



## Introduction

The past two decades have witnessed the rapid growth and consolidation of the global private security industry. Tens of thousands of contractors working for private military and security companies (PMSCs) now provide a wide range of services to states, international organisations, corporations and non-governmental organisations around the world. Many PMSCs operate in zones of armed conflict, where they carry out functions that were formerly the exclusive domain of the armed forces. In this context, PMSCs have performed coercive activities such as offensive combat, armed security and the detention and interrogation of prisoners, as well as non-coercive activities such as military advice and training, transport, housing and intelligence collection and analysis. Some PMSCs provide a wide range of military and security services, whilst others specialise in a small number of specific activities.

Nowhere has the scale and scope of PMSC activity been more evident than in Iraq and Afghanistan, where the US has become dependent on private contractors to carry out its operations. During the period from 2003 to 2007, US agencies awarded around US\$85 billion in contracts for work to be performed in the Iraqi theatre alone.<sup>1</sup> By 2007, the number of contractors working for the US in the Iraqi theatre was at least 190,000 – more than the number of US troops – and the ratio of contractors to US troops was at least 2.5 times higher than it had been during any other major US conflict.<sup>2</sup> Subsequently, as the Obama administration shifted its focus from Iraq to Afghanistan, the number of contractors working for the US in Iraq began to decline, while the number in Afghanistan increased significantly.<sup>3</sup> In 2010, contractors made up around 54 per cent of the

1 US Congressional Budget Office, 'Contractors' Support of US Operations in Iraq' (August 2008). The following countries are considered to be part of the Iraqi theatre: Iraq, Bahrain, Jordan, Kuwait, Oman, Qatar, Saudi Arabia, Turkey and the United Arab Emirates.

2 *Ibid.*

3 US Commission on Wartime Contracting, 'At What Cost? Contingency Contracting in Iraq and Afghanistan' (10 June 2009).

US Department of Defense (DOD) workforce in Iraq and Afghanistan, with the total number of DOD contractors in those countries hovering around 250,000 and additional contractors working for other government agencies.<sup>4</sup>

The extensive outsourcing of military and security activities calls into question twentieth-century paradigms of interstate warfare and conventional conceptions of the state as the primary holder of coercive power.<sup>5</sup> Indeed, although private force is by no means a new phenomenon in historical terms, the recent proliferation of private, profit-driven military and security actors signals a clear shift in the modern conceptualisation and delivery of security. This presents significant challenges for the normative frameworks and accountability structures of traditional international law, which largely assume that the use of force in the international arena falls within the mandate of state institutions. Of particular concern is the reduction in state *control* over military and security activities, as well as the lack of adequate *accountability* mechanisms for PMSC misconduct in the field. Whilst there is no evidence that private contractors are more likely to misbehave than national troops, private contractors certainly can, like national soldiers, engage in inappropriate or harmful behaviour in the course of performing their functions. Yet states often fail to take the same measures to control PMSC personnel that they would ordinarily take to control national soldiers, and many of the accountability mechanisms that exist for the national armed forces are weak or absent in the case of PMSCs.

Notwithstanding these challenges, this book argues that the state-centred frameworks of traditional international law are in fact sufficiently flexible to accommodate the modern private security industry. The extensive use of PMSCs has certainly reduced reliance on national

4 Schwartz, 'Department of Defense Contractors in Iraq and Afghanistan: Background and Analysis', Congressional Research Service Report for Congress R40764 (2 July 2010); see also US Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, 'Contractor Support of US Operations in the USCENTCOM Area of Responsibility, Iraq, and Afghanistan' (May 2010); US Government Accountability Office, 'Contingency Contracting: Improvements Needed in Management of Contractors Supporting Contract and Grant Administration in Iraq and Afghanistan' (April 2010).

5 Max Weber's classic definition of the modern nation-state as 'a human community that (successfully) claims the monopoly of the legitimate use of physical force' has been conventional wisdom since the mid-nineteenth century and remains the obvious point of reference for most contemporary inquiries: see, e.g., Gerth and Mills, *From Max Weber: Essays in Sociology* (1948), 77–8; Weber, *The Theory of Social and Economic Organization* (1964).

armed forces, but it has not undermined the role of the state *per se* in regulating contemporary armed conflict. In general, for every PMSC working in a conflict zone, three states retain a significant capacity to influence company behaviour and to promote accountability in cases of contractor misconduct: first, the state that hires the PMSC (the hiring state); secondly, the state in which the PMSC operates (the host state); and thirdly, the state in which the PMSC is based or incorporated (the home state). This book critically analyses the principal international obligations on these three states and discusses how PMSC misconduct may give rise to state responsibility in each case. In addition, this book evaluates the recent laws and practices of certain key states in order to ascertain the extent to which those states appear to be fulfilling their international obligations. This two-way analysis fills a critical gap in the existing private security literature, as there is currently little in-depth analysis of the relationship between states' domestic frameworks on the one hand and states' international legal obligations and responsibility on the other.

Chapter 1 presents the historical, normative and factual background of the private security industry. It traces the historical evolution of private military actors and assesses how perceptions of their legitimacy and utility have shifted over time. It then critically examines the moral and practical objections that consistently arose in relation to private military actors in the past, and considers the extent to which similar concerns have arisen in relation to modern PMSCs. Within this historical and normative context, Chapter 1 scrutinises the facts surrounding the contemporary private security industry, first locating PMSCs on the broader spectrum of military and security service provision, and then examining their general character and the main activities that they perform in armed conflict today.

Chapter 2 lays the theoretical groundwork for the book by outlining the basic normative structure of the international legal system and explaining how the law of state responsibility operates within that systemic context. It discusses the general nature of international obligations and the conditions for breach, and identifies the key categories of obligations on the hiring state, the home state and the host state of a PMSC. Within this conceptual framework, Chapter 2 identifies the different ways in which states may violate their obligations through state organs or other individuals acting as state agents, and it then outlines the general circumstances that may justify or excuse states' otherwise wrongful acts. This paves the way for a detailed analysis of the obligations and responsibility of the hiring state, the host state and the home state in the subsequent chapters of the book.

Chapter 3 critically examines the attribution of PMSC misconduct to the hiring state. It identifies three situations in which such attribution may occur: first, in rare cases the contractor may form part of the hiring state's armed forces; secondly, and more commonly, the contractor may be empowered by the law of the hiring state to exercise elements of governmental authority; and, thirdly, the contractor may be acting on the instructions or under the direction or control of the hiring state when he or she engages in the relevant misconduct. Chapter 3 argues that a large proportion of PMSC activity in armed conflict will fall within at least one of these three categories. In practice, however, it will frequently be more difficult to prove the responsibility of the hiring state for violations committed by a PMSC employee than it would be if a national soldier of that state were to behave in the same way, and some PMSC conduct may fall outside the rules of attribution altogether. This reveals a potential responsibility gap between states that act through their national armed forces and states that hire PMSCs.

Chapters 4, 5 and 6 closely analyse the obligations on the host state, the hiring state and the home state to take positive steps to prevent, investigate, punish and redress PMSC misconduct in the field. Where such an obligation applies and a state fails to take the necessary measures to control PMSC behaviour, contractor misconduct may give rise to the responsibility of that state under international law. Although it is the PMSC employee's misconduct that triggers state responsibility in such cases, it is the state's *own failure* to take adequate preventive or remedial measures that in fact constitutes the basis for the state's responsibility, and not the PMSC activity itself. The obligations discussed in these three chapters may provide a pathway to state responsibility that is independent of the attribution of PMSC misconduct to the hiring state, thus helping to bridge the attribution gap (identified in Chapter 3) between PMSCs and national soldiers.

The legal analysis in this book focuses on PMSCs operating in armed conflict, including situations of military occupation. In this context, international humanitarian law (IHL) will be applicable and may influence the interpretation of other international legal frameworks, such as human rights law. Yet it is important to bear in mind that many PMSCs also operate in other contexts, such as peacekeeping, territorial administration and post-conflict reconstruction, where IHL will not apply and where other frameworks will assume primary importance. Although non-conflict situations are not the principal focus of this book, certain parts of the analysis are highly relevant in those contexts, particularly the assessment

of the law of state responsibility in Chapters 2–3 and of human rights law in Chapters 4–6.

Overall, this book may facilitate the assessment of state responsibility in cases of PMSC misconduct, by identifying and expounding the content of states' obligations to control PMSCs in armed conflict and the precise circumstances in which contractors' misconduct may give rise to state responsibility. This book does *not* argue that the law of state responsibility is sufficient in itself to address the control and accountability concerns surrounding the private security industry; on the contrary, any response should incorporate a range of strategies targeting various actors including individual contractors, PMSCs and states.<sup>6</sup> Nonetheless, the law of state responsibility provides a useful mechanism for addressing some of these concerns and, in doing so, it provides a significant legal incentive to states themselves to exert greater control over PMSC activity. More generally, by highlighting and clarifying the pertinent international obligations on states, this book could play an important standard-setting role to encourage and assist states in developing their domestic laws and practices on private security, with a view to improving overall PMSC compliance with international law.

6 Similarly, the UN Working Group that is studying the private security industry supports a 'three-tier approach' to the regulation of PMSCs, including self-regulation, regulation at the national level, and international regulatory legal standards and oversight mechanisms: see Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination (2 July 2010), UN Doc. A/HRC/15/25.

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## The private security industry uncovered

Private, profit-driven military actors are almost as old as warfare itself, and were a central component of most wars until the mid-nineteenth century. Throughout history, these individuals triggered various moral and practical objections which ultimately affected their success in the international system. Whilst the modern private security industry is unprecedented in its scale and sophistication, it shares a number of characteristics with past markets for force, and some PMSCs have attracted social stigma similar to that borne by their historical counterparts. An understanding of this historical and normative backdrop provides a key foundation for the analysis of states' international obligations to control PMSCs in contemporary armed conflict.

Accordingly, this chapter provides a critical overview of the private security industry in its historical and normative context. The first section traces the historical evolution of private military actors, and assesses how perceptions of the legitimacy and utility of those actors shifted over time. The second section draws on that historical analysis in order to identify three recurring objections to private force, and considers the extent to which those objections have arisen in response to modern PMSCs. The third section scrutinises the contemporary spectrum of military/security service provision, and locates modern PMSCs on that spectrum by reference to other actors such as mercenaries and national soldiers. Finally, the fourth section examines the private security industry in depth. What exactly are PMSCs and what do they do? It first considers the nature of the companies themselves, the conflicts in which they operate and the clients for whom they work, and it then develops a typology of the private security industry by classifying PMSC services into four categories. This typology is central to the legal analysis in subsequent chapters because the scope of states' international obligations to control a PMSC in armed conflict depends primarily on the services provided by that company in a particular case.

### 1.1 History of private military actors in international relations

Max Weber's classic definition of the modern nation-state as 'a human community that (successfully) claims the monopoly of the legitimate use of physical force' has been conventional wisdom since the mid-nineteenth century.<sup>1</sup> Twentieth-century paradigms of interstate warfare between standing national armies reflect this model of the state as the primary holder of coercive power. Even as states privatised many core public services during the latter half of the twentieth century, the military continued to be regarded as *qualitatively* different and thus remained one of the last bastions of government monopoly. Indeed, as Samuel Huntington noted in 1957, 'while all professions are to some extent regulated by the state, the military profession is monopolised by the state'.<sup>2</sup>

Although Weber's conception of the state has been the obvious reference point for most modern debates about international security, in historical terms state monopoly over force is actually an anomaly. States have a long history of reliance on the private sector for military operations, going right back to the armies of ancient China, Greece and Rome.<sup>3</sup> Twelfth-century feudal lords supplemented their forces by hiring foreign, independent and profit-motivated fighters, as did the Pope, the Renaissance Italian city-states and most of the European forces during the Thirty Years' War of 1618–48. Reliance on private force essentially persisted in various forms until the nineteenth century, when the modern paradigm of interstate warfare between citizen armies prevailed. Thomson explains:

The contemporary organisation of global violence is neither timeless nor natural. It is distinctively modern. In the six centuries leading up to 1900, global violence was democratised, marketised, and internationalised. Non-state violence dominated the international system.<sup>4</sup>

This section critically examines how the 'contemporary organisation of global violence' evolved from the twelfth century to today, and considers

1 See Gerth and Mills, *From Max Weber* (1948), 77–8; Weber, *The Theory of Social and Economic Organization* (1964); Weber, *Economy and Society: An Outline of Interpretive Sociology* (1978), 54.

2 Huntington, *The Soldier and the State: The Theory and Politics of Civil–Military Relations* (1957), 37.

3 For a detailed history of private military service, see Mockler, *The New Mercenaries* (1985), ch. 1; Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (1994); Percy, *Mercenaries: The History of a Norm in International Relations* (2007); France (ed.), *Mercenaries and Paid Men: The Mercenary Identity in the Middle Ages* (2008).

4 Thomson, *Mercenaries, Pirates, and Sovereigns*, 3.

how changing perceptions of the legitimacy and utility of private force can help to explain that evolution. This discussion focuses on the *perceived* legitimacy of private military actors, and does not attempt to assess their actual legitimacy on the basis of some moral, political and/or legal criteria. In other words, the notion of legitimacy is used in this chapter in a descriptive rather than a normative sense.<sup>5</sup> This is appropriate as it is the *perception* of illegitimacy that can influence the responses of states and the international media, and this in turn can hinder the success of the private military actors themselves.

*Private force in twelfth- to seventeenth-century Europe*

Foreign, independent and profit-motivated fighters – known in common parlance as mercenaries<sup>6</sup> – were widespread in Europe between the twelfth and seventeenth centuries. These individuals freely sold their military services to the highest bidder on the international stage. Some mercenaries joined together to offer a collective form of military service known as ‘free companies’. Perhaps the earliest example was the Grand Catalan Company hired by the Byzantine Emperor to fight the Turks around 1300.<sup>7</sup> Free companies played a crucial role in the Hundred Years’ war of 1337–1453, and continued to provide military services on the European market for some time thereafter. Far from being accepted as legitimate actors on the international stage, these companies gained notoriety as quasi-criminal, loosely organised bands whose members often behaved reprehensibly whilst performing their contracts and then worked for themselves pillaging Europe in between formal employment.<sup>8</sup> Fowler notes that the free companies were ‘an affront to order’<sup>9</sup> and ‘one of the major problems facing those responsible for government and the rule of law in western Europe’.<sup>10</sup>

In Renaissance Italy, instead of hiring free companies, the northern city-states contracted with independent commanders known as *condottieri*

5 For a discussion of legitimacy in the normative sense, see Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (2004).

6 The term ‘mercenary’ is used in the first two sections of this chapter in a non-technical and non-legal sense to refer to any foreign, independent and profit-motivated fighter. The legal definition of a mercenary, on the other hand, is discussed in the third section of this chapter, and in greater detail in the first section of Chapter 5.

7 Mockler, *The Mercenaries* (1969), 9–10.

8 Mallett, *Mercenaries and Their Masters* (1974), 27–9.

9 Fowler, ‘War and Change in Late Medieval France and England’, in Fowler (ed.), *The Hundred Years War* (1971), 171.

10 Fowler, *Medieval Mercenaries* (2001), vol. I, 1.



to supply specific numbers of troops for particular military services.<sup>11</sup> Although the *condottieri* were less problematic than the free companies in other parts of Europe, the system nonetheless caused periodic difficulties for the Italian city-states, particularly during the pause in the Hundred Years' War between 1360 and 1369.<sup>12</sup>

The use of private fighters enabled rulers to further foreign policy interests abroad without having to accept responsibility if their endeavours failed. This contributed much to rulers' political, territorial and economic goals, at little cost to themselves.<sup>13</sup> Nonetheless, this international system of marketised force had serious practical shortcomings, as the *ad hoc* delegation of violence to freelance mercenaries led to a lack of legitimate control over force – that is, a lack of control imposed by the entity that was understood to have the authority to wage war, be it a sovereign state, a king, a prince or even the Pope.<sup>14</sup> The practice of privateering, whereby rulers authorised private naval actors to carry out hostilities at sea, led to organised piracy. Mercenaries' activities overseas threatened to drag their home states into foreign conflicts to which they were not a party. Empowered mercantile companies used violence against each other and even against their home states.<sup>15</sup> In short, states and other rulers proved unable to control the independent fighters that they hired, and then simply disclaimed responsibility when their private endeavours produced negative consequences. The post-Westphalian rise of the nation-state did not immediately reverse this trend, leading to a situation that Thomson describes as 'probably the closest the modern state system has come to experiencing real anarchy'.<sup>16</sup>

*The first shift away from mercenary use: state troop exchange*

Between the fifteenth and seventeenth centuries, many European rulers addressed these practical problems of control by formally integrating foreign fighters into their standing armies and buying or leasing army units from other rulers. As Percy explains, '[t]he challenges posed by independent companies of mercenaries were overcome by bringing the use of force under centralised control and creating more permanent armies'.<sup>17</sup> The practice of states officially buying and leasing troops from other states

11 Mockler, *The Mercenaries*, 44.      12 Mallett, *Mercenaries and Their Masters*, 27.

13 Thomson, *Mercenaries, Pirates, and Sovereigns*, 21, 32–3, 43, 84–8; Avant, *The Market for Force: The Consequences of Privatizing Security* (2005), 27.

14 See Percy, *Mercenaries: The History of a Norm*, 57.

15 Thomson, *Mercenaries, Pirates, and Sovereigns*, 67–8.      16 *Ibid.*, 43.

17 Percy, *Mercenaries: The History of a Norm*, 83.

became so common that, by the eighteenth century, foreigners constituted between 25 and 60 per cent of regular European standing armies.<sup>18</sup> Accompanying this increase in official state-based troop exchange was a decrease in states' use of independent mercenaries hired on the open market. In fact, by the eighteenth century, independent mercenaries freely selling their services to the highest bidder had virtually disappeared.<sup>19</sup> This broad shift in practice towards the formal exchange of foreign fighters within state-based institutions eliminated many of the practical problems of control and accountability that had been associated with the independent mercenaries of earlier years.

*The second shift away from mercenary use: citizen armies*

It was not until the nineteenth century, however, that states shunned the use of foreign fighters altogether by ending the official exchange of military units with other states. The Napoleonic Wars separated the 'wars of kings' from the 'wars of people', and this led to a remarkable change in the conduct of European warfare as states began to fight wars using exclusively their own citizens. As Avant observes, '[m]ercenaries went out of style in the nineteenth century . . . It became common sense that armies should be staffed with citizens.'<sup>20</sup>

A combination of material and ideational changes had preceded the French Revolution and laid the groundwork for the shift towards citizen armies.<sup>21</sup> Material changes arose from the pressures of population growth, which required territorial expansion and organisational and technological changes in military institutions. Armies of nationalistic soldiers fighting for their country gradually came to be seen as more effective than armies of mercenaries.<sup>22</sup> Ideational changes arose from Enlightenment ideas which motivated military and constitutional reformers to advocate

18 Mockler, *The New Mercenaries*, 8.

19 Percy, *Mercenaries: The History of a Norm*, ch. 3.

20 Avant, 'From Mercenaries to Citizen Armies: Explaining Change in the Practice of War' (2000) 54(1) *International Organization* 41, 41.

21 The term 'citizen army' is sometimes used to refer to an army of conscripts and at other times to an army of citizens fighting for their own country (even if they volunteer). For the purposes of this discussion, the latter definition is more important.

22 E. Cohen, *Citizens and Soldiers: The Dilemmas of Military Service* (1985); Gooch, *Armies in Europe* (1980); Posen, 'Nationalism, the Mass Army, and Military Power' (1993) 18(2) *International Security* 80; McNeill, *The Pursuit of Power: Technology, Armed Force, and Society Since AD 1000* (1982); Rothenberg, *The Art of Warfare in the Age of Napoleon* (1977).