

Violence for Rent: the Moral and Legal Justifiability of PMSCs

MASTER THESIS

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This thesis explores to what extent the conduct of private military and security companies (PMSCs) is morally justifiable, and to what extent national and international law standards allow PMSCs to be prosecuted for immoral conduct. The conduct is morally justifiable when the four conditions of the principle of double effect are met. The scrutiny of PMSCs must be proportional to their role. Suing PMSCs for immoral conduct is very complicated, and depends on the intentions and on the legal system of the host state and/or the home state. If the state is willing to prosecute, there are three options: 1) sue individual employees via International Humanitarian Law, 2) sue individual employees via (inter)national criminal law, and 3) sue the company as a legal entity via civil proceedings. This paper confirms the complexity of suing PMSCs, and emphasizes the obstacles in doing so by applying the moral and legal frameworks to the case-studies on Sierra Leone and Iraq. Despite the complex system to prosecute and monitor PMSC activity, there continues to be a gap in the academic literature exploring the unwillingness of states to hold PMSCs accountable for committed human rights violations.

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1. Introduction

Private military and security companies (PMSCs) are private businesses which provide military and/or security services. PMSC staff are often referred to as contractors since they are commonly outsourced, in contrast to state armed forces. Over the years, the use of PMSCs has consistently expanded - both state and non-state actors (especially humanitarian organisations and private companies) hire these companies.¹ As a result, many Western democracies no longer hold the monopoly on the lawful use of violence to protect their citizens. Instead, an increasing number of profit-oriented companies such as PMSCs have taken the role of alternative suppliers of security to both citizens and states.²

An illustrative example of an armed conflict where PMSCs are at play is the war in Libya. The Libyan civil war has witnessed the emergence of mercenaries and other armed non-state actors acting on behalf of states.³ Both regional experts and a report released by the United Nations make clear how Libya is becoming “a mercenary’s dream with multiple factions competing for hired guns from across the Middle East and Africa”.⁴ The increasing use of PMSCs in armed conflicts raises questions of legitimacy, legality, and accountability, as well as concerns about human rights and sovereignty. To what extent are the actions of PMSCs morally justifiable? To what extent are the actions of PMSCs perceived as ethical when they intervene in armed conflicts and contribute to quell the violence? What political and legal frameworks are in place to govern the use of PMSCs? While the wrongful actions of regular troops are attributable to governments, PMSCs usually do not fight under the flag of a state. Given the close cooperation between states and PMSCs in conflict zones, as well as PMSCs’ support to reaching military objectives, it is of particular interest if PMSCs can be legally targeted by parties to an armed conflict.⁵ However, the main subjects of international law are

¹ Avant, D. *The Market for Force: The Consequences of Privatizing Security*. Cambridge: Cambridge University Press, 2005: 1-3; Vestner, T. “Targeting Private Military and Security Companies.” *The Military Law and the Law of War Review* 57 (2) (2018-2019): 1-2.

² Krahnemann, E. “Security: collective good or commodity?” *European Journal of International Relations* 14 (3) (2008): 380.

³ *The Arab Weekly*. “Tripoli militias said to be receiving help from foreign mercenaries.” April 26, 2019. <https://theArabweekly.com/tripoli-militias-said-be-receiving-help-foreign-mercenaries>; *The Economist*. “Magnet for mayhem: foreign powers are piling into Libya.” December 12, 2019. <https://www.economist.com.proxy.library.uu.nl/middle-east-and-africa/2019/12/12/foreign-powers-are-piling-into-libya>;

⁴ Hammond, J. “Foreign fighters and mercenaries fueling Libyan conflict.” *Real Clear Defense*. January 2, 2018. https://www.realcleardefense.com/articles/2018/01/02/foreign_fighters_and_mercenaries_fueling_libyan_conflict_112843.html.

⁵ Tobias Vestner raises this point in his article as well. Vestner, T. “Targeting Private Military and Security Companies.” *The Military Law and the Law of War Review* 57 (2) (2018-2019): 2.

states. Is it possible within the framework of (inter)national law to hold PMSCs accountable for human rights violations, or are these companies acting within a ‘legal vacuum’?

The relevance of researching this matter is that PMSCs may affect how and whether people can control violence. The implications of privatizing security for the control of force are debated. The so-called pessimists, among others Silverstein, claim that the turn to private security threatens to undermine state control and democratic processes.⁶ Optimists such as Brooks and Shearer however, declare private options offer solutions to difficult security problems that can operate within national interests and/or the values shared by the international community.⁷ In addition, the increasing use of PMSCs in armed conflicts may threaten self-determination - a key-stone principle of the international order. In contrast to the use of state armies, or troops of international organisations, PMSCs are not subject to the public debate on accountability. There is no international oversight of PMSCs’ operations. Therefore, it is important to explore the legitimacy of the actions of PMSCs. If these actions are not lawful, can international law be a tool in targeting PMSCs?

This paper explores these questions by answering the following main question: “to what extent is the conduct of private military and security companies (PMSCs) morally justifiable, and to what extent do national and international law standards allow PMSCs to be prosecuted for immoral conduct?”. This main question is split up in four sub-questions that will both unravel and answer the main question:

- To what extent is the conduct of PMSCs morally justifiable?
- To what extent do national and international law standards allow PMSCs to be prosecuted for immoral conduct?
- To what extent has national or international law been successfully applied to PMSCs’ human rights violations in the case of Sierra Leone?
- To what extent has national or international law been successfully applied to PMSCs’ human rights violations in the case of Iraq?

⁶ Avant, D. *The Market for Force: The Consequences of Privatizing Security*. Cambridge: Cambridge University Press, 2005: 3-5; Silverstein, K. “Privatizing War: How Affairs of State are Outsourced to Corporations Beyond Public Control.” *The Nation*. July 28, 1997.

⁷ Avant, D. *The Market for Force: The Consequences of Privatizing Security*. Cambridge: Cambridge University Press, 2005: 3-5; Brooks, D. “Write a Cheque, End a War: Using Private Military Companies to end African conflicts.” *Conflict Trends* 6, July 2000: 33-35; Shearer, D. *Private Armies and Military Intervention*. Oxford: Oxford University Press, 1998.

There are various definitions of PMSCs, and they range from very narrow to very broad. An important element is whether the definition of “mercenary” is applicable to PMSCs, and whether this definition can be applied to the individual PMSC contractors.⁸ The anti-mercenary norm has prohibited violent market actors from participating in combat. Therefore, in order to be perceived as legitimate PMSCs aimed to change the combat component of the anti-mercenary norm. PMSCs created an alternative interpretation that established the practice as appropriate by arguing that their use of force is not combat but rather individual self-defence.⁹ In order to be precise in categorizing companies in the private security sector as PMSCs, it is necessary to rely on a clear definition. Evenly and Bewley-Taylor point out that if the definition of PMSCs in legal documents contains gaps, or is imprecise, there is a risk to overly broad interpretation.¹⁰ As this paper discusses literature from a number of authors that define PMSCs all slightly different, the definition which will be used in this paper is broad. It would not be possible to discuss and compare all literature if this paper only follows a very narrow definition. This paper uses the following definition of PMSCs: a PMSC is a non-state actor that provides military and/or security services, irrespective of how they describe themselves. This means that they can be categorized as combatants. Military and security services in particular include armed guarding and protection of persons and objects, such as convoys, building and others places; maintenance and operation of weapons systems; prisoner detention; and providing advice to- or training to local forces and security personnel.¹¹

The aim of this paper is to clarify the moral and legal debate on the use of PMSCs by constructing a framework of characteristics that helps to assess whether – and when – the actions of PMSCs are morally and legally justifiable. The second and third chapter create this framework. The second chapter focuses on the moral dimension of the framework by answering the first sub-question: to what extent is the conduct of PMSCs morally justifiable? The moral

⁸ Torroja, H. *Public International Law and Human Rights Violations by Private Military and Security Companies*. Cham: Springer International Publishing AG, 2017: 4.

⁹ Petershohn, U. “Reframing the anti-Mercenary Norm: Private Military and Security Companies and Mercenarism.” *International Journal* 69(4), 2014: 475-476.

¹⁰ Eventon, R., and Bewley-Taylor, D. “Above the Law, Under the Radar: A History of Private Contractors and Aerial Fumigation in Colombia.” Policy Report 4. *Global Drug Policy Observatory and Swansea University*. February, 2016: 5.

¹¹ Part of this definition is similar to the Red Cross’s definition of PMSCs. See: Federal Department of Foreign Affairs, and International Committee of the Red Cross. *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*. Switzerland: Federal Department of Foreign Affairs, 2008: para. 9(a); Seiberth, C. *Private Military and Security Companies in International Law: A Challenge for Non-binding Norms: The Montreux Document and the International Code of Conduct for Private Security Service Providers*. Cambridge: Intersentia, 2014: 67.

debate on the actions of PMSCs is reviewed by analysing and comparing secondary sources. Such an approach naturally provides a broad range of both perspectives. Due to the limited length of this paper, the second chapter does not consider all fields of literature equally. However, the work of the most prominent authors in the debate on the use of PMSCs is analysed.

The third chapter shows to what extent national and international law standards allow PMSCs to be prosecuted for immoral conduct by researching and analysing both primary sources and secondary sources. The primary sources consist of legal documents such as the Montreux Document, article 4A (1) and (2) of the Third Geneva Convention, and customary law.¹² The legal documents are selected on their influence in international law, their relevance and their date of publication. The consulted secondary sources in chapter three are articles on these legal documents. The legal dimension of the framework is created by answering the second sub-question in chapter three.

The fourth and fifth chapter applies the constructed framework to two cases-studies: to what extent has national or international law been successfully applied to PMSCs’ human rights violations in these cases? In case of immoral conduct, these chapters research to what extent (inter)national law has been successfully applied. Chapter four answers the third sub-question by analysing the case-study of Sierra Leone. Finally, the fifth chapter answers the fourth sub-question by analysing the case-study of Iraq. Both chapters rely on primary sources such as reports by the United Nations, and secondary sources on the use of PMSCs in these particular conflicts.

The contents of this paper may seem broad when compared to others in the same academic field. However, the moral and legal frameworks provide deep insight to assess whether, and when, the actions of PMSCs are morally and legally justified. The debate on PMSCs is ongoing on both an academic level and international and national level.¹³ This paper contributes to the global understanding and need for clarification by clarifying when PMSCs can legally and legitimately act in an armed conflict, and by considering the most prominent theories on

¹² See: Vestner, T. “Targeting Private Military and Security Companies”. *The Military Law and the Law of War Review* 57 (2018-2019): 254.

¹³ Burke, J. and Salih, Z. M. “Mercenaries flock to Libya raising fears of prolonged war.” *The Guardian*. December 24, 2019. <https://www.theguardian.com/world/2019/dec/24/mercenaries-flock-to-libya-raising-fears-of-prolonged-war>; Huet, B. van. “Rusland en Turkije hofleverancier voor huurlingen in Libië: vliegtuigen vliegen af en aan.” *Algemeen Dagblad*. August 1, 2020. <https://www.ad.nl/buitenland/rusland-en-turkije-hofleverancier-voor-huurlingen-in-libie-vliegtuigen-vliegen-af-en-aan~a4df1144/?referrer=https%3A%2F%2Fwww.google.com%2F>.

this matter. The chapters on the two case-studies emphasize the limitations in enforcing national and international law. Further, this paper shows the continuing gap in academic literature exploring states’ unwillingness to hold PMSCs accountable for committed human rights violations.

2. Moral debate

Introduction

This chapter discusses the moral debate on the use of PMSCs, and answers the first sub-question: “to what extent is the conduct of PMSCs morally justifiable?”. Aquinas’ principle of double effect clarifies the main discrepancy between the pessimists and optimists of this moral debate. The application of this principle to the moral debate gives guidelines that show to what extent the actions of PMSCs are morally justifiable.

The most prominent authors who have written on the legitimacy of PMSCs, are Brooks, Shearer, Avant, Silverstein, Musah, Fayemi, and Vilnes. Avant has made a distinction between pessimists and optimists in this debate. This paper upholds that distinction in order to clarify the conflicting opinions and claims within the moral debate on PMSCs. In short, the main distinction between the two sides is the pessimists claim the turn to private security threatens to undermine state control and democratic processes. The optimists however, declare private options offer solutions to stubborn security problems that can operate within national interests and/or the values shared by the international community.¹⁴ The following paragraphs explore the discrepancies between these claims.

Pessimists

Silverstein characterizes the turn to private security as one by which the responsibilities of government are transferred to corporate hands. This privatization allows corporate entities to do what governments cannot do.¹⁵ For example, the United States (US) used a PMSC for peace negotiations in Sudan. Even though US law forbids it to fund a political party or agenda, the

¹⁴ Avant, D. *The Market for Force: The Consequences of Privatizing Security*. Cambridge: Cambridge University Press, 2005: 3-5; Brooks, D. “Write a Cheque, End a War: Using Private Military Companies to end African conflicts.” *Conflict Trends* 6, July 2000: 33-35; Musah, A-F., Fayemi, J. *Mercenaries: an African Security Dilemma*. London: Pluto Press, 2000: 4; Shearer, D. *Private Armies and Military Intervention*. Adelphi Paper 316. Oxford: Oxford University Press, 1998; Silverstein, K. “Privatizing War: How Affairs of State are Outsourced to Corporations Beyond Public Control.” *The Nation*. July 28, 1997.

¹⁵ Avant, D. *The Market for Force: The Consequences of Privatizing Security*. Cambridge: Cambridge University Press, 2005: 3-5; Silverstein, K. “Privatizing War: How Affairs of State are Outsourced to Corporations Beyond Public Control.” *The Nation*. July 28, 1997; Silverstein, K. *Private Warriors*. New York: Verso, 2000: 143.

US can get around those provisions by hiring private contractors.¹⁶ According to Avant, the implication of Silverstein’s argument is privatization undermines “institutions that contain violence”. The turn to private security undermines institutions such as the Ministry of Defence, because privatization “erodes established tools for accountability”. Outsourcing reduces the information available to parliament and the opportunities for parliament to influence policy. Avant illustrates this argument by pointing to the US. Even though Congress approves the military budget, it does not approve with the individual decision to outsource training and may not even know how to influence these decisions. That is because the annual consolidated report on military assistance and sales does not contain information on the party that is conducting the training. Using PMSCs is a way to avoid oversight. Privatization also reduces the information available to the public since there is very little media coverage of PMSCs’ activities, as opposed to the activities of national armies.¹⁷ Violence becomes a private commodity rather than a public good. Silverstein argues the result is a defence policy that ignores the real issues and threats only to be shaped by the motive of profits and “egos of a small group of hardliners”.¹⁸

Musah and Fayemi focus on the consequences of the turn to privatization in Africa. They argue that the conglomeration between mercenaries and arms manufacturers, mineral exploiters and Africa’s authoritarian governments, and warlords supports the militarization of Africa. The rise of corporate mercenaries and the associations to the increase of small arms and to mineral conglomerates poses a mortal danger to democracy in the region. In short, unregulated private armies linked to international business interests threaten to undermine democracy and development in Africa.¹⁹

Another problematic consequence of the actions of PMSCs in Africa that Musah and Fayemi emphasize is that the countries in which PMSCs operate become economically tied to these companies by giving them access to their natural resources. According to the United Nations Special Rapporteur on Mercenaries private security firms, like EO and Sandline, begin

¹⁶ Eventon, R., and Bewley-Taylor, D. “Above the Law, Under the Radar: A History of Private Contractors and Aerial Fumigation in Colombia.” Policy Report 4. *Global Drug Policy Observatory and Swansea University*. February, 2016: 3; Chatterjee, P. “Darfur Diplomacy: Enter the Contractors.” *Corpwatch*. October 21, 2004. <https://corpwatch.org/article/darfur-diplomacy-enter-contractors>.

¹⁷ Avant, D. “The Privatization of Security and Change in the Control of Force.” *International Studies Perspectives* 5 (2004): 154-155.

¹⁸ Avant, D. *The Market for Force: The Consequences of Privatizing Security*. Cambridge: Cambridge University Press, 2005: 3-5; Silverstein, K. “Privatizing War: How Affairs of State are Outsourced to Corporations Beyond Public Control.” *The Nation*. July 28, 1997; Silverstein, K. *Private Warriors*. New York: Verso, 2000: 143.

¹⁹ Avant, D. *The Market for Force: The Consequences of Privatizing Security*. Cambridge: Cambridge University Press, 2005: 3-5; Musah, A-F., Fayemi, J. *Mercenaries: an African Security Dilemma*. London: Pluto Press, 2000: 23-26.

to exploit the concessions received by associating with established mineral companies or setting up a convoluted network of associated companies which engage in ‘legitimate’ business. In this manner, they acquire a significant, if not hegemonic, presence in the economic life of the country in which they are operating. Instead of using the resources to alleviate poverty and reducing conflict, these resources are now spent on wars.²⁰ Musah and Fayemi find it entirely reasonable to conclude, given the strong links between mercenaries and regime security, any reduction in the involvement of mercenaries in African conflicts may help to control arms proliferation on the continent. This would reduce the wasted resources needed for economic developments in beleaguered states.²¹

The arguments of Musah and Fayemi show it is essential to distinguish the actors who hire PMSCs. The consequences of PMSCs’ conduct depend on who hires them – whether it is a legitimate government, a “warlord”, an opposition group, or an illegitimate government that is not recognized by its citizens. After all, the economic resources of legitimate governments are often larger than those of warlords. Therefore, it is unlikely that PMSCs gain access to natural resources as a way of payment when legitimate governments hire them. The risk that PMSCs become economically tied to natural resources is larger when they are hired by warlords.

Vilnes argues mercenaries have no perceivable role in a conflict management that seeks to root out the underlying causes of war. Based on a number of case-studies, he concludes none of the PMSCs he researched has shown the ability to provide anything but short and localised respites from conflict - they have certainly not enhanced stability or encouraged business confidence. Vilnes accuses PMSCs of the erosion of national self-determination and sovereignty in situations of crisis, the lack of transparency, their training in psychological warfare against civilians and their use of combatants with track records of human rights abuse.²² The pessimists argue PMSCs undermine state control, democratic processes and can worsen the (economic) developments in the countries in which they operate. In addition to these arguments, the increasing use of PMSCs can cause a competition between the state’s army and private companies for the most talented employees. PMSC recruitment can pull competent

²⁰ Musah, A-F., Fayemi, J. *Mercenaries: an African Security Dilemma*. London: Pluto Press, 2000: 27; Office of the UN High Commissions for Human Rights. *Report on the Questions of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-Determination (A/52/495)*. October, 16, 1997.

²¹ Musah, A-F., Fayemi, J. *Mercenaries: an African Security Dilemma*. London: Pluto Press, 2000: 27.

²² Vilnes, A. “Mercenaries, Human Rights and Legality” in: Musah, A-F., Fayemi, J. *Mercenaries: an African Security Dilemma*. London: Pluto Press, 2000: 169-197.

soldiers from the army and put them in private companies rather than transforming their allegiance to the government.²³ PMSCs can pay their employees two to ten times what they would earn in the regular military.²⁴

Optimists

The other side of the coin, according to the optimists, PMSCs offer solutions to intractable security problems that can operate within national interests and/or the values shared by the international community. PMSCs can provide post-conflict security, offering a window of peace for political negotiation, state building and democratic change. In addition, Brooks emphasizes PMSCs can do this faster, better and much cheaper than the UN, saying “all it takes to end Africa’s most enduring wars is a small, but willing chequebook”.²⁵ Considering the distinct limitations of PMSCs, it is unrealistic to expect PMSCs to solve the larger political issues. These private companies can stop the killing and provide the essential window for peace that will allow reconciliation, and free and fair self-determination. Brooks argues state building should come from multinational political organisations with established political legitimacy which is not a task of PMSCs.

Brooks understands the moral dilemma related to the use of PMSCs. The greatest obstacles in using PMSCs to end African wars are moral. Many African leaders have condemned mercenaries and attempts to outlaw them have been festering in the UN for years. Brooks however emphasizes that the modern PMSCs have very different motivations and much greater professionalism than the old freelance mercenaries, and it would be wrong to ignore their potential. In Brooks’ eyes, PMSCs cannot be morally worse than the armies of untrained conscripts and children. Even though it is easy to take the moral high ground and condemn PMSCs, while ignoring the potential that they could bring peace to Africa, it is reprehensible to insist that wars can only be ended by complex, multinational conferences and discussions. “Ultimately, for all our talk about the theoretical niceties of ‘state sovereignty’ and ‘self-determination’, we cannot stand by idly while Africans are butchered in the hundreds of thousands”.²⁶ This reasoning has clear resemblances with the Responsibility to Protect (R2P)

²³ Avant, D. *The Market for Force: The Consequences of Privatizing Security*. Cambridge: Cambridge University Press, 2005: 158. Avant refers to an interview with Rocky Williams, ISS, on February 28, 2000.

²⁴ Mitchell, S. “Becoming Legitimate: How PMSCs are Seeking Legitimacy in the International System.” PhD diss, University of South Florida, 2018: 33-35; Singer, P. “Outsourcing War.” *Foreign Affairs* 84 (2), 2005: 129.

²⁵ Brooks, D. “Write a Cheque, End a War: Using Private Military Companies to end African conflicts.” *Conflict Trends* 6, July 2000: 33-35.

²⁶ Brooks, D. “Write a Cheque, End a War: Using Private Military Companies to end African conflicts.” *Conflict Trends* 6, July 2000: 33-35.

doctrine: the protection of human rights is more important than the principle of sovereignty. Furthermore, Brooks proposes that a consortium of PMSCs could bring years of peacekeeping experience and NATO level professionalism to protect vulnerable populations. They could also train local police officers in patrolling and human rights so as to build a more professional local force.²⁷ In short, Brooks argues it would be waste to neglect the knowledge and skills of PMSCs.

Shearer’s stance on PMSCs is optimistic yet critical. He argues that in Africa and elsewhere PMSCs can help end civil conflicts that would otherwise be intractable, since PMSCs are willing to take on messy intervention tasks that Western militaries are eager to avoid. Rather than outlawing PMSCs, the international community should engage them, give them a legitimate role and expect them to operate as professionals, according to the values held by the international social system. Shearer finds that a government’s use of a PMSC is little different from its purchase of weapons from private sources. In both cases, the government’s aim is to enhance its military capabilities. The difference between buying weapons and hiring a PMSC concerns the lack of accountability. The conduct of military companies is well-covered by International Humanitarian and Human Rights Law. What is lacking is adequate independent control of their activities. Close human-rights monitoring of private military companies is urgently needed, according to Shearer, companies themselves would be well advised to expose themselves to greater scrutiny as part of their bid for legitimacy.²⁸ Chapter three discusses this legal debate.

The optimists are not fully endorsing PMSCs, they are still critical. They, however believe that the value of PMSCs should not be overlooked but should rather be used in a responsible way in order to end violent conflicts. The following paragraphs focus on the discrepancy between the pessimists and the optimists, and show how the principle of double effect can measure to what extent the conduct of PMSCs is morally justifiable.

²⁷ Avant, D. *The Market for Force: The Consequences of Privatizing Security*. Cambridge: Cambridge University Press, 2005: 5; Brooks, D. “Help for Beleaguered Peacekeepers.” *Washington Post*. June 2, 2003.

²⁸ Avant, D. *The Market for Force: The Consequences of Privatizing Security*. Cambridge: Cambridge University Press, 2005: 5; Shearer, D. *Private Armies and Military Intervention*. Adelphi Paper 316. Oxford: Oxford University Press, 1998: 69-72.

The principle of double effect

The main discrepancy between the pessimists and the optimists is whether or not choosing private solutions to intractable security problems is worth the undermining of state control and democratic processes. Is it reasonable to turn to private security companies for intractable security problems? These companies undermine state control and democratic processes on the one hand, and can simultaneously operate within national interests and/or the values shared by the international community. This dilemma can be clarified by Aquinas’ principle of double effect.²⁹ Life constantly forces us to consider both the positive and negative consequences of our actions. For example, bombing an enemy’s ammunition depot might increase one’s chances of winning the war, but it may also cause innocent civilians to die if the depot is located in a residential area.³⁰ As the previous paragraphs illustrated, using PMSCs may cause positive and negative effects at the same time.

Aquinas’ principle of double effect states an act with good and bad effects may be permissible if the following interlinked conditions are met:

- 1) **Character of the act.** The action must be good or at least morally indifferent (independently of its consequences).
- 2) **Intention of the actor.** The actor only intends the good effect. The bad effect may be foreseen, tolerated and admitted, but it must not be intended.
- 3) **Distinction between means and consequences.** The bad effect must not be a means to attaining the good effect. If the good effect was a direct causal effect of the bad effect, it would be intended by the agent in his effort to attain the good effect. The good effect must not be reached by means of the bad effect.
- 4) **Proportion between good and bad effect.** The good effect must outweigh the bad.³¹

²⁹ The principle of double effect originated in the context of Catholic moral theology. It first appeared in the work of medieval philosopher and theologian Thomas Aquinas, and was further developed by other Catholic authors such as Tommaso de Vio, Francisco de Vitoria, Domingo de Sta Teresa, Jean Pierre Gury and Peter Knauer. See: Cerny, D. *The Principle of Double Effect: A History and Philosophical Defense*. New York: Routledge, 2020: 1-2.

³⁰ This hypothetical situation has strong resemblances with the bombing on Hawija, in Iraq. In June 2015, a Dutch F-16 jet serving with the US-led coalition in Iraq targeted an IS bomb factory in Hawija. 70 civilians were killed as a result of large, unexpected secondary explosions. Dutch Defence Minister Ank Bijleveld said that the intelligence before the strike had indicated that there were no civilians in the immediate vicinity of the target. In October 2020, the Dutch Cabinet started an independent investigation on the attack, and announced that it will compensate the citizens of the city of Hawija. *BBC*. “IS Conflict: Dutch air strike killed about 70 people in Iraq in 2015.” November 4, 2019. <https://www.bbc.com/news/world-europe-50286829>; Keultjes, H. “Kabinet stelt onderzoek in naar misgelopen bombardement Hawija.” *Algemeen Dagblad*. October 10, 2020. Updated on October 13, 2020. <https://www.ad.nl/politiek/kabinet-stelt-onderzoek-in-naar-misgelopen-bombardement-hawija~aefc5e17/>.

³¹ Cerny, D. *The Principle of Double Effect: A History and Philosophical Defense*. New York: Routledge, 2020: 1-9, 107-111.

In applying the principle of double effect to the moral debate on PMSCs, this paper focusses on the dilemma between on the one hand solving intractable security problems, and on the other hand undermining state control and democratic processes. The following paragraphs discuss each condition of the principle of double effect and apply these to the moral debate on PMSCs. Since measuring acts and intentions in terms of “good”, and “bad”, is very restrictive and absolute, this paper speaks of well-intended and ill-intended acts and intentions.

The first condition concerns the character of the act – that is, solving security problems by using PMSCs. Security problems such as armed conflicts destabilize countries and communities, often go hand in hand with economic malaise and result in atrocities and the violation of human rights. Employing PMSCs may therefore be a well-intended act. What complicates this matter is that solving security problems in *other* states violates the right to self-determination. This right entails that identifiable groups have a right to determine for themselves how they wish to be politically organized.³² They are free to choose their sovereignty and interfering with this is a violation of a state’s sovereignty - even when a state tries to solve security problems in another state. As for legitimate governments that employ PMSCs in their own states, it is hard to claim that they violate their own sovereignty. After all, legitimate governments are obliged to defend and protect the right to self-determination of their citizens.

The second condition, the intention of the actor, may be hard to assess. When an actor – a state or an NGO, among others - wants to solve security problems by using PMSCs, they are well-intended. Having stated this, the actor may also have secondary intentions on *why* it wants to solve security problems. Does an actor want to solve security problems because this can result in more political influence, or because it wants to gain access to natural resources? Musah and Fayemi state a major objective of the new mercenary business is access to natural and mineral resources. PMSCs demand payments in the form of mining concessions and oil contracts, confident most of the clients in desperate need of their services are not in a position

³² Klabbers, J. *International Law*. Cambridge: Cambridge University Press, 2017: 129; Under the influence of the decolonization process, the right to self-determination became enshrined in two UN human rights covenants of 1966, and was confirmed as one of the main principles of international law in a Declaration of Principles adopted by the General Assembly in 1970. Under this Declaration, self-determination can take the form of independent statehood, association, or integration with another state, or some other political status. It is generally considered a rule of customary international law, and the ICJ has referred to self-determination as an *erga omnes* principle. See: General Assembly Res. 2623 (XXV); *East Timor (Portugal v. Australia)*, [1995] ICJ Rep. 90, para. 29.

to pay in cash.³³ Secondary intentions such as these can obstruct realizing the primary intention of solving security problems. It is hard to research the precise intentions of an actor since there are few sources (if any) that show the full extent of reasoning why an actor intends to solve security problems by using PMSCs. This principle of double effect, particularly the second condition, has been criticized by scholars such as Walzer. Walzer argues the principle of double effect allows soldiers to harm civilians as long as this is not the intention of the act. In his opinion, this principle provides a “blanket justification” for civilian deaths that are “unintended but foreseeable”.³⁴ A more fruitful way to assess the attention of the actor is following Wheeler’s argument and focus. Wheeler emphasizes it is more useful to examine the consequences and proportionality of an action.³⁵ Chapter three further elaborates on the proportionality principle. This condition is thus met as long as the consequences and proportionality of an action are in balance.

The third condition is the distinction between means and consequences. Naturally, this condition is interlinked with the other three. The contribution of this condition to the principle of double effect is that it states the good effect must not be reached by means of the bad effect.³⁶ The discrepancy between the means and the consequences is not always transparent. Does an actor want to solve security problems or does it want to undermine another state? In Afghanistan, the creation of parallel structures of government has been a consequence of using PMSCs.³⁷ Mitchell shows that placing PMSCs parallel to the apparatus of the state is a result of the debate on whether the use of force is an inherent function of states or if privatizing is more beneficial.³⁸ An effect such as undermining the state should not be a means to attaining a

³³ Musah, A-F., Fayemi, J. *Mercenaries: an African Security Dilemma*. London: Pluto Press, 2000: 23; According to Enrique Bernalles Ballesteros, the United Nations Special Rapporteur on Mercenaries, firms like EO and Sandline begin to exploit the concessions received by associating with established mineral companies or setting up a convoluted network of associated companies which engage in ‘legitimate’ business. In this manner, they acquire a significant, if not hegemonic presence in the economic life of the country in which they are operating. See: Office of the UN High Commissions for Human Rights. *Report on the Questions of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-Determination (A/52/495)*. October, 16, 1997.

³⁴ Walzer, M. *Just and Unjust Wars: A Moral Argument with Historical Illustrations*. London: Allen Lane, 1978: 153; Wheeler, N. *Saving Strangers: Humanitarian Intervention in International Society*. Oxford: Oxford University Press, 2000: 36.

³⁵ Wheeler, N. *Saving Strangers: Humanitarian Intervention in International Society*. Oxford: Oxford University Press, 2000: 37.

³⁶ Cerny, D. *The Principle of Double Effect: A History and Philosophical Defense*. New York: Routledge, 2020: 107-111.

³⁷ *Global Policy Forum*. “PMSCs: Risks and Misconduct.” No date. Accessed on October 22, 2020. <https://www.globalpolicy.org/pmcs/contractor-misconduct-and-abuse.html>.

³⁸ Mitchell, S. “Becoming Legitimate: How PMSCs are Seeking Legitimacy in the International System.” PhD diss, University of South Florida, 2018: 101.

well-intended effect such as solving an armed conflict. In order to solve this theoretical dilemma, this paper applies Wheeler’s argument on the consequences and proportionality of actions to this condition as well.³⁹ In order to examine whether this third condition is met, the other conditions as well as the legal debate on PMSCs, should be carefully considered.

Lastly, the condition of proportion between good and bad effect brings in the notion of proportionality. Does the effect of solving security problems (often, ending the violence) outweigh the effect of undermining state control and democratic processes? The key to the solution of this question, is Wheeler’s argument on consequences and proportionality.⁴⁰ To what extent does the use of PMSCs solve security problems? Brooks argued PMSCs can stop the killing and provide the essential window for peace that will allow reconciliation, and free and fair self-determination.⁴¹ This well-intended effect outweighs the effect of undermining state control, as long as the extent of the undermining is proportionally small. However, if using PMSCs undermines state control to the extent that it is no longer in proportion, this condition cannot be met. Chapter four and five assess these four conditions in the case-studies on Sierra Leone and Iraq.

The sub-question “to what extent is the conduct of PMSCs morally justifiable?” can be answered as follows: the conduct of PMSCs is morally justifiable when the four conditions of the principle of double effect are met. The character of the act and the primary intention of the actor should be well-intended. As for the intention of the actor, the effects of the action should be positive. The distinction between means and consequences, and proportionality, should be carefully assessed in every individual case. When the positive effects outweigh the negative effects, and when a negative effect is not a means to attaining this positive effect, these two conditions are met as well.

Normative theory, such as the principle of double effect, formulates basic principles of moral theory. As it is difficult to apply these philosophical principles to the complexity of moral dilemmas in real life, the need for legal guidelines is high. After all, the bandwidth of normative

³⁹ Wheeler, N. *Saving Strangers: Humanitarian Intervention in International Society*. Oxford: Oxford University Press, 2000: 37.

⁴⁰ Wheeler, N. *Saving Strangers: Humanitarian Intervention in International Society*. Oxford: Oxford University Press, 2000: 36.

⁴¹ Brooks, D. “Help for Beleaguered Peacekeepers.” *Washington Post*. June 2, 2003; Brooks, D. “Write a Cheque, End a War: Using Private Military Companies to end African conflicts.” *Conflict Trends* 6, July 2000: 33-35.

theory is too large to carefully assess the extent of a well-intended or ill-intended action. This emphasizes the relevance and need for (inter)national laws. The moral and legal debate coexist next to each other, since legal norms are the result of a philosophical debate, and national and international politics. The next chapter on the legal debate on PMSCs shows to what extent national- and international law standards allow PMSCs to be prosecuted for immoral conduct.

3. Legal debate

Introduction

This chapter discusses the legal debate on PMSCs, and answers the second sub-question “to what extent do national- and international law standards allow PMSCs to be prosecuted for immoral conduct?”. By researching and analysing both primary sources and secondary sources concerning among others International Humanitarian Law (IHL), International Human Rights Law (HRL), and (inter)national criminal law, this chapter shows that legal steps against PMSCs can be taken by 1) suing individual employees via IHL, 2) suing individual employees via (inter)national criminal law, and 3) suing PMSCs as legal entities via civil proceedings. Nevertheless, it is very complicated to start legal proceedings. Furthermore, this chapter illustrates to what extent the activities of PMSCs are regulated outside the scope of IHL and HRL.

Discussion on how to sue PMSCs

Suing PMSCs for violations of human rights is complicated, and it is important to consider that human rights violations by (individual employees of-) PMSCs are very difficult to investigate considering PMSCs’ lack of transparency, and the context of conflict and civil unrest. Human rights violations are also less likely to be reported and made public in places where few journalists (if any) are allowed. Especially when these journalists are protected by PMSCs.⁴² A contemporary example of a conflict where journalists are actively refused, is Yemen. As a result, the humanitarian crisis in this county is almost invisible for the outside world.⁴³ Suing the company as a legal entity is only possible under civil law standards and remains dependent on the intentions of the state where the PMSC is registered, and/or on the

⁴² Pingeot, L. “Dangerous Partnership: Private Military and Security Companies and the UN.” New York: Global Policy Forum and Rosa-Luxemburg-Stiftung e.V., 2012: 16.

⁴³ Hofman, L. “Hoe ik 1,5 jaar en 14.075 euro besteedde om Jemen in te komen (en wat dit zegt over oorlogsjournalistiek.” *De Correspondent*. July 4, 2018. <https://decorrespondent.nl/8199/hoe-ik-1-5-jaar-en-14-075-euro-bestedde-om-jemen-in-te-komen-en-wat-dit-zegt-over-oorlogsjournalistiek/588393036-4b26b1ae>.

intentions of the state where the PMSC is active.⁴⁴ Further, the possibilities depend on whether these states are party to IHL treaties such as the Geneva Conventions. Apart from suing the company as a legal entity under civil law standards, there is also the possibility to prosecute individual employees of PMSCs for acts regarded as criminal by international law. This includes crimes against humanity and war crimes, amongst them grave breaches of the Geneva Conventions.⁴⁵ The following paragraphs elaborate on this by firstly explaining how the conduct of PMSCs is regulated in international law. Secondly by explaining how individual PMSC employees can be prosecuted by a national or international criminal court of law. And thirdly by explaining how companies as legal entities can be sued by national civil law courts, and how PMSCs are regulated.

How is the conduct of PMSCs regulated in international law?

IHL is a set of rules that applies during armed conflicts to protect the actual or potential “victims of war”: those who are not actively involved in such conduct, as well as those who are no longer taking part in hostilities.⁴⁶ Gillard emphasizes that differently as claimed by among others Singer, Walker and Whyte, PMSCs do not act in a legal vacuum as their actions are regulated by IHL. IHL is not concerned with the lawfulness or legitimacy of PMSCs, nor of the hiring of PMSCs by states. Instead, IHL regulates the behavior of PMSCs when they are operating in armed conflicts. It is important to emphasize that whenever PMSCs operate in other contexts than armed conflicts, IHL does not apply to their activities.⁴⁷ Therefore, it is

⁴⁴ In addition to this, states can claim jurisdiction on the basis of five overlapping principles: territoriality, nationality, protection, passive personality and universality. See: Klabbers, J. *International Law*. Cambridge: Cambridge University Press, 2017: 99-105. Francioni and Bakker use the concepts of “home state” and “host state” in *War by Contract*. See: Bakker, C. “Duties to Prevent, Investigate, and Redress Human Rights Violations by Private Military and Security Companies: The Role of the Host State.” in *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, edited by Francioni, F., and Ronzitti, N. Oxford: Oxford University Press, 2011: 130; Francioni, F. “The Role of the Home State in Ensuring Compliance with Human Rights by Private Military Contractors.” in *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, edited by Francioni, F., and Ronzitti, N. Oxford: Oxford University Press, 2011: 94.

⁴⁵ Karska, E. “Human rights violations committed by private military and security companies: an international law analysis.” *Espaço Jurídico Journal of Law* 17(3), 2016: 760-761; Lanzerini, F., and Francioni, F. “The Role of Human Rights in the Regulation of Private Military and Security Companies.” in *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, edited by Francioni, F., and Ronzitti, N. Oxford: Oxford University Press, 2011: 55.

⁴⁶ Janaby, M. *The Legal Regime Applicable to Private Military and Security Company Personnel in Armed Conflicts*. Basel: Springer, 2016: 152; Kolb, R. *Advanced Introduction to International Humanitarian Law*. Cheltenham: Edward Elgar Publishing Limited, 2014: 12.

⁴⁷ Gillard, E-C. “Business goes to war: private military/security companies and international humanitarian law.” *International Review of the Red Cross* 88 (863), September 2006: 528-529, 570; Singer, P. “War, profits and the vacuum of law: Privatized military firms and international law.” *Columbia Journal of Transnational Law* 42, 2004: 524, 541; Walker, C., and Whyte, D. “Contracting out war? Private military companies, law and regulation in the United Kingdom.” *International and Comparative Law Quarterly* 54, 2005: 651, 687.

crucial to examine whether violations of human rights have occurred in the context of an armed conflict.

In IHL, the formal status of individuals determines their privileges and obligations. To what extent individuals can be held liable for their actions, thus depends on their status. Do PMSCs’ employees qualify as combatants, civilians or mercenaries?⁴⁸ In order to qualify as combatants, PMSC’s employees must meet the four conditions laid down in Article 4A(2) of the Third Geneva Convention. These conditions are: that of being commanded by a person responsible for his/her subordinates, that of having a fixed distinctive sign recognizable at a distance, that of carrying arms openly, and that of conducting their operations in accordance with the laws and customs of war.⁴⁹ Combatants, under IHL, are allowed to participate directly in hostilities.⁵⁰ In addition, they may be targeted at all times.⁵¹ When having the status of “civilians”, individuals are obliged not to be involved in direct participation in hostilities. If they do so, they lose their protected status and would be a lawful target for combatants. Civilians also have to refrain from using “weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”. As for the means of war, it is prohibited for PMSCs “to employ methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment”.⁵² The third formal status is that of mercenaries. They have no right to take direct participation in hostilities. Which activities amount to taking direct participation in hostilities? The Commentary on the Additional Protocols to the Geneva Conventions defines these activities as follows: “acts which, by their nature and purpose are intended to cause actual harm to enemy

⁴⁸ “If PMSCs’ employees are combatants, they may be targeted at all times but have the right to take direct part in hostilities; if captures, they are entitled to prisoner-of-war status and may not be prosecuted for having participated in hostilities.” Gillard, E-C. “Business goes to war: private military/security companies and international humanitarian law.” *International Review of the Red Cross* 88 (863), September 2006: 531.

⁴⁹ Gillard, E-C. “Business goes to war: private military/security companies and international humanitarian law.” *International Review of the Red Cross* 88 (863), September 2006: 531-532, 534; Article 4A(1) and Article 4A(2) of the International Committee of the Red Cross. *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*. August 12, 1949.

⁵⁰ Janaby, M. *The Legal Regime Applicable to Private Military and Security Company Personnel in Armed Conflicts*. Basel: Springer, 2016: 44.

⁵¹ Additional Protocol I to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 609 (adopted 8 June 1977, entered into force 7 December 1978): art. 50(1); Gillard, E-C. “Business goes to war: private military/security companies and international humanitarian law.” *International Review of the Red Cross* 88 (863), September 2006: 531.

⁵² Additional Protocol I to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 609 (adopted 8 June 1977, entered into force 7 December 1978): art. 35(1), art. 35(2), art. 35(3), art. 51; Janaby, M. *The Legal Regime Applicable to Private Military and Security Company Personnel in Armed Conflicts*. Basel: Springer, 2016: 152-154.

personnel and equipment”.⁵³ Mancini researched whether and in which cases PMSCs’ employees can be classified as mercenaries under international law. She, together with the UN Working Group on the use of mercenaries, came to the conclusion that only a very limited number of PMSCs’ employees fall within the definitions of mercenaries. In addition, many activities undertaken by PMSCs cannot be considered mercenary activities under the existing international treaties.⁵⁴ Article 47 of the Additional Protocol I states a mercenary is any person who:

- “a) is specially recruited locally or abroad in order to fight in an armed conflict;
- b) does, in fact, take a direct part in the hostilities;
- c) is motivated to take part in the hostilities especially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- e) is not a member of the armed forces of a Party to the conflict, and;
- f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.”⁵⁵

The UN Convention Against the Recruitment, Use, Financing and Training of Mercenaries (1989) and the Organisation of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa (1977) also prohibits the use of mercenaries.⁵⁶

Depending on the nature of the conflict (armed or not), IHL can thus be applied to PMSCs’ employees. When the employees qualify as combatants, they are allowed to participate

⁵³ International Committee of the Red Cross. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: Martinus Nijhoff Publishers, 1987: para. 1942 and para. 4787; Gillard, E-C. “Business goes to war: private military/security companies and international humanitarian law.” *International Review of the Red Cross* 88 (863), September 2006: 540.

⁵⁴ Additional Protocol I to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 609 (adopted 8 June 1977, entered into force 7 December 1978): art. 47; Janaby, M. *The Legal Regime Applicable to Private Military and Security Company Personnel in Armed Conflicts*. Basel: Springer, 2016: 152-160; Mancini, M. “Private Military and Security Company Employees: Are They the Mercenaries of the Twenty-first Century?” European University Institute. Academy of European Law. PRIV-WAR project, 2010: 15-16; The legal definition of mercenaries is determined by three instruments: Article 47 of the Additional Protocol I, the Convention for the Elimination of Mercenaries in Africa 1977 and the UN Mercenary Convention 1989. See: Janaby, M. *The Legal Regime Applicable to Private Military and Security Company Personnel in Armed Conflicts*. Basel: Springer, 2016: 16.

⁵⁵ Article 47 “Mercenaries”. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁵⁶ The Geneva Centre for the Democratic Control of Armed Forces. *Legislative Guidance Tool for States to Regulate Private Military and Security Companies*. Geneva: DCAF, 2016: 20.

directly in hostilities and they cannot be prosecuted for lawful acts. Under the status of civilians and mercenaries however, they cannot take direct participation in hostilities. Further, they cannot use material and methods of warfare that cause unnecessary suffering, injuries or severe damage to the natural environment. There are a few exceptions in applying IHL. Vestner points out that IHL cannot be applied to PMSCs’ employees when they work for a non-state entity other than an organized armed group, when they defend others without directly participating in hostilities (including defending military objectives against criminal activities), and when PMSCs’ employees defend themselves.⁵⁷ Clearly, the legal rules that are applicable to individual employees depend on their status. However, Janaby emphasizes that PMSC employees may face individual criminal responsibility regardless of their status if they commit grave breaches of IHL: provisions for (e.g.) war crimes can apply to anyone regardless of whether or not he or she is a civilian, combatant or mercenary.⁵⁸

The previous chapter discussed proportionality and the principle of double effect. These two philosophical concepts can be found in customary IHL and in the Geneva Conventions as well. The principle of distinction is the “legal translation” of proportionality, and the legal principle of precautions in attack has strong resemblances with the principle of double effect. The principle of distinction between civilians and combatants (rule I) states “the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians”.⁵⁹ Further, the principle of precautions in attacks (rule 15) states “in the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects”.⁶⁰

⁵⁷ Vestner, T. “Targeting Private Military and Security Companies”. *The Military Law and the Law of War Review* 57 (2018-2019): 270-271.

⁵⁸ Janaby, M. *The Legal Regime Applicable to Private Military and Security Company Personnel in Armed Conflicts*. Basel: Springer, 2016: 159.

⁵⁹ The principle of distinction is codified in Article 48, 51(2) and 52(2) of Additional Protocol I, to which no reservations have been made. Additional Protocol I to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 609 (adopted 8 June 1977, entered into force 7 December 1978): art. 48, art. 51(2), art. 52(2); International Committee of the Red Cross. “IHL Database: Customary IHL. Rule 1.” *IHL Databases*. https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1.

⁶⁰ This principle is codified in Article 57(1) of the Additional Protocol I, to which no reservations have been made. Additional Protocol I to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 609 (adopted 8 June 1977, entered into force 7 December 1978): art. 57(1); International Committee of the Red Cross. “IHL Database: Customary IHL. Rule 15.” *IHL Databases*. https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15.

Suing individuals: criminal law

Lehnardt states that since PMSCs’ employees perform the same tasks as state militaries, they are “at risk” of violating norms of international law. Therefore, it is unsurprising that these employees have been implicated in incidents that possibly violate the laws of war. The examples of incidents he recalls range from participation in war crimes and crimes against humanity, through the abuse of prisoners, to shooting indiscriminately at civilians.⁶¹ Individual employees of PMSCs can be sued for these crimes under (inter)national criminal law and under IHL.

Criminal law exists on both the domestic and international level. Lehnardt emphasizes that if criminal responsibility can be established, the site of enforcement will in general be domestic criminal courts. It is possible to hold PMSCs’ employees accountable for an international crime, which must then be heard in an appropriate court such as national courts or the ICC. However, since the ICC is premised on the principle of complementarity, and considering that only cases of ‘sufficient gravity’ are admissible, Lehnardt finds it unlikely that cases against PMSCs’ employees will be adjudicated on in The Hague.⁶² Nevertheless, as stated earlier, if the host state struggles with institutional instability, it is not realistic to rely on the state as provider of security and governance. Suing individual private contractors on a domestic level is very complicated (if not impossible) when the host state has no working legal system. This argument also holds for the hiring state. And even if suitable legislation exists, actual prosecution depends on national authorities. Are they willing and equipped with sufficient resources to address international crimes committed by PMSCs’ employees (abroad)? The case of the inhuman treatment of Iraqi prisoners in Abu Ghraib illustrates this matter. Although these abuses are arguably chargeable offences under the US War Crimes Act, the Act has not been used against PMSCs’ employees.⁶³

Apart from the host state and the hiring state, the home state can also claim jurisdiction over PMSCs’ employees. Nevertheless, the example of Abu Ghraib emphasizes that the home state does not always claim jurisdiction. Furthermore, there is the possibility of universal jurisdiction. International crimes are considered to be directed against the interests of the

⁶¹ Lehnardt, C. “Individual Liability of Private Military Personnel under International Criminal Law.” *The European Journal of International Law* 19(5), 2008: 1015-1016.

⁶² The principle of complementarity is laid down in Article 1 of the ICC Statute. Article 17(1) of this Statute describes that only cases of sufficient gravity are admissible. Lehnardt, C. “Individual Liability of Private Military Personnel under International Criminal Law.” *The European Journal of International Law* 19(5), 2008: 1030.

⁶³ Lehnardt, C. “Individual Liability of Private Military Personnel under International Criminal Law.” *The European Journal of International Law* 19(5), 2008: 1032.

international community as a whole. As a result, crimes which are not grave breaches of the Geneva Conventions or Additional Protocol I are subject to non-compulsory universal jurisdiction. This means any state can claim jurisdiction over such crimes. Moreover, Lehnardt states international law not only allows states to prosecute international crimes, but even makes it mandatory to do so under certain circumstances. Grave breaches include torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health. According to Lehnardt, these crimes have arguably been committed by PMSCs’ employees in the context of past international armed conflicts. Nevertheless, “the obligation to investigate or extradite persons suspected of grave breaches, however, is one that has rarely been put into practice”.⁶⁴ Since certain concepts may not exist in domestic criminal law, there are more opportunities to sue individuals under international criminal law. For example, superior responsibility is a creation of international criminal law, and not many states have adopted it in their domestic criminal legislation.⁶⁵ Under the principle of superior responsibility, superiors are criminally responsible for war crimes committed by their subordinates.⁶⁶ Karska considers it problematic that the ICC Statute has not been ratified by world powers such as China and the US.⁶⁷ However, most crimes committed by PMSCs’ employees have been brought before civil courts by victims on the basis of tort law. There are few examples of prosecutors bringing these crimes before criminal courts. Lehnardt states this suggests that, if at all, the enforcement of international criminal law against PMSCs’ employees is not considered a priority.⁶⁸ The following example shows how individuals can be held accountable for their crimes under international criminal law, even when they act under the umbrella of a corporation.

The IG Farben Trial represents the first attempt to hold individuals accountable for their business activity under international criminal law. The indictment contained no charge against the legal entity of IG Farben since the applicable law did not foresee corporate liability. Instead, the prosecution was of the opinion that the accused top management had used Farben as a tool

⁶⁴ Lehnardt, C. “Individual Liability of Private Military Personnel under International Criminal Law.” *The European Journal of International Law* 19(5), 2008: 1030-1031.

⁶⁵ Lehnardt, C. “Individual Liability of Private Military Personnel under International Criminal Law.” *The European Journal of International Law* 19(5), 2008: 1032.

⁶⁶ “If superiors ‘look the other way’, their omission is a serious potential danger, and therefore the basis for criminal responsibility if they culpably violate the duties of control assigned to them.” Lehnardt, C. “Individual Liability of Private Military Personnel under International Criminal Law.” *The European Journal of International Law* 19(5), 2008: 1025.

⁶⁷ Karska, E. “Human rights violations committed by private military and security companies: an international law analysis.” *Espaço Jurídico Journal of Law* 17(3), 2016: 761.

⁶⁸ Lehnardt, C. “Individual Liability of Private Military Personnel under International Criminal Law.” *The European Journal of International Law* 19(5), 2008: 1034.

to commit crimes against peace, war crimes and crimes against humanity. Specifically, “through the production of synthetic fuel and rubber required and used for the war of aggression waged by Nazi Germany; plundering and spoliation of other people’s property in the German-occupied territories; supply of toxic gas Zyklon B to the concentration camps; conducting of medical experiments on prisoners; and use of forced labour”. After 152 days of proceedings, the US Military Tribunal sitting at Nuremberg convicted 13 of the 23 accused people. There were convictions for war crimes and crimes against humanity, but none of the accused was found guilty of taking part in a war of aggression.⁶⁹

As for PMSCs however, Quirico emphasizes that despite various reported incidents, no private contractor has been sentenced for committing war crimes yet. For example, in the aftermath of the inhuman treatment of Iraqi prisoners in Abu Ghraib, employees of PMSCs CACI and International Titan were not charged with any crime whilst state military officers were subjected to court martial and sentenced to prison. Quirico states that the torture of prisoners arrested and detained as a result of military operations in Abu Ghraib could be classified as war crimes. Nevertheless, the private perpetrators did not face any criminal charges.⁷⁰ There is thus a large gap between the possibilities of suing individuals and the reality. The intentions of states determine for a large part whether an individual or PMSC as a legal entity will be sued or not.

Suing companies

How PMSCs as legal entities can be sued depends on the intentions and laws of the home state and/or the host state. The home state is the state in which the company was constituted by way of incorporation or registration as a legal person.⁷¹ The state on whose territory PMSCs operate, is referred to as host state.⁷² States are generally obliged to prevent-, to investigate-, and to punish human rights violations, since various IHL treaties are customary international

⁶⁹ Jessberger, F. “On the origins of individual criminal responsibility under international law for business activity: IG Farben on trial.” *Journal of International Criminal Justice* 8(3), 2010: 783-802.

⁷⁰ Quirico, O. “The Criminal Responsibility of Private Military and Security Company Personnel under International Humanitarian Law.” in *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, edited by Francioni, F., and Ronzitti, N. Oxford: Oxford University Press, 2011: 424, 447.

⁷¹ “This is the most widely accepted criterion of attribution of nationality to a corporation and this criterion remains decisive for the purpose of international law, as recognized by the ICJ in the 1970 judgment in the Barcelona Traction case.” Francioni, F. “The Role of the Home State in Ensuring Compliance with Human Rights by Private Military Contractors.” in *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, edited by Francioni, F., and Ronzitti, N. Oxford: Oxford University Press, 2011: 96.

⁷² Bakker, C. “Duties to Prevent, Investigate, and Redress Human Rights Violations by Private Military and Security Companies: The Role of the Host State.” in *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, edited by Francioni, F., and Ronzitti, N. Oxford: Oxford University Press, 2011: 130.

law.⁷³ These obligations also apply to the hiring state: the state which has concluded the contract with the PMSC. When a state is no party of the most important IHL treaties, it is of course difficult to oblige states to punish the violations of IHL. Apart from having intentions to sue PMSCs, it is worth emphasizing that the host state can have a weak role. If PMSCs are hired in areas where armed conflict or institutional instability prevails, one cannot realistically rely on the host state, whose inability or incapacity to provide security and governance is the *raison d’être* of hiring PMSCs (either by the host state or by another party).⁷⁴ Bakker points out that the hiring state and the home state are often the same, for example when Control Risks was contracted by the United Kingdom and when Blackwater was contracted by the US, but this is not always the case.⁷⁵

The following example shows the complexities of suing a company under national law. In the *Kiobel versus Shell* case, four Nigerian women started civil proceedings against Shell over its alleged complicity in human rights abuses committed in Nigeria against the Ogoni people during the 1990s. They claim that Shell was involved in the unlawful arrest, torture and execution of their husbands by the Nigerian Military. In 1995, nine men (collectively known as the Ogoni Nine) were hanged by the Nigerian government. Esther Kiobel first filed a case against Shell in the US in 2002 but saw her case dismissed in 2013 when the American Supreme Court ruled it did not have jurisdiction to examine her allegations. In 2017, she filed a new case in the Netherlands (Shell is an Anglo-Dutch company), together with three other widows. Shell has claimed that the events are too old and that the Netherlands does not have jurisdiction to rule over the case. However, in May 2019, a Dutch civil court ruled out these claims, and ordered Shell to share specific documents with them.⁷⁶ Even though the case is on-going, these

⁷³ Bakker, C. “Duties to Prevent, Investigate, and Redress Human Rights Violations by Private Military and Security Companies: The Role of the Host State.” in *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, edited by Francioni, F., and Ronzitti, N. Oxford: Oxford University Press, 2011: 130; There are a series of important IHL treaties, as described by Kolb. Among others the following treaties: The Hague Conventions I-XIV of 1907, The Geneva Conventions I-IV of 1949, the Additional Protocols I and II to the Geneva Conventions (1977), and the Rome Statute of the International Criminal Court (1998). See for the complete series: Kolb, R. *Advanced Introduction to International Humanitarian Law*. Cheltenham: Edward Elgar Publishing Limited, 2014: 54-64.

⁷⁴ Francioni, F. “The Role of the Home State in Ensuring Compliance with Human Rights by Private Military Contractors.” in *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, edited by Francioni, F., and Ronzitti, N. Oxford: Oxford University Press, 2011: 95.

⁷⁵ Bakker, C. “Duties to Prevent, Investigate, and Redress Human Rights Violations by Private Military and Security Companies: The Role of the Host State.” in *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, edited by Francioni, F., and Ronzitti, N. Oxford: Oxford University Press, 2011: 131.

⁷⁶ *Amnesty International*. “Nigeria/Netherlands: Shell involvement in execution of Ogoni Nine to be decided by court.” April 29, 2019. <https://www.amnesty.org/en/latest/news/2019/04/nigerianetherlands-shell-involvement-in-execution-of-ogoni-nine-to-be-decided-by-court/>. Accessed on November 5, 2020; Zwam, Erik van. “Eerste succesje Ogoni-weduwen in zaak tegen Shell.” *Trouw*. May 1, 2019. <https://www.trouw.nl/nieuws/eerste-succesje-ogoni-weduwen-in-zaak-tegen-shell~b632e883/>. Accessed on November 5, 2020.

proceedings show how difficult and time-consuming it is to sue a company. The complexity of investigating alleged human rights violations also plays a role here.

Regulation

At the international level, there are currently no binding instruments specifically governing PMSCs. However, a series of initiatives in this regard have been undertaken. The Working Group on Mercenaries from the UN prepared a draft Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies, which was presented to the UN Human Rights Council. The Council did not adopt the draft convention because it lacked support by states relying on PMSCs, primarily Western states. The Human Rights Council established an open-ended intergovernmental working group to continue the efforts in this regard. Thus far, it has failed to produce concrete results.⁷⁷

Since there is no legally binding convention, the normative framework on PMSCs at the international level particularly consists of soft law. The Montreux Document outlines good practices for states to promote compliance with international law during armed conflicts through due diligence obligations.⁷⁸ This Document is not an internationally binding instrument, it can be applied only for IHL interpretation and does not create new obligations.⁷⁹ Rather, it recalls the existing legal obligations of hiring states, home states, host states, and all companies providing security services. Obligations are drawn from both IHL and HRL. This includes the obligation of hiring states to ensure that PMSCs are aware of and trained in IHL.⁸⁰

Industry adopted the International Code for Conduct for Private Security Service Providers (ICoC) in 2010. This set of principles is open to signature by PMSCs. The ICoC is binding for signatory companies but does not operate at the inter-state level. It articulates companies' human rights responsibilities for the provision of PMSCs, particularly when operating in complex environments. The ICoC Association (ICoCA) works as a multi-

⁷⁷ United Nations, Human Rights Council. “Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.” July 5, 2010. UN Doc A/HRC/15/25; United Nations Human Rights Special Procedures. “Mercenarism and Private Military and Security Companies: an overview of the work carried out by the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.” April, 2018. HRC/NONE/2018/40: 25; Vestner, T. “Targeting Private Military and Security Companies”. *The Military Law and the Law of War Review* 57 (2018-2019): 254.

⁷⁸ Vestner, T. “Targeting Private Military and Security Companies”. *The Military Law and the Law of War Review* 57 (2018-2019): 254.

⁷⁹ Karska, E. “Human rights violations committed by private military and security companies: an international law analysis.” *Espaço Jurídico Journal of Law* 17(3), 2016: 756.

⁸⁰ Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, 2008. Part I.

stakeholder supervisory and governance mechanism. Initially encompassing 700 companies, the number has dropped to approximately 100 because smaller companies could not bear the financial burden of membership to the ICoCA.⁸¹ As the following two chapters research two case-studies, it is interesting to examine whether the example PMSCs are part of the ICoCA. If they are a party, there are additional rules which the employees have to follow. The following two chapters examine a number of PMSCs. The selection of these companies is not based on whether they are a member to the ICoCA, but rather whether they have (allegedly) committed human rights violations. Naturally, the analysis of these PMSCs in chapter four and five points out whether these companies are a member, since an ICoCA membership influences their legal obligations.

The second sub-question “to what extent do national- and international law standards allow PMSCs to be prosecuted for immoral conduct?” can be answered as follows: suing PMSCs for immoral conduct is very complicated. The possibilities of suing individual employees and PMSCs as a legal entity, depend on the intentions and on the legal system of the host state and/or the home state. If the state is willing to prosecute human rights violations, there are three options: 1) sue individual employees via IHL, 2) sue individual employees via (inter)national criminal law, and 3) sue the company as a legal entity via civil proceedings.

All possible options are very complicated to carry out considering the difficulties of examining alleged human rights violations and the passive attitude of states. Nevertheless, perpetrators can be prosecuted for grave IHL violations (such as war crimes) under criminal law in both domestic and international courts, regardless of their status under IHL. The following two chapters examine to what extent international law has been successfully applied to human rights violations in the cases of Sierra Leone and Iraq.

4. Case-study: Sierra Leone

Introduction

This chapter applies the theory discussed in the previous two chapters to the case of Sierra Leone. The third sub-question, “to what extent has national or international law been successfully applied to PMSCs’ human rights violations in the case of Sierra Leone?” will be

⁸¹ International Code of Conduct for Private Security Service Providers, 2010; See: https://www.icoca.ch/en/the_icoc#b-definitions; Vestner, T. “Targeting Private Military and Security Companies”. *The Military Law and the Law of War Review* 57 (2018-2019): 253-255.

answered by a combination of primary sources and secondary sources. The first reason why this paper examines the specific case of Sierra Leone, is because according to the data of Akcinaroglu and Radziszewski, the state saw “a significant amount of PMSC activity”. Their data show that twelve unique PMSCs were contracted by the government between 1991 and 1999, which indicates that the environment was highly competitive.⁸² In the analysis of Faulkner, Lambert and Powell, who analyse also the years between 1999 and 2002, the total number of PMSCs in the Sierra Leone war is fifteen (see appendix 1 for their table). These PMSCs are “widely regarded as having provided effective services”.⁸³ As part of these fifteen, PMSC Executive Outcomes (EO) played a pivotal role in ending the long and cruel conflict in Sierra Leone, stabilizing the government and setting the stage for “civilian politics”.⁸⁴ Following the principle of double effect and Wheeler’s argument on the consequences of actions, these are clearly positive results of EO’s work. The second argument in favour of this specific case-study, is that the work of PMSCs in Sierra Leone is considered successful and effective. The third argument for choosing this case is that EO’s work in Sierra Leone is “the most prominent case” of PMSCs participating actively in offensive combat operations. EO’s employees were contracted directly to engage in hostilities.⁸⁵

Introduction to the conflict in Sierra Leone

In March 1991, the conflict in Liberia spilled over the border into neighbouring state Sierra Leone. Between 1991 and 2002, Sierra Leone suffered a brutal civil war during which the rebel forces of the Revolutionary United Front (RUF) committed horrendous atrocities, terrorizing the population and gaining control of Sierra Leone’s diamond mines.⁸⁶ The Sierra Leonean government of Captain Valentine Strasser hired EO in 1995 to defeat the RUF, which it did.

⁸² Akcinaroglu, S., and Radziszewski, E. “Private Military Companies, Opportunities, and Termination of Civil Wars in Africa.” *Journal of Conflict Resolution* 57 (5), 2013: 795-821; Faulkner, C., Lambert, J., and Powell, J. “Reassessing private military and security company (PMSC) ‘competition’ in civil war: lessons from Sierra Leone.” *Small Wars and Insurgencies* 30(3), 2019: 644.

⁸³ Faulkner, C., Lambert, J., and Powell, J. “Reassessing private military and security company (PMSC) ‘competition’ in civil war: lessons from Sierra Leone.” *Small Wars and Insurgencies* 30(3), 2019: 642, 646.

⁸⁴ Executive Outcomes is a South Africa-based company composed of ex-commandos who served in South Africa’s apartheid-era security forces. Leander, A. “The Market for Force and Public Security: The Destabilizing Consequences of Private Military Companies.” *Journal of Peace Research* 42(5), 2005: 607-608; Zarate, J. “The Emergence of a New Dog of War: Private International Security Companies, International Law and the New World Disorder.” *Stanford Journal of International Law* 34(1): 76.

⁸⁵ Quirico, O. “The Criminal Responsibility of Private Military and Security Company Personnel under International Humanitarian Law.” in *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, edited by Francioni, F., and Ronzitti, N. Oxford: Oxford University Press, 2011:423-424.

⁸⁶ Kwaja, C. “The Private Military and Security Sector and African Conflicts.” *Journal of African Foreign Affairs* 1(1), 2014: 88-89.

EO retook the Kono diamond area and trained local citizens to take over security. Further, this PMSC brought the RUF to the negotiating table and paved the way for the 1996 presidential elections.⁸⁷ Various coups and UN interventions followed, as well as peace accords that were signed and then violated.⁸⁸ Sierra Leone’s diamonds significantly contributed as a booster to the war since combats were financed with the export of diamonds. Those who controlled the diamond mines, had the resources to continue the war. Kwaja emphasizes that diamonds played a critical role during the conflict. For the private security sector, it was a major incentive for their involvement in this war. And, when the government of Sierra Leone was unable to meet its financial obligations, it had to concede mining fields to these PMSCs.⁸⁹ As pointed out in chapter two, “pessimists” Musah and Fayemi as well as the UN Special Rapporteur on Mercenaries consider these economic ties problematic.⁹⁰ In 2002, the civil war officially ended. In the same year, the Special Court for Sierra Leone was set up to address serious crimes committed against civilians and UN peacekeepers during the war.⁹¹

PMSCs human rights violations

Since this paper relies on a broad definition of PMSCs (“a non-state actor that provides military and/or security services, irrespective of how they describe themselves”), it is important to emphasize that this paper does not characterise the RUF as a PMSC. Since the RUF is a revolutionary movement trying to gain political power in Sierra Leone with military conduct, the RUF does not “provide military services” and does thus not comply with the definition of PMSCs.⁹² Francis describes PMSCs’ human rights violations, and emphasizes how the Sierra Leonean government was discouraged from taking action against them because they were

⁸⁷ Leander, A. “The Market for Force and Public Security: The Destabilizing Consequences of Private Military Companies.” *Journal of Peace Research* 42(5), 2005: 608; Zarate, J. “The Emergence of a New Dog of War: Private International Security Companies, International Law and the New World Disorder.” *Stanford Journal of International Law* 34(1): 95.

⁸⁸ BBC. “Sierra Leone profile – timeline.” April 5, 2018. <https://www.bbc.com/news/world-africa-14094419>.

⁸⁹ Humanity House. “Rampen en conflicten: Sierra Leone. Politiek conflict, 1991-2000.” January 23, 2017. <https://humanityhouse.org/rampen-conflicten-sierra-leone-politiek-conflict-1991-2000/>; Kwaja, C. “The Private Military and Security Sector and African Conflicts.” *Journal of African Foreign Affairs* 1(1), 2014: 89, 102. Furthermore, the RUF recruited many of its force from youth that were engaged in illicit diamond mining. See: Akinrinade, B. “International Humanitarian Law and the Conflict in Sierra Leone.” *Notre Dame Journal of Law, Ethics and Public Policy* 15(2), 2001: 397.

⁹⁰ Musah, A-F., Fayemi, J. *Mercenaries: an African Security Dilemma*. London: Pluto Press, 2000: 27; Office of the UN High Commissioner for Human Rights. *Report on the Questions of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-Determination (A/52/495)*. October, 16, 1997.

⁹¹ *The Residual Special Court for Sierra Leone and the SCSL Public Archives, Freetown and The Hague*. “Special Court for Sierra Leone.” No date. <http://www.rscsl.org/>.

⁹² Abdullah, I. “Bush Path to Destruction: The Origin and Character of the Revolutionary United Front (RUF/SL).” *Africa Development/Afrique et Développement* 22(3/4), 1997: 49-58.

considered as part of the government’s security and military apparatus. Francis illustrates his argument by giving the following example. When the commander of the British PMSC Gurkha Security Guards was killed in an ambush, the unsuccessful military offensive to recover his body was remarkable for its brutality and indiscriminate killings. “According to one senior officer involved in the operation, the alleged unprofessional conduct of the Gurkha forces and the torture of captured rebels caused a lot of resentment within the army and government”.⁹³ However, there are no records of legal steps taken against this PMSC. After Gurkha had failed to completely “wipe out” the RUF threat in the diamond mining areas, EO was hired in March 1995.⁹⁴ Gurkha and EO are both no signatory party of the ICoCA.⁹⁵

EO presents itself as a defender of African state security, and as a stabilising force for African development.⁹⁶ The founder of EO, Eeben Barlow, noted, “You cannot keep peace if there is no peace, as we saw in Bosnia. But we can help a country achieve some form of stability before the UN comes in”.⁹⁷ Nevertheless, this PMSC is not free of human rights violations either. Lehnardt and Rubin recall when the EO pilots Walker and Alberts told their military commander in Sierra Leone they were having difficulty distinguishing between the rebels and civilians, the reply was “kill everybody”. As a result, they carried out air strikes against all people “camped under the impenetrable canopy of vines and trees”.⁹⁸

Is the conduct of these two PMSCs morally justifiable? This depends on whether the four conditions of the principle of double effect are met. The indiscriminate killings by both Gurkha and EO cannot be characterized as well-intended. There was no reasonable or higher purpose to “kill everyone”, nor did this conduct result in positive effects. These killings seem to be a result of a) revenge for the death of the Gurkha commander, and b) laziness to distinguish between rebels and civilians. This conduct is thus not proportionate at all. Finally, the positive effects do not outweigh the negative effects since these killings did not contribute to a higher

⁹³ Francis, D. “Mercenary intervention in Sierra Leone: providing national security or international exploitation?” *Third World Quarterly* 20(2), 1999: 332-333.

⁹⁴ Juma, L. “The Human Rights Approach to Peace in Sierra Leone: The Analysis of the Peace Process and Human Rights Enforcement in a Civil War Situation.” *Denver Journal of International Law and Policy* 30(3), 2020: 344.

⁹⁵ *International Code of Conduct Association*. “Members.” Accessed on December 2, 2020. <https://icoca.ch/membership/>.

⁹⁶ Howe, H. “Private Security Forces and African Stability: The Case of Executive Outcomes.” *The Journal of Modern African Studies* 36(2), 1998: 307-308.

⁹⁷ Faulker, C., Lambert, J., and Powell, J. “Reassessing private military and security company (PMSC) ‘competition’ in civil war: lessons from Sierra Leone.” *Small Wars and Insurgencies* 30(3), 2019: 643.

⁹⁸ Lehnardt, C. “Individual Liability of Private Military Personnel under International Criminal Law.” *The European Journal of International Law* 19(5), 2008: 1017; Rubin, E. “An army of one’s own.” *Harper’s Magazine* 294 (1761), February 1997: 44-56.

purpose. None of the conditions of double effect are met, therefore the conduct of these two PMSCs is immoral.

Have there been attempts to sue PMSCs?

Despite the committed human rights violations, there have been no lawsuits against PMSCs or individual employees for their conduct in Sierra Leone. This confirms that it is indeed very complicated to take legal steps against PMSCs. The lack of transparency and the context wherein PMSCs operate contribute to this. Pingeot points out that in such situations of conflict or civil unrest, general chaos and confusion make it difficult to know exactly what PMSCs and their employees do. In places shunned by the media, abuses are also less likely to be reported and made public. Especially when media reporters themselves are protected by PMSCs.⁹⁹ Even though there have been no attempts to hold PMSCs and their employees accountable for their actions by relying on the legal framework, there has been international attention to PMSCs’ conduct in Sierra Leone. In December 1995, the *Dutch Financial Times* published an article warning against the problematic ties between the diamond-industry and EO, and EO’s “contribution to anarchy and terror”.¹⁰⁰ This was already public knowledge nine months after the entrance of EO in Sierra Leone. *CNN* contributed to this discussion with its critical publications in 1997.¹⁰¹ Further, there were various calls to stop employing mercenaries, as they are “a serious threat to stability in Africa”.¹⁰² When PMSC Sandline violated the UN weapons-embargo in 1998, international newspapers were more concerned about Sandline’s ties with the British government (did the Ministry of Foreign Affairs instruct this PMSC to import weapons or not?), than with the accountability of this PMSC.¹⁰³ However, a year later the discussion on

⁹⁹ Pingeot, L. “Dangerous Partnership: Private Military and Security Companies and the UN.” New York: Global Policy Forum and Rosa-Luxemburg-Stiftung e.V., 2012: 16.

¹⁰⁰ Schaik, J. van. “Sierra Leone is: armoe, huurlingen en de diamanten.” *Het Financieele Dagblad*. December 27, 1995. <https://advance-lexis-com.proxy.library.uu.nl/document/?pdmfid=1516831&crd=87e1673a-0f81-4018-956d-a58366065e51&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A3WNW-9110-00MN-1457-00000-00&pdoccontentcomponentid=208267&pdtteaserkey=sr0&pditab=allpods&ecom=fzx2k&earg=sr0&prid=420ed13c-080f-4426-a918-a0d4fdd32071>.

¹⁰¹ Frassand, T., and Arnett, P. “Sierra Leone Mercenaries.” *CNN*. March 31, 1997; Amanpour, C. “Dogs of war: Executive Outcomes sells the services of its mercenaries to assist armies of countries who will pay.” *CBS News Transcripts*. June 1, 1997.

¹⁰² Nduru, M. “Africa: leaders urged to stop recruiting mercenaries.” *IPS-Inter Press Service*. June 18, 1997.

¹⁰³ *Algemeen Nederlands Persbureau ANP*. “Cook: geen reden tot aftreden over wapenleveranties Sierra Leone.” May 10, 1998; Drohan, M. “U.K. knew of Sierra Leone plan, mercenaries say Letter from lawyers for Sandline International likely to deepen scandal over breaking of UN arms embargo enmeshing Foreign Office.” *The Globe and Mail (Canada)*. May 9, 1998; Manthorpe, J. “Military expertise for hire an international growth industry: a serious brouhaha faces the British government over knowledge of use of mercenaries in ouster of Sierra Leone regime.” *The Vancouver Sun (British Columbia)*. May 11, 1998.

PMSCs’ accountability did start. International organisations such as the UN, the Red Cross and CARE have different perspectives on the moral justifiability of PMSCs but they agree that the lack of accountability is a problem that should be solved.¹⁰⁴ Still, the positive effects of PMSCs’ work are highlighted in the international media, while the negative effects are not gaining as much attention.¹⁰⁵ Human rights abuses in Sierra Leone were extensively described, but the focus was on the RUF as perpetrator instead of other parties.¹⁰⁶ In 2000, the T.M.C. Asser Institute (specialised in Public International Law, IHL, and International Criminal Law), stated that considering the economic benefits and efficiency of EO, “we should research whether private forces are a better alternative for failing UN missions”. This institute praised EO for its accomplishments such as winning territory from the RUF, and did not point to any human rights violations.¹⁰⁷ *Africa News* was completely opposed to this standpoint, characterising hired soldiers as “Messiahs of Terror”.¹⁰⁸ The World Organisation Against Torture (OMCT) expressed its grave concern over the deterioration of the security situation and continuing violation of human rights and IHL by “armed parties” in 2001. They did not specifically call out PMSCs, but did urge the government of Sierra Leone to carry out full and impartial investigations.¹⁰⁹ Despite this international attention for the war in Sierra Leone, and for the presence of PMSCs, these companies have never been sued for their human rights violations.

Further international attention to the conflict in Sierra Leone came in the shape of the Special Court for Sierra Leone. Even though the purpose of this tribunal was to address serious crimes against civilians and UN peacekeepers, the ICC did not take legal steps against PMSCs. This is a shame since they did commit crimes against civilians as well. The tribunal included both national and foreign justices, adjudicating under both domestic and international laws. The proceedings took place in both Freetown (the capital of Sierra Leone) and The Hague. Freetown hosted the trials of the leaders of three different militia formations (the RUF, CDF, and AFRC), whereas the trial of Charles Taylor took place in a chamber of the ICC in The Hague. Taylor was charged with orchestrating atrocities in Sierra Leone. His trial process concluded in 2012 with his conviction and sentencing to life imprisonment, in 2013 this verdict was upheld on appeal. Jones finds the court’s most notable legal contributions were the convictions of AFRC

¹⁰⁴ Zevenbergen, A. “Huurlingen zijn een bedreiging voor Afrika.” *Algemeen Dagblad*. March 31, 1999.

¹⁰⁵ *The Guardian*. “Send in the mercenaries if our troops won’t fight; William Shawcross seeks to hink the unthinkable in Sierra Leone.” May 10, 2000.

¹⁰⁶ Lobe, J. “Rights-Sierra Leone: Report details horrific abuses.” *IPS-Inter Press Service*. June 24, 1999.

¹⁰⁷ *Algemeen Nederlands Persbureau ANP*. “Sierra Leone ‘huurlingen alternatief voor VN-vredesmacht’.” May 11, 2000.

¹⁰⁸ *Africa News*. “Mercenaries: Messiahs of Terror.” June 8, 2001.

¹⁰⁹ *Africa News*. “Sierra Leone: OMCT Condemns Human Rights Violations in Sierra Leone.” May 17, 2000.

figures for forcibly conscripting children, and of RUF leaders for inflicting forced marriage on women. Under international law, these were the first times such verdict had been rendered.¹¹⁰ It is clear the human rights violations of PMSCs were of another nature, but it is nevertheless a shame that they were not part of these proceedings at all.

The third sub-question, “to what extent has national or international law been successfully applied to PMSCs’ human rights violations in the case of Sierra Leone?” can be answered as follows: national and international laws have not been applied to PMSCs’ human rights violations in Sierra Leone. Even though the international community as well as the international press were aware that 1) PMSCs were active in Sierra Leone, and 2) human rights violations were said to be committed by them. As far as this research reaches, no steps were undertaken to sue PMSCs or individual employees.

5. Case-study: Iraq

Introduction

This chapter applies the theoretical framework to the case of Iraq, and answers the fourth sub-question “to what extent has national or international law been successfully applied to PMSCs’ human rights violations in the case of Iraq?” by a combination of primary and secondary sources. Even though the case of Iraq has been researched more often in academic literature, there are two strong arguments to research this case. Firstly, there have been lawsuits against PMSCs and individual employees who were active in Iraq. In other, more recent, conflicts, there have been very little to none attempts to sue PMSCs, which makes an analysis very difficult.¹¹¹ Secondly, by researching this case, this paper shows whether there has been a development for what concerns prosecuting PMSCs over the years. The case of Iraq fits well in the timeline, as this war started 10 years after the start of the war in Sierra Leone.

¹¹⁰ Jones, A. *Genocide: A Comprehensive Introduction*. New York: Routledge, 2017: 714-715; Smith-Spark, L. “Charles Taylor: War Crimes Conviction, 50-year Sentence Upheld.” *CNN*. September 26, 2013. <https://edition.cnn.com/2013/09/26/world/africa/netherlands-charles-taylor-verdict/index.html>.

¹¹¹ For example, the conduct of PMSCs in Libya has not led to any legal proceedings.

Introduction to the conflict in Iraq

On March 21, 2003, American-British troops invaded Iraq.¹¹² What were the reasons for this invasion for the US?¹¹³ Butt describes that three explanations are especially popular in the literature on International Relations and security- and conflict studies: 1), the desire to spread democracy in the Middle East, 2) the war was fought to placate the “Israel lobby”, and/or the war was fought because of the oil lobby and 3) the invasion of Iraq was an act of preventive war based on the threat Saddam Hussein’s weapons of mass destruction (WMD) capabilities would pose in the future. Butt himself claims “the US fought Iraq not because of a dyadic dispute but to demonstrate that is was, and would remain, the global hegemonic power in the post-9/11 era”.¹¹⁴ Due to the limited length of this paper and its focus on PMSCs, the background of this invasion will not be discussed more extensively. After the Iraqi government fell in 2003, lawlessness followed and an “army” of private contractors flooded Iraq. They performed the work that used to be done by military personnel: logistics, operational support of weapons systems, and training the Iraqi police force and army. Personnel of other PMSCs provided security for employees rebuilding oil fields, journalists working for ABC News, and US Army employees by translating and interrogating prisoners. In the Spring of 2004, it was estimated that more than 20,000 private contractors employed by sixty different PMSCs worked for the American government, the British government, the Coalition Provisional Authority (CPA), private firms and international NGO’s in Iraq.¹¹⁵

PMSCs human right violations

Several human rights violations by PMSCs caused turmoil in the international media. The following two examples illustrate this. The abuse of Iraqi detainees at the Abu Ghraib prison by CACI is the first example of illegal conduct by PMSCs in Iraq. Abu Ghraib became a focus of world attention when the photographs of humiliated prisoners were aired by CBS on April 28, 2004.¹¹⁶ A few months earlier, in January 2004, the International Committee of the Red Cross (ICRC) published its confidential “Report on the Treatment by the Coalition Forces of

¹¹² Hurst, S. *The United States and Iraq since 1989 Hegemony, Oil and War*. Edinburgh: Edinburgh University Press, 2009: 175.

¹¹³ Since this chapter focusses on violations committed by Americans, the emphasis of this chapter will be on the US at large.

¹¹⁴ Butt, A. “Why did the United States Invade Iraq in 2003?” *Security Studies* 28(2), 2019: 251-253.

¹¹⁵ Avant, D. *The Market for Force: The Consequences of Privatizing Security*. Cambridge: Cambridge University Press, 2005: 1-2.

¹¹⁶ Lewis, A. “Introduction.” in *The Torture Papers: The Road to Abu Ghraib*, edited by Greenberg, K., and Dratel, J. Cambridge: Cambridge University Press, 2012: 15; Smeulers, A., and Van Niekerk, S. “Abu Ghraib and the War on Terror – a case against Donald Rumsfeld?” *Crime, Law and Social Change* 51, 2009: 327-328.

Prisoners of War and other protected persons in Iraq”. The ICRC drew the attention to a number of serious violations of IHL including 1) physical or psychological coercion during interrogation to secure information, 2) brutality against protected persons upon capture and initial custody, sometimes causing death or serious injury, and 3) excessive and disproportionate use of force against persons deprived of their liberty resulting in death or injury during their period of internment.¹¹⁷ As this document was confidential, the contents were not available to the public. On May 7, 2004, however, the *Wall Street Journal* published extensive excerpts from this report.¹¹⁸ After the CBS coverage, and this article, the abuses at the Abu Ghraib prison were public knowledge. The perpetrators in the Abu Ghraib-case consisted of soldiers of the Coalition Forces as well as private contractors. Two private contractors implicated in the abuses at Abu Ghraib were hired as interpreters/translators from CACI.¹¹⁹ *The New York Times* stated that, according to Pentagon officials, CACI sent 27 interrogators to Abu Ghraib. CACI’s one-year military contract was part of a broader effort by the military to enlist Arabic linguists and other civilians in the work of questioning Iraqi detainees.¹²⁰ Is CACI’s conduct morally justifiable? The torture of prisoners to gain highly valuable information could be considered well-intended. Nevertheless, torture and abusive interrogation tactics are illegal under both American law and international law.¹²¹ Further, the effects of this abuse are not at all positive. The conduct is disproportionate, as confirmed by the ICRC.¹²² The positive effects

¹¹⁷ The International Committee of the Red Cross. “Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation.” January 2004. Geneva: ICRC, 2004.

¹¹⁸ International Committee of the Red Cross. “Report by the ICRC on the coalition forces’ treatment of persons held in Iraq.” May 7, 2004. <https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/5yrl67.htm>.

¹¹⁹ Janaby, M. *The Legal Regime Applicable to Private Military and Security Company Personnel in Armed Conflicts*. Basel: Springer, 2016: 35. Quirico, O. “The Criminal Responsibility of Private Military and Security Company Personnel under International Humanitarian Law.” in *War by Contract: Human Rights, Humanitarian Law, and Private Contractors*, edited by Francioni, F., and Ronzitti, N. Oxford: Oxford University Press, 2011: 424, 431.

¹²⁰ Jehl, D., and Schmitt, E. “The Struggle for Iraq: The Military; In Abuse, a Portrayal of Ill-prepared, Overwhelmed G.I.’s.” *The New York Times*. May 9, 2004. <https://www.nytimes.com/2004/05/09/world/struggle-for-iraq-military-abuse-portrayal-ill-prepared-overwhelmed-gi-s.html>.

¹²¹ Torture is prohibited under U.S. Law: 1) Constitution, 5th, 8th, and 14th Amendments; 2) Executive Order 13491 – Ensuring Lawful Interrogations, 3) Detainee Treatment Act, 4) McCain-Feinstein Amendment, 5) U.S. Torture Act, 6) War Crimes Act. The prohibition on torture is a jus cogens norm, meaning it is a fundamental principle of international law. In addition, the US is a party to several international treaties that prohibit torture: 1) Convention Against Torture Art. 1 and 2; 2) Geneva Conventions, Art. 3 and 75; 3) International Covenant on Civil and Political Rights, Art. 7. See: *Human Rights First*. “Torture and Cruel Treatment: Prohibitions Under Domestic Law and International Commitments.” Issue Brief. January 9, 2017. <https://www.humanrightsfirst.org/resource/torture-and-cruel-treatment-prohibitions-under-domestic-and-international-law>.

¹²² The International Committee of the Red Cross. “Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation.” January 2004. Geneva: ICRC, 2004.

(if any) do not outweigh the negative effects. Even though the first condition is met to a certain extent, the other three conditions of the principle of double effect are not: the abuse at Abu Ghraib is thus immoral conduct.

Secondly, the shooting of 17 Iraqi civilians in Baghdad in September 2007 by Blackwater guards. On 16 September, employees of Blackwater engaged in a firefight on the Nisour Square. Even though spokesmen of Blackwater claimed the employees responded to an attack by insurgents that followed a car-bomb explosion nearby, Iraqi witnesses insisted Blackwater employees fired without provocation on a slow-moving civilian car that failed to stop, killing its occupants. The employees continued firing in response to the panic and confusion of civilians and Iraqi security forces on the square. American and Iraqi investigations confirmed these statements by Iraqi witnesses.¹²³ Blackwater is no signatory party of the ICoCA.¹²⁴ Is the shooting in Baghdad morally justifiable, following the principle of double effect? The character of the act – shooting civilians without provocation - is not well-intended. The effects of this, the dead of 17 civilians, are not positive either. This conduct cannot be considered proportionate. There are no positive effects of this conduct –therefore the positive effects do not outweigh the negative effects. None of the conditions of the principle of double effect are met, the conduct of Blackwater is immoral.

Have there been attempts to sue these PMSCs?

The PMSCs responsible for these human rights violations have been sued. In both cases, the process of starting legal proceedings against PMSCs or individual contractors has been long and complicated. In the case of Abu Ghraib, the Center for Constitutional Rights (CCR) brought a federal (civil) lawsuit against CACI on behalf of four Iraqi torture victims: the Al Shimari v. CACI lawsuit. These four Iraqi victims of torture stated CACI directed and engaged in illegal conduct, including torture at the Abu Ghraib prison in Iraq, where it was hired by the US to provide interrogation services.¹²⁵ Four years after the abuses, the CCR filed a complaint on behalf of four Iraqi torture victims on June 30, 2008. Twelve years later, the lawsuit is still on-

¹²³ Nevers, R. “Private security companies and the laws of war.” *Security Dialogue* 40, 2009: 169.

¹²⁴ *International Code of Conduct Association*. “Members.” Accessed on December 2, 2020. <https://icoca.ch/membership/>.

¹²⁵ As emphasized in chapter three, Lehnardt stated that it is indeed possible to sue PMSCs via civil suits. Lehnardt, C. “Individual Liability of Private Military Personnel under International Criminal Law.” *The European Journal of International Law* 19(5), 2008: 1034; Torroja, H. *Public International Law and Human Rights Violations by Private Military and Security Companies*. Cham: Springer International Publishing AG, 2017: 90.

going.¹²⁶ The defence of CACI argued the civil suit is baseless: “The plaintiffs have not identified any mistreatment they suffered at the hands of a CACI PT interrogator, nor have they developed evidence that CACI PT personnel directed anyone to mistreat any of these plaintiffs”. Investigations of the Defense Department however, found that CACI interrogators “directed or participated in some of the abuses, along with a number of military personnel”.¹²⁷ Even though there is no verdict yet, a number of conclusions follow from these developments. Firstly, the CCR has chosen to sue CACI as a legal entity under domestic law of the home state. This means that they have followed the “route” of suing the company instead of individual employees. Furthermore, this case shows how time-consuming the process of starting legal steps as well as the lawsuit itself is.

In Iraq, the five men accused of opening fire in Nisour Square have never faced charges. Even though Iraq’s government maintained this was murder, it was unable to prosecute the contractors. The reason for this is that the head of the Coalition Provisional Authority (CPA), issued CPA Order No 17, which protected contractors from any kind of prosecution in Iraq.¹²⁸ Efforts to prosecute the five Blackwater employees failed until October 2014, when three contractors were convicted for manslaughter and using a machine gun to carry out a violent crime. The fourth contractor was convicted for murder and sentenced to life in prison. The fifth contractor had pleaded guilty to manslaughter before the 2014 trial and cooperated with prosecutors. *The New York Times* reports that the case against these contractors faced a number of hurdles, “many of them of the government’s own making”. There were indications that officials of the State Department tried to gather shell casings after the shooting, trying to protect Blackwater. The State Department also gave limited immunity to the contractors after the shooting, which made it significantly harder to the Justice Department to build its case. In 2009, a judge disregarded all charges concerning governmental behaviour of a careless nature. A new prosecution team salvaged the case but dropped charges against one guard because of a lack of evidence.¹²⁹ Clearly, this illustrates that suing contractors is not only a matter of the law, it is

¹²⁶ *Center for Constitutional Rights*. “Al Shimari, et al. v. CACI.” Last modified on September 9, 2020. Accessed on December 2, 2020. <https://cerjustice.org/AlShimari>.

¹²⁷ Fenton, J., and Abedine, S. “Iraq: Aby Ghraib victims fight for US justice.” *Al-Jazeera*. May 12, 2016. <https://www.aljazeera.com/news/2016/5/12/iraq-abu-ghraib-victims-fight-for-us-justice>; Stempel, J. “Abu Ghraib torture lawsuit revised by U.S. appeals court.” *Reuters*. June 30, 2014. <https://www.reuters.com/article/us-abughraib-caci-idUSKBN0F51BK20140630>.

¹²⁸ Chatterjee, P. “Iraq war logs: military privatisation run amok.” *The Guardian*. October 23, 2010. <https://www.theguardian.com/commentisfree/cifamerica/2010/oct/23/iraq-war-logs-us-military>.

¹²⁹ Apuzzo, M. “Blackwater Guards Found Guilty in 2007 Iraq Killings.” *The New York Times*. October 22, 2014. <https://www.nytimes.com/2014/10/23/us/blackwater-verdict.html>; Sullivan, E. “Blackwater Security Contractor

also a matter of politics. Especially when the contractors are hired by a state, instead of an NGO or private party. In the Nisour Square shooting-case, the contractors were individually sued in their home state in a criminal trial. As a result of the CPA Order No 17, these men could not be sued in host state Iraq. It is striking that the home state forbids prosecution of contractors in the host state, especially because one of the reasons for the intervention in Iraq was to spread democracy. In 2012, the United Nations called upon states to make continuous efforts to strengthen the rule of law and promote democracy by guaranteeing that no individual or public or private institution is above the law.¹³⁰ Nevertheless, the principles of equal protection before the courts and under the law were not respected by the US in Iraq, nine years prior to this UN resolution.

The fourth sub-question, “to what extent has national or international law been successfully applied to PMSCs’ human rights violations in the case of Iraq?” can be answered as follows: in the two researched lawsuits against PMSCs/individual employees, national law has been successfully applied to PMSCs’ human rights violations since the victims of the violations have been able to sue. Through the rule of law, investigations showed the extent of illegal conduct. Regardless of the outcome in the on-going lawsuit against CACI, this paper considers these proceedings successful. Further, these two examples show that possibilities to sue PMSCs are indeed dependent on the willingness of the home/host state.

6. Conclusion

This paper explores and answers the main question “to what extent is the conduct of private military and security companies (PMSCs) morally justifiable, and to what extent do national- and international law standards allow PMSCs to be prosecuted for immoral conduct?” by focussing on four sub-questions. Analysing and comparing primary sources and legal documents, as well as academic literature, together with the two case-studies, provided an extensive answer on this question.

The conduct of PMSCs is morally justifiable when the four conditions of the principle of double effect are met. Proportionality is of key relevance here: to what extent is the conduct of PMSCs proportionate? This principle is reflected in (inter)national law standards as well. Suing

Found Guilty, Again, in Deadly 2007 Iraq Shooting.” *The New York Times*. December 19, 2018. <https://www.nytimes.com/2018/12/19/us/politics/blackwater-security-contractor-iraq-shooting.html>.

¹³⁰ Human Rights Council of the United Nations. “19/36: Human rights, democracy and the rule of law.” A/HRC/RES/19/36. April 19, 2012: 4.

PMSCs for immoral conduct is very complicated, and depends on the intentions and on the legal system of the host state and/or the home state. If the state is willing to prosecute, there are three options: 1) sue individual employees via IHL, 2) sue individual employees via (inter)national criminal law, and 3) sue the company as a legal entity via civil proceedings. The case-studies on Sierra Leone and Iraq confirm how complicated suing PMSCs is. Furthermore, the case on Iraq shows that lawsuits against PMSCs or individual employees are very time-consuming.

Another conclusion of this research is that there is little progress in terms of prosecuting PMSCs worldwide. Comparing the case on Sierra Leone with the case on Iraq, it seems as if over a time span of roughly ten years, it has become easier to sue PMSCs. However, in the recent case of Libya, there have been no examples of legal proceedings against PMSCs, so this precarious development of progress has not carried on yet. Another explanation of the “progress”, is that when the rule of law of either the host- or home state is highly developed, it is easier to prosecute PMSCs. Since in various contemporary conflicts, PMSCs fight in countries where the rule of law is less developed, it is harder to initiate legal proceedings. Still, the willingness of the host/home state to prosecute immoral conduct by PMSCs remains crucial. The *Al Shimari v. CACI* lawsuit shows how, even in states with a developed rule of law (the US), a state’s unwillingness to prosecute can complicate legal proceedings to a high extent.

National and international laws are often not enforced on PMSCs. A limitation of this research is its lack of attention for the political background of government’s decisions not to prosecute PMSCs. The lawsuits presented in this paper are the tip of the iceberg for what concerns human rights violations committed by PMSCs. Unfortunately, the perpetrators of these violations often go free due to a lack of 1) evidence, 2) media coverage, and 3) states’ unwillingness to prosecute. This third factor on why perpetrators go free has not been researched often nor extensively in the current academic literature. Academic research on why legal proceedings against PMSCs are often absent, even when it is obvious that contractors have committed human rights violations, is scarce in general. Suggestions for further research therefore comprehend to explore this, and analyse how this matter can be improved. Is it for example possible to make stricter rules on the acceptance of new employees of a PMSCs? And would this be a viable solution to the problem? Or, can the oversight of PMSCs’ conduct become stricter? In the current academic literature, research on how to decrease the negative effects of PMSCs’ conduct is almost absent as well. This is a pity, since these valuable insights

can contribute to improve the main discrepancy between the pessimists and the optimists (see chapter two). Is choosing private solutions to intractable security problems worth the undermining of state control and democratic processes? As soon as PMSCs can provide these solutions without undermining state control and democratic processes, their potential to solve violent conflicts and save lives is exceptional.

7. Appendices

Table 1. PMSCs in the Sierra Leone civil war. This table is from Faulkner, Lambert and Powell.¹³¹

<i>Company name</i>	<i>Service provisions</i>
Specialist Services International (SSI)	German firm providing customs collection and port management for revenue generation.
Marine/Maritime Protection Services (MPSSL)	British firm hired to police and prevent illegal fishing and collect fishing royalties for revenue generation.
Frontline Security Services (FSS)	Hired by Sierra Rutile and Sierra Ore and Metal Company (SIEROMCO) for the protection of area that had been leased for mining.
Special Protection Services Ltd. (SPS; Special Project Services Ltd.)	Approached by Sierra Rutile and SIEROMO for the protection of their interests in Sierra Leone following the GSG’s failure. *no conclusive evidence that a contract was actually signed.
Gurkha Security Guards (GSG)	Security for mining company Sierra Rutile in collaboration with the Sierra Leone Government. Provided training services for officers and cadets of the RSLMF.
Executive Outcomes (EO)	Frontline combat operations and military training.
Ibis Air International	Provided EO air service during its campaign in Sierra Leone.
LifeGuard Management	Protection of diamond mines in Sierra Leone – owned by Barlow – part of the EO conglomerate. Transferred tasks to Sandline in January of 1998.
Teleservices	Angolan security firm hired by EO for mine security. Developed by EO in Angola.
Control Risks (CR); Group 4	Security company focused on consultancy for risk assessment. Worked with mining companies/PMSCs on situations involving kidnapping and ransom.
Defense Systems Limited (DSL)	Early activities included mine security and guard management. Later, acquired by the US firm ArmourGroup International and contracted by the UN for support and security. Advertised “it ‘never gets involved in other people’s wars. It’s simply not an aspect of our business... We want to

¹³¹ Faulker, C., Lambert, J., and Powell, J. “Reassessing private military and security company (PMSC) ‘competition’ in civil war: lessons from Sierra Leone.” *Small Wars and Insurgencies* 30(3), 2019: 646.

	<p>establish clear blue water between us and mercenary firms”.</p> <p>*Had recommended Sandline to Papua New Guinea Government.</p>
Sandline International	<p>Provided combat operations for the deposed Kabbah regime for a counter-coup. Significant links to EO.</p>
Pacific Architects & Engineers (PA&E)	<p>Logistical support for ECOMOG peacekeeping troops in Sierra Leone.</p>
Cape International Corporation	<p>Co-founded by Fred Marrafono and two other former members of EO. Marrafono who had befriended Chief Samuel Hinga Norman, coordinator of the Civilian Defence Forces (CDF), used this organization as a way to continue to train the Kamajors following EO’s departure. The company is also rumoured to have contracted with a mining company (Golden Prospect Mining Company) to provide security.</p>

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