveal the functional, rather than structural aspect of the modern state, envisaging different types of governance.

| Despotic Power | Infrastructural Power | |
|----------------|-----------------------|-------------------------|
| | Low | High |
| Low | Feudal | Bureaucratic-democratic |
| High | Imperial/absolutist | Authoritarian |

Figure 1: Two Dimensions of State Power

In *Coercion, Capital and European States*, Charles Tilly is concerned with the relationship between war and states. He argues that, on the international level, wars created European networks of national states, while the internal state structures were significantly shaped by preparations for war.³⁹ Exploring this relationship between coercion and economic power allows Tilly to go beyond the Westphalian concepts of states and sovereignty, and significantly enhances the scope of his analysis. Weber sets out, although not entirely explicitly, a relationship between political and military power, which thinkers like Tilly and Mann take up

³⁶ Mann, 1993, *supra*, p. 59.

³⁷ Held, D., McGrew, A. et al. (eds): *Global Transformations: Politics, Economics and Culture*, Polity, Cambridge, 1999, p. 33.

³⁸ Mann, 1993, *supra*, p. 59.

³⁹ Tilly, *supra*, p. 76.

more openly. "All political structures use force, but they differ in the manner in which and the extent to which they use or threaten to use it against other political organisations."⁴⁰

Weber also considers the question of the 'legitimacy' of government and military power, which for him is linked to economic expansion, and to class and status relationships. Coined by Geuss as *de jure* authority, legitimacy derives from law and assumes "there is a law that prescribes that people should obey them."⁴¹ *De jure* authority crystallises into legitimacy that *should not* be questioned and *ought* to be followed, while *de facto* political authority translates into raw power that simply *cannot* be questioned. The two concepts of power and legitimacy, articulated through the different faces of authority, serve as a methodological basis for my analysis. Both concepts are timeless and neutral in the sense that they are present in every single state formation to a certain extent; they are fundamental, almost atomic components to the formation of any form of governance.

In the context of this research, legitimacy is best envisaged in terms of the acceptance and validation of power. First of all, according to Geuss's criteria, a legitimate state has effective control over a given territory which it claims, and it monopolises the use of force within that area.⁴² The monopoly of violence creates a visibility of control that the state ought to uphold. Commonly associated with the state and a centralised governmental remit, 'public', in a military context, ought to represent the force that is controlled by the sovereign. However, would the monopoly of force diminish if a state (sovereign) chooses to use "a mostly foreign and private force for one purpose (CIA covert operations), a foreign and public force (colonial armies, foreign legions), and a domestic and private one for yet some other (US private contractors in Iraq)"?⁴³

⁴⁰ Gerth and Wright Mills, *supra*, *Essays in Sociology*, Chapter 6 "Structures of Power", p. 159.

⁴¹ Geuss, *supra*, p. 40.

⁴² *Ibid.*, p. 32.

⁴³ Barkawi, T.: "State and Armed Force in International Context" in Colas, A. and Mabey, B. (eds): *Mercenaries, Pirates, Bandits and Empires: Private Violence in Historical Context*, Hurst & Company, London, 2010, pp. 50-51.

What separates private force from illegitimate or criminal acts is the (potential) recognition of the former as a legitimate tool chosen by the state, and the latter as a violation of its laws. Kontorovich argues that while piracy and privateering are effectively the same type of activity, piracy was considered a heinous crime, while privateering was legitimised state commission.⁴⁴ It is therefore crucial to understand the narrative of legitimacy when analysing the use and regulation of different types of military power. Legitimacy does not simply arise from a widespread behaviour; it derives from normative behaviour and a sense of obligation. The importance of legitimacy is not purely theoretical; it transpires into norms and has the ability to drive policy. To take the example of sixteenth-century Italian city-republics, Machiavelli dismisses wealth as the source of legitimacy of *signorie* in favour of a mixed governance, based on republican values and a citizen army.⁴⁵ Or, more recently, the extent of 1980s neoliberal policies demonstrates the rationalisation of outsourcing the security sector, a change that was unimaginable even thirty years prior to that.

Sovereignty

It was not until the latter half of the seventeenth century, marked by the Peace of Westphalia, that the concepts of 'state' and 'sovereignty' acquired their modern meaning.⁴⁶ Sovereignty is one of the most important elements in the framework of modern politics and IL: "today the most obvious form of legal ordering is that of sovereign territorial state."⁴⁷ Sovereignty serves as a definition of the modern international system, as it accordingly marks the "division of the

⁴⁴ Kontorovich, E.: "The Piracy Fallacy: Modern Universal Jurisdiction's Hollow Foundation" 2004, Vol. 45 (1), *Harvard International Law Journal*, p. 187.

⁴⁵ Machiavelli, N.: "The Discourses" in Machiavelli, N. (ed. Wootton, D.): *Selected Political Writings*, Hackett Publishing Company Inc., Cambridge, 1994, p. 89.

⁴⁶ Ibid., p. 35; see other critical and historical literature on sovereignty: Croxton, D.: "The Peace of Westphalia of 1648 and the Origins of Sovereignty", 1999, Vol. 21, *International History Review*, pp. 569-582; McCormick, N.: *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, OUP, Oxford, 1999; Osander, A.: "Sovereignty, International Relations, and the Westphalian Myth", 2001, Vol. 55, *International Organization*, pp. 251-287.

⁴⁷ Dorsett, McVeigh, *supra*, p. 5.

world into sovereign states.”⁴⁸ Often assigned solely to the nation-state construct, sovereignty represents the nexus between power and legitimacy, covering a much wider array of governmental formations. I purposefully separate the notions of the modern state and sovereignty to distance myself from the widespread ‘Westphalian’ conception, as it solely epitomises one form of governance rooted in territoriality and autonomy.⁴⁹ Sweeping reconfigurations of sovereign authority have restructured the international system in important ways.⁵⁰ For Douzinas, sovereignty is the name given to the act of coming together or the self-constitution of a community in and through jurisdiction, the speaking of law.⁵¹

A fundamental concept, sovereignty cannot be defined in a legal and political vacuum. It has distinct properties and characteristics, but no definition. However, sovereignty does not start with the nation-state; it has a much longer history. State conduct was always concerned with the justification of authority. Whether deriving from the Church (in feudalism and the Holy Roman Empire), dynasty (in absolute monarchies), reason (Machiavellian republicanism), the state and the people (territorial and popular sovereignty of a nation-state), or law, these accounts demonstrate a variety of historical and normative justifications of resort to power.⁵² It is possible to locate sovereignty in all of these forms of authority. It manifests itself through the existence of a state, or any other form of governance, and through its supporting driving agents, power and legitimacy. Sovereignty is the content of the structural shell of a state.

Contrary to the Westphalian belief,⁵³ I suggest to circumvent the limitation by territory and approach the concept of sovereignty from a different angle. By associating sovereignty with

⁴⁸ Barkin, J. S. and Cronin, B.: “The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations”, 1994, Vol. 48 (1), *International Organization*, p. 107.

⁴⁹ Krasner, S. D.: “Compromising Westphalia”, 1995-6, Vol. 20 (3), *International Security*, pp. 119.

⁵⁰ Philpott, D.: “Usurping Sovereignty of Sovereignty?”, 2001, Vol. 53 (1), *World Politics*, p. 311.

⁵¹ Orford, A., “A Jurisprudence of the Limit” in *International Law and its Others* (ed. Orford, A.), CUP, Cambridge, 2006, p. 9-10.

⁵² Dorsett, McVeigh, *supra*, p. 11.

⁵³ Westphalian model limits the scope of inquiry to nation-states only, however, I am taking a more comprehensive approach to locate sovereignty to a greater or lesser extent in every form of governance from the fifteenth century onwards. See: Beaulac, S.: *The Power of Language in the Making of*

political authority, rather than exclusively with territory, I can identify its many institutional forms. For example, in the absolutist state “the ultimate instance of legitimacy was the dynasty, not the territory.”⁵⁴ And, although feudal authority was often exercised on a territorial basis, the notion of ‘public’ and ‘national’ territory did not and could not apply until the establishment of the modern state.⁵⁵ The importance of consolidation between power and legitimacy, thus, manifests itself in every epoch regardless of the extent of the sovereignty possessed by the state: “A ruler could be sovereign, as could a husband or the Church.”⁵⁶ In the various forms of governance the actual power of the state as an institution (*power*), did not necessarily correspond to that of the ruler (*legitimacy*). It is, therefore, essential to identify this dynamic within each of the selected state types in conjunction with the type of force deployed at the time. Besides the literature on method,⁵⁷ theoretical resources used in my research include extensive sources on military history and the changing nature of war;⁵⁸ historical accounts of

International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia, Martinus Nijhoff, Leiden, 2004; Croxton, D.: “The Peace of Westphalia of 1648 and the Origins of Sovereignty”, 1999, Vol. 21, *International History Review*, pp. 569-582; Osiander, A.: “Sovereignty, International Relations, and the Westphalian Myth”, 2001, Vol. 55, *International Organization*, pp. 251-287.

⁵⁴ Anderson, P.: *Lineages of the Absolutist State*, NLB, London, 1974, p. 39.

⁵⁵ Dorsett, McVeigh, *supra*, pp. 39 - 41

⁵⁶ *Ibid.*, p. 35.

⁵⁷ Please note that the below literature list is not exhaustive; it provides some of the core readings. The remaining sources are referenced throughout this thesis in respective chapters.

⁵⁸ Parker, G.: *The Military Revolution: Military Innovation and the Rise of the West 1500-1800*, CUP, Cambridge, 1988; McNeil, W. H.: *Pursuit of Power: Technology, Armed Force and Society Since A.D. 1000*, University of Chicago Press, Chicago, 1982; Tilly, C.: *Coercion, Capital, and European States, AD 990-1990*, Basil Blackwell, Oxford, 1990; Held, D., McGrew, A. et al. (ed.): *Global Transformations: Politics, Economics and Culture*, Polity, Cambridge, 1999; Kaldor, M.: *New and Old Wars: Organized Violence in a Global Era*, Polity Press, Cambridge, 2002.

differing forms of governance, such as feudalism,⁵⁹ Italian city-republics,⁶⁰ absolutism,⁶¹ imperialism⁶², nation-states,⁶³ and material on neoliberalism,⁶⁴ privatisation, and the decline of the state.⁶⁵ Examining historical examples of different forms of governance helps to outline structural commonalities in state management and shows the gradual formation of the modern state as an institution, as opposed to its medieval predecessor in the shape of the monarch. It also clearly demonstrates the changing extent of sovereignty and brings to light the reasons for its expansion and contraction.

⁵⁹ On feudalism, see: Stephenson, C.: "The Origin and Significance of Feudalism", 1941, Vol. 46 (4), *The American Historical Review*, pp. 788-812; Coulborn, R., Strayer, J. R.: *Feudalism in History*, Princeton University Press, Princeton, 1956; Ganshof, F. L.: *Feudalism*, Harper & Row, New York, 1964; Brown, E. A. R.: "The Tyranny of a Construct: Feudalism and Historians of Medieval Europe", 1974, Vol. 79 (4), *The American Historical Review*, pp. 1063-1088; Strayer, J. R.: *On the Medieval Origins of the Modern State*, Princeton University Press, Princeton, 1970; Fischer, M.: "Feudal Europe, 800-1300: Communal Discourse and Conflictual Practices", 1992, Vol. 46 (2), *International organization*, pp. 427-466.

⁶⁰ On Italian city-republics, see: Bock, G., Skinner, Q. and Viroli, M. (eds): *Machiavelli and Republicanism*, CUP, Cambridge, 1990; Machiavelli, N., (ed. Wootton, D.): *Selected Political Writings*, Hackett Publishing Company Inc., Cambridge, 1994; Kent, D.: "The Florentine Reggimento in the Fifteenth Century", 1975, Vol. 28 (4), *Renaissance Quarterly*, pp. 575-638; Rubinstein, N.: "Politics and Constitution in Florence at the End of the Fifteenth Century" in E. F. Jacob (ed.): *Italian Renaissance Studies*, Barnes and Noble, New York, 1960.

⁶¹ Anderson, P.: *Lineages of the Absolutist State*, NLB, London, 1974; Kiernan, V. G.: "Foreign Mercenaries and Absolute Monarchy", 1957, Vol. 11, *Past and Present*, pp. 66-86; Wallerstein, I.: *The Modern World-System I. Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century*, Academic Press, London, 1974.

⁶² Anghie, A.: "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law", 1999, Vol. 40 (1), *Harvard International Law Journal*, pp. 1-80; Scott, D.: "Colonial Governmentality", 1995, Vol. 43 (3), *Social Text*, pp. 191-220; Ruskola, T.: "Legal Orientalism", 2002, Vol. 101 (1), *Michigan Law Review*, pp. 179-234; Killingray, D.: "The Idea of a British Imperial African Army", 1979, Vol. 20 (3), *The Journal of African History*, pp. 421-436; Cohn, B. S.: *Colonialism and its forms of knowledge: the British in India*, Princeton University Press, Princeton, 1996.

⁶³ Mann, M.: *The Sources of Social Power, Vol. II The Rise of Classes and Nation-States, 1760-1914*, CUP, Cambridge, 1993; Tilly, C.: *The Formation of National States in Western Europe*, Princeton University Press, Princeton, 1975; Hobsbawm, E. J.: *Nations and Nationalism since 1780*, CUP, Cambridge, 1990.

⁶⁴ Hayek, F. A.: *The Road to Serfdom*, Routledge, Abingdon, 2001; Friedman, M.: *Capitalism and Freedom*, The University of Chicago Press, London, 2002; Chomsky, N.: *Profit over People: Neoliberalism and Global Order*, Seven Stories Press, New York, 1999; Wapshott, N.: *Keynes. Hayek: The Clash that Defined Modern Economics*, W. W. Norton & Company, London, 2012; Prasad, M.: *The Politics of Free Markets: The Rise of Neoliberal Economic Policies in Britain, France, Germany, & the United States*, The University of Chicago Press, London, 2006; Harvey, D.: *A Brief History of Neoliberalism*, OUP, Oxford, 2005; Odysseos, L.: "Human Rights, Liberal Ontogenesis and Freedom: Producing a Subject for Neoliberalism?", 2010, Vol. 38 (3), *Millennium – Journal of International Studies*, pp. 747-772.

⁶⁵ Abrahamsen, R., Williams, M. C.: *Security beyond the State: Private Security in International Politics*, CUP, Cambridge, 2011; Singer, P. W.: *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, New York, 2004.

To ensure consistency across the thesis, I adopt the following assessment mechanism that assumes the role of the analytical framework for my research, loosely based on a socio-historical approach to state and military found in the accounts of Weber, Tilly, Mann, and Dorsett and McVeigh. It demonstrates the relationship between the state and military force within different governmental configurations. It does so by scrutinising the structure of the state and locating the sources of its legitimacy, and by establishing the type of military force used by the state by articulating the concept of power. This methodology offers a systematic historical perspective while formulating a trend of state-military relationships. Building an intellectual bridge between the state and the military in different governmental formations historically allows us to evaluate the effectiveness of existing and emerging policies attempting to regulate contemporary PMCs.

Part 2: Mercenaries, Contractors, Civilians

In the absence of a universally accepted definition of mercenaries, the term has been stretched from hired individuals, to private security firms contracted by the state, to cross-border troops providing military services.⁶⁶ Historically, as *Chapter 2* demonstrates, mercenaries were ascribed a more colloquial meaning, exemplifying the nature of medieval privateering and the professional aspect of the absolutist standing armies. In the twentieth century the national liberation movements of the Cold War era urged for criminalisation of mercenaries through the ratification of the 1972 Convention for the Elimination of Mercenaries in Africa by the Organisation of African Unity (OAU). Combining the elements of nationality and motive, the first

⁶⁶ Avant, D.: *The Market for Force: The Consequences of Privatising Security*, 2005, CUP, Cambridge, p. 22; see literature on mercenaries: Percy, S.: *Mercenaries: The History of a Norm in International Relations*, OUP, Oxford, 2007; Mockler, A.: *Mercenaries*, Macdonald and Company, London, 1969; Thompson, J. E.: *Mercenaries, Pirates and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe*, Princeton University Press, Chichester, 1994; Armstrong, S.: *War PLC: The Rise of the New Corporate Mercenary*, Faber & Faber Limited, London, 2008; Axelrod, A.: *Mercenaries: A Guide to Private Armies and Private Military Companies*, Sage, London, 2014; Singer, P. W.: *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, 2004; McFate, S.: *The Modern Mercenary: Private Armies and What they Mean for the World Order*, OUP, Oxford, 2014; Chesterman, S. and Lehnard, C. (eds): *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, OUP, Oxford, 2007.

regional definition of mercenaries was comprehensively drafted in order to address the challenges that mercenaries posed for the national liberation movements and the sovereign integrity of the newly established African states.⁶⁷ While binding on the signatory states, the OAU definition of mercenaries was subsequently altered in 1980 by the addition of Appendix III, aligning it with the most widely accepted international definition of a mercenary, codified in the 1977 Additional Protocol (AP) I to the Geneva Conventions.⁶⁸ AP I articulates the parameters of motivation in order to define mercenaries under IL. Article 47 (2) of Protocol I states that a mercenary is any person who:

- (a) is especially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) 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 ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Later, the 1989 UN Mercenary Convention⁶⁹ broadened the definition to include non-nationals recruited to overthrow a “government or otherwise undermining the constitutional order of a State; or undermine the territorial integrity of a State.” While this definition of mercenaries was largely based on AP I, it was expanded by being applied to “armed conflict”⁷⁰ and to “any other

⁶⁷ OAU Convention for the Elimination of Mercenaries in Africa, O.A.U. Doc. CM/433/Rev. L. Annex 1, 1972, Article 1: “Under the OAU Convention a ‘mercenary’ is classified as anyone who, not a national of the state against which his actions are directed, is employed, enrolls or links himself willingly to a person, group or organization whose aim is: (a) to overthrow by force of arms or by any other means the government of that Member State of the Organization of African Unity; (b) to undermine the independence, territorial integrity or normal working of the institutions of the said State; (c) to block by any means the activities of any liberation movement recognized by the Organization of African Unity.”

⁶⁸ The Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts, Protocol I, Article 47, June 1977; some countries, including the United States, do not support the Protocol.

⁶⁹ International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989; A/RES/44/34 available at <http://www.un.org/documents/ga/res/44/a44r034.htm>.

⁷⁰ UN Mercenary Convention, *supra*, Article 1, para. 1.

situation”.⁷¹ The latest UN General Assembly annual report from the Working Group on the use of mercenaries (WG) outlines the notion of foreign fighters. The report considers “motivation and recruitment practices, the linkages between foreign fighters and mercenaries and the human rights implications”.⁷² As part of the report, the WG compares and contrasts the concepts of mercenaries and foreign fighters. They conclude that while both may be recruited abroad or locally, “foreign fighter mobilisations may encompass nationals of a party to the conflict, such as from the diaspora, while mercenaries are necessarily non-nationals.”⁷³ Although AP I did not produce a timeless and universally accepted definition, it formalised the legal status of a mercenary as a non-combatant under IL, marking an important change in the normative classification of private military actors. The status of PMC contractors does not have a separate definition under IL. According to the Montreux Document, the personnel of Private Military and Security Companies (PMSCs)

are protected as civilians under international humanitarian law, unless they are incorporated into the regular armed forces of a State or are members of organised armed forces, groups or units under a command responsible to the State; or otherwise lose their protection as determined by international humanitarian law.⁷⁴

In 2013 the Geneva Academy of International Humanitarian Law and Human Rights published a revised document on the topic of regulation of private security, “The international Code of Conduct for Private Security Providers” (ICoC). The ICoC does not define contractors or civilians; their definition refers to Private Security Companies and other Private Security Service Providers (PSCs) personnel as:

persons working for a PSC, whether as employees or under a contract, including its staff, managers and directors. [...] Persons are considered to be personnel if they are connected to a PSC through an employment contract (fixed term, permanent or open-ended) or a contract of assignment (whether renewable or not), or if they are

⁷¹ UN Mercenary Convention, *supra*, Article 1, para. 2.

⁷² A/70/330, Summary, p. 2.

⁷³ *Ibid.*, Art. 87.

⁷⁴ The Montreux Document, *supra*, Art. 26 (b), p. 14.

independent contractors, or temporary workers and/or interns (whether paid or unpaid), regardless of the specific designation used by the Company concerned.⁷⁵

It is particularly important to highlight that PMC contractors are non-combatants and, therefore, civilians, if they are not incorporated into the military forces of the state. However, the idea of civilians who provide military and security services on behalf of a private company, which in turn is contracted by a state, but not formally incorporated in its military structure, is a rather problematic one. Whether referred to as civilians, non-combatants, or PMC contractors, this particular segment of non-military personnel who have access to hostilities challenges contemporary international legal norms and is not appropriately regulated.

Definition of Private Military Companies

Although most defenders of the private military industry, and even some critics,⁷⁶ insist on the separation between private military companies and mercenaries, the nature of their activities have substantial similarities, and their motives and methods often overlap. Putting aside the political context of the AP I definition of mercenaries, rooted in the rhetoric of decolonisation and national liberation movements, the aim of international community is to criminalise inappropriate participation in hostilities by groups and individuals who have no national or ideological relation to either party to the conflict.

The WG defines a PMSC as “a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities”.⁷⁷ By acknowledging that PMC activities fall outside of the UN Mercenary Convention’s definition, they become excluded from its regulatory scope.⁷⁸ Meanwhile, the AP I mercenary definition disregards most PMC

⁷⁵ ICoC, *supra*, para. 51, p. 50.

⁷⁶ In his book *Law’s Impunity* Hin-Yan Liu argues that although PMCs share historical lineages with mercenaries, they are fundamentally different due to their corporate legal identity.

⁷⁷ A/HRC/24/45, UN General Assembly, Human Rights Council; 24th session: “Annual 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”, July 2013, p. 3.

⁷⁸ Nikitin, A.: A/HRC/10/14 paras 40-41.

personnel, many of whom are nationals of one of the parties to the conflict and are not contracted to fight in military operations.⁷⁹ The WG has been following the development of the Policy and the Operations Manuals on the use of armed services from private security companies and engaging with the UN Department of Safety and Security in order to produce a comprehensive, human rights-compliant policy framework for the procurement and use of armed private security companies by United Nations organs and bodies.⁸⁰ This initiative clearly indicates the WG's intention to legitimise the deployment of armed private contractors by the UN.

Another definition of PMCs was proposed by the International Committee of the Red Cross. At the fourth meeting on the 'Swiss Initiative' in September 2008, the Montreux Document was finalised and adopted by consensus of participating governments.⁸¹ The Montreux Document is an intergovernmental document intended to promote respect for international humanitarian law (IHL) and human rights law whenever PMCs are present in armed conflicts.⁸² It states that:

PMSCs are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security 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.⁸³

The industry as well as academic literature provides a variety of terms: private security company (PSC), private military company (PMC), private security and military companies (PMSC), private security companies and other private security service providers (PSCs). Interestingly, the Montreux Document and the ICoC do not differentiate between PMSCs based on the nature of

⁷⁹ The Montreux Document, p. 40.

⁸⁰ A/HRC/24/45, para. 11, pp. 4-5.

⁸¹ Federal Department of Foreign Affairs, Section for International Humanitarian Law, available at <http://www.eda.admin.ch/psc>.

⁸² The Montreux Document on pertinent international legal obligations and good practices for states related to operations of private military and security companies during armed conflict, ICRC, Montreux, 2008, p. 31.

⁸³ The Montreux Document, *supra*, Preface, Art. 9 (a), p. 9.

the contribution they make (or do not make) to the conduct of hostilities.⁸⁴ For the purpose of this research I use the term PMC, as it reflects a company engaged in the provision of armed contractors.

While I critique the regulatory application and highlight limitations of the Montreux Document in the following chapters, its definition of PMCs closely supports the proposed scope of my analysis. In other words, all of the functions listed above, except for advisory services, apply to armed private contractors. While the ICoC builds upon the foundation of the Montreux Document, attempting to address some of its regulatory gaps, the proposed definition only covers Private Security Companies and Private Security Service Providers (PSCs). Similar to its predecessor, the ICoC describes a PSC as “any Company (as defined in this Code) 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.”⁸⁵ Although omitting ‘military’ companies or services from their terminology, the ICoC recognises the military aspect of PSC activity nonetheless. The ICoC Preamble states that “PSCs play an important role in protecting state and non-state clients engaged in relief, recovery, and reconstruction efforts, commercial business operations, diplomacy and military activity.”⁸⁶ Such codification mechanisms adopted by the recognised international regulatory authorities inadvertently distance PMC from their contentious mercenary association, thereby further normalising and legitimising PMC activity.

Challenges of the Definitions

The key problem of defining the legitimacy of mercenaries, or their corporate successors, private military companies, is not a legal, but mainly a political one. Whether examined from a historical angle, or that of nationality or motive, there is always a degree of irregularity present in the field

⁸⁴ ICoC, *supra*, p. 5.

⁸⁵ The International Code of Conduct for Private Security Service Providers, *Geneva Academy of International Humanitarian Law and Human Rights*, Geneva, August 2013, p. 18.

⁸⁶ ICoC, *supra*, Preamble.

of private military force. This needs to be recognised as a limitation. According to Kevin O'Brien the definition of a 'mercenary' contained in AP I is generally unworkable as a legal instrument for two reasons. First, it describes the actor and not the act of mercenarism. Second, all six parameters of the definition must apply to the actor in order to meet the criteria.⁸⁷

One broad criterion for defining a mercenary is grounded in nationality or citizenship, i.e. foreign recruits in a national army. However, countries like the US, the UK, and France have legal mechanisms that enable foreign citizens to serve in their militaries.⁸⁸ Defining a mercenary based on a motivation of financial gain is too narrow because it excludes contractors who participate in a conflict for ideological reasons.⁸⁹ It also omits a large number of ex-military personnel who continue their profession outside of the state army. Motives are hard to establish, as they may vary depending on the individual. Moreover, they are subjective and open to interpretation. Basing the entire set of regulations purely on motivation makes the law easy to manipulate, depending on political agendas. As noted in the Diplock Report, released in 1976 following the involvement of British mercenaries in Angola, the "soldier of conscience may be found fighting side by side with the soldier of fortune."⁹⁰ A definition based on motivation questions the neutrality and impartiality of law and once again brings political rhetoric into play. However, if the element of motivation by profit is removed from the definition, its content degrades substantially. If mercenaries are not distinguished from other combatants by commercial gain, then the term would cover all non-nationals and non-residents who enlist to oppose or support any political movement in an armed conflict.⁹¹

⁸⁷ O'Brien, K.: "What Should and what Should Not be Regulated?" in Chesterman, S. and Lehnard, C. (eds): *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, OUP, Oxford, 2007, p. 34.

⁸⁸ Barkawi, *supra*, p. 47.

⁸⁹ Thomson, J. E.: "State Practices, International Norms, and the Decline of Mercenarism" 1990, Vol. 34 (1), *International Studies Quarterly*, p. 23.

⁹⁰ Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries, Cmnd. 6569, 1976, London, p. 2.

⁹¹ Taulbee, J. L.: "Myths, Mercenaries and Contemporary International Law", 1985, Vol. 15, *California Western International Law Journal*, p. 353.

The test of motivation offers another controversial facet in the more contemporary example of the Indonesian army. Freeport-McMoRan Copper & Gold Inc. is a prominent US mining company that controls one of the world's largest gold and copper mines in Indonesia. The company collaborated with the Indonesian army who guarded the Grasberg mine. In 2003, two US pension funds that were shareholders in the company raised a concern about "human rights abuses against the indigenous population [of Papua] by the Indonesian military in connection with security operations conducted on behalf of Freeport-McMoRan."⁹² As a result of this inquiry Freeport-McMoRan were found to have made substantial payments to the Indonesian army, often to a single general, to ensure military protection of the extraction business. According to the research conducted by Global Witness, Indonesian reformists considered these payments controversial, and saw them as evidence of the dependency of the Indonesian national army on a private company.⁹³ This is a question of motivation and loyalty, and an example of a national army pursuing private, mercenary goals instead of serving the state and the nation.

The military suggested that the activities conducted by Freeport-McMoRan were a lucrative business ameliorating the military facilities, equipment, and transport.⁹⁴ If the security services provided by the military ultimately benefited the Indonesian economy and the state, they could potentially be regarded as catering to public state interests. This argument would stand, had Freeport-McMoRan not been found to be paying the military directly, rather than the Indonesian government. Between May 2001 and March 2003, Global Witness found that "a series of payments totalling US\$247,705 appear to have been made by Freeport Indonesia to an Indonesian general named Mahidin Simbolon."⁹⁵ In this scenario, an army was a governmental

⁹² "Paying for Protection: The Freeport Mine and the Indonesian Security Forces, A Report by Global Witness", July 2005, p. 12.

⁹³ "Paying for Protection", *supra*, p. 18.

⁹⁴ McCulloch, L.: "Trifungsi: the role of the Indonesian military in business", paper delivered to the International Conference on Soldiers in Business, Jakarta, 17-19 October 2000.

⁹⁵ "Paying for Protection", *supra*, p. 4.

institution that pursued private goals outside of the public framework. Security services to the mining company were provided in exchange for monetary gain, therefore evoking a mercenary motive.

A historical and at the same time universal example of piracy can be explored in contrast to mercenarism to better understand the definition. As a rule, mercenaries and PMCs always act upon instruction within the terms of a contract or in exchange for a payment, while pirates pursue their own interests. Although piracy fundamentally differs from mercenarism in this respect, there have been historical examples where pirates were used by a state to perpetrate an attack on their opponent. By the 1720s, thousands of pirates had sought to build autonomous, relatively equal, and democratic orders of their own, countering Atlantic capital. Captains were often elected and accountable to their crews, attitudes were liberal, and decisions were democratic.⁹⁶ Despite these positive characteristics, for hundreds of years, IL has treated the pirate as a *hostis humani generis* – an enemy of all mankind.⁹⁷ The rationale behind the universality of the pirate as an enemy was the indiscriminate threat that piracy posed to trade, other sailors, and even the established world order. However, before sailors-turned-pirates could claim their own ship, they commonly “served the needs of the maritime state and the merchant community in England.”⁹⁸ Some seamen were recruited to serve on Jamaican privateers during the War of Spanish Succession.⁹⁹ A mercenary motive or a legitimating state action could draw distinctions between a pirate and a privateer. In 1817 William Hutchings was accused of piracy for sailing an American ship under a “Buenos Aires commission and colours as

⁹⁶ Neocleous, M.: “The Universal Adversary Will Attack: Pigs, Pirates, Zombies, Satan and the Class War” 2015, Vol. 8 (1), *Critical Studies on Terrorism*, p. 30; Linebaugh, P. and Rediker, M.: *The Many-Headed Hydra. Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic*, Beacon Press, Boston, 2000, pp. 162-163.

⁹⁷ Kontorovich, E. and Art, S.: “An Empirical Examination of Universal Jurisdiction for Piracy” 2010, Faculty Working Papers, Paper 38, Vol. 98 (1), *California Law Review*, p. 251.

⁹⁸ Linebaugh and Rediker, *supra*, p. 156.

⁹⁹ *Ibid.*, p. 159.

a part of their independence struggle against Spain.”¹⁰⁰ In *United States v. Hutchings*¹⁰¹ the court established that *animo furandi*, a necessary component of piracy, could be disproved if the accused was acting under a commission or acting on government service without a commission.¹⁰² In addition, Woodes Rogers was known for both recruiting pirates in his capacity as a captain of a large scale privateering trip, and denouncing them in the West Indies as royal governor of the Bahama Islands.¹⁰³

While nationality and motive have been prominently used to distinguish and define mercenaries, both tests can also be problematic in terms of context and universality. Unlike pirates, terrorists, freedom fighters, and militias, mercenaries and PMCs are typically hired to provide their services on behalf of another party, rather than waging a conflict to pursue their own political or ideological goals. Also, under current provisions of IL, only states can commit the acts of aggression, using mercenaries as their implements; mercenaries themselves cannot be the perpetrators.¹⁰⁴ So, rather than focusing on the monetary gain, I propose to envisage a transactional relationship between supply and demand of private security that existed long before modern sovereign states, national armies, and arguments concerning the ethics and morality of private military resources.¹⁰⁵

For the purposes of socio-historical analysis, this thesis considers a broader spectrum of irregular military actors, foregoing the rigidity of the proposed definitions in order to evaluate all forms of private violence used by a state. The scope of my enquiry extends to various privately

¹⁰⁰ Paige, T.: “Piracy and Universal Jurisdiction” 2013, Vol. 12, *Macquarie Law Journal*, p. 140.

¹⁰¹ *United States v. Hutchings* 26 F.Cas. (Brunn.Coll.C) 440 (Circuit Court, District Virginia, 1817).

¹⁰² Rubin, A. P.: *The Law of Piracy*, US Naval War College Press, Newport, 1988, pp. 159-160.

¹⁰³ Linebaugh and Rediker, *supra*, p. 161.

¹⁰⁴ Liu, H.-Y.: *Law’s Impunity: Responsibility and the Modern Private Military Company*, Hart Publishing, Oxford, 2015, p. 181.

¹⁰⁵ Pattison, J.: “Deeper Objections to the Privatisation of Military Force”, 2010, Vol. 18 (4), *The Journal of Political Philosophy*, pp. 425-447; Tesón, F.: “Humanitarian Intervention: Loose Ends”, 2011, Vol. 10 (3), *Journal of Military Ethics*, pp. 192-212; Pattison, J.: “Outsourcing the Responsibility to Protect: Humanitarian Intervention and Private Military and Security Companies”, 2010, Vol. 2 (1), *International Theory*, pp. 1-31; “Private Military and Security Companies: Ethics, Policies, and Civil-Military Relations”, Routledge Military Studies, 2008.

organised military forces deployed by a state or a sovereign, regardless of the contemporary classification. Such an approach allows us to trace different facets of private security in the changing conflict paradigm. Narrowing down the definition may hinder the broader purpose of understanding the constitutive elements of contemporary issues posed by private military actors. Therefore, in *Chapter 2*, the terms ‘mercenary’ and ‘private military’ are used interchangeably. It does not, however, negate the nuanced differences that the two notions have *in the abstract*.

According to Nikolas Rose, the value of narrow definitions lies in their ability to provide the grounds for critical thought in response to contemporary issues.¹⁰⁶ However, a more historically informed classification of mercenaries enables us to consider patterns of state-military relationships, where a more rigid contemporary legal definition would draw a line. For example, Hampson argues that foreign units that were routinely hired and incorporated into states’ own forces before the nineteenth century cannot be considered mercenaries.¹⁰⁷ While Hampson’s assessment is accurate if measured against the criteria set out by the AP I definition of 1977, it is crucial to bear in mind the political circumstances of decolonisation under which this definition was drafted. The context of national liberation struggles can hardly apply to the widespread professionally hired private soldiers of the fifteenth and sixteenth centuries. However, the fact alone that mercenaries were not criminalised, but were actually a norm for centuries, insists on the significance of the ‘private’ element in feudal, absolutist, and imperial military cultures. When a conflict unfolded in sixteenth-century Europe, the king would summon his barons who appeared with *their* troops,¹⁰⁸ leaving him dependent on the patronage and loyalty of feudal lords rather than his own ability to centralise military power. Similarly, nineteenth-century empires were not relying on their own ‘home’ armies to fight territorial wars. They were

¹⁰⁶ Rose, N.: *Powers of Freedom: Reframing Political Thought*, CUP, Cambridge, 1999, p. 9.

¹⁰⁷ Hampson, F.: “Mercenaries: Diagnosis before Prescription”, 1991, Vol. 22, *Netherlands Yearbook of International Law*, pp. 5-6.

¹⁰⁸ Geuss, *supra*, p. 44.

leveraging colonial armies, whom they subjected and utilised in a manner that considerably differed from the treatment of national conscripts.

The context in which the definitions of mercenaries were drafted implies that the law is not neutral; instead it is shaped by various expressions of power and articulated through the concept of legitimacy. This becomes of particular significance when analysing current and future legal responses to PMC regulation. Different aspects of violence, traditionally segregated into public and private, are not purely arbitrary. They bear political and normative meaning and are related to a state's choice of security resources, their allocation and distribution, as well as the formation of norms supporting this choice.

Part 3: Regulation: Theory and Concepts

Since the end of the Cold War, an overwhelming number of PMCs have been operating as part of foreign military operations, with their services ranging from consulting and risk assessment to training and combat. As a result of numerous high-profile incidents involving PMCs, such as Blackwater in Iraq or DynCorp in Bosnia, there has been a growing international interest in regulating private military activity. Regulatory responses came from many directions. The UN strategy is divided between the Human Rights Council's (HRC) voluntary initiatives,¹⁰⁹ and the Working Group, who took a firm stance through the Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies (Draft Convention), attempting to invoke state responsibility for all PMSCs registered on their territory. It also produced a number of comprehensive legally binding and voluntary guidelines aimed at enhancing the responsibility of transnational businesses to respect human rights, including prevention, mitigation, and remediation. In the meantime, the industry introduced a number of

¹⁰⁹ "Guiding Principles on Business and Human Rights. Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Human Rights Office of the High Commissioner", New York and Geneva, 2011.

self-regulatory bodies that certify PMCs and provide guidelines in order drive the standards of their services internationally. Amongst such industry bodies are the American Society for Industrial Security (ASIS) International,¹¹⁰ the International Organisation for Standardisation (ISO/PAS 28007:2012)¹¹¹ providing guidelines for Private Maritime Security Companies supplying privately contracted armed security personnel on board ships, the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises,¹¹² and the International Code of Conduct for Private Security Providers, which is discussed in more detail in *Chapter 5*. The outcome of such active regulatory responses to private military conduct is a complex network of binding and voluntary provisions that all claim to regulate private military space. What complicates this picture further is the domestic jurisdiction invoked by the corporate nature of PMCs, therefore introducing company law, contract law, and tort law into the mix.

It is important to identify what exactly is meant by ‘regulation’, as this term can mean a variety of controls with different degrees of enforcement and state intervention. A common understanding of regulation is tied up with the concept of ‘command and control’, whereby the state uses legal rules that are often backed by criminal sanctions.¹¹³ According to Andrees, Nasri, and Swiniarski, regulation can be statutory, i.e. legally binding, in which case it is ordained and enforced by a judicial body or government authority. It can also be voluntary, whereby the measures adopted by the industry actors serve as guiding principles and behavioural standards.¹¹⁴ The OECD, for example, defines regulation as the “imposition of rules by

¹¹⁰ Founded in 1955, now focusing on security sector; see: <https://www.asisonline.org/About-ASIS/Who-We-Are/Pages/default.aspx>.

¹¹¹ ISO membership comprises 163 national standards bodies; see: <http://www.iso.org/iso/home/about.htm>.

¹¹² <http://www.oecd.org/corporate/mne/>.

¹¹³ Black, J.: “Critical Reflections on Regulation” 2002, Vol. 27, *Australian Journal of Legal Philosophy*, p. 2.

¹¹⁴ Andrees, B., Nasri, A. and Swiniarski, P.: “Regulating labour recruitment to prevent human trafficking and to foster fair migration: Models, challenges and opportunities” 2015, *International Labour Organization*, p. 8.

government, backed by the use of penalties that are intended specifically to modify the economic behaviour of individuals and firms in the private sector.”¹¹⁵ Prices, output, rate of return, disclosure of information, standards, and ownership ceilings, or in other words, all mechanisms of social control affecting all aspects of behaviour, can all be considered as regulatory instruments.¹¹⁶

Regulation can be broadly differentiated by the level of state involvement, with the conservative approach rooted in free market principles, the liberal approach seeking a balance between regulatory and criminal sanctions, and, finally, the radical approach relying predominantly on the punitive nature of criminal justice.¹¹⁷ As a critique of a centred prosecutorial theory, David Garland develops a more comprehensive approach to regulation. To address and mitigate criminal activity holistically, the ‘responsibilisation’ approach seeks to incorporate a wide range of civil society instruments and institutions, including the private sector.¹¹⁸

A purely state-centred definition of regulation¹¹⁹ does not reflect current industry influences, which are prominent in the PMC field. By embracing a wider range of regulatory techniques, a decentred approach emphasises social responsibility rather than the punitive nature of criminalisation.¹²⁰ It can help raise and maintain industry standards and drive ethical behaviour amongst PMCs and their employees. The decentred approach is characterised by five key notions: complexity, fragmentation, interdependencies, ungovernability, and the rejection of a clear distinction between public and private.¹²¹ Together all these notions more accurately

¹¹⁵ See: <https://stats.oecd.org/glossary/detail.asp?ID=3295>.

¹¹⁶ Baldwin, R., Scott, C. and Hood, C.: *A Reader on Regulation*, OUP, Oxford, 1998, p. 3.

¹¹⁷ Clarke, M.: *Regulation: The Social Control of Business between Law and Politics*, Macmillan, Basingstoke and London, 2000; Simpson, S.: *Corporate Crime, Law, and Social Control*, CUP, Cambridge, 2002.

¹¹⁸ Garland, D.: *The Culture of Control: Crime and Social Order in Contemporary Society*, OUP, Oxford, 2001; Fouladvand, S.: “Decentring the Prosecution-Oriented Approach: Attacking both Supply and Demand in the Struggle against People Trafficking”, unpublished, p. 4.

¹¹⁹ Ogus, A.: *Regulation: Legal Form and Economic Theory*, Clarendon Press, Oxford, 1994; also one of the definitions outlined by Baldwin, Scott and Hood, *supra*.

¹²⁰ Black, *supra*, p. 4.

¹²¹ *Ibid.*

describe current regulatory needs, whereby the state no longer holds a monopoly of force, and there are a number of new complex and interconnected actors that understand and drive industries, and the processes that govern them. These five notions create a rationalisation for a new decentred regulator who, in theory, would be much closer to the industry, and therefore more likely to understand the needs and the risks related to the regulatees.

While the contemporary security sector is no different in some ways to the proliferation of privatisation and outsourcing of numerous military functions, the lethal nature of the industry coupled with the international context of PMC presence makes the military unique. Under the current norms of IL, it is not permissible to wage a private war. Government involvement, therefore, becomes inevitable in one shape or another. Although, as contemporary PMCs can be involved in a range of non-military activities, such as the extraction business on behalf of a multinational corporation, there are scenarios to which the state is not party to. However, my enquiry is concerned with the PMC engagement in international state or multilateral¹²² projects, whereby contractors operate in conflict or post-conflict environments of high sensitivity and are exposed to direct participation in hostilities.

A criminal justice approach, therefore, could contribute to punishing and also preventing gross violations in the realm of private security. Meanwhile, all controls that are currently in place for mercenaries and PMCs are not criminalised, with the exception of the narrow definition of mercenaries, contextualised in decolonisation. Nonetheless, the merging of the lines between public and private can be identified in 'hybrid' regulatory bodies that combine governmental and non-state actors.¹²³ For the private military industry such decentred regulation can be observed in the Montreux Process and the International Code of Conduct.¹²⁴

¹²² Such as UN peacekeeping operations, for example.

¹²³ Black, *supra*, p. 8.

¹²⁴ There is a similar debate on accountability and the regulation of police forces, however, policing is outside the scope of my research. Some of the literature covering this debate: Jones, T., Newburn, T.

The Purpose of Regulation

Julia Black defines regulation as “the intentional activity of attempting to control, order or influence the behaviour of others.”¹²⁵ This definition sets regulation apart from both the government operating domestic state laws, and market and social forces, by invoking the element of intentionality. As such, regulation can have multiple goals. Most generally it aims to provide some sort of organisation, but it can also manage risk,¹²⁶ provide access to justice,¹²⁷ or strive to achieve justice.¹²⁸ My enquiry is concerned with the application and the effective exercising of the regulation, therefore focusing on a functional aspect of the definition. To unfold the key issues of this research, regulation is conceptualised as a broader mode of administering PMC activity, with ‘responsibilisation’ representing a more decentred approach that entails both legally binding and voluntary norms, and criminalisation, invoking criminal justice exercised through judicial systems and government authorities. As a discipline, regulation can operate across sovereign borders; it reaches both international and industry realms, forming a variety of relationships between state, law, and society.¹²⁹ Regulation can be analysed from an effectiveness perspective, whereby the gap between what a regulation sets out to do and what it does in practice is at the core of the critique. It can also be critiqued in terms of value, or whether it is aimed at the appropriate goals, and if it delivers the appropriate value of legitimacy

and Smith, D. J.: *Democracy and Policing*, Policy Studies Institute, London, 1994; Bayley, D.: *Changing the Guard: Developing Democratic Police Abroad*, OUP, Oxford, 2006; Zedner, L.: “Policing Before and After the Police” 2006, Vol. 46 (1), *British Journal of Criminology*, pp. 78-96; Baldwin, R.: “Why Accountability?” 1987, Vol. 27 (1), *British Journal of Criminology*, pp. 97-114; Campbell, E.: “The People, Policing and Power” 2014, Vol. 95 (1) *Criminal Justice Matters*, pp. 26-27; Harkin, D.: “Simmel, the Police Form and the Limits of Democratic Policing” 2015, Vol. 55 (4), *British Journal of Criminology*, pp. 730-746; Friedman, B. and Ponomarenko, M.: “Democratic Policing” 2015, Vol. 90 (6), *New York University Law Review*, pp. 1827-1905.

¹²⁵ Black, *supra*, p. 25.

¹²⁶ *Ibid.*, p. 10.

¹²⁷ Parker, C.: *Just Lawyers: Regulation and Access to Justice*, OUP, Oxford, 1999.

¹²⁸ Ayres, I. and Braithwaite, J.: *Responsive Regulation: Transcending the Deregulation Debate* OUP, Oxford, 1992, chapter 3, “Tripartism”.

¹²⁹ Black, *supra*, p. 26.

or justice.¹³⁰ This thesis adapts a critical approach of legal and policy reform¹³¹ in order to analyse the gap between existing and future regulation of the private military space, and the justice that this regulation can provide in the event of gross violations by private military actors.

Building on the value-based approach, an important goal of regulation specifically concerning private security providers is to enable an appropriate use of PMCs. According to Nigel White, “the idea of PMSCs using force may be distasteful, but if it is used in a regulated manner to protect the human rights of vulnerable people, then arguably it should not be prohibited.”¹³² In other words, regulation should ensure an environment whereby private security resources could address the needs of the international security landscape without the risk of their acting with impunity. Effective and value-based regulation could also help PMCs to finally overcome their legally dubious and unethical reputation in the eyes of the public.

Part 4: Individual, Corporate, and State Responsibility

Law and regulation fulfils its goals through enforcement, or in other words by invoking responsibility. When a PMC is involved in committing a gross violation, such as killing a number of civilians as part of its contracted activities, who should be responsible and in what way? Is it the contractor who fired the gun? Or perhaps the company he was recruited by, who may not have provided the appropriate training? Or should it be the state that outsourced the support of military activities to a private entity? Both military conduct and human rights are viewed as primary concerns of states, rather than corporations or individuals.¹³³ Equally, if the context of the PMC as a professional occupation is removed, it then reduces the situation to an instance of

¹³⁰ Black, *supra*, p. 28.

¹³¹ Dorsett and McVeigh, *supra*, p. 20.

¹³² White, N.: “Regulatory Initiatives at the International Level” in Bakker, C. and Sossai, M. (eds): *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European, and Domestic Norms*, Hart Publishing, Oxford, 2012, p. 20.

¹³³ Ruggie, J.: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles for the Implementation of the United Nations “Protect, Respect and Remedy” Framework; Principle 6 State-Business Nexus; Commentary, p. 8.

one civilian killing another. This means that all three components, the contractor, the company, and the state are crucial to establishing responsibility in PMC conduct.¹³⁴

Hannah Tonkin discusses the theory and practice of state responsibility and, most importantly, relevant international regulation and how it applies.¹³⁵ She argues that the fundamental principle of state responsibility is that a state is only responsible for its *own* acts rather than all acts.¹³⁶ The rationale for this construct prevents the state from performing as the guarantor of all acts in its territory, or acts of its nationals abroad.¹³⁷ What differentiates the relationship between the state and PMCs from using the services of any other corporation is the potential resort to power on the international level, and human rights violations in the context of post-conflict reconstruction, humanitarian intervention, peacekeeping, etc.

There are very strict norms in IHL and Customary IL concerning intervention and the use of force by states.¹³⁸ Due to the governmental nature of PMC activity, a number of regulatory

¹³⁴ Core literature on individual, corporate and state responsibility: Rome Statute of the International Criminal Court; Eser, A.: "Individual Criminal Responsibility" in Cassese, A., Gaeta, P. and Jones, J. (eds): *The Rome Statute of the International Criminal Court: A Commentary*, OUP, Oxford, 2002; International Law Commission: *Responsibility of States for Internationally Wrongful Acts 2001*; The United Nations "Protect, Respect and Remedy" Framework; The UN Guiding Principles on Business and Human Rights; Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies, 13 July 2009; Wells, C.: *Corporations and Criminal Responsibility*, OUP, Oxford, 2001; White, N. D.: "The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention" 2011, Vol. 11 (1), *Human Rights Law Review*, pp. 133-151; Pinto, A. and Evans, M.: *Corporate Criminal Liability*, 2nd edition, Thompson, Sweet & Maxwell, London, 2008.

¹³⁵ Tonkin, H.: *State Control over Private Military and Security Companies in Armed Conflict*, CUP, Cambridge, 2011.

¹³⁶ *Ibid.*, p. 56.

¹³⁷ *Ibid.*

¹³⁸ Henderson, C.: *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era*, The Ashgate International Law Series, Routledge, Abingdon, 2010; Gray, C.: *International Law and the Use of Force*, OUP, Oxford, 2000; Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc.A/6014 (1965); *Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention No V)*, 18 October 1907; Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 2465, 23rd Session, 1968; Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (1970).

mechanisms have been developed to establish state responsibility, whereby the conduct of the private party is assignable to the state. Amongst such mechanisms are the Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles) adopted by the International Law Commission in 2001. Together with the Commentaries, the ILC Articles outline the conditions for attribution of private conduct to the state. There are also industry-specific regulatory bodies, such as the Montreux Document and the Draft Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies that outline the obligation of states who hire, host, and domicile PMCs. Additionally, the United Nations “Protect, Respect and Remedy” Framework sets out the guiding principles for states, as well as businesses, to ensure human rights values are promoted and followed.

Finally, the relationship between the state, as client, and the PMC, as provider of services, is administered by contractual terms that both parties agree to. Contract law adds an extra layer of surveillance and legal enforcement, as its jurisdiction applies when one of the parties is found to be in breach of contractual terms. While only states and international organisations are recognised as subjects of IL, individuals possess international legal personality under the Rome Statute of the International Criminal Court (ICC), which outlines their responsibility for the commission of genocide, crimes against humanity, and war crimes.¹³⁹ In order for a PMC employee or director to be held liable for aiding or abetting a crime under the Rome Statute, prosecution must demonstrate that the assistance was provided “for the purpose of facilitating the commission of the crime”.¹⁴⁰ In other words, it is necessary to prove the knowledge and the intent of the accused.

Furthermore, Article 21 of the Draft Convention establishes the rules on individual criminal responsibility by exercising its jurisdiction over individuals through the domestic laws of state

¹³⁹ Art. 25 Statute of the International Criminal Court UN Doc./A.CONF.183.9*, 2187 UNTS 1998, p. 90.

¹⁴⁰ Rome Statute, *supra*, Part 3, Article 25 (3) (c).

parties.¹⁴¹ On a national level, contractors are also subject to domestic criminal laws just like any civilians. However, domestic criminal law is often limited by territoriality, whereby its jurisdiction does not extend beyond the national borders of the state. Also, it has been observed in past practice that hiring states would grant PMC contractors legal immunity from local criminal legal systems of the state where they performed their services. Such was the case during the Coalition Provisional Authority (CPA) administration in Iraq. To overcome these issues, in 2000 the United States Congress passed the Military Extraterritorial Jurisdiction Act (MEJA), that gave federal courts jurisdiction over felonies committed by persons “employed by or accompanying the armed forces” overseas. Similarly, according to the UK 2006 Armed Forces Act, PMC contractors working for the UK Armed Forces are subject to Service discipline. The limitations and practical applicability of regulations invoking individual responsibility for private military contractors are analysed in *Chapter 5*.

Finally, there are numerous regulatory bodies that make provisions for corporate responsibility; some are international, some domestic, some binding, others self-regulating and voluntary. Corporate liability can be of a criminal (domestic criminal justice system) or social nature (in tort law). Historically, corporate liability developed in a different way to that of states or individuals. Unlike individuals and states, who can be tried at the ICC (and the ad hoc Tribunals) and the International Court of Justice respectively, currently the mainstream view is that legal persons cannot be held criminally liable on an international level. While there is no strong norm of international criminal responsibility for the corporation, the African Court of Justice and Human Rights is an emerging precedent to that end. As of May 2014, it became the first international court to recognise and criminalise corporate liability for international crimes.¹⁴²

¹⁴¹ The Draft Convention, Article 21.

¹⁴² Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, May 15, 2014, STC/Legal/Min/7(I) Rev. 1, Art. 46C; see also Decision on the Draft Legal Instruments, Doc. Assembly/AU/8(XXIII), at 1 in African Union, Decisions, Declarations And Resolution,

To conclude, the choice of this critical approach enables this research to consider a wide range of different configurations of state, military, policy, and law. The following three chapters demonstrate that private security is a long-existent phenomenon that is deeply entrenched in governmental, political, and economic structures, all of which should be considered when formulating current and future regulatory mechanism. Having established the theoretical framework of this thesis and explored the key themes and definitions, I now proceed to examine governmental and military developments that contributed to the establishment of this norm.

Chapter 2

Historical Typology of States and Military Forces

While contemporary definitions of mercenaries derive from experiences of the Cold War and the wars of national liberation, a large body of historical evidence defends and even welcomes private military service. For centuries, more often than not states relied heavily on external military support to sustain power, expand territories, and extend their rule. Typically linked to the concept of modern nation-states,¹⁴³ sovereignty and the subject of its decline are often explored in international relations (IR) and IL literature from the standpoint of modernity.¹⁴⁴ By decoupling the notion of sovereignty from the modern nation-state, I consider different expressions of private and irregular force in contrasting forms of governance and examine state practice in regulating these forces.

While not considered states in the modern sense, different forms of governance from the fourteenth century onwards each had characteristic military power and distinct sources of legitimacy. Analysed through the concepts of power and legitimacy, these typologies help us to track lineages of state/military relations up to the present day. This chapter offers a reading of historical military developments in order to draw attention to the differing ways in which violence was normatively organised. It develops an account of the changing nature of war and military power in modernity, providing the necessary context to critique contemporary attempts

¹⁴³ The Peace of Westphalia, 1648.

¹⁴⁴ See: MacCormick, N.: *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, OUP, Oxford, 1999; Brown, W.: *Walled States, Waning Sovereignty*, Zone Books, New York, 2010; Magnuson, W.: "The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection under International Law", 2010, Vol. 43 (2), *Vanderbilt Journal of Transnational Law*, pp. 255-312.

by IL to regulate mercenaries and PMCs. The typologies are offered as examples only and are not intended as authoritative historical accounts.

Having highlighted the structural and functional elements of a state in *Chapter 1*, I here build upon the accounts of Machiavelli, Anderson, Mann, Tilly, Wallerstein, and Marshall to consider the process of state formation through the lens of military history and the changing nature of war. I explore the questions of public and private violence by conducting a study of the role of mercenaries and private armies in different forms of governance between the fourteenth and late nineteenth centuries, such as feudalism, absolutism, Italian city-republics, the early nation-state of Revolutionary France, and the outsourced government of the British Empire, run by the East India Company (EIC). To approach this task with consistency, I analyse the relationship between the state and the military through the concepts of power and legitimacy. I scrutinise the structure and organisation of these forms of governance and locate the type of military force that prevailed in every scenario.

Part 1 outlines the core ideas that summarise the feudal form of governance and considers military power in medieval states. It also examines the key features of absolutist states and demonstrates how the legitimacy of a monarch was diversified and strengthened through various institutions. It focuses on the development of professional armies and the role of mercenaries in their creation. Part 2 offers an account of republicanism and the anti-mercenary norms through the neo-Roman political thought of Machiavelli and his contemporaries. It analyses the sources of legitimacy prevailing in Renaissance republics, and explores the concept and practical application of the civilian militia as a type of military force developed and promoted in the sixteenth century.

Part 3 focuses on the establishment of the nation-state and military nationalism, analysed through the lens of the French Revolution. Contrary to the position of a vassal in a feudal organisation who paid for his war equipment and provisioning, as well as the administrative and

legal costs of the fief entrusted to him out of his own pocket,¹⁴⁵ the nation-state developed a mechanism to streamline administrative processes, and assumed responsibility and control over the organised violence that only its citizens (according to this view) ought to take part in. Hence I examine the role of citizenship and popular sovereignty in the formation of the nation-state and national army, and how they influenced the anti-mercenary norms. Part 4 analyses the outsourcing of governmental and military functions to the British East India Company and the role of colonial armies in imperial expansionism. While the institutionalisation of the national army created a strong rationale against the use of mercenaries and foreign legions, colonial encounters introduced European powers to a brand-new pool of unclassified military resources. Neither mercenary, nor national, these forces formed an integral part of colonial armies, raising questions about their legitimacy and highlighting the differentiation between public and private in the military context. In both France and Britain, we observe a limited use of mercenary forces at home while raising colonial armies to pursue their colonial ambitions abroad. The two models are chosen to demonstrate the first modern attempt at constructing a nation-state with a mass-raised army, *levée en masse*, and the contrasting outsourced governance of the EIC.

The final part of this chapter offers normative conclusions that each attempt to explain, within their own historical circumstances, states' decision to deploy certain type of military force. It illuminates the norms that link governmental structures to specific types of armies. While considering some of the normative approaches grounded in these relationships, it sets the scene and introduces different forms of military force, revealing varying interpretations of its classification into public and private through changing conflict paradigms. This critical typology of different forms of governance and prevailing military actors allows me to take a more

¹⁴⁵ Weber, M.: "Politics as a Vocation" in *The Vocation Lectures*, Hackett Publishing Company, Cambridge, 2004, p. 36.

meaningful and informed approach when analysing contemporary challenges in IL posed by the use of private force.

Part 1: Feudalism and Absolutism

Feudalism in Europe emerged from the disintegration of an empire, forming a 'civilisation' but not a world-system.¹⁴⁶ Described by Tilly as *patrimonialism*,¹⁴⁷ this historical stage stretched up to the fifteenth century in Europe and, arguably, some of its elements merged into successive forms of governance. The Christian Church and feudalism were the two pillars of medieval society that extended through to the era of absolutism. I do not intend to provide a full historical account of feudalism; instead I suggest some ideas that characterise the feudal order and contextualise early modern use of mercenaries.

In the feudal form of governance, fourteenth-century knights and princes prioritised continuous conquests over the stability of the territories they possessed and the population within these territories. These rulers sought legitimacy for their authority from the Church,¹⁴⁸ while their lords supplied the military power, leaving them with little sway over governmental processes. From an economic standpoint, the governmental construct of Western feudalism, according to Wallenstein, was a nodal system of increasing population and productivity, whereby landowners controlled the surplus and the legal system.¹⁴⁹ In the absence of a money-based economy, centralised defence, or administration mechanisms, political fragmentation was undoubtedly a prominent feature of feudal society.¹⁵⁰ The feudal military system was based predominantly on

¹⁴⁶ Wallerstein, I.: *The Modern World-System I: Capitalist Agriculture and the Origins of the European World-Economy in the Sixteenth Century*, Academic Press, London, 1974, pp. 17-18. Background reading on feudalism: Ganshof, F. L.: *Feudalism*, Harper & Row, New York, 1964; Coulborn, R. and Strayer, J. R.: *Feudalism in History*, Princeton University Press, Princeton, 1956; Strayer, J. R.: *On the Medieval Origins of the Modern State*, Princeton University Press, Princeton, 1970.

¹⁴⁷ Tilly, C.: *Coercion, Capital, and European States, AD 990-1990*, Basil Blackwell, Oxford, 1990, p. 29.

¹⁴⁸ Held, McGrew et al., *supra*, p. 35.

¹⁴⁹ Wallerstein, *supra*, p. 18.

¹⁵⁰ Fischer, M.: "Feudal Europe, 800-1300: communal discourse and conflictual practices", 1992, Vol. 46 (2), *International organization*, p. 444. Fischer outlines three orders in the feudal society: the *oratores*,

private agreements,¹⁵¹ while the only 'legitimate' wars could be fought to defend and expand Christendom against the pagans, or to remedy injustice.¹⁵² The main actors of feudal warfare were tribes, feudal levies, urban militias, and similar customary forces.¹⁵³ The prohibition of arbitrary war drastically reduced the authority of the rulers, leaving them dependent on local private military forces. Ultimately, the idea of Christian unity did not coincide with the reality of territorial fragmentation and the continuous conflicts between those striving for control of tiny strips of territory.

Power and legitimacy derived from the lord/vassal nexus. According to Montesquieu, the essence of feudalism lay in the custom of vassalage, to which the fief was entirely subordinate, used as a form of pay for loyal service.¹⁵⁴ While a vassal's primary duty was military service,¹⁵⁵ the feudal lord provided his vassals with material maintenance and protection both on the field of arms and in court.¹⁵⁶ The lord and the vassal who were "by definition, on different social levels", were bound together by a contract.¹⁵⁷ Feudal lords relied on a financially driven relationship with their vassals that carried a mercenary nature. What distinguishes this relationship from the twenty-first century freedom of contracts witnessed between states and PMCs is the framework of oaths that characterised feudal society.¹⁵⁸ The same respect for oaths was observed by knights. By accepting knighthood, all knights (even those who had not pronounced it) were bound by an oath.¹⁵⁹ However, the common practice of "multiple

or clergy, providing the community with divine grace; the *bellatores*, or knights; and the *laboratores*, or peasants, who procured economic sustenance.

¹⁵¹ Brown, E. A. R.: "The Tyranny of a Construct: Feudalism and Historians of Medieval Europe", 1974, Vol. 79 (4), *The American Historical Review*, pp. 1073.

¹⁵² The just war doctrine, Fischer, *supra*, p. 436.

¹⁵³ Tilly, *supra*, p. 29.

¹⁵⁴ According to Montesquieu, quoted in Stephenson, C.: "The Origin and Significance of Feudalism", 1941, Vol. 46 (4), *The American Historical Review*, pp. 789.

¹⁵⁵ Bloch, M.: *Feudal Society*, 2nd edition, Routledge, Abingdon, 1962, p. 220.

¹⁵⁶ Fischer, *supra*, p. 448.

¹⁵⁷ Bloch, *supra*, p. 227.

¹⁵⁸ *Ibid.*, p. 237.

¹⁵⁹ *Ibid.*, p. 317.

vassalage”¹⁶⁰ provided a certain level of choice and autonomy for the vassal to pick sides in the event of a conflict between two of his lords. Such risk inevitably weakened the military power paradigm that feudal nobility relied on.

Furthermore, military power, the judicial system, and land revenue were all concentrated in the hands of lords, making them more powerful than any other feudal institution.¹⁶¹ At the same time, feudal lords had virtually no governmental instruments at their disposal to provide control over the claimed territories¹⁶² and the legitimacy of courts was often “restricted by private vengeance”.¹⁶³ Distinct mercenary features can be observed in certain aspects of the feudal judiciary system, such as trial by battle, for instance. A practice favoured by the physically strong and also by the rich, it allowed women and clerics to offer a substitution, extending it to “any man who could afford to pay a warrior to fight in his stead, spawning a regular profession of judicial champions for hire.”¹⁶⁴

Power and Legitimacy in Absolute Monarchies

The next historical typology that I explore in order to understand state practice in relation to mercenaries is the example of absolute monarchies. Rising from its feudal roots and characterised by the rising scale of war, absolutism resonated with an increase in state authority, leaving its footprint on sixteenth-century Europe. However, due to continuing limitation by divine and natural law, ‘absolute’ meant ‘unsupervised’ rather than ‘unlimited’.¹⁶⁵ Although many features of the feudal mode of governance remained, finding their niche in the construction of the absolutist state, the changing nature of war set in motion further

¹⁶⁰ Fischer, *supra*, pp. 449

¹⁶¹ Barendse, R. J.: “The Feudal Mutation: Military and Economic Transformations of the Ethnosphere in the Tenth to Thirteenth Centuries”, 2003, Vol. 14 (4), *Journal of World History*, pp. 511.

¹⁶² Held, McGrew et al., *supra*, p. 34.

¹⁶³ Bloch, *supra*, p. 360.

¹⁶⁴ *Ibid.*, pp. 456-457.

¹⁶⁵ See: Hartung and Mousnier; Wallerstein, *supra*, p. 144.

development and concentration of systems that under feudalism had been fragmented and unconsolidated.

Sixteenth century absolutism introduced an ideology whereby monarchs claimed the divine right of kings as a new means of legitimising their authority.¹⁶⁶ To fortify their position, monarchs used the mechanisms of bureaucratisation, the monopolisation of force, the creation of legitimacy, and the homogenisation of their population.¹⁶⁷ As absolutist states evolved, the source of their legitimacy was diversified beyond divine law. While firmly entrenched in one prince or a dynasty, a sovereign's power now extended to a number of new institutions within their immediate interests, allowing for a shift away from feudal political fragmentation and towards state centralisation.¹⁶⁸ Centralisation progressed by way of integrating smaller political units under a unified territorial area, with a consolidated legislative system and political authority to administer the new territory.¹⁶⁹ The concentration of power initiated numerous key processes that bridged the medieval forms of governance with a modern sovereign state. Over the course of the sixteenth and seventeenth centuries European monarchs¹⁷⁰ cultivated a politically mature system of set territorial borders, slow yet steady monopolisation of military power, and its reorganisation into state armies.¹⁷¹ The bureaucratic state arose from administrative enhancements in the civil and military realm, introducing tax and credit systems, ample enough to sustain and nurture the belligerent ambitions of early modern states.

Obtaining the monopoly of force in a modern sense may have been a conscious strategy to further monarchical authority or a reaction to the growing warfare demands of rising

¹⁶⁶ Wallerstein, *supra*, p. 144.

¹⁶⁷ *Ibid.*, p. 136.

¹⁶⁸ Genicot, L.: "Crisis: From the Middle Ages to Modern Times" in Postan, M. M. (ed.): *The Cambridge Economic History of Europe from the Decline of the Roman Empire: The Agrarian Life of the Middle Ages*, CUP, Cambridge, 1966, p. 700.

¹⁶⁹ Held, McGrew, *supra*, p. 36.

¹⁷⁰ Louis XI in France, Henry VII in England, and Ferdinand of Aragon and Isabella of Castile in Spain.

¹⁷¹ These developments have not been coherent across Western Europe. This is a general summary of the features of absolutism, and different forms of government are called out and analysed to demonstrate key distinctions.

absolutism. Demilitarisation of the noble class, restrictions on the civilian right to bear arms, and a conscious reinforcement of distinct state frontiers, all played a crucial role in increasing state capacity to pacify its own population.¹⁷² Administrative and military functions were performed by those dependent directly on the monarch, as opposed to unsubordinated, disobliging feudal lords. Suppression of the private armies in Tudor England¹⁷³ and Richelieu's efforts in France to tear down the fortresses within the state only to fortify its borders,¹⁷⁴ are just a few examples that supported the trend.

Having reached significant heights in warfare, this period merited the title of 'military revolution'.¹⁷⁵ The magnitude of this revolution was tied up in the reforms of the sixteenth and seventeenth centuries. As part of the strategic innovation in the military and social realms, Maurice of Orange and Gustavus Adolphus introduced the officer as the vital element of the European army.¹⁷⁶ The officer assumed managerial responsibilities in the conduct of a battle. Not only did this change influence the conduct of war, it also sought to shape the social construction of the state, introducing a new and increasingly important professional class in European society.¹⁷⁷ Bureaucratic structures were developed to administer states' heavy monetary demands to further their military growth, recruit, and pay the troops, and to fund wars, immense in scale and resources.¹⁷⁸ A typical army of 60,000 men, with its 40,000 horses,

¹⁷² Pocock, *supra*, p. 386.

¹⁷³ Stone, L.: *The Crisis of Aristocracy, 1558-1641*, OUP, Oxford, 1967, pp. 199-272.

¹⁷⁴ Tilly, *supra*, p. 69.

¹⁷⁵ The concept was first formulated by Michael Roberts and focuses on the changing nature of war and its relationship to the state in the age of military expansion. See: Roberts, M.: "The Military Revolution 1560-1660" in *Essays in Swedish History*, Weidenfeld and Nicholson, London, p. 199. For further background on military revolution, see the following accounts: Parker, G.: *The Military Revolution: Military Innovation and the Rise of the West 1500-1800*, CUP, Cambridge, 1988; Black, J.: *A Military Revolution? Military Change and European Society, 1550-1800*, Humanities Press, Atlantic Highlands, 1991; Parker, G.: "The "Military Revolution," 1560-1660 – a Myth?", 1976, Vol. 48 (2), *The Journal of Modern History*, pp. 195-214.

¹⁷⁶ Ralston, D. B.: *Importing the European Army: The Introduction of European Military Techniques and Institutions into the Extra-European World, 1600-1914*, The University of Chicago Press, London, 1990, p. 8.

¹⁷⁷ Ibid.

¹⁷⁸ Held, McGrew et al., *supra*, p. 107; Ralston, *supra*, pp. 8-9.

consumed almost a million pounds of food per day.¹⁷⁹ By strengthening and developing the administrative apparatus, the state could afford more flexible access to funding in the event of having to urgently raise an army, lowering the risk of financial crises and mutiny caused by unpaid military forces.¹⁸⁰

Professional Armies

So what was the role of mercenaries in the process of developing professional standing armies? Usually assembled at the start of a war and disbanded at the end or even in the process of the conflict, due to a lack of resources or subsequent mutiny, the armed forces of the sixteenth century were unable to realise their full potential in the absence of effective control by the state and the structure of a permanent army. Distrust amongst the lower classes over the obligation to bear arms prevented monarchs from successfully building national armies.¹⁸¹ This led to the inevitable use of foreign mercenaries to conduct wars and pacify local uprisings, when the sovereigns lacked authority over their people. The absolutist state pioneered the professional army, which was largely mercenary in the sense of recruitment and pay.¹⁸² At the same time, the military revolution inflated in scale and facilitated the rapid proliferation of warfare by introducing gunpowder, portable firearms, siege artillery, anti-siege fortifications, and other significant innovations.¹⁸³

Using mercenaries had numerous advantages. Professional disposable military resources were commonly used to conduct wars and expand the territories of the monarchy. The army of the Dutch Republic,¹⁸⁴ for instance, was keen to finance mercenaries since their ruling elite was a

¹⁷⁹ Tilly, *supra*, p. 81.

¹⁸⁰ Ralston, *supra*, p. 9.

¹⁸¹ Roberts, *supra*, p. 200.

¹⁸² Kiernan, V. G.: "Foreign Mercenaries and Absolute Monarchy", 1957, Vol. 11, *Past and Present*, p. 78.

¹⁸³ Roberts, *supra*, p. 199; McNeil, W. H.: *Pursuit of Power: Technology, Armed Force and Society Since A.D. 1000*, University of Chicago Press, Chicago, 1982.

¹⁸⁴ The Dutch Republic was the first in Europe to establish an armed force on a more lasting basis, towards the end of the sixteenth century.

commercial class with no military aspirations.¹⁸⁵ In addition, it gave the rulers the means to control the lords as the new source for supplying military force emerged, “creating an employment vacuum for the lesser nobility.”¹⁸⁶ It also mitigated the risk of uprisings, fuelled by the population growth in Western Europe and the ‘vagabondage’ phenomenon. By incorporating a part of the population into their armies, rulers provided employment, simultaneously using this group to pacify the others.¹⁸⁷ The new armies had significant influence on the integral state structure by inverting the feudal order from one where social position determined rank, to one where rank determined social position.¹⁸⁸ This inversion resulted in dynastic monarchs rediscovering and adapting the core military principles of antiquity: the effectiveness in combat of trained infantry.¹⁸⁹

This shift in military layout was most successfully demonstrated by the example of Swiss pikemen, free peasants from the poor forest regions in central Switzerland. Their efficiency was rooted in an ordered discipline in battle rather than in the advances of innovative weaponry. They widely exported their superior military skills, and were known as one of the most popular mercenary forces in history. While these flexible, highly skilled military resources were always available to princes to fulfil their belligerent needs at home and abroad, the disadvantages of using foreign mercenaries included drastically impeding the consolidation of state sovereignty. The main challenge was to contain and fund foreign armies without the fatal consequence of bankruptcy for the monarchy. The ever-increasing cost of war, more expensive armaments, longer periods of training, and bigger administrative staffs shook the finances of every state in Europe.¹⁹⁰ Therefore, incorporation of mercenary units into standing professional armies could be interpreted as a cost-saving alternative to waging wars with predominantly private military

¹⁸⁵ Ralston, *supra*, pp. 6-7.

¹⁸⁶ Wallerstein, *supra*, p. 143.

¹⁸⁷ *Ibid.*, pp. 139-143.

¹⁸⁸ Feld, *supra*, p. 20.

¹⁸⁹ Ralston, *supra*, p. 3.

¹⁹⁰ Roberts, *supra*, pp. 206-207.

resources. Such an approach can be considered a form of regulation of mercenaries through state practice. To demonstrate an opposing normative approach to mercenaries, I now examine a form of governance that, while sharing the same historical period, differed greatly to the governmental paradigm of absolute monarchies.

Part 2: Italian City-Republics and Civilian Militia

Renaissance Italy contrasted in governance and military structure to the comparatively centralised absolute monarchies of Western Europe. While the dynastic monarchies north of the Alps were growing in size and capacity, Italian city-republics found it challenging to develop beyond a 'segregated mass' into a consolidated entity. I will provide an account of the development of republicanism and the anti-mercenary norms through the neo-Roman political thought of Machiavelli and his contemporaries, analysing the sources of legitimacy that prevailed in Renaissance republics, and exploring the concept and practical application of civilian militia as a type of military power, developed and promoted throughout the fifteenth and sixteenth centuries. Amongst the differing interpretations of Machiavelli and his thought,¹⁹¹ I seek to build upon the work of John Greville Agard Pocock and other historians who advocate Machiavelli's republican nature.¹⁹² Understanding Machiavelli's republican vision is important in the context of tracing the regulation of mercenaries in different historical typologies. Unlike

¹⁹¹ Barber, N.: "Machiavellianism and Altruism: Effect of Relatedness of Target Person on Machiavellian and Helping Attitudes", 1994, Vol. 55 (1), *Psychological Reports*, pp. 403-422; Grant, R. W.: "Hypocrisy and Integrity: Machiavelli, Rousseau, and the Ethics of Politics", 1999, Vol. 38 (3), *Dialogue: Canadian Philosophical Review*, pp. 671-674; Colish, M. L.: "The Idea of Liberty in Machiavelli", 1971, Vol. 32, *Journal of the History of Ideas*, pp. 323-350; Newell, W. R.: "How Original is Machiavelli? A Consideration of Skinner's Interpretation of Virtue and Fortune", 1987, Vol. 15, *Political Theory*, pp. 612-634; Flanagan, T.: "The Concept of *Fortuna* in Machiavelli" in Parel, A. (ed.): *The Political Calculus*, Toronto, 1972, pp. 127-156.

¹⁹² Pocock, J. G. A.: *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, Princeton University Press, Princeton, 1975; Baron, H.: "Machiavelli: The Republican Citizen and the Author of 'the Prince'", 1961, Vol. 76, No. 299, *The English Historical Review*, pp. 217-253; Colish, M. L.: "Republicanism, Religion, and Machiavelli's Savonarolan Moment", 1999, Vol. 60, *Journal of the History of Ideas*, pp. 597-616; Bock, G., Skinner, Q. and Viroli, M. (eds): *Machiavelli and Republicanism*, CUP, Cambridge, 1990; Skinner, Q.: *Visions of Politics: Volume II: Renaissance Virtues*, CUP, Cambridge, 2004.

observing regulation and normative approaches to mercenaries in the state practice of absolute monarchies, Machiavelli's republican account offers regulation at a moral (rather than purely practical) level.

In the absence of any overarching unity,¹⁹³ multiple governing authorities, otherwise known as *signorie*,¹⁹⁴ emerged in Northern and Central Italy. Formally independent from the German Holy Roman Empire, they formed small independent governmental structures of city-states that prevailed in the region between the ninth and fifteenth centuries. Run by landed aristocrats, known as *signori*, this mode of governance was rooted in wealth rather than any other unifying authority, such as dynasty or the Church. Resting on force and personal fraud, the legitimacy of *signori* lacked communal support and aristocratic order or duty.¹⁹⁵ Despite constitutional checks and balances, wealth played an important part in Italian city-republics, serving as a key source of legitimacy and power.¹⁹⁶ Machiavelli condemned wealth as a source of legitimacy,¹⁹⁷ as he deemed it deceitful, leading to corruption and the limitation of republican popular freedom.¹⁹⁸ Furthermore, it encouraged the aristocracy to build their own private armies, inevitably putting the integrity of a republic at danger.¹⁹⁹

Unlike the relatively consolidated monarchies north of the Alps, most Italian republics suffered from internal division within the cities, while the frequency of external warfare brought incessant crises of both military and fiscal nature.²⁰⁰ Although by the end of the fourteenth century most of Italy was governed by *signori*, the cities of Florence and Venice, retaining the

¹⁹³ After the end of Episcopal rule, when the Empire collapsed and the Church lost its overarching authority.

¹⁹⁴ By the 1280s the *signoria* had become the normal constitutional form over the entire northern plain, signalling the start of victory of tyranny over republicanism; see Waley, *supra*, pp. 166-170.

¹⁹⁵ Anderson, *supra*, p. 162.

¹⁹⁶ Kent, *supra*, p. 608.

¹⁹⁷ See also the dialogue of Lorenzo and Niccoli about the sources of nobility; from Bracciolini, P.: *De Nobilitate*, referenced in Skinner, *supra*, p. 134.

¹⁹⁸ Pocock, *supra*, 157; Skinner, *supra*, p. 167.

¹⁹⁹ Skinner, *supra*, p. 175.

²⁰⁰ Waley, *supra*, p. 165.

status of independent city-republics, maintained their power throughout the fourteenth and fifteenth centuries.²⁰¹ While Venice was designed as a mixed government, in practice it was run by a large yet finite body of ancient families, therefore limiting the political participation of citizens.²⁰² Florentine republican structure was also deformed under an authoritarian reorganisation, with the “political participation now increasingly determined from above.”²⁰³ With no viable bureaucracy to administer the Papal States,²⁰⁴ the fragmented structure of Italian cities was neither truly republican nor monarchical in practice. In the absence of coherent sovereign authority, “temporary coalitions and consultative institutions played significant parts in war and extraction, but little durable state apparatus emerged on a national scale.”²⁰⁵ Beginning in 1434, a sixty-year long Medici rule²⁰⁶ marked the decline of *signoria* political authority, as the Florentine electoral system was replaced with that of unilateral appointment.²⁰⁷ By the 1490s, the major powers of Italy – Venice, Milan, Florence, Naples, and the Papal States – had been warring with each other intermittently for decades;²⁰⁸ by the 1520s, the Habsburgs and Valois were fighting their dynastic wars on Italian territory.²⁰⁹ As of 1540, Milan and Lombardy had fallen under Spanish rule, France occupied much of Savoy and Piedmont, Florence had become a Medici-ruled duchy, and Naples was an appendage of the

²⁰¹ Venice was governed by the principles of Machiavelli’s “good constitution”. It distinguished a Doge (a monarch), a Senate (the aristocracy), and a Consiglio Maggiore (democracy). See: Skinner, *supra*, p. 5, p. 126; Machiavelli, “The Discourses”, *supra*, p. 91; Pocock, *Supra*, Chapter IV, “From Bruni to Savonarola: Fortune, Venice and Apocalypse”, pp. 83-113.

²⁰² Pocock, *supra*, p. 100. The idealisation of Venetian mixed government was later known as the “Venetian myth”. On the “Venetian myth” and its application by Florentine aristocracy, see: Grubb, J. S.: “When Myths Lose Power: Four Decades of Venetian Historiography”, 1986, Vol. 58 (1), *The Journal of Modern History*, pp. 43-94; Robey, D. and Law, J.: “The Venetian Myth and the *De Republica Veneta* of Pier Paolo Vergerio”, 1975, Vol. 15, *Rinascimento*, pp. 3 – 59; Rubinstein, N.: “The Venetian Constitution in Florentine Political Thought” in Rubinstein, N. (ed.): *Florentine Studies: Politics and Society in Renaissance Florence*, Faber & Faber, London, 1968.

²⁰³ Rubinstein, *supra*, p. 13.

²⁰⁴ Anderson, *supra*, p. 146.

²⁰⁵ Tilly, *supra*, p. 21.

²⁰⁶ On the Medici regime, see: Brinton, S.: *The Golden Age of the Medici (Cosimo, Piero, Lorenzo de' Medici) 1434-1494*, Methuen & Co., London, 1925; Kent, G.: *The Rise of the Medici: Faction in Florence, 1426-1434*, OUP, Oxford, 1978.

²⁰⁷ *Ibid.*, pp. 14-16.

²⁰⁸ Tilly, *supra*, p. 77.

²⁰⁹ *Ibid.*, p. 78.

Spanish crown. Even Venice and Genoa, although maintaining their oligarchic institutions, lost their authority in the Mediterranean,²¹⁰ forcing Italian republicanism to surrender in the face of proficient centralised absolutist states.

Expressions of military power by Italian city-states also differed to those seen in the absolutist mode of governance. Dependent on commerce and manufacture,²¹¹ cities served predominantly as market centres for local commodities, with limited warfare capacity on land and at sea.²¹² Military engagements were pursued out of necessity rather than strategy and were avoided where possible in order to protect the free flow of trade.²¹³ In the absence of a standing army or any necessary political infrastructure to facilitate a permanent military force, the *condottieri* in Italy owned their mercenary troops, “auctioning them and switching them from side to side in local wars.”²¹⁴ The military disadvantages of Italian city-states became evident in the late sixteenth century, when Spain, England, and Holland all started to send large armed vessels into the Mediterranean for trade and piracy. Unable to compete with the military capacity and scale of absolute monarchies, city-states such as Ragusa, Genoa, and Venice found their previous reliance on speed, connections, and craftiness insufficient to protect them from great commercial losses.²¹⁵ Italian leaders and troops played only a marginal part in the developments fostered by the military revolution, with the army of Venice being by far the most distinct exception.²¹⁶

There could be various explanations as to why mercenaries did not achieve the same results in Italy as in the European absolutist states. The above research suggests that different forms of governance support different military structures. Italy was divided into multiple city-states,

²¹⁰ Tilly, *supra*, p. 78.

²¹¹ Held, McGrew et al., *supra*, p. 35; Tilly, *supra*, p. 21.

²¹² Anderson, *supra*, p. 153.

²¹³ Mallett, M. E. and Hale, J. R.: *The Military Organisation of a Renaissance State: Venice C. 1400 To 1617*, CUP, Cambridge, 1984, pp. 8-9.

²¹⁴ Anderson, *supra*, p. 161.

²¹⁵ Tilly, *supra*, p. 64.

²¹⁶ Mallett, Hale, *supra*, p. 4.

severely lacking the political consolidation and infrastructural capacity required to produce a permanent army, or to effectively incorporate mercenary forces. Furthermore, both the composition and organisation of the mercenary forces were different. Unlike in absolute monarchies, Italian mercenaries, auxiliary forces, and their commanding officers were predominantly foreign, paid, and trained by their country of origin.²¹⁷ Resembling the commercial structure of modern-day private military companies, the authority over these troops lay in their homeland with the ruler who had ultimate control over them.²¹⁸ Unlike their fourteenth-century predecessors, the mercenary soldiers of fifteenth-century Italian cities were mainly formed of Italians.²¹⁹ The *condottieri* in Italy contracted out troops under their command to city-states for use in local wars. Meanwhile the other European monarchs created mercenary corps directly under their own control, forming professional standing armies.²²⁰ While some Italian states provided an increasingly disciplined and effective military, they did not produce a universal strengthening of the morale and collective virtue of the citizenry.²²¹ It is at the heart of this republican rationale that Machiavelli's perception of mercenaries was formed, placing a citizen's financial independence and genuine desire to protect the republic on the other side of the spectrum, serving as a guarantee against corruption.²²²

Civilian Militia as a Norm Against Mercenaries

Critical of the political and military practices of city-states, Niccolo Machiavelli's republican views were opposed to the fragmented Italian governance that relied on mercenaries for provision of power and whose legitimacy was rooted in wealth. In his capacity as a senior official

²¹⁷ One of the most infamous mercenary groups was the White Company, led by Sir John Hawkwood, see: <https://www.britannica.com/biography/John-Hawkwood>; Machiavelli elaborates extensively on the ill qualities of mercenaries in Chapter Twelve of *The Prince*, *supra*, pp. 38-42.

²¹⁸ Machiavelli, "The Discourses", *supra*, pp. 183.

²¹⁹ Kiernan, V. G.: "Foreign Mercenaries and Absolute Monarchy", 1957, Vol. 11, *Past and Present*, p. 71.

²²⁰ Anderson, *supra*, p. 161.

²²¹ Mallett, M.: "The Theory and Practice of Warfare in Machiavelli's Republic" in Bock, G. et al. (eds): *Machiavelli and Republicanism*, CUP, Cambridge, 1990, p. 177.

²²² Shalhope, R. E.: "The Armed Citizen in the Early Republic", 1986, Vol. 49, *Law and Contemporary Problems*, p. 127.

in Florence (1498-1512), Machiavelli modelled the governance of Renaissance Italy in the period of constitutional switch between monarchies and republics upon the ideal of the Roman republic. Based on a good constitution,²²³ the republican ideal of civic glory,²²⁴ and, finally, the concept of the citizen militia, Machiavelli envisaged a republican alternative to the widespread idea of dynasty and private armies dominating the European landscape. Leonardo Bruni was the first humanist to attempt an analysis of the Florentine republican constitution.²²⁵ Like Machiavelli, he saw great value in the liberty and loyalty of every citizen to help promote a legitimate government, and therefore reinforce the liberty of a republic.²²⁶

Fifteenth- and early sixteenth-century Florentine republicanism emphasised the importance of “good arms and good orders”²²⁷ or, in other words, the relationship between military resources, available to the state, and an established system of administrative power. In line with his interpretation of Roman civic traditions,²²⁸ Bruni considered military functions “an essential attribute of citizenship itself.”²²⁹ He deemed mercenaries dishonourable, arguing that they fought poorly as they were not part of what they fought for.²³⁰ To Machiavelli, there was nothing more commendable than citizens defending their own state through the formation of an accountable military and active participation in the governmental system. To that end, Machiavelli advocated a military force comprised of citizens, and called for the establishment of

²²³ Machiavelli, N.: “The Discourses” in Machiavelli, N. (ed. Wootton, D.): *Selected Political Writings*, Hackett Publishing Company Inc., Cambridge, 1994, p. 89; Rubinstein, N.: “Machiavelli and Florentine Republican Experience” in Bock, G., Skinner, Q. and Viroli, M. (eds): *Machiavelli and Republicanism*, CUP, Cambridge, 1990, p. 6.

²²⁴ Skinner, *supra*, p. 149.

²²⁵ Ibid., p. 5; see also: Bruni, L. (translation and introduction by Scheepers, A.): *In Praise of Florence: The Panegyric of the City of Florence and an Introduction to Leonardo Bruni's Civil Humanism*, Olive Press, 2005.

²²⁶ Skinner, *supra*, p. 131; Machiavelli, “The Discourses”, *supra*, p. 123.

²²⁷ Silvano, G.: “Florentine Republicanism in the Early Sixteenth Century” in Bock, G. et al. (eds): *Machiavelli and Republicanism*, CUP, Cambridge, 1990, p. 58.

²²⁸ See Bruni: *The Militia and Funeral Oration*.

²²⁹ Pocock, *supra*, p. 89.

²³⁰ Ibid., p. 89.

civilian militia, which materialised in 1509.²³¹ Through the logic of civic glory and the urge of men to defend their own, the militia was viewed as a mechanism that transformed men into citizens.²³² Subsequent republican visions also promoted a contemporary appeal for a distinct form of public security, namely a civilian responsibility to protect.²³³

While in the rest of Europe mercenaries were a precondition of the new royal armies, Machiavelli's neo-communal militia was formed of regular troops.²³⁴ Promoting an ethical argument against the use of foreign mercenaries, Machiavelli failed to see them as a valid military option for the absolutist states. However, the power of dynastic authority kept mercenary troops in check and used them successfully to their military advantage.²³⁵ Militias, on the other hand, were lacking in training and skill; their failure in Germany²³⁶ proved that only mercenary armies could compete in the new military landscape.²³⁷ The nature of absolutist warfare was highly territorial, requiring a military force to travel and fight beyond the homeland borders. This was not something a civilian militia had the capacity to deliver. And, although fifteenth- and sixteenth-century Italian militias found their niche in fortifying camps, digging defensive ditches,²³⁸ patrolling streets, and intervening in public conflicts,²³⁹ they could not compete with the professional range, experience and capacity of mercenary forces. Their fragmented governance made it problematic for city-republics to match the ever-growing armies of absolute monarchies; they simply crumbled under the weight of the sixteenth

²³¹ Najemy, J.: "Machiavelli's service to the Republic" in Bock, G. et al. (eds): *Machiavelli and Republicanism*, CUP, Cambridge, 1990, p. 112.

²³² Pocock, *supra*, pp. 292-293.

²³³ Baron, H.: "Machiavelli: The Republican Citizen and the Author of 'The Prince'", 1961, Vol. 76, No. 299, *The English Historical Review*, pp. 218-219; Levi-Malvano, E.: *Montesquieu et Machiavelli*, Biblio Bazaar, Paris, 2009. Giannotti advocated for equality under one public authority and condemned private affiliations; see Pocock, *supra*, p. 291 (*Archivio Storico Italiano*, ser. 5, vol. 8 (1891), Sanesi, G. R. (ed.): *Un discorso sconosciuto di Donato Giannotti intorno alla milizia*, p. 17).

²³⁴ Oman, C.: *A History of The Art of War in The Sixteenth Century*, Dutton, New York, 1937.

²³⁵ Anderson, *supra*, p. 168.

²³⁶ Roberts discusses the tendency towards the use of citizen militias in many German States: Saxony, Bavaria, Brandenburg, etc.

²³⁷ Roberts, *supra*, p. 199.

²³⁸ Silvano, *supra*, p. 178.

²³⁹ Tilly, *supra*, p. 55.

century's military requirements.²⁴⁰ Although the recourse to civilian militias in the context of the vast absolutist armies of the period was unsuccessful, the deliberate intention to restrict the use of private force was clearly defined, even if the concept was not fulfilled at the time.

Part 3: The French Revolution and the Nation-State

Alongside the professional army, the end of the seventeenth century also saw the principles of sovereignty and territoriality assume a new form.²⁴¹ In Western Europe, absolutism ignited the process of state consolidation, reducing the differences *within* a state and increasing the differences *amongst* them, forming distinct political communities with a growing sense of national identity.²⁴² Sovereignty became the entitlement to rule over a distinct territory. The emerging nation-states of the late seventeenth and early eighteenth centuries started developing structures "to claim to the monopoly of legitimate physical violence within a particular territory."²⁴³ The territory, associated with appropriation and legitimacy,²⁴⁴ became an essential defining feature for the concentration and control of power.

In this section I trace the changing form of governance in the context of the French Revolution, and the changes it instilled in military organisation. The value of examining the governmental and military structures of Revolutionary France lies in attaining another distinct typology of the state-military relationship. Through the liaison between the army and the emerging nation-state I examine the original nature of *levée en masse*, a new form of conscription that pioneered the mass citizen army. The example of the French Revolution highlights the model of an early nation-state, with its legitimacy rooted in a more centralised popular government, and its power drawn from the people, who gradually acquired the status of citizen-soldiers. The normative value of

²⁴⁰ Tilly, *supra*, p. 65.

²⁴¹ Held, *supra*, p. 37.

²⁴² Tilly, C.: *The Formation of National States in Western Europe*, Princeton University Press, Princeton, 1975, p. 19.

²⁴³ Weber, M.: "Politics as a Vocation" in *The Vocation Lectures*, Hackett Publishing Company, Cambridge, 2004, p. 33.

²⁴⁴ Held, *supra*, p. 37.

this type of governance lies in the regulatory attempt to outlaw foreign soldiers, juxtaposing them against French citizens, bound together by territorial borders and national ideology.

According to Bukovansky, the French Revolution “accelerated the shift in the European states system from the dynastic territorial state to the nation-state as the dominant model of political legitimacy.”²⁴⁵ Change of authority and governmental structure was inevitable when the Third Estate’s deputies transformed themselves on 17 June 1789 into a ‘National Assembly’ against the rule of the two senior orders. Giving the Assembly the power to devise a constitution, “they thereby announced their intention of redefining royal authority in terms of ‘national consent’.”²⁴⁶ The idea of public opinion as a source of legitimacy challenged monarchical rule.²⁴⁷ It also symbolised a loss of power for the *ancien régime*, allowing the revolutionary coalitions to fill the vacuum.²⁴⁸ Centralisation emerged from within the nation as the bourgeois class united and led the people under the idea of popular sovereignty.²⁴⁹ These transformations in state organisation enabled changes to military structure on a national scale. Following the Seven Years War (1754-1763) an increasing warrior sentiment convinced the bourgeoisie and the nobility of the need for a standing army which, according to Bertaud, ought to become national to prevent it becoming an instrument of despotism.²⁵⁰ In practical terms this meant that the legitimacy of dynastic monarchy was (at least in theory) replaced with national institutions of wider popular representation. Previously dictated by wealth and class, professional military careers conflicted

²⁴⁵ Bukovansky, *supra*, p. 165.

²⁴⁶ Jenkins, B.: *Nationalism in France: Class and Nation since 1789*, Routledge, London, 1990, p. 16. This shift was more symbolic than universal, as the nation-state at the period was neither democratic in the contemporary sense, nor had fully rid itself of the class relationships of the *ancien régime*.

²⁴⁷ Bukovansky, *supra*, pp. 182-183; Jenkins, *supra*, p. 19.

²⁴⁸ *Ibid.*, p. 166.

²⁴⁹ IR Literature takes a more refined approach to popular and national sovereignty and often distinguishes between the two. See: Barkin, S. J. and Cronin, B.: “Changing Norms and the Rules of Sovereignty”, *International Organization*, 1994, Vol. 48 (1), pp. 107-130; Hall, R.: *National Collective Identity: Social Constructs and International Systems*, Columbia University Press, New York, 1998; Buchheit, L.: *Secession: The Legitimacy of Self-Determination*, Yale University Press, New Haven, 1978; Hobsbawm, E. J.: *Nations and Nationalism since 1780*, CUP, Cambridge, 1990.

²⁵⁰ Bertaud, J.P.: *The Army of the French Revolution: From Citizen-Soldiers to Instrument of Power*, Princeton University Press, Guilford, 1988, p. 40.

with the concept of equality and inclusion, promoted by the Revolution. As control of the army was transferred from the king to the Assembly, a three-year project of military reorganisation had begun.²⁵¹ By taking control of the funds and the terms of enlistment, defining the budget and duration of service, and having admission based on merit rather than class, the Assembly claimed and established its legitimacy.

The Revolutionary state apparatus used literacy and ideology to drive military conscription and promote the idea of nationalism within the army. Increased literacy improved the technological capacity and therefore the effectiveness of the army, and was conducive to the organisation of a large-scale military through training and education.²⁵² Literacy also made soldiers more susceptible to propaganda, which, inevitably, facilitated the spread of nationalist ideology.²⁵³ Numerous pamphlets exhorted soldiers to protect citizens and to disobey their officers when ordered to oppose the people.²⁵⁴ The revolts soon became frequent and eventually led to the disintegration of the Royal Army in 1790-1791.

A turning point was reached in March 1791 when the contract of enlistment was no longer between two individuals, but between the conscript and the state. This change was especially momentous as it implied stepping away from the notion of the private soldier carried through military history by feudalism. This contract of enlistment asserted the separation between private and public military force, assigning the former an air of mistrust and archaism, and the latter political relevance and strong national principles. Foreigners were disqualified, and the principle of homogeneous national armies, without foreign units or foreign private soldiers, was retained until Napoleon's rule.²⁵⁵

²⁵¹ This covers the period between 1789 and 1792; Bertaud, *supra*, pp. 44-58.

²⁵² Posen, B. R.: "Nationalism, the Mass Army, and Military Power", 1993, Vol. 18, (2), *International Security*, p. 121.

²⁵³ *Ibid.*

²⁵⁴ Bertaud, *supra*, pp. 22-26.

²⁵⁵ Posen, *supra*, p. 100.

The strength of nationalist ideology and its relevance to the army derived from acceptance based on citizenship. All members of the state were considered members of a status-group, as citizens, sharing all the requirements of collective solidarity that implies.²⁵⁶ Besides strengthening the revolutionaries with ideological power, nationalism gave the state an administrative dimension.²⁵⁷ The recognition of territorial sovereignty amplified the reorganisation of the military. Nation-states were now in possession of a defined territory and population which gave natural advantage to populous states such as France and Britain by allowing them to form mass armies from their own citizens.²⁵⁸ Perhaps the citizen armies did not directly arise from nationalism. However, as classes and other actors attained civil and political citizenship, the state became “their” nation-state, an “imagined community” to which they developed loyalties.²⁵⁹

Although the army of Louis XIV included a substantial segment of French citizens, professional armies were predominantly foreign.²⁶⁰ Later, the transformation of the key governmental bodies produced strong national militarism,²⁶¹ leaving little room for private and foreign military recruits. This symbiosis between raising a citizen army in exchange for the promise of equality was critical to the processes of wartime mobilisation.²⁶² The war of 1792 served a unifying purpose, initiating the distinction and separation between national and foreign, which was perceived as a threat to the Republic. When the military was later reorganised, foreign recruits of all ranks faced radical changes. Under the admissions principles of the Legislative Assembly, foreigners were disqualified from joining the army. To ensure reliability, separate legions that also contained foreign recruits were created.²⁶³ Because legions were mistrusted on the basis of

²⁵⁶ Wallerstein, *supra*, p. 145.

²⁵⁷ Feld, *supra*, p. 21.

²⁵⁸ Tilly, *supra*, p. 65.

²⁵⁹ Mann, *supra*, p. 74.

²⁶⁰ In the context of eighteenth-century politics, notions of foreign and mercenary soldiers were interchangeable.

²⁶¹ Schama, S.: *Citizens: A Chronicle in the French Revolution*, Penguin Books, London, 2004, p. 858.

²⁶² Bukovansky, *supra*, p. 209.

²⁶³ Bertaud, *supra*, pp. 74-80.

nationality, an added level of military authority was present between the soldiers of the legions and the army general.

This air of autonomy and the uncertainty surrounding their allegiances made the legions resemble private troops more than a unified national army. Although faced with nationalist controversy, these were used as an instrument of war and to propagate revolutionary ideas amongst foreign populations, where mercenaries were often recruited.²⁶⁴ Foreign military forces, therefore, played an important role in the French Revolution. Formed by the emigrated nobility, these served as a catalyst to popular mobilisation, forming the separation between 'native' and 'alien' while fuelling the nation's drive for self-determination.²⁶⁵ This crystallisation of the notion of a national state and citizenship influenced the norm against the use of foreign mercenaries in France at end of the eighteenth century. The relationship between an early model of a nation-state and a national army, therefore, illustrates another historical typology with a unique normative approach to private force.

La Levée en Masse

With a military policy aimed at transforming a professional army into a national army,²⁶⁶ 1793 saw the introduction of a new ideological military concept of '*levée en masse*', which dramatically altered the scale of land warfare.²⁶⁷ Inspired by the Minister of War, Lazare Carnot, and orchestrated by sans-culottes between 1793 and 1794, the brigade formation process was essential to republicanise the army and make its chiefs respect civil power.²⁶⁸ On 23 August 1793 the Committee of Public Safety ratified the Mobilisation Decree that imposed responsibility on all citizens to protect the French state. The Decree stated:

²⁶⁴ Bertaud, *supra*, p. 74.

²⁶⁵ Jenkins, *supra*, p. 21.

²⁶⁶ Bertaud, *supra*, p. 39.

²⁶⁷ Fitzsimonds, J. R. and Van Tol, J. M.: "Revolutions in Military Affairs", 1994, Spring Issue, *The Joint Force Quarterly*, p. 25.

²⁶⁸ Bertaud, *supra*, p. 89.

all Frenchmen are in permanent requisition for the services of the armies. The young men shall fight; the married men shall forge arms and transport provisions; the women shall make tents and clothes and shall serve in the hospitals; the children shall turn old lint into linen; the old men shall betake themselves to the public squares in order to arouse the courage of the warriors and preach hatred of kings and the unity of the Republic.²⁶⁹

Popular sovereignty was henceforth articulated through equality of military recruitment and was reflected in the command system of a diversified national army. "The combination of the first waves of volunteers and the first conscripts produced an army that was by 1794 representative of the society as a whole."²⁷⁰ All single men aged between 18 and 25 were required to join military forces, therefore expanding the French army to over one and a half million soldiers by 1794. Used as a measure of internal security, the *levée en masse* united the nation and afforded the French supremacy in combat.²⁷¹ While many scholars associate national conscription with democratic governance and republican values,²⁷² the army was born out of necessity and desperation, as much as ideology.²⁷³ It is important to note that French republican rhetoric about the spiritual bond between nation and army was more conceptual than practical. Philip Bobbit makes a distinction between the "state-nation" of Revolutionary France, where the people of all classes are put at the service of the idea of the nation, and the much later "nation-state", where the state is put at the service of the people.²⁷⁴ However, the example of Revolutionary France carries normative value. This type of military conscription was unprecedented in modern history; it also contributed to the formation of a national identity. At the same time, the concept of citizenship and the three pillars of liberty, equality, and fraternity fostered and shaped the new mass army. A modern state with its defined territory and population provided the necessary political infrastructure to implement such numerically

²⁶⁹ Mobilisation Decree, Article 1; Parliamentary Archives 1787-1860.

²⁷⁰ Posen, *supra*, p. 94.

²⁷¹ Lytle, S.: "Robespierre, Danton, and the Levée en Masse", 1958, Vol. 30 (4), *The Journal of Modern History*, p. 331.

²⁷² Rothenberg, G. E.: "Soldiers and the Revolution: The French Army, Society, and the State, 1788-99", 1989, Vol. 32 (4), *The Historical Journal*, pp. 983; see also Posen and Bertaud.

²⁷³ Forrest, A.: "L'Armée de L'an II: La Levée en Masse et la Création d'un Mythe Républicain", 2004, Vol. 335 (1), *Annales Historiques de la Révolution Française*, p.112.

²⁷⁴ Bobbit, P.: *The Shield of Achilles: War, Peace and the Course of History*, Penguin Books, London, 2002.

immense armies that it was neither necessary nor economically viable to hire mercenaries. The unifying ideology of nationalism introduced republican practices to the European political landscape. It also reinforced the importance of citizen military duty, opposing it to the immorality of mercenary forces. This particular version of modernity, with national militarism at its core, was imitated by other European powers, turning the idea of national mass army into a norm desired by many states.

Part 4: The British Empire and the East India Company

Contrary to the military struggles between the European dynasties or nation-states, the conflict paradigm of colonial expansion was an asymmetric encounter between a sovereign European state and what was perceived as an amorphous, ‘uncivilized’ entity. Given the lack of military organisation on the part of the non-European states, and in the absence of any legal limitations for states to wage war, seventeenth-century European empires expanded by conquering large parts of Asia and Africa.²⁷⁵ European empires were better equipped to obtain collective wealth and security than others because they possessed greater “capacity and legitimacy”.²⁷⁶ While military and administrative power was real, imperialist legitimacy was built upon Eurocentric, orientalist projections of European sovereignty.²⁷⁷ Rather than rooted in dynasty, divine laws, or republican values, the legitimacy of an empire was based on an assumed cultural superiority and military strength.

²⁷⁵ Anghie, A.: “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law”, 1999, Vol. 40 (1), *Harvard International Law Journal*, p. 51.

²⁷⁶ Avant, D.: *The Market for Force: The Consequences of Privatising Security*, 2005, CUP, Cambridge, p. 24.

²⁷⁷ On legal orientalism and European cultural prejudice: Ruskola, T.: “Legal Orientalism”, 2002, Vol. 101 (1), *Michigan Law Review*, pp. 179-234; Gadamer, H. G.: *Truth and Method*, 2nd rev. edition, Continuum, London, 2004; Nunn, K.: “Law as a Eurocentric Enterprise”, 1997, Vol. 15, *Law and Inequality*, pp. 323-372; Cohn, B. S.: *Colonialism and its Forms of Knowledge: the British in India*, Princeton University Press, Princeton, 1996; see also: Omissi, *supra*, p. 2; Mann, 2012, *supra*, p. 33.

Born out of the industrialisation of war, the second British Empire was a classic example of Western imperialism with a huge and well organised armed force at its disposal.²⁷⁸ Exercising an ‘informal empire’ on the Indian subcontinent until 1858, it allowed its peripheral rulers to retain formal sovereignty while significantly constraining their autonomy by intimidation through military and economic power.²⁷⁹ Enforcement posed no real difficulties as European military strength and organisation prevailed.²⁸⁰ In the case of imperial Britain, both coercion and military superiority were combined to create ostensibly legal instruments.²⁸¹

This example highlights a model of an outsourced governance which is diametrically opposed to the previously explored example of a nation-state. In order to explore the governmental construct of the British Empire in India, I analyse the state administration, financial, and legal paradigms that were deeply immersed in military practices. Then, through the lens of power and legitimacy, I examine the army of the East India Company (EIC). By considering its composition, role within the Empire, and its relationship with the sovereign, I consider if such a colonial army should be deemed a public or a private force. The historical example of the British EIC and its colonial army illustrates the legal gaps in the classification and organisation of military power. It highlights the importance of PMC and mercenary regulation, and mirrors some of the contemporary state behaviours in their attempts to bypass the law through outsourcing military functions to a private company.

The East India Company and its Accession to Power

Founded in 1600, the EIC was run by a court of twenty-four directors. With its key focus on competitive trade, by the first half of the eighteenth century the Company had achieved the status of a respectable commercial body, connected with London City banking and the Stock

²⁷⁸ Held, McGrew et al., *supra*, p. 94.

²⁷⁹ Mann, 2012, *supra*, p. 18.

²⁸⁰ Anghie, *supra*, p. 33; Omissi, *supra*, p. 3.

²⁸¹ Anghie, *supra*, p. 41.

Exchange.²⁸² While originally the EIC had a pacifist outlook and was mainly preoccupied with commerce,²⁸³ the Anglo-French struggles of the early to mid-eighteenth century were an important factor in the Company's territorial expansion and assertion of governing power in India.²⁸⁴

With the power of the Mughal dynasty²⁸⁵ dominating throughout the sixteenth and seventeenth centuries, the Indian Empire was the second greatest power in the East, after China.²⁸⁶ Whether Britain's accession to power in India was made possible by fractions in the Mughal rule,²⁸⁷ Hindu-Muslim tensions,²⁸⁸ or due to the emergence of a new political order in eighteenth-century India,²⁸⁹ the British seized the opportunity to insert a much stronger authority, built on trade, a strong industrial, financial, military basis, and an effective organisation of local resources. The needs of Indian rulers for cash and troops met British ambitions to play a political role as bankers and military commanders.²⁹⁰

When in 1757 Robert Clive²⁹¹ brought Bengal, Bihar, and Orissa under the protectorate of the Company, its servants were granted possession of vast territories, authority over about twenty million people, as well as access to three million pound sterling in revenues.²⁹² In the south, the British occupation created a new state; whereas in Bengal, the Company operated within an

²⁸² Fieldhouse, *supra*, p. 140. General literature on the EIC: Philips, C. H.: *The East India Company 1784-1834*, Manchester University Press, Manchester, 1961; Gardner, B.: *The East India Company: A History*, Granada Publishing Limited, London, 1971; Bowen, H. V.: *The Business of Empire: The East India Company and Imperial Britain, 1756-1833*, CUP, Cambridge, 2006; Keay, J.: *The Honourable Company. A History of the English East India Company*, Harper Collins, London, 1993.

²⁸³ Ferro, *supra*, p. 55.

²⁸⁴ Fieldhouse, D. K.: *The Colonial Empires: A Comparative Survey from the Eighteenth Century*, Weidenfeld and Nicolson, London, 1966, pp. 166-167.

²⁸⁵ Also known as Mogul.

²⁸⁶ Fieldhouse, *supra*, p. 162.

²⁸⁷ *Ibid.*

²⁸⁸ Spear, *supra*, p. 186.

²⁸⁹ Marshall, 1998, *supra*, p. 493; Fieldhouse, *supra*, p. 163.

²⁹⁰ Marshall, 1998, *supra*, p. 497.

²⁹¹ Also known as Clive of India, a British officer who established military and political supremacy of the EIC in Bengal.

²⁹² Marshall, *supra*, p. 492; Washbrook, *supra*, p. 399.

existing state, dealing directly with the local power.²⁹³ Local customs were respected as the EIC focused on economic rather than cultural imperialism. Just like the Indian states, the British Empire in India was built on the taxation levied on the cultivators of the land.²⁹⁴ A dynamic private sector bound the Indians and the British through active trade and the voluntary subordination of wealthy Indian merchants to the Europeans in exchange for security and stable commerce. The Company achieved its sovereign status by penetrating beneath the surface and building up its strength not on commerce alone. It used the local resources – popular, administrative, and military – to establish its rule and, thereafter, to expand it while retaining formal control of the territory.²⁹⁵ Legitimacy had to be established in order for the EIC to claim power over the new territories; it materialised following the India Act of 1784²⁹⁶ introducing the rule of the law in the English Presidencies. After becoming administrators of Indian law, the British presided over courts in which issues of rights to land and distribution of revenue were decided.²⁹⁷

The EIC also held control over military resources, although these were not under the direct rule of the British Empire. They were privately managed, locally sourced, and funded by the profits of the Company: taxes raised through Indian administrative systems or bribes received directly from Indian aristocrats.²⁹⁸ However, in military and administrative practice, just like in trade, local traditions had to be respected if the Company was to stand a chance of establishing its authority. The common denominator amongst administrative, financial, and legal functions was

²⁹³ Spear, *supra*, p. 194.

²⁹⁴ Marshall, *supra*, p. 504.

²⁹⁵ Fieldhouse, *supra*, p. 164.

²⁹⁶ Implemented in India after 1786 by the reforming Governor-General Lord Cornwallis; Ray, R. K.: "Indian Society and the Establishment of British Supremacy, 1765-1818" in Marshall, P. J. (ed.): *The Oxford History of the British Empire: The Eighteenth Century*, OUP, Oxford, 1998, pp. 520-521.

²⁹⁷ Marshall, *supra*, p. 504.

²⁹⁸ Indians who hired Company troops had to pay the Company, and reward the officers privately.

the ever-growing role and presence of the military apparatus, rooted at the core of the state and the society.²⁹⁹

The Army of the East India Company

The eighteenth century marked a shift in the Great Power struggles, from European issues to markets and territories that ranged across the globe.³⁰⁰ Administration of vast overseas territories was highly expensive and deeply impractical, unless “use was made, wherever possible, of existing political structures and resources.”³⁰¹ In order to save costs and minimise the use of British soldiers, the EIC chose to obtain its military manpower from local sources.³⁰² The indigenous population, although lacking the training and unity of a professional army, came at a much lower cost than British soldiers. Following the French, who piloted sepoy³⁰³ conscription, the British raised their own local forces, grouping them into battalions in Bengal and Madras by the late 1750s.³⁰⁴ Unlike the French, who used coercion as a method of enlistment, the British offered voluntary service, which was an accepted norm by this time for free-born Britons.³⁰⁵ For the sepoys, paid voluntary service was a more attractive alternative to the French compulsory conscription. To make the enlistment contract between the soldier and the Company more lasting, as well as to attract recruits and to purchase their quiescence during service, British policymakers deployed material incentives.³⁰⁶

Until the European invasions, Indian military culture was predominantly feudal in nature, with private mercenaries serving a different warlord based on pay and opportunity. French and

²⁹⁹ From the mid-1820s the government of India maintained “sixteen European regiments of the line as well as a permanent standing army of 170 sepoy regiments, totalling 235,000 men.” Washbrook, *supra*, p. 402.

³⁰⁰ Kennedy, P.: *The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500-2000*, Fontana Press, London, 1989, p. 195.

³⁰¹ Held, McGrew et al., *supra*, p. 41.

³⁰² Kiernan, 1998, *supra*, p. 16.

³⁰³ From the Persian *sipahi*, ‘soldier’, Omissi, *supra*, p. 3.

³⁰⁴ Ibid.

³⁰⁵ Kiernan, 1998, *supra*, p. 16.

³⁰⁶ Omissi, *supra*, p. 48.

British imperialists introduced a very effective mechanism that gave the sepoys a military framework and a sense of job security, while simultaneously ensuring a constant supply of military manpower. This European pseudo-standing army created a real sentiment of fraternity by offering the sepoys discipline, uniforms, and a regular pay that also guaranteed their loyalty to the Company. Furthermore, the use of more advanced firearms made the sepoys stronger and more effective than any local opposition.³⁰⁷ Equality ended there, as no sepoy, however long his service tenure, could ever rise above the rank of 'native officer'.³⁰⁸ In addition to the Royal Navy, which had long been an inherent source of power, the Company's forces in India added a significant new element to Britain's military capacity, a major land-based army,³⁰⁹ making it a source of British imperial expansion.³¹⁰ The size of the sepoy infantry force, and the Company's ability to mobilize a flow of resources, were key to its subsequent military success.³¹¹

While gradually becoming the central infrastructure of the British Indian state, and an unparalleled regional military force, the army of the EIC had a complex constitution, full of contradiction and inequality. The British Army in India predominantly consisted of volunteers who were not citizens.³¹² While expected to fight and die for the Empire, they did not qualify as citizens in the French revolutionary or modern sense of that term.³¹³ The army was composed of at least three different elements: the centralised monarchical army, the national army, and the mercenary army.³¹⁴ Although controlled by a national command, John Company's European forces consisted largely of non-nationals. Even those sepoys recruited locally were not necessarily subjects of the British Empire. For example, starting from 1820s, the region of

³⁰⁷ Spear, P.: *India: A Modern History*, University of Michigan Press, New York, 1961, p. 191.

³⁰⁸ Kiernan, 1998, *supra*, p. 26.

³⁰⁹ Washbrook, *supra*, p. 401.

³¹⁰ Marshall, 1998, *supra*, p. 491.

³¹¹ Barua, *supra*, p. 600; Ray, *supra*, p. 517.

³¹² Arielli, N. & Collins, B. (eds): *Transnational Soldiers: Foreign Military Enlistment in the Modern Era*, Palgrave Macmillan, Basingstoke, 2013, p. 5.

³¹³ *Ibid.*, p. 7; there was no concept of a 'British Citizen' until the 1948 British Nationality Act. Until that point both UK and colonial residents shared the same national identity as British subjects. After 1948 they all became citizens of the UK and colonies, and this wasn't differentiated until 1981.

³¹⁴ Barua, *supra*, p. 614.

Oudh³¹⁵ was an important source for the recruitment of Indian sepoys; however, it did not become part of British India until 1856.³¹⁶

At this time, while most armies and some navies still contained elements of international 'service' and mercenary nobility,³¹⁷ standing armies were beginning to prevail across European nation-states and empires. However, there was one more, little known, yet extraordinary element to the EIC army which puts in question its status as a public military force. In 1781 the EIC hired two Hanoverian regiments.³¹⁸ These German auxiliary troops were hired out by a prince to the British, amongst other imperial powers, under a subsidy treaty stipulating the number of troops, the term of service, the geographical area in which they were to be deployed, and the missions they could be used for, in return for financial and political benefits.³¹⁹ The presence of auxiliary troops, although regulated, brings another mercenary dimension to the composition of the Company's army.³²⁰ After the official transfer of India's political authority to Queen Victoria on 2 August 1858³²¹ and the dissolution of the Company in 1874 by an Act of Parliament,³²² the Company's European regiments, including the battalions raised during the Great Mutiny,³²³ were transferred to the British Army. The local units, with all ranks predominantly taken by Indians, were consolidated into an Indian Army under the power of the

³¹⁵ Also known as Awadh.

³¹⁶ Arielli, *supra*, p. 5.

³¹⁷ Mann, 1993, *supra*, p. 420.

³¹⁸ Tzoref-Ashkenazi, C.: "German Auxiliary Troops in British and Dutch East India Companies" in Arielli, N. and Collins, B. (eds): *Transnational Soldiers: Foreign Military Enlistment in the Modern Era*, Palgrave Macmillan, Basingstoke, 2013, pp. 32-33.

³¹⁹ Ibid., p. 32; see also Kiernan, 1998, *supra*, p. 16.

³²⁰ A large part of the Loyalist army in the North American revolution was comprised of Hanoverian and Hessian units.

³²¹ Reid, S.: *Armies of the East India Company 1750-1850*, Osprey Publishing, Oxford, 2009, p. 12.

³²² <http://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-empire/parliament-and-the-american-colonies-before-1765/east-india-company-and-raj-1785-1858/>.

³²³ Further literature on the Great Mutiny: Spear, *supra*, Chapter 14, pp. 264-273; Callahan, R.: "The Great Sepoy Mutiny" in Marston, D. P. and Sundaram, C. S. (eds): *A Military History of India and South Asia: From the East India Company to the Nuclear Era*, Indiana University Press, Bloomington, 2008, pp. 16-34; Gardner, B.: *The East India Company: A History*, Granada Publishing Limited, London, 1971, pp. 255-288; Naidis, M.: *The Second British empire 1783-1965: A Short History*, Addison-Wesley Publishing Company, London, 1970, pp. 75-78.

Queen.³²⁴ The main change, driven by the transfer of authority, was a separation between government and the military, subordinating the latter to the former.³²⁵ While this change had gradually taken place, the army remained a dominant consideration of future imperial policy.

Was the Army of the EIC Private or Public?

Though at home the British military had moved away from the use of foreign, private, or irregular forces, the EIC army was often referred to as mercenary. Formed of colonial subjects and two German auxiliary regiments, the enlisted soldiers fought for pay, and not to selflessly defend the Raj.³²⁶ The concepts of mercenaries and a colonial army were purposefully separated by the layers of imperial and orientalist logic to manage British public opinion at home whilst successfully pursuing colonial goals abroad. A similar approach is often deployed today by states using PMCs as part of their foreign policy. In addition to the existing types of military, mercenaries, and citizen armies, the logic of imperialism included a new, legally undefined military force: imperial troops.³²⁷ Whether perceived as a public force, controlled by the sovereign, or a private force outsourced by the Empire, either choice opens up a debate on accountability and the ownership of colonial military power. Quasi-state-owned, the colonial troops existed under imperial rule and the extended sovereign capacity of the hegemon. The empire had broadened the scope of its power to incorporate new territories and the resources that came with it. The British Empire could, therefore, be perceived to have retained the formal control of the use of force within the territory.³²⁸

However, accountability and effective control would lie with the Company for two key reasons. Firstly, India was ruled directly by a small number of the Company's servants, who were heavily

³²⁴ Reid, *supra*, p. 13.

³²⁵ Washbrook, *supra*, p. 419.

³²⁶ Omissi, *supra*, p. 47.

³²⁷ Owens, *supra*, pp. 25-26.

³²⁸ White, N. and MacLeod, S.: "EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility", 2008, Vol. 19 (5), *The European Journal of International Law*, p. 969.

reliant on the local political and administrative structures and a locally raised Indian army. Secondly, it was controlled indirectly, through Indian princes, treaties, troops, and resident advisers (the source of *de facto* authority). In effect, until sovereign power was officially transferred to the Crown in 1858 after the Great Mutiny, the British Indian army, alongside the administration of British India itself, was fully governed by a private company. It was a classic case of ‘sub-imperialism’, whereby local interests dominated over metropolitan ones.³²⁹ The source of authority was determined by men actually in India, as opposed to Company directors in London or, even less so, in Parliament. And while Parliament repeatedly insisted that the state had a right “to interpose its authority” on the Company,³³⁰ it could not achieve the same level of influence. Furthermore, the legal status of the Company’s possessions had not been clarified, and while numerous assertions of the state’s right to Indian revenues had been made by ministers, these had not been supported in law or statute.³³¹ In the absence of clear regulation concerning the use of colonial troops, the line between public and private tends to be blurred. The example of the EIC army is a testament to this ongoing issue. The areas where charter companies took on military functions fell outside the established order of the European state system.³³² Therefore, while the Western hemisphere was consciously building national armies and moving away from mercenaries, colonial troops could easily be deployed due to an existent legal loophole.

Part 5: Normative Approaches to Mercenaries

Throughout modern history, foreign forces of one kind or another have been deployed by the great ruling powers.³³³ Tracing various forms of private military forces through the lens of shifting conflict paradigms demonstrates a political predisposition towards regulation. By

³²⁹ Marshall, *supra*, pp. 498-499.

³³⁰ Sir William Meredith, 10 May 1773, *Parliamentary History*, xvii, p. 803 in Marshall, 1987, *supra*, 114.

³³¹ Bowen, *supra*, p. 537.

³³² Singer, *supra*, p. 35.

³³³ Kiernan, V. G.: *Colonial Empires and Armies, 1815-1960*, Sutton Publishing Ltd, Stroud, 1998, p. 16.

exploring historical patterns of the use of private force, I have illustrated different normative stances in favour and against mercenaries, depending on a particular form of governance. Such a method of historical typology is crucial for analysing the effectiveness and applicability of contemporary attempts to regulate PMCs. Having distinguished several forms of governance in the period between the fourteenth and the nineteenth centuries, we observe considerable differences in sovereign and organisational structures, highlighting the importance of understanding historical variability. Bringing together these patterns of governance allows us to trace normative approaches to public and private military power.

The shifts in the use and regulation of mercenaries can be observed in the changing modes of governance, from Machiavellian republicanism, to growing centralisation and the professional armies of absolute monarchies. Similar republican and later national visions are endorsed in Revolutionary and republican France where foreign soldiers were gradually ruled out as the antithesis of the republic and the national army. While a norm in Western nation-states, this was contrasted with the imperial practice of the East India Company and its use of foreign colonial troops overseas. Selected examples were chosen to demonstrate contrasting approaches to mercenaries that existed in the same historical period but that were distinct in terms of types of governance. Machiavelli's perception of mercenaries was defined by the questions of ethics, morality, and republicanism. Juxtaposing an army fighting for their own country and a mercenary who is hired to further someone else's political interests, Machiavelli deemed soldiers for hire useless, lacking commitment and a motive strong enough to make them faithful and devoted.³³⁴ It is important to draw a distinction in Machiavelli's perception of mercenaries, as he seems to reject the use of foreign mercenaries on one hand, and applaud the structural integrity of sixteenth-century English armed forces on the other. It is understood that the 'foreign' aspect of mercenaries is not concerned with the composition of the troops, as

³³⁴ Machiavelli, "The Discourses", *supra*, p. 140. As demonstrated in *Chapter 1*, motivation is a parameter that continues to dominate contemporary definitions of mercenaries.

at the time it would be irrelevant in the absence of national borders and the contemporary notion of citizenship. Instead, it relates to the origin of the troops supplied to a king, whether they were locally sourced or sent from abroad. What Machiavelli seems to object to is the cross-border trading of military force as commodity, which demoralises the value of the state and endangers citizen security. 'Good laws' needed to lay ground for 'good armies',³³⁵ and so Machiavelli's response to military corruption came in the shape of civilian militia, based on the citizen's right and responsibility to protect their own state, and the privilege they have of doing so.³³⁶ Contrasting the widely deployed military strategies of Western Europe, Machiavelli's militia was an ideological attempt not fit for its time and, most importantly, for the international state system at the time. Only the horizontal growth of the government could foster an environment favourable to conceive and propel the establishment of a permanent standing army. The difference with the military development of progressive absolutist states, such as Holland or Sweden, was their capacity to train and sustain their own officers, rendering the commanding layer of the army if not 'national', at least domestic.

By the end of the sixteenth century the majority of armies and navies of Western Europe had become royal. This was effectively the first step to them becoming national. Keeping an army embodied all year round, as opposed to disbanding for the winter, laid the foundations for the modern standing army. However, the roots of this trend were military and financial, rather than political or constitutional; the shift towards standing armies was a tactical choice.³³⁷ Nonetheless, this change brought states and their rulers one step closer to realising the importance of a permanent state army. Although Ralston implies there were elements of abnegation and even selflessness in the way an organised infantry force operated,³³⁸ there

³³⁵ Mallett, M.: "The Theory and Practice of Warfare in Machiavelli's Republic" in Bock, G. et al. (eds): *Machiavelli and Republicanism*, CUP, Cambridge, 1990, p. 179.

³³⁶ Machiavelli, "The Prince", *supra*, p. 46.

³³⁷ Roberts, *supra*, p. 201.

³³⁸ Ralston, *supra*, p. 3.

appears to be little evidence to suggest that absolutist states eschewed the use of mercenaries for ethical reasons. Monarchs were quite reluctant to arm civilians due to fear of uprisings, intentionally demilitarising the nobility in the effort to subordinate rivals and achieve a greater degree of centralisation.

In seventeenth-century Europe the shifting conflict paradigm was described in the context of the rapid expansion in the scale of war, while the rise of the modern state was marked by a change in military organisation. Instead of using ad hoc mercenaries, the majority of European states gradually integrated them into their own professional armies. Military expansion began to overshadow the forces and the weaponry available to any private local competitors.³³⁹ Practicing military skill as a mass discipline eradicated the need for narrow specialisation, such as English longbow-men, Swiss pikemen, or Spanish men-at-arms.³⁴⁰ The increasing amplitude of war, powered by the absolutist state, directed the armed forces towards mass production by increasing the military productivity of a state. It reshaped the state structure by establishing an administrative system within a more centralised state apparatus. While in the context of absolutism, foreign and mercenary soldiers were more positively associated with the professional army, the foreign soldiers of Revolutionary France and later the French republican army were perceived as a threat to the republic and an unwelcome trespasser on the preserves of the national army. The new legitimating principle was the “people” or the “nation”.³⁴¹ Revolutionary mobilisation introduced the trend of the mass citizen army and accelerated the decline of foreign and mercenary troops. Revolutionary France retained some existing normative angles, previously observed in republican thought; it also introduced new ones, making a comprehensive statement against the use of mercenaries. The common ground that prevails both in Machiavellian thought and in revolutionary pamphlets, also featuring in the

³³⁹ Tilly, *supra*, p. 69.

³⁴⁰ Feld, *supra*, p. 19.

³⁴¹ Mann, *supra*, p. 200.

American Revolution,³⁴² was the element of the citizen-soldier that was borrowed from antiquity in an attempt to revive the power of the ancient Roman army. The idea of soldiers who are first and foremost citizens, participating in projects of national significance, contributing to the development of the infrastructure, and raising the moral value of military status, was actively promoted in Servan's *Le Soldat-Citoyen*.³⁴³ At the same time, Rousseau praised citizen armies while consistently denouncing professional and mercenary armies.³⁴⁴ According to Rousseau's *Social Contract*,³⁴⁵ every citizen should be a soldier by duty, and not by trade. Other professional officers, such as Comte de Guibert, shared the idea of a national army, condemning the armies composed of mercenaries, foreigners, and vagabonds.³⁴⁶

Another norm, previously seen in Machiavelli's republican aspirations, was the idea of a citizen militia as a measure against mercenarism. Unlike in fifteenth-century Italian cities which predominantly relied on foreign mercenaries, the militia was an established concept in France. Some officers, like the Chevalier de Pommelles, studied ways to develop the militia into a system of conscription, while the bourgeoisie considered the transformation of the militia into a national army as "the best guarantee for the community as a whole against the 'mercenary' menace."³⁴⁷ The rising nation-state with its "revitalised concept of citizen warfare"³⁴⁸ created a new set of anti-mercenary norms. Key changes to military organisation, such as relative democratisation in terms of pay and admission by merit, were born out of the struggle for control of the army by the changing revolutionary leaders.³⁴⁹ It must be said that these changes,

³⁴² Literature linking the French and American Revolutions: Dull, J. R.: *The French Navy and American Independence: A Study of Arms and Diplomacy, 1774-1787*, Princeton University Press, Princeton, 1975; Bukovansky, M.: *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture*, Princeton University Press, Woodstock, 2002.

³⁴³ Bertaud, *supra*, p. 43.

³⁴⁴ Gourevitch, V. (ed.): *Rousseau: The Social Contract and Other Later Political Writings*, CUP, Cambridge, 1997, p. 294.

³⁴⁵ Rousseau, J. J.: *The Social Contract*, Hafner Press, New York, 1947.

³⁴⁶ Bertaud, *supra*, p. 41.

³⁴⁷ Ibid.

³⁴⁸ Bukovansky, *supra*, p. 204.

³⁴⁹ Bertaud, *supra*, p. 83.

although significant for their time, were not universal, and the army was far from democratised. Although born from popular, street level agitation, the French Revolution was essentially a bourgeois revolution. Despite the ideology of popular sovereignty, the citizen army was still officered by the middle classes. Nevertheless, with the crystallisation of territorial sovereignty, the national citizen army started to become the new norm. In the meantime, legions that contained foreign recruits and were more autonomous in their structure were seen as the antithesis of the Republic.

The rise of new forms of governance created a new set of anti-mercenary norms. The normative approach to mercenaries and foreign troops following the French Revolution was different to the economic limitations posed by absolutism, and not fully in line with the purely republican ideology promoted by Machiavelli. Not only were mercenaries imposing on already stretched state budgets and undermining the moral value of citizen-soldiers, they were now opposing a notion of territorial sovereignty that did not exist in Italian city-republics or any other previous form of government. With the crystallisation of the concept of the nation-state, standing armies flourished and grew in strength and size. The new political relationship between citizens and the state meant that citizens were perceived as representatives of their home country. As citizen armies became the new norm, states also began to pass neutrality laws, which prohibited their citizens' enlistment in foreign armies. The overseas empires followed a different normative logic to Westphalian Europe. In the latter half of the nineteenth century the great powers preferred to reserve the national population for domestic use, as the main military focus on the continent turned to building mass national armies.³⁵⁰ For Barkawi this combination of the institution of neutrality and the essentials of nation-state building meant that mercenarism declined as an

³⁵⁰ Thompson, J. E.: *Mercenaries, Pirates and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe*, Princeton University Press, Chichester, 1994, p. 96.

institution.³⁵¹ At the same time, colonial armies fostered the spread of the empires and made their existence possible, providing a lucrative, effective, and accessible substitute for foreign mercenaries. According to Owens, the incorporation of imperial soldiers into armies and private trading companies is explained by the normative shift away from mercenaries and private armies.³⁵² A similar argument is promoted by Percy,³⁵³ although the example of the East India Company's army illustrates a different side to this trend, rooted in a specific mode of governance.

In a time when "war and the military were central to state leadership and foreign policy",³⁵⁴ the British Empire was outsourcing administrative and military authority to a trading organisation. One possible explanation lies in the limited knowledge the British Parliament had of India and its population. Meanwhile, EIC servants understood and did not interfere in the local culture, granting the Company its prevalent authority. To a great extent, the EIC had a firm hold on local infrastructure, building connections that were fruitful for themselves as well as the Empire. Hence, at first, there was no advantage in disturbing the successful management of affairs. Another explanation can be found in the negative perception of colonialism and the government's desire to further distance imperial expansion from domestic affairs.³⁵⁵ The belligerent and subjugating image of the Second British Empire went against the norms of liberty and law, established in the Metropole. The structure of imperial governance was handled at arm's length. By creating a buffer of supposed legitimacy between 'virtuous' Britain and the 'backward' colonial regime, it removed direct responsibility from the Crown.

³⁵¹ Barkawi, T.: "State and Armed Force in International Context" in Colas, A. and Mabey, B. (eds): *Mercenaries, Pirates, Bandits and Empires: Private Violence in Historical Context*, Hurst & Company, London, 2010, p. 38.

³⁵² Owens, P.: "Distinctions, Distinctions: 'Public' and 'Private' Force?" in Colas and Mabey (eds), *supra*, p. 27.

³⁵³ Percy, *supra*, pp. 121-122.

³⁵⁴ Mann, 1993, *supra*, p. 413.

³⁵⁵ Armitage, D.: *The Ideological Origins of the British Empire*, CUP, Cambridge, 2000, p. 3.

To compare the two modes of governance further, power in imperial Britain was not centralised and rationalised in the manner of the post-Revolutionary France; instead it was diffused and conflicted. Even at the height of imperialism, England was liberal in its approach to conscription, unlike the French monarchy. The constant conflict between Parliament and the Indian administrators, who were often censured for despotism, highlights the lack of true centralisation of power and legitimacy across the British Empire. It was a combination of competing authorities, unresolved conflict, and innovation. In India, there was no central police force, no central administration of the military, no constitution, nor obedient judiciary.

As demonstrated in the EIC example, power, right up until the mid-nineteenth century, was scattered across the Empire rather than concentrated in any central state. Eighteenth-century imperialism presented an element of 'extra-territorial' sovereignty, which significantly increased the EIC's military and economic power on the Indian sub-continent as well as in Europe. The sepoy army was at the core of British imperial expansion as it helped to establish and secure Britain's dominance of the rich and lucrative Indian subcontinent. Later, under the direct rule of the Crown, it featured prominently in both World Wars, successfully fighting for the Empire. A legal and normative paradox, this is simply one historical example that demonstrates states' methods of removing responsibility in the pursuit of their sovereign needs through alternative means.

Conclusion

Different governmental formations resorted to different types of military forces, forming broad historical patterns. The overall conclusion that can be drawn from the typologies discussed in this chapter is that more centralised states that consolidate their administrative and legal apparatuses are more likely to also be in greater control of the army, and where possible incorporate or eliminate any private or irregular soldiers. In Western absolute monarchies, mercenaries were a means to an end; their military skills were used to fortify the army,

incorporating professional soldiers into the core regiments. Nation-states also shared the anti-mercenary stance, often invoking the republican ideals of antiquity, as voiced by Machiavelli. On the other hand, the context of colonial history alludes to a broader geo-political conditionality that played a significant role in the new military configuration. This conditionality arises from the availability of disposable cost-effective colonial resources. In addition, the brutal and legally dubious nature of colonialism makes it problematic to consider the move away from mercenaries to be a norm, driven by ethics and republican values in the case of overseas empires.

Some historical accounts³⁵⁶ view the use of colonial armies as the sovereign's choice of military power. While Britain may have ceased hiring private mercenary companies for its own national army after the Crimean War (1853-1856),³⁵⁷ it fielded hundreds of thousands of foreign soldiers before and after 1858 in the form of colonial armies and auxiliary troops.³⁵⁸ In reality, there may not have been a conscious shift away from the use of mercenary or private forces; the lack of regulation and the novelty of colonial armies was a lucrative ground for raising a cost-effective mass army through the legitimate use of non-national forces. British colonialism in India provided the context for a new, unclassified type of military force. Thompson calls it 'extraterritorial violence',³⁵⁹ referring to foreign military manpower, as well as the existence of private military forces of various kinds, such as those employed by the great trading companies of the early period of European expansion. The question of codification is both relevant and important and I examine it more fundamentally in chapters 4 and 5, where I focus on contemporary regulation of private military companies.

³⁵⁶ Fieldhouse, *supra*; Kiernan, *supra*; White and MacLeod, *supra*.

³⁵⁷ Percy, *supra*, p. 148.

³⁵⁸ Barkawi, *supra*, p. 40.

³⁵⁹ Thompson, *supra*, p. 37.

While the institutionalisation of the national army created a strong rationale against the use of mercenaries and foreign legions, colonial encounters introduced European powers to a brand-new pool of unclassified military resources. Neither mercenary, nor national, these forces formed an integral part of colonial armies, raising questions about their legitimacy and highlighting the disparity between public and private in the military context. Moreover, the outsourcing of military functions to a private body is a tactic states continue to use to this day in order to economise, or to evade responsibility, thus transforming the East India Company “from an historical curiosity into a highly relevant case study.”³⁶⁰

³⁶⁰ *The Economist*, 17 December 2011, available at <http://www.economist.com/node/21541753>.

Chapter 3

World Wars, Cold War, and Decolonisation

Having considered a historical account of normative approaches to private and foreign armies in different forms of governance, I now commence my legal analysis of the use and regulation of mercenaries in the twentieth century. Following a brief analysis of the forms of military power prevailing in the first half of twentieth century, this chapter focuses on the role of mercenaries in the new type of conflicts that arose after the end of the Second World War. It identifies the laws that effectuate the control of mercenary activities in the context of decolonisation and the Cold War. Finally, the chapter examines the ability of IL to formulate norms relating to the use of mercenaries, and explores some of the challenges that state practice has posed to this process.

The twentieth century saw a wide array of norms and stances on the use of mercenary forces. At the start of the century mercenaries were considered a taboo. In the 1990s there were fifty military personnel for every one contractor; now the ratio is ten to one.³⁶¹ In less than a hundred years the military landscape has transformed from national citizen armies into an unregulated market for force, with private contractors filling a variety of security and military roles across borders. IL responded to this change with a number of treaties and conventions aimed at defining and regulating mercenary activity. This chapter evaluates the legal norms by scrutinising customary IL and state practice, along with the key international legal documents that include The Hague Convention V (1907), 1977 Additional Protocol I (AP) to Article 47 of the Geneva Convention (1949), the Organisation of African Unity (OAU) Convention for the

³⁶¹ Singer, P. W.: *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, 2004; Avant, D.: "The Privatisation of Security and Change in the Control of Force", 2004, Vol. 5, *International Studies Perspectives*, pp. 153-157.

Elimination of Mercenaries in Africa (1972), and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989), as well as various General Assembly (GA) Resolutions.

These international legal treaties are examined in the context of the changing nature of war in the twentieth century. Through the imperial practices of decolonisation and proxy warfare I trace the attempts of IL to address the issues of mercenarism and private warfare. It is important to understand the changing nature of war across different times, as it has direct influence on the legal approach to the problem. During the Cold War, most academic and legal contributions were based on the paradigm of internationalised internal armed conflict by proxy.³⁶² After 1990, ethnic and secessionist conflicts prevailed, marking a shift in international regulation, which I discuss in *Chapter 4*. The correlation between conflict paradigm and regulatory approach can also be observed in the legal documentation whereby the former ordains the latter.³⁶³

This chapter provides a socio-historical explanation of how private forces re-emerged in the international arena following the noticeable normative shift away from the use of mercenaries in the preceding centuries, and particularly in the first half of twentieth century. The chapter offers normative conclusions that explain the juxtaposition between the anti-mercenary norms, codified in various international legal provisions following the post-colonial activism of African states, and what can be viewed as US enthusiasm to place military contractors at the centre of their recent and current foreign policy, coupled with the ambiguity of IL. Most importantly, it considers the position of IL in relation to mercenaries in the twentieth century and analyses attempts to regulate private forces.

³⁶² Nolte, G.: "Intervention by Invitation", *Max Planck Encyclopedia of Public International Law*, 2010, Oxford Public International Law at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL>.

³⁶³ The norms of non-intervention were reinforced at the end of WW2, for example, while the definition of mercenaries was solidified in the AP I in 1977 as a result of wars of national liberation in the Third World.

I approach this question in three sections. First, I introduce the political and regulatory principle of non-intervention. Arising from the end of the nineteenth century and reinforced as a result of two World Wars, this norm prevailed until the 1960s. The military context of the Cold War shifted conflicts to the Global South,³⁶⁴ and introduced mercenary troops into the military conduct of these tensions. I consider the processes of decolonisation and the wars of national liberation that shaped the issue in two ways. First, national tensions meant the wars were internal rather than between states. Second, the lack of strong national armies created demand for military force, which often meant welcoming foreign involvement. Between 1945 and 1990 the overwhelming majority of wars were fought by proxy rather than directly between the US and the Soviet Union, marking another change in conflict paradigm. While proxy warfare poses multiple challenges to IL, I focus on two most relevant to the overall argument, namely state intervention by invitation, and the use of mercenaries in the process. Through empirical examples of proxy wars in the Congo and Angola I provide the ground for the legal analysis in the final part of the chapter.

By considering relevant treaty law, state practice and the International Court of Justice (ICJ) case of *Nicaragua*, I analyse the international regulation of mercenaries during the period of the Cold War. I examine the efforts of Central African states that were directly manifested in the creation of the OAU Convention for the Elimination of Mercenaries in Africa and, indirectly, in the AP I to the Geneva Conventions, also considering other legal attempts to codify and regulate private military activity in the context of decolonisation and proxy warfare. From the state practice perspective, I examine in what way twentieth century international legal provisions allowed for pro-mercenary norms to arise, introducing the war in Vietnam as a contributing factor. Finally, I

³⁶⁴ The term 'Third World' will be used in this chapter when referring to the Global South in the context of the Cold War.

analyse the position of IL on the *Nicaragua case* in the context of the use of mercenaries and state responsibility.

Part 1: The Rise of International Legal Norms

The first half of the twentieth century saw the pinnacle of the centralisation of military power and economic resources within the state, and a significant drop in mercenary activity. Enabled by developments in infrastructure and logistics, the two World Wars (1914-1918 and 1939-1945) introduced the notion of 'total war', a term describing extreme mobilisation and targeting of national economies and populations.³⁶⁵ While World War I was orchestrated by the elite, it was executed by the masses:³⁶⁶ first drawing the numbers from volunteers and, by 1916, through conscription to compensate for a decline in volunteering.³⁶⁷ The science and technology behind total warfare were key, and states were happy to invest in these new progressive and lethal developments.³⁶⁸ Submarines, fighter planes, artillery shells, and tanks all contributed to the totality of the Great War. A mature level of industrialisation meant that around 60 million men were mobilised into the armed forces, and kept in the field all year round,³⁶⁹ leaving little opportunity or need for mercenary forces.³⁷⁰

In a similar way, the total nature of World War II, with peoples, technology, and all imaginable resources centralised in the hands of the state, left almost no room for mercenary units. Citizenship and national allegiance played an important role, further emphasising the norm against the use of private military forces, while existing colonial troops served to close any military gaps across empires. The scope and scale of these wars eliminated any opening for

³⁶⁵ Mann, 2012, *supra*, p. 153.

³⁶⁶ For more detail on soldier motivation, see: Audoin-Rouzeau, S. and Becker, A.: *14-18: Understanding the Great War*, Hill & Wang, New York, 2000.

³⁶⁷ Mann, 2012, *supra*, p. 145.

³⁶⁸ *Ibid.*, p. 142.

³⁶⁹ *Ibid.*, pp. 140-141.

³⁷⁰ Britain and France continued to deploy huge hired armies of colonial subjects in the conflict.

mercenaries, with the exception of small groups of dispersed private soldiers,³⁷¹ as states obtained a monopoly on violence and refused to share it with the private sector. According to Tilly, “the [build-up] of big navies and expensive, nationally-recruited standing armies, furthermore, entailed the disarmament of civilian populations, which reduced the prevalence of small-scale private warfare.”³⁷² The Gurkhas were the most significant example of and the closest thing to a mercenary force experienced during the WW2 period.³⁷³ In contemporary international legal terms, Gurkhas would not fall under the mercenary category, as they were always recruited as members of the armed forces of a party to a conflict.³⁷⁴ Nonetheless, a quarter of a million professional Gurkha soldiers served in World War II in almost all theatres.³⁷⁵ The American Volunteer Group, more widely known as the ‘Flying Tigers’, were a three-unit force of fighter pilots who were contracted to fight with the Chinese against the Japanese during World War II.³⁷⁶ This private military force had a short lifespan of only two years, before being officially disbanded in July 1942. Some soldiers later returned to serve in the military for the remainder of the war.³⁷⁷

Besides the drastic changes in the global political layout and major military advances brought about by the World Wars and imperial expansion, the end of the ‘long nineteenth century’ marked the start of the universalisation of IL.³⁷⁸ The international legal system that emerged in its current form at the beginning of twentieth century built its foundation upon the rules of sovereign equality of states and against imperialist violations. From the late nineteenth century

³⁷¹ McFate, S.: *The Modern Mercenary: Private Armies and What They Mean for the World Order*, OUP, Oxford, 2014, p. 20.

³⁷² Tilly, C.: “War and State Power”, 1991, Vol. 171, *Middle East Report*, p. 38.

³⁷³ On Gurkhas see: Cross, J. P. and Gurung, B. (eds): *Gurkhas at War: Eyewitness Accounts from World War II to Iraq*, Greenbill Books, London, 2007; Birch, G.: “Gurkha Tales: From Peace and War, 1945-2011”, 2013, Vol. 44 (3), *Asian Affairs*, pp. 490-492.

³⁷⁴ AP I, art. 47, para. 2(e).

³⁷⁵ <http://www.ayo-gorkhali.org/en/timeline/soldiers-of-empire/1939-45-world-war-ii>.

³⁷⁶ Toland, J.: *The Flying Tigers*, Laurel Leaf Books, Random House LLC, 1963.

³⁷⁷ <http://www.history.com/news/history-lists/6-legendary-mercenary-armies-from-history>.

³⁷⁸ Anghie, A.: “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law”, 1999, Vol. 40 (1), *Harvard International Law Journal*, p. 1.

and until 1945, international regulation of mercenaries was conducted largely through the development of the law of neutrality.³⁷⁹ In 1907 the European colonial powers rejected a German proposal for a total ban on the service of foreigners in national militaries. Instead they opted merely to require neutral states to prevent commercial recruiting on their territory.³⁸⁰ The International Committee of the Red Cross emphasises that neutral states have the right “to stand apart from and not be adversely affected by the conflict” and duties of “non-participation and impartiality.”³⁸¹ If a state allowed the recruitment or enlistment of mercenaries on its national territory, it was considered to be in support of the belligerent.³⁸²

Although no definition of mercenaries was formulated at the time, two provisions relating to the recruitment and procurement of mercenaries were included in the 1907 Hague Convention. Article 4 states that “Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.”³⁸³ The provisions are very clear in drawing the line on state responsibility. A state was not required to regulate their nationals if they wished to offer their military services to a third party state during a conflict and was, therefore, not accountable for individual outsourcing of mercenaries.³⁸⁴ As a consequence of the two World Wars, the laws of neutrality lost much of their former importance, and were superseded by the League of Nations and the United Nations, prohibiting the resort to war.³⁸⁵ In addition, lessons were learned that urged the international community to outlaw extreme

³⁷⁹ Kinsey, C.: “International Law and the Control of Mercenaries and Private Military Companies”, *Cultures & Conflicts* [online], English documents, available online from 26 June 2008, p. 3, available at: <http://conflicts.revues.org/11502>.

³⁸⁰ Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention No V), 18 October 1907, 1 Bevans 654-658, Art. 4.

³⁸¹ ICRC, The Law of Armed Conflict. Neutrality, available at: https://www.icrc.org/eng/assets/files/other/law8_final.pdf.

³⁸² Kinsey, *supra*, p. 3.

³⁸³ Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907; Chapter I: The Rights and Duties of Neutral Powers, Art. 4.

³⁸⁴ *Ibid.*, Art. 6.

³⁸⁵ ICRC, available at: <https://www.icrc.org/ihl/INTRO/200?OpenDocument>.

use of force in favour of the growing interdependence and cooperation of states, rather than reliance on the raw balance of power.³⁸⁶

Non-Intervention as an International Legal Norm

Based on the Westphalian tradition, non-intervention and the sovereign equality of states have been at the core of accepted international conduct.³⁸⁷ The principles of non-intervention are largely focused on diplomacy, as opposed to coercion, as an acceptable method of state influence in international relations. The Montevideo Convention of 1933 fortified the definition of a state as an actor of IL with a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.³⁸⁸ Furthermore, Article 8 of the Convention affirmed that “no state has the right to intervene in the internal or external affairs of another.”³⁸⁹ The UN GA Declaration on the Inadmissibility of Intervention (1965)³⁹⁰ advocated by Latin American countries and the Soviet bloc, and the Friendly Relations Declaration (1970),³⁹¹ reinforced the principle of non-intervention and the inadmissibility of foreign troops by invitation of a government.

The following years saw a number of significant regulatory endeavours in the realm of non-

³⁸⁶ Held and McGrew, *supra*, p. 62.

³⁸⁷ Holsti, K. J.: *International Politics: A Framework for Analysis*, Prentice-Hall International Editions, Englewood Cliffs, 1988, p. 81; Funston, J.: *ASEAN and the Principle of Non-Intervention: Practice and Prospects*, Institute of Southeast Asian Studies, Singapore, 2000, p. 1.

³⁸⁸ Montevideo Convention on the Rights and Duties of States, Uruguay, December 26, 1933, Art. 1, available at: <http://www.cfr.org/sovereignty/montevideo-convention-rights-duties-states/p15897>.

³⁸⁹ *Ibid.*, Art. 8.

³⁹⁰ See: *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, 1966, Vol. 60 (3), *The American Journal of International Law*, pp. 662-664; Paul, C.: “Humanitarian Interventions and the Limits of Sovereignty”, 1996, Vol. 10 (2), *Public Affairs Quarterly*, pp. 103-119; Levin, D.: “The Non-interference Principle Today”, 1966, Vol. 12 (11), *International Affairs*, pp. 21-25.

³⁹¹ See: Rosenstock, R.: “The Declaration of Principles of International Law Concerning Friendly Relations: A Survey”, 1971, Vol. 65 (5), *American Journal of International Law*, pp. 713-735; M. Sahovic (ed.), *Principles of International Law Concerning Friendly Relations and Cooperation*, Oceana Publications, New York, 1972; Arangio-Ruiz, G.: “The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations”, 1972, Vol. 137 *Collected Courses*, pp. 419-742; Keller, H: “Friendly Relations Declaration” in Wolfrum, R. (ed.): *Max Planck Encyclopaedia of Public International Law*, 2008 (online ed.).

intervention. It was declared as one of the principles guiding relations between states in the 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe.³⁹² The 1976 Declaration on Non-interference³⁹³ was wider than the Friendly Relations Declaration, as it denounced any form of interference, overt or covert, including the use of mercenary forces.³⁹⁴ The Declaration also laid out a clearer exception for acts committed in pursuance of the right of self-determination.³⁹⁵ Supported by the non-aligned states and the Soviet bloc, the 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States was adopted by 102 votes to 22. The Declaration attempted to define the scope of intervention in more detail than previous resolutions, representing a very broad concept of non-interference that is not in line with the accepted understanding of reality of customary IL.³⁹⁶

Since 1957 about thirty-five UN Resolutions have been adopted by the GA with a particular focus on intervention and interference.³⁹⁷ This increased legal activity, deriving from different sources of law, is a clear indication of the efforts by the international community to reinforce and solidify the norm of non-intervention, covering a variety of scopes and avenues. State practice, however, indicates that the principle of non-intervention does not prohibit certain limited operations of foreign troops at the invitation of a government. In other cases, state practice demonstrated, although covertly, a different kind of intervention, an illegitimate intervention by invitation of the opposition.

Part 2: Decolonisation and Proxy Warfare

Historically, the concept of sovereignty has been closely associated not only with the state, but with the practice of imperial expansion, and little changed immediately after the end of the

³⁹² 1975 Helsinki Final Act, Art. 1 (a), Principle VI Non-intervention in internal affairs.

³⁹³ UNGA 92; A/RES/31/91.

³⁹⁴ Ibid., 31/91, Art. 3.

³⁹⁵ Ibid., 31/92, Art. 2; Jamnejad, M. and Wood, M.: "The Principle of Non-Intervention", 2009, Vol. 22 (2), *Leiden Journal of International Law*, p. 355.

³⁹⁶ Jamnejad and Wood, *supra*, p. 355.

³⁹⁷ Ibid., p. 350.

Second World War.³⁹⁸ According to Michael Mann: “Nation-states, many of them embodying greater citizen rights, were established almost everywhere around Europe, but the overseas empires remained.”³⁹⁹

This chapter does not intend to retell the history of decolonisation, nor is it possible or appropriate to identify all of its causes and effects. Instead, it provides the historical and political context of state behaviour that either directly encouraged the immediate use, or created a plausible environment for the long-term spread of private military forces. One such example derives from the struggle between the newly decolonised states, their former empires, and the two superpowers. The end of the Second World War brought significant demilitarisation which, in theory, ought to signify a post-war pacifist outlook. The US Army land and air forces began partial demobilisation of its approximately 8,290,000 soldiers on 12 May 1945⁴⁰⁰ and by the end of 1948 had trimmed the army to about one-sixteenth of its original size.⁴⁰¹ Since 1945 the ‘Long Peace’ resulted in a significant reduction of war between the Western states. It did, however, also see a significant rise of military activity throughout the rest of the world.⁴⁰²

Article 2(4) of the UN Charter prohibited states from resorting to threat or use of force in their international relations. The change in conflict paradigm that we observe post-1945 is that most conflicts were either internal or carried out by proxy, such as civil wars and wars of national liberation. This marked a shift from large scale international wars to ‘border actions’,⁴⁰³ though these were no less vicious or brutal. After 1945 civil wars became more frequent, as two or more parties within the same state acquired military capacity in order to pursue state power.⁴⁰⁴

³⁹⁸ Duncanson, I.: “Law as Conversation” in *International Law and its Others* (ed. Orford, A.), CUP, Cambridge, 2006, p. 57.

³⁹⁹ Mann, 2012, *supra*, p. 165.

⁴⁰⁰ Sparrow, J. C.: *History of Personnel Demobilization in the United States Army*, The Free Press, New York, 1984, p. 21.

⁴⁰¹ McCormick, D.: *The Downsized Warrior*, New York University Press, New York, 1998, p. 10.

⁴⁰² Tilly, C.: “War and State Power”, 1991, Vol. 171, *Middle East Report*, p. 38.

⁴⁰³ Gray, *supra*, p. 51.

⁴⁰⁴ Tilly, 1991, *supra*, p. 39.

Aggressive nationalism, seen throughout the WW2, lived on as a consequence of the war, even more so than its cause.⁴⁰⁵

Some other factors contributed to placing the armed conflict at the core of decolonisation. Regardless of the extent of authority allowed for local governing groups, colonies were run by European imperialists. Force, rather than consent, was at the root of colonial administration.⁴⁰⁶ The main transfers of power from colonial to indigenous rule took place during the first two decades of the Cold War, varying from simple and quick withdrawals in some cases, to prolonged bloody wars of liberation, as a general rule. Nationalism in the new emerging states was ideological, strong, and dynamic, unrestrained by any local administrative or industrial mechanisms. Often deriving from poverty and intensified by the colonial past, radicalisation was an inherent part of the post-colonial Third World. Since empires regularly attempted to retain some of their key investments even after decolonisation, especially in the exploitation of raw materials, the new nations understood the importance of state building and prioritised its implementation.⁴⁰⁷

Institutions and procedures, inherited from the colonial era, prevailed in the new states after independence, often with a functioning indigenous administrative system that predated the empire, such as in India or in Nigeria.⁴⁰⁸ Despite these governmental legacies, the former colonies found themselves in a hollow, often corrupt shell of a state, striving to recuperate decades of political and economic development. Having fought their way out from empire, they were left to be constantly looking over their shoulder in the fear of colonial return or internal disintegration due to corruption and ethnic tensions. The extension of a Western-dominated state system with its European-style armies and constitutions to the Third World encouraged

⁴⁰⁵ Mann, 2012, *supra*, p. 165.

⁴⁰⁶ Westad, *supra*, p. 76.

⁴⁰⁷ *Ibid.*, p. 90.

⁴⁰⁸ *Ibid.*

and fuelled the spread of violence, authoritarian regimes, and military autonomy.⁴⁰⁹ Decolonisation, in the broader rhetoric of the Cold War, therefore, contributed to the militarisation of the Third World not only strategically, by treating the newly emerging territories as the battlefield of the two superpowers, but also tactically, by establishing the supply of weapons and manpower from the West to the rest of the world. Military enablement was especially prominent in those countries that supplied valuable commodities such as oil.⁴¹⁰

Former colonies transitioned from imperial rule into a world ideologically partitioned by two new dominating superpowers. Both the US and the Soviets were actively pursuing newly liberated states through a different kind of imperialism. While not claiming the territories, they managed to dictate all other aspects of state governance with a very limited, and often forced, choice of either communism or capitalism. On the receiving end, there were the Third World states, often fighting wars of national liberation. Embedded in the wider context of the Cold War, these were tactically executed through proxies. Prevalent for over half a century, this mode of warfare played a crucial role in the militarisation of the Third World, and, ultimately, the re-emergence of private military forces in the international arena. In 1964 the political scientist Karl Deutsch termed proxy wars as:

an international conflict between two foreign powers, fought out on the soil of a third country; disguised as a conflict over an internal issue of that country; and using some of that country's manpower, resources and territory as a means for achieving preponderantly foreign goals and foreign strategies.⁴¹¹

Deeming Deutsch's definition too state-centric, Mumford defines proxy wars as "conflicts in which a third party intervenes indirectly in order to influence the strategic outcome in favour of its preferred faction."⁴¹² Mumford's definition does not exclude the role of non-state actors,

⁴⁰⁹ Tilly, 1991, *supra*, p. 38.

⁴¹⁰ *Ibid.*, p. 39.

⁴¹¹ Deutsch, K. W.: "External Involvement in Internal War", in Eckstein, H. (ed.): *Internal War, Problems and Approaches*, New York, Free Press of Glencoe, 1964.

⁴¹² Mumford, A.: "Proxy Warfare and the Future of Conflict" 2013, Vol. 158 (2), *The RUSI Journal*, p. 40.

such as insurgent groups, and broadens the term beyond ideological motivation.⁴¹³ He claims that the definition here of 'proxy warfare' rests on an underlying principle of *indirect* engagement, whereby State A uses proxies in State B to conduct 'subversive operations' on its behalf.⁴¹⁴ During the Cold War indirect belligerency was important in the context of the nuclear arms race to ensure that a 'hot war' between the two superpowers could be avoided.⁴¹⁵ Although proxy warfare did not rely solely on private military groups, it followed the same transactional model of demand and supply of military power, characteristic of mercenarism. The difference being, in this scenario, the financial incentive was replaced or supplemented with political alliance and a very loose concept of protection. This increases the risks associated with managing the relationship between the benefactor and the proxy, a relationship that once again resembles that of a hiring state and a contracting party. The aid to Third World countries was provided with strings attached, often creating an environment where the recipient had little authority.⁴¹⁶

While political reasons for frequent intervention were rooted in assumed responsibility for global world order,⁴¹⁷ the legal arguments only went as far as 'self-defence' and 'intervention by invitation', since ideology had not been ratified as a valid motive for intervention. For the duration of the Cold War, American foreign policy was based on pre-emptive interventions in the Third World on ideological grounds, against Soviet Union-influenced left-wing movements, and vice-versa. On one hand, the provision of armaments and military advisers made it easier for the superpowers to distance themselves from some types of limited war. On the other hand, the development of permanent military alliances and of military bases in affiliated territories

⁴¹³ Mumford, *supra*, p.40.

⁴¹⁴ Ibid.

⁴¹⁵ Towle, P.: "The Strategy of War by Proxy" 1981, Vol. 126 (1), *The RUSI Journal*, p. 21.

⁴¹⁶ Westad, *supra*, p. 96.

⁴¹⁷ See Zubok, V. M.: *A Failed Empire: The Soviet Union in the Cold War from Stalin to Gorbachev*, The University of North Carolina Press, 2009, p. 248.

made it much more likely for states to get involved if their allies came under attack.⁴¹⁸ All of these aspects fuelled global belligerency, unfolding extreme militarism across Latin America, the Middle East, Africa, and Asia.

Mercenary Forces in the Congo and Angola

In order to comprehend the scale of the Cold War and the mercenary activity that supplied the means of proxy warfare, I consider some examples of CIA-organised operations that included the financing, training, and provision of mercenary troops. The purpose of these empirical examples is to raise questions of legitimacy in outsourced nation-building⁴¹⁹ and to demonstrate the increasing mercenary presence in the military landscape of the Cold War. These questions contribute to an understanding of how and in what way IL attempted to address the use of mercenaries in the second half of twentieth century.

Starting from the early 1960s, mercenaries were a prominent tool of Congolese internal policy.⁴²⁰ One of the first and most notorious instances of mercenary deployment was by Moïse Tshombe's secessionist government in the province of Katanga.⁴²¹ During the Congolese Civil War the CIA established an army in the Congo to back pro-Western leaders Cyrille Adoula and Joseph-Desiré Mobutu. On 24 November 1964 five hundred Belgian paratroopers were airlifted into the city, diverting from a much more extensive US-backed military operation against the rebels, executed by European mercenaries and Cuban pilots who were funded and organised by the CIA.⁴²² George Godley, the US ambassador to the Democratic Republic of the Congo and

⁴¹⁸ Towle, P.: "The strategy of war by proxy", 1981, Vol. 126 (1), *The RUSI Journal*, p. 21.

⁴¹⁹ McCormick, *supra*, p. 120.

⁴²⁰ Hempstone, G.: *Rebels, Mercenaries and Dividends: The Katanga Story*, Preager, New York, 1962; Clarke, S. J. G.: *The Congo Mercenary: A History and Analysis*, The South African Institute of International Affairs, Johannesburg, 1968; Mockler, A.: *The Mercenaries: The Men who fought for Profit – from the Free Companies of Feudal France to the White Adventurers in the Congo*, Macmillan, London, 1969, pp. 155-171.

⁴²¹ Taulbee, J. L.: "Myths, Mercenaries and Contemporary International Law", 1985, Vol. 15, *California Western International Law Journal*, p. 341.

⁴²² Westad, *supra*, p. 136.

later ambassador to Laos, spoke openly about US involvement in the 'nation-building' of Congo, which included dependency on Western mercenaries to pacify the population.⁴²³ The Mobutu dictatorship was reinstated under the pretext of modernisation and elimination of future insurgency.⁴²⁴ The Mobutu government had also been known to hire mercenaries to suppress further revolts in Katanga.⁴²⁵ When the Congo was renamed Zaire between 1971 and 1997, about three hundred Chinese instructors served with the National Front for the Liberation of Angola and were joined by fifty contracted military personnel from Romania and North Korea.⁴²⁶ The purpose and use of mercenaries in the Congo stretched from supporting secessionist movements, to being hired by the government to combat extremist groups, to opposing the government itself.⁴²⁷ The short few decades of Congolese independence were mutilated by various mercenary groups, hired by conflicting political factions, intervening and shaping state politics.

In 1975, after years of bloody fighting and civil unrest in Angola, Portugal finally let go of its last African colony. The transition to a new government was to take place on 11 November 1976 with three political factions competing for control of the country. These were the pro-communist Popular Movement for the Liberation of Angola (MPLA), and two pro-Western organisations, Holden Roberto's National Front for the Liberation of Angola (FNLA) and Jonas Savimbi's National Union for the Total Independence of Angola (UNITA). Beyond the ideological rivalry with the Soviet Union, Angola had little importance to questions of US national security, and its economic significance did not exceed the small amounts of petroleum extracted from the Cabindan fields and the coffee export to the American markets.⁴²⁸ However, not only did the Soviet and US governments operate on Angolan territory through mercenary troops, UNITA

⁴²³ Ambassador Godley to State, 30 October 1965, DDRS.

⁴²⁴ Westad, *supra*, p. 143.

⁴²⁵ Clarke, *supra*, p. 68.

⁴²⁶ Westad, *supra*, p. 227.

⁴²⁷ Taulbee, *supra*, p. 341.

⁴²⁸ Stockwell, *supra*, p. 43.

troops were trained and led by South African and Portuguese military teams, as well as various mercenary groups.⁴²⁹

In September 1976 the first South African training camp was operational inside Angola.⁴³⁰ Over three months the CIA was allocated almost \$50 million in total to be used to train, equip, and transport anti-MPLA troops.⁴³¹ The bulk of the money was spent on arms and on paying French and South African mercenaries to help organise the Angolan troops, especially those of the FNLA.⁴³² While ten thousand organised Cuban regular army troops were fighting on the MPLA side, mercenaries were instrumental in the military performance of the FNLA and UNITA. The CIA decided to recruit twenty Frenchmen to work directly with Bob Denard,⁴³³ famous for his mercenary activity in the Congo, and three hundred Portuguese mercenaries. While the Portuguese were already being recruited in small numbers by the FNLA, Colonel Castro, and Captain Bento,⁴³⁴ the latter had never materialised for Operation Savannah. The third mercenary force, involving around 160 British and American venturers, was organised and financed by Holden Roberto, allegedly also from CIA funds.⁴³⁵ The lack of sponsors and of cooperation from Congress ironically turned out to be a winning combination that limited the scope of escalation in Angola, therefore preventing another Vietnam.⁴³⁶ It did, however, introduce an unregulated market for force, exacerbating the security problems in the region.

These are only a few examples. Both sides had relentlessly raised, trained, and sponsored third party military troops, which were often radical and contentious, to pursue their political goals, disregarding the sovereign borders and political integrity of the Third World states they

⁴²⁹ Marcum, J. A.: "Lessons of Angola", 1976, Vol 54 (3), *Foreign Affairs*, p. 417.

⁴³⁰ Westad, *supra*, p. 230.

⁴³¹ *Ibid.*, p. 228.

⁴³² Stockwell, J.: *In Search of Enemies: A CIA Story*, André Deutsch, London, 1978, pp. 40-57.

⁴³³ The French intelligence service introduced CIA case officers to Bob Denard, and for \$500,000 cash – paid in advance – he agreed to provide twenty French mercenaries; Westad, *supra*, p. 228.

⁴³⁴ *Ibid.*, p. 228.

⁴³⁵ Marcum, *supra*, p. 419; Stockwell, *supra*, pp. 223-224; Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries, Cmnd. 6569, 1976, London, p. 1.

⁴³⁶ Stockwell, *supra*, p. 217.

operated in. Other examples include: Nationalist Chinese troops in Burma,⁴³⁷ Sumatran Rebels in Indonesia,⁴³⁸ Khamba horsemen,⁴³⁹ the Cuban Bay of Pigs Invasion Force,⁴⁴⁰ Meo tribesmen of *L'Armée Clandestine*,⁴⁴¹ the Ukrainian Insurgent Army,⁴⁴² the Afghan Mujahedin,⁴⁴³ El Salvador death squads,⁴⁴⁴ and the Haitian National Intelligence Service.⁴⁴⁵

Decline of Non-Interventionism

While decolonisation marked the liberation of new sovereign states from imperial rule, relentless interventions during the Cold War put the relevance of international rules on the use of force into question. I now examine to what extent intervention on political grounds contributed to the decline of sovereignty and, most importantly, the response of IL to these interventions.

The formation of NATO in 1950 ensured continued joint defence preparation, while the presence of foreign troops on the ground reduced each country's military freedom, something that would have been considered an intolerable infringement of state sovereignty a decade earlier.⁴⁴⁶ To those states whose road to independence passed through a 'battlefield', both the US and the Soviet Union were providing vitally important military aid. It was partially through

⁴³⁷ Wise, D. and Ross, T. B.: *The Invisible Government*, Random House, 1964, pp. 84-87.

⁴³⁸ Conboy, K. J. & Morrison, J.: *Feet to the Fire: CIA Covert Operations in Indonesia, 1957-1958*, Naval Institute Press, Annapolis, 1999; Scott, P. D.: "The United States and the Overthrow of Sukarno, 1965-1967", 1985, Vol. 58 (2), *Pacific Affairs*, pp. 239-264; Wise and Ross, *Supra*, pp. 88-94.

⁴³⁹ Blum, W.: *Killing Hope: US Military and CIA Interventions Since World War II*, Zed Books, London, 2003, pp. 21-26.

⁴⁴⁰ McCormick, *supra*, p. 144.

⁴⁴¹ Blum, *supra*, pp. 140-144.

⁴⁴² <http://archive.larouchepac.com/node/29841>.

⁴⁴³ Prados, J.: "Notes on the CIA's Secret War in Afghanistan", 2002, Vol. 89 (2), *The Journal of American History*, pp. 466-471.

⁴⁴⁴ LeoGrande, W. M.: *Our Own Backyard: The United States in Central America, 1977-1992*, The University of North Carolina Press, London, 1998, pp. 149-284; Nairn, A.: "Behind the Death Squads: An exclusive report on the US role in El Salvador's Official Terror", 1984, *The Progressive*, available at <http://www.historyisaweapon.com/defcon1/nairnelsalvadorbtds.html>.

⁴⁴⁵ Weiner, T.: "C.I.A. Formed Haitian Unit Later Tied to Narcotics Trade", November 14, 1993, *The New York Times*, available at <http://www.nytimes.com/1993/11/14/world/cia-formed-haitian-unit-later-tied-to-narcotics-trade.html?pagewanted=all>.

⁴⁴⁶ Towle, *supra*, p. 24.

economic and political dominance and partially by invitation that the framework of the Cold War led to the decline of the concepts of non-interventionism and territorial sovereignty.

At the 1962 UN Committee on Colonial Peoples, the representative for Mali raised a serious concern about the connection between military activities and colonialism, considering the presence of military bases “an impediment to the process of decolonisation” and noting that the “use of force was an inevitable consequence of a military presence.”⁴⁴⁷ While the legal norms of non-intervention were reinforced in numerous UN Resolutions and multilateral treaties, state practice was demonstrating a different trend. Until World War II, the legality of supplying certain types of armaments to belligerents was still sometimes questioned, and it was frequently argued that such sales would almost automatically involve the supplier in the conflict.⁴⁴⁸ However, during the Cold War and afterwards, the Americans and the Soviets supplied the Third World with military training, weapons, and often auxiliary forces, changing the normative approach to military assistance and intervention.⁴⁴⁹

Most commonly, interventions were provoked when the two competing policies were pursued in the same state, triggering indirect US and USSR involvement through proxies. Such foreign policy frameworks, albeit almost always covert, set a precedent for the use of private forces. Moreover, this gradually reintroduced mercenary and private military groups into the security landscape. Intervention by invitation or consent is a significant limitation to the principle of state sovereignty, introduced during the Cold War. Chapter V of the International Law Commission describes eight different circumstances that can be considered as precluding the wrongfulness

⁴⁴⁷ Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 640th Meeting, 30 September 1968, *AJAC.109JSR.640*, p. 16.

⁴⁴⁸ See: Borchard, E. and Lage, W. P.: *Neutrality for the United States*, Yale University Press, New Haven, 1940.

⁴⁴⁹ Towle, *supra*, p. 22.

of state intervention.⁴⁵⁰ Consent, covered in Article 20, is arguably the most relevant condition for post-1945 interventions, as it reflects the conflict paradigm of proxy warfare. According to Article 20, valid state consent precludes the wrongfulness of an act by another state.⁴⁵¹ While such codification does not allow for unlimited state intervention, it marks the weakening of the norm of non-intervention, opening it up to political interpretation.⁴⁵² The weakening notion of territorial sovereignty laid the premise for indirect state intervention and ‘arms-length’ politics, allowing the superpowers to establish an interventionist policy with a global reach.⁴⁵³ Mercenaries became the most widely used tool for covert operations in proxy warfare. Their return had a particularly negative impact in the wars of national liberation, signalling the need for an international legal response to regulate these forces that were often perceived as a sign of neo-colonialism by the newly liberated nations.

Part 3: International Legal Response to the Use of Irregular Forces

1. Anti-Mercenary Norms

While anti-mercenary norms prevailed amongst states of the Western hemisphere during the World Wars, the same rules rarely applied to the Third World and the wars of decolonisation. Soldiers of fortune played a prominent, controversial, and often disreputable role in the wars in Africa during the first few decades of the Cold War.⁴⁵⁴ This is why it is not surprising that anti-mercenary norms were particularly prominent amongst the African countries: “this is based partly on the experience of the 60s and 70s when, starting with the Congo, mercenaries were

⁴⁵⁰ Also see: Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Part 1: Internationally Wrongful Act of a State, pp. 32-86.

⁴⁵¹ International Law Commission: *Responsibility of States for Internationally Wrongful Acts 2001*, Art. 20.

⁴⁵² The opposition cannot legitimately invite a foreign state to intervene, but this rationale was frequently overlooked during the Cold War.

⁴⁵³ Westad, *supra*, p. 130.

⁴⁵⁴ Axelrod, A.: *Mercenaries: A Guide to Private Armies and Private Military Companies*, SAGE Publications, London, 2014, p. 187.

associated with instability and secessionist movements.”⁴⁵⁵ The rise of new, independent Third World states began to change the role of the United Nations. The five-year conflict over the decolonisation of the Congo was a testament to the changing role of the UN from a tool of US foreign interventions into a more diverse forum, bringing together the non-aligned countries, less susceptible to American influence than before.⁴⁵⁶

The newly decolonised states urgently turned to the UN, the OAU, and other multilateral treaty-negotiating fora, with the goal of developing and implementing norms to limit the use of mercenaries.⁴⁵⁷ Commercial military activity was deemed to violate the right to self-determination, and, therefore, ought to be prohibited. According to Christine Gray, in the making of international regulations concerning the use of force, consensus between states can only be reached “at the price of ambiguity”.⁴⁵⁸ This explains some of the generalisation, or on the contrary, the need to meet all of the specific criteria, leaving room for political interpretation and avoidance. The Declaration on the Granting of Independence to Colonial Peoples of 1960⁴⁵⁹ was the first significant GA resolution to mark the legitimacy of decolonisation. However, it made no mention of regulation of force by national liberation movements.⁴⁶⁰ In 1965 the UN passed a Declaration on the Inadmissibility of Intervention,⁴⁶¹ whereby it explicitly implemented a wording appropriate for the context of the Cold War. The Declaration prohibited direct or indirect intervention, legally covering the threat of proxies.⁴⁶² Although it does not reference mercenarism, it instructs states to refrain from organising, assisting, or financing terrorist or

⁴⁵⁵ Foreign and Commonwealth Office: *HC 577 Private Military Companies: Options for Regulation 2001-02*, The Stationery Office, London, 2002, p. 14.

⁴⁵⁶ Westad, *supra*, p. 136.

⁴⁵⁷ Avant, *supra*, p. 201.

⁴⁵⁸ Gray, *supra*, p.46.

⁴⁵⁹ Declaration on the Granting of Independence to Colonial Countries and Peoples, Adopted by General Assembly resolution 1514 (XV) of 14 December 1960.

⁴⁶⁰ Gray, C.: *International Law and the Use of Force*, OUP, Oxford, 2000, p. 45.

⁴⁶¹ *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc.A/6014 (1965).

⁴⁶² *Ibid.*, Art. 1.

armed activities directed towards the violent overthrow of the regime of another state.⁴⁶³ The 1968 UN GA Resolution 2465 Article 8 condemned the use of mercenaries against movements for national liberation and independence, and called upon “the Governments of all countries to enact legislation declaring the recruitment, financing and training of mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries.”⁴⁶⁴

The 1970 resolution on the Legal Status of the Combatants fighting against colonialism⁴⁶⁵ was a step towards a more formal codification of mercenaries. In the context of wars of national liberation, the resolution considered the use of mercenaries by colonial and racist regimes to be a criminal act, and mercenaries themselves to be criminals.⁴⁶⁶ The resolution did not provide any further guidelines for regulation, and left this matter to the legal and political interpretation of national courts. The 1970 Friendly Relations Declaration followed the same approach, condemning intervention and emphasising state duty to refrain from organising irregular forces, including mercenaries, for incursion into the territory of another state.⁴⁶⁷ All efforts were drawn towards regulating and outlawing mercenary activity in Africa and the rest of the Third World. In 1972 the first definition of mercenaries was formulated in the OAU Convention, while the Diplock Report was published in 1976 following British involvement in Angola, signalling governments’ awareness of the issue and the need for new legislation.

⁴⁶³ Ibid., Art. 2.

⁴⁶⁴ Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 2465, 23rd Session, 1968, Art. 8, available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/244/25/IMG/NR024425.pdf?OpenElement>.

⁴⁶⁵ Preceded by The General Assembly “Reaffirming the declarations made in General Assembly resolutions 2548 (XXIV) of December 1969 and 2708 (XXV) of December 1970 that the practice of using mercenaries against national liberation movements in the colonial Territories constitutes a criminal act.”

⁴⁶⁶ Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes, General Assembly Resolution 3103, 1970, Art. 5; Taulbee J. L.: “Myths, Mercenaries and Contemporary International Law”, 1985, Vol. 15 (2) *California Western International Law Journal America: California Western School of Law*, p. 346.

⁴⁶⁷ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR 25th Sess., Supp. No. 18, U.N. Doc. A/8018 (1970), Art. 1.

The non-aligned countries repeatedly denounced foreign mercenary activities in the Third World during this period. Their criticism was heard at the Diplomatic Conference on Humanitarian Law, held in Geneva from 1974 to 1977. Arguing to deprive mercenaries of any legal protection, they were able to force regulatory change, despite the objections raised by other states.⁴⁶⁸ As a result, in 1977 AP I was established, defining mercenaries in Article 47 and, in theory, excluding them from combatant and prisoner of war status upon capture.⁴⁶⁹ Furthermore, since 1987 the Commission approved a special *rapporteur* to monitor the alleged use of mercenaries in contemporary conflicts on the African continent.⁴⁷⁰ This was a direct result of the concerns raised by the African states based on their detrimental experiences of mercenary involvement since the 1960s.

Codification of the Law Relating to Mercenaries

While there have been several attempts to define the essence of mercenarism,⁴⁷¹ international legal codification of this matter faces significant criticism. What poses a problem is the lack of a universally accepted definition of mercenaries, as the term was stretched from hired individuals, to private security firms contracted by the state, to cross-border troops providing military services.⁴⁷² Nonetheless, the legal status of a mercenary as a non-combatant was formalised under IL, marking an important departure in the norms concerning their use.

⁴⁶⁸ Towle, *supra*, p. 25.

⁴⁶⁹ Colonel Draper, G. I. A. D.: "The new law of armed conflict", 1979, Vol. 124 (3), *Journal of the Royal United Services Institute*, p. 7.

⁴⁷⁰ Glahn, G. V. and Taulbee, J. L.: *Law among Nations: An Introduction to Public International Law*, Routledge, London, 2013, p. 418.

⁴⁷¹ See: Mockler, A.: *The Mercenaries: The Men who fought for Profit – from the Free Companies of Feudal France to the White Adventurers in the Congo*, Macmillan, London, 1969; Cesner, R. E. and Brant, J. W.: "Law of the Mercenary: An International Dilemma", 1977, Vol. 6 (3), *Capital University Law Review*, pp. 339-370; Burmester, H.: "The Recruitment and Use of Mercenaries in Armed Conflict", 1978, Vol. 32 (1), *American Journal of International Law*, pp. 37-56.

⁴⁷² Avant, D.: *The Market for Force: The Consequences of Privatising Security*, 2005, CUP, Cambridge, p. 22.

In 1972 the OAU ratified the Convention for the Elimination of Mercenaries in Africa, containing a definition of mercenaries based on nationality and motive. It was formulated based on the challenges that mercenaries posed for national liberation movements and the sovereign integrity of the newly established African states. Instead of focusing on monetary gain, it identified the aims of a mercenary as being to overthrow a government, undermine independence, and interfere with the liberation movements.⁴⁷³ Despite a clear aversion to mercenaries and the innovative nature of the definition, the OAU Convention did not explicitly forbid the employment of mercenaries.⁴⁷⁴ This formulation aimed to regulate foreign private recruits from Europe and South Africa, leaving non-nationals, employed by a government to defend itself from dissident groups within its own borders, outside of the legislation. This was the case of the Cuban troops that fought for the Popular Movement for the Liberation of Angola (MPLA) during the Angolan civil war.⁴⁷⁵

Nevertheless, the OAU Convention is binding amongst member states,⁴⁷⁶ and its key purpose was to outlaw and eliminate mercenaries who, in the context of national liberation movements in post-colonial Africa, were considered a threat to sovereignty, independence, and development.⁴⁷⁷ In contrast to the 1907 Hague Convention, the OAU Convention called for states to introduce laws forbidding their nationals from engaging in mercenary activities.⁴⁷⁸ This provision invoked state responsibility to both prevent mercenary activity on their territory and to take extraterritorial measures to prevent their citizens from committing any of the offences defined in Article 2. It classified mercenarism and all auxiliary activities, such as training, financing, and recruitment, crimes against peace and security in Africa.⁴⁷⁹ Unlike any previous

⁴⁷³ OAU Convention for the Elimination of Mercenaries in Africa, O.A.U. Doc. CM/433/Rev. L. Annex 1, 1972, Article 1.

⁴⁷⁴ Taulbee, *supra*, p. 347.

⁴⁷⁵ Kinsey, *supra*, p. 4.

⁴⁷⁶ OAU Convention, *supra*, Article 3.

⁴⁷⁷ *Ibid.*, Preamble.

⁴⁷⁸ *Ibid.*, Article 3 (a).

⁴⁷⁹ *Ibid.*, Article 2.

treaties, it explicitly declared the duty of contracting states to impose sanctions for any offences that fell under Article 2 of the Convention.⁴⁸⁰

In 1976, triggered by significant mercenary activity in Angola, Appendix II was added to the OAU Convention. It reinforced the need for codification, and expanded the definition to not only include the actors (mercenaries) but also to extend international legal regulation over the act of mercenarism.⁴⁸¹ The definition was no longer limited to foreign nationals; the crime of mercenarism could now apply to “the individual, group or association, representatives of state and the State itself” acting for personal gain, amongst other reasons listed in the original Convention.⁴⁸² Furthermore, Article 5 of the Appendix highlights the fact that not only are offences committed by mercenaries considered a crime; being classified as a mercenary is a crime in itself.⁴⁸³

The trajectory of international regulation of mercenaries was defined by the relentless interventions into the state affairs of African countries from the 1960s onwards. The OAU proved an effective mechanism in protecting the national interests of newly decolonised states. It heard the concerns of states posed by mercenarism, and articulated them into norms and regulations, calling for state responsibility and cooperation to eliminate this issue. The expansion of the definition of mercenaries was an attempt to outlaw all types of mercenary activity, regardless of the nationality, or the level of the involvement of the offenders. This is why the addition of Appendix III in the form of the International Convention against the Activities of Mercenaries in 1980⁴⁸⁴ seems rather contradictory. It took a different direction and adapted

⁴⁸⁰ Ibid., Article 5.

⁴⁸¹ Appendix II to the OAU Convention, Draft Convention on the Prevention and Suppression of Mercenarism, Article 1, Draft produced by the International Commission of Inquiry on Mercenaries, in Luanda, Angola, June 1976.

⁴⁸² Appendix II to the OAU Convention, Article 1 (a).

⁴⁸³ Ibid., Article 5.

⁴⁸⁴ Appendix III to OAU Convention, International Convention against the Activities of Mercenaries in 1980, U.N. Doc. A/35/366/Add.1 at 10-16, 1980.

the narrow definition of mercenaries found in AP I,⁴⁸⁵ focusing on monetary gain, direct participation in combat, and nationality.⁴⁸⁶

British Mercenaries in Angola and the Diplock Report

Significant international attention turned to mercenary activity following the trial of thirteen foreigners in Angola in 1976.⁴⁸⁷ All were convicted of the crime of “being a mercenary”, with four offenders sentenced to death, and the others to long prison sentences.⁴⁸⁸ The Diplock Report⁴⁸⁹ was published as a result of the recruitment of British mercenaries to join the armed forces of the FNLA in Angola, with the purpose of assessing whether the UK had sufficient controls in place to regulate British citizen recruitment for mercenary service. The assessors had to, therefore, agree on a definition of mercenaries in order to conduct the inquiry. They dismissed the factor of motivation, deeming it too vague and inconclusive to serve as the defining criterion. According to the Report, mercenaries can be defined only by reference to what they do, and not why they do it.⁴⁹⁰ A definition was consequently proposed in line with UK national jurisdiction, defining a mercenary as “any person who serves voluntarily and for pay in some armed force other than that of Her Majesty in the right of the United Kingdom”.⁴⁹¹ This definition was formulated for the purpose of the inquiry, exclusively for the UK. While it could contribute to formulating a norm and a workable definition under IL, it has not evolved to acquire an international dimension and universality.

The key debate concerning the Diplock Report was about the regulation of recruitment of mercenaries on the territory of the UK versus the enlistment of British citizens into foreign

⁴⁸⁵ 1977 Additional Protocol I to the 1949 Geneva Conventions.

⁴⁸⁶ Ibid., Article 1.

⁴⁸⁷ Taulbee, *supra*, p. 347.

⁴⁸⁸ Cesner, R. E. and Brant, J. W.: “Law of the Mercenary: An International Dilemma”, 1977, Vol. 6 (3), *Capital University Law Review*, p. 339.

⁴⁸⁹ Report of the Committee of Privy Counsellors appointed to inquire into the recruitment of mercenaries, Cmnd. 6569, London, August 1976.

⁴⁹⁰ Ibid., p. 2.

⁴⁹¹ Ibid.

armed forces abroad. As the former could be regulated by means of national jurisdiction, the report concluded that any new penal legislation should be aimed at prohibiting the recruitment of mercenary services and advertising of such recruitment in the UK.⁴⁹² The latter, however, falls outside of national criminal law, as the state has no means of enforcing the prohibition of citizen enlistment outside of the UK.⁴⁹³ The report, therefore, proposed “the abolition of any statutory offence by a United Kingdom citizen of enlisting as a mercenary while abroad.”⁴⁹⁴ Outlining the challenges that the irregular conflict paradigms pose to national legislation, the Report concluded that the UK Government had no legal authority to prevent the enlistment or recruitment of mercenaries until the status of every party to the conflict in Angola was established under IL.⁴⁹⁵ Moreover, when the Diplock Report was published in 1976, serving as a mercenary was not considered an offence under IL.⁴⁹⁶

While the norm was not codified in AP I until the following year, the OAU Convention had already made significant steps in outlawing mercenarism as a crime against peace and security in Africa. At the same time, a statute was included in the US Code,⁴⁹⁷ according to which a citizen may lose his or her citizenship by “entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense.”⁴⁹⁸ However, there have been no instances to date of this provision being enforced.⁴⁹⁹

Additional Protocol I and the 1989 UN Mercenary Convention

⁴⁹² Ibid., p. 12.

⁴⁹³ The Diplock Report, p. 3.

⁴⁹⁴ Ibid., p. 11.

⁴⁹⁵ Ibid., p. 10.

⁴⁹⁶ Ibid., p. 3.

⁴⁹⁷ The Code of Laws of the United States of America, abbreviated to U.S.C.

⁴⁹⁸ 8 U.S.C. § 1481(a)(3) (1976).

⁴⁹⁹ Taulbee, *supra*, pp. 360 – 361.

Although it was not the first international legal effort undertaken to regulate the use of mercenaries, the 1977 Additional Protocol I to the Geneva Conventions of 1949⁵⁰⁰ provided the most widely accepted international definition of a mercenary. Unlike all previous definitions, the one formulated in AP I was the first universal codification of mercenaries under IL, applicable to all member states and geographically neutral.⁵⁰¹ The AP I definition was charged with the complex task of providing a point of reference, broad enough to encompass all present and future political circumstances, while being narrow enough to limit the scope of political and ideological interpretation. Motivation and nationality were chosen as the two parameters to define mercenaries under IL. While this definition was formulated as a result of OAU codification initiatives, it made no reference to national liberation movements, or any other specific political circumstance beyond the references to ‘armed conflict’ and ‘hostilities’. The definition was narrow in comparison to that formulated in the OAU Convention; in order to be deemed a mercenary under AP I, all six criteria must be met.⁵⁰²

Following AP I, the norm against the use of mercenaries was further solidified in 1989 by UN Resolution 44/34,⁵⁰³ which adopted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. Coming into force in 2001, it was more widely known as the UN Mercenary Convention. Article 1 clause 2(i) of the UN Mercenary Convention broadens the definition to include non-nationals recruited to overthrow a “Government or otherwise undermining the constitutional order of a State; or undermine the territorial integrity of a State.” While the definition of mercenaries is largely based on AP I, it is expanded by applying to “armed

⁵⁰⁰ The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977. Also referred to as AP I, or Protocol I in the text.

⁵⁰¹ The Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts, Protocol I, Article 47, June 1977; see also Chapter 1, p. 25

⁵⁰² Taulbee, *supra*, p. 351.

⁵⁰³ International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989; A/RES/44/34, available at <http://www.un.org/documents/ga/res/44/a44r034.htm>.

conflict”⁵⁰⁴ and also to “any other situation”.⁵⁰⁵ Thirty-five countries are currently party to the convention.⁵⁰⁶

Needless to say, the majority of states involved are those who suffered from mercenary activity to the detriment of their national liberation during the Cold War, while none of the UN Security Council member states has so far ratified the convention. Although mercenaries are excluded from prisoner of war status, the 1989 Convention offers the right to each of the member states to invite the ICRC to communicate with and visit alleged offenders in violation of this Convention held on its territory.⁵⁰⁷ This clause, therefore, provides a bridge between the Convention of 1989 and IHL. Article 16 (a) of the Convention explicitly applies to the rules relating to the international responsibility of States. The Draft Code of Crimes against the Peace and Security of Mankind Articles proposed by the Drafting Committee in 1991 called out mercenarism as an international crime regulated by the Code, “whenever agents or representatives of a State were involved.”⁵⁰⁸ This clause was not, however, included in the 1996 version of the Draft, leaving the issue open. When attempting to define the legitimacy of mercenaries, or their corporate successors, private military companies, both legal and political challenges arise. Whether examined from a historical angle, or that of nationality or motive, there is always a degree of irregularity present in the field of private military force. This needs to be recognised as a limitation. On the surface, it appears that the lessons of decolonisation and the tenacity of African countries succeeded in establishing and codifying norms against the use of mercenaries on the international legal level. In practice, however, these norms were not universally accepted and could be tactically bypassed.

⁵⁰⁴ Mercenary Convention, Article 1, para. 1.

⁵⁰⁵ Ibid., Article 1, para. 2.

⁵⁰⁶ As of December 2016.

⁵⁰⁷ Mercenary Convention, Article 10, para. 4.

⁵⁰⁸ Draft Code of Crimes against the Peace and Security of Mankind. Titles and texts of articles adopted by the Drafting Committee: Parts One and Two; articles 1-26: reproduced in A/CN.4/SR.2236 to SR.2237 and SR.2239 to 2241, *Extract from the Yearbook of the International Law Commission*, 1991, Vol. 1, p. 198.

While AP I provides the most widely accepted international definition of a mercenary, some states have not endorsed it and are instead governed by the previous Convention where the definition of combatant and, therefore, prisoner of war, is more inclusive. Furthermore, the definition is so specific, that it would be almost impossible to qualify any private military activity as illegal based on the specified criteria. While AP I applies only to situations of international armed conflict, the UN Mercenary Convention expands on the definition, and, like the OAU convention, it covers both international and internal conflicts.⁵⁰⁹ However, its authority does not cover those states which chose not to ratify it, and the act of mercenarism remains uncoded under its auspices.

2. Pro-Mercenary Norms and the Vietnam War

As an example of state practice that demonstrates the normative shift towards the use of private military forces in the twenty-first century, I would like to highlight a particular episode of the Cold War. The Vietnam war was different to the majority of small CIA-led operations as it was an example of direct US intervention against the direct influence of the Soviet Union and China.⁵¹⁰ Despite its colloquial label, the 'Vietnam war' was fought in all of Indo-China.⁵¹¹ Known as America's longest war, it lasted from 1950, with President Truman's support of French military activity in Vietnam, until 1973, marking Nixon's acceptance of the Paris peace accords.⁵¹² Vietnam's importance was based on the domino theory, i.e. the growing perception that the loss of one state to communism would automatically trigger the loss of others, such as Laos and Cambodia.

⁵⁰⁹ Cameron, L. and Chetail, V.: *Privatising War: Private Military and Security Companies under Public International Law*, CUP, Cambridge, 2013, p. 68.

⁵¹⁰ Westad, *supra*, p. 159.

⁵¹¹ McCormick, *supra*, p. 111.

⁵¹² *Ibid.*, p. 99.

Similar to other proxies, the US government provided South Vietnam with substantial military, economic, and technical aid. The Eisenhower administration took even more drastic and intrusive measures in Indonesia in their attempt to modify the future political direction of the most influential South-East Asian state.⁵¹³ The American-supported army of Ngo Dinh Diem became the main driver for expanding the centralised authority over local power structures,⁵¹⁴ while the Nungs, Chinese hill people living in Vietnam, were hired and organised by the CIA as a mercenary force.⁵¹⁵

The increasing public distrust and doubts over the legitimacy of overseas intervention increasingly undermined the rationale for deploying citizen-soldiers.⁵¹⁶ The Vietnam war was the only episode during the Cold War where US policy options were limited by growing popular opposition at home. This limitation was mainly caused by conscription, which ultimately converted citizens into soldiers and put their lives at risk for a cause that had little support or understanding from the US nation. In 1973 John Mueller's study showed the direct correlation between public support and the US soldier casualties in the Korean and Vietnam wars, mounting by fifteen per cent from 100 to 1,000, and then another fifteen per cent as casualties increased from 1,000 to 10,000.⁵¹⁷ In the Vietnam war, according to McCormick, the US government pursued the interests of Japan and the world system as a whole, rather than its own.⁵¹⁸ Since the war was removed from national and public interest, using private troops could be a way of overcoming this limitation, limiting exposure and responsibility in the eyes of the public. The Vietnam war demonstrated the lack of popular support in sacrificing US citizens for a war that the public could not relate to. It undermined America's legitimacy and swayed the government

⁵¹³ Westad, *supra*, p. 128.

⁵¹⁴ McCormick, *supra*, p. 121.

⁵¹⁵ <http://www.mercenary-wars.net/vietnam/>.

⁵¹⁶ Burk, J.: "The Military Obligation of Citizens since Vietnam", 2001, Vol. 31 (2), *Parameters*, p. 48.

⁵¹⁷ Jentleson, B. W.: "The Pretty Prudent Public: Post Post-Vietnam American Opinion on the Use of Military Force", 1992, Vol. 36 (1), *International Studies Quarterly*, p. 52.

⁵¹⁸ McCormick, *supra*, p. 115.

towards the use of private military force in order to maintain public support while pursuing their foreign policy. By reducing the number of US citizen casualties, privatisation removed this issue from public concern and the public sphere of IL. It also helped the US government to overcome public aversion while continuing to pursue its foreign policy with substantially lower barriers.

On one hand, the Vietnam war was a symbolic victory for the Third World, since for the first time such a conflict had brought down an American president and imposed limits on what only a few years before was seen as a limitless pattern of intervention.⁵¹⁹ On the other hand, it created a very strong case for the use of private military resources for future American governments. Coupled with the legitimacy provided by the neoliberal policies of the 1980s,⁵²⁰ the outsourcing of military functions has gradually become a standard state practice for both Britain and the US, with a significant increase in scale and breadth since the end of the Cold War.

3. The *Nicaragua Case*

Having examined the different normative views on the use of mercenaries in international treaties and customary law, I now turn my enquiry to case law to further explore the ways in which IL dealt with the rising volume of private and mercenary actors after 1945. This section discusses the role of mercenaries in the *Nicaragua case* within IL literature.

The US relationship with Nicaragua, alongside its relationship with the rest of the Latin America, cannot be viewed in isolation as proxy warfare. In the 1850s the US felt obliged to intervene directly against local resistance to foreign control in Nicaragua. The trend continued towards the end of the nineteenth century with interventions in Cuba, the Caribbean, and Central America.⁵²¹ Nicaragua has therefore a symbolic meaning in the challenges it presented to US proxy warfare, as even before the Cold War in 1933 its political leader Augusto César Sandino

⁵¹⁹ Westad, *supra*, p. 193.

⁵²⁰ Discussed more broadly in *Chapter 4*.

⁵²¹ Westad, *supra*, p. 144.

proclaimed the country to be the centre of a new anti-US Central American movement, following his defeat to the US sponsored regime in the twenties.⁵²²

In a similar vein, Nicaragua and Honduras also served as a training ground for the right-wing belligerent group – the Contras – that, in agreement with the Organisation of American States, were raised and armed by the US against the elected Guatemalan government of Jacob Arbenz in 1954.⁵²³ The Luis Somoza Debayle government also provided training bases for American-sponsored interventions in Cuba in 1961 and supplied its own troops to join those of the US in the Dominican Republic in 1965.⁵²⁴ In November 1981 President Ronald Reagan signed a top secret National Security Directive authorising the CIA to spend \$19 million to recruit and support the Contras, opponents of Nicaragua's Sandinista government.⁵²⁵ When the US lost an ally in Somoza to the Sandinista revolution in 1979, they turned to previously deployed tactics of economic pressure, managed subversions, and the threat of a military intervention.⁵²⁶ In supporting the Contras, the CIA carried out several acts of sabotage without consent of Congressional intelligence committees. In response, Congress passed the Boland Amendment, prohibiting the CIA from providing aid to the Contras. While the Cold War provided the rhetoric for the regular subordination of the Third World to the will of the superpowers,⁵²⁷ this time IL had the ability and the scope to step in, resulting in the *Nicaragua case*.⁵²⁸

⁵²² Ibid., p. 145.

⁵²³ McCormick, T. J.: *America's Half Century: United States Foreign Policy in the Cold War and After*, 2nd edition, The Johns Hopkins University Press, Baltimore, 1995, p. 122; <http://listverse.com/2007/07/10/top-10-secret-armies-of-the-cia/>; Westad, *supra*, p. 147.

⁵²⁴ McCormick, *supra*, p. 211.

⁵²⁵ LeoGrande, *supra*, pp. 285-552.

⁵²⁶ McCormick, *supra*, p. 211, p. 220.

⁵²⁷ Westad, *supra*, p. 143.

⁵²⁸ Otherwise known as the Case concerning military and paramilitary activities in and against Nicaragua; International Court of Justice, Pleadings, oral arguments, documents, Vol. IV, available at <http://www.icj-cij.org/docket/files/70/9619.pdf>. On the *Nicaragua case* see: Czapliński, W.: "Sources of International Law in the Nicaragua Case", 1989, Vol. 38 (1), *The International and Comparative Law Quarterly*, pp. 151-166; Norton Moore, J.: "The Nicaragua Case and the Deterioration of World Order", 1987, Vol. 81 (1), *The American Journal of International Law*, pp. 151-159; Highet, K.: "Evidence, the Court, and the Nicaragua Case", 1987, Vol. 81 (1), *The American Journal of International Law*, pp. 1-

Key International Legal Themes of the *Nicaragua Case*

On numerous occasions Ronald Reagan, alongside the representatives of his administration, openly spoke about the ideological and political reasons for intervening in Nicaragua and supporting the Contras.⁵²⁹ These statements mainly referenced international policy and not the law.⁵³⁰ The US did not claim the legal right of invitation to use force to overthrow the government of Nicaragua. First of all, the use of force was carried out through proxies, and not by direct forcible intervention of the US army. Secondly, it was done covertly through CIA operations and, arguably, did not call for legal justification.⁵³¹ The law, specifically Article 2 (4), is clear on the inadmissibility of forcible intervention. The US covert operation qualified under IL as non-forcible support for forcible action by non-state actors.⁵³² The *Nicaragua case* demonstrated that non-forcible support can still breach the non-use of force principle.⁵³³

In April 1984 the Nicaraguan Government filed a claim with the International Court of Justice (ICJ) on the basis of forcible military intervention by the US in “Nicaragua’s internal affairs, in violation of Nicaragua’s sovereignty, territorial integrity and political independence and of the most fundamental and universally accepted principles of international law.”⁵³⁴ The ICJ held that the US violated IL by supporting the Contras in their rebellion against the Nicaraguan government and by mining Nicaragua’s harbours. The Court concluded that “the action constituted a breach of international law in that it involved injuring citizens of Nicaragua without any lawful justification, and was a serious violation of the sovereignty and territorial integrity of

56; Hargrove, J. L.: “The Nicaragua Judgment and the Future of the Law of Force and Self-Defense”, 1987, Vol. 81 (1), *The American Journal of International Law*, pp. 135-143.

⁵²⁹ *Nicaragua*, Pleadings, Oral Arguments, Documents, Section III. Express admissions of responsibility on the part of the Government of the United States, pp. 41-50.

⁵³⁰ Gray, 2000, *supra*, p. 56.

⁵³¹ *Ibid.*, p. 75.

⁵³² Jamnejad, M. and Wood, M.: “The Principle of Non-intervention”, 2009, Vol. 22 (2), *Leiden Journal of International Law*, p. 361.

⁵³³ *Nicaragua*, *supra*, para. 195.

⁵³⁴ *Nicaragua*, Application Instituting Proceedings, para. 1.

Nicaragua.”⁵³⁵ The Court established that the US committed a *prima facie* violation,⁵³⁶ meaning the evidence before trial was sufficient to prove the case unless there was substantial contradictory evidence presented during the trial.⁵³⁷ As for the self-defence argument, put forward by the US representatives, the Court dismissed it on the basis that there is no such rule in customary IL that would allow a state to exercise this right based on its own assessment: “where collective self-defense is invoked, it is to be expected that the State for whose benefit this right is used will have declared itself to be the victim of an armed attack.”⁵³⁸

The key lesson of the *Nicaragua case* is the ICJ ruling on the nature of US intervention. IL allows a number of exceptions whereby intervention is permissible. While intervention by invitation of the state government is considered legitimate, the Court assessed that the US intervened with the purpose of assisting the opposition to forcibly remove the ruling government, which is forbidden under IL. The principle of non-intervention would become obsolete if forcible assistance to rebel groups was to be permissible.⁵³⁹ The ICJ formulated an authoritative general dictum according to which “it is difficult to see what would remain of the principle of non-intervention in international law if intervention, which is already allowable at the request of the government of a State, were also to be allowed at the request of the opposition.”⁵⁴⁰

In terms of IHL, an intervention in support of the opposition would change the nature of the conflict from internal (or internationalised) to international. In other words, a foreign state who intervenes and sides with insurgents is effectively fighting the legitimate government of the host state.⁵⁴¹ In the context of a civil conflict, the difference between international and internal

⁵³⁵ *Nicaragua*, Pleadings, Oral Arguments, Documents, para. 169.

⁵³⁶ Gray, 2000, *supra*, p. 56.

⁵³⁷ Definition of *prima facie* at: <http://dictionary.law.com/default.aspx?selected=1598#ixzz405HOhe9A>.

⁵³⁸ *Nicaragua*, para. 195.

⁵³⁹ Gray, C.: “The Use of Force and the International Legal Order” in Evans, M. D. (ed.): *International Law*, 4th edition, OUP, Oxford, 2014, p. 626.

⁵⁴⁰ *Nicaragua*, para. 246; Nolte, G.: “Intervention by Invitation”, *Max Planck Encyclopedia of Public International Law*, 2010, Oxford Public International Law, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1702?prd=EPIL>.

⁵⁴¹ Turns, D.: “The Law of Armed Conflict” in Evans, *supra*, p. 827

conflict occurs when the intervening state is either directly involved in the civil war, or is deemed to have full control of a party to the conflict.⁵⁴² This distinction is important because there are no provisions for prisoners of war in non-international armed conflicts, and captured rebels would be subject to the domestic law of the state where the conflict is taking place.⁵⁴³

Defining Mercenaries and State Responsibility in the *Nicaragua Case*

The ICJ found the US Government to be in breach of the principles of non-intervention and non-use of force, granting Nicaragua the sum of 370.2 million US dollars in reparations (which remains unpaid).⁵⁴⁴ My enquiry focuses on two closely related points. First is the legal status of the Contras under IL, and second is the attribution of authority to the US in relation to the Contras. The notion of state responsibility has traditionally been associated with the concept of territorial sovereignty.⁵⁴⁵ While there is no inherent justification for the state monopoly of violence, military power is typically concentrated where authority and legitimacy coincide. Whatever institution possesses sovereignty would also possess economic resources and, therefore, would be interested in providing security for its subjects as well as resources through the military means it controls. This correlation demonstrates the important link between the state, the military forces it controls, and the responsibility it upholds under IL. A violation of IL by a state creates responsibility in two scenarios. First, if loss or damage resulted from the act; and, second, if the delinquency can be imputed to the state.⁵⁴⁶

The majority of contemporary legal instruments concerning the use and regulation of mercenaries were internationally established and available to the Court during the *Nicaragua case* proceedings. The 1977 AP I defined mercenaries, the 1974 Definition of Aggression

⁵⁴² Shaw, M. N.: *International Law*, 6th edition, CUP, Cambridge, 2008, p. 1194.

⁵⁴³ Ibid., p. 1196.

⁵⁴⁴ ICJ Judgement summary, 27 June 1986, XII (paras. 283-285), p. 168.

⁵⁴⁵ Taulbee, *supra*, p. 356.

⁵⁴⁶ Ibid., p. 357.

referenced their use and affiliation to the recruiting state, and of course the wars of liberation in Africa had provided an array of examples of the use of mercenaries by proxy. In their statements to the Court, Nicaragua described the Contras as “bands of mercenaries which have been recruited, organised, paid and commanded by the Government of the United States.”⁵⁴⁷ On that basis they argued that the Contras had no real autonomy from the US Government, strongly implying the need for attribution of authority.⁵⁴⁸ In addition, the US government in numerous public statements referred to irregular armed groups as mercenaries; however, the Court made no such distinction. The Court’s judgement did not invoke the definition of mercenaries codified in AP I, even though the Contras were described exclusively in those terms by the Nicaraguan side in the case pleadings, oral arguments, and documents. The only mention of mercenaries in the ICJ judgement were in reference to the Nicaraguan claim concerning the extent of US government control and authority over the Contras, and other formulations made by Nicaragua.

The question of the degree of control of the Contras by the US Government is central to establishing the attribution of responsibility to the US for activities of the Contras. To demonstrate the extent of US involvement, Nicaragua had recorded over 470 instances of US-led mercenary attacks taking place between December 1981 and November 1984.⁵⁴⁹ These were attributed to “CIA-trained mercenaries” or “mercenary forces”, and included kidnapping, assassination, torture, rape, killing of prisoners, and killing of civilians not dictated by military necessity.⁵⁵⁰ Nicaragua asked for responsibility to be attributed to the US Government on the basis of US direct recruitment, financing, regulation, and organisation of the mercenary forces, on the strategic, tactical, and operational levels,⁵⁵¹ concluding that the US Government was

⁵⁴⁷ ICJ Judgement, para. 114.

⁵⁴⁸ ICJ Judgement, para. 114.

⁵⁴⁹ *Nicaragua*, pp. 136-159.

⁵⁵⁰ ICJ Judgement, para. 113.

⁵⁵¹ Pleadings, Oral Arguments, Documents, para. 257.

“substantially involved” at every level of mercenary operations.⁵⁵² This terminology was taken from the 1974 GA Resolution 3314, where a specific clause related to the use of mercenaries was included in the definition of aggression.⁵⁵³ While it provided legal grounds to classify US activity in Nicaragua as the use of force under Article 2 (4), at no stage in the *Nicaragua case* were the Contras defined as mercenaries by the ICJ. Attribution of authority was also claimed based on the proof that the US Government repeatedly ratified and approved acts of aggression by mercenary forces against Nicaragua.⁵⁵⁴

All the evidence presented to the Court by Nicaragua pointed to the same conclusion: in the proxy war in Nicaragua, mercenaries were an instrument of US policy. Having examined the genesis, development, and activities of the Contra forces, in the Judgement summary of 27 June 1986 the Court confirmed that the Contras were largely financed, trained, equipped, armed, and organised by the US Government.⁵⁵⁵ The ICJ also concluded that the evidence available to the Court was insufficient to demonstrate the total dependence of the Contras on the US aid, therefore leaving the Contras responsible for their own acts under international law. The Court stated that, “for the United States to be legally responsible, it would have to be proved that that State had effective control of the operations in the course of which the alleged violations were committed.”⁵⁵⁶ In its judgement the ICJ referred to the Friendly Relations Declaration on the matters of non-use of force and non-intervention. However, the judgement omitted to mention that the Declaration also sets out three rules specifically regulating the conduct of states with regard to insurgent or terrorist groups.⁵⁵⁷ The prohibitions are against “organising”, “inciting”, and “tolerating” irregular forces or armed bands, including mercenaries, for the purpose of

⁵⁵² Pleadings, Oral Arguments, Documents, para. 265.

⁵⁵³ Definition of Aggression, United Nations General Assembly Resolution 3314 (XXIX); A/RES/29/3314: “The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.”

⁵⁵⁴ Pleadings, Oral Arguments, Documents, paras 270-271.

⁵⁵⁵ ICJ Judgement Summary, Section V, paras 75-125.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ Jamnejad and Wood, *supra*, p. 361.

intervention into the territory of another state.⁵⁵⁸

Furthermore, according to the Definition of Aggression, “substantial involvement” with an armed group acting against another state makes the actions of that group attributable to the state.⁵⁵⁹ Nor did the ICJ refer to the 1981 Declaration, which in Section 2 outlines the state obligation “to prevent on its territory the training, financing and recruitment of mercenaries, or the sending of such mercenaries into the territory of another State and to deny facilities, including financing, for the equipping and transit of mercenaries.”⁵⁶⁰ There was no further mention of the alleged IL violations by the Contra forces, or how these ought to be classified and regulated by the ICJ, or by domestic legal systems. Overall, it is clear that the regulation of mercenaries or irregular forces was not in the scope of the *Nicaragua case* from the standpoint of the Court. The *Nicaragua case* highlighted a significant overlap between the rules on forcible intervention and customary law in Article 2(4).⁵⁶¹ The GA resolution 2625 (XXV)⁵⁶² views the support for subversive or terrorist armed activities within another state as a threat or use of force, therefore breaching the principle of non-intervention and the use of force.⁵⁶³ However, numerous incidents involving mercenary groups committing offences against Nicaraguan citizens were left out of the ICJ’s judgement.

The issue here is twofold. First of all, the Contras were not defined as mercenaries by the Court. The lack of ICJ ruling on this matter is problematic as it removes a great degree of responsibility from the Contras themselves, leaving their legal status ambiguous. Second, it alleviates the issue of US responsibility. In other words, if the Contras were deemed mercenaries, they would inevitably have had direct connection and full financial dependency on the US Government, or

⁵⁵⁸ 2625 (XXV). Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations; A/RES/25/2625.

⁵⁵⁹ A/RES/29/3314, Art. 3 (g).

⁵⁶⁰ Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, 9 December 1981; A/RES/36/103, II (g).

⁵⁶¹ Gray, 2000, *supra*, p. 55.

⁵⁶² A/RES/25/2625, 24 October 1970.

⁵⁶³ *Nicaragua*, para. 205.

on the CIA who procured them. If, however, the Contras are considered to be freedom fighters, then they possess a valid motive under the AP I definition to fight independently from US support. Unfortunately, this debate was not held as part of the ICJ judgement, and the issue was omitted entirely.

Conclusion

The international legal system of the twentieth century was founded upon the rules of Westphalian sovereign equality, non-intervention, and state monopoly of force, in order to promote human rights and to serve as a shield of protection against aggression and imperialist violations. However, these principles had been undermined for two centuries through imperial expansion on the part of the West. Equally, the two World Wars showed that nationalism does not only equate to citizenship, but often leads to political extremism, military conscription, and ethnic disasters. The premise of IL was not fit to serve the international system at the time and it was certainly not future-proof. World War II put an end to world empires and initiated the process of decolonisation, drastically changing the political landscape. Territorial empires gave way to two opposing superpowers that created and cultivated the framework of the Cold War through cultural imperialism, “the global carrier of the social practices of ‘modernity’ in all its manifestations”,⁵⁶⁴ and, most prominently, through proxy warfare.

While Article 2 (4) of the UN Charter established the principles of non-intervention following the end of World War II, IL was not focused on regulating mercenarism. Mercenaries had not been widely deployed in Europe for centuries and the empires were still holding on to their fading authority over the colonial troops in their possession, which served as a plausible alternative to private contractors. There was no immediate legal precedent or normative state practice that would call for regulation on the subject of mercenarism. It was not until the wars of national liberation that mercenaries surfaced again, playing a major role in the belligerent activities of the Third World states, with some of the most severe and contentious episodes suffered in the countries of Central Africa. Decolonisation created a geopolitical loophole for powerful states to intervene, creating states with a new type of sovereignty, the “sovereignty of absence of

⁵⁶⁴ Golding, P. and Harris, P. (eds): *Beyond Cultural Imperialism: The Many Cultural Faces of Imperialism* by Annabelle Sreberny-Mohammadi, SAGE Publications, London, 1997, p.51.

value”.⁵⁶⁵ The Third World has undergone a so-called liberal democratic ‘formatting’, leaving them with the postmodern sovereignty of globalisation and empire.

Having analysed the attempts of IL to regulate mercenaries in the twentieth century, I draw several conclusions. First of all, the IL of the twentieth century was largely politicised.⁵⁶⁶ Treaties were considered the strongest binding mechanism for recognition and compliance with IL by the states. In essence, the nature of such IL is purely state-centric, as these are bilateral or multilateral agreements between states and states only. Treaty law, such as UN resolutions and International Conventions, and case law, such as court rulings, were frequently disregarded by states and deemed purely arbitrary. The outcome of the *Nicaragua case* is a testament to that. Although the ICJ clearly classified US intervention and the use of proxies in Nicaragua as illegitimate activities that undermine state sovereignty, the Court’s judicial procedure could not enforce the participation of both parties. Furthermore, following the US withdrawal from the case, the ICJ ruling, based on unilateral input, was not a strong enough authority to enforce the paying of US compensation to the government of Nicaragua.

Another major challenge that twentieth century IL faced was the lack of universality in its relevance and applicability. While responding to anti-mercenary movements, it also provided an easy opt-out mechanism for states. States that did not ratify AP I are governed by the previous Conventions, and the definition of mercenaries does not apply to their conduct. While AP I was the legal response that African states were actively campaigning for, two challenges arise from the codification of mercenaries and their prisoner of war status in the AP I. The definition of mercenaries is so specific that it omits a range of irregular military actors, and, therefore, fails to provide comprehensive regulation. The original definition of mercenaries agreed by the OAU Convention was situational and political. It focused on the regional specificity of the issue of

⁵⁶⁵ Douzinas, *supra*, p. 289.

⁵⁶⁶ See: Koskeniemi, M.: “International Legislation Today: Limits and Possibilities”, 2005, Vol. 23 (1), *Wisconsin International Law Journal*, pp. 61-92, at p. 63.

mercenarism, and therefore has legal limitations. While it cannot be used to define mercenaries universally across geographies and different forms of conflict, it is arguably more usable, as it targets a very distinct offence, common to African states during the Cold War, unlike the narrow definition of AP I.

The *Nicaragua* case demonstrated the weaknesses of IL, which fell subject to the political interpretation of a more powerful state. When the 1965 Declaration on the Inadmissibility of Intervention was described by the US as a mere a statement of political intent, the ICJ did not contest that.⁵⁶⁷ The ICJ statement, according to which “intervention is allowable at the request of the government”,⁵⁶⁸ marks a departure from the stance taken in the 1960s and 1970s regarding state intervention and the use of foreign troops. This arguably stretches the norm on non-intervention further, weakening the sovereign integrity of states. Finally, the wording of the UN Mercenary Convention, alongside other international legal efforts, clearly aims to cater for the post-colonial misuse of mercenaries. However, is it apt to regulate the use of private military actors today? With UN efforts to regulate mercenaries applicable only to situations of international armed conflict or national liberation movements, and the act of mercenarism not being criminalised, twentieth century international law has left some significant gaps unfilled, and the question of the legality of mercenaries unanswered.

⁵⁶⁷ Jamnejad and Wood, *supra*, p. 353.

⁵⁶⁸ *Nicaragua*, para. 246.

Chapter 4

Neoliberalism, New Wars, and the Rise of PMCs

Throughout the first half of the twentieth century the world was preoccupied with global wars fought by centralised states and their national standing armies. The prevalent mode of governance that characterised states during this time was a sovereign nation-state with its typology of a centralised 'warfare' government. Fulfilling the belligerent needs of the twentieth century, the strong state provided robust military infrastructure, manpower, as well as the necessary democratic controls through the choice of products, investment, and intervention in the internal management of private arms companies.⁵⁶⁹ The end of the Cold War brought significant demilitarisation, creating a pool of unemployed experienced military personnel, providing sufficient supply of security resources. It also marked a significant increase and spread of private military companies (PMCs) who until that point were never used overtly as part of official state policy.

Both strong and weak states were promoting privatisation and the outsourcing of security; the former did so as a result of neoliberal policies, while the latter had little choice in the absence of strong existing military structures. Whether emerging from the collapse of Yugoslavia, or engrossed in the ongoing internal wars on the African continent, politically weaker states were on the receiving end of Western neoliberal ideas. With growing internal unrest, corruption, and fragmented governance, their fragile internal conditions were exacerbated by their economic dependency on the IMF and the World Bank for humanitarian and economic support.⁵⁷⁰ According to Mann, the structural adjustment programs of the IMF and the World Bank were

⁵⁶⁹ Krahmann, *supra*, pp. 66-69.

⁵⁷⁰ See: Peet, R.: *Unholy Trinity: IMF, World Bank and WTO*, 2nd edition, Zed Books, London, 2009, pp. 66-177.

refocused on the Global South, portraying a form of economic imperialism.⁵⁷¹ The Washington Consensus was the neoliberal programme for indebted countries who received loans in exchange for a restructuring of their domestic economies towards neoliberal standards of privatisation, high interest rates, and reduced government spending.⁵⁷²

This chapter examines the rise of PMCs at the end of the twentieth century, and their continuing proliferation until the present day. I explore what appears to be a sharp normative change from exclusive use of state-owned and organised military resources to a widespread commodification of security through privatisation and outsourcing. First, I consider the theory and practice of neoliberal principles in the UK and the US, focusing on the policy changes in the security sector. Neoliberalism provided the context to the mode of governance that prevailed in parts of the Western hemisphere from the 1980s. Its principles were indirectly imposed on the Global South through economic aid and various peacebuilding efforts. Most importantly, neoliberal reforms carried normative value, contributing to the changing perception of private security from categorically unacceptable at the start of twentieth century to a plausible and even preferred solution from the 1980s onwards.

I then examine the rise of PMCs in the context of the changing conflict paradigm of the new wars. By analysing military aspects of ethnic wars in Bosnia and Sierra Leone, I highlight the trend for privatisation of violence both internally and internationally. In addition to the domestic resort to mercenaries and PMCs by the states in question, I evaluate the privatisation trend within the international involvement in these conflicts. I conclude this chapter with an analysis of PMC classification. By working through the taxonomy of PMCs, I define the scope for further analysis of contemporary PMC regulation under international and domestic laws.

⁵⁷¹ Mann, 2013, *supra*, p. 167.

⁵⁷² *Ibid.*

Part 1: Neoliberalism

In this section I discuss the role of neoliberalism⁵⁷³ in shaping the security sector in the UK and the US from the 1980s onwards, and the normative effect that neoliberal policies have had on the rise of PMCs. This section illustrates how the rise of neoliberalism, with its trend towards privatisation and outsourcing, contributed to the commodification of security. First, I look into the premise of the rise of neoliberalism and outline the key features of neoliberal thought. I then evaluate the government policy initiatives in Britain and the US that played a significant role in reintroducing and integrating PMCs into the domestic and international security landscape. I also raise questions of accountability and state control in the security sector under neoliberal policies. Finally, drawing on Michel Foucault and Wendy Brown, I examine neoliberalism not only as an economic factor, but also as political discourse that contributed to the rise of PMCs.⁵⁷⁴

A number of economic and political factors contributed to the shift from the model of centralised government to that of a neoliberal state. Neoliberal ideals were fundamentally opposed to state interventionism, unlike those of John Maynard Keynes, which rose to prominence in the 1930s in response to the Great Depression.⁵⁷⁵ Contrary to welfare capitalism, neoliberalism promised greater cost efficiency and openness to private interests by reducing the role of government, replacing state planning with the free market mechanism, or, in other words, rolling back the state.⁵⁷⁶ According to neoliberal theory, the state favours strong individual private property rights, contractual obligation, and the institutions of freely

⁵⁷³ Literature on neoliberalism: Hayek, F. A.: *The Road to Serfdom*, Routledge, Abingdon, 2001; Friedman, M.: *Capitalism and Freedom*, The University of Chicago Press, London, 2002; Chomsky, N.: *Profit over People: Neoliberalism and Global Order*, Seven Stories Press, New York, 1999; Wapshott, N.: *Keynes. Hayek: The Clash that Defined Modern Economics*, W. W. Norton & Company, London, 2012; Prasad, M.: *The Politics of Free Markets: The Rise of Neoliberal Economic Policies in Britain, France, Germany, & the United States*, The University of Chicago Press, London, 2006; Harvey, D.: *A Brief History of Neoliberalism*, OUP, Oxford, 2005.

⁵⁷⁴ Foucault, M.: *The Birth of Biopolitics: Lectures at the College de France, 1978-1979*, Palgrave Macmillan, Basingstoke, 2008; Brown, W.: *Undoing the Demos: Neoliberalism's Stealth Revolution*, Zone Books, New York, 2015.

⁵⁷⁵ Harvey, *supra*, pp. 20-21.

⁵⁷⁶ Prasad, *supra*, p. 43; Krahmann, *supra*, pp. 72-73.

functioning markets and free trade.⁵⁷⁷ Its critics, however, interpret neoliberalism as a doctrine in which all forms of social solidarity are to be dissolved in favour of individualism.⁵⁷⁸ Privatisation of state owned enterprises, liberalisation of trade, and deregulation of the economy have been identified by Manfred Steger and Ravi Roy as the three key features of neoliberalism.⁵⁷⁹ Coupled with competition, these elements ought to “eliminate bureaucratic red tape, increase efficiency and productivity, improve quality, and reduce costs, both directly to the consumer through cheaper commodities and services and indirectly through reduction of the tax burden.”⁵⁸⁰ Inadvertently, these also contributed to the acceptance and integration of private military forces into the defence policy. For example, the deregulation of all sectors opened up new areas of unrestricted market freedoms for powerful corporate interests.⁵⁸¹ According to Michael Bell’s⁵⁸² statement in the 1994 NATO Colloquium, privatisation enabled the British Government to “pursue its policy of opening up defence procurement as fully as possible to competitive pressures.”⁵⁸³ Such competition in defence procurement, in its turn, “produced substantial economies to the defence budget”.⁵⁸⁴

Some of the key connections between neoliberalism and the privatisation of security derive from Milton Friedman’s views on governmental power as a threat to individual freedom.⁵⁸⁵ Friedman argued that in order to prevent the abuse of state power, first of all “the scope of government must be limited”⁵⁸⁶ and, secondly, state power must be dispersed.⁵⁸⁷ He suggested that eliminating the state monopoly on power through competition with the market would

⁵⁷⁷ Harvey, *supra*, p. 64.

⁵⁷⁸ *Ibid.*, p. 23.

⁵⁷⁹ Steger, M. B. and Roy, R. K.: *Neoliberalism: A Very Short Introduction*, OUP, Oxford, 2010, p. 14.

⁵⁸⁰ Harvey, *supra*, p. 65.

⁵⁸¹ *Ibid.*, p. 26.

⁵⁸² Britain’s Deputy Under-Secretary of State for Defence Procurement, Ministry of Defence.

⁵⁸³ Bell, M.: “Defence Industry Privatisation: The British Case”, *NATO Colloquium*, Brussels, 29-30 June 1994 at: <http://www.nato.int/docu/colloq/1994/eco9419.txt>.

⁵⁸⁴ *Ibid.*

⁵⁸⁵ Friedman, *supra*, p. 2.

⁵⁸⁶ *Ibid.*

⁵⁸⁷ *Ibid.*, p. 3.

establish a balance of power. In Friedman's view an "appropriate free market arrangement [for the armed forces] is volunteer military forces; which is to say, hiring men to serve."⁵⁸⁸ Following on from that rationale, 'rolling- back' of the warfare state opens up opportunities for the private military contractor to implement neoliberal principles in the armed forces.⁵⁸⁹ The market is seen as an alternative to the state monopoly of force that helps to divide coercive capabilities and ensure competition among multiple companies and between public and private agents, therefore preventing centralisation of power which could endanger the rights and freedoms of citizens.⁵⁹⁰

Neoliberalism in the United Kingdom and the United States

The UK and the US adopted neoliberalism as a new economic orthodoxy regulating public policy at the state level in 1979.⁵⁹¹ Both countries were governed by leaders that truly believed in the neoliberal values of Friedrich Hayek and the Mont Pelerin Society. Ronald Reagan and Margaret Thatcher promoted numerous policies of 'rolling back the state', and their success was carried forward well beyond their time in office, even by opposition parties.⁵⁹² The UK Conservative Party leader and Prime Minister, Margaret Thatcher,⁵⁹³ made neoliberalism her election programme, promising to dismantle the British warfare/welfare state.⁵⁹⁴

Most commonly, Thatcherism is explained as a pushback against the Keynesian consensus prompted by the rise of a set of free market ideas.⁵⁹⁵ Fragmentation of security provision among public and private providers helped to portray Thatcher's turn to neoliberalism as the

⁵⁸⁸ Friedman, *supra*, p. 36.

⁵⁸⁹ Krahmann, *supra*, p. 74.

⁵⁹⁰ *Ibid.*, p. 36, p. 39.

⁵⁹¹ Harvey, *supra*, p. 22.

⁵⁹² Prasad, *supra*, p. 98.

⁵⁹³ In Office as the Prime Minister: 4 May 1979 to 28 November 1990.

⁵⁹⁴ Macdonald, G.: "Reform of UK Defense Procurement and State/Industry Relationships during the 1980s and 1990s", 1999, Vol. 15 (1), *Defense Analysis*, p. 3.

⁵⁹⁵ Prasad, *supra*, p. 101; see also: Cockett, R.: *Thinking the Unthinkable: Think-Tanks and the Economic Counter-Revolution, 1931-1983*, Harper Collins, London, 1995.

continuation of a Liberal political tradition dating back to the nineteenth century.⁵⁹⁶ Large-scale privatisation was at the top of the political agenda, offering a way to manage the state budget and raise capital. While neoliberalism was promoted in order to generate efficiencies, a more visionary goal was to transform political culture by introducing a new mentality of extended corporate and personal responsibility, innovation, and initiative.⁵⁹⁷ In this scenario the new role of the government was that of a customer rather than the sole manager of the security sector.⁵⁹⁸ Furthermore, the absence of any constitutional or legal restrictions on the outsourcing of military services in the UK facilitated the privatisation of a wide range of military functions and services.⁵⁹⁹

Since the rise of neoliberalism in the 1980s, Britain has pioneered the privatisation and the outsourcing of significant proportions of its national defence establishment.⁶⁰⁰ According to the Ministry of Defence (MOD), privatisation meant the relocation of military services to private suppliers “depending on whichever is better placed to deliver required services at best value”.⁶⁰¹ Public-private partnerships and outsourcing contracts legitimised the private sector in the procuring and financing of security, and enabled the integration of civilians into the military realm. Increasing state reliance on outsourcing amplified the private sector’s presence in the supply of military services.⁶⁰²

In addition to the Private Finance Initiative (PFI), the MOD sought to expand its use of private contractors under standard outsourcing agreements. To do so, the government initiated a comprehensive review of military functions to identify what kind of military support operations

⁵⁹⁶ Krahmann, *supra*, p. 84.

⁵⁹⁷ Harvey, *supra*, p. 60.

⁵⁹⁸ Smith, R.: “Defence Procurement and the Industrial Structure in the U.K.”, 1990, Vol. 8 (2), *International Journal of Industrial Organization*, p. 195; Macdonald, *supra*, p. 6.

⁵⁹⁹ Spackman, M.: “Public-Private Partnerships: Lessons from the British Approach”, 2002, Vol. 26 (3), *Economic Systems*, p. 285.

⁶⁰⁰ Krahmann, *supra*, p. 84.

⁶⁰¹ MOD, ‘Public Private Partnerships: Changing the Way We Do Business’, 2000.

⁶⁰² More generally on contracts, see: Deakin, N. and Walsh, K.: “The Enabling State: The Role of Markets and Contracts” 1996, Vol 74 (1), *Public Administration*, pp. 33-47.

could be contracted out to the private sector. In 1991 the Competing for Quality White Paper revised and built on Thatcher's market-testing programme. Its focus was not privatisation per se; it was designed to improve state efficiency by promoting competition between in-house and private bidders for service delivery.⁶⁰³ The document outlined three types of services: those that were inappropriate for government and should be privatised or eliminated; those that were unsuitable for government delivery and should be outsourced; and services that were appropriate for government and should be decentralised and subjected to market-testing.⁶⁰⁴

Most widely outsourced to the private sector was the management of military facilities, such as navy bases, garrisons, and airfields. Even the management of the Atomic Weapons Establishment at Aldermaston was contracted out.⁶⁰⁵ Other areas of private contracting included the MOD's defence estate programme and repairs and maintenance. Since 2004 logistic support has been a growing area for private contracting, with the MOD outsourcing the majority of logistic services to Kellogg, Brown & Root (KBR) under the Contract for Logistics Support arrangement.⁶⁰⁶

While all of these areas of privatisation demonstrate the neoliberal trend in the security sector, the outsourcing of military training has particular significance. Large-scale PFI projects catered for private training, such as the Defence Training Review and the Military Flight Training Systems contracts, "which merged private military flight training for the army, navy and the RAF."⁶⁰⁷ Military training brings private contractors one step closer to active participation in combat, and therefore to the core function of the military. If one can train how to fight, one can also fight. Sean McFate, an academic and a former DynCorp military contractor, analyses this fine line

⁶⁰³ Maude, F., the Financial Secretary to the Treasury, Hansard, HC Deb 18 November 1991 Vol 199 cc 25-35, available at: <http://hansard.millbanksystems.com/commons/1991/nov/18/competing-for-quality>.

⁶⁰⁴ HM Treasury, *Competing for Quality: Buying Better Public Services*, Cm 1730 (London: HMSO, 1991).

⁶⁰⁵ White, D.: "MOD Trains Its Big Guns on Commercial Target", *Financial Times*, 13 December 1993.

⁶⁰⁶ Krahmann, *supra*, p. 93.

⁶⁰⁷ *Ibid.*, p. 94.

between military training and participation in combat in the context of peacekeeping operations. While in theory there is a clear distinction between support contractors, used for defence and training, and mercenaries, who stage offensive operations on behalf of a client, in practice “if you can do one, you can do the other.”⁶⁰⁸ By designating civilian contractor positions in a military realm, governments legitimise the notion of private military activity. While the government accepts liability when hiring individual civilian contractors who are incorporated in the military structure of the state, the issue of responsibility arises when corporate entities are involved in supplying the contractors to the state. I discuss this issue in more depth in the next chapter, however at this stage it is important to highlight the trend of normalisation and legitimisation of private security that derived from the state itself.

Although Thatcher pioneered the neoliberal model, the Major and Blair governments developed it further, increasing the private sector contribution to national and international defence.⁶⁰⁹ The number of civil servants in the MOD declined by 40 per cent between 1979 and 1990 as civilian positions were the first to be cut or replaced.⁶¹⁰ By 2000, around £10 billion, or 45 per cent of the MOD’s annual function, had been reviewed for potential private sector involvement under the *Better Quality Services* (BQS) initiative.⁶¹¹ Overall, the above statistics reflect the increase of private military presence in the security sector, whereby the government had taken deliberate steps to implement this change. Affiliation of significant military figures with PMCs was another element that contributed to a gradual normalisation of the private military industry. For example, General Sir Roger Wheeler (former UK Chief of General Staff) and Lord Inge (former field marshal of the British Army) were board members of Aegis Defence

⁶⁰⁸ Interview with Sean McFate, available at <http://www.theatlantic.com/international/archive/2015/03/return-of-the-mercenary/388616/>.

⁶⁰⁹ Krahmann, *supra*, p. 86.

⁶¹⁰ Dandeker, C.: “The United Kingdom: The Overstretched Military”, in Moskos, C. C., Williams, J. A. and Segal, D. R. (eds): *The Postmodern Military*, OUP, Oxford 2000, p. 43.

⁶¹¹ Launched in 1998; Uttley, M.: *Civilian Contractors on Deployed Military Operations: United Kingdom Policy and Doctrine*, Strategic Studies Institute, September 2005, p. 7.

Services,⁶¹² and Lieutenant General Sir Cedric Delves (former British Army General and NATO Deputy Commander in Chief) joined the Olive Group in 2005 as a Senior Advisor.⁶¹³

In many ways paralleling Britain's economic endeavours, US President Ronald Reagan introduced the ideological rationale for outsourcing military functions to private firms, thereby promoting the concept of the 'small state'. The premise for outsourcing was originally laid out in 1966 when the US Government introduced specific procedures for comparing public and private sector provisions of goods and services in the Office of Management and Budget (OMB) Circular A-76.⁶¹⁴ In order to determine what should and should not be outsourced, the A-76 outlined 'Inherently Governmental Functions' which included management and direction of the Armed Services, and activities performed exclusively by military personnel who are subject to deployment in a combat, combat support, or combat service support role.⁶¹⁵ Notwithstanding this definition, the A-76 process was fully set up to procure private military services. After notifying Congress and comparing bids from the military and the private sector, if a private sector bid was 10 per cent of the personnel cost or \$10 million lower than the competing military bid, the private bidder was awarded the contract.⁶¹⁶

Additionally, following the rise of neoliberalism in the 1980s, the extent of the DOD's acquisition of military services from private firms under the A-76 procedures nearly doubled.⁶¹⁷ The functions that the DOD and the A-76 process defined as commercial rather than governmental, with the exception of large-scale armed combat, ranged from depot maintenance and repair, logistics, training, to intelligence services, armed guarding, and the management of

⁶¹² Axelrod, A.: *Mercenaries: A Guide to Private Armies and Private Military Companies*, Sage, London, 2014, p. 248.

⁶¹³ <http://www.olivegroup.com/search.php>.

⁶¹⁴ Krahmann, *supra*, p. 121.

⁶¹⁵ Circular A-76, Executive Office of the President, Office of Management and Budget, 4 August 1983, Art. 6 (e).

⁶¹⁶ Krahmann, *supra*, p. 121.

⁶¹⁷ Cohen, *Defense Reform Initiative Report*, p. 28.

government-owned facilities.⁶¹⁸ Not only had the latter been considered an inherently governmental function until the mid-1990s, these have also been amongst the largest growth areas in terms of outsourcing.⁶¹⁹

Furthermore, the Competition in Contracting Act 1984 and two subsequent acts in 1986 had a significant impact on military procurement through deregulation, eliminating military specifications, and requiring “the military services to use competition in contracting in increasing amounts each year”.⁶²⁰ The Reagan administration provided the vital political backing for neoliberal ideology through further deregulation, tax and budget cuts, as well as attacks on trade union and professional power.⁶²¹ As part of the deregulation initiatives, the Commission on Roles and Missions of the Armed Forces advocated the elimination of restrictive legislation in the United States Code, Title 10 – Armed Forces, which prohibited the contracting-out of key military occupations.⁶²² In 1985, ten years prior to the Commission’s regulation, the Logistics Civil Augmentation Program (LOGCAP) was established. It began as a US Army-administered forum for engaging private security and military firms to support US government missions abroad.⁶²³ Initially founded in order to outline the policies and procedures for using civilian contractors during wartime,⁶²⁴ in 1992 it became a centralised mechanism for PMC procurement. The key distinction of LOGCAP from any previous outsourcing endeavours lies in the “umbrella concept” it uses to obtain a wide range of support functions under one contract.⁶²⁵ The scope of LOGCAP spanned across operations in Somalia, Haiti, Rwanda, Italy,

⁶¹⁸ Krahmann, *supra*, pp. 131-132; GAO, *Defense Budget: Trends in Operation and Maintenance Cost and Support Services Contracting*.

⁶¹⁹ Krahmann, *supra*, p. 130.

⁶²⁰ McNaugher, T. L.: “Weapons Procurement. The Futility of Reform”, 1987, Vol. 12 (2), *International Security*, p. 101.

⁶²¹ Harvey, *supra*, p. 25.

⁶²² Commission on Roles and Missions of the Armed Forces, *Directions for Defense*, 1995, p. ES-6.

⁶²³ Logistics Civil Augmentation Program (LOGCAP), US army, regulation 700-137, 1985.

⁶²⁴ Ettinger, A.: “Neoliberalism and the rise of the private military industry” 2011, Vol. 66 (3), *International Journal*, p. 753.

⁶²⁵ Colonel Russell, D. W.: Understanding the Application of Army’s Logistics Civil Augmentation Program (LOGCAP), U.S. Army War College, Carlisle Barracks, Pennsylvania, 1997, p. iii.

and South-West Asia, and it also provided crucial support and combat forces for peacekeeping missions in Hungary, Croatia, and Bosnia.⁶²⁶

While by 2001 it became clear that public-private cost comparisons and outsourcing were not producing the anticipated efficiencies, the neoliberal trend was not abandoned.⁶²⁷ In the ten years between 1996 and 2006 total spending on private military services increased by 146 per cent from \$46 to \$113 billion.⁶²⁸ So despite Reagan's promise to roll back the state, federal spending increased as a result of growing military expenses.⁶²⁹ In fact, through military spending Reagan created the largest US deficit at the time, tripling Gross Federal Debt, from \$900 billion to \$2.7 trillion.⁶³⁰ By transforming the roles of the military and private businesses with regard to decision-making and the implementation of national defence strategies, Reagan's reforms contributed to strengthening the private military position in government policy.⁶³¹ Furthermore, through the tools of privatisation and outsourcing, neoliberalism promoted nodal or fragmented security governance, whereby the state retained only partial control over defence resources, and only in the form of a contract.

Accountability and State Control

As part of neoliberal doctrine, states outsourced and privatised numerous governmental functions that until the 1980s were under the direct control of the state. The work of neoliberal thinkers like Hayek and Friedman promoted the concept of a minimal state,⁶³² something that both Reagan and Thatcher attempted to implement. In this context, state sovereignty is willingly surrendered to the global market in favour of commodity and capital movements.⁶³³ According

⁶²⁶ Colonel Russell, *supra*, pp. 11-12.

⁶²⁷ Graves, R. H.: "Seeking Defense Efficiency", 2001, Vol. 36 (4), *Defense Acquisitions Review*, p. 51.

⁶²⁸ Krahmann, *supra*, p. 129.

⁶²⁹ Mann, 2013, *supra*, p. 150.

⁶³⁰ Richman, S. L.: "The Sad Legacy of Ronald Reagan" 1988, Vol. 6 (10), *The Free Market*, available at: <https://mises.org/library/sad-legacy-ronald-reagan-0>; Mann, 2013, *supra*, p. 151.

⁶³¹ Krahmann, *supra*, pp. 135-137.

⁶³² Hayek, *supra*, pp. 33-45; for more on the concept of small government, see: Friedman, *supra*, p. 32.

⁶³³ Harvey, *supra*, p. 66.

to Friedrich Hayek, “private monopoly is scarcely ever complete and even more rarely of long duration or able to disregard potential competition. But a state monopoly is always a state-protected monopoly – protected against both potential competition and effective criticism.”⁶³⁴

Hayek and his followers view state monopoly as a threat to individual freedom and see the market as the instrument most fit to perform the mediating function.

In neoliberalism, “the sanctity of contracts and the individual right to freedom of action, expression, and choice must be protected.”⁶³⁵ Friedman argued that the state should be the arbiter of contracts and, therefore, of law. However, this gives rise to two possible risks. If the state designs and puts in place legitimising mechanisms for private forces to enter the security market, then the market becomes an instrument for the consolidation of monopoly power. Such deregulation in the security sector could generate impunity if the military function, i.e. the function of killing, is left ungoverned. Also, in reality, the state may lose its hierarchical position in the face of contract law. Unless specifically stipulated, a contract between a PMC and the state creates a horizontal relationship between two equal parties to a contract.⁶³⁶ As a consequence, such a contract between a state and a PMC could immunise the state against responsibility under IL, as the state is no longer seen to be directing or controlling the private security provider.⁶³⁷

As a political framework, neoliberalism also rationalised the legitimacy of the private military contractor. Amongst a number of set criteria, Additional Protocol I defined a mercenary as any person who is motivated “essentially by the desire for private gain”,⁶³⁸ who was promised higher rates of pay than the uniformed soldier, and who was not a national of a party to the conflict

⁶³⁴ Hayek, *supra*, p. 203.

⁶³⁵ Harvey, *supra*, p. 64.

⁶³⁶ Liu, *supra*, pp. 209-210.

⁶³⁷ See: International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts

⁶³⁸ A/RES/44/34, Article 1; 1 (b), available at: <http://www.un.org/documents/ga/res/44/a44r034.htm>.

nor a local resident. As observed in neoliberal practice, most PMCs recruit contractors based on eligibility and desired expertise, therefore removing political content from the military role performed by the contractor. The privatisation of the security sector and the outsourcing of multiple defence functions and facilities blurred the distinction between the professional soldier and the private military contractor. However, according to the neoliberal vision, this political neutrality on the part of the soldier should be viewed as an advantage in terms of democratic control and accountability.⁶³⁹ Equally, a profit motivation poses no issues to neoliberalism in ensuring democratic control and contractor accountability. While military services were legally exempt from outsourcing, the growing spectre of defence support functions that could and were contracted out, starting from the 1980s and continuing to this day, did in fact create a plausible environment for PMCs to exist and to prosper.

Governance and Governmentality

Although the shift towards the private sector is striking when analysing the late twentieth century security landscape in the UK and the US, it was extensively articulated through government policy and various state programmes. However, we can only truly appreciate the extent of this shift if we contrast it to the national defence structure of the rest of the twentieth century. In the context of the core argument of this thesis, the above examples of neoliberal states present a very important connection between the dominant form of governance and the type of military power. As in previous chapters, I refer to the composition of the army, the type of soldier that dominated the military landscape, and the shifting ownership of means of violence from state-centric to deferred or privatised.

A neoliberal state is best described as a small, decentralised state and the characteristic military of such a state, as we have observed, is a mixed arrangement comprised of a professional

⁶³⁹ Krahmann, *supra*, p. 48.

national army and private contractors. As Harvey noted, “the shift from government (state power on its own) to governance (a broader configuration of state and key elements in civil society) has therefore been marked under Neoliberalism.”⁶⁴⁰ In this context governance is understood as a broader configuration of the state as opposed to state power on its own. As part of this shift, the state monopoly of force has also been undermined.⁶⁴¹ In addition, internationally the governance model is more open to interventions and alternative authorities, such as international regulatory bodies and PMCs.⁶⁴²

When analysed through the lens of the overall methodology of this thesis, neoliberalism completes the full circle of types of governance, exhibiting some similarities to feudal fractured sovereignty.⁶⁴³ In other words, through neoliberalism we observe the return of fragmented sovereignty and decentralisation as the dominant form of governance. This is particularly important as a validation of the method I use to analyse existing and future regulatory efforts, i.e. there is a direct correlation between the prevalent form of governance and the type of military force it prefers to deploy. Moreover, this correlation demonstrates that there is a deeper explanation to the rise and proliferation of PMCs, entrenched in the form of governance. While the questions of ethics surrounding mercenary and private military actors are important, they tend to stand against a conscious governmental effort to restructure state-military relationships in one way or another. PMCs do not simply arise and operate haphazardly, pushing out professional armies. They are ‘welcomed’ by the governments who design their policies in a way that allows for private military firms to exist.

⁶⁴⁰ Harvey, *supra*, p. 77.

⁶⁴¹ On the concept of governance see: McCarney, P. and Stren, R.: *Governance on the Ground: Innovations and Discontinuities in the Cities of the Developing World*, Woodrow Wilson Center Press, Princeton, 2003; Dixit, A.: *Lawlessness and Economics: Alternative Modes of Governance*, Princeton University Press, Princeton, 2004.

⁶⁴² Krahmann, *supra*, p. 40.

⁶⁴³ John Pratt makes a similar argument about the sightings of premodern penal practices; Pratt, J.: “The Return of the Wheelbarrow Men; or the Arrival of Postmodern Penalty” 2000, 40 (1) *British Journal of Criminology*, pp. 127-145.

Finally, the transformation from a centralised ‘warfare’ state with a national army to a neoliberal ‘small’ government whose defence policy includes private contractors is a very broad, yet blatant way to illustrate the normative change in the government-military relationship.⁶⁴⁴ Having examined neoliberalism as an economic factor, it is important to also consider it as a political and legal discourse that contributed to the rationalisation of PMCs. In the Western hemisphere, the spread of neoliberalism transpired through changes in government policy, but also in the discourse of legality. Building on Michel Foucault’s notion of governmentality, Wendy Brown explains the transformation of practices that were formerly unacceptable or irregular to becoming normal and legalised.⁶⁴⁵ Brown argues that the norms and principles of neoliberal rationality initiated a commodification of areas that were previously considered public, or “noneconomic”.⁶⁴⁶

Brown’s and Foucault’s reading of neoliberalism as a “specific and normative mode of reason” could explain the changed perceptions in the sphere of private security. By articulating neoliberal ideals, the US and UK governments promoted privatisation and outsourcing across all sectors, including security, therefore changing the legal perception of its inherently public nature. The exponential growth of private military activity is directly linked to the current globalised form of governance. Whether failing or co-dependent, states no longer uphold the same extent of sovereignty as they did throughout the majority of the twentieth century. Moreover, they are overarched by global legal and political institutions and undercut by multinational corporations, shifting states further from the Westphalian concept of a monolithic entity that comprises all governmental functions behind its sovereign borders. Power is no longer administered by states alone.

⁶⁴⁴ It must be noted that, at the same time, US military spending of state tax revenue is enormous, surpassing anything seen in the last century.

⁶⁴⁵ Brown, W.: *Undoing the Demos: Neoliberalism’s Stealth Revolution*, Zone Books, New York, 2015, p. 47.

⁶⁴⁶ *Ibid.*, p. 50.

While it is true that states continue to be the main owners and users of military power, the growing number of operational⁶⁴⁷ and advocacy⁶⁴⁸ NGOs, and the rise of transnational organisations,⁶⁴⁹ multinational corporations,⁶⁵⁰ and global political players such as the UN and NATO, changed the political and legal dynamic by adding new actors to the international arena. It is also important to mention terrorist organisations who not only claim authority, but also change the political landscape by resorting to asymmetric warfare. They are yet another non-state actor that controls the means of power and violence, typically in parallel to a formal government.⁶⁵¹ Finally, the growing presence of the private military industry today indicates that the market for force is shifting, marking a decline of the state monopoly of force. All these phenomena conceptualise 'Neomedievalism',⁶⁵² a term coined by Hedley Bull, however never realised during his time. 'Neomedievalism' suggests an alternative to the Westphalian state system that is characterised by technological unification of the world synonymous with globalisation,⁶⁵³ the regional integration of states, the rise of transnational organisations, the disintegration of states, and the restoration of private international violence.⁶⁵⁴ All of these elements suggest a shift away from a Westphalian state system and highlight the decline of territorial sovereignty. While some characteristics of pre-modern governance are visible in contemporary security developments, the medieval world, as Foucault and others have insisted, is epistemically separated from our own and recovering the complexity of meaning and understanding from this period and applying them to our own is an impossible task. So, although

⁶⁴⁷ e.g.: Medecins sans Frontieres, Oxfam, and the Red Cross.

⁶⁴⁸ Advocacy NGOs that hired PMCs include, but are not limited to: Save the Children, CARE, CARITAS, GOAL, IRC, and Worldvision.

⁶⁴⁹ A hundred years ago there were 1,083 NGOs, today there are more than 40,000; see: Richmond, P. O.: "The Dilemmas of Subcontracting the Liberal Peace" in Richmond, P. O. and Carey, H. F. (eds): *Subcontracting Peace: The Challenges of NGO Peacebuilding*, Aldershot, Ashgate, 2005, p. 20.

⁶⁵⁰ Such as ExxonMobil and Walmart.

⁶⁵¹ For more on the new actors in the international arena see McFate, *supra*, pp. 77-89.

⁶⁵² Neomedievalism is a metaphor loosely based on the world order of the European high Middle Ages, but it does not portend a literal return to the medieval period. It is an alternative to the Westphalian system researched by Philip Cerny, Mark Duffield, Jorg Friedrichs, Stephen Kobrin, and others.

⁶⁵³ This closely resembles the trade and partnership networks of fifteenth-century Italian city-states.

⁶⁵⁴ McFate, *supra*, 75.

‘Neomedievalism’ is too broad of a claim, it highlights the overlap of different jurisdictions that characterises the twenty-first century mode of governance.

Part 2: The Rise of PMCs

Unlike the ambiguous use of mercenaries in covert operations during the Cold War, private civilian contractors were much more openly integrated into military structures and government policy at the turn of the twenty-first century. The presence of contractors versus military personnel grew from one to fifty in 1991, to a staggering ratio of one to ten in 2003.⁶⁵⁵ The rise of PMCs at the end of the Cold War can be explained in different ways. Availability of resources as a result of military downsizing created a considerable supply of manpower, while the demand was driven by long-simmering conflicts, previously sustained by the logic of the Cold War and the balance of two superpowers.⁶⁵⁶

Lineages of private force can also be traced in the changing form of governance that derived from neoliberal ideals. Neoliberalism offered to address the presumed short-term security demands which arose from multiple military interventions in the former Yugoslavia, Somalia, Afghanistan, and Iraq with the temporary hire of private military contractors rather than an increase in professional soldiers, allowing countries like the UK to “punch above their weight”.⁶⁵⁷ In a methodological way, neoliberalism completes the full circle of types of governance, returning to a small government that resorts to nodal security. Although in the West privatisation of military services was conducted through neoliberal policies, in the rest of the world privatisation of violence was understood in the context of the failed state. While neoliberalism generated a new form of governmental rationality and state legitimacy,⁶⁵⁸ the

⁶⁵⁵ Avant, D.: “The Privatisation of Security and Change in the Control of Force”, 2004, Vol. 5, *International Studies Perspectives*, pp. 153-157.

⁶⁵⁶ Isenberg, D.: “Private Military Companies in Iraq” in Chesterman, S. and Lehnard, C. (eds): *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, OUP, Oxford, 2007, p. 82.

⁶⁵⁷ Krahmann, *supra*, p. 85.

⁶⁵⁸ Brown, *supra*, p. 51.

'new wars' that emerged after 1989 created new opportunities. The changing conflict paradigm at the end of the Cold War created a demand for a different kind of security. Mary Kaldor explains the rise of the new wars in relation to external pressures of cutting government spending, and loss of revenue and legitimacy, leading to disorder and military fragmentation.⁶⁵⁹ Incapable of raising and maintaining their own military infrastructure and fighting the new kind of wars, failing governments all over the world became keen clients of private military firms, while utilising the surplus of arms and manpower that was generated by the Cold War.⁶⁶⁰

A deliberate attempt to establish ethnically homogenous territories in the newly formed countries of the former Yugoslavia laid the foundations for ethnic cleansing in Bosnia-Herzegovina between 1992 and 1995.⁶⁶¹ The Bosnian conflict involved different types of military power.⁶⁶² As in most new wars, the types of fighting units in Bosnia included paramilitaries, parts of the national army that were no longer controlled by the state, foreign mercenaries, organised criminal groups, and, later, external peacekeeping forces.⁶⁶³ Foreign mercenary groups varied from British servicemen siding with the Croats⁶⁶⁴ to Mujahedeen soldiers supporting Bosnian

⁶⁵⁹ Kaldor, M.: *New and Old Wars: Organized Violence in a Global Era*, Polity Press, Cambridge, 2002, p. 92.

⁶⁶⁰ Ibid., p. 96.

⁶⁶¹ On the Bosnian war and ethnic cleansing see: Bax, M.: "Warlords, Priests and the Politics of Ethnic Cleansing: a Case-Study from Rural Bosnia Hercegovina" 2000, Vol. 23 (1), *Ethnic and Racial Studies*, pp. 16-36; Bell-Fialkoff, A.: "A Brief History of Ethnic Cleansing" 1993, Vol. 72 (3), *Foreign Affairs*, pp. 110-121; Hayden, R. M.: "Imagined Communities and Real Victims: Self-Determination and Ethnic Cleansing in Yugoslavia" 1996, Vol. 23 (4), *American Ethnologist*, pp. 783-801; Toal, G. and Dahlman, K.: *Bosnia Remade: Ethnic Cleansing and its Reversal*, OUP, Oxford, 2011; Duffield, M. R.: *Global Governance and the New Wars: The Merging of Development and Security*, Zed Books, New York, 2014.

⁶⁶² Held, McGrew, et al., *supra*, p. 72.

⁶⁶³ Kaldor, *supra*, pp. 93-96.

⁶⁶⁴ Boggan, S.: "Britons flock to fight in Bosnia: Thousands of ex-soldiers and 'untrained idiots and psychopaths' said to be serving as mercenaries with all three sides" 10 February 1993, *The Independent*, available at: <http://www.independent.co.uk/news/britons-flock-to-fight-in-bosnia-thousands-of-ex-soldiers-and-untrained-idiots-and-psychopaths-said-1471991.html>.

forces.⁶⁶⁵ Other mercenaries from Russia, Italy, Denmark, Sweden, Finland, and the US were also involved in the Bosnian conflict.⁶⁶⁶

Due to the multitude of fighting units and in the absence of a single source of authority or military command, this kind of war is run by horizontal coalitions that cooperate with one another on the basis of common projects and negotiated partnerships.⁶⁶⁷ The new wars can, therefore, be distinguished by the complete breakdown of the state monopoly of force. Besides the internal fragmentation of security which furthered the privatisation of violence, international involvement in the Bosnian conflict also brought private military contractors to the scene under the banner of peacebuilding operations. The severity of violence in Bosnia triggered the dispatch of UN peacekeeping forces (UNPROFOR). To provide the necessary manpower, the UN Department of Peacekeeping Operations contracted several PMCs, such as DynCorp and Defense Systems Limited (DSL) to carry out tasks such as crime prevention and detection, close protection, and border security duties.⁶⁶⁸

Operation Joint Endeavour (OJE) in Bosnia, Hungary, and Croatia was the result of the Dayton Peace Accord. OJE was conveyed as part of the LOGCAP initiative following two previous operations in Somalia and Haiti. The explanation for the deployment of private forces as opposed to the US military partially lies in the political past of the Cold War. Until the Accord, there was no host nation support agreement between the US and the above countries due to their former association with the Soviet bloc, making LOGCAP a practical alternative for supplying combat and service support.⁶⁶⁹ Brown & Root, now KBR, was the private engineering and procurement company that provided logistics and a wide array of other services under the

⁶⁶⁵ Dzidic, D.: "Report Probes Mujahideen Killings During Bosnian War" 25 January 2016, *Balkan Investigative Reporting Network*, available at: <http://www.balkaninsight.com/en/article/bosnian-serb-victims-still-waiting-for-mujahedin-crimes-justice-01-25-2016>.

⁶⁶⁶ Kaldor, *supra*, p. 49.

⁶⁶⁷ *Ibid.*, p. 95.

⁶⁶⁸ Ostensen, *supra*, p. 16.

⁶⁶⁹ Col. Russell, *supra*, p. 12.

LOGCAP initiative in Bosnia.⁶⁷⁰ The LOGCAP II contract was awarded to DynCorp International to perform peacebuilding activities in Bosnia between 1997 and 2002.⁶⁷¹ Unlike the other three LOGCAP initiatives, little can be found on the content of this particular programme in official US government sources. On the contrary, there has been a lot of controversy in the press surrounding the scandalous behaviour of DynCorp contractors involved in prostitution and human trafficking in Bosnia.⁶⁷² The link to the US Army official programme was rarely explicit, and public blame and responsibility was placed mainly on the UN, which was arguably a more abstract and fluid target than the US government. Although since 1998 eight DynCorp contractors were sent back from Bosnia, they have not been prosecuted.⁶⁷³ Moreover, DynCorp was later selected for the LOGCAP IV contract in 2007 for a term of up to ten years.⁶⁷⁴

International involvement did not stop there; in 1993, as a legal response to severe outbreaks of aggression, the Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) under the authority of Chapter VII of the UN Charter.⁶⁷⁵ While the UN and NATO⁶⁷⁶ had been operating since the end of World War II, they were often perceived as a legitimising vehicle for US foreign policy.⁶⁷⁷ The ICTY and the International Criminal Court (ICC), on the other hand, were an evolving exception to this rule, since in some cases these institutions

⁶⁷⁰ https://kbr.com/Documents/Project%20Profiles/ProjectProfile_LOGCAPIII.pdf.

⁶⁷¹ Franke, V.: *Security by Contractor: Outsourcing in Peace and Stability Operations*, Centre for Complex Operations, National Defense University, Washington, 2010, p. 11.

⁶⁷² See: Isenberg, D.: "It's Déjà Vu for DynCorp All Over Again" 25 May 2011, *Huffpost Business*, available at: http://www.huffingtonpost.com/david-isenberg/its-dj-vu-for-dyncorp-all_b_792394.html; Robson, T.: "Bosnia: The United Nations, human trafficking and prostitution" 21 August 2002, available at: <https://www.wsws.org/en/articles/2002/08/bosn-a21.html>; Diu, N. L.: "What the UN Doesn't Want You to Know" 6 February 2012, *The Telegraph*, available at: <http://www.telegraph.co.uk/culture/film/9041974/What-the-UN-Doesnt-Want-You-to-Know.html>; SFOR Contractor Involvement, Human Rights Watch, available at: <https://www.hrw.org/reports/2002/bosnia/Bosnia1102-11.htm>.

⁶⁷³ Liu, *supra*, pp. 82-83; Barnett, A. and Hughes, S.: "British firm accused in UN 'sex scandal'. International police in Bosnia face prostitution claims" 29 July 2001, *The Guardian*, available at: <http://www.theguardian.com/world/2001/jul/29/unitednations>.

⁶⁷⁴ <http://www.dyn-intl.com/news-events/press-release/dyncorp-international-selected-for-logcap-iv/>.

⁶⁷⁵ Craven, *supra*, p. 231; Cryer, R.: "International Criminal Law" in Evans, *supra*, p. 770.

⁶⁷⁶ The UN was established in 1945 and NATO in 1949.

⁶⁷⁷ See Westad, *supra*; Sewell, B. and Lucas, S. (eds): *Challenging US Foreign Policy: America and the World in the Long Twentieth Century*, Palgrave Macmillan, London, 2011.

investigate and try citizens of states that have not signed and ratified the Rome Statute.⁶⁷⁸ The ICTY addressed the issues of private violence through the mechanism of individual criminal liability. Dusko Tadic was the first accused to appear before the ICTY and was charged with grave breaches of the 1949 Geneva Conventions.⁶⁷⁹ Tadic participated in the attack, seizure, murder, and maltreatment of Muslims and Croats both within and outside three prison camps, using military and paramilitary groups.⁶⁸⁰ The Bosnian Serb Army acted aggressively in their attempt to establish *Republika Srpska* on Bosnian territory in January 1992.⁶⁸¹ As in the case of Nicaragua, it was essential to establish the relationship and the extent of control between the Yugoslavian state and the military and paramilitary forces in order to assign responsibility. Despite finding that the armed forces of the *Republika Srpska* “were almost completely dependent on the supplies of the [Army of the FRY] VJ to carry out offensive operations”, the Trial Chamber found the evidence insufficient to establish either full or effective control.⁶⁸² The case then went through the Appeals Chamber, who affirmed that:

The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.⁶⁸³

In the *Tadic* case, the Appeals Chamber found that there was “continuing payment of salaries, to Bosnian Serb and non-Bosnian Serb officers alike, by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)”⁶⁸⁴ which indicates and proves control.⁶⁸⁵ The Appeals

⁶⁷⁸ McFate, *supra*, 78; on ICC jurisdiction over citizens of non-parties see Elsea, J.: *International Criminal Court: Overview and Selected Legal Issues*, Congressional Research Service, 2002, pp. 25-26.

⁶⁷⁹ ICTY Statute, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Art. 2, p. 5.

⁶⁸⁰ Van den Hole, L.: “Towards a Test of the International Character of an Armed Conflict: Nicaragua and Tadic” 2004-2005, Vol. 32 (4), *Syracuse Journal of International Law and Commerce*, pp. 272-273.

⁶⁸¹ Craven, M.: “Statehood, Self-Determination, and Recognition” in Evans, M. D. (ed.): *International Law*, 4th edition, OUP, Oxford, 2014, pp. 223-224.

⁶⁸² ICTY, *The Prosecutor v. Dusko Tadić*, IT-94-1, Trial Chamber II, Judgement, 7 May 1997, para. 605.

⁶⁸³ *Tadic*, Case No. IT-94- I-A, Appeals Judgment, at para. 137.

⁶⁸⁴ “Opinion and Judgment”, *The Prosecutor v. Duško Tadic*, Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997, para. 601.

⁶⁸⁵ *Tadic*, *supra*, para. 150.

Chamber concluded that the armed forces of the *Republika Srpska* acted under the “overall control” of and on behalf of the FRY, classifying the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina as an international armed conflict.⁶⁸⁶ The link between the Federal Republic of Yugoslavia and the conduct of the Bosnian Serb forces and paramilitary groups was established by ICTY and later also by the International Court of Justice (ICJ) in the *Bosnian Genocide case*.⁶⁸⁷ However, the ICJ rejected the test for overall control, proposed by the Appeals Chamber, deeming it unsuitable as it stretches too far the necessary connection between the conduct of a state’s organs and its international responsibility.⁶⁸⁸

Importantly, the *Tadic case* contributed to the construction of an essential element in the criminal liability for corporations, namely joint criminal enterprise.⁶⁸⁹ The principle of this collective liability depends on lowering the culpability threshold as one individual may be deemed liable for another’s actions when operating in a group. It also changed the perception of war crimes dating back to Nuremberg, to an idea that crimes against humanity can also occur outside of international conflict.⁶⁹⁰ While the ICTY made incredible progress in establishing individual criminal responsibility, there are still questions and grey areas surrounding the attribution of authority on a state and corporate level. Is prosecution of individual war criminals a proportionate legal response to ethnic and political disasters of such scale? Are the existing international legal mechanisms capable of effectively allocating blame and invoking

⁶⁸⁶ *Tadic, supra*, para. 162.

⁶⁸⁷ Crawford, J. and Olleson, S.: “The Character and Forms of International Responsibility” in Evans, *supra*, p. 456; for the *Bosnian Genocide case* see: Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnian and Hercegovina v. Serbia and Montenegro*), Merits, Judgement, ICJ Reports 2007; from Summary of the Judgement of 26 February 2007: “It [the ICJ] first notes that, during the period under consideration, the FRY was in a position of influence, over the Bosnian Serbs who devised and implemented the genocide in Srebrenica, unlike that of any of the other States parties to the Genocide Convention owing to the strength of the political, military and financial links between the FRY on the one hand and the Republika Srpska and the VRS on the other”.

⁶⁸⁸ *Bosnian Genocide, supra*, p. 43, para. 406.

⁶⁸⁹ Simpson, S.: *Corporate Crime, Law, and Social Control*, CUP, Cambridge, 2002, p. 120.

⁶⁹⁰ Schabas, W. A.: *An Introduction to the International Criminal Court*, CUP, Cambridge, 2001, p. 12; *Tadic, supra*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

responsibility on states and corporate actors such as PMCs? While there was evidence of deploying private military forces, the issue of mercenarism was not raised at the time. Moreover, as mercenarism was not codified as an international crime under the Rome Statute, the ICC does not currently have any special jurisdiction over private military actors.⁶⁹¹

Sierra Leone was another typical example of a weak state, engrossed in ongoing internal struggles following the end of the Cold War.⁶⁹² Its army, the Republic of Sierra Leone Military Force (RSLMF), was unable to neutralise the rebels and establish security.⁶⁹³ The lack of adequate training, funding, or a military ethos further exacerbated security issues and in 1995 head of state Valentine Strasser first contracted Gurkha Security Guards and later Executive Outcomes (EO) to supply training and military support.⁶⁹⁴ However, the involvement of private military firms only aggravated the instability in the country and in the region, empowering corrupt governments through appropriation of all proceeds from mineral and oil concessions.⁶⁹⁵ As part of the funding package to the financially struggling Sierra Leone, the IMF approved payments to EO.⁶⁹⁶ Following the neoliberal framework of global governance, the IMF would quite naturally see private military firms as the most fitting solution to Sierra Leone's security problems.

⁶⁹¹ Liu, *supra*, p. 182.

⁶⁹² See: Migdal, J. S.: *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World*, Princeton University Press, Chichester, 1988; Reno, W.: *Warlord Politics in African States*, Lynne Rienner Publishers, 1999; Venter, A. J.: "Sierra Leone's Mercenary War for the Diamond Fields" 1995, Vol. 28 (11), *Jane's International Defence Review*, pp. 65-68.

⁶⁹³ Avant, *supra*, p. 83.

⁶⁹⁴ Avant, *supra*, pp. 85-87; see also: Schocken, C.: "The Special Court for Sierra Leone: Overview and Recommendations" 2002, Vol. 20 (2), *Berkeley Journal of International Law*, pp. 43-461; Harding, J.: "The Mercenary Business: Executive Outcomes" 1997, Vol. 24 (71), *Review of African Political Economy*, pp. 87-97; Howe, H. M.: "Private Security Forces and African Stability: The Case of Executive Outcomes" 1998, Vol. 36 (2), *The Journal of Modern African Studies*, pp. 307-331.

⁶⁹⁵ Muthien, B. and Taylor, I.: "The return of the dogs of war? The privatization of security in Africa", in Hall, R. B. and Biersteker, T. J. (eds): *The Emergence of Private Authority in Global Governance*, CUP, Cambridge, 2002, p. 195.

⁶⁹⁶ Shearer, D.: *Private Armies and Military Intervention*, Adelphi Paper No. 316, OUP, Oxford, 1998, p. 68.

Between 1994 and 1998 the network of EO's shareholders and associated businesses included around 30 to 50 military-related and mineral companies, who worked together to facilitate EO's operations in Africa.⁶⁹⁷ When in January 1993 EO first entered Angola on a two-month contract, they were not recruited by the Angolan government or any of its factions. Two British special service officers hired EO to capture and defend valuable oil tanks in the towns of Soyo and Kefekwena, controlled by UNITA forces.⁶⁹⁸ The next two-and-a-half-year contract with the Angolan government confirmed EO as a significant player in the private security field, and enabled its expansion both through capital and conflict opportunity. Their subsequent contract in Sierra Leone was aimed at defeating the Revolutionary United Front (who were later trained by an Israeli company, Spearhead Ltd), which ultimately led to free elections in 1996.⁶⁹⁹ EO's outward mercenary profile was condemned by the international community and the South African government; the Regulation of Foreign Military Assistance Act 15 of 1998 was the final nail in EO's coffin. The Act precluded any South African citizen from participating in an armed conflict, nationally or internationally. It also specifically prohibited recruitment, use, training, financing or engaging in mercenary activity, thereby criminalising mercenarism both in South Africa and outside of its borders.⁷⁰⁰

When in 1997 Sandline International was involved in suppressing an armed independence movement in Papua New Guinea, it subcontracted EO to facilitate armed forces and logistics needed for the military contract.⁷⁰¹ Although EO has been formally dissolved and Sandline have taken over their operations in Sierra Leone, currently there are few legal mechanisms to track and prevent the subcontracting relationship between the two entities, creating an impunity

⁶⁹⁷ Pech, K: *Chapter 5: Executive Outcomes – A corporate conquest*, 1999, p. 84, available at: <https://www.issafrica.org/pubs/Books/PeaceProfitPlunder/Chap5.pdf>.

⁶⁹⁸ Ibid., p. 85.

⁶⁹⁹ Silverstein, K.: *Private Warriors*, Verso, London, 2000, p. 165.

⁷⁰⁰ The Regulation of Foreign Military Assistance Act 15 of 1998, Art. 2, p. 4.

⁷⁰¹ Kaldor, *supra*, p. 95; Pech, *supra*, p. 93; see also: Shearer, D.: "Private Armies and Military Intervention" 1998, Vol. 38 (316), *The Adelphi Paper* 316.

construct, known as the corporate veil.⁷⁰² Most jurisdictions recognise the company law doctrine of “separate corporate personality”, whereby a parent company and its subsidiaries are considered to be separate legal entities, despite the link of shareholding.⁷⁰³ The doctrine was reinforced in *Prest v. Petrodel*⁷⁰⁴ as the UK Supreme Court asserted that the “courts may only ‘pierce the corporate veil’ in exceptionally limited circumstances.”⁷⁰⁵ Such a construct of legal separation and limited liability allows for impunity on the part of PMCs and cannot be addressed by only invoking individual criminal responsibility of PMC employees and directors.

As the main PMC clients, states welcomed the integration of private violence into their government policy, and were not prepared to outlaw it. Normalisation of private security came from every direction. Leading powers were promoting a neoliberal form of governance; weak and failing states lacked military structures and the capacity to sustain local security; international organisations, like the IMF and the World Bank, imposed impossible loan terms on developing nations while encouraging private military assistance. Finally, PMCs rose to the challenge as they acquired legal corporate status, thereby distinguishing themselves from illegitimate gangs and ‘soldiers of fortune’. Furthermore, the use of private force potentially enabled states to avoid traditional rules of engagement and shed some of the responsibility, which would have been inevitable when using uniformed personnel.

This shifting conflict paradigm demonstrates that wars no longer took place in the same context as they did historically. From the mid-twentieth century they began to be replaced with phenomena such as proxy wars and struggles of national liberation across the Third World, leading to internal conflicts, ethnic tension, humanitarian intervention, peacekeeping

⁷⁰² Ottolenghi, S.: “From Peeping behind the Corporate Veil, to Ignoring it Completely” 1990, Vol. 53 (3), *Modern Law Review*, pp. 338-353.

⁷⁰³ Schutter, O. D.: “Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations”, December 2006, p. 36, available at: <http://198.170.85.29/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf>.

⁷⁰⁴ *Prest v. Petrodel Resources Ltd & Others* (2013) UKSC 34.

⁷⁰⁵ Davies, P. L. and Worthington, S. (eds): *Gower Principles of Modern Company Law: Tenth Edition*, Sweet and Maxwell, London, 2016, pp. 2-8.

operations, and post-conflict reconstruction at the turn of the century. PMCs emerged and thrived in the context of these new wars, which often allowed them to bypass traditional laws of armed international conflict. But before attempting a deeper analysis of contemporary PMC regulation, it is important to examine the meaning behind the term 'private military company' and understand why regulating PMCs and their contractors poses a problem to IL.

Part 3: PMC Classification

According to Robert Mandel PMCs represent a modified form of organised corporate mercenarism, shielding their home states from international responsibility by concealing their participation or influence in conflicts.⁷⁰⁶ While there are plenty of critics blurring the lines between PMCs and mercenaries,⁷⁰⁷ it is important to distinguish the basic components of PMCs from a legal rather than ethical or political standpoint. From a corporate legal perspective, PMCs arose from the juxtaposition of civilian corporations and the lack of any clear criminalisation of mercenaries by the instruments of IL.⁷⁰⁸ Like mercenary groups, PMCs are still formed and run exclusively by civilians, albeit the majority are former military personnel. However, PMCs acquired a corporate legal personality which distinguishes them from their legally dubious predecessors. The construct of incorporation turned a private business of mercenarism into a limited company.

While the legitimacy of PMC activity is widely debated under IL, it is important to establish the starting point of their status. Incorporated as companies with subsidiaries, investors, and profit reports, PMCs enjoy the same protection by corporate law as any other company. In other words, all PMCs are *a priori* legitimate, since according to the legal definition of corporate and

⁷⁰⁶ Mandel, R.: *Armies without States: The Privatisation of Security*, Lynne Rienner Publishers, London, 2002, p. 33.

⁷⁰⁷ See for example: Scahill, J.: *Blackwater: The Rise of the World's most Powerful Mercenary Army*, Serpent's Tail, London, 2007; Armstrong, S.: *War PLC: The Rise of the New Corporate Mercenary*, Faber & Faber Limited, London, 2008; Young Pelton, R.: *Licensed to Kill: Privatising the War on Terror*, Three Rivers Press, New York, 2006.

⁷⁰⁸ Liu, *supra*, p. 192.

contract law, no company can be formed with the purpose of engaging in illegal activities.⁷⁰⁹ As argued by Hin-Yan Liu and also demonstrated in *Chapter 3*, IL failed to criminalise the act of mercenarism, therefore leaving a loophole for PMCs to exploit. I discuss the regulation of PMCs under corporate and contract law in more detail in *Chapter 5*, however the above clarification was necessary to identify the starting point for PMC classification.

There is no one right way to classify a PMC. Peter Singer divides PMCs into three “business sectors”: (i) military provider firms supplying “direct, tactical military assistance” that can include serving in front-line combat; (ii) military consulting firms that provide strategic advice and training; and (iii) military support forms that provide logistics, maintenance, and intelligence services to armed forces.⁷¹⁰ Wulf divides the companies in five categories, identifying (i) private security companies; (ii) defence producers; (iii) private military companies; (iv) non-statutory forces; and (v) mercenaries. He further differentiates PMCs by the nature of their activity, i.e. provision of consulting, logistics and support, technical services, training, peacekeeping and humanitarian assistance, and combat forces.⁷¹¹ McFate separates PMCs into ‘mercenary and military enterprisers’.⁷¹² South Africa’s Executive Outcomes⁷¹³ and London based Sandline International⁷¹⁴ fall under McFate’s classification of mercenary enterprisers, defining them as a private army conducting autonomous military campaigns. According to McFate, raising rather than commanding military forces is a distinct feature of military enterprisers, such as Blackwater, DynCorp International, or Triple Canopy.⁷¹⁵ Meanwhile the industry itself classifies

⁷⁰⁹ Ibid., p. 183.

⁷¹⁰ Singer, P.: *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, New York, 2003.

⁷¹¹ Schreier, F. and Caparini, M.: *Privatising Security: Law, Practice and Governance of Private Military and Security Companies*, Geneva, 2005, pp. 39-41, available at: www.dcaf.ch.

⁷¹² McFate, *supra*, p. 14.

⁷¹³ Defunct in 1998.

⁷¹⁴ The company closed on 16 April 2014.

⁷¹⁵ McFate, *supra*, pp. 14-17, specifically Table 2.1.

private military and security companies (PMSCs) as “private business entities that provide military and/or security services, irrespective of how they describe themselves.”⁷¹⁶

While as of March 2011 there were 90,339 contractors in Afghanistan, compared to approximately 99,800 uniformed military recruits,⁷¹⁷ the armed contractors represented a minority of approximately 16% of all DOD contractor personnel.⁷¹⁸ This is important when conceptualising the scope of PMC activities, as the majority of contractors fulfil purely civilian functions, such as logistics and transportation of supplies, maintenance, etc. PMC taxonomy is made problematic by the ambiguous use of the term ‘security’ or ‘military’ in the context of private civilian-formed companies. The term ‘military’ is the contentious part of the term ‘private military company’, as it creates an automatic assumption that the company is belligerent and armed. While PMCs are used by governments to provide support in their military operations abroad, the term ‘military’ can be somewhat misleading, implying that this is the direct function of the company. It also becomes an oxymoron, as the term ‘military’ which, according to current rules and regulations of IHL, is inherently governmental, is juxtaposed against the term ‘private company’, contradicting public state ownership of legitimate means of violence. Therefore, for the purposes of this research, when referring to a PMC, I propose to address the fraction of private security contractors that are armed, and could directly participate in hostilities, as well as the companies themselves. The use and regulation of weapons in the context of private security varies greatly, ranging from 2 per cent of armed private security providers in Croatia, India, and Sweden, to 80 per cent in the Dominican Republic, and 85 per cent in Colombia.⁷¹⁹

⁷¹⁶ The Montreux Document, *supra*, Preface, Art. 9 (a), p. 9.

⁷¹⁷ Source: CENTCOM 2 Quarter FY 2011 Contractor Census Report; Troop data from Joint Chiefs of Staff, “Boots on the Ground” January report to Congress.

⁷¹⁸ McFate, *supra*, p. 23.

⁷¹⁹ *Ibid.*, p. 9.

Although there is a range of academic critique condemning the privatisation and outsourcing of any governmental functions,⁷²⁰ the majority of PMC activity, such as logistics support, construction, communication, and maintenance, does not pose codification or accountability issues under IL. While ethical arguments are valid in condemning the mercenary motive, and the impact on democratic accountability,⁷²¹ these are often disproportionate to the reality of the armed contractor issue. On an institutional level, the norm against the use of private force on ethical grounds was demonstrated in 1994, when Executive Outcomes approached Kofi Annan at the outbreak of Rwandan atrocities. The UN decision was firmly against using a PMC to address the crisis. However, the inability to mobilise public forces in a timely manner, and the reluctance to defer to a PMC resulted in over 800,000 casualties, which combined exceeds the number of victims in Iraq and Afghanistan.⁷²² However, since then, the UN has been using PMCs both directly and through US procurement for their peacekeeping and humanitarian operations.⁷²³

Conclusion

By acquiring an international military dimension, PMCs became relevant to IL and international armed conflict. At the same time, these companies pose a significant challenge to IL as they create a situation whereby civilians have access to direct participation in hostilities. Through

⁷²⁰ See for example: Dickinson, L. A.: "Government for hire: Privatizing foreign affairs and the problem of accountability under international law" 2005, Vol. 45 (1), *William and Mary Law Review*, pp. 137-237; Dolovich, S.: "State Punishment and Private Prisons" 2005, Vol. 55 (3), *Duke Law Journal*, pp. 437-546; Metzger, G. E.: "Privatization as Delegation" 2003, Vol. 103 (6), *Columbia Law Review*, pp. 1367-1502.

⁷²¹ See: Pattison, J.: *The Morality of Private War: The Challenge of Private Military and Security Companies*, OUP, Oxford, 2014; Pattison, J.: "Outsourcing the Responsibility to Protect: Humanitarian Intervention and Private Military and Security Companies", 2010, Vol. 2 (1), *International Theory*, pp. 1-31; Tesón, F.: "Humanitarian Intervention: Loose Ends", 2011, Vol. 10 (3), *Journal of Military Ethics*, pp. 192-212; Percy, S.: "Morality and Regulation" in Chesterman, S. and Lehnard, C. (eds): *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, OUP, Oxford, 2007.

⁷²² McFate, *supra*, p. 38.

⁷²³ Ostensen, A. G.: "UN Use of Private Military and Security Companies: Practices and Policies", The Geneva Centre for the Democratic Control of Armed Forces, SSR Paper 3, 2011, available at: <http://www.dcaf.ch/Publications/UN-Use-of-Private-Military-and-Security-Companies-Practices-and-Policies>.

outsourcing and privatisation, states have handed over a portion of inherently governmental functions to private companies, allowing PMCs and their employees to obtain a certain form of power and governance that resembles that of fifteenth-century Italy. This chapter has explained the premise for the legitimisation of PMCs and scrutinised the critical political, strategic, and economic factors that brought private military forces back into the international arena. Neoliberal reforms, new wars, and the rise of PMCs marked the transition from state centrism to fragmented governance which remains prevalent in today's forms of power and legitimacy. The rise of neoliberalism was an important factor in integrating private military contractors into UK and US security from the 1980s onwards. Its ideology and economic policy allowed PMCs to find and establish a growing security market that significantly accelerated following the Cold War. In the context of domestic and international security, this phenomenon is accompanied by the rise of international organisations, corporations, and various military groups, all competing for authority and legitimacy alongside sovereign states on the international arena.

The shrinking of the state in favour of the free market economy coincided with the decline of state sovereignty, as international legal organisations and multinational corporations gained increasing gravitas and regulatory powers. Current regulation and classification of PMCs pose numerous issues to IL. These companies are no longer mercenaries in legal terms; they are registered and operating openly under a licence. However, the remit of their legitimate activities is still under question, and the liability issue remains unresolved. PMCs transformed the private military landscape of colonial troops and disreputable mercenaries into a legitimised business of civilian security, while post-Cold War demilitarisation provided the numbers to support the industry and its proliferation.

How we arrived at such a widespread and seemingly unregulated use of PMCs at the end of the twentieth century can be explained in the context of neoliberal policies. Extensive privatisation and outsourcing not only made room for private providers in the security sector; more

importantly, it changed the perception of normality and the legality of private security. Of course, this statement does not apply universally, otherwise PMCs would not be facing such significant criticism. However, this change of perception was substantial and touched enough states and international institutions to allow the idea of security privatisation to enter the governmental sphere. What was unimaginable 50 years ago at the time of the World Wars has become an obvious and plausible solution.

The neoliberal doctrine, coupled with new wars, PMC corporate identity, and the absence of criminalisation of mercenarism provides the context for contemporary use and regulation of PMCs, and the subsequent challenges this poses. This context challenges the view that considers PMCs a new issue under IL, providing a more comprehensive explanation of their rise, beyond the simple demilitarisation claim. Building on this background, I now focus on the questions of accountability, codification, and the aptitude of existing domestic and international legislation to effectively regulate the contemporary security sector. This juxtaposition of existing norms against the use of mercenaries and the prevailing economic and governance ideology promoting privatisation and outsourcing is the starting point for my contemporary analysis of the use and regulation of PMCs. By analysing all applicable regulation, I highlight the conflicts and gaps in contemporary international law concerning mercenary and PMC activity.

Chapter 5

Legal Analysis of PMC Regulation

When a private company is involved in committing a gross violation, such as accidentally killing a number of civilians while performing a military support operation abroad, who should be held responsible and in what way? Would it be the contractor who fired the gun? Or perhaps the company he was recruited by, which may have instructed him to do so, or which did not provide the appropriate training? Or should it be the state that outsourced the support of military activities to a PMC?

Both military conduct and human rights are viewed as primary concerns of states, rather than private entities or individuals.⁷²⁴ The presence of armed contractors abroad, whether deemed as combatants or civilians under AP I, adds an inter-state aspect which plays an important part in these questions. In other words, it is no longer a matter of one state's national committing an offence abroad against a foreign national. The premise of such an offence is defined by the contracted operation initiated by the client state, without which the contractors would not have found themselves in close proximity to hostilities. Equally, if the context of the professional occupation of a PMC is removed, the situation can appear as simple as one civilian killing another. This means that all three components, the contractor, the company, and the client (the state) are crucial to establishing responsibility in PMC conduct.⁷²⁵

⁷²⁴ Ruggie, J.: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles for the Implementation of the United Nations "Protect, Respect and Remedy" Framework; Principle 6 State-Business Nexus; Commentary, p. 8.

⁷²⁵ In the context of this chapter the terms 'liability' and 'responsibility' are interchangeable, with 'liability' referring to legal responsibility of an actor.

The question of regulation of private military forces remains critical regardless of the century. The move from mercenaries to standing armies has been observed during Absolutism with the purpose of establishing control of mercenaries and private armies.⁷²⁶ Today, neoliberal policies reintroduced private forces to the security landscape. This change in governance model created a market for force that runs parallel to the established system of public security regulated by states and the international humanitarian law. The private segment of security, however, loosely resembles the interdependent relationship of feudal contracts or the fragmented security model of Italian *condottieri*.⁷²⁷ Overall, this signals the weakening the controls of states over the private security sector as they become increasingly reliant on PMCs for provision of security, and introduces a system of overlapping PMC regulatory mechanisms.

There are a number of regulatory bodies that make provisions for PMC regulation; some are international, some domestic, some binding, others self-regulating and voluntary. The outcome of such an active regulatory response concerning private military conduct is a complex network of binding and voluntary provisions that all claim to regulate the private military space. What complicates this picture further is the domestic jurisdiction invoked by the corporate nature of PMCs, therefore introducing company law, contract law, and tort law into the mix. There are norms and treaties that ensure that a state cannot evade its responsibility by transferring its functions to a private entity. The UN Human Rights Council has also produced a number of comprehensive, legally binding, and voluntary guidelines aimed at enhancing the responsibility of transnational businesses to respect human rights, including prevention, mitigation, and remediation. Equally, there is a set of well-established international and domestic legal mechanisms to invoke individual criminal responsibility.

⁷²⁶ See Chapter 2, pp. 50-56.

⁷²⁷ See Chapter 2, pp. 50-53; 57-63.

The purpose of this chapter is to navigate through these bodies of law in order to identify the gaps and overlaps in the existing regulatory structure for PMCs.⁷²⁸ My enquiry is concerned with the application and the effective exercise of regulation in order to analyse the gap between existing and future regulation of private military space, and the resolution that this regulation can provide in the event of gross violations within the PMC industry. When analysing existing and emerging regulation, I take into consideration the lessons learned from the historical chapters in terms of the relationship between government and the military. These patterns can help shape future policy as well as identifying weaknesses in existing regulatory approaches. This chapter examines all three types of responsibility, individual, state, and corporate, in the context of a gross human rights violation or a war crime by a private military company. This chapter also raises the broader issue of a parallel power relationship between states and PMCs, rooted in the analysis of different governance models.⁷²⁹ Created by the horizontal nature of a contract and exacerbated by states' reliance on PMCs to provide security, the state/military relationship of the twenty-first century differs significantly from the trends observed in more recent governance models. Instead it shows resemblance to the sovereignty claims of feudal lords who controlled their own troops.⁷³⁰ Internationally recognised industry self-regulation will be examined here as an attempt for PMCs to assert themselves as a governing entity and claim legitimacy by establishing control and oversight mechanisms.

Part 1: Individual Liability for PMC Contractors

On 16 September 2007 in Nisour Square in Iraq, Blackwater contractors opened fire and killed seventeen Iraqi civilians, while twenty-four were wounded. PMCs provided three types of services in Iraq: personal security for senior civilian officials, non-military site security, i.e.

⁷²⁸ A table summarising the bodies of law and if they apply to individuals, corporations, and states can be found in Appendix 1 and 2, pp. 249-250.

⁷²⁹ In Chapters 2, 3, and 4.

⁷³⁰ As discussed in *Chapter 2*, pp. 50-52.

buildings and infrastructure, and non-military convoy security.⁷³¹ The massacre took place in 2007; going back a few years, during the Coalition Provisional Authority (CPA) administration in Iraq,⁷³² a legal framework was established stipulating the regulation of PMC activities:

In accordance with international law, the CPA, Coalition Forces and the military and civil personnel accompanying them, are not subjects to local law or the jurisdiction of local courts. With regard to criminal, civil, administrative or other legal process, they will remain subject to the exclusive jurisdiction of the State contributing them to the Coalition.⁷³³

The reference to international law does not seem to bear any judicial or practical meaning as it was not mentioned at all during the proceedings of the Blackwater Trial,⁷³⁴ making a clear statement about the civilian status of PMC contractors and disabling the vehicle of IHL. Such legal configuration puts the blame on the company and the contractors, entirely bypassing IL and leaving the hiring state free from responsibility. While the CPA, and the reference to IL, may have lost its relevance in 2007, the contractors were not tried in the local Iraqi courts. Instead, a bill was passed to subject all private contractors operating in combat zones to the Military Extraterritorial Jurisdiction Act (MEJA).⁷³⁵ The MEJA was originally passed by Congress in 2000, giving federal courts jurisdiction over felonies committed by persons “employed by or accompanying the armed forces” overseas.⁷³⁶ By extending the MEJA jurisdiction to private contractors, the US government ensured the Blackwater employees were not tried in Iraq, where the crimes were committed, but instead remained under the authority of US courts.

⁷³¹ Isenberg, D.: “Private Military Companies in Iraq” in Chesterman, S. and Lehnard, C. (eds): *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, OUP, Oxford, 2007, p. 84.

⁷³² 21 April 2003-28 June 2004

⁷³³ Office of the Administrator of the Coalition Provisional Authority Baghdad, Iraq; Public Notice regarding the Status of Coalition, Foreign Liaison and Contractor Personnel, 26 June 2003.

⁷³⁴ J. Stewart, *Inside the Blackwater Trial*, conference paper presented at the Institute for Global Law and Policy, Harvard Law School, June 2015.

⁷³⁵ Meyer, J. and Barnes, J. E.: “Congress moves to rein in private contractors” 4 October 2007, *Los Angeles Times*, available at: <http://articles.latimes.com/2007/oct/04/nation/na-blackwater4>; Madhani, A.: “House: No pass for contractors. Blackwater shooting in Iraq spurs curbs” 5 October 2007, *Chicago Tribune*, available at: http://articles.chicagotribune.com/2007-10-05/news/0710050148_1_security-company-blackwater-usa-private-contractors-private-security.

⁷³⁶ Public Law 106-523—Nov. 22, 2000.

In the Blackwater case, the contractors disputed the applicability of MEJA jurisdiction due to their contract with the State Department, rather than the Department of Defence (DOD). The legal wording of the MEJA creates uncertainty and potential jurisdictional gaps.⁷³⁷ During the trial, Gordon England, former Deputy Secretary of Defence, testified that at the time of the shooting, Blackwater contractors were supporting the Department of State mission only, rather than the Department of Defence.⁷³⁸ This distinction is important because in 2004 Congress extended MEJA jurisdiction to cover

the civilian employees, contractors, and employees of contractors of any Federal agency or provisional authority, and their dependents, to the extent that the employment relates to the mission of the Department of Defence overseas or to operations within territory that the United States occupies solely or jointly.⁷³⁹

According to Gordon England, there was no cooperation between the Department of State and the Department of Defence, and since Blackwater was formally contracted to the Department of State, the MEJA jurisdiction could not be applied to invoke state responsibility.⁷⁴⁰ Ultimately, four contractors were prosecuted in the US District Court for the District of Columbia;⁷⁴¹ they were found guilty and were sentenced to lengthy prison terms.⁷⁴²

The principle of extraterritorial criminal jurisdiction is not exclusive to the US. In the UK, for example, according to the Armed Forces Act 2006 (UK), PMC contractors working for the UK Armed Forces are subject to service discipline. This, however, does not apply to contractors recruited abroad for UK Armed Forces missions.⁷⁴³ In English law, any criminal act committed by

⁷³⁷ Cameron, L. and Chetail, V.: *Private Military and Security Companies under Public International Law*, CUP, Cambridge, 2004, p. 624.

⁷³⁸ Stewart, J. and Gray, S.: "The Blackwater Trial: Part 2 – Two Legal Issues" 27 October 2014, *Just Security*, available at: <https://www.justsecurity.org/16807/blackwater-trial-part-2-legal-issues/>.

⁷³⁹ H.R. 4390 (108th): MEJA Clarification Act, 5/19/2004, available at: <https://www.govtrack.us/congress/bills/108/hr4390/summary>.

⁷⁴⁰ Stewart and Gray, *supra*.

⁷⁴¹ Estate of Himoud Saed Atban, et al. v. Blackwater USA, et al., the U.S. District Court for the District of Columbia, 2007.

⁷⁴² Nick Slatten was sentenced to life in prison, and the other three guards, Dustin Heard, Evan Liberty, and Paul Slough, to 30 years each.

⁷⁴³ Cameron and Chetail, *supra*, p. 625.

an employee of a company would lead to a breach in contract.⁷⁴⁴ However, this is not clear-cut in the private military industry, where the legality and criminality of contracted activities cross over. The International Criminal Court Act 2001 provided jurisdiction to prosecute core crimes, such as crimes of aggression, war crimes, genocide and crimes against humanity,⁷⁴⁵ committed by British nationals in or outside the United Kingdom.

Where national courts lack extraterritorial reach to prosecute offences committed by their nationals abroad, the International Criminal Court may exercise its jurisdiction. Based on the principle of complementarity, the ICC may only apply authority when national legal systems are unable or unwilling to do so. Moreover, the Rome Statute provisions relating to individual criminal responsibility do not undermine the responsibility of states under IL.⁷⁴⁶ The ICC and the ad hoc tribunals are the most obvious avenues for ascribing international criminal responsibility for the most serious of crimes.⁷⁴⁷ The jurisdiction of the Court is, however, limited to the most serious crimes of concern to the international community as a whole.⁷⁴⁸ PMC contractors bear criminal responsibility as individuals, regardless of their status under IHL. While the applicability of war crimes provisions is equal to both civilians and combatants, a link to an armed conflict needs to be established for an offence to qualify as a war crime.⁷⁴⁹ ICC Articles 11, 12, and 13 define more specifically the conditions for international criminal prosecution. However, it is Article 25 of the ICC that defines the parameters of individual criminal responsibility.⁷⁵⁰ The Court has jurisdiction over natural persons only, as opposed to states or corporations, and it can

⁷⁴⁴ Pinto, A. and Evans, M.: *Corporate Criminal Liability*, 2nd edition, Thompson, Sweet & Maxwell, London, 2008, p. 23.

⁷⁴⁵ White, N. D.: "Regulation of the Private Military and Security Sector: Is the UK Fulfilling its Human Rights Duties?" 2016, Vol. 16 (3), *Human Rights Law Review*, p. 596.

⁷⁴⁶ Rome Statute of the ICC, Art. 25 (4).

⁷⁴⁷ On individual criminal responsibility see: Van Sledregt, E.: "The Criminal Responsibility of Individuals for Violations of International Humanitarian Law" 2004, Vol. 2 (3), *Journal of International Criminal Justice*, pp. 932-936; Eser, A.: "Individual Criminal Responsibility" in Cassese, A., Gaeta, P. and Jones, J. (eds): *The Rome Statute of the International Criminal Court: A Commentary*, OUP, Oxford, 2002.

⁷⁴⁸ Rome Statute of the ICC, Part 2, Article 5 (1).

⁷⁴⁹ Cameron and Chetail, *supra*, pp. 597-598.

⁷⁵⁰ Rome Statute of the ICC, Art. 25.

ascribe criminal responsibility and be held liable for a crime within the jurisdiction of the Court.⁷⁵¹ Individuals can be either held directly liable for the offences they committed, or be deemed responsible for ordering, soliciting or inducing, as well as aiding, abetting, or otherwise assisting the commission of a crime.⁷⁵²

Another important aspect of individual criminal responsibility develops from the idea of superior or command responsibility.⁷⁵³ The theory of command responsibility arises from the laws of armed conflict and was firmly entrenched in treaty law in 1977 as part of Articles 43 and 87 of AP I.⁷⁵⁴ Under the doctrine of command responsibility, a commander, or the one performing the role and the duties of a commander, may be held liable for the conduct of his subordinates.⁷⁵⁵ In order to deem a PMC employee or director personally liable, they must have proven *de facto* control over their subordinates, and have the material ability to prevent and punish the commission of the crime.⁷⁵⁶ ICC Article 28 on 'Responsibility of commanders and other superiors' clearly stipulates criminal responsibility of "a military commander or person effectively acting as a military commander" for the crimes committed by subordinates under their effective command and control.⁷⁵⁷ In other words, their civilian status does not shield PMC employees or directors from criminal responsibility via application of Article 28. When a contractor is entitled to give orders, his responsibility may be invoked on the basis of being a *de facto* military commander.⁷⁵⁸ Lindsey Cameron and Vincent Chetail suggest that, when performing tasks that

⁷⁵¹ Ibid., Art. 25 (1); (3).

⁷⁵² Ibid., Art. 25 (3) (a), (c).

⁷⁵³ For more on superior responsibility, see: Arnold, R. and Triffterer, O.: "Article 28. Responsibility of Commanders and other Superiors" in Triffterer, O. (ed.): *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition, Hart, Munich, 2008; Mettraux, G.: *The Law of Command Responsibility*, OUP, Oxford, 2009; Olasolo, H.: *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes*, Hart, Oxford, 2009.

⁷⁵⁴ Cameron and Chetail, *supra*, p. 616.

⁷⁵⁵ Ibid., p. 613.

⁷⁵⁶ Case law: *Celebici* Trial Chamber Judgement 2001, paras 354, 378; *Semanza* Trial Chamber 2003, para. 402; *Kordic and Cerkez* Trial Chamber Judgement 2001, paras 414-415.

⁷⁵⁷ Rome Statute of the ICC, *supra*, Art. 28 (a).

⁷⁵⁸ Cameron and Chetail, *supra*, p. 605, p. 619. See also: *Prosecutor v. Kunarac, Kovac and Vukovic*, Trial Chamber Judgement, Case No. IT-96-23-T & IT-96-23/1-T; para. 397.: "The giving of orders or the

give PMC employees or directors *de facto* control over soldiers of states whose armed forces are not fully developed, their inaction and silent by-standing in the place where crimes occur could merit engaging their responsibility. Following the same logic, it may be sufficient to establish *de facto* control, rather than *de jure* incorporation of PMCs into state armed forces, in order to attribute their actions to the state they are representing. However, this connection seems far-fetched because it concerns state responsibility, even though a similar rationale is applied.⁷⁵⁹

PMC-Specific Regulation and Individual Responsibility

As part of the UN “Protect, Respect and Remedy” Framework, a number of states have adopted a range of approaches to invoke individual liability for PMC contractors, such as direct extraterritorial legislation and enforcement, whereby criminal regimes allow for prosecutions based on the nationality of the offender beyond national borders.⁷⁶⁰ However, besides domestic legal systems, there has been an active development on the international level, specific to PMC regulation. The Working Group (WG) on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination was established in 2005. In 2009, the WG introduced a new framework of regulation in the form of the Draft Convention. The purpose of the new draft was to strengthen accountability and extraterritorial provisions, especially to address the complex environments in which PMCs operate.⁷⁶¹ At its 15th session, on 1 October 2010, the Human Rights Council adopted resolution 15/26, by which it decided the following:

to establish an open-ended intergovernmental working group with the mandate to consider the possibility of elaborating an international regulatory framework, including,

exercise of powers generally attached to a military command are strong indications that an individual is indeed a commander. But these are not the sole relevant factors”, p. 132.

⁷⁵⁹ See *Nicaragua case*.

⁷⁶⁰ Guiding Principles on Business and Human Rights. Implementing the United Nations “Protect, Respect and Remedy” Framework, UN Human Rights Office of the High Commissioner, New York and Geneva, 2011, p. 4.

⁷⁶¹ A/HRC/30/47, Art. 33 (g), p. 10.

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 and impeding the exercise of the right of peoples to self-determination.⁷⁶²

Since 2010 three more sessions have been held, and the mandate of the open-ended intergovernmental working group had been further extended twice in order for it to undertake and fulfil its mandate, and it is currently entering its final year with a projected close date of August 2017. Following its fourth session, which was held from 27 April to 1 May 2015, the group presented its recommendations to the Council at its thirtieth session. Article 21 of the Draft Convention proposed to establish rules on individual criminal responsibility. Similarly, as it applies to legal entities, the Draft Convention exercises its jurisdiction over individuals through the domestic laws of state parties.⁷⁶³ It obliges each state party to take necessary measures when:

- (a) The offence is committed in the territory of that State;
- (b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed; or
- (c) The offence is committed by a national of that State.⁷⁶⁴

Although it is not explicit in the above provision, one can assume that Article 21 requires state parties to take responsibility for their nationals committing offences not only on their territory, but also abroad. This approach is distinct from the majority of domestic regulation, though it is in line with the OAU Convention for the Elimination of Mercenaries.⁷⁶⁵ The Draft Convention also suggests, although it does not strictly require, that states establish jurisdiction over the offences committed against their nationals or permanent residents,⁷⁶⁶ while Article 23 covers

⁷⁶² A/HRC/RES/15/26, p. 2.

⁷⁶³ Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies, 13 July 2009, (The Draft Convention), Article 21.

⁷⁶⁴ Ibid., Article 21 (1)

⁷⁶⁵ The OAU Convention called for states to introduce laws forbidding their nationals from engaging in mercenary activities. OAU Convention for the Elimination of Mercenaries in Africa, O.A.U. Doc. CM/433/Rev. L. Annex 1, 1972, Article 3 (a).

⁷⁶⁶ The Draft Convention, Article 21 (2).

obligations related to prosecution, ensuring effective remedies for victims.⁷⁶⁷ The most valuable provision relating to individual responsibility stipulates that state parties must ensure that no immunity agreement is granted to PMCs and their contractors for violations of international human rights law.⁷⁶⁸ The significance of this passage lies in its direct attempt to eliminate the impunity that PMCs and their personnel have enjoyed through granting of protection.⁷⁶⁹ The same clause mentions the enforcement of IHL, however no details are specified on how states should go about this process through the premises of domestic judicial systems.

Today, a number of European Union member states allow for extraterritorial legislation concerning human rights by virtue of the application of the European Convention on Human Rights (ECHR).⁷⁷⁰ However, it does not apply outside the ECHR *espace juridique*,⁷⁷¹ which therefore significantly limits the scope of its jurisdiction. Also, provided that PMC-caused human rights violations are more likely to occur in conflict zones and outside the ECHR founding states' judicial remit, the exact parameters of the ECHR's extraterritorial reach would ultimately rely on individual states' jurisdiction, and individual extraterritoriality clauses.

Individual Responsibility under the Montreux Document

Another significant attempt at regulation of PMCs was initiated by the Swiss Federal Department of Foreign Affairs in cooperation with the International Committee of the Red Cross in 2005. Industry and civil society actors were closely engaged in the process, which comprised five

⁷⁶⁷ Ibid., Article 23 (1).

⁷⁶⁸ The Draft Convention, Article 23 (2).

⁷⁶⁹ On immunity mechanisms see: Simpson, G.: *Law, War and Crime: War Crimes Trials and the Reinvention of International Law*, Polity Press, Cambridge, 2007, p. 17.

⁷⁷⁰ Kirshner, J. A.: "A call for the EU to assume jurisdiction over extraterritorial corporate human rights abuses" 2015, vol. 13, (1), *Northwestern Journal of International Human Rights*, p. 19.

⁷⁷¹ Ryngaert, C.: "Clarifying the Extraterritorial Application of the European Convention on Human Rights. *Al-Skeini and others v. United Kingdom* App No 55721/07 (ECtHR, 7 July 2011)" 2012, Vol. 28 (74), *Utrecht Journal of International and European Law*, p. 59.

intergovernmental and four expert meetings.⁷⁷² At the fourth meeting on the ‘Swiss Initiative’ in September 2008, the Montreux Document was finalised and adopted by consensus of the participating governments.⁷⁷³ Although lacking legally binding standing, the Montreux Document outlines obligations and responsibilities that individual PMC directors and employees ought to follow. It references contractor obligations under relevant domestic laws, and all human rights and IHL provisions imposed upon them nationally.⁷⁷⁴ According to the Montreux Document, the personnel of PMCs are:

protected as civilians under international humanitarian law, unless they are incorporated into the regular armed forces of a State or are members of organized armed forces, groups or units under a command responsible to the State; or otherwise lose their protection as determined by international humanitarian law.⁷⁷⁵

To interpret this statement, unless a PMC forms part of a state’s military, either for various or one specific operation, PMC contractors are classified as civilians. The Montreux Document subsequently extends IHL protection to an organised group of armed civilians recruited by a state, or a non-governmental entity. This protection is, however, revoked if the contractors are participating in hostilities.⁷⁷⁶ Could this be the normative genesis of the legal vacuum that is increasingly growing in scale and complexity?

The Document also offers a very vague provision on superior responsibility, referring to government officials, with no particular explanation as to what establishes their superiority over PMC employees and PMC directors.⁷⁷⁷ Furthermore, James Cockayne suggests that this provision “sidesteps the difficult question of the nature of the knowledge and intent a superior

⁷⁷² Cockayne, J.: “Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document” 2009, Vol. 13 (3), *Journal of Conflict & Security Law*, p. 402.

⁷⁷³ Federal Department of Foreign Affairs, Section for International Humanitarian Law, available at <http://www.eda.admin.ch/psc>.

⁷⁷⁴ The Montreux Document on Private Military and Security Companies, 17 September 2008, Section E. PMSCs and their personnel, paras 22-23, p. 14, available at: <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html>.

⁷⁷⁵ Montreux Document, Section E. PMSCs and their personnel, para. 26 (b), p. 14.

⁷⁷⁶ *Ibid.*, para. 25, p. 14.

⁷⁷⁷ Montreux Document, Section F. Superior responsibility, para. 27(a), p. 15.

must possess in order for his or her responsibility to be triggered”,⁷⁷⁸ as it asserts that superior responsibility arises from “effective authority” and “in accordance with the rules of international law”⁷⁷⁹ without explicitly referencing any particular rules or laws.

Between Civilians and Combatants: Immunity of Private Contractors

Having reviewed the existing legal frameworks that govern PMC contractors both domestically and internationally, an important question arises. Are there any impunity mechanisms that would prevent domestic extraterritorial jurisdictions and the international criminal law framework provided by the ICC and the ad hoc Tribunals from treating PMC employees in the same way as all other civilians in the event of a human rights violation in the context of international crimes? Immediately, there appears to be a conflict between the independent procedure of the ICC to try grave crimes, and the political influence of the Security Council and certain individual states.⁷⁸⁰ There are currently different immunity mechanisms, such as the Forces Agreement between the UK and Afghanistan,⁷⁸¹ and the Article 98 agreements⁷⁸² that shield UK and US military personnel from ICC investigations.

Another source of individual impunity for PMC employees has been legal immunity, provided to contractors by the hiring state.⁷⁸³ In Abu Ghraib lawsuits against CACI International⁷⁸⁴ and Titan Corporation (now L-3 Services),⁷⁸⁵ the US federal court established that “Titan employees performed their duties under the direct command and exclusive operational control of the

⁷⁷⁸ Cockayne, *supra*, p. 411.

⁷⁷⁹ *Ibid.*, para. 27 (b), p. 15.

⁷⁸⁰ According to Art. 16 of the Rome Statute, “no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect”.

⁷⁸¹ As part of the International Security Assistance Force.

⁷⁸² See Rome Statute, Art. 98; see also the Status of Bilateral Immunity Agreements, available at: http://www.iccnw.org/documents/CICCFs_BIAstatus_current.pdf.

⁷⁸³ Cameron and Chetail, *supra*, p. 623.

⁷⁸⁴ *Al Shemari et al. v. CACI et al.*

⁷⁸⁵ *Saleh et al. v. Titan.*

military.”⁷⁸⁶ Establishing the presence of military control meant that government contractor immunity was extended to Titan employees and the plaintiffs’ claims could be pre-empted. While CACI employees were found to have operated under a dual chain of command, supervised by both military and company managers, the court found CACI employees to have been integrated into a military mission, and, therefore, also in possession of government contractor immunity. The District of Columbia Circuit Court of Appeals ruled in favour of the defendants on 11 September 2009.⁷⁸⁷

Part 2: State Responsibility

Why is it important to invoke state responsibility in the context of PMC conduct? First of all, the military nature of PMCs sets them apart from other companies, as their business is set up to conduct military support operations on behalf of a client. PMC clients are predominantly multinational corporations, international organisations, or states. In the case of the former, PMCs are likely to provide security for an extraction business or similar activities. However, when their clients are states or international organisations, such as the UN, PMCs are likely to be recruited to support military or peacekeeping operations abroad. Contractors would work alongside military personnel, fulfilling a number of functions from logistics to military training. This proximity to combat and the potential for direct participation in hostilities brings PMCs into a grey area of legality and closer to the realm of international armed conflict. PMCs are reliant on state contracts to ensure their presence in these areas, and therefore it is crucial to examine the extent of state responsibility in this relationship.

The second reason for state involvement is tied up in the high risk of human rights violations associated with PMC operations in conflict and tension zones. In his capacity as the Special

⁷⁸⁶ See: <https://business-humanrights.org/en/abu-ghraib-lawsuits-against-caci-titan-now-l-3-0>.

⁷⁸⁷ See:

[https://www.cadc.uscourts.gov/internet/opinions.nsf/B6913B5CFF9D636B852578070058D528/\\$file/08-7008-1205678.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/B6913B5CFF9D636B852578070058D528/$file/08-7008-1205678.pdf).

Representative of the Secretary-General on the issue of human rights and transnational corporations, John Ruggie argued that:

states individually are the primary duty-bearers under international human rights law, and collectively they are the trustees of the international human rights regime. Therefore, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights, quite apart from any legal obligations States may have in certain circumstances.⁷⁸⁸

In 2001 the International Law Commission (ILC) adopted a complete text of the Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles), together with accompanying Commentaries. More specifically, articles 4, 5, 8, 9, and 11 of the ILC cover the conditions for attribution of private conduct to the state. The Montreux Document and the Draft Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies are the industry-specific regulatory bodies that outline the obligations of states who hire, host, and domicile PMCs. In addition, the UN "Protect, Respect and Remedy" Framework sets out the guiding principles for states, as well as businesses, to ensure human rights values are promoted and followed. Finally, the relationship between a hiring state and the PMC is administered by a contract under which both parties are liable. If the terms of the contract are breached, the jurisdiction of contract law would apply, adding an extra layer of surveillance and legal enforcement to the realm of private forces. On the surface, these regulatory bodies provide a comprehensive structure for the state to administer PMC conduct, and for state responsibility to be invoked in the event of gross violations by PMCs. This section examines the existing legal mechanism with regards to state responsibility, in order to establish the effectiveness of the existing regulatory regime.

The UN Guiding Principles on Business and Human Rights stipulate that home states should require businesses "to respect human rights abroad, especially where the State itself is involved

⁷⁸⁸ Ruggie, *supra*, Principle 6 State-Business Nexus; Commentary, p. 8.

in or supports those businesses.”⁷⁸⁹ As part of the initiative, a Reporting Framework, created and overseen by John Ruggie, was established to help businesses implement and follow the Guiding Principles. The section on the State-Business Nexus (principles 6-8) emphasises state responsibility under international human rights law,⁷⁹⁰ and stresses the continued existence of such responsibility in the event of outsourcing to a private company.⁷⁹¹ While these documents promote human rights values in a corporate realm and imply overarching state responsibility over the actions of its “formal and informal agencies”, there are some fundamental weaknesses. First of all, the major instruments of corporate social responsibility are not legally binding and lack punitive mechanisms, or any form of legal enforcement. Second, their regulatory rhetoric is significantly undercut by the existing limitations of IL in ascribing responsibility to the state, which I explore next.

1. Gaps in the ILC Articles on Attribution of Conduct

In order to fully understand the extent and limitations of regulatory frameworks concerning PMC conduct, it is first important to consider the relationship between PMCs and their primary clients, states. By the nature of their business, PMCs are service providers who operate on behalf of a client rather than independently. While PMCs do not have a political agenda, as they carry out another party’s strategy, states are seen to increasingly rely on PMCs for provision of security, therefore relinquishing some of their power and control. PMCs, on the other hand, operate a market for force, keeping a firm hold on the private sources of power. This dynamic of supply and demand of security services is administered by two legal frameworks, a contract that defines the terms of agreement between a state institution and the PMC, and a set of International Law Commission Articles (ILC Articles) that outline the criteria for ascribing private conduct to the acts of a state. It is noted in the Guiding Principles that states which privatise the

⁷⁸⁹ Guiding Principles, *supra*, p. 4.

⁷⁹⁰ Ruggie, *supra*; Principle 6 State-Business Nexus; Commentary, p. 9.

⁷⁹¹ *Ibid.*

delivery of services should continue to ensure that companies adhere to human rights norms. Failure to do so “may entail both reputational and legal consequences for the State itself.”⁷⁹² While with the proliferation of neoliberal ideas, privatisation and the outsourcing of numerous services became increasingly widespread, certain functions are still considered purely governmental. The UN Working Group on Mercenaries asserts that

certain functions were inherent to the State, for which it retained ultimate responsibility regardless of whether or not it outsourced that function. Some inherent State functions might not be outsourced, namely direct participation in hostilities in armed conflict, and detention and interrogation of prisoners of war, as defined in the Geneva Convention of 12 August 1949.⁷⁹³

Despite this statement, the nature of PMC activity brings companies and their employees into conflict zones, where the risk of participation in hostilities is very high. Equally, PMCs like CACI International and Titan Corporation (now L-3 Services), were officially contracted by the US Government to conduct interrogation and translation services at military prisons in Iraq.⁷⁹⁴ According to ILC Articles, “every internationally wrongful act of a State entails the international responsibility of that State.”⁷⁹⁵ ILC Article 4 provides the basic rule of attributing the conduct of state organs to the state:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.⁷⁹⁶

In this scenario, the relation to the PMC is irrelevant unless the PMC acts as a state agent, i.e. is officially incorporated into the organs of government. Amongst the examples are companies such as Sandline and Executive Outcomes whose personnel were enrolled as “Special

⁷⁹² Guiding Principles, *supra*, p. 8.

⁷⁹³ A/HRC/30/47, Art. 33 (a), p. 10.

⁷⁹⁴ See: <https://business-humanrights.org/en/abu-ghraib-lawsuits-against-caci-titan-now-l-3-0>.

⁷⁹⁵ ILC “Report of the International Law Commission: Fifty-Third Session” (UNGA, 2001) A/56/10, Art. 1.

⁷⁹⁶ ILC, *supra*.

Constables” on an assignment to Papua New Guinea.⁷⁹⁷ As seen from the previous section, PMC employee incorporation into the military chain of command had been proposed in order to extend contractor immunity to CACI and Titan employees. However, state responsibility was not invoked, therefore spreading the legal vacuum around PMC activity and fostering impunity.

ILC Article 5 covers entities that are empowered by the state and are exercising elements of governmental authority. For a state to carry responsibility over PMC actions, the PMC must be empowered by the state to exercise governmental authority. There is little clarity on what the empowerment should look like, besides the fact that only the entities that are empowered by internal law can exercise governmental authority.⁷⁹⁸ While a contract between a state and a PMC could be considered an instrument of domestic law, it is the element of empowerment that is crucial to attribute private conduct to the state and, therefore, establish responsibility. Without a specific empowerment clause, a contract can be reduced to a horizontal service agreement between two equal parties. Similarly, ILC Article 8 attributes responsibility to the state for conduct carried out under its direction or control. These examples may include auxiliaries and volunteers who do not necessarily form part of the armed forces but who are authorised by the state to carry out a particular mission.⁷⁹⁹ When a state deprives an individual of liberty, as for example in the case of detention, it takes control over the detainee’s life, rights, and conditions. The state, therefore, also yields a heightened level of responsibility to protect that individual’s rights.⁸⁰⁰ Consequently, there is a strong argument to invoke state responsibility in situations when detention and correctional facilities have been outsourced to a private company, regardless of the contract in force. Nigel White acknowledges that the principles of state responsibility are extremely abstract, and “do not concern themselves with practical

⁷⁹⁷ Singer, P.: *Corporate Warriors: The Rise of the Privatized Military Industry*, Cornell University Press, New York, 2003, p. 38.

⁷⁹⁸ ILC, *supra*, p. 94.

⁷⁹⁹ Liu, *supra*, p. 104.

⁸⁰⁰ A/HRC/32/39, p. 16.

means and methods of implementation and enforcement.”⁸⁰¹ Indeed, the lack of specific parameters defining ‘direction and control’ makes it almost impossible to attribute PMC conduct to a state. The lack of precedent in historically significant cases like *Nicaragua* and *Tadic* reinforces states’ impunity when irregular forces are used.

ILC Articles 9 and 11 prove to be even weaker mechanisms; Article 9 comes into play when the private 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”, and Article 11 actually requires a state to “acknowledge and adopt the conduct in question as its own.”

The UN Guiding Principles explicitly state that the corporate responsibility to respect human rights exists independently of state responsibility to fulfil their human rights duties, and, most importantly, does not diminish those duties.⁸⁰² This is distinct from the question of legal liability, which remains defined largely by national law provisions in relevant jurisdictions.⁸⁰³ Similarly, the International Code of Conduct for Private Security Service Providers (ICoC) “does not replace the control exercised by Competent Authorities, and does not limit or alter applicable international law or relevant national law.”⁸⁰⁴ This means that neither Human Rights law, nor the voluntary industry regulation, can enact the ILC Articles to effectively manage state responsibility in the context of private company conduct. Therefore, in practice, the ILC Articles provide a weak legal framework for establishing state responsibility over the conduct of a contracted PMC.

⁸⁰¹ White, N.: “Regulatory Initiatives at the International Level” in Bakker and Sossai (eds), *supra*, p. 29.

⁸⁰² Ruggie, *supra*, Principle 12 The Corporate Responsibility to Respect Human Rights; Commentary, p. 12.

⁸⁰³ *Ibid*, p. 13.

⁸⁰⁴ The International Code of Conduct for Private Security Service Providers, Geneva Academy, August 2103, para. 14, p. 23, available at: http://www.geneva-academy.ch/docs/publications/briefing4_web_final.pdf.

Institutional Responsibility

While this research does not elaborate in detail on institutional responsibility, it is important to mention the core principles and initiatives in this realm. In 2011 the ILC adopted a set of Articles on the Responsibility of International Organisations (ARIO), ascribing international legal personality to international organisations, thereby subjecting them to IL.⁸⁰⁵ This meant that same rules ought to apply to international organisations hiring PMCs as they would to states.

The UN had previously engaged armed PMCs in selected duty stations as a last resort in Afghanistan, Haiti, and Somalia, “in an effort to strengthen the safety and security of its personnel and to enable the Organisation to deliver its programmes and mandates in high-risk environments.”⁸⁰⁶ The principles of the deployment and use of private security resources is outlined in the UN Policy on Armed Private Security Companies.⁸⁰⁷ The engagement and use of such services is governed by a clear accountability and responsibility framework, and clear operational standards and oversight, stipulated in the Guidelines on the Use of Armed Security Services from Private Security Companies.⁸⁰⁸ However, the document only articulates ‘Daily and Monthly Operations Reviews’, omitting to explicitly state whether or not the UN is ultimately accountable for the private forces they deploy, and who is liable in the event of a violation committed by a private contractor. White and McLeod suggest that the absence of an equivalent attribution clause in the Draft Articles on Institutional Responsibility may present a legal loophole for private military contractors since there is no separate provision for attribution of the conduct of individuals.⁸⁰⁹ So, in principle, institutional responsibility should apply in the same

⁸⁰⁵ Akande, D.: “International Organisations” in Evans, M. D. (ed.): *International Law: Fourth Edition*, OUP, Oxford, 2014, p. 251.

⁸⁰⁶ A/HRC/30/47, Art. 65, p. 17.

⁸⁰⁷ See:

<http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/UNSecurityPolicyManual.pdf>.

⁸⁰⁸ <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesOnUseOfArmedSecurityServices.pdf>.

⁸⁰⁹ White, N. and MacLeod, S.: “EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility” 2008, Vol. 19 (5), *European Journal of International Law*, p. 976.

manner as state responsibility. However, if neither state nor the hiring international organisation can establish authority, command, and control, then, unless a less stringent test of attribution is used, the issue would be considered solely from the perspective of corporate responsibility.⁸¹⁰ Nonetheless, simply because an international organisation does not exercise full control over individual states' PMC contingents, it should not evade accountability for the overall operation and the acts or omissions of PMCs during that operation.⁸¹¹

In reality, however, the concept of effective control in IL seems to operate on a separate plane to that of structural organisation. For example, in its capacity as a US government agent, the CIA trained, financed, and organised the Contras to conduct insurgency operations. In the *Nicaragua case*, the International Court of Justice (ICJ) required the establishment of 'effective control' in order to define and attribute responsibility to the American state.⁸¹² In the end, there was insufficient evidence to establish effective control, and, therefore, a link to the American government. Similar logic applies to the UN peacekeeping forces who, on the surface, are far less controversial in nature. These forces are supplied to the UN by member states to conduct peacekeeping operations. However, IL is constructed in such a way that it hinders the establishment of responsibility over these forces and their conduct. *A priori*, the law itself renders the use of these forces problematic, as it defers the act of establishing the accountable party. In other words, neither the UN as the ultimate 'recruiter' of the peacekeeping troops, nor the member states as their 'provider', are responsible for their conduct, unless 'effective control' can be established. In this way, IL promotes a culture of blamelessness and irresponsibility for international organisations, states, and corporations, whereby liability is established after the fact, rather than at the outset.

⁸¹⁰ Ibid., p. 973.

⁸¹¹ Ibid., p. 975.

⁸¹² See *Chapter 3*, pp. 117-125.

2. States as PMC Clients and Limitations of Contract Law

Contract law plays an important part in PMC regulation as it is a necessary element that defines the relationship between a PMC, as a service provider, and the state as its client. I therefore here explore the role and the limitations posed by contract law in the context of state responsibility. The basic principle of modern contract law is based on the compensation of the innocent party for moneys lost due to a breach.⁸¹³ Laura Dickinson identifies contracts as the vehicle of military privatisation, and, contrary to Liu, believes that contracts should be used in order to transfer the norms of public IL into the private sector.⁸¹⁴ In other words, a contract between PMCs and their clients can and should be drafted in a way that reflects necessary oversight, enforcement, and conduct requirements applicable to private military contractors. According to Dickinson, contracts “could resolve any lingering ambiguities about the applicability of international human rights and humanitarian law” by incorporating specific provisions for training of the personnel, accreditation of the company, etc. Dickinson proposes to also include relevant IHL provisions applicable to governmental actors in order to define the boundaries of state responsibility at the outset.⁸¹⁵ However, it is important to consider the relationship that a contract constructs between the state and the private provider of security. As a client, the state is reliant on the PMC for provision of security or, in other words, protection. Therefore the client’s ability to effectively control a PMC’s behaviour is hamstrung by the nature of this relationship.⁸¹⁶ Furthermore, when a state enters into a contract with a PMC, it arguably loses its hierarchical position of authority and becomes a private party to a contract.⁸¹⁷ The contract between the state and the PMC, therefore, immunises the state against responsibility under ILC Article 8 as the state is no longer seen to be directing or controlling the PMC, instead

⁸¹³ Bix, B.: *Contract Law: Rules, Theory, and Context*, CUP, Cambridge, 2012, p. 87.

⁸¹⁴ Dickinson, L.: “Contract as a Tool for Regulating Private Military Companies” in Chesterman and Lehnardt, *supra*, p. 218.

⁸¹⁵ Dickinson, *supra*, p. 221.

⁸¹⁶ Liu, *supra*, p. 204.

⁸¹⁷ *Ibid.*, p. 208.

entering into a 'horizontal' agreement where both parties are equal under the construct of a contract.⁸¹⁸ This is a serious limitation to state responsibility imposed by the structure and the nature of contract law.

While the margins of accountability are an obvious gap, created by current IL and the way the ILC Articles are drafted, the inclusion of such a provision would automatically expose the government should a PMC commit an act of gross misconduct, a situation that existing IL is keeping obscure and undefined. Potential evasion of responsibility is arguably part of the rationale for state outsourcing to a private company instead of using uniformed troops, though Dickinson does not agree with this argument. Furthermore, her proposal does not negate the 'effective control' argument. Nor does it solve the issue of the horizontal nature of a contract, whereby both parties are equal and neither one is subordinate to the other, unless responsibility of state is explicitly attributed in the contract. Since liability is defined through agreement, contract law has serious limitations, as its rule is restricted to the agreed scope between the parties to the contract, becoming a very narrow means of regulating PMCs. Therefore, in the event of non-compliance with IHL and human rights, third parties are unable to make a private claim as the contract only applies to the contracting parties: the PMC as the service provider, and the state as the client. There are numerous exceptions to compensation: "innocent parties cannot recover punitive damages, damages for pain and suffering or attorney's fees. [...] [I]nnocent parties are almost assured of *not* being fully compensated for their losses."⁸¹⁹ To that end, Dickinson proposes adjusting the structure of the contract to enable third parties, affected by a PMC's activity, to enforce the terms of the agreement.⁸²⁰ However, the possibility of implementing these changes is low due to the breadth of detail that will unravel, should third party claims be made possible under contract law. Although Dickinson recognises the likelihood

⁸¹⁸ Ibid., pp. 209-210.

⁸¹⁹ Bix, *supra*, p. 87.

⁸²⁰ Dickinson, *supra*, p. 224.

of state objections to increased contractual regulation, she argues that the ILC Articles on State Responsibility address the gaps of privatisation.⁸²¹ She deems invalid the argument that states use PMCs to avoid accountability, because there are international legal mechanisms that can ascribe PMC conduct to the state. As demonstrated above, while these provisions exist in principle, their actual applicability is extremely narrow and requires substantial supporting evidence, that both states and companies often fail to produce.

Although contract law has obvious gaps in regulating PMCs, there is no need to rely solely on one type of regulation. Contract law should, in turn, serve as a kind of audit to keep the terms of the PMC contract in check. While contract law is not subordinate to IL by default, it can explicitly articulate the ICoC clauses concerning human rights and overall standards, which is a common practice in typical service agreements across a number of sectors. In addition, the horizontal nature of state/PMC contracts is a vehicle that enforces PMCs' position of power. To ensure a state's authority over the means of private violence, the contract ought to explicitly state that the client, any entity that is recruiting a PMC, is superior and, therefore, assumes overall accountability for the PMC and the actions of its employees, who is the subordinate in terms of the contract. If such provisions are not stipulated in the contract, then states and PMCs will continue to exist in an equal relationship, circumventing the ILC attribution framework and reinforcing PMCs' claims to power and legitimacy.⁸²²

3. State-Centric Regulation Concerning PMCs

The Montreux Document

The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict

⁸²¹ Ibid., pp. 228-229.

⁸²² These claims are explored in more detail in the section on PMC self-regulation.

is an intergovernmental document intended to promote respect for IHL and human rights law whenever PMCs are present in armed conflicts.⁸²³ As of May 2016, the Montreux Document is supported by fifty-three states and three international organisations as its signatories.⁸²⁴ The Montreux Document is largely state-centric in nature. Its guidelines relate to the obligations of a 'contracting state' entering into a contract with PMCs; the 'home state' where the companies are registered; and the 'territorial state' where PMCs operate.⁸²⁵ This classification is arguably an important soft legal norm that constitutes an explicit recognition by signatory states of a specific duty to protect human rights during PMC operation.⁸²⁶ The Document does not create any new legal obligations either for states or PMCs, and while it provides guidelines, it is not necessarily a step towards a new treaty.⁸²⁷

Nevertheless, the Document reinforces the narrative of the ILC Articles on attribution of responsibility by affirming that "entering into contractual relations does not in itself engage the responsibility of Contracting States."⁸²⁸ The four conditions⁸²⁹ whereby PMC violations are considered an act of the state are also consistent with the ILC Articles, and therefore with customary IL. The Document's full title indicates its specific application 'during armed conflict'. However, White argues that PMCs are more likely to be deployed outside of an armed conflict, for example, during a post-conflict reconstruction.⁸³⁰ While insisting that PMCs do not operate in a legal vacuum, the Montreux Document seeks no binding authority from participating states or non-state actors using private security services. It elaborates on different agreements

⁸²³ Montreux Document, p. 31

⁸²⁴ See: www.mdforum.ch/en/participants.

⁸²⁵ Montreux Document, p. 10; ICoC, p. 5.

⁸²⁶ Cockayne, *supra*, p. 406.

⁸²⁷ A/HRC/32/39, p. 11.

⁸²⁸ Montreux Document, para. 7, p. 12.

⁸²⁹ These are: (a) Incorporation of PMCs into state regular forces, (b) PMCs are under the direct command of the state, (c) PMCs are empowered (authorised by law), (d) PMCs acting on the instructions of the state.

⁸³⁰ White, *supra*, p. 13.

(interstate, belonging to international organisations, national laws, etc.⁸³¹) that stipulate state behaviour in relation to the PMCs.

To draw upon the historical typologies and the relationship between the form of governance and the military force,⁸³² the Montreux Process offers a state-oriented approach to a network-based private field of activity, rendering its regulation largely ineffective. By offering a normative framework for regulated PMC participation in an armed conflict, while at the same time lacking legal enforcement, the Document inadvertently normalises and rationalises civilian participation in hostilities. A member of the UN WG, Gomez Del Prado believes that the ICRC stamp of approval was premature, and that the Document “recognises *de facto* this new industry and the military and security services it provides. It legitimises the services the industry provides, which still remain unregulated and unmonitored.”⁸³³ In addition, the Montreux Document contains a section labelled “PMSCs and their personnel”⁸³⁴ which refers to obligations, yet it makes no mention of PMC responsibility as companies. Nevertheless, the Document contains a particular provision on superior responsibility that could develop into a valuable precedent for corporate criminal responsibility internationally. In September 2008, seventeen states (including the US, the UK, China, and South Africa) officially agreed that the idea of superior responsibility, grounded in international criminal law, has a potential role in assigning responsibility for international crimes to PMC directors and those contracting PMCs.⁸³⁵ According to the Montreux Document,

Superiors of PMSC personnel, such as: a) governmental officials, whether they are military commanders or civilian superiors, or b) directors or managers of PMSCs, may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. Superior responsibility is

⁸³¹ Montreux Document, p. 20, p. 24.

⁸³² As discussed in chapters 2, 3, and 4.

⁸³³ Del Prado, J. L. G.: “Private Military and Security Companies and the UN Working Group on the Use of Mercenaries” 2008, Vol. 13 (3), *Journal of Conflict & Security Law*, p. 444.

⁸³⁴ Montreux Document, Section E. PMSCs and their personnel, paras 22-26, pp. 14-15.

⁸³⁵ Stewart, *supra*, p. 25.

not engaged solely by virtue of a contract.⁸³⁶

While in its current form the Montreux Process focuses predominantly on states, it is important to recognise the opportunity it creates for international criminal responsibility for corporations.

The Draft Convention

Critical of the over-inclusive nature of the Montreux Document and the self-regulatory profile of the Code of Conduct,⁸³⁷ the Working Group proposed a legally binding Draft Convention on Private Military and Security Companies (Draft Convention).⁸³⁸ Unlike the Montreux Document, that allows for all services to be outsourced to PMC contractors (other than direct participation in hostilities), the Draft Convention does not allow for inherently governmental functions to be performed by anyone other than the state.⁸³⁹ Inherent, or “Fundamental State functions” are classified in the *Definitions* of the Draft Convention as:

functions that a State cannot outsource or delegate to non-State actors. Among such functions, consistent with the principle of State monopoly on the use of force, are waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence and police powers, especially the powers of arrest or detention, including the interrogation of detainees.⁸⁴⁰

Resistance from the UK and the US, as well as from the EU to ratify the Convention, however, is not surprising, considering that these states welcome private security providers. The relationship between the form of governance and the type of military power used by the state comes into play. As highlighted in *Chapter 4*, countries that follow neoliberal ideals of ‘small government’, deregulation, and privatisation are likely to outsource numerous functions and

⁸³⁶ The Montreux Document on Private Military and Security Companies, 17 September 2008, available at <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html>.

⁸³⁷ Introduced and discussed in Part 3 of this chapter, p. 204.

⁸³⁸ On the criticism of the Montreux Document by the UN Working Group: White (2012), *supra*, p. 17.

⁸³⁹ Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies, 13 July 2009, Preamble, p. 3.

⁸⁴⁰ *Ibid.*, Art. 2 Definitions, p. 7.

activities, including security. Whereas those states with greater centralisation are less lenient towards integration of PMCs as it contradicts their governmental model.

The Draft Convention is a suppression convention,⁸⁴¹ meaning it requires states to establish jurisdiction over ‘treaty crimes’ or crimes of ‘international concern’ committed on their territory, when extradition is not possible.⁸⁴² It does, however, offer means of international supervision in the form of a Committee on the Regulation, Oversight and Monitoring of Private Military and Security Activities (Oversight Committee).⁸⁴³ Article 4 (1) on state responsibility towards PMCs states that “each State party bears responsibility for the military and security activities of PMSCs registered or operating in their jurisdiction, whether or not these entities are contracted by the State.” This fundamentally contradicts the basic principle that the state is only responsible for its own actions. Furthermore, it is not in line with the attribution clauses of the ILC Articles. In theory, the Draft Convention attempts to create a firmer legal position on state responsibility. In practice, however, it creates a vast discrepancy between existing public IL and an emerging treaty, therefore polarising the PMC regulatory space. Failure to explicitly define the parameters of secondary levels of responsibility leaves the existing gap in the rules on attribution of conduct unfilled. The protection of all human rights under state jurisdiction is the only standing legal responsibility that states are bound by in the realm of PMC regulation. This means that the Draft Convention does not, in fact, impose any additional responsibility on states using PMCs. Furthermore, the Draft Convention is old-fashioned in the sense that it does not consider contemporary governmental trends, nor the trends of globalisation and the spread of free market principles.⁸⁴⁴

⁸⁴¹ On suppression conventions and human rights see: Boister, N.: “Human Rights Protection in the Suppression Conventions” 2002, Vol. 2 (2), *Human Rights Law Review*, p. 199.

⁸⁴² Del Prado, J. L. G.: *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*, 2 July 2010, A/HRC/15/25 Art. 21 (5).

⁸⁴³ White, *Supra*, p. 22.

⁸⁴⁴ Based on the analysis conducted in chapters 2, 3, and 4.

While both the Montreux Document and the Draft Convention outline the obligations of home, host, and contracting states, neither process has reached an effective implementation of these procedures. Besides the challenge of incompatibility between the legally binding nature of the Draft Convention, the contradicting content of the evolving Montreux Process, and the self-regulating PMC industry, there is a risk of polarisation between party states.⁸⁴⁵ Two diverging regulatory cultures are likely to progress, with PMC-welcoming states endorsing the Montreux Process, and the 'non-aligned' countries striving for a stricter, more punitive regulation. The choice faced by the international community is represented by the two procedures and is informed by a deep scholarly division between the advocates of a state-oriented binding approach, and those who consider that collective self-regulation regulation and soft norms are the key to upholding industry standards and the elimination of human rights violations by the PMCs.

Part 3: Limitations to Corporate Liability

This section examines the bodies of law that attempt to regulate private military companies as corporations, and the ways in which they invoke corporate responsibility. The importance of this analysis lies in the problem posed by PMCs' corporate legal status and the absence of strong international criminal accountability mechanisms applicable to legal persons. With state responsibility being a highly theoretical matter,⁸⁴⁶ and individual criminal responsibility only able to address PMC contractors or directors, there appears to be a strong case to better understand how PMCs, as companies, can be liable for gross human rights violations or crimes of international significance. This section assesses both international and domestic regulations that claim jurisdiction over corporations and, more importantly, it identifies their weaknesses, omissions, and gaps which could lead to corporate impunity.

⁸⁴⁵ White, *Supra*, p. 30.

⁸⁴⁶ Simpson, *supra*, p. 56.

First, I examine domestic and transnational avenues for invoking criminal and social corporate liability. I highlight the key doctrinal and territorial limitations that obstruct access to an effective corporate criminal procedure, and provide a number of examples to showcase the disparity of PMC and mercenary-specific provisions in a number of domestic legal systems. I continue my enquiry into the legal standing of corporate responsibility through the theory and practical application of tort law as I analyse a number of recent case studies, whereby PMCs were sued as companies, rather than as individual contractors.

On the international level, I analyse the most recent UN and industry initiatives concerning business conduct and proposed best practices. Such non-binding regulatory framework forms part of the ‘responsibilisation’ approach and is often referred to as Corporate Social Responsibility (CSR).⁸⁴⁷ I evaluate the unhelpful effects of self-regulatory voluntary bodies, which create a false sense of legitimacy and regulation. By applying the concepts of power and legitimacy, industry self-regulation is analysed not only as a step towards the commodification of security to fit the framework of the free market, but also as an attempt by PMCs to extend their authority, by claiming legitimacy in the form of self-regulation.⁸⁴⁸ Meanwhile, at the other end of the spectrum we observe the surfacing of legally binding UN initiatives, actively promoted by the Human Rights regime, which attempt to impose stricter controls within the current international security landscape. This part also outlines the contemporary challenges of the polarised approach to PMC regulation. Competing approaches of ‘responsibilisation’, promoted by the industry, and the prospective criminalisation of UN initiatives, are hardly complementary, and create a divisive environment that prevents coherent and effective regulation of PMCs.

⁸⁴⁷ Accounts that consider the relationship between CSR and law: Segerlund, L.: *Making Corporate Social Responsibility a Global Concern: Norm Construction in a Globalised World*, Ashgate, Surrey, 2010; Zerk, J.: *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law*, CUP, Cambridge, 2006; McBarnet, D., Voiculescu, A. and Campbell, T.: *The New Corporate Accountability: Corporate Social Responsibility and the Law*, CUP, Cambridge, 2009; Olufemi, A. (ed.): *Corporate Social Responsibility, Human Rights and the Law*, Routledge, Abingdon, 2011.

⁸⁴⁸ Building upon the overall methodology of the thesis.

Finally, I highlight the importance of international criminal law (ICL) as an antidote to the obstacles posed by other areas of law attempting to regulate criminal corporate responsibility.

1. Limitations Arising from the Corporate Status of PMCs: Domestic & Transnational Law

Unlike states and international organisations who are the recognised subjects of IL,⁸⁴⁹ corporations fall outside this remit. Nor are they effectively governed by international criminal and humanitarian laws concerning genocide, war crimes, and crimes against humanity, applying to natural persons.⁸⁵⁰ The language of criminal law assumes that the state will exercise its coercion against the crime committed by one individual over another, leaving corporations outside of this paradigm.⁸⁵¹ The lack of corporate criminal liability in many legal systems poses additional legal obstacles. It is important to explore how corporations fit into a criminal justice system. Understanding the reach of criminal law over corporations in different national jurisdictions helps us to identify and create a norm and set a precedent for corporate criminal liability, both domestically and internationally. It is particularly important in the realm of PMCs, where multinational corporations can both be a provider and the client of lethal services, often operating transnationally.

Procedural Obstacles

The corporate status of the company poses a number of issues to its recognition and treatment under criminal law. In countries like France and Germany, for example, the principle of *societas delinquere non potest* – “a legal entity cannot be blameworthy” – long prevented imposition of criminal liability at all.⁸⁵² In *Ferguson v. Wilson* (1886), Lord Cairns concluded that “a company cannot act in its own person for it has no person, it can only act through directors, who are the

⁸⁴⁹ Akande, *supra*, p. 251.

⁸⁵⁰ Fafo Report, Business and international crimes: assessing the liability of business entities for grave violations of international law (2005), p. 19, available at: http://www.fafo.no/index.php?option=com_zoo&task=item&item_id=3742&Itemid=927&lang=en.

⁸⁵¹ Wells, C.: *Corporations and Criminal Responsibility*, OUP, Oxford, 2001, p. 15.

⁸⁵² Diskant, *supra*, p. 129.

agents of the company.”⁸⁵³ Described by Viscount Haldane L. C. in the judgement of the civil case of *Lennard’s Carrying Co. Ltd v. Asiatic Petroleum Co. Ltd*⁸⁵⁴ as “an abstraction”, a corporation could only bear liability through its agent, who carries out its acting and directing will.⁸⁵⁵ If corporations are understood as inanimate tools run by individuals, the responsibility will be placed on natural rather than juridical persons.⁸⁵⁶ Not only does such an approach pose doctrinal obstacles to holding companies criminally liable, it also defeats the purpose of assigning corporations with a legal personality.⁸⁵⁷ A positivist approach creates significant limitations to corporate criminal liability, as, according to Kramer, “recognition of the corporation as a legal person has largely carried with it protections without the imposition of corresponding responsibilities and obligations.”⁸⁵⁸

Individuals and corporations alike can bear vicarious liability, when liable for the acts of another, or personal, when liable for their own actions. Until 1944 all cases brought forward against corporations concerning criminal responsibility in England were based on vicarious liability.⁸⁵⁹ In the context of PMCs, the application of vicarious liability transfers criminal responsibility from an individual employee to the corporation itself, while the agent or employee remains responsible for the crime committed.⁸⁶⁰ However, three cases, *DPP v. Kent & Sussex Contractors Ltd*,⁸⁶¹ *R. v. ICR Haulage Co. Ltd*,⁸⁶² and *Moore v. Bresler Ltd*,⁸⁶³ demonstrated that companies can have direct personal liability, as it was established that acts of certain employees can under

⁸⁵³ *Ferguson v. Wilson*, 1866, Chamber of Appeals 77, p. 89.

⁸⁵⁴ 1915, A. C., 705.

⁸⁵⁵ 1915, A. C., 713.

⁸⁵⁶ Moore, M.: *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics*, OUP, Oxford, 2010, pp. 246 -247, p. 623.

⁸⁵⁷ Liu, *supra*, p. 248.

⁸⁵⁸ Kramer, R.: “Criminologists and the Social Movement against Corporate Crime” 1989, Vol. 16 (2), *Social Justice*, p. 157.

⁸⁵⁹ Pinto and Evans, *supra*, p. 39.

⁸⁶⁰ A/HRC/32/39, p. 19.

⁸⁶¹ 1944, 1 K. B. 146.

⁸⁶² 1944, K. B. 551.

⁸⁶³ 1944, 2 K. B. 515.

certain circumstances be viewed as the acts of a company itself.⁸⁶⁴ The doctrinal value of these cases lies in their introduction of the 'doctrine of identification' to criminal law in the cases of personal liability for corporations.⁸⁶⁵ This meant that the courts recognised that the acts of a company's agents can be viewed as the acts of the company.⁸⁶⁶

Criminal liability for a corporation is made problematic by the 'black letter' reading of the law. For example, it is considered that a company cannot commit murder, because only an individual can bear the lawful sentence, life imprisonment, for such crime.⁸⁶⁷ It is complicated further by the definition of homicide, whereby it is understood as "the killing of one human being by another human being."⁸⁶⁸ The same logic applies to crimes such as bigamy, incest, rape, and conspiracy with a company's sole director. While most jurisdictions stipulate that a company cannot commit a murder per se, it can be found guilty as a secondary party.⁸⁶⁹ Nourse L. J. in *Odyssey Re (London) Ltd & Another v. OIC Run Off Ltd*⁸⁷⁰ established that "there would be an unacceptable shortcoming in company law if evidence given on behalf of a company was incapable of being treated as the evidence of the company." Moreover, legal persons cannot be compared to physical individuals like for like. So, why should jurists attempt to apply the same jurisdictional methods to these incomparable legal personalities? According to Celia Wells, part of the problem arises from attempting to apply the same legal framework to physical and legal persons. While the law recognises both individuals and companies, the legal treatment and approach to responsibility should be tailored to suit the social construction of both subjects.⁸⁷¹ Criminal law and its liability mechanisms are focused on the individual, and are problematic should they be applied to a corporation unchanged.

⁸⁶⁴ Pinto & Evans, *supra*, pp. 39-42.

⁸⁶⁵ *Ibid.*, p. 44.

⁸⁶⁶ *Ibid.*, p. 39.

⁸⁶⁷ *Ibid.*, p. 5.

⁸⁶⁸ *R. v. P&O European Ferries (Dover) Ltd*, 1991, 93 Criminal Appeal Reports, p. 72.

⁸⁶⁹ Pinto & Evans, *supra*, p. 90.

⁸⁷⁰ Formerly *Sphere Drake Insurance Plc* and *Orion Insurance Co. Plc*, respectively.

⁸⁷¹ Wells, *supra*, p. 74.

In the UK, procedural obstacles of criminal prosecution were addressed by the s. 33 (3) Criminal Justice Act 1925, which allowed a corporation to enter a plea through a representative.⁸⁷² Furthermore, procedural complexities of corporate indictment were also linked to the need of a defendant being present in court. On the practical side, limited budgets and the costs of litigation can be an obstacle that discourages public prosecutors from investigating and indicting what tend to be complex matters.⁸⁷³ Drawing on the work of John Braithwaite and Brent Fisse,⁸⁷⁴ a significant development has been introduced in Australian criminal law to that end. Criminal courts can convict companies of offences based on a body corporate's failure "to create and maintain a corporate culture that required compliance with the relevant provision."⁸⁷⁵

In 2007 the UK Corporate Manslaughter and Corporate Homicide Act was published to create a new offence in relation to corporate responsibility. It shifted the focus of liability from individual guilt to identifying gross negligence in the way a corporation organises and conducts its activities. Under the Act, a company could be criminally liable if its conduct "causes a person's death, and amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased."⁸⁷⁶ As a corporation, a PMC would have a relevant duty of care in regards to its contractors in the event of a corporate manslaughter offence. Contract law would establish that only parties to a contract can invoke liability as a result of a breach. It is, therefore, debatable whether or not a PMC would owe a relevant duty of care to individuals outside of company employees. On the other hand, PMCs that are signatory parties to the ICoC commit to upholding human rights values. Perhaps it could be argued that this commitment to conduct their activities in adherence with human rights values could be sufficient to establish a relevant duty of care in regards to non-employees. However, in regards to private military activity a "relevant duty of

⁸⁷² Pinto & Evans, *supra*, p. 19.

⁸⁷³ "Corporate Responsibility for International Crimes", Chatham House International Law Programme, Meeting Summary, 19 May 2015, London, p. 5.

⁸⁷⁴ Fisse, B. and Braithwaite, J.: *Corporations, Crime and Accountability*, CUP, Cambridge, 1993.

⁸⁷⁵ Section 12.3(2)(d) Commonwealth Criminal Code Act of 1995, Australia.

⁸⁷⁶ Corporate Manslaughter and Corporate Homicide Act 2007, Chapter 19, Art. 1 (1) (a), (b), p. 1.

care” is limited. An offence committed by private military contractors who are incorporated in state forces, or if the PMC is contracted by the Ministry of Defence, does not invoke a “relevant duty of care” and, therefore, would not be subject to this legislation.⁸⁷⁷ This example demonstrates the complexity and the fundamental inefficacy of overlapping laws and regulations concerning PMC activity. As a result, the hard laws prevail, while the human rights norms and industry self-regulation create only a veneer of legality.

Corporate law produces another source of impunity that is highly relevant in the realm of PMCs, namely the company law doctrine of “separate corporate personality” that most jurisdictions recognise. According to this doctrine, a parent company and its subsidiaries are considered to be separate legal entities. Such a construct of legal separation and limited liability allows for impunity, commonly referred to as the ‘corporate veil’, whereby a parent company will not be held liable for acts or offenses committed by its subsidiary merely on the basis of shareholding.⁸⁷⁸ The Human Rights Council recognises the discrepancies across national jurisdictions of parent companies’ legal responsibilities to identify, prevent, and mitigate human rights abuses, and acknowledges the associated barriers to remedying them, through added legal costs and delays.⁸⁷⁹ While this liability gap is recognised by Human Rights Law, it is in the early stages of development and is currently unable to address the challenges of the corporate veil.⁸⁸⁰

Criminal responsibility may not apply to other businesses as much as it does to PMCs, whose activities and employees have a close connection with hostilities and the use of lethal force. Notwithstanding the ascribed legal personality that companies have acquired, the account of

⁸⁷⁷ Corporate Manslaughter and Corporate Homicide Act 2007, p. 5.

⁸⁷⁸ A/HRC/32/19, Art. 22, p. 9; Schutter, O. D.: “Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations”, December 2006, p. 36, available at: <http://198.170.85.29/Olivier-de-Schutter-report-for-SRSG-re-extraterritorial-jurisdiction-Dec-2006.pdf>.

⁸⁷⁹ A/HRC/32/19, Art. 23, p. 10.

⁸⁸⁰ Ibid., Art. 22, p. 9.

rationality and autonomy, explored by Wells, appears to exclude corporations from the legal realm based on the assumption that they are not persons in a metaphysical sense.⁸⁸¹

This juxtaposition between the corporate immunity of *societas delinquere non potest* and deniability of corporate criminal responsibility is one of the origins of PMC (and other company) impunity with regards to criminal law. What the PMC legal status could achieve, is the potential to attribute responsibility to a legal person. However, without a more granular definition, the attribution on its own fails to clarify and solidify the process of holding a corporation liable.⁸⁸² Peter French argues that “corporations are not just organised crowds of people [...] they have metaphysical-logical identity that does not reduce to a mere sum of human members.”⁸⁸³ When examining the nature of PMC activity and the failure to adequately punish significant wrongdoings, such as human rights violations or war crimes, this approach becomes extremely relevant. Take the infamous Blackwater case, for example. The company committed crimes that no one disputes, yet its founder and former CEO moved on to a new endeavour in the same sector, while the company itself has been renamed, sold, and then once again renamed. It continues to offer military and security services, and, ironically, is also a signatory company to the International Code of Conduct. The only outcome of the Nisour Square atrocities is a few contractors behind bars, while the company that facilitated the intelligence, the arms, and other means, continues to prosper, albeit under a different name.

Territorial Limitations & Examples of Domestic Jurisdiction on PMCs

Domestic criminal legal systems are often challenged by the extraterritorial nature of PMC activity. For example, the world’s largest private security company, G4S, employs more than 623,000 people on six different continents, of whom more than three-fifths are in Asia, the

⁸⁸¹ Wells, C.: *Corporations and Criminal Responsibility*, OUP, Oxford, 2001, p. 65.

⁸⁸² Ibid.

⁸⁸³ French, P.: *Collective and Corporate Responsibility*, Columbia University Press, New York, 1984, p. 32.

Middle East, and Africa.⁸⁸⁴ When the two components of criminal liability, *actus reus* (criminal act) and *mens rea* (criminal intent), are identified to be in the same place, the place of the crime and, therefore, acting jurisdiction, is straightforward.⁸⁸⁵ However, when it comes to the corporate liability of PMCs, in most scenarios the criminal act would occur in a different country to that of the PMC headquarters or incorporation address. In 1988 the Council of Europe urged its member states to support the practice of corporate criminal responsibility due to the limitations of individual criminal liability of corporate officers, which left a regulatory gap that corporate criminal responsibility could fill.⁸⁸⁶ Although today a number of member states allow for extraterritorial legislation concerning human rights, most of the laws do not extend to companies.⁸⁸⁷

To tackle this gap, the UK enacted the International Criminal Court Act of 2001. While not specific to PMCs, it can impose criminal liability on corporations acting both in and outside of British territory.⁸⁸⁸ In addition, the UK Security Industry Authority was set up under the Private Security Industry Act 2001, which is “responsible for regulating the private security industry by, *inter alia*, operating a licensing regime for individual security operatives and a voluntary approvals scheme for security businesses.”⁸⁸⁹ In France national legislation encompasses corporate criminal liability for businesses that operate abroad. The same legal framework exists in Canada, Norway, and the US.⁸⁹⁰ In the US, “corporations – as entities – can be criminally tried and convicted for crimes committed by individual directors, managers, and even low-level

⁸⁸⁴ See: www.g4s.com/en/Who%20we%20are/Our%20people/Our%20employees/.

⁸⁸⁵ Pinto & Evans, *supra*, p. 91.

⁸⁸⁶ Council of Europe, Recommendation no. R (88) 18 of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities.

⁸⁸⁷ Kirshner, *supra*, p. 19.

⁸⁸⁸ International Criminal Court Act, 2001, c. 17, § 4 (UK), available at: <http://www.legislation.gov.uk/ukpga/2001/17/2005-06-07>.

⁸⁸⁹ A/HRC/30/47, Art. 23, p. 7.

⁸⁹⁰ Fafo Report, *supra*, p. 12.

employees.”⁸⁹¹ While in the US companies are criminally liable and could face criminal prosecution, in reality the risk of an actual trial is very low. Edward Diskant explains this phenomenon through shifting liability from corporation to individuals. The companies forfeit any protections and avoid criminal liability in exchange for agreements to waive their privilege, to deny indemnification to employees, and to cease any support provided to those individuals under investigation.⁸⁹²

Since developing the Draft Convention in 2011, the Working Group on the use of mercenaries has been conducting a study across a number of states on domestic laws that are aimed specifically at regulating private military and security companies.⁸⁹³ For the purposes of the review, the WG defined PMCs as “a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities.”⁸⁹⁴ To date, it has reviewed national legislation of twenty-one African states,⁸⁹⁵ eight selected countries in Asia and the Middle East,⁸⁹⁶ eight countries in Central America and the Caribbean,⁸⁹⁷ eight countries in South America,⁸⁹⁸ as well as the US and Switzerland,⁸⁹⁹ and France, Hungary, and the UK.⁹⁰⁰ The study found that, with the exception of South Africa, none of the African, Asian, or Central and South American countries reviewed had legislation that covered the export of military or security services.⁹⁰¹ Equally, French law does not contain relevant provisions on the direct

⁸⁹¹ Diskant, E. B.: “Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure” 2008, Vol. 118, *The Yale Law Journal*, p. 128.

⁸⁹² Ibid., pp. 133-134.

⁸⁹³ See: A/HRC/24/45, A/HRC/27/50, and A/HRC/30/34.

⁸⁹⁴ A/HRC/27/50, p. 4.

⁸⁹⁵ Results on Botswana, Ghana, the Gambia, Kenya, Lesotho, Mauritius, Namibia, Nigeria, Sierra Leone, South Africa, Swaziland, Uganda, Zimbabwe presented in A/HRC/24/25; results on Burkina Faso, Cameroon, Côte d’Ivoire, the Democratic Republic of Congo, Mali, Morocco, Senegal, Tunisia presented in A/HRC/27/50.

⁸⁹⁶ China, India, Malaysia, Pakistan, the Philippines, Singapore, Sri Lanka, and the United Arab Emirates covered in A/HRC/27/50.

⁸⁹⁷ Costa Rica, Cuba, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Panama covered in A/HRC/30/34.

⁸⁹⁸ Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Peru, and Uruguay covered in A/HRC/30/34.

⁸⁹⁹ Presented in A/HRC/21/43.

⁹⁰⁰ Presented in A/HRC/30/34.

⁹⁰¹ A/HRC/24/25, p. 6.

participation of private military and security company personnel in hostilities.⁹⁰² In the meantime, the Belgian legislature revoked provisions for extraterritorial corporate liability in 2003,⁹⁰³ as a result of the US threat to move the NATO headquarters out of Brussels.⁹⁰⁴ A similar trend was noted in the Spanish legal system, as the Parliament “acted to limit the jurisdiction over human rights cases in 2009.”⁹⁰⁵

To address the growing numbers of South Africans with military skills and experience offering their services abroad in the post-apartheid era, South Africa passed the Regulation of Foreign Military Assistance Act No. 15 in 1998, which covers both mercenary activity and private military companies.⁹⁰⁶ While the definition of a ‘mercenary’ in South African legislation differs from that in international or regional regulations, it specifically outlaws mercenary activities and “requires permission for the rendering of military or security services to a party to an armed conflict or to a designated country.”⁹⁰⁷ When it became known that a number of South African citizens participated in a coup attempt in Equatorial Guinea in 2004,⁹⁰⁸ stronger legislation was adopted.⁹⁰⁹ In 2007, the Prohibition of Mercenary Activities and Regulation of Certain Activities in the Country of Armed Conflict Act came into force. The extraterritorial jurisdiction of the Act applies to individuals as well as corporations, therefore criminalising both mercenaries or private military contractors as well as the companies they work for.⁹¹⁰

⁹⁰² A/HRC/30/34, Art. 28, p. 7.

⁹⁰³ Ratner, S. R.: “Belgium’s War Crimes Statute: A Postmortem” 2003, Vol. 97 (4), *American Journal of International Law*, pp. 888, 889; Murphy, S. D. (ed.): *Contemporary Practice of the United States Relating to International Law*, 2003, Vol. 97 (4), *American Journal of International Law*, pp. 984, 986-987.

⁹⁰⁴ Black, I. and MacAskill, E.: “US threatens NATO boycott over Belgian war crimes law”, 13 June 2003, *The Guardian*, available at: <https://www.theguardian.com/world/2003/jun/13/nato.warcrimes>; Wastell, D.: “America Threatens to Move NATO After Franks Is Charged”, 18 May 2003, *Sunday Telegraph*, available at: <http://www.telegraph.co.uk/news/worldnews/europe/belgium/1430468/America-threatens-to-move-Nato-after-Franks-is-charged.html>.

⁹⁰⁵ Kirshner, *supra*, p. 16.

⁹⁰⁶ A/HRC/21/43, p. 8.

⁹⁰⁷ A/HRC/24/25, p. 7.

⁹⁰⁸ See Roberts, A.: *The Wonga Coup*, Profile Books, London, 2006. See also A/HRC/18/32/Add.2.

⁹⁰⁹ A/HRC/21/43, p. 8.

⁹¹⁰ Prohibition of Mercenary Activities and Regulation of Certain Activities in the Country of Armed Conflict Act, Art. 11, p. 10, available at: <http://www.gov.za/sites/www.gov.za/files/a27-06.pdf>.

Domestic criminal jurisdictions are often limited by the extraterritorial nature of PMC and mercenary activity.⁹¹¹ Even those domestic legal systems that cater for extraterritoriality are frequently dependent on transnational cooperation. In the thirtieth session of the HRC as part of the open-ended intergovernmental working group (IGWG) the South African delegation expressed their disappointment at the lack of cooperation among countries where foreign military activities had taken place, which were often those countries involved in the Montreux Document and International Code of Conduct processes.⁹¹² Non-cooperation renders the enforcement of the Regulation of Foreign Military Assistance Act No. 15 of 1998 impossible, and the Act itself ineffective. Nonetheless, South Africa has got one of the most (if not the most) elaborate and comprehensive domestic legal frameworks to regulate mercenaries and PMCs. The country is openly opposed to private security in a military context, and their stance was presented in the abovementioned HRC session. The South African delegation suggested that “norms should be elaborated in international law to (a) define private military and security companies; and (b) hold such companies accountable under international humanitarian and international human rights law.”⁹¹³

The Swiss draft law on the provision of private security services abroad is one of the most recent national efforts to address the issues of PMC regulation. The draft law prohibits selected activities, such as direct participation in hostilities in an armed conflict, and the hiring, training, and provision of security personnel for direct participation in hostilities. However, it does not ban PMCs *per se*.⁹¹⁴ In the US, besides the Military Extraterritorial Jurisdiction Act that invokes individual criminal responsibility, legislation covers “possible criminal charges under the False Claims Act for those private security companies which falsely stated that they were in

⁹¹¹ Kirshner, *supra*, p. 12.

⁹¹² A/HRC/30/47, Art. 19, p. 7.

⁹¹³ *Ibid.*, Art. 13, p. 5.

⁹¹⁴ Smith, R.: “Switzerland Checks Mercenaries, Partially” 18 February 2013, *Inter Press Services*, available at: <http://www.ipsnews.net/2013/02/switzerland-checks-mercenaries-partially/>.

compliance with the required standard.”⁹¹⁵ None of the other states reviewed by the WG have appropriate laws or regulations to address military-like activities or PMSCs, nor do they provide extraterritorial jurisdiction for companies.⁹¹⁶ The laws of the Russian Federation currently do not cater for extraterritorial PMC activities. In the HRC’s thirtieth session, the Russian delegation argued that this is due to those functions being deemed inherently governmental and only being undertaken by state institutions.⁹¹⁷ There was no mention of the PMCs registered and domiciled on the territory of the Russian Federation, nor was this statement challenged at any point during the session.⁹¹⁸ The WG plans to continue its enquiry and analysis of domestic legislations with the purpose of highlighting the legislative gaps in national jurisdictions and establishing a legally binding international regulatory instrument as a way of ensuring consistent regulation.⁹¹⁹

While domestic legal systems are inconsistent and patchy when it comes to corporate responsibility and specific PMC provisions, the absence of a strong norm of international criminal liability for corporations creates another major regulatory gap. To counter that perception and demonstrate strong precedent, a joint project of the International Peace Academy and the Norwegian think tank Fafo on Assessing the Liability of Business Entities for Grave Violations of International Law (Fafo report) identified the premise for criminal liability for corporations in many jurisdictions.⁹²⁰ The report lists contemporary cases brought against corporations that were believed to have committed war crimes. Amongst them are cases of *Presbyterian Church of Sudan v. Talisman Energy*⁹²¹ and *Sarei v. Rio*,⁹²² whereby the defendant corporations are charged with aiding and abetting certain war crimes including military

⁹¹⁵ A/HRC/30/47, Art. 18, p. 6.

⁹¹⁶ A/HRC/27/50, Art. 16, p. 7.

⁹¹⁷ A/HRC/30/47, Art. 25, p. 8.

⁹¹⁸ Russian PMCs include: Center-Alfa, Moran Security Group, Viking, RSB Group.

⁹¹⁹ A/HRC/30/47, Art. 131, p. 23.

⁹²⁰ Business and international crimes: assessing the liability of business entities for grave violations of international law (2005), available at: http://www.fafo.no/index.php?option=com_zoo&task=item&item_id=3742&Itemid=927&lang=en.

⁹²¹ US Court of Appeals for the Second Circuit, United States.

⁹²² US Court of Appeals for The Ninth Circuit, United States.

bombings and assaults on civilian targets, torture, rape, and genocide.⁹²³ Additionally, the cases of *Doe v. Unocal*, *Wiwa v. Royal Dutch Petroleum Co. (Wiwa)*, *Bowoto v. Chevron (Bowoto)*, *John Does v. Exxon Mobil Corp (Exxon Mobil)*, *Rio Tinto*, and *Beanal v. Freeport-McMoran Inc.*,⁹²⁴ were brought forward on the bases of crimes against humanity.⁹²⁵ Also, in Argentina there are currently a number of criminal proceedings pending against large Argentine as well as EU and US companies concerned with corporate complicity in dictatorship crimes.⁹²⁶

Limitations of Social Liability in Tort Law

The corporate identity of PMCs creates a legal gap for regulation. On one hand, corporate law assigns juridical personhood to companies, legitimising their status to the extreme of *societas delinquere non potest*. On the other, IL does not characterise corporations as subjects with rights and respective responsibilities for their wrongful acts. This challenge is particularly evident in the jurisdiction of the Alien Tort Statute. The 1789 Alien Tort Statute (ATS), also known as the Alien Tort Claims Act (ATCA), is a piece of legislation that enables US federal courts to assert 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.”⁹²⁷ As the ATS does not ascribe criminal responsibility, legal persons cannot stand criminal trial. Therefore the torts committed by a company, however substantial, are limited to being a civil wrong under the ATS.⁹²⁸

There are a number of cases that were brought specifically against PMCs under the ATS. DynCorp was contracted to combat production of illicit drugs in Colombia by aerially spraying cocaine and poppy plantations with the herbicide glyphosate. In September 2001 a group of bordering Ecuadorian farmers, who claimed to be affected by the spraying, filed a class action

⁹²³ Fafo Report, *supra*, p. 17.

⁹²⁴ All the above-mentioned cases were heard in the US courts.

⁹²⁵ Fafo Report, *supra*, p. 17.

⁹²⁶ Kaleck and Saage-Maasz, *supra*.

⁹²⁷ <https://www.globalpolicy.org/international-justice/alien-tort-claims-act-6-30.html>.

⁹²⁸ Liu, *supra*, p. 266.

against the company, known as *Arias v. DynCorp*. The suit was filed under the ATS, the Torture Victim Protection Act (TVPA), and state law claims in US federal court.⁹²⁹ The court found that the claims raised by the plaintiffs were outside the scope of the Congressional authorisation of DynCorp's contract.⁹³⁰ In addition, the plaintiffs raised an international legal question, by claiming that defendants were operating as a "wilful participant in joint activity with the State or its agents", were "controlled by an agency of the state", or were "entwined with governmental policies."⁹³¹ They claimed that the "Defendants' activity which allegedly caused plaintiffs' harm was cloaked in the authority of the U.S. State Department and the Colombian government."⁹³² In February 2013 the court ruled in favour of the PMC, and the District of Columbia judge dismissed all claims.⁹³³ However, a parallel complaint (*Quinteros v. DynCorp*) was filed in 2006 by Ecuadorian citizens before the Inter-American Commission of Human Rights for the lack of enforcement of a ruling of the Constitutional Court, ordering all relevant ministries to adopt all necessary measures to remedy the damage suffered by communities on the northern border of Ecuador, as a consequence of the aerial herbicide sprayings on the Colombian side of the border, and to prevent further damage from being caused. However, a decision on the admissibility of the complaint is still pending.⁹³⁴ *Aerial Herbicide Spraying (Ecuador v. Colombia)* was then brought before the ICJ in March 2008. Ecuador subsequently moved to discontinue the case in September 2013, following an agreement between the parties "that fully and finally resolves all of Ecuador's claims against Colombia" in the case.⁹³⁵

⁹²⁹ *Arias v. DynCorp*, 517 F.Supp.2d 221 (2007), United States District Court, District of Columbia.

⁹³⁰ Business and Human Rights Resource Centre available at: <http://business-humanrights.org/en/dyncorp-lawsuit-re-colombia-ecuador-0>.

⁹³¹ *Arias v. DynCorp*, 517, *supra*.

⁹³² *Ibid*.

⁹³³ *Arias v. DynCorp*, 752 F.3d 1011 (2014), United States Court of Appeals, District of Columbia Circuit.

⁹³⁴ The DynCorp Case in Colombia, Environmental Justice Organisations, Liabilities and Trade (EJOLT), August 2015, p. 2, n. 5, available at: <http://www.ejolt.org/wordpress/wp-content/uploads/2015/08/FS-47.pdf>.

⁹³⁵ *Aerial Herbicide Spraying (Ecuador v. Colombia)*, International Court of Justice, No. 2013/20, 17 September 2013 at: <http://www.icj-cij.org/docket/files/138/17526.pdf>.

One of the most infamous and media-covered PMC lawsuits was the Blackwater case of the 16 September 2007 Baghdad incident. During the proceedings of this case, individual, corporate, and state responsibility were examined. From the corporate liability perspective, however, a very limited result was achieved. The case was filed under the ATS in a US federal court against Blackwater, its parent company The Prince Group, and Blackwater founder and chairman Erik Prince. The company was charged with opening fire on unarmed civilians, which constituted extrajudicial killings and a war crime.⁹³⁶ In December 2010 Blackwater argued that the US government, and not the company itself, should be held accountable for the shooting incident because it was providing security to State Department personnel. As demonstrated in the previous section, this argument did not stand due to technical grounds, and was thereafter dismissed by the court. Blackwater consequently settled the wrongful-death lawsuit out of court in 2012 for an undisclosed sum.⁹³⁷

Despite its capacity to try corporate cases, the extent and capacity of the ATS have been hamstrung over the years. First of all, in a 2004 case, *Sosa v. Alvarez-Machain*, the scope of the statute was narrowed to include only claims based on fundamental principles of customary IL on the basis that they could be incorporated into American federal common law.⁹³⁸ In other words, a claimant must bring forward a “cause of action in international law sufficiently fundamental to have developed into a customary norm.”⁹³⁹

Second, historically, there has not been a coherent view on the applicability of the ATS to legal persons, and after *Kiobel v. Royal Dutch Petroleum Co. PLC* it has reduced significantly. According to the claim, Nigerian military and police forces attacked Ogoni villages, committing atrocities and looting the property of the residents. Meanwhile the respondents, the Royal Dutch

⁹³⁶ <https://business-humanrights.org/en/blackwater-usa-lawsuit-re-16-sep-2007-baghdad-incident-1>.

⁹³⁷ Apuzzo, M.: “Blackwater Guards Found Guilty in 2007 Iraq Killings” 22 October 2014, *The New York Times*, available at: http://www.nytimes.com/2014/10/23/us/blackwater-verdict.html?_r=0.

⁹³⁸ 542 U.S. 692, 732 (2004).

⁹³⁹ Kirshner, *supra*, p. 9.

Petroleum Company and Shell Transport and Trading Company, aided and abetted these offenses by “providing the Nigerian forces with food, transportation, and compensation, as well as by allowing the Nigerian military to use respondents’ property as a staging ground for attacks.”⁹⁴⁰

In 2002 Royal Dutch/Shell was sued in a US Federal court for illegal detention, torture, extrajudicial killing, and other violations pursuant to the ATS. The court dismissed the motion in 2010 on the basis that a direct business relationship between the US and its Nigerian subsidiary (the Petroleum Development Company of Nigeria) had not been established in order for ATS to apply.⁹⁴¹ After numerous appeals, the Second Circuit dismissed the entire complaint in 2013, reasoning that the law of nations does not recognise corporate liability.⁹⁴² Judge Cabranes’s statement in *Kiobel v. Royal Dutch Petroleum Co. PLC* provides a strong normative insight regarding the readiness of US courts to arbitrate corporate responsibility. He concluded that “modern international tribunals make it abundantly clear that, since Nuremberg, the concept of corporate liability for violations of customary international law has not even begun to ‘ripen’ into a universally accepted norm of international law.”⁹⁴³

In principle, corporate liability under ATS is permissible, but the statute cannot be breached by private action alone without the ‘colour of law’.⁹⁴⁴ There is a requirement for a related state action to be established in order to punish a corporate entity under the ATS. This provision immunises corporations that directly violate human rights, reducing PMC responsibility to the mode of complicity and liability as an accessory. Furthermore, the liability of a state actor is undercut by sovereign immunity that the state could choose to extend to the PMC in question.⁹⁴⁵

⁹⁴⁰ *Kiobel v. Royal Dutch Petroleum*, 569 U.S. (2013), p. 2, available at: https://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf.

⁹⁴¹ <https://business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa#c9306>.

⁹⁴² 569 U.S. (2013), *supra*, p. 3.

⁹⁴³ *Kiobel v. Royal Dutch Petroleum Co. PLC*, 2010, United States Court of Appeals for the Second Circuit, p.137.

⁹⁴⁴ Liu, *supra*, p. 280.

⁹⁴⁵ *Ibid.*, p. 281.

Finally, the ATS is not fit to address human rights violations by PMCs. The structure of its jurisdiction only allows for social/civil liability, which practically reduces gross criminal violations to mere civil wrongs that can be financially reimbursed. To paraphrase James Stewart, if former military and political leaders indicted at the ICC for war crimes deserve criminal punishment, how can a company, that participated in the same crimes, circumvent criminal charges simply by paying a fine?⁹⁴⁶

The concept of prosecuting a legal entity is a difficult task, as it could only be found liable to the extent that the actions of an employee could be in fact attributed to the corporation. This poses significant evidentiary challenges when dealing with corporate criminal liability.⁹⁴⁷ However, according to Liu, if corporate liability is excluded from the ATS it would not only immunise corporations, but also their profit-making through the violation of human rights.⁹⁴⁸ The issue of war economies is a separate international legal gap, as there is no general rule against economic pursuit in armed conflict. As Kaleck and Saage-Maasz put it, “profiting from armed conflict is not forbidden under international law.”⁹⁴⁹ Although on the surface the ATS and the TVPA appear to have the potential to invoke PMC liability, the legislation of both is very narrow and conditional in their current form. As such, all extraterritorial claims are excluded from the ATS’s jurisdiction, while TVPA liability is limited to natural persons and does not extend to corporations.

While such legal practice sets a precedent for multinational corporations who hire PMCs, if considered under IL, the limitation of ‘effective control’ arises. Furthermore, as the court judgements swayed in favour of the corporations, the cases brought against private military companies do not set a strong precedent for international criminal responsibility for companies that enter into force. Nonetheless, academic and legal coverage of these cases helps to create

⁹⁴⁶ Stewart, *supra*, p. 55.

⁹⁴⁷ Fafo Report, *supra*, p. 14.

⁹⁴⁸ Liu, *supra*, p. 272.

⁹⁴⁹ Taylor, M.B.: “Uncharted Territory” 22 April 2015, *Fafo Research Foundation*, available at: <http://jamesgstewart.com/uncharted-territory/>.

a new historical narrative which is an important first step towards formulating corporate responsibility and ending impunity.⁹⁵⁰ PMCs may not have declared wars and initiated hostilities but, due to the nature of their business, they have and are capable of perpetrating serious human rights abuses. There is, therefore, a need for criminal corporate responsibility because states would not be responsible for every offence committed by PMCs they hire, and individual responsibility does not prevent the company from continuing to conduct their business, and potentially committing future crimes.

2. Limitations of International Regulation

Under current IL, corporate liability of PMCs predominantly exists in the form of voluntary, self-regulatory industry standards, such as the International Code of Conduct (ICoC), the Montreux Document, or the Human Rights driven initiatives, such as the UN guidelines aimed at implementing the corporate responsibility to respect human rights. Broadly characterised in this thesis as the ‘responsibilisation’ approach, these voluntary norms and standards are created by the industry to invoke corporate social responsibility (CSR). As argued by Edwin Mujih⁹⁵¹ and Saleem Sheikh,⁹⁵² the lack of an authoritative definition of the concept of CSR poses a problem to understanding its legal application. CSR can broadly be understood as a corporation’s responsibility to be socially aware, ensuring plausible working standards for its employees and their families,⁹⁵³ ethical conduct towards society and the company’s stakeholders⁹⁵⁴ beyond the maximisation of profit, and basic regulatory standards with the purpose of making a positive

⁹⁵⁰ Kaleck and Saage-Maasz, *supra*.

⁹⁵¹ Mujih, E.C.: *Regulating Multinationals in Developing Countries: A Conceptual and Legal Framework for Corporate Social Responsibility*, Routledge, Abingdon, 2012, pp. 23-24.

⁹⁵² Sheikh, S.: *Corporate Social Responsibility Law and Practice*, Cavendish Publishing, London, 1996, pp. 14-15.

⁹⁵³ Regelbrugge, L. (ed.): *Promoting Corporate Citizenship: Opportunities for Business and Civil Society Engagement*, Kumarian Press, 1999, p. 32.

⁹⁵⁴ Watts, P. and Holme, Lord: *Meeting Social Expectations: Corporate Social Responsibility*, World Business Council for Sustainable Development, Geneva, 1999, p. 3.

contribution to the society.⁹⁵⁵ What CSR implies in the context of my argument and beyond the mere need for punishing corporate misconduct is that companies have established such an extent of power and governing authority that, just like states and international actors, they ought to carry a responsibility equivalent to their status and the scope of their activity.⁹⁵⁶ While the non-binding ‘responsibilisation’ approach currently dominates the stage of PMC regulation, a pressing need to recognise international criminal responsibility for corporations is driving the development of legally binding instruments. In this section I explore the challenges that CSR poses to PMC regulation and consider the narrative it creates for the legitimacy of international corporations in the private military sector. I also analyse the implications of simultaneously emerging criminalisation and ‘responsibilisation’ approaches, and what this polarisation means for the future of PMC regulation.

Industry-Driven Regulation: the ICoC, the Montreux Document and Other Industry Bodies

On the international level, the most prominent PMC regulation emerges from the industry itself. Amongst a number of industry standards, the ICoC is the most relevant regulatory body specifically focusing on private security providers. The ICoC is an international, industry-driven initiative that originated from a 2005 Swiss Federal Council report on private military and security companies that “recommended pursuing further dialogue and action in this area.”⁹⁵⁷ While based on the Montreux Process, its purpose and content are aimed at businesses, rather than states. It is also administered by the industry, making it a self-regulatory body. The purpose of the ICoC is to set out a range of industry-developed principles and standards to guide PMCs on matters of international human rights and humanitarian law:

Signatory Companies will exercise due diligence to ensure compliance with the law and

⁹⁵⁵ Khan, F.: “Pandora’s Box: Managerial Discretion and the Problem of Corporate Philanthropy” 1997, Vol. 44 (3), *UCLA Law Review*, p. 628; Slaughter, C.: “Corporate Social Responsibility: A New Perspective” 1997, Vol. 18 (10), *The Company Lawyer*, p. 321.

⁹⁵⁶ Drawing on the concepts of power and legitimacy as per the historical chapters of the thesis.

⁹⁵⁷ ICoC, p. 5.

with the principles contained in this Code, and will respect the human rights of persons they come into contact with, including, the rights to freedom of expression, association, and peaceful assembly and against arbitrary or unlawful interference with privacy or deprivation of property.⁹⁵⁸

Furthermore, the Code stipulates that signatory companies must comply with the outlined grievances procedures,⁹⁵⁹ as well as ensure that they have “sufficient financial capacity in place at all times to meet reasonably anticipated commercial liabilities for damages to any person in respect of personal injury, death or damage to property.”⁹⁶⁰ The issue arising from this liability clause is the implication that human rights violations can be mitigated or punished through a financial settlement. In other words, if a company is found to have committed a human rights offence that under the ICoC is considered inadmissible, this company would have to undergo a self-imposed grievance procedure, and, as a result, establish the amount of a ‘reasonable’ financial damage, while not being legally bound to do so.

While the Code states that “the procedures must allow complaints to be brought by personnel or third parties”,⁹⁶¹ the only practical repercussions against violations of the Code is aimed at PMC personnel and could result in dismissal.⁹⁶² The ICoC contains provisions concerning PMC respect for human rights and mandates that “Signatory Companies will adhere to the Code whether or not the Code is included in a contractual agreement with a Client.”⁹⁶³ However, another conflict of regulation arises. According to contract law, the contracting party is obliged to follow only those provisions that are explicitly listed in the contract. In other words, if the human rights provisions are not stated in the contract, the client cannot expect them to be adhered to.⁹⁶⁴ The concluding paragraph in the liability section reinforces this point, stating that the provisions listed in the Code cannot replace or override any contractual requirements or

⁹⁵⁸ ICoC, para. 21, pp. 25-26.

⁹⁵⁹ Ibid., 66-68, pp. 51-53.

⁹⁶⁰ Ibid., para. 69, p. 53.

⁹⁶¹ Ibid., para. 66, p. 51.

⁹⁶² Ibid., para. 67 (f), p. 52.

⁹⁶³ Ibid., para. 19.

⁹⁶⁴ Liu, *supra*, p. 199.

specific Company policies or procedures concerning wrongdoings.⁹⁶⁵ This provision presents a moot point, as it highlights the obvious fact of a legally binding contract between a PMC and its client prevailing over a set of voluntary norms. In September 2013 the International Code of Conduct for Private Security Service Providers' Association was established. While the aim of this external governance and oversight mechanism was to improve accountability in the sector and provide a forum for third party complaints, currently the Association does not have the necessary resources to fulfil this opportunity.⁹⁶⁶

The language used in the ICoC is extremely important as it inflates the legal significance of the document. The ICoC creates a false sense of legitimacy by referencing IHL and including extracts from the Rome Statute on the definition of war crimes.⁹⁶⁷ Despite its legitimising framework, the ICoC currently lists over 700 companies, including the above-mentioned DynCorp and Xe (formerly Blackwater).⁹⁶⁸ In analysing the future of PMC impunity, scholars like Liu and White are concerned with the effectiveness of self-regulation, suggesting that the industry would create the appearance of regulation, and could even prevent other, more robust, enforcement mechanisms from emerging in the realm. While Liu acknowledges that self-regulation could lead to greater compliance to industry standards, he notes that its extra-legal nature leaves the question of PMC accountability unresolved.

Self-regulation raises another important issue in the context of a changing governance, a method developed throughout this thesis.⁹⁶⁹ Since the 1980s states have been transferring functions and services to the private sector through privatisation and outsourcing. The companies that have subsequently taken on the functions formerly owned by states have also

⁹⁶⁵ ICoC, para. 68, p. 53.

⁹⁶⁶ A/HRC/32/39, p. 11.

⁹⁶⁷ ICoC, pp. 27-31.

⁹⁶⁸ 708 as of 1 October 2013, see: <https://business-humanrights.org/en/conflict-peace/special-initiatives/initiatives-on-private-military-security-companies/international-code-of-conduct-for-private-security-service-providers-icoc-a-process-aimed-at>.

⁹⁶⁹ See chapters 2, 3 and 4.

inadvertently acquired a form of governance. In the case of PMCs, we can trace the shift in governance from the state to a corporation, whereby PMCs perform the bureaucratic functions of logistics, organising security operations, training and, ultimately, killing. Along with the military power that these companies possess, PMCs are also making claims to a form of legitimacy by establishing a self-governing body that is being recognised by the industry, but also by states and international organisations.

Other Industry Bodies

Although the norms of corporate responsibility vary across states and industries, the human rights regime has been urging corporations to respect human rights in their conduct.⁹⁷⁰ Regulating companies on human rights grounds commenced as early as the mid-nineties. Established in 1999, the UN Global Compact (GC) is a network of corporate and civil society participants, all of whom work with the freestanding Global Compact Office and a variety of UN agencies.⁹⁷¹ The GC was formed as a result of public scrutiny relating to Nike's use of child labour and general poor employment conditions, in order to promote the principles of human rights across businesses.⁹⁷² The military, security, and defence sectors appear to be omitted from categories of participating companies.⁹⁷³

The OECD's Guidelines for Multinational Enterprises are an instrument of Corporate Social Responsibility and consist of recommendations regarding social and environmental standards. The Guidelines are voluntary in nature and limited in scope.⁹⁷⁴ The standards apply to multinational enterprises (MNEs) based in OECD states, which in turn agree to promote

⁹⁷⁰ Pillay, N.: "The Corporate Responsibility to Respect: a Human Rights Milestone", *International Labour and Social Policy Review*, Geneva, 2009, pp. 63-68.

⁹⁷¹ White and McLeod, *supra*, p. 978; www.unglobalcompact.org and UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 of 26 Aug. 2003. For the principles of the Global Compact see: www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html
www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html

⁹⁷² UN Global Compact, available at: <https://www.unglobalcompact.org>.

⁹⁷³ White and McLeod, *supra*, p. 980.

⁹⁷⁴ *Ibid.*, p. 978.

observance of the Guidelines among MNEs and ‘good practice’ in the spheres of human rights, labour standards, and the environment.⁹⁷⁵

A very recent development by the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the International Committee of the Red Cross (ICRC) is the Toolkit for Addressing Security and Human Rights Challenges in Complex Environments.⁹⁷⁶ The Toolkit is a guidance document which addresses real-life security and human rights challenges identified through engagement with many stakeholders. For each listed “Challenge”, the Toolkit outlines good practice and recommendations, offering practical tools such as checklists, templates, and case studies.⁹⁷⁷

In September 2015 the International Organization for Standardization (ISO) published its new Management System for Private Security Operations: Requirements with Guidance (ISO 18788).⁹⁷⁸ It provides PMCs and their clients with a business and risk management framework ensuring compliance with law, human rights, and relevant voluntary regulatory measures ISO is party to. ISO standards have earned a strong and healthy reputation across a number of corporate sectors, from finance to manufacturing.⁹⁷⁹ While the industry alone is not robust enough to regulate private military providers and invoke corporate responsibility, it could form a solid complementary foundation for standards and measures of quality. If PMCs are required to obtain ISO certification before they can contract out their services, this could replace the vague vetting process of the UN Guiding Principles and help standardisation across the sector.

As different regulatory standards emerge, it is important to consider the possible effects on the PMCs themselves and what the practical results may be. During the HRC’s thirtieth session,

⁹⁷⁵ OECD, *Guidelines for Multinational Enterprises*, Revision 2000, note 62, I(1) and II(1) and (2).

⁹⁷⁶ Addressing Security and Human Rights Challenges in Complex Environments Toolkit, Third Edition, DCAF and ICRC, June 2016, available at: <http://www.securityhumanrightshub.org/content/toolkit>.

⁹⁷⁷ See section 3 on “Working with Private Security Providers”.

⁹⁷⁸ See: www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=63380.

⁹⁷⁹ Bowen, R.D.: “ISO 9000 is the New ‘Gold Standard’ for Banking” June, 2000, *ISO News*, pp. 26-31.

Paul Gibson, Director of the Security in Complex Environments Group, raised a significant point, highlighting the PMC perspective on emerging and future regulation and associated costs. He recalled that PMCs are profit-driven businesses, therefore any regulatory endeavours should be financially viable for PMCs to comply with. In other words, it is “important that the costs of increasing regulation should not make companies uncompetitive – so as not to penalise those who wished to comply.”⁹⁸⁰

The Human Rights Regime: UN Guiding Principles, UN Resolution 26/9, UN Draft Convention

The Human Rights regime has arguably been the most active area of IL in developing a range of initiatives to address corporate impunity. Although the work of the Human Rights Council and various working groups has been extensive and multi-faceted, no legally binding mechanisms have been established to date. In 2011 the UN Guiding Principles on Business and Human Rights were approved. The HRC endorsed the Guiding Principles in its resolution 17/4. The previous section discussed their role in regards to state responsibility and human rights. As this section focuses on corporate liability, I examine the second pillar of the Guiding Principles, namely “the role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights.”⁹⁸¹

The Guiding Principles address the responsibilities of states and corporations and require them to respect, protect, and comply with all applicable laws to uphold human rights. They further acknowledge corporate responsibility to respect human rights and stress that it exists independently of a state’s responsibility to fulfil their human rights duties, and, most importantly, does not diminish those duties.⁹⁸² They also highlight the lack of clarity in corporate law regarding the human rights requirements for companies: “laws and policies in this area

⁹⁸⁰ A/HRC/30/47, Art. 46, p. 13.

⁹⁸¹ Guiding Principles, *supra*, p. 1; A/HRC/17/31.

⁹⁸² Ruggie, *supra*, p. 12.

should provide sufficient guidance to enable enterprises to respect human rights, with due regard to the role of existing governance structures such as corporate boards.”⁹⁸³ Reference to the ‘governance structures’ resonates with the overall argument of this thesis concerned with developing a regulation that would be more aware and adaptable to the changing forms of power and legitimacy not only amongst states, but also corporations. Having acknowledged that the risk of human rights violations is higher in areas affected by conflict, the guidelines propose an increased state presence in the form of identifying and monitoring the risks; denying access to public support and services to a business that is found to have violated human rights; and ensuring adequate liability mechanisms are in place.⁹⁸⁴

Nevertheless, the premise of the Guiding Principles does not build a strong foundation for corporate liability. The guidelines do not mention an adequate vetting process that ought to be undertaken by the state prior to engaging a PMC, nor do they stipulate for human rights provisions to be explicitly incorporated into the terms of the contract. The Principles misleadingly point to the provisions of the Rome Statute of the ICC when discussing the sources of corporate criminal liability for companies, while in fact referring to national jurisdictions.⁹⁸⁵ As a response to the shortcomings of the Guiding Principles, the HRC established an “open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.”⁹⁸⁶ The IGWG was launched to consider the possibility of developing an international regulatory framework, including the option of drafting a legally binding instrument on the regulation, monitoring, and oversight of private military and security companies.⁹⁸⁷ The resolution instructs the IGWG to create a legally binding international instrument to increase corporate accountability and ensure access to remedy for victims of

⁹⁸³ Guiding Principles, *supra*, p. 5.

⁹⁸⁴ *Ibid.*, pp. 8-9.

⁹⁸⁵ *Ibid.*, pp. 25-26.

⁹⁸⁶ Established at the 26th HRC session in June 2014, by adopting resolution 26/9, A/HRC/RES/26/9, p. 2.

⁹⁸⁷ A/HRC/32/39, p. 10.

business-related human rights abuse. Although the resolution was passed, out of the five permanent UN member states only China and Russia were in favour its adoption. A number of delegations expressed their opinion that the Guiding Principles

did not get to the core of the discussion on maximum protection of human rights and access to remedies, and that a complementary international instrument was needed in order to strengthen national capabilities to ensure human rights protection in the domestic sphere.⁹⁸⁸

Furthermore, there was a lack of consensus as to what the main focus of the IGWG should be, the implementation of the legally binding instrument or the Guiding Principles. While the overall strategy is yet to be defined, its current form appears to have some notable gaps. The treaty is limited to gross violations, therefore not covering other types of corporate human rights abuses. With its main focus on transnational corporations, the resolution does not apply to national companies, and currently does not provide a definition of what exactly is considered a transnational organisation.⁹⁸⁹ It is also currently not clear whether the instrument would define available remedies and access to those remedies if states fail to act on obligations, or if it would focus on establishing corporate liability, or both.⁹⁹⁰ Importantly, the special nature of PMCs was called out by a group of NGOs during the session. Referring to corporate impunity, they argued that states and international organisations should not extend any kind of immunity to PMCs that would allow them to escape corporate liability or limit access to remedy for victims.⁹⁹¹ This point is particularly relevant in the light of a fundamental shift in the balance of power between corporations and states, driven in particular by the rise of new technologies that facilitate cross-border management of companies and deregulation across multiple sectors.⁹⁹² Even at the UN level there is a general polarisation between the ‘responsibilisation’ and criminalisation

⁹⁸⁸ A/HRC/31/50, p. 7.

⁹⁸⁹ Ibid., p. 5, p. 12.

⁹⁹⁰ This concern was also raised during the session’s panel on state obligations; Panel V. Obligations of States to guarantee the respect for human rights by transnational corporations and other business enterprises, including extraterritorial obligation, A/HRC/31/50, pp. 13-15.

⁹⁹¹ A/HRC/31/50, p. 19b.

⁹⁹² Ibid., p. 11.

approaches to regulation. While the IGWG insists that the legally binding instrument will be designed to complement the Guiding Principles, there is a lack of coherence in the overall UN approach. The proposed instrument was more of an afterthought in the absence of a legally binding mechanism to invoke company liability.

UN Draft Convention

To evaluate PMC-specific UN regulatory efforts I now examine the applicability of the Draft Convention to corporations. The Draft Convention is designed to be a binding legal mechanism that would apply to all states that are party to the treaty. Although Article 20 includes provisions covering corporate liability, it does not specify direct liability provisions for PMCs. Instead, it requires each state party to implement national legislation that allows the affected party to make a complaint.⁹⁹³ Whether criminal, civil, or administrative,⁹⁹⁴ the liability is to be determined at state discretion and in line with state party domestic legal principles.⁹⁹⁵ While this provision clearly shows that the Draft Convention supports criminal corporate responsibility in principle, the lack of uniformity and reliance on domestic law is likely to create a disparate practice. This could also lead to PMCs choosing to register their company in home states that have weak or no corporate liability laws in order to continue operating in a legal vacuum. These provisions do not negate contractor individual criminal liability for committing the offences in questions.⁹⁹⁶ Finally,

Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including fines, economic sanctions, prohibitions of further employment, obligation to provide restitution and/or compensation to the victims.⁹⁹⁷

⁹⁹³ Draft Convention, Article 20 (1) Liability of legal persons and entities.

⁹⁹⁴ Or a combination of all three.

⁹⁹⁵ Draft Convention, Article 20 (2).

⁹⁹⁶ Ibid., Article 20 (3).

⁹⁹⁷ Ibid., Article 20 (4).

This provision bears great relevance and importance, as it actually mentions tangible consequences that companies could be facing if found guilty of an offence. These are adequate, measurable, and applicable to corporations in the same way that criminal punishment is applicable to individuals. This provision goes beyond a mere financial penalty, and could arguably be a proportionate punishment for human rights violations. However, by instructing each state party to assume accountability for corporations and adequate jurisdiction over their actions, the Draft Convention inadvertently distances itself from identifying and placing responsibility directly on the companies. According to Nigel White, by not addressing PMCs, the Draft Convention reveals the weaknesses of IL.⁹⁹⁸ The fact that it does not recognise companies as independent bearers of responsibility could add another barrier to the formation of international corporate liability.

Article 20 exactly mirrors the wording of Article 10 of the UN Convention against Transnational Organized Crime,⁹⁹⁹ issued in 2004. Reference to legal persons also features in Article 31 on Prevention, as it instructs all state parties to take necessary measures to “reduce existing or future opportunities for organized criminal groups to participate in lawful markets with the proceeds of crime, through appropriate legislative, administrative or other measures.”¹⁰⁰⁰ Such prevention measures would include establishing public records on companies that committed an offence and temporary disqualification of company directors, also to be included in the public record.¹⁰⁰¹ Public shaming of this kind could in fact serve as an effective regulatory mechanism, potentially preventing PMCs from misconduct. As profit-driven companies, PMCs have to manage their reputational risk, as in an overflowed security market bad press can cost PMCs

⁹⁹⁸ White, *supra*, p. 29.

⁹⁹⁹ United Nations Convention against Transnational Organized Crime and the Protocols thereto, 2004, available at: https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf.

¹⁰⁰⁰ *Ibid.*, Article 31 (2).

¹⁰⁰¹ UN Convention against Transnational Organized Crime, Article 31 (2)(d)(i)-(iii).

their business. Nonetheless, the above argument applies, and all the above-mentioned enforcement mechanisms first depend on states ratifying the treaty and, second, are subject to domestic jurisdiction concerning legal entities.

The Draft Convention remains at an early stage of its formulation, as no accord has been reached in its regard amongst the UN intergovernmental working group.¹⁰⁰² To visualise the difficulties of obtaining consensus on the Draft Convention, it is enough to recall that, to date, only thirty-five states have ratified the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which would be a logical first step and a sign of endorsement of the WG's strategy on the part of the states. In practice, the Draft Convention is diametrically opposed to the ICoC self-regulating non-binding principles.

The co-existence of these regulatory mechanisms is problematic as it puts policy choice at a crossroad. The issue may not be immediate, as each address a different audience, with the Draft Convention aimed at states, and the ICoC at the industry. However, in the long term the opposing approaches to PMC regulation are likely to create a divide and prevent the development of coherent norms and standards internationally. The polarisation of regulatory models is challenging and is unlikely to produce a coherent solution for PMC regulation. According to White, "states connected to the industry are more likely to stick with and entrench the Montreux Process, and those opposed to PMCs as a modern form of mercenarism are more likely to support the Draft Convention process."¹⁰⁰³ The same applies to the companies themselves, so, unless a domestic legal system has reach over unlawful PMC activity, there is no legally binding way to invoke corporate liability.

¹⁰⁰² A/HRC/30/47, Art. 39, p. 11.

¹⁰⁰³ White, N.: "The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention" 2011, Vol. 11 (1), *Human Rights Law Review*, p. 150.

Conclusion

While there is a need to ensure parity of legal obligation for corporations, currently prospective international codification of corporate criminal liability is made problematic by the inconsistencies across national legislation. Nonetheless, there is a strong scholarly and case-based demand for corporate liability that cannot and will not be left unnoticed. As Andrew Clapham argues,

as long as we admit that individuals have rights and duties under customary international human rights law and international humanitarian law, we have to admit that legal persons also have the necessary international legal personality to enjoy some of these rights and conversely be prosecuted or held accountable for violations of their international duties.¹⁰⁰⁴

Therefore, any corporation, including PMCs, should be accountable for any breaches of IL, in particular war crimes and violations of human rights.¹⁰⁰⁵ The existing legally binding mechanisms, such as domestic criminal jurisdictions and the Alien Tort Statute, are insufficiently effective to address the international extent of corporate criminal liability. By establishing a presumption against extraterritorial jurisdiction under the ATS, *Kiobel v. Royal Dutch Petroleum* significantly reduced the reach of the Statute. It found that this presumption may only be bypassed if the alleged tort sufficiently touches and concerns the United States.¹⁰⁰⁶ Furthermore, the ATS “allows federal courts to recognise certain causes of action based on sufficiently definite norms of international law.”¹⁰⁰⁷

¹⁰⁰⁴ Clapham, A. “The Questions of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court” in Kamminga, M. T. and Zia-Zarifi, S. (eds): *Liability of Multinational Corporations under International Law*, The Hague, Kluwer, 2000, pp. 139, 190.

¹⁰⁰⁵ Stewart, *supra*, pp. 1-78; see also Stewart’s work on corporate accountability and criminal justice at: <http://jamesgstewart.com/category/blog/corporate-accountability/>; White, N. and MacLeod, S.: “EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility” 2008, Vol. 19 (5), *European Journal of International Law*, p. 967.

¹⁰⁰⁶ “Corporate Responsibility for International Crimes”, Chatham House International Law Programme, Meeting Summary, 19 May 2015, London, pp. 3-4.

¹⁰⁰⁷ 569 U.S. (2013), *supra*, p. 5.

The work of the UN Human Rights Council has been extensive and elaborate. The IGWG intelligently identified the gaps in corporate liability, while the WG on mercenaries is working towards a consensus on the possible Draft Convention. The intensity and breadth of HRC activity supports the Special Rapporteur's claim that "the extraterritorial applicability of human rights law, and specifically human rights treaties, is crucial to the regulation of the sector."¹⁰⁰⁸ However, according to James Stewart, basic notions of retributive justice stipulate that the Business and Human Rights movements cannot erase past offences "out of a laudable commitment to future compliance."¹⁰⁰⁹ In other words, a former serial murderer cannot avoid responsibility by discontinuing their criminal conduct and claiming compliance. Nor should this method be extended to corporations. Equally, the liability gap that fosters the corporate veil cannot currently be mitigated by Human Rights Law.

With the extraterritorial scope of the ATS recently limited, and the industry bodies as well as Human Rights Law setting the standards and providing guidance only, there is a need for an alternative avenue that would allow for extraterritorial claims to be pursued against corporations for international crimes. PMCs are different from other corporations on the basis of the military nature of their activity. Even if mercenarism was to be criminalised and the issue of contractor participation in hostilities addressed, PMCs continue to support military operations and operate in highly sensitive and risky environments. As such, the nature of PMC activity increases the risk of serious offences, including human rights violations. Finally, the imbalance created by the horizontal nature of the contracts and states' reliance on PMCs for provision of security rationalises the self-regulation of the private security industry. This newly acquired governance of PMCs signals, in turn, the need for a mechanism that could invoke corporate responsibility.

¹⁰⁰⁸ A/HRC/32/39, p. 19.

¹⁰⁰⁹ Stewart, *supra*, pp. 66-67.

Therefore, it is important to establish criminal responsibility for PMCs on a company level, and not just for individual contractors and directors. Furthermore, since PMC activity is largely extra-territorial, with almost all contracts based outside of the home state, this signals a need for international criminal corporate responsibility. Having examined existing fora that attempt to address the issues of corporate impunity, it appears that international criminal law could offer a more effective regulatory answer to the PMC-specific challenges of corporate liability. Unlike the self-regulation by the industry and other voluntary initiatives, international criminal law provides a binding legal framework that is highly relevant in the context of high-risk PMC activity. Establishing international criminal responsibility would also help drive the standards of corporations concerned with military activity; this includes, but is not limited to, the arms trade, the production of biological, chemical, and nuclear weapons, PMCs, etc. It would also add gravitas to the ILC Articles on attribution of conduct to the state, therefore strengthening the case for invoking state responsibility where human rights violations occur as a result of PMC transgression.

Chapter 6

International Criminal Responsibility for Corporations

Although corporations do not currently possess an international legal personality, in other words, they are not considered to be actors under international law (IL), PMC activity extends internationally. Therefore, PMC regulation has to be considered an international issue where the military and civilian realms meet and overlap. International criminal responsibility for PMCs is required for a number of reasons. Having analysed existing regulatory bodies and legal frameworks that are tasked with PMC regulation, it became apparent that none of them take into consideration the mode of global governance that private military actors operate in. Social liability is not sufficient to address gross human rights violations, war crimes, or crimes against humanity. While there are numerous self-regulatory industry bodies that claim to raise the standards of PMC services and spread human rights awareness, they cannot tackle serious violations adequately or bring justice to victims. Although a rapidly developing field, domestic criminal corporate responsibility is disparate and territorially restricted. Moreover, PMCs are different to other corporations due to the military nature of their activity, and therefore should be treated with greater scrutiny. Finally, the formulation of international criminal liability for corporations would reinforce state responsibility and drive down impunity for PMCs. This, in turn, will ensure a more efficient and controlled use of private military resources by states and international organisations.

One of many practical advantages of using international criminal law (ICL) and universal jurisdiction (UJ) as criminalisation tools is that these avenues allow for the trial of international

crimes potentially committed by PMCs, such as war crimes¹⁰¹⁰ and crimes against humanity. Neither the International Law Commission nor the ICC are competent for the international criminal regulation of companies. To better understand this phenomenon and to evaluate the potential trend of international corporate criminal responsibility into the future, I will introduce a brief historical background on the formation of the concept of corporate responsibility.

Part 1: International Criminal Law and Corporate Responsibility

Historically, the main purpose of IL was to regulate relations between states. As principal actors, states were sanctioned in the event of violation of norms or treaties through political, economic, or territorial measures.¹⁰¹¹ This was the case until the end of WW2, when the idea of international criminal responsibility for individuals materialised through the establishment of the Nuremberg and Tokyo military tribunals.¹⁰¹² Unlike individuals and states, who can be tried at the ICC (and the ad hoc Tribunals) and the International Court of Justice respectively, corporations cannot be held criminally liable on an international level. Equally, the UJ doctrine has only ever been applied to natural rather than legal persons. However, the international legal personality of companies has developed over a lengthy period of time. As demonstrated in *Chapter 2*, the British and Dutch East India Companies operated as sovereign entities managing their respective empires abroad as early as the seventeenth century. On the basis of Royal Charters these companies exercised key governmental functions, including local administration, tax collection, and the control of armed forces. The British East India Company had “the right to have its contracts treated as international treaties and the right to make war”.¹⁰¹³ As a result,

¹⁰¹⁰ Due to PMC’s civilian status, it is unlikely that their conduct can be considered as part of an international conflict. Article 3 in each of the 1949 Conventions provides a description of war crimes that are applicable to non-international conflicts.

¹⁰¹¹ Zolo, D.: *Victors’ Justice: From Nuremberg to Baghdad*, Verso, London, 2009, Introduction: p. ix; also: Germany following the Treaty of Versailles; a more recent example is the US in the *Nicaragua case*.

¹⁰¹² Nuremberg Prosecutor Jackson claimed there was precedent for the idea of individual criminal responsibility under customary IL in cases of piracy, see: Lauterpacht, H.: “The Law of Nations and Punishment of War Crimes” 1944, Vol. 21, *British Yearbook of International Law*, pp. 61, 64; Heller-Roazen, D.: *The Enemy of All: Piracy and the Law of Nations*, Zone Books, New York, 2009.

¹⁰¹³ Garrett, A.: “The Corporation as Sovereign” 2008, Vol. 60 (1), *Maine Law Review*, p. 133.

some scholars have evoked the international corporate personality of the East India Companies as a valid precedent and norm to promote the establishment of international corporate criminal responsibility.¹⁰¹⁴

Cameron and Chetail believe that the Nuremberg Trials provide grounds for a theory of corporate criminal liability.¹⁰¹⁵ According to the Charter of the International Military Tribunal,

in cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts.¹⁰¹⁶

The criminality of corporations was, therefore, used in order to establish individual criminal responsibility.¹⁰¹⁷ Contrary to Cameron and Chetail, Liu evokes the Nuremberg Trials as he traces the normative roots of corporate impunity. He argues that by criminalising civilian industry leaders of German arms production rather than the corporations that facilitated the war crimes, the Nuremberg international legal proceedings set the precedent in favour of individual criminal responsibility over the corporate one.¹⁰¹⁸ According to Bush, corporate criminal liability was explored in depth at Nuremberg, and was never rejected as legally unsound.¹⁰¹⁹ However, he disagrees with those who claim that Nuremberg signalled a normative move towards the establishment of corporate criminal liability.¹⁰²⁰ Jonathan Bush argues that the reasons for not criminalising German armaments companies were economic rather than legal. US prosecutors did not want to hamper the reconstruction of the German economy.¹⁰²¹

¹⁰¹⁴ White and MacLeod, *supra*, p. 969; see also: Robins, N.: *The Corporation that Changed the World: How the East India Company Shaped the Modern Multinational*, Pluto Press, London, 2006; Stone, C.: *Where the Law Ends: The Social Control of Corporate Behaviour*, Harper and Row, New York, 1975, p. 15.

¹⁰¹⁵ Cameron, L. and Chetail, V.: *Privatizing War: Private Military and Security Companies under Public International Law*, CUP, Cambridge, 2013, p. 584.

¹⁰¹⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, London, 8 August 1945, Article 10.

¹⁰¹⁷ Cameron and Chetail, *supra*, p. 585.

¹⁰¹⁸ Liu, *supra*, pp. 252-254.

¹⁰¹⁹ Bush, J.: "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said" 2009, Vol. 109, *Columbia Law Review*, p. 1239.

¹⁰²⁰ Bush, *supra*, p. 1237, see n. 559 for a list of works.

¹⁰²¹ *Ibid.*, p. 1240.

In addition, Cameron and Chetail have identified the preparatory works of the Rome Statute as the foundation of international corporate criminal liability. It is important to note at the outset that to this day the ICC has no jurisdiction over corporate entities, nor was the act of mercenarism codified as an international crime under the Rome Statute, therefore leaving the ICC toothless in exercising any jurisdiction over PMCs. Notwithstanding this, the question of corporate criminal responsibility was raised in the early ILC discussions on the creation of an international criminal legislative body.¹⁰²² However, the notion faced significant criticism and was rejected due to its novel and controversial nature.¹⁰²³ Ironically, while private armies dominated the security landscape at many periods throughout history, PMCs are often considered a novelty under the different bodies of IL.¹⁰²⁴ The first preliminary statute of the ICC (1998) contained provisions for criminal corporate responsibility. However, consensus could not be reached, mainly for technical reasons.¹⁰²⁵ In 2000 a reference to the liability of legal persons was made in Article 10 of the UN Convention against Transnational Organised Crime,¹⁰²⁶ although it was removed in later revisions.

There have been some instances of institutional practice within the ICL of recognising criminal corporate responsibility. There are existing emerging exceptions that support international criminal liability for corporations. One example is the Special Tribunal for Lebanon (STL), which is currently prosecuting two media corporations for contempt of court.¹⁰²⁷ However, as this does not amount to a core crime under the STL's statute, it is arguable that the precedent for international corporate liability in this case is weak.¹⁰²⁸ There is another much more prominent regional example that could amount to a strong precedent in IL. Following the struggles of

¹⁰²² 1951/53 Reports of the Committee on International Criminal Jurisdiction of the ILC.

¹⁰²³ See: Clapham, A. in Kamminga and Zia-Zarifi (eds), *supra*, pp. 171-172.

¹⁰²⁴ Liu, *supra*, p. 289.

¹⁰²⁵ See Clapham, *Jurisdiction over Legal Persons*, p. 191; Schabas, *supra*, p. 81.

¹⁰²⁶ 225 UNTS 275.

¹⁰²⁷ *Prosecutor v. Mohamed et al.*, STL-14-05 (2014); *Prosecutor v. Al Amin et al.*, STL-14-06 (2014).

¹⁰²⁸ "Corporate Responsibility for International Crimes", Chatham House, *supra*, p. 6.

national liberation from 1960s onwards, the African Court of Justice and Human Rights has emerged as the driving force behind the establishment of international and regional anti-mercenary norms. It is therefore not surprising that it became the first international court to recognise and criminalise corporate liability for international crimes.¹⁰²⁹ In June 2014 members of the African Union (AU) approved a protocol that extended the Court's jurisdiction "over legal persons, with the exception of States." While the Court's legislation does not contain any clauses specific to PMCs, its international criminal jurisdiction does recognise the crime of mercenarism.¹⁰³⁰ Sadly, as noted above, there is a significant disconnect, whereby the Statute defines only a mercenary, and not mercenarism as an activity. In addition, the Statute's definition of a mercenary derives from the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989, which is narrow and contextual.¹⁰³¹

Arguably, until the act of mercenarism is defined, it cannot be used to criminalise private military companies for the crime of mercenarism under the jurisdiction of the Statute. In its current form, it can only be applied to individuals and does not prevent a company from incorporation with the purpose of delivering private military services. Nonetheless, the list of other crimes under the Court's jurisdiction includes crimes against humanity, war crimes, corruption, and trafficking in persons, drugs and hazardous wastes, all the serious violations which can potentially be committed by PMCs and can now be tried for as corporations. This regional precedent is highly promising as it has the potential to contribute to the establishment of international legal personality for corporations in domestic and international legal systems.

¹⁰²⁹ Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, May 15, 2014, STC/Legal/Min/7(I) Rev. 1, Art. 46C, available at: http://www.iccnw.org/documents/African_Court_Protocol_-_July_2014.pdf; see also the Decision on the Draft Legal Instruments, Doc. Assembly/AU/8(XXIII), at 1 in African Union, Decisions, Declarations And Resolution, Assembly/AU/Dec.517-545(XXIII), available at: http://www.au.int/en/sites/default/files/decisions/9661-assembly_au_dec_517_-_545_xxiii_e.pdf.

¹⁰³⁰ STC/Legal/Min/7(I) Rev. 1, Article 28A, International Criminal Jurisdiction of the Court, p. 15.

¹⁰³¹ See *Chapter 3*, pp. 113-114.

Part 2: How Could ICL Help Prevent Corporate Impunity of PMCs?

There is a need to prosecute international crimes committed by corporations. How can it be done in the absence of international legal personality for companies and an internationally recognised crime of mercenarism, not to mention the existing deficiencies of international regulation for PMCs and given the jurisdictional limits of international tribunals?¹⁰³² Contemporary international criminal law is normally associated with individual responsibility and is often envisaged through the ICC and the ad hoc Tribunals where this law is usually exercised.¹⁰³³ While I consider the limitations associated with the application of ICL through the ICC, I propose to decouple the two and envisage ICL as the appropriate law that can address international crimes committed by corporations.¹⁰³⁴ Just like the IMT at Nuremberg and the ICTY in the case of *Tadic* asserted jurisdiction over individuals on the basis of commission of international crimes,¹⁰³⁵ the international element is integral to PMC conduct and the subsequent offences that may occur.

According to Article 1 of the Rome Statute the ICC is complementary to national jurisdictions, which is different from the primary relationship of the ICTY and ICTR tribunals.¹⁰³⁶ It obliges domestic legal systems to prosecute international crimes, and steps in if national courts are unwilling or unable to do so. Although it puts more pressure on national systems to develop an international criminal legal procedure, it also allows for some flexibility in classifying the crimes, which are narrowly defined at the ICC level. It also decouples ICL from the context of international courts and tribunals, allowing it to shift between the domestic and international

¹⁰³² For example, the ICC's limit to territory of state parties and nationals of state parties.

¹⁰³³ On the ICL procedure and the ICC see: Schabas, W.: *Introduction to the International Criminal Court*, 4th edition, CUP, Cambridge, 2011; Cryer, R., Friman, H., Robinson, D. and Wilmshurst, E.: *An Introduction to International Criminal Law and Procedure*, 3rd edition, CUP, Cambridge, 2014; Schwobel, C. (ed.): *Critical Approaches to International Criminal Law: An Introduction*, Routledge, Abingdon, 2014.

¹⁰³⁴ Echoed in Schwarzenberger, G.: "The Problem of an International Criminal Law" 1950, Vol. 3 (1), *Current Legal Problems*, pp. 263-296.

¹⁰³⁵ Simpson, *supra*, pp. 44-45.

¹⁰³⁶ Rome Statute, Art. 1.

domains.¹⁰³⁷ While the ICC is a forum for the prosecution of the most grave crimes,¹⁰³⁸ it was not set up to adjudicate isolated cases. So it is important to establish whether the offences committed by PMCs could fit within the current categorisation of the Rome Statute. Crimes under the jurisdiction of the Court include genocide, aggression, war crimes, and crimes against humanity.¹⁰³⁹ The crime of aggression,¹⁰⁴⁰ defined at the Kampala Conference in 2010, is directly linked to state armed forces, and cannot, therefore, be applied to PMCs who are always contracted to deliver services on behalf of a client. The crime of aggression could only be extended to PMCs if they were formally incorporated into state national forces, or if their conduct could otherwise be attributed to the acts of the state.¹⁰⁴¹

Arguably, it is also less possible that genocide could be perpetrated by PMC employees, as it requires “intent to destroy, in whole or in part, a national, ethnical, racial or religious group”,¹⁰⁴² which is unlikely to occur, especially systematically, under the contracted services of the company. Individual acts associated with war crimes and crimes against humanity, such as murder, hostage-taking, rape, or torture, are more likely to occur and do not necessitate the special intent (intent to destroy) of the international crime of genocide.¹⁰⁴³ However, the definition by the Rome Statute of crimes against humanity imposes a limitation by considering these acts “as part of a widespread and systematic attack directed against any civilian population.”¹⁰⁴⁴ Article 8 further stipulates that in order for the ICC to exercise its jurisdiction

¹⁰³⁷ Simpson, *supra*, p. 53.

¹⁰³⁸ Bassiouni, C. M.: “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice” 2001, Vol. 42 (1), *Virginia Journal of International Law*, p. 82; Cryer, R.: “International Criminal Law” in Evans, *supra*, p. 754.

¹⁰³⁹ Rome Statute, Art. 5 (1).

¹⁰⁴⁰ *Ibid.*, Art. 8 *bis*, inserted by resolution RC/Res.6 of 11 June 2010.

¹⁰⁴¹ See ILC Articles on attribution of conduct.

¹⁰⁴² Rome Statute, Art. 6.

¹⁰⁴³ Simpson, *supra*, pp. 68-69.

¹⁰⁴⁴ Rome Statute, Art. 7 (1).

over war crimes, these ought to be part of a broader “plan or policy”, or identified as “part of a large-scale commission of such crimes”.¹⁰⁴⁵

Critics of international criminal law have questioned the autonomy and impartiality of the courts and prosecutors, the respect for the accused’s rights of pre-trial release, and the quality of the punishment.¹⁰⁴⁶ Trying corporations would also make criminal court processes longer and more expensive.¹⁰⁴⁷ Amongst the main critiques of international criminal justice is also the selectivity of crimes that reach the tribunals.¹⁰⁴⁸ The lack of justice following the Hiroshima and Nagasaki atomic bombings in 1945, NATO’s bombing raids on Serbia, Vojvodina, and Kosovo in 1999, are only a few examples that characterise the bias of so-called victors’ justice.¹⁰⁴⁹ Gerry Simpson disagrees with the victors’ justice frame and considers war crimes trials to be political, as the concept of what is political is at play all the time. Compromising between idealism and realism, war crimes trials set out to carry out prosecutions in the political realm while also guaranteeing immunity to the hegemons.¹⁰⁵⁰ To an extent, victors’ justice and increased politicisation are present across all aspects of IL.¹⁰⁵¹ Although limiting the ‘universality’ of ICL and UJ, these concerns should not prevent the development of the international criminal justice system. Daniele Archibugi sees all existing bodies of ICL as “the embryos of more robust ones that will be needed to guarantee global legality”, and argues that “a fully fledged international criminal

¹⁰⁴⁵ Rome Statute, Art. 8 (1).

¹⁰⁴⁶ Zolo, *supra*, p. 140.

¹⁰⁴⁷ Amann, D. M.: “Capital Punishment: Corporate Criminal Liability for Gross Violations of Human Rights” 2000, Vol. 24 *Hastings International and Comparative Law Review*, p. 334.

¹⁰⁴⁸ See: Cryer, R.: *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, CUP, Cambridge, 2005; McCormack, T. and Simpson, G. (eds): *The Law of War Crimes: National and International Approaches*, Kluwer Law International, The Hague, 1997; Bull, H.: *The Anarchical Society*, Macmillan, London, 1977; Kelsen, H.: “Will the Judgement at Nuremberg Constitute a Precedent in International Law?” 1947, Vol. 1 (2), *International Law Quarterly*, pp. 153-171; Kelsen, H.: *Peace Through Law*, The University of North Carolina Press, Chapel Hill, 1944; Roling, B. V. A.: “The Nuremberg and Tokyo Trials in Retrospect” in Bassiouni, C. and Nanda, U. P. (eds): *A Treatise on International Criminal Law*, Charles C. Thomas, Springfield, 1973.

¹⁰⁴⁹ Zolo, *supra*, p. xi.

¹⁰⁵⁰ Simpson, *supra*, pp. 18-19.

¹⁰⁵¹ Greene, T. P.: *Wilson at Versailles: Problems in American Civilization*, D.C. Heath and Company, Lexington, 1957; Koskeniemi, M.: “Between Impunity and Show Trials” 2002, Vol. 6, *Max Planck Yearbook of United Nations Law*, pp. 1-35.

court needs to be set up.”¹⁰⁵² Furthermore, companies operate on a different plane to individuals and so ICL could tackle the corporate veneer that is currently producing corporate impunity in the absence of criminal responsibility norms for corporations. For the same reasons, the implementation of the principles of UJ may clash with political interests and diplomacy, and this could hinder its development.¹⁰⁵³

The question remains as to why international criminal law should be deployed in order to invoke corporate criminal responsibility? ICL is based on the principle that certain human rights are so widely acknowledged in IL that abuses should be punished regardless of the location of the offence.¹⁰⁵⁴ In other words, serious international crimes naturally enjoy extraterritorial application. Another part of the attraction of ICL is that it largely circumvents customary IL and common law.¹⁰⁵⁵ As demonstrated in *Chapter 5*, corporate criminal liability for international crimes is available in many European jurisdictions and in the African Court of Justice and Human Rights without resort to customary IL.

The legislative mandate for corporate criminal liability for international crimes is enabled through domestic legal systems by incorporating the language of ICL.¹⁰⁵⁶ Between 2004 and 2005, Fafo conducted a study of sixteen national jurisdictions across a variety of legal systems and traditions to identify the practice of corporate criminal liability. The results of the survey showed that eleven out of sixteen countries, namely Australia, Belgium, Canada, France, India, Japan, the Netherlands, Norway, South Africa, the United Kingdom, and the United States, have developed provisions for the criminal liability for corporations, while Argentina, Germany,

¹⁰⁵² Archibugi, D.: “Demos and Cosmopolis” 2002, Vol. 13, *New Left Review*, p. 36.

¹⁰⁵³ Philippe, X.: “The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?” 2006, Vol. 88 (862), *International Review of the Red Cross*, p. 376; Langer, M.: “The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes” 2011, Vol. 105 (1), *American Journal of International Law*, pp. 1-49.

¹⁰⁵⁴ Thompson, R. C., Ramasastry, A. and Taylor, M. B.: “Translating UNOCAL: The Expanding Web of Liability for Business Entities Implicated in International Crimes” 2009, Vol. 40 (4), *George Washington International Law Review*, pp. 845-846.

¹⁰⁵⁵ Stewart, *supra*, p. 40.

¹⁰⁵⁶ *Ibid.*, p. 47.

Indonesia, Spain, and Ukraine currently do not recognise such liability.¹⁰⁵⁷ The importance of this research is that it is an indication of the growing inclusion of corporate persons into national criminal practice. At the same time, there has been an increasing trend of national courts extending their reach to international crimes.¹⁰⁵⁸

According to Stewart, if international crimes are defined by IL and incorporated into domestic legal systems, then more varied standards of blame attribution could be applied to these “international-crimes-made-national”.¹⁰⁵⁹ Aiding and abetting, or complicity, was the most prominent method of attributing responsibility to corporations both in domestic legal systems and through the ATS.¹⁰⁶⁰ ICL, on the contrary, offers a much wider selection of “modes of liability”, including superior responsibility, joint criminal enterprise, and more.¹⁰⁶¹ As demonstrated in the previous chapter, by the means of the Montreux Process, seventeen states (including the US, the UK, China, and South Africa) officially agreed that the idea of superior responsibility, grounded in ICL, has a potential role in assigning responsibility for international crimes to PMC directors and their clients.¹⁰⁶² While lacking legal enforcement, the Montreux Process creates a clear norm concerning corporate responsibility, that can be leveraged through ICL.

¹⁰⁵⁷ Ramasastry, A. and Thompson, R. C.: “Commerce, Crime and Conflict. Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A Survey of Sixteen Countries, Fafo report 536, 2006, p. 13, available at: http://biicl.org/files/4364_536.pdf.

¹⁰⁵⁸ Simpson, *supra*, p. 134.

¹⁰⁵⁹ Standards of attribution would depend on and vary by domestic legal system; Stewart, *supra*, p. 40.

¹⁰⁶⁰ See: *Talisman, Khulumani*, etc.

¹⁰⁶¹ See: Sepinwall, A. J.: “Failures to Punish: Command Responsibility in Domestic and International Law” 2008, Vol. 30 (2), *Michigan Journal of International Law*, pp. 251-304; Damaska, M. R.: “The Shadow Side of Command Responsibility” 2001, Vol. 49 (3), *American Journal of Comparative Law*, pp. 455-496; Van Sliedregt, E.: *Individual Criminal Responsibility in International Law*, OUP, Oxford, 2012; Jain, N.: *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes*, Hart, Oxford, 2014; Ohlin, J. D.: “Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise” 2007, Vol. 5 (1), *Journal of International Criminal Justice*, pp. 69-90.

¹⁰⁶² Chapter 5, pp. 182-183; The Montreux Document on Private Military and Security Companies, 17 September 2008, available at <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/psechi.html>.

Universal Jurisdiction and Piracy

Another method adopted by ICL to address the problem of international crimes is through universal jurisdiction (UJ). Stephen Macedo describes UJ as “part of a wider set of political and legal movements to expand legal accountability and the global rule of law, and thereby to end impunity for serious crimes under international law.”¹⁰⁶³ The purpose of UJ is its ability to invoke criminal responsibility “in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim.”¹⁰⁶⁴ Approximately 150 of the 197 UN member states provide for UJ for at least one of the four recognised international crimes.¹⁰⁶⁵ Also, cases such as *Demanjuk*¹⁰⁶⁶ in 1985, *Pinochet*¹⁰⁶⁷ in 1999, *Butare Four*¹⁰⁶⁸ in 2001, *Pascal Simbikangwa*¹⁰⁶⁹ in 2014, and most recently the *Hissène Habré* trial by the Extraordinary African Chambers in 2015,¹⁰⁷⁰ validate the practical applicability of UJ as a method of trying international crimes.¹⁰⁷¹ However, there is an ongoing debate amongst states as to its sources, scope, and application. In the sixty-fourth UN General Assembly (GA) session in 2009,¹⁰⁷² the delegations disagreed on whether the principle had become part of customary IL, or if the crimes covered under the principle of UJ belong to treaty law.¹⁰⁷³ Some delegations raised concerns about an

¹⁰⁶³ Macedo, S. (ed.): *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, University of Pennsylvania Press, Philadelphia, 2004, p. 5.

¹⁰⁶⁴ International Law Association Committee on International Human Rights Law and Practice: “Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences”, 2000, p. 2.

¹⁰⁶⁵ Universal Jurisdiction Annual Review 2016, p. 4; note that e.g. Reydam is critical of NGO data collection; see: Reydam, L.: *Universal Jurisdiction. International and Municipal Legal Perspectives*, OUP, Oxford, 2004.

¹⁰⁶⁶ *Demanjuk v. Petrovsky*, US Court of Appeal, 6th Cir., 31.10.1985, ILR 79, 546.

¹⁰⁶⁷ House of Lords, 24 March 1999, 2 WLR 827.

¹⁰⁶⁸ Cour d’Assises de Bruxelles, 8 June 2001, available at: <https://www.legal-tools.org/en/browse/record/a70d94/>.

¹⁰⁶⁹ See: Trial International, available at: <https://trialinternational.org/latest-post/pascal-simbikangwa/#section-2>.

¹⁰⁷⁰ See: “The Trial of Hissène Habré”, *Human Rights Watch*, available at: <https://www.hrw.org/tag/hissene-habre>.

¹⁰⁷¹ Langer, M.: “Universal Jurisdiction is Not Disappearing. The Shift from ‘Global Enforcer’ to ‘No Safe Haven’ Universal Jurisdiction” 2015, Vol. 13 (2), *Journal of International Criminal Justice*, pp. 245-256.

¹⁰⁷² See: <http://www.un.org/en/ga/sixth/64/UnivJur.shtml>.

¹⁰⁷³ Following *Pinochet*, a debate arose over whether the authority to prosecute the crime of torture derived from universal jurisdiction, or if it was the principle of customary international law (*aut dedere aut judicare*).

expansion of the crimes covered under UJ and suggested that it should only be used as a last resort, while disagreeing on the scope of crimes under the jurisdiction.¹⁰⁷⁴

For centuries the doctrine of UJ was applied only to the prosecution and punishment of the crime of piracy, whereby any nation could capture and try pirates it found on the high seas.¹⁰⁷⁵

The pirate was regarded as *hostis humani generis* or *hostis omnium*, an “enemy of all mankind”.¹⁰⁷⁶ This lay the foundation for the principle that piracy should be considered a paradigmatic crime for which IL authorises and even requires universal enforcement and punishment.¹⁰⁷⁷ What makes the crime of piracy a universal one is the indiscriminate harm that pirates cause to their victims and trade regardless of political views, geographies, or nationality.

Piracy affects all states without discrimination, except for those states who used pirates as a policy vehicle, providing state harbour and creating the category of privateers. According to Kontorovich and Art, piracy concerns even the countries not directly involved in shipping, as pirate attacks raise the prices of commodities.¹⁰⁷⁸ In this respect piracy is rather different to mercenarism, as there is always a state (or non-state) party that deliberately wishes to hire a private military force to further its own political conduct. Even though, as with mercenaries and private military contractors, pirates fall in the grey zone between military combatants and

¹⁰⁷⁴ UN GA 64th Session, 2009, available at: <http://www.un.org/en/ga/sixth/64/UnivJur.shtml>; UN GA 67th Session, 2012, available at: <https://www.un.org/press/en/2012/gal3442.doc.htm>; UN GA 71st Session, 2016, available at: <http://www.un.org/press/en/2016/gal3525.doc.htm>

¹⁰⁷⁵ United Nations Convention on the Law of the Sea Arts 3, 56(1), Dec. 10, 1982, 1833 U.N.T.S. 397, 400, 418; Legal Framework for the Repression of Piracy Under UNCLOS, updated 9 September 2010, available at: http://www.un.org/depts/los/piracy/piracy_legal_framework.htm.

¹⁰⁷⁶ Neocleous, M.: “The Universal Adversary will attack: pigs, pirates, zombies, Satan and the Class War” 2015, Vol. 8 (1), *Critical Studies on Terrorism*, p. 29; an alternative view, argued in the Harvard Research Draft Convention on Piracy, considers piracy a municipal offence that gave rise to an exception to exclusivity of territorial jurisdiction; see: Bingham, J. W.: “Part-IV Piracy” 1932, Vol. 26 (1, Supplement: Research in International Law), *The American Journal of International Law*, p. 757.

¹⁰⁷⁷ Kontorovich, E. and Art, S.: “An Empirical Examination of Universal Jurisdiction for Piracy” 2010, Faculty Working Papers, Paper 38, Vol. 98 (1), *California Law Review*, p. 246.

¹⁰⁷⁸ *Ibid.*, p. 252.

civilians,¹⁰⁷⁹ the political drive behind the private security demand could be a serious obstacle to the criminalisation of mercenary activity.

There is also a second pillar that supports the universality of the crime of piracy. According to Christopher Staker the purpose of UJ is to deliver justice against crimes that would otherwise go unpunished.¹⁰⁸⁰ The issue of corporate impunity persists in cases of private military activity, and it has several roots. The problem is not only the lack of a universal definition of a mercenary, but also the situational and political context of existing definitions. In addition, while the AP I outlined a number of narrow scenarios that criminalises mercenaries, the act of mercenarism has not been criminalised. On that premise, PMCs were able to be incorporated as companies, and continue to operate under the legitimising shield of their legal personality. If mercenarism as an activity is criminalised, this could have two possible benefits. First of all, civilian participation in hostilities on behalf of a private company without a proper incorporation into a state's army would be forbidden, which, as demonstrated throughout the thesis, has never been achieved through hard law, even if the general normative sentiment of the twentieth century claimed otherwise. Secondly, PMCs will no longer be able to form corporations that provide military services, as civilian participation in hostilities will be illegal. The criminalisation of mercenarism is discussed in more detail in the Recommendations section below.

War Crimes and Crimes Against Humanity

According to David Hirsh the notion of crimes against humanity marks a "recognition that there is no sovereign right to commit such crimes and that the claim made by cosmopolitan law, that it has jurisdiction within all sovereign states in relation to such crimes is legitimate."¹⁰⁸¹ Falling under the UJ, these international crimes could potentially be extended to PMC misconduct. In

¹⁰⁷⁹ Kontorovich and Art, *supra*, p. 245; pirates who were hired by states were not considered criminals, instead state practice legitimised privateering and distinguished it from piracy.

¹⁰⁸⁰ Staker, C.: "Jurisdiction" in Evans, *supra*, p. 322.

¹⁰⁸¹ Hirsh, D.: *Law Against Genocide: Cosmopolitan Trials*, Glasshouse Press, London, 2003, p. 152.

May 1960 Mossad, the Israeli intelligence service, captured Adolf Eichmann from his hiding place in Argentina and transported him to Jerusalem to be tried in an Israeli court.¹⁰⁸² After May 1960, only first degree murder could be prosecuted, while all other offences were reduced to twenty years of imprisonment under the statute of limitation.¹⁰⁸³ Ironically described by Gerry Simpson as “a latter-day pirate” with his crimes “against all states”,¹⁰⁸⁴ Eichmann was charged with crimes against the Jewish people, crimes against humanity, and war crimes committed under the Nazi regime during the Second World War.¹⁰⁸⁵ The jurisdiction to try the accused in Eichmann’s case was the Nazis and Nazi Collaborators (Punishment) Law 5710-1950,¹⁰⁸⁶ which is equivalent to the “enforcement through universal jurisdiction of prohibitions under the rules of war against the commission of crimes against humanity.”¹⁰⁸⁷ What undermines the universality of this case is the focus on the Jewish people, rendering it an experience of “particular groups at the hands of other groups” instead of a “universal experience subject to universal laws.”¹⁰⁸⁸ While Eichmann had insisted that he was only “aiding and abetting” in the commission of the abovementioned crimes, the District Court of Jerusalem reached a decision that could set precedent to address the limitation currently posed by complicity in IL. The Court concluded that:

in such an enormous and complicated crime as the one we are now considering, wherein many people participated at various levels and in various modes of activity – the planners, the organizers and those executing the acts, according to their various ranks – there is not much point in using the ordinary concepts of counselling and soliciting to commit a crime. [...] On the contrary, in general, the degree of responsibility increases

¹⁰⁸² *Attorney General v. Adolf Eichmann*, available at:

<http://www.internationalcrimesdatabase.org/Case/192/Eichmann/>.

¹⁰⁸³ Arendt, H.: *Eichmann in Jerusalem: A Report on the Banality of Evil*, revised and enlarged edition, Penguin Books, Harmondsworth, 1994, p. 14.

¹⁰⁸⁴ Simpson, *supra*, p. 41.

¹⁰⁸⁵ *Attorney General v. Adolf Eichmann*, Criminal Case No. 40/61, District Court of Jerusalem, Judgement

¹⁰⁸⁶ Israel Ministry of Foreign Affairs, available at: <http://www.mfa.gov.il/mfa/mfa-archive/1950-1959/pages/nazis%20and%20nazi%20collaborators%20punishment-%20law-%20571.aspx>.

¹⁰⁸⁷ International Committee of the Red Cross, Customary IHL, Practice Relating to Rule 157: Jurisdiction over War Crimes, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_il_rule157; the Israeli courts also cited passive personality jurisdiction and protective jurisdiction; see: Lasok, D.: “Eichmann Trial” 1962, Vol. 11 (2), *International and Comparative Law Quarterly*, p. 368.

¹⁰⁸⁸ Simpson, *supra*, p. 51.

as we draw further away from the man who uses the fatal instrument with his own hands.¹⁰⁸⁹

This judgement set a precedent for the comprehensiveness of war crimes and crimes against humanity or, more generally, international crimes. Therefore, it allows ICL to address the entire ‘supply chain’ of crimes. Currently the parent company is protected by corporate law from any responsibility over the indiscretions of its subsidiaries. If ICL could be extended to corporations, it could address the challenges posed by the corporate veil and ensure the parent company’s liability is also invoked.

Eichmann was a bureaucrat who, prior to his position as head of the Centre for Emigration of Austrian Jews in 1938, had had a rather insignificant career as a travelling sales person. A *déclassé* son of a solid middle-class family,¹⁰⁹⁰ he was never truly interested in the Nazi ideology, nor had he read Hitler’s *Mein Kampf*.¹⁰⁹¹ The ‘banality of evil’, according to Hannah Arendt, lies in the way Eichmann’s lack of professional fulfilment and his natural talent for organisation and negotiation led him to setting in motion “forced emigration” and all subsequent stages of the Nazi Solution to the Jewish Question.¹⁰⁹² The bureaucratic background to a series of war crimes can be comparable with the banality of a company operating in politically sensitive and high risk regions. To quote Diane Amann, “corporations are being used as instrumentalities for great and unimaginable suffering.”¹⁰⁹³ The corporate structure removes the element of aggression, intervention, and civilian participation in hostilities. It also obscures all those rules and norms that international humanitarian lawyers have worked so methodically to establish. Beyond the principle of the nature of crime¹⁰⁹⁴ that characterised the UJ of the “Eichmann model”, the case also demonstrated a form of bureaucratic power on the part of an individual who worked for

¹⁰⁸⁹ *Attorney General v. Adolf Eichmann*, *supra*, para. 197.

¹⁰⁹⁰ Arendt, *supra*, p. 31.

¹⁰⁹¹ *Ibid.*, p. 33.

¹⁰⁹² *Ibid.*, see in particular chapters 2 and 3, pp. 21-55.

¹⁰⁹³ Amann, *supra*, p. 336.

¹⁰⁹⁴ *Princeton Principles on Universal Jurisdiction*, Princeton University, New Jersey, 2001, p. 28.

the government and executed the state's policy through his role as a functionary. In the case of PMCs, we can trace the shift in governance from state to corporation, whereby PMCs in particular perform the bureaucratic functions of logistics, organising security operations, training, and, ultimately, killing. By drawing on the historical typology of mercenary activity, it becomes evident that states have shrunk; their functions have been limited or modified through privatisation and outsourcing to the private sector.

The companies which have subsequently taken on the functions formerly owned by states have also inadvertently acquired a form of governance, making claims to legitimacy through self-regulation. This newly acquired governance on the part of PMCs builds a strong case against an overarching criminal responsibility for corporations. In other words, companies make sovereignty claims by establishing international regulatory frameworks within the industry that promote human rights values on one hand, and do not have to answer to any judicial or state authority, on the other. It can be argued that the 'responsibilisation' approach of voluntary norms and industry standards falls in line with the neoliberal framework of the free market. However, to follow my claim for normative regulation, PMCs are different to other companies because they often preform inherently governmental functions and their activity takes place predominantly in zones of conflict or political tension. In other words, the 'business of killing' should not be self-regulated; instead PMCs' increasing claims to sovereignty signal the need for criminal responsibility that ought to recognise corporations as independent actors, and tackle their misconduct directly.

Part 3: Recommendations

Having reviewed the existing regulatory landscape for corporations, and PMCs as a specific category, I conclude that there is a strong need for international criminal responsibility for corporations, in order to address the corporate impunity of PMCs and to ensure a more effective and responsible use of private security resources internationally. One of the many practical

advantages of this is that ICL and UJ allow for the trial of international crimes.¹⁰⁹⁵ The need for corporate liability does not negate the value brought by the standard-setting regulatory mechanisms, such as ISO, for example. However, other industry-led self-regulatory processes, such as the ICoC and the Montreux Process, can act as a distraction from the legal vacuum of the PMC space. Ultimately, voluntary regulation can only be meaningful and beneficial in controlling private force if there is a strong criminalisation mechanism that could step in, should the soft law fail to govern.

In order to tackle the challenge of prosecuting international crimes committed by corporations, I propose to explore the opportunities within international criminal law. ICL could offer a way of constructing a criminal corporate responsibility that is appropriate for the contemporary security landscape and which would be capable of adapting to changing governance structures. International crimes in ICL can address the entire ‘supply chain’ of crimes, thereby tackling the challenges posed by the corporate veil. As ruled in *Eichmann*, war crimes and crimes against humanity are comprehensive enough to extend responsibility beyond the individual firing the gun.¹⁰⁹⁶ If transferred to corporations, this could ensure the parent company is also held responsible.

With that in mind, I propose four possible criminalisation options that explore different methods of employing ICL and exercising it in different fora, domestic, international, and transnational. Each method considers the advantages and possible challenges that may arise, bearing in mind the current critique of the international justice system, the existing deficiencies of PMC regulation, and associated state practice. The first option explores criminalisation of the act of mercenarism through universal jurisdiction. The following three options partially circumvent the need for state buy-in on criminalising mercenarism, adopting the framework of ICL to prosecute

¹⁰⁹⁵ Philippe, *supra*, p. 377.

¹⁰⁹⁶ On different forms of criminal liability see Chapter 15 “General Principles of Liability” in Cryer, Friman, Robinson and Wilmshurst, *supra*, pp. 353-397.

companies for already codified criminal acts under UJ and the Rome Statute. These recommendations should be treated as proposals that, while they could address the key loophole of the corporate impunity of PMCs, each require a deeper analysis to enable implementation.

1. Criminalising Mercenarism

One way of criminalising the act of mercenarism is for it to be added to the list of grave crimes covered by the UJ. By adopting the approach to UJ that justifies the principle based on the nature of crimes, then by analogy UJ can be claimed by states if the act is a crime under IL. This option could materialise either through customary IL, or via a treaty process such as the Geneva Conventions.¹⁰⁹⁷ The limitations of treaty-based regulation have been discussed in depth in previous chapters, and the impotence of the UN Mercenary Convention is an indication as to how future efforts to criminalise mercenarism through treaty law will pan out. After the *Arrest Warrant Case* in 2000¹⁰⁹⁸ there has been a shift away from the “Eichmann model” which focuses on the nature of offence towards state behaviour, requiring a strong precedent to justify application of UJ.¹⁰⁹⁹ Unlike the Princeton definition that solely emphasises the “nature of the crime, without regard to where the crime was committed”,¹¹⁰⁰ more recent attempts to define UJ outline three state-focused conditions, in which at least one should apply to meet the legal principle. The infraction must either be committed in the territory of the state, or by a national of the state, or the victim must be a citizen of the state in question.¹¹⁰¹ Possible challenges that

¹⁰⁹⁷ There is a debate in legal academic literature over whether treaty-based UJ is a separate principle of *aut dedere aut judicare*; see: Da Rocha Ferreira, A. et al.: “The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)” 2013, Vol. 1, International Law Commission, *UFRGS Model United Nations Journal*, pp. 204-205.

¹⁰⁹⁸ *Democratic Republic of the Congo v. Belgium*.

¹⁰⁹⁹ Reydamas, 2004, *supra*; Reydamas, L.: “The rise and fall of universal jurisdiction” in Schabas, W. and Bernaz, N. (eds): *Routledge Handbook of International Criminal Law*, Routledge, Abingdon, 2011, pp. 337-354.

¹¹⁰⁰ *Princeton Principles on Universal Jurisdiction*, Princeton University, New Jersey, 2001, p. 28.

¹¹⁰¹ Universal Jurisdiction Annual Review 2016, *Make Way for Justice* 2, p. 3.

would arise from this shift are related to the state-centric model of UJ, which, as discussed in *Chapter 5*, is unlikely to succeed under the current mode of global governance.

Although both avenues are likely to face considerable challenges to state acceptance and implementation, I shall consider this option in more detail. As discussed earlier, UJ is aimed at delivering justice in respect of crimes that would otherwise go unpunished, as in the case of mercenary activity. It is important not only to criminalise a mercenary, but also to codify the crime of mercenarism, as originally attempted by the OAU Convention and now codified under the jurisdiction of the African Court of Justice and Human Rights, in order to establish responsibility under IL. Mercenaries are used, trained, and recruited by a contracting party, meaning they need financing and a direction in order to perform their function. It is not sufficient to criminalise the mercenary as they are simply a tool of aggression on behalf of a contracting party. The importance of codification lies in the blurred lines between mercenaries, PSCs, and PMCs. It is thus crucial to define the intended activity and not just the actor when approaching the question of regulation. Criminalisation of the act of mercenarism could restrict civilian, or more accurately non-combatant, participation in hostilities. This will mean that states will be forced to incorporate private military contractors into their own forces, therefore taking on the responsibility under the ILC Articles. In this way, criminalising mercenarism could also potentially increase state responsibility under IL.

The criminalisation of mercenarism could not only prevent civilians from direct participation in hostilities, but could also help to regulate the companies themselves. It could address the issue of PMC regulation from the corporate perspective. According to the provisions of corporate and contract law, companies cannot be formed with a purpose of engaging in illegal activities. As discussed in *Chapter 4*, the failure to criminalise mercenarism following the end of the Cold War gave rise to a multitude of private military companies. If mercenarism, or the provision of private armed forces for combat purposes, is deemed criminal, then private military companies will not

be incorporated to pursue belligerent goals. Of course, companies could fail to declare the provision of military services as part of their functions yet continue to supply these services covertly. However, this would then qualify as misconduct and create liability.

Another advantage of criminalising mercenarism through UJ is the strength of national commitment to the international community, as a state would have to take necessary measures to ensure the UJ can be exercised in national courts.¹¹⁰² At the same time, this could also pose a serious challenge. There are other doctrinal limitations to this solution. Currently there is no legally neutral, universal definition of the act of mercenarism, while the existing definitions can be conflicting and restricted by political context. The same is seen in the failure to codify terrorism as an international crime. Due to the lack of consensus on the definition of terrorism amongst states, customary IL does not currently provide for the prosecution of ‘terrorist’ acts under the universality principle.¹¹⁰³

As to state exercised precedent, in 2015 alone the principle of UJ was applied to forty cases, with arrests, indictments, or convictions achieved in twenty-seven cases, significantly exceeding the 2014 results.¹¹⁰⁴ Moreover, as part of the UN GA’s seventy-first session on the scope and application of the principle of UJ,¹¹⁰⁵ Georgia advised that participation of mercenaries in armed conflicts or military actions is codified in Article 410 of chapter XLVII of the Criminal Code as part of specific legislation relating to UJ.¹¹⁰⁶ However, other recent examples of the exercise of UJ in Spain and Belgium have demonstrated the prevalence of sovereign interests over international justice.¹¹⁰⁷ In 2003, as a result of the US threat to move the NATO headquarters out of

¹¹⁰² Philippe, *supra*, p. 387.

¹¹⁰³ See: *United States v. Yousef*, 327 F.3d 56, 97 (2nd Circuit, 2003); in the Spanish UJ case of Pinochet, one of the crimes he was charged with was terrorism, as defined in Spanish law; see: Wilson, R. J.: “Prosecuting Pinochet in Spain”, available at: <https://www.wcl.american.edu/hrbrief/v6i3/pinochet.htm>.

¹¹⁰⁴ Universal Jurisdiction Annual Review 2016, p. 7.

¹¹⁰⁵ A/71/111, Item 85 of the preliminary list, 28 June 2016.

¹¹⁰⁶ *Ibid.*, Table 2.

¹¹⁰⁷ Simpson, *supra*, p. 42.

Brussels,¹¹⁰⁸ the Belgian legislature revoked provisions of its extraterritorial 1993 UJ law.¹¹⁰⁹ Meanwhile the Spanish Parliament “acted to limit the jurisdiction over human rights cases in 2009.”¹¹¹⁰ The amendment stipulated that, in order for UJ to apply, the victims must be of Spanish nationality, the alleged perpetrators must be in Spain, or there should be an important connecting link with Spain, and that another jurisdiction or an international criminal court should not have initiated investigation and prosecution of those offences.¹¹¹¹ More recently, in 2014, a new amendment was issued, limiting the jurisdiction to cases initiated by public prosecutors and victims.¹¹¹²

Most importantly, the implementation of this option would be subject to the prevailing relationship between states and military actors. The clear privatisation trend, coupled with the practice of ‘small’ government, signals the desire of states to use PMCs and incorporate private security into government policy. The limitation of governmental functions results in the outsourcing of various tasks to private companies, including security. In other words, states are unlikely to accept mercenarism as an international crime under UJ because they are leading PMC clients and willingly use private military resources.

2. Include Corporations (or at Least PMCs) in the Jurisdiction of the Rome Statute

Another option for establishing criminal corporate responsibility for international crimes is through the international forum of the ICC. In other words, corporations should also be made

¹¹⁰⁸ Ratner, *supra*, pp. 890-891.

¹¹⁰⁹ Human Rights Watch: Belgium: *Universal Jurisdiction Law Repealed*, 1 August, 2003, available at: <https://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed>; Reydam, L.: “Belgium reneges on Universality: The 5 August 2003 Act on Grave Breaches of International Humanitarian Law” 2003, Vol. 1 (3), *Journal of International Criminal Justice*, pp. 679-689.

¹¹¹⁰ Kirshner, *supra*, p. 16.

¹¹¹¹ See: *Boletín Oficial Del Estado*, No. 266, 4 November 2009; Kern, S.: “Spain Rethinks Universal Jurisdiction” 31 January 2014, *Gatestone Institute International Policy Council*, available at: <https://www.gatestoneinstitute.org/4149/spain-universal-jurisdiction>.

¹¹¹² Article 23 (4) of the 1985 Organic Law of the Judicial Power; Molto, J. E. E.: “The ‘Great Leap Forward’ to Impunity. Burying Universal Jurisdiction in Spain and Returning to the Paradigm of Human Rights as ‘*domaine reserve*’ of States” 2015, Vol. 13 (5), *Journal of International Criminal Justice*, pp. 1121-1144.

liable under IL alongside individuals for crimes within the jurisdiction of the Rome Statute. PMCs demand an even greater scrutiny due to the military nature of their business and the fact that their services are always delivered outside of their home state, so the international element is inevitable. If corporations acquire international legal personality, they can then be liable for war crimes in an international conflict, rather than only non-international; currently PMCs are treated as a civilian component of an operation, not military. This change in PMC status would expand the scope of potential violations and curtail corporate impunity.

The first underlying principle of the Rome Statute, the principle of complementarity, stipulates that the ICC may exercise jurisdiction only when national legal systems are unable or unwilling to do so.¹¹¹³ This means that domestic courts prevail in cases of simultaneous jurisdiction. “The court is not intended to replace national courts, but operates only when they do not.”¹¹¹⁴ While it assumes that both domestic and international criminal justice systems ought to function in a subsidiary manner,¹¹¹⁵ it does not negate the need for recognition of international criminal responsibility for corporations, for two reasons. First, corporate criminal liability is not consistently codified across all domestic legal systems, meaning that the ICC could be the sole avenue for such jurisdiction.¹¹¹⁶ Second, the principle of complementarity does not apply uniformly across all international courts. The ICTY and the ICTR ad hoc Tribunals both prevail over national courts in cases of concurrent jurisdiction.¹¹¹⁷ Alongside all the above-mentioned advantages of ICL application, the use of an international forum has the advantage of

¹¹¹³ Rome Statute, Article 17(2).

¹¹¹⁴ Arsanjani, M. H.: “The Rome Statute of the International Criminal Court” 1999, Vol. 93 (1), *The American Journal of International Law*, pp. 24-25.

¹¹¹⁵ Philippe, *supra*, p. 380.

¹¹¹⁶ However, the key rationale behind Art. 17 on complementarity is to urge states into getting their domestic legal order into shape.

¹¹¹⁷ Article 9 of the ICTY Statute: International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, p. 7; Article 8 of the ICTR Statute: Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighbouring States, between January 1, 1994 and December 31, 1994.

extraterritoriality. While the ICC is only applicable to state parties, the nationals of non-parties who committed a crime within the ICC's jurisdiction can be subjected to it.¹¹¹⁸ The UN Security Council can refer a case to the ICC involving non-party nationals, or the ICC can have jurisdiction if an act was committed on the territory of a state party by a non-party national.¹¹¹⁹

So, if the ICC's jurisdiction extended to corporations, or even PMCs specifically, this could overcome the territorial barrier of national jurisdiction. Unfortunately, this extraterritoriality is highly conditional. Although the ICC has jurisdiction over crimes against humanity, it does not exercise UJ as it was specifically rejected in the proceedings of the Rome Statute,¹¹²⁰ significantly limiting its extraterritorial reach. This means that the biggest PMC providers and clients, namely the US, China, and Russia, would not be subject to the ICC's jurisdiction, having not ratified the Rome Statute.¹¹²¹ Furthermore, different immunity mechanisms shield UK and the US military personnel from ICC investigations.¹¹²² What complicates matters further is that the ICC was not set up to deal with isolated cases of international crimes; instead it is perceived as a forum where only the most heinous and systematic crimes ought to be tried, such as genocide, crimes of aggression, war crimes, and crimes against humanity.¹¹²³ The need to prove that the offences were systematic could potentially obstruct the prosecution of one-off cases and continue to foster PMC impunity. Lacking the general requirement of being "widespread and systematic",

¹¹¹⁸ See Bassiouni, *supra*, p. 92: "in the territory of a state party or against citizens of a state party, and are found in the territory of a state party or in the territory of a non-party willing to cede jurisdiction to the ICC."

¹¹¹⁹ Rome Statute, Article 13.

¹¹²⁰ Simpson, G.: *Law, War and Crime: War Crimes Trials and the Reinvention of International Law*, Polity Press, Cambridge, 2007, p. 47.

¹¹²¹ In October 2016 Burundi, South Africa, and Gambia withdrew from the ICC. Experts believe that Kenya, Namibia, and Uganda could be among the next countries to leave the Court. Sieff, K.: "Gambia is the latest African country deciding to pull out of International Criminal Court" 26 October 2016, *The Washington Post*, available at: https://www.washingtonpost.com/world/gambia-latest-african-country-deciding-to-pull-out-of-international-criminal-court/2016/10/26/7f54d068-c4ca-440f-848f-e211ba29dc34_story.html?utm_term=.d33089cea7d2.

¹¹²² Simpson, *supra*, p. 17.

¹¹²³ Rome Statute, Art. 5, also reflected in the IMT Charter at Nuremberg.

the case of Baha Mousa,¹¹²⁴ an Iraqi civilian who was beaten to death while detained by British army soldiers in 2003, never made it to the ICC. The systematic element could pose an issue for PMC regulation, as single violations that do not form part of a large-scale action will not qualify as crimes against humanity and, therefore, will not be accepted by the Court. Equally, other serious crimes, such as human rights abuses, gross negligence, etc., are currently not covered by the Statute, signalling the potential need for a new category. Until codified by the international military tribunals at the end of the Second World War, the types of crimes committed by the Nazis, such as crimes against humanity and crimes of aggression, did not exist under IL.¹¹²⁵ Perhaps if corporations are recognised as actors under IL by the Rome Statute, a new type of crime, a corporate international crime, needs to be codified in order to reflect the gross misconduct of PMCs in military support operations abroad.

Another hurdle that IL would have to overcome is the narrow responsibility of complicity for corporations,¹¹²⁶ as well as the narrow catalogue of crimes currently tried before the ICC. It is not sufficient for only the most important crimes to be tried before the ICC,¹¹²⁷ as it would leave less grave PMC misconduct unpunished. Without a doubt, not all PMC violations will require a criminal justice response, so there is still room for social corporate responsibility to regulate less heinous violations. Whether this should be done on the domestic level, or brought to the international forum, is a question of implementation and subject to further research, as the fact remains that PMCs operate internationally and differ from other corporations based on the nature of their business.

¹¹²⁴ Williams, A.: "Baha Mousa will never get justice while the army investigates itself" 12 September 2013, *The Guardian*, available at: <https://www.theguardian.com/commentisfree/2013/sep/12/baha-mousa-justice-army-lawrence>.

¹¹²⁵ Schabas, *supra*, p. 6; Simpson, *supra*, p. 40.

¹¹²⁶ See: Clapham, A. and Jerbi, S.: "Categories of Corporate Complicity in Human Rights" 2000-2001, Vol. 24, *Hastings International & Comparative Law Review*, pp. 339-349; Clapham, A.: "Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups" 2008, Vol. 6 (5), *Journal of International Criminal Justice*, pp. 899-926.

¹¹²⁷ Philippe, X.: "The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?" 2006, Vol. 88 (862), *International Review of the Red Cross*, p. 384.

Another limitation of IL as a forum for international criminal responsibility for corporations is the lack of widely recognised international criminal responsibility for corporations, outside of the African Court of Justice and Human Rights, and the very narrow precedent set by the Special Tribunal for Lebanon. Even if the jurisdiction of the international courts is extended to legal persons, the ICC and the Tribunals would have to develop or adopt legal procedures for the criminal trial of a corporation rather than a natural person. Here I refer to the existing procedural difficulties associated with corporations, addressed in detail in *Chapter 5*. International legal space remains highly politicised as the ICTY and ICTR have limited jurisdictional reach, while the principle of the complementarity of the ICC tasks domestic courts with prosecuting international crimes.¹¹²⁸ So before corporations can be tried at the international courts, first, it appears, the international criminal procedure would need to be significantly amended.

3. 'Downloading' ICL to Domestic Legal Systems

The solution could nevertheless be implemented through domestic legal systems.¹¹²⁹ If undertaken across a considerable number of states, this approach could arguably be more effective in terms of enforcement than that of the international courts, due to their tendency to take on only the most serious crimes. By adopting ICL in domestic legal systems, corporate responsibility could bypass the limitation of complicity posed by corporate criminal procedure, and potentially expose corporations to a greater level of criminal responsibility in the event of misconduct. Furthermore, a 'domestic' solution could overcome the resistance of international law practitioners to the recognition of corporate legal personality. Given the international nature of PMC activity, domestic case law would provide grounds for developing customary international law. In addition, choosing a national legal system as the criminal liability forum for

¹¹²⁸ Simpson, *supra*, p. 50.

¹¹²⁹ An example of a purely domestic proposal is to replicate US Foreign Corrupt Practices Act (<https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act>) in Ganesan, A.: "One of the Missing Pieces in the Accountability Puzzle" 11 April 2015, *Human Rights Watch*, available at: <http://jamesgstewart.com/one-of-the-missing-pieces-in-the-accountability-puzzle/>.

corporate bodies gives domestic courts a relative freedom of interpretation, which would not be the case on the international level, where consensus would have to be reached on a number of provisions, including definitions and enforcement. Finally, this issue of extraterritoriality could be resolved under UJ for the most serious international crimes, as opposed to the first option which suggests codifying the crime of mercenarism as a new offence under UJ.¹¹³⁰ By applying UJ to PMCs as corporations who are found to have committed grave international crimes, such as war crimes, crimes against humanity, etc., companies could be tried at any national court without having to rely on the geographical coverage of domestic legal systems. On the other hand, it could mean continued disparity in the treatment of PMC violations and a lack of coherent regulation standards for corporate crimes. Divergence amongst states as to how they define the crime and what jurisdiction they assert over it poses difficulties for the emergence of a customary international law rule. The territorial limitation would leave room for impunity, as not all states would be willing to embrace international criminal responsibility for corporations. This could also exacerbate corporate impunity should PMCs shift their business to the states where corporate criminal liability is not recognised.

4. Employing Transnational Law to Construct Corporate Criminal Responsibility

Similar to the previous option, transnational criminal law suggests “the indirect suppression by international law through domestic penal law of criminal activities that have actual or potential trans-boundary effects.”¹¹³¹ Forming part of ICL, transnational criminal law (TCL) still benefits from the international dimension in which the crimes are committed, but is not limited to the core international crimes¹¹³² and reliance on customary international law.¹¹³³ Due to PMCs

¹¹³⁰ I use the interpretation that reads UJ as ‘any state’ can prosecute, as per the *Eichmann case*, practices in Belgium, Randall, K.C.: “Universal Jurisdiction under International Law” 1988, Vol. 66 (4), *Texas Law Review* 785-841.

¹¹³¹ Boister, N.: “‘Transnational Criminal Law’?” 2003, Vol. 14 (5), *European Journal of International Law*, pp. 955.

¹¹³² Articles 5 – 8 of the Rome Statute.

¹¹³³ Boister, N.: *An Introduction to Transnational Criminal Law*, OUP, Oxford, 2012, p. 18.

operating mostly in post-war environments, it may be problematic to argue for heinous systematic crimes in many cases of PMC offences. As part of broader misconduct, acts of murder, torture, rape, etc., all constitute a crime against humanity¹¹³⁴ and are on the ICC Rome Statute list of international crimes. TCL could, however, overcome this limitation as the catalogue of transnational crimes¹¹³⁵ covers of a wide variety of offences, including organised, white-collar and political crime.¹¹³⁶

By employing transnational law, this solution could be seen as loosely replicating the ATS principle, only through criminal, not purely social corporate responsibility. In its current form, transnational criminal law is arguable more suitable to corporations than international law as it does not require the same extent of adjustments or recognition of international legal personality. According to Bassiouni, transnational crimes are those committed by private or non-state actors.¹¹³⁷ Such classification is more tailored to PMC conduct as it removes the necessity of establishing the link to state bodies in order for PMC crimes to be recognised as international or as part of state conduct in a different state.

However, a great extent of scholarly and practical development is necessary to realise this recommendation as private military activity does not fall organically within the realm of transnational criminal law. TCL predominantly targets the criminal market,¹¹³⁸ while the PMC activity is a priori legitimate and only becomes an unregulated issue when human rights abuses and other serious offences occur. TCL is limited to offences covered by a suppression

¹¹³⁴ Rome Statute, Art. 7; in *Tadic*, amongst other charges, the Appeals Chamber found Dusko Tadic guilty of one count of murder as a crime against humanity and one count of murder as a violation of the laws of war; IT-94-1-ES, Decision of the President, para. 7.

¹¹³⁵ The term was first used at the Fifth UN Congress on Crime Prevention and the Treatment of Offenders in 1975; see: Williams, P. and Vlassis, D. (eds.): *Combatting Transnational Crime: Concept, Activities, Responses*, Frank Class, London, 2001.

¹¹³⁶ Boister, 2012, *supra*, p. 4.

¹¹³⁷ Bassiouni, C. M.: "An Appraisal of the Growth and Developing Trends of International Criminal Law" 1974, Vol. 45, *Revue Internationale de Droit Penal*, p. 421.

¹¹³⁸ Such as drug and human trafficking, cross border contraband, money laundering etc., see Boister, 2012, *supra*, p. 15.

convention,¹¹³⁹ so state buy-in is necessary to willingly suppress a particular form of conduct. For PMC regulation it could either mean following the existing framework of transnational crimes,¹¹⁴⁰ or designing a new category of human rights violation by PMCs transnationally. While such convention requires governmental consent, it does not prevent the use of PMCs or demand the criminalisation of PMC activity as such. Instead, it would specifically target gross misconduct and offences that would call for criminal liability on the domestic level, or if committed by an individual. Therefore, criminalisation of serious PMC offences through transnational criminal law could offer the most tailored approach to regulation in the context of global governance.¹¹⁴¹

While the disparity in prosecuting legal persons exists on the national level and should, without a doubt, be recognized as a limitation, the private nature of transnational crimes makes the inclusion of corporate liability in the suppression conventions more likely. The United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organized Crime (UNTOC) both oblige state parties “consistent with its legal principles, to establish the liability of legal persons”.¹¹⁴²

This solution would naturally be enforced through a domestic forum. Alternatively, the precedent of the Extraordinary African Chambers¹¹⁴³ allows for the ad hoc establishment of a new special tribunal while national courts streamline the corporate prosecution procedures. This solution, coupled with the ‘domestic’ option described above, would produce comprehensive coverage while overcoming doctrinal difficulties.

¹¹³⁹ See Boister, N.: “Human Rights Protections in the Suppression Conventions” 2002, Vol. 2 (2), *Human Rights Law Review*, pp. 199-227.

¹¹⁴⁰ E.g.: The International Convention for the Suppression of Counterfeiting of Currency, 20 April 1929; UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, the 1950 European Convention for the Protection of Human Rights and Freedoms, etc.

¹¹⁴¹ Drawing upon the relationship between the form of governance and the type of power, analysed in chapters 2, 3, and 4.

¹¹⁴² Article 26 of UNCAC and Article 10 of UNTOC.

¹¹⁴³ See: <http://www.chambresafricaines.org>.

Conclusion

This thesis has surveyed an extensive terrain, from the feudal lords and fifteenth-century Italian *condottieri* who contracted their own troops in local wars, to the professional mercenary soldiers of the absolute monarchies of continental Europe, to the outsourced governance of the East India Company, to the modern-day PMC contractors working for legitimate private corporations. The historical analysis provided the necessary context, demonstrating the use of private military forces by different types of state both in the past and today. It afforded me the broader benefit of understanding the suitability and efficacy of existing and future legislation that administer this relationship between the state and military force. Tracing the patterns of state behaviour and their likely choice of security policy depending on the governmental model and the characteristics they exercise, allows me to draw conclusions addressing the use and regulation of private military actors today and into the future.

The contemporary relationship between power and legitimacy demonstrates a number of conflicts between legitimate systems. As revealed in *Chapter 5*, the coexistence of domestic, international and industry-level regulatory systems is not complementary. Instead these conflicting legitimising systems claim authority over the private sources of power without a true effective and coherent enforcement. The conflict of emerging 'responsibilisation' and criminalisation approaches is also likely to create a dissonance and polarisation between the states in the two opposing regulatory camps.

By utilising the concepts of power and legitimacy, this thesis traces the evolving nature of state power, authority, law, and economic power, and the way these shifts influence the relationships between the concepts from a socio-historical perspective. In the context of this research, legitimacy is best envisaged in terms of acceptance and validation of power, while power is understood as the military force that prevails in any given form of governance. Throughout this

thesis I have tried to analyse the manifestations of private violence in different forms of governance and the corresponding responses to this private force, in order to demonstrate a range of different normative standpoints concerning mercenaries, private armies, and PMCs.

The socio-historical approach provides a wide scope for analysis of the seemingly contemporary issue of the use and regulation of private military companies. The concept of legitimacy predates that of the modern state and IL, and can serve as an indicator of the normative behaviour of a state. Legitimacy transforms into norms and has the ability to drive policy. Thinking critically about historical forms of state and military allows us to identify regulation in previously unsuspected places. For example, Machiavelli's civilian militia was an ideological pushback against the overwhelming mercenary activity in sixteenth-century Italy, while the legitimacy of neoliberal ideas rationalised the outsourcing and privatisation of security in the US and the UK since the 1980s.

Current regulation of private military space highlights the fact that power is out of synchronisation with the demands of legitimacy and cannot be adequately managed. There is, therefore, a need for legitimacy that responds to new and changing forms of power in the context of state-military relations. The regulation of killing and human rights violations needs to be taken seriously, whether these are committed by individuals, a state, or a corporation. Social corporate responsibility is insufficiently strong to single-handedly fulfil the function of creating responsibility. It lacks legally binding instruments to criminalise wrongful behaviour. Nor are the control mechanisms of state responsibility always reliable, due to the biased relationship and frequent reliance of states on PMCs. Referring to the historical analysis, it is unlikely that this reliance, at least for the biggest PMC client states, will diminish in the next few decades. In order to overcome the problem of corporate immunity, an international criminal response ought to be freed from the state responsibility limitation.

At the outset, this thesis sought to question the ability of existing PMC regulation to adequately control private force and its capacity for delivering justice in the event of infringement. In other words, it asked whether current IL can effectively regulate PMCs and if it is suitable for the system of global governance? The contemporary legal analysis of *Chapter 5* answers the first part of the question, and the historical enquiry spanning chapters 2, 3, and 4 contributes to the latter.

The legal analysis identified the gap between existing regulation and justice, while the historical patterns of relationships between states and military force provided insight into the effectiveness of existing and future regulatory responses. PMC regulation, current and developing, can be broadly divided into the 'responsibilisation' and criminalisation approaches. Although the soft norms of 'responsibilisation' are aimed at raising standards and PMC respect for human rights, they run a risk of creating a veneer of false legitimacy while lacking legal enforcement and any tangible mechanisms of delivering justice. The proposed criminalisation efforts, on the other hand, are state-centric and are likely to create a divergence between the states in the two opposing regulatory camps.

By examining the questions of the use and regulation of PMCs, this thesis also highlighted the main source of impunity, namely the lack of a strong norm of corporate responsibility and, particularly, international criminal liability for corporations. The proposal to deploy international criminal law as an appropriate PMC criminalisation mechanism is based on a number of principles. International criminal responsibility for corporations shifts the focus from states to PMCs as companies. By taking on functions that are considered to be inherently governmental, PMCs have acquired a new, more significant role in their relationship with states, a role that needs to be appropriately governed. State reliance on outsourced, privatised security is unlikely to diminish in the foreseeable future, while the model of small, relatively decentralised government prevails.

Furthermore, PMC activity is international, making PMC regulation an international issue of a merged military-civilian realm. Due to the military nature of their activity, international criminal responsibility for PMCs is required to address gross human rights violations, war crimes and crimes against humanity, and other international crimes. Finally, the formulation of international criminal liability for corporations would reinforce state responsibility and, coupled with selected industry standards, could bridge the legal gaps created by problems with contract law and the legal personality of PMCs.

While the above recommendations could address key gaps in PMC regulation and improve accountability mechanisms, it is important to remember that the current form of governance poses an inherent limitation on the notion of the state monopoly of force. The rise of competing actors in international relations, as well as the conscious changes in government policy to limit the role of the state and outsource some of its functions, inevitably creates space for private military actors to exist. International law will struggle to fully criminalise and eliminate the risk of the unethical use of private force. However, by identifying the key sources of impunity across the supply chain of private military power, we can target the issues of corporate responsibility of PMCs. International criminal law offers a number of possible complementary avenues to implement a more robust mechanism to try and punish companies that to date have escaped liability for gross offences and violations by virtue of their corporate legal personhood.

Although the implementation of the proposed options requires further scrutiny, the criminalisation of gross corporate misconduct could ensure a more efficient and controlled use of private military resources by states and international organisations, making PMCs a welcome, rather than a feared, addition to the security landscape.

Appendix 1

International Legal Bodies that Attempt to Regulate Private Military Space

| Type of Responsibility | International Law | | | | | | | | |
|-----------------------------|---|--|---|--|---------------------|----------------------|-----|---|-------------------|
| | Human Rights Law | | | International Humanitarian Law | | Customary IL | | | Int. Criminal Law |
| | UN WG on Mercenaries Draft convention on PMSC | IWG-proposed binding instrument on Business & HR | Guiding Principles for Implementation of the UN's "Protect, Respect and Remedy" Framework | Juridical Status of Irregular Combatants under IHLAC | <i>jus in bello</i> | <i>jus ad bellum</i> | ILC | Draft Code of Crimes against Peace and Security of Mankind 1991 | ICC |
| Individual (PMC Contractor) | y | | | y | | | | y | y |
| State responsibility | y | y | y | | y | y | y | y | |
| Corporate (PMC) | y | y | y | | | | | | |

Appendix 2

Industry and Domestic Legal Bodies that Attempt to Regulate Private Military Space

| Type of Responsibility | Industry | | | Domestic Law | | | |
|-----------------------------|-------------------------------------|-------------------|---|---------------------------------------|--|------------------------------|--|
| | Self-Regulatory Bodies | | | Corporate Law | Contract Law | Criminal Law | Tort Law |
| | ICoC for Private Security Providers | Montreux Document | OECD's Guidelines for Multinational Enterprises | <i>Societas delibquere non potest</i> | Contracts between PMC and Client, and between PMC and Contractor | Corporate Criminal Liability | ATCA & TVPA UK Corporate Manslaughter Act |
| Individual (PMC Contractor) | y | y | | | y | y | y |
| State responsibility | | y | | | y | | |
| Corporate (PMC) | y | y | y | y | y | y | y |

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