DEPARTEMENT OF POLITICAL SCIENCE AND INTERNATIONAL RELATIONS

Private Military and Security Companies in Africa and the Politics of International Law: Responsibility of Body Corporates

A thesis submitted as partial requirement for the Master in International Relations and Diplomacy

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7 June 2024

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Content

Acknowledgement

I would like to express my appreciation to Dr. Yonas Ashine and Dr. Firehiwot Sintayehu of the Addis Ababa University Department of Political Science and International Relations for their effective leadership; Dr. Demeke Achiso, who makes our time in the department lively and participatory, and Dr. Solomon Mebrie, an exemplary gentleman who encourages new ways of researching politics, especially an interdisciplinary approach to international law and international politics. Not to mention, Dr. Fekade Terefe, whose advice, insights, and recommendations were invaluable throughout the research.

List of Abbreviations and Acronyms

AFRC Armed Forces Revolutionary Council

AMIS African Union Mission in Sudan

ASR Draft Articles on State Responsibility

CADSP Common African Defense and Security Policy

CCB Civil Cooperation Bureau

ECOMOG Economic Community of West African States (ECOWAS) Monitoring Group

ECOWAS Economic Community of West African States

EO Executive Outcome

FAE Fuel Air Explosive

ICC International Criminal Court

ICJ International Court of Justice

ICRC International Committee of the Red Cross

ICTY International Criminal Tribunal for the former Yugoslavia

IHL International Humanitarian Law

IHRL International Human Right Law

ILC International Law Commission

IPOA International Stability Peace Operations Association

MPF Military Provider Firms

MPLA *Movimento Popular de Libertação de Angola*

OAU Organization of African Unity

PMC Private Military Companies

PMSC Private Military and Security Companies

POW Prisoners of War

PSC Private Security Companies

RUF Revolutionary United Front

SSR Security Sector Reform

UNITA *Uniõ Nacional para a Independencia Total de Angola*

Abstract

The thesis examines the politics surrounding the regulation of PMSCs, which exempts companies from criminal responsibility. In addition to using secondary sources of data, the interdisciplinary analysis made use of international critical legal scholars' application of Article 38 of the ICJ statute. The findings of the research pointed out that the international community's conflicting political interests, particularly the divergent interests of Western and non-Western states, are the primary explanation why PMSCs are allowed to operate with impunity. The thesis further disclosed that although there is a general consensus regarding the existence of international law requiring states (hiring or territorial) to regulate the operations of PMSCs and that failure to do so results in the attribution of the PMSC's conduct to those states, the implementation of this law is inconsistent and seldom contradictory. Furthermore, it proved that home states should have been obliged by international law to regulate the operations of their PMSCs in order to effectively regulate PMSCs and put an end to the pervasive impunity they currently enjoy. The thesis claimed that in the unlikely event that an internationally binding agreement regulating PMSCs materializes, these companies will continue to violate human rights and operate with impunity.

Chapter One: Introduction

1.1. Background

Throughout much of the twentieth century, private, profit-driven military engagement in foreign wars was internationally uncommon since the citizen army was an established pattern for warfare. During Africa's post-colonial conflicts in the 1960s, foreign, autonomous and profit-driven personnel reappeared in the spotlight, this time linked with the lone mercenary "thug" who lacks morality and restraint and who is motivated "solely" by personal profit (Tonkin, 2011:12). They actively participated in both fighting against the liberation movements for self-determination and 'plundering the wealth of the African continent' (Del Prado, 2019). *Les Affreux* (also known as "The Terrible Ones"), featuring the notorious Irishmen "Mad" Mike Hoare and Frenchman Bob Denard, were the most famous examples (Singer, 2008:37). In addition to directly opposing emerging state regimes in Africa and stifling national liberation movements, mercenaries also caused disruptions to the UN's peacekeeping mission in Congo (Cassese, 1980). According to Singer (2004), and Percy (2007b:183), they even engaged in combat with the UN while it was operating in the Congo (1960–4).

Through Article 47 of the First Additional Protocol to the Geneva Conventions (Protocol I, 1977), which denies mercenaries the right to Prisoner of War (POW) status, states enshrined their abhorrence of mercenaries into International Humanitarian Law (IHL). A regional convention that outlawed mercenarism in Africa was concluded by the Organization of African Unity (OAU) in 1977 as well. Nevertheless, the international community was unable to establish a sweeping prohibition on mercenarism in international law, even though they condemned mercenaries on numerous occasions in the 1960s and 1970s (Tonkin, 2011:13). Since the issue surrounding Private Military and Security Companies (PMSCs) is a continuation of the debate on mercenaries, the discussion of mercenaries is pertinent to this study.

The early 1990s saw the emergence of the contemporary private companies. The end of the Cold War had the effect of making the great powers far more aware of the domestic political ramifications of military losses, particularly for reasons unrelated to the national interest, since there was no longer a threat to sway public opinion. Several states have adjourned conscription in response to this development (Singer, 2001-2; Adams, 2002; Singer, 2008: 49). On the

contrary, this progress was accompanied by an increasing interest for private participation. On the receiving end, the private sector emerged as an appealing alternative as outside assistance, both direct and indirect, dried up (Leander, 2006:43; Singer, 2008). According to Singer (2008), Zabci (2007), and Ortiz (2004), the neo-liberal revolution of the previous decades, that is, the normative change towards the 'marketization' of the public sector, may have been the most significant reason preceding the emergence of the private security business. The transformation of the citizen army is a result of the policy elites' adoption of neo-liberal ideology, which has caused them to reevaluate the relationship between the state and its citizens. The concept of the state's role in providing services to its citizens has changed, moving from 'government' to 'governance' (Rosén, 2008). While the state continues to be accountable for ensuring that a variety of services are available, it now supervises the delivery of those services rather than providing them directly through its own agencies (Alexandra, 2012) .

Many material and ideological breakthroughs had occurred prior to the French Revolution, providing the groundwork for the eventual shift toward citizen armies and the subsequent opposition to the enlistment of foreigners in the armed forces, both of which were entrenched after the revolution (Avant, 2000). As citizens became more and more viewed as representatives of their home states, states also had to assume some responsibility for managing private violence (Thomson, 1994; Avant, 2000). As a result, the international law of neutrality was created (De Bustamante, 1908; Thomson, 1994). This encouraged nations to forbid their nationals from enlisting in foreign military forces and therefore contributing to the reduction of the supply of hired foreign combatants (Thomson, 1994: 84; Tonkin, 2011:11).

This concept of neutrality later reconstructed, according to Rosén (2008), the 'reappearance of private extraterritorial force could not have occurred on such a scale without a restructuring of neutrality in international relations'. It is argued that private force may be more acceptable in some situations (such as peacekeeping or post-war reconstruction) because to its neutrality, in addition to the fact that coercive action does not require state attachment to be legitimate. This actually calls for a redefinition of what it means to be neutral (Rosén, 2008). These days, the highest authority does not necessarily mean issuing commands at the "state level". Indirectly and

through a number of methods, statecraft involves directing and controlling a dispersed network of actors and society functions toward the accomplishment of political goals (Rosén, 2008).

The trend of privatization of war has become so widespread and strong during the Iraq War that it is now considered impossible for the US and a growing number of other countries to wage war without the participation of the private military sector (Zabci, 2007). Though some early observers suggested that PMSCs could be crucial in bringing otherwise unwinnable civil conflicts to a close, it soon became evident that considerable international opposition persisted to private, 'offensive warfare' (O'Brien, 2007). As in the past, critics centered their arguments on two points of contention: first, the use of private force raises moral questions (Musah and Fayemi, 2000:234); second, the use of private force raises practical issues, such as the lack of state oversight over PMSCs and a lack of effective procedures for holding PMSCs accountable for misconduct (Zabci, 2007). As Zabci (2007) argues '[a] new set of regulatory mechanisms is required in order to solve the accountability problem of these companies. However, the colonialist objectives of the advanced Western states will probably obstruct the development of such regulation in international law'.

States are generally not directly liable for the actions of individuals unless they are state agents or an exception exists (ILC, 2001: Arts 4-11). On the other hand, it is less clearly established how companies can have 'international responsibility' for international crimes. Direct criminal responsibility for corporate actors was generally excluded from the International Criminal Court's (ICC) jurisdiction. Furthermore, at the moment, the potential extension of Article 16 of the International Law Commission (ILC) draft to cover complicity in corporate crimes is at best a recommendation '*de lege ferenda*' unsubstantiated by state practice (Guilfoyle, 2015). Measures aimed at controlling and regulating their activities has been at the origin of the development of international and regional (African) treaties (Del Prado, 2019). However, the presence of PMSCs in many conflicts has sparked a dispute about how attribution and "governmental authority" apply to them (Lehnardt, 2007). Despite the fact that there has been literature on mercenaries since time immemorial and PMSCs since their proliferation following the Afghanistan and Iraq wars, the causes of the international community's failure to come up

with international law that governs PMSCs- the politics- have been unfathomed. The objective of this research is to bridge this gap.

1.2. Statement of the Problem

Though it was a relatively recent development, the (re)emergence of PMSCs in late 1990s caught the interest of academics, particularly political scientists and international lawyers, who expanded the field's research as a furtherance of the study of mercenaries. This period did not signify the end of mercenarism; rather, it marked the beginning of a new era in which governments in both first- and third-world countries authorized and used the corporate form of private army (Krahmann, 2007). Prior research on the subject of PMSCs'/mercenaries' engagement in developing countries, especially those in Africa, has mostly focused on denouncing it (Zarate, 1998; Arnold, 1999; Musah and Fayemi, 2000; Adams, 2002). The phenomenon of private force crystallizing into PMSC, corporate formations, in late 1990s was the empirical outcome of this (Moesgaard, 2013).

The most contentious and pivotal event that led to the resurgence of PMSCs was their deployment in Iraq and Afghanistan. This was perceived as undermining the state's monopoly on legitimate use of violence, which generated controversy in the first decade of the 21st century (Avant, 2005; Leander, 2006). Avant (2005) is especially inquisitive about the effects that privatization has had on the control of violence. The 'why' behind the emergence of a 'private market for force' has been the subject of numerous academic works. Particularly, the end of the Cold War has been characterized as crucial for the private sector, along with the rise of low intensity conflicts, the strategic disinterest of western governments in suffering casualties in international operations, and the loss of interest in civil wars and ethnic conflicts (Shearer, 1998a; Avant, 2005; Singer, 2008).

Debates over how one regulates the use of PMSCs also surface during the wars in Afghanistan and Iraq (Kinsey, 2006; Chesterman and Lehnardt, 2007). Scholarly writings saw a dramatic shift from denouncing PMSCs to regulating them (O'Brien, 2007; Percy, 2007a). This time, in order to avoid the analytical locks of the earlier works, scholars discovered that they needed to engage in conceptual refinement in order to offer subtleties to the definitions of private force by developing taxonomies and subcategories of the private industry. In his 'tip-of-the-spear'

taxonomy of PMSCs, Singer categorized private force based on how close it is to the front lines of combat (Singer, 2001-2; Singer, 2008: 92- 93).

An indulgent approach to using PMSCs as a means of state was one important development in the debate over their efficacy. Empirically, the US use of contractors in Iraq and Afghanistan has been a major source of fuel for this discussion. A more 'pragmatic' viewpoint that investigated the circumstances in which private actors could properly assume the state's monopoly on the legitimate use of force was investigated. Proponents focused mostly on low-intensity conflicts and those in which the public opposes the use of military personnel (Shearer, 1998a; Kinsey, 2006). There were also opponents to any type of intervention (Avant, 2005; Renou, 2005). Renou (2005) asserts, in particular, that 'corporate mercenaries are not, and could not by any means, be agents for peace and development'. On the contrary, Carafano (2008) contends that the growth and use of PMSCs are inevitable because of their high level of service efficiency. According to Rosén (2008), efficiency and economy are valued over maintaining direct state control over the execution of foreign policy, including the application of coercive force.

The literature expanded its scope beyond military functions to encompass broader security practices of PMSCs (Avant, 2005; Singer, 2008). In terms of theoretical advancement, writers from this age place the phenomena of PMSCs within a larger framework for security administration, extensive theoretical discussions regarding the post-modern state, and the blurring of boundaries between the public and private sectors (Avant, 2000; Percy, 2007b). Regarding the analytical object, the literature diverges from earlier periods by concentrating instead on particular fields of security, what these fields are made up of, how power is distributed, and who is empowered or disempowered by these organizations (Leander, 2005a; Abrahamsen and Williams, 2011; Petersohn, 2017). Some argue that the idea that the state has a monopoly on the legitimate use of violence is treated as fact rather than construct, and similarly, viewing security privatization only through the lens of this state monopoly on violence ignores the additional effects of privatization on social, economic, and international relations (Kruck and Spencer, 2013; Taylor, 2015).

It is possible to actively engage with the activities of PMSCs and how these affect the formulation of dichotomies such as national/international, market/state, and military/security by

approaching the subject from a perspective other than state centrism (Leander, 2005a; Jones, 2006). For example Singer (2008) and Leander (2006) contend that international relations of diffused and dispersed authority replace the previous systems of international order and anarchy. On the other hand, Leander (2005a) and Jones (2006) argue that PMSCs possess 'epistemic power'. Because of their involvement in the security industry, PMSCs create security policies rather than just implementing them. Collecting and assessing intelligence for commercial enterprises or policy officials might be considered a different kind of epistemic power that influences decision making (Leander, 2005a). Abrahamsen and Williams (2011:93) interject that the corporate nature of the PMSCs not only broadens the range of services they provide and indicates that they have the resources and ideational ability to conduct business internationally. Therefore, an amalgamation of methods from the fields of criminology, sociology, and international politics is necessary to fully comprehend the intricacy of the private sector's engagement in security and its relationship with states (Abrahamsen and Williams, 2008a).

The formal end of the Iraq War provides a useful line of demarcation because the industry grew enormously as a result of military contracting in the wars in Afghanistan and Iraq, and because of their controversial involvement in these conflicts, which provoked outrage and criticism and demonstrated the impunity that PMSCs and their contractors enjoy in some volatile and armed situations (Human Rights First, 2008; UNHRC, 9 January 2008). New developments witnessed after the official end of Iraq war , the typology of PMSCs revised emphasizing 'the specific military characteristics of the PMSC, as defined by their provision of organized violence and the direct nature of their involvement within armed hostilities by adapting IHL principle of distinction'. The objective of such revision in typology was to justify greater oversight and closer regulation (Liu, 2015). Faulkner's (2017) study of PMSC interventions' impact on peace duration is part of such development. An empirical investigation was then conducted to look at the relationship between the kind of PMSC participation and the duration of peace that ensues in both major and minor civil wars (Radziszewski and Akcinaroglu, 2020; Petersohn, 2021).

The mercenary convention and IHL were examined in order to determine the legal status of PMSCs under international law after their proliferation in the wake of the wars in Iraq and Afghanistan (Fallah, 2006). The overwhelming involvement of PMSCs in both Iraq and

Afghanistan led scholars to conclude that, in the absence of appropriate regulation, the violations of human rights that have been observed during these wars will persist (Lehnardt, 2007; Human Rights First, 2008; UNHRC, 9 January 2008). Subsequent developments, with a focus on IHL, offered a thorough investigation of the legal framework that would be applicable to PMSCs operating in armed conflict (Tonkin, 2011; Cameron and Chetail, 2013; Moyakine, 2015).

It looks at the restrictions placed by international law on the use of private actors by states, moving the discussion past the issue of whether or not PMSCs are mercenaries. The writers explore topics like the relationship between direct involvement in hostilities and the use of force in self-defense, how PMSCs are obligated by humanitarian law, and whether individuals working for them are civilians or combatants (Cameron and Chetail, 2013). Both direct involvement in hostilities and membership to a formalized armed group are contentious concepts. This also applies to the definitions of internal and international conflicts (Mathieu and Dearden, 2007). In its Interpretive Guidance on Direct Participation in Hostilities, the International Committee of the Red Cross (ICRC) attempted to provide guidance for target analysis in the unorthodox and civilianized operating context of modern non-international wars (Melzer, 2008).

The application of effective control and due diligence principles is utilized to investigate the potential for attributing an act carried out by PMSCs to a state (Lehnardt, 2007; Cameron and Chetail, 2013). Frulli (2010) explored the doctrine of command responsibility's applicability to State officials who supervise private contractors as well as to managers and senior employees of PMSCs, who are increasingly employed to carry out important state functions in extremely complicated circumstances. A similar scholarly investigation has been conducted with respect to corporate responsibility (Martin-Ortega, 2008; Clapham, 2008). By modifying the international (ICC) and national tribunals to allow them to exercise their jurisdiction over non-natural persons (such as political parties or other legal entities), Clapham (2008) investigates the prospect of expanding individual criminal responsibility to corporations. The idea of complicity is likely to be the primary driver behind the expansion of criminal law's application beyond the individual (Clapham, 2008).

The international community has been interested in the debate that has taken place over the legitimacy of PMSCs, the standards that should govern their operations, and the best ways to

monitor their activities. Resolutions adopted by the General Assembly, several reports of the Commission on Human Rights and now the Council's 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; the thematic reports of special rapporteur of the commission on human rights; the 2005 report of experts on traditional and new forms of mercenary activities; the 2011 UN Guiding Principles on business and human rights; reports of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of PMSCs which continued until 2024 are some of the initiatives the UN engaged on. This processes resulted in the UN Draft International Convention on the Regulation, Oversight, and Monitoring of Private Military and Security Companies (UN Draft Convention) in 2009. When consensus was not reached, non-legal document, the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict (Montreux Document) is drafted by some states to regulate the activities of PMSCs.

Despite the international attempt to institutionalize PMSCs regulatory norms and the overwhelming research to link PMSCs activities to states, which concludes that the international legal regime on PMSC's regulation is insufficient; the politics underlying such endeavor is not investigated. The varied policies followed by international community regarding the regulation of PMSCs are the primary reason for the failed attempts thus far. Other than raising it as a side discussion, such diverse interest and manifestation is not systematically investigated in academics. By combining parts of literature that tackled the problem primarily as a side issue, the study attempts to show the politics behind institutionalizing the rules that regulate the operations of PMSCs.

1.3. Core Argument

The absence of an international regulatory institution for PMSCs is more of a political division than absence of a breach of human rights, as some analysts allege. This is supported by evidence that the PMSCs violated international law, notably international human rights, but were not held

accountable owing to political divisions over its regulatory mechanism. Such division is attested by previous attempts made to establish an international regulatory mechanism.

1.4. Objectives of the Study

Overall objective

Given that there is no international law that regulates the activity of PMSCs despite their role in African armed conflicts, the objective of the study is to investigate the politics that prevented the adoption of international norms that should have applied to PMSCs as well as the responsibility that should have ensued in cases where these companies violate international law.

Specific Objectives

1. The study examines the deficiencies of the normative efforts that have been implemented thus far to regulate PMSCs.
2. The study also looks into the debate surrounding the establishment of generally accepted standards that might regulate PMSC activity.
3. The research looks into the contentions that make it difficult to hold PMSCs or the relevant states responsible for violating international law (IHL and IHRL).
4. The study also looks at PMSCs' legal status, the extent to which their employees are accountable, and if any responsibility falls on them as a company.
5. The effectiveness of applying state responsibility principles to regulate PMSC operations is also examined in this study.

1.5. Research Question

Core Research Question

Why has the international community failed to establish an international monitoring framework that oversees the activities of PMSCs and holds relevant states and companies accountable, despite established PMSCs involvement in violations of international law?

Specific Questions

1. What are the shortcomings of the rules that have been put in place so far to control PMSCs operation?

2. What are the points of contention about the creation of widely recognized standards that could regulate PMSC operations?
3. What are the challenges to holding relevant states or PMSCs responsible for violating international law?
4. What is the legal status of PMSCs, and can they or their employees be held responsible for breaching international law
5. Is it possible to apply the draft article on state responsibility for actions carried out by PMSCs?

1.6. Study Area

The study focuses on PMSC's involvement in African states conflicts and its role in swaying statecraft and interstate relations. Examining international regulation of PMSCs is its scope, though, because PMSCs are transnational in nature and the politics behind the institutionalization of laws regulating their operations rely on the interests expressed through numerous interstate relations that transcend the continent.

1.7. Methodology

The variables in this topic are non-statistical. Therefore, this thesis takes a qualitative approach. Because the issue is best addressed using descriptive and interpretive methods of analysis, a qualitative approach is appropriate. The longitudinal method is used to inquire retrospectively into the trend the international community went through in dealing with PMSCs. The historical progress made by the international community in implementing state responsibility, as well as the challenge of mercenarism, is described. The rise of 'new mercenaries' and how the international community has attempted to deal with the problem they claim to have posed interpreted using cases and international and regional regulatory systems that have been implemented or at least attempted. The reasons why the international community failed to develop norms governing the operations of PMSCs is meticulously determined following an examination of all previous efforts.

For this study, Executive Outcome (EO) is chosen while examining PMSC in Africa. First of all, it is the first, and probably the only, corporate entity to participate in the most contentious operations (direct combat) in Africa. In certain instances, EO had been replaced in the most well-known conflicts by dozens of associated companies, notably the British firm Sandline.

Moreover, its active participation in warfare raises moral dilemmas and concerns regarding the status of its employees. In addition to violating International Human Right Law (IHRL) and IHL, which raises questions regarding responsibility and regulation, it also switches sides in the conflict, complicating any regulatory effort. Third, its engagement in wars in Africa caused global attention to turn toward the commercialization and monopolization of violence as well as its regulation.

Sources of data and instruments of data collection

In terms of methodology, data for this study gathered from secondary sources such as books, journals, articles, magazines, newspapers, and websites. The draft Montreux Document and the UN draft convention are also used as a foundation for what norms the international community attempted to establish and why it has so far failed. Being an interdisciplinary study, the legal part of the research employs international critical legal studies' application of Article 38 of the Statute of International Court of Justice. Because of the 'indeterminacy thesis', however, critical international legal studies do not rely only on the legal sources (in the positivist sense), even while they uphold the division between 'legal' and 'non-legal' sources based on Article 38 of the statute. Because of 'fragmentation', which is exacerbated by freedom of interpretation, contradiction is a fundamental feature of international law. Soft law, such as voluntary self-regulation and codes of conduct, for instance, does not, in accordance with Lehnardt (2017), establish responsibility. For Tonkin (2011) and Moyakine (2015), however, legal obligation is established by instruments such as the Montreux Document. As a result, references to 'extralegal sources' like 'soft laws' is made.

1.8. Scope of the Study

The study looks into the accountability of PMSCs when they violate international rules such as international humanitarian law, as well as the possibility of attributing their actions to a relevant state. It attempts to investigate states discontent in developing standards to regulate PMSCs and the influence of politics. It also looks into AU's approach to PMSCs regulation.

1.9. Significance of the Study

The study will contribute to the understanding the politics that delayed the adoption of the Convention on Private Military and Security Companies. As an interdisciplinary study, it will aid in understanding how international politics shapes and influences international law, with regulation of PMSCs serving as an explanatory variable.

1.10. Organization of the Study

There are six chapters in the thesis. The first chapter will introduced the subject matter of the study along with some background information and a review of the work that has already been accomplished. The second chapter will cover the literature on monopolization of force, how privatization of force affects a state's monopoly of violence, the reasons behind the making and unmaking of international law to regulate interstate relations, and the theoretical alternatives put forth by different perspectives to regulate PMSCs and state monopoly of violence. Above all, it clarifies some key concepts and challenges that are associated with them. With an emphasis on the UN's draft convention and the Montreux Document, the third chapter will discuss the normative attempts that have been put forth thus far to regulate the operations of PMSCs. It also shows how the 'Swiss Initiative' is influencing the draft treaty that the UN is sponsoring. It also examines the flaws of the two initiatives. The analysis under chapter four focuses on Africa and evaluates the potential impact of the AU/OAU Convention on Mercinarism and the 2014 Malabo Protocol on PMSCs. How a PMSC got involved in conflicts in Africa and how their operations changed over time will be examined. It also examines the political and ideological rift mirrored in the UN Human Rights Council, as well as the efforts undertaken by African states to institutionalize the norms governing PMSCs. The impossibility of imposing obligations on PMSCs, the challenge of holding them directly liable for human rights violations committed by their employees, and the inadequacy of the international law that is thought to be applicable in holding the relevant states responsible for crimes committed by PMSCs are all covered in Chapter Five. A conclusion is provided in chapter six.

Chapter Two

Literature Review

2.1. Definitions and Explanation of Concepts

Though both PMSCs and mercenaries are classified as "security workers", the work they undertake is quite distinct. PMSCs are descendants of earlier mercenary groups; they provide military services, including the use of coercive force, for payment (Tonkin, 2011:6). However, they distinguish themselves from mercenaries in significant, if not fundamental ways. As Singer puts it, '[t]he essential difference is the corporatization of military services. [PMSCs] are structured as firms and operate as businesses first and foremost' (Singer, 2008:40). Individuals recruited by these firms are referred to as "corporate warriors" or "contractors," as opposed to "mercenaries", who work freelance and are not subject to domestic law (Varin, 2018).

The first international convention to address the issue of mercenaries was the 1977 Additional Protocol I to the Geneva Conventions. It attempted to place mercenaries inside a framework by claiming that they cannot be considered combatants or Prisoners of War (POW) (Kálmán, 2013). By listing cumulative requirements it describes what mercenaries are and what they do (Protocol I, 1977: Art 47(1)). It states that a 'mercenary' is one who is 'motivated to take part in the hostilities essentially by ... material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party' (Protocol I, 1977: Art 47(2) c). This law was initially intended to apply exclusively to international conflicts, but it is also quite broad and might be read to extend to anyone providing any direct paid service to a military institution, no matter how small (Adams, 2002).

PMSCs are private companies that sell military services. Individuals, who sell these services on their own, also known as mercenaries, are usually regarded as illegal under international law (Singer, 2004). However, the classifications used by international law to identify mercenaries involve a series of imprecise, albeit restrictive, conditions, making it nearly impossible to identify someone, particularly a corporation in the PMSC industry, who meets all of the criteria (Brooks and Solomon, 2000; Henckaerts and Doswald-Beck, 2005b: 2576-7). We can also conclude that if personnel of PMSCs do not meet even one of these criteria, they cannot be classified as mercenaries and must be classified as combatants or civilians. From a humanitarian

law standpoint, whether a person can be considered mercenary or not in the event of an armed conflict is a ‘question of life and death’ (Kálmán, 2013). ‘Legitimate’ PMSCs do not qualify as mercenaries under any current legal (national or international) or other accepted standards, which is by itself highly problematic (O’Brien, 2007). It is important to highlight that PMSC is “one of art instead of law”; no international convention refer to or define the term, or its synonyms (Fallah, 2006).

A mercenary, according to a widely accepted definition, is ‘one who serves or acts solely for motives of personal gain..., particularly a soldier who offers himself for service in any army which may hire him’ (Encyclopaedia Britannica, 1964: 268). According to Scott Goddard, mercenaries are those who are paid to perform tasks within a foreign entity’s military scope, also referring to participation in military like action, without regard for ideology, legal or moral obligations, or rules of domestic or international law (Goddard, 2001). The ideal type of mercenary is the “soldier of fortune”. We often think of a mercenary as someone who fights for an entity other than his own state and is motivated by money. There are, however, mixed types of military services that fit one but not both of the above conditions (Thomson, 1994:26).

The African Union Convention (OAU convention on mercenarism 1977) is the other international instrument that addresses the meaning of mercenaries. It almost entirely adopts the concept of Article 47 of Additional Protocol I and establishes the identical cumulative conditions for defining someone as a mercenary. The International Convention against the Recruitment, Use, Financing, and Training of Mercenaries, the UN Convention (1989) is the third international instrument that defines mercenaries. The UN Convention has a larger application circle than the other two since it generated much broader and more straightforward concepts (Kálmán, 2013). It classifies two types of persons as mercenaries. The first group corresponds to the aforementioned criteria, with the exception that direct participation in combat is not a requirement (UN Convention, 1989: Art 1(1)). According to the second criterion, a mercenary is also any other person who meets the treaty’s broader qualifications in any other situation (UN convention, 1989: Art 1(2)). As can be seen, we are also discussing cumulative conditions in this situation. Additionally, in the case of point (a), ‘when a person is specially recruited locally or

abroad for the purpose of participating in a concerted act of violence', the action must match to dual conditions (UN convention, 1989: Art 1(2)).

Investigating international treaties reveals that the concept of mercenaries is defined based on Additional Protocol I in each of them. They all follow the same formula; they list a number of requirements that must be satisfied in order to classify someone as a mercenary (Mancini, 2010). It is plausible to argue that the treatment of mercenaries under international humanitarian law (Protocol I) is more symbolic than practical. In terms of criminal sanctions, the mercenary specific conventions (the OAU and UN) spell out more serious implications for the mercenary (Fallah, 2006). Article 47 of Protocol I solely has the effect of removing the mercenary's combatant or POW status (Fallah, 2006). Furthermore, the UN Convention has a far lower threshold for designating someone as a "mercenary". The UN Convention's criminalization of all forms of mercenary activity contributes to the implications to simplifying the definition (Fallah, 2006).

While mercenaries are explicitly defined by IHL, PMSCs are not mentioned in IHL treaties or specifically governed by customary international law (Doswald-Beck, 2007). Because their operations are partially regulated and partially not, the term "grey zone" is frequently employed in the literature to characterize the operational region of contractors (Liu, 2010). With the rise of PMSCs, there will undoubtedly be more discussion, and possibly revision, of the mercenary clauses in international agreements (Fallha, 2006). The treaties' language, however, makes no mention of the recruiter; therefore it might even be a company that a state has given the responsibility of providing military or security services in war areas (Kálmán, 2013).

Although the Montreux Document represents an effort to provide an in-depth account of PMSCs, the terms "Private Military Company" and "Private Security Company" have not yet been given a widely recognized legal definition (Brooks and Solomon, 2000). Spear (2006:7), defines PMSCs as 'corporate entities that provide military expertise and other professional services essential to combat and warfare'. However, these "other professional services" are quite fluid and under certain circumstances may coalesce into mercenary activity (Baker and Gumedze, 2007). Enrique Bernales Ballesteros, the UN's special rapporteur on the use of mercenaries, has noted personnel working for private companies, 'even when they have a military background and

are highly paid' cannot be considered as 'coming within the legal scope of mercenary status' (UNESC, 20 February 1997: par 106). Singer (2001-2), defines PMSCs as 'corporate bodies that specialize in the provision of military skills, including tactical combat operations, strategic planning, intelligence gathering and analysis, operational support, troop training, and technical assistance'. Because PMSCs are corporate entities, it makes commercial sense for them to vary their expertise in order to maximize profits. As such, the list Singer presents is certainly not exhaustive, and PMSCs engage in a wide range of activities (Baker and Gumedze, 2007). O'Brien (2007), made a further distinction between PMSCs that carry out operations with the intention of changing the strategic environment and those that just have a local, as in, immediate impact.

Three primary forms of private force operate in the global system, according to Percy (2007a): mercenaries, combat Private Military Companies (PMCs), and security or non-combat PMCs, known as Private Security Companies (PSC). While they insist do not participate in direct combat, PMCs are primarily focused on offering services to the armed forces. On the other hand, PSCs are independent contractors that provide protection for people, properties, and fields (Percy, 2007a; Percy, 2007b:61). According to Krahmann and Abzhaparova (2010), PMCs and PSCs focus on different fields of operation. The former, offer services such as military base-guarding and explosive ordnance disposal, while the latter deal mostly in security consulting and investigative services .

Despite these differences, the classification of these companies is quite ambiguous because some of them operate in a variety of 'businesses', and some have subsidiaries that conduct security or military operations throughout the world (Tonkin, 2011: 33). The distinction between mercenaries, PMCs, and PSCs is frequently unclear: PSCs engaged in site protection may traverse the line into offensive military operations, and individuals who have previously engaged in what could be considered "mercenary" activity that is, selling their skills on the open military market without a corporate affiliation, may find themselves employed by one of the two companies (Ortiz, 2004; O'Brien, 2007). Contracts between states and companies are frequently made public, whereas contracts between companies and their 'warriors' are usually kept confidential (Kálmán, 2013). The industry's lack of transparency, which makes it challenging to

obtain comprehensive information on the founding, assets, and operations of these companies, further weakens the classification (Brooks and Solomon, 2000; Saner, Uchegbu and Yiu, 2019). However, a PMSC's typology is significant because it determines the extent of a state's international obligations to govern a PMSC in an armed conflict based on the services the company offers in that specific situation (Tonkin, 2011:6).

On the other hand, some argue 'persuasively' against the categorization of the private military industry and propose examining individual contracts as units of analysis because the services offered by these corporations frequently overlap (Ortiz, 2004; Avant, 2005: 17; Singer, 2008: 88). Most importantly, a definition based on services acknowledges that all kinds of companies from risk consultants to armaments firms, can offer these services (Singer, 2008:91). Furthermore, a rule that governs services rather than companies can be relevant to one company about a specific contract, but it need not apply to the entirety of its operations. A service-based definition is standard procedure in defense export regulation, despite the fact that it may at first seem unclear and challenging to put into practice (Krahmann, 2005). Accordingly, based on the 'tip of the spear' typology, what Singer prefers to refer to as Private Military Firms (PMFs) are classified into three categories: Military Provider Firms (MPF), Military Consultancy Firms (MCF), and Military Support Firms (MSF). Singer argues MPFs are set up to provide one of three main services: non-lethal aid and assistance, advice and training, or direct military support (Singer, 2008: 91-100).

As a result, establishing the intended activity is essential to approaching the regulatory issue since it revolves around the entity rather than the other way around (O'Brien, 2007). Studying and regulating the private military force industry would be better served by defining it in terms of the services offered rather than the characteristics of the organizations that deliver them. Consequently, "private" military services may be defined as 'services directly related to the provision of national security and to international interventions, if they are offered by registered companies' (Krahmann, 2005). This method serves the idea that a party's obligations under international humanitarian law are determined by the nature of the actions that party actually does, not by the label that is applied to it (Gillard, 2006).

Instead of characterizing PMSCs by their attributes, current definitions generally categorize them based on the services they provide. The Montreux Document, for instance, defines "private business entities that provide military and/or security services, irrespective of how they describe themselves", which is a broad description that is supplemented with more detailed instructions in a concise list of possible PMSC services (Saner et al, 2019). The draft UN convention on PMSC defines PMSCs as follows:

> a) A Private Military and/or Security Company (PMSC) is a corporate entity which provides on a compensatory basis military and/or security services, including investigation services, by physical persons and/or legal entities. (b) Military services refer to specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, military training and logistics, and material and technical support to armed forces, and other related activities. (c) Security services refer to armed guarding or protection of buildings, installations, property and people, police training, material and technical support to police forces, elaboration and implementation of informational security measures and other related activities (UN Draft Convention, 13 July 2009).

The Montreux Document does not draw any distinction between PMCs and PSCs; it uses the term PMSCs (The Montreux Document, 2008). Moreover, PMSCs encompass all businesses that offer security or military services in support of national duties (Kálmán, 2013). Walker and Whyte (2005), make a strong case that it is frequently difficult to distinguish between mercenaries, PSCs and PMCs, the last being the most recent "mercenary version" and lacking a legal classification under either domestic or international law. Because of this, the Private Military and Security Company (PMSC) is employed as a whole for the purposes of this study, with distinctions between the individual firms being established only where necessary.

The status of POW is the other contentious issue. The basic distinction between international armed conflict and internal armed conflict is the basis of modern international law pertaining to POW, as outlined in the Third Geneva Convention of 1949 (Baxter, 2013: 246). Regarding the former, according to international law, "armed forces of a Party to the conflict" and "members of militias or volunteer corps forming part of such armed forces" as well as "other militias and members of other volunteer corps, including those of organized resistance movements" are considered legitimate belligerents and, as such, worthy of POW treatment in the event of capture,

provided they meet certain specific requirements (Baxter, 2013: 112). This implies that an armed combatant who satisfies the conditions entitled to the 'status of a prisoner of war', but an individual who does not match the qualifications gets a 'treatment of a prisoner of war' (Baxter, 2013: 356). Consequently, mercenaries may be regarded as legitimate fighters if they fight in an international armed conflict on behalf of one of the parties involved and meet the necessary requirements. There is still a group of people who, because they have engaged in hostile conduct and do not meet the requirements outlined in Article 4 of the 1949 Geneva Prisoners of War Convention, and therefore are not eligible to be treated as either peaceful civilians or POW. As a result, they are subject to the most severe penalties that the belligerent holding them feels like imposing (Baxter, 2013: 42).

In contrast, international law does not step in to regulate the legal status of parties involved in internal armed conflicts; instead, the parties are governed by the national laws of the State whose territory the conflict is taking place (Cassese, 1980). Therefore, mercenaries may be classified as regular military forces and are therefore deemed lawful belligerents, but normally within the existing country's legal system, if they work for the incumbent government. On the other hand, the rebels are free to handle the mercenaries the way they see fit, whether that is legitimate combatants or as ordinary criminals. As a result, different definitions of mercenaries may emerge in such scenario (Cassese, 1980). Thus, customary international law has not benefited or impedes mercenaries who have participated in domestic military conflicts since 1960 (Cassese, 1980).

On the contrary, norms have not kept pace with the rise of private coercive contractors. In general, the current state of international law is inadequate to address PMSCs, which have only been prominent in the past 20 years (Singer, 2004). Only PMSCs involved in an international armed conflict such as when one state's military forces occupy another are entitled to the status of POW, given they fulfill the requirements. Non-international conflicts do not recognize POW status, so any member of a PMSC that is caught will be subject to national law unless the company has an agreement with the state that gives its members immunity from local courts (Doswald-Beck, 2007). The fact that states that are not parties to Additional Protocol I of 1977 are still subject to the regulations outlined in the Third Geneva Convention of 1949 complicates the issue of whether PMSCs benefit from combatant or POW status (Doswald-Beck, 2007).

The 1977 Protocol specifies who is to be regarded as a combatant and who among them is eligible for POW status. The primary alteration from the 1949 Geneva Convention is the elimination of distinctions between the regular armed forces and other armed groups in terms of combatant status. According to Article 44, any combatant, as defined by Article 43, who comes under the control of an adversary, will be considered a POW as long as they satisfy the conditions outlined in Article 43. Nonetheless, there is disagreement among IHL experts over whether PMSC members could be eligible for POW status as a result of these rules (Doswald-Beck, 2007). PMSCs may still grapple with being classified as "mercenaries" even if they are viewed as belonging to the "armed forces" (as defined by Additional Protocol I) or "militias or volunteer corps" (as defined by the Third Geneva Convention) (Doswald-Beck, 2007).

2.2. Theoretical Framework

In the context of International Relations theories, this part used the interpretations provided by Katzenstein, Keohane, and Krasner (1998), to "general theoretical orientations" as opposed to "specific research programs", whose applicability is examined further in the following section. It also refers to the other fundamental distinctions made between the major theories of international politics, namely "actor-oriented theories" and "sociological theories", according to Krasner (1999:43), based on the variable that they consider ontologically given. Waltz's (1979:88-101), typology, as anarchic and hierarchic, is also considered. Therefore this section covers the general theoretical framework on the role of international politics in making and unmaking international law and why states enter in to international agreements.

The foundation of liberal theory is a "bottom-up" understanding of politics, which treats the needs of individuals and social groups as analytically coming before politics. Domestic and international civil society, which is viewed as a collection of 'boundedly rational individuals', with varying preferences, social commitments and resource endowments, participates in political activity (Moravcsik, 1997). Among these social and sub-state actors, globalization is a universal phenomenon characterized by varying transnational connection, either material or ideational. It generates many cross-border incentives for political engagement and governance (Moravcsik, 2013).

In the past few decades, the nature of governance and the fundamental objectives of international law have undergone profound transformations due to the processes of globalization and the rise of new transnational challenges. In order to guarantee that states work together to counter threats before they cross national boundaries, international law can and must play a crucial coordinating role (Burley and Burke-White, 2006). The fundamental assumption is that interactions between governments will take place inside a network of one to one and group interactions within transnational civil society. Intergovernmental agreements will be influenced by this broader context in a number of ways (Burley, 1995). As such, it is essential to think of the politics of many international agreements as a 'two-level game' (Putnam, 1988). At domestic level the 'game' is 'played' between politicians and domestic group and at international level it is 'played' between national governments. Therefore, as long as their countries continue to be sovereign and interdependent, central decision makers cannot disregard either of the two 'games' (Putnam, 1988). Moreover, the demand for national regulation will probably give way to a need for international regulation quite quickly (Burley, 1995).

An intergovernmental agreement can be established to coordinate or harmonize regulatory action in the event of a regulatory conflict. When a variety of informal cooperative activities emerge, it could be desirable to institutionalize them as the foundation for further collaboration through an agreement (Burley and Burke-White, 2006). For example, Van Creveld claims 'war without law is not merely a monstrosity but an impossibility' (Van Creveld, 1991:65). There cannot be a war without a law that specifies what is and is not accepted (Van Creveld, 1991: 93). Contrary to what Clausewitz and many of his supporters appear to believe, the goal of the law of war is not merely to comfort the consciences of a small number of kindhearted people. The protection of the armed forces themselves is its main objective. This is so because the realm of war is one of uncertainty and suffering. Nothing is more likely than the dread of war to drive reason out of the window, or to lead even the most prudent man to start acting very differently (Van Creveld, 1991:89).

This understanding of international law is particularly important for its explicit focus on influencing or shaping political outcomes within sovereign states to conform to international legal norms (Burley and Burke-White, 2006). Although they alter the legal and policy

procedures, international legal norms are fundamentally domestic (Moravcsik, 2013). Consequently, if present political, economic, and scientific trends persist, international law's future effectiveness will depend on its capacity to sway and transform domestic politics (Burley and Burke-White, 2006).

In relation to Realism, the extent of universally accepted international norms, the presence or durability of an international "society" or "community," and the transformation of soft law into hard law are all subjects of skepticism (Krasner, 1999). Many claims of customary international law are questioned by realists, who prefer clear cut state by state declarations of *opinio juris* that demonstrate consent (Steinberg, 2013). Treaties are concluded by powerful nations to further state interests, according to Thucydides, Machiavelli, and Morgenthau. Interests occasionally converged and occasionally diverged. As a result, powerful states may occasionally force smaller states to accept international law, and states may occasionally reach an agreement on matters of mutual concern (Steinberg, 2013).

Realists maintain that nations operate strategically to ensure their security in the system; hence governments pick war winning techniques. Armed force, according to Clausewitz, is subject to no rules other than those of its inherent nature and those of the political cause for which it is waged. That organized violence should only be referred to as "war" if it is carried out by, for, or against the state (Van Creveld, 1991: 36). Clausewitz has no sympathy with the "philanthropist" view that war may or should be limited and waged with as little violence as possible: "In dangerous things such as war, errors made out of kindness are the worst" (Van Creveld, 1991: 64). The moment would come when, as each used every available means and went to whatever length to vanquish its opponents, it would boldly proclaim its right, and even its responsibility, to do so (Van Creveld, 1991: 64). As a result, legal rules have no binding power when they are intended to harm the Prince or the State. Whether it is an issue of conquest, war, the treatment of conquered populations, or respect for the given word, the main motive for moderation or even humanism will be political expediency, and their sole measure will be the calculation of powers (De visscher, 1957:11-12).

According to Morgenthau, international law only exists when a power arrangement enforces it or when it is in the mutual interest of all parties to abide by it. According to his argument, there are

two categories of international law that can be distinguished based on the persistence of a state's interests: 'Non-political international law', which comprises customary laws and treaties that are advantageous to all states independent of international power arrangements, and 'political international law', which includes peace and alliance treaties that may also be advantageous to all states but are contingent on a specific power arrangement (Morgenthau, 1940). However, realist commentators made it increasingly clear that where international rules run contrary to state security interests, security interests will prevail and norm based international law will not constrain behavior (Morgenthau, 1967:266-72; 281-83).

Nonpolitical international law may solve coordination or cooperation problems, yielding outcomes that are beneficial to all states, so consent to that international law could be voluntary (Steinberg, 2013). Realists, on the other hand, have long maintained that in making international law, majoritarianism is only empirically allowed by powerful states in institutions that are legally qualified to develop soft law (Morgenthau, 1967:309-12; Krasner, 1983). Soft law is usually considered as unimportant by realists, positivists, and public international lawyers. Realists readily embrace custom in "nonpolitical areas of international law", such as the law of treaties. On the other hand, customary laws that go counter to the interests of powerful states are usually contested. International law is thus created by procedures, regulations, and claims of authority that guarantee it will represent the interests of powerful states, regardless of whether we focuses on treaties, customary international law, or soft law (Steinberg, 2002; Steinberg, 2013) .

In Waltz's structural realism interests are depicted as divergent, zero sum, focused on relative gains for survival and accretion of power (Waltz, 1979:134,195). Waltz by ridding them of the non-realist factors, norms, domestic institutions, and religion 'purified' realism by eliminating the indeterminacy of earlier versions (Steinberg, 2013). A theoretical framework that allowed non-realist domestic issues to take precedence over material geostrategic interests, according to Waltz, was a "reductionist" perspective rather than realism (Waltz, 1979:60). The 'international legal model' is based on maximizing the probability of national survival; therefore states are primarily concerned with relative gains, such as acquiring or retaining power. As a result, states have divergent interests, and the international system's structure remains their focus (Steinberg, 2013).

According to Krasner (1999: 37,85,157-75), the content of international law has been produced by relative state power, leading to outcomes of international law bargaining that may be 'Pareto improving' but are nevertheless distributively biased in favor of powerful nations. Power assessment is renowned for being challenging (Steinberg, 2013). But state power, particularly when used by powerful states to coerce weaker states to accept international laws they would not otherwise accept is central to realist theory and its most distinctive feature (Krasner, 1999:157-75). Krasner termed the defining characteristic of Westphalian sovereignty, the existence of durable principles and norms, which were also frequently compromised, as 'organized hypocrisy' (Krasner, 1999). 'Norms have been decoupled from behavior, which has been motivated by power or interest or guided by principles that have been inconsistent with Westphalian autonomy' (Krasner, 1999: 201).

As regards neoliberals, they argue that international institutions offer a different structural framework in which states may articulate their interests and reconcile divergent policies in an interdependent world (Katzenstein, 1996). Keohane contends that conditions of international anarchy do not always lead to outright power politics that realists believe will follow hegemony in international politics. Rather, the problem of international anarchy can still be addressed by the international order that hegemons have established through institutions (Moravcsik, 2013; Keohane, 1984). Even game theorists believe that the logic of bilateral cooperation and coordination may be applied to any number of agents. A multilateral treaty can promote the transparency of international relations by establishing a permanent international institution, making it easier to identify and punish cheaters, and thereby lowering the incentives to cheat (Keohane, 1984).

The foundation of rational choice theory is the idea that political actors, namely states, act strategically to further their own self-interests and 'world politics is a realm in which power is exercised regularly and in which inequalities are great' (Keohane, 1982). However, Goldsmith and Posner claim that 'international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of power' (Goldsmith and Posner, 2005:3). Rationalist assumptions are shared by neorealism, neoliberal institutionalism, and at least two "new institutionalism" approaches: historical institutionalism

and rational choice institutionalism (Pollack, 2010). Nonetheless, neoliberal institutionalism is the most well-known theory of international relations that draws from rational choice methods and the most important explanatory variable for neoliberal institutionalism is institutional design rather than state power (Krasner, 1999:60).

In the literature on international law and international relations, institutionalism primarily addresses three topics: the creation, interpretation, and application of international agreements. It is assumed that states act rationally, that cooperation is at least potentially advantageous, and that the primary theoretical framework is based on a game-theoretic approach (Koremenos, 2013). The demand that states cooperate in a 'Pareto-improving' manner is a rational institutionalist's foundation for supporting international institutions (Keohane, 1984). Rational design, in contrast to previous institutionalist work, does not address the issues of whether institutions are important or whether cooperation is feasible. Rather, the question of rational design is what kinds of institutionalized cooperation take shape (Keohane, 1982). The fundamental theoretical assumption of rational design is that comprehending the underlying "cooperation problem[s]" that the agreements are attempting to address is the first step in designing and comparing international agreements. The problem of cooperation, sometimes known as "uncertainty about behavior", ultimately leads to a central monitoring system as an institutional design solution (Koremenos, 2013). 'Most international regimes are control oriented' (Keohane, 1982).

International law is often viewed by neoliberal institutionalists, who place a high value on norms, as an instrument for signaling or as an outcome of successful interest projection through formal adjudication and explicit negotiation (Brunnee and Toope, 2013). According to Finnemore (1996), 'norm institutionalization', becoming embedded in international organizations and institutions, is critical to patterns of norm evolution. Finnemore and Sikkink (1998), after identifying a three-stage process of norm influence or 'the Norm "Life Cycle"', claim for an emergent norm to reach a threshold and move toward the next stage, it must become institutionalized in specific sets of international rules and organizations. These factors have led to the perception of international law, including its procedural rules, as a reliable and strong source of leverage during negotiations (Steinberg, 2002). Rational design also recognizes the legal component and law-like nature of international institutions. States carefully craft the terms of

their agreements because 'clever' institutional design helps them in resolving cooperation problems and as a result, international law shapes future behavior (Koremenos, 2013).

The concept of "international regime", which is derived from a longstanding tradition of international law and was initially employed in the political science literature by John Ruggie, was the center of the neoliberal challenge to realism (Katzenstein, Keohane and Krasner, 1998). It embraces the idea that credible commitments in treaties could resolve the prisoners' dilemma. International regimes, which are largely constituted by international law, lower transaction and communication costs of negotiations (Abbott, 1993). 'Regimes serve to facilitate agreements' (Krasner, 1983; Keohane, 1984: 97). This approach became known as "rationalist institutionalism" or a "functional" theory of regimes even though it is completely consistent with structural realism and is based on the same presumptions and notions that underpin structural realism (Keohane, 1984:70). In fact, the method is better understood as an economic justification for how international law might enhance state welfare, which is also in line with historical realist arguments (Steinberg, 2013).

Agreements are spontaneous, frequently "one-shot", arrangements. States would rather create regimes than merely reach agreements on a case by case basis due to defects, which economists refer to as "market failure". Similar to imperfect markets, institutional defects in global politics prevent mutually beneficial cooperation (Keohane, 1982: 246). Institutions could help states accomplish their goals more quickly, mostly by informing actors about regulations rather than enforcing them centrally (Keohane, 1982: 246). By enhancing the costs of transactions, institutions would modify state strategy; institutionalization might therefore encourage cooperation (Keohane, 1982). Keohane doesn't deny the assertion that power and vulnerability in world politics will play a significant role in shaping the features of international regimes. The choices made by actors will be restricted in a way that will give priority to those who are more powerful (Keohane, 1984: 63, 72). Consequently, we must constantly be aware of the structural context in which agreements are negotiated when applying rational-choice theory to the establishment and maintenance of international regimes. The decision to voluntarily enter the regime does not mean identical conditions or consequence (Keohane, 1982).

The logic of structural realism is completely consistent with all major realists' conclusion that international law could, in absolute terms, make all states better off, a positive-sum effect of law. Nevertheless, many international lawyers broadened and oversimplified the structural claim into a "straw man" (Steinberg, 2013). Furthermore, Waltz's theory of the balance of power, which holds that states display repetitive balancing behavior as a result of systemic pressures, is not a regime. Regimes are more than just 'epiphenomenal, once in place they do affect related behavior and outcomes' (Krasner, 1983). According to Krasner (1983), regimes are irrelevant in zero-sum, egoistic self-interest situations where states try to maximize the difference between their utility and those of others. On the contrary, structural realism suggests that international regimes cannot independently influence the structure of the system; rather, they are dependent upon it (Steinberg, 2013).

The most contentious and significant claim regarding international law was made by Krasner, who employed Waltz's structural realism to support his argument that states' relative power and self-interest influence the substance of international regimes, which in turn influences "related behavior and outcomes" (Steinberg, 2013). According to Krasner's distributive approach to regimes, the main issue facing states in the international system is distributional conflicts rather than "market failure" or 'Pareto suboptimal outcomes' (relative gains). Regimes are not characterized by *equilibria* that are Pareto suboptimal rather in addition to reaching the Pareto frontier 'the point on the frontier that is chosen' is a problem that requires power and negotiation to solve, not just the best possible institutional design (Krasner, 1991).

When more than one cooperative agreement is possible, actors may face a distribution problem. Its magnitude depends on how each actor compares its preferred alternative to other actors' preferred alternatives. In a pure coordination game, where both actors prefer the same coordination point(s), there is no distribution problem. In Prisoners' Dilemma games where there are multiple efficient *equilibria*, the distribution problem depends on actors' differences 'along the Pareto frontier' (Krasner, 1991). Finally, the problem is most severe in a zero-sum game because a better outcome for one leaves less for the others; regimes are irrelevant in this situation. Therefore, conflicts between states about how to divide the costs and benefits of

cooperation, a major barrier to successful cooperation, are overlooked by the functionalist approach to regime that relies on the Prisoners' Dilemma (Krasner, 1991).

According to Krasner (1991), endeavors at cooperation in international politics frequently take the shape of a 'battle of the sexes game', in which several states have specific preferences regarding different international norms or standards. The main question is whether and how states can secure cooperation on their preferred terms (bargain to resolve distributive conflicts). Even if all states benefit from a common standard, raising the prospect of joint gains, the distribution of those gains depends on the specific standard chosen (Krasner, 1991). Power asymmetries can explain why more powerful states receive more favorable terms, the political nature of international institutions is acknowledged explicitly, and anarchy matters (Krasner, 1991). 'Power may be used to determine who can play the game in the first place, dictate rules of the game and used to change the payoff matrix'(Krasner, 1991). Therefore, international law can be understood as a mere manifestation of the power and interests of states (Krasner, 1999).

As to constructivists, the main point of agreement between some international law theorists and constructivists has shown to be their preoccupation with the construction, evolution, and destruction of norms because international law is by its very nature norm focused (Brunnee and Toope, 2013). Constructivists stress that in order for international law to establish legal obligations, norm creation and implementation must satisfy "specific criteria of legality" (Brunnee and Toope, 2013). Constructivists do make an effort to explain the substantive content of international cooperation, even though they do not do so as a result of attempts to actualize material interests and normative ideals transmitted through representative institutions. Their rationale relies on conceptions about appropriate behavior in international relations or regulatory policy that are distinct from the rational calculations of social actors endowed with state power (Moravcsik, 2013).

Constructivists define "norms" as standards of behavior that are developed through mutual expectation in a social context (Brunnee and Toope, 2013). However, a lot of societal norms never become legal norms. Furthermore, the definition of a "legal norm" is ambiguous. Depending on how one interprets the law, different norms will fall under different categories (Brunnee and Toope, 2013). The majority of constructivist researchers have focused on norms

and institutions rather than attempting to find out what makes legal norms and institutions different (Barnett, 1997).

Reus-Smit (2004) contends that international political actors act as though there were a well-defined 'legal realm', based on the premises that international politics and international law are mutually constitutive. This realm is distinguished by an institutionally independent, distinctive discourse that delegitimizes mere pursuit of power and self-interest while drawing from an established set of norms and justification processes. International societies contain deep 'constitutional structures' that are generated, replicated, and reshaped by the politics of identity that inevitably accompany the mutual recognition of sovereign states. These institutions are underpinned by 'systemic procedural justice norms', which promote certain forms of rule governance (Reus-Smit, 2004). Actors are lured to such a legal realm, where the exercise of raw power and self-interest is prohibited due to the politics of legitimacy and pragmatism. Because international law is a normative order, expressing claims in legal terms connects interests and strategies to international society's norms, harnessing the force of social opinion to one's advantage (Reus-Smit, 2004).

According to Reus-Smit (2004), understanding the obligatory nature of law is essential in order to appreciate 'uniqueness of the modern institution of international law'. The legal realm is the realm of formal, enforceable contract ('self-legislation') and the legitimacy of the legal system as a social institution underpins the obligatory nature of legal norms (Reus-Smit, 2004). International law developed specific structural characteristics, as well as special procedures and content. The constitutional structures, among other normative components, determine the fundamental parameters of permissible state behavior. The demarcation, however, fails when we consider the relevance of customary norms in the international legal order. The content of these norms is frequently ambiguous, their obligations are powerful but not contractually binding, and they are understood and applied through social discourse and argument rather than formal systems of adjudication or arbitration (Reus-Smit, 2004).

Negotiating the 'rules of the game' on the international level is more severe for earlier Constructivists like Kratochwil since international society is considerably less develop and younger than domestic society. Kratochwil acknowledges the existence of power and hierarchy

in his ‘theory of society’, but considers them to be relatively inconsequential because he believes human understanding and reasoning operate rationally. He sees power and hierarchy as the result of the absence of a centralized sovereign. Furthermore, he regards the international legal arena as ‘benign’; transgression and noncompliance are not lawlessness, but part of the negotiation process (Sinclair, 2010:33–34).

While the majority of constructivists have portrayed law as the final step toward normative development and as ‘benign’, some critical constructivists have disputed this view (Brunnee and Toope, 2013). For instance, according to Sinclair (2010), scholars who believe that law is the positive culmination of normative development have accepted a fallacious ‘common sense idea of law’ based on formalism, according to which legal norms are perceived as being distinct, neutral, and, once enacted, independent of politics and power dynamics (Sinclair, 2010:40-3). One notable aspect of the expanding corpus of constructivist research on international law, or constructivist-inspired international law scholarship, is the dearth of focus on the processes that lead to the creation of legal norms (as opposed to norms in general) and the absence of a well-developed theory of law. Instead, most of this study focuses on procedures and practices of actors’ engagement with international law (Brunnee and Toope, 2013).

Constructivism, thus, provides a less positivist and more flexible interpretation of international law (Johnstone, 2013). It is difficult to link the process of creating, interpreting, and enforcing laws to the principals who delegate agents’ explicit power and regulate them when it is abused. Rather, according to Ian Johnstone (2013), ‘it is a complex, dynamic type of social interaction’. The international legal framework of Brunnee and Toope however is an exception. By bringing upon concepts from constructivism and the legal theory of Lon Fuller, they have claimed to have constructed a ‘complete’ theory of international legal obligation (Brunnee and Toope, 2011; Brunnee and Toope, 2013).

First, their theory presupposes that legal norms may only emerge within the framework of social norms that are founded on mutual understandings, drawing on constructivist principles. Second, what sets law apart from other forms of social ordering, is not form rather adherence to the specific legality standards proposed by Fuller - generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules

and official action (Brunnee and Toope, 2011; Brunnee and Toope, 2013). Actors can pursue their targets and manage their interactions through the legal system when norm development satisfies these requirements and when there is what Brunnee and Toope refer to as a 'practice of legality' (norm application that also satisfies the legality standards). These legality-related attributes and practices are essential for creating an exclusive legal legitimacy and a feeling of loyalty (or "fidelity" in Fuller's words) among the people to whom the law is intended. When combined, they give rise to legal obligation (Brunnee and Toope, 2011).

According to Brunnee and Toope, the 'interactional' framework for international law and the nature of legal obligation both depend on "reciprocity". It reflects the idea that actors must work together to develop shared understandings and preserve a practice of legality rather than viewing the law as a one-way street (Brunnee and Toope, 2011). The formation and implications of legal obligation, rather than the form or implementation of the law, are what give law its unique character, according to their 'interactional approach'. In the constructivist framework developed by Brunnee and Toope, each of the following instances, a treaty's adoption or enforcement, a case decided by an international court, or the Security Council using military force to enforce a resolution, represents only a step in the ongoing interactions that create, reshape, or unmake international law (Brunnee and Toope, 2013).

2.3. The Monopolization of the Means of Coercion and Its Regulation

This section cover discussions that shed light on the factors that influence a state's strategic decision-making regarding security, as well as how a state could regulate private force based on pertinent theoretical perspectives discussed above. It discusses who monopolizes force and how private force influences a state's monopoly of violence, using relevant variables and the probable linkages between them provided by 'general theoretical orientations'. This discussion includes mercenaries because, as Percy (2007b:227), contends, the emergence of PMSC was shaped by the normative hurdles that followed mercenaries' engagement in warfare. In addition'...mercenaries cut to the heart of some of the central issues of international relations' (Percy, 2007b:4). Furthermore, the modern privatization of military force in particular will be assessed in light of the theoretical and ideological frameworks of civil-military relations, which

offer according to Krahmann (2010: 18), standards for democratic control and accountability of the state and the armed forces in general.

Max Weber's theory of the state as the principal source of coercive power is reflected in 20th century conceptions of interstate warfare between standing national armies. Even when states privatized many other public services in the second half of the 20th century, the military was still seen as quite distinct, making it one of the last strongholds of government monopoly (Tonkin, 2011:6). The monopoly of violence is a distinguishing feature of state sovereignty itself, according to Max Weber's classic definition of the state as "a human community that claims the monopoly of the legitimate use of physical force within a given territory" (Tonkin, 2011:2). '[T]he right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it' (Gerth and Mills, 1946: 77-8). Starting from this premise, the modern rise of private military actors was quickly perceived as a sign of state weakness or of a ceding power from the state to a variety of private, frequently foreign, actors (Abrahamsen and Williams 2008b). Therefore, PMSCs are a key example of the growing influence of the private sector in international politics (Abrahamsen and Williams, 2007). As the privatized military industry continues to expand and become more active, the Weberian monopoly over means of violence is gradually breaking down at the beginning of the 21st century (Singer, 2001-2).

More recently, Giddens (1985:121) defines the nation-state, in part, as having 'direct control of the means of internal and external violence' within 'a territory with demarcated boundaries'. According to Harel (2011), fighting wars is a fundamentally governmental function. When the government asks private contractors to fight a war, they have an ethical obligation to evaluate the morality of the cause differently than regular soldiers do, and to only enter combat if they really believe it to be just. As such, there is 'a fundamental difference between a war fought by a state and a war initiated by a state but fought by mercenaries' (Harel, 2011).

Even though it predates the emergence of modern states, the just war tradition is founded on this assumption. Many of the trends linked to the emergence of the Westphalian state system and the state's consolidation of power over the use of political violence are being reversed by the privatization of force (Eckert, 2016:29). The establishment of PMSC caused doubt about *jus ad bellum*, just as the multiple authorities to declare war across numerous actors did during the

feudal system (Eckert, 2016:27). The moral legitimacy of the military, for instance, is the explicit normative issue for the Moderate Instrumentalist Approach to just war. To be sure, it is not an essential requirement for determining whether a war is justifiable; yet, the legitimacy of the military frequently plays a big role in this regard (Pattison, 2011). In fact, the legitimacy of the military may decide whether a war is just or unjust in cases where it is not immediately apparent to decide (Pattison, 2011).

It can be argued that ideology has a significant impact on the responsibilities of the state, the citizen, and the soldier in providing national and international security. Republicanism and liberalism have influenced and continue to impact whether and to what extent the state has monopolized the provision of security (Krahmann, 2010:18). Both ideologies maintain that the responsibilities and relationships between the state, the citizen, and the soldier are critical to guaranteeing democratic control over and accountability for collective military force deployment (Krahmann, 2010:11). Republicanism and liberalism share commitments to individual equality and freedom, albeit their interpretations of these notions (particularly the meaning of freedom) differ. Republicanism departs from the notion that individuals are fundamentally interdependent and concludes that the community is best suited to secure its citizens' safety (Carter, 1998). As the democratic representation of the community, the state or government is vital to national and international security. The Republican state's ideal model is 'centralized government', i.e. a centralized supply of and control over public resources and services (Carter, 1998). In terms of security, the envisioned model comprises the state's monopoly on providing national and international security, as well as the centralized delivery of all security-related services by the state and the armed forces (Krahmann, 2010:11).

In terms of institution of coercion, Machiavelli considers permanent, national armies to be essential for the establishment of a powerful state in an era when national states were just emerging (Zabci, 2007; Machiavelli, 1965[1521]). The political status of the citizen was immediately linked to the duty to fight for the state in the original Western understanding of citizenship, originating from classical Greece and republican Rome, and this model of the citizen soldier still permeates republican ideology (Carter, 1998). Jean-Jacques Rousseau maintained

that the citizen-republic relationship was exceptionally virtuous, and that citizens would go to great lengths to protect the interests of the common cause (Rousseau, 1994[1762]:31).

It is essential to highlight that there is no absolute divide between liberal and republican thought (Carter, 1998). However, according to the liberal perspective, the ideal world is one in which there is no violation of rights and thus no basis for violence, and thus no place for organizations of violence (Alexandra, 2012). Hobbes and Locke approached the issue of military service in a similar manner. They recognized the desirability of military commitment and a state powerful enough to enforce it, but their understanding of the ends of politics provided no compelling justification for the citizen to risk his life for the state (Cohen 1985: 135). As Michael Walzer observes, '[i]ndeed, the great advantage of liberal society may simply be this: that no one can be asked to die for public reasons or on behalf of the state' (Walzer, 1970:89). The threat to a civilization must be substantial and evident in order for citizens to accept the danger of death in order to protect it (Cohen, 1985: 136).

The reconsideration of the relationship between state and citizen as a result of the dominance of neoliberal ideology among policy elites is one factor for the changing nature of armies (Alexandra, 2012). Neoliberalism entails a fragmentation and limitation of government functions, as well as the political neutrality of professional armed forces (Krahmann, 2010:253). The perceived overstretch of the modern welfare or 'warfare' state, as well as rising dissatisfaction with the Republican model of centralized government, were the other grounds for the reconsideration of Liberalism in the middle of the 20th century (Krahmann, 2010:34). Many governmental agencies have been privatized as part of this transformation (Alexandra, 2012). Thus, neoliberal ideology makes the supply of military services by private rather than public suppliers at least theoretically preferable (Alexandra, 2012). In short, it appears that nothing is sacred in the implacable advance of neoliberal values (Walker and Whyte, 2005).

States have a long history of relying on private firms for their defense, dating back to ancient China, Greece, and Rome. During the Thirty Years' War of 1618-48, feudal lords reinforced their armies by enlisting foreign, autonomous, and profit-motivated fighters, as did the Pope, Renaissance Italian city-states, and the majority of European powers (Thomson, 1994; Percy, 2007b). Private force was used in many forms until the 19th century, when the contemporary

model of interstate warfare between citizen armies took hold (Thomson, 1994; Tonkin, 2011:7). Both realist and sociological perspectives offer functional (material or ideational) explanations for the change from mercenary to citizen armies (Tonkin, 2011: 7).

PMSCs are still subject to the same historical concerns that prompted restrictions on the "public" military's involvement in politics (O'Brien, 2007). A particular perception of the accountability relationships between the people, the state, and the army was introduced with popular sovereignty. The army answered to the state, which commanded and controlled it. The people, on whose behalf it acts, held the state accountable for how it uses the army (Alexandra, 2012). Therefore, the argument in favor of the citizen-soldier is not limited to a simple juxtaposition of citizenship and military duty. One point of contention centers on the subject of civil-military relations, or more precisely, the issue of civilian control over the armed forces (Cohen, 1985: 123).

According to the democratic peace, public opinion can have a significant impact on a state's reluctance to enter a war, especially if too many soldiers are killed or if their lives are in danger. As Kant argues, 'if the consent of the citizens is required in order to decide that war should be declared . . . nothing is more natural than that they would be very cautious in commencing such a poor game, decreeing for themselves all the calamities of war' (Kant, 1983[1795]:113). Because the public won't notice or care less about the deaths of private fighters than they would about the deaths of soldiers, one criticism of the PMSCs is that it undermines or weakens the restraints of public opinion (Percy, 2007a; Percy, 2007b:237; Krahmann, 2010). Because there is less democratic control of wartime decisions in states that utilize PMSCs, there may be a decline in democracy in those states. Another perspective on the same issue contends that PMSCs merely weaken citizens' obligations to the state, which is critical to democracy (Percy, 2007a).

By extending the Kantian theory of liberal internationalism and departing from the reigning paradigm of sovereign equality, Burley (1992) constructed a "liberal internationalist model" of transnational legal relations that specifies how such relations among liberal states might be expected to differ from those between liberal and non-liberal states. Liberal states operate in a "zone of law", domestic courts regulating transnational relations under domestic law contrary to "zone of politics" in which non liberal states operate. Courts within "zone of law" evaluate and

apply the domestic law of foreign states (private international law) in accordance with general pluralist principles of mutual respect and interest-balancing (Burley, 1992).

Milton Friedman argued that the ideal relationships between the state, the citizenry, and the army depended more on the availability of free market alternatives to the state than on monitoring and punishing abuses of the military power. Friedman's Neoliberalism contends that the competition between the state and the market, serves as an "exit", a tactic for guaranteeing accountability and control of armed force (Krahmann, 2010:34). Similar to traditional liberals, Friedman began with the premise that 'power concentration poses the greatest threat to freedom'. Controlling the state's monopoly on legitimate utilization of force can be strengthened by the minimal state principle and the market's ability to counterbalance governmental power (Friedman, 1962: 36).

The supply and demand theory provides a thorough explanation for the expansion of PMSCs and the subsequent opposition to regulating their operations (Singer 2008: 49). The decision made by strategic leaders to replace the use of national forces with private security contractors is an illustration of supply-demand behavior. According to Carafano (2008:195), the cost of maintaining the military has risen to the highest level due to military expenditures. The military is just one example of how an unrestricted free market may 'provide services faster, cheaper, and more effectively' than any kind of government (Carafano, 2008:37). As a result, the state bears responsibility because PMSCs would not exist if there was no need for their services (Percy, 2007a). Therefore, many more advanced PMSCs were established as a result of the evolved supply and demand dynamics (Rosén, 2008).

The sociological tradition deviates from this perspective by asserting that "compatibility" of the culture in the military and general society is of greater importance than formal regulations and institutional norms. There is never a guarantee from formal regulation that security personnel play a positive role. 'Only a basic shared worldview can' (O'Brien, 2007). The fundamental idea is that the armed forces need to be capable of adapting to adjust to changing social norms. For example, the 'military establishment is continuously prepared to act, committed to the minimum use of force, and seeks viable international relations, rather than victory, because it has incorporated a protective military posture' (Janowitz, 1964:418). As a result, the sociological perspective on PMSCs' involvement in politics is on whether or not military recruiting, training,

promotion, hierarchies, and identities generate values that are consistent with society, or if not, how they could be shifted to do so (O'Brien, 2007).

Similar to institutional regulation, sociological regulation has taken many different shapes and has different goals (Mearsheimer, 1994-5). Attempts by the general public to socially control experts on violence have an impact on PMSCs. In addition, States can influence PMSC culture and conduct externally by enforcing mandatory screening protocols, limiting permitted activities, and solely acquiring services from companies adhering to predetermined guidelines (O'Brien 2007). Furthermore, because of their close ties, the public armed forces and PMSCs may have an impact on one another. Specifically, PMSCs may adopt the organizational culture, values, and priorities of the public armed forces. Besides, when states regard PMSCs as legitimate actors, it may encourage them to behave in a way that supports these indirect processes (O'Brien, 2007).

It is becoming increasingly clear to political scientists and a renowned group of international lawyers that studying one without the other is not of much use. International politics and international law share the same conceptual realm (Burley, 1992; Reus-Smit, 2004). International politics and international law are not only entwined and constitute each other, but actors also alternate between using legal and extralegal means of justification in order to forward their respective goals (Brunnee and Toope, 2013). Though neither law nor politics can be considered scientific, International Relations theorists possess an advantage when it comes to developing broadly applicable theories regarding the actions of states and in conceiving the fundamental framework of the international system (Slaughter, 1995).

Moreover, the main structures and dynamics of international politics cannot be identified, explained, or comprehended by a single theory (Katzenstein, 1996; Krasner, 1999: 43-56; Burchill and Linklater, 2005; Wight, 2009: 256). All four theoretical traditions' insights can be used into 'eclectic theorizing' in order to better understand inherently 'complex social and political processes' (Katzenstein and Okawara 2001; Katzenstein and Sil 2008; Sil and Katzenstein 2011). This perspective holds that, borrowing a well-known metaphor from Stephen Krasner, institutionalism explains attempts to maximize efficiency and compliance, realism explains distributional outcomes, and liberalism specifies the structure of the 'Pareto frontier' (Krasner, 1991; Krasner, 1999). As a result, the thesis employed 'eclectic theorizing' to develop

a causal narrative that depicts the intricacy, contingency, and messiness of the context in which actors have to identify issues and use knowledge derived from ‘paradigm-bound’ research to address them.

The Montreux document reflects the engagement of western states in responding to the challenge posed by PMSCs, according to the liberal argument. The endeavors of domestic actors, specifically PMSCs, to shape the UN mechanism aimed at establishing guidelines for their oversight is indicative of their influence. It also examines realists’ presumption that the main factor influencing state decisions to institutionalize norms is power and how strong states affect the UN system’s lawmaking process. The argument made by institutionalists that regimes improve collaboration by establishing norms that govern state conduct and expectations is mirrored in the efforts of states to create institutions that would regulate PMSC operations. Divergent preferences for international norms, which are evident in the varying viewpoint states had regarding how PMSCs should be regulated, are cited by structural realists as the primary obstacle to cooperation. It also looks into the argument, certain established norms in IHRL and IHL had an impact on the negotiations to institutionalize norms that should have regulated PMSC activities, which is consistent with constructivist theory that norms and standards shape states’ interests.

Chapter Three

Normative Initiatives Meant to Regulate PMSCs

3.1. The UN Drafts of a Possible Convention

Within the UN system, there are two major sources of opinion on private forces. First, the Commission on Human Rights (now the Council) has been examining the issue of private force since the early 1980s, and it housed the Special Rapporteur on Mercenaries. The mandate of the special rapporteur was established by the UN in 1987 to deal mainly with the activities of mercenaries in the lack of a system or mechanism in the world body to address this situation (Del Prado, 2008). In 2005 it was replaced by a UN Working Group on Mercenaries (Singer, 2004). In July 2005, the UN Commission on Human Rights established its Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of Rights of Peoples to Self-Determination (UNCHR, 7 April 2005). Among other things, the working group was tasked to 'monitor and study the effects of the activities of private companies ... and to prepare draft international basic principles that encourage respect for human rights on the part of those companies in their activities' (UNCHR, 7 April 2005: par 12(e)). The Group has stated that one of its main priorities is examining 'the role of the State as the primary holder of the monopoly of the use of force, and related issues such as sovereignty and state responsibility to protect and ensure respect for human rights by all actors' (UNCHR, 23 December 2005: par 5, 38).

Second, since the 1970s, the General Assembly has actively opposed the use of private force. Since the mid-1970s, the GA has passed more than a hundred resolutions specifically mentioning mercenaries. In fact, since then, the resolution has been repeated yearly with tougher language, labeling mercenaries as criminals (Percy, 2007a). The UN asserted more forcefully in 2008 that PMSC activity needs to be regulated. The Assembly urged member states to impose prohibitions on businesses that interfere in armed conflicts or take part in any activity that might overthrow constitutional regimes in resolution 62/145 (UNGA, 4 March 2008). It also encouraged states that employ the services of PMSCs to, 'establish regulatory national mechanisms for their registering and licensing of those companies in order to ensure that imported services provided

by those companies neither impede the enjoyment of human rights nor violate human rights in the recipient country' (UNGA, 4 March 2008).

These two UN groups, in addition to the development of international law in the 1970s and 1980s, strongly institutionalized dislike of mercenaries on moral grounds within some bodies of the UN, particularly the GA and what is now the Human Rights Council. Many people believe that mercenaries and PMSCs are prohibited by international law because of the early development of regulations about mercenaries when PMSCs first appeared on the global scene, even if there isn't an actual, explicit ban on them (Singer, 2004).

Furthermore, since 2007, the GA and the Council have granted the UN Working Group on the Use of Mercenaries (Working Group) permission to convene regional discussions with member states regarding the management and oversight of PMSC operations (Del Prado, 2008). In 2008, the new Human Rights Council adopted resolution 7/21 of 28 March 2008, whereby the activities of the Working Group were broadened and its five independent members recommence for an additional term of three years (UNHRC, 28 March 2008). In this resolution, the Human Rights Council reiterated the mandate given to the Working Group by the former Commission that the Working Group should 'monitor and study … the activities of [PMSCs] offering military assistance, consultancy and security services on the international market and to prepare a draft of international basic principles that encourage respect for human rights' and 'to elaborate and present concrete proposals on possible complementary and new standards aimed at filling existing gaps, as well as general guidelines or basic principles'(UNHRC, 28 March 2008).

The Working Group found that there is a regulatory legal vacuum encompassing PMSC operations as well as a lack of common standards for these businesses' licensing and registration, employee screening and training and weapon management (Del Prado, 2011). On 13 July 2009, a United Nations Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies (UN Draft Convention) was approved for distribution (UN Draft Convention, 13 July 2009). The convention does not seek to create a legally binding framework itself (Elsea, 2010). Instead, the Draft Convention seeks to 'promote cooperation between states regarding licensing and regulation of the activities of private military and security companies'; 'reaffirm and strengthen the principle of State responsibility for the use of force';

and ‘identify those functions which are, under international law, inherently governmental and cannot be outsourced’(UN Draft Convention, 13 July 2009: art 1).

The draft Convention outlines its main objective as the need to fill the ‘important gaps … in national and international legal regimes applicable to private military and security companies’ (UN Draft Convention, 13 July 2009). The progress on the Draft Convention was put forward to the Human Rights Council by the UN Working Group on the Use of Mercenaries in July 2010 (UNHRC, 2 July 2010). After reaching the ‘logical conclusion’ that a new, legally binding international instrument is required to regulate and manage PMSC operations, the Working Group recommended to the UN in 2010 that an open-ended intergovernmental working group be established with the responsibility of developing a regulatory framework for managing PMSC operations (Del Prado, 2011). On 1 October 2010 the Human Rights Council adopted a Resolution establishing an intergovernmental open-ended working group to elaborate a legally binding instrument on the regulation, monitoring and oversight of the impact of the activities of PMSCs on the enjoyment of human rights, on the basis of the Draft Convention proposed by the Working Group (UNHRC, 7 October 2010).

The Draft Convention would substantially broaden state responsibility for the actions of PMSCs (Perrin, 2009). Irrespective of the division as contracting state, territorial state and home state, states will still bear responsibility ‘for military and security activities of PMSCs registered or operating in their jurisdiction, whether or not these entities are contracted by the state’ (UN Draft Convention, 13 July 2009: art 4(1)). In order to hold a state responsible for the actions of PMSCs, regardless of whether they are registered or operating in that territory, it will therefore no longer be essential to demonstrate “attribution” or “subordination”, as is the case under general rules of international law (Juma, 2011). This is a ‘vague and undefined’ expansion of state responsibility assignment that goes well beyond recognized norms and principles of customary international law. This results from the drafters’ claimed conceptual approach, which holds that states should be the primary target of pressure to address PMSC related issues. Major home, territorial or contracting states are therefore unlikely to be willing to ratify the Draft Convention in its current form (Perrin, 2009).

The Draft Convention calls for a two-tiered PMSC monitoring framework. The domestic level comes first. States are obviously important because they have better organized systems for enforcing laws and promulgating regulations (Juma, 2011). The Draft Convention requires State parties not to 'delegate or outsource fundamental state functions to non-State actors' and 'specifically prohibit functions which are intrinsically governmental' (UN Draft Convention, 13 July 2009: art 4(3), 8). According to the Working Group, the 2011 draft includes an enumerated non-exhaustive list of activities (UNHRC, 6 August 2012: par 12). What it does is to define 'inherent' state functions as those 'consistent with the principle of state monopoly on the use of force', such as 'direct participation in hostilities, waging war and or combat operations, taking prisoners, law making …and other functions that a state party consider to be inherently state functions' (UN Draft Convention, 13 May 2011: art 2(i), 9).

On the other hand, the 2022 draft convention stipulates in its preamble its 'concern' about the increasing delegation or outsourcing of inherently state functions. Accordingly it defined state functions as 'functions which are consistent with the principle of the State monopoly on the legitimate use of force' (UNHRC-OEIGWG on PMSCs, 10 October 2022: art 1(h)). Under its objective, it prohibits PMSCs from exercising state functions (UNHRC-OEIGWG on PMSCs, 10 October 2022: 2(e), 4(3), 6, 7(1)). Critics counter that these "private soldiers" are not limited to "armed conflicts" covered by IHL; they operate in a variety of dealings. In addition, according to Gumedze, the essential roles of the state extend beyond those that align with its monopoly to use force (Gumedze, 2009). Second, even though the 2009 Draft Convention falls short of the objective to identify fundamental state functions, it does allow state parties to identify those functions on their own. The entire purpose of the Draft Convention, as stated in Article 1 (outlining fundamental state functions), is negated on these grounds (Gumedze, 2009). Consequently, the draft law, being watered down by the ideologies of privatization and the free market, has not deviated from the international framework for monitoring private companies, which frequently results in the creation of weak and ineffective procedures (Juma, 2011).

According to the draft Convention, a national system of licensing, regulating, and supervising PMSCs and their subcontractors' operations must be established (UN Draft Convention, 13 July 2009: art 4(5) c; UN Draft Convention, 13 May 2011: art 4(4) a). In addition, the Draft

Convention requires that '[e]ach State party shall take legislative, judicial, administrative and other measures as may be necessary to ensure that PMSCs and their personnel are held accountable' in accordance with the draft Convention and to ensure respect for and protection of IHRL and IHL (UN Draft Convention, 13 July 2009: art 7). It also allows states to exercises a wider criminal jurisdiction including universal jurisdiction for an enumerated list of offenses and take measures necessary for investigation, prosecution and punishment of violations of the draft Convention (UN Draft Convention, 13 July 2009: art 22 and 23).

The home states (where PMSCs are registered) bear more responsibility under the draft convention for the export of military and security services provided by PMSCs that are licensed and registered therein (del Prado 2011b). States that allow PMSCs to operate on their territory (territorial or host state) ought to make sure that these companies are effectively controlled (UN Draft Convention, 13 July 2009: art 14-19). The host and home states seem to be held responsible for PMSC activities that develop within their jurisdiction, but the Draft Convention makes no mention of secondary levels of responsibility, such as the state's responsibility for violations or for not taking appropriate action to stop violations from happening by any other contracting state (White, 2012). Nonetheless, it may be argued that the drafters included the secondary rules of responsibility, especially those pertaining to attribution of conduct, into the Convention because they are content to cite the ILC's draft Articles on State Responsibility (ASR) of 2001 in the preamble (White, 2012).

Regarding PMSCs, their operations, and their personnel, the proposed Convention would apply not just to states but also intergovernmental organizations, within the bounds of their authority (UN Draft Convention, 13 July 2009: art 3(1)). This is reasonable, according to some observers, since the organizations employ PMSCs in various areas of their operations. For example, unlike in the past, the UN and AU are now frequently using PMSC services and might be as guilty as states in maintaining the comparatively high level of impunity enjoyed by PMSCs operators (Juma, 2011). On the other hand, critics contend that as non-state actors are unable to ratify, sign, or accede to the Draft Convention, their inclusion is absurd (Gumedze, 2009).

The second is on international level. The proposed Convention calls for the creation of an International Register of PMSCs, requiring States to submit yearly reports on the import and

export of PMSCs services as well as standardize data on PMSCs licensed and registered in State parties (UN Draft Convention, 13 July 2009: art 17(2), 40(4)). A UN Committee on the Regulation, Oversight, and Monitoring of PMSCs would also be established by the convention; it would have the responsibility to conduct a confidential investigation upon receiving credible information containing solid evidence of PMSCs operations that violates IHL and IHRL (UN Draft Convention, 13 July 2009: art 32-36).

Each state party is required to submit a report detailing the 'legislative, judicial, administrative and other measures' it has taken to give effect to the Convention (UN Draft Convention 13 July 2009: art 33(1)). The representatives of state Parties must be present when each report is discussed in public. The Committee will offer any comments and suggestions it deems suitable on the report and its examination. States Parties may be asked to provide the Committee with further information pertaining to the implementation of the proposed Convention (UN Draft Convention, 13 July 2009: art 33(3)). Additionally, the Committee will, when necessary, provide interpretive commentary on the Convention's provisions (UN Draft Convention, 13 July 2009: art 34).

The Draft Convention's articles 37 and 40 outline complaints against state parties. For individuals or group of individuals compliant, two conditions are important. Prior to the Committee considering complaints or reaching a conclusion against the state over PMSC operations within its borders, a state must recognize the Committee's competence (UN Draft Convention, 13 July 2009: art 40(1)). Second, complaints will only be admissible based on the exhaustion of remedy rule (UN Draft Convention, 13 July 2009: art 40(5) and (7)). According to White (2012), the requirement that each party endorse in its national law legislation giving effect to the Convention makes up for the lack of direct recourse against PMSCs in the Convention by providing complainants with local remedies that must be exhausted before bringing a complaint before the Committee.

There is a recognition in the Draft Convention that a remedial mechanism is required at the international level, but it takes the form of a provision that requires states to 'consider establishing an International Fund to be administered by the Secretary General to provide reparation to victims of offences under this Convention and/or assist in their rehabilitation' (UN

Draft Convention, 13 May 2011: art 28). In addition, interstate compliant, which later excluded from the most recent draft, introduced under article 37, after all available domestic remedies have been invoked and exhausted in the case, 'in conformity with the generally recognized principles of international law' a state party may bring the matter to the attention of the Committee. Above all the Draft Convention provides that, '[s]tates parties may refer cases to the International Criminal Court' (UN Draft Convention, 13 July 2009: art 26(2)).

The use of force is prohibited by article 10 of the 2009 Draft Convention and article 8 of the 2011 Draft Convention when it pertains to: overthrowing a government; forcing a change in internationally recognized borders; violating sovereignty or aiding a foreign occupation; specifically targeting civilians or causing disproportionate harm (UN Draft Convention, 13 July 2009: art 10; UN Draft Convention, 13 May 2011: art 8). Compared to the UN Charter, the Draft Convention prohibits the use of force on far narrower grounds (Liu, 2015: 224). The UN Charter prohibits the threat or use of force outright, subject only to the right of self-defense in Article 51. The Draft Convention, on the other hand, seeks to restrict violence directed towards specific outcomes. However, this list is not exhaustive and is meant to serve as a starting point for additional discussion (Liu, 2015: 224).

According to the most recent draft, the ban would be applicable in every circumstance in which PMSCs carry out their operations, regardless of whether or not it is deemed to be an armed conflict (UNHRC-OEIGWG on PMSCs, 10 October 2022: art 3, 11(1) a). However, the PMSCs might carry out operations that would fall under the ambit of *jus ad bellum* without going against the law, but they would still be in violation of the prohibition on the use of force (Liu, 2015: 225). Despite the Draft Convention's implication that it permits PMSCs to operate, it is impossible for them to do so without using force. Military companies will inevitably employ force due to their very nature. It is impossible for such businesses to refrain from using force until and unless they are not identified as "military" (Gumedze, 2009).

When the document was first released in 2009, it contained 52 articles; however, the most recent version, which was made public in 2022, only has 24 articles (UNHRC-OEIGWG on PMSCs, 10 October 2022). In its resolution 36/11 of 28 September 2017, the Human Rights Council established a new open-ended intergovernmental working group whose objective is to develop

the details of an international regulatory framework that will protect human rights and ensure accountability for abuses and violations associated with the operations of PMSCs (UNHRC, 9 October 2017). It succeeded the 2010 open-ended intergovernmental working group established by the Council in its resolution 15/26 to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of PMSCs (UNHRC 7 October 2010). It was renewed for a further period of three years by resolution 45/16 adopted on 6 October 2020 (UNHRC, 12 October 2020). The 2022 draft convention was eventually produced by the Progress Report that came after multiple intergovernmental working groups' discussions. The present Draft would only apply to states, even though previous drafts did extend the obligations to PMSCs itself in addition to international organizations (UNHRC-OEIGWG on PMSCs, 10 October 2022).

Apart from the aforementioned deficiencies, the most recent draft convention takes a moderate stance regarding the responsibility of states. The 2009 draft, article 1, which enshrined states' responsibility 'for the military and security activities of private entities registered or operating in their jurisdiction, whether or not these entities are contracted by the State', as well as the 'civil and criminal responsibility for the use of force under national and international law, whether the use of force occurs within its territory or outside its borders', were excluded from (UNHRC-OEIGWG on PMSCs, 10 October 2022). The most recent draft of 2022 does not include the explicit provision that prohibits PMSCs from using excessive force or firearms, particularly when doing so in order to overthrow a government, change international boundaries, violate the territorial sovereignty of another state, evict residents from any territory, or control its natural resources. Instead, reference to IHL is made regarding the use of weapons (UNHRC-OEIGWG on PMSCs, 10 October 2022: art 11 (1) (a)).

Referral to the International Court of Justice (ICJ) of matters on which states parties failed to agree upon the terms of arbitration is included, but referral of international crimes to the ICC is omitted (UNHRC-OEIGWG on PMSCs, 10 October 2022: art 18(2)). The international committee that the 2009 draft had planned to establish was similarly removed from the most recent draft of 2022. The latest draft also 'recognized' the contribution of the Montreux Document in 'establishing an expectation that PMSCs will respect human rights, regulating the

activities of [PMSCs] and preventing abuses or violations… as well as setting standards for access to effective remedies for abuses' (UNHRC-OEIGWG on PMSCs, 10 October 2022).

3.2. The Montreux Document

On 17 September 2008, 17 states endorsed 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 (The Montreux Document) (Tougas, 2014). Now, with 59 states, 3 international organizations, the European Union (EU), North Atlantic Treaty Organization (NATO), and the Organization for Security and Cooperation in Europe (OSCE), are 'participating' in the Montreux Document (Montreux Document Forum, 2024). Regarding the subject of private armed contracting, it is the most extensively recognized international agreement (Ralby 2016). States and organizations that take part in the process make it clear that their goal is not to support the use of PMSCs; rather, they seek to make use of multilateral collaboration to lay out the laws and practices that states and other contractual entities should follow when deciding whether to employ a PMSC (Montreux Document, 2008: preface par 7, 8).

The Montreux Document is one of many "soft law" initiatives which are being undertaken. The language employed in the explanation and description of the Montreux Document suggests a deliberate attempt to avoid mistaking it for a hard law instrument. It is neither "in effect" nor ratified by any state and states are not signatories. States "participate" in it instead. This delicacy highlights the Document's soft law status, or at the very least, its non-binding nature (Ralby, 2016). Nonetheless, the term "soft law" is debatable because some scholars and jurists deny its existence (Steinberg, 2002; Steinberg, 2013). The objective of the document was to lay out the regulatory framework that PMSCs operate in. It is a formal rejection of the common belief that these bodies function in a legal vacuum, among other things (Chesterman, 2011). However, it does not set any specific restrictions (Liu 2015: 212). It does not create or modify any legal obligations and is clearly non-binding (Montreux Document, 2008: preface par 3).

Part one (I) of the Document recalls 'existing international legal obligations of States regarding [PMSCs]' and breaks them into six categories: those applicable to contracting states, territorial states, home states, all other states, PMSCs and their personnel and finally the relevant laws of superior responsibility. According to the Montreux Document, contracting states, territorial

states, home states, and all other states are advised that they have an obligation ‘to ensure respect for international humanitarian law’(Montreux Document, 2008 : art 3, 9, 14, 18) and ‘are responsible to implement their obligations under international human rights law’(Montreux Document, 2008 : art 4, 10, 15, 19). Furthermore, contracting states, territorial states, home states, and all other 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’(Montreux Document, 2008 : art 5, 11, 16, 20).

Unlike the UN draft which prohibits delegation of fundamental state function, contracting states cannot delegate to PMSCs only functions that they are not legally entitled to perform themselves since they still must maintain their international legal responsibilities even after entering into a contract with a PMSC (Montreux Document, 2008 : art 1 and 2). It prohibits contracting PMSCs to carry out activities that IHL ‘explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner of war camps or places of internment of civilians’ (Montreux Document, 2008 : art 2).

It further defines PMSC personnel as ‘persons employed by, through direct hire or under a contract with, a PMSC, including its employees and managers’ (Montreux Document, 2008: art 9(b)). This, according to critics, narrows down the category of persons that may incur responsibility on behalf of the PMSC (Juma, 2011). This definition was incorporated into the UN draft convention of 2022, whereas it was completely absent in the earlier versions (UNHRC-OEIGWG on PMSCs, 10 October 2022: art 1(e)). In addition, the Montreux Document does not clarify the blurring status of these “independent contractors or private soldiers” who are recruited as civilians, but are heavily armed to provide “passive or static security”. The probability that they will use force or engage in hostilities is very high. They may carry out preemptive offensive against adversaries for defensive reasons when it is impossible to distinguish between offensive and defensive operations, as occurred in a number of incidents (most famously EO in Sierra Leone and Angola) (O’Brien 2007). They operate in a ‘grey area’ and might be mistaken for mercenaries or irregular combatants easily (Del Prado, 2008).

The definition provided in the Montreux Document makes the assumption that these entities can only be “private”, yet it is also feasible that they could be companies that are jointly owned by the public. This implies that the company cannot be referred to as a PMSC if it is a private-public partnership. When the 2022 UN draft convention defines PMSCs as ‘private business entities’ instead of applying the preceding ‘corporate entity’, it is evident how much the document has influenced the latest UN draft convention (UNHRC-OEIGWG on PMSCs, 10 October 2022: art 1(d)). Additionally, several PMSCs have been found to house a mercenary unit, which has essentially made the problems posed by mercenaries worse (Brooks and Solomon, 2000; Gumedze, 2008; Gumedze, 2009). Furthermore, according to Special Representative of the Secretary-General, John Ruggie, the document’s limited nature is evident because it makes no mention of the State’s obligation to respect and enforce the due diligence principle which is visible in the UN draft convention (UNHRC, 7 April 2008: par 56–64). Others, on the other hand claim based on Part I, article 4, 10 and 15, the Montreux Document contain clauses that in effect recognize due diligence obligations of states (White, 2012).

Furthermore, the objective of the “Swiss Initiative” is “to recall certain existing international legal obligations of states regarding private military and security companies”. It emphasizes the fact that international law is not devoid of provisions. In fact, there are several laws and other regulations that address IHRL and IHL violations, some of them directly, most of them indirectly. The actions of mercenaries, private contractors, private guards, and PMSCs, however, can pass through multiple cracks like ‘water through a sieve’ (Del Prado, 2008). Nor is there any provision in the document that states should strengthen government standards for procurement, contracting and management of the industry backed by an effective reporting mechanism (Del Prado, 2008).

In addition to states that hire PMSCs, individual criminal responsibility for activities performed by PMSC employees are established (Montreux Document, 2008: par 27). This provision states that contractual relationships by themselves are insufficient to give rise to such responsibility. A superior must have control over a contractor in order for him or her to be held personally accountable for their actions, whether the superior work for a PMSC, the client government, or a non-state client that hired the PMSC (Ralby, 2016). In addition, ‘[t]he status of the personnel of

PMSCs is determined by international humanitarian law, on a case by case basis, in particular according to the nature and circumstances of the functions in which they are involved' (Montreux Document, 2008 : par 24). Like the UN draft conventions which only prohibit direct participation in hostilities, this provision does not provide criteria for evaluating whether the individuals are protected civilians, unprotected civilians, members of militias and other volunteer corps, contractors accompanying the armed forces, or possessing of some other status (Ralby, 2016). Their determination of status is left for IHL, '[i]f they are civilians under international humanitarian law, the personnel of PMSCs may not be the object of attack, unless and for such time as they directly participate in hostilities' (Montreux Document, 2008: art 25).

According to the ICRC's perspective, contractors who are directly involved in hostilities but are not granted authorization by a party to the conflict to act as combatants would still be classified as civilians for the purposes of IHL, but they would no longer be protected from direct attack while doing so (Melzer, 2008). It is challenging to interpret the direct participation in conflicts. Despite the fact that the ICRC has released its interpretive guidance on the subject, not everyone agrees with its interpretations, especially when it comes to PMSCs. Although there is general agreement that self-defense, the primary function of PMSCs, does not entail direct participation in hostilities, this and many other provisions of the Document are too ambiguous to offer consistent guidance (Ralby, 2016).

The document's most important paragraph, article 26, describes how PMSCs fit within the current framework for armed conflict law (Ralby, 2016). In terms of providing clarity, this provision shows that PMSCs can have a range of statuses and can have prisoner of war protection in certain circumstances. It also establishes that their default status is as protected civilians, unless that status is mitigated or altered under the circumstances listed. It also emphasizes their adherence to IHL regardless of their status and gives them the opportunity to exercise their quasi-official governmental status in terms of their obligations under IHRL. The danger is that it leaves quite a few uncertainties (Ralby, 2016).

According to its preface, the Document 'recalls existing legal obligations of states and PMSCs and their personnel . . . and provides states with good practices to promote compliance with international humanitarian law and human rights law during armed conflict' (Montreux

Document, 2008: preface, par 2). The assertion that IHL is applicable only during armed conflicts serves as an example of the document's restrictive approach (UNHRC, 21 January 2009); since the threshold to designate a situation as an armed conflict is not clear (Del Prado, 2008). The preface of the Montreux Document clarify that the principles of the Document also apply to contexts other than armed conflict (Montreux Document, 2008: preface par 5 and 8). Due to its universal nature IHRL is applicable to every individual; anywhere in the world, at all times, and under any circumstances (Del Prado, 2008). However, there is not a paragraph in the document that addresses states' obligations to respect or protect human rights (Del Prado, 2008).

In part two of the document, there is the suggestion that it is 'good practice' for contracting, territorial or home States ' [t]o determine which services may or may not be contracted, carried out in their territories or may not be exported by PMSCs'(Montreux Document, 2008: art 1, 24, 53). Although it's unclear where to draw the line, guidelines seem to suggest that taking part in hostilities directly would be forbidden (Ralby, 2016), as it notes that 'contracting, territorial or home states take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities' in determining which services may not be contracted, carried out in their territories or may not be exported (Montreux Document, 2008: art 1, 24, 53).

In order 'to ensure transparency and supervision in the selection and contracting of PMSCs', contracting, territorial, and home states are advised to implement the 'good practices' listed in choosing PMSCs for contract, deciding whether to authorize the operation of PMSCs, and awarding an authorization (licensing), respectively (Montreux Document, 2008: part II). Still unresolved is how states authenticate the information recommended in the absence of an international infrastructure for collecting or storing the necessary information. Verifying IHL violations is particularly challenging as there is no central body that decides cases involving such violations and since states often find themselves helpless to take legal action (Ralby, 2016). In addition, the document offers several important good practices that the Contracting State might consider incorporating into the PMSC contract. According to the working group, it does not, however, call for the establishment of a centralized office tasked with registering all contracts, enforcing uniform standards, and monitor the contracts (UNHRC, 21 January 2009: par 48).

One of the document's distinctive recommendations is to include 'contractual clauses and performance requirements that ensure respect for relevant national law, [IHL] and [IHRL] by the contracted PMSC' (Montreux Document, 2008: Part II art 14-15). The Document furthermore establishes that states have an affirmative 'obligation' to monitor the PMSCs with which they contract and to punish any violations of international law (Montreux Document, 2008: art 3-4, 6). Contracting states also, according to the Document, have a responsibility to provide reparations to parties injured by PMSCs as the result of violations of IHL and IHRL when such conduct is attributable to the Contracting States in accordance with the customary international law of State responsibility (Montreux Document, 2008: art 8). Accordingly, contractual clauses may also provide for the Contracting State's ability to terminate the contract for failure to comply with contractual provisions. They may also specify that 'appropriate reparation be provided to those harmed by the misconduct of PMSCs and their personnel' (Montreux Document, 2008: art 14).

Violations that are said to be attributable to the Contracting State, consistent with customary international law are listed under paragraph 7 of the 'Legal Obligations' section or Part I. However, the main objective of contractual remedies is restitution, and their nature is financial. Furthermore, only the parties are concerned with the restitution of contractual remedies. Because of this, the Montreux Document's offer of compensation to victims can only be voluntary; the victim is not taken into account in the bilateral nature of contractual remedies. In contrast, the objectives of human rights law remedies go beyond simple financial compensation (Liu, 2015: 213-4). In addition, the obligation of contracting, territorial and home state is to 'to take appropriate measures to prevent, investigate and provide effective measures for relevant misconduct of PMSCs and their personnel' (Montreux Document, 2008: art 4, 10, 15). This weakens the states' apparent remedial obligations because it is still unclear how "relevance" and "misconduct" might be determined (Cockayne, 2008).

Contract law's 'myopia' has two direct and widespread effects. First, because all elements not specifically included as contractual terms, the scope of duties and obligations assumed by the parties to the contract is constrained. Second, the scope of entities to whose responsibilities are owed to the contractual parties exclusively is limited to the parties by contract law ('privity' of

contract) (Liu, 2015: 197, 215). Ultimately, this means that contract law limits the extent and nature of responsibility (Liu 2015:199). The likelihood of enforcement is limited by the 'privity' of contract, and the remedies available under contract law are mostly improper responses to violations of criminal, human rights, and IHL (Liu, 2015: 197, 215). Regardless of how the agreement affects other parties, the contracting parties benefit from it, and this is why the parties have the discretion and incentives to enforce its provisions (Liu, 2015: 203-4).

On the other hand, the purpose of human rights law is limiting, establishing standards for what constitutes appropriate behavior. Given this, it is challenging to understand how contract law may successfully protect human rights (Liu, 2015:212). Regardless of whether the contractual relation creates any degree of state attribution or not, the contract does not suggest that the state may equally bear responsibility for the actions of PMSCs it contracts. Furthermore, it doesn't address jurisdictional issues that can surface when several states share responsibility for a PMSC operation (Del Prado, 2008). The phrase 'entering into contractual relations does not in itself engage the responsibility of contracting states' under article 7 of part I can be understood to mean that where the conduct of PMSCs is not attributable to the contracting state and where contracting states have otherwise taken the necessary steps to discharge their obligations to ensure respect, as specified in articles 1-6, then they will not be responsible for violations of IHL simply because they are contracting partners (Cockayne, 2008). Moreover, the contracting, territorial, and home states approach leaves out states where PMSCS hire labor overseas, usually without first consulting the corresponding governments (UNHRC, 21 January 2009: par 48).

Furthermore, neither the collective security principle of the UN Charter addressed nor the fundamentally governmental functions that form the basis of state sovereignty are defined by the document (Del Prado, 2008).Unfortunately, these good practices have not generally been followed by PMSCs or the major states outsourcing military and security services (Del Prado, 2011). States and other actors may find it challenging to realize comprehensive accountability since it does not bridge the differences in practice between legal systems (Ralby, 2016). The legal section does not go into great detail about the intricate details of state-mandated laws or provide any guidance on how the industry's international legal responsibilities should be interpreted. In fact, the Montreux Document raises many of the most difficult legal issues

surrounding PMSCs under international law and fails to provide satisfactory answers. Furthermore, the part on good practices does not offer a thorough or legally binding "how to" guideline for handling every situation that could come up in private military and security contracting (Ralby, 2016).

As the Working Group has pointed out, the document places more responsibility on the territorial states, the States in which PMSCs operate, than on the contracting or home states, the States from which these businesses are based or where they secured contracts (UNHRC, 21 January 2009), in contrast to the UN draft convention, which places more responsibility on the home state. The entire document makes clear how limited the obligations are for contracting or home states. For example, the territorial states must "designate a central authority competent for granting authorizations and to allocate adequate resources and trained personnel to handle authorizations properly and timely", according to the relevant good practices. On the other hand, the Home States' procedural requirements for authorizations are restricted to evaluating "the capacity of the PMSC to carry out its activities in respect of relevant national law, [IHL] and [IHRL], taking into account the inherent risk associated with the services" (Del Prado, 2008).

According to the working group, although it is an excellent promotional document on current IHL, it does not address the regulatory gap in the responsibility of states regarding the conduct of PMSCs and their employees (UNHRC, 21 January 2009: par 44). One of the issues is that the 'Swiss Initiative' hasn't followed the UN system's requirement for an intensive consultation process. The Working Group on Mercenaries and the UN Departments did not participate in the process (UNHRC, 21 January 2009: par 44). Therefore, it is evident that there are problems with the Montreux Document's and the UN Draft Convention's compatibility (White, 2012).

Industry lobbies appear to have participated fairly decisively (UNHRC, 21 January 2009). In this regard, it is distressful to note the press release from the International Stability (now called Peace) Operations Association (IPOA), which stated that it "was honored to be a part of the process" and that it saw "the agreement as an affirmation of the global value of ethical private sector operations in conflict, post-conflict, and disaster relief operations". This is because PMSCs like Triple Canopy and Blackwater (through its subsidiary Total Intelligence) have been

represented as members of this association, and they have allegedly committed serious human rights violations (Del Prado, 2008).

In June 2009, a parallel initiative was introduced, which was supported by the governments of the US, UK, and Switzerland. In 2010, the International Code of Conduct for Private Security Service Providers was approved (Del Prado, 2011). The major proponents of this project include corporations, directors of PMSCs, and organizations like IPOA and the British Association of Private Security Companies (BAPSC). Despite the fact that the crucial role PMSCs play in "military activity" is mentioned in Article 1 of the Preamble to the Code, all references to the "Montreaux Document" have been abandoned (Del Prado, 2011).

Critics contend that "the Swiss Initiative" de facto recognizes this new industry and the military and security services it provides by 'stamping its seal of legitimacy, which still remains unregulated and unmonitored', rather than advocating for a 'moratorium until the good practices become reality and the pertinent mechanisms they provide have been put in place' (UNHRC, 21 January 2009). On the contrary, it suggested that the Montreux Document provides a valuable starting point for a process that will need to continue indefinitely (Perrin, 2009; Ralby, 2016). As such, a treaty or convention may be unnecessary at this time and even detrimental (Ralby, 2016). On the other hand, critics contend that states would not likely move on with continuing to address the challenges if they believed the Document to be the answer to each question (Cockayne, 2008). If the International Code of Conduct Association (ICoCA) and the Montreux Document get widespread political backing, a powerful international norm may be established. This would most likely affect an international convention that the UN is currently working on (Gwatiwa, 2016). This could result in what is known as 'interstitial law', when legal obligations are deduced from established customs and indirectly applicable laws, even if it takes decades (Kelly, 2000).

3.3. AU's Malabo Protocol and the Convention on Mercenarism

There is no continental framework in Africa that governs PMSC. According to the AU, PMSCs are still considered a new breed of mercenaries, and their operations could be governed under the 1977 mercenary convention (Gwatiwa, 2016). However, if there is a specific place on the earth where the private provision of armed force must be highly monitored, it is Africa (Gumedze,

2007a). As Gumedze (2007a) points out, the only legal instrument currently available in Africa to accomplish this is the 1977 OAU/AU Convention on the Elimination of Mercenarism in Africa, which is desperately inadequate and in need of serious modification.

The professionalization of the security market in the 21st century had largely normalized, if not legitimized, the use of these actors, whether for armed protection, guarding strategic facilities , consulting and training services, or even combat (Avant, 2005; Leander, 2005a; Percy, 2007b:207). Furthermore, only 36 of the AU's 55 member states have signed the 1977 convention outlawing mercenary activity (AU, 18 March 2024). Many of the African states who have hired PSMCs since 1990 were signatories, illustrating the significance of this "measure" against mercenary employment (O'Brien, 2000).

The central problem with the OAU convention, like the First Additional Protocol of 1977 to the Geneva Convention and the UN definition, is that it defines the individual rather than the activity, that all six elements of the definition must be present, and that it clearly defines profit as the primary motivation, which is impossible to prove in court making them basically unworkable (Singer, 2004; O'Brien, 2007; Del Prado, 2019). It may also be argued that "private gains" are not always monetary. A review of mercenary activities in the 1960s and 1970s reveals that they do not necessarily have financial motivations. Certain individuals maintain a strong sense of commitment to ideological views, which might become the principal basis for their involvement (Musah and Fayemi, 2000; Del Prado, 2019). The act committed, not the reason behind it, should be given greater weight in the definition of a crime. The fact that the offense was committed is more important than the motivation, whether it is financial, emotional, or ideological (Del Prado, 2019).

The OAU Mercenary Convention is definitely out of date. An immediate problem is that the Convention does not define an armed conflict (Gumedze, 2007a). The distinctions made between an international and non-international armed conflict under international humanitarian law, which are absent in the convention, are important because the definition of a mercenary given under IHL is provided in Additional Protocol I to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts, and this is an instrument that deals with international armed conflicts as opposed to non-international armed conflicts. As a

result, the assumption is that mercenaries can only participate in international armed conflicts since they are regulated by an instrument designed for international armed conflicts (Gumedze, 2007a).

In addition, it is unclear that the drafters of the Convention intended the agreement to apply merely to mercenaries involved in armed conflicts, whether international or otherwise. Mercenaries operating in areas where no armed conflict is taking place, such as mercenaries recruited to overthrow a government that is not currently engaged in an armed conflict, are arbitrarily exempted from being labeled as mercenaries under the Convention (Gumedze, 2007a). Furthermore, whatever motivated this definition of a mercenary, it was never expected that established governments would recruit private force just to protect regime security, as we have seen in Angola and Sierra Leone. Beyond its statist design, the definition raises more issues than it resolves in its subsequent phrases, 'perhaps unintentionally' (Musah and Fayemi, 2000).

In addition, the Mercenary Convention does not define "taking a direct participation". While the basic documents of IHL do not offer solutions, the Commentary on Additional Protocol I to the Geneva Conventions does (Gumedze, 2007a). Direct participation is defined as 'acts of war which, by their nature or purpose, are likely to cause actual harm to the personnel and equipment of enemy forces' (Pilloud and Pictet, 1987: par 1944). Another problem with this interpretation is the use of the term "war", which the Mercenary Convention avoids in favor of "armed conflict" (Gumedze, 2007a). It should be noted that African wars are not always wars in the true sense of the word, and 'the nature of the actors in Africa's wars rarely conforms to the conventional conception of organized, hierarchical, and disciplined professional armies fighting in identifiable military uniforms'(Jackson, 2006). Jackson (2006) listed a dozen potential actors, some of whom could not possibly be physically present.

According to the direct participation requirement, a person is considered a mercenary if he or she is physically present in the theatre of armed conflict and does (or is expected to cause) direct harm to the adversary's personnel and equipment. The preamble to the Mercenary Convention must also be considered, as it links direct participation to its objective of undermining the independence, sovereignty, territorial integrity, and harmonious development of AU member states. It must also threaten the legitimate exercise of African people's right to independence and

freedom under colonial and racist domination (Gumedze, 2007a). According to article 1(2) of the OAU convention a mercenary engages in certain acts with the intention of opposing a process of self-determination, stability, or territorial integrity of another state through armed violence. There is no mercenary crime if such intent is not there (Gumedze, 2007b). Furthermore, if only states affected by questions of self-determination, as well as states with a vested interest in supporting self-determination in other parts of the world, were interested in controlling mercenaries, it could indicate that the norm against mercenary use was far from universal (Percy, 2007b:179-80).

According to Article 1(2), the crime of mercenarism is committed by an individual, group, or association, as well as a state representative. A mercenary is also recognized as a legal person under the definition in Article 1(3) of the Mercenary Convention. 'Arguably', PMSCs that meet the requirements outlined in article 1(1) of the Mercenary Convention may be considered mercenaries because their juridical nature is recognized in article 1(3) (UNESC, 14 February 2001: par 43, Singer, 2004; Gumedze, 2007a). However, Article 6(a) of the Mercenary Convention provides some guidance on whether a mercenary is a natural or artificial person. The provision's wording, which states that a state is required to "prevent its nationals or foreigners on its territory from engaging in any acts mentioned in article 1 of this Convention", implies that a mercenary is a natural person rather than an artificial one as defined in article 1(3) (Gumedze, 2007a).

A crucial standard applied to the convention is the 'party to the conflict' under criteria 3-6 of Article 1(1) of the convention. It appears that the term 'party to the conflict' in this Mercenarism criterion refers to a state, therefore while a state may employ such a person, a non-state actor may not. Thus, if a non-state actor employs someone in such a capacity, it implies that the person is a mercenary (Gumedze, 2007a). In addition, the sixth requirement for being categorized as mercenary is that the person '[must] not be sent by a state other than a party to the conflict on an official mission as a member of armed forces of the said state'. This sets double standards by prohibiting the employment of mercenaries against African states but allowing them to be used by African states inside the limits of an "official mission" (Gumedze, 2007a). Furthermore, a person cannot be classified as a mercenary if they are a citizen of a conflicting

party or a resident of the territory under their control (OAU Convention, 1977: art 1(d)). The reality of diaspora citizens working against their home country is not included in this definitional orientation (Del Prado, 2019)

A variety of approaches that could be employed in interpreting the Convention result in confusion over whether its provisions prohibit governments from hiring 'soldiers of fortune' (Kufuor, 2000). The current role of mercenaries is focused on suppressing insurgent uprisings. Such resistances are easily interpreted as a process of self-determination. Self-determination is no longer exclusive to colonial settings. To emphasize the point, the African Charter on Human and Peoples' Rights provides that opposition to oppressive rule is a necessary step in the path of self-determination. If, for example, a government known for human right violations and undemocratic tendencies employs mercenaries to quash a rebel revolt, this might be considered a violation of Article 1(2) of the Mercenary Convention (Kufuor, 2000). However, Zarate (1998) argues the OAU convention's omission to clearly prohibit governments from recruiting mercenaries opens the door to broadening our analysis and depending on the context in which it was interpreted, rather than relying solely on the Convention's provisions. A common maxim in international law is that if an act in question is not expressly required or prohibited, it is up to the states in the international system to decide whether or not to carry out the conduct (Zarate, 1998).

Applying this to the Convention, one could argue that there is no particular clause prohibiting states from recruiting mercenaries; hence the operations of PMSCs in Africa do not violate the Convention (Kufuor, 2000). None of the states that have used mercenaries have been colonial or racially oppressive. This was the setting or condition that fueled a series of OAU resolutions against mercenaries, culminating in the adaptation of the Convention in 1977. It could also be asserted that a government's employment of mercenaries (PMSCs) against rebels in a civil war does not constitute the type of threat contemplated in the Convention's preamble (Kufuor, 2000). The OAU did not, therefore, especially concern itself with the judicial definition of mercenaries participating in armed conflicts, nor did it focus on the use of mercenaries by states against national liberation struggles (Cassese, 1980). That is, the drafters carefully designed the Convention to allow African governments to continue hiring non-nationals as long as they were

used to defend themselves against “dissident groups within their own borders”, while prohibiting their use against any other OAU supported rebel groups (Zarate, 1998; Singer, 2004).

The basic concept of the OAU convention is out of alignment with the growing legitimacy and ‘credibility’ of PMSCs. Considering that many of the ‘successful’ uses of PMSCs to help troubled African governments, there is unlikely to be much support for banning, or even strictly controlling such PMSCs (Spear, 2006:49). In addition, only PMSCs with the primary goal of “opposing by armed violence a process of self-determination, stability, or the territorial integrity of another state” are considered mercenaries (Gumedze, 2007). Much more significant in the context of the mercenary convention are the problems posed concerning state sovereignty and the principle of noninterference inherent in the OAU charter during the Cold War rivalry, throughout the period of independence (Musah and Fayemi, 2000). Nothing in the Convention indicated that the traditional notion of state sovereignty did not apply. On the other hand, mercenaries may fit into the gray but quasi-permissible category of forces that provide outside support to African rulers. In fact, the right to conduct internal affairs in the manner that the state deems appropriate, which has never been a concern of the OAU, gives adequate justification for the employment of PMSCs (Kufuor, 2000).

Gumedze (2008a) pointed out the main areas where AU’s PMSC regulation fell short. In the few years that the AU has been in operation; it has not succeeded in getting all of its members to ratify the 1977 OAU/AU Convention. Second, the convention was rendered ineffective because the AU was unable to provide a document establishing a treaty organ to oversee and enforce the convention. Third, while being aware of the rise of new mercenarism modalities in the form of PMSCs, the AU has not, at least not internationally, regulated the latter’s operations. Subsequently, given the definition of a “mercenary” and the complexities of PMSC involvement in African conflicts and post-conflict states, peacekeeping operations, and humanitarian assistance activities, the AU has neglected to evaluate the relevance of the OAU/AU Mercenary Convention (Gumedze, 2008a).

Besides, the clear distinctions between the internal and external aspects of conflict are blurred by the networked nature of the new participants to African war (Jackson, 2006). Between 1989 and 2014, there were more than 330 military conflicts in Africa. With a few rare exceptions, like the

war between Ethiopia and Eritrea, these violent wars have mostly involved intrastate rivalries as ‘quasi-totalities’. According to the Uppsala Conflict Data Program, one unsettling aspect of these conflicts is the participation of outside parties (Del Prado, 2019) One problem is that the legal frameworks pertaining to conflict and warfare have not changed in tandem with the evolution of conflict or the arrival of new non-state actors (Ndlovu-Gatsheni and Dzinesa, 2008).

Only South Africa, which is not a party to the OAU Convention, has enacted an anti-mercenary statute, despite the fact that the convention depends on its members to execute it through national legislation (Sriram, Martin-Ortega, and Herman, 2018). The logic of this action is debatable, though, especially in light of the South African government’s extremely limited ability to implement the laws it has established to crack down on the export of military and security capabilities by private companies to international war zones (Avant, 2005). Nevertheless, this had still not been enacted. The UK opposed it and threatened to offer citizenship to all South Africans serving in the British army when President Jacob Zuma attempted to sign it into law in 2007 (Gumedze, 2010). The African continent lacks experience with such laws unless they are implemented in a member state with the highest number of PMSCs (Gwatiwa, 2016).

As of 2013, no African state has responded to the UN’s request for its database through the UN Working Group on the use of mercenaries, in response to the UN Human Rights Council’s proposal, pointing out either specific legislation that prohibits mercenary activities or specific past convictions (UNHRC, 1 July 2013: par 13,22-25). Likewise, in the following African states: Botswana, Burkina Faso, Cameroon, Côte d’Ivoire, Ghana, Democratic Republic of the Congo, The Gambia, Kenya, Lesotho, Mali, Mauritius, Morocco, Namibia, Nigeria, Senegal, Sierra Leone, Swaziland, Tunisia, Uganda, and Zimbabwe, no particular legislation addressing the activities of mercenaries and/or PMSCs has been adopted (UNHRC, 1 July 2013: pars 15–44; UNHRC, 30 June 2014: pars 22–5). Mercenarism is not explicitly outlawed by domestic legislation in other states, such as the Comoros, despite being a party to the 1977 OAU Convention (UNHRC, 4 August 2014). A country that has been severely impacted by mercenary operations is the Comoros. Serious abuses of human rights, including as the right to self-determination, have been inflicted upon the population by mercenaries (Del Prado, 2019).

In 1991, UN Member States rejected the International Law Commission's suggestion to include mercenarism in the code of crimes against the peace and the security of mankind. Further, Mercenarism is not included in the ICC's Rome Statute. In contrast, the AU's Malabo Protocol of 2014 includes mercenarism as one of the 14 international crimes that judges of the African Court of Justice and Human and Peoples Rights could be allowed to adjudicate (Malabo Protocol, 2014: art 28 A, H). The judges of the future African Court of Justice and Human Rights will also be able to link mercenary activity to other international crimes.

Furthermore, under the Protocol's Article 46(c) (Corporate Criminal Liability), judges will be able to prosecute not only natural persons but also legal entities (companies) for the crime of mercenarism (Malabo Protocol, 2014: 46C). In fact, the approval of Article 46C by the African Union implies that the African context has successfully surmounted the desirability barrier. This also shows what seems to be a fairly strong agreement among civil society organizations in Africa regarding the necessity of criminal and civil liability frameworks in order to address the impunity with which companies continue to operate in many African countries (Kyriakakis, 2019). However, the application is general to all businesses and does not target PMSCs or any particular offenses they may conduct beyond those specified in article 28A (Malabo Protocol, 2014: art 46C).

Contrary to the 1989 International Convention, Article 28 H has integrated all the six requirements contained in Article 47 of Additional Protocol I of 1977 to the Geneva Conventions which relate to taking a direct part in hostilities with significant change. The sixth condition in the provisions of Article 47(2) namely 'does, in fact, take a direct part in the hostilities', has been included in the wording of paragraph 3 of Article 28H which reads 'A mercenary, as defined in paragraph (1) (a) or (b) above, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence'.

Article 28 H of the AU 2014 Protocol incorporates the provisions included in Article 1, (1) and (2) of the 1989 international Convention by retaining the last part of the sentence but excluding the term 'significant' before 'private gain' in Article 1 (1)(b) of the convention which reads '[i]s motivated to take part in the hostilities therein essentially by the desire for significance private gain…' and by excluding the last part of the sentence from Article 47(2) c of the Additional

Protocol I which reads '…substantially in excess of that promised or paid to combatants of similar ranks and functions of that party' (Malabo Protocol, 2014: art 28H(1)(a) ii and (b) ii). This can be seen as something positive because it would have been harder to prove a motive for engaging in mercenarism if they had been included (Del Prado, 2019). In 1977, the OAU Convention included references to "direct participation" in relation to an individual's involvement in "hostilities" of an armed conflict or in a "concerted act of violence". Article 28 H retains these references in the event that an individual is charged with the crime of mercenarism. Such conditions were not anticipated by the 1989 international convention (Del Prado, 2019).

Article 28 H covers two types of situations: 'direct participation in hostilities', which is specifically addressed in the provisions of Article 47 of Additional Protocol I in situations of an international armed conflict but not covered by the 1989 convention; and 'concerted acts of violence', which is covered specifically in Article 1(2) a of the 1989 International Convention but is not covered by the additional protocol. Direct participation is not mentioned in the contracts that are usually signed by those hired for these kinds of operations (Del Prado 2019). They mention of "a high-risk environment", including "risks and hazards of war", "a hazardous environment", etc. Usually, the person hired to offer security is hired as an independent contractor rather than as a fighter or mercenary (UNHRC, 4 February 2008: Par 27-8). The second type of situations relating to 'concerted acts of violence', such as (1) overthrowing a legitimate Government or otherwise undermining the constitutional order of a State; (2) assisting a government to maintain power; (3) assisting a group of persons to obtain power; or (4) undermining the territorial integrity of a State, as in the case of a situation of an international armed conflict, can be applied to both individuals as well as to employees of PMSC who, in the past, have been involved in African countries (Del Prado, 2019).

For the African context, the two aforementioned goals (numbers 2 and 3) are novel. These are innovative clauses that were absent from earlier international criminal conventions. They take into account circumstances like those in Angola, Sierra Leone, and, more recently, Zaire during the 1990s power struggle against Mobutu and Kabila. The phrase "assisting a group of persons to obtain power" may be read in connection with Article 28 E of the AU Malabo Protocol, which

states that it is unlawful to replace a democratically elected government with mercenaries (Del Prado, 2019).

In addition to fulfilling the condition of participating directly in hostilities the person must satisfy the following five prerequisites stipulated in Article 28 H (1) (a) namely: '[i]s specially recruited locally or abroad in order to fight in an armed conflict'; '[i]s motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation'; '[i]s neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict'; [i]s not a member of the armed forces of a party to the conflict'; and '[h]as not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces' (Malabo Protocol, 2014: 28H (1) a). With the exception of the previously discussed changes to article 1(1) b, these provisions are exactly the same as those included in the 1989 international convention.

Unfortunately, several of the features that define the crime of mercenarism found in Article 1 (2) of the 1977 OAU Convention have not been incorporated into Article 28 H of the 2014 African Protocol. According to Del Prado (2019), these can refer to natural or legal persons, such as "individuals", "groups", "associations", "representatives of a state", or "a state itself". Had the 2014 AU Protocol's amended definition of mercenarism included a reference to juridical persons, such as associations or groups, it would have enabled the proper prosecution of both PMSC employees and individual mercenaries, as well as the companies themselves, for engaging in mercenary activities. This would have implicated corporate responsibility. Another major drawback is that it has not retained many other activities like sheltering, organizing, assisting, equipping, promoting, or employing a group of mercenaries. The Convention's declaration that the crime of mercenarism might also be regarded as a crime against peace and security in Africa has been discarded, along with these components (Del Prado, 2019).

The 2014 African Union Protocol's definition of mercenarism, as stated in Article 28H, raises several concerns about the effectiveness of the protocol's provisions in addressing the phenomenon and the connections between new and old forms of mercenarism. These include the foreign mercenaries known as "dogs of war" from the 1960s and 1970s and the new commercial enterprises known as PMSCs and their hired soldiers that have proliferated, especially in Africa

(Del Prado, 2019). The requirements for meeting the definition of mercenary, which were first introduced in Article 47 of Additional Protocol I and have since been retaken by other international conventions regarding mercenaries, were greatly simplified by the elaboration of Article 28 H (Del Prado, 2019). Nevertheless, it is very challenging to prove these conditions. In a court of law, it would be extremely difficult to establish each of the conditions required to get at the definition if they were to be applied separately. Applying all six of them simultaneously is equally challenging (Del Prado, 2019).

Additionally, it should be noted that once the 2014 Protocol comes into effect, its application may be made easier by the fact that Article 28 H of the AU 2014 Protocol incorporates, with some modifications, the provisions found in Articles 1(1) and (2) of the 1989 International Convention. This applies to both the 25 additional non-African States (two states added to the list) parties to the 1989 International Convention as well as the 31 African States (one state added to the list) that are currently ratified/ parties to the 1977 OAU Convention for the elimination of mercenarism in Africa (Del Prado, 2019). According to Del Prado (2019), the African Court will have the jurisdiction to interpret and apply a wide range of regional and international agreements in this regard.

Chapter Four

Regulating PMSCs Operation in Africa

It would be impossible to list or thoroughly discuss the hundreds of companies that emerged in post-cold war Africa and their involvement in conflicts in this chapter. Rather, after examining the pattern in the emergence of private combatants as a body corporate, it highlights the contract of a major company in a few selected states. As a result, the main topic of discussion is PMSC's involvement in operational missions, or direct combat, in domestic or international conflicts in Africa, with a focus on Executive Outcome (EO) and businesses that have commercial relationships with EO, such as those involved in mining and oil exploitation. According to Spear (2006:7), PMSCs' combatant role gives them the greatest potential for violating human rights, and it is primarily because of this reason that appeals for national, regional, and international regulation and monitoring systems are made. Since the well-known episodes of Executive Outcomes (EO) involvement in Angola and Sierra Leone, PMSC's activities in Africa have expanded into a complex transnational network of multiple actors (Reno, 1998:61-8).

4.1. PMSCs Operation in Africa

Mercenary activity has evolved in the post-Cold War years with respect to its organizational structure, economic relationships, target clients, and means of "rewarding" services. Corporate players with media relations skills, such as Tim Spicer of Sandline International, based in London, and Eeben Barlow of Executive Outcomes (EO), one of the most well-known mercenary groups in the industry, have replaced 'renegades like Colonel Callan and others involved in the Angolan disaster' (Musah and Fayemi, 2000). On the other hand, African military intervention in neighboring states has gained legitimacy in the years following the continent's general independence (Cilliers and Cornwell, 1999). Following the Cold War, foreign intervention also took on novel characteristics. The means of coercion were no longer monopolized by the state and its foreign patrons. The new wars were globalized and commercialized. During this time, neighboring states and non-African powers joined in intervention (Schmidt, 2013: 193-4). Liberia, for instance, was crucial in extending the war in Sera Leon (Sriram et al, 2018: 114). Other times, foreign powers and peacekeepers used state collapse for their own geopolitical ends, plundering natural resources. According to Schmidt

(2013), they were similar to the warlords, rebel armies, and criminal groups they were fighting since they too preyed on the local population.

Companies such as Sandline asserted that they were prepared to work exclusively for legitimate government. However, it's unclear who would define legitimacy. This obviously cannot be left to the management of PMSCs employed by multinational corporations (MNC) with apparent economic interest and clients made up of the select few dominant nations or clients who have endorsed by the intelligence services of "key western governments" (Cilliers and Cornwell, 1999). The UN special rapporteur claims that this is one of the most contentious elements of the problem: a state may privatize a lot of services and goods that fall under its responsibility, 'but not that which constitutes its very raison d'être' (UNESC, 27 January 1998: par 74). Furthermore, the market for force is such that it is challenging to distinguish between legitimate and illegitimate clients; even if this challenge were to be addressed, it is highly improbable that regulations could determine which demand and which client is 'legitimate' (Leander, 2005b).

The globalization-associated elements of capital, power, and the need to maximize profits also apply to the extraordinary rise of the private military and security industry (Gumedze, 2007b). Without bringing any more stability, foreign hired military assistance had become the norm in a country like Sierra Leone by the late 1990s. As Cilliers and Cornwell (1999) pointed out, instability was actually a result of their ongoing job. It is evident from state practices in Africa and elsewhere that PMSCs are, in one way or another, substantially dependent upon during and post African conflicts (Gumedze, 2009). These companies thrive on conflict because it creates market opportunities for them; otherwise, they would be unsuccessful business endeavors (Francis, 1999). Political constraints have no effect on military corporations. They have profited from the pervasive impact of economic liberalism in the late 20th century and see war as a business opportunity. Additionally, they have shown a rapid adaptability to the intricate designs of civil wars (Shearer, 1998b).

It appears that since PMSCs have been involved in regions of war like Iraq and Afghanistan, the usage of PMSCs in combat operations has become standard procedure, particularly in the west. In Africa, this isn't always the case, though. Nowadays, hardly a single African state claims to have used PMSCs in conflict areas. Because of this, the term "mercenary" is frequently used

when PMSCs operate in conflict areas (Gumedze, 2009). Developing nations refer to them as "criminals" and "mercenaries" despite their corporate appearance (O'Brien, 2000). Angola accounted for the majority of the estimated 90 private armies operating throughout Africa by mid-1997. Therefore, Angola has served as Africa's testing ground for PSMC development and change in various ways (O'Brien, 2000).

Angola

The emergence of PMSCs in the international order begins in early 1993 when EO was hired by Angolan government to retake *Soyo*, an area with significant oil reserves (Kinsey, 2006:14). A number of operators held stakes in *Soyo*, which was formerly the source of 7% of US oil supplies, including Heritage Oil and Gas, a division of the Branch-Hertage Group (Shearer, 1998a). Through the Angolan parastatal Sonangol, Heritage collaborated with other Western oil firms on several joint-venture oil exploration projects in Africa. The problem, however, was that *Uniõ Nacional para a Independencia Total de Angola* (UNITA) had taken control of the oil refining and pumping facilities at *Soyo* in northern Angola a year earlier, aided by white mercenaries who spoke English (Arnold, 1999:43). Because UNITA could not be driven out of *Soyo* by the Angolan army, the oil did not flow (O'Brien, 2000; Howe, 2001:199).

There is a significant, albeit unclear, British connection to EO. Simon Mann, a former British army officer, and British businessman Anthony Buckingham registered EO in Britain in September 1993. Buckingham and Mann approached Barlow at the beginning of 1993, giving him the task of assembling a South African force to retake the oil town (Arnold, 1999:119). In the early spring of 1993, a small group of about 80 men managed to take control of the station, but once the South Africans withdrew, UNITA retook *Soyo*. But Buckingham's interest in oil was not going to end there. His goal in founding Branch Energy Ltd. in 1993 was to take advantage of strategic resources in conflict areas (O'Brien, 2000). A contingent of South African mercenaries was sent by air to fight UNITA in *Saurimo*, in the province of *Lunda* South, northeastern Angola, in July 1994. Their arrival created an anomaly because South Africa was fighting against the dos Santos regime and sponsored UNITA in the 1980s to help Savimbi. Their current goal was to seize from UNITA the diamond fields in the provinces of *Lunda* South and *Lunda* North on behalf of the government (Arnold, 1999:43).

Buckingham was successful in getting the host government's consent by securing those resources from the ongoing war and using them as an inducement. In this way, the organization that would eventually become Branch-Heritage, with Buckingham serving as principal and Michael Grunberg as lead director, started acting as a facilitator for the introduction of PMSCs, EO, and subsequently Sandline International, LifeGuard Management, and all other EO spin-offs into the conflict affected state (O'Brien, 2000). The government increased the hiring of South African mercenaries after UNITA forces recaptured *Soyo*. As a result, by mid-1994, there were reportedly 500 mercenaries in Angola. Executive Outcomes, a gradually renowned company with its main office in Pretoria, hired them (Arnold, 1999:43-4).

The Civil Cooperation Bureau (CCB), a clandestine organization that specialized in carrying out targeted assassinations of African National Congress (ANC) members in Africa and Europe, is actually connected to the early privatization of military security in South Africa (Varin, 2018). The EO's founder, Eeben Barlow, previously directed the CCB's Western Europe division (Varin 2018). Lafras Luitingh, the director of EO, was formerly employed by CCB, until it had been secretly dissolved by President de Klerk three years prior. Eeben Barlow, the former commander of '32 battalion', who led South Africa's intervention in Angola during the apartheid era, provided assistance to Luitingh. They now planned for the men from these groups to resurface as 'hired guns' in Angola (Arnold, 1999: 44).

EO's blatant participation in offensive military activities at the behest of governments and multinational companies is what makes it so engrossing (Gumedze, 2009). The active involvement of EO in offensive combat operations exemplifies a new type of mercenary activity that is carried out by a well-organized, powerful contractual company rather than by an individual as was normally the case. But engaging in combat for financial gain has drawbacks of its own, particularly when the funds aren't enough to keep the PMSCs operating. As a result, mining concessions as payment became an alternate strategy to maintain PMSCs' ongoing involvement (Reno, 1998; Gumedze, 2009). On the other hand, the government believed UNITA employed mercenaries from South Africa, Israel, Serbia, and Ukraine (Vines, 2000).

The Angolan army at the time faced pressure to stop employing EO and replace it with the US Company MPRI, despite EO's desire to remain and train the new army (Vines, 2000). In 1995,

The Clinton administration threatened President Dos Santos that if he would not terminate the government's contract with EO and replace it with MPRI, his administration would suspend UN aid to Angola. MPRI was established to safeguard US interests, like in the *Soyo* oil reserves, and to guarantee significant US economic access to the *Launda* regime. In exchange, Washington, which had long backed UNITA rebels, against the *Movimento Popular de Libertação de Angola* (MPLA) socialist government, improved relations with the Angolan government (Francis, 1999). EO formally left Angola in January 1996. Many employees of EO, however, continued to work for EO after being reassigned to related companies like Branch Mining, Shibata Security, Stuart Mills International, Saracen, and Alpha 5. Diamond mines were among the several economic concessions granted across the country to EO and its allies as a reward (Vines, 2000).

Sierra Leon

The second contract that EO had was with the government of Sierra Leone, starting in May 1995 and lasting 22 months. A third of the country's defense budget, or $35 million, was invested in it (Shearer, 1998b). The Revolutionary United Front (RUF), a rebel group, initiated the country's civil war in 1991, which led to the extensive use of 'mining mercenaries'. This signaled the start of the influx of mercenaries into Sierra Leone, mostly from the UK (Musah, 2000). When the Momoh government faced economic collapse in 1992, Valentine Strasser staged a coup d'état. 'A free-for-all for diamonds' resulted from the breakdown of order in the diamond areas and the entry of RUF rebels in to *Kono*. Due to his inability to maintain control over his troops engaged in diamond mining in the bush, Strasser lost ground to the RUF (Kreijen, 2004:83). In 1995, with the RUF destined to take control of the country, Strasser was forced to rely on foreign companies with mining interests to maintain order. It is reported that Strasser offered diamond concessions to the South African EO (Kreijen, 2004:83). The RUF was obliterated by EO with the assistance of local civilian militias (Shearer, 1998b).

A professional fighting force faced the rebels for the first time in living memory. The RUF suffered slaughter in large numbers since they lacked even the most basic military skills (Engbrecht, 2011: 83). Apart from participating in direct combat, EO provided training to the local hunting communities-the *Kamajor* militia and the Republic of Sierra Leone Military Forces (RSLMF) to prepare them for counter-RUF operations (Musah, 2000). In January 1996, after

Valentine Strasser was overthrown in a bloodless coup, a general by the name of Julius Bio was appointed acting president. EO supported the coup even though it did not actively participate in it (Engbrecht, 2011: 83). Bio used his connections to the mercenary group and the EO-trained forces under his command to overthrow Strasser as the head of the National Provisional Ruling Council (NPRC) in a palace coup (Reno, 1998:131). A different assertion is, despite not carrying out the coup, the company approved of it because Bio was thought to be easier to work with (Singer, 2008: 143-4). According to Howe (2001:204), '[i]t did not become involved in the several coup plots of 1996. EO reportedly forestalled a planned coup against the 1996 elections'.

To everyone's surprise, a legitimate multiparty civilian election was held in Sierra Leone in February 1996. President Ahmed Kabbah assumed presidency (Engbrecht, 2011: 84-5). However, according to Reno (1998:134), the election contributed to the solidification of a restructured political alliance based on the presence of EO, the firm's alliance with a fresh group of politicians, and the dismantling of Sierra Leone's previous bureaucracies, which included a significant part of the military. Due to all of this, the political alliance became extremely reliant on the presence of foreigners. The leadership of Sierra Leone had grown increasingly precarious, and Brigadier Maada Bio, the new military leader, was forced to step down (Musah, 2000). Negotiations for peace were initiated with the lingering RUF, which was still present in the southeast of the country, since Kabbah's top goal was to try to put an end to the civil war (Engbrecht, 2011: 85-5). Following the RUF's withdrawal from the peace process in October, EO returned to combat and destroyed its headquarters in the southeast of the country (Singer, 2008: 114). A few weeks later, facing annihilation, Foday Sankoh signed the peace agreements on behalf of the RUF (Engbrecht, 2011: 84-5).

The RUF demanded EO to leave Sierra Leone in order for them to sign the peace accord. This is comparable to the requirement set by Jonah Savimbi for the EO pullout prior to the signing of the UNITA-MPLA peace accord in Lusako in 1994. The government of Sierra Leone only consented to the EO pullout in exchange for the anticipated deployment of a UN peacekeeping force acting as an independent monitoring group (Francis, 1999). The RUF's defeat was brief since EO's departure turned out to be crucial in shifting the military's balance of power (Sriram et al, 2018:118). At the conclusion of its contract in January 1997, EO officially withdrew,

although about 100 of the 285 employees continued to work for various companies, some of which had links to EO, including the security company LifeGuard (Vines, 2000).

In 1993, Barlow, Lafras Luitingh, and Nicolaas Palm (the financial manager of EO) founded Strategic Resources Corporation (SRC). It is believed to have been connected to around 50 companies during its existence (Pech, 1999; O'Brien, 2000). Together, EO, a group of former South African soldiers, and Sandline, a UK-based organization, have collaborated in Sierra Leone (Musah, 2000). EO statements suggest that SRC was dissolved in July 1997, the same month Barlow and Luitingh left EO. It is thought that at this period, multiple companies, including Sandline International, switched from the EO to the Branch-Heritage umbrella. The Branch-Heritage group of companies, which includes Diamond Works, has clear corporate connections to EO since all of these companies were once owned and controlled by Barlow and EO, either directly or through SRC (Pech, 1999; O'Brien, 2000).

In general, Sandline has started to function as EO's British replacement, especially after EO was terminated on January 1, 1999 basically since South Africa passed legislation to regulate PMSCs in 1998 (Pech, 1999). Its personnel base, which supplied its soldiers, is essentially the same, as are its management and staff (O'Brien, 2000). Furthermore, when government clients required for services that EO could not provide, its founders submitted a bid for the job and then obtained the services from a large pool of military and security experts in South Africa, the UK, or any other state. For the purpose of providing the required services, EO could thus outsource to another company or to relevant specialists (Pech, 1999).

The balance of power inside the Sierra Leone People's Party (SLPP) government was altered by the deployment of foreign soldiers in charge of maintaining regime security. Kabbah became less dependent on traditional power brokers thanks to EO's (and Nigeria's) control of internal security, but he became more dependent on foreign forces to maintain his position (Reno, 1998:135-6; Musah, 2000). In May 1997, Kabbah's democratically elected government was overthrown after Executive Outcomes withdrew (Engbrecht, 2011:85). The rule of law totally collapsed under the AFRC/RUF junta, which was never acknowledged as legitimate by the people or the international community, after Paul Koroma was proclaimed leader of the Armed

Forces Revolutionary Council (AFRC) and invited the RUF to join a coalition government in June 1997 (Keen, 2005: 154; Engbrecht, 2011:85).

Michael Grunberg claims that EO told Kabbah that if he went through with the decision to send them back, his government would be toppled in 100 days. On the 95th day following EO's "exit", Kabbah was overthrown (Musah, 2000; Singer, 2008:114). In fact, there is evidence that suggests the AFRC received a cargo of weaponry from "LifeGuard, the security wing of both EO and Sandline into which many EO personnel were absorbed after EO officially left Sierra Leone" (Musah, 2000). LifeGuard provided the continued training and assistance when EO left Sierra Leone in early 1997 (Pech, 1999). Government and UN representatives sought cover in Lifeguard offices, which had remained behind to protect mining properties. However, the general public was not given any protection (Singer, 2008:114).

Described as "a British mercenary force", Sandline International assisted in the reinstatement of Sierra Leone's elected president in March 1998 (Adams, 2002). An air and ground assault on Freetown was carried out on February 18, 1998, by a coalition of Nigerian troops, the Kamajors, and roughly 200 mercenaries from Sandline International. The majorities of the guerrillas in the AFRC-RUF alliance tactically concede the capital, Freetown, to the invading force and fled into the surrounding countries and the bush within a day. The fact that Sandline (EO) was the only force to fly a warplane throughout the operation highlighted the crucial role that they played in the countercoup. The government of Tejan Kabbah returned from exile to Freetown (Musah, 2000).

Despite being portrayed in the media as a private security company defending "mining and construction interests", Sandline told reporters that the British High Commissioner in Sierra Leone urged them to assist in supplying and training a local army that would be able to overthrow the generals. Additionally, it appears that the US State Department was kept fully informed, and the US government provided at least its latent support (Adams, 2002). The British and American government officials who were fully informed about the March assault that forced out Koroma's Junta were listed in a letter supplied by Sandline's attorneys during the affair's investigation in UK (McGregor, 1999). It was evident that the British government intended to carry out its promise to reinstate Kabbah, but at the lowest possible cost to the tax payers and

with no overt involvement in a coup. Sandline effectively functioned as the armed forces and intelligence network of the UK government. In addition, it served as the US's eyes and ears. This high-ranking role gave the 'mercenary' group even more confidence (Musah, 2000; Keen, 2005:217).

With the secret backing of the British Foreign Office, the overthrown government recruited London-based Sandline International to assist in the restoration of the civilian government (Francis, 1999; Keen, 2005:217). Following the British investigation, the extent of Sandline's involvement in the events leading up to the coup and its overthrow, as well as the support of British and US government officials, remained undisclosed (O'Brien, 2000). However, Sandline supplied 35 tons of military hardware, purchased in Bulgaria, to the ECOMOG and soldiers loyal to the exiled government, along with intelligence, air support, and logistical assistance throughout the operation (Cilliers and Cornwell, 1999; Francis, 1999). One could argue that the affair marked a watershed in the history of the industry. Both the Foreign Secretary and the Foreign Affairs Committee agreed that private security could contribute positively to international peace and security by the time the Green Paper on the options for regulating the industry was published, following the Sandline affair that lead to the British government's renewed interest (Kinsey, 2007).

The level of mercenary involvement in the war was further revealed by the rebel capture of Freetown in January 1999 and the subsequent offensive by the Economic Community of West African States (ECOWAS) Monitoring Group (ECOMOG) soldiers. During the counteroffensive, a ship carrying mercenaries from Liberia into Sierra Leone under rebel control was attacked by ECOMOG fighter jets and navy gunboats. Several mercenaries, mostly from Burkina Faso, Liberia, and Ukraine, are said to have died in the assault (Musah, 2000). On March 1998, President Kabbah's reinstatement to office, however, had not stopped the civil war from escalating. Once more, the fuse was provided by private interests in the diamond trade (Kreijen, 2004:84).

The RUF rebels had been rearmed and reinforced by their international allies, which now included eastern European cum-security companies, which are comparable to the UK and South African 'mercenary' and mining interests supporting the Kabbah regime. In December 1998, the

RUF infiltrated the capital during the Christmas break by teaming up with rebel sections of the government army to retake the *Kono* diamond fields in three weeks and push across the country's north towards Freetown. On January 6, 1999, the RUF seized control of a significant portion of the city (Kreijen, 2004:84). The civilian population would have to endure five years of horror before the RUF was ultimately destroyed, requiring a significant use of British Special Forces and Marines. Before the country becoming stable enough to hold elections in 2002, UN intervention was also needed (Kreijen, 2004:85; Keen, 2005:264-6; Engbrecht, 2011:85).

4.2. The Shifting Patterns of PMSCs in Africa

The engagement of PMSCs in African conflicts after the end of the Cold War has given rise to new trends with distinct features. Because of their corporate identity, they can establish financial ties with businesses in the same industry or other industries. In fact, many of the most successful businesses, like MPRI, Armorgroup, and Vinnell, are subsidiaries of larger organizations (Singer, 2001-2). The complexity of these concerns increases when a multinational corporation has a close relationship to a state and is owned by the public. Instances of this include the mining sector in South Africa, where a government agency is in charge of monitoring investments made on behalf of political shareholders in state-owned businesses (Saner et al, 2019).

International companies are increasingly forming joint ventures with local businesses to escape the consequences of regulations in specific countries. For instance, Angola was home to more than 80 security companies, many of which were owned jointly (Shearer, 1998b). Foreign ownership of PMSCs in Angola was outlawed in 1992. Corporate directors would typically collaborate with Angolan citizens, mostly politicians or military officials, to establish PMSCs based in Angola, like Defence Systems Angola did, in order to circumvent this prohibition (as was the case with many EO spin-off companies) (O'Brien, 2000). Companies can also readily mask their operations by posing as defense firms offering security services and then participating in aggressive military operations (UNGA, 23 September 1996: par 53; Shearer, 1998b).

Another method of evasion is for businesses to just adopt a new name or corporate structure whenever they face legal challenges. For instance, LifeGuard Management maintained its use of EO's personnel, financial, and managerial services in addition to its access to EO's force pool even after founded independently in Pretoria (O'Brien, 2000; Singer, 2004). Nevertheless, this

did not remove LifeGuard from EO's corporate network. Eeben Barlow also assumed leadership of Specialized Tasks, Training, Equipment and Protection International (STTEP), one of the organizations hired by the Jonathan administration to combat the Boko Haram insurgency in Nigeria, following the dissolution of Executive Outcomes in 1998 (Murphy, 7 April 2015). Pilgrims Africa, a well-known company in Nigeria's private security sector, is led by Cobus Claassens, a former Executive Outcomes employee (Allison, 11 March 2015). It appears that South African mercenaries and contractors maintain their standing as some of the 'best military experts' in the business and are uniquely qualified to provide support throughout Africa's civil wars (Varin, 2018).

However, given their past and roots, it is understandable, 'if not justified', that South African PMSCs are still viewed as racist, untrustworthy fighters who will fight for the greatest price, regardless of their genuine level of success (Varin, 2018). Evidence suggests that combatants switched loyalty among belligerent groups, despite the impression of permanency (O'Brien, 2000; Howe, 2001:205; Singer, 2008: 108-9). Research of "hired guns" made in Sierra Leone reveals a loyalty shift related with struggle for control of mineral resources, similar to EO's move from UNITA to MPLA in Angola (Musah and Fayemi, 2000). When Pretoria was at the height of its destabilization operation against its northern neighbors, several of EO's employees in Angola had previously served there in support of UNITA (Arnold, 1999:43).The rivalry particularly had intensified, with the Jean-Raymond Boulle group facing off against the former EO, which was connected to Diamond Works and Branch Energy (Musah and Fayemi, 2000).

The provision of military training in weak states is one facet of donor-sponsored Security Sector Reform (SSR) that has seen a significant level of private sector involvement. Throughout the 1990s, PMSCs with US bases trained armed forces in over 42 countries (Avant, 12 October 2005). Military training in Africa has been outsourced (in whole or in part) by the US State Department and the US Department of Defense (DOD) to organizations such as Science Applications International Corporation (SAIC), MPRI, Defense Forecasts Incorporated (DFI), and Logicon (Avant, 12 October 2005). For instance, PMSCs are an essential part of Sierra Leone's SSR program (Juma, 2011). As a result, the question of whether state militaries are capable of maintaining national security without the assistance of PMSCs is raised by the issue

of the strong reliance on PMSCs (Gumedze, 2009). A precise definition of each actor is necessary for the integration of private security operations and mercenarism into SSR and Disarmament, Demobilization and Reintegration (DDR) processes. Moreover, the fact that 'in most African states, there has never been a clear-cut distinction between private and public security' creates some challenges in the African context (Isima, 2007).

The existing defect in accountability and legitimacy of PMSCs is problematic, regardless of whether they are hired directly by a weak state to strengthen security capabilities or indirectly by a donor government to conduct military training or add other capacity within security sector institutions (Holmqvist, 2005). Amnesty International USA has noted that military, security, or police force training provided by PMSCs is not required to include any subject relating to human rights, humanitarian law, or perspectives on arms proliferation (Holmqvist, 2005). Even though there had been concerns expressed over the human rights record of the Sao Tomean armed forces, MPRI evaluated the country's defense needs in June 2004 in the hopes of being awarded a contract to supply security support to the defense institution. It does not appear to be an unwarranted concern that training forces with a history of violations of human rights could encourage wrongdoing by private actors (Holmqvist, 2005).

Within the broad subject of security studies, the discussion around the employment of private security providers in Africa's conflicts and post-conflict settings has gained significance over the past three decades. However, serious concerns weren't raised until EO became involved in Sierra Leone, particularly given its growing interest in the country's plentiful mineral wealth, which were used as payment to the company for services performed (Gumedze, 2009). But the unfathomable loss of human life is a heavy price to pay for this short-lived security (Francis, 1999). Human rights may also be violated in some circumstances in order to further corporate interests. Examples could include the indiscriminate use of force by EO's personnel in Angola and Sierra Leone (Musah and Fayemi, 2000). In January 1996, for example, the RUF captured three Lifeguard Security guards at the Rutile mines in *Mobimbi*. This prompted EO to launch a major military operation in an attempt to rescue them. There were great deals of civilian casualties from this attack (Francis, 1999). In addition, unless they need information, 'mercenaries' usually avoid taking prisoners of war. Mercenaries cause chaos, murder, and ruin

in their wake by pillaging, robbing, and occasionally killing without cause or differentiation (Francis, 1999).

A considerable portion of Angola's long history of violations of human rights had been committed by mercenaries. It is also known that EO utilized fuel air explosives in the *Kono* district, sometimes known as vacuum bombs or Fuel Air Explosives (FAEs) (Vines, 2000). Due to their exceptionally severe and indiscriminate nature, international bodies consider the use of FAEs to be a violation of human rights. However, their great efficacy also accounts for why a company would prefer to employ them (Singer, 2001-2). Their pilots had also complained about the dense forest making it difficult for them to distinguish between rebels and civilians. In response, the Strasser administration gave them the command to fire without differentiation (Vines, 2000).

Unfortunately, the security debate in the context of war and conflict in Africa is now in a perilous position because the demands of human rights and the free market are at odds. Despite the fact that the African state is now more vulnerable due to the neo-liberal system, it is still a difficult decision to make between continuing with national military to uphold constitutional standards and utilizing the free market and its private operators (Juma, 2011). However, throughout much of Africa, where concerns for state survival are frequently subordinated to the personal security and well-being of those in power, it is challenging and dangerous to apply western assumptions about the nature of state security (Cilliers and Cornwell, 1999). What is more concerning is the diplomatic community's tendency to downplay this fact, at least in public, as it serves its own purpose in upholding the myth of abstract and apathetic sovereignty. In such circumstances, it is unlikely that the origins of African politics, as well as other foreign and domestic politics, will be accurately determined, which is undoubtedly a requirement for thoughtful international intervention (Cilliers and Cornwell, 1999).

Since PMSCs are generally viewed as illegal organizations, concerns about their civil and criminal responsibility have not even been discussed in the African context. PMSCs that support African dictators are viewed as contributing to the national peace effort, whilst those that later support the rebel faction are viewed as mercenaries who should be exterminated (Gumedze, 2009). However, there exist two reasons why security provision, at least in the domestic sphere,

has gray areas between the public and private domains. First, public security forces have been abused by authoritarian governments for their own gain (Isima, 2007). Furthermore, as crime rates rise and the government is unable to effectively address it, citizens will increasingly feel insecure, which will inevitably lead to the desire for alternative, "private" solutions. The ensuing "hybrid" security arrangements present significant challenges for regulation and control, particularly at the domestic level where allegiances appear to be constantly shifting (Schulz, 2008).

Deploying PMSCs for peacekeeping operations has been considered, as evidenced by the unwillingness of the western states to deploy soldiers on such missions (Shearer, 15 September 1998; Cilliers, 2002; Grofe 2007; Cameron and Chetail, 2013: 19). Comparatively, African regional organizations that are hampered by a lack of resources and competence to address peacekeeping issues have looked to the private sector for support in peace operations. In 1998, the ECOMOG in Sierra Leone engaged Sandline to provide logistical and transportation support (Cilliers and Cornwell, 1999; Francis, 1999). International logistics firm PA&E provided assistance to ECOMOG forces during the 2003 ECOWAS Mission in Liberia (ECOMIL) (Holmqvist, 2005). These companies have done everything in their power to distance themselves from any suggestion that what they do is mercenary. They went by the names Private Military Companies, Private Security Companies, and ultimately Private Security Providers, which is a more neutral designation that enables them to offer their services to international humanitarian organizations (Del Prado, 2019).

However, the issue here goes much beyond the technical or financial question of "make or buy", or whether the UN uses its members to maintain its own security or contracts out the "production of security" to private companies. Security is a very political issue, not a commodity. Who decides to hire PMSCs, with what authority, for what reason, and with whom oversight are the main concerns (Cilliers, 2002; Del Prado 2011b) One significant distinction between a military company's intervention and that of the UN, whose funding comes from donors rather than the state in question, is the source of financing. The UN is undoubtedly in a difficult situation. While some member states have expressed condemnation of the utilization of military companies, others have either hired them or approved of their operations (Shearer, 1998b). Since

international conflicts have frequently followed the deployment of national soldiers abroad, even with a UN mandate, contracting PMSCs has grown more appealing (Saner et al, 2019). It could be argued that permitting commercial organizations to engage in such activities places them outside of the international consensus and, as a result, outside of any restrictions or controls that may be imposed under international law, since such operations have traditionally been governed by international consensus that is derived through a UN mandate (O'Brien, 2007).

Two PMSCs, PA&E and Medical Support Solutions (MSS), were contracted to construct bases, set up logistical systems, and provide transport and communication services in support of the African Union Mission in Sudan (AMIS). The US State Department contributes funds to the expansion of AMIS, but DynCorp and PA&E handled separate assignments (Holmqvist, 2005). Comparable to the collaboration between ECOMOG and Sandline, there has been minimal controversy surrounding the security services LifeGuard Security supplied to UN relief operations in and around Freetown, even though personnel from EO, Sandline, and LifeGuard are all recruited from the same pool (Cilliers and Cornwell, 1999). The UN Charter's tenet that member states assume responsibility for maintaining peace and security under UN authority is undermined in this context by the use of PMSCs in multilateral operations, which nevertheless signals a renunciation of state control over the means of violence. Currently, there are insufficient mechanisms in place within the UN and regional organizations that guarantee PMSCs good standards of conduct and, most importantly, the operations' long-term viability (Holmqvist, 2005; Cameron and Chetail, 2013: 17-25).

Even if their existence and activities create a number of ethical and legal questions, PMSCs have come to be recognized as an "indelible feature of large-scale military and even humanitarian interventions" (Gumedze, 2009). However, when questioned in June 1997 about the effectiveness of using PMSCs as part of a broader UN strategy to put an end to Sierra Leone's vicious civil war, UN Secretary General Kofi Annan categorically rejected the idea, claiming that there was no difference between PMSCs and mercenary groups (Shearer, 1998b). On the contrary, under "foreign" leadership, protected extraction facilities are likely to exacerbate rebel grievances in wars where natural resources play a central role. It is possible that the same PMSC protects both MNC in the extractive industries and aid organizations in a state. As one report

noted, this might lead to accusations of hypocrisy and erosion of trust in humanitarian actors (Vaux et al, 2002).

Currently, Russia, Europe, and the United States are the main sources of Notable PMSCs operating on the Continent. These include the Wagner Group from Russia, ASGAARD from Germany, CACI & Academi from the US, AEGIS Defense Services from the UK, and OMEGA Consulting from Ukraine. The Dyck Advisory Group (DAG) of South Africa is also active in the Continent (AUPSC, 1 December 2023). Russian influence has grown in the Sahel while French influence has decreased. This is particularly evident in the Wagner Group's presence in the region, a PMSC with connections to the Russian government. Most notably, according to the Mo Ibrahim Foundation (October 2023), the Wagner Group has been involved in Mali, offering security support in exchange for preferential access to resources.

4.3. The Ambiguity of Regulating PMSCs in Africa

Despite international debate about how PMSCs should be treated differently from mercenaries, the AU still refers to them as mercenaries. The UN draft convention, for example, explicitly provided that '[t]he present Convention has no application with respect to those persons or entities' covered by the UN Mercenaries Convention' (UN draft, 2009: art 3(2)). Even companies that have conducted combat operations for clients, like Executive Outcomes, have frequently challenged the utilization of the term "mercenaries", citing the legal UN definition as the reason they weren't mercenaries in the first place (Brooks and Solomon, 2000; UNGA, 17 August 2005:21). Gumedze (2008b) argues that mixing mercenaries with PMSCs is completely wrong, as it obscures the true nature of the issue, which is that although mercenaries are explicitly outlawed by international law, PMSCs are not. Individual states, the UN, and even the AU frequently use them for a variety of activities. International security companies and the circumstances they operate have changed significantly since the 1970s. Some are in fact de facto arms of their national governments, in the cases of Dyn Corp and MPRI (Adams, 2002). The lack of a regulatory framework in Africa, which Abrahamsen and Williams (2011) claim is the largest PMSC operating theater after Iraq and Afghanistan, calls for an explanation.

Determining whether PMSCs and mercenaries are the same is a difficult undertaking. First off, there is still debate over what constitutes a mercenary under international law. Secondly, there is

a lack of consensus in international law on the definitions of PMSCs, which are in reality closely linked to mercenaries. While some consider PMSCs, especially those involved in conflict, to be mercenaries, others view them as respectable private entities whose principal goal is to uphold peace and stability (Gumedze, 2008b). Apart from the potential harm that PMSCs can cause to the exercise of human rights, it is imperative to make a clear distinction between activities of the contractor and those of other non-state actors, including mercenaries, praetorian guards, paramilitaries, proxy armies, and covert agents. The conditions we face today with regard to 'pirates, corsairs, filibusters, privateers, and buccaneers are strikingly similar to those of the 16th - 18th centuries' (Del Prado, 2011). Many PMSCs "walks a fine line of legality, with potentially illegitimate clients, business practices, and employees with dark pasts" (Singer, 2008).

Except for a few governments, African states are aware of the activities carried out by PMSCs, but there is a general lack of interest in addressing the issues related to mercenaries and their new modes of operation. The AU has done little more than adopt 'a wait-and-see' approach in light of the recent trend of PMSC involvement in Africa. Neither the AU Commission nor the AU Assembly has taken an official position. This is something to be concerned about (Gumedze, 2008a). The decision to intervene and to take sides in an armed conflict is a political one, whether it is made by an international organization, a regional organization, a coalition of states, or a single state. When private individuals and companies are allowed to make such decisions, the concept of international law loses all meaning (Malan and Cilliers, 1997). The idea that legal rules promote moral behavior in international affairs is directly challenged by the overall lack of law in this crucial area. It is concerning as well since it puts the law to a broad test. Because laws that are absent, ambiguous, or viewed as improper will undoubtedly lose some of their respect and effectiveness (Singer, 2004). Supporters of the industry, such as O'Brien (2007), assert without offering any supporting evidence that '[p]rivate companies providing combat services may now be banned or at least ostracized in Africa'.

The emergence of the AU was spurred by a number of intricate factors. These included a reasonable concern about maintaining the territorial integrity of African states, as well as a desire to move away from the logic of the OAU's founding concept of non-intervention in the domestic affairs of its Member states (Kioko, 2003; Jalloh, 2019). In fact, the African Union's Constitutive

Act explicitly required the organization to adopt proactive measures to combat impunity in light of the growing regional sensitivity to this issue (Jalloh, 2019). Under Article 4(o) of the Constitutive act, the AU (2000) reaffirmed its commitment to 'respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities'. There have been obvious hints since the end of the Cold War that the OAU is moving away from the notions of "territorial integrity" and "non-interference in the internal affairs of other states". Impunity and human rights violations are no longer considered "internal" maters, but rather issues that require immediate international attention (Kufuor, 2000).

In the late 1990s, the OAU adopted a series of resolutions condemning military coups and unconstitutional change of government. Notably, the Lomé Declaration defines 'conditions that could be considered as situations of unconstitutional change of government', which includes mercenary intervention to overthrow a democratically elected government (Lomé Declaration, 2000). The African Union's Constitutive Act of 2000 affirms the 'condemnation and rejection of unconstitutional changes of governments' (AU, 2000: art 4(p)). More interestingly, the African Charter on Democracy, Elections, and Governance (2007) stipulates that when 'there has been an unconstitutional change of government in a State Party', the Peace and Security Council (PSC) shall suspend a member state's right to participate in the Union. The Charter also includes a list of measures to be carried out against coup regimes and those who carried out unconstitutional change of government (Article 25(1)).

Nonetheless, according to (Gwatiwa, 2016) the AU's failure to officially set aside the OAU Mercenary Convention of 1977 is due to 'agency slack', in which the AU acts independently to achieve unwanted or unexpected outcomes. This is achieved through 'shirking' and 'slippage'. Perceptions of PMSCs as mercenaries persist in policymaking circles of AU, especially at the AU Commission. This demonstrates that the AU regards PMSCs as mercenaries working behind a corporate cover. The execution of such a position is a sort of 'shirking'. Despite its experience with PMSCs, the AU is persistently reducing its efforts to implement a policy (Gwatiwa, 2016). The AU and its member states have employed 'shirking methods' to reduce participation in non-UN initiatives. They also used 'slippage tactics' to defend their exemption from such initiatives, while claiming to understand PMSCs. Shirking refers to an agent limiting the work it is capable

of exerting, whereas slippage refers to an actor shifting policy away from a preferred outcome and toward its own preferences. These two strategies effectively cover African regional preferences in a world where the region wields very little power in international politics (Gwatiwa, 2016).

The AU acts should be interpreted as being carried out on behalf of member states using a principal agent paradigm. Essentially, a weak and desperate regime that contracts a PMSC to participate in combat is less concerned with the legality of the PMSC's actions than with the regime's survival (Spear, 2006:52). In certain ways, this is a clear demonstration of state interest. Angola spent the 1970s and 1980s condemning the employment of mercenaries before becoming the first state to contract a PMSC on large scale in the early 1990s due to its dire situation (Percy, 2007b:208). Promoting the private security sector was the only way to escape accountability for violations of human rights while pursuing national security objectives, as PMSCs' low human rights outcomes were less likely to harm governments' reputation than those of national armies (Juma, 2011). Weak and illegitimate governments face a variety of challenges as they attempt to strike a balance across the continent (Musah and Fayemi, 2000).

PMSC producing states include AU member states such as South Africa and Angola. Key states, including Algeria and Egypt, have already announced that they will not engage in PMSC related processes, including humanitarian efforts. African states, notably Nigeria, one of the continent's most prominent 'norm entrepreneurs', are unwilling to raise accountability concerns since they receive US aid and military assistance through American PMSCs. Regulation becomes problematic when African states fail to fund the processes and mechanisms that constitute an international agreement (Gwatiwa, 2016). This reluctance of member states suggests that the Assembly of Heads of State and Government, the Commission's ultimate source of power, is unlikely to vote in favor of revising the Mercenary Convention in such a way that it differs significantly from the current understanding of PMSCs as mercenaries resurfaced (Gwatiwa, 2016).

Hiring PMSC to strengthen state security clearly confirms the fragility of African state structures and their dangerous reliance on external support, which explains, among other things, certain African states' reluctance to agree on international rules that could eliminate mercenarism, as

well as their positions in the UN and OAU (Spear, 2006:52). The indecision of numerous states informs the regional demand for a more binding regulatory law enforced by the UN. The Africa Group at the UN in New York vigorously advocated for the UN Convention on Mercenaries, which went into effect in 2001. Similarly, the Africa Group aggressively advocated for an international convention governing PMSCs based on the results of national regulatory efforts so far implemented. The absence of such regulations that transcend regions undercuts some national efforts in a particular manner. AU member states favor a UN convention because it would carry greater weight and have uniform legitimacy and legality around the world. A global consensus would help to prohibit PMSCs from engaging in opportunistic behavior (Gwatiwa, 2016).

When the issue of PMSCs emerged in the early 2000s, the AU attempted to exert the same influence in a draft form first endorsed by Russia and several Asian states. However, the US, the UK, and EU member states all rejected this proposal, underlining the fact that PMSCs are not mercenaries (Gumedze, 2010). As mercenaries, this would suggest that PMSCs ought to be categorically prohibited, as international law currently dictates. Though this isn't always the case, PMSCs do play a significant part in maintaining security and peace, therefore in actuality this would not be feasible. As will become evident, this incorrect classification is a consequence of PMSCs' prior engagement in mercenary like operations and is also influenced by popular perceptions of what "mercenarism" means. Nevertheless, it is not appropriate to use the terms "military services" and "mercenary services" synonymously. While military expertise is typically required for mercenary operations, mercenaries are not always used to provide military services (Gumedze, 2008b).

It is widely acknowledged that Africa has wasted a significant chance to address the roles PMSCs had in armed conflicts. African states, particularly the AU, did not participate in the drafting of the UN Convention until 2009 (Gumedze, 2009). In March 2010, 21 African states engaged in a regional consultation, with the primary concern being the threat presented by 'mercenaries to national independence'. The UN Working Group had to explain the reasons behind their proposals for the drafting of a new binding international instrument to regulate PMSC operations. Members of the group expressed that the concept of mercenary did not apply to PMSCs or its personnel. They emphasized the legal vacuum surrounding PMSCs operations

and the need for establishing new norms to regulate the industry (UNHRC, 2 June 2010). The AU representative stated that the AU recognizes the need to establish an international framework to govern the operations of PMSCs. Several representatives confirmed their support for the Working Group's efforts to draft a new convention, emphasizing the existing legal vacuum and the importance of ensuring that PMSC activities are strictly monitored (UNHRC, 2 June 2010).

During the regional consultation, the working group noted that in some situations, the boundary between the legitimate activities of PMSCs and the illicit activities of mercenaries may be blurred. A representative of the AU commission asserted that the AU had no objections to the actions of 'legally constituted private security companies' as long as they were not mercenary in nature, as stipulated in the OAU Convention (UNHRC, 2 June 2010). This claim runs counter to the AU's long-standing assessment of PMSCs as a corporate incarnation of mercenaries, which Enrique Ballesteros, the UN special rapporteur, also maintained. According the Special rapporteur; '[t]he distinction between using mercenaries for good or evil ends is no more admissible than is the distinction between good and bad mercenaries' (UNESC, 13 January 1999: par 71).

African countries have thus far not participated in the development of an international PMSC code of conduct. In reality, compared to Europe and the Americas, Africa has gotten little attention in the discussion over how to properly regulate PMSCs in armed conflicts. This is extremely deleterious to the continent, which is plagued in some form by PMSCs. Only three of the 17 states who adopted the Montreux Document were from Africa: Angola, Sierra Leone, and South Africa. While Uganda and Madagascar joined the initiative in 2009 (DCAF, 2015), none of the African participants were officially representing their member states, according to the South African "representative" (Gumedze, 2010). The Geneva Centre for the Democratic Control of Armed Forces (DCAF) has swayed the AU twice: in 2010 with South Africa, and again in 2015. In 2015, the AU responded exactly as it had in 2010. The Common African Defense and Security Policy (CADSP) expert delivered the same statement, claiming that PMSCs are a corporate incarnation of mercenaries. The statement further stated that it was up to the AU to address the issue through its internal structures and processes. This implies that the

AU is dubious about a non-binding initiative sponsored by governments that rejected the first draft convention at the UN (Gwatiwa, 2016).

According to some commentators, the only effective method to address the accountability challenges facing the private security industry is through a convention (UNHRC, 2 July 2010). To completely remove PMSCs from the 'legal "grey zone"' in which they have been operating, new international laws are required; these would probably take the shape of a new UN Convention with a subsequent model law (Del Prado, 2008). However, there is a great deal of uncertainty about the Draft Convention's future. Though ultimately the Draft Convention, or at least a process for its further development, survived the Human Rights Council's discussions on the Working Group's report and Draft Convention in September 2011 and the open-ended intergovernmental working group discussion in September 2010 were dissatisfying in this regard (White, 2012).

Deep ideological and political divisions about the role of private contractors are reflected in the Council's discussions, which will be extremely challenging to resolve (White, 2012). The majority of developing states on the Council, including those representing the Organization of Islamic Conference and the African Group as well as Russia and China, endorsed the Working Group's report and the concept of an international treaty on the regulation and oversight of PMSCs. They did so by citing the states' reluctance to take responsibility for PMSCs as well as their lack of accountability when these contractors violate human rights (UNHRC, 13 September 2011). The EU, the US, and the UK all voiced their strong objections. The arguments focused on the Council's competence over an issue that was not centrally human rights-related and questioned the need for a new treaty in light of existing international standards and initiatives (UNHRC, 13 September 2011).

It is argued that the world does not need a new law to regulate PMSCs because the current international regulatory systems are adequate. Moreover, it is claimed that the effectiveness of current frameworks, like the newly agreed International Code of Conduct for Private Security Service Providers or the Montreux Document, has not been put to the test (Juma, 2011). In order to guarantee that PMSC employees are held legally and administratively accountable for any transgressions of international law, the draft PMSC convention stipulates that governments

assume state responsibility and control over PMSCs (UN draft 2009: art 7,13, 33). The major Western powers, from which 70 percent of the private military and security services come, did concerned with this position. They claimed that the draft convention was biased against PMSCs and at odds with the Montreux Document and the International Code of Conduct (ICoC) (UNHRC, 14 September 2010; UNHRC, 2 September 2014).

Furthermore, it is claimed that the Working Group went beyond its power by trying to pass legislation to address a matter that was solely related to human rights. The Working Group's mandate is understood to be restricted to looking into mercenary activity and helping member states eliminate the threat (Juma, 2011). During the decolonization era the UN General Assembly adopted a report by its Sixth Committee: the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in conformity with the Charter of the United Nations. Western delegations believe that the Sixth Committee of the UN General Assembly should address the mercenary issue rather than the Human Rights Council or the Third Committee of the General Assembly, as the Sixth Committee was the one that handled these concerns (Del Prado, 2008).

Furthermore, industry representatives have stated that the UN Working Group on Mercenaries, the primary UN body presently addressing the problems associated with private security, is unproductive (UNGA, 17 August 2005:21). According to Percy (2006), senior PMSC employees do not think that the working group represents a practical option for international regulation. Additionally, they claim that there is disagreement over what "inherent" government functions are, or what can be lawfully kept out of the privatization scheme. As a result, seeking to enact legislation on the matter seriously jeopardizes the objective of standardizing the guiding principles for national industry regulation (Juma, 2011). Finally, it is claimed that an international convention like the one envisioned requires more extensive consultations than have been done up to this point. It is further asserted that the licensing mechanism proposed by the Draft Convention will be costly for some states (Juma, 2011).

Since 2019, the open-ended intergovernmental working group has convened annually, producing the updated 2022 zero draft. In addition to key Western states, some states, including China, have started to recognize the Montreux Document and the International Code of Conduct as

regulatory instruments and have attributed a ‘complementary role’ to the proposed UN convention. It was openly recommended to the working group to aim for ‘ensuring complementarity’ with the Montreux Document (UNHCR, July 12, 2022). Citing current international law, especially human rights treaties, state delegates have questioned the need for a new convention, arguing that doing so will lead to the ‘multiplicity of international instrument’ (UNHCR, 6 July 2021). In contrast, the majority of states persisted in their support for an international legally enforceable agreement, pointing out the shortcomings of the Montreux Document (UNHCR, 6 July 2021; UNHRC, 4 July 2023).

States such as Japan and Turkey expressed worry that the document is drafted similarly to legally binding agreement. Consequently, requested a revision to the text stating that it is non-binding (UNHCR, July 12, 2022: par. 18). Later, the US, UK, and EU all firmly echoed this position (UNHRC, 4 July 2023: pars. 5, 8, and 9). A number of states, most notably Russia, have consistently pointed out areas where international law lacks clarity and a number of topics that are still debatable and unclear, therefore, need to be discussed (UNHCR, 6 July 2021; UNHCR, 12 July 2022; UNHRC, 4 July 2023). The intergovernmental working group discussions that have been underway since 2022 suggest that, should the draft convention come to realization, it will merely serve as a formal endorsement of the Montreux Document, including with regard to its legal status. Furthermore, during the 2023 session, fresh perspectives started to surface during the draft convention preparation debate. These included the idea of regulating all businesses in a ‘non-discriminatory manner’, rather than simply PMSCs (UNHRC, 4 July 2023: par 5).

During the 2010 regional consultation with the UN working group, AU’s Commission representative recalled that when the OAU/AU Convention was adopted, PMSCs were not as prevalent as they are today, but emphasized the possibility of revising the Convention to address the issue. In this regard, the Specialized Technical Committee on Defense, Safety, and Security (STCDSS), in December 2019, directed the Commission to revise the OAU Convention for the Elimination of Mercenarism in Africa. The 33rd AU ordinary session of the Assembly of Heads of State and Government endorsed this. Following that, the Commission’s Political Affairs, Peace, and Security (PAPS) Department prepared a zero draft of the new Convention. To offer more input regarding the zero draft revised convention, the commission has held consultative

meetings with various organs of the AU (AUPSC, 1 December 2023). The Commission additionally issued an Operational Guidance Note (OGN) on foreign fighters in Africa, which is intended to provide member states, regional economic communities, and regional mechanisms with operational guidelines for dealing with issues related to the disarmament, reintegration, or repatriation of foreign fighters within their operational contexts (AUPSC, 1 December 2023).

The African Union Peace and Security Council (AUPSC) has been preoccupied with the issue of irregular military in all their forms, whether PMSCs or mercenaries. Some recent observations on these phenomena include the Council's 996th meeting, convened on 14 May 2021, to examine the report of the fact-finding mission to the Republic of Chad. The situation in Chad clearly highlighted the threat posed by 'foreign fighters and mercenaries', necessitating serious efforts and targeted support to guarantee a peaceful democratic transition following the death of President Idriss Deby Itno. Similarly, at its 1138th meeting on 8 February 2023, the PSC expressed concern about the continued existence of a number of threats to peace, security, and development in Africa, including an increase in foreign 'terrorist fighters and mercenaries' (AUPSC, 1 December 2023). However, PMSCs are mention alongside mercenaries for the first time, in the May 2022 Malabo Declaration, as a threat to peace, security, stability, sovereignty and territorial integrity of some member States (AU, 28 May 2022)

The AU recently concluded that the practice of buying and selling security and military forces as any other commodity poses a threat to the continent's peace, security, and stability. This call for immediate action by member states to better prepare to respond to such potential threats in all five domains of war: land, air, water, and cyber (AUPSC, 1 December 2023). Also in April 2023, at its 1150th meeting, the PSC's debates on "Towards National Reconciliation in Libya" emphasized the need for the gradual and sequential withdrawal of 'foreign fighters, foreign forces, and mercenaries' as a requirement for the successful implementation of the ceasefire agreement. Furthermore, at its 1159th ministerial meeting on 22 June 2023, on "Briefing on the Status of Implementation of the [CADSP] and Other Relevant Defense and Security Instruments on the Continent", with specific focus on update on "Operationalization of the African Standby Force", the PSC expressed concern about the influx of 'mercenaries and foreign fighters' in the Continent (AUPSC, 1 December 2023).

More recently, the PSC's 1170th meeting held on 22 August 2023, on Briefing on Continental Early Warning and Security Outlook by the Committee of Intelligence and Security Service of Africa (CISSA) and the Africa Centre for the Study and Research on Terrorism (ACSRT) and the AU Police Coordination Mechanism (AFRIPOL), expressed concern over a number of resurgence and emergence of peace and security threats, including the proliferation of 'foreign fighters, mercenaries, and foreign terrorist fighters', illegal exploration of natural resources (AUPSC, 1 December 2023). The summit emphasized the importance of comprehensive security sector reform programs in member states, particularly those currently combating terrorism and violent extremism, in order to strengthen national law enforcement, defense, and security capacities. At the recently held 4th meeting of the AUSSR Steering Committee, the challenges and measures to mitigate the unintended consequences of engaging PMSCs were discussed. Specifically, the ECOWAS area is conducting a mapping survey to determine the nature and extent of PMSCs operation in Western Africa (AUPSC, 1 December 2023). Even if the AU keeps on branding PMSCs as new forms of mercenaries and retains the existing framework as a regulating mechanism, the industry is here to stay and needs separate regulation (amendment). The question of how the industry might be best regulated is not addressed by viewing PMSCs via a "mercenary lens" (Gumedze, 2008b).

In this context, the June–July 1976 Luanda Trial to adjudicate foreign mercenaries hired by the National Liberation Front of Angola (FNLA) to fight the MPLA was held (Caisese, 1980). The defendants were accused of being mercenaries by the Luanda Court in 1976. The domestic legislation of Angola was based on resolutions passed by the UN at the time, and no international definition had been established to mercenaries (UNHRC, 4 July 2011a: par 23-7; UNHRC, 4 July 2011b: par 17-23, 34-36). The adoption of African regional instruments pertaining to mercenaries was triggered by the Luanda Trial, which resulted in the prison sentences of nine mercenaries (UNHRC, 4 July 2011b: par 34). Based on a draft developed by the International Commission of Inquiry on Mercenaries after the Luanda Trial in 1976, the 1977 Convention was made (Del Prado, 2019).

An excellent example of the blurring of lines between situations and types, as well as the strong relationship between mercenaries and some PMSCs, is the attempted coup in Equatorial Guinea

in 2004. As was previously indicated, none of the African states reviewed by the UN Working Group on the use of mercenaries had enacted any legislation specifically pertaining to PMSCs (UNHRC, 30 June 2014: par 67-75). Former British officer Simon Mann, the organizer, Nick du Toit, and other participants had previously served for EO on missions in Sierra Leone and Angola (UNHRC, 4 July 2011a: par 18-20). Six of the eight people accused with the crime of mercenarism have been found guilty by South African court. They were accused of engaging in mercenary activities, not as PMSC or PMSC employees (UNHRC, 4 July 2011b: par 34). In Equatorial Guinea, they were charged with crimes against government and against the head of state. In Zimbabwe, they faced accusations of smuggling weapons into Zimbabwe (UNHRC, 4 July 2011a: par 23-7; UNHRC, 4 July 2011b: par 17-23, 34-36). In July 2008, Simon Mann was sentenced to thirty-four years in prison for his role in an attempted coup in Equatorial Guinea (Chesterman, 2011). Zimbabwe also extradited Mann to Equatorial Guinea (Chinaka, 10 August 2007; VOA, 31 October 2009). Equatorial Guinea and Chad prosecuted those involved in the 2017 attempted coup for offences related to mercenary activities (Punch, 7 June 2019). But, such trials are exceptional (Chesterman, 2011).

Chapter Five

Responsibility for Acts of PMSCs

This chapter explores the possibility of holding a PMSC responsible for the crimes that its employees may have committed. In the event that such responsibility is lacking, it also investigates the possibility of attributing its act to a relevant state. As a brief introduction to the topic, it is necessary to explain the ambiguous normative structure and meaning of the notion of due diligence (Besson, 2023) and the ongoing debate on State Responsibility (Crawford and Olleson, 2005). The secondary rules of international law, which define the general conditions under which a state may be held responsible for any wrongdoing and the legal ramifications that follow from such responsibility, regulate the issue of whether a specific act or omission qualifies as "act of a state" (Tonkin, 2011:55). The purpose of the Draft Articles on State Responsibility (ASR) is to create a framework for the application of the responsibilities, rather than to define the so-called primary or substantive obligations of states (Crawford and Olleson, 2005; Crawford, 2002:74; Shaw, 2003:694-8) . The debate over whether international law requires fault (Brownlie, 1983:37-40; Higgins, 1994: 159-61; Show, 2003: 698) is a broader one that is intertwined with the theoretical discussions surrounding the concept of due diligence. This is a topic that the Draft Articles on state responsibility do not address (Crawford and Olleson, 2014).

International responsibility is neither dependent on fault nor independent of fault. The primary rule in question establishes the necessary degree of fault (Tonkin, 2011: 67) or the level of diligence to be exercised (Cameron and Chetail, 2013: 228). According to a recent assertion by Besson (2023:133), a state's international responsibility is by definition "without fault" because it results from the breach of a legal obligation attributable to a state. Nevertheless, international responsibility law takes into account negligence and fault. As a result, the due diligence test requires application in light of the particular facts of each case and involves some degree of flexibility (Shaw, 2003: 764; Tonkin, 2011: 69). However, the concepts of state responsibility are abstract and have little to do with practical application or enforcement methods (White, 2012). Therefore, this chapter looks at how the idea of responsibility for corporate conduct should be applied when circumstances call for a flexible application of the due diligence.

5.1. Responsibility of PMSCs

From a purely positivist standpoint, it is important to recognize that, with very few exceptions, explicit obligations to corporations are rarely imposed by current international law (Cameron and Chetail, 2013:306). There is no common international framework for governing the responsibilities of non-state actors, even though individuals may have international responsibility in criminal cases. Furthermore, positivists argue that since none of the three international criminal tribunals have the authority to try legal persons, 'there has been no development of corporate criminal responsibility in international law' (Crawford and Olleson, 2014). Others contend that the notion that PMSCs have no legal standing under international law, implying that neither the companies nor their employees are subject to any legal obligation, is deceiving from the perspective of IHL. Since international humanitarian law does not govern the status of legal entities, the corporations themselves have neither obligations nor status under it. However, their employees do have such status and obligation, even if no treaty directly mentions them (Gillard, 2006).

Because of their unique organizational design and involvement in hostilities, PMSCs are difficult to categorize under some of the more established definitions of IHL or IHRL, which leaves many of their operations with impunity (Sriram et al, 2018: 90). The official UN position, expressed through the working group was that 'the employees of [PMSCs], contracted as civilians but armed as military personnel, operate in these "grey zones" with uncertainties as to whether their status is that of a combatant or of a civilian' (UNHRC, 9 January 2008: par 25). '[i]t does not seem that the international human rights instruments … currently impose direct legal responsibilities on corporations' (UNHRC, 19 February 2007: par 44). However, it is widely acknowledged that individuals or corporations may be held directly responsible under international law if the violation reaches the level of a *jus cogens* violation or a peremptory norm of international law (such as the prohibition of genocide, war crimes, or crimes against humanity) (UNHRC, 19 February 2007: pars 19-32). Others claim they have been directly granted a "functional personality" by international law, which is defined as a corporation's ability to act within precise boundaries and for the specific purposes stipulated by that law. Three

distinct legal instruments can grant a restricted and derived personality: treaties, internationalized contracts ("*contrats d'état*"), and customary law (Cameron and Chetail, 2013:296-305),

The contractual status of the PMSC and its employees, as well as the fact that the contract confers some sense of legitimacy, have been major sources of uncertainty over the status of "the contractor" (Liu, 2015:207). Laws that govern armed conflict and protect human rights faced unique difficulties as a result of the corporate form of organized violence (Liu, 2015: 184; Grofe, 2007). This is because these legal branches assume particular types of actors and require the existence of particular features in order to be utilized, both of which are compromised by the corporate structure. The PMSC's unique formula for 'legalized impunity' ('passive immunity') stems from the status the company maintains, while providing military services, it adopted a civilian structure. This combination compromises the legal framework's potential to adequately articulate the harms that PMSCs cause as well as the validity of the rules intended to control the industry in which they operate (Liu, 2015: 184).

One could argue that a corporation's legal personhood status is the foundation for the possibility of corporate responsibility for international crimes (Liu, 2015:187). However, the process of 'interpretive denial' culminates in the application of what Stanley Cohen refers to as "magical legalism", which supports the claim that "crime is necessarily an ultra vires act of a corporation; liability cannot be imputed to a corporation because a corporation cannot legally be formed for the purpose of committing a crime" (Liu, 2015:192). Even if the deeds may not change, "[t]he harm is cognitively reframed and then allocated to a different, less pejorative class of event" (Liu, 2015:216). Here, violating someone's human rights is equivalent to breaching a contract (Perrin, 2012; Liu, 2015:216). The ancient notion that corporations cannot commit crimes is reflected in the Latin maxim *societas delinquere non potest* (companies cannot commit an offense). This notion is still present in the legal systems of some states, including France, Germany, and Austria, where corporate criminal liability is applied judiciously and generally more strictly than in Anglo-Canadian law's "identification theory" (Clapham, 2008).

In other words, the basis for weak industry regulation going forward is established by the 'active impunity' mechanisms that absolve the PMSC of criminal responsibility and clear it of civil liability (Liu, 2015:297). Although using contract law can get around major jurisdictional

obstacles that affect other regulatory efforts (Cameron and Chetail, 2013: 184-97, 265-79), the more often contract law is used to regulate PMSC activities that fall under the substantive purview of IHL, IHRL, and criminal law, the more likely it is to amplify this potential problem as well as problems related to contract law itself (Liu, 2015:195). When there is significant pressure to terminate contracts, this practical legitimacy, what Liu (2015) refers to as 'active impunity', becomes especially apparent (Leander, 2010). Leander (2010) contends that the products and services that PMSCs offer are the source of 'Legal Exceptionalism'. The trade in products and services related to security provision places discourses and practices pertaining to security and risk expertise at the center of their authority, resulting in a systematic bias in favor of a focus on security and risk when framing the contestation of PMSCs. This suggests that the pursuit of PMSC legal responsibility is likewise marked by the 'exceptionalism' connected with security and risk in law (Leander, 2010).

Contracts also undermine the international criminal law notion of superior responsibility, which in turn reflects the requirement of IHL that armed groups be organized hierarchically (Liu, 2015:210). Although "[s]uperior responsibility is not engaged solely by virtue of a contract", the Montreux Document, 'reflecting existing international law', makes it clear that superiors of private security personnel, whether military or contractors, may be held accountable for crimes against international law committed by individuals under their effective authority and control (Liu, 2015:210). Therefore, the horizontal contractual relationship between the State and the PMSC as well as the PMSC and its employees has undermined the hierarchical organization required by IHL (Liu, 2015:211). This shows how legal systems organize PMSC impunity and shows how the law itself removes responsibility from the PMSC (Liu, 2015:186).

Second, because PMSC contractors work with military services, their civilian status raises the bar set by the doctrine, which is unwarranted (Liu, 2015: 186). This is due to the straightforward fact that the PMSC's absence of hierarchical links makes it difficult to hold military commanders and civilian superiors accountable for the misconduct of soldiers or contractors further up the command chain (Liu, 2015:227-8). Unlike the superiors of military personnel, these superiors will not be held liable because the hierarchical structure of violence, defined by "effective control", is required (Liu, 2015:229). That command responsibility only applies if PMSCs offer

an internal structure strong enough to create “effective control” of superiors, either civilian PMSC senior employees exercising de jure or de facto authority over lower ranking private contractors or military commanders exercising de facto authority over PMSC employees (Frulli, 2010)

It was stated in a recent study, ‘the doctrine of superior responsibility is an extraordinary legal and prosecutorial instrument because it is theoretically capable of extending to areas of liability where other forms of liability are unable to go’ (Mettraux, 2009:272). Certain basic components of this legal notion are controversial, such as the strictness of effective control and whether command/superior responsibility is a kind of attributed liability for the crimes of subordinates (‘coming closer to complicity’) or a separate and distinct responsibility by omission, which makes superiors accountable for failing to carry out a specific act, i.e., for failing to prevent or punish crimes committed by their subordinates (Frulli, 2010). Despite the debates, an efficient method to establish criminal liability based on command or superior responsibility in ‘non-traditional settings’ is to apply Articles 86 and 87 of Protocol I, Ad Hoc tribunals establishing instruments, Articles 6 and 7 of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), respectively, or Article 28 of the Rome Statute with ‘flexibility’ (Frulli, 2010). As Mettraux (2009:272) argues ‘wherever the will to prosecute exists the doctrine of superior responsibility will provide for a ready mechanism to hold that superior accountable’.

Either outright banning or regulating it is the obvious approach to determine the legal status of the privatized military industry in comparison to the current unregulated status quo. Regretfully, neither choice is easy (Singer, 2004). Complete prohibitions on military operation overseas or recruiting for such operation are neither feasible nor enforceable in terms of permissible activities (O’Brien, 2007). Additionally, it is unclear how states’ rights to self-defense codified in Article 51 of the UN Charter, which ASR stipulates as ‘circumstances precluding wrongfulness’, would be affected by any move to outlaw PMSCs. States are permitted to take broad defensive measure against attacks. Any attempt to prohibit a new option for states to do so could violate this clause if there is no profound reason for doing so. Not to mention the ongoing problems with enforcement and compliance. Before any kind of prohibition could be put into effect, such

barriers would need to be cleared (Singer, 2004). Furthermore, any endeavor to develop systematic legislation warrants an exemption to the rule of law when it comes to matters such as national security (Leander, 2010).

Today, the use of armed force is not limited to states; it can also be employed by PMSCs operating through their employees on behalf of governments and other non-state actors (Moyakine, 2015:107). According to a written statement submitted to the UN Working Group on the Use of Mercenaries by Human Rights Advocates, '[u]nlike state-run military and police forces, which are subject to fairly strict regulation by their governments and international laws, PMSCs act with relative impunity in the current international and domestic legal landscape' (UNHRC, 21 February 2008: par 4). The fact that the state's monopoly on violence is a legal institution that poses normative and practical challenges exacerbates the effect of the prejudice. Many lawyers acknowledge that, similar to other areas, the law governing the use of force may be "fragmenting", and that there may be inconsistent, partially overlapping, and frequently incompatible practices and regulations in place (Leander, 2010).

The use of force between states is forbidden by Article 2(4) of the UN charter. One could argue that it doesn't specify when or how a state could use force against armed groups (Cameron and Chetail, 2013: 11). In *Congo vs. Uganda*, the ICJ maintained, in spite of criticism, its ruling that using force against internal armed groups is not governed by the right to use force in self-defense (ICJ 2004: par. 139; ICJ, 2005: par 144-47). Nonetheless, by hiring or otherwise recruiting a PMSC to use aggressive force against another state on its behalf, a state cannot operate beyond the charter's limit on the use of force (UNGA Res 3314 (XXIX), 14 December 1974). As a corporate entity that stands in the space that lies between the State and the individual, PMSCs will be free to engage in aggressive behavior as long as the State cannot be held responsible for it in accordance with the special (secondary) rules (Liu, 2015: 225, 297). Furthermore, companies those operates independently or on behalf of another "principal" rather than only states get overlooked, which has the effect of negating the impact of the pursuit of legal accountability on them. The result is "inconsequentialism" that strengthens the perception of impunity (Leander, 2010).

None of the UN Charter's two legal justifications for the legitimate use of force, self-defense and enforcement action expressly approves of or forbids the delegation of such authority to private companies. In fact, PMSC norms of engagement frequently stem from the need for self-defense (Cameron and Chetail, 2013: 12). It is difficult to imagine a state outsourcing a decision to use force to defend itself against an armed attack (*Jus ad Bellum*). However, they might actually be outsourcing the decision to use force against another state if we use a much more specific example, such as giving drone operators the authority to decide whether and how to respond to a target they identify operating on foreign soil (Cameron and Chetail, 2013: 15). A range of factors considered in the process of attributing legal responsibility are broken down and controlled by the laws governing war (*Jus ad Bellum*) and the conduct of warfare (*Jus in Bello*) (Liu, 2015:19). The legal approach within *jus ad bellum* (as one manifestation of 'passive impunity') has 'bifurcated to impose either state responsibility or individual criminal responsibility for its breach', not corporate responsibility, demonstrating the limitation of the law to define what constitutes corporate aggression (Liu, 2015:186).

Due diligence has evolved from being a tool to protect corporate interests to a voluntary standard to assess how well a company is doing in terms of adhering to social norms and respecting the human rights of those affected by its operations (Martin-Ortega, 2008). Due diligence is something that businesses do for both pragmatic and legal reasons. However, there is no standard definition for the precise content of due diligence (Lambooy, 2010). It is only recently that legal due diligence requirements have been included into an increasing number of regulatory systems. In these situations, failing to adhere to due diligence raises the possibility of litigation and, with it, the risk of rising costs. However, due diligence is becoming a more formal procedure in practice, even though it is not necessarily required by law (Martin-Ortega, 2008; McCorquodale, 2009). Accordingly, due diligence is a procedure used in a company's best interest to evaluate risk (McCorquodale, 2009). This idea is encapsulated in a broad corporate responsibility to uphold human rights, which is not a formal obligation under international law but rather an 'aspiration' or 'expectation' from the international community (Martin-Ortega, 2008; Perrin, 2012).

According to commentators such as Clapham, non-state actors must conform to a minimal level of human rights compliance. He draws attention to the idea of "general principles common to international human rights law", which was defined as applying to non-state actors (insurgents) by the Guatemalan Historical Clarification Commission (Clapham, 2006:37). He also mentions the conclusions reached by the Sierra Leonean Truth and Reconciliation Commission, which stated that Executive Outcomes had engaged in "human rights violations" (Clapham, 2006:37). It is entirely possible to sue a corporation for breaking international law if it is the main perpetrator. Suits have been brought, for instance, in relation to claims that contractors providing interpretation and interrogation services to the US at *Abu Ghraib* prison in Iraq violated international law, allegedly torturing and subjecting people to inhuman or degrading treatment. The issue is readily apparent in the straightforward case where a corporation's actions truly amount to war crimes, enslavement, or genocide. Due to its violation of international criminal law, the corporation may face legal consequences in the US under the Alien Tort Statute (ATS) (Clapham, 2008; Ryngaert, 2008).

According to Ratner (2001), a corporation 'is liable as the state for violations of human rights' when its actions are attributable to the state, as recognized by the ASR, and these claims are based on cases that were brought before US courts under the Alien Tort Statute (ATS) or the Alien Tort Claims Act (ATCA). Ratner in his 'the mirror image' approach holds the view that 'the extant rules of state responsibility that make the state liable for the acts of some private actors can provide for the responsibility of those private actors as well' (Ratner, 2001). Ratner identifies three types of relations between the state and the corporation that will warrant the extension of the states' human rights obligations to corporations, namely 'corporations as governmental agents', 'corporate complicity' and 'corporations as commanders' (Ratner, 2001).

In the Nicaraguan case, for example, if we assume that the principal's responsibility also extends to the agent, then this body of jurisprudence implies that private companies acting as the state's agent, whether de facto or de jure, would be held responsible for violating human rights in cases where the government has instructed them to do so. Regarding the complicity, the claim relies on states' responsibility for "aiding and assisting" in another state's conduct of illegal act, as well as individual complicity based on the Genocide Convention and instruments creating the ICTY and

ICC (Ratner, 2001). According to this perspective, a business should be held responsible under international law if it knowingly participates in a materially complicit relationship with a government that violates human rights. Finally, he proposed the idea of 'corporations as commanders', by 'flip[ping] the traditional doctrine of state responsibility'. He argue that the firm bears a greater degree of responsibility for the actions of the government forces if, for example, the company used those forces to maintain security outside a mine's perimeter and those forces breached human rights (Ratner, 2001).

Some argue that there is already a trend in domestic case law to acknowledge legal entities' responsibility for crimes committed abroad, and that such a development on an international scale cannot be ruled out in the future (Bonafè, 2009:67; Cameron and Chetail, 2013:310). Thus, we find ourselves at an interesting juncture in history where the traditional state-centric interpretation of international human rights law is becoming less and less prevalent, but not to the extent that an incident involving a PMSC employee working for a non-state client could be easily categorized as a breach of IHRL (Perrin, 2012). Whether PMSCs, like other companies, are accountable to direct international law is still up for debate. Eventually, a decision about whether or not these companies must adhere to international criminal law standards may be made (Lopez, 2017). Legal entities are not currently subject to criminal prosecution under international criminal law (Bonafè, 2009: 67)

5.2. The Responsibility of the Hiring State

The principle of due diligence dictates that states must take appropriate measures or apply due diligence in order to prevent, punish, investigate, or provide remedies for harm caused by human rights violations committed by PMSCs or their staff (individuals or entities) in addition to their own state agents (Henckaerts and Doswald-Beck, 2005a: 532; Doswald-Beck, 2007; Moyakine, 2015: 341; UNHRC, 26 May 2004: pars 16, 18-20). Initially, there is a significant restriction on the application of human rights treaties. It seems that states' jurisdiction under different human rights regimes is restricted to a specific territory. But if states employ PMSCs to conduct operations, outside of their borders, that could be a problem (Moyakine, 2015: 115). It is undeniable that the state in which a PMSC is operating has a duty to investigate potential violations of human rights by private entities. However, it calls into question whether it extends

to other countries (Tonkin, 2009; Cameron and Chetail, 2013: 231). Therefore, contracting states engaged in armed conflict are limited in their ability to apply the human rights framework extraterritorially (Tonkin, 2009). Some argue, however, that a state should be prepared to take all necessary steps to ensure that a PMSC does not infringe against human rights in the (host) state in which it is entering into a contract to support its forces (or troops of a host state) (Francioni, 2011; Evgeni, 2015:311).

Regarding human rights treaties, states are required under IHRL to respect and protect the rights of all individuals residing on their territory or under their jurisdiction. Over time, there has been a shift in the interpretation of international law concerning this issue (Tonkin, 2011:65; Palou-Loverdos and Armendáriz, 2011; Moyakine, 2015:340-61; Lopez, 2017). Human rights bodies and regional courts have come to hold that states violate their obligations when they do not take reasonable steps to prevent, punish, investigate, or redress for harm caused by individuals or private companies (Martin-Ortega, 2008; Moyakine, 2015: 340–61; Cameron and Chetail, 2013: 231). Human rights bodies' jurisprudence has demonstrated that this principle covers protection of any person 'within the power or effective control of the State', even if that person is not physically located on state territory, as is the case during an occupation. It also covers protection of all people, regardless of nationality, including migrant workers and refugees. (ICJ, 2004: Par 109,111; UNHRC, 26 May 2004: par 10). Although human rights conventions are becoming more and more extraterritorial (Milanović, 2011), it is unclear how far this obligation requires states to regulate private actors; commercial conduct, particularly those operating outside the State's jurisdiction, and how that translates into specific actions in any given situation (Gillard, 2006; Massingham and McConnachie, 2021).

The Geneva Conventions and their Additional Protocols do not contain the phrase "due diligence" (Doswald-Beck, 2007; De Preux, 1987: par 3660). It is vital to examine specific Geneva Conventions clauses in order to ascertain whether governments are required by IHL to exercises due diligence over the operations of non-state actors, such as PMSCs (Cameron and Chetail, 2013:236). Consequently, the Geneva Conventions contain specific obligations pertaining to due diligence (Palou-Loverdos and Armendáriz, 2011; Evgeni, 2015:319-20; Cameron and Chetail, 2013:240-4). States are required by specific IHL obligations to exercise

due diligence with regard to the actions of individuals in both international and non-international armed conflicts. This makes sense because both private individuals and state actors may pose a threat to the protections afforded by IHL to those impacted by armed conflict (Cameron and Chetail, 2013:244).

While the due diligence rule originates from human rights law, some experts contend that common Article 1 of the Geneva Conventions, which obliges states Parties to "undertake to respect and ensure respect for the present Convention in all circumstances", gives rise to an analogous due diligence concept under IHL (Tonkin, 2009; Moyakine, 2015: 362; Massingham and McConnachie, 2021). This means that states that are not parties to a conflict must take action to persuade parties to the conflict to respect IHL by using any influence states not parties to the conflict may have over an unlawful act or over individuals who are committing or about to commit the act (Tonkin, 2011: 71; Cameron and Chetail, 2013:248,250). According to Doswald-Beck (2007), Tonkin (2009), Cameron and Chetail (2013), and Massingham and McConnachie (2021), the ICRC's interpretation of Common Article 1 as it relates to PMSCs would cover all contracting states that employ PMSCs to operate in areas of armed conflict or occupation, not just those states that are actually parties to the conflict in question. The Geneva Conventions require all states, including the home state, to prevent and prosecute serious violations of IHL, even if there is no requirement for home states to establish a systematic export control mechanism (Lehnardt, 2017).

The hiring state for PMSC services is usually the host (territorial) state. Alternatively, the contracting state could employ PMSC services to further its own objectives as an occupying power or to assist the host state's military forces. It seems obvious that the question of attribution must be addressed in order to determine whether certain conduct qualifies to be imputed to a state. The next step needs to be to determine whether that conduct was in accordance with rules and principles of international law that are expected to be complied with by states. Some commentators objected to the approach in article 2 of the draft article, providing its reversed approach (Stern, 2010). Remarkably, in one of the ICJ's more recent cases, the Bosnian *Genocide case*, the court applied the two fundamental components in the opposite order (Moyakine, 2015:212).

A State's international responsibility won't be invoked even in cases where a breach of international law has been identified but cannot be attributed to it (Moyakine, 2015:224). Positive obligations may offer an alternative way to approach international responsibility if it is not possible to attribute the act so that states take responsibility for the unlawful acts that PMSCs as private actors perform. States are required by human rights treaties to "respect", "protect", or "redress" human rights (ICJ, 2005: pars 215-17; Lehnardt, 2013). A state may nevertheless be required to exercise "due diligence" with regard to a private actor even in situations when it is impossible to attribute their actions to the state. Therefore, the basic legal obligations of a state with regard to PMSCs, both those it contracts itself and those operating on its territory or territory it controls, can also be established by the principles on obligation of a state (due diligence principle) (Cameron and Chetail, 2013:134-5).

According to Article 91 of Protocol I for international wars and Article 2(2) of the ILC draft article on state responsibility (2001) for domestic conflicts, any violations of IHL committed by national soldiers are automatically attributable to their state. A '[p]arty to the conflict... shall be responsible for all acts committed by persons forming part of its armed forces', reads Article 91. The clause serves as a *lex specialis* to Article 7 of the ILC's article on state responsibility, which stipulates that the state is only responsible when one of its organs performs the act in question (Henckaerts and Doswald-Beck, 2005a:530; ICJ, 2005: par 214; Tonkin, 2011: 96). Article 4(A) of the Geneva Convention III and Additional Protocol I's Article 43(1) identify combatants, or armed forces. Although the terms "armed forces of a party" and "belonging to a party to the conflict" do not specifically exclude contractors who are not hired to fight but are nonetheless armed, such as security guards, the provisions should be interpreted more narrowly because PMSCs do not meet the particular IHL requirement. Thus, only PMSCs who are members of the armed forces are covered by article 91 (Cameron and Chetail, 2013:162; Lehnardt, 2017).

As stated previously, designation as a combatant denotes permission to engage in war (Tonkin, 2011:84; Lehnardt, 2017). There are several indicators that the state did not give the contractors permission to fight, such as when they are granted the status of civilians accompanying the armed forces or when the contracting state explicitly states that the corporation is only being hired to provide "defensive services". Private military personnel are not considered combatants

just because they eventually engage in combats. Regarding their personal criminal liability, it is a different topic (Cameron and Chetail, 2013:434; Lehnardt, 2017). As a result, it is unlikely that the contracting state can be held responsible for the contractors' actions, with the exception of situations in which they are actually instructed to fight, and that the basis for doing so is Article 91 of Additional Protocol I (Cameron and Chetail, 2013:434; Lehnardt, 2017).

Only in specific situations, usually when the contractor in question is acting under the hiring state's instructions, direction, or control, are violations by PMSC personnel attributable to the hiring state (either the contracting or host state) (ILC Commentary, 2001: art 5 and 8). The International Law Commission's official Commentary on Article 5 introduces the notion of 'parastatal entities', which 'exercise elements of governmental authority in place of State organs', 'provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by state organs, and the conduct of the entity relates to the exercise of the governmental authority concerned', and directly mentions 'private security firms' as an example of such parastatal entities (ILC Commentary, 2001: art 5). Generally speaking, only acts taken under the direction, instigation, or control of the organs of government or by individuals acting as state agents are acknowledged as emanating from the State on an international level (Brownlie, 1983: 132-66).

According to article 43 of Protocol I, if PMSC's personnel incorporated in the state military or based on the command and internal discipline theory subordinated to the government, they could become state organ (Juma, 2011; Tonkin, 2011: 87). Determination of "attribution" for an activity that is undertaken by entity which is not a state organ has been challenging (Lehnardt, 2017). Since incorporating PMSCs in state organ is infrequent, attributing their act to a state by the application of article 5 is rare (Juma, 2011; Tonkin, 2011: 58; Moyakine, 2015: 229-34). States are unwilling to incorporate PMSCs in to either their armed force, police force or their domestic law because of their private nature (Cameron and Chetail, 2013: 138).

According to the ICJ ruling, the fact that the private agent acted with "complete dependent" on the state ("dependence on the one side and control on the other") results the attribution of its act to a specified state, even in the absence of specific instruction or national legislation (ICJ, 2007: pars 391-395, 397). Accordingly some commentators argue a contract to provide a service on

behalf of a state party to a conflict, if not deemed allegiance, could be considered as control or "relationship of dependence" (Schmitt, 2005). However, only companies hired on behalf of a state party to an international armed conflict could meet the requirement under article 4A (1) of the third Geneva Convention. Those companies hired by or acting on behalf of non-state actors and operating in warfare are not covered by this provision (Schmitt, 2005). Others claim it would be ludicrous to suggest that any private entity that enters a contract with a state thereby becomes an organ of that state. Unless the contract can have the effect of incorporating the contractor or the company as that of a state organ like a contract between Sandline International and the state of Papua New Guinea. Still, this could not meet the criteria under article 4A (Cameron and Chetail, 2013: 139-43; Tougas, 2014).

According to ICJ in some circumstances, 'persons, groups of persons or entities may, for purposes of international responsibility, be equated with state organs even if that status does not follow from internal law' (ICJ, 2007: par 392). Probably the most compelling objective criteria on which to contend that PMSCs and their employees can be paralleled with organs of the state concerned is the 'complete dependence' of the PMSC on the state. However, the terms of the contract constrain the state in terms of the level of order it can give to contractors (Cameron and Chetail, 2013: 155-7; Momtaz, 2010). Second, while hiring PMSCs to undertake a function that has been traditionally assigned to armed forces, states deny them access to equivalent privileges and benefits members of the military or other government organs would be eligible for (Moyakine, 2015:243). In addition, the fact that an entity is considered as an organ of the state or undertake the functions of the military doesn't mean that entity or its employees consists of the armed force of the state per provisions of IHL (Cameron and Chetail, 2013:161-2).

The armed force of a state and PMSC had engaged in warfare side by side in Angola where employees of EO wearing some military uniforms participated in hostilities alongside the Angolan armed force (Cameron and Chetail, 2013: 154). In such circumstances, it looks apparent that the PMSC's personnel and members of the armed force of the state are one and the same and therefore considered equal for the legal purpose. It also appears the same conclusion could be reached in Sierra Leone, where the employees of the PMSC planned and executed the attack on behalf of the government (Cameron and Chetail, 2013: 154). However, the president of EO,

Eeben Barlow claimed in those circumstances, their employees were officially integrated into the State armed forces of each of those States (Cameron and Chetail, 2013: 154). Other features of these events show that, even in such circumstance, to be quick to draw a conclusion that these PMSCs are state organs is a mistake. In Sierra Leone, for example, during and after the coup which certainly alters the command chain, EO continued to provide service. In such circumstance, it is improbable to maintain the 'completely dependent' relationship of the private business entity and the state (Cameron and Chetail, 2013:155).

When private contractors violate international humanitarian and human rights law, a state may be held responsible if PMSCs are allowed to carry out 'elements of governmental authority', as specified in Articles 5 and 7 (Lehnardt, 2007; Moyakine, 2015: 238). 'For the purposes of article 5, an entity is covered even if its exercise of authority involves an independent discretion or power to act; there is no need to show that the conduct was in fact carried out under the control of the state' (ILC Commentary, 2001: Art 5). Whether "empowered by the law of that State" includes the use of a contract is not clearly provided by the ILC Commentary. However, general authorization, including contract, deemed a general delegation, therefore, will be sufficient for the purposes of Article 5 (Cameron and Chetail, 2013:168). Reference is made in the ILC commentary with regard to private security guards contracted to run prisons (ILC Commentary, 2001: Art 5). On the other hand, outsourcing 'elements of governmental authority' to private companies doesn't exclude the responsibility of the state for any transgression of international law they committed, irrespective of the outsourcing was done in violation of or in contrary to national law (Cameron and Chetail, 2013:70).

The concept of "governmental authority", whose definition is inherently political and hence not only differs from place to place but also changes over time, makes the implementation of the principle of attribution challenging (Lehnardt, 2017). According to ILC, companies that are owned by the State and hence directly under its control should be regarded as separate entities, unless they carry out elements of governmental authority as defined by Article 5 and their actions cannot be attributed to the State (Crawford. 2002: 112). The nature of the activity, such that a PMSC could act exercising elements of governmental authority, and not the public or

private character of the agent are key in such circumstance (Hoppe, 2008; Cameron and Chetail, 2013:166).

What constitutes "governmental authority" and what type of services the exercise of this authority entails remains controversial (ILC Commentary, 2001: Art 5; Lehnardt, 2007; Moyakine, 2015:209; Lehnardt, 2017). Because some activities are more attributed to the state than others, commentators have argued that the nature of the activity is important. If PMSCs engage in policing or administer detention centers, any violation while doing so may be easily attributable to a state than merely guarding installations (Hoppe, 2008; Cameron and Chetail, 2013:172; Lehnardt, 2017). However, given that the ASR expressly foresees that such functions (core state functions) may be outsourced (Cameron and Chetail, 2013:172,202), the mere fact that PMSCs carry out some core state functions does not inevitably imply that those companies exercise elements of governmental authority and that this matter automatically falls under the purview of Article 5 (Moyakine, 2015:240). If such operations constitute direct participation in hostilities on behalf of the state, they would involve the exercise of elements of governmental authority. However, the concept of direct participation in hostilities remains vague (Cameron and Chetail, 2013:202-3).

The existence of domestic legislation delegating public authority to certain entities cannot be considered the primary determining element when analyzing this specific form of attribution (Momtaz, 2010; Cameron and Chetail, 2013:171). As noted at the Meeting of Experts hosted by the University Centre for International Humanitarian Law in Geneva (UCIHL, 2005), there is no comprehensive list of governmental functions or 'intrinsic state functions', nor is there a general criterion to identify entities exercising elements of public power (Momtaz, 2010; Cameron and Chetail, 2013:174). Consequently, a number of variables need to be taken into account (Juma, 2011; Moyakine, 2015:242-3). It should, at the very least, be the duty of the government to decide what is and is not "inherently governmental" (Moyakine, 2015:244-51; Cameron and Chetail, 2013: 178).

According to the ILC Commentary (2001: Art. 5), the ASR further acknowledged that 'what is regarded as "governmental" depends on the particular society, its history, and traditions'. State parties are bound by human rights treaties, and one can conclude that where there is an

international obligation, there should also be an implied authority to be exercised (UCIHL, 2005:17–18). Nonetheless, a state's obligation to guarantee the fulfillment of human right falling under its jurisdiction requires several forms of state commitment, not just the use of its governmental authority (UCIHL, 2005:17-18; Lopez, 2017; Cameron and Chetail, 2013:200).

Article 8 of ASR applies depending on a specific factual relationship between the wrongdoings committed by individuals or groups of individuals (the "de facto organs" of the state) and the State. This relationship is set when individuals or entities do not exercise elements of governmental authority on the basis of internal law, as provided in Article 5 of the draft articles, nor do they constitute official state organs, as provided in Article 4 of the draft articles (Moyakine, 2015:251). The doctrine of state responsibility shall be applied when individuals, groups of individuals, or entities act under the direction, instruction, or control of the State, and their illegal act could be attributed to the State (ILC Commentary, 2001: Art 8). To begin with, Article 8 ASR's language makes clear that "control", "instructions" and "direction" are disjunctive criteria as opposed to cumulative ones (ILC Commentary, 2001: Art 8). The extent of ownership and the degree of state control are undoubtedly very important since they may suggest that the State is responsible for the illegal actions of such companies, but it's important to remember that they are not a set of determining factors (Momtaz, 2010; Cameron and Chetail, 2013: 210). Additionally, just because a private company's operations are carried out in a state or have a license from that state does not mean that the criteria of effective control have been met (Cameron and Chetail, 2013:214).

There is disagreement over how much control a state should have over individuals, organizations, and private companies like PMSCs and their employees (Lehnardt, 2007; Cameron and Chetail, 2013:212). 'The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity' (ILC Commentary, 2001: Art 8). However, since the companies operate independently and states avoid direct involvement in the form of instructions or direction (Lopez, 2017), the term "control" in the actual wording of Article 8 would be meaningless if it only refers to "instructions and direction" or if it requires proof that the state accepted the commission of the unlawful act (Cameron and Chetail, 2013:211). According to the

ILC, attribution requires a “real link” between the private individual or group and the state apparatus (Crawford, 2002: 110). Additionally, it is debatable whether or not the State is responsible for the actions of PMSCs when they are part of the armed forces, under their direction, or receive direct orders from the State (Sossai, 2011). Besides, in conflict situations where even the status of government is questioned, the PMSC activity under investigation must have a cognizable relationship with the authority conferred, and this is never easy to prove (Juma, 2011; Moyakine, 2015: 329).

Following the ILC’s lead in its draft articles on State responsibility, the ICJ has established stringent requirements that must be satisfied before actions by unofficial groups can be attributed to a state (Moyakine, 2015:266). In the *US Diplomatic and Consular Staff in Tehran case*, the court determined that the militants’ initial actions in taking over the embassy could not be attributed to the Iranian government because there was insufficient evidence to draw the conclusion that the militants had been given orders to carry out this operation by competent Iranian authority (Cassese, 2005: 250). The occupation was not considered an act of the Iranian state for which it could be held responsible internationally until the Iranian leadership approved it later and decided to keep things as they were (ICJ, 1980: par 58, 74; Cassese, 2005: 250).

The will of the state authorizing the commission of a particular act that violates the international obligation of that state is required when we mean by “instruction” (ICJ, 1980: par 59). According to some commentators this general rule is applicable to PMSC or its personnel. If a PMSC or its employees are instructed to commit an illegal act, the state that gave such instruction will be responsible for any act committed for the implementation of such instruction (Gillard, 2006; Lehnardt, 2007). Whether the crime committed is incorporated into the contract or not is irrelevant to the issue at hand. Any unlawful conduct, such as killing civilians or torturing POWs, is attributable to the contracting state that orders private individuals or entities to engage in such unlawful conduct (Cameron and Chetail, 2013:206). In order to be held responsible for the conduct of individuals or groups of individuals, the level of control to be exercised by a state is particularly discussed in the Military and Paramilitary Activities (*the Nicaragua case*) (ICJ, 1986: par 109).

The ICJ applied the "effective control" test in *the Nicaragua case*, assuming the State does not authorize an entity to violate international law. This was later affirmed in *Armed Activities* and *the Genocide Case* (Liu, 2015: 222). The Court maintains that 'it would in principle have to be proved that [the United States] had effective control of the military or paramilitary operations in the course of which the alleged violations were committed', as to whether the conduct of *the contras* could be attributable to the US, resulting in the general responsibility of the later for the violation of IHL (ICJ, 1986: par 115). Similarly, the ICJ (2005: par 160) relied on the 'effective control' test in *the Armed Activities* case to establish the responsibility of Uganda. As an occupying power in the *Ituri* district in the Democratic Republic of the Congo, the ICJ found Uganda responsible for its lack of vigilance in preventing the violation of human rights and IHL and its violation of the obligation not to tolerate such violence by any third party (ICJ, 2005: par 178-9). More recently, the 'effective control' test was affirmed by the ICJ in the Bosnian *Genocide case* (ICJ, 2007: par 399). The Court explicitly rejected the 'overall control' by arguing:

> It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf… This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed (ICJ, 2007: par 406).

The threshold of 'effective control' is extremely high in the Nicaragua case, since "United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the Contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation" was believed to be insufficient for attributing the acts of *the Contras* to the US (Liu, 2015: 222). It was necessary to prove that the United States had specifically 'directed or enforced' the perpetration of those acts (ICJ, 1986: par 115). In the case of 'direction', the state is required to lead the steps to be taken in the commission of the unlawful conduct, as distinct from just giving instructions. How the operation is to be conducted must be clarified by the state (Cameron and Chetail, 2013: 209).

Claiming that the degree of control depends on the circumstances of each case and 'overall control' over the private individuals is sufficient, in the *Tadić* case, the Appeals Chamber of the ICTY judges did not apply the strict test introduced in *the Nicaragua case* (Cameron and Chetail, 2013: 217) . Therefore, they looked for a new concept of state control. According to the view of the ICTY, the "effective control" test must be regarded as 'unpersuasive' (ICTY, 1999: par 115,124; Moyakine, 2015: 260). This is because, according to international law, any state is responsible for any actions taken by official state organs, organized individuals, or entities under its control that violate its laws and principles, regardless of whether the State provided those actors with explicit instructions (Moyakine , 2015: 260). By citing article 8 of the draft article on state responsibility, the court reason:

> The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility (ICTY, 1999: par 121). Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law(ICTY, 1999: par 137).

The state cannot use the company's separate legal status as an excuse to absolve itself of responsibility. In situations where the "corporate veil" is merely a tool or a means of fraud or evasion, international law does not recognize the separateness of corporations (ILC Commentary, 2001: art 8). Nonetheless, it is unlikely that the actions of PMSCs will be attributed to the State by virtue of direction or control under Article 8 given that PMSCs normally aren't state-owned and instead have independent legal status as illustrated by their independence of contract and independent juridical personhood (Cameron and Chetail, 2013: 215; Liu 2015: 223). Furthermore, as per the recently affirmed ICJ jurisdiction ('settled jurisprudence' according to ICJ (2007: par 107)), states must authorize PMSCs and maintain effective control over all of their operations (Stern, 2010; Cameron and Chetail, 2013: 210).

In *Tadić* case, the Appeals Chamber distinguished between the 'immutability' to a state of the conduct of private individuals and non-organized armed groups, compared with organized armed

groups. Regarding the first case, the tribunal asserted that specific instructions to commit an unlawful act were required to prove state responsibility (Cameron and Chetail, 2013: 218). Concerning organized armed groups, the Appeal Chamber stated:

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law (ICTY, 1999: par 131).

The ICTY Appeals Chamber states that, as long as the relevant groups operate under a hierarchical command structure, the proof that the state provides the groups with equipment and funding, as well as organizes or assists them in coordinating their military activity, will suffice to meet the criteria of "control" (Cameron and Chetail, 2013: 219). When evaluating the ICTY's criteria, it is important to recognize that PMSCs usually meet the condition of having an organizational structure. Nevertheless, private contractors don't operate as single individuals taking commands from the States that employ them or from any other state. Conversely, they are arranged in strongly connected business structures, where each employee in a corporation has a specific role and responsibilities inside the organization (Moyakine, 2015: 274). In addition, the ILC Commentary on the ASR does not identify the group's organizational structure as a factor affecting the degree of control (Cameron and Chetail, 2013: 218).

For the purposes of attribution for conditions under articles 4 and 5, it makes no difference if the agent violated specific instructions, was not able to do the conduct in issue, or exceeded the authority delegated to it (Cameron and Chetail, 2013: 158, 163-4). 'The conduct of an organ of a state or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions' (ILC Commentary, 2001: art 7). However, under article 8, the state will not be held liable if the act was outside the scope of the authority delegated to the PMSC and not incidental to the mission (ILC Commentary, 2001: Art 8; Gillard, 2006; Juma, 2011; Cameron and Chetail, 2013: 207-8). This is unless the unlawful act was carried out during an operation that was effectively under the state's command

(Cameron and Chetail, 2013: 220). Scholars have clearly expressed strong opposition to this regulation (ultra vires). It is suggested that states shouldn't be exempted from responsibility if there is "apparent authority" (Gillard, 2006; Lehnardt, 2007; Browlie, 2008:452).

In common article 1 of the Geneva Conventions, the requirement encompasses that states hiring PMSCs must be in effective control, a position to influence PMSCs effectively, as an important condition for their application (Henckaerts and Doswald-Beck, 2005a:509 Tonkin, 2011:189). The foundation on which the committee considers states to be internationally responsible is clarified by the Committee against Torture. With regard to private agents, it has noted:

> The Convention imposes obligations on States parties and not on individuals. States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under color of law (CAT, 24 January 2008: par 15).

Other treaty organs do not seem to have followed the practice and doctrine of the Committee against Torture. The Human Rights Committee generally endorses the idea that states have an obligation 'to exercise due diligence' to ensure that private agents do not violate the rights of third persons within their jurisdiction (UNHRC, 26 May 2004: par 8). What is generally accepted is that these international treaties lay down obligations for states and they focus primarily on states. Therefore, for a breach or failure to fulfill their obligations under each treaty, only states can be held responsible (Lopez, 2017).

5.3. The Responsibility of Home State

The home state is usually the state where the corporation is registered, but, could also become a hiring (contracting) state at the same time. Under the general rules of state responsibility, the home state of a PMSC whose employee(s) commit an international crime is not responsible. As is imposed on territorial states to exercise due diligence in regulating the conduct of PMSCs, neither is there an analogous obligation imposed on home states (Brownlie, 1983: 165). Given that most PMSCs originate in developed countries with the ability to regulate them, the crux of a deficient international regulatory framework governing PMSCs lies in the lack of legal responsibility for the actions of PMSCs (Francioni, 2011). Because home states now get large financial benefits without incurring considerable risk, they have little interest in regulating

PMSC operations abroad (Perrin, 2012). Some also claim that, except for the responsibility of states, agreeing on the criminal responsibility of entities to be attributed to a state is wrong (Eser, 2002).

According to some observers, the home state of the PMSC should bear responsibility for willfully permitting its territory to be misused for illegal activities within or against other states. In the jurisprudence, this principle has been clearly established (UCIHL, 2005: 35; Francioni, 2011; McCorquodale and Simons, 2007). De Schutter (2009), on the other hand, contends that this obligation can be derived from general principles of law and Article 56 of the UN Charter in addition to human rights treaties. Additionally, the majority of the larger PMSCs ensure that they function with the express approval of both the host state and the country in which the PMSC is registered (Adams, 2002). One could contend that PMSCs and (home) states often share a common set of objectives (Moyakine, 2015:274).

A great deal of work has also been put into seeking to give the 1949 Geneva Conventions' Common Article 1 new life, which outlines states' international obligations to "ensure respect" for IHL (Evgeni, 2015:320). Common Article 1 thus requires diligent conduct. It is generally accepted that home states have some influence over private contractors that established on their territory and are obligated to ensure that these companies observe the law related to armed conflict (Tonkin, 2011:254). States are expected to take a number of positive measures to fulfill their obligation to ensure respect of international humanitarian law (Moyakine, 2015:375).

According to Faite (2004), home states have significant responsibilities regarding their PMSCs. Regretfully, it is impossible to interpret the "ensure respect" obligation as anything more than a prohibition on states encouraging, advising, or supporting their own organs, citizens, or PMSCs incorporated within their territory in violating international humanitarian law due to its vague and abstract nature. According to (Doswald-Beck, 2007) and (Lehnardt, 2007), it is undoubtedly insufficient justification for claiming that home states have a duty to take positive measures to ensure that PMSCs abide by IHL or other lower standards through legislation or regulations. Doswald-Beck (2007) argues that the lack of regulation of PMSCs or their insufficient training does not lead to a violation of the obligations of home states under Common Article 1 according to current state practice.

The unilateral extraterritorial regulation of PMSCs by the home state also raises some problems. First, the application of different or even incompatible standards might challenge the sovereignty of territorial (host) states (Singer, 2004; Ryngaert, 2008; Perrin, 2012). Second, it is at odds with legitimate exercise of commercial interests and probably even a violation of an agreement in international trade in services since it is an unjustified and improper constraint (Perrin, 2012). Therefore, there is no general obligation imposed on home states by the treaties of international human rights law requiring these states to take positive steps to prevent PMSCs from violating human rights abroad (Tonkin, 2011: 256). If international law permits or even requires governments to exercise jurisdiction over specific offenses, then concerns about sovereignty will be mitigated (Ryngaert, 2008).

When multiple states collaborate, as opposed to just one state acting alone, it sometimes leads to internationally wrongful conduct (Brownlie, 1983:189-192; Quigley, 1986). It's possible that several states collaborate through a common organ to carry out an illegal act (Crawford, 2002:145). As a result, the distinction between legal and illegal kinds of cooperation is outlined in Article 16 of the Draft Articles on State Responsibility. The norm provides that:

> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State (ILC, 2001:art 16).

Neither Article 16 of the ASR nor its commentary provides the definition of aid and assistance; instead, it is generally understood to encompass a variety of behaviors. Notably, when it comes to interventions in internal conflicts, common forms of support and aid might include the supply of material aid and weaponry, in addition to "financial support, logistical support, and technical assistance" (Crawford, 2013:402; Jackson, 2015:153). The state that gains from foreign assistance bears primary responsibility. Participation by aid carries a lower level of responsibility than equal involvement in the wrongdoing (Graefrath, 1992; Moynihan, 2016; Redaelli, 2021:162). Only to the degree that the assisting state's actions resulted in or aided in the internationally wrongful act will it be held responsible (Crawford 2002:148). However, in cases where the state's involvement is substantial, the assistance may become jointly responsible for the commission of the crime (Redaelli, 2021:165).

Three cumulative conditions are listed in the ILC Commentary to the Draft Articles on State Responsibility as what triggers the obligation to refrain from aiding and assisting an internationally wrongful act:

> First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting state itself (ILC Commentary, 2002: art 16; Crawford, 2002:149).

Some argue that this principle ought to extend to circumstances in which a state supports specific corporate misconduct that violate international criminal law or human rights. McCorquodale and Simons have argued for just such an approach:

> …where the state through aiding and assisting corporate activity is complicit in the commission of an internationally wrongful act committed by another state or by the corporation itself, then the state will be internationally responsible. Therefore, where a home state aids or assists a corporation in the commission of, or in the latter's complicity in, acts that, if committed by that home state would constitute internationally wrongful acts, that state will incur international responsibility, at least where the aid or assistance 'contributed significantly to that act'…[Facilitation] also includes the failure by a state to prevent actions by its corporate nationals (including privatized state corporations) that violate human rights, both within and outside its territory(McCorquodale and Simons, 2007).

However, the most contentious requirement in establishing guilt is the mental element. Article 16 requires that the state provides aid or assistance 'with the knowledge of the circumstances of the internationally wrongful act' (ILC, 2001: Art 16(a)). On the other hand, the ILC Commentary specifies that 'aid or assistance must be given with a view to facilitating the commission of the wrongful act' and that '[a] state is not responsible for aid or assistance under article 16 unless the relevant state organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct' (ILC Commentary, 2001: art 16). For the purposes of Article 16, several authors argue that the knowledge criteria suffice (Redaelli, 2021: 166).

This appears to be the prevailing opinion at the moment, and *the Genocide case* provides evidence of this. As the ICJ confirmed, knowledge is a requirement for providing aid or assistance (ICJ, 2007: par 43, 270). Second, practically speaking, it is almost hard to prove the state's particular motive for assisting and aiding another state. For the purposes of Article 16,

knowledge should therefore be sufficient (Redaelli, 2021: 166). In *the Genocide case*, the Court explicitly referred to Article 16 of the ILC's text, which, 'in one of the more remarkable instances of legal development', proposed a general rule against complicity in State responsibility (Tams, 2015), making it 'now generally accepted that it has attained the status of customary law'(Redaelli, 2021: 163). The ICJ not only leniently reaffirmed the rule, but it also expanded its application to include one non-state entity and one state instead of two states. Furthermore, the combination of the ILC rule and the ICJ's endorsement appears to have redrawn the shared responsibility map, based on the response that followed (Tams, 2015).

The question of attributing responsibility for internationally wrongful conduct to states is the most contentious and possibly intriguing aspect of state responsibility (Higgins, 1994: 160-61). '[T]he idea of the implication of one state in the conduct of another is analogous to problems of attribution' (Crawford, 2002:147). Second, it is not always possible to frame criminal groups' actions in terms of state conduct and, therefore, are challenging to assess using the instruments of individual criminal responsibility. As a result, it could be very challenging to assign responsibility for crimes committed by violators who have taken part in a collective criminal enterprise (in this case, PMSCs) and who share the criminal intent with numerous other perpetrators (Bonafè, 2009: 67).

Chapter Six

Conclusion

Over the past thirty years, human rights groups have focused most of their discussion on the problem of non-state actors' obligations under international human rights law. With the rise of PMSCs as a civilian corporate structure, the concern that non-state actors are challenging the established monopoly on violence and abusing human rights without facing legal repercussions has grown. The operations of PMSCs are not subject to any comprehensive regulation. The Montreux Document, which some contend is the main international legislation governing PMSC, is manifestly non-binding, does not impose any particular obligations, and did not consider the opinions of a significant number of States. So far, what it is done have weakened the efforts being made to prepare an international agreement under UN auspices. The 2009 Draft Convention would require governments to control PMSCs operating not just in the conventional definition of their 'territory', but also under their jurisdiction, significantly expanding state responsibility for the conduct of PMSCs, particularly the responsibilities of home states. Nevertheless, these clauses were later removed from the most recent draft, which makes clear reference to the Montreux Document.

Liberal ideology has such a strong hold over PMSC regulation that states find it difficult to define 'inherently governmental functions' and to prohibit outsourcing them to PMSCs. Since major PMSC exporting countries (the Western states) are against such binding international regulation and in favor of soft law initiatives like the Montreux Document, it appears that the realization of a binding international convention that imposes obligation on states to regulate the activities of PMSCs will never materialize. There are still difficult issues that must be settled before institutionalizing norms that may regulate PMSC. There is disagreement on a number of issues, including the legitimacy of PMSCs, their legal status under IHL, and what government functions are inherently public and hence cannot be privatized. These problems mostly emerged as a result of the organizational structure that PMSCs adopt. Due to their corporate structure and contractual relation rather than incorporating in the armed forces, it was challenging to apply current international laws to their operations. As such, attributing their actions to a relevant state continues to be difficult.

The regulation of PMSCs' operations abroad and the argument that it would infringe on the host state's sovereignty present challenges for the extraterritorial application of the due diligence obligation. On the other hand, the due diligence principle that applies to businesses derives from voluntary adherence to those principles, without any potential legal consequences in the event that they are breached, in contrast to the principle that international law requires of nations. Based on ASR, no specific variables can be used to attribute the actions of a PMSC or any other private entity to a state. Attributing the act of PMSC to a state is nearly impossible due to the strict 'effective control' standards that the ICJ identified in the Nicaragua case and later affirmed in the Genocide case. On the other hand, the attempt to apply article 16 to attribute the actions of PMSCs to a home state is merely scholarly discourse that is unsupported by jurisprudence.

The desperate anticipation of African states that the international community will come up with a convention regulating PMSC activities is now looks in peril. The procedure highlights how the window of opportunity is dwindling daily. This compelled the Commission to amend the OAU Convention for the Elimination of Mercenarism in Africa, as directed by the Specialized Technical Committee on Defense, Safety, and Security. Nevertheless, as the convention's implementation has shown, few states have ratified it, and the transnational character of PMSCs makes the convention's implementation challenging. Second, the international community will not cooperate in the implementation of any amendments made to the mercenary treaty, which is essential to regulate PMSCs, unless the AU agrees to modify its position on PMSCs as mercenaries resurfaced. More investigation is needed to establish what issues must be resolved before the intended AU amendment to the 1977 mercenary convention can be implemented. Any revision should take into account the Montreux Document's increasing influence which distinguishes between PMSCs and mercenaries, as well as the fact that several African states are 'participating' in this initiative.

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