

**The Privatisation of Violence:  
An Examination of Private Military and Security  
Contractors and Their Effect on Sovereignty and  
Fundamental Rights in a Globalised World**

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In Loving Memory of Frances Gough

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The most incredible Mother a person could have  
ever wished for.

1965 - 2013



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## **Abstract**

This thesis considers the effects the private exercise of coercive violence on the modern nation-state through an examination of the increasing prevalence of Private Military and Security Contractors. It studies the practical implications of the privatisation of violence for Domestic and International Law and seeks to propose an original typological framework for the classification and regulation of PMSCs.

This thesis begins by examining the historical relationship between coercive violence and maintenance of power/authority from the perspective of the Westphalian Sovereignty and the resulting state-centric international legal regime. It considers how the ‘violence-power’ relationship has historically been conceptualised through social contract and ‘force of law’ theories and the limitations these suffer in relation to PMSCs. Specific focus is given to the manner in which existing theories have tended towards viewing violence either as an instrument of power or, as a public good and the corresponding implications of the commodification and globalisation of violence. The study, therefore, seeks to develop an original conceptual framework on the nature of coercive violence. This conceptual framework draws upon a body of work built around the theoretical critiques of violence undertaken by Walter Benjamin and Hannah Arendt, allowing the study a unique perspective to analyse the relationship between private violence and governmental power/authority

Utilising this conceptual underpinning, this thesis investigates the political and economic factors instrumental in the growth of PMSC activity, considering the expansion of globalisation and neo-liberalism and the corresponding weakening of the nation-state. To highlight the increasing diversity of private actors, the research presents three case studies into the globalisation of coercive violence within national security assemblages namely; Peru, Nigeria and Afghanistan. These case studies first examine the social and political climate in which the growth of private coercive

violence developed and identify key security concerns which have affected these areas. Each case studies identifies the legal regulation of PMSCs in the State to understand both how States have sought to limit the proliferation of private violence and understand the difficulties these States have encountered in applying or enforcing these regulations.

Drawing upon these case studies, the thesis critically analyses the current attempts to regulate and establish accountability for PMSCs through either domestic or state-centric international Law noting the inherent difficulties within these. It considers how effectively the Montreux Document and the International Code of Conduct for Private Security Contractors are able to regulate the activities of PMSCs before analysing the effectiveness of the international legal regime in regulating PMSCs with a focus on the doctrine of State Responsibility. This notes the inherent difficulties in establishing effective regulatory frameworks and particularly the arbitrary distinctions drawn within these regulations

Finally, considering both the practical and theoretical issues identified throughout the research the thesis looks to create an original typological approach to identifying and classifying PMSCs. This approach examines stakeholder relationships and power structures to produce a framework for the classification of PMSC activity and extrapolates trends and features with emphasis on democratic accountability and human rights. The thesis proposes the suitability of this system as a framework for legal regulation in a manner capable of addressing the intricacies and difficulties posed by PMSCs.

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# INTRODUCTION

## General Theme of Enquiry

This thesis seeks to examine the position and role of coercive violence and fully consider the implications of the increasing prevalence of private coercive violence within the international legal regime. It seeks to provide a conceptual framework for the growth and proliferation of Private Military and Security Contractors as a foundation for a greater understanding of their implications for the modern nation-state and propose a unique solution to some of the difficulties posed by the changes within state structures and legal systems. Specifically, this thesis considers the need to re-examine the relationship between the nation-state, the exercise of coercive violence and conceptions of sovereign power. In this way, the thesis provides a conceptual and practical foundation through which the increasing prevalence of private violence can be critiqued in a practical and effective manner.

## Understanding the Importance of the Investigation

A full examination of the importance of private coercive violence within the modern state is desirable for a number of reasons as Private Military and Security Contractors (PMSCs) become an increasingly central and legitimate figure within the modern global security landscape. While estimates of the value of the industry vary widely they are generally considered to exceed the £500 billion,<sup>1</sup> with an annual growth rate of over 5%. Included within this is almost half of the entire US Intelligence Agency budget<sup>2</sup> as well as a large proportion of both the American and UK's Defence

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<sup>1</sup> Arjun Sethi, 'Military Contracting: Our New Corporate Warriors' *The Guardian* (London, 23 January 2013) <<http://www.theguardian.com/commentisfree/2013/jan/23/military-contracting-corporate-mercenaries>> accessed 13 December 2014.

<sup>2</sup> L Elaine Halchin, 'The Intelligence Community and Its Use of Contractors: Congressional Oversight Issues' (Congressional Research Office, 18 August 2015) <<https://fas.org/sgp/crs/intel/R44157.pdf>> accessed 17 May 2016.

Department budgets.<sup>3</sup> More recently, however, an increasing proportion of this business is coming from the private sector. It is estimated that Shell spends over \$120 million on security for its Nigerian operations each year<sup>4</sup> while the PMSC G4S is currently the world's second largest private employer with over 600,000 employees working in 125 nations.<sup>5</sup> Furthermore, much as their original growth coincided with the end of the Cold War and the corresponding downsizing of standing armies, it is suggested that evolving security threats and reductions in large-scale military activities may lead to a similar surge in the private security market<sup>6</sup>. The growth in non-traditional, asymmetric conflict has led to an increasing reliance upon non-traditional security with private actors playing a central role in fulfilling the security needs of both public and private organisations. The ability and need for companies to quickly transfer operations, equipment and personnel across the globe has created a situation in which actors increasingly require uniform security services, a situation the States involved are incapable of providing. A 2011 study found PMSCs operative in 28 of the 32 states that have "collapsed".<sup>7</sup> Finally, PMSCs are increasingly blurring the line between security and military operations and in two of the most notable examples of this, Iraq and Afghanistan, PMSCs have at times represented the largest foreign contingents.<sup>8</sup> Overall, private security is believed to outnumber public security in at least 40 nations around the world.<sup>9</sup>

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<sup>3</sup> Simon Chesterman, 'We Can't Spy ... If We Can't Buy!': The Privatization of Intelligence and the Limits of Outsourcing 'Inherently Governmental Functions' (2008) 19(5) *European Journal of International Law* 1055; Casper Alexander Daugaard, 'Blackwater And Private Military Contractors' (2012) *The Yale Review of International Studies* <<http://yris.yira.org/essays/707>> accessed 13 December 2014.

<sup>4</sup> Afua Hirsch & John Vidal, 'Shell Spending Millions Of Dollars On Security In Nigeria, Leaked Data Shows' *The Guardian* (London, 19 August 2012) <<http://www.theguardian.com/business/2012/aug/19/shell-spending-security-nigeria-leak>> accessed 13 December 2014.

<sup>5</sup> 'Who We Are' (G4S) <<http://www.g4s.com/en/Who%20we%20are/>> accessed 16 December 2014.

<sup>6</sup> Eberhard Kienle, 'The Security Implications of the Arab Spring' (Geneva Papers, 2013\_ <[https://www.files.ethz.ch/isn/160196/GCSP\\_RS\\_10.pdf](https://www.files.ethz.ch/isn/160196/GCSP_RS_10.pdf)> accessed 14 May 2017; David Isenberg, 'The Ferengi Rules of Acquisition: PMSC and the Arab Spring' *Huffington Post*, (New York, 2012) <[http://www.huffingtonpost.com/david-isenberg/ferengi-rules-of-acquisition\\_b\\_1830366.html](http://www.huffingtonpost.com/david-isenberg/ferengi-rules-of-acquisition_b_1830366.html)> accessed 14 May 2017.

<sup>7</sup> Željko Branović, 'The Privatisation of Security in Failing States: A Quantitative Assessment' (Geneva Centre for the Democratic Control of Armed Forces Occasional Paper - No 24) 26 <[http://psm.du.edu/media/documents/reports\\_and\\_stats/think\\_tanks/dcaf\\_branovic\\_the\\_privatisation\\_of\\_security\\_in\\_failing\\_states.pdf](http://psm.du.edu/media/documents/reports_and_stats/think_tanks/dcaf_branovic_the_privatisation_of_security_in_failing_states.pdf)> accessed 16 May 2016 (Collapsed states were defined by having suffered one of the four major events identified by the Political Instability Task Force namely; revolutionary wars, ethnic wars, adverse regime change and genocides and politicides).

<sup>8</sup> Moshe Schwartz & Jennifer Church, 'Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress' (Congressional Research Service, May 17, 2013) Table A-1, Table A-2 <<https://www.fas.org/sgp/crs/natsec/R43074.pdf>> accessed 16 May 2016.

<sup>9</sup> Claire Provost, 'The Industry of Inequality: Why the World is Obsessed with Private Security' *The Guardian* (London, 12 May 2017) <<https://www.theguardian.com/inequality/2017/may/12/industry-of-inequality-why-world-is-obsessed-with-private-security>> accessed 14 May 2017.

Considering this, there is a growing consensus that the private actors are not only now legitimate, but increasingly necessary within the global security sector.

In light of the increasing range and variation within modern security providers, this thesis proposes that an examination of the role of coercive violence within societies is necessary to fully understand the implications of the increasingly diverse provision of security. This requires an understanding of their function in both privatising and externalising violence from communities, with reference to the historical relationship between violence, power and governance. In particular, this must recognise that the ability to exercise coercive violence has historically been viewed as the basis of the sovereign power of states.<sup>10</sup> Max Weber's proposition that the state is he who "lays claim to the monopoly on legitimate physical violence"<sup>11</sup> has persisted as the basis of the majority of academic discussion regarding the foundation of the nation-state, and the relationship between violence and power. PMSCs however, have the ability to fundamentally alter this relationship. The exercise of coercive violence for financial reward alone represents a divergence from the assumption that it constitutes an integral aspect of the internal power structures within a political community. From this point of view, the use of force by PMSCs should not be viewed through the prism of the exercise of legitimate power. This thesis, therefore, proposes that a new form of dialogue must be devised to consider the issues that arise with their proliferation.

Furthermore, these changes pose significant challenges to established forms of accountability and justice with PMSCs increasingly undertaking roles that place them in a position to exercise coercive violence in a manner historically occupied by state entities. Consequently, they are also increasingly in positions to directly impact individuals and groups, in a manner

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<sup>10</sup> For more in depth examinations of this see Michael Barnett & Raymond Duvall (eds.) *Power in Global Governance* (Cambridge University Press, 2008); Anna Leader, 'Globalisation and the State Monopoly on the Legitimate Use of Force' (2004) *Political Science Publications* 1, 4.; Rodney Hall & Thomas Biersteker (eds.) *The Emergence of Private Authority in Global Governance* (Cambridge University Press, 2007).

<sup>11</sup> 'Politics as a Vocation' in Max Weber: *Essays in Sociology*, (H.H. Gerth and C. Wright Mills trs. and eds., Oxford University Press, 1946).

unforeseeable during the establishment of modern international law and specifically international human rights regime. This is particularly troubling when they do so acting on behalf of parties directly responsible for the implementation and safeguarding of these rights, and the sole bearers of legal responsibilities under these international regimes.<sup>12</sup> For this reason, this thesis considers it necessary to re-evaluate these mechanisms in the context in which PMSCs now operate. This requires considering the effectiveness of these approaches to the divergent factual circumstances in which they are applicable and thereafter considering alternative approaches better able to serve this purpose. Central to this is an appreciation that modern PMSCs operate in such disparate conditions and activities that attempts to examine or discuss them as a homogenous group are not capable of dealing with these complexities. While individual incidences have attracted academic attention, attempts to extrapolate trends from these suffer from over-generalisation.<sup>13</sup> Therefore, this thesis considers that accurately and effectively examining the proliferation of PMSCs encompasses a foundational need for classification, capable of accurately and concisely categorising PMSCs with reference to the specific circumstances involved.

## **Gaps in the Current Research**

Considering the significant presence of PMSCs throughout global security assemblages, it is unsurprising that they have attracted significant academic and journalistic attention. Despite this, however, there exists a significant lacuna within the current legal analysis and published work that this study seeks to fill. Specifically, despite the exponential growth of PMSCs in both size and activities, much of the academic and political dialogue relating to them has focussed on a limited set of circumstances in which they operate. As a result, the current body of work on PMSCs overwhelmingly falls into a number of categories with regards to their approach to studying PMSCs.

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<sup>12</sup> See e.g. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (noting “the state parties to the present Covenant” and the “obligation of States under the Charter of the United Nations”); Alan Bryden & Marina Caparini, *Private Actors and Security Governance* (Springer, 2007) 288-9 (For a consideration of the difficulties posed by “mercenarism and private security and military services in the framework of security governance”).

<sup>13</sup> The events of Nissour Square in Iraq have been repeatedly examined, however, they are largely unrepresentative of the many DOD contractors who worked in Iraq.

## Illicit Actors

The first approach, that many examinations of PMSCs have adopted, is to begin from the premise that their mere existence represents the exercise of violence and power that more properly belongs to the state and is thus illegitimate, and illicit. Thus, for example, Hall and Biersteker's examination of PMSCs in *The Emergence of Private Authority in Global Governance*, is limited to concluding that the authority of PMSCs should be classed alongside that of mafias and mercenaries.<sup>14</sup> Similarly, the recent report by the NGO War On Want, *Return the Dogs of War* approaches the use of PMSCs via the language of mercenaries, presenting them as illicit actors.<sup>15</sup> This approach has been particularly prevalent in relation to the use of PMSCs in developing nations, with the actions of Executive Outcomes and Sandline International continuing to influence modern views.<sup>16</sup>

## Military Contractors

Second among these approaches, in particular since the emergence of Blackwater in Iraq, there remains an overarching tendency to discuss PMSCs and the privatisation of security, within the context of warfare.<sup>17</sup> P.W. Singer's *Corporate Warriors*<sup>18</sup> and Robert Mandel's *Armies Without States*<sup>19</sup> stand out within this field and have undertaken extensive quantitative and qualitative investigations into both the actions of, and potential issues with, PMSCs. In comparison, works from Jeremy Scahill and Robert Pelton represent studies more limited in scope, though more

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<sup>14</sup> Rodney Bruce Hall & Thomas J. Biersteker (n 10).

<sup>15</sup> 'Mercenaries Unleashed: The Brave New World of Private Military and Security Contractors' (War on Want, 2016) <<http://www.waronwant.org/sites/default/files/Mercenaries%20Unleashed%2C%202016.pdf>> accessed 20 May 2017.

<sup>16</sup> See e.g. Fabien Mathieu and Nick Dearden, 'Corporate Mercenaries: The Threat of Private Military & Security Companies' (2007) 34(114) *Review of African Political Economy* 744; MH Foaleng, 'Private Military and Security Companies and the Nexus Between Natural Resources and Civil Wars in Africa' (2007) 139 *Institute of Security Studies Monographs* 176.

<sup>17</sup> Among the many excellent works on PMSCs within warzones see generally Sean McFate, *The Modern Mercenary: Private Armies and What They Mean for World Order* (Oxford University Press, 2015); Bruce E Stanley, *Outsourcing Security: Private Military Contractors and U.S. Foreign Policy* (Potomac Books, 2015); P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell Press, 2007); James Jay Carafano, *Private Sector, Public Wars: Contractors in Combat - Afghanistan, Iraq, and Future Conflicts* (Praeger Publishing, 2008)

<sup>18</sup> P.W. Singer, *Corporate Warriors: The Rise of the Private Military Industry* (Cornell Press, 2007).

<sup>19</sup> Robert Mandel, *Armies Without States: The Privatisation of Security* (Reinner Press, 2002).

detailed, relating to specific examples of PMSCs and their use during the War on Terror. Scahill's *Blackwater*,<sup>20</sup> provides not only a detailed account of the actions of Blackwater during the Iraq war but more importantly, the political negotiations and financial motivations behind the employment of contractors.<sup>21</sup> Similarly, Pelton's *Licensed to Kill*,<sup>22</sup> notes many of the financial motivations behind the rise of PMSCs.

Works within this approach overwhelmingly examine the increasing use of PMSCs by western governments, primarily the US and UK, in order to undertake politically inexpedient actions or undertake foreign interventions in the face of "continued reluctance by the international community to intervene"<sup>23</sup> and potentially circumvent governmental checks and balances within democratic governance.<sup>24</sup> Both Singer and Mandel specifically cite the lack of Congressional oversight in the deployment of PMSCs by the US during the war on drugs, suggesting that despite the importance of their role their use has been hidden from public scrutiny.<sup>25</sup> American PMSCs working with governments, who would normally be ineligible for US military aid due to "extensive allegations of human rights abuses",<sup>26</sup> have attracted attention from the perspective of undermining American democratic processes and foreign policy.<sup>27</sup> Crucially, however, these fail to examine the effects on the host nation populations with no consideration given to how external actors may affect the democratic processes within host countries. The potential effects of PMSCs in these circumstances can be seen in the differing outcomes of the Arab Spring. In Egypt the citizen army ultimately refused to comply with orders to open fire on protestors turning the tide in the revolution,<sup>28</sup> whereas in comparison, the UAE finance and employ a notable subsidiary of the firm

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<sup>20</sup> Jeremy Scahill, *Blackwater: Rise of the World's Most Powerful Mercenary Army* (Serpents Tail, 2008).

<sup>21</sup> Ibid.

<sup>22</sup> Robert Young Pelton, *Licensed To Kill: Hired Guns in the War on Terror* (Penguin, 2006).

<sup>23</sup> Mandel (n 19) at 16; Singer (n 18) at 129 (both authors cite the actions of MPRI in Bosnia and the role of DynCorp in Colombia.)

<sup>24</sup> Singer (n 18) at 215.

<sup>25</sup> Singer (n 18) at 220; Mandel (n 19) at 83.

<sup>26</sup> Singer (n 18) at 131, (discussing MPRI's assistance to the Sri Lankan army)

<sup>27</sup> Ibid.

<sup>28</sup> Chris McGreal, 'How Hosni Mubarak Misread his Military Men' *The Guardian* (London, 12 February 2011) <<http://www.theguardian.com/world/2011/feb/12/hosni-mubarak-misread-military-men>> accessed 23 December 2014.

previously known as Blackwater, which is responsible for a state security force, to quell the internal revolt.<sup>29</sup> According to one source, this is made up solely of foreign non-Muslims to ensure there is no religious opposition to use of lethal force.<sup>30</sup> As such, it is clear that there remains considerable scope for further discussion of PMSCs from a less US-centric approach.

### **Doctrinal Legal Analysis**

More recently, a range of exemplary legal analysis has sought to clarify the legal position of PMSCs under international law. Francesco Francioni's edited collection<sup>31</sup> addresses much of the previously existing gaps in legal analysis with a broad-ranging qualitative examination of PMSCs. Within this work, various authors propose a variety of regulatory possibilities, including both host states human rights regime and international business regulations based upon John Ruggie's UN report.<sup>32</sup> In the period since its publication a body of legal analysis has sought to further examine the applicability of existing legal regimes in establishing accountability for both contractors and their employers.<sup>33</sup> These works have significantly reduced the opacity that has plagued the legal accountability of PMSCs since their emergence. As a result of this discourse there now exists a largely established understanding of the legal responsibilities of PMSCs and their employers under a range of legal regimes. Despite this, however, this thesis proposes that there remains scope for examination within this field. In particular, much of this work remains focussed on large-scale overtly military operations, with the use of PMSCs in Iraq continuing to dominate the discourse. Less attention has been paid to the effect that privatising even seemingly "civilian" tasks, may have

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<sup>29</sup> Mark Mazetti, 'Blackwater Founder Force Set Up By Former Blackwater Founder' *New York Times* (New York, 14 May 2011) <[http://www.nytimes.com/2011/05/15/world/middleeast/15prince.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/05/15/world/middleeast/15prince.html?pagewanted=all&_r=0)> accessed 1 January 2015.

<sup>30</sup> *Ibid.*

<sup>31</sup> Francesco Francioni & Natalino Ronzitti, (Eds.,) *War by Contract; Human Rights, Humanitarian Law, and Private Contractors* (Oxford University Press, 2011).

<sup>32</sup> *Ibid* at 476.

<sup>33</sup> *See e.g.* Nigel D. White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs' (2012) 31(3) *Criminal Justice Ethics* 233; Jackson Maogoto & Benedict Sheehy, 'Private Military Companies & International Law: Building New Ladders of Legal Accountability & Responsibility' (2009) 11 *Cardozo J. Conflict Resol.* 99, 101; Antenor H. de Wolf, 'Modern Condottieri in Iraq: Privatizing War From the Perspective of International and Human Rights Law', (2006) 13 *Ind. J. Global Legal Stud.* 315; Chia Lehnardt, 'Individual Liability of Private Military Personnel Under International Criminal Law' (2008) 19 *Eur. J. Of Int'l Law* 1025.

in light of the increasing diversity of PMSC activities. Considering this, it is clear, despite the significant academic attention that PMSCs and the legal regimes have attracted, there remains both the scope and the necessity to consider the more nuanced and foundational effect that PMSCs have. Specifically, this requires examining not just the effects of privatising war, but how privatising violence in general can impact the structures that international law and politics often assume underpin discussions of power and sovereignty.

## **Research Approach**

### **Research Question**

This thesis asks how the proliferation of PMSCs affects the relationship between the exercise of coercive violence and sovereign power and the practical implications of this for International Law and Human Rights.

### **Research Aims**

- Examine the relationship between violence and power through an original theoretical lens in order to conceptualise the effects of the increasingly private provision of coercive violence.
- Consider the extent to which the globalisation of coercive violence affects the legal position of both PMSCs and their employers.
- Identify major variations in the manner in which PMSCs operate.

### **Research Objectives**

- Critically analyse the ability of existing avenues to establish accountability and regulation within the PMSCs market.
- Establish an effective classification system for the study of private security activities with reference to the theoretical approach adopted within this study.



## Research Methods

The thesis draws upon a combination of research methods in order to effectively examine PMSCs within the research framework established. Much of the research will be undertaken through an interpretivist approach, aiming to utilise pre-existing data and literature, re-examining and interpreting this within the theoretical framework outlined above. The thesis will specifically review data relating to the increasing use of PMSCs by MNCs for roles that State police or militaries would traditionally have undertaken. Through this interpretivist approach, it will seek to identify the contextual and time relative relationship between power and violence through focusing on the variables responsible for these changes. Furthermore, it will seek to utilise the knowledge of these variables in order to identify potential future trends and seek to examine the actors able to influence and manipulate these variables. The research will seek to understand the changing nature of power through the ability to exercise legitimate violence, not only by sovereign states but by a global hegemony of MNCs and transnational actors. Utilising this knowledge, the work will seek to understand the potential effects the changing nature of power. This will be combined with quantitative research to establish the prevalence of PMSCs internationally, and the proportion of those engaged in military, quasi-military or general security services. Due to transparency issues, various research avenues are combined to provide an overview including budgetary/shareholder documents of both PMSCs and MNCs and secondary sources.

Alongside this, the thesis utilises doctrinal research<sup>34</sup> to critically analyse the liability of PMSCs under international law. This will examine the content of PMSCs regulations, including both legal and voluntary agreements, and consider the basis and background for the implementation

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<sup>34</sup> Enrico Patarro, *A Treatise of Legal Philosophy and General Jurisprudence* (Springer, 2005) 3 (Patarro describes doctrinal research as the foundation of legal research “There is one kind of legal research prominent in professional legal writings... that implements a specific legal method consisting in the systematic, analytically evaluative exposition of the substance of... law, etc... One may call this kind of exposition of the law “legal doctrine.”)

of these regulations. Furthermore, doctrinal analysis will be used to establish the legal approaches to PMSCs operate in a range of countries.

### **Original Approach Adopted Within this Study**

In order to complete these research aims; this thesis will undertake an original analysis of PMSCs combining two specific research approaches. The first of these is that the research will look to examine the historical relationship between coercive violence and maintenance of power/authority within the formation of the nation-state. This will provide the context needed to consider how the increased privatisation of coercive violence may affect the ability of states to operate in the manner necessary to fulfil their national and international obligations. This will require combining and synthesising a unique conceptual framework with a historiographical account of the relationship between violence and power drawing upon the theories of Walter Benjamin and Hannah Arendt in order to present a synthesised theory of violence. This study will look to utilise this theory in order to critically analyse the monopolisation of violence by the (European) state through the founding of Westphalian Sovereignty and the resulting state-centric international legal regime. This will seek to critically analyse the historical relationship between the capacity to monopolise legitimate violence, and the ability to exercise a form of power, or authority over a population or geographical area. Through combining these historical precedents and the conceptual framework the work will seek to extrapolate a unified and evidentiary theory as to the relationship between coercive violence and the governmental power.

Parallel to this theoretical investigation, this thesis will seek to examine the application of potential avenues of accountability to PMSCs as an increasingly diverse range of actors. Using case studies to identify specific examples of the use of PMSCs the thesis will critically analyse the effectiveness of existing legal instruments for regulating and establishing accountability for PMSCs. Finally, building upon this foundation of knowledge and theory this study seeks to provide

a mechanism through which PMSCs can be accurately studied. Specifically, considering the range of variation within the actors exercising coercive violence, this thesis considers that in order to accurately and effectively examine the increased prevalence of PMSCs there is a more foundational need; namely that of classification. Therefore, this study seeks to present a classification criteria capable of identifying and grouping PMSC activity in a manner that addresses their role within local power structures and provides a grounding for future regulation, within the international legal system. Specifically, it aims to identify the criteria necessary for an accurate and comprehensive examination of PMSC activities, in a manner capable of identifying how the structural relationships that underpin their appropriation and exercise of violence interact with established concepts of power and effect mechanisms of accountability and governance. The assumption is that a classification that is nuanced towards the specificity of the circumstances, that permit PMSCs to operate and flourish, is a pre-requisite if focused and effective mechanisms of scrutiny and regulation are to exist.

## **Thesis Structure**

In order to achieve these research outcomes, the study is split into six chapters. The first of these chapters looks to consider traditional understandings of violence within power structures. The study, therefore, begins by critiquing Hannah Arendt's *On Violence*, discussing her interpretation of violence within the modern society. Specifically, it will draw upon her interpretations of the relationship between violence and power. The work will move on to consider Walter Benjamin's *Critique of Violence* which takes a more philosophical approach to understanding the role of coercive violence within society. It will examine how Benjamin's work has since been understood and interpreted by subsequent theorists most notably Michel Foucault and Giorgio Agamben. These examinations will be formulated into a synthesised conceptual framework that will form the basis of this examination of the role of coercive violence within power structures and authority.

Having established this conceptual framework, Chapter Two will move on to scrutinise the historical position of violence within society, with a particular focus on understanding the development of the European nation-state. As such, it will briefly consider the early civilisations that played a central role in establishing European society namely, Egyptian, Greek and Roman considering how these societies organised coercive violence both internally and externally with particular reference to how this was related to the maintenance of their power structures. Beyond this, the study will focus more substantially on the role of violence during the enlightenment. This will first consider the competing political formations of city-states and empires in order to examine the reasons for the variation in the forms of societal violence. Beyond this, the study will examine both how and why the nation-state emerged as the preeminent entity within modern international law. It will consider how societal changes were central to the emergence of the national state, most notably the increasing importance of the Social Contract. It will examine how Social Contract theories fundamentally changed the relationship between the state and their citizens, regulating the role of coercive violence in controlling and exercising authority over the citizens. This examination will provide the foundation for an understanding of the role of the coercive violence as a central aspect of the relationship between a state and the citizens, and particularly of how the ability to both exercise, but also withhold, coercive violence is the foundation of legitimate power in comparison to pure forceful authority.

Having identified the role of the nation-state in developing the perceived monopoly over violence Chapter Three will examine the conditions against which the growth of PMSCs has occurred. It will consider how changes within the structures and capabilities of states have established the environment in which private security has flourished. This includes identifying these factors both in terms of providing the supply of resources necessary and also the increasing demand for private security as a basis for an examination of the current security market.

Chapter Four of this study will be split into two separate sections. The first section will seek to examine the growth of modern private security and consider the role of the changing nature of statehood in this growth. This section will begin by examining the security landscape following the end of World War Two. From this point, it will examine the growth of private actors, considering the changing nature of statehood as a foundation for understanding the role of private actors in the traditional state preserve of coercive violence. This will include an examination of how traditional security industries have interacted with globalisation to form organisations capable of exercising coercive violence in increasingly widespread and influential manners. Thereafter, the study seeks to provide an in-depth examination of the causes behind the growth of PMSCs. This will include examining the growth of asymmetrical warfare and terrorism, the growth of supranational organisations and the prevalence of MNCs requiring security across the globe. The second section of Chapter Three will consist of three case studies which identify the difficulties posed by the broad variety of actors exercising coercive violence in a state. The section will begin by establishing the methodological approach utilised in the study. Having established this, the section will move on to discuss the three chosen case studies namely; Peru, Nigeria and Afghanistan. These case studies will proceed by first examining the social and political climate in which the growth of private coercive violence is being considered. Thereafter each case study will identify specific security concerns which have affected these areas in order to provide a factual background for the security markets. Each of the case studies identifies the legal regulation of PMSCs in the State in order to understand both how States have sought to limit the proliferation of private violence and the difficulties they have encountered in applying or enforcing these regulations. The study identifies the types of actors present in each of these regions concentrating on identifying the key characteristics of the actors including the make-up of both the leaders/owners and employees and the type of employer likely to engage these actors. Finally, the study identifies notable examples of how these actors have affected the region they are employed in, particularly noting any credible allegations of human rights abuses, criminal activity or use of excessive violence.

Chapter Five of this thesis will examine the legal and regulatory framework in which PMSCs currently operate. It will examine the extent to which PMSCs and their employers can be held legally accountable under international law. It will examine the extent to which states retain legal obligations for PMSCs operating on their behalf, or in their territorial jurisdiction through the doctrine of state responsibility. Thereafter, it will consider the extent to which international criminal law is capable of holding those most responsible accountable in circumstances in which PMSCs are found to have committed serious breaches of international law. Finally, this section will identify the manner in which the international community has sought to address the growth of PMSCs through regulatory approaches. It will identify and examine the strengths and weaknesses of the various approaches including the Montreux Document and the International Code of Conduct of Private Security Providers.

The final chapter of this thesis will present an original typology with the aim of providing an effective mechanism that can both facilitate further study and ground a regulatory framework. The study proceeds from an assumption that a degree of specificity in relation to the circumstances that permit PMSCs to operate and flourish is a pre-requisite if focused and effective mechanisms of scrutiny and regulation are to exist. On this basis, the classification seeks to identify the operative distinctions within PMSCs at a foundational level, in order to identify their ability to both directly affect human rights, and also the secondary impact their use may have for accountability and governance. This section, therefore, begins by identifying the variations within the form of coercive violence undertaken by the PMSC. Thereafter, the study considers the distinctions first within the identity of the group or individual employing the PMSC and thereafter the identity of those individuals employed by or acting on behalf of the PMSCs. Having established the framework for the typology, this study will seek to combine this framework with both the case studies and the conceptual framework in order to establish a series of classes of PMSCs. This section will aim to

provide both a specific but workable classification system capable of accurately capturing the operative distinctions and thereafter classifying PMSCs into similar types.

## The Definition of Coercive Violence

Before undertaking this study it is essential that work establishes a consistent definition of violence within which this study is situated. Specifically, within much of the existing literature, the term violence is simultaneously overused and under analysed, with the scope of potential activities covered by the term violence vast. The English term violence is particularly difficult within this framework of this study as it fails to consider the corresponding intent that motivated the violence. Examining Walter Benjamin's *Critique of Violence*,<sup>35</sup> it appears the German term Gewalt referring, instead to the use of force or violence in the pursuit of authority or power is much more instructive. It is this form of violence that this thesis seeks to consider, specifically the use, or even threat, of violence in a manner designed to coerce another's actions. For the purpose of this thesis, the term "coercive violence" will be used to represent this form of violence. Whilst it is impossible to fully consider every form of coercive violence within a state, for the purpose of this research two specific forms are instructive. The first of these is that of internal coercive violence, utilised to compel the citizens of a state to act in accordance with the will of the sovereign. Alongside this, is external coercive violence, the provision of force necessary to protect the sovereign's interests from external threats. In the modern state these two forms of coercive power are associated with the police and the military respectively, and it is the privatisation of the functions of these institutions that this work will consider.

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<sup>35</sup> Walter Benjamin, 'Critique of Violence' in *Reflections* (Random House, 1995).



# CHAPTER ONE:

## COERCIVE VIOLENCE AND SOVEREIGN POWER

### 1 Introduction

To fully understand the implications of the privatisation of violence through the use of PMSCs, it is necessary to understand the role of violence in the creation and maintenance of sovereign power and authority. The ability of sovereigns to exercise authority within their specific territory, both over the citizens of that state and against external threats, is an essential component of the Westphalian sovereignty that international law is based upon. As such, this research suggests that in order to understand the effect of PMSCs within international law, it is necessary to fully consider the foundational relationship between the provision of coercive violence and the exercise of sovereign power.

This question has been considered and examined since the beginning of political theory and goes to the very foundation of law. This theory has been examined extensively within fields including social contract theory and more recently force of law theory and the sociology of law. Even before social contract theories were explicitly espoused and popularised in the sixteenth century the question as to the legitimate control, and use of, violence over the population remained a key political concern, both philosophically and practically. For millennia, the ability of sovereigns to raise armies or command an internal security force had provided a political tightrope, and on many occasions, failing at this balancing act was the impetus for revolutions.

## 1.1 Evidence from the Etymology

Before even considering the historical and theoretical foundation of the relationship between coercive violence and power, simply considering the etymology of many of the words we commonly associate with the state security apparatus indicates a complex context. The term Police, used in modern states to describe a body impose the law and maintaining order, instead has a much more consensual foundation. Taken directly from a Middle French translation of the Latin *politia*, which is in turn the Latinisation of the Greek *politeia* the term originally denoted a combination of “citizenship, administration, civil polity.”<sup>36</sup> It is ostensibly derived from the word *polis* which describes nothing else but the city or more accurately the city-state. In ancient Greece, therefore, the word *politeia* represented the force of power mastered by the head of the state to ensure compliance with what had been voted into force.<sup>37</sup> In comparison, the modern term soldier has an entirely apolitical heritage, with its military meaning being adopted relatively recently in the 17<sup>th</sup> Century. Instead, soldier derives through the Middle English or Anglo-French word *soudoer*, from a combination of the words *Sou*, a term for the currency of the time and *soldarius*, which translates almost directly to ‘being in the pay of.’<sup>38</sup> Meanwhile, the modern move away from the term Mercenary to Private Contractors, bears a striking resemblance to term Latin term Condottiero, the name of the military companies hired out by the Roman City States to conduct their wars, which traces its roots to the Latin term *condotta* for contract,<sup>39</sup> and in Renaissance Italian came to mean literally contractor.

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<sup>36</sup> ‘Police’ (*Oxford English Dictionary*, 2017) < <https://en.oxforddictionaries.com/definition/police>> accessed 4 July 2015.

<sup>37</sup> ‘The Police in Ancient Greece’ (*The Greek Reporter*) <<http://greece.greekreporter.com/2013/05/30/the-police-in-ancient-greece/>> accessed 23 September 2016.

<sup>38</sup> ‘Soldier’ (*Oxford English Dictionary*, 2017) < <https://en.oxforddictionaries.com/definition/soldier>> accessed 4 July 2015.

<sup>39</sup> Singer (n 18) at 22.

Considering this, it is clear that this historical relationship between power and the exercise of violence goes to the very foundation of society, and it is as a result of the foundational importance of the control over violence that Weber formed the conclusion that the sovereign is he with the monopoly over the legitimate use of violence. In order to fully understand the implications of the privatisation of violence, it is necessary to consider the foundational relationship of violence and power and acknowledge that the modern phenomenon of PMSCs represents a unique form of the exercise of coercive violence within the modern state. Whilst some literature has suggested that modern PMSCs are modern incarnations of powerful medieval mercenary armies or colonial trading companies, no similar entity has co-existed with either the concepts of self-determination or within the era of human rights. In examining the privatisation of coercive violence through the use of PMSCs therefore, it is important to note the unique context within which they operate. Considering this, it is important for this research to establish the conceptual framework through which study will examine and interpret the development and current use of PMSCs.

## **1.2 Analysing the Role of Coercive Violence**

The starting point for this work is an analysis of the role and function of coercive violence as an independent concept. In doing so this section seeks to counteract the overarching narrative adopted within legal and political studies that consign coercive violence to a mere function of sovereign power. However, considering the unique nature of PMSCs, this research finds it necessary to establish and examine the position of coercive violence as a “phenomenon in its own right.” Only through this approach can the research accurately examine the role and position of PMSCs within modern legal regimes and governance structures. Examining coercive violence as a unique phenomenon will allow the thesis to more accurately analyse how private coercive violence interacts with traditional theoretical concepts of sovereign power and authority. Specifically, this understanding of the relationship between the exercise of coercive violence and power is important on two distinct levels.

The first of these is that the study utilises this conceptual framework of coercive violence as the basis for the interpretivist research undertaken throughout this work. Through developing a conceptual framework which identifies the specific role of coercive violence within sovereignty, the study will seek to re-interpret and understand historical changes and movements in a manner that provides a perspective through which to examine and critique PMSCs. Numerous studies have examined the historical position of mercenaries and similar organisations and sought to draw parallels to the modern position of PMSCs. However, this research proposes that through utilising a firm conceptual framework this historical data can be interpreted in a manner that allows conclusions to be extrapolated in order to reconceptualise the purpose and effects of PMSCs. Beyond simply drawing parallels based upon historical similarities, this approach allows the research to provide a detailed analysis of the role of coercive violence within power and governance in order to accurately study the implications of the increasing globalisation of violence.

Secondly, at a more foundational level, this research argues that a comprehensive understanding of this concept is a fundamental requirement for any examination of law that questions the grounding of domestic and international legal regimes. Identifying the relationship between the capacity to exercise coercive violence, and the ability to exercise authority or govern are intrinsically linked. It has even been suggested that a questioning of the social role of coercive violence is a “questioning of the foundations of law, morality and politics”<sup>40</sup> and therefore provides an essential insight into foundations of both the national and international legal regimes this work relies on for discussing PMSCs.

In order to establish this theoretical framework, this section will first consider conventional theories of the foundations of law and sovereignty, proceeding from Max Weber’s ubiquitous definition of the nation-state. This will consider the position of coercive violence within these

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<sup>40</sup> Jacques Derrida, ‘The Force of Law’ in Drucilla Cornell, Michel Rosenfeld & David Gray Carlson (eds.) *Deconstruction and the Possibility of Justice* (Routledge, 1992) 234.

theories and particularly note the failure of these to distinguish coercive violence as a unique phenomenon, the result of which is that they fail adequately to explain many of the factual circumstances which arise. This research will particularly consider the extent to which PMSCs as purely “violent” actors, are able to fit within these theories and the difficulties they pose in undermining traditional conceptions. The section will thereafter look to consider theories that have sought to reimagine the position of coercive violence within political and legal structures in a manner that would provide a framework for interpreting the phenomena of PMSCs and provide the capabilities to analyse and critique the rise of private coercive violence. This section, therefore, proceeds from an examination of the works of Walter Benjamin and Hannah Arendt, drawing upon interpretations of their work in order to present a theoretical framework that serves as the basis for this study.

### **1.2(1) Power, Violence and the Law**

As he concluded his remarks to the lecture theatre, Max Weber commented: “let's revisit this topic again in ten years.”<sup>41</sup> It is unfortunate therefore that Weber’s definition of the state has formed the basis of almost all questions of the changing nature of statehood and sovereignty. Nowhere has this been more ubiquitous than in the study of PMSCs; almost all examinations of PMSCs proceed from a starting point of Max Weber’s definition of the state,<sup>42</sup> as a “community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory.”<sup>43</sup> Weber’s conception of the state, as he himself makes clear only applies to the modern formulation of the state; which this work refers to as the nation-state. According to John Ruggie, the defining characteristic of nation-state its position within the unique, modern “global organising principle of global politics – sovereignty.” As a result, the common understanding is that a nation-state must possess the monopoly over legitimate coercive violence in order to be considered

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<sup>41</sup> ‘Politics as a Vocation’ in Max Weber: Essays in Sociology, (H.H. Gerth and C. Wright Mills trs. and eds., Oxford University Press, 1946).

<sup>42</sup> Ibid.

<sup>43</sup> Ibid at 1.

sovereign, with the proliferation of PMSCs often considered to bring into question the sovereignty of the state and its ability to exercise power within its geographical borders. This work, however, seeks to consider this proposition more forcefully, in order to fully consider the impact of the erosion of the state monopoly over coercive violence. Specifically, if sovereignty is the ability to monopolise coercive violence, sovereign power must be intimately connected to coercive violence. However, what is necessary to establish is the function of coercive violence and the justification of the state in monopolising it.

In the following section, this work will consider the theoretical foundation of Weber's "monopoly on violence", tracing its routes from *Hobbes Leviathan* to the foundation of the modern state and considering how the justification and necessity of this monopoly has been interpreted. Specifically, it will conclude that the monopoly over coercive violence is based on an assumption that coercive violence is an instrument of power. Identifying the limits of these approaches, particularly in relation to the globalised world and the increasingly contested nature of power, this section will seek to identify a new theory for understanding the true nature of the function of coercive violence. This will examine two critiques of the state monopoly over coercive violence that have sought to establish the function of violence, specifically Walter Benjamin's *Critique of Violence* and Hannah Arendt's *On Violence*. It will examine how these theories seek to ground legitimacy of power and examine their perceived illegitimacy of violence. Using this as a foundation, this section will argue that the issue posed by the increasing use of PMSCs is not one of the state monopolies over violence, but instead one of the instrumentalities of violence, and the legitimacy of the power created.

## **1.2(2) The Theoretical Precedents of the State Monopoly over Coercive Violence**

While the monopoly over coercive violence as a prerequisite of the state is frequently discussed within "Weberian Sovereignty", the theoretical foundation for the sovereign monopoly

over coercive violence traces its routes from the theories of Hobbes and Locke. Much as Weber conceived his theory of the state with thought to the horrors of World War I, early legal theorists were first drawn to consider the question of political legitimacy in direct relation to the control of coercive violence, and the ability to control the excesses of violence across the European continent. Ostensibly, the social contract sought to discover the foundation of the relationship between the sovereign and citizens, and in particular the grounding of the legitimacy of the sovereign power.

For Hobbes this was built upon a common consent of the people to lift themselves out of a “state of nature”, characterised by self-preservation through the perpetual use of personal violence leading to “continuall feare, and danger of violent death.”<sup>44</sup> In order to do this, Hobbes proposed empowering an absolute authority to regulate the interaction of each individual and vesting in them “all of their power and strength... [to] act, or cause to be acted, those things which concern the Common Peace and Safetie.”<sup>45</sup> In *The Leviathan*, therefore, Hobbes first proposed the state monopoly on legitimate violence, with the implication that coercive violence is synonymous with, and an essential constituent of sovereign power. Interpreting Hobbes in this manner leads to the conclusion that “[t]he central issue of [the] authority of the sovereign is... whether the sovereign can effectively discharge the obligation to protect those who have consented to obedience.”<sup>46</sup> Both Weber and Hobbes clearly “think of the state in terms of violence and physical force.”<sup>47</sup> Even as the Enlightenment increasingly placed the conception of the supreme sovereign under scrutiny, the central role of coercive violence within power structures remained unquestioned. Locke’s *Two Treatises of Government* establishes that for the sovereign to be capable of executing these rules they must exercise sole authority over the use of coercive violence for the effective functioning of

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<sup>44</sup> Thomas Hobbes, *Leviathan*, (Tom Griffiths ed., Wordsworth Editions, 2014) (see Chapters 10-14 for a discussion of the State of Nature)

<sup>45</sup> *Ibid* at 120.

<sup>46</sup> Winston P. Nagan and Aitza M. Haddad, ‘Sovereignty in Theory and Practice’ (2012) 13 San Diego International Law Journal 429, 442.

<sup>47</sup> A. Anter, *Max Weber’s Theory of the Modern State; Origins, Structure and Significance* (Palgrave Macmillan, 2014) 29.

the state.<sup>48</sup> If this is not the case, society reverts to a position of insecurity and uncertainty and it is only “where there is an Authority... from which relief can be had by appeal, there the continuance of the State of War [Nature] is excluded.”<sup>49</sup> Similarly, it has been argued that Weber’s conception of the state draws upon a monopoly over violence because without the “monopoly... the law is no longer binding.”<sup>50</sup> It is clear that Weber’s formulation drew upon theoretical concepts that have deep roots. Furthermore, it has been suggested that the specific definition of the state monopoly over violence was conceived by Rudolph von Iherin, “who defined “coercive force” as within the “absolute monopoly” of the state.”<sup>51</sup> Clearly, therefore, Weber’s analysis of the state monopoly over violence follows a long tradition of seeking to monopolise violence for the purpose of sovereign power. However, it has been suggested that like the absolute sovereigns of Hobbes and Locke the purpose of violence within this formulation is reliant upon the ability to establish obedience, and that only through a monopoly on legitimate violence can we “establish enduring subordination [as] the authority to enforce rules by force needs credible “inner justification”<sup>52</sup> As a result of these foundations, Weber’s concept of the state has been criticised as an “authoritarian fantasy.”<sup>53</sup> Despite these criticisms, however, there has been little discussion of alternative approaches to conceptualising the function of violence within the state. Instead, overwhelmingly, the function of violence has been premised upon the ability to enforce acquiescence. Even where theorists have sought to posit a variety of other factors within this relationship,<sup>54</sup> almost universally they have concluded that its foundation is built upon an exercise of domination. In this tradition, Derrida in seeking the *Mystical Foundation of Authority*<sup>55</sup> first discusses Blaise Pascal’s assertion

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<sup>48</sup> A. John Simmons, *The Lockean Theory of Rights* 161-163 (1994) (discussing the Lockean argument for the state monopoly on punishment by virtue of the fact “that the natural right to punish *must* be sacrificed (i.e., freely alienated) by all members on entrance into civil society). *See also* John Locke, *Second Treatise of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960) “[T]hough every Man has enter’d into civil society... has therefore quitted his power to punish Offences against the Law of Nature”.

<sup>49</sup> John Locke, *Second Treatise of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960), 282.

<sup>50</sup> A. Anter (n47) at 34

<sup>51</sup> *Ibid* at 29.

<sup>52</sup> Albrecht Funk, “The Monooly of Legitimate Violence and Criminal Policy” in W. Heitmeyer and J. Hagan (eds.) *International Handbook of Violence Research* (Springer Link, 2003) 1058.

<sup>53</sup> *Ibid* at 31.

<sup>54</sup> *See e.g.* Derrida’s *Acts of Religion* (Routledge, 2001); Bertrand Russell, *Power* (Routledge, 2004).

<sup>55</sup> Jacques Derrida, *The Force of Law; The Mystical Foundation of Authority* <[http://users.polisci.wisc.edu/avramenko/methods/derrida\\_theforceoflaw.pdf](http://users.polisci.wisc.edu/avramenko/methods/derrida_theforceoflaw.pdf)> accessed 13 October 2014.



that “it is right that what is just should be followed; it is necessary that what is strongest should be followed.”<sup>56</sup> Throughout much of political and legal theory therefore, the distinction between power and violence has been largely under-examined if acknowledged at all, with “theorists from the left to right think[ing] that “violence is nothing more than the most flagrant manifestation of power”<sup>57</sup> It is unsurprising therefore that Bertrand Russell, a self-described socialist, conceived in *Naked Power*<sup>58</sup> a view of violence as an extreme power that largely mirrors Carl Schmitt’s concept of the sovereign decision in the state of exception.<sup>59</sup> While neither considers coercive violence to be the sole basis of power, they both consider the ability to exercise a monopoly over coercive violence as a pre-requisite foundation upon which other forms of legitimate power may thereafter build. As a result, while people’s acquiescence may occur for various reasons, the fundamental quality of sovereign power lay in being able to violently control the population when all other forms of power failed.

### **1.1(1) The Contested Nature of Power**

While these may provide an account of the effect of coercive violence, they provide little illumination as to the function of violence and instead pose significant questions concerning the legitimacy of the regime they support. Specifically, these classical formulations of the violence - power relationship are all theorised against a formulation of power in which the state controls an absolute and indivisible power over the population. According to this approach, power exists only as legitimate state power, which is exercised in a top-down fashion where individuals agree to submit to a sovereign who, in return for the guarantee of security, establishes and enforces the distinction between permitted behaviour and prohibited. From Hobbes’ statement that “[P]ower...

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<sup>56</sup> Ibid at 239.

<sup>57</sup> Richard J. Bernstein, ‘Hannah Arendt’s Reflections on Violence and Power’ in *Violence: Thinking Without Banisters* (Polity Press, 2011).

<sup>58</sup> Bertrand Russell, *Power: A New Social Analysis* (first published 1938, Routledge, 2004).

<sup>59</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (first published 1922, University of Chicago Press, 2006).

is his present means to obtain some future apparent Good”<sup>60</sup> to Weber’s formulation that power is “the probability that one actor... will be in a position to carry out his own will despite resistance.”<sup>61</sup> This view has come under increasing scrutiny as the nature of power has been theoretically reformulated to explain and understand the practical transformation of the modern states. While this research does not intend to fully investigate and study the nature of power in general, there are several salient points that provide assistance in understanding the effect that this change has had on the relationship between violence and power and supports the decision within the research to focus on alternative approaches to examining coercive violence.

While the exact nature of power remains elusive, recent theoretical developments have to a large extent agreed that the classical formulation fails to conceptualise the more complex power structures that are contained within the modern state. The theoretical discussion surrounding the contested nature of power has sought to identify the more opaque manner in which power actually functions in society. Among the most prominent of these approaches is the that of *governmentality* proposed by Michael Foucault in *Discipline and Punish*<sup>62</sup> and later refined in *Security, Territory, Population*.<sup>63</sup> According to this approach, the state exists superstructurally through local and personal power relations, including among many others those of doctor-patient and teacher-student, whose relationship has been brought under the control of the state placing the physical life as an increasingly central role in political power. This role, coined *bio-politics* by Foucault proposes that since the fall of the *ancient regime*, man has changed from “a living animal with the additional capacity for political existence” to an “animal whose politics places his existence as a living being in question.”<sup>64</sup> For Foucault, this change represented the threshold of political modernity; from the historical position of sovereignty, based upon the sovereign taking life or allowing to live; to the

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<sup>60</sup> Hobbes (n44) at 62.

<sup>61</sup> Max Weber, *Economy and Society: An Outlines of Interpretive Sociology* (University of California Press, 1978) 53.

<sup>62</sup> Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin, New Edition, 2001).

<sup>63</sup> Michel Foucault, *Security, Territory, Population (Michel Foucault: Lectures at the Collège de France)* (Palgrave MacMillan, 2007).

<sup>64</sup> Michel Foucault, *The History of Sexuality* (Vintage Books, 1990) 143

modern *bio-politics* in which the primary duty is to “foster life or disallow it, to the point of death.”<sup>65</sup> It is arguable that this approach to the horizontal dispersion of power is in effect mirrored by PMSCs who provide a correlating, horizontal dispersion of coercion, capable of simultaneously extending and isolating the states coercive capacity particularly from the population.

More recently the importance of the bio-power has been reviewed in Giorgio Agamben’s *Homo Sacer* trilogy<sup>66</sup> Noting that the era of *bio-politics* has been accompanied by an ease with which great totalitarian states transform into liberal democracies and vice-versa,<sup>67</sup> Agamben hypothesises that there exists a hidden foundation, represented by a point in which taking life and keeping alive become indistinguishable, with this point of indistinction representing precisely the borderline that sovereignty has historically been built around<sup>68</sup> identifiable through an examination of an “obscure figure of archaic roman law”<sup>69</sup> who could be killed by anyone without the commission of homicide, but who could not be sacrificed; the *homo-sacer*. Central to perceiving this figure is an understanding of sovereign power which Agamben derives from the work of Carl Schmitt assertion that “the sovereign is he who decides upon the exception.”<sup>70</sup> As general laws can apply only within a normal situation, for Schmitt this decision amounts to a declaration that due to a specific situation, the law no longer applies.<sup>71</sup> Furthermore, as the “precise details of an emergency”<sup>72</sup> nor “how it is to be eliminated”<sup>73</sup> can be planned or legislated for, this moment contains a “specifically juristic element – the decision in absolute purity.”<sup>74</sup> Fundamentally, therefore according to Schmitt, power is the monopoly over the last decision, with the essence of

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<sup>65</sup> Ibid. at 138.

<sup>66</sup> Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, 1998); Giorgio Agamben, *State of Exception* (University of Chicago Press, 2005); Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive* (Zone Books-MIT, 2002)

<sup>67</sup> *Homo-Sacer* (n 66) at 122.

<sup>68</sup> Ibid at 37-38.

<sup>69</sup> Ibid at 65.

<sup>70</sup> Ibid at 5.

<sup>71</sup> Ibid at 13.

<sup>72</sup> Ibid at 6.

<sup>73</sup> Ibid at 7.

<sup>74</sup> Ibid at 13.

sovereignty contained not within its ability to coerce or rule but in the monopoly to decide over what he termed the “borderline concept.”<sup>75</sup>

For Agamben however, this presents a much more complex relationship, in which this “borderline concept” creates a boundary of law to identify the internal and external. Within this framework, therefore, the essence of sovereignty originates as an exclusion from the law. However, as the exclusion occurs through the law itself; rather than simply excluding the situation; it includes it through its exclusion.<sup>76</sup> The fundamental sovereign claim, therefore, is characterised “by applying in no longer applying; including that which is outside of itself”;<sup>77</sup> an inclusive exclusion. Within the paradox of this ‘inclusive exclusion,’ Agamben believes there exists a “limit figure” in which exists every possibility; “membership and inclusion... outside and... inside,... exception and rule.”<sup>78</sup> At its foundation, therefore, Agamben believes the inclusive exclusion is a relationship of banishment, with the ban” therefore representing the original power of sovereignty. However, within this structure “he who has been banned is not... simply set outside of the law... but rather abandoned by it.... Exposed and threatened on the threshold in which life and law... become indistinguishable.”<sup>79</sup> It is arguable that while Agamben proposed this theory with reference to the U.S. torture program and Guantanamo Bay, the conceptual framework is able to equally identify the key issues with the growth of PMSCs, as law and power are externalised. What is left is not a population explicitly set outside of the law but rather simply exposed and removed from the protection afforded by the state.

Finally, while not an explicit theory of power *per se*, it is also enlightening to consider the neo-Gramscian perspective of international relation, evolved largely from Robert Cox’s, *Social*

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<sup>75</sup> Ibid.

<sup>76</sup> *Homo Sacer* (n 66) at 24; *State of Exception* (n 66) at 35 (“the Sovereign who can decide on the state of exception, guarantees its anchorage to the juridical order”).

<sup>77</sup> Ibid at 24.

<sup>78</sup> Ibid at 25

<sup>79</sup> Ibid at 28.

*Forces, States and World Orders: Beyond International Relations Theory*.<sup>80</sup> Adapting Antoni Gramsci's concept of hegemony, this approach perceives power relationships through a hegemonic structure comprised not only of states but of multi-national companies and transnational organisations. Within this structure, power is derived not through unilateral dominance or economic leverage but initially by developing a perception of legitimacy within a hegemonic block through the establishment of a dominant ideology<sup>81</sup> and the control over the social forces required to support this. As a result, contrary to classic sovereign power theories, neo-Gramscianism argues that rather than power existing solely as a top-down domination it instead relies upon harnessing existing social and cultural structures in order to engage the tacit consent of those being ruled with coercion the final resort in the face of a new hegemonic block.

Though this section has not sought to reconsider the nature of power, it has sought to demonstrate that existing theories of the violence-power relationship predicated upon traditional notions of power as domination will necessarily be limited by the increasingly contested nature of power. The following section will therefore seek to more directly examine the problems implicit within the theory of a state monopoly over violence and seek to outline an alternative that can answer some of these problems. This research particularly identifies two strains of political thought which over the past two decades have gained increasing attention within the academic world; the works of Hannah Arendt and Walter Benjamin. These two approaches have particular relevance due to their focus on the role of violence outside traditional theories of power which provides a particularly appropriate perspective for the examination of PMSCS. Walter Benjamin conceived his *Critique of Violence* against the backdrop of a collapse within the Weimar Republic and a growing disenchantment with the terms of the Versailles Treaty. Arendt placed her examination of violence against growing dissatisfaction with the US war in Vietnam and increasing violence on both sides of the civil rights movement.

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<sup>80</sup> Robert Cox's "Social Forces, States and World Orders: Beyond International Relations Theory" (1981) 10 Millennium 2.

<sup>81</sup> Peter Burnham, Neo-Gramscian Hegemony and the International Order (1991) 15(3) Capital & Class 73, 76.

### 1.2(3) An Alternative Theory

In considering a conceptual framework for this study, this section first requires a theoretical examination of coercive violence. In grounding his research, Benjamin approaches *Critique of Violence* by identifying an appropriate existing theory and deconstructing this before rebuilding it, as a critique of violence as a stand-alone phenomenon. Benjamin adopts a traditional Kantian methodological approach of selecting two opposing, seemingly axiomatic ideas, examining the problems with each and how these correspond to the other and synthesising these to create a “perfect, paradoxical symmetry.”<sup>82</sup> Benjamin identifies the nature of the relationship between violence and justice as the true question of his critique, and so starts from the opposing positions of natural and positive law. Natural law, he claims, predicated upon the basis that there exists a true “good” within which violence exists only as a means; a “raw material, the use of which is in no way problematical unless force is misused for unjust ends.”<sup>83</sup> In contrast to this, Benjamin examines how violence exists within a theory of positive law, which without a call to an inherent good, relies instead upon a consideration of the act itself, in order to decide whether an act is just or not. Both natural law, and positive law are therefore equally reliant upon a circular paradox; justice can only be established through an alignment of means and ends but “positive law is blind to the absoluteness of ends, natural law... to the contingency of means.”<sup>84</sup> In order for violence to be just, Benjamin seeks to break this circular argument in order to examine the legitimisation of coercive violence “independent... of just ends and justified means.”<sup>85</sup>

Benjamin adopts positive law as a “hypothetical basis,”<sup>86</sup> as types of violence can be independently distinguished, in contrast to a reliance upon their eventual application, as either

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<sup>82</sup> Mathew Abbott, ‘The Creature Before the Law: Notes on Walter Benjamin’s Critique of Violence’ (2008) 16 Colloquy 80, 81.

<sup>83</sup> Walter Benjamin, ‘Critique of Violence’ in *Reflections* (Random House, 1995) 278. (as such, according to Benjamin, before the conclusion of a social contract, wherein man exists in a “state of nature” any violence that a man has at his disposal, he is *de jure* acceptable for him to use.

<sup>84</sup> *Ibid* at 279

<sup>85</sup> *Ibid* at 278

<sup>86</sup> *Ibid* at 279.

sanctioned or unsanctioned violence. It is this distinction that Benjamin utilises to illuminate the rest of his study. Benjamin's study therefore considers how legitimate and illegitimate violence exist. He suggests that for a subject acting within a legal system,<sup>87</sup> the exercise of violence for an individual's own ends "must collide with legal ends." Instead, the legal system will "erect in all areas where individual ends could be usefully pursued by violence, legal ends that can only be realized by legal power,"<sup>88</sup> with Benjamin concluding that "law sees violence in the hands of individuals as a danger undermining the legal system." However, it is not that the use of violence by individuals in private matters may undermine the legal ends that Benjamin sees as problematic for the executive, "or if this were the case violence as such would not be condemned, but only that directed to illegal ends."<sup>89</sup> Rather, Benjamin suggests that the potential for violence to pursue ends outside of the law is not the issue; the problem for the system is the mere existence of violence outside of the law. Instead, it is presupposed that the price of moving from a Hobbesian *State of Nature* into a modern state is the abdication of the personal use of violence.

Benjamin however, identifies a case in which the state monopoly on violence is called into question, that being the general strike. This represents for Benjamin a paradox; an "objective contradiction in the legal situation, but not a logical contradiction in the law."<sup>90</sup> Specifically, this refers to the fact that through sanctioned means, the general strike, the proletariat are able to work towards an unsanctioned end, revolution, and that within these circumstances the laws only recourse is to meet violence with violence.<sup>91</sup> Through this example, Benjamin sets the foundation for the central narrative of his thesis, "[f]or in a strike the state fears above all else that function of violence which it is the object of this study to identify as the only secure foundation of its critique."<sup>92</sup> Specifically, the example of the general strike illuminates the ability of violence to not only meet

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<sup>87</sup> Ibid at 280.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid. at 282.

<sup>92</sup> Ibid.

immediate ends but “found and modify legal conditions.” Comparing the violence of the general strike with the “peace ceremony” that follows military violence, Benjamin concludes that all violence, used for natural ends; that is unsanctioned ends, inherently contains “a law making character.”<sup>93</sup> This then, “explains the... tendency of modern law to divest the individual... as a legal subject, of all violence” for an individual using violence for their own natural ends, which Benjamin illustrates through the character of “the great criminal”<sup>94</sup>, would threaten to declare a new law.<sup>95</sup> Benjamin’s central narrative, therefore, arrives in the form of an opposition between two types of violence. The first of these is the law-making violence epitomised by the “peace ceremony” or the “general strike.” Parallel to this however, exists violence utilised for sanctioned, or legal, ends. Benjamin cites the example of conscription as the most extreme illustration of this, in which the State forces individuals to risk their lives for the protection of the state, a legal end. In these cases, law-preserving violence, from the extreme case of conscription but down to each arrest or imprisonment, seeks not to create law but instead fortify the pre-existing legal order. All violence, therefore “is either law-making, or law-preserving.”<sup>96</sup>

However, Benjamin does not believe that the relationship between these is one of strict limitations and that the two are unconnected. In particular, focusing on the police, Benjamin sought to examine and deconstruct the relationship between the two, in order to illuminate its true symbiotic nature. Although the police always exercise violence within the arc of law-preserving, they do so with the authority to decide “within wide limits.” Though Benjamin cited the right of decree as evidence of this, such acts are in fact daily occurrences having to decide whether infractions are worthy of intervention, or certain laws are enforceable, with policing, therefore, an exercise of law-preserving violence on a situational basis.<sup>97</sup> Furthermore, Benjamin cites police

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<sup>93</sup> Ibid. 283.

<sup>94</sup> Ibid. at 281.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid at 287.

<sup>97</sup> Abbot (n 82) at 84. (“The refrain that “it depends on the cop”.... There are countless legal situations in which police must exercise a discretionary power”)



interventions prior to unlawful acts or at large gatherings for “security reasons” as further evidence of the decision-making aspect of this. Within each of these decisions therefore there exists an element of law-making, in which the violence exercised is in excess of “strict legality, but that will have been legitimate.”<sup>98</sup> Furthermore, Benjamin considers this amplified by modern society in which the foundation of this decision-making capacity is “formless, like its nowhere tangible, all-pervasive, ghostly presence in the life of civilized states”<sup>99</sup> giving it a particularly devastating spirit:

“And though the police may, in particulars, everywhere appear the same, it cannot finally be denied that their spirit is less devastating where they represent, in absolute monarchy, the power of a ruler in which the legislative and executive supremacy are united, than in democracies where their existence, elevated by no such relation, bears witness to the greatest conceivable degeneration of violence.”<sup>100</sup>

It is clear that for Benjamin, the modern police force, through their law-preserving violence simultaneously exercises perpetual law-making violence. However, as a result of their (the police) ubiquity, their law-making violence can manifest at any time or place. Hence, establishing the central founding point of this violence becomes impossible; instead becoming an almost omnipresent underlying foundation of the society. There are two key points at work here that converge to materialise in Benjamin’s final conclusion.

The first of these points is that rather than law-preserving and law-creating violence being two separate entities they are instead rigorously inseparable. For law-creating violence to remain powerful and capable of fulfilling its role it must evidently become law-preserving; the process of legitimising the law can never reach its end. Instead, with each act, the legitimacy upon which the violence was based is lost and we are instead left with the cyclical acts of law-making or preserving violence building off each another. This “oscillation” continues increasingly moving away from its

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<sup>98</sup> Ibid.

<sup>99</sup> Benjamin (n 83) at 287.

<sup>100</sup> Ibid.

foundation<sup>101</sup> It has been noted that for Benjamin what “manifests itself as laws inner decay is the fact that the rule of law is... established and sustained by a dimension of... violence that, as it were, holds the place of those missing foundations.”<sup>102</sup> For Benjamin the effect of law-making violence is that;

“with violence as its means, what is... established is law, but at the moment of instatement does not dismiss violence... it specifically establishes as law not an end unalloyed by violence, but one necessarily and intimately bound to it”<sup>103</sup>

This is the rotten core of law that Benjamin saw exposed through the police and capital punishment; the law represents not justice but instead a form of rule based upon “an immediate manifestation of violence.”<sup>104</sup> However, as the legitimisation is lost instead of losing power it will demand an increasingly violent defence of the law.<sup>105</sup> The “something rotten” that Benjamin identified within the law was a “continual reinforcement of the means/end relationship in which laws preservation, as an end, will legitimise any means in order that law be in fact preserved.”<sup>106</sup> It was this that Benjamin criticised in the French Revolution as the vacuum left by the *ancien regime* was replaced by a reign of terror, in which violence became a mere instrument in preserving their rule.

### Arendt’s Theory of Violence

While not explicit, it is likely that Arendt took up Benjamin’s critique in *On Violence*<sup>107</sup> having witnessed the ultimate manifestation of the reign of terror under the Nazi and Stalinist regimes. Seeking an answer to the instrumental nature of violence that Benjamin identified, Arendt sought to re-examine the relationship between power and coercive violence in order to prevent the

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<sup>101</sup> Ibid. at 300

<sup>102</sup> Eric L. Santner, *My Own Private Germany: Daniel Paul Schreber’s Secret History of Modernity* (Princeton Uni Press, 1998) 10.

<sup>103</sup> Benjamin (n 83) at 295.

<sup>104</sup> Ibid.

<sup>105</sup> Andrew Benjamin, *Working With Walter Benjamin: Recovering a Political Philosophy* (Edinburgh Uni Press, 2013) 114.

<sup>106</sup> Ibid at 114.

<sup>107</sup> Hannah Arendt *On Violence* (Harvest Books, 1970 ).

re-emergence of this kind of totalitarian regime. Arendt particularly sought to redefine power which had, largely as a result of Weber's *Politics as a Vocation*, been reduced to the power of men over men through domination.<sup>108</sup> For Arendt, to view the state as a mere manifestation of violence is to view the state as nothing more than a superstructure physically imposing down upon the populace.<sup>109</sup> Instead, she sought to redefine the terms of this debate by returning to the foundation of power in order to understand how it interacts with violence. She argued that if "the essence of power is the effectiveness of command"<sup>110</sup> then power is exemplified by "the barrel of a gun."<sup>111</sup> To believe this, however, would be to accept that the orders given by a policeman have equal legitimacy to those of a hostage taker,<sup>112</sup> and as this is not the case we must reconsider the nature of power. Tracing the route of the term "power" to Athens, where it was conceived as "the power of the people" she concluded that "in this perspective, power is dissociated with the command-obedience relationship... instead power is consensual."<sup>113</sup> For Arendt therefore, when the term power is used correctly, it represents not an act undertaken by a person or group but instead the act of being empowered, by the majority.

As such, one of the most obvious distinctions between power and coercive violence is that power is always formed through the basis of consensual support; even when seemingly small numbers of individuals institute non-violent change, it is through the tacit support of the majority. In the moment of revolution, what is revealed in the moment of "sudden dramatic breakdown" is how "civil obedience – to laws, to rulers, to institutions- is but the outward manifestation of obedience." For Arendt, even the "most despotic domination" known to man, the institution of slavery, was possible not because of the brutally violent coercion but instead rested upon the "organisation of power"<sup>114</sup> behind it, the solidarity of support for the institution. In the United

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<sup>108</sup> Beatrice Hansenn, *Critique of Violence, Between Poststructuralism and Critical Theory* (Routledge, 2000).

<sup>109</sup> Arendt (n 107) at 36.

<sup>110</sup> Ibid at 37.

<sup>111</sup> Ibid at 37.

<sup>112</sup> Ibid.

<sup>113</sup> John Scott, *Power: Key Concepts* (Polity, 2001)

<sup>114</sup> Arendt (n 107) at 36.

States, once this fell in the 'free' states, the institution of slavery could not, even with brutal coercion, survive on violence alone. Similarly, within actual warfare, Arendt draws upon the increasing effectiveness of 'guerrilla warfare' in particular noting the American experience in Vietnam, to illustrate that even overwhelmingly superior armies are ineffective against a well-supported and therefore, more powerful opponent.<sup>115</sup>

Despite this Arendt recognises the frequent interaction between the two concepts as power frequently utilises violence. However, while states often do occupy a seeming monopoly on violence, this is not a constitutive aspect of the state. Instead, this monopoly lasts only so long as the power structures necessary to implement this violence exist; once these power structures fail, if police refuse to enforce the law or army refuse to use their weapons, this monopoly is instantaneously lost. This does not mean that violence is incapable of appearing as if it "were the prerequisite of power." With the right instruments, the exercise of this violence may create the effect of power for "out of the barrel of a gun grows, the most instant and perfect obedience."<sup>116</sup> Furthermore, in "head on clashes" between pure violence and power, violence "can destroy power."<sup>117</sup> Attempted popular uprisings, resting purely on power such as Gandhi's efforts against Britain, would have been entirely futile if instead faced with "Stalin's Russia, Hitler's Germany even pre-war Japan." Instead, Arendt views the difference between violence and power as one of legitimacy. Power derives its legitimacy from the initial, act of empowering an individual or group to act on behalf of the political community, and all future claims derive from this past act. Any claims of legitimacy within violence are according to Arendt, instead misleadingly based upon a claim of justification. Violence can in certain extreme cases, self-defence and necessity, be justified but this can never equate to legitimacy and as a result, while violence may be capable of destroying power, it is "utterly incapable of creating it."<sup>118</sup>

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<sup>115</sup> Ibid at 51.

<sup>116</sup> Ibid at 53.

<sup>117</sup> Ibid at 53.

<sup>118</sup> Ibid at 56.

Furthermore, it is not simply that violence is unrelated to power; instead, she suggests that they have an axiomatic relationship. To illustrate this, Arendt examines how the concepts of violence and power are manifested at their most extreme ends. For power, this is represented by a scenario in which “all are against one” whereas the most extreme form of violence is represented by “one against all.”<sup>119</sup> Arendt suggests that if a rule of power is founded by the majority, then “rule by sheer violence comes into play where power is being lost.”<sup>120</sup> Furthermore, considering that violence is incapable of creating power, the use of violence is “self-defeating,”<sup>121</sup> destroying the basis of the power. Furthermore, for Arendt once a government has destroyed its legitimacy through the uninhibited use of violence, a new form of government replaces that lost through power:

“terror is not the same as violence, it is, rather, the form of government that comes into being when violence, having destroyed all power, does not abdicate but, on the contrary, remains in full control.”<sup>122</sup>

For Arendt however, this terror in the form of a totalitarian government<sup>123</sup> supported by violence is inherently limited. It relies upon the ability of the state to prevent any potential for power to be founded, “every kind of organised opposition must disappear.”<sup>124</sup> At its most extreme, this appears as “social atomisation,”<sup>125</sup> a state in which every person one comes into contact with has the potential to be an informant.<sup>126</sup> Within this society, power has no foothold and as such violence remains the sole form of coercion. Instead, so long as violence cannot create power, it remains instead a destructive force, the ubiquity of the informer in the modern police state marks the point when the “state begins to devour its own children.” Arendt suggests that at this moment, when yesterday’s executioner, becomes today’s victim, that violence loses its coercion, and the instruments of violence themselves begin to turn against the state. In explaining the de-Stalinisation

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<sup>119</sup> Ibid at 42.

<sup>120</sup> Ibid at 53.

<sup>121</sup> Ibid at 54.

<sup>122</sup> Ibid at 55.

<sup>123</sup> Hannah Arendt, *The Origins of Totalitarianism* (Benediction Books, 2009) Chapter 12

<sup>124</sup> Arendt (n 107) at 36.

<sup>125</sup> Ibid at 56. Arendt (n 123) at Chapter 12.

<sup>126</sup> Ibid at 55.

of Russia, Arendt cites the belief of Stalinist functionaries that they would be the next victims as a central reason for the fall of the regime,<sup>127</sup> with their belief that the regime's continuation within such a cannibalistic manner would lead to a paralysis of the whole country. In the end, therefore, "Violence appears where power is in jeopardy, but left to its own course it ends in power's disappearance."<sup>128</sup>

### 1.3 Re-Positioning the Debate on the Monopoly

It is clear through this examination that there are significant problems attempting to establish legitimacy for coercive violence. Traditional approaches that perceive it as an instrument of power remain prevalent. From this position, the ability to coerce a population through violence is primarily viewed as synonymous with power, with the sovereign therefore recognised as the entity or person that can enforce their rule over the population through physical coercion. However, these theories fail to establish a lasting basis for legitimacy. Instead, as Benjamin identified, each act of violence moves the power away from its original foundation, as the legitimacy is gradually destroyed to be replaced by pure violence. Therefore, when considering the role of coercive violence in the power structures, this work proceeds by adopting the positions of Benjamin and more explicitly Arendt that the use of coercive violence should be considered axiomatic to the establishment of legitimate power. The reliance upon physical coercion, should instead of being considered the basis of legitimate government, be seen as its "rotten core." The reliance on violence for the basis of authority establishes a "bloody power over mere life for its own sake,"<sup>129</sup> the effect of which is that which Arendt terms a regime of terror; "the form of government that comes into being when violence, having destroyed all power, does not abdicate but, on the contrary, remains in full control."<sup>130</sup> While the ability to monopolise coercive violence need not inherently be

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<sup>127</sup> Ibid at 56.

<sup>128</sup> Ibid

<sup>129</sup> Benjamin 297.

<sup>130</sup> Ibid at 55.

dangerous, the ability to exercise it against legitimate power, in the form of the will of the citizens, is the basis of an authoritarian state.

Although representing varying political spectrums, the two theorists clearly converge and in effect, at the foundation of both of these lines of thought is a fundamental belief that coercive violence represents a unique phenomenon unrelated in practice to legitimate power. While violence is capable through coercion of maintaining the obedience of the population, it is impossible for coercive violence to gain legitimacy as power. Furthermore, so long as this rule through violence cannot gain legitimacy, it is an inherently weak system and is constantly threatened by a more legitimate and powerful form of authority based upon the collective action of the population.

An analysis of both author's views of the role of police further illustrates their views on the true nature of the exercise of coercive violence, and provides a clue as to how PMSCs may fit into this conceptual framework. Both suggesting the violent function of the police goes beyond that of simply upholding the law. For Benjamin, the role is instead to reinforce the law, with each police decision, supported by the threat of coercive violence, creating a new law for that situation. Much like Benjamin, Arendt's analysis also sees the role of the police as an explicit manifestation of the relationship between violence and power. She considers this manifestation can appear on varying levels, the central role that the police hold in supporting violent institutions places them at the heart of this relationship. In particular, in a society run through violence, it is the police that acts as the instrument of violence by means of which governments are able to suppress legitimate expressions of contradictory power. In situations in which the power has become "impotent,"<sup>131</sup> the police offer a "temptation to substitute violence" where there exists a potential for loss of power.<sup>132</sup>

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<sup>131</sup> Arendt (n 107) at 54.

<sup>132</sup> Ibid at 54.

Ultimately, however, both Arendt and Benjamin discussed the role of violence with a nation-state and could not have envisaged the effects of globalisation and decreasing sphere of state influence. As a result, their work fails to explicitly consider the dissipation of coercive violence through a web of transnational corporations, private military contractors and non-state actors. Specifically, both theories were premised upon a state monopoly of coercive violence within a defined geographical territory. The globalisation of coercive violence, however, has transformed this relationship, with fundamental consequences for the relationship between coercive violence and power. Through globalisation and the development of PMSCs, coercive violence has essentially been commodified. In the phenomenon of PMSCs, we see coercive violence as a transactional commodity whose function is predicated solely upon an economic benefit. This, therefore, has the potential to remove the political function from the exercise of coercive violence and through removing this link between coercive violence and power. While both Arendt and Benjamin saw rule through violence as weak, this was due to the

The use of PMSCs clearly has the potential to undermine a central element that many of these traditional theories were predicated upon. The second transformative effect of the globalisation of coercive violence through PMSCs is the externalisation of violence through the use of contractors who are external to the polity. Specifically, traditional theories on the nature of the relationship between coercive violence and authority have been premised upon citizen armies and public policing. The externalisation of coercive violence by PMSCs fundamentally undermines this assumption. It instead provides the opportunity to import into a polity a form of coercive violence which can act with relative impunity, as it is essentially removed from the consequences that traditionally would otherwise follow.



While Arendt, partially envisaged this when predicting that “biological weapons... would enable “small groups of individuals to upset the strategic balance”<sup>133</sup> and “the amount of violence at the disposal of any given country may soon not be a reliable indication of the country’s strength... or guarantee against [its] destruction,”<sup>134</sup> she was unable to foresee the role of private, profit-driven actors within this future. When considering Marx’s view of violence, she concluded that while it was an instrument of the ruling class, it could not be the source of its power,<sup>135</sup> however, it is possible to hypothesise that PMSCs represent a vehicle capable of *de facto* blurring these lines. Returning to Benjamin’s view of the police, which he believed when controlled by a bureaucratic institution give violence an ethereal presence against which the citizens have no recourse, this effect is exacerbated by the use of PMSCs. The use of non-local contractors, not representative of or accountable to the population, can be combined with a decision-making body beyond even minimal democratic control. The effect is to prevent any recourse against pure violence, subverting legitimate power and removing any mechanisms of accountability. In these circumstances, the inherent weaknesses of a rule through violence can in effect be circumvented, and the internal strength of legitimate power negated.

Considering this, this research proceeds from the basis that PMSCs rather than just diluting the state monopoly over violence, fundamentally undermine the foundation of representative sovereignty. The ability to exercise coercive violence on a large scale without the support of a population fundamentally undermines the factors that are considered to make violence deficient in relation to power. PMSCs therefore, if not adequately controlled, can represent the vehicle through which violence and power can be blurred, undermining accountable governance and potentially establishing a foundation for effective authoritarianism.

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<sup>133</sup> Arendt (n 107) at 10.

<sup>134</sup> Ibid at 10.

<sup>135</sup> Ibid at 11.



# CHAPTER TWO

## MAINTAINING SOVEREIGN POWER: LEGITIMACY THROUGH COERCIVE VIOLENCE?

### 2 Introduction

The theoretical framework, identified within Chapter One of this study sought to identify the relationship between the ability to exercise coercive violence, and the position of sovereigns in maintaining both legitimate and tyrannical power. For this study, it is important that this framework is supported by the practical application of this theoretical understanding to factual circumstances. This section, therefore, seeks to undertake a historical examination of the position and role of coercive violence in societies and consider how this has interacted with contemporaneous political structures. The research will use this overview to trace the historical relationship between the control of coercive violence and power and analyse this through the research's conceptual framework.

Through a chronological overview of the evolution of coercive violence, and the role of private actors within this, the aim is to demonstrate that a state monopoly over coercive violence has historically been the exception rather than the rule. It will demonstrate that instead, the use of private coercive violence has historically been a prominent feature of unaccountable rulers in preserving power. The chapter will examine how the desire to monopolise coercive violence was central to the underpinning of sovereign states, signifying that the monopoly over coercive violence is a central component in the establishment of the nation-state. Finally, it considers how evolving

conceptions of statehood and society relied upon a developing democratic control over coercive violence, in transitioning away from autocratic or tyrannical rule. It identifies how the move away from autocracy, and the corresponding development of reciprocal rights and duties between states and their citizens, required an ever-increasing monopolisation of coercive violence, culminating in the development of citizen armies and national police. Through the combination of these themes, this chapter will seek to demonstrate how the ability to control coercive violence was essential for maintaining power in historical societies, while conversely uncontrolled private actors had the ability to destabilise and undermine power. Through identifying historical parallels, this chapter will provide the study with a foundation from which to examine the growth of modern PMSCs and the issues related to them.

This chapter begins by examining the organisation of coercive violence in three ancient civilizations; specifically, Pharaonic Egypt, the Greek city-states and finally the Roman Empire. These civilizations represent three of the most influential Ancient States in the historical development of Europe, with their power structures replicated throughout European society in the proceeding centuries. These civilizations represent three of the most common recurring societal structures replicated throughout history, specifically hierarchical or feudal systems, commercial city-states, and the empire. Thereafter, the section will consider the competing sovereign models of the European middle ages, in particular, the feudal approach of northern Europe and the Italian city-state models, examining how this led to the increase in private violence that prevailed in the period leading up to the Hundred Years War. Finally, it discusses both the practical and theoretical changes that occurred following this, leading to the establishment of Westphalian sovereignty, and the corresponding state monopoly on coercive violence, as the preeminent form of statehood within International Law.

## 2.1 From Ancient Societies to the Middle Ages

When considering the provision of coercive violence through a historiographical lens, it is notable that private soldiers have formed a part of society for as long as written history has existed, becoming so widespread as to appear repeatedly for example throughout Old Testament accounts. David, prior to defeating Goliath, commanded a roving group of mercenaries who had previously fought for the Philistines while on the run from Saul.<sup>136</sup> Similarly, when Pharaoh chased the Israelites out of Egypt, he did so with a force of hired foreign soldiers.<sup>137</sup>

### 2.1(1) Ancient Egypt

Ancient Egyptian society, based upon a form of divinely appointed dynasty, relied heavily upon military power and coercive violence, to maintain and thereafter expand its control with the army consequently requiring large numbers of troops.<sup>138</sup> This was achieved primarily through local “nomarchs” being required to make levies of men available to the Pharaoh.<sup>139</sup> In times of emergency a form of national conscription was implemented, with the soldiers of this responsible directly to the Pharaoh, often causing power struggles between the Pharaoh and nomarch.<sup>140</sup> The Ancient Egyptian army eventually supplemented this heavily with the employment of mercenaries from at least 2400 B.C.E., drawing particularly heavily upon the skills of the Nubian archers,<sup>141</sup> who were revered for their excellence with the bow.<sup>142</sup> While the use of hired soldiers in conducting warfare was common throughout the period, mercenaries also played an important role in the internal politics of the society, with personal authority so dominant, many early rulers found it prudent to

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<sup>136</sup> See Bible (King James Bible) 1 Samuel 27

<sup>137</sup> Bible (King James Version) Exodus 14

<sup>138</sup> For a general overview of the structure of the Egyptian military see e.g. Richard A. Gabriel, *The Great Armies of Antiquity* (Greenwood, 2002); Christelle Fischer-Bovet, *Army and Society in Ptolemaic Egypt (Armies of the Ancient World)* (Cambridge, 2014)

<sup>139</sup> See Richard A. Gabriel, *The Great Armies of Antiquity* (Praeger, 2002) 60 (The system acted much like the later Feudal system utilised throughout much of Europe.)

<sup>140</sup> Ibid at 61-3.

<sup>141</sup> Anthony J Spalinger, ‘Military Institutions and Warfare: Pharaonic’ in Alan B. Lloyd ed., *A Companion Guide to Ancient Egypt* (Wiley Blackwell, 2014). 426, 429-430.

<sup>142</sup> For a detailed account of the esteem Nubian mercenaries were held in See M. Healy, *Qadesh 1300 BC: Clash of the Warrior Kings*, (Osprey Publishing, 1993) 39.

rely upon hired foreign forces for personal protection. Following difficulties maintaining authority within the civil society, Amenhotep IV employed a force of personal bodyguards, recruited exclusively from outside of Egypt, using their threat of violence to “break the power of the priesthood and the bureaucrats.”<sup>143</sup> Beyond this, internal security was largely directed to two forms of activity;<sup>144</sup> protecting borders and sights of civic importance including palaces and royal tombs,<sup>145</sup> and maintaining civil obedience in public and ensuring payment of correct taxation.<sup>146</sup> The former of these tasks was undertaken by a paramilitary force known as the Medjay<sup>147</sup> drawn from Nubian soldiers. The latter role was undertaken by a force whose leadership were drawn exclusively from within the ruling classes, who were known primarily for their wanton brutality and corruption.<sup>148</sup>

## **2.1(2) Ancient Greece**

The deployment of coercive violence in ancient Greece shared many similarities with that of ancient Egypt, although the form of society necessitated differences. The first notable difference was that as Ancient Greece consisted of City States there was no one overall sovereign. Instead, geographically smaller and isolated trading states were governed with an element of democracy. Relations between the States resulted in regular inter-state clashes as cities fought for hegemony through controlling trade routes. The security requirements of these City States were therefore unique, with the protection of trade being of primary importance. Mercenarism became a lucrative business, in particular following 30 years of the Peloponnesian war, when many of the city-states

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<sup>143</sup> ‘The Armed Forces’ (Reshafim) <<http://www.reshafim.org.il/ad/egypt/timelines/topics/army.htm>> accessed 17 May 2015.

<sup>144</sup> Ian Shaw, ‘Police, Pharaonic Egypt’ in *The Encyclopaedia of Ancient History* (Oct 2012). (on file with author).

<sup>145</sup> Ibid (These tasks seem to have been undertaken increasingly by groups of Medjay mercenary soldiers, who also guarded temples, palaces, and cemeteries.)

<sup>146</sup> Ibid; see also Ann Rosalie David, *Handbook to Life in Ancient Egypt* (Oxford Uni Pres, 1999) 92-3 (for a description of the importance taxation played within the limited legal system).

<sup>147</sup> The use of foreign conscripts in the Medjay was so commonplace that the term became almost interchangeable with Nubian. see ‘The Police in Ancient Egypt’, (Reshafim) <[http://www.reshafim.org.il/ad/egypt/law\\_and\\_order/police.htm](http://www.reshafim.org.il/ad/egypt/law_and_order/police.htm)> accessed 17 May 2015.

<sup>148</sup> S. E. Finer, *The History of Government from the Earliest Times: Volume I: Ancient Monarchies and Empires: Ancient Monarchies and Empires* (Oxford Uni Press, Vol. 122, 1997) 187-192.

were left financially ruined and had a generation of men who had no experience beyond war.<sup>149</sup> As technological advances made the waging of war more difficult and expensive, many city-states established themselves as specialists within a particular field, with the most in-demand specialisms proving financially highly lucrative. The most successful of these built reputations that lasted for centuries, among these were Cretan slingers, known for their highly-specialised ability with the bow,<sup>150</sup> and the Greek hoplites, highly organised spearmen.<sup>151</sup> At times, the mercenary forces themselves became so powerful that during the Punic Wars, upon learning that they would not be paid correctly, Carthage's mercenaries revolted temporarily taking control of the city of Tunis.<sup>152</sup> Within these Greek city-states, the internal provision of security was representative of the democratic form of governance<sup>153</sup> with individual dispute-settlement, arbitrated by elders the primary form of legal order.<sup>154</sup> Where this failed and "crimes" did occur it was the personal responsibility of the individual, often assisted by other citizens, to arrest and punish the offender.<sup>155</sup> As such, the maintenance of social order was heavily dependent upon on tribal kinship and affiliations."<sup>156</sup> Moreover, a belief that divine collective punishment was essential to ensuring communities policed themselves.<sup>157</sup> When the first laws were written, society was so concerned with the vesting of coercive violence in one person or group directly that they used foreign slaves to undertake "police work"<sup>158</sup> with the belief that having citizens undertake the exercise of coercive

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<sup>149</sup> G. T. Griffith, *The Mercenaries of the Hellenistic World* (Cambridge Uni Press, 2014) 4; A. G. Russell, 'The Greek as a Mercenary Soldier' (1942) 11(33) *Greece & Rome* 103, 105 <[http://www2.warwick.ac.uk/fac/arts/classics/students/modules/warfare/essays/the\\_greek\\_as\\_a\\_mercenary\\_soldier.pdf](http://www2.warwick.ac.uk/fac/arts/classics/students/modules/warfare/essays/the_greek_as_a_mercenary_soldier.pdf)> accessed 9 May 2016.

<sup>150</sup> *Ibid* at 107.

<sup>151</sup> Justin D. Lyons, *Alexander the Great and Hernán Cortés: Ambiguous Legacies of Leadership* (Lexington Books, 2015) 21.

<sup>152</sup> John Francis Lazenby, *The First Punic War: A Military History*; John Francis Lazenby, *Hannibal's War: A Military History of the Second Punic War* (Oxford Uni Press, 1998) 20-1.

<sup>153</sup> L. Foxhall & A. D. E. Lewis, *Greek Law in Its Political Setting: Justifications Not Justice* (Clarendon, 1996) 57 (From the beginning of this century legal historians... have emphasized that modern legal categories are not adequate tools with which to understand ancient Greek legal sources.")

<sup>154</sup> *Ibid* at 59.

<sup>155</sup> *Ibid*.

<sup>156</sup> 'History of Police' in Larry E. Sullivan, Marie Simonetta Rosen, Dorothy Schulz & M.R. Haberfield, eds., *Encyclopaedia of Law Enforcement* (Sage Publications, 2010) 1090.

<sup>157</sup> Christopher Fuhrmann, *Policing the Roman Empire: Soldiers, Administration, and Public Order* (Oxford University Press, 2011) 45.

<sup>158</sup> History of Police (n 156) at 1090.

violence over their fellow citizens was potentially dangerous, because it vested them with the power of the state.<sup>159</sup>

### **2.1(3) The Roman Empire**

The use of coercive force within ancient Rome was considerably more developed, centralised and authoritative than in either Egypt or Greece providing one of the earliest true examples of a state security apparatus. There was a high degree of centralisation of power within the Roman Empire, supported largely by an authoritarian structure in place to prevent unrest throughout the Empire. The use of highly regimented citizen armies and security throughout the Empire is often considered indicative of this authoritative system.

Despite the reputation for central power, and the popular belief that Rome existed solely upon a citizen army, in reality the Roman Empire relied heavily upon mercenaries throughout much of its 1000-year history. In particular, the lack of a trained cavalry meant that the early Roman Empire, after suffering a devastating loss at the Battle of Adrianople against Gothic cavalry, began to rely heavily upon Germanic mercenaries,<sup>160</sup> with these eventually outnumbering even Roman soldiers.<sup>161</sup> The reliance upon Germanic mercenaries, funded by victory loot, meant that once the Empire stopped expanding, unrest crept into their ranks eventually playing a central role in the fall of the Roman bureaucracy as the Gothic cavalry, who had for a long time been employed by the Romans, instead invaded Rome.<sup>162</sup>

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<sup>159</sup> Ibid.

<sup>160</sup> See David A. Latzko, 'The Market for Mercenaries' (Paper Presentation) <<http://www.personal.psu.edu/~dxl31/research/presentations/mercenary.html>> accessed 5 March 2015; see also 'The Roman Army' (The Roman Empire) <<http://www.roman-empire.net/army/army.html>> accessed 5 March 2015 (. In the six years after Adrianople, the Roman empire hired almost 40,000 German heavy cavalry to complement their traditional infantry)

<sup>161</sup> Singer (n 18) at 21; Hans Delbrück, *History of the Art of War: Within the Framework of Political History*, (Praeger, 1975).

<sup>162</sup> Bryan Ward-Perkins, *The Fall of Rome: And the End of Civilization* (Oxford Uni Press, 2006).



Beyond simply employing mercenaries for the external expansion of the Empire, the early Roman Emperors also relied upon foreign mercenaries for personal protection.<sup>163</sup> Having seen the growth in influence of the Praetorian guards, to the point that they were regularly responsible for deposing and choosing replacement Emperors, several Emperors supplemented these with the Imperial German Bodyguards<sup>164</sup> who were chosen primarily for the fact that they bore no political allegiance to any particular province of the Roman Empire. They continued in the form of the Varangian Guard in the Byzantine Empire until the late 14<sup>th</sup> century.

For the average Roman citizen, security was a largely personal affair with wealthy individuals relying heavily upon private bodyguards, often gladiators or even slaves, to protect themselves and their property.<sup>165</sup> However, as the authoritarian nature of the Emperors increased Rome was considered to have employed one of the first public security forces attributed to the Roman Emperor Augustus, through the introduction of Roman vigils.<sup>166</sup> Established following the assassination of Julius Caesar, around 27 B.C., these were an effort to bring Rome under a centralised control. Included within this were an elite unit, called the Praetorian Guard, whose sole role was to protect the Emperor from assassination.<sup>167</sup> Studies suggest up to 9000 men were employed at each time, with around 1/3 of these operating undercover, being housed among the civilian residents to report upon them. Urban Cohorts, consisting of men not good enough to get into the Praetorian Guard, acted as local police, arresting lawbreakers, and eventually gaining the name of the *vigiles* (watchmen) of Rome.<sup>168</sup> Outside of Rome, the rule of law was enforced on a more stringent basis through military rule using Roman Guards. Legions were employed to maintain law and order, while *auxilia* (non-roman citizens) were allowed to undertake similar roles

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<sup>163</sup> Pat Southern, *The Roman Army: A Social and Institutional History* (Oxford Uni Press, 2007) 173-4; *see also* The Roman Army (The Roman Empire) <<http://www.roman-empire.net/army/army.html>> accessed 5 March 2015.

<sup>164</sup> *Ibid.*

<sup>165</sup> Edward J. Maggio, *Private Security in the 21st Century: Concepts and Applications* (Jones & Barret, 2008) 4

<sup>166</sup> *Ibid* at 4; Edward Echols, 'The Roman City Police: Origin and Development' (1958) 53(8) *The Classical Journal*.

<sup>167</sup> *Ibid*; *see also* Southern (n 163) at 116-119; Edward Echols, 'The Roman City Police: Origin and Development' 1958 (53(8) *The Classics Journal* 377.

<sup>168</sup> *Ibid*; John S. Dempsey & Linda S. Forst, *An Introduction to Policing* (Cengage Learning, 2009) 4.

only outside of their home regions.<sup>169</sup> In Alexandria, 18,000 heavy infantry were available to the Roman Governor to enforce the governor's rules.<sup>170</sup> In effect, outside of Rome, citizens of the Roman Empire lived under a constant state of martial law, with the military responsible for preventing crime and punishing criminals.<sup>171</sup>

## **2.1(4) Lessons of Ancient Society**

Early societies, therefore, present a series of notable trends in discovering the relationship between coercive violence and power. The authoritarian nature of both the Egyptian and late Roman societies coincided with the use of a private external force in order to maintain control. In both of these societies, these external actors were relied upon as the local population were considered dangerous to the sovereign's power. Ancient Rome is particularly instructive, within Rome German guards were employed to protect the Emperor, while in the Empire Roman citizens were considered suitable to compel the local population's obedience. The reliance upon external actors to violently enforce the submission of their population indicates that within this societies power was applied with force from the top down. In effect, both Egypt and the Roman Empire were controlled through tyranny. In comparison, Greece, which retained an early form of democratic and accountable leadership, sought to limit the influence of coercive violence within the state, with popular will taking precedence over coercion. Externally, there appears to be similarities between all three societies including a heavy reliance on mercenaries in both defence against external enemies and in geographical expansion . However, there remains a slight difference between Greece and Roma/Egypt. Both Rome and Egypt attempted to maintain a citizen army. For the Egyptians, this was based upon a hierarchical duty, though ultimately this proved insufficient as personal loyalty

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<sup>169</sup> See Michael P. Spiedel, 'Raising New Units for the Late Roman Army: Auxilia Palatina' (1996) 50 *Dumbarton Oaks Papers* 163; G.E.F Chilver, 'Review: Roman Auxilia' (1955) 5(2) *The Classical Review* 189, 189 (the dispatch of troops to areas far from their homes again becomes a noticeable phenomena in the second century); Jonathon McLaughlin, 'The Transformation of the Roman Auxiliary Soldier in Thought and Practice' (Doctoral Thesis, 2015) <[https://deepblue.lib.umich.edu/bitstream/handle/2027.42/111635/jjmcl\\_1.pdf?sequence=1&isAllowed=y](https://deepblue.lib.umich.edu/bitstream/handle/2027.42/111635/jjmcl_1.pdf?sequence=1&isAllowed=y)> accessed 19 June 2017 149 (discussing the make-up of Auxilia groups and noting that even where there was a similar cultural background, it was ensured that the soldiers and civilians would not meet).

<sup>170</sup> R.W. Davies, 'Police Work in Roman Times' (1968) 18(10) *History Today* <<http://www.historytoday.com/rw-davies/police-work-roman-times>> accessed 12 May 2016.

<sup>171</sup> See Southern (n 163) at 76-80.

was insufficient to maintain allegiance. In Rome, an early form of citizenship was used to justify the need to serve one's country. Whilst this proved highly successful with citizens from within Rome, the citizens of the Empire felt no such civic duty, and at this point the military was supplemented by individuals serving for financial gain. In comparison, Ancient Greece saw warfare largely as a commercial undertaking and as a result of the use of mercenaries, who were better equipped to win battles, was the norm.

## **2.2 The Middle Ages**

Following the fall of the Roman Empire, European States moved to one of two social structures. The coastal and trading regions of Italy moved towards a city-state system, with City Councils of the wealthiest businessmen *de facto* controlling the city. In comparison, the largely agricultural based regions of France and England moved towards a feudal system with monarchs, under papal authority, representing the head of the realm, supported by Lords and below them Knights.

### **2.2(1) The Feudal System**

The provision of coercive violence within the Feudal system largely drew upon the experiences of the Roman Empire, with particular regard to the difficulty establishing authority over large geographical areas. Partly due to the experience of the late years of the Roman Empire, the Feudal system was originally based around the concept that citizens would give a certain amount of time to the military operations of their Lords in exchange for personal protection and the holding of land, which would then be subdivided again between their subjects. The hierarchical pyramid system was considered effective because each level was expected to ensure the loyalty of those

below them. Ultimately, however, the system proved to be ineffective,<sup>172</sup> and feudal lords began to rely heavily once again upon mercenaries to fill the specialist roles within their military.<sup>173</sup> In particular, the ruler could rely upon their military only for certain periods and, due to these limited periods of military service, the soldiers would usually be of an inferior quality to professional soldiers.<sup>174</sup> Furthermore, during the Hundred Year War (1337-1453), European rulers frequently dropped into and back out of war and were unable to maintain the standing forces required to conduct warfare on the scale expected.<sup>175</sup> Simultaneously, frequent warfare left the land and the ruling class economically ruined while during times of peace rulers found the maintenance of order challenged by large numbers of men returning home to difficult economic situations.<sup>176</sup> With no home or job to go home to, the soldiers banded together in order to sell their military services for the highest price, and when not in service provide each other with communal protection. These groups of soldiers became known as Companies, or specifically Free Companies, in response to their opposition to the feudal society.<sup>177</sup> The feudal system expected all people to be tied to a hierarchical order; the Free Companies sought to establish themselves outside of this system, eventually playing a central role in undermining the whole system. In particular, these Free Companies saw no reason to respect the position of nobility and even questioned the position of the church.<sup>178</sup> These Free Companies, posed a direct threat to the authority of feudal rulers, as when they were employed to wage war they maintained a livelihood by pillaging local communities who refused to pay for their protection.

Alongside this threat to the established political order, the Free Companies were directly responsible for ensuring Europe remained in a perpetual state of war for centuries. The level of

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<sup>172</sup> John France, *Mercenaries and Paid Men: The Mercenary Identity in the Middle Ages* (Brill, 2008) 55. Alan Axelrod, *Mercenaries: A Guide to Private Armies and Private Military Companies* (QC Press, 2014) Chapter Two; Mary Kaldor, *New and Old Wars: Organised Violence in a Global Era* (Stanford Uni Press, 1999) 31-37.

<sup>173</sup> Sarah Percy, *Mercenaries: A History of a Norm in International Relations* (Oxford, 2007) 79-83.

<sup>174</sup> Axelrod (n 172) at 36.

<sup>175</sup> Percy (n 173).

<sup>176</sup> *Ibid*; Singer (n 18) at 23-6.

<sup>177</sup> Singer (n 18) at 24; Maggio (n 165) at 9.

<sup>178</sup> Percy (n 173) at 81 (“Pope Urban V was instrumental in the fourteenth-century attempts to regain control over the mercenary problem”).

destruction they left ensured it was more expedient for rulers to maintain their employment as a permanence presence than risk the Companies destroying their populace.<sup>179</sup> As further protection, it was considered prudent to ensure that the Free Companies employed by a ruler were given missions as far from that ruler's homeland as possible.<sup>180</sup> France, in particular, was ravaged, as noblemen sent these mercenaries to attack far away rivals for the simple reason of ensuring they were not around to cause destruction on their soil. This destruction was compounded by the manner in which most of these battles were fought. Due to the purely economic nature of the Free Companies, they tended to see all out battles as a waste and unnecessary risk. The leaders had invested personally in training and arming their groups and were averse to risking the potential loss of life. Furthermore, the Companies' reputation was built upon their successes, and a major loss in battle could undermine the fear they used to drum up business and extort the local population. Instead, therefore, these battles concentrated on small and tactical counterattacks, often focusing primarily on taking prisoners to be ransomed back for further economic profit. It was this method of warfare that led Machiavelli, when the Free Companies crossed the Alps into Renaissance Italy, to describe mercenary fighting as "bloodless battles".<sup>181</sup> Despite this, when required the Free Companies were able to call upon huge quantities of resources. When the King of France, unable to cope with the near constant destruction these Free Companies caused, raised the entire French feudal army, the Free Companies formed a temporary alliance routing the French army at the Battle of Brignais in 1362.<sup>182</sup> The French king eventually decided the only way to prevent the Free Companies entirely destroying the nation was to employ them, waging campaigns in Spain and Hungary "just to find their private units some employment and get them out of the country"<sup>183</sup> Eventually, France found relative peace only when the Free Companies discovered that the City States of Renaissance Italy offered a better business environment. Once these Companies had left,

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<sup>179</sup> W. Caferro, 'Mercenaries and Military Expenditure: The Costs of Undeclared Warfare in XIVth Century Siena' (1994) 23(2) *Journal of European Economic History* 219.

<sup>180</sup> McFate (n 17) at 45; Percy (n 173) at 82.

<sup>181</sup> Nicolo Machiavelli, *The Prince* (first published 1532, Penguin Classics, 2003) at Chapter XII "How Many Kinds Of *Soldiery There Are, And Concerning Mercenaries*"

<sup>182</sup> Norman Housley, 'The Mercenary Companies, The Papacy, And The Crusades, 1356-1378' (1982) 38 *Traditio* 253.

<sup>183</sup> Singer (n 18) at 25.

King Charles VII imposed a standing tax on all merchants, using the proceeds to keep rehire several of the larger Companies permanently.<sup>184</sup> With this, the King Charles VII of France created the first professional, standing army of the modern era, made almost entirely of Scots and Germans.<sup>185</sup>

While mercenaries played a central role in the external security of the feudal state, internal security was more community-based. Attempts at policing sought to replicate the hierarchical feudal approach to military service, being based on community pledges of individuals, with each feudal community expected to aid neighbours and protect their villages from crime.<sup>186</sup> In the thirteenth century, a watch system was developed to protect property in larger towns and cities. Watchmen patrolled at night and helped protect against robberies, disturbances and fire reporting to the area constable. In England this was formalised in 1326, when justices of the peace were first appointed to assist the sheriff in controlling the county and maintain peace.<sup>187</sup> In France, a similar system was supplemented by a military police, whose role it was to ensure that the rural areas remained peaceful and were safe from foreign attack. This force, the *Maréchaussée*, was formally a branch of the French national army, but operated outside of the Feudal hierarchy and were employed directly by the King of France to enforce order and ensure the safety of the highways.<sup>188</sup>

In Britain, the importance of the Monarch in the rationale for the establishment and implementation of laws eventually came to be signified by the establishment of the “kings peace,” which each member of the community was considered responsible for keeping.<sup>189</sup> Disobedience and criminality were, therefore, seen as a direct affront to the King, whose position had been anointed by God. Thus, the punishment was seen not only within the specific circumstances it

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<sup>184</sup> Percy (n 173) at 83.

<sup>185</sup> Singer (n 18) at 26.

<sup>186</sup> Dempsey & Forst (n 168) at 5; Maggio (n 165) at 6-8; For context See Helen M. Jewell, *English Local Administration in the Middle Ages* (David & Charles. 1972)

<sup>187</sup> Dempsey & Forst (n 168) at 5; Maggio (n 165) at 6-8.

<sup>188</sup> Charles Reith, ‘Comparative Systems of Law-Enforcement’ (1945) 31 Transactions of the Grotius Society 150, 154.

<sup>189</sup> J. L. Lyman, ‘The Metropolitan Police Act of 1829’ (1964) 55 Journal of Criminal Law, Criminology & Police Science 141, 141.

occurred, but also with the potential to undermine the civic and religious system more generally. These punishments, which were exceptionally harsh and intended primarily to warn the population, were considered to have gained their legitimacy through the Church.

## **2.2(2) The City States**

Unlike the Feudalist systems of the North, the City States in Italy did not view the control over coercive violence as an essential aspect of their State function. Instead, with the increasing economic prosperity of many of these States, it became unpopular to expect merchants and bankers to give their own time to military endeavours. It was this growing economic independence that led the Italian City States to move away from citizen armies to *Condotta* or contract armies.<sup>190</sup> In this system, business guilds represented states and their clients would contract out the defence to private units, leaving the merchants and bankers free to continue their trade. While geographically small, their role as merchants rather than agrarian also meant that the City States were considerably more wealthy, and with capital not tied to lands, than the feudal lords or France. As a result, while they had first formed in rural France, Italy's City States provided the perfect ground for the Free Companies to expand.

However, while they often provided a desired service to the City States, when they could not find employment by the States, the City States limited geographic size meant they could call upon only small citizen defence forces and the Free Companies took advantage by extracting premium "insurance" money.<sup>191</sup> Over three days in 1375 alone, one Free Company was able to extract 35,500 Florins (more than the operating capital of Francisco Dantini, a famous merchant of

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<sup>190</sup> Percy (n 173) at 85-6; Singer (n 18) at 23.

<sup>191</sup> McFate (n 17) at 54.

the time.<sup>192</sup>) On one occasion, a city was extorted for so much they could not afford to pay in one lump sum and instead gave over hostages as a form of collateral.<sup>193</sup>

With time, the Free Companies came to represent an integral part of Italian culture, moving away from the roving hordes into legitimate legal entities. The agreements between the companies and their employers became increasingly complex documents, with one contract between a Company and the City of Florence having more than 230 individual signatories. These contracts, or *Condotta*, eventually gave rise to the new term for these organised and legal mercenaries, the *Condottieri* (literally the Contractors.)<sup>194</sup> Among these contractors were groups whose success made them equivalent to some of the largest armies of the day, and with it their captains held a privileged position within society. The White Company, immortalised by Sir Arthur Conan Doyle, was presided over by Sir John Hawkwood and could call upon over 8,000 men, including 3,500 cavalry.<sup>195</sup>

This approach to the private provision of coercive violence was similarly utilised for the internal security of the City States, with the richest of the trading city-states particularly keen to establish more effective forms of policing and enforcing local laws. As such, many Italian City States operated a form of security called the *Podesta* which, when communities were suffering either political or criminal difficulties, an external judicial organisation, complete with police, would be hired to temporarily quell the difficulties. Romagna, a town of only a few thousand inhabitants, hired such a *Podesta* around 1300 AD. The lease included the services of one *Podesta*, one knight, three trained judges, and ten policemen whose “principal objectives were urban peace and justice for all. Although his policemen were ordinary soldiers, his judges theoretically had five

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<sup>192</sup> Caferro (n 179); Hannah Tonkin, *State Control over Private Military and Security Companies in Armed Conflict* (Cambridge Uni Press, 2013) 9.

<sup>193</sup> Caferro (n 179) at 137.

<sup>194</sup> Percy (n 173) at 75.

<sup>195</sup> David Murphy, *Condottiere 1300-1500: Infamous Medieval Mercenaries* (Osprey, 2007) 126.



consecutive years of legal training at Bologna or at some other renowned university.”<sup>196</sup> In bigger Cities the Podesta could call upon significantly bigger police forces, with Florence maintaining a force of 300 for its Podesta. A key feature of the Podesta’s justice during the period was the harsh and disproportionate sentences the individuals judged guilty of committing criminal acts were expected to receive, most commonly implemented in public.<sup>197</sup>

Ultimately, while these policing cooperatives were able to deal with low-level local criminals they were largely powerless against the more serious threats, and incapable of implementing law and order in the manner expected by the wealthy traders. These businessmen, though neither nobility nor elected, maintained *de facto* control over their communities, with many of the great City States making “the protection of their merchants a matter of policy.”<sup>198</sup> As such, “[L]ocal government, always limited in its resources, could never fully replace private justice.”<sup>199</sup> It was the security and protection of these merchants and traders that first created the demand for private security that the Free Companies, and later the Condottieri, would be more than happy to fill. As discussed, however, the import of this form of private security was to turn the City States into a primary target for extortion, or even rival attacks. With time, “[S]uppression of private warfare constituted the greatest single problem faced by the community in its effort to attain a new, more ordered and more stable form of political life.”<sup>200</sup>

### **2.1(3) Private Violence Takes Control Across Europe**

Regardless of the competing forms of state system, however the majority of the medieval period was characterised by widespread private violence and organised criminal gangs, in the shape

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<sup>196</sup> Peter Riesenbergs, ‘Violence, Social Control and Community Planning in Medieval Italian City States’ (1975) Washington Uni. Law Quarterly 723, 727.

<sup>197</sup> Ibid at 725.

<sup>198</sup> N.J.G. Pounds, *An Economic History of Medieval Europe* (Routledge, 1994) 355; *see also* Riesenbergs, *supra* note 61, at 729-31 (for a general discussion of the importance of merchants to the economies of individual City States.)

<sup>199</sup> Riesenbergs, *supra* note 61, at 728.

<sup>200</sup> Ibid at 728.

of the Free Companies and Condottieri. Local communities were often forced to pay sums of protection money to unemployed mercenary groups to prevent them from looting and pillaging. Even with this, however, roaming groups of Free Companies plagued the security of the medieval state at both a local and state level, interrupting trade routes and swapping allegiances to rival Nobles or City States. The growth of private violence eventually reached the point of entirely surpassing State violence, with mercenaries not only supplementing but entirely replacing state armies and creating a Golden Age of Mercenaries. Two innovations within the market for violence were largely responsible for this.

The first of these was a shift in tactics that placed two competing forms of infantrymen at the pinnacle of warfare. This began with the burgeoning reputation of the Swiss army following their surprising victory over the Austrian Habsburgs, at Sempach (1368) and Nafels (1388), with just 1,600 Swiss defeating over 6,000 Austrian.<sup>201</sup> Their revolutionary use of close square formations and pikemen was able to repeatedly defeat heavily armed cavalry formations that had previously been considered the strongest battlefield units.<sup>202</sup> With this reputation, the Swiss were able to command the highest fees in Europe and as such, were employed extensively throughout Italy, France and Germany, with contracts drawn directly with the leader of the Canton from which the group originated. Amongst the biggest of these contracts was a continuing relationship with the House of Valois, protecting the French crown. A similar relationship existed between the Swiss Guards and the Vatican City, a role they continue symbolically to date.<sup>203</sup>

Eventually, the Swiss lost their monopoly over the pike formation, as Austrian and German soldiers from similar mountainous regions as the Swiss, believed they could cash in on the success

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<sup>201</sup> Singer (n 18) at 26.

<sup>202</sup> Ibid at 26-8; David Parrott, *The Business of War. Military Enterprise and Military Revolution in Early Modern Europe* (Cambridge Uni. Press, 2012) 46-8.

<sup>203</sup> Singer (n 18) at 27.

of the Swiss.<sup>204</sup> The Landsknecht, as they became known, copied the tactics and style of the Swiss but were not bound by the same loyalty and geographical rigidness. The Landsknecht quickly grew in popularity across Europe as a mercenary force and, due to their flexibility, with the invention of firearms, the Landsknecht soon became the most powerful mercenary force, cementing this status at the battle of Bicocca.<sup>205</sup>

The turn of the Sixteenth Century saw the final innovation in the “golden era of mercenaries” with the final move from military business to the business of military. According to the historian Michael Howard, “war became the biggest industry in Europe.”<sup>206</sup> In particular, having seen the success of the Swiss Cantons and Landsknechts, many wealthy businessmen saw an opportunity to invest their wealth, and establish their own Free Companies to lease out themselves; coining the term *entrepreneurs*.<sup>207</sup> One of the first of these entrepreneurs was Wallenstein, then one of the richest men in the Habsburg empire, which following the reformation and protestant revolt was teetering on the brink of collapse. As such Wallenstein proposed that he would field a force of fifty thousand men at his own personal cost, who rather than fighting as part of the Habsburg army would be lead separately by Wallenstein himself, with final say over all internal matters.<sup>208</sup> In return for targeting enemies of the Habsburgs, Wallenstein would be able to keep the entirety of any war bounty made, paying the soldiers, and keeping whatever else as profit.<sup>209</sup> Wallenstein thereafter used his experience as a businessman to revolutionise the manner in which armies were constructed, setting up armament factories to control the supply of weapons, and introducing rigid training. When Ferdinand announced the Edict of Restitution in 1629, Wallenstein was able to call upon over 130,000 soldiers to enforce the decision on Ferdinand’s behalf.<sup>210</sup> Wallenstein’s approach to

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<sup>204</sup> Ibid; *see also* Gilbert John Millar, ‘The Landsknecht: His Recruitment and Organization, With Some Reference to the Reign of Henry VIII’ (1971) 35(3) *Military Affairs* 95.

<sup>205</sup> McFate (n 17) at 50.

<sup>206</sup> Singer (n 18) at 28.

<sup>207</sup> Singer (n 18) at 27.

<sup>208</sup> Parrot (n 202).

<sup>209</sup> Singer (n 18) at 27.

<sup>210</sup> Peter Paret, *Understanding War: Essays on Clausewitz and the History of Military Power* (Princeton Uni Press, 1993)

financing armies, with the money coming out of the spoils of war, soon caught on amongst many other wealthy and entrepreneurial individuals of the time.<sup>211</sup> It has been suggested that the military entrepreneur offered a middle ground for rulers combining aspects of the condottieri style contractor, and a civilian standing army; to represent a “hybrid of both”<sup>212</sup>. Specifically, the entrepreneurs tended to be more loyal to the parties they represented, with their interests often being closely interlinked with those of their employer. As such, they tended to work closely with one group for extended periods, rarely switching sides when the money was better as the condottieri had often been accused of. As a result, however, they relied heavily upon their individual employer, continually undertaking military campaigns with the constant requirement of war spoils, ensuring that there was an almost endless supply of increasingly violent conflict.

Although ostensibly a war between Catholic and Protestants, it was the finance and motivation of these military entrepreneurs that led the Thirty Years War to become one of the most deadly and destructive wars in European history. As more nations and rulers joined the war, almost every side was made up of a majority of mercenaries. Among the most remarkable feats of military entrepreneurs of the day was Lous de Geer, who sourced and funded a complete navy for the Swedish when they sought to enter the fray, whilst even the revolutionary army of Gustavus Adolphus of Sweden consisted of over 90% hired soldiers.<sup>213</sup> In total, the soldiers of the Thirty Years War represented almost every corner of Europe; Scotland alone contributed 50,000 troops, while the Ottomans leased 60,000 cavalry in exchange for a tribute to the Sultan.<sup>214</sup> Eventually, however, the toll of such large numbers of troops became too much. If there was no fighting available, the local populations found themselves being destroyed by the forces intended to protect them. The Elector of Brandenburg at the time went so far as to write, “our military forces have cost us a great deal and done much wanton damage. The enemy could not have done worse.”<sup>215</sup> It was

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<sup>211</sup> Parrot (n 202).

<sup>212</sup> McFate (n 17) at 30.

<sup>213</sup> Sean McFate, ‘The Evolution of Private Force’ in Jackim Berndtsson & Christopher Kinsey (eds) *The Routledge Research Companion to Security Outsourcing* (Routledge, 2016) 67-9.

<sup>214</sup> Ibid.

<sup>215</sup> Sidney B Fay, ‘The Beginnings of the Standing Army in Prussia’ (1917) 22(4) *American Historical Review* 22.

this general demoralisation that gave the eventual peace treaty the designation *The Peace of Exhaustion* although as far as its relation to private contractors is concerned, it its official title as The Treat of Westphalia, and specifically its namesake theory of sovereignty that provides the basis for the modern conception of the state monopoly on violence.

As the chapter above makes clear, for the greater part of European history the concept of private violence has been the rule, rather than the exception. Within the vast majority of forms of states and sovereigns, the ability to call upon private violence was not only a positive but more fundamentally a necessity for maintaining order. The reasons for this would often vary from state to state. Within types of personal rule, including monarchies and divine dynasties, this fundamentally came down to the fact that the use of force was primarily seen as the private preserve of individual rulers to maintain or expand their power. While the use of local forces was common, relying upon them was both very expensive and a significant risk. In particular, the devolution of local power to lords, or their regional equivalents, meant that the local power structures did little to encourage or foster loyalty, with relationships primarily operating at a local, rather than a larger state, level. In comparison, many states based primarily on trading including city-states considered it more practical and efficient to contract out the exercise of violence within a state. Despite this, over the hundred years between the mid 17<sup>th</sup> and mid 18<sup>th</sup> century, there was a foundational shift towards a belief that the state alone should hold control over the monopoly on coercive violence.

## **2.3 The Growth of the State Monopoly over Coercive Violence**

For much of human history, coercive violence has been a tool wielded by rulers to maintain authority and ensure obedience by their citizens. Even a brief examination of European history comprehensively demonstrates that for millennia, societies were overwhelmingly formed and maintained through the tyrannical control of coercive violence. Sovereigns, regardless of their form, relied upon and exploited coercive violence in order to sustain their power at the expense of their

subjects. More significantly, to do so, these sovereigns came to rely upon private, and often external, actors to exercise coercive violence on their behalf. The use of mercenaries was pervasive, both for protecting their territory from external threats, but more notably for enforcing order among their own subjects. It is remarkable therefore that within 200 years the two most powerful European Nations would voluntarily enact laws prohibiting the use of mercenaries<sup>216</sup> and just a century later the democratic control over coercive violence would become accepted as a necessity within international law.<sup>217</sup> Without this transformation, this study would be redundant. It is imperative, therefore, that if this study is to understand the implications of the increasing prevalence of private violence, it must understand this transformation. Therefore, this section will attempt to trace the growth of the state monopoly over coercive violence and the corresponding decline of private violence that places PMSCs in the lacuna they currently occupy. Three factors within this transformation are particularly notable in reference to the study of PMSCs: the move towards citizen armies, the democratic control over coercive violence and the move towards a state responsibility for their citizen's safety. While this section will seek to consider these factors separately, in practice many of the influences behind these changes are common to more than one and tracing this evolution will unfortunately therefore not be a linear or chronologically simple task.

Crucial to positioning the transformation within coercive violence was the emergence of the sovereign state as the pre-eminent form of institution within the political establishment. The starting point for this examination, therefore, must be the Peace of Westphalia, which when signed to end the Thirty Years War gave rise to the conception of the Westphalian state with the sovereignty of each nation paramount. These series of treaties, forming the Peace of Westphalia,

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<sup>216</sup> The French National Assembly banned the use of mercenaries in 1790 see Erika Calazans, *Private Military and Security Companies: The Implications Under International Law for Doing Business in War* (Cambridge Scholars, 2016), Britain prohibited the use of mercenaries through the Foreign Enlistment Act of 1819, see Nir Arielli & Gabriela A Frei, 'The Foreign Enlistment Act, International Law, and British Politics, 1819-2014' (2015) 38(4) *The Int'l History Rev.* 636, 639-45.

<sup>217</sup> See e.g. Council of Europe, European Commission for Democracy Through Law, Study Paper 389/2007 "Study on the Democratic Control of Armed Forces; Why Control Armed Forces" <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-DEM\(2007\)003-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-DEM(2007)003-e)> accessed 13 September, 2016 (it is also useful to note that the Geneva Centre for the Democratic Control of Armed Forces is supported by institutions including the United Nations, European Union and African Union among others).

were essentially an attempt at “seeking a response to the religious conflict of Europe”<sup>218</sup> through recognising a “European body politic” consisting of “decentralised sovereignty dominated bod[ies].”<sup>219</sup> This approach, influenced heavily by the theories espoused by Grotius regarding the self-determination and independence of states, established the framework for modern international law based upon the equal sovereignty of nations.<sup>220</sup> The effect of this approach was to establish a system of sovereign states with the right of each nation to control its own internal affairs, without external interference or intervention a central prerequisite to the state monopolizing force. It was immediately following the Peace of Westphalia that a European state first established a standing national army with the issuing of a decree to retain fifty-two regiments of the Habsburg Empire’s military<sup>221</sup> for the Holy Roman Empire. This army, funded by a direct taxation upon the Estates and commanded personally by the Habsburg monarchy through a Council hand-picked by the sitting Monarch,<sup>222</sup> became the model of a national army. Similarly, the Prussian Army retained over 4,000 permanent professional soldiers following the Peace of Westphalia,<sup>223</sup> while the first French national military was formed in 1659 with the incorporation of permanent infantry units alongside the rapid expansion of the national *Gendarmerie* from 1667 onwards.<sup>224</sup> England, which had not been a party to much of the Thirty Years War due to its own Civil War, for the first time in its history saw the establishment of the New Model Army under Oliver Cromwell in 1645, as a fully professional and permanent army, not tied to Feudal lands and obligations.<sup>225</sup>

Despite the rapid incorporation of these state armies however, the effect of Westphalia is regularly overstated. The suggestion that the conclusion of the Treaty meant “sovereignty won out

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<sup>218</sup> Nagan & Haddad (n 46) at 446.

<sup>219</sup> Ibid.

<sup>220</sup> John T. Parry, ‘What is The Grotian Tradition in International Law’ (1946) 23 *British Year Book of International Law*. 1; Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (LSE Monographs in International. Jul 2002).

<sup>221</sup> Laurence Cole, *Military Culture and Popular Patriotism in Late Imperial Austria* (Oxford Uni Press, 2014) 23.

<sup>222</sup> Ibid at 24.

<sup>223</sup> Fay (n 215)

<sup>224</sup> McFate (n 17) at 32; see generally Mears JA, “The Thirty Years' War, the ‘General Crisis,’ and the Origins of a Standing Professional Army in the Habsburg Monarchy” (1988) 21 *Central European History* 122.

<sup>225</sup> Deborah Avant, ‘From Mercenary to Citizen Armies: Explaining Change in the Practice of War’ (2000) 54(1) *International Organisation* 41, 57.

against the empire”<sup>226</sup> or the “Treaty of Westphalia of 1648 officially sanctioned [the] state’s monopoly on the legitimate use of force”<sup>227</sup> exaggerate the impact of the *Treaty* significantly. Instead, the monopolisation of coercive violence within states was slow and gradual, with the effects being seen in a varying degrees depending upon the unique characteristics of each state. Furthermore, regardless of the rationale for the use of private force preceding the Thirty Years War, it remained at the time of the *Treaty* one of the most lucrative businesses in Europe.

Military entrepreneurs, who stood to lose heavily from the downsizing of mercenary warfare exercised strong political influence and often a financial interdependence with many rulers. Rather than directly establishing citizen armies, or even prohibiting the employment of mercenaries, following the *Treaty* states increasingly regulated mercenary activity by incorporating them into their standing armies. Mercenaries remained a principal component of the armies of most European states with hired foreign forces forming up to 60 percent of all infantry and cavalry.”<sup>228</sup> The principal change, therefore, was not a move away from mercenaries per se, but instead the removal of their purely financial motives as “[t]he mercenaries remaining were no longer independent and were generally hired out from one state to another in situations of tight control.”<sup>229</sup> It is clear therefore that while the Peace of Westphalia was influential in establishing the foundation of the state monopoly over coercive violence, while sovereign’s remained absolute the use of private violence continued to be a norm. The provision of private coercive violence remained an important and lucrative industry.<sup>230</sup> Tracing the origins of the state monopoly over coercive violence therefore requires a comprehensive examination of the changes concerning the ideas of sovereignty and the provision of coercive violence.

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<sup>226</sup> Singer (n 18) at 29.

<sup>227</sup> Calazans (n 216) at 14.

<sup>228</sup> Singer (n 18) at 32.

<sup>229</sup> Percy (n 173) at 91.

<sup>230</sup> See for example The hessian units employed by the British to protect their financial interests throughout the Empire M.L. Lanning, *Mercenaries: Soldiers of Fortune, from Ancient Greece to Today’s Private Military Companies* (Presidio Press, 2005) 78-83.



In order to do this, this section will examine the most significant factors in the transformation of coercive violence and consider how each relates to the move towards citizen armies, the democratic control over coercive violence and the move towards a general acceptance of the idea of a state responsibility for their citizen's safety. In her examination *Mercenaries: The History of a Norm in International Relations*<sup>231</sup> Sarah Percy identifies three prevalent arguments within existing literature for the shift towards a citizen army. Percy argues that traditional approaches within literature adopt either systemic arguments, i.e. that population growth and changing demographics caused citizen armies to be seen as beneficial, political changes, in particular, the development of enlightenment ideals and finally international changes, specifically the development of the doctrine of neutrality before advancing her own argument premised upon changes in morality. This section adopts a similar approach but argues that this complex transition cannot be attributed to any one individual cause but requires a holistic approach to establishing the cause of what was in effect a fundamental redefinition of the relationship between a sovereign and citizens.

### **2.3(1) Attitude to War**

A central component of these social changes was a shift in opinion towards the role of coercive violence. Influenced heavily by military progress that affected both the practical approach and public view of warfare, societal opinion shifted against the perpetual state of war that private coercive violence relied upon financially. As the previous section shows, for much of European history war had been a regular and lucrative business. Entire regions relied heavily upon the income provided by mercenaries, with little other work for the male population and the prospect of significant war booty from successful trips.<sup>232</sup> While European rulers, seeing mercenaries as a threat

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<sup>231</sup> Percy (n 173)

<sup>232</sup> See Percy (n 173) at 85; See also John McCormack, *One Million Mercenaries: Swiss Soldiers in the Armies of the World* (Oxford Uni Press, 1993) 181 (It is estimated that at least one million Swiss men fought as mercenaries, while their importance to the France caused Switzerland to be granted free trading within France in exchange for continued access to their mercenaries); Ibid at 121.

to their power, had long sought to bring this industry under their control,<sup>233</sup> practicalities had ensured that mercenaries and military entrepreneurs continued to play an important role. The eventual impetus for change came as a result of technological advances in warfare. As the mechanisation of war introduced the use of both heavy and light artillery, and an increasing prevalence of firearms, the entire nature of warfare suddenly changed. The effect was to make war an increasingly cheap and deadly vocation. Prior to these innovations, a ruler's primary difficulty in maintaining a standing army lay in the economic requirements of funding for training and maintaining soldiers and equipment. Highly skilled soldiers in the cavalry, archery or certain infantry divisions, Swiss Pikemen or Landsknechts for example, required several years of expensive training to reach the standard expected and with this came an understanding of the value of their skills and an expectation of appropriate remuneration. These soldiers expected continuous employment at high wages and could not simply be mobilised quickly when necessary. This changed with the advent of the musket which, turned common infantrymen, with relatively little training, into the most sophisticated and deadly soldiers on the battlefield. As a result, rulers were able to maintain small or medium garrisons or soldiers at low wages, and when necessary quickly expand this force without great expenditure or training, and with this the standing army became both an economic and practical reality. Moreover, prior to the expansion of firearms warfare had been surprisingly non-lethal. Training troops was a significant investment and tactics were designed to ensure minimum casualties, casualties were primarily non-fatal and the injured soldiers would often return to a later battle. This had even developed into the establishment campaigning season, accompanied by a corresponding break during which soldiers would go home to recover over winter before taking up arms again in the spring. Firearms and artillery changed this indefinitely with the level of fatalities and serious injuries growing exponentially.<sup>234</sup> Soldiers who could be replaced

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<sup>233</sup> Percy (n 173) at 69-93.

<sup>234</sup> Maurice Keen, *Medieval Warfare: A History* (Oxford University Press, 1999) 144-5 (during the year long Flanders War of 1127 only five fatalities were recorded, there were exceptions to this The Battle of Agincourt nearly 4,000 French troops died however, this was largely due to an order by Henry V to kill all prisoners see Henry J. Webb, 'Prisoners of War in the Middle Ages' (1948) *Military Affairs* 46, 48); see also T.N Depuy, *The Evolution of Weapons and Warfare* (De Capo Press, 1990) 81-91 discussing the Swiss pike formations and 130-144 discussing the increasing use of firearms and artillery.)

cheaply became expendable, with the result that military tactics becoming riskier, while the decreasing effectiveness of formations against artillery left individual effectiveness as the decisive factor.<sup>235</sup> The ability to quickly recruit soldiers took precedence over the ability to train soldiers and as a result, the nation-state, with the ability to conscript, for the first time emerged as the most adept organisation for waging war. While the process was by no means immediate<sup>236</sup> these technological advances played a crucial role in establishing the state monopoly over coercive violence and in particular the transition towards citizen armies.

### **2.3(2) Development of the Nation State**

While changes within the nature of warfare made the state monopolisation of coercive violence a practical goal, they also played a second arguably more crucial role in this transition, establishing the political framework for the development of the nation-state and the corresponding emergence of public international law (PIL). As the changing nature of warfare made it easier and cheaper for rulers to conduct war, the increasing levels of violence led to the growth of a widespread European antipathy towards war on a level previously unseen. Even before the Thirty Years War, Europe had witnessed an unprecedented level of violence both between rulers and increasingly by rulers against their citizens.<sup>237</sup> While firearms had already made war an increasingly deadly activity, the religious upheavals that accompanied the Protestant Reformation gave added significance to the perceived importance of victory and pushed the boundaries of warfare. The German Peasant Revolt of 1524-1525 and the Wars of Religion in France from 1562 to 1598 devastated their countries causing over 300,000 and 2,000,000 deaths respectively.<sup>238</sup> Modern technology made Total War<sup>239</sup> increasingly conceivable, culminating in the Thirty Years War, where an increasing number of

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<sup>235</sup> Ibid at 189.

<sup>236</sup> See Ibid at Chapter 5 (for a comparative chronology of the transition to citizen armies for France, America, the UK and Prussia).

<sup>237</sup> See e.g. Joseph Kanning & Hartmut Lehmann, *Power, Violence and Mass Death in Pre-Modern and Modern Times* (Routledge, 2004) 93-97, 141-162; N M Sutherland, 'The Origins of the Thirty Years War and the Structure of European Politics' (1992) 107(424) *The English Historical Review* 587.

<sup>238</sup> Robert J Knecht, *The French Religious Wars 1562-1598* (Osprey Publishing 2002) 9-10.

<sup>239</sup> Peter H. Wilson, 'Was the Thirty Years War a 'Total War'?' in Erica Charters, Eve Rosenhaft, and Hannah Smith (eds.) *Civilians and War in Europe, 1618-1815* (Liverpool Scholarship Online, 2012).

belligerents expanded the conflict throughout Europe. As these interventions increased so did the ruthlessness of the armies, with widespread devastation on a level unseen before.

Furthermore, previous military tactics had largely limited the impact of warfare on civilian populations; large open spaces were required for cavalry and pike formations, leaving urban centres largely unaffected directly by conflict.<sup>240</sup> The evolution of military technology and tactics increasingly blurred this line; warfare became progressively less restricted with actors seeking not only victory but total annihilation of the opposition, military and civilian alike.<sup>241</sup> By the end of the war between a quarter and third of all people living within the fragmented states of the Former Holy Roman Empire had been killed, and a third of all towns raised to the ground.<sup>242</sup> Entire regions were decimated, with previously prosperous towns left without a trace that have not recovered to this day. This widespread devastation was previously unknown with Grotius stating that “Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of... there is no longer any respect for law, divine or human; it is as in accordance with a general decree, frenzy had been let loose for committing of all crimes.”<sup>243</sup>

As the effects of war began to be felt more significantly by civilians, citizens increasingly began to question the incontestable rights of their rulers to exercise coercive violence. This gradual movement gained significant momentum from the middle of the 16<sup>th</sup> Century as the Reformation split Europe and increasingly undermined the foundation of monarchies across the continent. Legal theorists, including Bodin<sup>244</sup> and Grotius,<sup>245</sup> emerged seeking to establish alternative theories both for the justification of the authority of sovereigns to complement, or eventually replace, divine

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<sup>240</sup> Harald Kleinschmidt, *Understanding the Middle Ages: The Transformation of Ideas and Attitudes in War* (Boydell Press, 2003) 187- 189.

<sup>241</sup> Ibid.

<sup>242</sup> Hunt Janin, & Ursula Carlson, *Mercenaries in Medieval and Renaissance Europe* (McFarland & Co., 2013) 162.

<sup>243</sup> Hugo Grotius, *De Jure Belli ac Pacis* (first published 1625, Nabu Press, 2010) Prologue sec. 28.

<sup>244</sup> Jean Bodin, *On Sovereignty: Six Books of the Commonwealth* (first published 1576, CreateSpace, 2009)

<sup>245</sup> Grotius (n 243).

choice and for the identification of limits upon the role of a sovereign which could prevent some of the most exceptional atrocities carried out in the name of religion.. Bodin's *Six Books of the Commonwealth*<sup>246</sup> was conceived in reflection on the Saint Bartholomew's Day massacre, arguing that only through a strong unitary sovereign could such events be prevented in future. Similarly, Grotius wrote *De Jure Belli Ac Pacis (Of the Law of War and Peace)*<sup>247</sup> in the middle of the devastation, and genocidal tactics, of the Thirty Years War. Finally, Thomas Hobbes' espousal of the first complete explanation of a social contract, did so with direct reference to the English Civil War and the tyrannical rule that Oliver Cromwell had relied upon, to conclude that a contractual transfer of sovereign power from a people to their ruler was essential to "defend them [citizens] from the invasion of Forraigners, and the injuries of one another."<sup>248</sup>

While these theorists ultimately came to competing conceptions of sovereignty, their explanations ultimately rested upon the pre-eminence of Sovereign States within the international community. The starting point was Jean Bodin, who although did not invent it, most consider the "father" of 'sovereignty'<sup>249</sup> For Bodin, establishing an absolute sovereign with a corresponding absolute control over coercive violence was essential to maintaining peace with this, while not explicitly, laying the foundation for the pre-eminence of the sovereign state, in particular against the claim of papal superiority.<sup>250</sup> Bodin's theory of sovereignty was re-examined by Grotius who while he questioned the need for a ruler to have absolute sovereignty over their citizens, maintained that at the international level sovereign states remained the only legitimate actors and maintained the absolute control over the decision to utilise a state's coercive violence, within the constraints of Natural Law.<sup>251</sup> The effect of this philosophical development was to establish the sovereign state as

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<sup>246</sup> Bodin, (n 244).

<sup>247</sup> Grotius (n243).

<sup>248</sup> Hobbes (n 49).

<sup>249</sup> Stéphane Beaulac , 'The Social Power Of Bodin's 'Sovereignty' And International Law' (2004) 4(1) Melbourne Journal of International Law 1.

<sup>250</sup> Bodin was particularly concerned with preventing large scale wars under the papal banner and so argued that each states sovereign maintained absolute primacy. See M. K. McRae, 'Bodin's Sense of Nationality' in Jean Bodin, *Actes du Colloque Interdisciplinaire d'Angers, 24 au 27 mai 1984* (Presses de l'Universite d'Angers1985) 155.

<sup>251</sup> Benjamin Straumann, 'Early Modern Sovereignty and Its Limits' (2015) 16(2) Theoretical Inquiries in Law 423, 424.

the pre-eminent actor within international law, establishing the foundation of what we now term Westphalian sovereignty, and placing state sovereignty at the centre of public international law.

Overall, therefore, this development of what we now term Westphalian sovereignty is particularly relevant in the study of private coercive violence. It was largely due to the increasing supremacy of the sovereign state, at the expense of both extra-territorial authority in the case of the Church and localised authority in the case of Feudal Lords, that national armies became a prevailing standard. And while not exclusively the case, it was the view that states exercised sole authority over their citizens which also led to a gradual increase in the number of these armies consisting only of citizens. Parallel to this, while the theory of internal sovereignty played a role in developing citizen armies, the external theory of the sovereign state, led towards the principle of non-intervention. This view that states should not interfere with the actions of other states was an essential component of Westphalian Sovereignty and intimately linked to the *Peace's* attempt to prevent further religious wars. A key component of this non-intervention was a duty on states to prevent the recruitment and organisation of mercenaries within their territory for the purpose of intervening in another state. Private mercenaries therefore became increasingly proscribed within international law. Ultimately, however, it is important to note that while the doctrine of state supremacy reduced the influence of private mercenaries, the use of foreign armies remained relatively widespread.<sup>252</sup>

### **2.3(3) The Social Contract and the Sovereign State**

The final and most significant factor it is necessary to examine in relation to the state monopoly over violence is the development of the social contract. At the heart of the question that these theorists sought to answer was discovering the relationship between the sovereign and their

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<sup>252</sup> Percy (n 173) at Chapter 5.3 (noting particularly the continued use of foreign forces by the English army when they risked losing control.)

citizens. As a result, this era became associated with the first modern conceptions of nationality and the reciprocal relationship of rights and duties between a state and its citizens. While it is beyond the scope of this study to fully consider the development of social contract theory, an examination of the three most prominent proponents can give us an insight into how this philosophical revolution transformed the nature of the sovereign power and consequently coercive violence within societies. This section will therefore examine the theories of Thomas Hobbes, John Locke and finally Jean-Jacques Rousseau. It will examine how their attempts to identify the relationship between sovereign, state and citizen laid the foundation for the modern conception for not only the state monopoly over violence but also the corresponding democratic control over this coercive violence.

The starting point for this examination, therefore, must be Thomas Hobbes' whose *Leviathan* is widely considered to have established Social Contract theory. Hobbes' central thesis claims that all political society is premised upon a common consent of the people to lift themselves out of the anarchical "state of nature" which was "solitary, poor, nasty, brutish, and short."<sup>253</sup> In order to do this, Hobbes reasoned that the citizens must come together and "erect such a Common Power, as may be able to defend them from the invasion of Forraigners, and injuries of one another".<sup>254</sup> In effect, Hobbes social contract was founded upon the basis of a sovereign monopoly over legitimate violence. Hobbes reasoned that only through giving up their "natural right to the use of armed force for their protection and transfer[ing] it to a collective authority"<sup>255</sup> can a society ensure that cooperation, rather than violence prevailed as the form of societal authority. The central component of this theory, however, lay not simply in combining the means of violence within a society, but instead in "prohibiting the private use of armed force and invest[ing] it in a sovereign"<sup>256</sup> Specifically, Hobbes argued that "[t]he nature of War, consisteth not in actual fighting; but in the known disposition thereto, during all times there is no assurance to the

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<sup>253</sup> Hobbes (n 49) at 48.

<sup>254</sup> Ibid at 120.

<sup>255</sup> Ellie Krahmman, *Private Security Companies and the State Monopoly on Violence: A Case of a Norm Changes?* (Peace Research Institute Frankfurt, 2009) at 23.

<sup>256</sup> Ibid.

contrary”<sup>257</sup> The key aspect to maintaining this assurance of peaceful interaction in the social contract therefore, is the sovereign monopolisation of coercive violence. This sovereign monopoly has two effects on the relationship between sovereign power and citizens. Within a state, this monopoly over violence required the sovereign to exercise a form of coercive authority, supported by the threat of violence, to secure the enforcement of the Social Contract. As the sole bearer of coercive capacity, the sovereign owed a responsibility to citizens to maintain peace and order over society. Internally, therefore, the sovereign owed a duty to citizens to ensure their physical safety and protect their rights from interference; in effect establishing the state responsibility for enforcing laws.

Beyond the national borders however, the sovereign’s absolute right manifests in an ability to utilise the collective violence of the society in “procuring the safety of his People” through “making Warre and Peace with other nations... that is to say of judging when it is for the publique good; and how great forces are to be assembled, armed and pay’d for that end.”<sup>258</sup> In relation to private violence, it is notable that Hobbes did not specifically mention mercenaries. This is possibly due to the fact that while mercenaries were used in the English Civil War, their prevalence was relatively minor and limited to individual mercenary groups, unlike the military entrepreneurs who devastated much of Central Europe. Instead, it must be inferred that if all citizens vest their capacity for violence in an absolute sovereign the Social Contract would not allow an individual to offer their personal violence in a private market. Hobbes further alludes to this when stating that a man may be “commanded” to serve as a soldier under threat of death<sup>259</sup>, and while generally they may avoid service if they can find a suitable replacement, this option is removed when “the Defence of the Commonwealth, requireth at once the help of all that are able to bear Arms.”<sup>260</sup> The implication is that the social contract establishes a citizens duty and therefore the use of mercenaries would be

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<sup>257</sup> Hobbes (n 49) at 88-9.

<sup>258</sup> Hobbes (n 49) at 126.

<sup>259</sup> Ibid.

<sup>260</sup> Ibid at 152.



unacceptable. Hobbes formulation of a social contract radically overhauled the perceived relationship between states and their citizens, espousing the most complete theory of state sovereignty to that point. In doing so the Hobbesian social contract offered a justification and support for Bodin's earlier conception of the absolutist sovereign, to the effect that only through a strong and unified central figure, vested with the violence of the entire nation, could the security of a state be guaranteed.

Over the succeeding century and a half however, the concept of the supreme sovereign was to come under increasing scrutiny as enlightenment theorists sought to further redefine the relationship between sovereign and citizen. Their formulations found reflections in the revolutions in America and France, which while rooted in a number of factors were both underpinned by an increasing call for representation within decision-making processes. Accompanying these political revolutions was a philosophical reimagining of the social contract in terms of a reciprocal relationship between sovereign, and citizen which began with the formulations of Locke and Rosseau but was picked up by John Stuart Mill in England,<sup>261</sup> and Hamilton and Madison in America,<sup>262</sup> and came to shape Western political landscape as the competing arguments for liberalism and republicanism respectively.

Locke's *Two Treatise of Government*<sup>263</sup> does not directly discuss the state monopoly on violence, the central aspect of Locke's social contract is the postulate that the continuing consent of the citizen to being ruled is required for a legitimate and accountable state. The primary role of this state is to act as arbiter between competing claims between citizens; setting rules and settling disputes. However, within this Locke establishes that for the state to be capable of executing these rules they must exercise sole authority over the use of coercive force for the functioning of the

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<sup>261</sup> John Stuart Mill, *On Liberty* (first published 1859, Cosimo Classics, 2005).

<sup>262</sup> See e.g. James Madison in *The Federalist Papers* (first published 1787).

<sup>263</sup> John Locke, *Second Treatise of Government*, (Peter Laslett ed., Cambridge University Press, 1960).

State,<sup>264</sup> as “where there is an Authority... from which relief can be had by appeal, there the continuance of the State of War [Nature] is excluded”<sup>265</sup> Beyond the state, however, Locke agreed with Hobbes that the executive was empowered to act independently as “prerogative powers by the executive would apply... to foreign affairs and war.”<sup>266</sup> This suggests that with regards to the collective violence of the citizenship in defence of the state, Locke saw this as being wholly vested in the executive. Contained within this monopoly of violence, was an implicit understanding that “society expects its men... to go to war in its defence. A good citizen must have a sense of civic obligation.”<sup>267</sup> Locke’s work, however, must be read in context and in particular with reference to the “Glorious Revolution” of 1688 during which much of his work was written and which provided much of its inspiration. And it must be recognised that Locke’s executive is not the absolute sovereign of Hobbes’ *Leviathan*. Indeed, one of the central aspects of the Glorious Revolution was the prohibition on the King maintaining a standing army during peacetime without the consent of parliament.<sup>268</sup> As such, although Locke saw the state as maintaining a monopoly on legitimate violence, it was understood that this was vested within a representative of the people and for the good of the people.

Almost 100 years later, this approach was to be expanded significantly as Rousseau wrote *Of the Social Contract* which emphasised the importance of the general will of the population. For Rousseau, a social contract did not exist between citizens and a sovereign; but instead among all

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<sup>264</sup> A. John Simmons, *The Lockean Theory of Rights* 161-163 (Princeton University Press, 1994) (discussing the Lockean argument for the state monopoly on punishment by virtue of the fact “that the natural right to punish *must* be sacrificed (i.e., freely alienated) by all members on entrance into civil society). *See also* John Locke, *Second Treatise of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960) “[T]hough every Man has enter’d into civil society... has therefore quitted his power to punish Offences against the Law of Nature”.

<sup>265</sup> Locke (n 263) at 282.

<sup>266</sup> Geoffrey Scholl, *Social Theory of Fear, Terror, Torture, and Death in a Post-Capitalist World* (AIAA Publishing, 2010) 47 (quoting Mark Neocleous, *Critique of Security* (2008)).

<sup>267</sup> Caroline Varin, *Mercenaries, Hybrid Armies and National Security: Private Soldiers and the State in the 21st Century* (Routledge, 2014) 40-41; *see also* Locke (n 263) at 74 “for the preservation of the army, and it in of the whole commonwealth, requires an *absolute obedience* to the command of every superior, and it is justly death to disobey or dispute the most dangerous or unreasonable of them.”

<sup>268</sup> British Bill of Rights [1688] Chapter 2 1 Will and Mar Session 2. (Standing Army – That the raising or keeping of a standing Army within the Kingdome in time of Peace unlesse it be with Consent of Parlyament is against the Law.)

citizens.<sup>269</sup> Unlike Locke, however, Rousseau saw the provision of, and monopoly over, violence as one of the central requirements for a state or sovereign. The basic formation of the social contract was therefore to “find a form of association that will bring the whole common force to bear on defending and protecting each associate’s person and goods.”<sup>270</sup> For Rousseau, therefore, the monopolisation of violence as a key characteristic of any sovereign was self-evident, and the primary purpose of the social contract was to “prevent[s] the abuse of the sovereigns monopoly on armed force.”<sup>271</sup> In order to achieve this, Rousseau believed that the sovereign should, rather than be an individual imbued with this power by virtue of personality, be a collective body which through acting in unity represents the general will.<sup>272</sup> As such in forming the social contract, “[e]ach of us puts his person and all his power in the common under the supreme direction of the general will; and in a body we receive each member as an indivisible part of the whole.”<sup>273</sup> In doing this, Rousseau is able to both monopolise the use of force within a “sovereign” and democratise it to ensure that it works for the benefit of those who entrust their capacities within it. Beyond this, however, Rousseau, echoing the British Bill of Rights prohibition on peacetime standing armies, explicitly called upon the sovereign force to be reliant solely upon its citizens, as “regular troops... are only good for two purposes: to attack and conquer neighbors, or to shackle and enslave citizens.”<sup>274</sup> Furthermore, Rousseau believed that when “public service stops being the chief business of the citizens, and they prefer to serve with their money than their persons, the state is not far from collapse.” Giving the specific example, he continues [if] “they are needed to march out to war... [but] [t]hey pay troops and stay at home... they end up with soldiers to enslave their country.”<sup>275</sup> Considering this it is clear that according to this formation of the social contract, the

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<sup>269</sup> Jean Jacques Rousseau *The Social Contract* (first published 1762, Early Modern Texts, 2010) <<http://www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf>> accessed 14 May 2016 at 7.

<sup>270</sup> *Ibid* at 5.

<sup>271</sup> Krahmann (n 255) at 26.

<sup>272</sup> Julia Simon-Ingram, *Rousseau And The Problem Of Community: Nationalism, Civic Virtue, Totalitarianism*, 16 *History of European Ideas*, 23, 34 (1993).

<sup>273</sup> Rousseau (n 265) at 7.

<sup>274</sup> Krahmann (n 255) at 26.

<sup>275</sup> Rousseau (n 265) at 49.

citizen army, and the duty to serve in it, are not simply a judicious choice, but the very foundation of the social contract.<sup>276</sup>

The development of social contract theory played a further role in the increasing state monopolisation of violence and the increase of citizen armies, as it was instrumental in influencing the growth of Romantic Nationalism during the Enlightenment period.<sup>277</sup> Rousseau, in particular, relied heavily upon an understanding of a communal nationality, replacing imposed subjection, as the common bond between citizens necessary to generate the “general will” of patriotic duty towards protecting one’s own nation.<sup>278</sup> Aided by the expansion of enlightenment ideal of separation of Church and State, and the growing recognition of the power of a shared language, culture and history to bind people together, patriotism spread quickly across Europe and America. Indeed it has been suggested that the expansion of nationalist ideals was intentionally fostered with military factors in mind.<sup>279</sup> In particular, considering the separation of Church and State, nationalism was potentially considered essential to filling the void left by religion as a key motivating factor within nations.<sup>280</sup> From this point of view, argues Juergensmeyer, “secular nationalism, therefore, involves not only an attachment to a spirit of social order but also an act of submission to an ordering agent.”<sup>281</sup>

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<sup>276</sup> Krahmhann (n 255) at 26; *see also* Rousseau (n 265) at 10.

<sup>277</sup> *See e.g.* Mark Juergensmeyer, ‘Global Rebellion’ (2009) <<http://content.ucpress.edu/chapters/11087.ch01.pdf>> accessed 3 August 2016, 12-15.

<sup>278</sup> For an example of this *see* Julia Simon-Ingram, ‘Rousseau And The Problem Of Community: Nationalism, Civic Virtue, Totalitarianism’ (1993) 16 *History of European Ideas*, 23, 2 (discussing the Corsican example of Rousseau’s social contract “It is no longer surprising that one of the functions of the general will is to establish the *moi commun* for the social group. In the Corsican example, it is evident that Rousseau uses the concept of the general will to establish nationalism and patriotism as essential to the public good. In other words, it is always in the interest of a people to share a common identity, to mark itself by specific national characteristics that set it apart from other nations. 7 This ‘national character’ aids in maintaining the independence of the state because it sparks citizens to fight for their country”); *See also* Mark Juergensmeyer, (n 277).

<sup>279</sup> *See* Barry R. Posen, ‘Nationalism, the Mass Army, and Military Power’ (1993) 18(2) *International Security* 80 (Discussing how the use of education to foster common language, culture and history was utilized as propaganda by European states as “military and political leaders believe that such ideas enhance the commitment of the troops to the purpose of war.”; *Ibid* at 85.

<sup>280</sup> *Ibid* at 113. (an example of this is evident in the fact that Prussia sought to replace religion with “history and the German language” as the core of state education.) *See also* Mark Juergensmeyer, (n 277) at 19-23. (Secular political authorities now monopolize the authority to sanction violence. Political leaders attempted to do so long before the advent of the nation-state but usually in collusion with religious authority, not in defiance of it).

<sup>281</sup> Mark Juergensmeyer, (n 277) at 20 (quoting Max Weber).

## 2.4 The Modern State: Monopolising Coercive Violence

### 2.4(1) The Citizen Army

Within 100 years, the effect of the combination of these practical changes and philosophical developments were evidenced as the concept of Westphalian Sovereignty, the Social Contract and Civic Nationalism converged in the French and American revolutions. The defining characteristics of these events, the call for liberty, equality and democratic representation formed the foundation of the modern state. Central to these ideals was a fundamental rejection of absolute monarchs who were unanswerable to the people and the establishment of Republics, effectively manifesting the competing ideals of Rousseau's and Locke's social contract.

Considering the democratic ideals that inspired the creation of these newly formed republics, the importance of citizen armies, and militias, in both gaining and maintaining this form of representative government.<sup>282</sup> The American Revolution was “the first major case... where a citizen army motivated by duty and patriotism fought an old-style army”<sup>283</sup> with the advantage that it could “call upon the service of free citizens who had a stake in their society.”<sup>284</sup> Civic duty in Madison's, conception of representative government, included “a duty to defend [the citizens] community through active military service.”<sup>285</sup> This duty, unlike previous military duties based upon feudalism etc., was explicitly designed to enforce the popular control of the government's monopoly on violence. As such, the American model of armed forces was designed to consist of a citizen army supplemented by civilian militias with the explicit rejection of the use of mercenaries as a moral and political act. This view was echoed in the French Revolution when having disbanded the French Military and *ancien regime*, Secretary of the National Assembly Dubois-Crancé argued

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<sup>282</sup> This is not to say that these were successful in doing so, the Reign of Terror and the return to autocracy through the coup d'état of Napoleon *see* Ian David, *From Enlightenment to Tyranny* (Profile Books, 2016) *see also* Hannah Arendt, *On Revolution* (first published 1963, Penguin Classics, 2009). In America, the representative nature of the state was primarily undermined by the continuation of the institution of slavery.

<sup>283</sup> Percy (n 173) at 123.

<sup>284</sup> *Ibid* at 234.

<sup>285</sup> Krahmann (n 255) at 29.

that “in a nation that seeks to be free... every citizen should be a soldier and every soldier a citizen.”<sup>286</sup> Stretching beyond the voluntary service expected in America, the French approach required all citizens to actively participate in the French war effort, from conscripting males of fighting age, to employing women to make tents for the military. Furthermore, as part of this nationalist approach, the National Assembly passed a bill preventing the use of foreign fighters within the regular French military.<sup>287</sup> The use of citizen armies and militias, however, was not simply the civic duty but a fundamental protection from the absolutist sovereignty which preceded the revolution. Both the French and American leaders recognised that only the democratic control of state violence could protect the citizens from tyranny. As such, serving in the army or militia was simultaneously a duty towards one's country and an act of self-defence to control the state monopoly on violence.<sup>288</sup>

By the 20<sup>th</sup> Century, the concept of the state monopoly over coercive violence had largely been established as a norm within international law. Antimercenarism laws had been passed by Britain (1819), France (1804), United States (1794), Russia (1845) and Switzerland (1853) followed by most other European nations.<sup>289</sup>

## **2.4(2) Public Policing**

Whilst social contract theory led to the state monopolisation on force, the position of the state as a bearer of responsibilities also led to the increasing belief in the need for representative, civilian justice systems, with public police forces performing a central role in this evolution. The harsh punishments that formed the basis of medieval security, came to be seen as a reflection of the

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<sup>286</sup> Percy (n 173) at 132; *See also* Roger Chickering & Stig Förster, *War in an Age of Revolution, 1775-1815* (Cambridge University Press, 2010) 300.

<sup>287</sup> The exception to this is the French Foreign Legion which consists entirely of foreign troops. However, completed service in the Legion is a path to citizenship, highlighting the inseparable relationship between military service and citizens.

<sup>288</sup> Krahmman (n 255) at 43.

<sup>289</sup> Janice E. Thompson, *Mercenaries, Pirates & Sovereigns* (Princeton Uni Press, 1994) 83 (Table 4.2 identifies the years that all major European States passed anti-mercenarism laws.)

tyrannical nature of many of the absolute monarchs. From this point of view, Beccaria's *On Crimes and Punishments* drawing upon enlightenment ideas of rationality, legality and crucially the social contract, proposed that the private citizens' position within society required the administration of justice and punishment to be fair, just and proportionate. Accordingly, the imposition of punishment, and the harshness of the imposed punishment, is justified only with regard to preserving the social contract, with the harshness imposed to represent both a societal deterrent but also crucially, a proportionate repayment of the debt the criminal owes to society for his actions.<sup>290</sup> This treatise became the foundation upon which Voltaire,<sup>291</sup> Bentham<sup>292</sup> and Blackstone<sup>293</sup> among others built their theories of modern criminal justice.<sup>294</sup> Within this new system, however, the purpose of a police force was no longer to protect the interests of the Monarch or the businessmen that paid them, but instead to represent, protect and finally deter the local community from crime.

Prior to this, in Britain, there had remained a steadfast reliance upon the system of Justices of the Peace and Constables that had formed the basis of the "public security" for nearly 800 years.<sup>295</sup> This system was supplemented by an array of private actors, the most notable of which were "thief-takers" and *Posse Comitias* who worked alongside or instead of the police. This system was based upon the series of regulated financial rewards, paid either by the crown, private individuals or insurance companies and offered for the capturing of criminals. When this approach was exported to newly inhabited areas of the Western states of America by migrants, this reward system would often lead to the creation of semi-official vigilante groups, who operated under the combination of civic duty and financial reward.

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<sup>290</sup> Bernard E. Harcourt, 'Beccaria's 'On Crimes and Punishments': A Mirror on the History of the Foundations of Modern Criminal Law' (Coase-Sandor Institute for Law & Economics Working Paper No. 648, 2013) <[http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1633&context=law\\_and\\_economics](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1633&context=law_and_economics)> accessed 24 February 2016).

<sup>291</sup> See Ibid at 4 Voltaire wrote a commentary to accompany the text.

<sup>292</sup> Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (first published 1823).

<sup>293</sup> William Blackstone, *Commentaries on the Laws of England* (first published 1765)

<sup>294</sup> Harcourt (n 290) at 4-6.

<sup>295</sup> Elaine A. Reynolds, *Before the Bobbies: The Night Watch and Police Reform in Metropolitan London* (Stanford University Press, 1998).

By the early 19<sup>th</sup> Century, as London faced several large-scale riots against working and living conditions in the city, the inadequacies of the system were revealed when army cavalry was brought in to quell a working-class protest at St. Peters field. The 1819 Peterloo Massacre left 11 protestors dead and nearly 400 injured. The subsequent passing of the “Six Acts” left many in the ruling class to view Britain as dangerously close to the kind of political warfare that France had seen just 50 years earlier. In 1829 this culminated in the passing of the Metropolitan Police Act, establishing one centralised force, answerable directly to parliament through the Home Office. The measure originally met fierce resistance, being seen as an attempt to replicate the brutal and repressive security forces used throughout continental Europe. In the event, however, as the police were unarmed, and wore top hats, rather than protective helmets, to indicate the civilian nature of their role<sup>296</sup> these suspicions were allayed, assisted by a fall in crime rates and restoration of order to the streets of London. Following the success, Birmingham followed suit in 1839, before the passing of the Country and Borough Police Act in 1856, extending the home office funding across the whole of Britain. By the turn of the 20<sup>th</sup> century the entirety of Britain was under a modern state police force, answerable to parliament through the Home Secretary.

In America, attempts to institute central government police forces proved much more difficult, with political conflicts within States and cities producing significant variations within the manner of policing throughout the nation. For a period of the 19<sup>th</sup> Century, New York effectively employed two rival police forces, with conflicting state and city governments attempting to exercise their authority. Furthermore, as mass migration to America from European cities attempts to institute police forces representative of the local population were soon policing populations with whom they often had negative relationships. Boston, in particular, suffered from difficulties as the influx of Irish immigrants was met by the election of the Protestant Know Nothing party who effectively banned Catholics serving in the police.<sup>297</sup> Furthermore, while the metropolitan police,

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<sup>296</sup> Clive Emsley, ‘Community Policing/Policing and Communities: Some Historical Perspectives’ (2007) 1(2) Policing 235.

<sup>297</sup> See e.g. Ed Forry, ‘Boston’s First Irish Cop: Remembering What Barney Did’, *Boston Irish Reporter* (Boston, 1 March 2001) <<http://www.bostonirish.com/publishers-notes/bostons-first-irish-cop-remembering-what-barney-did>> accessed 23 May 2015; Jack Tager, *Boston Race Riots: Three Centuries of Social Violence* (North-eastern University Press, 200) 157 – 165.



upon which almost all American police forces were based, had clear rules about being unarmed and using only proportionate violence, their American counterparts were overwhelmingly armed with both a club and a revolver. Many early American police forces, effectively insulated, or actively hostile, to the communities that they were policing were characterised by a lack of accountability and excessive use of force.

## **2.5 The Exceptions (That Help Prove The Rule)**

While an examination of the development of the state monopoly over coercive violence, and particularly the reciprocal citizens' rights that were implicit within this is illustrative, equally illuminating is an examination of the exception to this evolution. In particular, this section will consider how the continuation of the private coercive violence in the maintenance of the European Empires illustrates the extent to which a rule of coercive violence where the social contract is unable to form legitimate power.

### **2.5(1) Coercive Violence and the Empire**

“While national sovereignty became an established notion in Europe, power and legitimacy of overseas empires could be instilled in other apparatuses than just the state.”<sup>298</sup>

At the beginning of the 17<sup>th</sup> century, the European nations that formed a central part of the spice trade, began to challenge the monopoly the Portuguese had maintained over the East Indian spice ports<sup>299</sup> the British East India Company and Dutch East India Company, formed in 1600 and 1602 respectively came to play an increasingly important role. Originally established as trading companies, they most likely the first multinational companies,<sup>300</sup> however, before long these organisations, along with other similar companies, began to control the most powerful private

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<sup>298</sup> Katerina Galai, ‘Companies of Past and Present: Lessons from the East India Company on the Use and Regulation of Private Forces Today’ (2016) 4 Legal Issues J. 1, 1.

<sup>299</sup> Thompson (n 289) at 63.

<sup>300</sup> Galai (n 298).

armies of the day. By the 18<sup>th</sup> century the British East India Trading company commanded an army of over 200,000 men; mercenaries from Germany, Japan and Switzerland among a large proportion of these.<sup>301</sup> Many others were hired from the local populations that were considered loyal and trustworthy, including the Nepalese area of India. The loyalty, bravery and success of these Nepalese soldiers led to them becoming a permanent regiment of the British Army known as the Ghurkha's, a position which remains today. These private armies in effect came to control the vast majority of the Indian Subcontinent, establishing port towns, forts and military garrisons in a manner to be expected of a sovereign.<sup>302</sup> These companies in effect directly contradicted the state monopoly over coercive violence, along with potentially undermining the Doctrine of Neutrality. They were able to, and frequently did, declare war. For much of the 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> century, South East Asia was host to a number of battles, essentially fought between private companies and using mercenary armies.<sup>303</sup> Furthermore, due to their unpopularity with the local population, when the Companies were not in direct conflict with each other, they used their military might to violently suppress the local population. In effect, their operations relied upon indefinite martial law, with capital punishment and torture central components within their criminal systems. Similarly, sieges and blockades were used to secure monopolies over the trading rights of local produce. The Bengal Famine of 1770, which resulted in the deaths of over ten million Bengalis, was the direct result of the actions of the British (then English) East India Trading Company, which sought to maximise its local profits through a combination of increasing taxation, eventually taking nearly half of all the local produce, and ordering the planting of the more profitable opium plant in the place of rice and grain.<sup>304</sup>

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<sup>301</sup> Singer (n 18) at 35, Axelrod (n 172).

<sup>302</sup> Galai, *supra* note, at 7.

<sup>303</sup> See Thompson (n 289) at 63-67 (for a detailed account of the inter-company battles that took place between mercantile companies.)

<sup>304</sup> Nick Robins, *The Corporation that Changed the World: How the East India Company Shaped the Modern Multinational* (Pluto Press, 2012) 56-60.

These trading companies provide an excellent comparison with the development of the state monopoly over coercive violence outside of the social contract. While the Company was viewed as a legitimate actor within the international sphere, and recognised by both other States, and rival Companies as essentially exercising sovereignty over their area of commercial activity,<sup>305</sup> it is difficult to consider its position legitimate within any moral consideration. The relationship between these trading companies and the local population was clearly one of tyranny in which economic exploitation was maintained through a rule of pure violence void of any legitimacy.<sup>306</sup> Owing no responsibility to the people of India, the British East India Company protected their shareholder's investment through a rule of the iron fist. The eventual collapse of the East India Company in 1857, came not because the directors of the company realised their crimes, but because they allowed their monopoly over coercive violence to slip beyond their control. The increasing costs of hiring European mercenaries forced the Company to move towards employing the local population to supplement the British and numerous German forces that the Company had traditionally relied on.<sup>307</sup> By 1858, the local forces outnumbered British officers nearly 6 to 1 and structural reorganisation had given greater autonomy to local forces<sup>308</sup> preventing them from being able to suppress the internal revolt. The then Manchester Guardian concluded that as a result of the revolt "[w]e sincerely hope that the terrible lesson thus taught will never be forgotten ... We may rely on native bayonets, but they must be officered by Europeans."<sup>309</sup> The British Army, requiring all of its military capabilities, eventually suppressed the revolt, massacring at least 100,000 Indian soldiers alongside most likely millions<sup>310</sup> of rebels and civilians.<sup>311</sup> One outcome of the revolt was to demonstrate that this rule of pure violence was incapable of sustaining itself; the East India Company was disbanded and replaced by the direct rule of the British Crown. Although the eventual

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<sup>305</sup> Galai (n 298) at 8.

<sup>306</sup> Thompson (n 289).

<sup>307</sup> Chen Tzoref-Ashkenazi, 'German Auxiliary Troops in the British and Dutch East India Companies' in *Transnational Soldiers: Foreign Enlistment in the Modern Era* (Palgrave MacMillan, 2012)

<sup>308</sup> Galai (n 298) at 8.

<sup>309</sup> Randeep Ramesh, 'India's Secret History: A Holocaust, One Where Millions Disappeared' *The Guardian* (LONDON, Aug 24, 2007) <<https://www.theguardian.com/world/2007/aug/24/india.randeepramesh>> accessed 15 July 2016).

<sup>310</sup> Ibid (quoting a British record of the era "'on account of the undisputed display of British power, necessary during those terrible and wretched days - millions of wretches seemed to have died").

<sup>311</sup> Ibid (although figures are impossible to verify the author from examining and combining three primary sources proposes a figure of 10million).

truthfulness of the statement is at very least dubious, this rule was built upon a promise from Queen Victoria that “We hold ourselves bound to the Natives of our Indian Territories by the same obligations of Duty which bind Us to all Our other subjects.”<sup>312</sup>

## **2.5(2) American Policing: The Role of Slave Patrols**

A further illustration, through omission, of the role played by the evolving social contract in the development of the state monopoly over coercive violence can be found in the establishment of American policing. The United States had traditionally viewed central authority with suspicion and adopting in effect early American policing was limited. That which did exist either replicated the community system developed in the United Kingdom, or was built on commercial arrangements. Suspicions of government power, predicated on their experience under British rule meant that government policing meant that the provision of security was considered a civilian duty with local voluntary watches common.<sup>313</sup> One exception to this existed in many southern States where Samuel Walker identified slave patrols as the first publicly funded police agencies in the American South.<sup>314</sup> Slave patrols were created to manage the economic interests of slaveholders and maintain the institution of slavery in the southern region of America; by maintaining control over slave populations and returning escaped slaves to their masters.<sup>315</sup> Supported by statutes that made it legal “for any person, or persons whatsoever, to kill or destroy such slaves (i.e. runaways... without accusation or impeachment of any crime”<sup>316</sup> this control was enforced with a singular degree of brutality and ruthlessness. As the slave population grew, the level of tyranny increased. In 1721, South Carolina, increasingly concerned with potential uprisings, made its entire citizen militia responsible for the surveillance of slaves.<sup>317</sup> And while the slave patrols were officially

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<sup>312</sup> Proclamation of Queen Elizabeth, Nov. 1, 1858  
<<http://www.csas.ed.ac.uk/mutiny/confpapers/Queen%27sProclamation.pdf>> accessed 17 July 2016).

<sup>313</sup> Olivia B. Waxman, ‘How the U.S. Got Its Police Force’ *Time Magazine* (New York, 18 May 2017)  
<<http://time.com/4779112/police-history-origins/>> accessed 17 July 2016).

<sup>314</sup> S. Walker, *Popular Justice*. (Oxford Uni Press, 1980).

<sup>315</sup> P.L. Reichel, ‘Southern Slave Patrols as a Transitional Police Type’ (1988) 7(2) *Am J Police* 51, 53-4.

<sup>316</sup> *Ibid.* at 57.

<sup>317</sup> *Ibid.* at 59.

disbanded following the Civil War, the remnants of these groups quickly came to resemble and operate in a way that was similar to some of the newly established police departments in the United States. As such, several scholars and historians assert that the transition from slave patrols to publicly funded police agencies was seamless in the southern region of the United States.<sup>318</sup> While the transition from slave patrol to public police is easy to overstate, this role of the slave patrols demonstrates once again the central role of the social contract in establishing the modern state monopoly over coercive violence. The relationship between white citizens had placed legitimate power at the centre of society, and with it the belief that in protecting their rights and liberties, the use of coercive violence was to be exercised by a representative community. In comparison, black slaves, outside of the social contract were to be subjugated through the exercise of pure violence.

## 2.6 Conclusions

Throughout this Chapter it has sought to discuss the extent to which this relationship between sovereign power and coercive violence is defined by the reciprocity of rights and duties between a ruler and their citizens. Through examining the changes that occurred within the social system, it demonstrated that the eventual monopolisation of violence developed in relation to evolving conception of the social contract and the emergence of the nation-state. By the turn of the 19<sup>th</sup> century, the state monopoly over coercive violence had largely been established as a norm across Europe and the United States. As the enlightenment transformed the relationship between sovereign and citizen, the ability to exercise coercive violence increasingly became a symbiotic relationship, in which the sovereign right to exercise violence corresponded with a responsibility to use it only in defence of the general will of the population. Furthermore, as the state monopoly over coercive violence developed into an accepted norm, a corresponding doctrine of neutrality developed. This sought to prevent states from raising an army with another's citizens, individuals from selling their services to another state, and individuals conducting military actions against a

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<sup>318</sup> Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (Harvard Historical Studies, 2001) 203-221; Reichel (n 315); Linda Forst and John Dempsey, *An Introduction to Policing* (Cengage Delmar Learning, 2013).

state for their private interests. Internally, the role of the sovereign had morphed from absolute to representative and responsible, having responsibilities towards their citizens. Public policing, premised on representative and civilian justice systems had largely displaced the combination of local, community-based criminal justice and within the UK in particular, even the hint of martial law drew comparisons with tyrannical monarchs of the pre-enlightenment.

# CHAPTER THREE

## THE STATE AND POST-MODERNITY: POSITIONING THE RISE OF PRIVATE COERCIVE VIOLENCE

### 3 Introduction

Despite the prominent position that private actors currently hold within the security landscape, the privatisation of coercive violence as discussed within this research has principally evolved to its current form in little over 30 years. The prevailing notion of the state's monopoly on legitimate violence reached its apex following the Two World Wars, with states laying a direct claim to the violent potential of its citizens. Across much of the world through the establishment of public police forces and standing citizen armies, the provision of coercive violence was increasingly heavily controlled by Governments and their representatives. It is against this background that this chapter seeks to trace the rise of PMSCs; examining the major trends that have contributed to this position of modern PMSCs. It will seek to position these trends within the changing nature and capabilities of States, identifying the primary factors behind these.

While the transformation of coercive violence, and the increasingly private provision of it, is indisputable the causes of this are more difficult to trace, with a variety of inter-related and co-dependent factors contributing to varying degrees. In attempting to determine these factors this Chapter will begin by examining how the changing nature of states has contributed to the growth

of PMSCs. It will demonstrate how the ability of States to fulfil the roles traditionally considered the preserve of public authorities has diminished, leaving the space for private actors to expand. Thereafter it will consider how these changes were directly affected by the control over the instruments of coercive violence. It will both identify how these changes affected the ability of States to control coercive violence, as well as consider how the accessibility of the instruments violence, including trained personnel and weapons, that created an environment in which PMSCs could rapidly expand. The final factor this chapter will consider, related to the changes in state capabilities, is the increasing prevalence of neo-liberal policies and the corresponding growth of globalisation throughout the international community. It will consider the extent to which this has exacerbated the inability, or unwillingness, of states to fulfil their traditional state roles. While these considerations are by no means an exhaustive discussion of the changes influential in the privatisation of coercive violence they represent three of the most influential factors. And although they are separated into these three categories, they are highly inter-related and dependent upon each other.

It will conclude by drawing together these factors in a thematic model, identifying the key themes consistent within these causes. It will seek to demonstrate that each of the factors is directly affected by the changing nature of sovereignty in post-modernity, highlighting that the weakening of the state has been accompanied by a growth of private coercive violence to fill the vacuum. Demonstrating that the growth of PMSCs has developed most rapidly in areas where there is limited state sovereignty and highlight the reverse relationship between the strength of the state and the function/violence of the PMSCs.

### **3.1 Post War (In)Security: The Seeds of PMSCs**

Following the Allied victory in World War Two, the world was entering an entirely unknown age. Europe had lost its position as the financial and military capital of the world, its



armies decimated, and its economies largely reliant upon American loans. The Atlantic Charter,<sup>319</sup> the guiding document of the Allies post-war international policy established self-determination as a guiding principle of international law.<sup>320</sup> The colonial empires that had controlled much of the world for the past 500 years were falling apart and with it, much of the civil and political infrastructure that had maintained it. The natural resources that had financially supported these Empires pre-War were increasingly moving away from the control of their colonial rulers. The transnational corporations that ran many of these ventures essentially on behalf of colonial regimes were increasingly unwelcome with independence, nationalist and socialist movements emerging across the globe. Finally, with the emergence of the Soviet Union as a global superpower ensured that with the conclusion of World War Two, the whole globe essentially descended directly into the Cold War.

The era was defined by a backdrop of rampant militarism, a reliance by smaller states on the two superpowers, and exponential developments in nuclear and other military technologies. Considering this, the post-war world was dominated by several key themes with security at the centre. The first of these was fast military expansions, with both the USSR and NATO expanding their military capabilities quickly, and consistently for the next 30 years. Alongside this, internal security took on an increasingly important role both sides of the Iron Curtain. Soviet control over the USSR was implemented through increasingly totalitarian means with the Ministry of State Security and GRU controlling almost all political and social activities.<sup>321</sup> In reply, the US government, following the National Security Act of 1947,<sup>322</sup> was a military-focused response to the

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<sup>319</sup> The Atlantic Charter (United States – United Kingdom) (adopted 14 August 1941) text available at <[http://www.nato.int/cps/en/natohq/official\\_texts\\_16912.htm](http://www.nato.int/cps/en/natohq/official_texts_16912.htm)> accessed 23 May 2016. For a history of the signing of the document including the Atlantic Conference see ‘The Atlantic Conference & Charter, 1941’ (*Office of the U.S Historian*) <<https://history.state.gov/milestones/1937-1945/atlantic-conf>> accessed 23 May 2017.

<sup>320</sup> Ibid at The Atlantic Charter at Para. 2 – 4.

<sup>321</sup> Antoni Z. Kaminski, ‘Coercion, Corruption, and Reform: State and Society in the Soviet-Type Socialist Regime’ (1989) 1(1) *Journal of Theoretical Politics* 77; Arendt (n 123)

<sup>322</sup> The National Security Act of 1947 (26 July 1947) Public Law 253, Chapter 343, 1<sup>st</sup> Session; S. 758; see also David Jablonsky, ‘The State of the National Security State’ (2003) 43(4) *Parameters* 4, 14.

evolving Cold War concept of national security.<sup>323</sup> In achieving the grand strategic function of containing the USSR, the US national security state grew, at least in part, in relation to the Soviet “total security state.”<sup>324</sup> This pattern of increased centralised state control over security was replicated throughout much of the world, in particular, Western Europe. Many European states who were experiencing political upheaval in their Empires, resorted to martial law, internment camps and brutal repression. The British treatment of the Mau Mau in Kenya,<sup>325</sup> and the French response to Algerian independence movements,<sup>326</sup> represent just a small portion of the military operations undertaken by Colonial rulers. Those states that had achieved independence were quickly drawn into the spheres of influence of either the US or USSR, as the cold war increasingly transformed into a proxy-war. And both superpowers looking for stability and control turned towards authoritarian regimes. By the turn of the 20<sup>th</sup> century, therefore, across the globe States had laid a claim to the monopoly on violence. From strong public police forces, secret intelligence units and large standing armies, the provision of force both within a sovereign territory, and in the name of a nation, was expected to be controlled by Governments and their representatives. It is from this backdrop that this study must start to examine the trends towards the current state of private coercive violence.

### **3.1(1) Changing Nature of Statehood in Post-Modernity**

Considering the central role that the development of sovereignty played in the development of coercive violence, it is unsurprising that this provided a central catalyst for this change. Specifically, it is essential to recognise a foundational transformation in the change in the nature of

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<sup>323</sup> Douglas T. Stuart, ‘Ministry of Fear: The 1947 National Security Act in Historical and Institutional Context’ (2003) 4(3) *International Security Perspectives* 293; Melvyn P. Leffler, ‘The American Conception of National Security and the Beginnings of the Cold War, 1945-48’ (1984) 89(2) *The American Historical Review* 346,365-368.

<sup>324</sup> David Jablonsky, ‘The State of the National Security State’ (2003) 43(4) *Parameters* 4, 18.

<sup>325</sup> Fabian Klose, *Human Rights in the Shadow Of Colonial Violence: The Independence Wars in Kenya and Algeria* (Donna Geyer Trs., Pennsylvania Studies in Human Rights, 2013); *See also* Caroline Elkins, ‘Alchemy of Evidence: Mau Mau, The British Empire, and the High Court of Justice’ (2011) 39(5) *Journal of Imperial and Commonwealth History* 731, 733-736; Mathieu Deflem, ‘Law Enforcement in British Colonial Africa: A Comparative Analysis of Imperial Policing of Nyasaland, The Gold Coast, and Kenya’ (1994) 17 *Police Studies* 45, 60-67.

<sup>326</sup> Klose (n 325)

states. As Robert I Rotberg, former President *Emeritus* of the World Peace Foundation notes, “[S]tates are much varied in their capacity and capability than they once were.”<sup>327</sup> While the range of “population sizes, physical endowments, wealth”<sup>328</sup> among other factors are increasingly diverse among the growing number of States. This transformation has been remarkably quick. In the years preceding World War Two, there were sixty-five recognised political states. By 1970 this number had jumped to ninety, and over the next forty years this number more than doubled, with 191 states. Alongside an exponential increase in the number of states, however, was a shift in the characteristics of these states, with the nation-state transformed from inherently large and powerful entity. Instead, many of these newly sovereign states were characterised by political insecurity and weak governance, without the levels of infrastructure established over hundreds of years in many of the older states. Two events are instructive in relation to both the increase in the number of states and simultaneously the characteristics of the newly formed states.

### **3.1(2) Decolonisation**

Following the signing of the Atlantic Treaty in 1941,<sup>329</sup> the Western Empires of Britain and France agreed to move towards a position of self-determination. The acceptance of this as a necessity within International Law was further strengthened with the passing of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>330</sup> In the 30 years following World War Two, the vast majority of former colonies gained independence, with the UN General Assembly declaring these new states as sovereign and ratifying their borders. Many of these new nations, however, suffered from great instability with economic, cultural and political

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<sup>327</sup> Robert I Rotberg, ‘Failed States, Collapsed States, Weak States: Causes and Indicators’ <[http://www.brookings.edu/press/books/chapter\\_1/statefailureandstateweaknessinatimeoferror.pdf](http://www.brookings.edu/press/books/chapter_1/statefailureandstateweaknessinatimeoferror.pdf)> accessed January 15 2015).

<sup>328</sup> *Ibid.*

<sup>329</sup> Terms of the text are available at ‘Atlantic Charter’ (Yale Law) <<http://avalon.law.yale.edu/wwii/atlantic.asp>> accessed 15 January 2015); for background *see* ‘The Atlantic Conference’ (Office of the US Historian) <<https://history.state.gov/milestones/1937-1945/atlantic-conf>> accessed 15 January 2015.

<sup>330</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples (New York, 14 December 1960) <<http://legal.un.org/avl/ha/dicc/dicc.html>> accessed May 4 2015.

divisions plaguing region where “states... are not states in the strictest sense... they do not possess authority, as distinct from mere power; they do not possess enduring legal and administrative structures.”<sup>331</sup> While the Nation State had developed within Europe over centuries, beneath the colonial power, many regions of the world retained a “heterogeneous political heritage”<sup>332</sup> that was “brushed aside in the rush by nationalists to seize the reins of power.”<sup>333</sup> Noted Ghanaian historian Albert Adu Boahen noted that Independence created “new states with clearly defined (albeit inappropriate) boundaries in place of “the existing innumerable lineage and clan groups, city-states, kingdoms, and empires without any fixed boundaries.”<sup>334</sup> As a result of the manner in which these States were formed and their respective territories drawn, however, the withdrawal of the strong central power of the Colonial States invariably led to tensions among the artificial borders that failed to accurately reflect ethnic, tribal or cultural ties. The historical use of “divide and rule” policies to maintain colonial power had further caused lasting tensions that came to the forefront as the favoured groups were invariably able to gain control of the political and economic interests following independence. The German and subsequent Belgium preference for the Tutsi people of East Africa led to their establishment as the ruling class in Rwanda and Burundi despite numeric disadvantage and to this day rule fuels ethnic violence in the region.<sup>335</sup> Furthermore, following independence, whilst some States managed to form representative democratic governments, the vast majority resorted to various forms of dictatorship, often propped up along ethnic or religious lines. Fearful of the threat from the “growing threats from their own subordinates”<sup>336</sup> however, many rulers intentionally minimised the development of bureaucratic apparatus in fear it “might develop their own agendas”<sup>337</sup> Regardless of this, democracy was largely unsuccessful with 72 percent of African leaders leaving office through a coup between 1970 and 1989.<sup>338</sup> In South East Asia, the cases of India and Indonesia, two well established and continuous democracies following

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<sup>331</sup> Hadley Bull & Adam Watson, *The Expansion of International Society* (Oxford University Press 1984) 430.

<sup>332</sup> Jeffrey Herbst, ‘Responding to State Failure in Africa’ (1997) 21(3) *International Security* 120, 121.

<sup>333</sup> *Ibid.*

<sup>334</sup> A. Adu Boahen, *African Perspectives on Colonialism* (Johns Hopkins University Press, 1987) 95.

<sup>335</sup> See e.g. Romeo Dallaire, *Shake Hands With the Devil: The Failure of Humanity in Rwanda* (Arrow, 2003) 47.

<sup>336</sup> Beatrice Hibou, *Privatising the State* (Columbia Uni Press, 2013) 99.

<sup>337</sup> *Ibid.*

<sup>338</sup> *Ibid.*

independence are vastly outnumbered by those neighbouring states who have fallen into autocracy and dictatorships. Combined with this was a rush to exploit the vast mineral reserves of many of these nations. With the process lacking in accountability and infrastructure an environment flourished in which powerful leaders were able to vastly expand their personal wealth and utilise this to buy support, as such large-scale corruption became the rule rather than the exception.<sup>339</sup> As State assets were sold off the “incumbent elites” overwhelmingly took advantage of their positions to either acquire these at knock-down prices or else privately profit from the sale to a third party.<sup>340</sup>

Alongside this, much of the potential for large-scale violence was exploited by the escalation of the cold war, with many conflicts transforming into asymmetric proxy wars between the U.S. and U.S.S.R. The Angolan civil war is emblematic of this process, during which the ethnic tensions between the Ambundu, Bakongo and Ovimbundu people were exploited for the purpose of Cold War interests.<sup>341</sup> The USSR, and Cuba in particular, were essential to the establishment and military support of the Ambundu backed *People Movement for the Liberation of Angola* (MPLA). This included financial and military aid, with over 30,000 Cuban soldiers taking part in the hostilities. Parallel to this was a much more illicit backing of the Ovimbundu backed National Union for the Total Independence of Angola. Despite explicit Congressional refusal to support the UNITA rebels, the CIA and high ranking political leaders within the Reagan administration met with and provided backing to UNITA.<sup>342</sup> Much of this was through third-party states, with Israel and South Africa, in particular, providing an indirect method of providing support.

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<sup>339</sup> Patrick Loch Otiendo Lumumbu, ‘Corruption: The Bane of Africa’ in *Corruption in Africa: A Threat to Justice and Sustainable Peace* (2014) 21 <[http://www.globethics.net/documents/4289936/13403252/GE\\_Focus\\_14\\_web.pdf](http://www.globethics.net/documents/4289936/13403252/GE_Focus_14_web.pdf)> accessed 19 August 2016.

<sup>340</sup> Peter Lock, ‘Military Downsizing and Growth in the Security Industry in Sub-Saharan Africa’ (1998) 22(9) *Strategic Analysis* 1393.

<sup>341</sup> M. Ross, ‘How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases’ (2004) 58(1) *International Organization* 35, 37-43.

<sup>342</sup> See M McFaul, ‘Rethinking the "Reagan Doctrine" in Angola’ (1989) 14(3) *International Security* 99 (for an overview of the Reagan administrations role in the Angolan Civil War and more generally a discussion of the US approach to military interventions against Soviet influences.)

### **3.1(3) Fall of the Soviet Union**

In 1991, the changing nature of states was further complicated with the fall of the Soviet Union. This directly affected the nature of statehood through the dissolution of the USSR into fifteen individual states. Followed soon after by the collapse of the Yugoslavia and Czechoslovakia into a further nine smaller states. As with the former colonial states, these newly independent states of the USSR, and the international community, were faced with unique difficulties posed by their situations. The European Commission, in considering these difficulties, noted particularly that “the majority of contemporary states were not formally established as distinct entities”<sup>343</sup> instead transitioning from former Empires to the USSR. As a result, many of these newly formed states faced difficulties transitioning to open democratic states, including a lack of any form of civil society, which had been intentionally repressed by the single party system with the bureaucratic arms of the State centrally controlled from Russia. Further difficulties were encountered through the lack of financial and commercial infrastructure suitable to incorporate into an international order, required for assistance from the IMF and WTO.<sup>344</sup>

It is clear that following Independence of many former colonial or Soviet states there was a drastic shift in the nature of States within the international community. Alongside a dramatic increase in the number of countries was a significant change in the nature of countries. Prior to 1945, the majority of States existed within designated physical parameters that had evolved over a period of hundreds of years. In comparison, many newly established States were arbitrary geographic spaces predicated upon the interests of external actors, without concern for the internal demographic or economic relationships of the citizens within these States. While historical States had developed systems of governance to suit the requirements and benefit their nation, these

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<sup>343</sup> European Commission, ‘25 Years After the Fall of the Iron Curtain: The State of Integration of East and West in the European Union’ (2014) 12 <[https://ec.europa.eu/research/social-sciences/pdf/policy\\_reviews/east-west\\_integration.pdf](https://ec.europa.eu/research/social-sciences/pdf/policy_reviews/east-west_integration.pdf)> accessed 18 July 2016).

<sup>344</sup> James Roaf, Ruben Atoyán, Bikas Joshi & Krzysztof Krogulski, ‘25 Years of Transition: Post-Communist Europe and the IMF’ (International Monetary Fund, 2014); Kim Reisman, ‘The World Bank and the IMF: At the Forefront of World Transformation’ (1992) 60 Fordham Law Review 349 <<http://ir.lawnet.fordham.edu/flr/vol60/iss6/16>> accessed 23 May 2016.

infrastructures were not in place for many newly independent states whose administration was designed primarily to benefit external parties. Furthermore, the foundational requirement of the State was the ability to provide security for their citizens. In most of these newly independent states, these capabilities were absent. Vesting coercive violence in the local community was a direct threat to either the colonising states or the USSR. As such, much of the security had been provided by external forces, for example, the use of the British Army and Navy, the French *Troupe Coloniales* or Soviet troops and KGB agents.<sup>345</sup> The majority of these withdrew rapidly upon independence. In the absence of this, many States were unable to fulfil their primary obligation of protecting their citizens, either internally or externally. Instead of seeking to replace the overall security apparatus, a task too complicated and expensive for many young States, there was a shift towards an increased use of semi-private violence with “Presidential guards a case in point... Sometimes it is not clear whether state formations have been appropriated for private interests... or substitute government functions.”<sup>346</sup> In a number of Sub-Saharan African states, it has been suggested that “the armed forces have denigrated into self-serving corporations geared mainly at enriching their upper ranks... whose objective functions bear little relation to security, neither internal, nor external.”<sup>347</sup> The effect was a proliferation of small states incapable of effectively controlling violence within their own borders and constantly threatened from outside.

It is clear therefore that the independence movements associated with former colonial or Soviet States fundamentally transformed the conception of Statehood as imagined during the rise of the Nation State. As such, the ability of these newly formed States to exercise a monopoly over the use of coercive violence within their territory was increasingly limited. Many of these newly formed states lacked the infrastructure or capabilities required to control the use of coercive force.

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<sup>345</sup> See e.g. Internal Security of USSR (United States Marine Corps, 2012) <[http://www.marines.mil/Portals/59/Publications/Soviet%20Union%20Study\\_11.pdf?ver=2012-10-11-163301-657](http://www.marines.mil/Portals/59/Publications/Soviet%20Union%20Study_11.pdf?ver=2012-10-11-163301-657)> 15 May 2016.

<sup>346</sup> Peter Lock, ‘Africa: Military Downsizing and Growth in the Security Industry in Sub-Saharan Africa’ (1998) 22(9) Strategic Analysis 1393, 1395.

<sup>347</sup> Ibid at 1395.

Furthermore, many of the sovereigns within these new States lacked legitimacy and as such could often not command authority over the entire territory of their state. The social contract, that lay at the foundation of the concept of the nation-state, had not been allowed to develop in many of these states, with other social institutions more powerful than national concerns.<sup>348</sup>

Alongside the direct changes to the nature and capabilities of States by the recognition of newly independent States, came equally important secondary effects. It is worth considering three of these in relation to the growth of the PMSC industry.

## 3.2 Changing Military Power of States

Following the end of the Cold War, many of the major nations sought to reduce military spending from the unsustainable heights of the 70s. As such, most NATO and former Soviet countries reduced their standing armies dramatically. Between 1989 and 1995 alone, as America reduced its standing army, over \$30b was taken from the US Army budget, reducing it from \$93b to just over \$60b.<sup>349</sup> As a result of these cuts, huge reductions took place in active troop numbers; the Brookings Institute, which tracks this data finding that the US Armed Forces reduced from 2.1 million in 1989 to 1.37million in 2000. Similar cuts were common across many NATO states, with the United Kingdom reducing its armed forces from around 250,000 to around 120,000 troops during the same period.<sup>350</sup>

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<sup>348</sup> David K. Leonard, Ferdinand Mugumo Mushi & James Vincent, 'Social Contracts and Security in Sub-Saharan African Conflict States: The Democratic Republic of Congo, Sierra Leone and Somalia' (African Studies Association Conference 2012) <<https://www.files.ethz.ch/isn/133992/Contracts%20and%20Conflicts%20-%20ASA.pdf>> accessed 23 May 2016.

<sup>349</sup> Theo Farrell & Sten Rynning, *Transforming Military Power since the Cold War: Britain, France, and the United States 1991-2012* (Cambridge University Press, 2013) 19.

<sup>350</sup> *Ibid.*



While reductions to NATO forces reduced significantly, the corresponding reductions within former Warsaw Pact nations were even more sweeping, with commentators suggesting that the speed and scale of the reductions had caused the Russian military to “deteriorate so badly that instead of providing security it has become a major source of insecurity”.<sup>351</sup> The Russian national armed forces decreased from over 4 million in 1989 to just over 1 million in 2009,<sup>352</sup> whilst its funding suffered a 90% decrease in relation to GDP. These reductions left Russia incapable of fulfilling its own security needs and unsuccessful campaigns in Chechnya were met with deep resentment among the Russian population.<sup>353</sup> This increasing inability to ensure security within its own borders also helped create an environment in which Islamic extremism was able to gain a rapid foothold, with clashes in many Caucasus regions of Dagestan and Azerbaijan were indicative of the weakened position of the Russian Army.<sup>354</sup>

Whilst the Russian army failed to control the countries South-East, much of its forces in the West had been lost completely being transferred to the newly independent Balkan nations, whose national armies essentially disintegrated following independence.<sup>355</sup> Ukraine provides a unique example of the difficulties encountered by these newly independent states, who inherited large amounts of unsustainable Soviet military infrastructure. As Ukraine had been at the forefront of the Iron Curtain, it housed a disproportionate amount of Soviet military bases and equipment. As such, for a brief period between 1991 and 1993, it ranked as the third largest nuclear power in the world, with over 1,200 nuclear Intercontinental Ballistic Missiles and 41 Nuclear Bombers, along

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<sup>351</sup> Pavel K. Baev, ‘The Trajectory of the Russian Military: Downsizing, Degeneration, and Defeat’ in Steven Miller & Dmitri Trenin eds., *The Russian Military: Power and Policy* (MIT Press, 2004) <[http://mitpress.mit.edu/sites/default/files/titles/content/9780262633055\\_sch\\_0001.pdf](http://mitpress.mit.edu/sites/default/files/titles/content/9780262633055_sch_0001.pdf)> accessed 23 May 2016.

<sup>352</sup> Ibid.

<sup>353</sup> Pavel K. Baev, ‘The Trajectory of the Russian Military: Downsizing, Degeneration, and Defeat’ <[https://mitpress.mit.edu/sites/default/files/titles/content/9780262633055\\_sch\\_0001.pdf](https://mitpress.mit.edu/sites/default/files/titles/content/9780262633055_sch_0001.pdf)> accessed 17 August 2016; Opinion, ‘The Debilitated Russian Military’ *New York Times* (New York, 18 June 2000) <<http://www.nytimes.com/2000/01/18/opinion/the-debilitated-russian-military.html>> accessed 20 August 2016.

<sup>354</sup> Svante Cornell, *Small Nations and Great Powers: A Study of Ethnopolitical Conflict in the Caucasus* (Routledge, 2000)

<[https://is.muni.cz/el/1423/podzim2012/MVZ208/um/35586974/Small\\_Nations\\_and\\_Great\\_Powers\\_\\_A\\_Study\\_of\\_Ethnopolitical\\_Conflict\\_in\\_the\\_Caucasus\\_.pdf](https://is.muni.cz/el/1423/podzim2012/MVZ208/um/35586974/Small_Nations_and_Great_Powers__A_Study_of_Ethnopolitical_Conflict_in_the_Caucasus_.pdf)> accessed 10 August 2016. 262-272.

<sup>355</sup> Ibid.

with the third largest Airforce in the World, despite having virtually no military infrastructure to support this.<sup>356</sup> Furthermore, despite having a population of just over 50million in 1991, the army consisted of over 700,000 troops, nearly triple that of Britain despite having a smaller population.<sup>357</sup> By 1997 this number had been halved to under 350,000, a pattern replicated across many former Eastern Bloc countries.

The downsizing of militaries was arguably most visible in the nations who had been at the forefront of proxy wars during the Cold War. As such, in assessing the state of African armies following in the mid 90's the US Defence Intelligence Officer for Africa noted that:

“Most African state armies are in decline, beset by a combination of shrinking budgets, international pressures to downsize and demobilize, and the lack of the freely accessible military assistance that characterized the Cold War period. With few exceptions, heavy weapons lie dormant, equipment is in disrepair, and training is almost non-existent... The principal forces of order are in disorder in many countries at a time when the legitimacy of central governments (and indeed sometimes the state) is in doubt.”<sup>358</sup>

The stark nature of this military downsizing is evident when considering that for a period sub-Saharan Africa “absorbed military equipment worth up to \$5 billion a year... [b]y 1995, recorded values were estimated at \$270million.”<sup>359</sup> The effect of this has been that States have often “yielded the monopoly of legitimate violence” with both military and police forces contributing towards an effective security vacuum.<sup>360</sup>

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<sup>356</sup> Stephen D. Olynyku, ‘Ukraine as a Post-Cold War Military Power’ (Center for Counterproliferation Research National Defense University Washington 1997) <<http://www.dtic.mil/dtic/tr/fulltext/u2/a426799.pdf>> accessed 24 May 2016.

<sup>357</sup> Baev (n 353).

<sup>358</sup> William C. Thom, ‘An Assessment of Prospects for Ending Domestic Military Conflict in Sub-Saharan Africa’ (CSIS Africa Notes, No. 177, October 1995) 3.

<sup>359</sup> Lock (n 346).

<sup>360</sup> Ibid.

These massive reductions in the militaries across the globe provided two of the key elements for the successful growth of PMSCs. The first of these was a huge number of well trained and professional soldiers who suddenly found themselves unemployed and available for hire on the PMSC Market. The abundance of ex-soldiers provided firms with the ability to move from simple guarding sector into the more professional security sector easily, and with relatively low set up costs. PMSCs became viable alternatives to public forces for large-scale security operations and often came with a significant cost benefit. Public forces were required to provide extensive training, long-term contracts and work benefits. PMSCs were often able to avoid these. They could hire quickly, raising a fully trained force within days, and through using short-term contracts were able to minimise expenses during quiet periods.

### **3.2(1) Proliferation of Arms**

Alongside the reduction in state militaries, the fall of the Soviet Union provided another key ingredient for PMSCs to grow in the manner they have, specifically the proliferation of arms. During the Cold War, both the USA and USSR had transported large numbers of arms to third parties to conduct proxy wars. Between 1986 and 1990 the USSR exported between \$11.6- \$20 billion of arms per year,<sup>361</sup> with many these sales taking place between the USSR and other Soviet bloc or socialist countries. The Arab Socialist Iraqi government received over \$10billion in arms from the USSR between 1982-1985 alone.<sup>362</sup> The US similarly gifted, leased or loaned at least £12billion a year during the 1970s through its various military assistance programmes. In total, it is calculated that the USA sold or gifted more than £300billion of arms to over 120 countries from the period of 1954 to 1990.<sup>363</sup> In a significant amount of these cases the recipients were either unstable states or non-state actors. This famously includes the CIA arming of the Nicaraguan

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<sup>361</sup> Ian Anthony, 'Economic Dimensions Of Soviet And Russian Arms Exports' in Ian Anthony ed., *Russia and the Arms Trade* (Oxford Uni Press, 1998) <<http://books.sipri.org/files/books/SIPRI98An/SIPRI98An04.pdf>> accessed 24 May 2016.

<sup>362</sup> Richard F. Grimmett, 'Trends in Conventional Arms Transfers to the Third World by Major Supplier, 1982-1989' (Congressional Research Service, 1990) <<https://fas.org/sgp/crs/weapons/transfers82-89.pdf>> accessed 24 May 2017.

<sup>363</sup> William Holt, *United States Military Assistance: An Empirical Perspective* (Praeger, 2002) 20.

Contras,<sup>364</sup> whilst in 1965, Secretary of Defense Robert S. McNamara stated that the principal objective of the military aid to Latin America was to assist "in the continued development of indigenous military and paramilitary forces capable of providing, in conjunction with the police and other security forces, the needed domestic security."<sup>365</sup> Similarly, during the civil war in Angola, the CIA estimated the USSR supplied over \$2billion in military support to the embattled ruling MPRA.<sup>366</sup> Many of these small arms and light weapons made their way onto the open market, the type now most frequently seen in PMSC.<sup>367</sup> The standard Soviet weapon, the AK-47, is to date the most abundant weapon on earth with an estimated one AK-47 in operation for every 70 people on earth, while there are estimated to be a minimum 500 million small arms in private circulation at this time.<sup>368</sup>

Similarly, with the end of the Cold War, many newly independent and financially weak Eastern European nations found themselves with huge stockpiles of weapons they no longer had an immediate need for. The vast majority of these arms found their way onto the commercial market. Many of these military grade weapons proved essential for moving PMSCs from the support roles they had previously been involved in, to the wholesale exercise of coercive violence in the manner traditionally associated with States.

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<sup>364</sup> Lee H. Hamilton & Daniel K. Inouye, 'Report of the Congressional Committee Investigating Iran Contra' (Congressional Committee, H. Rept. No. 100-433, 1987) <<http://nsarchive.gwu.edu/NSAEBB/NSAEBB40/19871117.pdf>> accessed 23 May 2016.

<sup>365</sup> U.S. Congress, 'House Committee on Foreign Affairs, Foreign Assistance Act of 1967' (Hearings, 90th Cong., 1st Ses., 1967) 117.

<sup>366</sup> 'Soviet and Cuban Intervention in the Angolan Civil War' (Intelligence Memorandum, Central Intelligence Services, released 2001) <[https://www.cia.gov/library/readingroom/docs/DOC\\_0000518406.pdf](https://www.cia.gov/library/readingroom/docs/DOC_0000518406.pdf)> accessed 14 August 2016.

<sup>367</sup> See Michael T. Klare, 'A Scourge of Guns: The Diffusion of Small Arms and Light Weapons in Latin America' (Arms Sales Monitoring Project, Federation of American Scientists, 1996) Chapter 3 <<http://fas.org/asmp/library/scourge/scourge-ch3.pdf>> accessed 24 May 2016 (for an analysis of official SALW transfers to Latin America during 1980-1993).

<sup>368</sup> Abdel-Fatau Musah, 'Africa: The Political Economy of Small Arms and Conflicts' <<http://unpan1.un.org/intradoc/groups/public/documents/IDEP/UNPAN002406.pdf>> accessed 24 May 2016; Abiodun J. Oluwadare, 'The Impact of the Proliferation of Small Arms and Light Weapons on West African States: An Analysis of the Sierra Leone Civil War' (2014) 7(2) Journal of Studies in Social Sciences 189.

### 3.3 Export of Neo-Liberal Policies and Globalisation

The final factor that this study considers is the growth and export of neo-liberal policies and in particular the process of globalisation that is largely considered to have resulted from these. While the growth of neo-liberal policies can be traced to the 1980s and in particular the Presidency of Ronald Reagan and Prime Ministership of Margaret Thatcher, it was only following the end of the Cold War that it became the truly dominant ideology within the international community with the process of globalisation expanding rapidly. Specifically, as the United States was left as the world's only true superpower, and Russia's financial crisis prevented it from supporting its previously dependent States, the US was able to export its social and economic policies across the Globe. In contrast to the centrality of States within PIL however, has been the rapid growth of globalisation which, particularly since the decline of communism, has been advanced in large by powerful supranational organisations such as the IMF and World Bank Group.<sup>369</sup> The adoption of these neo-liberal approaches by the World Bank, and IMF in particular, was essential to creating the environment in which PMSCs were able to expand in the manner they did. Alongside these supranational organisations, developed countries or trading blocks, notably the USA and EU have also sought to tie market access to the liberalisation and privatisation of public services. A central result of this change has been the ever-increasing role and power of MNCs primarily as a result of the neo-liberal policies, aggressively advanced by these supranational organisations.<sup>370</sup>

In relation to the development and growth of PMSCs, the export, or neo-liberal social and economic policies, contributed in a number of significant ways. The first of these is the changing position of states when considering power and authority, with private corporations and supranational organisations increasingly challenging the centrality and sovereignty of states. Specifically, the growth of these MNCs, directly interacts with the changing nature of states with a

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<sup>369</sup> See Joseph Sitglitz, *Globalization and its Discontents* (Penguin, 2002) 12-20; M.A.G. Van Meerhaeghe, 'Globalisation: Concept, Outcome, Future – A Continental View' (2012) 33(2) *European Journal of Law & Economy* 239, 244.

<sup>370</sup> *Ibid.*

significant line of academic thinking that suggests that this growth of MNCs directly contradicts the supremacy of states. Meanwhile, the increasingly important role of supranational organisations, including the IMF but also ICSID, is increasingly being viewed as antithetical to the ideals of liberal democracy.<sup>371</sup> The unaccountable nature of many of these organisations, combined with their increasing power has led to a suggestion of a democratic deficit.

### **3.3(1) Multi-National Corporations and Supranational Organisations as (Quasi)Sovereigns**

One of the most visible effects of globalisation has been the rapid expansion of multinational corporations growing from 35,000 in 1990 to 75,000 in 2005. Furthermore, while this amounted to a 66% increase of MNCs in developed nations it represented a 700% increase in the number of MNCs in developing nations. As a result of this global liberalisation, MNCs now represent an increasingly powerful actor within the international community, with 51 corporations now worth enough to break into the 100 richest countries.<sup>372</sup> The oil giant Shell, for example, would be significantly richer than several large European states including the Czech Republic or Croatia. Furthermore, due to the aggressive pursuit of these policies, many of these markets are liberalised before the states infrastructure and civil systems are able to support the presence of MNCs.<sup>373</sup> Investors in developing countries are often several times more economically powerful than the country they are investing in and as such are able to effectively force states into operating in a manner beneficial to the company rather than the state. There has been a growing acceptance across the political spectrum that MNCs now are “placed... on a level either equal to or above governments

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<sup>371</sup> Armin von Bogdandy, Ingo Venzke; ‘In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification’ (2012) 23(1) *European Journal of International Law* 7; Catharin E. Dalpino, *Does Globalization Promote Democracy?: An Early Assessment*. (Brookings Institute, 2001) <[http://www.brookings.edu/articles/2001/fall\\_democracy\\_dalpino.aspx](http://www.brookings.edu/articles/2001/fall_democracy_dalpino.aspx)> accessed 25 May 2017.

<sup>372</sup> Sarah Anderson & John Cavanagh, ‘The Rise of Corporate Global Power’ (The Inst. For Policy Studies 2000) <[http://www.ips-dc.org/downloads/top\\_200.pdf](http://www.ips-dc.org/downloads/top_200.pdf)> accessed 2 May 2016.

<sup>373</sup> See C. Baez, M. Dearing & C. Dixon, ‘Multinational Enterprises and Human Rights’ (2000) 8 *U. Miami. Int’l & Comp. L. Rev.* 183; Stiglitz (n 369) at 69-72.

as determinants of the economic... and political destinies of the nation-states.”<sup>374</sup> As a result, while the nature of states was changing from large secure entities too often geographically or economically small and weak states, they were increasingly being asked to compete at an international level, with private organisations able to call upon significantly more economic resources. When considering the growth of PMSCs the growth of MNCs is notable for a number of reasons.

Considering the leverage that MNCs often enter into negotiations with, there is a tendency to consider that they can operate outside of the legal system of the nation and are largely unaccountable to the government of the country. It ultimately falls upon the host-state to ensure that MNCs remain accountable within their operations, if a host-state is incapable or unwilling to establish accountability, this directly questions the sovereign power of that state. The primary reason that states are in practice unable to hold MNCs accountable is that the corporations often hold significant power, and therefore political influence, over the nations in other respects. Within manufacturing and production industries the ability to quickly move operations between countries, depriving the host-state of the income and jobs, gives MNCs a negotiating position from which the state may be under pressure to overlook their actions. Considering this, the UN Special Representative for Business and Human Rights John Ruggie noted that “some developing countries may lack the institutional capacity to enforce national laws... or they may feel constrained from doing so by having to compete internationally for investment”<sup>375</sup> Similarly, within mineral extraction, MNCs are often the only ones with the technical capabilities to conduct the operations,

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<sup>374</sup> Stephen D Cohen, ‘Multi Nationals Versus the Nation State: Has Sovereignty Been Outsourced’ in Stephen D. Cohen ed., *Multinational Corporations and Foreign Direct Investment: Avoiding Simplicity, Embracing Complexity* (2007) 6.

<sup>375</sup> See e.g. John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights* (Report of the Human Rights Council, Eighth Session) A/HRC/8/5 7 April 2008 <[www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A-HRC-8-5.doc](http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A-HRC-8-5.doc)> accessed 9 November 2015, 6; See also Liesbeth Enneking, *Foreign Direct Liability and Beyond* (Eleven Int’l Publishing, 2012) 365.

leaving the country deprived of the essential income unless willing to overlook the MNCs methods.<sup>376</sup>

Finally, most MNCs enter a country as a result of bilateral investment treaties (BIT). These treaties create enforceable rights for investors, which are thereafter strongly protected at an international level through supranational arbitration.<sup>377</sup> In 2006 Ecuador was ordered to pay nearly \$2bn, about 5% of its GDP, for breaching its BIT when it terminated an oil production investment.<sup>378</sup> Furthermore, the results of being found accountable in these supranational panels can have a substantial lasting effect on international trade within that country.<sup>379</sup> As a result of this, BITs often give MNCs substantial bargaining power at the expense of other interested parties, particularly local populations, and even the state government.<sup>380</sup> As such, even if states were willing to initiate proceedings against the MNC they may well not be in a position to do so.<sup>381</sup>

The increasing strength of MNCs relative to their host state has led to them becoming a chief employer of PMSCs. Within these industries there is a vast degree of variation in the security requirements, with company requirements ranging from simple protection from theft to the defence against armed insurgencies. Corporations involved in the extraction of natural resources such as oil, diamonds, and other minerals have in particular relied upon the more extreme end of private security in order to expand their operations. In recent years, exploratory drilling and mining operations have been established in areas such as Angola, Chechnya and Libya, in search of potentially high financial rewards. This has significantly increased the security risks to both staff and property,

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<sup>376</sup> See e.g. Charis, Kamphuis, 'Foreign Investment and the Privatization of Coercion: A Case Study of the Forza Security Company in Peru' (2012) 37 *Brook Journal of International Law* 530, 532-4.

<sup>377</sup> Tra T. Pham, 'International Investment Treaties and Arbitration as Imbalanced Instruments: A Revisit' (2010) 13(3) *International Arbitration Law Review* 81.

<sup>378</sup> 'Largest Award Ever in Bilateral Investment Treaty Case at ICSID' (Bankside Chambers) <<http://www.bankside.co.nz/Latest/tabid/87/id/43/title/largest-award-ever-in-bilateral-investment-treaty-case-at-icsid/Default.aspx>> accessed 7 May 2015.

<sup>379</sup> Gus Van Harten, 'Policy Impacts of Investment Agreements for Andean Community States' (September 1, 2008) <<http://ssrn.com/abstract=1461097> or <http://dx.doi.org/10.2139/ssrn.1461097>> accessed 7 May 2015.

<sup>380</sup> *Ibid.*

<sup>381</sup> *Ibid*; see also Ruggie (n 375) at 6.



which are often seen either as strategic targets by warring factions because the corporation has control over precious natural resources or ideological targets on the basis of the MNCs relationship to another country. When the host government is unable to guarantee security for these foreign investors, corporations are increasingly taking responsibility for their own security by hiring local or international security companies. Host governments have been similarly keen to see these bilateral security arrangements occur as it secures foreign investment and strengthens the security position within the country. The Angolan government has gone so far as to make it part of its constitution that foreign investors provide their own security arrangements.



# CHAPTER FOUR

## THE MODERN SECURITY LANDSCAPE

### 4 Introduction

In the previous Chapter, this study identified the factors that are considered to have contributed to the growth of PMSCs. The analysis demonstrated that over the past 30 years, in particular, the characteristics of the nation-state have fundamentally evolved, due to both internal changes in the capabilities and characteristics of states, and externally the growth in transnational actors, including supra-governmental organisations, and multi-national corporations. As a result of this, the state's control over coercive violence has been increasingly diluted as private actors have sought to capitalise on the retreat of the state. This chapter will look to trace this transformation and provide a basis for which to critically analyse the legal and regulatory environment in which PMSCs currently operate.

The first section of this chapter will therefore seek to examine and critically analyse how these changes have been reflected in the growth of the private security sector, and consider how this has culminated in what has been described as “global security assemblages”- complex hybrid structures of actors, knowledge, technologies, norms, and values that stretch across national boundaries but operate in national settings.”<sup>382</sup> This modern security environment primarily traces its roots to the growth, evolution and eventual convergence of two sectors. This section will begin by examining how the growth of neo-liberal policies and concurrent expansion of multi-national corporations has been mirrored by private security guards, moving from traditional night-watchmen to transnational

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<sup>382</sup> Abrahamsen & Williams, ‘Security Privatization and Global Security Assemblages’ (2011) 18(1) *The Brown Journal Of World Affairs* 153, 153.

security providers. Thereafter this chapter will examine how the changing state military capacities led to the emergence of Private Military Contractors as a supplement to national capabilities. It will examine how the success of these, combined with changing foreign policy, led to an increasing legitimisation of their activities reflected in their emergence as a central component of many western militaries. It will suggest that as a result of this legitimisation and the expansionist policies of Private Security Firms we have seen the convergence of Private Military and Security Contractors into a hybrid security sector, where traditional distinctions between military/civilian, security/warfare have been eroded leaving the legal and regulatory frameworks exposed and inadequate. Finally, this section will examine how these legitimised actors have been embraced by both supra-governmental organisation and NGOs in the search for operational security, positioning PMSCs as the answer to global insecurity.

The second section of this Chapter will seek to provide an empirical equivalent to this conceptualisation and provide a practical basis from which this work can critically analyse the issues within the legal frameworks currently available. This section will, therefore, present three country-specific case studies, examining the hybrid security sectors that have developed. In doing so, this will demonstrate the range of actors currently operating within individual marketplaces. It will highlight the divergence of national regulations and examine the difficulties encountered both in enforcing these and in ensuring they protect their citizen's fundamental rights. These case studies will, therefore, follow a clear format through which intra-national comparisons can be more clearly identified. They will begin by assessing the political and economic climate of the state, establishing the extent to which the factors considered in Chapter Four have affected the security landscape. From there the case studies will identify the primary security threats within each state, seeking to identify the key motivations for the current security sectors position. Finally, each case study will identify the major actors within each state. It will examine the primary roles of these actors including considering on whose behalf they are operating and the security threat they are responding to. Finally, it will highlight any problems associated with each actor, specifically noting claims of

illegal activities or human rights abuses and consider how each state has been able, or willing, to punish these infractions.

## **4.1 Private Violence in the 20<sup>th</sup> Century**

### **4.1(1) Night-Watchmen Meet Globalisation**

Whilst post-WW2 the development of civilian police had largely taken over the security market in the Western hemisphere, there remained gaps in which the private market continued to exist. One of these gaps, was the common employment of private night watchmen, particularly by large factories and some larger stores. An examination of the evolution of one of these firms, Group4 provides an excellent illustration of how this local guarding developed into the transnational security industry we are concerned with here. Established as a subsidiary of Kjobenhavn Fredixberg Nattevagt, a Swedish guard company established in 1901, Group4 moved to the UK in 1950.<sup>383</sup> Group4 experienced significant and sustained growth, expanding into much of the European market by 1980. In 1981 however, the firm split with two brothers taking half of the company; one company remained Group4, the other becoming Securitas AB. Group4 subsequently undertook an aggressive expansion project, following a pattern of buying established security providers in markets they otherwise did not operate in.<sup>384</sup> As such, they acquired interests in Saudi Arabia, Hungary and the UAE before merging with a similar security provider Falck becoming the second largest private security organisation in the world.<sup>385</sup> In 2002, G4F finally moved into the American market, purchasing the company that held the contracts for the protection of US embassies. By this time G4F employed over 200,000 people in over 80 countries. Mirroring this growth was Securicor, a British based company who established in 1935 as a private police watch. Originally employing 15 watchmen, by 2004 it had a staff of over 120,000 people, and having expanded into the cash security

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<sup>383</sup> For an overview see Our History, (G4S) <<http://www.g4s.com/en/Who-we-are/Our-History>> accessed 14 May 2016.

<sup>384</sup> Ibid.

<sup>385</sup> Rita Abrahamsen & Michael C Williams, *Security Beyond the State: Private Security in International Politics* (Cambridge Uni Press, 2011) 43

for banks was transporting more money in Britain than any other company.<sup>386</sup> G4F and Securicor merged in 2004 to create G4S, quickly becoming the largest private security firm in the world, and the largest single employer on the London Stock Exchange.<sup>387</sup> In a similar manner, Securitas AB has continued to grow through a series of acquisitions, moving into the South and North American markets. The most notable of these was the purchase of Pinkertons, then the largest private security provider in the US.<sup>388</sup> By the turn of 2010 a string of purchases in South America, including Colombia, Mexico and Peru, pushed Securitas annual revenue to over \$9 billion.<sup>389</sup>

#### **4.1(2) Post-Colonial Africa - Remnants of Mercenaries**

Alongside security firms, it is also informative to consider the provision of violence on a greater scale. In particular, although for the most part post-1945, states were the principal actors within warfare, there remained a small number of notable mercenaries who continued to operate throughout the world. The mercenaries of the 20<sup>th</sup> century operated illicitly and were marginalised from society while previous mercenaries could expect to operate as part of large squadrons, or even trading companies, these men often worked alone or with small groups of likeminded ex-soldiers, offering their military expertise to local groups. The most notorious of these was “Mad Mike Hoare” an Irish born Commando, who raised through the ranks of the British military in WW2.<sup>390</sup> Following attempts at civilian life as a safari guide, he instead offered his services as a commander to rebel groups seeking a foothold in Africa. Twice, along with a group of European mercenaries know as “the Terrible Ones” he led attempts to establish a separate Katanga state in Congo, essentially at the behest of mining firms.<sup>391</sup> The defining factor of these post-WW2 mercenaries was their illegal and underground nature, although often backed by Western companies and

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<sup>386</sup> Ibid.

<sup>387</sup> Graham Ruddick, ‘G4S To Become World’s Biggest Security Company,’ *Daily Telegraph* (London, 11 October 2011) <<http://www.telegraph.co.uk/finance/newsbysector/supportservices/8832858/G4S-to-become-worlds-biggest-security-company.html>> 14 May 2016.

<sup>388</sup> Our History – 1999-2000, (Securitas) <<http://www.securitas.com/about-us/our-history/1999-2000/>> accessed 9 March 2016.

<sup>389</sup> Annual Report 2011, (Securitas) <[http://www.securitas.com/globalassets/com/files/annual-reports/en/annual\\_report\\_2011.pdf](http://www.securitas.com/globalassets/com/files/annual-reports/en/annual_report_2011.pdf)> accessed 9 March 2016.

<sup>390</sup> Caroline Holmqvist, *Private Security Companies: The Case for Regulation* (SIPRI Policy Paper No. 9, 2005)

<sup>391</sup> Singer (n 18) at 37.

occasion Western Governments, with the CIA, in particular, being linked to their support, this was done unofficially and without record. The mercenaries were paid as individuals and with cash for their services.

In 1989, this changed with the establishment of Executive Outcomes, considered the earliest of the modern PMSC era, and providing one of the most interesting accounts of PMSC activity.<sup>392</sup> EO was formed almost exclusively of former South African Special Forces, including members of the “Civil Co-Operation Bureau”, the political assassination squad of the apartheid regime.<sup>393</sup> Following the disbanding of the Apartheid era South African military, many of these redundant soldiers formed Executive Outcomes, with the aim of offering Special Forces training to newly established militaries. Notably, they were registered in the UK with their head office listed as “Plaza 107” 535 King’s Road, London. According to an investigation by *The Observer*, Plaza 107 was the registered head office of a string of international companies ranging from diamond mining to aviation services<sup>394</sup> Due to these murky and unclear business relationships, there has been extensive speculation as to how these businesses were organised.<sup>395</sup> In 1996, a UN report found that “Executive Outcomes is receiving about US\$30 million and mining concessions in the Koidu district for its mercenaries operations.”<sup>396</sup>

Regardless of their business practices, in the early nineties EO shot to prominence for its role in supporting the governments of Angola and Sierra Leone during bloody civil wars and were widely heralded as a stabilising force within the region, capable of preventing bloodshed in an

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<sup>392</sup> Deborah Avant, *The Markets for Force: The Consequences of Privatizing Security* (Cambridge University Press, 2006).

<sup>393</sup> See Eeben Barlow, *Against All Odds* (Galago Publishing, 2007) 59; see also Khareen Peech, ‘Executive Outcomes- A Corporate Conquest’ (*Institute for Security Studies Africa*) 1, <<http://www.issafrica.org/uploads/PEACECHAP5.PDF>> accessed 3 Aug 2103, provides an excellent account of the make-up and activities of EO.

<sup>394</sup> See *Ibid.*, at 8.

<sup>395</sup> *Ibid.*

<sup>396</sup> Report of Enrique Bernales Ballesteros, Special Rapporteur, Report on the Question of Mercenaries as a Means of Violating Human Rights and Impeding the Rights of Peoples to Self-Determination, 17 January 1996, UN Doc E/CN.4/1996/27, para 65.

unprecedented manner.<sup>397</sup> Indeed, after EO left both countries, they were replaced with UN forces who failed to maintain their success with both countries quickly plunging back into civil war.<sup>398</sup> However, it has been suggested that this stabilisation came at a significant humanitarian cost. Fighting against untrained and unorganised rebel forces, armed primarily with ex-soviet machine guns, EO's professionally trained soldiers were armed with a combination of high-tech American and Soviet military equipment.<sup>399</sup> They were particularly known to operate sophisticated reconnaissance equipment and utilise heavy artillery and military helicopters to inflict huge damage on rebel forces. Through their connections with Ibis Air, Executive Outcomes was able to call upon the support of SU-25 bombers and Mig-27 ground attack planes. Their primary weapons, however, were ex-Soviet mi 24 attack helicopters, armed with four-barrelled Gatling guns and 40mm Grenade Launcher. Despite this, the rebels often operated within, or close to, civilian areas and the large-scale destruction caused by the attacks were potentially disproportionate to the military gains. Of particular concern was the widespread use of ex-Soviet "fuel-air explosive" bombs.<sup>400</sup> These thermobaric weapons have a blast range of nearly 2km, incinerating those close to the explosion, whilst causing a vacuum at the edge of the blast range capable of rupturing lungs and crushing internal organs.<sup>401</sup> While not explicitly outlawed, they are considered a significant human rights concern and due to the indiscriminate nature of their damage can constitute a war crime, unless used with discretion and precision. Alongside the manner of their operations, one of the most significant questions regarding the employment of EO relates to their payment. In particular, when EO were initially employed by the Angolan Government, their initial contract related to the

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<sup>397</sup> See for example David Shearer, *Private Armies and Armed Intervention* (OUP 1998) 73-77. Shearer, who was head of Save the Children in Sierra Leone states that although unorthodox EO significantly stabilised the region and prevented the recruitment of child soldiers.

<sup>398</sup> See for example Dena Montague, *The Business of War and the Prospects of Peace in Sierra Leone* (Arms Trade Research Centre, World Policy Institute, 2002) 7.

<sup>399</sup> See generally Barlow (n 393) at 61-67.

<sup>400</sup> Al J Venter, 'Privatizing War' (Janes International Defense Review, 2010) <<http://www.mercenary-wars.net/pdf/al-ventor-privatising-war.pdf>> accessed 5 Aug 2015; see also HRW, Angola, 'Arms Trade and Violations of the Laws of War' (Human Rights Watch) 82 <<http://www.hrw.org/sites/default/files/reports/ANGOLA94N.PDF>> accessed 7 Aug 2015.

<sup>401</sup> 'Background on Russia's Fuel Air Bombs (Vacuum Bombs) (Human Rights Watch) <<http://www.hrw.org/en/reports/2000/02/01/backgrounder-russian-fuel-air-explosives-vacuum-bombs>> accessed 4 Aug, 2015.



recovery of the Soyo Oil Fields which had recently been taken by Unita.<sup>402</sup> Many of these fields were owned and operated by Western-based oil companies, with the implication that their involvement was central to the funding of EO. Meanwhile, in Sierra Leone, their funding relied primarily on the recovery of diamond fields from the RUF. Even when their operations were finished, however, the financial arrangements remained difficult to establish, with many EO employees remaining in the region as employees of subsidiaries of sister companies. Furthermore, their close relationship was maintained with many firms who benefited from their actions, including sharing an office with mining firms who gained contracts in Sierra Leone after their involvement.<sup>403</sup>

These new “semi-legitimate” military contractors played a central role in several successful and attempted *coups* in the early 1990’s, with one such operation in Papua New Guinea causing a major international political incident. Sandline International, established and run by a former British Army colonel, were brought in to suppress an insurgency in a province of Papua New Guinea. The use of mercenaries to undertake this operation was opposed by the national military and the governments of neighbouring Australia and New Zealand. Indeed, Australia went so far as to scramble its air force to intercept Sandline’s transport of personnel and equipment. The eventual failure of the mission led to the resignation of the Prime Minister of Papua New Guinea.<sup>404</sup> Despite this, Sandline would continue to operate as a Military Contractor, including working closely with Executive Outcomes in Liberia and Sierra Leone.

### **4.1(3) Military Contractors – The New Normal**

Following Executive Outcomes rise to increasing prominence in Africa, the concept of military contractors gained traction throughout the West, and when Europe was confronted by an

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<sup>402</sup> Ibid.

<sup>403</sup> Singer (n 18) at 37.

<sup>404</sup> Ibid.

unconventional war they were largely unprepared for<sup>405</sup> military contracting firms proved a popular option to Western Governments. During the Yugoslavian civil war; with two companies, DynCorp and MPRI playing a central role.<sup>406</sup> Under UN Security Council Resolutions 1031<sup>407</sup> and 1088,<sup>408</sup> NATO forces were mandated to provide limited military intervention through the UN Implementation Force (IFOR) and later Stabilisation Force (SFOR).

MPRI were originally set up by former high-level officials of the US Army to provide military training to American allies, with Taiwan and Sweden providing amongst their biggest clients. In 1994 however, the US employed MPRI to undertake border patrols to implement the UN enforced arms embargo. However, as the Yugoslavian Civil War began to turn against the US allies, an agreement was executed for the MPRI to provide advice to the Croatian Ministry of Defense for the development of “strategic long-term capabilities.”<sup>409</sup> Emphasising the link between MPRI and the US military, the MPRI team was to be run by John Sewall who had been the US envoy to the area. Despite the contract not officially including any direct training of the Croatian military, observers have almost universally credited MPRI with training and tactical planning that helped turn the course of the Yugoslav War. In particular, having suffered consistent heavy defeats to the Yugoslav Army following the involvement of MPRI, the Croats undertook an offensive operation called “Operation Storm” which according to military sources in the area was “a textbook operation.... Whoever wrote that plan of attack could have gone to any NATO staff college in North America... and scored an A-plus.”<sup>410</sup> Which would be unsurprising, considering MPRI wrote the textbooks used in NATO colleges. Specifically, whilst the Croatian army was officially trained in Soviet-style attrition tactics, that had been common in the earlier battles, the Croatian military

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<sup>405</sup> Bethea, McClean G., "Letting Bygones Be Bygones: The United States Military's Turn from Irregular Warfare in the Wake of the Vietnam War" (Master's Capstone Theses, 2017) 144 <<http://digitalcommons.apus.edu/theses/144>> accessed 7 April 2017.

<sup>406</sup> Deborah D. Avant and Renée de Nevers, 'Military Contractors & the American Way of War' (2011) 140(3) *Daedalus* 88, 93.

<sup>407</sup> UNSC Res 1031 (15 December 1995) UN Doc S/RES/1031.

<sup>408</sup> UNSC Res 1088 (16 December 1996) UN Doc S/RES/1088.

<sup>409</sup> Deborah Avant *Markets for Force: The Consequences of Privatizing Security* (Cambridge University Press, 2005) 125.

<sup>410</sup> Laura Silber & Alan Little, *Yugoslavia; Death of a Nation* (Penguin, 1997) 357.

employed a NATO-style combined offensive attack, that within a week recovered an area of territory that had been continually lost over the previous 6 months. Further speculation of MPRI involvement was triggered when the company won a contract to “Train and Equip” the Croatian army, despite never having been part of the official bidding process. And while officially, MPRI involvement was on behalf of the US, NATO and the UN, the funding for their involvement was discovered to have been donated to the region through, amongst others, Saudi Arabia and Kuwait and the UAE, who were keen to see a Muslim majority country as the figurehead of the western efforts.

Alongside the direct involvement of PMSCs in military operations, contractors were used extensively as a training tool for local police forces. Part of the IFOR Mandate specifically called for the provision of training, through the UN International Police Task Force (UNIPTF), to the new national police forces<sup>411</sup> and due to the actions of both sides during the war, there was particular emphasis placed ensuring that the police were trained to protect human rights.<sup>412</sup> As the US does not have a Federal police force to provide such training, a \$15million contract was given to the Virginia based PMSC, DynCorp, to recruit and train officers for the new Bosnian police force.<sup>413</sup>

Following the involvement of MPRI in former Yugoslavia and DynCorp in Colombia, the prevalence of Contractors within the military increased significantly. When the US invaded Afghanistan and then Iraq, the military found itself stretched beyond a level it could manage, and the rapid expansion of military capabilities required to conduct these simultaneous wars fell squarely at the feet of contractors. In the decade following, the US government agreed contracts

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<sup>411</sup> Ibid at para. 26-29.

<sup>412</sup> UNSC Res 1088 (16 December 1996) UN Doc S/Res/1088 at para. 28 (“advising law enforcement agencies on guidelines on democratic policing principles with full support for human rights, and investigating or assisting with investigations into human rights abuses”)

<sup>413</sup> See Human Rights Watch, ‘Hopes Betrayed: Trafficking of Women and Girls to Post-Conflict Bosnia and Herzegovina for Forced Prosecution’ at 14, fn. 33.

worth over £100 billion to private firms for services in Iraq,<sup>414</sup> whilst for a period as the war was winding down, private contractors outnumbered Coalition forces in both Afghanistan and Iraq.<sup>415</sup> The privatisation of the American military machine means that it is now impossible for large-scale troop deployments to occur without contractors. They are responsible for almost all support services, including building semi-permanent bases, running the canteen, and providing on-base security.<sup>416</sup> They also engage in much more active roles, often providing “security” to American forces on the frontline, and in essence fighting alongside American troops. Amongst the roles these security contracts included were the extraction of injured troops from the battlefield. On one occasion, the extraction of a marine culminated in Blackwater guards engaging in an 18-hour firefight with over 300 insurgents. The Blackwater guards were able to call upon the assistance of their own company helicopters to provide aerial attacks and resupply the guards with ammunition and supplies, demonstrating the overtly military nature of their operations.<sup>417</sup>

With this expansion of military contracting, transnational security services saw room for growth into the developing and lucrative field, expanding into territories and undertaking roles increasingly disparate from the traditional private guard. This expansion has required providing security in a range of scenarios that blur the lines between civil security and military. In 2008 G4S acquired ArmorGroup, a British Company with contracts from the US and UK governments in Afghanistan and Iraq, along with permanent offices in Colombia, Nigeria and Sudan.<sup>418</sup> G4S now operates a dedicated “complex environments” team staffed largely by ex-military personnel, their roles include de-mining, close protection and security envoys.<sup>419</sup> It is this combination of large

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<sup>414</sup> Heidi Peters, Moshe Schwatz & Lawrence Kapp, ‘Department of Defence Contractor and Troop Levels in Iraq and Afghanistan: 2007-2016’ (Congressional Research Service, Aug. 15, 2016) <[http://psm.du.edu/media/documents/us\\_research\\_and\\_oversight/csr\\_reports/us\\_crs\\_2016\\_r44116.pdf](http://psm.du.edu/media/documents/us_research_and_oversight/csr_reports/us_crs_2016_r44116.pdf)> accessed May 15, 2016.

<sup>415</sup> Ibid.

<sup>416</sup> Ibid; *see also* Singer (n 19) at 13-20.

<sup>417</sup> Scahill (n20) at 305-20.

<sup>418</sup> *See* ‘G4S Completes Acquisition of ArmorGroup International PLC,’ (G4S) <<http://www.g4s.com/en/media%20centre/news/2008/05/07/g4s%20completes%20acquisition%20of%20armorgroup%20international%20plc/>> accessed 16 April 2017; *see also* Joakim Berndtsson, Christopher Kinsey, *The Routledge Research Companion to Security Outsourcing* (Routledge, 2016) 150.

<sup>419</sup> CSR Case Studies, (G4S) <<http://www.g4s.com/en/Social-Responsibility/CSR-Case-studies/All-news/Business-for-peace>> accessed 21 May 2017.

multinational companies, with interests in wide-ranging activities that have come to represent the modern face of PMSCs.

#### **4.1(4) Private Contractors and Humanitarian Intervention**

The increasing legitimacy of PMSCs is potentially most evident in the increasing use of private security to support humanitarian operations. As a result of the upward trend in “incidents of major violence against humanitarian workers,”<sup>420</sup> the use of PMSCs by NGOs is a gradually expanding security sector. As early as 1999 a report by the Canadian NGO CARE concluded that “the core dilemma for, from which all others arise, stems from the security vacuum engendered by the emergency itself and the unwillingness of internationally sanctioned, legitimate forces to address the need for security”.<sup>421</sup> Not only is there an absence of humanitarian space in which to deliver emergency relief, but violent attacks against humanitarian aid workers have grown at an alarming rate. In 1998, the number of civilian UN workers killed exceeded UN military casualties for the first time. Recent conflicts in Syria and Libya have shown that civilians and aid agencies are increasingly considered strategic targets. Furthermore, the nature of warfare has increasingly placed civilian populations, and therefore the aid organisations, directly into danger. Since WWI the proportion of civilian casualties in war has risen from 5% to 80%. The safety of staff is now a major concern for donors and agencies alike. Faced with these increased security risks, humanitarian agencies are having to review their security arrangements, including the use of private security companies.

Legally host governments are responsible for the security of humanitarian operations within its territory. However, where law and order have broken down or regions of their territory have

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<sup>420</sup> Abby Stoddard, Adele Harmer and Victoria DiDomenico, *The Use Of Private Security Providers And Services In Humanitarian Operations* (Humanitarian Policy Group Report 27, London: Overseas Development Institute, 2008)

<sup>421</sup> Damian Lilly, ‘The Privatization Of Security And Peacebuilding : A Framework For Action’ (International Alert, 2000) < <http://www.sandline.com/pdfs/privsec.pdf> > accessed 5 August 2016 at Section 5.5

fallen under the control of insurgents and rebel groups, the government is often unable or unwilling to fulfil this obligation. In particular, it has been suggested that the withholding of humanitarian aid is increasingly utilised as a tactic of war. Increasingly, local and international private security companies are used in these situations to ameliorate the security problems faced and to provide protection to personnel and property. Often, the only other viable option would be to rely upon, and co-operate with, local security forces, insurgents or potentially multilateral peacekeeping forces to provide a security for the humanitarian mission and delivery of aid.

#### **4.1(5) Preliminary Conclusions**

It is clear from the above, that over the past 30 years, the security landscape both nationally and internationally has fundamentally transformed the position of the state and the bearer of instruments of coercive violence. Internationally, globalisation has transformed local night-watch companies into transnational security firms with capabilities often beyond those of the state. This growth has made them invaluable to both developed nations, where political policies have reduced the capabilities of the state and sought to establish private competition; but also in developing nations, where these external actors are able to provide services of which the existing state infrastructure is incapable. Alongside this, as the nature of warfare has transitioned from large-scale inter-state conflicts, to more frequently asymmetric and often intra-state, state militaries have demonstrated an inability to confront these security threats. The outcome of this has been that private actors, offering professional and highly specialised services, have increasingly been seen as the answer to these situations and the global security market has grown exponentially to meet this demand. The following section will examine how this growth has in fact led to increasingly divergent actors representing a variety of interests and offering a range of capabilities and professionalism. It will examine how this transformation has been represented in three states with a range of unique political, economic and security characteristics.

## **4.2 Case Studies on the Privatisation of Violence**

The following section of this study will present three case studies on private coercive violence within states. These case studies will form the factual basis for the future examination of legal and regulatory frameworks of PMSCs, and provide the basis of the unique typological classification system that this thesis seeks to develop. They will seek to provide examples of the difficulties associated with the dispersion of coercive violence away from states and towards a range of private actors. In Chapter Five, this data will be used to provide references through which current legal and regulatory approaches can be analysed. Specifically, these case studies will seek to demonstrate that modern private coercive violence is a global phenomenon, with opaque unique characteristics and that as a result of this, traditional responses are incapable of confronting the issues posed by modern PMSCs. Specifically, applying arbitrary distinctions between types of contractors, or based upon the host-nation, fails to address the fluid modern security providers. It will suggest, therefore, that international responses are required and that these must be flexible, but detailed in order to effectively regulate and control the use of private coercive violence.

### **4.2 Method Adopted Within the Case Studies**

In order for these case studies to provide an effective basis for this analysis, they must represent a broad and reflective overview of the modern security sector as a whole. Alongside this, they have also been chosen in order to best illustrate the issues and difficulties associated with private actors exercising coercive violence. As such, this study has identified the nations of Peru, Nigeria and Afghanistan. These nations all have significant, and growing, private security sectors, consisting of a broad range of the types of contractors currently prevalent within global security assemblages. Furthermore, the states themselves present a range of unique issues and characteristics. For example, Peru and Nigeria both have significant extractive industries, but these face divergent security threats. Similarly, both Nigeria and Afghanistan face internal terrorism, however, the factors responsible, and the responses to this, have been distinct. This research

originally included a case study on Papua New Guinea in place of Afghanistan. However, it was considered that the case studies were too similar to provide an accurate and illustrative overview of the PMSC industry. In particular, it was considered that Afghanistan offered an opportunity to include PMSCs used by Coalition forces, an important component in any study on PMSCs.

These case studies were undertaken through a thorough review of existing literature on the areas included with the case studies formed from a synthesis of this information. As a result, it was essential to ensure that the literature relied upon was accurate and impartial in order to ensure these case studies were accurate. Much of the primary data relied upon was collected/collated by either supranational organisations, including the United Nations, and European Union. Alongside this, however, it was necessary to rely upon the work of NGOs and other academics, and in these cases the research was cautious in relying upon peer-reviewed and reputable NGOs.

## **4.3 Case Studies**

### **4.3(1) Case Study One - Peru**

#### **4.3(1)(a) Political and Economic Background**

The political and economic background of Peru is one still affected by the influence of external interests within the country. Following its Independence from Spain in 1852 Peru sought to establish a society rooted in the ideals of European enlightenment liberalism, with democracy and individual rights and equality at the heart of the society. Following the unsuccessful Pacific Wars against neighbouring nations, however, a feeling that Indigenous tribes were responsible for the defeats lead to their significant repression within the Peruvian state. One commentator at the time suggested that “The main cause of the big disaster of 1883 is that the majority of the population of Peru is formed by an abject and degradable race that you wanted to dignify.”<sup>422</sup> As a result,

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<sup>422</sup> Maritza Paredes, ‘Weak Indigenous Politics in Peru,’ (Crises Working Group Paper, 2008) <<https://assets.publishing.service.gov.uk/media/57a08bc0e5274a27b2000d25/wp33.pdf>> accessed 7 June 2015.



Peruvian society fundamentally transformed, with restrictions upon voting and political associations transforming the society and exacerbating long-standing divisions among the various sectors of Peruvian society. For much of the late 19<sup>th</sup> and 20<sup>th</sup> Century, Peru resultantly suffered from significant political turmoil with frequent and often violent transitions from far-left populist parties to military dictatorships. As a result, Peru had “13 constitutions, with only 9 of 19 elected governments completing their terms”<sup>423</sup>

Democracy in Peru was finally restored in 1980 with the establishment of universal suffrage and multi-party elections held with the far left APRA’s Alan Garcia. As a result, hyperinflation crippled the economy with the international finance community largely withdrawing support from the State. Alongside this, the Maoist Shining Path, having refused to partake in the elections instead instigated a guerrilla war, targeting local Andean civilians. In 1990 the increasing militancy, corruption and economic crisis led to the popular election of the Fujimori whose promised counter-insurgency strategy was coupled with implementing radical neo-liberal economic reforms. In 1992, Fujimori, citing the exceptional security concerns, suspended the constitution and for the next 8 years ruled without any effective checks from the judiciary. The result of this was a violent and excessive crack-down, ostensibly on Shining Path, but with many innocent people simultaneously caught up in the violence. The level of this violence led to extensive human rights abuses across the country with “widespread massacres, forced disappearances and the massive use of sexual violence and torture.”<sup>424</sup> Prevalent to the extent that following his removal from office, Fujimori was tried and sentenced for Crimes Against Humanity and human rights abuses.<sup>425</sup> Despite this, Fujimori’s reforms play an essential role in understanding the economic and political position of Peru to date. In particular, the embrace of neo-liberal economic policies and the accompanied

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<sup>423</sup> Maureen Taft-Morales, ‘Peru in Brief: Political and Economic Conditions and Relations with the United States’ (Federation of American Scientists, 17 June 2013) <<https://www.fas.org/sgp/crs/row/R42523.pdf>> accessed 7 June 2015.

<sup>424</sup> Jo-Marie Burt, ‘Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations’ (2009) 3(3) International Journal of Transitional Justice 384 <<http://ijtj.oxfordjournals.org/content/3/3/384.full.pdf+html>> accessed 7 May 2017.

<sup>425</sup> Jo-Marie Burt, ‘Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations’ (2009) 3(3) International Journal of Transitional Justice 384 <<http://ijtj.oxfordjournals.org/content/3/3/384.full.pdf+html>> accessed 7 May 2017.

foreign direct investment in Peru continues to shape the economy to this day. At the heart of this approach was a classical liberal theory of reducing state involvement, in particular through privatising many of the national assets, and from 1991 “opened all sectors of the Peruvian economy to foreign direct investment” while “lift[ing] restrictions on remittances of profits, dividends, royalties” etc.<sup>426</sup> The effect was to make “[t]he Peruvian economy... now dominated by the private sector... and intricately linked to the global order.” To the point that “Peru [became]... one of the most open and liberal economies... in the world”<sup>427</sup> according to an IMF report.

One of the most fundamental reforms undertaken within the program of liberalisation was within the mining sector. Mineral exports have consistently remained one of the centrepieces of the Peruvian economy, with the State believed to hold within the top ten global reserves of copper, gold, lead, silver, tin and zinc.<sup>428</sup> Many of these reserves, however are held in the highland areas, traditionally home to the indigenous *Campesino* communities. From the first Constitutions of Peru in 1820, the legal system of Peru recognised unique communal land rights for the Indigenous populations, requiring the State to actively protect the community’s interests in the land. These ideals were continually reaffirmed throughout Peru’s constitutional history, through the implementation of “agrarian land laws” which recognised the autonomy of the community in choosing how to utilise the land. The implementation of the National Mining Cadastre Law, (Law 26615) which sought to reform the antiquated mining concession process into a centralised and unified system combined with the *Law for the Promotion of Investment in the Agrarian Sector* which removed the communal aspect of land titles, separating the community land into individual plots.<sup>429</sup> As a result of these reforms, however, the new system “guaranteed national and transnational mining firms exclusive control of the necessary land resources to implement their

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<sup>426</sup> Jeffrey Bury, ‘Mining Mountains: Neoliberalism, Land Tenure, Livelihoods, and the new Peruvian Mining Industry in Cajamarca’ (2005) 37 *Environment and Planning* 221, 239 <<https://people.ucsc.edu/~jbury/Publications/BuryEPA05.pdf>> accessed 6 May 2017.

<sup>427</sup> *Ibid* at 223.

<sup>428</sup> *Ibid*.

<sup>429</sup> Charis Kamphuis, ‘Foreign Mining, Law and the Privatization of Property’ (2012) 3(2) *Journal of Human Rights and the Environment* 217

operations.”<sup>430</sup> As a result, many indigenous communities who had competing rights to the land found themselves pushed off their ancestral homes without their consent or any form of compensation.

One such investor was the US mining giant Newmont, which in 1993 acquired a majority stake world’s fourth largest goldmine, the Yanacocha mine. Opposition to the proposals came immediately from both environmental groups, and local indigenous *Campesino* communities, who communally owned a large proportion of the land outlined for development and who have, with a degree of success, argued the land was illegally sold without their permission.<sup>431</sup> Considering this, the Yanacocha project has been targeted by protestors since its opening with protestors numbering into the thousands at regular events from 1993 onwards.<sup>432</sup> Since 2004 when plans were announced to expand the mines onto neighbouring mountains, large-scale protests have flared up with regularity. Both the size and regularity have increased significantly since 2010 when Newmont announced an intention to open the “Conga Mine”<sup>433</sup> located at the convergence of the five major river basins, essential to the local farmers and fishers.<sup>434</sup> This opposition has increased following several incidents at the Yanacocha mine including a large mercury spill in 2000 in which over

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<sup>430</sup> Bury (n 426) at 239

<sup>431</sup> See e.g. Kamphuis (n 376) at 543 (citing the report of the Peruvian Ombudsman who found the sale had occurred “in violation of the Peruvian and international human rights law”); Raul Wiener & Juan Torres, ‘Large Scale Mining: Do They Pay the Taxes They Should; The Yanacocha Case’ (LATINDADD, 2015) 15 <<http://www.latindadd.org/wp-content/uploads/2015/02/The-YANACOCOA-Case.pdf>> accessed 31 May 2016; See also Bury (n 426) at 239.

<sup>432</sup> For a brief overview of the protests see e.g. Robert Kozak, ‘Peru’s Yanacocha Says Protestors Vandalized Mine’ *The Wall Street Journal* (New York, 16 January 2014) <<http://www.wsj.com/articles/SB10001424052702304149404579325413016570756>> accessed 26 April 2015); Jane Perlez & Lowell Bergman, ‘Tangles Strands in Fight Over Peru Gold Mine’, *New York Times* (New York, 14 June 2010) <<http://www.nytimes.com/2005/10/25/world/americas/tangled-strands-in-fight-over-peru-gold-mine.html>> accessed 26 April 2015; ‘Protests Shut Down Production at Gold Mine in Peru’, *The New York Times* (New York, 29 August, 2006) <[http://www.nytimes.com/2006/08/29/business/worldbusiness/29iht-mine.2626915.html?\\_r=0](http://www.nytimes.com/2006/08/29/business/worldbusiness/29iht-mine.2626915.html?_r=0)> accessed 25 April 2015.

<sup>433</sup> See generally Steven Herz, Antonia Vina & Jonathon Sona, *Development Without Conflict, The Business Case for Community Consent* (World Resource Institute, 2007) 41; Trefis Team, ‘Newmont’s Conga Project in Peru Faces Uncertain Fate’ *Forbes* (New York, Apr. 12, 2013) <<http://www.forbes.com/sites/greatspeculations/2013/04/12/newmonts-conga-project-in-peru-fates-uncertain-fate/#673b279b5ceb>> accessed 13 April 2016; Cecilia Jamasmie, ‘Newmont’s Conga Mine Could Remain Halted Until 2018’ (Mining.com) (Oct. 15<sup>th</sup>, 2014) <<http://www.mining.com/newmonts-conga-mine-could-remain-halted-until-2018-93678/>> accessed 13 April 2016.

<sup>434</sup> Ingenierod S.A.C., Conga Project Closure Plan (2011) 33 <[http://www.newmont.com/files/doc\\_downloads/south\\_america/conga/fact/Conga-Project-Mine-Closure-Plan-Oct-2011-\(Translated-from-Spanish\).pdf](http://www.newmont.com/files/doc_downloads/south_america/conga/fact/Conga-Project-Mine-Closure-Plan-Oct-2011-(Translated-from-Spanish).pdf)> accessed 18 May 2016.

150kg of mercury were spilt during transport,<sup>435</sup> while the use of “cyanide leaching”<sup>436</sup> to separate the gold has been blamed for the loss of agriculture and fishing.<sup>437</sup>

In recent years, changes have been made to the Agrarian Land Law, which have sought to redress some of the problems faced by indigenous communities from the increased extractive industry. In particular, since 2012, a consultation law has required indigenous communities be consulted prior to any planning stages for operations on ancestral lands.<sup>438</sup> This has brought Peruvian law into line with the International Labor Organisations Convention on Indigenous Peoples. Despite these changes, however, mining concessions now cover nearly 30 million hectares, or one-fifth of the Peruvian land mass.<sup>439</sup> Furthermore, the consultation requirement has been criticised as it is advisory only<sup>440</sup> and as a result in some regions this proportion rises up to 50%<sup>441</sup> with social protests therefore continuing.

Despite the economic reforms, many Peruvians found their standard of life severely limited as inflation has remained a constant problem throughout the past twenty years, with gas and electricity prices rising by 3000% and 5300% respectively, as the previously government controlled and subsidised industries were sold to private companies.<sup>442</sup> Despite a period of relative growth income inequality remains significant with a particular gap between urban and rural populations. While overall poverty fell to a quarter in 2012, some indigenous communities continue to experience poverty rates above 60%.<sup>443</sup> One of the effects of this rural poverty has been a turn back

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<sup>435</sup> Herz, Vina & Sona (n 433) at 42; ‘Peruvian Villagers to Sue Mining Giant’ *BBC News* (London, 4 June 2012) <<http://news.bbc.co.uk/1/hi/business/2025485.stm>> accessed 5 November 2016; ‘Newmont Mining, Fact Sheet Choropampa’ (Report into Mercury Spill at Yanacocha by Newmont Mining) <[http://s1.q4cdn.com/259923520/files/doc\\_downloads/south\\_america/yanacocha/Choropampa-Fact-Sheet-01-25-2013.pdf](http://s1.q4cdn.com/259923520/files/doc_downloads/south_america/yanacocha/Choropampa-Fact-Sheet-01-25-2013.pdf)> accessed 10 May 2016.

<sup>436</sup> Herz, Vina & Sona (n 433) at 40-1.

<sup>437</sup> Wiener & Torres (n 432).

<sup>438</sup> Maureen Taft-Morales (n 423).

<sup>439</sup> Grufides, ‘Police in the Pay of Mining Companies; The Responsibility of Switzerland and Peru for Human Rights Violations in Mining Disputes’ (Society of Threatened Peoples, 2013) 9.

<sup>440</sup> *Ibid* at 3.

<sup>441</sup> *Ibid*.

<sup>442</sup> Bury (n 426) at 239.

<sup>443</sup> Maureen Taft-Morales (n 423).

towards the production of Cocoa plants, with an estimated 60% of the world's cocaine now grown in Peru.

#### **4.3(1)(b) Security Threats in Peru**

##### **Crime**

One of the foremost factors in the growth of the private security sector in Peru is the prevalence of crime, both low-level and organised. The percentage of people who were victims of a criminal act in Peru, is consistently one of the highest in the Latin America region, with one study suggesting that 36% of Peruvians were a victim of a crime in 2014 alone.<sup>444</sup> The United States lists Peru as a “critical” state in regards to the incidences of crime and restricts travel within Peru based upon criminal activity. Similarly, the UN considers the homicide level in Peru to be above the threshold for endemic. The crime level is inextricably linked to two factors. The first of these is the level of income inequality within both urban and rural areas. In urban areas, in particular, low-level crime is overwhelmingly associated with individuals from poorer neighbourhoods. Within this, mugging, robbery and burglary are particularly common. Alongside this, however, is the growth of high-level organised crime, including the increasing drug trade, illegal mining, and stolen antiques among others are estimated to be worth \$5billion a year. In rural areas, in particular, the increasing involvement of international cartels combined with a growing relationship between farmers and *Shining Path* militants has led to an increasingly violent drug trade.<sup>445</sup> These high levels of crime are further exacerbated by the prevalence of firearms, in particular, illegal firearms, with over 1 million firearms in private circulation.<sup>446</sup>

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<sup>444</sup> ‘Peru Tops List for Most Victims of Delinquency in Latin America’ (Living in Peru, 22 April 2015) <<http://www.peruthisweek.com/news-peru-tops-list-for-most-victims-of-delinquency-in-latin-america-105973>> accessed 28 May 2016.

<sup>445</sup> Maureen Taft-Morales (n 423).

<sup>446</sup> ‘Peru Country Profile’ (DCAF International Security Sector Advisory Team 2015) <<http://issat.dcaf.ch/Learn/Resource-Library/Country-Profiles/Peru-Country-Profile>> accessed 6 May 2017.

## Mining Conflicts

One of the most significant security threats within Peru is the escalation of mining conflicts within the indigenous *Campesino* communities. Following the changes to Peruvian land law, multinational corporations were quick to acquire interests in mining operations the overwhelming majority of which is on traditionally *Campesino* land. While originally, many of the *Campesino* communities welcomed the extractive corporations, with the Peruvian government promising that the additional revenue would be reinvested in the local communities. Furthermore, with unemployment in the areas disproportionately high, the promise of the job creation by the foreign investment ensured that the majority of the operations began peacefully. Within years, however, it became clear that the economic benefits of many of the mining operations were removed from the area, with little or no additional social spending in the regions. As a result of the increasing job opportunities, migration to the regions grew, increasing the strain on local infrastructure and services, whilst being blamed for an increase in “overcrowding, rising crime, violence, alcoholism and prostitution.”<sup>447</sup> Alongside this, many of the mining projects have had serious environmental impacts, causing secondary problems for the local communities. One of the most common of these is the pollution, or sometimes poisoning of the local water supplies, with acid leaking a particular concern. As many *Campesino* communities are heavily reliant upon fishing for both food and the local economy, the destruction of local fish supplies has caused several major social conflicts.<sup>448</sup> As a direct result of this transition, conflict within the communities surrounding extractive industries has grown exponentially, with the Ombudsman for Human Rights reporting that there are more than 200 active conflicts surrounding mining operations.<sup>449</sup> As a result of these social conflicts, the most recent statistics from 2012 found these conflicts to have caused “24 deaths and 649 injuries”<sup>450</sup>

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<sup>447</sup> Herz, Vina & Sona (n 433).

<sup>448</sup> See Anthony Bebbington, Michael Connarty, Wendy Coxshall, Hugh O’Shaughnessy & Mark Williams, ‘Mining and Development in Peru: With Special Reference to the Rio Blanco Project, Piura’ (Peru Support Group, 2007) 38, 42-44.

<sup>449</sup> Maureen Taft-Morales (n 423) at 3.

<sup>450</sup> Ibid.

The response to these mining conflicts has been criticised by NGOs and the Inter-American Commission on Human Rights,<sup>451</sup> who have argued that the government have sought to criminalise protests.<sup>452</sup> Specifically, it has been claimed that the public authorities have in a “systematically and recurring way” brought “baseless criminal actions”<sup>453</sup> against community organisers and human rights defenders as a method of undermining and intimidating the local community and discourage any further protests. These have included among others teachers, academics and human rights defenders.<sup>454</sup> As a result, there are currently around “400 protestors and HRDs... facing court proceedings... initiated by mining companies, their staff or the public prosecutor” taking advantage of vaguely drafted laws on offences including terrorism, rebellion and “resistance to an official order”<sup>455</sup>

### **Guerilla Warfare**

Internal conflict has plagued Peru for much of the past 30 years, with the extreme Maoist *Shining Path* responsible for the majority of the violence. A truth and Reconciliation Commission in 2003, found that between 61,000 and 77,000 people were killed during the 20-year insurgency.<sup>456</sup> Of this, over half were believed to have been killed by *Shining Path* who frequently targeted rural farmers and *Campesinos* who, if they failed to respond to their calls for “peasant uprisings,” they believed were engaged in a form of feudal capitalist oppression.<sup>457</sup> Whilst this insurgency was

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<sup>451</sup> See ‘Second Report on the Situation of Human Rights Defenders in the Americas’ (Inter-American Commission on Human Rights Report, 31 December 2011) < <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>> accessed 9 May 2016.

<sup>452</sup> See e.g., ‘Criminalisation of Social Protest Related to Extractive Industries in Latin America’ (Peru Support Group, 15 April 2011) <[http://www.pasc.ca/sites/pasc.ca/files/articles/Criminalisation%20of%20Social%20Protest%20related%20to%20Extractive%20Industries%20in%20Latin%20America\\_CIDSE%20analysis%20and%20recommendations\\_June%202011-1.pdf](http://www.pasc.ca/sites/pasc.ca/files/articles/Criminalisation%20of%20Social%20Protest%20related%20to%20Extractive%20Industries%20in%20Latin%20America_CIDSE%20analysis%20and%20recommendations_June%202011-1.pdf)> accessed 19 February, 2016).

<sup>453</sup> ‘Second Report on the Situation of Human Rights Defenders in the Americas’ (Inter-American Commission on Human Rights Report, 31 December 2011) < <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>> accessed 9 May 2016.

<sup>454</sup> Ibid at 3.

<sup>455</sup> Ibid at 3-4; see also ‘Environmental Rights Defenders at Risk in Peru’ (Frontline Defenders, June 2014) < <https://www.frontlinedefenders.org/en/statement-report/environmental-rights-defenders-risk-peru>> accessed 17 February 2016, 3.

<sup>456</sup> ‘Peru Truth and Reconciliation Commission’ (United States Institute for Peace) <<http://www.usip.org/publications/truth-commission-peru-01>> accessed 14 August 2016.

<sup>457</sup> ‘The Findings of Peru’s Truth and Reconciliation Commission’ (Peru Support Group) <[http://www.perusupportgroup.org.uk/files/fckUserFiles/file/TRC\\_booklet.pdf](http://www.perusupportgroup.org.uk/files/fckUserFiles/file/TRC_booklet.pdf)> accessed 14 August 2016; see also

largely considered to have been defeated by 2000, over the past five years there have been renewed acts of violence by militias linked with *Shining Path*. One of the key reasons behind this has been the shift of *Shining Path* into the narcotics industry. With much of their traditional Andean heartlands now being used to cultivate Coca plants, *Shining Path* have moved away from their Maoist traditions and “is now a new organization in that it is now a group completely involved in all levels of the chain of production of narco-trafficking.”<sup>458</sup> Furthermore, rather than relying upon violence to intimidate local populations, the vast wealth accumulated from the production of Coca have according to one study on their re-emergence allowed *Shining Path* to

“stockpile ever more sophisticated weapons, hire new recruits, and invest in improving organizational networks. These activities have also provided the necessary funds to finance the co-optation of peasants, allowing SL to disavow its previous hostile attitudes towards the peasantry”<sup>459</sup>

As a direct result of this, the security situation in many of the regions associated with *Shining Path* have deteriorated significantly over the past 5 years with a renewed level of violence and insurgency. While much of this increased violence has taken the form of traditional narco-trafficking, including contract killings and wars over territory, this has been accompanied by significant high-level political violence. Much of this has been the result of weapons and training from the similarly narco-communist FARC in Colombia who are believed to have flown shipments of weapons and financial support to SP when seeking to re-establish themselves.<sup>460</sup> In particular, they have been noted to target military and police personnel although they have also resorted to kidnapping mining employees for ransom. In one of the most notorious of these incidents, 71 pipe-installation employees with Argentinian company Techint were kidnapped with a ransom

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Barnett S. Koven, ‘The Reemergence of Sendero Luminoso (SL)’ (Air University) <[http://www.airpower.maxwell.af.mil/apjinternational/apj-s/2010/2010-2/2010\\_02\\_04\\_koven\\_eng.pdf](http://www.airpower.maxwell.af.mil/apjinternational/apj-s/2010/2010-2/2010_02_04_koven_eng.pdf)> accessed 27 June 2016.

<sup>458</sup> See Ibid at 3 (quoting 35. "El Comando Especial VRAE Entra en Acción." El Comercio 12 April 2008. (20 April 2009)).

<sup>459</sup> Koven (n 457)

<sup>460</sup> Marisa Mealy and Carol Shaw, Austad, ‘Sendero Luminoso (Shining Path) and Ethnocultural Conflict in the Andes’ in D. Landis & R. Albert eds., *Handbook of Ethnic Conflict. International and Cultural Psychology* (Springer, 2012) <[https://www.researchgate.net/publication/228397971\\_Sendero\\_Luminoso\\_Shining\\_Path\\_and\\_Ethnocultural\\_Conflict\\_in\\_the\\_Andes](https://www.researchgate.net/publication/228397971_Sendero_Luminoso_Shining_Path_and_Ethnocultural_Conflict_in_the_Andes)> accessed 29 June 2016.



request.<sup>461</sup> As a result of this, security in the rural Andean mountains remains precarious with the Peruvian military and police stretched and unable to fully secure the region.

#### **4.3(1)(c) PMSCs and the Legal Environment**

In light of the above considerations, the provision of security has become an increasingly important consideration, with the use of PMSCs in Peru attracting significant academic attention due to the wide range of actors engaged in the market. In particular, when considering the range of services and providers within the private security sector there are two primary legal environments that interact with the use of PMSCs. The first of these are regulations upon the establishment of Private Security Companies. In particular, there are limited specific regulations concerning the registering of PMSCs, who are regulated through the Ministry of the Interior.<sup>462</sup> Whilst the Minister of the Interior is responsible for regulating and controlling PMSC activity, the most recent UN working group on the use of mercenaries, described the legal condition surrounding PMSCs as a vacuum.<sup>463</sup> In 2015, Peru undertook a radical overhaul of these regulations following criticism by the Organisation of American States and UN over the actions of a Peruvian PMSC *Forza Security*. In particular, *Forza* were found to have systematically intimidated, followed and bugged the offices of human rights defenders and their lawyers. As a result, Peru enacted *National Decree No 1213 on the Regulation of Private Security Services*. Under this legislation, private security firms must obtain an operating license from the *Superintendencia Nacional de Control de Servicios de Seguridad, Armas, Municiones y Explosivos de Uso Civil (SUCAMEC)*, a section of Peruvian Ministry of the Interior specialised in the regulation of PMSCs.<sup>464</sup> Part of gaining this license requires the meeting

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<sup>461</sup> 'Peru Hostages Set Free' (*BBC News*, 11 June 2003) <<http://news.bbc.co.uk/1/hi/world/americas/2980154.stm>> accessed 6 May 2015.

<sup>462</sup> For a detailed analysis of the Peruvian regulations see 'National Legislation on Private Security in the Countries of South America' (Officer of the High Commissioner of Human Rights) <[http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Legislation/SouthAmerica\\_NationalLegislation.docx](http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Legislation/SouthAmerica_NationalLegislation.docx)> accessed 10 May 2016.

<sup>463</sup> José Luis Gómez del Prado, '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' (UNHRC, 4 February 2008, Seventh Session U.N. Doc. A/HRC/7/7/Add.2) Para. 39.

<sup>464</sup> Peru, 'Decree No. 1213 Regulating Private Security Services' Art 32.1 (September 2015)

of a series of professional and bureaucratic standards, including “to ensure the appropriate training of its agents as well as the adequate monitoring of their work.”<sup>465</sup> Thereafter are required to register with the *National Register of Data Management* who work alongside the SUCAMEC to oversee and follow up on their suitability, including “monitoring and inspection at any time.”<sup>466</sup> Whilst PMSCs by law must register, the requirements are light and the Ministry responsible lacks the manpower to conduct the biannual inspections it is supposed to undertake, with official figures suggesting up to 250,000 people are employed within the security sector.<sup>467</sup> Furthermore, whilst PMSCs are limited by law as to the type of weapons they are authorised, this system suffers from both a lack of reporting and difficulties establishing ownership, with most corporations using a combination of PMSCs and police/army alongside each other.<sup>468</sup>

Alongside the establishment of private security contractors, following the growth of neoliberal policies and associated government budget cuts, Peru has been at the forefront of a trend to subcontract out, or third-party finance their otherwise public security forces, with up to 50% of the whole budget for some regions coming from private sources<sup>469</sup>. Within Peru, these have been facilitated by two aspects of Peruvian law. The first of these, a *recursos directamente recaudados*, meaning literally “resources directly collected” allow regional divisions of the police and army to sign contracts with private companies or individuals for specific security services with the money/resources counted as part of the defence budget. For the Police forces these agreements can

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<sup>465</sup> ‘Legislative Guidance Tool for States to Regulate Private Military and Security Companies’ (Geneva Centre for the Democratic Control of Armed Forces, 2016) <<http://www.dcaf.ch/Publications/Legislative-Guidance-Tool-for-States-to-Regulate-Private-Military-and-Security-Companies>> accessed 14 September 2016.

<sup>466</sup> *Ibid* at 25.

<sup>467</sup> See Marc Von Boemcken, Michael Ashkenazi & Clara Schmitz-Pranghe ‘Dealing with Private Security Companies: Options for development Cooperation in Timor-Leste, Liberia and Peru’ (Bonn Int’l. Center for Conversion, 2012) 4 <[http://psm.du.edu/media/documents/reports\\_and\\_stats/think\\_tanks/bicc\\_pscs\\_cooperation.pdf](http://psm.du.edu/media/documents/reports_and_stats/think_tanks/bicc_pscs_cooperation.pdf)> accessed 4 May 2016.

<sup>468</sup> Kamphuis (n 376) at 539 (“[L]aw and practice facilitate the provision of a particular set of coercive resources to transnational mining companies. These resources consist of private security companies... these resources include fleets of off-duty police officers organized to function like a Private security); Grufides (n 439) at 9 (for an analysis of the range of legal contracts that can occur between companies, private security and the police force.); See also Boemcken, Ashkenazi & Schmitz-Pranghe (n 467) at 52.

<sup>469</sup> Maiah Jaskoski, ‘The Military Protection Markets in Peru and Ecuador: A Detailed Analysis’ in M. Dunigan & U. Peterson eds., *The Markets for Force: Privatization of Security Across World Regions* (Uni of Pennsylvania Press, 2015) 48, 43. [hereinafter *Markets for Force*].

take the form of either individual moonlighting by officers, or through an institutional agreement between the local police authority and a private organisation. The legal status of these agreements are established through governmental decrees dependent upon whether they are individualised or institutional agreements. In the case of moonlighting by officers, no official government law regulates the *moonlighting* by officers and it is believed that “almost all officers use their spare time to work as private guards”<sup>470</sup> Following a nationwide strike by police officers the government effectively sought to encourage this<sup>471</sup> by instituting a one day on, one day off shift pattern the Peruvian National Police implement providing individual officers considerable time to undertake private guarding.<sup>472</sup> Furthermore, in an attempt to streamline the *moonlighting* process, the Peruvian government has excluded public security employees from the registrations and training requirements of private security guards. The lack of regulatory oversight of these *moonlighting* officers causes the separation of their duties to be almost indistinguishable. In particular, the officers are not prevented from wearing their regular uniform or carrying their police-issued baton and gun. As such “[f]rom an outside perspective moonlighting officers become virtually indistinguishable from their on-duty counterparts.”<sup>473</sup> The regulation for institutional agreements is slightly strict with governmental Decree No. 004-2009 regulating the “provision of extraordinary services additional to normal police duties.”<sup>474</sup> These allow for private companies to agree either permanent or occasional contracts under which the local police federation will provide a pre-agreed number of police to undertake security for a private client.

Alongside this, as part of counter-terrorism movement pressed for by the USA<sup>475</sup> to counter Maoist “shining path” rebels, Peru introduced a law, allowing private companies whose work was essential to the finance or infrastructure of the country, or whose operations utilised potentially

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<sup>470</sup> Boemcken, Ashkenazi & Schmitz-Pranghe (n 467) at 51.

<sup>471</sup> Boemcken, Ashkenazi & Schmitz-Pranghe (n 467) at 51-53.

<sup>472</sup> Ibid; Grufides (n 439) at 9.

<sup>473</sup> *Id*; Lucía Dammert, *Fear and Crime in Latin America: Redefining State-Society Relations* (Routledge, 2012) 126

<sup>474</sup> Decree No. 004-2009-IN Approving the Regulations Governing the Provision of Extraordinary Services Additional to Normal Police Duties

<sup>475</sup> Maiah Jaskoski, *Military Politics and Democracy in the Andes* (John Hopkins Press, 2013) 69-72 .

dangerous materials or explosives, to directly fund the police or local army to provide security for their work or installations.<sup>476</sup> Considering the broad scope of this, it has been used extensively by extractive industries from oil, natural gas and mining. Considering the use of the police and army by private organisations it is important also to consider laws Peru has recently passed in relation to the civil liability of the public security forces. Specifically, Legislative Decree No. 30151 grants immunity to both army and police personnel for causing death or injury through the use of guns or other weapons whilst on-duty.<sup>477</sup> This law has provoked criticism from a wide range of NGOs along with the UN High Commissioner for Human Rights. Furthermore, due to the nature of the drafting of the law, even if the army or police are undertaking work for a private client, so long as the agreement is at an institutional level, the employee will be considered on-duty and therefore immune from prosecution.

#### **4.3(1)(d) Types of PMSCs Present in Peru**

##### ***a) Police***

One of the largest sectors of private security within Peru is through the private supplementary contracting of the public police forces for private roles. Many of the roles undertaken by these police are primarily defensive guarding duties. Specifically, considering the indistinguishable nature of on and off-duty police officers the presence of an individual in police uniform is often considered an effective form of security through deterrence. Considering this, it is estimated that two-thirds of bank security is conducted by police officers *moonlighting* independently for the banks.<sup>478</sup> Parallel to this, however, is the use of police by private organisations in more volatile situations can cause difficulties in establishing the rule of law and the State's role in public security. As an example of this like many other large extractive projects in Peru,

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<sup>476</sup> Maiah Jaskoski, 'Public security Forces With Private Funding: Local Army Entrepreneurship in Peru and Ecuador' (2012) 47(2) Latin American Research Review 79, 91.

<sup>477</sup> 'Environmental Rights Defenders at Risk in Peru' (Frontline Defenders, June 2014) <<https://www.frontlinedefenders.org/en/statement-report/environmental-rights-defenders-risk-peru>> accessed 17 February 2016, 3.

<sup>478</sup> Boemcken, Ashkenazi & Schmitz-Pranghe (n 467) at 52.

documents have shown that a large proportion of the security for the Yanacocha site is provided through a series of contracts with the local police force.<sup>479</sup> As such, when in 2011, local protesters marched upon the mine, it was the local police, operating under an auxiliary contract with Yanacocha mine, who were sent to disperse the group. During the violence, the police systematically attacked three *Campesino* communities accused of organising the protests.<sup>480</sup> In the wake of these protests, independent journalists and human rights activists were targeted by the police, with excessive force and extra-judicial detention reported.<sup>481</sup> Amongst these one human rights activist accused the police of torturing him while detained on the mining site.<sup>482</sup> The police have used both non-lethal and lethal crowd dispersal equipment. Fatalities have therefore become common, with five protesters killed in July 2012 alone, whilst in May of 2015 four protesters died.<sup>483</sup> In a neighbouring site at the Antapaccay Mine, the use of Police operating under private contracts resulted in as similarly troubling outcome. In May 2012, over 2000 police were drafted in to provide additional security following local protests against planned expansion of the mine. During the protests, indigenous protestors clashed with the police occurred and the police opened fire with tear gas and live rounds, killing three protesters and injuring scores more, while 26 individuals were arrested. Those arrested were kept on the mining site and according to a local report “there is documentary evidence that the civilians arrested were physically and psychologically mistreated and tortured.”<sup>484</sup> Similar stories have been documented across much of Peru<sup>485</sup> with it estimated that there have been over 30 large scale institutional contracts agreed between the police and multinational corporations.<sup>486</sup>

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<sup>479</sup> Grufides (n 439) at 9-13. (for an analysis of both the legal framework within which these contracts were concluded and also a specific examination of the police actions at Yanacocha.) See ‘Yanacocha Security Agreement with Peruvian National Police’ (Spanish) < [http://s1.q4cdn.com/259923520/files/doc\\_downloads/south\\_america/yanacocha/Convenio-de-Prestaci%C3%B3n-de-Servicios-entre-la-Polic%C3%ADa-Nacional-del-Per%C3%BA-y-Minera-Yanacocha-S-R-L.pdf](http://s1.q4cdn.com/259923520/files/doc_downloads/south_america/yanacocha/Convenio-de-Prestaci%C3%B3n-de-Servicios-entre-la-Polic%C3%ADa-Nacional-del-Per%C3%BA-y-Minera-Yanacocha-S-R-L.pdf)> accessed 15 May 2016).

<sup>480</sup> Grufides (n 439) at 12; *see also* Environmental Rights Defenders at Risk in Peru’ (Frontline Defenders, June 2014) < <https://www.frontlinedefenders.org/en/statement-report/environmental-rights-defenders-risk-peru>> accessed 17 February 2016.

<sup>481</sup> *Ibid* at 12.

<sup>482</sup> Grufides (n 439) at 14; ‘Abuses and Deaths During Protests: Accountability’ (Human Rights Watch, 2016) < <https://www.hrw.org/sites/default/files/peru.pdf>> accessed 7 July 2017.

<sup>483</sup> ‘Peru: The Price Must Not be Death’ (Amnesty International, 26 May 2015) < <https://www.amnesty.org/en/latest/news/2015/05/peru-the-price-of-protest-must-not-be-death/>> accessed 13 June 2015.

<sup>484</sup> Grufides (n 439) at 14.

<sup>485</sup> *See generally* *Ibid*.

<sup>486</sup> Grufides (n 439).

***b) Armed Forces***

To date, the use of the military as a form of private security has been largely concentrated in the Southern Highlands regions of the VRAE, with security against the re-emerging *Shining Path* along with local *Campesino* communities whose ancestral lands many of the pipelines run through. The private contracting of the army is conducted at an institutional level, with companies contracting directly with the regional army officials to provide an over-arching security solution for the company. Many of these contracts include the company funding an entire battalion of soldiers in exchange for a focus on protecting their assets. During one investigation into the prevalence of these relationships, Professor Maiah Jaskoski found that in the VRAE (Valley of the Apurimac and Ene Rivers) of Peru, all of the army's counterinsurgency bases protected a private gas pipeline owned by the, with further forces based at all fourteen installations along the pipeline.<sup>487</sup> Considering the Peruvian military's history in the region, in particular, the widespread human rights violations that took place during the fight against *Shining Path*, the return of the military to the region has been controversial. This has been further exacerbated by the passing of an Amnesty Law, that prevents the military from being tried in a civil court for injuries or death that occur while soldiers are on duty, regardless of proportionality or justification.

***a) Private Security Services***

Alongside the large number of police officers employed privately, there is an increasing market for specialist Private Security Firms. These in particular in the urban centres where crime and gangs have increased over the past decade. In Lima, around 60% of the population employ some form of private security. There are over 500 registered private security firms who employ nearly 90,000 contractors,<sup>488</sup> on top of the *moonlighting* police officers. As such, there are as many private security guards in Peru as there are police. Within these, nearly 50% are employed by just

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<sup>487</sup> Ibid at 92.

<sup>488</sup> Peru Country Profile' (DCAF International Security Sector Advisory Team 2015) <<http://issat.dcaf.ch/Learn/Resource-Library/Country-Profiles/Peru-Country-Profile>> accessed 6 May 2017.

six firms including the international giants Securicor, G4S and Prosegur accounting for the majority of these. One recent study on the private security sector in Peru identified three key customer bases, with individual needs. The first of these are government contracts which are believed to account for nearly “30% of the total security market”<sup>489</sup> This is primarily a result of the neo-liberal economic approaches adopted by successive governments in which public contracts have increasingly been offered for public bidding. These services are almost exclusively defensive guard duties, in which personnel act as a visual deterrent, including guarding many of the governmental buildings and providing security for ministers during transport.

These private security firms are also regularly contracted by multinational organisations to provide security to their sites, usually supplemented by local public forces as considered above. As such, the Yanacocha mining development, also directly employs more traditional PMSCs through Forza Security Services, a local subsidiary of Securitas.<sup>490</sup> Throughout their employment at Yanacocha, Forza have been dogged by complaints, with their conduct being scrutinised within Peruvian parliament,<sup>491</sup> the Inter-American Commission on Human Rights,<sup>492</sup> and the UN Working group on the Use of Mercenaries.<sup>493</sup> In particular, Forza have been accused of operating a highly sophisticated espionage operation, aimed at intimidating and repressing the work of community activists and environmental defenders. Using wiretaps, private investigators and paid informants, Forza have been found to track, threaten and blackmail senior individuals within the Yanacocha protest movement. More alarmingly, Forza has been accused of falsely presenting opposition leaders as members of the Maoist terrorist organisation *Shining Path*, as a result of which many have been extra-judicially detained under Peru’s harsh anti-terrorism laws.<sup>494</sup> Furthermore, their

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<sup>489</sup> Boemcken, Ashkenazi & Schmitz-Pranghe (n 467) at 52.

<sup>490</sup> ‘Securitas Acquires Security Services Company in Peru’ (Securitas, 23 November 2007) <<http://www.securitas.com/en/media/pressreleases/Securitas-acquires-security-services-company-in-Peru/>> accessed 15 June 2017).

<sup>491</sup> Kamphuis (n 376) at 550.

<sup>492</sup> Kamphuis (n 376) at 550.

<sup>493</sup> José Luis Gómez del Prado, ‘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’ (UNHRC, 4 February 2008, Seventh Session U.N. Doc. A/HRC/7/7/Add.2) at 16-17.

<sup>494</sup> *Ibid* at 72.

close working relationship, with the police paid to protect Yanacocha, has also led to questions as to their involvement in several fatal incidents involving protesters.<sup>495</sup> Following the 2005 shooting of a protester allegedly by police subcontracted to Yanacocha, an “investigation of Forza’s warehouse, located on Yanacocha's property... found war ammunition” illegal under the state small arms law.<sup>496</sup>

Finally, these firms may be employed by individual clients, primarily for home guarding duties. These clients are usually wealthy and often employed by multi-national corporations based in the country, while gated communities, with communal security guards, are growing in popularity among the middle class.<sup>497</sup>

#### ***b) Rondas***

One final consideration when considering the security market in Peru is the presence of Rondas Campesinas, and Rondas Urbanas. Roughly translating to rounds, Rondas were established to provide additional security to local indigenous communities who were disproportionately victims of crime and due to underrepresentation within the police force held the view that they were not afforded the same protection.<sup>498</sup> With Urbanisation in the early 2000’s these Rondas were copied by urban communities and organised as a form of community watch. The members are usually paid a small amount for taking part with a tax levied upon all the houses covered by their watch. Despite the community nature of the Rondas, the lack of official oversight has often left them able to commit human rights abuses with relative impunity. One particularly common feature of these Rondas is the use of immediate and public corporal punishment against suspected criminals.<sup>499</sup> In many

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<sup>495</sup> See e.g. Kamphuis (n 376) at 550.

<sup>496</sup> Kamphuis (n 376) at 550.

<sup>497</sup> Boemcken, Ashkenazi & Schmitz-Pranghe (n 467) at 52.

<sup>498</sup> See German Nuñez Palomino, ‘The Rise Of The Rondas Campesinas In Peru, Journal Of Legal Pluralism’ (1996) 28(36) The Journal of Legal Pluralism and Unofficial Law 211.

<sup>499</sup> See Frank Bajak, ‘In Peru, Whip-Cracking Vigilantes Serve Up Justice’ *The San Diego Union-Tribune* (San Diego, 26 November 2014) <<http://www.sandiegouniontribune.com/sdut-in-peru-whip-cracking-vigilantes-serve-up-justice-2014nov26-story.html>> accessed 23 August 2017.



regions Rondas are easily identifiable by the presence of their whip, which is used to extract confessions and administer punishments. This form of vigilante justice runs directly contrary to the rule of law and poses significant questions for the Peruvian states commitment to human rights.

## **4.3(2) Case Study Two Nigeria**

### **4.3(2)(a) Political, Economic and Social Background**

As is common among African States, both the history and current position of Nigeria is intimately linked with the with European Colonialism. Originally, under the control of the Royal Niger Company, the current State of Nigeria was established as a protectorate of the British Government in 1914. The British utilised a form of “indirect rule,” where an overarching national legal and governmental system premised upon the British system was combined with the maintenance of local traditional systems of Tribes and Chieftains. This Protectorate of Nigeria consisted of between 250 and 400 separate ethnic groups with a wide variety of customs, religions, practices and hierarchical structures. By the end of World War Two, Independence movements grew across the country. The British, seeking to retain some control instituted a federal system of governance, with each state increasingly independently governed, with the federal government reduced in importance. While calls for Independence continued to grow, the federal system had created a heavily unbalanced hierarchy among the ethnic groups. As a result, “in each of the three Regions of Nigeria... either a minority or group of minorities... described fears and grievances which they felt would become more intense when the present [colonial] restraints were removed”<sup>500</sup> with powerful groups within each of the regions accused of persecuting and repressing minorities. As such, the process of Independence was stalled while the British Government undertook the “Willink Minorities Commission” seeking to consider geographical or constitutional changes to provide safeguards to these minorities. Despite these difficulties, by 1960, Nigeria gained independence as the Federation of Nigerian states. The Ethnic tensions remained with two particular

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<sup>500</sup> The Willink Commission Final Report, Conclusions and Recommendations 1 <[http://eie.ng/wp-content/uploads/2014/03/TheWillinkCommissionReport\\_conc\\_recom\\_lt.pdf](http://eie.ng/wp-content/uploads/2014/03/TheWillinkCommissionReport_conc_recom_lt.pdf)> accessed 24 July 2016

difficulties. The first of these was a religious split between the Muslim dominated North, and the Christian dominated South. Compounding this, by 1960 Nigeria's economy was increasingly prospering on the back of oil discoveries all of which were located in the Southern Regions, the central Government in contrast with a majority of representatives from the North Region and located in the far West. Just six years after independence a military coup, often referred to as the "Igbo Coup"<sup>501</sup> sought to replace the federal system with "a unitary State with the Igbo predominating in its governance"<sup>502</sup>. A counter-Coup by Northern tribes quickly followed during which recriminations against the Igbo, resulting in the massacre of between 30,000-50,000 Igbo civilians living in the North. The resulting Biafran War, in which the South-Eastern Igbo dominated regions sought independence lasted until 1970 when the Government based in Lagos, with substantial support from Britain, was able to break the Biafran resistance and regain control over the whole territory. The war is estimated to have cost nearly 3 million lives directly through conflict and indirectly through starvation and disease.

While ethnic tensions had sparked the war, it was oil that had ensured it continued, with potential control of oil resources causing foreign governments to back opposing sides for the opportunity to exploit post-war resources. At the beginning of the war, the majority British controlled Shell and BP joint-venture owned and controlled the vast majority of Nigeria's oil, as such the British Government strongly supported the Federal governments' military campaign through military assistance and training. Following the war, Nigeria experienced an unprecedented economic boom with the subsequent discovery of further oil reserves in Biafra and the neighbouring Niger Delta, consisting of the single largest deep-water discovery to date. In the 50 years since oil was discovered in the Niger Delta, conflict and instability have plagued the nation continuously.

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<sup>501</sup> Odeyemi, Jacob Oluwole, 'A Political History of Nigeria and the Crisis of Ethnicity in Nation-Building' (2014) 3 *International Journal of Development Societies* 87 <<http://www.baraka.consulting/uploads/A%20Political%20History%20of%20Nigeria%20and%20the%20Crisis%20of%20Ethnicity%20in%20Nation-Building.pdf>> accessed 24 July 2016.

<sup>502</sup> Ibid.

### **4.3(2)(b) Security Threats in Nigeria**

One of the most consistent factors in the instability of Nigeria is rampant corruption and ethnic favouring. Successive military coups followed by authoritarian Juntas sought to exploit the nation, primarily for personal profit with loyal supporters receiving financial rewards. Between 1979 and 1983 alone it was estimated that \$16 billion in oil revenue was lost to corruption. In 2014 the Nigerian National Petroleum Corp. was found to have lost \$35 billion in money due to government negligence.<sup>503</sup> In the Niger Delta area this has ensured that whilst the region is responsible for the vast majority of Nigeria's oil wealth, it remains amongst the most underdeveloped areas of the country with the United Nations Development Programme (UNDP) describing the region as suffering from "administrative neglect, crumbling social infrastructure and services, high unemployment, social deprivation, abject poverty, filth and squalor, and endemic conflict."<sup>504</sup> Outside of the Niger Delta region income inequality remains a consistently destabilising factor as "Despite its oil wealth and large economy, Nigeria's population is among Africa's poorest, and the distribution of wealth is highly unequal."<sup>505</sup>

In light of the kleptocratic nature of much of Nigeria's political system, the use of public security forces to undermine opposition to these authoritarian regimes, in particular, the use of police and military to break up large protests fundamentally undermined the public support and trust in the public security services.<sup>506</sup> It has been suggested that as result of "the demand for

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<sup>503</sup> Aaron Sayne, Alexandra Gillies and Christina Katsouris, Inside NNPC Oil Sales: A Case for Reform in Nigeria (National Resource Governance Institute, August 2015) <[https://resourcegovernance.org/sites/default/files/NRGI\\_InsideNNPCoilSales\\_CompleteReport.pdf](https://resourcegovernance.org/sites/default/files/NRGI_InsideNNPCoilSales_CompleteReport.pdf)> accessed 9 April 2016 at 9.

<sup>504</sup> 'Niger Delta Human Development Report' (United Nations Development Programme, 2006) 9 <[http://hdr.undp.org/sites/default/files/nigeria\\_hdr\\_report.pdf](http://hdr.undp.org/sites/default/files/nigeria_hdr_report.pdf)> accessed 24 July 2016.

<sup>505</sup> Lauren Ploch Blanchard & Tomas F. Husted, 'Nigeria: Current Issues and U.S. Policy' (Congressional Research Service, 2016) 5 <<https://www.fas.org/sgp/crs/row/RL33964.pdf>> Nigeria: Current Issues and U.S. Policy'

<sup>506</sup> Monsuru Adegboyega Kasali, 'Analyzing the Evolution of Private Security Guards and Their Limitations to Security Management in Nigeria' (2012) 1(2) African Journal of Criminology and Justice Studies 32, 40.

security and inability of the public security agents to meet the security needs of various segments of the public have necessitates the growing acceptance of... private security guards.”<sup>507</sup>

The economic equality of the Nigerian state has been further exacerbated by a series of “Structural Adjustment Programs” implemented as a requirement for World Bank assistance<sup>508</sup> in response to the oil crisis of the 1980’s which left the Nigerian state in severe economic shock.<sup>509</sup> These programs committed the Nigerian government to reducing public expenditure on key service areas including health, education and even security. As a result of this lack of funding, the Nigerian Police Force is stretched and overwhelmingly concentrated in the strategic areas of Lagos and the Niger Delta. Despite this crime remains a constant threat within both urban and rural areas with the U.S. Government listing the countries Crime Rating as Critical with “armed muggings, assaults, burglaries, car-jackings, rapes, kidnappings, and extortion” common throughout the country.<sup>510</sup>

Beyond criminal enterprises, ethnic and religious conflict remains a serious danger throughout much of Nigeria with the renewed armed struggle in the Niger Delta, being joined by the rise of Islamist Terrorism in the Northern Territory. Boko Haram are currently the deadliest terrorist organisation with estimates suggesting they were responsible for 5,100 deaths in 2015 alone. Since gaining international notoriety for kidnapping 300 Christian school girls, the Northern Region of Nigeria has become increasingly violent and inaccessible. In particular, there has been a move away from conventional terrorist attacks towards an “offensive to seize and hold territory.”<sup>511</sup>

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<sup>507</sup> Ibid; Ali Ado Siro, P. Sundramoorthy, ‘Security Management: The Achievements and Challenges of Police Force in Urban Kano Nigeria’ (2016) 9(1-4) *Sans Humanika* 89.

<sup>508</sup> Victor Olumide Ekanade, ‘The Dynamics of Forced Neoliberalism in Nigeria Since the 1980s’ (2014) 1 *Journal of Retracing Africa* 1, 2-5

<sup>509</sup> Ibid at 7.

<sup>510</sup> Nigeria 2016 Crime & Security Report’ (United States Department of State, Bureau of Diplomatic Security, 15 April 2016) <<https://www.osac.gov/pages/ContentReportDetails.aspx?cid=21383>> accessed 18 February 2017.

<sup>511</sup> Blanchard & Husted (n 505) at511 12.

The UN now classes large swathes of the Northern Region completely inaccessible with many more areas limited in safe access.<sup>512</sup>

After a period of peace in the Niger Delta, violence has once again erupted within the area. With the region home to over twenty ethnic groups, and 1,600 autonomous communities,<sup>513</sup> the perceived inequitable share of the oil wealth has raised ethnic and tribal tensions.<sup>514</sup> Finally, an assortment of disastrous environmental practices has left the region amongst the most polluted areas on earth. Continuous,<sup>515</sup> and now chronic oil spills have left over 15 million barrels of oils to pollute the land.<sup>516</sup> A recent UNEP study concluded these spills contributed to a 10% decrease in vegetation over just a four year period,<sup>517</sup> describing the destruction of the mangrove, which is relied upon heavily by the local population for fish and vegetation<sup>518</sup>, as “disastrous” with the region suffering from “extreme distress” to “total destruction”<sup>519</sup>. The scale of the environmental disaster surrounding the Niger Delta was such that the UN Environment Panel suggested setting aside \$1 billion as a starting point for the environmental clean-up of the region.<sup>520</sup> After failed attempts of the Nigerian government to distribute resources to the region local militias re-emerged in the form of the Niger Delta Avengers. Alongside the conflict within the Delta region, the coastal waters alongside Nigeria remain some of the most dangerous in the world. The Gulf of Guinea, the stretch

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<sup>512</sup> Nigeria Food Security Alert (Relief Wab, 7 July 2016) <<http://reliefweb.int/report/nigeria/nigeria-food-security-alert-july-7-2016>> accessed 14 September 2016.

<sup>513</sup> Paul Oghenero Okumagba, ‘Oil Exploration and Crisis in the Niger Delta: The Response of Militia Groups’ (2012) 1(3) *J. of Sustainable Society* 78, 78; cf Judith Burdin Asuni, ‘Blood Oil in the Niger Delta’ (United States Institute of Peace, August 2009) 3 <[http://www.usip.org/sites/default/files/blood\\_oil\\_nigerdelta.pdf](http://www.usip.org/sites/default/files/blood_oil_nigerdelta.pdf)> accessed 14 September 2016 (which suggests there may be up to 140 separate ethnic groups within the region)

<sup>514</sup> *Ibid.*

<sup>515</sup> See ‘Clean It Up: Shell’s False Claims About Oil Spill Response in The Niger Delta’ (Amnesty International, 2015) 10 (reporting the number of spills Shell has in 2014 over 500 separate spills were reported within the Niger Delta region.

<sup>516</sup> ‘Nigeria: Hundreds of Oil Spills Continue to Blight Niger Delta’ (Amnesty International, 19 March 2015) <<https://www.amnesty.org/en/latest/news/2015/03/hundreds-of-oil-spills-continue-to-blight-niger-delta/>> accessed 14 September 2016

<sup>517</sup> ‘Environmental Assessment of Ogoniland’ (United Nations Environment Programme, 2011) 163, Table 36 <[http://postconflict.unep.ch/publications/OEA/UNEP\\_OEA.pdf](http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf)> accessed 6 May 2016). [hereinafter UNEP Report]

<sup>518</sup> *Ibid.* at 154-182 (for an extensive and detailed analysis of the environmental effects of Oil spillages in the region); L. C. Osuji & P. E. Ezebiuro, ‘Hydrocarbon Contamination Of a Typical Mangrove Floor in Niger Delta, Nigeria’, (2006) 3(3) *International Journal of Environmental Science & Technology* 313.

<sup>519</sup> UNEP Report (n 517) at 158.

<sup>520</sup> UNEP Report (n 517) at 228

of water the Delta enters, was the location of 30% of piracy attacks between 2003-2011, second only to waters of Somalia.<sup>521</sup>

#### **4.3(2)(c) PMSC and the Legal Environment**

Considering the political, social and economic backdrop it is unsurprising that there is an ever-expanding market for private security throughout Nigeria, with it being suggested that “security is now the second largest money-spinner in Nigeria, surpassed only by oil and gas.”<sup>522</sup> The industry ranges from protecting oil exploration in the Niger Delta, where PMSCs are not only popular but essential for oil operations, to the modernisation and professionalization of the traditional “mai-guards” or local watchmen.<sup>523</sup> Up to 50% of the residents of Lagos are estimated to employ private guards in one form or other.<sup>524</sup> This is reflected in recent statistics suggesting that around 2,000 individual companies are registered within the security sector in Nigeria employing almost 100,000 contractors<sup>525</sup>. This represents the second largest market for multinational PMSCs after Iraq.

Despite the size of the industry, however, the legal framework within which they operate is limited and ineffective. The primary legislative regulation of PMSCs within Nigeria is Private Guard Act (1986).<sup>526</sup> Written before the wholesale growth of multinational PMSCs this law was designed primarily to regulate the use of Mai-guards within cities. This act establishes that anyone who “perfrom[s] the service of watching, guarding, patrolling or carrying of money” must be

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<sup>521</sup> Abdulrahman Dambazau, ‘Nigeria and Her Security Challenges’ (Harvard International Review, 13 June 2014) <<http://hir.harvard.edu/nigeria-and-her-security-challenges/>> accessed 15 September 2016.

<sup>522</sup> Rita Abrahamsen & Michael C. William, ‘The Globalisation of Private Security: Courty Report Nigeria’ 1 <<http://users.aber.ac.uk/rbh/privatesecurity/country%20report-nigeria.pdf>> accessed 9 May 2016.

<sup>523</sup> Monsuru Adegboyega Kasali, Analyzing the Evolution of Private Security Guards and Their Limitations to Security Management in Nigeria, (2012) 1(2) African Journal of Criminology and Justice Studies 1, 5.

<sup>524</sup> Adejoh Pius Enechojo, An Assessment of the Performance of Informal Security Structures in Community Crime Control in Metropolitan Lagos, (2014) 14(1) British Journal of Arts and Social Sciences <[http://www.bjournal.co.uk/paper/BJASS\\_14\\_1/BJASS\\_14\\_01\\_03.pdf](http://www.bjournal.co.uk/paper/BJASS_14_1/BJASS_14_01_03.pdf)> accessed 9 May 2016.

<sup>525</sup> Abrahamsen & William (n 385) at 125.

<sup>526</sup> Private Guard Companies Act (1986) Cap. 367, §17, the text of this act is available at <<http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/Nigeria.pdf>> accessed 15 March 2016.

registered as a company under Nigerian Law<sup>527</sup> and have applied for and been granted a licence to undertake private security. These licenses must be renewed every two years but there is little indication of an oversight procedure.

The law further states that for a company to be registered under the Act it must be “wholly owned by Nigerians”<sup>528</sup> with the licensing authority further required to reject any application in which “any director of the company or the person applying for approval... is not a citizen of Nigeria”<sup>529</sup> Despite this, however, a study of PMSCs in Nigeria identified that “there is nevertheless an expanding presence of international security personnel and companies operating through various intricate ownership arrangements, ‘sister’ companies, or embedding their personnel as employees of their clients.”<sup>530</sup> As such, from 2002 onwards Outsourcing Services Limited operated a nationwide PMSC despite being part of Gray Security, a South African PMSC.<sup>531</sup> Gray Security, was eventually bought out by G4S, the British based PMSC, who now employ over 7,000 contractors across Nigeria.<sup>532</sup> A Nigerian investigative journalist reporting on the Niger Delta found no less than 10 foreign PMSCs including G4S subsidiary ArmorGroup, and Erinys International, both known for their roles in Afghanistan and Iraq.<sup>533</sup>

Alongside the regulatory framework for establishing a PMSC the Private Guard Act (1986)<sup>534</sup>, also seeks to establish a minimum behavioural standard for PMSCs.<sup>535</sup> The first of these

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<sup>527</sup> Ibid at Chapter 1, Section 1(1).

<sup>528</sup> Ibid at Chapter 1, Section 1(1)(c).

<sup>529</sup> Ibid at Chapter 13(1)(e); *see also* Geoff Burt & Eric Muller, ‘Foreign Ownership Bans and Private Security: Protectionism of Security Sector Governance’ (Security Governance Centre, 2016) 29-30 <[http://www.segocentre.org/files/www/CSG\\_Paper\\_7\\_-\\_Private\\_Security\\_and\\_Security\\_Sector\\_Governance\\_July\\_2016.pdf](http://www.segocentre.org/files/www/CSG_Paper_7_-_Private_Security_and_Security_Sector_Governance_July_2016.pdf)> accessed 17 May 2016.

<sup>530</sup> Abrahamsen & William (n 385) at 125.

<sup>531</sup> Abrahamsen & William, (n 522) at 5.

<sup>532</sup> Abrahamsen & William (n 385) at 125.

<sup>533</sup> Tony Iyare, “Nigeria: Private Military Companies in the Niger Delta,” *Pamazuka News* (Lagos, 13 March 2009) <<http://www.pamazuka.org/global-south/nigeria-private-military-companies-niger-delta>> accessed 13 May 2016.

<sup>534</sup> Private Guard Companies Act (1986) Cap. 367, §17, the text of this act is available at <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/Nigeria.pdf> (last accessed March 15, 2016).

<sup>535</sup> Ibid at Chapter 1, Section 1(1)(c).

is that all PMSCs registered in Nigeria must undergo company training from a syllabus approved by the Minister of Internal Affairs. However, the rigorousness of this oversight has been questioned with little indication of the standard of training required and no national framework.<sup>536</sup>

Furthermore, under the original provision of the act private security personnel are prohibited from carrying firearms at any time in Nigeria. This restriction was loosened in 2004 with “certain specified persons employed by private security companies” allowed to “carry and use arms while on duty.”<sup>537</sup> These regulations are however still relatively strict with the requirement to register both weapons and ammunition every month. Despite this, specifications as to the type of weapons allowed prevent them from being effective against many of the security threats PMSCs are utilised for, in particular, the more conflict-ridden areas. For this reason, the national police and army are often required to co-operate and second forces to PMSCs, with the distinction between actors becoming increasingly blurred on occasion. One example of this fusion of personnel is provided by Abrahamsen and Williams’ analysis of Chevron Nigeria Ltd.’s contract with G4S. Included in the contract, is agreement provision that G4S, through their Nigerian subsidiary OLS, will supply heavily armed rapid response boats and employ ex-South African naval personnel to patrol swamp land within the delta and provide escort for oil supply vessels.<sup>538</sup> However, each morning OLS specify the number of Nigerian soldiers to work on board the vessel, who are to take control of the boat when “a life-threatening situation develops.”<sup>539</sup> Similar arrangements exist for almost all organisations working within the Niger Delta region, with the employing firm often paying the Government forces a weekly stipend and also provide food and accommodation.<sup>540</sup> Furthermore, whilst police or army employees retain their own organisational structure and hierarchy, when working with PMSCs their “operational authority is in the hands of a senior

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<sup>536</sup> Abrahamsen & William, (n 522) at 8.

<sup>537</sup> An Act to Provide for Professional Private Security Practitioners to Carry Arms While on Duty, SB. 94, replacing Private Guard Companies Act (1986) Cap. 367, §17.

<sup>538</sup> Abrahamsen & William (n 385) at 141,

<sup>539</sup> *Ibid.*

<sup>540</sup> *Ibid* at 138.



company security official” and so that they are “instructed to comply with the company’s guidelines for use of force.”<sup>541</sup> Alongside these secondment contracts between Government forces and a PMSC, private companies can also directly employ their own forces who are then trained and registered by the police, with the authority only to carry weapons and exercise police powers on the property of their employer.<sup>542</sup> It is estimated around 5,000 of these supernumerary police officers are currently registered in the Niger Delta, with Shell employing 1,200 alone.<sup>543</sup>

#### **4.3(2)(d) Types of PMSCs Present in Nigeria**

Considering the fragile nature of Nigerian society, and the unwillingness and inability of the Federal Government to fully protect the collective security of its citizens, private coercive violence is endemic throughout all aspects of society. This thesis will seek to examine some of the variations within these security providers, and consider some of the effects and problems that have arisen within each type.

##### **a) Local Guarding Watch Groups**

The most numerous of the types of PMSC within Nigeria are Local Guarding Watch Groups. These are primarily based upon a traditional conception of community security where either individual wealthy homeowners or collections of neighbours organise together to “provide security for residents especially at night, but sometimes during the day.”<sup>544</sup> In recent years these watch groups have largely split into two distinct types. The first of these are corporate arrangements

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<sup>541</sup> Ibid.

<sup>542</sup> See Police Act 1979 (Federal Statutes of Nigeria) Cap. 19, §18-21, (specifically see §18(3)(c) “shall, ... area in respect of which he is appointed and in any police area adjacent thereto, but not elsewhere, have the powers, privileges and immunities of a police officer”) (text of the act is available at <http://www.placng.org/new/laws/P19.pdf>); See also William Rosenau, Peter Chalk, Renny McPherson, Michelle Parker, Austin Long, ‘Corporations and Counterinsurgency’ (RAND Corporation, 2009) 17 <[http://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2009/RAND\\_OP259.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/2009/RAND_OP259.pdf)> accessed 3 June 2016 [hereinafter Corporations & Counterinsurgency]

<sup>543</sup> ‘Dirty Work, Shell’s Security Spending in Nigeria and Beyond’ (Platform, 2012) 6 <<http://platformlondon.org/wp-content/uploads/2012/08/Dirty-work-Shell%E2%80%99s-security-spending-in-Nigeria-and-beyond-Platform-August-2012.pdf>> accessed 3 June 2016 [Hereinafter Platform: Dirty Work]; Kenneth C. Omeje, High Stakes and Stakeholders: Oil Conflict and Security in Nigeria (Routledge, 2006) 79.

<sup>544</sup> Adejoh Pius Enechojo, ‘Assessment of the Performance of Informal Structures of Community Crime Control in Metropolitan Lagos’ (2013) 14 British Journal of Arts and Social Sciences 37, 45.

with a focus on manned guarding. The majority of these are concentrated in urban centres where crime and gangs have increased over the past decade. As such, in Lagos, almost 50% of the urban population employ some form of private guarding company. These services are almost exclusively defensive guard duties, in which personnel act as a visual deterrent, including guarding many of the governmental buildings and providing security for ministers during transport.

The second group of community guarding groups are increasingly prevalent are the informal security companies. These groups are often formed from within the ethnic population that they operate in with and often operate in a vigilante manner in response to perceived crimes against their community.<sup>545</sup> The most notorious of these groups are the O’odua People’s Congress and the Bakassi Boys. The semi-organised vigilante groups are employed by both local communities and occasionally local public authorities to supplement the Nigerian National Police. Although originally these groups were little more than local ethnic militias, often responsible for mass killings and extortion, some attempts to regulate these community groups. In some states this has been through the passing of laws effectively incorporating these community groups into the local law enforcement, for example through the passing of Anambra Vigilante Law No.9 of 2000.<sup>546</sup> As part of these reforms, the community guards were required to wear official uniforms as well as use marked vehicles. Despite this, these groups, however, are notorious for their violent and extrajudicial methods of enforcing community crime control. Although they no longer carry machetes and carry out ‘sleeving’ the act of chopping a hand off, they continue to publicly exercise corporal punishment through whippings and beatings.<sup>547</sup> Furthermore, there are still regular cases of “innocent civilians have been killed with... guns and other dangerous weapons by some

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<sup>545</sup> Ibid.

<sup>546</sup> Chris Udeze, ‘Addressing the Problem of Vigilante Operation in Anambra State’ <[https://www.academia.edu/8877692/Addressing\\_th\\_problem\\_of\\_vigilante\\_operation\\_in\\_Anambra\\_state\\_Nigeria](https://www.academia.edu/8877692/Addressing_th_problem_of_vigilante_operation_in_Anambra_state_Nigeria)> accessed 7 July 2016; Chinazor Queen Umeobika, ‘Synergy Of The Local Vigilante Group And The Police In Anambra State: A Proactive Step To Combat Crime’ (2012) 3 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 182.

<sup>547</sup> Monsuru Adegboyega Kasali, ‘Analyzing the Evolution of Private Security Guards and Their Limitations to Security Management in Nigeria’ (2011) African Journal of Criminology and Justice Studies 45.

overzealous... guards.”<sup>548</sup> Furthermore, these groups have been accused of disproportionately targeting other ethnic groups and accepting bribes for preferential treatment, as a result “the unlawful activities of Bakassi Boys have made public acceptance that the group previously enjoyed to rapidly dwindle.”<sup>549</sup>

a) **Local Militia**

Related to these community guarding groups are local militia, who are employed to provide security services. Unlike community guards, they play a much more pro-active role in providing security and are more prevalent in rural areas where the security situation is more complicated. To date, many of these militias have been employed by multinational corporations as local security forces, with the express intention of providing security against social unrest, community violence and terrorism. Despite this, the informal nature of the militias, and the lack of regulatory oversight means that they often operate in a manner closer to a criminal organisation than a security force. When the NGO Platform produced a report on Shell’s security budget in the Niger Delta, one of the most troubling aspects of its findings was the high level of unaccounted for security payments. Specifically, in the Niger Delta alone Shell listed \$75 million in “other” security payments.<sup>550</sup> Analysis of this expenditure revealed several channels of expenditure that produced serious accusations of human rights abuse and corruption. Amongst the most serious to arise from these was that Shell had, through subsidiary groups, provided significant funding to local militia groups to support their violent campaigns against rival militias who opposed the oil extraction.<sup>551</sup>

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<sup>548</sup> Kasali, *Ibid* at 45; *see also* Udeze (n 546)

<sup>549</sup> *Ibid* at 45.

<sup>550</sup> Platform: *Dirty Work* (n 543) at 8.

<sup>551</sup> ‘Counting the Cost: Corporations and Human Rights Abuses in the Niger Delta’ (Platform, 2011) 27 <[http://platformlondon.org/nigeria/Counting\\_the\\_Cost.pdf](http://platformlondon.org/nigeria/Counting_the_Cost.pdf)> accessed 23 June 2016 [hereinafter Platform: *Counting the Cost*].

One specific allegation relates to the use of “community engagement payments” in 2007 intended to benefit from Shell’s “development plan.” four local tribes, known as the Joinkrama 4, in areas surrounding the Adibawa oil field, Despite the locally elected chief (Chief Walters) asking for the money to be distributed between the four communities equally, Shell instead directed all of the money to just one of the four communities.<sup>552</sup> Following protests at the decision, the three other communities have come under constant physical attack from armed militia loyal to the one tribe who have burned vehicles and looted villages.<sup>553</sup> In 2005 this led to the deaths of 6 people, and the demolition of 300 homes.<sup>554</sup> The violence flared again in 2007 following local community elections. The aftermath left at least three dead and forced many more to live in makeshift camps, many for several years.<sup>555</sup> These militia attacks continued, with several community leaders who opposed the financial payments murdered with their bodies dumped in prominent positions as warnings. Throughout the violence, and despite the widespread reports of human rights abuses by militias, Shell continued to pay the local groups including payments of over \$135,000 in 2010 alone.<sup>556</sup>

Alongside this, the Wikileaks embassy cables reveal that Shell routinely paid individual militants, some of whom were linked with warlords, up to \$300 per month, to offer “protection” for their sites.<sup>557</sup> The cables suggested that this was a common method of providing security for oil companies working in the area, a claim the Managing Director of Shell Nigeria has admitted to, reasoning it was impossible to distinguish between legitimate security contractors and warlords<sup>558</sup>. These reports support evidence from the Platform report which found that Shell frequently used community payments to fund local militia known for their dismal human rights records.<sup>559</sup> Under one such agreement, Shell paid a local militia in the Rumuepke region over \$50,000 for services. Violence committed by the group led to the death of 60 civilians and the burning of an entire

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<sup>552</sup> Ibid at 37-39.

<sup>553</sup> Ibid at 38-41.

<sup>554</sup> John Ighodaro, ‘Nigeria: Six Feared Dead in Communal Clashes’ All Africa (March 8, 2005) <<http://allafrica.com/stories/200503080292.html>> accessed 23 June 2016.

<sup>555</sup> Platform: Counting the Cost (n 551) at 38.

<sup>556</sup> Ibid.

<sup>557</sup> Platform: Dirty Work (n 543) at 8.

<sup>558</sup> Ibid at 9.

<sup>559</sup> See Platform: Counting the Cost (n 551) at 42.

village.<sup>560</sup> However, it was not until the violence spread onto Shells property and a Shell engineer had his hand chopped off by a militiaman, that the company decided to terminate the funding.<sup>561</sup>

***b) Supernumerary Police***

Alongside these private security providers, however, one of the largest sectors of the private security industry in Nigeria are the “supernumerary police officers (SPO).” These SPOs are primarily utilised by multinational corporations, with the majority of their contracts operating in Niger Delta. One of the largest benefactors of the SPO services has been Shell who employ 1,200 of these SPOs.<sup>562</sup> Based directly on the sites of Shells operations, including on drilling platforms and around refineries. Shell maintains that these SPO do not generally carry arms and act primarily as a visual deterrent to thieves targeting oil and machinery for sale on the black market.<sup>563</sup> Despite this, Shell admits that this policy is flexible,<sup>564</sup> and it has in the past imported over 100 semi-automatic machine guns for use by their SPOs.<sup>565</sup> Regardless of the armed status of the SPOs however, they pose significant questions regarding an appropriate public/private split. In particular, whilst SPOs are legally classed as Shell employees, and work under the direct supervision, control and guidelines of Shell, <sup>566</sup> they operate and exercise the authority of the Nigerian national police. This includes wearing a government-issued uniform,<sup>567</sup> badge and carrying the standard police issue baton.<sup>568</sup> While the UN Rapporteur to the Region called for the practice to be “given up” entirely<sup>569</sup> almost 15 years ago, the practice remains unchanged. As such, local activists have continued to

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<sup>560</sup> Ibid at 28.

<sup>561</sup> Ibid.

<sup>562</sup> Abrahamsen & William (n 385) at 139

<sup>563</sup> Security in Nigeria (Shell) < <http://www.shell.com.ng/environment-society/safety-tpkg/secure-operations.html>> accessed 16 May 2016; *see also* ‘The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria’s Oil Producing Communities’ (Human Rights Watch, 2006) 116.

<sup>564</sup> K.C. Omeje (n 543) at 79.

<sup>565</sup> Ibid.

<sup>566</sup> Abrahamsen & William (n 385) at 139-145.

<sup>567</sup> Until January 2016, the supernumerary police wore the standard issue police uniform, however they now have a unique government uniform *see* Popoola Babalola, ‘Spy Police get January 2016 Deadline to Stop Wearing Police Uniform’ *The Eagle Online*, (22 October 2015) <<http://theeagleonline.com.ng/spy-police-get-january-2016-deadline-to-stop-wearing-police-uniform/>> accessed 13 June 2016.

<sup>568</sup> Ibid.

<sup>569</sup> Situation of Human Rights in Nigeria: Report submitted by the Special Rapporteur of the Commission on Human Rights, Mr Soli Jehangir Sorabjee, pursuant to Commission resolution 1997/53, United Nations Commission on Human Rights, U.N. Document E/c.12/1/1/Add.23 (Jan. 14, 1999).

campaign on the basis that this relationship gives undue influence to corporations over essential public services.

*c) Joint-Task Force*

Similar to the SPO, the Nigerian military is often required to supplement its budget through direct employment with private actors, primarily large multinational actors. One such employer is the American oil company Chevron who operate oil drilling sites throughout the Niger Delta region. As a result of their contract with the JTF, Chevron are able to call upon JTF boats to escort and protect their supply ships. As part of this agreement, Chevron are able to specify the number of JTF forces they want and the specific mission they will be undertaking on a daily basis. In practice, this means that the JTF forces are often working alongside, and taking their orders from Chevrons private security.<sup>570</sup> Furthermore, independent research by “conflict resolution experts”<sup>571</sup> claimed that JTF General Elias Zamani... charged oil companies an unaudited ‘stipend’ that included “fuel, stores and an estimated \$258,000 per month in cash.”<sup>572</sup> US cables suggest that cash was used to pay much of the JTF’s charges, providing ample opportunities for corruption.”<sup>573</sup>

Similar agreements are in place for almost all of the MNCs operating in the Niger Delta. As such, alongside their own security forces, a significant section of Shell’s security budget in the Niger delta goes towards financing and utilising a Nigerian government initiative called the Joint Task Force (JTF). Since its inception in 2003, Shell has invested around £600 million into supporting this taskforce, including providing the force with gunboats, helicopters and heavy-duty vehicles,<sup>574</sup> thereby ensuring that over 700 of these heavily armed soldiers currently work in close

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<sup>570</sup> Abrahamsen & William (n 385) at 141.

<sup>571</sup> Platform: Dirty Work (n 543) at 7; *see also* ‘Our Reconciliation Ministry’ (Coventry Cathedral) <<http://www.coventrycathedral.org.uk/wpsite/our-reconciliation-ministry/>> accessed 10 May 2016. (The centre was established in 1940 following Nazi bombing and has been a centre for conflict resolution since, with its foundation now working in over 35 countries).

<sup>572</sup> ‘The Potential for Peace and Reconciliation in the Niger Delta’ (Coventry Cathedral, 2009) 135.

<sup>573</sup> Platform: Dirty Work (n 543) at 7.

<sup>574</sup> *See* Judith Burdin Asuni, ‘Blood Oil in the Niger Delta’ (United States Institute of Peace, August 2009) <[http://www.usip.org/sites/default/files/blood\\_oil\\_nigerdelta.pdf](http://www.usip.org/sites/default/files/blood_oil_nigerdelta.pdf)> accessed 19 June 2016; Platform: Dirty Work (n 543) at 7.

proximity to Shell's operations.<sup>575</sup> On the basis of this expenditure, it is clear that the JTF are considered central to Shell's security operations in the Niger Delta region, and only last year Shell decided that a more focal role for the JTF would, along with better community relations form the central pillar of its new security framework.<sup>576</sup> It is however notable that the JTF have been routinely accused of serious and repeated human rights violations, in particular, its disproportionate use of force in response to unrest, including having been accused of extra-judicial executions and torture along with using collective punishment of entire communities to enforce compliance. Amongst the most serious is the allegation that in 2005 in response to a militant attack, the JTF unilaterally invaded the town of Odioma leaving 17 dead, whilst the town and many local livelihoods were burned to the ground.<sup>577</sup> Even more seriously, in 2010, in response to a similar militant attack, it is claimed the JTF killed over 100 people when they invaded a small town. Furthermore, Amnesty International report that rape is commonly used as a weapon by the JTF to coerce or intimidate local populations.<sup>578</sup>

#### ***d) Mercenaries***

The final group of private security contractors that are necessary to consider within Nigeria, is the increasing use of foreign mercenaries in the fight against Boko Haram. According to Nigeria's Chief of Defense Intelligence, these troops have been contracted by the Army with the sole purpose of training the Nigerian military. However, while the Nigerian government has yet to confirm the presence and use of mercenaries, repeated reports by newspapers and NGOs, backed up by photographic evidence, have universally come to the conclusion that mercenaries have been used

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<sup>575</sup> Ibid; see *US Embassy Cables* to counteract Shells claims they have no direct control over the deployment of the JTF forces Anticipated Military Action in the Delta ( 8 August 2003) <<http://wikileaks.org/cable/2003/08/03ABUJA1354.html#>>, Oil Companies Differ on Restarting Warri Production (3 November 2003) <<http://wikileaks.org/cable/2003/11/03ABUJA1908.html>>; Oil Worker Hostage Update (20 January 2006) <<http://wikileaks.org/cable/2006/01/06LAGOS74.html>>.

<sup>576</sup> 'Shell Overhauls Security Procedures in Nigeria to Prevent Oil Theft That is Costing it Hundreds of Millions of Pounds' *Daily Mail* (London, 21 September 2014) <[http://www.dailymail.co.uk/money/markets/article-2764272/Shell-overhauls-security-procedures-Nigeria-prevent-oil-theft.html?ITO=1490&ns\\_mchannel=rss&ns\\_campaign=1490](http://www.dailymail.co.uk/money/markets/article-2764272/Shell-overhauls-security-procedures-Nigeria-prevent-oil-theft.html?ITO=1490&ns_mchannel=rss&ns_campaign=1490)> accessed 14 June 2015.

<sup>577</sup> Corporations & Counterinsurgency (n 542) at 15.

<sup>578</sup> Abrahamsen & William (n 385) at 144.

on the frontline of the fight in active combat roles.<sup>579</sup> The use of these mercenaries has essentially been a return to the position of Executive Outcomes of the late 80's and 90's. Specifically, it is alleged that many of the mercenaries are former soldiers of the South African Defence Force, from the pre-apartheid era. These mercenaries have been credited with turning the tide against Boko Haram, having been engaged in the months prior to national elections. It is suggested that these mercenaries operate as the vanguard of the Nigerian army, moving into a territory undercover and crippling the Boko Haram infrastructure before the Nigerian army move in to complete the operation. The mercenaries are believed to be operating much more sophisticated equipment than even the Nigerian Army and are able to call upon air support and heavy artillery within their arsenal. As a result of the secrecy surrounding their operation, there is little verifiable data regarding the impact these mercenaries are having upon the civilian populations, however, it is clear that their tactics have effectively turned the tide against Boko Haram.

### **4.3(3) Case Study Three: Afghanistan**

#### **4.3(3)(a) Political, Economic and Social Background**

There are few countries in the world whose history can rival Afghanistan for insecurity and violence. The current state, geographically resulting from the “great game” rivalry between the British Empire and Russia, has been plagued by insecurity and civil strife since its conception. Since its unification in 1747 there have been just four peaceful transitions of power.<sup>580</sup> Much of this is underpinned by a complex ethnic makeup, with at least fourteen recognised ethnic groups.<sup>581</sup> Many of these ethnic groups have links with populations in other countries with Afghanistan often finding

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<sup>579</sup> See e.g. David Smith, ‘South Africa's Aging White Mercenaries Who Helped Turn the Tide on Boko Haram’ *The Guardian* (London, 14 April 2016); Adam Rossiter, ‘Mercenaries join Nigeria’s Military Campaign Against Boko Haram’ *New York Times* (New York, 12 March 2015).

<sup>580</sup> William Byrd, *Special Report: Lessons from Afghanistan’s History for the Current Transition and Beyond* (United States Institute of Peace, 2012).

<sup>581</sup> Abubakar Siddique, ‘Sources of Tension in Afghanistan and Pakistan: A Regional Perspective Afghanistan’s Ethnic Divides’ (Barcelona Centre for International Affairs, January 2012) <[https://www.cidob.org/en/content/download/56592/1454765/version/4/file/OK\\_ABUBAKAR%20SIDDIQUE.pdf](https://www.cidob.org/en/content/download/56592/1454765/version/4/file/OK_ABUBAKAR%20SIDDIQUE.pdf)> accessed 10 May 2016 at 1.



itself a staging ground for proxy conflict. Furthermore, due to Afghanistan's location as a central hub in Central Asia, it has been seen as an area of strategic importance for both trade and security. As a result of this, for the past 40 years, Afghanistan has been in a constant cycle of violence. Following the Soviet invasion in 1979, the violence "left a million dead and created the world's largest refugee population, with around six million refugees in Iran and Pakistan."<sup>582</sup> The Mujahideen an ultra-conservative religious guerrilla force, originally covertly backed by the CIA, Saudi Arabia and others as a bulwark as Soviet influence,<sup>583</sup> established Afghanistan as a centre of Jihad, attracting fighters from across the globe to wage holy war.<sup>584</sup> The civil war was eventually "won" by the Taliban, who comprised partially of remnants of the Mujahideen, were quick to establish Afghanistan as a haven for Sunni Islamic terrorism.<sup>585</sup> This exacerbated already significant religious tensions that had historically plagued Afghanistan, with these competing groups funded by Iran on one side, and Pakistan acting primarily as a proxy for Saudi Arabia on the other.<sup>586</sup> Throughout the 1990's the UN repeatedly criticised Afghanistan for harbouring terrorists<sup>587</sup> and following the September 11<sup>th</sup> attack, the US, citing self-defence through Article 51 of the UN Charter<sup>588</sup> invaded Afghanistan. In the period since, the political, economic and social situation in Afghanistan has been dominated by the ongoing military operations. The UN considers Afghanistan to have the second highest refugee population per capita, following only Syria<sup>589</sup>

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<sup>582</sup> Fatima Ayub, Sari Kouvo and Rachel Wareham, 'Security Sector Reform in Afghanistan' (International Centre for Transitional Justice, 2009)

<sup>583</sup> Michael Rubin, 'Who Is Responsible for the Taliban?' *Middle East Review of International Affairs* (2002) (By 1987 it is estimated that the USA and Saudi Arabia were providing funding of \$1.2 billion each year to the mujahidenn, although this must be considered against the Soviet Union contribution of nearly \$5 billion.)

<sup>584</sup> Jason Burke, 'Frankenstein the CIA Created' *The Guardian* (London, 17 January 1999) <<https://www.theguardian.com/world/1999/jan/17/yemen.islam>> accessed 14 July 2015.

<sup>585</sup> Ibid at 8; Norah Niland, 'Impunity and Insurgency: A Deadly Combination in Afghanistan' (International Review of the Red Cross, 2010) 932.

<sup>586</sup> Byrd, *supra* note , at 9; Rubin *supra* note 583

<sup>587</sup> See e.g UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267.

<sup>588</sup> Charter of the United Nations, Article 51.

<sup>589</sup> 'Human Development Report, Refugees by Country of Origin (Thousands)' (United Nations Development Programme) <<http://hdr.undp.org/en/indicators/21806>> accessed 15 May 2016.

Elections have successfully taken place on three occasions since the invasion, with peaceful transitions from power, however, allegations of corruption have plagued the process.<sup>590</sup> Corruption has plagued Afghan society in general with the NGO Transparency International rating it as 169 of 176 countries.<sup>591</sup> Bribes were estimated to be worth \$3.9 billion in 2012, nearly 20% of the GDP.<sup>592</sup> It is unsurprising therefore that when surveyed 56% of the population deemed corruption to be one of the most important issues for their country.<sup>593</sup> Considering this history of turmoil, it is unsurprising that the economy of Afghanistan is almost wholly under-developed. A large proportion of the population continues to rely upon traditional agricultural products and subsistence farming.<sup>594</sup> There is little of a formal economy, with over 90% of the Afghan Governments income coming from international donors<sup>595</sup> amounting to a total of \$57 billion in international donations since the U.S. invasion in 2001.<sup>596</sup> It is suggested that without any additional complications the Afghan economy will be self-sufficient by 2024 at the very earliest.<sup>597</sup> Parallel to the state economy exists an expansive black market economy, dominated by the production of opium. The country accounts for almost 50% of the worlds heroin production. The trade is the primary financial support for the Taliban<sup>598</sup> insurgency which has gained significant ground in the past five years, with opium production increasing by 43% between 2015 and 2016 alone.<sup>599</sup> However, many farmers from the poorest regions of Afghanistan also rely on the income from opium production, with estimates

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<sup>590</sup> See e.g. Carlotta Gill, 'In Afghan Election, Signs of Systemic Fraud Cast Doubt on Many Votes' *New York Times* (New York, 23 August 2014); Ghaith Abdul-Ahad, 'New Evidence of Widespread Fraud in Afghanistan Election Uncovered' *The Guardian* (London, 29 September 2009).

<sup>591</sup> See 'Country Report: Afghanistan' (Transparency International, 2016) <<https://www.transparency.org/country/AFG>> accessed 15 May 2017.

<sup>592</sup> UN Office on Drugs and Crime, *Corruption in Afghanistan: Recent Patterns and Trends 9* (2012) available at [https://www.unodc.org/documents/frontpage/Corruption\\_in\\_Afghanistan\\_FINAL.pdf](https://www.unodc.org/documents/frontpage/Corruption_in_Afghanistan_FINAL.pdf)

<sup>593</sup> *Ibid* at 3.

<sup>594</sup> *Ibid* at 6.

<sup>595</sup> Afet Deve, *Afghanistan: Challenges and Perspectives Until 2020* (European Union Directorate General for External Policies, 2017)

<sup>596</sup> *Ibid*.

<sup>597</sup> See Islamic Republic of Afghanistan, Ministry of Foreign Affairs, *Realizing Self-Reliance: Commitments to Reforms and Renewed Partnership* (Dec 2014) available at [http://mfa.gov.af/Content/files/Realizing%20Self%20Reliance%20-%202025%20November%202014\(1\).pdf](http://mfa.gov.af/Content/files/Realizing%20Self%20Reliance%20-%202025%20November%202014(1).pdf)

<sup>598</sup> See Gretchen Peters, *How Opium Profits the Taliban*, United States Institute of Peace (2009)

<sup>599</sup> United Nations Office on Drugs and Crime, *Afghanistan Opium Survey 2016: Cultivation and Production*, 43 (2016)

suggesting more than 3 million people from farming families are financially reliant on opium production.<sup>600</sup>

The political and economic insecurity of Afghanistan has led to it becoming one of the least developed countries in the world. The UNDP rates it as “Low Human Development” ranking 169 of 188.<sup>601</sup> The average life expectancy at birth is just 60.7 years, and while infant mortality has dropped from a high of 122 per 1,000 in the 1990’s it remains in the worst five in the world at 66.3.<sup>602</sup>

#### **4.3(3)(b) Security Threats in Afghanistan**

##### **Insurgency**

Considering the recent history of Afghanistan, security threats remain both significant and varied. The most substantial of security threats remains the insurgency that has continued since the US Invasion in 2001. In 2016 the United Nations Assistance Mission in Afghanistan documented 11,418 civilian casualties, fatal and non-fatal, as a result of conflict.<sup>603</sup> The Taliban account for the majority of insurgent violence, however, since 2015 the ISIS-affiliated ISKP have maintained a presence in the Khorasan Province and are increasingly targeting civilian populations. Among the threats posed by civilians from insurgents is the use of improvised explosive devices (IEDs) which accounted for 31% of civilian casualties attributed to the anti-government elements.<sup>604</sup> These IEDs are indiscriminate in nature and even when intended for military personnel often result in civilian

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<sup>600</sup> Declan Walsh, ‘UN Horrified by Surge in Opium Trade in Helmand’ *The Guardian* (London, 28 August 2007); Anders Corr, ‘To Defeat Terrorism in Afghanistan, Start With Opium Crops in Nanharhar Province’ *Forbes* (New York, 26 March 2017).

<sup>601</sup> United Nations Development Programme, Human Development Index, <http://hdr.undp.org/en/composite/HDI>

<sup>602</sup> Ibid.

<sup>603</sup> UNAMA Annual Report, ‘Afghanistan, Protection of Civilians in Armed Conflict’ (2016) <[https://unama.unmissions.org/sites/default/files/protection\\_of\\_civilians\\_in\\_armed\\_conflict\\_annual\\_report\\_2016\\_final\\_280317.pdf](https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_annual_report_2016_final_280317.pdf)> accessed May 13 2016.

<sup>604</sup> Ibid at 50.

casualties.<sup>605</sup> Increasingly, insurgents have favoured “suicide and complex attacks” those where armed insurgents conduct large-scale attacks or hostage taking. Many of these are targeted at security forces with the indiscriminate nature of the attacks causes mass civilian casualties as collateral damage, however, there has been a rise in sectarian attacks targeted directly at civilians. In one such attack, ISKP targeted a Shi’a minority protest killing 85 and injuring a further 413.<sup>606</sup> Similarly, in Kandahar 18 men and boys were executed, and a further 11 injured, for having connections with the local police forces.<sup>607</sup> Alongside attacks on civilians, the Afghan security services face daily violence. In many regions, even loose association, or perceived collaboration with the security services puts individuals at risk of death. In October 2016, insurgents from IKSP executed 26 shepherds in response to perceived collaboration with the Afghan National Army.

### **Lack of Effective Security Services**

These effects of these insurgencies are compounded by the weakness of the Afghan state security services which following the removal of the Taliban, was rebuilt from scratch. Prior to 2014, much of the security sector in Afghanistan was directly supported by NATO through the International Security Assistance Force. In 2012, over 130,000 NATO troops were deployed to Afghanistan,<sup>608</sup> both combatting the insurgency and providing security to the large population centres. When the ISAF mission was ended to be replaced by the much smaller Operation Resolute Support, the security environment in Afghanistan worsened significantly. Despite investment of over \$60 billion,<sup>609</sup> the Afghanistan National Security Forces remain under resources, trained and staffed. The national security forces are divided between the Afghanistan National Army (ANA) and the Afghanistan National Police (ANP). The ANA is responsible for the majority of offensive

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<sup>605</sup> See Ibid at 55 (“three IEDs targeting Afghan National Police detonated in Jalalabad city, Nangarhar province, killing five civilians (including one boy) and injuring 32 others”)

<sup>606</sup> Ibid at 60.

<sup>607</sup> Ibid at 64.

<sup>608</sup> The Guardian, DataBlog, ‘Afghanistan Troop Numbers Data’ *The Guardian* (London, 21 September 2009) <<https://www.theguardian.com/news/datablog/2009/sep/21/afghanistan-troop-numbers-nato-data>> accessed 14 May 2016.

<sup>609</sup> Supplement to SIGAR’s January 2015 Quarterly Report to the United States Congress’, Special Inspector General for Afghanistan Reconstruction (SIGAR), February 2015.

operations against the insurgents consisting of over 180,000 troops and despite some success in defeating the internal insurgency it still faces significant difficulties. High soldier turnover, over 33% leave within one year of joining. This has resulted in a disproportionately large amount of funding being focused on recruiting and retraining personnel with combat effectiveness and professionalism being sacrificed.<sup>610</sup> Desertion remains common throughout the ANA, becoming so widespread that the President of Afghanistan passing a law granting amnesty to soldiers who had deserted to save resources.<sup>611</sup> The effectiveness of the ANA is further compromised by an undersized Air Force, consisting of just 104 aircraft, has significantly limited the available air support to the ANA during combat operations.<sup>612</sup> Overall, the increasing effectiveness of the ANA is mitigated by the asymmetric nature of the warfare as the insurgents increasingly retreat to complex cave networks and rely on guerrilla attacks. The use of IEDs and suicide attacks continue to pose a significant threat and the level of casualties among the ANA remains high. There was an average of more than 330 casualties per week in the fight against the Taliban during 2015, and incidences of violence have been increasing year on year.<sup>613</sup>

Parallel to the ANA, the AFP take responsibility for providing security to the major population centres and the transport networks. Despite this central role in the Afghan security sector, the AFP is plagued by difficulties leading to it being described as “the weak link in security sector reform” in Afghanistan.<sup>614</sup> Just 70% of ANP trainees are literate, and most undertake between 15 and 40 days of training before returning to their local community.<sup>615</sup> The ANPs difficulties are exacerbated by the fact that while classed as police they undertake an overtly military role at the forefront of the fight against insurgents. Their training is primarily provided by the U.S. Military

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<sup>610</sup> United States Department of Defense, *Enhancing Security and Stability in Afghanistan* (June 2016) 37 available at [https://www.defense.gov/Portals/1/Documents/Enhancing\\_Security\\_and\\_Stability\\_in\\_Afghanistan-June\\_2016.pdf](https://www.defense.gov/Portals/1/Documents/Enhancing_Security_and_Stability_in_Afghanistan-June_2016.pdf)

<sup>611</sup> Ibid.

<sup>612</sup> Ibid at 59.

<sup>613</sup> Michaels, J. ‘Afghan security forces suffer record casualties’, *USA Today*

<<http://www.usatoday.com/story/news/world/2015/05/03/afghan-security-forces-suffer-recordcasualties/26828193/>> accessed 4 May 2016.

<sup>614</sup> Robert M. Perito, ‘Afghanistan’s Police: The Weak Link in Security Sector Reform’ (United States Institute of Peace, August 2009) <[https://www.usip.org/sites/default/files/afghanistan\\_police.pdf](https://www.usip.org/sites/default/files/afghanistan_police.pdf)> accessed 13 May 2016.

<sup>615</sup> Ibid at 4.

with “operational policy, force structure, and standardized training and professionalization, were modelled on military rather than civilian police institutions.”<sup>616</sup> However, while this has created a military focused police force, the equipment and support services have been insufficient to fulfil this role. The ANP have suffered “three times as many casualties as the Afghan National Army”<sup>617</sup> and during the period from March to September 2014 alone, 1,368 ANP officers were killed and a further 2,370 were injured.<sup>618</sup> Beyond these institutional problems, the ANP has been plagued by widespread allegations of corruption, drug trafficking, and a lack of professionalism. The British Foreign Office estimates that 60% of ANP operating in the Helmand province are drug users<sup>619</sup> while in many communities the reputation for bribery and extortion has led to them becoming less popular than the Taliban.

### **Drug Trafficking and Related Organised Crime**

The growth of Opium production has led to Afghanistan facing a consistent threat from violence related to international organised crime. UN reports have identified Mexican drug cartels and Russian Mafia among the buyers of Afghanistan’s opium and an increasing competition for resources has led to Afghanistan becoming a staging ground for a growing number of international mafia and cartels.<sup>620</sup> A report by the United Nations Office on Drugs and Crime identified at least 9 tons of heroin trafficked from Afghanistan to America via Mexican cartels.<sup>621</sup> Its land borders with Turkey and the Caucasus have caused competition between Russian and Turkish gangs for the lucrative European market. These gangs have bought with them unique security threats in order to

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<sup>616</sup> Michelle Hughes, ‘The Afghan National Police in 2015 and Beyond’ (United States Institute for Peace, March 2015) <[https://www.usip.org/sites/default/files/SR346\\_The\\_Afghan\\_National\\_Police\\_in\\_2015\\_and\\_Beyond.pdf](https://www.usip.org/sites/default/files/SR346_The_Afghan_National_Police_in_2015_and_Beyond.pdf)> accessed 16 May 2016.

<sup>617</sup> Ibid at 1.

<sup>618</sup> Sedra, M., ‘An Uncertain Future for Afghanistan’s Security Sector. Stability’ 2014 3(1) International Journal of Security and Development, art. 35.

<sup>619</sup> Ibid at 8.

<sup>620</sup> Insight Crime, ‘Mexican Cartels Buying Drugs in Afghanistan’ (Insight Crime, 4 January 2011) <<http://www.insightcrime.org/news-analysis/mexican-cartels-buying-drugs-in-afghanistan>> accessed 16 May 2016.

<sup>621</sup> UNODC, ‘The Global Afghan Opium Trade, A Threat Assessment’ (July 2011) <[https://www.unodc.org/documents/data-and-analysis/Studies/Global\\_Afghan\\_Opium\\_Trade\\_2011-web.pdf](https://www.unodc.org/documents/data-and-analysis/Studies/Global_Afghan_Opium_Trade_2011-web.pdf)> accessed 14 May 2016.

secure their trade routes. These often include extortion and kidnapping, while the border populations can be forced to pay protection money to either the gangs, or commonly the Taliban.<sup>622</sup>

### **Kidnapping and Extortion**

Beyond security threats tied to the insurgency, kidnapping and extortion present one of the most significant issues faced by both Afghan citizens and foreign visitors. The lack of an effective civilian police force has allowed mid-level organised crime in the form of kidnapping and extortion to flourish. Residents of Kabul have identified it as one of their biggest security concerns,<sup>623</sup> with a kidnapping occurring daily.<sup>624</sup> While many of the victims are local businessmen, with money changers particularly vulnerable, their family members are also targeted. Foreign visitors are similarly targeted, with aid workers particularly vulnerable. In these cases, the original kidnappers will often sell the victim to an insurgent group rather than seek a ransom directly,<sup>625</sup> with a high proportion being killed.<sup>626</sup> The ANP have belatedly identified the need to crack-down on this and last year 3,000 kidnappers were arrested,<sup>627</sup> however, despite this improvement it remains a constant security threat.

### **4.3(3)(c) PMSCs and the Legal Environment**

The legal environment in which PMSCs operate has undergone a significant transformation in the past 16 years following the U.S. invasion, with the current position remains opaque. For much

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<sup>622</sup> See Gretchen Peters, 'The Taliban and Organized Crime' 108, 126 <[https://comum.rcaap.pt/bitstream/10400.26/7644/1/NeD130\\_GretchenPeters.pdf](https://comum.rcaap.pt/bitstream/10400.26/7644/1/NeD130_GretchenPeters.pdf)> accessed 23 June 2016; World Bank Afghanistan's Drug Industry : Structure, Functioning, Dynamics, And Implications For Counter-Narcotics Policy 201 (Doris Buddenberg ed. & William Byrd Ed. (2006) <<http://documents.worldbank.org/curated/en/151161467996726308/pdf/389310AF0Drug0industry0Nov200601PUBLI C1.pdf>>

<sup>623</sup> Afghanistan in 2013: A Survey of the Afghan People, The Asia Foundation (2013) at 23 available at <https://asiafoundation.org/resources/pdfs/2013AfghanSurvey.pdf>

<sup>624</sup> Afghan capital plagued by kidnapping and extortion of locals, National available at <https://www.thenational.ae/world/afghan-capital-plagued-by-kidnapping-and-extortion-of-locals-1.11053>

<sup>625</sup> Ibid.

<sup>626</sup> 'Nigeria 2016 Crime & Security Report' (United States Department of State, Bureau of Diplomatic Security, 15 April 2016) <<https://www.osac.gov/pages/ContentReportDetails.aspx?cid=21383>> accessed 18 February 2017.

<sup>627</sup> Ibid.

of the decade following the 2001 invasion it was largely perceived that PMSCs operated in a legal and regulatory vacuum.<sup>628</sup> The first legal regulations of PMSCs were established in 2008 with the assistance of the Geneva Centre for the Democratic Control of Armed Forces. These regulations remain in force today, although they have been significantly revised by further regulations, and they are therefore necessary to consider. Under this law, PMSCs were required to possess an operating license from the Secretariat of the HCB, with the approval of the Council of Ministers.<sup>629</sup> Distinctions in the requirements for gaining an operating license vary depending on whether the PMSC is considered a National Security Company (NSC), or a Foreign Security Company (FSC).<sup>630</sup> FSCs are required to demonstrate transparency and good security practices with a guarantee from the countries which the company operates in.<sup>631</sup> In comparison, LSCs are required to demonstrate that their staff have not been suspected or accused of human rights violations.

Certain requirements of PMSCs are consistent regardless of whether national or foreign. Article 19 establishes that contractors can only carry weapons in specific areas established in their operating license,<sup>632</sup> while under Article 10 PMSCs could not employ more than 500 people without specific agreement from the Council of Ministers. Articles 19-27 set out more general regulations for PMSCs, including a list of prohibited activities. Included within this are participating in political activities, buying or selling weapons and wearing uniforms that may be confused with those of the ANA or ANP.<sup>633</sup> Notably, considering frequent allegations of ethnic or tribal violence, the list of prohibitions make explicit reference to “recruiting people collectively from one tribe or party.”<sup>634</sup> Any PMSCs found to be in breach of these regulations is liable to be stripped of its operating

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<sup>628</sup> Steve Brooking, ‘Private Security Companies in Afghanistan, 2001-11’ (Afghanistan Analysts Network) <[https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/09/13\\_Brooking\\_Private\\_Security\\_Companies.pdf](https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/09/13_Brooking_Private_Security_Companies.pdf)> accessed 20 February 2016).

<sup>629</sup> Islamic Republic of Afghanistan Ministry of Interior, Procedure for Regulating Activities of Private Security Companies in Afghanistan, Feb 2008 *available at* [http://psm.du.edu/media/documents/national\\_regulations/countries/asia\\_pacific/afghanistan/afghanistan\\_draft\\_regulations\\_on\\_psc\\_2008-english.pdf](http://psm.du.edu/media/documents/national_regulations/countries/asia_pacific/afghanistan/afghanistan_draft_regulations_on_psc_2008-english.pdf)

<sup>630</sup> Ibid at Art. 4.

<sup>631</sup> Ibid at Art. 14.

<sup>632</sup> Ibid at Art. 19

<sup>633</sup> Ibid at Art. 21

<sup>634</sup> Ibid.



license. In these cases, NSCs would have their weapons repossessed by the Minister of Interior, while FSCs would be required to remove all legal weapons from the country or else submit them to the MOI.<sup>635</sup> By August 2009, 52 companies had been granted operating licenses for PMSC activities. However, while these attempts were notable, they were considered to have failed in effectively regulating the PMSC market. While PMSCs operating in Kabul generally complied with these regulations this was not replicated in the rural regions. The UN Working Group on Mercenaries identified “500 security operating in the Eastern region which were not registered... by comparison, there were only six PMSCs registered with the MoI.”<sup>636</sup>

The perceived failure of this regulation, with the view that FNC were not taking this regulation seriously, led President Karzai to seek their complete abolition. Through Presidential Decree 62, Karzai implemented a 12 month “Bridging Period” until March 2012, after which PMSCs would be deemed illegal under Afghan law. This decree contained two significant caveats. In “commitment to the principles of the Vienna Convention on Diplomatic Relations” the decree exempted Embassies and entities accredited with diplomatic status.<sup>637</sup> These retained the ability to contract up to 500 contractors, or 1,500 with the imposition of significant fines so long as the PMSC was in good standing and holding an operating license issued prior to Degree 62.<sup>638</sup> The second exemption on the ban existed for “development programs, ISAF and coalition forces”<sup>639</sup> who for a period of two years could continue to contract PMSCs for security operations. Ultimately this two year period was softened with reviews at 3-month intervals following the bridging period “until the APPF is judged capable of assuming all ISAF relevant security requirements.”<sup>640</sup> Ultimately, the

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<sup>635</sup> Ibid at Art.35

<sup>636</sup> Shaista Shameem, ‘Promotion And Protection Of All Human Rights, Civil, Political, Economic, Social And Cultural Rights, Including The Right To Development’ UN Human Rights Council (July 2, 2010) A/HRC/15/25/Add.2 at Para. 17.

<sup>637</sup> Presidential Decree no. 62 at 9, available at [http://psm.du.edu/media/documents/national\\_regulations/countries/asia\\_pacific/afghanistan/afghanistan\\_decree\\_bridging\\_strategy\\_2011-english.pdf](http://psm.du.edu/media/documents/national_regulations/countries/asia_pacific/afghanistan/afghanistan_decree_bridging_strategy_2011-english.pdf)

<sup>638</sup> Ibid.

<sup>639</sup> Ibid at 11.

<sup>640</sup> Ibid.

deteriorating security conditions hindered this approach and by 2014 only 5 of 43 ISAF bases were protected by the APPF.<sup>641</sup>

Beyond these two caveats, PMSCs remained banned under Afghan law. Instead, following Presidential Degree 62, the Afghanistan Government established the Afghan Public Protection Force, with the intention of providing state-backed contracted security services to private clients. Their role has variously been described as “to provide “public protection” but not “law enforcement”<sup>642</sup> and as a “state-owned enterprise... to provide contract based facility and convoy services.”<sup>643</sup> During the one year transition, pre-existing NSCs were allowed to register as “bridging tashkil’s” essentially establishing them as subcontractors of the APPF, with the intention of transition to members of the Force after the bridging gap.<sup>644</sup> Alongside this, however, some PMSCs, primarily FSCs, were allowed to register as Risk Management Companies (RMC), who continue to provide security through “lightly armed expatriate consultants or Afghans.”<sup>645</sup> In 2014, following mixed outcomes in establishing the APPF, the organisation was fully incorporated into the ANP.<sup>646</sup> Due to force limitations, however, parallel to this the signing of Presidential Decree 66 over-ruled Decree 62, allowing U.S. and NATO forces to “contract with Private Security Companies based on their security requirements” indefinitely.<sup>647</sup> Overall, the current status of PMSCs under Afghan law is unclear. PMSCs continue to provide the majority of services to both foreign diplomatic and military installations and personnel. In theory, PMSCs remain banned in other circumstances,

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<sup>641</sup> Elke Krahnmann, NATO Contracting in Afghanistan: The Problem of Principal-Agent Networks (2016) 92 International Affairs 1401.

<sup>642</sup> Mark Checchia, ‘Afghanistan in Transition: Private Security Companies Give Way to the Afghan Public Protection Force’ (Civil-Military Fusion Centre, October 2011) <[http://psm.du.edu/media/documents/reports\\_and\\_stats/think\\_tanks/cfc\\_psc\\_give\\_way\\_to\\_appf.pdf](http://psm.du.edu/media/documents/reports_and_stats/think_tanks/cfc_psc_give_way_to_appf.pdf)> accessed May 14 2016.

<sup>643</sup> United States Department of Defense, Enhancing Security and Stability in Afghanistan (June 2016) 37 *available at* <[https://www.defense.gov/Portals/1/Documents/Enhancing\\_Security\\_and\\_Stability\\_in\\_Afghanistan-June\\_2016.pdf](https://www.defense.gov/Portals/1/Documents/Enhancing_Security_and_Stability_in_Afghanistan-June_2016.pdf)> at 85.

<sup>644</sup> Presidential Degree 66, (n 647) at 16.

<sup>645</sup> *Ibid.*

<sup>646</sup> Islamic Republic of Afghanistan, Minister of Interior Affairs, Deputy Minister of Afghan Public Protection Forces, <http://moi.gov.af/en/page/newdms/dm-appf> (This was achieved through decision 1391 of the Council of Ministers.)

<sup>647</sup> Presidential Degree 66, *available at* <https://www.ahg.af/aca/PSC%20Decree%2066.pdf>

however, the so-called “bridging tashkil’s” remain in existence to date under the authority of the NAP, operating as hybrid public-private security contractors.

#### **4.3(3)(d) Types of PMSCs Present in Afghanistan**

Due to the constantly evolving nature of threats and the legal framework in which PMSCs operate in Afghanistan, this section will consider types of PMSCs that both currently operate or have operated, in particular those since the U.S. Invasion in 2001. The security market can crudely be divided into four primary sectors in which private actors play a substantial role.

##### **A) Private Military Contractors**

The first of these is the provision of support for NATO militaries, most significantly the U.S. and Britain. At their height over 28,000 armed PMSCs operated in Afghanistan under contract from the U.S. Department of Defence, equating to almost one-quarter of the entire military force.<sup>648</sup> Among the tasks these contractors undertake is co-ordinating counternarcotic operations with contracts worth over \$1.7 billion awards between 2002 and 2013. These official figures, however are likely under representative as much of the use of PMSCs is classified, with the C.I.A. also employing a large contingent of contractors to assist their work. These forces are comprised primarily of ex-military personnel from NATO countries however, there is an increasing tendency to recruit from cheaper markets with Colombian and Nepalese contractors forming a substantial proportion.<sup>649</sup> These forces undertake a range of roles but are largely focussed on providing fixed-

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<sup>648</sup> Heidi Peters, Moshe Schwatz & Lawrence Kapp, ‘Department of Defense Contractor and Troop Levels in Iraq and Afghanistan: 2007-2016’ (Congressional Research Service, Aug. 15, 2016) <[http://psm.du.edu/media/documents/us\\_research\\_and\\_oversight/csr\\_reports/us\\_crs\\_2016\\_r44116.pdf](http://psm.du.edu/media/documents/us_research_and_oversight/csr_reports/us_crs_2016_r44116.pdf)> accessed May 15, 2016. (It should be noted that news reports often quote the total number of contractors which is much higher, currently three times the size of the U.S. Forces, but these contractors include many purely civilian roles including infrastructure building, catering etc.)

<sup>649</sup> Kareem Fahim & Bhadra Sharma, ‘Lured by Jobs in Afghanistan, Nepalis Face Risks and Death’ *The New York Times* (New York, June 28, 2016) <[https://www.nytimes.com/2016/06/29/world/asia/nepal-guards-kabul-afghanistan-taliban.html?\\_r=0](https://www.nytimes.com/2016/06/29/world/asia/nepal-guards-kabul-afghanistan-taliban.html?_r=0)> accessed May 16, 2016; AFP, ‘Suicide Bombing in Kabul Kills 14 Nepalese Security Guards’ *The Guardian* (London, June 20, 2016) <<https://www.theguardian.com/world/2016/jun/20/suicide-bombing-kabul-kills-nepalese-security-guards>> accessed May 16, 2016

site security and convoy security. The fixed-site security even extends to owning and running private bases, with Academi (formerly Blackwater) possessing a “10-acre forward operating base in Kabul, Afghanistan”<sup>650</sup> from which U.S. Special Forces undertake covert operations,<sup>651</sup> and counter-narcotics operations are planned.<sup>652</sup> Beyond these guarding roles, however, it has been suggested that the use of PMCs by the U.S., in particular, has a more sinister role in the War on Terror. Evidence suggests that the C.I.A. have used PMCs to both conduct rendition flights into and out of Afghanistan<sup>653</sup> and to undertake enhanced interrogation of suspected terrorists at C.I.A. “Black Sites”.<sup>654</sup> Equally disturbing are reports that the C.I.A. contracted the PMSC Blackwater to conduct covert surveillance, and potentially assassinations, of Al Qaeda leaders.<sup>655</sup>

#### ***b) Private Guards***

The second sector in which PMSCs operate is the provision of private guarding to VIPs and important structures. Included within this are foreign diplomats, dignitaries and due to their exemption from Presidential Decree 62, this remains common throughout Afghanistan with the majority of foreign governments relying upon primarily foreign PMSCs to provide security for both their buildings and personnel. In 2015, G4S signed a £100million contract with the British Foreign and Commonwealth Office for security services in Afghanistan<sup>656</sup> and will guard all FCO sites in

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<sup>650</sup> Academi, *Facilities*, <<https://www.academi.com/pages/facilities>> accessed 16 July 2016.

<sup>651</sup> Spencer Ackerman, ‘U.S. Commandos’ New Landlord in Afghanistan: Blackwater’ *WIRED*, (New York, May 5, 2012) <https://www.wired.com/2012/12/academi-special-operations/>; Mirwais Harooni & Jessica Donati, *Attacks on Army, Police and U.S. Special Forces Kill 50 in Kabul*, Reuters (Reuters, 9 August 2015) <<https://www.reuters.com/article/us-afghanistan-attack/attacks-on-army-police-and-u-s-special-forces-kill-50-in-kabul-idUSKCN0QC1U920150809>> accessed 16 July 2016.

<sup>652</sup> See SIGAR Report (n 609)

<sup>653</sup> Rupert Neate, ‘Lloyds owns stake in US firm accused over CIA torture flights’ *The Guardian* (London, 6 May 2012) <<https://www.theguardian.com/business/2012/may/06/lloyds-computer-sciences-corporation-cia-rendition>> accessed 16 July 2016.

<sup>654</sup> See Senate Select Committee on Intelligence, ‘Committee Study of the Central Intelligence Agency Detention and Interrogation Programme: Findings and Conclusion, Executive Summary’ (3 April 2014) text available at <<https://www.amnestyusa.org/pdfs/sscistudy1.pdf>> accessed 16 May 2016. The report found that more than 85% of the people who undertook interrogation and detention were contractors, *Ibid* at 19.

<sup>655</sup> Mark Mazzetti, ‘C.I.A. Sought Blackwaters Help to Kill Jihadists’ *The New York Times*, (19 August 2009) <[http://www.nytimes.com/2009/08/20/us/20intel.html?\\_r=4&hp](http://www.nytimes.com/2009/08/20/us/20intel.html?_r=4&hp)> accessed 16 July 2016; Mark Mazzetti & Scott Shane, ‘C.I.A. Had Plan to Assassinate Al Qaeda Leaders’ *The New York Times*, (13 July 2009) <<http://www.nytimes.com/2009/07/14/us/14intel.html>> accessed 17 July 2016.

<sup>656</sup> ‘G4S Wins Security Contracts in Iraq and Afghanistan’ (*G4S*, Sept. 11, 2015) <<http://www.g4s.com/en/Media%20Centre/News/2015/09/11/G4S%20wins%20contracts%20in%20Iraq%20and%20Afghanistan/>> accessed 4 January 2016.

the country. These roles have also included providing security during travelling, and there have frequently been accusations of these PMSCs blocking entire roads, barging other drivers and even arbitrarily opening fire on civilians perceived as threats.<sup>657</sup>

Beyond government officials, many multi-national corporations and NGOs continue to rely upon private guards to protect their staff, with foreign workers often at an increased risk of crime and kidnapping. These groups are often registered as RMC in order to circumvent the prohibition on PMSCs. Despite this, these RMCs continue to provide almost identical services to the PMSCs, with the flexibility of the requirement of “lightly armed” providing scope for various forms of actors. An example of such is Afghan Wantan Risk Management, who while registered as an RCM offer essentially private security services including “close protection services” and “quick reaction forces.”<sup>658</sup> Among their clients they include the Chinese National Petroleum Corporation, who they have a contract with to provide oil and gas “exploration in hostile environments and geographically inaccessible regions”<sup>659</sup> With the incorporation of the APPF into the ANP it is suspected that these forms of private guards will grow as the government seeks to attract foreign investment into the country.<sup>660</sup>

c) *Militia Companies*

Along with official or legitimate PMSCs, following the U.S. invasion, the United Nations found that many community militias and tribal warlords began advertising their services as PMSCs “represent[ing] an opportunity... to continue their activities legally.”<sup>661</sup> Under these arrangements, the employers, ISAF forces, the Afghan or provincial Government and multi-national corporations

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<sup>657</sup> David Zucchino, ‘Deadly Contractor Incident Sours Afghans’ *Los Angeles Times* (Los Angeles, 13 August 2009) <<http://www.latimes.com/la-fg-afghan-contractors13-2009aug13-story.html>> accessed 4 January 2016.

<sup>658</sup> ‘Products and Services’ *Wantan Risk Management* <[http://www.watanrisk.com/security\\_management.php](http://www.watanrisk.com/security_management.php)> accessed 14 January 2016.

<sup>659</sup> Oil and Gas, *Wantan Group* <<http://www.watan-group.com/oilandgas.php>> accessed 14 January 2016.

<sup>660</sup> See Nathan Hodge, ‘Afghanistan to Disband Crucial Guard Force’ *The Wall Street Journal* (New York, 5 March 2014) <<https://www.wsj.com/articles/afghanistan-to-disband-crucial-guard-force-1393935914>> accessed 15 January 2016.

<sup>661</sup> Shameem, (n 816) at Para. 19.

would pay these militias in order to provide security in one specific region. Examples of this include the use of Afghanistan Navin, a “PMSC” owned by “former mujahideen commander Lutfullah” who provide 500 security guards to the Bagram Airbase.<sup>662</sup> +On occasions, multi-national PMSCs have even sub-contracted these militia to undertake their security services for them. UPSI, an American based firm with contracts with the World Bank and United Nations was found to have made agreements with Northern Alliance militia to provide the personnel for their security contracts.<sup>663</sup> In one of the more embarrassing incidences, an investigation by the US Senate Committee on Armed Services found ArmorGroup (A subsidiary of G4S) subcontracted their role providing security to Shindand Airbase to two local warlords who “turned out to be in conflict with each other.”<sup>664</sup> This led to clashes between the two and culminated in the assassination of one of the warlords.<sup>665</sup> A scathing report by the United States House of Representatives concluded that the security contracts awarded for the U.S. supply chain in Afghanistan had “fuel[led] warlordism, extortion and corruption, and it may be a significant source of income for the insurgents.”<sup>666</sup> Since 2015, with the withdrawal of many NATO forces, these militias have played a more central role in the provision of security,<sup>667</sup> with the Afghan government increasingly relying upon them to provide security in rural regions.

Since the beginning, however, the use of militias and warlords as PMSCs has been accompanied by allegations of grave human rights abuses, including the use of torture and arbitrary detention, while some minority communities have accused the militias of committing ethnically

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<sup>662</sup> Markets for Force, (n 469) at 106

<sup>663</sup> Ibid.

<sup>664</sup> Elke Krahnemann & Cornelius Friesendorf, *Undermining Human Security: Private Companies, the APPF, Militias and Auxiliary Police in Afghanistan*, Frankfurt am Main 2014, (PRIF reports 128) <[http://www.ssoar.info/ssoar/bitstream/handle/document/43536/ssoar-2014-krahmann\\_et\\_al-Undermining\\_human\\_security\\_private\\_security.pdf?sequence=1](http://www.ssoar.info/ssoar/bitstream/handle/document/43536/ssoar-2014-krahmann_et_al-Undermining_human_security_private_security.pdf?sequence=1)> accessed 29 May 2015.

<sup>665</sup> ‘Inquiry Into The Role and Oversight of Private Security Contractors in Afghanistan’ (Report to the Committee on Armed Services, United States Senate, 111<sup>th</sup> Congress, 2<sup>nd</sup> Session < [https://fas.org/irp/congress/2010\\_rpt/sasc-psc.pdf](https://fas.org/irp/congress/2010_rpt/sasc-psc.pdf)> accessed 17 May 2017.

<sup>666</sup> United States House of Representatives, Committee on Oversight and Government Reform, *Warlord Inc. Extortion and Corruption Along the U.S. Supply Chain in Afghanistan*. (2010) [http://www.cbsnews.com/htdocs/pdf/HNT\\_Report.pdf](http://www.cbsnews.com/htdocs/pdf/HNT_Report.pdf)

<sup>667</sup> US DOD, *supra* note 610

motivated violence. The Kandak Amniate Uruzgan, a 2,000 strong security firms used by Dutch and Australian forces in the volatile Uruzgan region is operated by a Commander Matiullah Khan who “led... hit squads that killed stubborn fathers than did not want to surrender their land, daughters, and livestock.”<sup>668</sup> One of the most powerful militias employed by the Afghan government, the Junbish militia have been accused by UNAMA and HRW of killing 18 civilians and injuring a further 45 ethnic Pashtuns based on their perceived allegiance with the Taliban.<sup>669</sup> Despite these numerous reports of criminal behaviour, however, no militia commanders have been arrested or tried for the actions of their forces. It is generally accepted that these forces act with almost absolute impunity and no legal accountability.

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<sup>668</sup> Warlord Inc. *supra* note 666, at 26.

<sup>669</sup> See Afghanistan, *Forces Linked to Vice President Terrorize Villagers*, HRW (July 31, 2016) <https://www.hrw.org/news/2016/07/31/afghanistan-forces-linked-vice-president-terrorize-villagers>

## 4.4 Conclusions on the Modern Security Markets

Throughout this Chapter, the research has sought to critically analyse the modern phenomena of PMSCs. This intended to provide an analytical background against which an evaluation of existing legal and regulatory frameworks could be measured and a unique typological framework could be established. Through conducting three country case-studies, this research looked to identify trends and highlight the difficulties posed by modern security assemblages.

Among the preliminary conclusions that can be drawn from these case studies, three in particular stand out as central to the analysis that this work is seeking to undertake. The first of these is that traditional discourse on PMSCs which focuses on a clear distinction between security services provided by the state and those provided by private companies is increasingly tenuous. While existing research has been heavily focussed on the effect of states employing private actors, there is an increasing need to consider variations within these relationships. In particular, the *de facto* control of state security services by private companies provides equally important questions about the control over state functions, principally coercive violence, and the manner in which they remain responsible for their actions. Similarly, the use of PMSCs by private companies provides the very real prospect of them exercising features of sovereign power over local populations. The case studies of both Peru and Nigeria identified situations in which MNCs were able to effectively control geographical areas through the use of both PMSCs and sub-contracted state security forces undermining social and political structures upon which the states are built.

Alongside this the case studies appear to identify a need to further examine the dichotomous categorisation of PMSCs as either military or security actors with this approach incapable of precisely analysing the activities of PMSCs. The modern state faces an increasingly complex range of security threats with the effect that the actors operating within security markets is progressively diverse. This was frequently evident within the case studies where private security guards or police



were employed to counter asymmetric threats, as faced by an increasing number of states, resorting to the use of military-style tactics and warfare-like violence. One of the most significant findings in relation to the increasingly blurred lines between military and security contractors is the correlation between the type of violence used by the PMSC and the lack of popular support or legitimate power possessed by the employer. All three case studies identified increasingly violent tactics being utilised not only in response to higher security threats, but more concerningly in response to legitimate popular opposition to the political system or external commercial interests. As a result, a comprehensive analysis of the privatisation of violence requires a more nuanced approach if legal and regulatory frameworks are going to effectively confront the issues highlighted within the case studies and adequately examine the modern relationship between coercive violence and power.

Finally, the case studies have highlighted that the privatisation of the state monopoly over coercive violence is more complex than often presented within PMSC research. While the outsourcing of military roles remains a central issue within the PMSC market, any comprehensive analysis of the privatisation of violence must consider the increasing use of PMSCs to fulfil a wider range of traditional state activities. In particular, while the use of PMSCs for external military activities has prompted questions regarding the accountability for their activities, the use of PMSCs internally poses a no-less significant issue. The control of public security services by a combination of companies and private contractors poses significant questions for the democratic control over public security that evolved as a key structural component in the development of the modern state that the international legal system is developed from.

If this research is therefore to fulfil its objectives it must do so in a manner that effectively addresses these key outcomes from the case studies. In critically analysing existing avenues of accountability it is important that this research considers the full scope of PMSC activities in order to comprehensively and appropriately evaluate the existing legal regime. Similarly, if this research

is to propose modifications to the current PMSC discourse, including the development of a classification system, it must do so with explicit reference to both the breadth and function of the privatisation of violence.

# CHAPTER FIVE

## APPLYING TRADITIONAL FRAMEWORKS TO NON-TRADITIONAL PRIVATE ACTORS

### 5 Introduction

Throughout Chapters One to Four this research has investigated the increasingly complex nature of the contemporary private security markets, establishing that global security assemblages currently consist of a wide variety of both actors and activities, being utilised by both states and private actors in increasingly complex hybrid organisational systems. It is imperative therefore that this work examines the manner in which PMSCs or those who engage them can be held accountable for the activities of their contractors in order to ensure that private violence is not used as a mechanism for avoiding responsibility. In doing so, this chapter will consider the existing legal position of private actors, and highlight how the modern security landscape can create disparities in the effectiveness of mechanisms for legal accountability. It will seek to critically analyse the ability of existing approaches to establishing accountability for, and regulating, private coercive actors. It will seek to demonstrate that the state-centric structure of existing legal frameworks inevitably leads to inequitable enforcement with significant gaps in enforcement that weaken and undermine the current legal regime.

### Positioning the Legal Analysis

Throughout Chapters One to Four this research has sought to demonstrate that the current security markets and the contractors engaged within them have a potentially transformative effect on the power structures on which the modern state is conceived. Theoretically it was proposed that

the ability to not only monopolise coercive violence but externalise it from the local population has the potential to redefine the relationship between coercive violence and legitimate power, subverting the structural accountability implicit within the development of the nation-state. Furthermore, through both historical and qualitative analysis the research established that the growth of PMSCs has coincided with a redefining and repositioning of the state both internally and externally through the growth of MNCs and transnational organisations capable of exercising authority in the manner historically reserved for sovereigns. Through both the general global trends and the more specific national case studies it was possible to identify a direct link between the growth of PMSCs and the weakening of the structures perceived to confer legitimacy to the power being exercised. As a result, this research argues that it is key that there exists legal avenues of accountability and regulation beyond the state in order to ensure that this form of coercive violence is not utilised to circumvent internal accountability and undermine the social structures on which the state is founded. To this end, this chapter will look to consider how existing international avenues of regulation and legal accountability are capable of filling the gap left by the modern state.

### **Structure and Justification of the Analysis**

Considering the complex background against which this chapter seeks to analyse the applicability and effectiveness of existing legal and regulatory approaches, it is necessary that this section establishes and justifies the research structure, design and scope. The starting point for this is limiting the scope of this investigation to the international sphere; focussing only on international legal instruments and international regulatory frameworks. This approach has been chosen with two considerations in mind. The first of these is that as Chapter Four identifies, PMSCs are an increasingly global phenomenon with transnational operations prevalent throughout much of the security industry. As a result, relying upon state regulations would result in an unequal level of protection between nations. With security increasingly important both as a distinct commodity and a requirement for further investment, national approaches can be regularly affected by attempts to attract foreign investment, changes in the security threats and political transformations. As a result,

the consistency and reliability of state approaches is often limited and provides little valuable analysis of an overall effectiveness of current approaches. Secondly, Chapter Four demonstrated an identifiable trend that the most extreme use of PMSCs frequently corresponded to areas where the local community was most strongly at odds with operations that were politically or financially important for the government. The level of protection offered by states can therefore vary drastically with the use of coercive violence appearing to undermine the legitimate governance that effective state laws would rely upon. Focussing on states alone to regulate PMSCs would potentially leave citizens vulnerable to their state acting illegitimately on behalf of external interests at their expense. Similarly, while international human rights has often been cited as a potential avenue through which PMSCs may be controlled,<sup>670</sup> the state-centric nature of the regime significantly limits the effectiveness of its application. While, ostensibly an approach to holding states individually accountable for their failure to protect their citizens rights, the enforcement activities rely overwhelmingly on the state. While it is likely that international human rights have been beneficial in establishing international norms and standards,<sup>671</sup> its effectiveness in holding uncooperative states accountable is in practice marginal. Instead, it is only through an independent and external approach, beyond the direct influence of the state or organisation that it is seeking to hold accountable, that any uniform and consistent approach could exist.

As a result, this research focuses on strong international frameworks, considering the extent to which these avenues of legal accountability are in practice capable of independently holding both PMSCs and their employers responsible. This will critically analyse the capacity of these mechanisms to establish accountability at an institutional level, in a manner most suitable for attributing culpability and effecting change. When approaching this question, this work must

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<sup>670</sup> See e.g. Antenor Hallo de Wolf (n 31); David A. Sklansky, "Private Policing and Human Rights" (2011) 5(1) *Law & Ethics of Human Rights* 111.

<sup>671</sup> See for example Stuart Wallace, "Private Security Companies and Human Rights: Are Non-Judicial Remedies Effective" (2017) 35 *Boston University International Law Journal* 69; Lauren Groth, "Transforming Accountability: A Proposal for Reconsidering How Human Rights Obligations Are Applied to Private Military Security Firms" (2012) 35 *Hastings International and Comparative Law Review* 29; Sklansky, *Ibid*.

consider the complexities implicit in attributing accountability where the conduct includes multiple actors and complex, non-linear command structures. Thus, within international law there exists a general acceptance that in such circumstances, it is those “most culpable,” rather than those who simply physically commit the act, who should bear the greatest responsibility.<sup>672</sup> This research will therefore seek to examine methods through which the individuals most culpable, may be held legally accountable and simultaneously ensure that in future PMSCs act in a responsible manner.

In order to achieve these aims, this chapter identifies several approaches within the international sphere that provide the possibility of regulating the activities of PMSCs. The first of these is considering how international law is able to hold PMSCs, or the relevant actors, legally accountable when they fail to adhere to minimum legal standards. Parallel to this, it is necessary to consider how international instruments have sought to positively regulate the conduct of PMSCs, and their employers. Specific focus will be given to the “Montreux Document, on the Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict”<sup>673</sup> and the International Code of Conduct for Private Security Providers,<sup>674</sup> as the two most complete attempts to regulate the PMSC market.

In relation to international law this research proposes two mechanisms that offer the most appropriate forums in which to consider the accountability of PMSCs or their employers. The starting point for this will be seeking to establish the extent to which a state employing PMSCs can be held accountable for the actions of their contractors internationally. Specifically, it will consider the practicalities of utilising the doctrine of state responsibility for the conduct of PMSCs in

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<sup>672</sup> See for example Security Council Resolution, S/Res/1503 (2003) specifying that the ICTY should “concentrat[e] on the prosecution and trial of the most senior leaders”

<sup>673</sup> ‘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’ (International Committee for the Red Cross, August 2009) *text available at* <[https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf)> [hereinafter The Montreux Document]

<sup>674</sup> ‘International Code of Conduct for Security Service Providers’ (Swiss Federal Department of Foreign Affairs, 8 October 2010) <<https://www.state.gov/documents/organization/150711.pdf>> accessed 14 May 2017 [hereinafter ICOC]

violation of customary international law or international humanitarian law. Through examining this approach, the chapter will consider the extent to which international law is able to indirectly enforce state compliance with international norms. If effective this approach could be seen to minimise the regulatory benefits of the privatisation of coercive violence, often presented as one of the key factors in the use of PMSCs for states. While this would not entirely replicate direct state control over security forces, an effective system of state responsibility would continue to hold the state ultimately responsible for the actions of those PMSCs that it has either employed or allowed to operate within its borders. In order to critically analyse the effectiveness of state responsibility in achieving this, this chapter will examine the legal relationship required between PMSCs and the state, and the likely factual circumstances and evidentiary burdens necessary for the doctrine to engage. Through applying these requirements to the examples identified within the case studies, this section will demonstrate the inherent weaknesses within this approach. Notably, as a result of the control requirements established by international tribunals, any reliance upon state responsibility could act as an incentive to states, to further disassociate PMSCs from their control, effectively rewarding recklessness.

Considering these limitations, it will thereafter move on to examine the extent to which individual military and political leaders may be held accountable for the actions of PMSCs conducted on behalf of their states under international criminal law. Unlike human rights, international criminal law offers the significant benefit of presenting the opportunity to hold individuals accountable even when the state is non-cooperative. However, in order to critically analyse the extent to which this may in practice become an effective mechanism it is necessary to discuss the various “modes of accountability” utilised in international criminal law and consider how existing circumstances, drawn from the case studies, may fit within these modes. This will focus on the doctrines of perpetration by means, command responsibility, joint criminal enterprise and finally the control theory of co-perpetration. It will seek to establish the differing evidentiary burdens within each of these and consider how these may be practically applicable to the factual

circumstances encountered within PMSC activity. This will highlight the difficulty posed by PMSCs when standards designed for strict hierarchically answerable military structures are applied to indirect and opaque voluntary relationships as presented by PMSCs.

Having examined the possibility of holding PMSCs, and their employers legally accountable for criminal behaviours and human rights abuses, the chapter will consider how the international community has sought to prevent these from occurring in advance. It will therefore consider the role of international frameworks in regulating and overseeing the use of PMSCs. It will consider both the text and the context of both the Montreux Document<sup>675</sup> and the International Code of Conduct for Private Security Providers.<sup>676</sup> It will consider the rules established within both of these and will critically analyse the intention behind these rules and the planned effect of them. From this it will move on to consider the effectiveness of these instruments. Specifically, it will consider how these instruments are capable of adapting to the significant variations within the types and activities of modern PMSCs as highlighted within the case studies.

## 5.1 State Responsibility for PMSCs

When considering the legal accountability of PMSCs, one of the most frequently cited manners in which to establish criminal liability under international law is through the doctrine of state responsibility. Because of the supposed monopoly over coercive violence that sovereign states have maintained within the sphere of public international law,<sup>677</sup> it is a well-established principle of customary international law that states are responsible for upholding their international obligations. As a result of this, states in violation of these obligations are legally compelled to take action to stop the violation and thereafter responsible for making reparations. Furthermore, in

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<sup>675</sup> The Montreux Document (n 673)

<sup>676</sup> The ICoC (n 674)..

<sup>677</sup> See e.g. U.N. General Assembly, 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, A/HRC/15/25 Paragraph 49 (“To reaffirm and strengthen the State responsibility for the use of force and reiterate the importance of the State monopoly of the legitimate use of force”)



relation to PMSCs, this international responsibility will extend to certain violations of international law by private actors, dependent upon the extent to which they can be linked to that State.

Although the doctrine of state responsibility is accepted as customary international law, in 2001 after more than 40 years of working on them,<sup>678</sup> the International Law Commission adopted the Articles on the Responsibility of States for International Acts (ILC Articles).<sup>679</sup> Whilst, the ILC Articles were never formally adopted by the UN, they are considered to represent an accurate codification of the existing customary international law. As such, their principles remain enforceable<sup>680</sup> and have been cited by the International Court of Justice when considering state responsibility.<sup>681</sup>

In applying these rules to PMSCs, the first thing to note is that the ILC Articles do not themselves establish what are considered international wrongs; instead focusing upon setting out the “general conditions under international law for the State to be considered responsible.”<sup>682</sup> As a result, it is first necessary to establish the kind of action that may be capable of engaging state responsibility before considering the circumstances under which the action may be attributed to the state.

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<sup>678</sup> Daniel Bodansky & John R. Cook, ‘The ILC’s State Responsibility Articles: Introduction and Overview’ (2002) 96 *American Journal of International Law*, 773, 773.

<sup>679</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, <[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf)> accessed 5 July, 2015. [hereinafter ILC Articles]

<sup>680</sup> For further discussion of the position of the ILC Articles within international law see David D. Caron, ‘The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority’ (2002) 96 *American Journal of International Law* 857, 865.

<sup>681</sup> The ICJ cited an earlier draft text of the ILC articles in *Gabčíkovo-Nagyamaros Project (Hungary/Slovakia)* ICJ Reports 1997, 7, 38–41.

<sup>682</sup> ILC Articles (n 679) at 31.

## **5.1(1) International Wrongful Acts**

According to Article 2 of the ILC Articles, conduct constitutes an internationally wrongful act when the act or omission breaches an international obligation of that state.<sup>683</sup> Article 3 however, goes on to clarify that this characterisation is governed by international law. Specifically, a comparison cannot be drawn between whether an act would be considered unlawful within a State, for the purpose of deciding whether it constitutes an international wrong. Furthermore, due to the *sui generis* nature of PIL, establishing the legal foundation for the standards that attract responsibility is particularly complex with the wording of the treaties ensuring that legal obligations remain intentionally flexible. Within human rights, for example, even the strongest treaty, the ICCPR, stipulates only that State parties are under a duty to respect, and implement national legislation to “give effect to the recognised in the convention.”<sup>684</sup> As a result, when considering the legal responsibility of states for the actions of PMSCs, it is likely that international human rights generally will struggle to be effective. In relation to PMSCs therefore, there are two sets of international obligations that are particularly relevant to consider in relation to state responsibility.

## **5.1(2) Conduct Capable of Attracting State Responsibility:**

### **Geneva Conventions**

The conducts most likely of being an intentional wrong, capable of attracting state responsibility are breaches of the Geneva Conventions representing the fundamental rules of international law regulating the conduct of parties during war, specifically seeking to limit the barbarity of war, and protect individuals not directly involved in the conflict. As a large proportion of the Geneva Conventions are considered to be customary international law and as such, are non-derogable, binding all nations, providing an ideal foundation for state responsibility. In relation to

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<sup>683</sup> ILC Articles (n 679) at Art 2.

<sup>684</sup>International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Article 2(1).

PMSCs, it is clear from their past conduct that several of these Conventions are likely to be of particular relevance.

Under the First Geneva convention, representing the duties owed to soldiers *hors de combat*,<sup>685</sup> all wounded or sick soldiers must be treated with a minimum level of respect.<sup>686</sup> Specifically, they should not be killed, further injured or tortured whilst under the protection of the opposition forces. Furthermore, to the maximum extent possible they must be cared for and treated medically by the party under whose power they may be, who should not act, or omit to act, in any manner that may significantly negatively affect the health of those being held.<sup>687</sup> Considering these circumstances, it is clear the First Geneva Convention would have been invoked during the Abu Ghraib prison case. In particular, it is clear that both CACI International and Titan employees were responsible for conduct that further injured the prisoners both physically and mentally,<sup>688</sup> in a manner amounting to torture. Similarly, the allegation that CACI Int'l contractor Steve Stefanowicz explicitly ordered for medication to be withheld from a detainee suffering from appendicitis would have been a serious violation of the requirement to provide medical treatment.<sup>689</sup> Whilst there has been debate within America as to the position of detainees in Afghanistan and Guantanamo Bay,<sup>690</sup> the US has repeatedly emphasised that all Abu Ghraib detainees were prisoners of war, under the protection of the Geneva Convention.<sup>691</sup>

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<sup>685</sup> Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. [Hereinafter First Geneva Convention]

<sup>686</sup> First Geneva Convention (n 98) Art. 3(1)

<sup>687</sup> Ibid at Art. 3(1)(a)

<sup>688</sup> See *Tabuga Report* (n 42) 16; see also *Fay Report* (n 43) 69, 78, 99.

<sup>689</sup> Mark Benjamin & Michael Scherer, *Big Steve and "Abu Ghraib"* (Salon, March 31, 2006) <[http://www.salon.com/2006/03/31/big\\_steve/](http://www.salon.com/2006/03/31/big_steve/)> accessed 14 June 2013.

<sup>690</sup> See Erin Chlopak, 'Dealing with the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations under the Geneva Convention' Wash. Coll. Of Law Human Rights Brief, Vol. 9(3); See also Donald Rumsfeld called the detainees "unlawful combatants" who "do not have any rights under the Geneva Convention" Katherine Q. Seeyle, 'A Nation Challenged: The Prisoners' (NY Times, Aug 12, 2002) available at <<http://www.nytimes.com/2002/01/12/world/nation-challenged-prisoners-first-unlawful-combatants-seized-afghanistan-arrive.html>> accessed 13 June 2013.

<sup>691</sup> See CRS Report for Congress, 'Lawfulness of Interrogation Techniques Under the Geneva Convention' (Sep. 8, 2006) available at <<http://www.fas.org/irp/crs/RL32567.pdf>> accessed 13 June 2013.

Similarly applicable to PMSCs is Common Article 3 of the Geneva Conventions, which is present in all the Treaties and Additional Protocols. This lays out the minimum standard of protection afforded to civilians including the basic provision that no person shall be subjected to physical suffering or murder.<sup>692</sup> Furthermore, included within this definition the Convention prohibits the use of torture or even corporal punishment whilst under the protection of any party.<sup>693</sup> Whilst there are many instances in which PMSCs could have been implicated in such actions, the clearest contractor violation of Common Article 3 would be the actions of Blackwater at Nissour Square, where 17 individuals were indiscriminately killed. Particularly, as it was clear that these individuals were taking no part in the hostilities and therefore civilians, Blackwater were prohibited from willful killing, which it is clear from both the eye-witness events and official reports, were the intentions.<sup>694</sup>

The final section that is potentially relevant when considering the work of PMSCs is the principle of proportionality in attack. In particular, it is now a well-established doctrine of both codified and customary international law that attacks should be proportional to the military objectives. This principle, found in the Additional Protocol I of the Geneva Conventions<sup>695</sup> has according to the ICRC been declared that through state practice become a tenet of customary international law applicable to both international and non-international conflict.<sup>696</sup> As a result, the use of force in the knowledge that it will cause excessive loss to civilian life or property compared to the military outcome is legally prohibited and can be classed as a war crime. The most notorious example of this is the British registered Executive Outcomes who have repeatedly been accused of using excessive force whilst undertaking operations in both Sierra Leone and Angola. In particular,

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<sup>692</sup> Common Article 3, Geneva Conventions *available at* <<http://www.defense.gov/pubs/pdfs/App1.pdf>> accessed June 17, 2013.

<sup>693</sup> *Ibid.*

<sup>694</sup> *See* Scahill (n 20) at 3-9, for a detailed and accurate description of the Nissour Square shooting; *Ibid* at pages 9-13 for details relating to several repeated cases in which Blackwater were implicated in seemingly unprovoked “wilfull killings”.

<sup>695</sup> Additional Protocol I (n 19).

<sup>696</sup> Customary International Law, Rule 14, Proportionality in Attack *available at* <[http://www.icrc.org/customary-ihl/eng/docs/v1\\_cha\\_chapter4\\_rule14](http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14)> accessed July 14, 2013.

it was alleged that their use of helicopter gunships, cluster bombs and fuel-air explosives whilst engaging UNITA were not executed within this principle causing significant and disproportionate loss of civilian life and property.<sup>697</sup> Furthermore, similar claims have been made against MPRI for their role in the Croatian offensive, *Operation Storm* during the Yugoslavian civil war, and Blackwater during several Iraqi operations.<sup>698</sup>

### **5.1(3) Conduct Capable of Attracting State Responsibility:**

#### **Convention Against Torture**

Outside of the Geneva Conventions, the most likely international obligation capable of attracting state responsibility is the UN Convention Against Torture (CAT)<sup>699</sup> which is now considered to be established as customary international law and therefore non-derogable, binding all nations. As the debate surrounding US enhanced interrogation highlighted there is not yet a standard legal definition of conduct amounting to torture and as a result establishing whether specific conduct amounts to a violation of the Convention requires a degree of subjective analysis. Despite this, there are circumstances discussed within the case studies that would almost universally be considered to have violated the CAT. The role of private contractors at US black sites as part of the American CIA's program of extraordinary rendition would almost certainly have amounted to torture.<sup>700</sup> Evidence that detainees were transported from both Pakistan and Afghanistan to C.I.A. Black sites Under Article three of the CAT, a state is prohibited from transporting of individuals to any state where there are substantial grounds for believing they would be in danger of being subjected to torture.<sup>701</sup> Therefore, even if DynCorp employees were not directly involved in the torture or interrogations, they would be in breach of the CAT.

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<sup>697</sup> See Alex Vines, 'Mercenaries and the Privatisation of Security in Africa in the 1990s' p. 54

<sup>698</sup> *Genocide Victims of Krajina v. L-3 Communications Corp. & MPRI Inc.*, United States District Court, Northern District of Illinois Eastern Division, Case No. 1:10-CV-05197, 17 Aug, 2010 *available at* <<http://www.veritas.org/rs/wp-content/uploads/2011/08/tuzba-usa.pdf>> accessed 8 July, 2013; *see also* Scahill (n 20) at 3-6, 9-12, 186-188,

<sup>699</sup> United Nations, Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/39/46, 10 Dec, 1984. [hereinafter UN Convention Against Torture]

<sup>700</sup> See *Infra 'DynCorp in Extraordinary Rendition'* at page 22 and fn. 77-81.

<sup>701</sup> UN Convention Against Torture (n 112) Article 3.

## 5.2 International Law Commissions Draft Articles and Customary International Law

Considering the significant evidence that PMSCs have been responsible for conduct that would be considered an intentionally wrongful act it is necessary to examine the practicalities of attributing this conduct to a State. The foundation for attributing the conduct of PMSCs to a State can be found within the ILC Articles with Articles 5 and 8 in particular, providing potential avenues for States to be held responsible for the actions of PMSCs.

### 5.2(1) Article 5

Under Article 5 of the ILC Articles, a state may be held responsible for an intentionally wrongful act if the “person or entity... is empowered by the law of that state to exercise elements of the Governmental authority.”<sup>702</sup> This is however significantly restricted, as it applies only to acts taking place whilst the individual is acting “in that capacity”<sup>703</sup> The primary difficulty encountered when attempting to utilise Article 5 is that it remains unclear as to what represents an element of government authority. In the commentary attached to the ILC Articles, the authors provide the example of a “parastatal entities” and address the increasing privatisation of state functions<sup>704</sup> as a situation in which governmental authority may be deduced. Specifically, the commentary states “private security firms may be contracted to act as prison guards and in that capacity.... Exercise public powers such as detention.”<sup>705</sup> The use of PMSCs by Coalition forces as prison guards during the Iraq War, including their notable presence during the Abu Ghraib prison torture scandal,<sup>706</sup> would therefore seem likely to have fallen under the governmental authority. Furthermore, it has been suggested that PMSCs undertaking interrogations were acting with governmental authority as

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<sup>702</sup> ILC Articles (n 679) at Article 5

<sup>703</sup> Ibid

<sup>704</sup> ILC Articles (n 679) at 3.

<sup>705</sup> Ibid at Para 1.

<sup>706</sup> Antenor Hallo de Wolf (n 31)

questioning enemy combatants, particularly with a view to obtaining information linked to national security, is a fundamentally governmental function.<sup>707</sup> As a result, in certain situations it may be possible to attribute PMSC activity to a state through Article 5 however, there must exist a fundamental link between the function of the PMSC and a governmental function. Whilst it is therefore generally accepted that foreign policy is primarily a state function, this alone is not closely enough linked to governmental authority to invoke state responsibility.<sup>708</sup>

## **5.2(2) Article 8**

Outside of Article 5, the ILC Articles also provide a limited set of circumstances through which a state may be responsible by virtue of their control over the circumstances under which the wrongful act occurred. In considering whether it is possible to invoke state responsibility in this many through Article 8, the fundamental question becomes one of attribution. In particular, the ILC Articles state that for a state to gain responsibility, it must be shown that the person or entity is “acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”<sup>709</sup> It is generally considered that this description can be broadly split into two categories.

In relation to PMSCs, the first of these would be when a state explicitly instructs a private contractor to undertake a course of action that the state is aware, would breach an international obligation. Whilst such explicit instructions are likely to be rare, there are examples when this may well have been the case in, for example, DynCorp’s role in the CIA’s extraordinary rendition program.<sup>710</sup> Therefore considering that these instructions would have explicitly contradicted the

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<sup>707</sup> See Jackson Maogoto & Benedict Sheehy, ‘Private Military Companies & International Law: Building New Ladders of Legal Accountability & Responsibility’ (2009) 11 *Cardozo J. Conflict Resol.* 99, 101.

<sup>708</sup> See generally *Case Concerning The Military And Paramilitary Activities In And Against Nicaragua (Nicaragua V. United States Of America)* 1986 I.C.J. 14, [hereinafter *Nicaragua Contras Case*] paras. 75-79.

<sup>709</sup> ILC Articles (n 679) at Article 8.

<sup>710</sup> See *supra* “DynCorp in Extraordinary Rendition” at page 21.

US's obligations under the CAT, it is likely the act could invoke state responsible under the first heading of the ILC Article 8.

In general, however, it is the second heading of Article 8 that is most frequently suggested in relation to PMSCs. Under this, a state can be held responsible for the actions of a private contractor if it can be shown that the person or entity was operating under the control and direction of the State at the time of the violation. Although yet to be considered in relation to PMSCs directly the doctrine was discussed at length by the ICJ in relation to the United States funding of the UCLA in the Nicaragua Contras case.<sup>711</sup> Specifically, in relation to state responsibility, the ICJ considered the degree of control the state was required to exercise over the private entity in order to attract legal responsibility. Despite the central importance that the degree of control required plays in the attribution of state responsibility, the exact extent of control required is difficult to pinpoint. To date two varying degrees of control have been utilised with differing rationales and based upon differing legal sources, with both attracting a variety of judicial and academic backing.

The first test was proposed by the ICJ when considering state responsibility for the US funding of the Contras in Nicaragua. The ICJ held it was necessary to show the Contras were “acting as an organ of the US government,”<sup>712</sup> and therefore, found it necessary that the US must have exercised effective control over the specific illegal actions.<sup>713</sup> Specifically, the court found that for the Contras actions to be attributable to the US, it must be shown that they "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by Nicaragua."<sup>714</sup> The Court found it insufficient that the US funded, trained and equipped the Contras, even though it accepted the Contras could not have operated without the backing of the United States. This test in effect requires a degree of control similar to that found under the first heading of Article 8,

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<sup>711</sup> *Nicaragua Contras Case* (n 120).

<sup>712</sup> *Ibid* at 65.

<sup>713</sup> *Ibid* at 63-67.

<sup>714</sup> *Ibid* at 64, para. 115.



requiring the act to have been under the complete control of the State. This test was most recently reaffirmed as the degree of control required by the ICJ in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnian Genocide).<sup>715</sup> The ICJ concluded that the conduct of a private entity could not be attributed to a state simply on the basis that they were “completely dependent” upon that state. Furthermore, the Court held that the “effective control” was exercised.... in respect of each operation in which the alleged violations occurred.”<sup>716</sup> Therefore under the “effective control” test, for a state to be responsible for the actions of a PMSC, it would have to show that the abuse was directly orchestrated by the state. This was indicated in the *Contras* case, where the Court held that the United States was responsible for the actions of the “Unilaterally Controlled Latin Assets.” This group of agents operating within Nicaragua were found to be under the direct control of the CIA, and therefore operated “according to the “planning and direction” of organs of that state”<sup>717</sup> and capable of creating responsibility. Thus whilst it is clear that the “effective control” test will limit the circumstances in which states can be held responsible, it will not entirely preclude liability. Instead, the decision to attribute responsibility to a state will rely upon the amount of control the state has in “planning and directing”<sup>718</sup> the actions of the PMSC. It is clear for example, that the role of DynCorp in extraordinary rendition would certainly come under the effective control of the state. It is less clear though how this would apply to CACI Int’l and Titan, however, it is possible that their actions at Abu Ghraib could similarly be attributed to the US. Specifically, although the personnel were acting *ultra vires*, the close and intricate connection between the contractors and military personnel in the base suggests a relationship similar to that of planning and directing may well have been present.

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<sup>715</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia & Herzegovina v. Serbia & Montenegro) 26 Feb, 2007, ICJ Reports 2007, 43. [Hereinafter *ICJ Genocide Case*]

<sup>716</sup> *ICJ Genocide Case* (n 127) para. 401.

<sup>717</sup> Antonio Cassese, “The *Nicaragua* and *Tadic* Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia, [2007] 18 EJIL 649, 652.

<sup>718</sup> *Nicaragua Contras Case* (n 120) 64.

Despite, the seemingly settled position of the effective control test, there remains significant academic and judicial criticism of the appropriateness of this test, including by the Vice-President of the ICJ.<sup>719</sup> As a result of this disagreement, when the control requirement was considered in ICL, the ICTY in the case of *Tadic* criticised the effective control test as unduly strict.<sup>720</sup> The Court reasoned that the purpose of state responsibility was to prevent “States from escaping international responsibility by having private individuals carry out the tasks.”<sup>721</sup> Furthermore, the Court in *Tadic* found that differences in organisational structures could necessitate differing control tests. Specifically, it held that within groups with a hierarchical structure such as military or paramilitary organisations, it would be sufficient that a state exercised overall control over the group.<sup>722</sup> The Court emphasised that within such a command structure, “control manifested itself not only in financial, logistical and other... support,”<sup>723</sup> noting for example, that in *Tadic*, soldiers could be transferred between forces, as necessary for the military objectives. As a result, the Court found that even though the forces were not under the direct control of Tadic when the crimes took place, they were under the overall control through the hierarchical structure.<sup>724</sup>

Whilst this position seemingly directly opposes the view of the ICJ, the ICTY provided strong evidence that such an approach was correct; citing repeated international and regional decisions in support of the *overall control* test. Specifically, the Court noted that such a test had been repeatedly invoked in relation to war crimes committed during World War Two,<sup>725</sup> European Union litigation<sup>726</sup> and was even previously adopted by the ICJ in the *Hostages Case*.<sup>727</sup> As a result, despite the recent decision of the ICJ in the *Genocide Case*, *overall control* retains significant international academic and judicial support as the appropriate test. Considering this, it is clear that

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<sup>719</sup> *ICJ Genocide Case* (n 127), *Dissenting Opinion of Vice President Al-Khasawneh*, at 201.

<sup>720</sup> *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, 15 July 1999. [hereinafter *ICTY Tadic*] at para 118.

<sup>721</sup> *Ibid*

<sup>722</sup> *Ibid* at para. 118-121.

<sup>723</sup> *Ibid* at para. 156.

<sup>724</sup> *Ibid* at para. 120-123.

<sup>725</sup> *See generally ICTY Tadic* (n 132) para. 126-127 in which the Court undertakes a thorough and detailed investigation into the legal precedents for the “overall control” test.

<sup>726</sup> *Ibid*.

<sup>727</sup> *Ibid*.

in relation to PMSCs the “overall control” test would prove significantly easier in successfully attributing their actions to the employing state. In particular, a state employing a PMSC would be considered to exercise *overall control* of contractors, in as much as they are responsible for deciding the missions and jobs the contractors undertake. Furthermore, under the *Tadic* test, states would be responsible for the actions of PMSCs, even if outside the normal scope of their employment, providing an effective mechanism for ensuring states remain liable for the conduct of their foreign affairs.

## **5.3 International Criminal Law and Criminal Responsibility.**

### **5.3(1) Background of International Criminal Law**

Before considering the potential use of international criminal law to PMSCs, it is necessary to understand the definitional difficulties the increase in private actors presents for international criminal law. International humanitarian law (IHL) was developed over centuries following the Peace of Westphalia to limit the excesses of warfare that had been witnessed particularly following the reformation. As a result, modern international criminal law is designed to punish the gravest breaches of IHL primarily under the assumption that these would be directly attributable to either a state or an organised opposition force, both of which would be personally motivated and involved. The proliferation of PMSCs often undermines these presumptions, with significant consequences for the international legal accountability, international humanitarian law and human rights. Primary among these effects of this, it is the increasingly opaque position of Contractors if captured. ICL distinguishes between the obligations held by, and towards lawful combatants and those held by other parties to the conflict including civilians. Despite persistent attempts to clarify the legal position of PMSCs under IHL there remains significant ambiguity. More importantly for this study, IHL developed to punish serious violations of international law under the presumption that these would usually be attributable to public militaries, or other public security forces, from the state in question. In relation to PMSCs however, there is often no direct or personal link between the actual physical perpetrators (APP) and those responsible for the overarching situations under which the violations took place.

Considering these changes within the legal and political landscape it is necessary to consider the practical application of ICL to PMSCs. It is first important to note that regardless of the differences between PMSCs and state forces, it is well established under ICL that any individual,

regardless of position or motivation<sup>728</sup> is individually liable for grave violations of human rights.<sup>729</sup> Consequently, whether an individual is a member of state military apparatus or PMSC they can be held liable under ICL for crimes they physically perpetrate. This study, however, suggests that the reliance upon individual liability alone is contrary to the intention and purpose of ICL. While disparities between states in regard to prosecutions at the international level plague ICL generally, they may be further exaggerated when applied to PMSCs, who need not be tied to a specific nation. Considering this, as scholars have suggested that the actions of Blackwater, CACI and Titan contractors in Iraq could amount to war crimes,<sup>730</sup> the practical application would be highly selective. British and South African contractors of these PMSCs who were individually implicated<sup>731</sup> could theoretically be brought before the ICC however, as the US is not a signatory of the Rome Statute, their American colleagues could not even in the case of identical conduct.<sup>732</sup>

Potentially more disturbing is the possible secondary effects of relying solely on individual responsibility. The prosecution of individual PMSC contractors could lead to the more professional and regulated contractors refusing to engage in potentially dangerous situations. However, if ICL failed to affect those employing or funding them, their use would be unlikely to decrease and instead, knowing they were invulnerable firms may choose to contract with less scrupulous actors, increasing the possibility of unlawful actions taking place. Such difficulties are already visible in the use of PMSCs by private actors where, in particularly dangerous areas, PMSCs have subcontracted protection to local militias often to the extreme detriment of human rights protections. This is exemplified by the situation in the Niger Delta when BP employed the PMSC,

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<sup>728</sup> See *Prosecutor v. Erdemovic*, IT-96-22-A, International Criminal Tribunal for Yugoslavia, holding that orders, even upon threat of death was insufficient to dispose of individual liability.

<sup>729</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, Article 25(2).

<sup>730</sup> See Antenor H. de Wolf, 'Modern Condottieri in Iraq: Privatizing War From the Perspective of International and Human Rights Law', (2006)13 *Indiana Journal of Global Legal Studies* 315, 327).

<sup>731</sup> Blackwater employees present at the Nisour Square massacre were of both American and South African nationality, see also Scahill (n 20) at 264.

<sup>732</sup> Chia Lehnardt, 'Individual Liability of Private Military Personnel Under International Criminal Law' (2008) 19 *European Journal of International Law* 1025, 1032.

G4S to protect oil insulations.<sup>733</sup> Due to security concerns, however, G4S subcontracted out their operations through their wholly owned Nigerian subsidiary Outsourcing Ltd., who employed a local militia to fulfil the contract. As a direct result of this, however, these security services have been implicated in significant human rights abuses.<sup>734</sup> Similar difficulties were encountered when multinational agro-business Syngenta hired the PMSC, NF Security to protect farmland in Brazil, resulting in several murders and the illegal evictions of entire tribes.<sup>735</sup>

Fundamentally, it is clear that individual responsibility alone runs contrary to the primary intentions of ICL which international tribunals have repeatedly stressed is that those “most responsible” are of primary concern.<sup>736</sup> Almost universally, this has been interpreted as meaning those responsible for the planning and ordering rather than merely the physical perpetrators.<sup>737</sup> The reliance upon individual liability would run counter to this intention, allowing states or companies to act with impunity by employing PMSCs to undertake activities they cannot be liable for. It is unfortunate in the context of those most responsible for PMSCs, that ICL does not as yet recognise legal persons and as such, corporations cannot be found criminally liable. During the drafting of the Rome Statute, this was a contentious issue, with corporate criminal responsibility increasingly common within states.<sup>738</sup> Furthermore, it is notable that during the investigation of crimes committed in the Democratic Republic of Congo, the prosecutor explicitly investigated the role of corporations.<sup>739</sup> While this unfortunately limits the scope of ICL in establishing accountability for

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<sup>733</sup> *Supra* at Section 4.3(2)(d)

<sup>734</sup> UN, *Small Arms Survey: Protected but Exposed, Multinationals and Private Security* (2011) available at <<http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2011/en/Small-Arms-Survey-2011-Chapter-05-EN.pdf>> accessed 28 May, 2013.

<sup>735</sup> *Small Arms Survey 2011* (States of Security, Cambridge University Press, 2011) 150

<sup>736</sup> *See e.g.* Security Council Resolution 1503 (2003) specifying the ICTY should “concentrate[ing] on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes.”

<sup>737</sup> *See generally* Linsey Raub, ‘Positioning Hybrid Tribunals Within International Criminal Justice’ (2005) 41 *Journal of International Law and Politics* 1013.

<sup>738</sup> *See* Andrew Clapham, ‘The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court’, in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (2000) 139-195.

<sup>739</sup> Communication Received by the Office of the Prosecutor of the ICC, July 16, 2013 available at [https://www.icc-cpi.int/NR/rdonlyres/B080A3DD-7C69-4BC9-AE25-0D2C271A9A63/277502/16\\_july\\_\\_english.pdf](https://www.icc-cpi.int/NR/rdonlyres/B080A3DD-7C69-4BC9-AE25-0D2C271A9A63/277502/16_july__english.pdf)

PMSCs employed by corporations, their remains the possibility of charging individual directors or executives if criminal liability can be established.

In light of this, ICL has developed theories under which those bearing ultimate responsibility can be held accountable; this section will examine the extent to which these can be utilised in the case of PMSCs.

### **5.3(2) Perpetration by Means**

The most direct manner in which an agent may be held accountable for the actions of a PMSC is through the doctrine of perpetration by means<sup>740</sup> as codified in the Rome Statute through Article 25(3)(a). Under this approach an individual can be held accountable for acts committed “through another person.”<sup>741</sup> Whilst clear in scope, this approach has in practice been ineffectual in establish liability with the required level of control over the unlawful action extremely high, acting as a barrier to prosecution. Specifically, under this approach, the act must have been the result of an explicit instruction to the APP, who must act upon this, required to be acting directly under the agent responsible.<sup>742</sup> This situation is unlikely to occur in the case of PMSCs where traditional hierarchies are uncommon. The problems with this approach are evident in considering the Abu Ghraib torture scandal where CACI Int’l and Titan were employed to conduct interrogations on behalf of the US Government.<sup>743</sup> Under US Army Regulation 715-9 however, the perpetrators were explicitly not under the supervision of the Department of Defense but underemployed within a parallel contractor structure. Furthermore, as their role did not explicitly Call upon them to engage

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<sup>740</sup> See Keving Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011).

<sup>741</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, Article 25(3)(a).

<sup>742</sup> *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, 2 Sept. 1998, para. 483.

<sup>743</sup> Benedict Sheehy & Jackson Maogoto, ‘Private Military Companies & International Law: Building New Ladders of Legal Accountability & Responsibility’ (2009) 11 *Cardozo J Conflict Resolution* 99, 110-1.

in acts of torture,<sup>744</sup> perpetration by means would be incapable of holding anyone in the US Government or military.

### **5.3(3) Command Responsibility**

Among the alternative approaches to establishing liability, command responsibility is the most accepted, drawing upon the traditional military doctrine that individuals in positions of command are expected to take responsibility for their subordinates. This belief is a fundamental component of international law going as far back at least as Grotius, who espoused the doctrine in his seminal work *On The Laws of War and Peace*,<sup>745</sup> though many consider the doctrine to predate even that.<sup>746</sup> Within modern ICL, command responsibility (CR) was first applied in the military tribunals of several Axis leaders following WWII. Most significantly, CR was relied upon by prosecutors in the trial of General Yamashita, stemming from his “failure to discharge his duty as commander.”<sup>747</sup> Like perpetration by means, CR is now statutorily incorporated into the Rome Statute of the International Criminal Court (ICC) under Article 28.<sup>748</sup> In relation to PMSCs this approach is now more advantageous following the expansion of the class of potential commanders, in the International Criminal Tribunal for Yugoslavia (ICTY) in *Celibici*,<sup>749</sup> to include those acting in civilian positions.<sup>750</sup> Despite this, however, the complexity and indirectness of the command structures often utilised in the employment of PMSCs creates unique difficulties for courts. When PMSCs are used by States, the contracts are often awarded by multiple agencies for the same task making deciphering the command difficult. Similarly, when PMSCs are employed by private companies, it is often through a network of subsidiaries which would complicate the process of

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<sup>744</sup> Ibid at 111.

<sup>745</sup> Hugo Grotius, *De Jure Belli Ac Pacis* (Originally published 1625) 523.

<sup>746</sup> The doctrine is generally attributed to Sun Tzu’s, *The Art of War* published in the 6<sup>th</sup> Century B.C.

<sup>747</sup> Major Williams H. Parks, ‘Command Responsibility for War Crimes’ (1973) 62 *Military Law Review* 1, 10.

<sup>748</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, Article 28 “A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control”

<sup>749</sup> *Prosecutor v Mucic et. al.*, Case No. IT-96-21, Judgement (Feb. 10, 2001).

<sup>750</sup> Ibid, at 55.



establishing direct command. Despite these difficulties it is worth considering how CR may be practically applicable to PMSCS, with two requirements necessary to engage CR, namely knowledge and control.<sup>751</sup>

When considering the level of knowledge required of an individual within a position of command under international criminal law the most recent interpretation was provided by the ICC in the trial of *Bemba Gombo*<sup>752</sup> where the ICC proposed that the doctrine requires that the superior either knew, or should have known, about the illegal conduct.<sup>753</sup> In a significant development the ICC further states that actual knowledge can be inferred, particularly through an “established reporting and monitoring systems”<sup>754</sup> Citing the decision of the ICTY in *Blaskic*, the ICC held that a failure to attempt to “secure knowledge of the conduct” would suffice.<sup>755</sup> However, it is unclear how these requirements would be applied to PMSCs who often operate with less linear command structures. In particular, when employed by states, private contractors tend to operate parallel to, rather than under, the military command structure and therefore it is unclear whether commanders could be expected to actively oversee the conduct of all contractors. Within commercial settings, the use of PMSCs is often a removed from the central function of the company. The use of local militia by Shell in the Niger delta illustrates the difficulties with this approach as it remains unclear whether Shell have a duty to oversee these private actors in particular in relation to a positive duty to secure knowledge, and more significantly at what level of leadership this duty would displace. As a result of these difficulties, this approach has been heavily criticised in several international tribunals with it particularly contested that positive obligations, whilst suitable for military commanders were overreaching in relation to civilian leaders.<sup>756</sup> When this approach was adopted

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<sup>751</sup> Rome Statute of the International Criminal Court (n 155) Article 28(a) and 28(a)(i).

<sup>752</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08

<sup>753</sup> *Ibid* at para. 341; citing ICTY, *Prosecutor v Hadzihasanovic et al*, Case No. IT-01-47-T, "Judgment", 15 March 2006, para. 94.

<sup>754</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-424, at 152

<sup>755</sup> *Ibid* at 153.

<sup>756</sup> *Ibid*.

by the ICTY the words “should have known” were removed from the final Statute.<sup>757</sup> Similarly, the International Criminal Tribunal for Rwanda (ICTR) held that within civilian positions negligence alone was insufficient, requiring negligence “so serious as to be tantamount to acquiescence or even malicious intent.”<sup>758</sup> This question is particularly relevant where varying different departments or organisations act within a group. may be liable for the contractors. Unlike traditional military structures, which are designed with rigid hierarchical structures in place making ignorance to the knowledge difficult. In comparison, the level of information provided by PMSCs is likely to be in line with guidance required by the employing company, who could, therefore, avoid liability by establishing limited reporting procedures, effectively relying upon a “no questions” policy.

Beyond the degree of knowledge, CR requires that the superior be capable of exercising control over the APP of the crimes, with this condition encountering similar difficulties to when attributing state responsibility. To date, the exact degree of control required is unclear and courts have interpreted this as both *overall control* and *effective control*. When this requirement was considered under ICL in the ICTY case of *Tadic* (although not actually a CR case) the *effective control* test as heavily criticised as unduly strict for military organisations.<sup>759</sup> Instead, it has been suggested that where groups operate a clear hierarchical structure such as military or paramilitary organisations, it is likely that the *overall control* test will be applicable. It remains unclear how this form of hierarchy would be interpreted beyond explicitly military organisations. The level of knowledge of a superior in a private company is likely significantly less, or at least different in nature, than in a comparable military company. Furthermore, the appeal judgement stated that attributing state responsibility required “disregard[ing] legal formalities” in favour of formulating

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<sup>757</sup> U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Records of the 1st Meeting of the Committee of the Whole, U.N. Doc. A/CONF.183/C.1/SR.1 (20 Nov. 1998) (“Rome Conference Summary Records”), ¶ 67.

<sup>758</sup> *Prosecutor v. Akayesu*, (Judgement), ICTR Trial Chamber, Case No. ICTR-96-4-T, para. 489.

<sup>759</sup> *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, 15 July 1999, para. 118.

a “realistic concept of accountability”<sup>760</sup> an approach that the appeal court controversially concluded should similarly apply to criminal liability.<sup>761</sup>

This statement has been considered problematic, diminishing the concept of culpability to a mere “legal formality.” Considering the range of punishments that can attach to these crimes, many human rights advocates would decry such a rationale. Furthermore, in both *Blaskic*<sup>762</sup> and *Bagilishema*,<sup>763</sup> the counsel for the defendants raised the *Tadic* statement arguing that it undermined the fundamental nature of criminal justice<sup>764</sup> and preventing the right to a fair trial, with both courts eventually distancing themselves from this approach, cautious that it may be used as an excuse to undermine the legitimacy of ICL.

Regardless of the tests applied, however, there remain questions about the application of CR to PMSC activity. Unlike public organisations the relationship between the employer and PMSCs is a voluntary association, and as a result, control alone may not be an appropriate test leading to anomalous results. Under this approach, a state agent or company executive with full prior knowledge of serious criminal activity but without direct control over the perpetrators is considered less culpable than one who by their own negligence is unaware but would otherwise be in full control. While this approach can be justified within strictly hierarchical organisations, it is questionable whether this justification extends to situations in which the association is economically motivated. These issues are further compounded by CRs failure to differentiate levels of culpability instead charging all defendants as principals. There remain arguments over the extent to which holding a civilian leader, or company director equally as culpable as the APP can be justified on the basis of their negligence. Clearly, applying such a strict doctrine to increasingly flexible

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<sup>760</sup> Ibid at para 121.

<sup>761</sup> Ibid.

<sup>762</sup> *Prosecutor v Tihomir Blaskic, (Appeal Judgement)*, IT-95-14-A, International Criminal Tribunal for the former Yugoslavia.

<sup>763</sup> *The Prosecutor v. Ignace Bagilishema (Appeal Judgement: Reasons)*, ICTR-95-1A-A, International Criminal Tribunal for Rwanda.

<sup>764</sup> See *Blaskic* (n 170) at para. 257-58; *Bagilishema* (n 171) at para 35.

scenarios related to PMSCs is always likely to encounter difficulties, and attempting to circumvent these has the potential to disregard fundamental aspects of criminal.

### **5.3(4) Joint-Criminal Enterprise**

In light of the problems faced in applying perpetration by means and command responsibility, ICL has sought to rectify these through the development of joint-criminal enterprise (JCE). This abstract concept was accepted within the ICTY, despite the lack of a statutory foundation. Instead, following the high-profile acquittal in *Tadic* the tribunal felt it necessary to supplement the modes of liability already encompassed in the Statutes. As such, it took inspiration from prosecutions in for the *Nuremberg* tribunals on the basis of a previous “common plan,” and inferred this to be an established principle of customary international law.<sup>765</sup> The ICTY identified three distinct paths under which a person may be liable for a joint criminal enterprise,<sup>766</sup> however, for the purpose of establishing accountability for the actions of PMSCs, it is Extended JCE (commonly referred to as JCE-III) that is of particular concern<sup>767</sup>

Under extended JCE, an individual may be liable for a crime committed by another member of the original criminal enterprise even if their eventual actions were beyond the common plan, on the condition that it was a natural and foreseeable act.<sup>768</sup> The ICTY clarified this requirement, finding that so long as the defendant had been reckless in engaging with the common plan and had reconciled themselves with the action, they would be equally liable.<sup>769</sup> Furthermore, the court suggested that when the *mens rea* requirement is fulfilled, criminal liability can be established even

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<sup>765</sup> *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, 15 July 1999, para. 187-88.

<sup>766</sup> Stephen Ranieri, ‘Extended Joint Criminal Enterprise in International Criminal Law’ (2016) 80(6) *The Journal of Criminal Law* 436; Christopher Cowley, ‘To What Degree is the Concept of Extended Joint Criminal Enterprise Coherent? A Discussion with Regard to the International Criminal Tribunal of the Former Yugoslavia’ (2015) 79(4) *The Journal of Criminal Law* 270.

<sup>767</sup> *Tadic* (n 173) para. 204.

<sup>768</sup> *Ibid.*

<sup>769</sup> *Ibid.*

if the *actus reus* is physically perpetrated by non-members, so long as it was ordered by a member of the JCE.<sup>770</sup> Under this mode of accountability however, the other members of the JCE can be charged only for the act of ordering rather than the eventual crime/<sup>771</sup> In relation to PMSCs, therefore, this doctrine offers the benefit, in comparison with CR, of requiring a lower degree of control, allowing the employer of a PMSC to be held accountable for their contractors even when there is not the degree of effective control, or the contractor was operating *ultra vires*. Due to this scope, JCE-III is frequently cited as a potential mode of liability more suited to PMSCs.

However, while this approach is attractive from a prosecutorial point of view, there remains opposition to its application within ICL that must be considered. Primary amongst these is that such expansive liability has been condemned for removing individual culpability as the basis for criminal liability.<sup>772</sup> These criticisms increased substantially following the perceived use of overly expansive indictments by the ICTR. Several of these indictments contained the criminal enterprise of “conspiring to eradicate the Tutsi people” which the court held could amount to a “nationwide government organised system”<sup>773</sup> Despite the uniqueness of many international crimes, culpability remains an essential component of criminal liability. This formed the basis of several objections in ICTY appeals chambers.<sup>774</sup> More recently the Extraordinary Chambers in the Courts of Cambodia have explicitly rejected the availability of JCE-III, stating that at the times of the crimes of the Khmer Rouge it did not form part of customary international law.<sup>775</sup> Considering this opposition the legitimacy of JCE-III is currently questionable and its continued use of JCE-III could potentially aid states in refusing to co-operate with future prosecutions.<sup>776</sup>

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<sup>770</sup> *Prosecutor v. Radoslav Brdjanin (Appeal Judgement)*, IT-99-36-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2007, paras 95-97.

<sup>771</sup> *Prosecutor v. Radoslav Brdjanin (Separate Opinion of Judge Meron appended to the Appeal Judgement)*, IT-99-36-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 April 2007, Paras 5-6.

<sup>772</sup> See e.g. Ranieri (n 766).

<sup>773</sup> *Prosecutor v. Rwamakuba*, (Appeal Decision) ICTR-94-44C-A, International Criminal Tribunal for Rwanda, para 25.

<sup>774</sup> *Prosecutor v. Krajisnik*, (Appeals Judgement) IT-00-39-T, International Criminal Tribunal for Yugoslavia, Ground C, Para 153.

<sup>775</sup> *Prosecutor v. Nuon Chea and Kheiu Sampham*, Case 002/02 Extraordinary Chambers in the Courts of Cambodia, Supreme Court Chamber

<sup>776</sup> Michael G Karnavas, ‘Joint Criminal Enterprise at the ECCC: A Critical Analysis of the Pre-Trial Chamber’s Decision Against the Application of JCE III and two Divergent Commentaries on the Same’ (2010) 21(3) Criminal Law Forum 445.

Despite this reduced mental element required for JCE III, it is possible that the evidentiary burden on PMSCs could still be restrictively high. Specifically, in many cases, the employer could argue that the original plan that they agreed to was legal under international law and it is thereafter upon the prosecution to prove otherwise. As a result, the ICTY Appeal Chamber in *Gotovina & Markac*,<sup>777</sup> held that even the forcible expulsion of ethnic Serbs would only amount to a JCE if the “conduct could only... be explained as JCE-Activity” and not as legitimate warfare tactics.<sup>778</sup> In this, the Croatian government successfully argued that de-arming and removing potential combatants from the theatre of war could be considered a legitimate warfare tactic<sup>779</sup> suggesting a restrictively high evidentiary burden.

Applying these requirements to the case studies demonstrates that many of these circumstances would fail to meet the burden of an illegal plan. While it is clear that many of the militias and warlords contracted as security by the US in Afghanistan engaged in activities that breach IHL, the US could legitimately claim that their original plan, to provide logistical security, was not a criminal enterprise. Ultimately, the applicability of JCE to PMSCs suffers from two seemingly axiomatic problems issues. On the one hand it is too strict in considering whether the original plan or association is a criminal enterprise, with many cases potentially falling at this hurdle. Conversely, however, this mode of liability can be too liberal in disconnecting individual culpability from liability. Considering this JCE has suffered continual academic and legal backlash, falling out of favour with many international criminal tribunals.

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<sup>777</sup> *Prosecutor v. Gotovina & Markac*, IT-06-90-A, International Criminal Tribunal for Yugoslavia.

<sup>778</sup> *Ibid* at para. 107.

<sup>779</sup> *Ibid* at para 108-110.

### 5.3(5) Control Theory of Co-Perpetration

Considering the criticism of JCE-III, while the Rome Statute explicitly refers to liability through “contributing to a common plan”<sup>780</sup> the ICC has been reluctant to expand upon this approach. The *Lubanga*<sup>781</sup> pre-trial chamber therefore determined that Article 25(3)(a), whilst closely akin to JCE, is a “residual form of accessory liability.”<sup>782</sup> Drawing upon a theory of co-perpetration developed by German jurist Claus Roxin, the ICC charged Lubanga under the doctrine of control theory of co-perpetration.<sup>783</sup> This approach prioritises control as the key aspect in ascribing liability between principals and accessories to a crime. In relation to PMSCs, applying overall control as the active component allows courts to allocate principle liability between the PMSC and their employer depending upon the individual facts of each case. Considering this, if the contractor were employed to conduct illegal activities the employer would be principle actor whereas if, the contractor acted *ultra vires* in conducting the illegal act they would be the principal actor.<sup>784</sup>

In adopting this approach however, the ICC departed significantly from Roxin’s original conception. According to the traditional theory the *mens rea* of co-perpetration required awareness of a common plan and an intent to commit the crime in question.<sup>785</sup> In contrast, the ICC held that *dolus eventualis* was sufficient to establish accessorial liability, transforming the necessary *mens rea* from intent to advertent recklessness.<sup>786</sup> Under this approach, in situations in which there is a common plan, the *mens rea* requirement will be fulfilled so long as the defendant was aware of the possibility of the crime and had reconciled themselves with this risk.<sup>787</sup> This approach may provide

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<sup>780</sup> UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, Article 25(3)(d).

<sup>781</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06

<sup>782</sup> *Prosecutor v. Thomas Lubanga Dyilo*, (Pre-Trial Chamber I) ICC-01/04-01/06, para. 337.

<sup>783</sup> Claus Roxin, *Taterschaft and Tatherrschaft* (6<sup>th</sup> Edition, 1994) 34; See also Maria Granik, ‘Indirect Perpetration Theory: A Defence’ (2015) 28(4) *Leiden Journal of International Law* 977; Neha Jain, ‘The Control Theory of Perpetration in International Criminal Law’ (2011) 12(1) *Chicago Journal of International Law* 159.

<sup>784</sup> Granik, *Ibid*; Jain, *Ibid*.

<sup>785</sup> *Ibid*.

<sup>786</sup> Antonin Cassesse, *International Criminal Law 200-201* (OUP 3rd Ed. 2013)

<sup>787</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06, para. 352.

advantages to establishing liability for PMSCs as in contrast to JCE-III, their original agreement need not be expressly criminal.<sup>788</sup> Returning to the case of US employment of Afghan warlords, there is little doubt that US officials were aware of the possibility of criminal actions and had reconciled themselves with this risk. Significantly, however, this *mens rea* would only invoke accessorial liability which it is suggested would more accurately reflect the party's culpability. For example, therefore, when examining the case of the JTF in Nigeria, considering the previous allegations of serious breaches of ICL by the JTF, it is likely that the relevant Shell executives would be considered to have been reckless, and would consequently be criminally liable. Furthermore, as CTCP distinguishes between primary and accessory liability, it would be possible to charge senior JTF agents as primary, while holding reckless corporate executives liable as accessories, more accurately reflecting their moral culpability. In the infamous Abu Ghraib torture case, the employment of untrained interrogators, along with the authorisation of "enhanced interrogation" techniques would almost certainly fulfil the advertent recklessness in relation to the furthermore blatant abuses at the jail.

Beyond the *mens rea* requirements, modern CTCP can now be distinguished from Roxin's original conception by the establishment of individual liability for indirect co-perpetration (IDCP).<sup>789</sup> It has been suggested that this expansion fundamentally alters the nature of CTCP, effectively removing the control aspect.<sup>790</sup> Despite criticism, this approach to IDCP has resulted in the conviction of high-level civilian and military commanders on the basis of the actions of individuals under the control of their co-perpetrators. This has been particularly successful in situations where multiple agencies or groups have been responsible for individual tasks, all of which

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<sup>788</sup> Thomas Weigend, 'Intent, Mistake of Law and Co-Perpetration in the Lubanga Decision on Confirmation of Charges' (2008) 6 *Journal of International Criminal Justice* 471, 482.

<sup>789</sup> See Jens Ohlin, 'Second Order Linking Principles: Combining Vertical and Horizontal Modes of Liability' (2012) Cornell Law Faculty Publications, Paper 577 available <<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2006&context=facpub>> at 8; Christopher Cowley, 'To What Degree is the Concept of Extended Joint Criminal Enterprise Coherent? A Discussion with Regard to the International Criminal Tribunal of the Former Yugoslavia' (2015) 79(4) *Journal of Criminal Law* 270.

<sup>790</sup> *Ibid* at 9.



are necessary for the completion of the eventual crime, although only one actually commits the offence. Although never brought to trial due to death, such liability was alleged against Patasse in co-perpetrating with *Bemba-Gombo*.<sup>791</sup> Although Patasse's forces were never alleged to have committed the crimes, their presence and failure to act allowed the MLC to commit crimes against humanity and war crimes.<sup>792</sup> This approach presents several advantages in holding PMSC employers liable for the actions of their contractors where they were under a positive duty to protect. This is particularly relevant to the employment of PMSCs by states, however where a corporation utilises a PMSCS the host state retains a duty to ensure they act in accordance with IHL and IHR.

Finally, in considering the application of Roxin's CTCP it is necessary to consider the form of conduct required by the PMSC in order to engage liability. To date the ICC has approached this by requiring that the defendant's conduct was "essential" to the commission of the crime.<sup>793</sup> This has been decided through a process of hypothetical reasoning, asking whether the crime would have occurred without the co-perpetrators action.<sup>794</sup> This approach was adopted by the ICJ in the *Nicaragua Contras* case where it was established that without US funding the Contras could not have undertaken their activities.<sup>795</sup> In light of the widespread knowledge of the criminal acts and human rights abuses being undertaken by the Contras,<sup>796</sup> the US would almost certainly have to be considered to have reconciled itself with the action. If this case had been brought in ICL, US agents could, therefore, have been held accountable as accessory co-perpetrators with the Contras acting as principals. It is possible that similar principles could be applied to the use of Peruvian police and armed forces by Newmont Mining in Peru. The allegations of torture and extra-judicial executions

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<sup>791</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08. Para 128 "Jean-Pierre Bemba committed with another, Angel Felix Patasse, crimes against humanity...."

<sup>792</sup> *See* Ibid at paras. 112-123 detailing the evidence of an organisational structure under which the MLC troops committed the specific attacks.

<sup>793</sup> *Prosecutor v. Lubanga*, ICC-01/04-01/06, Para. 343.

<sup>794</sup> *See* Ibid (Separate Opinion of Judge Fulford) Para. 17, available at <http://www.icc-cpi.int/iccdocs/doc/doc1379838-A.pdf>

<sup>795</sup> *Case Concerning The Military And Paramilitary Activities In And Against Nicaragua (Nicaragua V. United States Of America)* 1986 I.C.J. 14 at paras. 120-124.

<sup>796</sup> *See* Christopher Dickey, *With the Contras* (Simon & Schuster, 1985) detailing the widespread CIA knowledge of the Contras human rights abuses; *See also* Robert Goldman, 'International Humanitarian Law: America's Experience in Monitoring Armed Conflict' (1993) 9 *American University of International Law Review* 49, 88-92.

of *Campesinos* were widespread, and Newmont must have reconciled itself with these acts. As the police and armed forces would not have been in the area but for their contract with the mineral companies, these crimes would not have taken place.

## 5.4 International Regulatory Frameworks: The Montreux Document

### 5.4(1) Background to the Montreux Document

Among the most comprehensive international attempts to regulate the PMSC market was the adoption of the Montreux Document, On The Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict.<sup>797</sup> This was written and prepared by the International Committee for the Red Cross and the Government of Sweden, with the input of 17 other nations. Included within these were the UK and USA, as the largest employers of PMSCs, alongside nations with a history tied to the PMSC industry including Angola, Sierra Leone, Iraq and Afghanistan.<sup>798</sup> Since the Documents publication, a total of 53 states have joined as signatories while the European Union, NATO and the Organisation for Security and Cooperation in Europe have also joined as participants. As a result, the Montreux document has been described as “the most legally significant” document in relation to PMSCs.<sup>799</sup> Despite this, however, it is important to understand several critical caveats to the effectiveness of the document in regulating the role and activities of PMSCs. The first thing to

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<sup>797</sup> The ICoC (n 674).

<sup>798</sup> The full list of participatory countries is; Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Russia, Sierra Leone, South Africa, Sweden, Switzerland, Ukraine, the UK and the USA, although Russia withdrew the day before the proceedings concluded.

<sup>799</sup> Ian Ralby, The Montreux Document: The Legal Significance of a Non-Legal Instrument in Gary Schaub Jr. & Ryan Kilty (eds) *Private Military and Security Contractors: Controlling the Corporate Warrior* (Rowman & Littlefield, 2016)

note is that the Montreux document is that it is not in itself a legally binding document. The preface of the Document is explicit in stating that:

“this document should therefore not be interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law”<sup>800</sup>

Instead, therefore, it seeks to present a “compilation”<sup>801</sup> of the existing international obligations and an overview of suggested good practice for states to implement. The Document places the onus on states to enact the necessary legal instruments required to fulfil their obligations under the Document. As a result, “each State is responsible for complying with the obligations it has undertaken pursuant to international agreements to which it is party.”<sup>802</sup> This is composed of both pre-existing legally binding instruments and a series of voluntary proposals for states to adopt. The Montreux Document therefore does not seek to directly regulate PMSCs or establish a model regulatory framework for PMSCs, but is instead an attempt to clarify state’s responsibilities in respect to the use and presence of PMSCs and fulfil their obligations under international law.

Considering these significant caveats, the starting point for analysing the applicability and effectiveness of the Montreux document in regulating the actions of PMSCs is understanding that the Document relates only to the use of PMSCs during times of armed conflict. The regulations within the document, therefore, are designed to apply only in situations legally classed as armed conflicts. Before considering the content of the Document, it is necessary to establish the circumstances in which they would be applicable. The position of Armed Conflict within International Law was most recently discussed by the 2008 International Committee of the Red Cross’ Opinion Paper “How is the Term “Armed Conflict” Defined in International Humanitarian

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<sup>800</sup> Montreux Document (n 673) at Preface, Page 9

<sup>801</sup> Montreux Document (n 673).

<sup>802</sup> Ibid at Preface

Law.”<sup>803</sup> The Geneva Conventions identify two distinct types of Armed Conflict; International Armed Conflict, and Non-International Armed Conflict and the Montreux Document would therefore only apply to the use of PMSCs in one of these two situations. Armed conflict is defined within Common Article 2 of the Geneva Conventions as situations;

“of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.<sup>804</sup>

This has been clarified in preceding jurisprudence. Most notably the International Tribunal for the Former Yugoslavia where the Court held in the *Tadic* case that "an [international] armed conflict exists whenever there is a resort to armed force between States." It is essential to clarify that this requirement relies upon the use of “armed force” as a general rather than the use of a States armed forces specifically, as the former of these would prevent the inclusion of PMSCs entirely. Instead, the ICRC Opinion Paper refers to the works of both David Schindler<sup>805</sup> and H.P. Gasser<sup>806</sup> to clarify that “any kind of use of arms between two States”<sup>807</sup> creates an international armed conflict. Furthermore, “[i]t makes no difference how long the conflict lasts, or how much slaughter takes place.”<sup>808</sup> It appears clear therefore that if a State were to contract a PMSC to use any armed force against another state, this would be sufficient to engage Article 2 of the Geneva Conventions, and the Montreux document would, therefore, be applicable to this situation. Compared to International

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<sup>803</sup> International Committee of the Red Cross (ICRC) Opinion Paper on Armed Conflict, March 2008, <<https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 13 August 2014. , The legal basis of this paper is drawn from the ICRC’s position as having been entrusted to "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof" Ibid.

<sup>804</sup> Common Article 2 to the Geneva Conventions of 1949

<sup>805</sup> D. Schindler, ‘The different Types of Armed Conflicts According to the Geneva Conventions and Protocols’ RCADI, Vol. 163, 1979-II

<sup>806</sup> H.P. Gasser, International Humanitarian Law: an Introduction, in: Humanity for All: the International Red Cross and Red Crescent Movement, H. Haug (ed.), Paul Haupt Publishers, Berne, 1993

<sup>807</sup> D. Schindler, The different Types of Armed Conflicts According to the Geneva Conventions and Protocols, RCADI, Vol. 163, 1979-II, p. 131.

<sup>808</sup> Natasha Balendra, Defining Armed Conflict, (2008) 29(6) Cardozo Law Review 2464, 2469 (Quoting 1 Jean S. Pictet, *Commentary on Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armed Conflict* (1952) 31).

Armed Conflict however, the position of Non-International Armed Conflict is more opaque applying a much stricter interpretation of Additional Protocol II to the Geneva Conventions. This requires the conflict to occur between the “High Contracting Party... armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”<sup>809</sup> These situations must be distinguished from “internal disturbances and tensions [or] isolated and sporadic acts of violence.”<sup>810</sup> It is this distinction that is key in establishing whether a situation would reach the threshold of an internal armed conflict as required for the Montreux document to engage.

The ICRC Opinion Paper suggests this distinction be drawn on the bases that the “hostilities must reach a minimum level of intensity” and that the non-governmental group involved possess a “certain command structure and have the capability to sustain military operations”<sup>811</sup> Crucially, this suggests that a situation will only reach the status of a Non-International Armed Conflict when the hostilities are so significant that the government is required to use “military force against the insurgents, instead of mere police forces”<sup>812</sup> In relation to PMSCs, the requirement that the government exercise military rather than police force could prove a significant obstacle in engaging the Montreux Document. This is particularly evident when considering the case studies relating to the use of PMSCs by governments to supplement national police or militaries. When the International Criminal Court was asked to consider the possibility of war crimes and crimes against humanity in the Niger Delta,<sup>813</sup> the Office for the Prosecutor concluded that “[a]vailable

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<sup>809</sup> Additional Protocol II, art. 1, para. 1 to the Geneva Conventions of 1949

<sup>810</sup> Additional Protocols, *supra* note 3, art. 1(2) (“This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”).

<sup>811</sup> See Opinion Paper (n 803) (quoting D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, RCADI, Vol. 163, 1979-II, p. 147.)

<sup>812</sup> *Ibid.*

<sup>813</sup> See generally, *Situation in Nigeria* (Article 5 Report, International Criminal Court, 2003) <<https://www.icc-cpi.int/iccdocs/pids/docs/sas%20-%20nga%20-%20public%20version%20article%205%20report%20-%2005%20august%202013.pdf>> accessed 14 May 2015.

information on the violence... is insufficient to conclude that an armed conflict of non-international character took place”<sup>814</sup> as although the non-governmental groups possessed a degree of organisation and capabilities for military violence, there was no evidence that the conflict was of a sufficiently sustained and intense level to meet the requirement of “protracted armed violence.”<sup>815</sup> Considering the factual circumstances, it is even more unlikely that the situation in Peru would reach this threshold, where the level of organisation within the groups and the military capabilities are both substantially more limited. There are, however, clearly circumstances in which PMSCs have been used in circumstances that have amounted to both International and Non-International Armed Conflict. Most notably, the increased Coalition reliance on PMSCs during the Iraq War, and the continued use of PMSCs by regional authorities acting on behalf of the Afghan Government to combat the Taliban insurgency.<sup>816</sup> It is likely therefore that the Montreux Document would likely be applicable to the actions of PMSCs in a limited number of cases, in which the level of violence is sufficient to create an Armed Conflict. Despite these limitations, it is important to consider how the provisions of the document and examine how their effects on the use and employment of PMSCs.

## **5.4(2) The Montreux Document**

The Document starts by establishing a distinction between the types of states involved in the PMSC activities. The Document distinguishes proceeds from the basis of drawing a distinction between Contracting States, Territorial States and finally Home States.<sup>817</sup> Contracting States are classed as those who employ the PMSC,<sup>818</sup> whether to operate within their own territory or during

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<sup>814</sup> Ibid at 31.

<sup>815</sup> Ibid at 32.

<sup>816</sup> See e.g. Shaista Shameem 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, Mission to Afghanistan, A/HRC/15/25/Add.2, 14 June 2010 <[http://www2.ohchr.org/english/issues/mercenaries/docs/A-HRC-15-25-Add2\\_AEV.pdf](http://www2.ohchr.org/english/issues/mercenaries/docs/A-HRC-15-25-Add2_AEV.pdf)> accessed 6 March 2015; see also Markets for Force, (n469) at 114-116.

<sup>817</sup> Montreux Document (n 673) at Preface, Section 9(c).

<sup>818</sup> Ibid.

conflict with, or occupation of, another State.<sup>819</sup> Territorial States are classed as those within which the PMSC physically operates or undertakes its security services. Finally, Home States, are classed as those “where the PMSC is registered or incorporated.” Alongside these three categories of states, the Montreux document provides guidance for both PMSC personnel and “all other states.”<sup>820</sup>

The responsibilities of a State under the Montreux Document differ depending upon the class of state. There is, however, a significant crossover between these classes. The most general provision, applicable to all states is an “obligation, within their power, to ensure respect for international humanitarian law by PMSCs.”<sup>821</sup> Alongside this, all states have “an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I.”<sup>822</sup> These general obligations form the basis of the Montreux Document, noting that regardless of the use of PMSCs states retain their obligations under International Humanitarian Law. Furthermore, they further clarify the positive obligation all States have in protecting International Humanitarian Law, including ensuring each States domestic law “adequately incorporate international legal principles and provide functional criminal penalties when international laws are violated”<sup>823</sup> Ultimately, these provisions however, offer little more than a reaffirmation of a state’s general obligations under international law, which are largely unquestioned, while providing little specific guidance on their application to PMSCs.

In comparison to the responsibilities of states and PMSCs under international law, the Montreux Document provides more detailed guidance on the applicability of international law to

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<sup>819</sup> Montreux Document (n 673) at Page 11.

<sup>820</sup> Montreux Document (n 673) at Part D at page 14.

<sup>821</sup> See e.g. Montreux Document (n 673) at Section A(3) (for Contracting States); Section B(9) (for Territorial States); Section C(14) (for Home States); Section D(18) (For all other States).

<sup>822</sup> Montreux Document (n 673) at A(3) (for Contracting States); Section B(9) (for Territorial States); Section C(14) (for Home States); Section D(18) (For all other States).

<sup>823</sup> Ian Ralby, ‘The Montreux Document: The Legal Significance of a Non-Legal Instrument’ in Gary Schaub Jr. & Ryan Keltly (eds.) *Private Military and Security Contractors: Controlling the Corporate Warrior* (Rowman & Littlefield, 2016).

PMSCs. This section will first consider those more general guidelines applicable to all, or most, of the different classes, before considering the type-specific regulatory requirements.

The first of these general requirements is the States obligation to ensure, within their power, that the PMSCs they contract respect International Humanitarian Law. This is set out in Sections 3, 9, 14 and 19 for Contracting, Territorial, Home States and All Other States respectively. The Document specifies that this should be achieved by Contracting States by ensuring PMSCs are trained and aware of their obligations,<sup>824</sup> while Home and Territorial States must “disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law.”<sup>825</sup> Furthermore, all States are required to ensure they do not encourage or assist in breaching any of these laws and take appropriate actions to prevent any violations.<sup>826</sup> For Contracting, Territorial and Home States, the Document further specifies that they have a responsibility to take legislative steps to implement their obligations under international humanitarian law, including “tak[ing] measures to suppress violations of international humanitarian law [including] regulatory measures as well as administrative, disciplinary or judicial sanctions”<sup>827</sup> while for Contracting and Territorial States this responsibility includes adopting appropriate “military regulations, administrative orders and other regulatory means.”<sup>828</sup> Alongside their requirements under International Humanitarian Law, the Document clarifies each state's obligations under both International Human Rights Law, and Customary International Law. Sections 4, 10, 15 and 19 cover the requirement for Contracting, Home, Territorial and All Other States to implement their obligations under International Human Rights Law. This includes provisions to “prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.”<sup>829</sup> Alongside this, the subsequent sections in each class of states cover the obligations

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<sup>824</sup> Montreux Document (n 673) at Section A(3)(a) page 11.

<sup>825</sup> Ibid at Sections 9(a) and 14(a).

<sup>826</sup> Ibid at Sections A(3)(a); 9(a)(2); 14(a)(1); 18.

<sup>827</sup> Ibid.

<sup>828</sup> Ibid at Sections 3(c); 9(c).

<sup>829</sup> Ibid at Sections 4; 10; 15.



with regards to “grave breaches of the Geneva Conventions and, where applicable, Additional Protocol 1.” For the first three classes this constitutes an obligation to enact legislation to provide effective “penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I”.<sup>830</sup> This requires states, without prejudice to the nationality of the contractor(s) to bring such people before their national courts, or “hand such persons over for trial in another state... or to an international criminal tribunal”<sup>831</sup> The final of the general requirements for states is that all states, regardless of their relationship to PMSC activity, have an “obligation to investigate and, as required by international law, or otherwise appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking.”<sup>832</sup> Effectively, the provisions of the first four sections of each class of state “unequivocally restate the bodies of law under which the various interested states must operate”<sup>833</sup> Despite this clarification however, these sections of the Montreux Document effect little to no change to the status or regulation of PMSCs. There was little question as to whether states retained their obligations under international law, the use of PMSCs was not considered to have altered these obligations per se. Instead, the primary question as to the use of PMSCs was not if, but how a state's obligation interacts with their use of PMSCs. These sections of the Montreux Document offer little clarity on how these accepted upon aspects of international law interact with the use and employment of PMSCs by states.

In relation to this question however, there are several sections that provide an insight into how the state's obligations are affected by PMSCs. The most comprehensive of these sections are contained within section 2 in relation to Contracting States. This section establishes that “States retain their obligations under international law, even if they contract PMSCs to perform certain

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<sup>830</sup> Ibid at Section A(5).

<sup>831</sup> Ibid at Sections 5, 11, 16, 20.

<sup>832</sup> Ibid at Section 6.

<sup>833</sup> Ian Ralby, ‘The Montreux Document: The Legal Significance of a Non-Legal Instrument’ in Gary Schaub Jr. & Ryan Kelty (eds.) (n 799).

activities.”<sup>834</sup> The effect of this has been argued to prevent states from outsourcing activities to PMSCs that they cannot legally do themselves, with it being suggested that this is “extremely important in light of criticism suggesting that states use PMSCs to avoid legal obligations.”<sup>835</sup> Ultimately, however, the effect of this is limited by the extent to which states can be held responsible under International Law.<sup>836</sup> Furthermore, while this is useful in clarifying the responsibilities of states in directing PMSCs to undertake internationally unlawful acts, the greater question is posed by the responsibility of states for actions of PMSCs given a desired task or outcome, but without specific guidance as to how to achieve this. Otherwise, States would be able to essentially outsource unlawful acts by maintaining ignorance over their contractor’s actions. Considering this, it is Section 7 of the Montreux Document that provides the most substantial examination of the international legal frameworks applicable to States who employ PMSCs. The starting point of this is to note that entering into a contractual agreement does not “in itself engage the responsibility of Contracting States.”<sup>837</sup> Instead, States that contract PMSCs are responsible for their violations of “International Humanitarian Law, Human Rights Law, or other rules of international law”<sup>838</sup> only where they are attributable to the “Contracting State, consistent with customary international law”<sup>839</sup> As such, this approach appears to suggest the Montreux Document does not seek to adapt or change the application of the doctrine of State Responsibility in relation to the use of PMSCs. It has, however, been argued that the wording of Section 7 should be interpreted in a unique manner in relation to State Responsibility. Specifically, during the negotiations for the Document, some States argued for a stricter application of State Responsibility, under which contracting alone would be sufficient to engage obligations under both International Humanitarian and Human Rights Law.<sup>840</sup> There have been suggestions that “section 7 may be

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<sup>834</sup> Montreux Document (n673) at Part A(1)

<sup>835</sup> See e.g. James R. Coleman, ‘Constraining Modern Mercenaries (2004) 55(6) Hastings Law Journal 1493, 1537; Ian Ralby, ‘The Montreux Document: The Legal Significance of a Non-Legal Instrument’ in Gary Schaub Jr. & Ryan Kelty (n 799) 241.

<sup>836</sup> See Section 5.1 for a full discussion of the applicability of State Responsibility to PMSCs.

<sup>837</sup> Montreux Document (n 673) at Section 7 (page 12).

<sup>838</sup> Ibid.

<sup>839</sup> Ibid.

<sup>840</sup> James Cockayne, ‘Regulating Private Military and Security Companies: The Content, Negotiation, Weakness and Promise of the Montreux Document’ (2009) 13(3) Journal of Conflict & Security Law 401, 409.

compatible with such an interpretation.”<sup>841</sup> Under this reading, while engaging a contract does not automatically engage state responsibility, if it can thereafter be demonstrated that the Contracting State has not undertaken their positive obligations under Sections 1-6, an approach mirroring that adopted in other similar legislation including the European Arms Export Code.<sup>842</sup> This approach to understanding the Montreux Document, however, must be viewed with extreme scepticism. The wording of Section 7 does not immediately preclude such a reading, and there are specific precedents within international law for such an understanding, most notably the European Arms Control Export Agreement, which was heavily relied upon as a guide in establishing the Montreux Document. Fundamentally, however, taking note of the introductory remarks of the Document it appears such a positive obligation would be contrary to the purpose of the document which is to simply clarify the existing position. There is not currently any positive obligation upon States in relation to the manner in which they contract with PMSCs, and while specific treaties have created positive obligations within international law, these are not considered to have established an overarching position within international law generally.

Furthermore, Paragraph 7 goes on to elaborate upon the circumstances in which States may be held responsible for the action of PMSCs under International Law.<sup>843</sup> These largely mirror the approach to modes of accountability established through the International Law Commissions Articles on State Responsibility.<sup>844</sup> This suggests again that Paragraph 7 merely seeks to reaffirm that the existing provisions of State Responsibility remain applicable in the cases of the use of PMSCs. While a detailed analysis of the applicability of State Responsibility is undertaken in the following section, it is worth noting how the Montreux Document addresses the issue, and specifically the forms of responsibility considered most applicable to PMSCs.

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<sup>841</sup> Ibid.

<sup>842</sup> Ibid.

<sup>843</sup> Ibid. at Section 7.

<sup>844</sup> See Ian Ralby, ‘The Montreux Document: The Legal Significance of a Non-Legal Instrument’ in Gary Schaub Jr. & Ryan Keltly (n 799) 241-7; Marie-Louise Tougas, ‘Commentary on Part I of 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’ (2014) 96(893) *International Review of the Red Cross* 305, 327–331.

The Montreux document first identifies the situation in which a PMSC is “incorporated by the State into their regular armed forces.”<sup>845</sup> This is the most straightforward method of holding States accountable for the actions of PMSCs they employ and as such would attract State Responsibility. Similarly, the Document identifies situations in which PMSCs are identified as “members of organized armed forces, groups or units under a command responsible to the State.”<sup>846</sup> The distinction between “regular armed forces” and “command responsible to the State”<sup>847</sup> is important in ensuring States remain accountable for all actions which take place under their supervision.<sup>848</sup> While this description maintains a degree of ambiguity, this section makes it clear that the Document takes account of circumstances in which PMSCs are incorporated into forms of *irregular* armed forces and non-military organisations that operate in security-based operations.<sup>849</sup> This would, therefore, cover the use of PMSCs for “so-called black operations”<sup>850</sup> or covert operations in Afghanistan and could include the JTF within the Niger Delta.

Beyond this, the Document identifies two further manners in which States may be held accountable for their use of PMSCs in circumstances in which the command structure is not as clearly defined. The first of these are situations in which the PMSC are “empowered to exercise elements of governmental authority if they are acting in that capacity.”<sup>851</sup> This section of the Document, therefore, has two key elements which require fulfilling; that the PMSC exercise “governmental authority” and that they are empowered to do this. The requirement for empowerment is expanded in parenthetical information to include only circumstances in which the state is “formally authorized.”<sup>852</sup> This is based on Article Four of the Articles of State Responsibility, and the accompanying commentary under which, States may be held accountable

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<sup>845</sup> Montreux Document (n 673) at Section 7(b)

<sup>846</sup> Ibid.

<sup>847</sup> Ibid.

<sup>848</sup> Tougas (n 844) at 328; James Cockayne, ‘Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document’ (2008) 13 *Journal of Conflict & Security Law* 401, 410; Chesterman (n 3) at 1074.

<sup>849</sup> Chesterman (n3) at 1074.

<sup>850</sup> Cockayne (n 848) at 410.

<sup>851</sup> Montreux Document (n 673) at Section 7(c).

<sup>852</sup> Ibid.

for actions of organs who acting in their official capacity exercise governmental authority.<sup>853</sup> The Montreux Documents requirements, therefore, would mirror those of the Articles, with this requirement applying only to cases where an entity is “empowered by internal law” to undertake a specific governmental role rather than circumstances in which operating under general command they are tasked with completing an operation which is traditionally governmental.<sup>854</sup> The second requirement that the entity exercise governmental authority is less clear as neither the Document, nor the Articles upon which it is based, provides significant guidance on what this constitutes a “function normally conducted by organs of the State.”<sup>855</sup> The Document does, in Paragraph Two, explicitly list “exercising the power of the responsible officer over prisoner-of-war camps of places of internments of civilians in accordance with the Geneva Conventions”<sup>856</sup> as being an example of a governmental task, and therefore not suitable for outsourcing. This definition, extending only to the responsible officer, is very limited and would suggest that the Document would class contractors who operate detention centres as non-governmental so long as a state agent was the responsible officer. Similarly, as the Document specifically lists activities PMSCs may undertake “armed guarding... protection of persons and objects, such as convoys, buildings and other places...”<sup>857</sup> it can be assumed that these would not be “governmental.”<sup>858</sup>

Potentially the widest mode of attribution identified within the Montreux Document is the fourth mode of attribution identified in Section Seven. Under this heading, States can be held accountable PMSCs when they are “in fact acting on the instructions of the State... or under its direction or control”<sup>859</sup> Ultimately, this corresponds largely with Article 8 of the ILC Articles, in attributing responsibility to a State in cases where the “conduct is carried out on the instructions of

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<sup>853</sup> ILC Articles (n 679) at Article 4.

<sup>854</sup> Ibid.

<sup>855</sup> Ibid.

<sup>856</sup> Ibid at page 11, Para. 2.

<sup>857</sup> Ibid at Preface Para. 9(a).

<sup>858</sup> *See e.g.* Cockayne (n 840) at 410 (“those services that are specifically listed as ‘military and security services’ offered by PMSCs in the definition of PMSCs provided in the preface must logically *not* involve the exercise of such elements” of Governmental authority.)

<sup>859</sup> Montreux Document (n 673) at Section 7(d)

a state organ or under its direction or control.”<sup>860</sup> This mode of attribution can in effect be considered to have two separate specifications. The first of these being where an explicit order or command to undertake an act has been issued, whilst the second covers situations in which the degree of control over the PMSC demonstrates an implicit support for their actions. Ultimately, however, while it is important to note the importance of “control” in establishing State Responsibility, the exact parameters of this are highly contentious with the Montreux Document adding nothing to the understanding of how this applies in practice. Instead the Document merely restates a States existing legal requirements for States in “control” of non-state actors under International Law which, as this research will consider further on, in this case, PMSCs remains highly contentious and unsettled within international law.

While the Montreux Document is overwhelmingly concerned with the responsibilities of States, Section E briefly address the responsibility of “PMSCs and their personnel” when operating within war zones. Paragraphs 22 and 23 outlines the legal systems applicable to PMSCs and individual contractors. This first notes that PMSCs retain their legal obligations under the national law of the State they are operating in.<sup>861</sup> It has been suggested that due to the ambiguousness of the guidance this approach may present difficulties when the “rule of law has collapsed... or when there is a conflict between the state’s laws and those of another relevant jurisdiction.”<sup>862</sup> Regardless of this, however, while seemingly innocuous, this provision is among the most notable of the Montreux Document. Specifically, PMSCs and Contracting States have repeatedly claimed immunity from the legal system of the states they operate in. During the Iraq War, Coalition Provisional Authority Order 17 specifically exempted PMSCs from Iraqi Laws for acts relating to their contract of employment.<sup>863</sup> Similar claims were made in relation to the use of PMSCs in Plan

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<sup>860</sup> ILC Articles (n 679) at Article 8

<sup>861</sup> Montreux Document (n 673) at Paragraph 23.

<sup>862</sup> Ralby (n 833) at 243.

<sup>863</sup> See e.g. Jennifer K. Elsea, *Private Security Contractors in Iraq and Afghanistan: Legal Issues* (Congressional Research Service, 2010) 15

Colombia<sup>864</sup> with US personnel granted immunity as part of the bilateral military pact signed between the US and Colombia.<sup>865</sup> Considering this, it is significant that signatories including the US and UK endorsed the view that in future PMSCs employed by them would be bound by the Laws of the territorial States.

Beyond these general obligations, the Montreux Document also addresses one of the most persistent issues within the use of PMSCs; their status as under IHL. While PMSCs, and all individuals, are bound by IHL and would be criminally responsible for serious breaches of this, the protections that PMSCs would be afforded have remained contentious. These protections primarily relate to their status under IHL and the corresponding protections offered to them both during conflict, and if captured by the opposition. Which regime is applicable to them would depend upon whether the individual contractor or employee qualifies as a “civilian”, “civilian accompanying the armed forces”, or “civilian directly participating in hostilities”, or whether he qualifies as a “member of the armed forces”, a privileged “combatant” entitled to “prisoner of war” status “civilian internee” protected by the Fourth Geneva Convention or, rather, a “mercenary.”<sup>866</sup> Rather than attempting to categorise PMSCs, the Montreux Document instead provides a suggested method for establishing their position on a “case-by-case basis.”<sup>867</sup> Paragraph 26 describes this process through which this determination can be made, with the starting point being that PMSC personnel will start as civilians under IHL. This status may change if they are incorporated into either the regular armed forces, or similar organisation, under a command responsible to the state.<sup>868</sup> Furthermore, PMSC personnel will be presumed to be entitled to prisoner of war status if they are accompanying armed forces, as set out in the Article 4A(4) of the Third Geneva Conventions. The

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<sup>864</sup> Irene Cabrera & Antoine Perret, ‘Colombia: Regulating Private Military and Security Companies in a “Territorial State,” 10-15 PRIV-WAR Report – Colombia (National Reports Series 19/09) <[http://psm.du.edu/media/documents/reports\\_and\\_stats/think\\_tanks/privwar\\_national-report\\_cabrera.pdf](http://psm.du.edu/media/documents/reports_and_stats/think_tanks/privwar_national-report_cabrera.pdf)> accessed 16 May 2017).

<sup>865</sup> Ibid.

<sup>866</sup> See Dr. Nils Melzer, Status of PMSCs under IHL (presentation) *available at* <[http://psm.du.edu/media/documents/reports\\_and\\_stats/think\\_tanks/iuhl\\_melzer\\_status\\_2012.pdf](http://psm.du.edu/media/documents/reports_and_stats/think_tanks/iuhl_melzer_status_2012.pdf)> accessed 28 May 2017.

<sup>867</sup> Ralby (n 833) at 243.

<sup>868</sup> Montreux Document (n 673) at Paragraph 24

primary benefit provided by this definition is the clarification of the default status of PMSCs as civilians. However, while it further clarifies that this presumption can be rebutted, it fails to consider or explain the circumstances in which this may be the case. Considering the Afghanistan case study, it is unclear whether the private militias employed by the Afghan National Army would be considered “incorporated” for the purpose of Paragraph 26<sup>869</sup>. The Document makes no attempt to identify the test required and it has been questioned whether this would require “de jure determination or would it also include de facto incorporation”<sup>870</sup>

## 5.4 International Code of Conduct for Private Security Providers

### 5.4(2) Background to the ICoC

Following the success of the Montreux Document for “Private Military Companies” in 2008, the Swiss Governments Division IV, which focusses on human rights generally, established a similar initiative for “Private Security Companies” in 2009.<sup>871</sup> The resulting International Code of Conduct for Private Security Providers (ICOC) was signed on 9 November 2010.<sup>872</sup> This drew upon a “multi-stakeholder initiative... with the over-arching objective to articulate the human rights responsibilities of private security companies, and set to set out the international and principles and standards.”<sup>873</sup> Parallel to this, foreseeing “that a voluntary code of conduct could lack enforcement

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<sup>869</sup> Ibid.

<sup>870</sup> Ralby (n 833) at 245.

<sup>871</sup> Anne-Marie Buzatu, ‘Towards an International Code of Conduct for Private Security Providers: A View From Inside a Multi-Stakeholder Process’ (Democratic Control of Armed Forces SSR Papers, 2015) <<https://icoca.ch/sites/default/files/resources/DCAF-SSR-12.pdf>> accessed 14 May 2017.

<sup>872</sup> Ibid.

<sup>873</sup> ‘History’ (*International Code of Conduct Association*) <<https://www.icoca.ch/en/history>> accessed 14 May 2017; *see also* ‘International Code of Conduct for Security Service Providers’ (Swiss Federal Department of Foreign Affairs, 8 October 2010) <<https://www.state.gov/documents/organization/150711.pdf>> accessed 14 May 2017 [hereinafter ICOC]



capacity to ensure compliance”<sup>874</sup> the initiative established a “multi-stakeholder oversight body, namely the International Code of Conduct Association (ICoCA).”<sup>875</sup> The ICoCA consists of the Secretariat, the General Assembly and the Board of Directors comprised of the three pillars of the ICoCA; governmental representatives, industry representatives and civil society.<sup>876</sup> This structure was designed to encourage a system of checks and balances between the three pillars, ensuring neither industry or civil society would dominate proceedings in a manner that might undermine the credibility or effectiveness of the Association.<sup>877</sup>

In comparison to the Montreux Document, the ICoC and the associated ICoCA presents several advantages in regulating PMSCs and establishing avenues of accountability. The first of these is that unlike the Montreux Document, the ICoC does not limit its scope to situations amounting to armed conflict. Instead, the Code identifies PSCs operating in “complex environments”<sup>878</sup> including areas “experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflict, where the rule of law has been substantially undermined, and in which the capacity of the states authority to handle the situation is diminished, limited, or non-existent.”<sup>879</sup> The scope of this definition has not been specifically articulated, however there are several factors that are noteworthy within this. The first of these is that the attributes are not cumulative and as a result could apply to situations in which the rule of law or state authority has been undermined but not as a result of natural disaster or armed conflict. However, even this more expansive scope fails to include all circumstances in which PMSCs may operate, including some in which PMSCs have been accused of human rights violations. Considering the case-study of Peru it

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<sup>874</sup> Nelleke Van Amstel & Tilman Rodenhauser, ‘The Montreux Document and the International Code of Conduct: Understanding the Relationship Between International Initiatives to Regulate the Global Private Security Industry’ (Democratic Control of Armed Forces, Public-Private Partnerships Series, 2016) <[http://www.dcaf.ch/sites/default/files/publications/documents/DCAF\\_PPPs\\_Series\\_Paper\\_The\\_MD\\_and\\_ICoC\\_Understanding\\_the\\_Relationship.pdf](http://www.dcaf.ch/sites/default/files/publications/documents/DCAF_PPPs_Series_Paper_The_MD_and_ICoC_Understanding_the_Relationship.pdf)> accessed 15 May 2017 at 8.

<sup>875</sup> Sorcha MacLeod, ‘Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-‘Plus’ (2015) 62 Netherlands International Law Review 119, 121.

<sup>876</sup> ‘Articles of Association’ (*International Code of Conduct Association*) <<https://www.icoca.ch/en/history>> accessed 14 May 2017; Buzatu (n 871) at 52-58.

<sup>877</sup> Amstel & Rodenhauser (n 874) at 9.

<sup>878</sup> ICoC (n 873) at 4.

<sup>879</sup> Ibid.

would be difficult to argue that the *Campesino* protests against mining companies<sup>880</sup> undermine the rule of law, or diminished the authority of the state. This highlights another potential limitation of the ICoC approach, as it focusses on the state monopoly over coercive violence without consideration for the legitimacy of this regime. As a result, while the ICoCs scope is significantly wider than the Montreux Document it inevitably retains many of the state-centric limitations associated with the “explicitly traditional... principles articulated”<sup>881</sup> in relation to the state responsibility and the corresponding presumed monopoly over coercive violence.<sup>882</sup>

Beyond the environments to which the ICoC is focussed, it is further distinguishable from the Montreux Document by its focus. In particular, while the Document overwhelmingly addresses the responsibilities of states, the ICOC considers the obligations and responsibilities of companies who provide security services directly. It has been suggested, therefore, that the ICoC is complementary to the Montreux Document and can “complement or even be an essential component of a state’s effort to regulate PSCs in accordance with Montreux Document good practices.”<sup>883</sup> To this end, like the Montreux Document, rather than establishing a new stand-alone regulatory framework, the ICoC “share[s] the principle objective of enhancing PSC compliance with applicable rules of international humanitarian law and international human rights law.”<sup>884</sup> In doing so, the ICoC attempts to expound a synthesise existing regulations and best practices into a “commonly-agreed set of principles and.. establish a foundation to translate those principles into... standards. Furthermore, while the ICoC does not seek to provide a new regulatory framework for PMSCs, it does seek to establish a new, and independent oversight mechanism through which individual PMSCs can be judged against existing standards. It is this that provides potentially the most significant benefit of the ICoC and ICoCA. In order to analyse the effectiveness of this approach, the following section will briefly consider some of the most relevant requirements under

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<sup>880</sup> See Chapter 4, Section 2(1)(b) on the security threats within Peru including mining conflicts.

<sup>881</sup> MacLeod (n 875) at 130.

<sup>882</sup> See also White (n 33) at 61.

<sup>883</sup> Ibid. (generally discussing the inter-relationship of the two approaches and suggesting that the ICOC is effectively a recommended approach to fulfilling the good practice guidelines contained within the Montreux Document.)

<sup>884</sup> Ibid at 1.

the ICoC, and thereafter analyse how effectively the ICoCAs oversight mechanism is able to regulate and establish accountability for PMSCs.

### **5.4(3) Contents of the ICoC**

Contained within the ICoC there are four headings under which the requirement of PMSCs are divided; general provisions, general commitments, specific principles regarding the conduct of personnel, and specific commitments regarding management and governance<sup>885</sup> The general provisions are focussed on reiterating the complementary nature of the ICoC to both international and national legal standards.<sup>886</sup> While the general commitments outline the signatory PMSCs continued commitment to operate in accordance with their obligations under host state national laws and international laws, alongside the standards contained within the ICoC. The specific principles provide more substantial guidance on the rules pertaining to PMSCs. These begin by establishing that signatory companies will agree to operate in accordance with the provisions of the ICoC, including ensuring that all their personnel along with sub-contractors “or other parties” operating under their contracts act in accordance with the code.”<sup>887</sup> Signatory companies will therefore not to enter into contracts which would require acting contrary to the policies and guidelines of the Code.<sup>888</sup> Similarly, signatory companies will not enter into contractual obligations that would require their contravention of IHL, human rights law, international law, the national laws of the host and home state or UN Security Council sanctions.<sup>889</sup> Furthermore, paragraphs 33 to 42 detail those activities which PMSCs under no circumstances should PMSCs engage, or sub-contract another party to engage, nor should individual contractors engage in these actions even if they believe they are being asked to do so by a superior officer.<sup>890</sup> These include committing sexual

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<sup>885</sup> ICoC (n 873) at “Contents”

<sup>886</sup> Ibid at Paragraph 14.

<sup>887</sup> Ibid at Paragraph 16.

<sup>888</sup> Ibid at Paragraph 20.

<sup>889</sup> Ibid at Paragraphs 21-22.

<sup>890</sup> Ibid. (Company prohibitions are listed in Paragraph 22, Contractors are provided in more detail between Paragraphs 35-41.

offences,<sup>891</sup> taking part in activities which may amount to “torture or other cruel, inhuman and degrading treatment or punishment”,<sup>892</sup> being involved in human trafficking,<sup>893</sup> slavery or forced labour,<sup>894</sup> or the “worst forms of child labour.”<sup>895</sup>

Beyond these explicit prohibitions, the ICoC provides a “well-developed and quite specific rules on the use of force,”<sup>896</sup> largely mirroring the approach of the United Nations Rules on the use of Force for Police.<sup>897</sup> The ICoC does not, therefore, preclude the use of force but instead emphasises that it must be a last resort and proportionate.<sup>898</sup> If the use of force includes the use of firearms this must be considered an extreme action with a strict interpretation or proportionality. The use of firearms must be resorted to only in cases of self-defence, or the defence of others where the risk of death or serious injury is a virtual certainty. According to the ICoC and the accompanying supplementary guidance<sup>899</sup> therefore, the use of firearms should not be resorted to in cases of protection of property or in the prevention of a crime unless there is a corresponding risk of death or serious injury to the PMSC or another.<sup>900</sup> Considered the case studies, it is clear that there exist many examples of PMSCs engaging in activities which would be considered to directly contradict this guidance. The use of lethal force by the JTF to prevent oil theft and sabotage would clearly fall foul of these guidelines. Similarly, as documented the private security at Yanacocha Mine have consistently been implicated in the disproportionate use of force against non-violent protestors up to and including the use of lethal force. Furthermore, the ICoC makes clear that when PMSCs should only apprehend people when necessary for the protection of persons and property<sup>901</sup> and

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<sup>891</sup> Ibid at Paragraph 38.

<sup>892</sup> Ibid at Paragraph 35-37.

<sup>893</sup> Ibid at Paragraph 39.

<sup>894</sup> Ibid at Paragraph 40.

<sup>895</sup> Ibid at Paragraph 41; Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (adopted 17 June 1999, entered into force 19 November 2000) ILO Convention No. 192.

<sup>896</sup> White (n 33) at 266.

<sup>897</sup> Basic Principles on the Use of Force and Firearms by Law Enforcement Officials’ United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August - 7 September 1990) (Hereinafter UN Basic Principles on Force)

<sup>898</sup> ICOC (n 873) at Paragraph 30-33. (drawing upon Ibid at Paragraphs 5-8).

<sup>899</sup> UN Basic Principles on Force (n 897) at Paragraph 9.

<sup>900</sup> Ibid at Paragraph 32.

<sup>901</sup> ICoC (n 873) at Paragraph 34.

must hand over any apprehended person to the relevant public authorities at the earliest opportunity. While at Yanacocha mine, it was discovered that the private security guards had detained protestors for days on the property of the mine.<sup>902</sup>

In combination with these negative obligations on the actions and activities of PMSCs, the ICoC seeks to establish a series of positive obligations to support and ensure these obligations are met, and ensure effective remedies are available where they are not. The ICoC, therefore, provides required internal institutional policies to enforce their obligations. Among the more general provisions established by these positive obligations are the establishment of a suitable and effective recruitment and vetting process. This requires companies to “exercise due diligence” in hiring personnel through establishing appropriate internal policies and procedures preventing the employment of individuals who have been convicted of criminal behaviour or dishonourable discharge or previous breach of ICoC alongside other general conduct that “according to an objectively reasonable standards, brings into question their fitness to carry a weapon.”<sup>903</sup> The companies must regularly review their personnel’s performance including the maintaining of their obligations under the Code and ensure that they are trained in their obligations under national and international law as well as the ICoC.<sup>904</sup> Importantly, this process applies to both contractors of the signatory company but also to any sub-contractor that may be used by the signatory company to complete the contract.<sup>905</sup> This policy is potentially an important step in ensuring PMSCs maintain appropriate standards of conduct, and could assist in preventing illegal activities and human rights. As the case study for Nigeria demonstrated in the past established and reputable firms have been known to engage inappropriate sub-contractors to conduct activities that they may otherwise be unwilling or incapable of performing. The obligation to apply an equal framework to sub-

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<sup>902</sup> See Supra Section 4(2)(1)(d) “Private Security Guards”

<sup>903</sup> ICoC (n 873) at Paragraph 48.

<sup>904</sup> Ibid at Paragraph 55.

<sup>905</sup> Ibid at Paragraph 50; see also Buzatu (n 871) at 40 – 41.

contractors and contractors would if successful prevent such activities in the future.<sup>906</sup> Beyond the rules regarding the employment of personnel, the ICoC also establishes a duty to ensure weapons<sup>907</sup> and other “materials of war”<sup>908</sup> are dealt with in accordance with national and international law.<sup>909</sup> This includes the safe storing of all materials or weapons and accounting procedures to prevent the illegal transfer of weapons.<sup>910</sup> Furthermore, where weapons are used the signatory company has an obligation that contractors that carry weapons be appropriately trained both in the use of weapons<sup>911</sup> and the applicable rules of force.<sup>912</sup>

Among the most important of the positive obligations for the effectiveness of the ICoC are those related to the reporting of breaches of the Code, the grievance procedures. These were written with the intention of ensuring that signatory companies build in responsible working practices into their company ethos and foster a “corporate culture that respects human rights.”<sup>913</sup> The final four sections of the ICoC, therefore, provide for incident reporting, safe and healthy working environments, harassment, grievance procedures and meeting liabilities. Among the most significant of these obligations is the duty of both the company and contractor to report any incident in which the personnel was required to use a weapon or any escalation of force, or incidents in which any party was injured or a crime was committed.<sup>914</sup> This report should be followed by an inquiry with copies of the outcome sent to the PMSCs client, “and to the extent required by law, to the competent authorities.”<sup>915</sup> This approach to reporting and monitoring incidents is a welcome development which allows companies to identify trends within the use of force by their personnel and maintain written records for the use of evidence in future internal disciplinary matters or legal

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<sup>906</sup> See *Supra* at Section 4(2)(2)(d) Private security (G4S’s use of local contracting firms/militias to undertake activities that breached the human rights of victims).

<sup>907</sup> ICoC (n 873) at Paragraph 59.

<sup>908</sup> *Ibid* at Paragraphs 60-62.

<sup>909</sup> The international obligations are particularly relevant to the prohibition on the possession of any materials of war that are illegal under international law, and that no transfers of these materials are made in contravention of UN Security Council Sanctions. *Ibid* at Paragraph 61

<sup>910</sup> *Ibid* at Paragraphs 56-58 for weapons and Paragraphs 62 for materials of war.

<sup>911</sup> *Ibid* at 59(a), (b).

<sup>912</sup> *Ibid* at Paragraph 59(c).

<sup>913</sup> Buzatu (n 871) at 41-43.

<sup>914</sup> ICoC (n 873) at Paragraph 63.

<sup>915</sup> *Ibid*.

matters. Paragraph 66 of the ICoC further provides that signatory companies must establish a grievance procedure through which personnel or third parties may bring allegations of misconduct or the failure of the company, or their personnel, to comply with their obligations under the Code. The Code states that the procedure for bringing a complaint must be publically accessible through a website, although it is difficult to establish the efficacy of this when working in volatile or under-developed environments where access to the internet may be limited. Instead, this has the potential to create a two-tier system through which those with resources are able to lodge complaints, while those unable to access modern technology, in many cases displaced or indigenous populations, may be *de facto* precluded from access to justice. Once a complaint has been lodged, the company is under a duty to provide a fair and impartial investigation and potentially pass on such records as may be relevant to legal authorities.<sup>916</sup> Following the conclusion of an inquiry, the company is under a duty to take appropriate disciplinary actions and keep records of such inquiries or allegations for use in future cases.<sup>917</sup> The final significant requirement of the Code is that all signatory companies must provide “ensure they have sufficient capacity in place at all times to meet reasonably anticipated commercial liabilities for damages in respect of personal injury, death or damage to property.”<sup>918</sup> As a result, the Code anticipates that all companies will be capable of making damages payments to any victims of their actions in accordance with the local legal regime.

#### **5.4(4) Oversight Mechanisms – The ICoCA**

The scope and contents of the Code of Conduct has generally been received mixed reviews as while the contents can be considered “normatively... robust,”<sup>919</sup> there remains scope for

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<sup>916</sup> Ibid at 67.

<sup>917</sup> Ibid.

<sup>918</sup> Ibid at 69.

<sup>919</sup> Laura Dickinson, ‘Regulating the Privatized Security Industry: The Promise of Public/Private Governance’ (2013) 63 Emory Law Journal 417, 421; *see also* Stuart Wallace, ‘Case Study on Holding Private Military and Security Companies Accountable for Human Rights Violations’ (Work Package No.7 – Deliverable No. 75, Fostering Human Rights Among European Policies) at 56 (“The Code has been praised for its detailed articulation of a wide range of norms and procedures that PSCs should adhere to”)

improvement by incorporating “economic, social, or cultural rights.”<sup>920</sup> Regardless of the scope and content of the provisions within the code, however, the fact that it creates no legal obligations on PMSCs is a central weakness to the efficacy of the approach.<sup>921</sup> In the absence of this, the initiative instead sought to establish an independent oversight mechanism with the focus directly on the signatory companies. The overall governance of this oversight mechanism sits with the twelve-member Board of Directors<sup>922</sup> which votes by a majority of 8 (at least two members from each of the four pillars must vote in favour of any decision.)<sup>923</sup>

Among the primary roles of the Primary role of the ICoCA is the certification of companies.<sup>924</sup> Originally, this was researched for companies who explicitly undertook to maintain and fulfil all their obligations under ICoC however, more recently this has been expanded to include companies who have “third-party certification to one (or more)... standards... issues by an independent accredited certification body.”<sup>925</sup> These must similarly fulfil the certification standards required<sup>926</sup> under the ICoC while the ICoCA may establish additional requirements for companies under third-party accreditation to bring the standards up to an equal level.<sup>927</sup>

Article 12 of the AOA provides that the ICoCA is responsible, after certifying, for the monitoring, reporting and assessment of the performance of PSMCs under the ICoC achieved through a multilevel approach. The primary basis of this monitoring and assessment is an annual self-assessment report completed by each PMSCs disclosing their compliance with their obligations

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<sup>920</sup> White (n 33) at 237.

<sup>921</sup> Ibid at 261; Amstel & Rodenhauer (n 874) at 9.

<sup>922</sup> Dickinson (n 919) at 421 (for a discussion of the make-up of the Board of Directors *See Supra* at 5.4(2))

<sup>923</sup> Ibid.

<sup>924</sup> ICoC (n 873) at Article 10.

<sup>925</sup> ‘Certification’ (*The International Code of Conduct*) < <https://www.icoca.ch/en/certification> > accessed 5 May 2016).

<sup>926</sup> Ibid; to date the ICoCA recognises the PSC.1, ISO 28007, ISO 18788 as consistent and sufficient for certification under the ICoCA [hereinafter ICoCA]; *see also* Buzatu (n 871) at 57.

<sup>927</sup> ‘Certification’ (*The International Code of Conduct*) < <https://www.icoca.ch/en/certification> > accessed 5 May 2016).



under the ICoC.<sup>928</sup> These self-assessment reports are combined with other “information collected”<sup>929</sup> including from public sources, submitted complaints and civil society.<sup>930</sup> If concerns are identified within this collation of data, the Executive Director may at their discretion undertake a field-based review<sup>931</sup> in order to further investigate and review any institutional issues which may impact the company’s ability to comply with their obligations under the ICoC. There have been numerous concerns expressed about the ability of the ICoCA to undertake this procedure with the necessary diligence, noting the relative lack of resources of the ICoCA in comparison to the number of signatory companies. This criticism focuses on the fact that the Secretariat consists of only five people responsible for receiving information and complaints from third parties and civil society organisations, in relation to over 101 companies,<sup>932</sup> raising questions about the detail with which these complaints can in practice be reviewed.<sup>933</sup> The ICoCA has responded to this by promising that;

“[a]ppropriate staffing and resource levels have been provided for in the 2016 and 2017 budgets, and the Secretariat anticipates that it will invest significant effort in 2017 on the development of a network of participating organizations and stakeholders in areas of significant concentrations of Member company activity.”<sup>934</sup>

However, it has yet to be established the sufficiency of these measures. Similarly, To date, no field-based reviews have been conducted and so data on the level of detail and success of this approach is negligible. Instead, the most recent ICoCA annual report noted simply that in July 2016 the

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<sup>928</sup> ‘Article 12: Procedures’ (*International Code of Conduct Association*) < <https://icoca.ch/sites/default/files/resources/ICoCA-At-Procedures-Article-12-Monitoring.pdf>> accessed 5 May 2016 at Section III.

<sup>929</sup> See ‘2016 Information Session: International Code of Conduct Association for Private Security Service Providers’ (*International Code of Conduct Association, 2016*) < <https://icoca.ch/sites/default/files/resources/ICoCA-2016-Info-Session.pdf>> accessed 6 May 2016.

<sup>930</sup> *Ibid* at 19.

<sup>931</sup> ICoCA (926) at Section VI (applying Article 12.2.3)

<sup>932</sup> ‘Membership’ (*International Code of Conduct Association*) < [https://www.icoca.ch/en/membership?private\\_security\\_companies=companies&op=Search&view\\_type=list&form\\_id=\\_search\\_for\\_members\\_filter\\_form](https://www.icoca.ch/en/membership?private_security_companies=companies&op=Search&view_type=list&form_id=_search_for_members_filter_form)> accessed 17 May 2016.

<sup>933</sup> Wallace, (n 919) at 57.

<sup>934</sup> ‘2015 – 2016 Annual Report’ (*International Code of Conduct Association, 2016*) < [https://www.icoca.ch/sites/default/files/resources/ICoCA\\_Annual-Report-2015-2016\\_0.pdf](https://www.icoca.ch/sites/default/files/resources/ICoCA_Annual-Report-2015-2016_0.pdf)> accessed 13 January 2017 at 12.

Working Group undertook a pilot study on field-reviews with the co-operation of three signatory companies. In their estimation “[t]he pilot, conducted over the course of four days between 6 and 9 July 2016, successfully demonstrated the capacity of the Secretariat to review Member company operations, provide guidance... and deliver appropriate reporting to the Board”<sup>935</sup> The details and conclusions of the review have not been released, however, to this authors mind a four day field-study is unlikely to be sufficiently stringent and detailed to illuminate all the potential non-compliance issues that a large security company may suffer from. While actual field-reports may be larger than this, it is difficult to consider that approach sufficient to establish “auditing and monitoring of their work in the field” as first envisioned by the text of the ICoC prior to the establishment of the ICoCA.<sup>936</sup>

This overall monitoring process is intended to be supported by a process through which the ICoCA may enforce compliance and it is this aspect that has potentially proved the most contentious, with a variety of views on the effectiveness of the approaches adopted. The primary mechanisms available through this are dialogue with member companies<sup>937</sup> and recommendations for corrective action. However, in extreme cases where this does not resolve the compliance issues, the board of directors may seek to begin suspension proceedings through which the company will lose its status as an ICoC member.<sup>938</sup> This is in effect the only consequence which companies can suffer even from repeated breaches of their obligations under the Code. As a result, the effectiveness of the ICoC approach in practice rests solely in the hands of the PMSCs employers with companies only negatively affected if clients refuse to hire them on the basis of a lack of ICoC membership. There are two substantial problems with this approach. The first of these is that to date, few employers have to date made this a requirement for employment, with the US and UK among a handful of states that have done so. However, no developing nations, who are an increasingly large

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<sup>935</sup> Ibid at 12.

<sup>936</sup> Buzatu (n 871) at 43.

<sup>937</sup> ICoCA (926) at Section IV (applying Article 12.2.5)

<sup>938</sup> Ibid at Section VIII.

market for PMSCs have followed suit.<sup>939</sup> Similarly, there has been no suggestion that any multi-national companies intend to incorporate ICoC membership into their employment contracts and as a result, the effectiveness of the self-regulatory approach may be ultimately undermined. Furthermore, at a more conceptual level, it is important to consider whether the self-regulatory approach is even desirable when considering these forms of international actors. While the ICoC draws upon the “Guiding Principles on Business and Human Rights” (Ruggie Principles)<sup>940</sup> and specifically the protect, respect and remedy framework it is questionable whether such an approach, drawn largely for manufacturing industries, is appropriate for the security sector. In practice, the motivation behind companies adopting the Ruggie Principles is largely in response to normative shifts within the consumer, that make respecting human rights a positive economic decision. The approach has been most successful in industries where the supply chain is clear enough to establish accountability, with clothing and food production considered particularly susceptible to the economic effects of negative human rights press.<sup>941</sup> This is not the case for the security markets, where the consumers are primarily institutions or companies rather than individuals and as a result, the effectiveness of these normative changes are more limited. The regulation of PMSCs in Iraq has been influenced more by one incident in Nissour Square that drew the attention of the Western media, than the systemic but low-level abuses many Iraqis felt they were subjected to. Furthermore, it is questionable whether the ethical principles of the consumer population, usually in a Western country, should decide the social responsibilities of a security company, exercising a traditional state function, in a foreign country. It is possible that this approach is responsible for the lack of economic, social and cultural rights within the ICoC. The visual impact of a population being physically abused is more obvious than preventing a population from forming trade unions for

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<sup>939</sup> ‘Membership: Governments’ (*International Code of Conduct Association*) <[https://www.icoca.ch/en/membership?view\\_type=list#search\\_for\\_members\\_list](https://www.icoca.ch/en/membership?view_type=list#search_for_members_list)> accessed 16 July 2017.

<sup>940</sup> ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (United Nations Office of the High Commissioner for Human Rights, 2011) <[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)> accessed 17 November 2014.

<sup>941</sup> John G. Ruggie, ‘The Social Construction of the UN Guiding Principles on Business and Human Review’ (Working Paper 67, Corporate Responsibility Initiative, June 2017) <[https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crri/files/workingpaper\\_67\\_0.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crri/files/workingpaper_67_0.pdf)> accessed 16 August 2017 at 7; Robert C Blitt, ‘Beyond Ruggie’s Guiding Principles on Business and Human Rights: Charting an Embracing Approach to Corporate Human Rights Compliance’ (2012) 48(1) *Texas International Law Journal* 33,

example, though both can be important in raising living standards and protecting human rights of the host population.

## **5.5 Conclusions on the Accountability and Regulation of PMSCs**

When examining the legal accountability and regulation of PMSCs several conclusions can be drawn from this Chapter of the study. The first of these is that attempting to ensure that PMSCs and their employers are held accountable for their actions presents complex legal and factual difficulties. The specific individual circumstances will significantly affect both the manner, and the extent, to which PMSCs and other actors may be held accountable and the regulations under which they operate. Despite this, however, it is also clear that there are legal avenues through which it is possible to establish accountability for PMSC activity including both state responsibility and international criminal law.

As the most frequently cited in relation to PMSCs, the doctrine of state responsibility provides a potential method for ensuring that states that employ PMSCs, remain accountable for the actions of their agents. Applied vigorously, this approach would confront security outsourcing head-on, however the vigorous application of this doctrine is not the current reality. While the doctrine is only applicable in cases where the conduct breaches relatively strong international obligations, most relevantly the Geneva Conventions and the UN Convention Against Torture, PMSCs have repeatedly been implicated in such activities.

Substantial questions do however remain over the practical application of the doctrine, with significant limitations on the circumstances in which this approach will provide an effective remedy. In particular, the current position adopted by the ICJ that the state must exercise “effective control” over the actual perpetrators has been criticised for being too strict in cases of privatisation

effectively requiring the state to intentionally direct the action in order to be accountable. The result is that this approach potentially benefits states who are negligent or willfully ignorant of their agent's actions, and potentially, therefore, promoting an “ask no questions” approach.

Considering the inherently dangerous role that PMSCs undertake, and their complex position within international law, it is possible that a more relaxed approach may be better equipped to deal with potential human rights abuses of PMSCs. In particular, there have been suggestions that within hierarchical structures a less stringent “overall control” test is more appropriate. Such an approach has significant support within both the legal and academic community, having been argued repeatedly that this represents the intention and purpose of state responsibility more accurately. Adopting this test, requiring only overall control over the contractors’ actions, even if they do not explicitly order them could more be more relevant in relation to PMSCs. Under this “overall control” test states could not outsource potentially violent activities, in which human rights abuses are a high-risk, and gain immunity through ignorance or negligence. Ultimately, however, as it currently stands state responsibility fails to adequately ensure that states are truly held responsible for the actions of their agents to the extent of actively requiring states to ensure PMSCs abide by their international obligations.

Beyond holding the states internationally responsible, one of the strongest manners to establish legal accountability for the actions of PMSCs would be to ensure that those “most culpable” are held criminally liable. Such an approach must draw an appropriate balance in imposing individual accountability on individuals who under their control, physically perpetrate illegal acts and re-emphasizing the importance of individual culpability. In relation to PMSCs however, as the association is voluntary in nature, a balance must be drawn between what a person actually knew and what that person should have known. Considering this, while traditional modes of liability, in particular CR and CTCP, offer potential avenues for prosecuting employers for crimes committed by PMSCs, both suffer significant limitations. The reliance upon a level of

knowledge can leave employers able to avoid liability by virtue of willful ignorance, or by intentionally distancing themselves from the physical perpetrators. It remains unclear how these theories may be applied to individuals in commercial leadership positions which, for the purpose of the PMSC activities may be crucial. Ultimately, however, the biggest problem faced in attempting to utilise international criminal law for the actions of PMSCs is the political will and capabilities to actively prosecute.

Alongside establishing accountability, the growth of PMSCs must be met by a strong regulatory framework with the Swiss Initiative of the Montreux Document and ICoC the most prominent among these. While the Montreux Document is often considered as a regulatory attempt to be unique in scope, in truth both the strengths, and weaknesses, of the Document lie in the application of pre-existing International Law. While state responsibility remains an essential aspect of a state-centric international legal regime, its application and effectiveness are limited increasingly in scope by the proliferation of private actors in general, with the market for security mirroring this more general trend. The clarification regarding the legal status of PMSCs is an important distinction to be made, although arguably primarily for the protection of PMSCs, rather than for the civilian populations in which they work. Furthermore, as the Document applies only to situations amounting to armed conflict this immediately prevents it from being relevant to the majority of PMSC activities. While this distinction is important for the purpose of IHL, when applied to private actors operating in complex environments across the globe the distinction becomes less relevant and can lead to arbitrary distinctions between the obligations depending upon where contractors are employed. Beyond this, the Montreux document relies overwhelmingly on the doctrine of state responsibility and as a result suffers from both the same positives and negatives as discussed above.

Finally, a more expansive regulatory approach directed at PMSCs themselves has the potential to eliminate some of the worst aspects of the current security market, with the ICoC and

related Association capable of becoming influential on actors operating within the private security market. It is positive therefore that they provide a relatively thorough and wide-ranging framework for good practice within PMSCS. This includes clear guidance on the use of force and the responsibilities that PMSCs have in storing and handling weapons and dangerous materials, issues which have consistently plagued PMSCs. Furthermore, the requirements on companies to undertake due diligence in not only ensuring their own personnel are suitable for the roles but also those of any sub-contractors is an important requirement considering the increasing use of localised sub-contracts in order to fulfil contractual obligations. Despite this, however, there remain significant obstacles to the effectiveness of the approach. Central among these is that due to a lack of strong enforcement measures, the success of the ICoC relies heavily upon PMSC clients requiring compliance and certification as a pre-requisite for employment, otherwise the Codes enforcement is limited. Similarly, there are wide-ranging questions as to the suitability of self-regulation within the private security industry as a whole, with the approach potentially more suitable for industries that are not related to functions considered so central to the state. Furthermore, it is clear therefore that while self-regulatory approaches, and the ICoC specifically, are positive steps in ensuring that PMSCs recognise their responsibilities and commit to fulfilling these, this approach cannot effectively establish legal accountability for PMSCs actions.





# CHAPTER SIX

## TOWARDS A UNIQUE TYPOLOGICAL CLASSIFICATION OF PMSCs

### 6 Introduction to the classification

In light of the data produced by the country case studies, and the critical analysis of existing legal and regulatory frameworks it is clear that current approaches to the issues posed by PMSC suffer from significant inadequacies. This research suggests that underlying many of these difficulties is that, despite the exponential growth of PMSCs in both size and activities, much academic and political dialogue relating to them has often relied upon overly-simplified and arbitrary distinctions in order to either group or isolate specific contractors in a manner that conforms to a predisposed position. As a result, however, much of the current discourse on PMSCs fails to fully examine the factual disparities within PMSCs, instead seeking to shoe-horn them into existing political and legal frameworks. This thesis, therefore, seeks to undertake a more rigorous analysis of the nuances within private actors and establish an original classification system capable of differentiating PMSCs with reference to the theoretical framework and empirical data identified in the preceding chapters of this work. To do this, this chapter will begin by critically examining some of the existing classification systems used within PMSC discourse, in order to identify the weaknesses that any new approach must avoid. Thereafter it will establish the methodological framework that this study will utilise to design its classification system, establishing the characteristics required of such an approach.

## **6.1 Current Classification and Definitional Approaches**

Taking note of the literature on the use of PMSCs, there are several approaches to defining and distinguishing PMSCs, and their activities, that have become prevalent within the current discourse. The first of these, and the most common approach within the literature, is to discuss PMSCs within either the privatisation of security or within the context of warfare. Within works adopting this approach, there are a myriad of motivations from both legal, political and practical perspectives however, this work will seek to show that regardless of these, the approach results in unavoidable inconsistencies when considered with reference to existing factual circumstances. The second approach to distinguishing PMSCs, which while similar and sometimes used concurrently is the differentiation between those contractors who work in “conflict zones” and those who do not. While there are legal implications under international for which this distinction is important, it fails as a more generalised approach to classifying PMSCs. The final approach is to define PMSCs by reference the specific tasks they undertake. This approach, which is sometimes combined with the military/security distinction, undoubtedly provides positives in examining PMSCs however, the lack of contextual and stakeholder specificity is an inherent weakness within this approach that disregards important structural issues.

### **6.1(1) Military or Security Exclusivity**

The first, and most common approach within PMSC literature, has been to distinguish between a security or military approach. Specifically, since the emergence of modern day military style contractors in the form of Executive Outcomes in Africa, and more recently Blackwater in Iraq, there remains an overarching tendency to exclusively separate those actors who work within the “military” or those within the “security” sectors. One of the earliest and enduring studies of the

modern PMSC market P.W. Singer's *Corporate Warriors*<sup>942</sup> exemplifies such an approach. While Singer identifies the numerous uses of PMSCs, including ostensibly non-military tasks such as "guarding pipelines and other commercial assets"<sup>943</sup> the study classes these all under the umbrella of military activities.<sup>944</sup> A similar approach is adopted by Elke Krahnemann in *States, Citizens and the Privatization of Security* who directly adopts a Singers taxonomy, and Deborah Avant in *The Market for Force*,<sup>945</sup> who similarly uses the military distinction as a starting point for a more specific differentiation. In comparison Abrahamsen and Williams, citing an abundance of scholarship on the private military companies,<sup>946</sup> instead focus their analysis solely on "private security."<sup>947</sup>

This approach however, has been described as "controversial"<sup>948</sup> for a number of reasons. Primary among these is the perception that this approach leads to seemingly arbitrary distinctions between military and security contractors.<sup>949</sup> The difficulties within this are exemplified by considering the range of operations undertaken by one single multinational PMSC, namely G4S. The operations of this organisation stretch across the globe, ranging from using unarmed security guards operating in the UK,<sup>950</sup> employing armed quasi-military groups throughout South America, and directly collaborating with the Nigerian Army in the Niger Delta.<sup>951</sup> Despite this, G4S fall within the category of a security firm, and as such are not considered within these examinations of PMSCs, nor would they be regulated under any potential rules designed for Private Military

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<sup>942</sup> Singer (n 18)

<sup>943</sup> Singer (n 18) at 9-17 (discussing the variations within the PMSC industry across the globe.)

<sup>944</sup> Singer (n 18) at 91. (Singer produces a typology of PMSCs based upon the proximity of the PMSC to the frontline of the war. As such he identifies, Military Provider Firms, those firms who undertake direct military actions citing Sandline International and Executive Outcomes. Military Consulting Firms, those firms who provide training and tactical advice without undertaking military operations. Finally, Military Support Firms, as those who provide logistical and technical support without directly affecting military combat.

<sup>945</sup> Avant (n 392)

<sup>946</sup> Abrahamsen & Williams (n 385) at 23.

<sup>947</sup> Ibid.

<sup>948</sup> Eugenio Cusumano, 'Policy Prospects for Regulating Private Military and Security Companies' in Francesco Francioni and Natalino Ronzitti (eds) *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*

<sup>949</sup> Ibid at 15.

<sup>950</sup> See e.g. What we Do, *G4S UK* <<http://www.g4s.uk.com/en-GB/>> accessed 15 September 2016.

<sup>951</sup> See Abrahamsen & Williams (n 385) at 139 -141 (Examining G4S's contract with Chevron Nigeria, and Shell. This includes working alongside and even commanding members of the Nigerian Joint Task Force, including members of the Nigerian Military and Navy.)

Contractors. In comparison, taking Singers definition of PMCs, the overwhelming majority of these contractors would provide logistical support only, with less than 15% of US DOD contractors performing services that may require force.<sup>952</sup>

## **6.1(2) Armed Conflict Operators**

The second approach to classifying PMSCs has been based upon the distinction between those contractors operating within armed conflicts and those which operate outside of these. To date this has been the most popular approach within attempts to regulate PMSCs, having been adopted most notably by the Montreux Document. To date the Montreux Document<sup>953</sup> is the most comprehensive attempt at regulation but, relates only to the use of PMSCs during armed conflict, thus excluding the vast majority of PMSC activity from regulation.<sup>954</sup> There is a clear rationale for distinguishing contractors within armed conflict due to the unique legal situation, the operation of International Humanitarian Law, and the generally accepted definition of mercenaries as exclusively within armed conflicts. However, while this provides a rationale for regulating PMSCs within armed conflict, many equally relevant reasons exist for regulating PMSCs outside of official armed conflicts. Considering the increasingly asymmetrical nature of warfare, the line at which a situation becomes an armed conflict is increasingly blurred. The potential complications posed by this are illustrated by the case study of Nigeria, where the situation in Northern Nigeria with Boko Haram would meet the criteria for an armed conflict,<sup>955</sup> and PMSCs assisting in it<sup>956</sup> would be covered by the Montreux Document, while the situation in the Niger Delta would not and PMSCs

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<sup>952</sup> Cusumano (n 948) at 15.

<sup>953</sup> ICRC & Switzerland, '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 & Switzerland, 2009) <[https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/voelkerrecht/Montreux-Broschuere\\_en.pdf](https://www.eda.admin.ch/content/dam/eda/en/documents/aussenpolitik/voelkerrecht/Montreux-Broschuere_en.pdf)> accessed 23 September 2016.

<sup>954</sup> Despite signatories to the *Montreux Document* including G4S and Securicor, the regulation explicitly considers only the "certain well-established rules of international law apply to States in their relations with private military and security companies (PMSCs) and their operation during armed conflict" Ibid at 9.

<sup>955</sup> 'Report on Preliminary Examination Activities 2013' (International Criminal Court, November 2013) <<https://www.icc-cpi.int/OTP%20Reports/otp-report-2013.aspx#nigeria>> accessed 17 October 2016.

<sup>956</sup> See 'Nigeria's Private Army: A Perception Study of Private Military Contractors in the War Against Boko Haram' (Remote Control Project, Oxford Research Group, 2016) <<http://www.oxfordresearchgroup.org.uk/sites/default/files/NSN%20report%20final.pdf>> accessed 18 December 2016.

operating alongside the same Nigerian military would not be covered.<sup>957</sup> Furthermore, differing interpretations of non-international armed conflict, under Common Article 3 of the Geneva convention, make the decision to classify a situation as an armed conflict flexible and could lead to uncertainty as to the status of PMSCs.

### **6.1(3) Task Differentiation**

The final approach that has gained significant traction within existing literature is the differentiation of PMSCs based on the specific activities they undertake. This is often combined with either of the above distinctions to create separate classes of tasks based on PMCs and PSCs. Singer, therefore, having differentiated between military and security roles further, divides PMCs, primarily in relation to the contractor's direct proximity to frontline combat situations. This result of this approach was to identify Military Provider Firms, Military Support Firms and Military Consultant Firms. Similarly, Schaub Jr. and Kelty's edited collection *Controlling the Corporate Warrior*<sup>958</sup> relied upon a task-specific determination derived from the Private Security Database,<sup>959</sup> a public data set on the use of PMSCs between 1990 and 2007, which distinguished 12 separate PMSC tasks ranging from combat operations and intelligence through to humanitarian aid and weapons disposal.<sup>960</sup> Distinguishing between tasks clearly has positive features allowing a differentiation between disparate tasks. However, the failure of this approach to consider the environment in which PMSCs are operating can prevent this approach from achieving its aim of uniformity with a brief examination of even the PSD's highly specialised distinctions shows how this can lead to anomalous results. Taking the example of "quasi-police tasks" if this were applied to the three case studies the functions fulfilled by those in Afghanistan,<sup>961</sup> where the police are tasked with countering the insurgency, would be vastly different from those in Peru,<sup>962</sup> who may be

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<sup>957</sup> Supra at Chapter 4.2(2)(d).

<sup>958</sup> Schaub & Kelty (n 799) at 9.

<sup>959</sup> 'Private Security Database' (*Data on Armed Conflict and Security*) < <http://www.conflict-data.org/psd/index.html> > accessed 13 May 2015.

<sup>960</sup> Schaub & Kelty (n 799) at 9.

<sup>961</sup> Supra at Chapter 4.2(3)(b).

<sup>962</sup> Supra at Chapter 4.2(1)(b).

faced with largely peaceful environmental protestors, and both would appear similarly inappropriate if placed within the UK context. Clearly, therefore, while this approach is specific it fails to fully deal with the importance of the individual circumstances that PMSCs operate and as a result, can lead to anomalous classifications and seemingly arbitrary distinctions between the actors and their activities.

## **6.2 A New Approach**

It is clear therefore that the current discourse on PMSCs is limited in practical application and each approach has limitations and negatives. One of the central aims of this thesis is to provide a mechanism to more completely understand the implications of PMSCs in a manner that can provide an effective foundation for a regulatory framework. This study proposes that to achieve this it is necessary to take a holistic approach that considers the overall position of PMSCs in a manner that can accurately identify and classify PMSCs as a foundation for further study and regulation. In order to do this, the study suggests utilising a typological methodology in order to construct a classification system that can fulfil these requirements. The assumption is that a classification that is nuanced towards the specificity of the circumstances that permit PMSCs to operate and flourish is a pre-requisite if focused and effective mechanisms of scrutiny and regulation are to exist. The classification seeks to identify the operative distinctions within PMSCs at a foundational level, in order to identify their ability to directly affect human rights, and also the implication this may have for accountability and governance.

## 6.2(1) Typological Methodologies

Typologies are considered to be “well-established analytical tools in the social sciences”<sup>963</sup> in particular political theory and international relations. Legal studies however, have been much slower to accept and value their use. The most recognisable of the few that do exist is Weber’s conception of “Legal Thought”<sup>964</sup> which published posthumously in 1968 sought to establish a system of understanding the compulsion of law. Despite this, typologies have remained largely minimal within legal research, with few further notable examples of their use.

It is important therefore to understand the rationale for choosing a typological approach, including both the benefits that they can bring, along with the limitations on their use. To do this it is necessary to establish what we mean by typology within this study. In essence, a typology is a classification system that seeks to systematically establish a series of conceptual sub-sets or dichotomous “types” with minimal “within group variance.”<sup>965</sup> In order to do this, a typology “requires conceptualization along at least two dimensions,”<sup>966</sup> with the variations of combinations within these representing a unique type. The operative feature of typologies is the conceptual nature of their categorising features in comparison to taxonomies which adopt a purely empirical approach to categorise on the basis of their occurrence, regulation or other observable data. The reliance upon conceptual characteristics is beneficial in identifying different types based upon their qualitative features.<sup>967</sup> A typological approach therefore offers a number of clear advantages in the examination of PMSCs.

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<sup>963</sup> David Collier, Jody LaPorte, and Jason Seawright, ‘Putting Typologies to Work: Concept Formation, Measurement, and Analytic Rigor’ (2012) 65(1) Political Research Quarterly 217–232.

<sup>964</sup> Max Weber, *Economy and Society* (first published 1968, University of California Press; Revised Edition, 2013)

<sup>965</sup> Kenneth D Bailey, *Typologies and Taxonomies: An Introduction to Classification Techniques* (Sage Publications, 1994)

<sup>966</sup> *Ibid.*

<sup>967</sup> *Ibid.*

The first of these benefits is the ability to design and customise the typology through the selection of relevant characteristics and therefore, unlike the arbitrary nature of classifications utilised to date, adopting a typological approach allows the study to proceed from a more holistic examination of PMSCs. In this way, the study is able to identify and analyse not just the circumstances of the PMSCs use but also consider the role of PMSCs in relation to the pre-established conceptual frameworks and historical precedents that this study has identified. This allows the study to consider not just the specific instance of PMSC activity, but instead identify the relevant structural factors within this and classify them in a manner that can be extrapolated to all sufficiently similar PMSCs.

Alongside this, the first of these is that typologies function as a tool with which to “reduce complexity or achieve parsimony.”<sup>968</sup> In relation to PMSCs therefore, the ability of typologies to simplify the almost infinite varieties of possible types and uses for PMSCs, and reduce these to a manageable number of classes provides significant benefits to future studies of PMSCs and particularly, attempts to form regulatory frameworks. As has been evident throughout this work, among the most pressing issues faced by researchers considering PMSCs is the wide variance among the situations and types of PMSCs. A typology can reduce the complexity of these variations through the identification and selection of salient characteristics and dimensions.

Finally, the typological approach benefits as a result of its capacity to recognize “similarities among cases, and group similar cases together for analysis”<sup>969</sup> Therefore, while the typology reduces the number of combinations and types of PMSCs/PMSC activities it does so in a manner that identifies and highlights the similarities within the classes. Conversely, having identified the similarities between the groups, the use of typologies allows the research to simultaneously identify and highlight the differences between the groups. This means the subsequent research undertakes an analysis of these classes with a focus on the intra-class

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<sup>968</sup> Ibid at 12.

<sup>969</sup> Ibid at 12.



similarities and inter-class variances. For this reason, the use of typologies provides the ideal tool through which to compare and contrast types in a meaningful and analytical manner. Furthermore, through the use of Lazarsfeld's "pragmatic reduction"<sup>970</sup> the typological approach is able to reduce a large number of variables into smaller sub-sets. This pragmatic reduction consists of "collapsing contiguous cells together"<sup>971</sup> through the identification of *sufficiently similar types*<sup>972</sup> which share necessary relevant characteristics and interrelation and can therefore be classed together. It is this ability to concisely and clearly differentiate within meaningful *types* that provides the unique foundation from which this study seeks to present a classification system capable of forming the foundation of future research and regulation of the PMSC market. Specifically, through utilising this typological approach the study seeks to produce a manageable list of sufficiently similar types, that within each class the common issues posed are best confronted in a similar manner.

## **6.2(2) Conceptual Framework**

Having established the rationale for undertaking a typology, it is necessary to outline and justify the methodological approach chosen. And to do this, this typology works within the conceptual framework established in the study of the relationship between coercive violence and sovereign power. As such, the typology draws upon the conclusions established in Chapter One of this thesis, and adopts a methodological approach sympathetic to the interpretation of the position of private violence documented throughout this work. In particular, this study proceeds from the assumption that the use of coercive violence can be antithetical to the exercise of legitimate power. Considering the function of coercive violence, within the theories of Hannah Arendt and Walter Benjamin in particular, and considering the relationship between its exercise and legitimate power, the typological framework seeks to identify how the structural relationships that underpin the appropriation and exercise of coercive violence interact with and affect mechanisms of

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<sup>970</sup> Ibid at 13.

<sup>971</sup> Ibid at 27.

<sup>972</sup> Ibid at 5.

accountability and governance. In essence, the approach considers how traditional power structures can be circumvented or entirely subverted within the communities where PMSCs are active. This typological study, therefore, proceeds from the basis of identifying and examining the determinative relationships between the parties relevant to, or affected by, PMSC activity and identify potential imbalances within community power structures as a result of PMSC activity. Specifically, this analysis highlights the extent to which this private violence is able to prioritise the protection of one group's interests at the expense of another's rights through the use of external force, circumventing local opinions or beliefs, undermining social responsibility and accountability.

To this end, the study identifies three differentiating factors as particularly compelling and informative in understanding the power structures, local politics and human rights issues that they raise. The first of these is the relationship between the PMSC and the local community, in particular, whether the contractors are representative of the local population or external forces. The second is the relationship between the funding party and the local population, focussing upon the geographical location and public/private nature of the employers, in order to establish the nature of the relationship between the local population and the interests being protected. The final criterion analysed within this typology is the form of engagement undertaken by the PMSC, specifically the type of coercive violence required in fulfilling their security roles.

Having examined the factors that this thesis proposes as the foundation for a future typological system, it is necessary to consider how such a framework can be organised in order to establish a manageable and effective classification system. To achieve this, the typology undertakes a "reduction" in which the full range of potential combinations can be reduced to a manageable and practical number and categorised together as "types" on the basis of possessing sufficiently similar key characteristics. This study therefore seeks to identify, and thereafter group, PMSC into types that have are suitably alike and have a comparable effect on the human rights protections and be can practically and effectively, grouped together for the purpose of future regulation. In undertaking

this reduction process, it is particularly important that this study avoids the arbitrary distinctions that have hindered the effectiveness of existing classification attempts and instead remains focused on the conceptual framework and empirical data within this research. Specifically, these groupings must consider the practical effect of each particular type of PMSC has on the relationship between coercive violence and power and the ability of these to alter traditional power structures and undermine the mechanisms of accountability that are within these. In order to achieve this, the research identifies two requirements that this reduction process must fulfil. First, it must ensure that all the actors within each group are sufficiently similar that the type can be workable and practical for the future study or regulation of PMSCs. Equally important however, this typology must also be capable of explicitly identifying the specific structural difficulties posed by each group.

In undertaking this reduction process, this section will begin by outlining the parameters of each group, through identifying the specific classes included within each grouping. It will thereafter move on to identifying the specific characteristics within the group as a whole and the issues and problems that are associated with this. To ensure that this is achieved in a concise and clear manner, this study will begin by discussing the first distinction considered within the typological framework; namely the level of violence, with the contractor classed as either a defensive, reactive or offensive PMSCs. The first subset; offensive PMSCs, presents by far the simplest form of distinction, with only two further factors being instructive with the variation between local PMSCs and external PMSCs presenting sufficient distinction for the eventual classification. In particular, it is clear that due to the level of violence exercised, both of these groups would most likely be considered to pose serious threats to the local population regardless of their employer or status as private or public forces. As such, therefore the pertinent legal consideration is whether the PMSCs are local or external to the host population.

## **6.3 Conceptual Characteristics**

### **6.3(1) Form of Violence**

The first consideration in undertaking a typological study of PMSCs is the form and level of violence that they privatise. On a preliminary level, when examining the potential effect upon human rights protection, the greater the degree of violence undertaken by a PMSC the higher the probability of abuse. Indeed, the use of many forms of violence by PMSCs will cause their actions to be illegal according to national or international legislation, while the use of excessive force is in direct opposition to the protection of individual's human rights. However, potentially more instructive for this study is the correlation between a higher level of violence and lack of local support. In particular, it is clear that the use of high levels of violence is primarily related to situations in which there is significant local opposition to the activities being undertaken, or at least the manner in which they are being undertaken. In these circumstances it is clear that where a higher level of violence is used, it is to enforce their interests at the expense of the local population and therefore is similarly likely to affect the ability of the local population to counteract their actions or seek to protect their interests and rights. The use of violence against a local population is particularly likely to impede those individuals rights most prominently the freedom of expression and freedom to assembly. In the case studies above, it is clear that the use of high levels of violence was a direct response to the inability, or unwillingness to listen to the views and opinions of the local communities and was therefore used as a violent means of coercion. As such, distinguishing between the levels of violence used provides an excellent starting point for examining establishing a framework for the future regulation of PMSCs. To do this, the research proposes three categories of violence which are capable of providing a useful insight into the nature of the contracting firm's operations and of discerning the risk posed by their use.

### 6.3(1)(a) Defensive forces

The first distinction identified by this work, are termed “Defensive PMSCs.” These are identified by their limited use of violence in their activities, and it would be expected that these form the majority of PMSCs, in particular throughout the developed world in the form of private security guards. Their role incorporates the use of force only in a defensive manner, with their primary duty being to observe and alert public police forces when necessary. This thesis draws on a variety of sources to identify common restrictions on the use of violence by PMSCs to provide a guide for distinguishing this form of defensive PMSC. The ICoC guidelines provide that “personnel... take all reasonable steps to avoid force”<sup>973</sup> However, the use of force may be necessary so long as proportionate to the threat and appropriate to the situation.<sup>974</sup> Similarly, the Sarajevo Code of Conduct for Private Security Companies,<sup>975</sup> a European Union and UN Development Programme initiative, considers the use of force and firearms as potentially permissible. Both cite the *UN Basic Principles on the Use of Force by Law Enforcement Officials*<sup>976</sup> and *UN Code of Conduct for Law Enforcement Officials*<sup>977</sup> as guides to the appropriate use of force and firearms. Article Three of the UN Code of Conduct specifies that “officials may use force only when strictly necessary and to the extent required for the performance of their duty.”<sup>978</sup> The associated commentary explains this to mean that the use of force may be used as is “reasonably necessary under the circumstances for the prevention of a crime, or in effecting an arrest”<sup>979</sup> The UN Basic Principles similarly state that personnel should “as far as possible, apply non-violent means before resorting to the use of force and firearms.”<sup>980</sup> Both further stipulate that the use of firearms, in particular, should be excluded except when the “suspected offender offers armed

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<sup>973</sup> ICoC (n 873) at Para. 30.

<sup>974</sup> Ibid.

<sup>975</sup> ‘The Sarajevo Code of Conduct for Private Security Companies’ (SEESAC, 2006) <<http://www.seesac.org/f/docs/Private-Security-Companies/The-Sarajevo-Code-of-Conduct-for-Private-Security-Companies-EN.pdf>> accessed 23 August 2015.

<sup>976</sup> ‘Basic Principles on the Use of Force and Firearms by Law Enforcement Officials’ United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August - 7 September 1990)

<sup>977</sup> ‘Code of Conduct for Law Enforcement Officials’ UNGA Res 34/169 (17 December 1979).

<sup>978</sup> Ibid at Article 3.

<sup>979</sup> Ibid. at Commentary (a)

<sup>980</sup> United Nations Basic Principles (n 976) at Paragraph 4.

resistance or otherwise jeopardises the lives of others”<sup>981</sup> or in self-defence or defence of others against imminent threat of death or serious injury.”<sup>982</sup> Accordingly, adopting this approach to classifying defensive PMSCs would suggest that while the use of force is not entirely precluded it would only be utilised in the direct protection of property and their personal safety and according to the principles of proportionality. The expectation, therefore, is that the use of physical force will be the secondary and minimal function, with their presence as a deterrent being their primary role. When force is utilised it is expected that this will, barring exceptional circumstances, be non-lethal and severely limited, for example restraining until a public security organisation can assume control of the situation. Within this framework, several groups of PMSC would clearly fall within the defensive category, including the majority of European security guards. This would also include security at shopping centres, private residences and banks as well as cash transport guards, in effect accounting for a large majority of the private security sector.

### **6.3(1)(b) Offensive PMSCs**

The second group of PMSCs this thesis terms offensive PMSCs. These represent the most fundamentally violent contractors; in particular, they are distinguishable by the requirement that rather than reacting to provocation, offensive PMSCs utilise violence to pursue their goals. Offensive PMSCs therefore operate with the specific aim of using the violence at their disposal to further or enhance their employer’s interests against the local population. In establishing whether the PMSC is to be classed as offensive, this thesis utilises the approach adopted by the ICRC in establishing whether an individual is undertaking direct participation in hostilities. While the legal implications of this, are limited to cases in which the conduct takes place during an armed conflict,<sup>983</sup> for the purpose of this typology the guidance is equally illustrative in cases not reaching

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<sup>981</sup> United Nations Code of Conduct (n 977) at Article 3, Commentary (c).

<sup>982</sup> Ibid at Paragraph 9.

<sup>983</sup> Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Law (International Committee of the Red Cross, Reference Reports, February 2009) <<https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>> accessed 23 July 2017 at 11 (the Interpretive Guidance is concerned with IHL only). [Hereinafter ICRC Direct Participation Guidance]

the status of an armed conflict.<sup>984</sup> According to established interpretations of direct participation in hostilities, a non-member of the armed forces will be considered to be directly participating in hostilities if they fulfil a three-step, cumulative criteria. First, their actions must adversely affect the operations or capacities of the opposition group, or alternatively inflict death, injury, or destruction on persons or objects protected against direct attack.<sup>985</sup> Secondly, there must be a “direct causal link between the act and the harm.”<sup>986</sup> Finally, the actions must be specifically designed to directly cause the required threshold of harm and be directly in support of the party they are acting for.<sup>987</sup> It is clear that adopting this criteria will allow the typology to distinguish those PMSC activities which rely upon the actual use of violence to advance their employers’ cause. Furthermore, while this definition is taken from IHL it is clear that PMSCs have acted in a manner capable of fulfilling these general requirements outside of official armed conflicts. There is significant evidence of PMSCs using this type of violence against local populations in relation to disputed land, or the securing of secure mining concessions. Considering the Case Studies, the use of local militia by Shell,<sup>988</sup> in order to gain community drilling concessions would class as an exercise of offensive violence. The militia’s actions in demolishing homes and the deaths that resulted from the violence would fulfil the three requirements for direct participation.<sup>989</sup> Similarly, in the case of Freeport Mine in West Papua, the Indonesian security forces were paid over \$41 million by the Freeport McMoRan mining company, alongside a further \$9.6 million to private guards.<sup>990</sup> Their activities included forcibly removing the indigenous population from disputed mining lands and destroying their homes while they have been implicated in the death and serious injury of a large number of the local population.<sup>991</sup> This demonstrates that while the legal implications are not relevant outside of

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<sup>984</sup> See for example Jamie A. Williamson, ‘Challenges of Twenty-First Century Conflicts: A Look at Direct Participation in Hostilities’ (2010) 20(457) *Duke Journal of Comparative & International Law* 458 (discussing the difficulties posed by asymmetric or guerrilla warfare and terrorism to the strict interpretation of hostilities and direct participation).

<sup>985</sup> ICRC Direct Participation Guidance (n 861) at 46.

<sup>986</sup> *Ibid.*

<sup>987</sup> *Ibid.*

<sup>988</sup> See *Supra* at Section 4(2)(2)(d) “Local Militia”

<sup>989</sup> *Ibid.*

<sup>990</sup> Joanna Kyriakakis, ‘Freeport In West Papua: Bringing Corporations to Account for International Human Rights Abuses Under Australian Criminal Law and Tort’ (2005) 31(1) *Monash University Law Review* 95, 101; ‘Paying for Protection: The Freeport Mine and the Indonesian Security Forces’ (Global Witness Report, July 2005) 1-5.

<sup>991</sup> Paying for Protection, *ibid* at 9-12; Assessment Report on the Conflict on the West Papua Region of Indonesia: ‘An Overview of the Issues and Recommendations for the UK and the International Community’ (Politics of Papua Project,

situations amounting to armed conflicts, the test for direct participation remains a relevant consideration outside of armed conflict situations for distinguishing the actions of PMSCs.

### **6.3(2)(c) Reactive PMSCs**

The final group of PMSCs that this thesis identifies are those who fall between defensive and offensive PMSCS, which this terms “reactive PMSCs.” Like defensive PMSCs, reactive violence is premised upon the use of violence only when provoked, however, within this framework it is differentiated by two characteristics that present greater issues for the protection of human rights and the legitimate control of coercive violence. These issues manifest primarily from the effect the difference in the PMSCs violence and the reduction in their ability balance and protect the human rights of the local population against the interests of their employer.

The first of these differences relates to the level of violence required to elicit a violent response. Whilst defensive violence would require the direct protection of violence against the property of people, reactionary violence could relate to non-violent provocation. The second identifying feature is the level of violence used in retaliation to the provocation. Thus, whilst defensive PMSCs may be armed, if the use of potentially lethal violence is utilised in cases outside of direct self-defence, the PMSC must be considered a reactive PMSC. This means that we can clearly identify contractors who respond to either violent or non-violent with force disproportionate to the threat or risk posed as reactive PMSCs. A common example of this would involve the use of a PMSC to break up a non-violent protest or strike by workers. Considering the case studies, when the Peruvian police, under contract with Newmont mining,<sup>992</sup> used lethal violence and enhanced interrogation against non-violent protesters attempting to block access to the site, they were not acting proportionately and with the use of force as a last resort. Equally, however, as they were

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University of Warwick, July 2016) 19- 28; Kylie McKenna, ‘Corporate Security Practices and Human Rights in West Papua’ (2015) 15(4) Conflict, Security & Development 359.

<sup>992</sup> See Supra at Section 4.2(1)(d)



reacting, even if disproportionately, to an illegal activity and as result these acts would not be sufficient to amount to direct participation. Specifically, as a reaction to a provocation, these would fall foul of the requirement of being conducted specifically for the benefit of one party.<sup>993</sup>

### **6.3(2) Identity of the contracting firm**

Having established the level of violence used by a contractor, the second factor that this framework proposes, relates to the type of the PMSC, with this identity valuable in understanding the nature of the relationship between the PMSC and the public. This understanding assists in developing an accurate classification with several characteristics providing a dynamic method of categorisation. Particularly, identifying the type of PMSC utilised can highlight potential issues and conflicts within the interests of the parties involved, and provides an opportunity to evaluate the potential risk of human rights abuses by the PMSC. Two identifying characteristics are useful to establishing a classification.

#### **6.3(2)(a) Location of the PMSC**

The first characteristic is the geographical proximity of the PMSCs organisation, to the work they are employed to undertake. This criterion is significant for two reasons. The first of these is that like the employer, a local PMSC is more likely to be responsive to the needs and rights of the local population. As with the location of the employers, this consideration is not itself decisive. However, it provides an increased risk for two factors. The first of these is that psychological studies have concluded that levels of empathy decrease between different races and cultures with the effects becoming particularly prevalent within law enforcement activities.<sup>994</sup> This phenomenon has often

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<sup>993</sup> See Supra at Section 6.3(2)(b)

<sup>994</sup> Among many excellent studies see Brad W. Smith, Malcolm D. Holmes, 'Police Use of Excessive Force in Minority Communities: A Test of the Minority Threat, Place, and Community Accountability Hypotheses' (2014) 61(1) Social Problems 83; Nick A. Theobald, Donald P. Haider-Markel, 'Race, Bureaucracy, and Symbolic Representation: Interactions between Citizens and Police' (2009) 19(2) Journal of Public Administration Research and Theory 409.

led to forces from different ethnic background being implicated in atrocities so that the use of forces of different religions, ethnic or tribal groups has been resorted to in order to avoid conscientious objections. This effect can be seen when examining the use of security forces during the Arab Spring; significant research has proposed a direct correlation between the use of sectarian militaries and unsuccessful revolutionary attempts.<sup>995</sup> For example, the Egyptian army, comprised primarily of local Sunni Muslims with little sectarian separation from the population, refused to fire upon protesters when ordered to do so following a popular uprising against then President Hosni Mubarak.<sup>996</sup> In comparison, during the uprising in Bahrain, a majority Shia country, large numbers of foreign security forces were imported from neighbouring states and Pakistan, specifically Sunni.<sup>997</sup> Although direct causation is inherently difficult to attribute, it is unsurprising that the response of the Bahraini mercenary forces to the protests has been considered to be a particularly brutal crackdown.<sup>998</sup> Indeed, in the current catastrophic Arab uprising in Syria, the ability of the Syrian regime to remain in control has been almost universally attributed in large part to both the ability to draw upon sectarian divisions within the country,<sup>999</sup> and the use of Shia Iranian and Hezbollah forces to suppress protests and opposition forces.<sup>1000</sup> An arguably even more startling example of this occurred in 2011 when the Crown Prince of Abu Dhabi, Sheikh Mohamed bin Zayed al Nahyan, paid £529million to Erik Prince, former CEO of Blackwater, to set up and staff 'Reflex Responses', a private security firm used by the UAE to "thwart internal revolt, conduct

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<sup>995</sup> See e.g. Heiko Wimmen, 'Divisive Rule: Sectarianism and Power Maintenance in the Arab Spring: Bahrain, Iraq, Lebanon and Syria' (German Institute for International and Security Affairs, March 2014) <[http://www.swp-berlin.org/fileadmin/contents/products/research\\_papers/2014\\_RP04\\_wmm.pdf](http://www.swp-berlin.org/fileadmin/contents/products/research_papers/2014_RP04_wmm.pdf)> accessed 25 July 2015; Housam Darwisheh, Trajectories and Outcomes of the "Arab Spring": Comparing Tunisia, Egypt, Libya and Syria (Institute of Developing Economies, March 2014) <<http://www.ide.go.jp/English/Publish/Download/Dp/pdf/456.pdf>> accessed 25 July 2015; Daniel Silverman, 'The Arab Military in the Arab Spring: Agent of Continuity or Change? A Comparative Analysis of Tunisia, Egypt, Libya, and Syria,' (APSA 2012 Annual Meeting Paper, 2012) <<http://politicalscience.osu.edu/intranet/cprw/Silverman%20CPRW%202012.pdf>> accessed 25 July 2015.

<sup>996</sup> See Jean-Pierre Filiu, *The Arab Revolution: Ten Lessons from the Democratic Uprising* (Oxford University Press, 2011) 57; see also Anthony Shadid and David Kirkpatrick, 'Mubarak Refuses to Step Down, Stoking Revolt's Fury and Resolve' *New York Times* (New York, 10 February 2011) <[http://www.nytimes.com/2011/02/11/world/middleeast/11egypt.html?\\_r=0](http://www.nytimes.com/2011/02/11/world/middleeast/11egypt.html?_r=0)> accessed 14 July 2015.

<sup>997</sup> Filiu (n 996) at 81-83; Wimmen (n 995) at 6-11.

<sup>998</sup> Filiu (n 996) at, at 81-83;

<sup>999</sup> Maya Bhardwa, 'Development of Conflict in Arab Spring Libya and Syria: From Revolution to Civil War' (2012) 1 *Washington University International Review* 76; Brian Michael Jenkins, 'The Dynamics of Syria's Civil War' (RAND Corporation Report, 2014); Heiko Wimmen, *supra* note 120, at 6-21-23.

<sup>1000</sup> Benedetta Berti and Jonathan Paris, 'Beyond Sectarianism: Geopolitics, Fragmentation, and the Syrian Civil War' (2014) 16(4) *Strategic Assessment* 21, 25-27.

special operations and defend oil pipelines and skyscrapers from attacks."<sup>1001</sup> According to widely reported documents seen by a number of media organisations, this originally 800 person force, increasing up to 7,000 was to consist only of foreign “non-muslim” troops.<sup>1002</sup> On a more practical level, forces removed from the local population are likely to be distant from the views of the local population and able to insulate themselves from local pressures or dangers to themselves and potentially even their families. As a result, they are more likely to operate in direct confrontation with the local communities, thereby increasing the potential for disproportionate violence, and posing a greater risk of local human rights violations.

### **6.3(2)(b) Public or Private Contractor**

Whilst this distinction may seem contrary to the notion of the privatisation of violence, as the two case studies above suggest, it is clear that within the private security sector, nominally public security forces are increasingly important actors. Specifically, two scenarios repeatedly occur within security operations. The first of these is the growing use of public groups as PMSCs; through the increasingly common practice of private companies to provide funding and material support in exchange for direct control over public forces. This scenario has been particularly frequent where extractive industries operate in developing and increasingly neo-liberal populations of South America and South-East Asia.<sup>1003</sup> Severe, ideologically motivated financial cuts have left the police and army budgets insufficient for operational needs, with the result that private companies increasingly making up the shortfall. This poses a particular difficulty for the protection of human rights and the local population as rather than a PMSC operating in addition to the local public forces, the two are in essence one and the same. As both the case studies demonstrated this

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<sup>1001</sup> Mark Mazetti and Emily Hager, ‘Secret Desert Force Set up by Blackwater’s Founder’ New York Times (New York, 14 May 2011) <<http://www.nytimes.com/2011/05/15/world/middleeast/15prince.html>> accessed 18 March 2016.

<sup>1002</sup> Ibid.

<sup>1003</sup> See for example John Haller, ‘Overcoming the Past; History and Transition of Indonesian Internal Security Infrastructure’ (Graduate School of Public and International Affairs (GSPIA), University of Pittsburgh 2006-34); Charles Hawksley, ‘Papua New Guinea at Thirty: Late Decolonisation and the Political Economy of Nation-Building’ (2006) 27(1) Third World Quarterly 161; ‘Paying for Protection: The Freeport Mine and the Indonesian Security Forces (Global Witness Report, July 2005).

inevitably raises the possibility that those employed to police and protect the local population, instead work for groups whose interests can be in direct opposition. Furthermore, in such circumstances, when an individual's rights are violated or threatened by the PMSCs actions, or these actions step beyond legality, there will be no immediate recourse or protection. With the police in particular, their control over the operation of the criminal justice system can pose considerable difficulties for individuals seeking restoration or justice.

Equally problematic is the sub-contracting of public forces to secondary countries. In this situation, governments essentially hire or lease the violent potential of another nation as a replacement for, or supplement to, their own. This scenario clearly poses the same risks as the previously mentioned non-local PMSC. In particular, due to the high probability that such requests are made with a political or sectarian motivation, the risk of their use being tied to the suppression of local populations is increased as is the chance that they are expected to operate with a level of violence that the local public forces will be unwilling to use. The most notable current example of this occurred when in 2013, Colombia complained to the UAE that it was losing most of its senior soldiers to the UAE based PMSC "Reflex Responses"<sup>1004</sup> without any compensation for their training. As a result, an agreement was reached whereby the UAE would pay Colombia to hire the troops, as well as paying the troops themselves with the result that 1,500 Colombian army troops are currently "loaned out" to the UAE.<sup>1005</sup> This use of foreign forces drew particular international attention when it was revealed that hundreds of the forces had been deployed by the UAE in Yemen, including 450 Latin American soldiers,<sup>1006</sup> whilst the commander of the elite force is a retired Australian Special Forces commander.<sup>1007</sup> A similar agreement has been in place between Saudi

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<sup>1004</sup> Mark Mazzetti and Emily B Hagermay, 'Secret Desert Force Set Up by Blackwater's Founder' *New York Times* (New York, 14 May 2011) <<http://www.nytimes.com/2011/05/15/world/middleeast/15prince.html>> accessed 30 June 2016.

<sup>1005</sup> Melanie Bencosme, 'Future of Colombia's 1.5k Troops in the United Arab Emirates Back on the Table' *Colombia Reports* (Bogota, 20 June 2014) <<http://colombiareports.co/colombian-troops-uae-talks-time/>> accessed 14 July 2016.

<sup>1006</sup> Emily Hager and Mark Mazzetti, 'Emirates Secretly Sends Colombian Mercenaries to Yemen Fight' *New York Times* (New York, 25 November 2015) <<http://www.nytimes.com/2015/11/26/world/middleeast/emirates-secretly-sends-colombian-mercenaries-to-fight-in-yemen.html>> accessed 14 July 2016.

<sup>1007</sup> Rori Donaghy, 'Revealed: The Mercenaries Commanding UAE Forces in Yemen' *Middle East Eye* (Dec. 23, 2015), <<http://www.middleeasteye.net/news/mercenaries-charge-uae-forces-fighting-yemen-764309832>> accessed 10 July 2016.

Arabia and Pakistan for over a decade,<sup>1008</sup> while the Iranian Revolutionary Guard Corps has been employed by Bashar Al-Assad to supplement the Syrian Arab Army which has been devastated by the Syrian civil war.<sup>1009</sup>

### **6.3(3) Identity of the Employer**

The final factor concerns the identity of the employer and raises the issue of funding, specifically, where and from whom the funding comes. This information provides the basis for establishing the interests being protected and highlights potential issues and conflicts within these interests. As such this information is informative in understanding the level of accountability that the employer will feel to the local population, and their ability to ignore and override the interests of the local population. Two factors in particular provide the greatest indicators as to where the interests being protected lie and the threat to the rights of the local population.

#### **6.3(3)(a) Geographical location**

The first criterion is whether the actor employing the PMSC is local or external to the area in which the security operation is undertaken. In particular, this information is central to establishing whether the interests being protected are held by an organisation with links to the local community most likely affected by the actions of the PMSC. Whilst location alone is not conclusive as to the extent to which the organisation reflects and is responsive to the views and rights of the local community, it provides a useful preliminary consideration. External actors, in particular foreign or transnational organisations, are more likely to be removed from the views of the local

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<sup>1008</sup> Colin Freeman and Taimur Khan, 'Pakistan in talks with Saudi Arabia to send combat troops to protect the kingdom' *The National* (Dubai, 13 March 2017) (while numbers are kept confidential it is believed there are at least 70,000 Pakistani troops in Saudi Arabia at any one time).

<sup>1009</sup> Bozorgmehr Sharafedin, Ellen Francis, Iran's Revolutionary Guards reaps economic rewards in Syria *Reuters* (Beirut, 19 January 2017) <<https://www.reuters.com/article/us-mideast-crisis-syria-iran/irans-revolutionary-guards-reaps-economic-rewards-in-syria-idUSKBN1531TO>> accessed 12 April 2017.

population, and furthermore subject to interests, particularly financial interests, unrelated to the local population. Due to this remoteness, external actors are more capable of insulating their operation from local pressures and therefore pose a greater potential for infringing or violating local human rights. Shell's operations in the Joinkrana area of the Niger Delta evidence how the geographic *isolation* from an area can allow local views and pressures to be ignored with impunity.<sup>1010</sup> Similarly, the case study of Yanacocha indicates how multi-nationals within the extractive industry often fail to engage with local populations increasing the likelihood of community protests and conflict.

### **6.3(3)(b) Public/Private bodies**

Alongside this geographical categorisation, the most useful distinguishing feature of a PMSC employer lies in whether the actor is a public or private organisation. The importance of this split is twofold. The first of these lies once again in identifying the interests being protected by the PMSC. Specifically, if exercised by a public body, the issue is whether the interests are held in theory for the public good. By contrast, a private actor is unlikely to hold concern for the considerations of the local population in relation to the interest held. Directly related to this is the employer's accountability to the population affected by the PMSC activity. For example, it is clear that local public authorities are more directly accountable to the local population, whilst private actors are accountable directly to the company's owners or shareholders. As such, the rights of individuals are in theory more likely to be better protected by public bodies responsible to their citizens.

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<sup>1010</sup> See *Supra* at Section 4.3(2)(b)

## **6.4 Classes of PMSCs – Offensive**

### **6.4(1) Mercenaries**

The first reduction within this classification is the grouping of all PMSCs sharing the characteristics of offensive operations and external contractors, regardless of further distinctions, into a single classification that this study defines as mercenaries. Whilst mercenary is simultaneously a specific and vague term, this thesis proposes this to be both the most suitable and accurate classification for this type of PMSC, drawing from both common usage and legal parlance with reference to the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. Notably, this group does not distinguish between actors based upon who they operate on behalf of, nor whether the contractors are employed by a private or public organisation. Taking into account the rationale for identifying these criteria within the typology and the theoretical and historical framework for these choices, this study concludes that the externality of the contractor and level of coercion utilised provides a sufficiently related group of classes that they can functionally be considered within a single class. The first of these criteria is that the contractor be external, the fundamental requirement for all interpretations of mercenaries, which draws upon the representation of mercenaries as a form of externalising violence. For the purpose of this typology, the requirement of externality also negates the consideration of public or private contractors. As the purpose of considering this was to identify whether the private employment of the contractors undermined their public commitments, however, if the contractors are external this will not be applicable. The second element of this requirement is the use of offensive violence in exercising their coercive power over the local population. Adopting the theoretical framework established for this study, the consistent use of this high level of coercive violence is instructive in identifying these contractors as operating against the interests of the local population. The use of offensive violence suggests that the PMSCs are seeking to support, or sustain a “tyrannical” or “purely violent” regimes to suppress a conflicting form of legitimate power. This also ensures that regardless of the employer, their consistent reliance upon this level of violence negates any public accountability, with the identity of the employer therefore not being instructive in distinguishing

between these groups. As such, these two characteristics, location of contractor and level of violence, are sufficient alone to constitute a class of PMSCs with this class possessing the characteristics that have been so central to ensuring mercenaries are illicit within international law. Specifically, this class clearly represents an attempt to use a foreign force as an instrument to suppress the democratic control over the states coercive violence. This combination fundamentally alters the state monopoly over violence and undermines the social contract by externalising the exercise of coercive violence, circumventing public accountability and supporting the use of coercive violence to exert domination over the population.

In considering this class, however, it is important to note that this group does not correspond directly to the current accepted legal definition of mercenary. It is clear that these external PMSCs would fulfil the requirement of not being a member of the party to the conflict, and is nor a “member of the armed forces of a party to the conflict” while being motivated by financial private gain<sup>1011</sup>. However, if adopting the purely legal definition of a mercenary, as per the Mercenary Convention, some of the cases identified within this class would have difficulty with the requirement of an “armed conflict.”<sup>1012</sup> This is a result of the typology seeking to redress the arbitrary distinction between “military contractors” and “security contractors,” solely on the basis of whether the contractor operates in non-conflict zones under the definition within International Humanitarian Law.<sup>1013</sup> In particular, with reference to the strict interpretation of non-international armed conflict adopted in Additional Protocol II to the Geneva Conventions, which requires the conflict to occur between the “High Contracting Party... armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this

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<sup>1011</sup> International Convention against the Recruitment, Use, Financing and Training of Mercenaries, A/RES/44/34 72nd plenary meeting, 4 December 1989, 44/34. Article 1, sections (b)(c) and (d)

<sup>1012</sup> Ibid at Article 1, Section (a) “in order to fight in an armed conflict.”

<sup>1013</sup> See ICRC, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’ (International Committee of the Red Cross, Opinion Paper, March 2008) <<https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 15 August 2016.



Protocol"<sup>1014</sup>. As previously discussed in Section 6.1(2) many of the areas and situations these offensive PMSCs operate would not reach this level of organisation and intensity.<sup>1015</sup> Similarly instructive would be the crackdown on protests in Bahrain in 2011, in which the Bahraini Government relied heavily upon foreign forces recruited from Pakistan and Jordan to violently suppress pro-democracy protests.<sup>1016</sup> The resulting clampdown killed over 200 and injured more than 3,000 suggesting that the approach taken would easily fulfil the criterion of offensive violence. Despite this, as the pro-democracy movement was a spontaneous, unorganised protest as part of the wider Arab Spring and as a result the situation could not have reached the threshold of a non-international armed conflict under IHL.<sup>1017</sup> Despite this, the UN's own Working Group on Mercenaries examined the situation in Bahrain.<sup>1018</sup> It is clear therefore that even within institutions of international law, this definition of mercenaries has become strained, with it frequently being condemned as unworkable. It is proposed therefore that within this typological study, the application of the term mercenary to external actors who undertake offensive actions is more workable, precise and accurate. This class is distinguished by the degree to which coercive violence is used to suppress the local population, and represents a form of coercive violence which is fundamentally incompatible with protecting human rights and ensuring accountability.

## **6.4(2) Warlord Militia**

The second reduced grouping within this classification relates to local PMSCs who operate in an offensive manner. Similar to mercenaries this grouping would apply regardless of their employer, or whether the contractors are publically or privately employed although their position as nationals would exclude them from consideration as mercenaries and therefore require a unique

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<sup>1014</sup> Additional Protocol II, art. 1, para. 1

<sup>1015</sup> Supra at Section 6.1(2) noting the different conclusions of the ICC in relation to violence in Northern Nigeria against Boko Haram, and Southern Nigeria in the Niger Delta.

<sup>1016</sup> Ahmed K Al-Rawi, 'Sectarianism and the Arab Spring: Framing the popular protests in Bahrain' (2015) 11(1) *Global Media and Communication* 25; Thomas Davies; Holly Eva Ryan; Alejandro Milci, *Protest, Social Movements, and Global Democracy Since 2011: New Perspectives* (Emerald, 2016)

<sup>1017</sup> See Section 5.4(1) for a detailed analysis of the requirements for an armed conflict.

<sup>1018</sup>

class. This typology therefore proposes that this group of PMSCs would operate under the title of “warlords”. While the terminology of the proposed classifications is clearly secondary in importance to accuracy and usefulness, it is important that the language is appropriate. Therefore it is important to consider the how “warlords” may accurately describe the type of PMSC. It is important to note that to date, “warlord” has not corresponded to an exact legal definition and has rather been associated with politics, sociology and international relations as a result it is its use within other disciplines and its common understanding that provides the most suitable basis for examining this. As a starting point, Merriam-Webster provides a functioning attempt at defining warlords as being “a leader of a military group” who also either does, or attempts to, “exercise civil power by force.”<sup>1019</sup> Within political science, “warlords” have increasingly been identified as actors who utilise coercive violence to exercise a form of authority, in particular where traditional power structures have disappeared such as those found in weak states.<sup>1020</sup> Additionally, the term militia is taken to mean a military force raised from within the local population. Both of these definitions represent and identify the key operative characteristics of PMSCs within this grouping of offensive but local actors. Considering this, it is suggested that “warlord militia” is a satisfactory classification and type.

These types of contractors provide particular difficulties in terms of regulation. As with mercenaries, the disproportionate use of violence illustrates that the contractors are acting in an attempt to violently coerce the local population in order to substitute submission for legitimate authority. This type of PMSC would draw parallels with Hannah Arendt’s regime of terror, with “the barrel of a gun” replacing legitimate power to enforce “perfect obedience.”<sup>1021</sup> Any attempt to enforce authority through coercive violence in this manner creates an immediate threat to the protection of individual’s rights.<sup>1022</sup> Furthermore, the use of this level of violence would ordinarily

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<sup>1019</sup> ‘Warlord’ (Merriam-Webster) <[https://www.merriam-webster.com/dictionary/warlord?utm\\_campaign=sd&utm\\_medium=serp&utm\\_source=jsonld](https://www.merriam-webster.com/dictionary/warlord?utm_campaign=sd&utm_medium=serp&utm_source=jsonld)> accessed 17 April 2016.

<sup>1020</sup> Kimberly Zisk Marten, *Warlords : Strong-Arm Brokers In Weak States* (Cornell University Press, 2012) At 1 -30 (describing Warlords as a Phenomena and explaining how they relate to weak states).

<sup>1021</sup> Arendt (n 107) at 98.

<sup>1022</sup> Arendt (n 107) at 97.

be expected to be considered unlawful in normal circumstances. As a result, contractors falling within this group would pose identical difficulties regardless of the identity of the employer. For example, the issues posed by Shell's use of local militias in the Niger Delta to control oil production are largely replicated by the use of "civilian militias" supported by the Philippines Government against local indigenous populations<sup>1023</sup> or even the Indonesian government in East Timor to suppress pro-independence East Timor at the turn of the 21<sup>st</sup> century.<sup>1024</sup> Indeed, as these examples demonstrate, the presence of these types of PMSCs usually indicates weakness or the complete failure of traditional state functions within the area in which they are operating. The employer therefore, whether private or public, could not claim legitimate authority over the population and would be utilising PMSCs in an attempt to suppress the legitimate views of the local population.

## 6.5 Classes of PMSCs – Reactive

The second stage within this reduction process is to consider those PMSCs who engage in reactive violence. These provide more difficulty in establishing groupings that are capable of distinguishing the variables that can accurately identify the operative features and potential difficulties posed, whilst remaining concise enough to be practically effective. Unlike those PMSCs operating in an offensive manner, the form of coercion utilised does not immediately indicate that the contractors are being utilised to suppress the local population. Instead, therefore, this reduction process must consider the relationships between the actors in order to establish whether, or in what manner the provision of private coercive violence is being utilised to alter power structures, or community relations. Furthermore, this requires a more complete consideration of the public/private split that can occur within both contractors and employers in order to establish how the use of

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<sup>1023</sup> Jim Gomez, Philippines to Investigate Militia Forces Linked to Attacks, *The Jakarta Post* (Jakarta, 27 September 2015) <<http://www.thejakartapost.com/news/2015/09/27/philippines-investigate-militia-forces-linked-attacks.html>> accessed 13 August 2016.

<sup>1024</sup> See Backgrounder: The Indonesian Army and Civilian Militias in East Timor (Human Rights Watch, 1999) <<https://www.hrw.org/legacy/press/1999/apr/etmilitia.htm>> accessed 13 August 2016.

PMSCs is interacting with traditional conceptions of state authority and the corresponding mechanisms of accountability.

### **6.5(1) Private Military Contractors (PMCs)**

The first grouping of contractors to be identified within this section comprises those contractors who are used to supplement the national military/security services through the use of either external contractors, or local privately employed contractors. This typology proposes those classes of contractors who are utilised in this manner be termed Private Military Contractors and grouped accordingly. As opposed to the generic term often utilised, the proposal here is for a specific class of PMSCs defined by the level of violence they use and their role in fulfilling traditional state functions in particular military or quasi-military roles. The first point to note is that this definition applies only to PMSCs who act in a manner that places them within the reactive form of violence. This ensures that PMCs represent more legitimate forms of contractors in comparison to the exercising offensive violence as discussed in the previous section. As such, they would not fulfil the criteria to be classified as mercenaries. Regardless of this however, the use of external, or private contractors for the provision of coercive violence still poses problems for traditional notions of the state monopoly on violence and civil control of coercive violence. In establishing the classes that would be within this grouping, this study includes all external contractors who are employed by a public authority, regardless of their location of the employer. While this may originally appear counter-intuitive, this approach suggests that when utilised by a public authority, any contractors operating within this level of violence are undertaking a function that is fundamentally governmental, regardless of their externality to the location.

Notable examples of PMSCs who would fall within this grouping would include Blackwater and Aegis as utilised by the Coalition during the Iraq and Afghanistan Wars.<sup>1025</sup> This approach would have prevented the two-tier system of justice that allowed many contractors to avoid disciplinary measures when corresponding military personnel did not.<sup>1026</sup> However, as this classification would include the use of foreign forces to supplement the internal security apparatus it would similarly include contractors employed by the home state, with the Afghanistan government increasingly relying upon PMSCs in order to fulfil the security roles previously undertaken by Coalition forces.

In order to ensure that there remains equal accountability this approach would suggest returning to a traditional acceptance that all people undertaking these governmental roles should fall under governmental authority, including those employed in roles sub-contracted out to private contractors. This thesis proposes this approach to ensure that States, and governments, are more clearly considered to be in control of, and exercising, authority over forces, which while not regularised into the military or armed police are operating under a similar authority or military style command. Furthermore, unlike some current proposals for regulation, this does not assume an illegitimacy to the outsourcing of these roles and instead takes into consideration the legitimate and valid reasons that public authorities may sub-contract out these roles. In particular, it accepts the positive benefits employing external PMCs can bring, in particular to countries struggling with weak governance and lack of trained or capable citizens. However, this nuanced approach offers the significant benefit of ensuring that these PMCs are explicitly discussed within the framework of national security forces, offering an approach that directly addresses the use of PMSCs to

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<sup>1025</sup> Jennifer K. Elsea, Moshe Schwartz & Kennon H. Nakamura, 'Private Security Contractors in Iraq: Background, Legal Status, and Other Issues' (CSR Report for Congress, Aug 2008) <<https://fas.org/sgp/crs/natsec/RL32419.pdf>> accessed 3 January 2015.

<sup>1026</sup> The most significant among these was Abu Ghraib, where contractors who acted directly alongside military personnel could not be held liable while the military personnel involved received custodial sentences. *See e.g.* Mark W. Bina, 'Private Military Contractor Liability and Accountability After Abu Ghraib' (2005) 38 *John Marshall Law Review* 1237; 'Accountability for Abu Ghraib Torture by Private Military Contractors' (Center for Constitutional Rights, January 2015) <<http://ccrjustice.org/sites/default/files/assets/files/PMC%20factsheet%20january%202015.pdf>> accessed 3 January 2016. Other instances in which military personnel were not implicated but would have been disciplined for similar actions were frequent most notably at Nissour Square *see e.g.* Peter W. Singer, 'The Dark Truth About Blackwater', (Oct 2, 2007) <<https://www.brookings.edu/articles/the-dark-truth-about-blackwater/>> accessed 4 January 2016.

circumvent traditional notions of state responsibility and would require governments to accept command control over the actions of their legitimate sub-contractors. As a result, instead of requiring a new regulatory framework to be developed, these contractors should be regulated in the same manner as their corresponding public counterparts. This would ensure there is no regulatory or accountability benefit to employing private contractors over public contractors, while retaining the possibility for states to utilise a positive resource when applied in the correct manner.

### **6.5(2) Private Paramilitary Contractors (PPCs)**

The second class of PMSCs to be considered within those which operate in a reactive form of coercive violence are those who either through the contractor, or employer, retain an external element but which cannot be regulated by virtue of the public nature of their employer. This grouping would, therefore, include those contractors who are external to the host population but are employed by local companies, alongside local private contractors employed by an external company. This study proposes these privately employed contractors which operate in parallel to the state security apparatus should be grouped within a class of contractors named Private Paramilitary Contractors. Similarly, to PMC's this group of contractors pose difficulties by virtue of the external influence exerted over their activities and the corresponding disconnect with the local population. As such, the important distinction with this class is that at least one organisational level, whether employer or contractor, is external to the community in which they are operating.

Within the examples discussed within the preceding case studies, it is likely that Forza security provides the clearest example of these private paramilitary forces, with an external foreign company employing a locally based private force to provide security. Furthermore, this example provides an indication of the issues that repeatedly arise within these types of PMSC, with disregard for the local community or environment by the employer manifesting in overly violent actions. This type of PMSC is often therefore present in regions and situations in which there is widespread, local

opposition to the operations of the employer in the local area. As in the case of Forza security, this is often an issue concerning land and mineral rights in indigenous, or minority regions, where the financial benefits are not shared by the local population. Furthermore, in cases where local indigenous or minority groups are present, this type of PMSC increases the risk of the operations undermining the right to self-determination, and resource sovereignty<sup>1027</sup> of the local population. Related to this, the use of these types of contractors is particularly prevalent in situations in which the rights to freedom of expression and assembly, in the form of protests, often in relation to environmental or economic concerns, are infringed upon by a violent crackdown on protestors.

Considering the conceptual framework influential in designing this typology this disconnect between the community and the employer and contractor significantly increases the possibility that these contractors will utilise coercive violence in a manner contrary to interests of the local population. In doing so, these contractors would be considered to be exercising a form of violent authority over the population, undermining or the legitimate authority of the local government. These issues highlight the importance of externality as a factor in identifying and grouping PMSCs within this type, with the ability of the local community to influence the decision-making process, or being prevented from doing so by coercive violence, central to the issues posed by this type of PMSC. In particular, it is clear that the use of an external contractor by a private company increases the likelihood that local stakeholders are not being considered, or more likely are in opposition to the interests. Even reactive violence when employed either for external interests or by local employers who never the less feel the need to rely upon external contractors without a legal recourse is likely to undermine community interests. Furthermore, in these circumstances establishing accountability and imposing liability in cases where illegal acts have been committed can prove difficult. Unlike PMCs, these contractors cannot be considered to be acting under governmental authority, and therefore liability must be established beyond this. Attempts to

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<sup>1027</sup> Nicolaas Schrijver, 'Self-Determination of People and Sovereignty over Natural Wealth and Resources, Right to Development' (Office of the Commissioner for Human Rights, 2014) <<http://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIChapter5.pdf>> accessed 12 December 2016.

regulate this form of contractor must consider the most appropriate form of liability, paying attention to those who are the most responsible for the contractor's actions. Considering the high level of violence utilised, and the lack of direct accountability at government level, it must be considered that these PPCs require a higher level of scrutiny than similar PMSCs as they pose the possibility of exercising a degree of power over a region through the direct use of coercive violence. In particular, due to the private nature of these actors, any regulatory framework must specifically note the issues related to the right to self-determination, that can occur where private actors are able to exercise a degree of sovereignty over an area by virtue of coercive violence.

### **6.5(3) Private Community Militia (PCM)**

The third class of PMSCs identified within the reactive class of coercive violence are those PMSCs whose operations rely upon local private contractors, working for local private employers. This thesis, drawing upon the local connotation of the term militia, proposes identifying and classifying these PMSCs as Private Community Militia.

For this class of contractors two shared key characteristics make them a discrete proposition within the overall PMSCs classification system. The first of these is that both the contractors and the employers are based within the local community. Unlike, PMCs and PPFs, Private Community Militias are suggested to have much closer links to the community, with both the contractor and employer being local organisations. It is suggested therefore that these closer links with the local community would ordinarily ensure that the contractors are less inclined to utilise excessive force in dispensing their duties and furthermore that the employers, being based in the local community, are likely to face less community opposition. This combination of both locally based contractor and employer would particularly suggest that the use of violence is more likely to relate to smaller elements of the community, and the use of reactive violence is necessitated by the level of violence encountered. These forms of PMSCs are prevalent in a large number of countries, with South



America, in particular, experiencing a huge growth in these types of firms over the last two decades. Specifically, both Brazil and Argentina, where the police are often unable to provide adequate security for local businesses have large private community militias.<sup>1028</sup> They are also increasingly prevalent throughout Africa, where economic growth and wealth gaps have not been accompanied by a similar growth in public security forces. Among the most notorious of these Private Community Militia are the aforementioned<sup>1029</sup> O’odua People’s Congress and the Bakassi Boys.<sup>1030</sup> These semi-organised vigilante groups are employed by both local communities and companies to supplement the local police, who are considered insufficient and often plagued by corruption.<sup>1031</sup> Similarly, when the local police have proved incapable of discharging their duties, the local public authorities have employed these groups to restore community order. This has particularly been the case in areas affected by Boko Haram, with local councils preferring to employ local militias as security instead of relying upon federal police and army units which have a reputation for fleeing in the face of adversity.<sup>1032</sup>

While the local nature of these contractors can be a restraining factor in ensuring the PCM act reasonably and proportionately in relation to the threats faced, it must be noted that this can also pose a direct threat to the protection of fundamental rights within the region. Specifically, the use

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<sup>1028</sup> Paulo Jorge Ribeiro & Rosane Oliveira, *The Impact Of Militia Actions on Public Security Policies in Rio De Janeiro (Crime & Globalisation, Debate Papers, March 2010)* < <https://www.tni.org/files/download/CrimeGlobalization-paper.pdf>> accessed 16 February 2017; Luciana Araújo de Paula, ‘The ” Grey Zones ” of Democracy in Brazil: The ” Militia ” Phenomenon and Contemporary Security Issues in Rio de Janeiro’ (2015) *Authoritarian Spaces, (Un)just Spaces?* 8 < <https://halshs.archives-ouvertes.fr/halshs-01508806/document>> accessed 7 May 2017.

<sup>1029</sup> Nigeria Case Study, *Supra* at Section 4.2(2)

<sup>1030</sup> <sup>1030</sup> Adejoh Pius Enechojo, ‘Assessment of the Performance of Informal Structures of Community Crime Control in Metropolitan Lagos’ (2013) 14 *British Journal of Arts and Social Sciences* 37, 45.

<sup>1031</sup> Chris Udeze, ‘Addressing the Problem of Vigilante Operation in Anambra State’ <[https://www.academia.edu/8877692/Addressing\\_the\\_problem\\_of\\_vigilante\\_operation\\_in\\_Anambra\\_state\\_Nigeria](https://www.academia.edu/8877692/Addressing_the_problem_of_vigilante_operation_in_Anambra_state_Nigeria)> accessed 23 June 2017; Chinazor Queen Umeobika, ‘Synergy Of The Local Vigilante Group And The Police In Anambra State: A Proactive Step To Combat Crime’ (2012) 3 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 182.

<sup>1032</sup> Adebisi Kolawole Shittu, ‘A Conceptual Examination of Militia Movements and Challenges to Socio- Economic Development in Nigeria’ (2013) 14(6) *IOSR Journal of Business and Management* 19 <<http://iosrjournals.org/iosr-jbm/papers/Vol14-issue6/E01462937.pdf>> accessed 23 March 2017; Eromo Egbejule, ‘They’re Defeating Boko Haram But are They Nigeria’s Next Security Threat?’ (Integrated Regional Information Networks, 22 August 2016) <<https://www.irinnews.org/feature/2016/08/22/they%E2%80%99re-defeating-boko-haram-are-they-nigeria%E2%80%99s-next-security-threat>> accessed 22 March 2017; Nigerian Town Looks To Militias For Salvation From Boko Haram - Not Africa’s Once ‘Mighty Army’ *Mail and Guardian Africa* (17 November 2014) <<http://mgafrica.com/article/2014-11-16-nigerian-town-looks-to-militias-for-salvation-from-boko-haram-not-africas-once-mighty-army>> accessed 23 March 2017.

of community-based militia can exacerbate community tensions in particular in cases where ethnic or religious minorities are excluded or side-lined. The case of Nigeria's community militias highlighted this with tribes using these militias to harass and attack rival tribes, often using trumped-up allegations to build animosity between the groups.<sup>1033</sup> Similarly, both Christian and Muslim minorities have complained that majority religious-based community militia have persecuted them and been responsible for sectarian attacks.<sup>1034</sup> As such, while community-based security is generally more representative of the local community, this does not prevent them being utilised in a manner that negatively affects the lives of the members of the community.

Considering this, it is important to note the second key characteristics of PCMs is that the contractors should be privately employed. This is relevant to any attempt to classify these contractors for the purpose of regulation as it results in a force exercising coercive violence parallel to the official state security forces. As private contractors, the state authority over the contractors is exercised indirectly through regulation and legal accountability. Within this typology, this is particularly notable as it distinguishes the form of regulation required for these types of PMSCs, to that for otherwise similar types of PMSCs. Unlike PPFs, the home state is entirely responsible for the legal regulation and accountability for PCMs, however, unlike the other locally based PMSCs, the state does not necessarily exercise any direct control over their operations. Thus, two significant issues remain within the Private Community Militia model that any attempt to regulate should be focused upon. The first of these is that any adequate form of legal regulation of Private Community militia relies heavily upon a fair and transparent public justice system, with all components of the community equally protected. This is necessary to ensure that all members of the community can rely upon the justice system for the protection from and accountability for these contractors as well as compensation in cases where the contractors may have breached their legal rights. Essential to

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<sup>1033</sup> Egbejule, Ibid.

<sup>1034</sup> Elijah Okon John, & Maurice John Akpabio, 'Ethnic and Religious Violence in Nigeria and the Need for Moral and Political Solutions' (2016) 15 *Journal of Culture, Society and Development* 46, 47-49 <<http://iiste.org/Journals/index.php/JCSD/article/viewFile/28124/28870>> accessed 23 March 2017; Atare Otite, 'Ethnic Militia Threat to Democracy and Security in Nigeria' (2012) 3(4) *Journal of Alternative Perspectives in the Social Sciences* 809.

this however, is the requirement that the government and legal system are capable of exercising authority over the militias. For any attempts at regulation or accountability to be satisfactory, there must be adequate and effective enforcement techniques to ensure that the PCMs remains within lawful and proportionate means when exercising coercive violence.

The problems posed by this type of contractor, therefore, are particularly relevant if there is not a sufficiently robust rule of law in the region. One of the consequences evident in areas where there is insufficient enforcement has been the propensity for PCMs to switch between levels of violence if community resistance is encountered. Evidence has repeatedly shown that these private community militias can quickly transform into forces that closely resemble warlords when allowed to exercise outside or above the law. This problem has recently been highlighted by the difficulties faced in Venezuela, where local authorities had employed community militia to supplement the national police and army in maintaining state security. However, following political upheaval in early 2014, these community militia became essential to the violent crackdown on pro-democracy protests.<sup>1035</sup> Similarly, in Brazil, small local security militias originally conceived to provide additional private security in response to the threats from gangs have increasingly used violence as their primary method of operation. Instead of protecting the community they are increasingly considered as terrorising the local community<sup>1036</sup> to the point that they have been considered to pose a similar threat to that of the gangs themselves, including running extortion rackets and kidnappings.<sup>1037</sup> Considering this, it is clear that while PCMs are able to play an effective role within the security sector, they continue to pose significant challenges to ensuring their legality and

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<sup>1035</sup> Marguerite Cawley, 'Venezuela Plans to Double Size of Civilian Militias' *Insight Crime* (28 August 2013) <<http://www.insightcrime.org/news-briefs/venezuela-push-to-double-size-of-civilian-militias-poses-concerns>> accessed 17 February 2017.

<sup>1036</sup> Moritz Schuberth, 'Challenging the Weak States Hypothesis: Vigilantism in South Africa and Brazil' (2013) 20 *Journal of Peace, Conflict & Development* 38, 46-51 <<http://www.bradford.ac.uk/social-sciences/peace-conflict-and-development/issue-20/Iss-20-Art-8-Final.pdf>> accessed 24 March 2017.

<sup>1037</sup> Robert Muggah, 'The State of Security and Justice in Brazil: Reviewing the Evidence' (George Washington University; Elliot School of International Affairs, Working Paper no. 4, June 2016) <<https://brazil.elliott.gwu.edu/sites/brazil.elliott.gwu.edu/files/downloads/The%20State%20of%20Security%20and%20Justice%20in%20Brazil-%20Reviewing%20the%20Evidence.pdf>> accessed Mar 13, 2017 at 4.

accountability. Ensuring they operate lawfully and effectively relies upon a strong regulatory framework and a public authority willing and able to hold them accountable.

#### **6.5(4) Privately Seconded Paramilitary Forces**

Within the reactive form of PMSCs, the final type identified within this typological approach are those local public forces who are employed, either directly or indirectly by a private organisation. While to date little attention has been paid to this class of contractors who are largely considered to remain public forces, this study proposes that these be classed separately as Seconded Paramilitary Forces. These forces are therefore those contractors who are formed of public security forces who whether individually or as a whole group are funded by private actors. As such, the relevant criteria for grouping this class of contractors is the fact that they operate privately, that being for the interests of a private organisation, while maintaining a degree of the authority of the state.

These types of PMSC are prevalent throughout much of South and Central America where the army and police regularly supplement their income through working for private organisations, often still within their official capacity as state employees. The primary concern within this type of arrangement lies in the democratic control of coercive forces. This difficulty is particularly enhanced when the state apparatus is utilised in an overtly violent manner as within reactive forces. The use of state apparatus for private means gives the employer a disproportionate level of influence over the local population relative to the size of their stake in the community. Within the conceptual framework identified throughout this thesis, the ability of private organisations to call upon, through financial means, the capabilities of the state's coercive violence pose significant problems for maintaining an appropriate relationship between coercive violence and the ability to exercise power. Indeed, this form of PMSC raises the spectre of private organisations exercising sovereign power over a region, maintained purely by violent means. Furthermore, as the coercive force behind a

state's power, when public security forces are seconded to a private organisation, it diminishes that states ability to exercise authority over that organisation in a manner equal to that of others. As such, it is possible that this form of PMSC is capable of effectively elevating a company or organisation above the law. It is clear, therefore, that this form of PMSC is inherently detrimental to both the democratic control over coercive violence and the rule of law.

The case of Shell's use of the JTF is a prime example of this form of scenario, where through co-opting ostensibly public security forces, a company is able to advance its own interests, under the auspices of a public interest.<sup>1038</sup> The use of the Nigerian military and police by Shell, and other oil companies, to suppress protests about environmental concerns and corruption essentially allowed Shell to advance their financial interests at the expense of the local community. Most significantly however, they did this in a manner that effectively allowed them no legal or political recourse. Similarly, the case study of Peru identified situations in which mining companies have controlled entire battalions of the Peruvian army and been able to influence or control the decisions of Peruvian military leaders. In this case, this has led to the State military being used to suppress the legal rights of indigenous people, including the fundamental right to self-determination within their lands.<sup>1039</sup> This is almost identical to the use of Indonesian security forces by the Freeport-McMoran corporation in order to suppress protests by the native West Papuans who have long claimed the Indonesian government have ignored their rights.<sup>1040</sup>

Considering these examples, it is clear that this form of PMSC poses a unique difficulty for legal accountability and regulation. Within the conceptual framework that this study proceeds from, it is near impossible to state that this form of PMSC, which so fundamentally blurs the distinction

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<sup>1038</sup> See e.g. John Vidal, 'Shell Oil Paid Nigerian Military to Put Down Protests, Court Documents Show' *The Guardian* (London, 3 October 2011) <<https://www.theguardian.com/world/2011/oct/03/shell-oil-paid-nigerian-military>> accessed 2 June 2016.

<sup>1039</sup> Markets for Force, (n 469) at 57.

<sup>1040</sup> See e.g. Assessment Report on the Conflict in the West Papua Region of Indonesia, (University of Warwick & European Social Research Council, 2016); Kylie McKenna, 'Corporate Security Practices and Human Rights In West Papua' (2015) 15(4) *Security & Development* 395-285.

between power or authority, and rule through coercive violence could be legitimate. Even within cases in which there are legitimate reasons for this type of contractor and their actions have currently not been excessive or illegal, the possibility remains that they can challenge local power structures to the point of undermining democratic governance. Indeed, it is arguable whether any form of regulatory framework or avenues of legal accountability can ever effectively control this form of contractor, with the relationship between coercive violence and the exercise of power fundamentally transformed by the ability of companies to call upon the coercive apparatus of states, in a manner similar to that utilised during colonial periods.<sup>1041</sup> As the body responsible for establishing and enforcing the legal status of these PMSCs is directly involved in the relationship, it is difficult to prove that these regulations will remain applicable beyond convenience. Furthermore, as the instruments, or a portion of them, required for enforcing these rules are working for the organisation they are supposed to be enforcing against, it significantly diminishes if not destroys the coercive effect of the law against that one group only, effectively leaving them above the law.

## **6.6 Classes of PMSCs – Defensive Violence**

The final group of classes to be considered are those who utilise defensive violence. In general of course, PMSCs who undertake only defensive forms of violence pose less of a direct threat to the rights and lives of the local community. Despite this, it remains imperative to consider how the variations within the stakeholder relationships are able to affect the local community and the ability of the state to protect the competing interests of the various stakeholders.

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<sup>1041</sup> For a discussion of this see e.g. Katerina Galai, 'Companies of Past and Present: Lessons from the East India Company on the Use and Regulation of Private Forces Today' (2016) 4(2) Legal Issues 1.

### **6.6(1) Privately Seconded Security Contractors**

The first group within these are those local public security forces who are subcontracted out to, or funded by, private organisations. This system classes this group as privately seconded security. Much as their corresponding class within “Reactive PMSCs” these are common in much of South and Central America, however, unlike the PSPs they are also much more prevalent in the global North. In particular, this form of relationship is common for cases in which private organisation require disproportionate security to the community as a whole. Generally, however, these are short-term arrangements with the most common examples including payments by Sports teams and performers to provide additional specific police for crowd control. Through the use of defensive violence, these forces do not often pose a direct threat to the protection of the local community. Despite this, they continue to present difficult issues when considering the role of coercive violence within the state. In particular, with budget cuts for central government roles like policing being cut almost universally across the world, the use of public services by private individuals raises the issue of a two-tier public safety system which rather than being utilised to coerce one group through inaction, is able to leave them exposed through inaction.

### **6.6(2) Outsourced Public Security Contractors**

The second group within the defensive class are here are those private contractors, whether local or external, who are employed by a public authority in a manner that the public security services would ordinarily be expected to perform. These are one of the fastest growing groups within the PMSC spectrum, with governments and local authorities across the globe increasingly turning to private contractors to substitute for the shortfalls within their provisions. The Department of Homeland Security utilised over 20,000 private security guards to protect federal buildings across the United States, while the use of private contractors to protect foreign embassies is now almost universal. This “Outsourced Public Security” raises several issues for understanding the basic functions of the sovereign state. The decision by states to remove their monopoly over

legitimate coercive violence through privatising one the basic functions of statehood has raised general questions as to the role of the State in the 21<sup>st</sup> century. Within this study in particular, this poses substantial consequences for the position of state-centric international legal regimes, particularly human rights. The state-centric application of human rights obligations has led to claims that this outsourcing has weakened human rights regime.<sup>1042</sup> In particular, when these security forces break the law or over-reach their jurisdiction, without a showing of endemic or widespread it can be difficult to hold the government to account in the same manner as in those cases where the employees are directly under the authority of the government.<sup>1043</sup> Resultantly, this thesis proposes that within this class the key requirement of any regulatory approach is to ensure that the outsourcing of state functions cannot be undertaken with a view to reducing the legal burden accountability for state functions. Instead, while outsourcing may occur for a number of legitimate reasons, legal frameworks must be established to ensure that when this occurs, both the organisations exercising coercive violence on behalf of a state remain liable for their actions and more essentially, the State remains ultimately accountable for the actions of their agents.

### **6.6(3) Private Security Guards**

The final group to emerge from the typology are Private Security Guards. These are those contractors who belong to private companies, whether local or external and are employed by private organisations to provide security to their operations, whether within a community in which they are based, or an external community entirely. As these guards rely only upon defensive violence, their type can be differentiated from those who exercise reactive violence, as the location of the employer and contractor is not a significant concern within these classes. In particular, the use of defensive violence alone does not represent a direct threat to the local population, and as such, the relationship

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<sup>1042</sup> See e.g, Simon Chesterman & Angelina Fisher (eds.) *Private Security, Public Order: The Outsourcing of Public Security And its Limits* (Oxford University Press, 2009) 25-44; Krahmman (n 255) at 17; Malcolm K. Sparrow, *Managing the Boundary Between Public and Private Policing* (National Institute of Justice; New Perspectives in Policing, 2014) <<https://www.ncjrs.gov/pdffiles1/nij/247182.pdf>> accessed 12 February 2015 9-20; Nicole Deitelhoff, 'Transformation(s) of the State? The State of (Private) Security and the Security of the State' (APSA Annual Conference, 2009).

<sup>1043</sup> Chesterman & Fischer, *ibid.*



between the local community and the security personnel are less significant than where a higher level of violence is identified. Instead, the difficulty posed by private security guards, while more mundane, is related to the role of the state more generally within a local population and the ability of the citizens to rely upon public authorities to provide the level of security expected within a state.<sup>1044</sup> This issue relates to the difficulty found when states abdicate their responsibilities under the traditional notions of a social contract to provide a monopoly over legitimate violence in order to facilitate the provision of security, both within a state's territorial borders and against any threats that they may face externally. Alongside this, the presence of private actors providing security services, requires the government of the region to be capable of implementing and enforcing strong framework for ensuring accountability and regulation of these PSCs. And where necessary, the local population should be able to rely upon a state's human rights obligations to ensure that they ensure minimum standards and establish accountability for these private actors.

## 6.7 Future Application of the Classification

When considering the future application of this classification, there remain several issues which must be addressed if this is to fulfil its purpose. The first of these is that as a form of qualitative analysis, this classification will be required to rely upon a degree of subjective analysis. This inevitably poses difficulties in applying the criteria in a not only a standardised, but also accurate manner, and defending the choices drawn throughout this. The most significant issue with regards to this subjectivity is experienced in distinguishing the level of violence used by a PMSC. This study suggests that decisions taken within this must be based on an organisational level, at least across the organisation within the specific location being considered. This is particularly

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<sup>1044</sup> See e.g. Jonas Hagmann & Moncef Kartas, 'International Organisation and the Governance of Private Security' in Bryden, Alan; Caparini, Marina (eds.). *Private Actors and Security Governance*, 285, 288 – 300 (Geneva Centre for the Democratic Control of Armed Forces, 2006) <[http://dcaf.ch/content/download/36838/528893/file/annex\\_contributors.pdf](http://dcaf.ch/content/download/36838/528893/file/annex_contributors.pdf)> accessed Aug 21, 2016); Krahmann (n 255) at 17.

challenging as this requires identifying and distinguishing the PMSC behaviour and policy, from individual contractor actions. Ultimately however, adopting this approach is necessary for this study if the cases considered drawn, and classifications thereafter identified are to be capable of drawing broad class-based conclusions required for an effective typology. Specifically, this approach allows these more comprehensive conclusions to form the basis for effective regulation, while simultaneously maintaining the accuracy necessary to classify PMSCs within legal systems, a central requirement for the effectiveness of the system. This thesis suggests that the application of this requires utilising a stringent form of review in which overwhelming evidence is required for a PMSC to be classified as a more offensive form. This would require undertaking an objective analysis, balancing the available policy documents or guidelines of the PMSC or employer, against the verifiable data on their recurring behaviour, in order to accurately and factually classify the PMSC as a whole. Considering the Niger Delta example therefore, whilst Shell's policy guidelines suggest that all contractors maintain minimum behavioural standards, overwhelming evidence exists that certain contractors used violence as a means, rather than a reaction. Bearing in mind that Shell's funding continued after substantial evidence of the militia activity it is reasonable to conclude that whether by design or willful ignorance, the purpose was to employ offensive violence for their own benefit.

Alongside this, difficulties will undoubtedly be encountered in trying to classify both the PMSC and employer as local or external actors. Overwhelmingly MNCs utilise a web of local, and international legal entities to organise their activities with a host of legitimate reasons to support this approach. Resultantly, however, the distinction between local and external actors is rarely as precise as first expected. This is particularly obvious in the case of employers, where several layers of corporations and corporate ownership can exist to blur the relationship between directly related firms. However, the case studies in both Peru and Nigeria identify this problem with international PMSCs registering local subsidiaries in order to bypass national legislation, with many PMSCs exhibiting features of both local and external forces. It is therefore necessary to form an appropriate

approach for both employer and contractor. The central aspect of this is ensuring that the approach fulfils the requirements of this typology and as a result, it is necessary to return to the purpose of the criteria in order to consider how these distinctions should be drawn.

As a result, the approaches for judging the type of contractor, and the type of employer will necessarily vary to align with the divergent purposes of the criteria. The purpose of identifying the employer as local or external has been identified as “establishing whether the interests being protected are held by an organisation with links to the local community most likely affected by the actions of the PMSC.”<sup>1045</sup> This was particularly identified as the remoteness of external actors allows them to insulate their operation from local pressures increasing the possibility that their operations run counter to the local population's interests and that their respective employment of PMSCs is seeking to exercise a coercive violence in order to protect these interests. The central factor within this criterion therefore is identifying the location of the primary financial beneficiaries of the employer's actions, and the location at which decisions based upon these financial interests are primarily made. As an example of this, while Shell's business in Nigeria is conducted through local subsidiaries, the primary financial interests stemming from the business in Nigeria remains with the parent company based registered in London. As such, the beneficiaries of the interests that Shell's use of PMSCs are seeking to protect are not of the local community, but external and detached entities. For the purpose of this typology, taking into account the rationale behind including the identity of the employer within this, Shell would have to be considered an external actor, despite operating through a local company.

When constructing the typology the rationale for the inclusion of the location of the contractors is similarly based on the ability for the contractor to insulate themselves from the concern of local populations. This was particularly the case as local contractors are likely to share

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<sup>1045</sup> Supra at Section 6.3(3)(a)

community relations, experiences and even familial ties with those affected by their actions and are therefore likely to be more restrained in their use of coercive violence. As such, despite the similar wording to employer criteria, this typology requires a different interpretation of the distinction between local and external contractors. Specifically, unlike the employer, the decisive factor is not the overall base of the company but rather the location of the individuals who are responsible for directly exercising coercive violence. Ultimately, however, even this distinction can be difficult to draw as the extent to which a contractor is representative of the population they are working within can vary vastly between regions. As such, the use of foreign contractors in the United States American would be less problematic, if they were from the UK for example, than the use of national contractors would in other countries. For example, the use of Iraqi Shia paramilitaries by the Iraqi government have been subject to significant scrutiny for their role in sectarian violence and reprisals against Sunni communities. There cannot, therefore, be a one size fits all approach to differentiating between local and external with a subjective element clearly necessary. While nationality plays an important role, more localised considerations must similarly be considered alongside ethnic, tribal and religious considerations. Fundamental to this is a question of intention in choosing the location of their employees, with this decision resting on subjective elements. While employing contractors from a foreign country amount to external contractors, this can similarly be the case if the contractors are chosen from a different region in the same country. Within this scenario, the question therefore, turns on whether the contractors were chosen due to their disassociation from the population in which they are operating, as opposed to alternative legitimate reasons most notably economic factors, unemployment etc. This requires considering the overall trend within the contractors as opposed to individual situations or individuals.

## **6.8 Concluding Remarks on the Typology**

This section has sought to present a classification method through which PMSC activity can be more effectively identified and grouped, in a manner that accurately considers the unique

nature of each situation. Specifically, it is suggested that through the application of this method, future attempts to design and implement regulatory frameworks may be more targeted, and therefore successful, than current approaches. It is proposed that through adopting the typological framework identified within this method this study is able to identify and categorise PMSC activity in a manner that accurately reflects the operative characteristics and relationships that highlight potential difficulties or risks within their behaviour. Through addressing the severance of the exercise of violence from the local population, this approach examines the use of PMSCs in a manner that identifies the key relationships within modern PMSC use and provides a framework from which these can be examined. Through the application of this methodological approach, regulatory frameworks can be formulated in a more focused and targeted manner. In particular, through identifying and addressing the non-linear relationship between host populations, the employer and the contractor this approach is able to compensate for traditional difficulties in regulating PMSCs. Furthermore, utilising this approach increases the ability for future regulatory examinations to interact with traditional state-centric systems, including human rights, to establish legal and social accountability in a targeted manner and effective manner.

This thesis believes that this classification system will provide several key advantages over current attempts to distinguish or classify PMSCs. The first of these is that rather than relying solely upon the self-identification of the PMSC as many approaches have, this classification seeks to establish an empirical basis from which to distinguish types of PMSCs. The method presented within this chapter therefore, does not focus on arbitrarily distinctions between PMSCs based solely upon whether their operations are presented as military or security. Considering the increasingly ambiguous distinction between these two classes, the method adopted instead seeks to focus upon both the relationship between the host population and PMSC, and factual evidence of their activity as more indicative of the nature of the PMSCs activity. Through identifying the behavioural trends of PMSCs it is able to accurately reflect the manner in which the contractors operate.

Additionally, through identifying the relationship between the host population, PMSC and employer, this classification draws upon the conceptual framework to identify potential disconnects within traditional civil-security relationship. Through emphasising the ability of PSMCs to change the balance of power structures within societies and undermine traditional modes of public accountability. This approach to the classification is able to both identify their potential to directly affect the local population, but also highlight the secondary impacts of their use. The use of non-linear organisational structures can negatively affect attempts to establish local public accountability or increase the corporate responsibility of companies within their spheres of operation. Furthermore, these relationships can give an insight into the ability of private violence to exert undue influence over communities, particularly with regard to economic development and extractive concessions. Specifically, this classification provides a tool for analysing the propensity of certain types of PMSC, to be utilised to circumvent local attitudes, legal accountability and even direct action, in order to protect the interests of one party against another.

Finally, it is hoped that by focusing upon not only the direct actions of PMSCs, but also on the wider context in which they operate, this classification system will facilitate the examination of the long-term societal effects their activities can have, and enhance the wider discussion as to the nature of the relationship between legitimate violence and legitimate power.

# CHAPTER SEVEN

## CONCLUDING SUMMARY AND FINAL OBSERVATIONS

### 7.1 Introduction

Private military and security contractors lie at the intersection of many lines of inquiry that have come to dominate the international arena of the 21<sup>st</sup> century. They question the “Westphalian” system that has underpinned centuries of development in international law and sit within the growth of the movement towards globalisation and the perceived erosion, or dispersion of democratic accountability that accompanies it. Their operations often highlight the increasingly blurred line between civilian and military and the potentially arbitrary legal distinctions drawn in relation to “armed conflict.”

It is against the background of these distinct yet inter-related issues that this study has sought to examine the privatisation of coercive violence. This study has therefore sought to identify the practical implications of the proliferation of PMSCs for international law and the protection of human rights. By adopting an original theoretical perspective, reconsidering how coercive violence interacts with conceptions of sovereign power, it has sought to identify not just ramifications of privatisation within existing legal frameworks, but also consider the suitability of these approaches through the conceptual lens of legitimacy.

This research was shaped heavily by an uncomfortableness with the dominance of theories regarding the state monopoly over coercive violence and a perceived *priori* suitability of this as a

foundation for the evaluation of PMSCs. Specifically, relatively new theories, primarily grounded on the notion of strong and equal nation-states, that often implicitly placed violent coercion as the arbiter of legitimacy appeared inappropriate as the basis for a study on PMSCs. Instead, this thesis sought to undertake an original analysis of PMSCs through a detailed theoretical and empirical examination of the historical relationship between coercive violence and maintenance of power. Using this context, the thesis aimed to critique existing legal and regulatory frameworks and propose an original approach to the classification of PMSCs in a manner that identifies the operative characteristics that affect their roles within both legal and power structures. Specifically, it aimed to identify the criteria necessary for an accurate and comprehensive examination of PMSC activities with reference to established concepts of power, accountability and governance.

## **7.2 Concluding Summary of the Research**

In approaching this, the research was split into six sections. Chapter One sought to examine the role of coercive violence within notions of sovereignty. Noting the ubiquity of Max Weber's, sovereign monopoly over violence, as a starting point for examinations of PMSCs the work seeks to identify the function of violence within this formulation. In doing so it found that across the political spectrum, the control over violence has been seen as a legitimate form of top-down coercion from which sovereignty derives its power. Drawing on Walter Benjamin's *Critique of Violence* it sought to illustrate the problems with this approach, noting that the resort to violence as a foundation for power establishes the environment in which authoritarianism can flourish. This study therefore suggested adopting Hannah Arendt's distinction between violence and power as a framework for critically analysing the impact of PMSCs. It concluded by establishing that within this framework, PMSCs must be recognised for the potentially subversive nature of their activities, noting that they offer the ability to insulate the sovereign from the consequences of their actions. This has the potential to allow illegitimate power to flourish while disregarding the political and civil rights of their citizens.



Having established this theoretical framework, Chapter Two sought to undertake a historical study of the relationship between coercive violence and power, in order to provide empirical support, the conclusions drawn in Chapter One. It showed that while the modern European state evolved from the competing polities of city-states and feudal kingdoms they shared a common need for private violence. As this form of mercenarism became widespread throughout Europe, with authoritarian rulers relying upon it to enforce and extend their authority, it increasingly threatened their position often undermining and in some cases deposing the ruling class. The study showed that while states had sort to limit this subversive potential by monopolising coercive violence, this only became possible following the growth of the social contract. It was the establishment of corresponding rights to their pre-existing responsibilities that led to citizens vesting their collective violence in a unified sovereign. This proposition was advanced in support the conclusions drawn in Chapter One that the ability to exercise of coercive violence should not be considered the defining feature of legitimate power. Instead, rather than the monopoly over coercive violence making a sovereign, it was only when citizens empowered a legitimate sovereign that they renounced their claim to their personal violence. This proposition was supported further by drawing comparison with populations who remained tyrannically subjugated. In both the institutions of slavery and the colonial empire a form of pure, and often external, violence was employed to maintain illegitimate rule over a population.

Considering the development of an assumed state monopoly over coercive violence, Chapter Three sought to position the growth of PMSCs and the increasing legitimisation of their activities. It identified a combination of both practical and ideological factors that created the environment in which PMSCs have thrived. Central to many of these factors is the globalisation of world politics and the corresponding growth of supranational and multi-national institutions. Having established the environment in which PMSCs grew Chapter Four traced the practical effects of their growth. The first section of this demonstrated how globalisation and the growth of MNCs

had corresponded to an expansion in private security. Parallel to this, increasing insecurity and state weakness following the end of the cold war created a vacuum into which first mercenaries and then private military companies moved and as the demand for security grew private actors became considered to be increasingly legitimate. The second section of Chapter Four therefore presented three country case studies on the presence and role of PMSCs. Examining Peru, Nigeria and Afghanistan demonstrated the wide array of private actors now involved in the global security market. These case studies were designed to provide an empirical basis against which to scrutinise current modes of accountability and regulatory frameworks, identifying the difficulties with such disparate entities being collectivised under the umbrella term of PMSCs. Similarly, it demonstrated that many ostensibly private entities are ignored by the majority examinations despite their central role in many countries security sectors, primarily local private security groups who often fulfil a tradition function of the state outside of existing legal and regulatory frameworks.

Chapter Four used these case studies to provide factual data against which existing legal and regulatory frameworks were critically analysed. Among these were the doctrines of state responsibility and international criminal law. Both offered opportunities for holding not only the PMSC but also potentially their employers accountable for the actions. However, it was found that despite their potential suitability a range of legal and political factors had largely blunted their effectiveness. Establishing intent was shown to be particularly difficult for the employers of PMSCs, creating a situation where ignorance, and ambiguous working practices or relationships, are beneficial and capable of removing liability from PMSC clients. Beyond these legal approaches, Chapter Four examined the most influential international regulatory approaches within the PMSC market. While both the Montreux Document and ICoC are positive steps towards establishing a normative framework for PMSCs the Chapter identified key weaknesses within these. For the Montreux Document, many of these weaknesses stemmed directly from its basis in the existing legal doctrine of state responsibility. In comparison, the ICoC adopts a more direct approach to PMSCs, focussing on companies however, considering the state-centric nature of international law

the enforcement and punishment mechanisms within the ICoC remain limited and rely instead upon clients refusing to engage with non-compliant companies. More fundamentally, it is questionable whether regulatory frameworks drawn up largely in response to calls from western populations are a suitable standard to be imposed as a uniform approach on global populations, with the omission of economic, social and cultural rights indicative of the western focus of these regulatory frameworks.

Considering the limitations of existing avenues of accountability and regulatory regimes this study identifies the need for a more focused and specific approach to confronting the privatisation of violence. Noting that the range and type of actors falling under the umbrella term PMSC were too broad to be effective and that the common division between PMC and PSC often drew arbitrary distinctions between otherwise similar actors, this study sought to extricate an original classification system. In order to do this, the research drew upon the theoretical framework established and investigated in the first two chapters and combined this with the data derived from the case studies and the subsequent analysis of existing approaches. Through this approach the Chapter sought to develop a more complete and systematic classification system. To achieve this, the study adopted a typological methodology identified the operative distinctions between PMSCs with reference to the effects on accountability and power structures. Specifically, the study noted the importance of the identity of the PMSC, the identity of the client and level of violence utilised and identified eleven variations within these categories. Through a process of reduction, the forty-eight potential variations were grouped into nine final types of PMSC. The effect of this process was to produce an empirically based classification system which categorises PMSCs in a specific and accurate manner with reference to their ability to impact upon the human rights of host populations and the extent to which coercive violence may be used to replace legitimate power.

## 7.3 Notable Research Outcomes and Implications

From the outset, a central aim of this investigation was to adopt an original position in the debate surrounding the privatisation of coercive violence. It aimed to re-examine the common consensus that the use of PMSCs is primarily an issue for the state monopoly over coercive violence which, while often not explicitly acknowledged, is philosophically predicated largely upon the belief that at its foundation sovereign power is derived from the ability to enforce obedience through violence. This work was able to demonstrate that this is not a suitable basis for examining the effects of PMSCs which are able to not only exercise private violence, but also externalise it from the host population. Through a reading of the works of Walter Benjamin and Hannah Arendt this research was able to re-examine this relationship with a focus on identifying a more acceptable foundation for legitimate power. Adopting the Arendtian perspective that power and violence are axiomatic allowed the research to highlight the more foundational issues with PMSCs. Within this interpretation, the legitimate power of a sovereign is derived by virtue of their empowerment by the citizens, who retain the ability to withdraw this support at any point, delegitimising the sovereign. Accordingly, citizen security services provided an essential set of checks and balances upon the state monopoly on violence, allowing for its removal when it was abused. The use of PMSCs fundamentally undermines this reciprocal relationship. The import of external violence, free from the consequences of their actions, circumvents this inbuilt accountability and has the potential to subvert legitimate power. A historical examination of the use of coercive violence supports this conclusion, illustrating that illegitimate rule as a result of its inherent weakness, must rely upon private and external coercive violence in order to maintain this position. Traced from the Egyptian Pharaohs to the British Empire, unaccountable and autocratic regimes have almost universally relied upon external violence to suppress internal power. Through an original synthesis of theoreticians and historical analysis it is this under-examined phenomenon that the research demonstrated lies at the heart of the questions posed by the proliferation of PMSCs. Considering this, it is suggested that in the future, examinations of PMSCs must take note of the unique nature of coercive violence in order to effectively address the issues that this poses. While previous

literature has often alluded to the state monopoly on violence, rarely has the nature or purpose of the coercive violence been addressed, instead often being presented without examination or analysis. Going forward, the function of coercive violence as an independent concept must take a more central role within an analysis of PMSCs. The research proposes that in future the assumption that coercive violence is incumbent within legitimate power should be explicitly rejected as the ability to detach violence from its political setting undermines the mechanisms of accountability historically integral to this claim.

Alongside the theoretical study of PMSCs, this research produced a detailed investigation into the current market for security services, providing a unique empirical basis for an analysis of existing regulatory frameworks. By examining the security sectors in three divergent regions the research was able to draw upon substantial empirical data against which to test both existing regulatory approaches and modes of accountability within international law. The doctrine of state responsibility was shown as a plausible approach to confronting some of the most egregious PMSC activities. The practical application however was found to be limited by the current requirement for a state to exercise “effective control” in order to engage liability with many of the case studies demonstrating the restrictiveness of this approach to actual circumstances. This approach was found to be increasingly inefficacious as modern command structures and increasing combination of public and private actors have blurred the traditional state hierarchies upon which this approach was developed. Using the analysis of the PMSC environment, the work demonstrated how the less stringent “overall control” test could be incorporated into the doctrine of state responsibility in order to broaden the range of situations under which a state could be held liable for the actions of a PMSC. Importantly, it considered how in light of the increasing support for this approach, adopting it would not significantly affect or undermine the legitimacy of the legal regime. Similarly, drawing upon the empirical case studies, the work was able to demonstrate that adopting innovative approaches to modes of liability could transform international criminal law into a vehicle capable of confronting the increasing use of PMSCs. The study found that adopting approaches that were designed to

ensure that the most culpable are held criminally liable, would similarly provide the opportunity to establish criminal liability for those most responsible for the actions of PMSCs. Finally, this empirical data was used to demonstrate the deficiencies within current international approaches to the regulation of PMSCs. Both the contents and the application of the Montreux Document and the ICoC, while positive steps in recognising the needs for regulation of private violence, are substantially limited in their effectiveness by the arbitrary distinctions they draw based upon where PMSCs operate and how they are classified. Furthermore, the study suggested that while self-regulation and the UN Guiding Principles may be adequate for some multi-national industries, the unique nature of PMSCs, particularly noting the conceptual framework that this study espouses, means that top-down regulation should not be considered appropriate.

Finally, and most significantly, this research produced an entirely original typological approach for the classification of PMSCs. This drew together the multiple lines of inquiry throughout this study, incorporating the conceptual framework and the findings from the empirical data in order to establish the framework for this typology. The outcome of this approach was to identify nine specific “classes” of PMSCs, representing the clearest and substantial divisions between the numerous types of PMSCs. Specifically, each class was deemed to compose of actors who by virtue of the manner in which they operate and the effect that these operations may have on the host community, share sufficient characteristics as to give each group an individual nature. It is intended that this will allow each class to be studied and regulated together without losing the specificity of each class, over-generalising or drawing arbitrary distinctions.

## **7.4 Recommendations for Further Research**

This research began with the aim to reposition the current debate regarding the use of private violence, and more significantly, the role of the state monopoly over coercive violence as a feature of sovereignty. There remains significant scope within this aspect of the research to expand

upon this analysis. In future, for example, individual case studies may benefit from a broader assessment within this conceptual framework in order to examine not just the individual PMSCs but the structural basis upon which the privatisation of violence has been advanced.

The typology produced within this thesis was designed with the explicit intention to foster future research. In particular, while the study briefly examined the future regulatory approaches that this typology could support the primary intention within this piece was to establish the conceptual framework and collect sufficient empirical data that the method could be rigorously analysed and the rationale could be factually verified. Considering this, there remains significant scope for the development of this approach from a more doctrinal basis. Such research would likely take the form of testing current international law approaches to specific classes within the research. This was alluded to in the final chapter as the research considered how state responsibility may interact with different classes of PMSCs in particular, those within the reactive range. Similarly, it was suggested that the offensive range of PMSCs may frequently interact with international criminal law, and future research into adapting or establishing new modes of accountability could be beneficial in confronting the growth of private violence that shows no signs of abating.

While the typology was produced within an international framework, it would equally benefit in future from an analysis of how it interacts with the internal legal mechanisms of the state. The benefits proposed for this typological method are equally applicable to specific states and as a result, would provide a framework against which to analyse individual security markets and identify any issues within these.





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