

# Private Military and Security Companies



# Private Military and Security Companies:

*The Implications Under  
International Law  
of Doing Business in War*

By

Erika Calazans

Cambridge  
Scholars  
Publishing



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This book first published 2016

Cambridge Scholars Publishing

Lady Stephenson Library, Newcastle upon Tyne, NE6 2PA, UK

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

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ISBN (10): 1-4438-9061-8

ISBN (13): 978-1-4438-9061-8

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## FOREWORD

### PROFESSOR SHIGEKI SAKAMOTO

I gladly comply with Dr. Érika Calazans' request that I should add a few words by way of introduction to her book. Dr. Calazans' book is an edited version of the thesis she prepared at the Graduate School of Law at Kobe University, Japan. This is the first study which aims to systematically and comprehensively explore this emerging legal subject.

Dr. Calazans produced a careful analysis of the new subject based on her research in a mass of legal materials with regard to Private Military and Security Companies (PMSCs). This is a pioneering work on PMSCs, illuminating this new topic from the viewpoint of international humanitarian law and the law of state responsibility. It also makes clear that the topic of PMSCs is of practical significance to contemporary international law.

In her work on PMSCs in international law, Dr. Calazans assesses the extent of this new phenomenon and addresses its implications. Furthermore, she tries to identify rules that may govern and develop theoretical and judicial understanding of the legal framework addressing PMSCs. Therefore, her study will provide the most useful guide to those who are interested in this new topic.

It is difficult for me to be impartial in assessing the work of my former student advisee, but I hope this book will be warmly welcomed by the international legal community.

Shigeki Sakamoto  
Emeritus Professor of Kobe University  
President of the Japanese Society of International Law



## PREFACE

This book is the result of the research I developed during my PhD in Japan. The primary concern of this work is to discuss the application of international humanitarian law (IHL) and international human rights law (IHRL) to address private contractors' business conduct during armed conflicts, but also to address state responsibility for human rights violations and the current attempts at regulation at the international level.

The book strives to achieve four interconnected objectives. First, it aims to differentiate private contractors from mercenaries, presenting a historical overview of private violence. Second, it intends to situate Private Military and Security Companies' (PMSCs) employees under the legal status of civilian or combatant in accordance with the Third and Fourth Geneva Conventions of 1949. Third, it aims to investigate the existing law on state responsibility and what sort of responsibility companies and their employees can face. And fourth, the book will discuss current developments on regulation within the industry and on national, regional and international levels. These objectives are interconnected by the argument that in order to find the gaps in the existing law it is necessary to establish what they are, which law is applicable and what further developments are needed.

Systemic research on the subject of PMSCs faces obstacles which limit the methodological options. The first obstacle is the lack of transparency and the unwillingness of PMSCs and clients to share information.<sup>1</sup> As a consequence, there is a gap in the literature regarding several basic issues such as the number, size and structure of companies and, more importantly, there is no information on the content of contracts.

The second obstacle is that most of the debate is polarized. Some authors consider PMSCs to be an evolution of classic mercenaries<sup>2</sup> while others believe they are a solution for several issues of international

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<sup>1</sup> In order to collect additional data on American and British companies, both the International Stability Operations Association and the British Association of Private Security Companies were contacted on different occasions but unfortunately no information was provided.

<sup>2</sup> Musah, Abdel-Fatau; Fayemi, J. Kayode (eds.), 'Mercenaries: an African security dilemma (First Edition, 2000).

security.<sup>3</sup> The academia, on different occasions, focus on labeling them as “good” or “bad”<sup>4</sup> instead of further developing the understanding of the legal dilemmas associated with the industry.

This book addresses the research objectives by adopting a descriptive approach combined with case-based reasoning. In other words, it relies primarily on a qualitative analysis of textual sources dealing with principles of IHL and state responsibility.

This work does not intend to be a definitive answer, but to further develop theoretical and judicial understanding of the legal framework surrounding PMSCs and generate new insights to contribute to further developments of a legal framework.

The research that resulted in this book was only possible due to the support of the Japanese Government from 2007 to 2012. I was lucky enough to receive the “Monbukagakusho” Scholarship from the Ministry of Education, Culture, Sports, Science and Technology (MEXT) and for that, I am truly grateful to Japan. I had the privilege of studying at Kobe University under the supervision of Professor Shigeki Sakamoto. He is a world-class scholar and a brilliant mind who helped me through the entire process of writing my work. I’m forever thankful to his kindness and patience over almost 4 years.

I also want to express my gratitude to Professor Mari Koyano, from Hokkaido University. She was responsible for helping me further develop my legal thinking, and through her example I was able to see the type of scholar I want to be someday. Finally, I would like to thank my friend Francisco Fonseca for reviewing this book, my husband José Freire Neto for always been there, and my mother Vânia Calazans for her love and support in every project I undertook throughout my entire life.

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<sup>3</sup> Shearer, David, ‘Private armies and military intervention’ (1998) 316 *Adelphi Paper* Oxford University Press.

<sup>4</sup> Berndtsson, Joakim, ‘The privatization of security and State control of force; changes, challenges and the case of Iraq’ (2009) 15.

# INTRODUCTION

During the 1990s Executive Outcomes and Sandline International, two famous Private Military and Security Companies (PMSCs), got involved in the armed conflicts in Angola and Sierra Leone. The active presence of these companies in the conflicts motivated debate and research on the subject.

Since then, the number of companies developing activities in armed conflicts has increased considerably. In fact, the Afghanistan war and the Iraq war became notorious for the heavy reliance of the US government on PMSC services. For instance, more than 30,000 private contractors were developing activities in Iraq during the armed conflict, of which the US government hired more than 3,000.<sup>1</sup> Furthermore, three incidents involving private contractors in human rights and international humanitarian law violations raised several questions on state responsibility and private contractors' accountability. The Nisoor Square massacre, the killings in Fallujah and the human rights violations in Abu Ghraib prison are the most prominent cases, widely publicized in the media, highlighting the controversy surrounding the industry.

On September 16, 2007 Blackwater's employees killed seventeen Iraq civilians and wounded twenty-four in Baghdad's Nisoor Square. Blackwater's employees were escorting Kerry Pelzmans, a US Agency for International Development (USAID) official when the incident occurred.<sup>2</sup>

In 2004, gross human rights violations took place inside the Abu Ghraib prison, with the involvement of Titan and CIAC's employees. The human rights violations included the torture, rape, sodomy and murder of Iraqi prisoners.

On March 31, 2004 four employees of Blackwater were killed by small arms fire while driving through Fallujah. Their bodies were then taken out of their convoy and mutilated by Iraqis. Images of two of the private contractors' corpses hanging over the Euphrates River were sent all over

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<sup>1</sup> Singer, Peter Warren, *Corporate Warriors: the rise of the privatized military industry* (updated edition, 2008).

<sup>2</sup> Human Rights First, *State of Affairs: three years after Nisoor Square – Accountability and Oversight of US Private Security and Other Contractors* (2010), 1-22. <http://www.humanrightsfirst.org/>

the world. Blackwater then faced a lawsuit filed by the victims' families claiming that the company was responsible for their deaths.

In the last decade scholars have made relevant contributions to improve theoretical understanding and knowledge of PMSCs. Nevertheless, legal scholars' debate has focused mostly on the issue of legitimacy, definition and classification of private contractors.

Recently, the discussion has evolved to include: the dichotomy between public and private functions; the delimitation of military and civilian actors; PMSC employees' legal status under IHL; and state responsibility and PMSC accountability for violations. Yet the research in this field is in its early stages and many questions remain only partially answered, requiring further investigation and discussion.

PMSCs have a controversial position under international law and on several occasions it has been said that companies and employees have no legal status and therefore no obligations.<sup>3</sup> Additionally, PMSC employees are frequently compared to mercenaries, since they are paid to provide services during armed conflicts, which are usually close to the heart of military functions.<sup>4</sup> Although companies do not have a legal status or liabilities expressed under IHL, employees can be included under the category of combatant or civilian. Their legal status will depend on their relationship with the contracting state, the type of activities provided and the satisfaction of the criteria of the Third and Fourth Geneva Conventions of 1949.

It is also important to clarify the difference between PMSC employees and mercenaries, and to confirm the inapplicability of mercenary treaties to the situation of private contractors. While mercenaries participate directly in hostilities for money with no ethical attachment, PMSCs are legal enterprises, usually hired to provide services with which the military lack expertise, and not to fight in a specific conflict.<sup>5</sup>

As there is a controversy surrounding the legal status of private contractors, and due to the inapplicability of mercenary treaties, some authors have claimed that private contractors operate in a "legal vacuum"<sup>6</sup>

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<sup>3</sup> Gillard, Emanuela Chiara, 'Business goes to war: private military/security companies and international humanitarian law' (2006) 88 [863] *International Review of Red Cross*, 525-572.

<sup>4</sup> Musah, Abdel-Fatau; Fayemi, J. Kayode (eds.), 'Mercenaries: an African security dilemma' (First Edition, 2000).

<sup>5</sup> Fallah, Katherine, 'Corporate actors: the legal status of mercenaries in armed conflicts' (2006) 88 [863] *International Review of Red Cross*, 599-611.

<sup>6</sup> Singer, Peter Warren, 'War Profits and the Vacuum of law: Privatized Military Firms and International Law' (2004) 42 [521] *Columbia Journal of transnational*

and that there is a gap in international law. However, private contractors will be included under the category of civilian or combatant in accordance with international humanitarian law. Depending on their legal status, the private contractor will have a relationship with a state and different international obligations will arise both for state and individual. For instance, when considered a combatant under the auspices of Article 4 A (1), companies' are included among state armed forces and have the right to take direct part in hostilities, and even if they kill an enemy while directly engaged, they cannot be prosecuted for that action, while civilians are committing a crime when directly participating in hostilities.

State responsibilities will differ depending on the relationship established with PMSCs. For instance, under the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts (DASR) Article 4, PMSCs incorporated among the armed forces will be considered state organs and therefore states are responsible for their misconduct. PMSCs' employees will be criminally responsible when committing war crimes or crimes against humanity.

Nevertheless, enforcement of the existing law and oversight of PMSC activities have been very limited. For instance, after the killings in Nisour Square, four of Blackwater's employees are still facing manslaughter charges.<sup>7</sup> In the Abu Ghraib abuse case, nine Americans were found guilty,<sup>8</sup> but the US Court of Appeals of the DC District ruled 2 to 1 to dismiss Saleh v. Titan,<sup>9</sup> a lawsuit brought against Titan and CACI International, leaving private contractors under the veil of impunity.<sup>10</sup> Therefore, oversight and

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law, 521-550.

<sup>7</sup> DeWinter-Schmitt, Rebecca, 'Holding Private Security Contractors Accountable for Human Rights Abuses' (2011) <http://blog.amnestyusa.org/justice/holding-private-security-contractors-accountable-for-human-rights-abuses/> at 8 November 2011.

<sup>8</sup> The New York Times, Abu Ghraib Prison .  
[http://topics.nytimes.com/topics/news/international/countriesandterritories/iraq/abu\\_ghraib/index.html](http://topics.nytimes.com/topics/news/international/countriesandterritories/iraq/abu_ghraib/index.html).

<sup>9</sup> Saleh v. Titan was a federal lawsuit brought by more than 250 Iraqi victims against private contractors from CACI International and Titan Corporation (now L-3 Services), charging the companies with torture and other heinous and illegal acts committed against Iraqi detainees in Abu Ghraib prison, while contractors were providing interrogation and translation services. Haidar Muhsin Saleh, et al v. Titan Corporation et al., 2004, CV 1143 R (NLS).  
<http://ccrjustice.org/ourcases/current-cases/saleh-v-titan>.

<sup>10</sup> Human Rights Now, the Amnesty International USA Web Log, 'US appeals court sets dangerous precedent against victims of torture' (2009)  
<<http://blog.amnestyusa.org/business/dangerous-precedent-further-blocks-efforts->

accountability gaps remain in jurisdiction over contractors who commit serious violent crimes.

Several initiatives on specific regulations to address the industry have been put forward on national, regional and international levels, and companies have even developed self-regulation instruments. Still, the existing law has been insufficient to address the pressing issues raised by the presence of PMSCs in armed conflict situations.

## **Book outline**

This book is divided into five parts: Chapter 1 will present a historical overview of private violence; Chapter 2 will focus on the rise of Private Military and Security Companies and the question of denomination; Chapter 3 will discuss the legal status of PMSC employees under IHL; Chapter 4 will address state responsibility and companies' and employees' accountability for IHL and IHRL violations; Chapter 5 will present and discuss the current attempts at regulation of the PMSC industry.

Chapter 1 seeks to summarize and highlight some historical events that illustrate the presence of private actors during warfare and demonstrate their importance in that context. The chapter will also consider the situations of growth and the relationship between these private agents and the private contractors of today.

Chapter 2 considers the factors contributing to the rise of the industry, the definition and classification of PMSC. The downsizing of standing armies during the Post-Cold War period, the disengagement of major powers from the developing world and the reluctance to assist weak states also facilitated the growth of the PMSC industry. Accompanying these factors, there was also the privatization trend under which states were privatizing several governmental functions and activities.

Regarding PMSC definition and classification of PMSCs, several authors have not yet agreed on a definition or a specific classification. Some authors prefer to address the industry as Private Security Companies, arguing that the term "security" is wider, while others prefer to designate the industry as Private Military Companies, since most of their services are addressed to the assistance of armed forces and provided in armed conflict situations.

Nevertheless, state practice and the Montreux Document of 2008 adopted a functional approach, which addresses the industry as Private

Military and Security Companies. This approach disregards how the industry addresses itself and the dichotomy between Private Military and Private Security terminology, focusing on the actual services provided, as the same company can provide more than one type of service. PMSCs can provide nonlethal aid, assistance, logistics, intelligence, technical support, supply and transportation, training, military advice, unarmed support, police training, intelligence gathering, risk assessment and several other services.

Chapter 3 will focus on determining legal status, based on international humanitarian law. PMSCs have a controversial position under international law and on several occasions have been said not to have a status or legal obligations. Nevertheless, according to the relationship with the state and the activities performed the legal status of employees can be determined. Under IHL there are only two statuses: combatants or civilians. Combatants have the right to directly participate in hostilities and the right to receive prisoner of war protections, while civilians commit a crime if they take part in conflicts directly. In general, PMSC employees are considered civilians, since usually they are not incorporated among the armed forces of a state or are not able to fulfil all the criteria listed in the articles of the Third Geneva Convention of 1949.

Chapter 4 addresses state responsibility and PMSC employees' and corporations' accountability for violations of international humanitarian law and human rights abuses. Articles 4, 5, 7 and 8 of the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts (DASR) are particularly relevant to establishing state responsibility for the conduct of private contractors they have hired.

Chapter 5 addresses possible venues for the regulation of PMSC activities: self-regulation, national legislation, regional regulation and international regulation. Self-regulation is based on voluntary principles, which means that no external public authority imposes regulations, instead companies willingly submit to them.

Regulation on the domestic level already addresses some important issues such as the registration of PMSCs with the competent authorities, the licensing regime and some measures to ensure transparency and accountability. Regional regulations are another venue that could bring a major contribution to international regulation addressing the PMSC industry. Two regional bodies play a key role in that sense: the African Union (AU) and the European Union (EU). On the international level there are two major contributions towards the regulation of the PMSC industry: the Montreux Document of 2008 and the Draft International Convention

on the Regulation, Oversight and Monitoring of Private Military and Security Companies of 2010.

# CHAPTER ONE

## A HISTORICAL OVERVIEW OF PRIVATE VIOLENCE

Since people came together to form society conflicts have existed and there have also been those willing to lend their strength in exchange for bread or silver pieces. The “fighters”, commonly called “mercenaries”, look to profit from the very fact of fighting someone else’s war.

From ancient times to the modern era, mercenaries and other private actors have been used to meet the military needs of rulers who did not have enough men to wage their wars.

The state’s monopoly on the use of force appeared only around four hundred years ago, when the Treaty of Westphalia of 1648 established the concept of sovereignty. With the entry of the sovereign state into the scenario of war, the use of force by private entities was banned, as well as the use of mercenaries without the prior approval of the state.

During the early years of the modern state, trading companies such as the Dutch East India Company and the English East India Company, were the closest ancestors of today’s PMSCs, due to their multinational character and exercise of public functions.

This chapter seeks to summarize historical events that illustrate the presence of private actors during warfare and to demonstrate the importance and influence of these agents in that context. In addition, it will discuss circumstances of growth and the activities of private agents, since this analysis assists in establishing the necessary background that justifies the existence of PMSCs today.

### **1.1 Ancient times (4000 BC – 476 AD)**

In about 3000 BC, upper and lower Egypt united to form the Egyptian Empire; the records of subsequent battles reflect the presence of hired soldiers.<sup>1</sup> The battle of Kadesh (1294 BC) was the first great battle in

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<sup>1</sup> Lanning, Michael Lee, *Mercenaries: Soldiers of Fortune, from Ancient Greece to Today’s Private Military Companies* (2005), 3.

history from which sufficient details survived to allow knowledge about the participants. In this battle, Pharaoh Ramses II assembled his army, including units of hired Nubians, Sherdens, and Numidians, and marched eastward against the Hittites along the Orontes River to defend his kingdom.<sup>2</sup>

The Bible is full of passages that mention hired foreign soldiers. For instance, Judges 9:4 and 11:3 describe how Hebrew leaders hired “vain”<sup>3</sup> men for pieces of silver to reinforce their armies, in about 1250 BC. Another example is Samuel 15:52, which narrates the tale of how Saul recruited foreigners to secure his kingdom. David, who killed the Philistine giant Goliath, running away from Saul, left to seek employment with Philistine army of Achish.

From the Archaic and Classical ages (700-323 BC) to the Hellenistic Age (250 BC) Greek soldiers played a major role in warfare. They were professionals hired to fight alongside the Assyrian Kings, in the Archaic age, with the Saite dynasty of Egyptian Pharaohs and with the Persian Empire’s army.<sup>4</sup> Professionals and military specialists made up Greek armies. These specialists were usually men from the fringes of the Greek world who supported the heavily armed citizen militias of the cities. There was considerable competition for the best naval crews, archers, slingers and cavalry.

According to Rolf Uessler, two factors determined the constant and massive presence of Greek soldiers in all armies and in several occasions on both sides of a conflict. First, there were the social structures consolidated in ancient Greece and second, the new battle techniques developed by the Greeks.

Greek society could not sustain itself with its infertile soil and most city-states had a strong class of farmers, craftspeople and merchants, with enough power to fight for their own interests. Therefore, Greeks offered their services and experience to external rulers. The Greeks also developed a type of mercenary soldier called a hoplite, who carried around an iron shield, wore a helmet, chest and leg armor, and who carried a two-meter-long lance. These soldiers were not only effective in defense but could also efficiently attack. The technique was made possible due to an

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<sup>2</sup> Singer, Peter Warren, *Corporate Warriors: the rise of the privatized military industry* (updated edition, 2008) 20.

<sup>3</sup> Lanning, Michael Lee, *Mercenaries: Soldiers of Fortune, from Ancient Greece to Today’s Private Military Companies* (2005) 8.

<sup>4</sup> Matthew Trundle, ‘Ancient Greek Mercenaries’ (2005) [116] *History Compass*, EU, 2.

<http://www3.interscience.wiley.com/cgi-bin/fulltext/118715603/PDFSTART>.

overpopulated Greece, which created an excessive number of soldiers, revolutionizing the way armed conflicts were conducted.<sup>5</sup>

Anabasis,<sup>6</sup> written by Xenophon, provides a good description of the famous “Ten Thousand” unit of Greek soldiers hired to fight in the Persian civil war (401-400 BC). The Great King of Persia, Darius II, had died in 404 BC and his two sons fought a civil war to master the Persian Empire.<sup>7</sup> Cyrus, the younger son, challenged his brother Artaxerxes with natives and about 13,000 hoplites. Cyrus died and the Greek soldiers, without payment, had to fight their way back to the sea.

During the Great Peloponnesian War (431 – 404 BC), Greek cities used several Macedonian mercenaries. Afterwards, King Philip united the Macedonian tribes and defeated the Greeks. Alexander the Great, his son, made an army of foreigner soldiers instead of Macedonians.

Carthage in North Africa began to rise in a campaign to control the Mediterranean and hired soldiers from Spain, Gaul, Italy and other areas. Carthage became a unique kingdom because its armies were almost exclusively made up of mercenaries.<sup>8</sup> At the end of the First Punic War (264-241 BC), soldiers revolted due to lack of payment and that movement was known as the Mercenary War.

In the Second Punic War (218-202 BC), Carthage was able to subjugate the Roman army. However, the war was lost when Carthage lost the silver mines in Spain to the Romans. After the Punic Wars, Rome established itself as the leading power in the Mediterranean.

The Roman Empire initially relied on the popular army, which was made of career soldiers and later became dependent on foreign legionaries. Romans hired specialist soldiers, such as archers and cavalry, particularly, to offset their losses after the Second Punic War. By the end of the third century AD the imperial army was formed more by foreigners than Romans.

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<sup>5</sup> Uessler, Rolf, *Servants of war; private military corporations and the profit of conflict*, (1st ed, 2006) 94-95.

<sup>6</sup> *Anabasis* means Expedition and is a book written by Xenophon, who was Socrates' student and also a mercenary.

<sup>7</sup> Singer, Peter Warren, *Corporate Warriors: the rise of the privatized military industry* (updated edition, 2008); Matthew Trundle, ‘Ancient Greek Mercenaries’ (2005) [116] *History Compass*, EU, 2, <http://www3.interscience.wiley.com/cgi-bin/fulltext/118715603/PDFSTART>; Lanning, Michael Lee, *Mercenaries: Soldiers of Fortune, from Ancient Greece to Today's Private Military Companies* (2005).

<sup>8</sup> Lanning, Michael Lee, *Mercenaries: Soldiers of Fortune, from Ancient Greece to Today's Private Military Companies* (2005) 24.

The word soldier comes from the Latin *soldare* meaning “to pay”,<sup>9</sup> and as long as Rome had enough money to pay for foreign military campaigns, professional soldiers and mercenaries, the empire would be able to secure their loyalty. Rome fell in 476 AD and other empires arose, such as the Byzantine Empire. Constantinople fell to Muslim Turks fighting for religious reasons, and both sides counted on hired units.

## 1.2 Middle Ages (476 AD – 1453)

### 1.2.1 The Free Companies and the Condottieri

With the decline of the Roman Empire, the new dominant culture across the entire non-Byzantine Mediterranean came from the Arabian Peninsula. As pointed out by Rolf Uessler, the Arabs were forced to hire foreign mercenaries to secure their areas of influence due to the increasing influence of Judaism and Christianity.

The Arab Empire’s external security “was almost completely dependent of mercenary bands”.<sup>10</sup> Consequently, the military power and political influence of mercenaries started to grow, leading them to turn upon the ruling elites. For instance, the Osmanlis, a band of mercenaries formed by tribes from the Black Sea, the Caucasus and Asia, gave the fatal blow to the Arab and Byzantine Empires, creating the Ottoman Empire.<sup>11</sup>

Feudalism spread throughout Europe after the decline of the Roman Empire. The feudal system was based on decentralization and personal alliances among feudal lords. The medieval world recognized many authorities, but none of them were absolute.<sup>12</sup> For that reason, war was conducted in the private sphere among feudal lords, city-states and the Catholic Church.

The contemporary notion of a state did not exist and the monopoly of weapons was the primary means by which the aristocracy maintained control over a fiefdom. Servants could not be used in battle. First, because they had a lack of training and second, they were essential to maintain feuds’ production. Feudal lords had a limited number of soldiers available in the feud, usually poorly trained peasants. During this period mercenary bands were used as reliable instruments to wage war. Skilled men, usually

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<sup>9</sup> Uessler, Rolf, *Servants of war; private military corporations and the profit of conflict* (1st ed, 2006) 96.

<sup>10</sup> *Ibidem*.

<sup>11</sup> Uessler, Rolf, *Servants of war; private military corporations and the profit of conflict* (1st ed, 2006) 98.

<sup>12</sup> Gray, John, *Al-Qaeda e o que significa ser moderno* (2004).

specializing in some particular weapon, such as the crossbow, composed the mercenary bands.<sup>13</sup>

The Battle of Hastings (1066) established the lethality of the crossbow as a weapon of war and created a new industry. “Mercenaries were considered important components of fighting forces and were often employed as elite units or as advisers.”<sup>14</sup> The cities of Pisa and Genoa in Italy were famous for mercenaries armed with crossbows.<sup>15</sup>

By the thirteenth century, cities and kingdoms reached new levels of wealth through trade and exploration. The proliferation of military demands and rising instability extended conflicts from a regional to an inter-regional scale and they tended to last longer than they had previously.<sup>16</sup> This was called the condotta system, where mercenaries were hired on contract.<sup>17</sup>

The contracts specified wages and services to be provided. Spain, France and Italy were especially fruitful places to hire soldiers and the growing market allowed war to be waged on a large scale. Condottieri were hired for a given campaign, working for monarchs, the church in Renaissance Italy or rulers of city-states. Many cities in Italy, such as Milan and Venice, started a policy of integration and assimilation of many condottieri by the concession of land and feudal rights in return for military services.<sup>18</sup>

The “free companies” of the late Middle Ages were large, organized military bands and replaced the smaller groups of mercenaries. The word “free” stands for their independence from any superior authority, as a challenge to the feudalism system, and the word “company” is derived from the Latin *com panis* which means “with bread”, designating the bread soldiers received.<sup>19</sup>

The free companies first appeared in Italy between 1320 and 1340 and in France from 1360 and afterwards. The reduction of standing armies at the end of a war, especially during the Hundred Years War (1337-1453)

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<sup>13</sup> Singer, Peter Warren, *Corporate Warriors: the rise of the privatized military industry* (updated edition, 2008) 22.

<sup>14</sup> Shearer, David, ‘Private armies and military intervention’ (1998) 316 Adelphi Paper Oxford University Press 13.

<sup>15</sup> Lanning, Michael Lee, *Mercenaries: Soldiers of Fortune, from Ancient Greece to Today’s Private Military Companies* (2005) 37.

<sup>16</sup> Contamine, Phillipe, *War and competition between states* (2000), 19.

<sup>17</sup> Contamine, Phillipe, *War in the Middle Ages* (1984), 158.

<sup>18</sup> *Ibidem*.

<sup>19</sup> Uessler, Rolf, *Servants of war; private military corporations and the profit of conflict* (1st ed, 2006) 98.

led to the rise of many companies. This period was characterized by instability because the feudal system was collapsing. The free companies were always searching for employment, prepared to put their swords into battle for the highest bidder. Some of the notable companies were the White Company of John Hawkwood, one of the largest companies operating in the Lower Rhone valley, the Great Company, with more than 10,000 men, and the Grand Catalan Company.<sup>20</sup>

Several authors, such as Davis, Milliard, Spicer and Zarate argue that there is a historical link between PMSCs, the free companies and the condottieri.<sup>21</sup> The link with the condottieri is established by taking under consideration the more permanent character of mercenary units and the existence of a contract with employees. Nevertheless, these peculiarities are insufficient to determine a parallel with PMSCs, due to the fact that the condottieri were confined to specific geographical areas, while PMSCs have a multinational character.<sup>22</sup>

### **1.2.2 The Swiss Guards and German Landsknechts**

The Swiss cantons emerged as a consequence of the fight for freedom waged by the Swiss Confederation against foreign rule in 1291. After 1393, the Swiss cantons established that all citizens between sixteen and forty years old were eligible for call-up and all those between forty to sixty years old were responsible for territorial defense. Young Swiss boys started to receive training from the age of eight, to turn them into powerful soldiers.<sup>23</sup>

Mercenary work became a national industry in Switzerland and soon their units earned an incomparable reputation for skill and courage on the battlefield. Even today, the Swiss Guard protects the Pope, a tradition started with the regiment hired in 1502 by Pope Julius II.<sup>24</sup> The work as a

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<sup>20</sup> Fowler, Kenneth Alan, *Medieval mercenaries* (2001), vol. I, 3.

<sup>21</sup> Davis, James R., *Fortune's warriors; private armies and the new world order* (2000) 127-128; Milliard, Tood S., 'Overcoming Post-Colonial myopia: a call to recognize and regulate military companies' (2003) 176 *Military Law Review*, 9; Spicer, Tim, *An unorthodox soldier* (1999) 40 and Zarate, Juan Carlos, 'The emergence of a new dog of war: private international security companies' (1998) 34 *Stanford Journal of International Law*, 91, 75-162.

<sup>22</sup> Ortiz, Carlos, 'Embryonic multinational corporations and private military companies in the expansion of the early-modern overseas Charter system' (2006) *Annual ISA Convention*, 1.

<sup>23</sup> Contamine, Phillipe, *War and competition between states* (2000) 49-50.

<sup>24</sup> Singer, Peter Warren, *Corporate Warriors: the rise of the privatized military industry* (updated edition, 2008) 27; Shearer, David, 'Private armies and military

mercenary was lucrative for the common peasants and convenient for monarchs and lords. Contracting mercenaries was a practical way to avoid obligations, especially after the war: mercenaries did not leave widows or orphans and at the end of a campaign they could simply be sent away.<sup>25</sup> The only limiting rule for Swiss Guards was that they were not allowed to fight against other Swiss. In case of meeting on the battlefield, the one with the older contract was given preference, while the other had to dissolve the contract with his employer and leave the battlefield.<sup>26</sup>

Similar to the Swiss, south Germany and Austria started to produce their own mercenaries in this lucrative market. The landsknechts or lansquenets were the most common military enemies of the Swiss mercenary units, losing many battles due to their poor organization. However, by the end of the fourteenth century, the German landsknechts surpassed the Swiss because they developed the ability to adapt and evolve in the market. Swiss supremacy came to an end in the Bicoocca Battle (1522) when the landsknechts massacred the Swiss mercenary units.<sup>27</sup>

The landsknechts played a major role in several historical events, including the discoveries of America and the ocean route to India and Asia. For instance, several units of lansquenets were involved in the search for the legendary city of El Dorado, and German soldiers also followed Francisco Pizarro as he destroyed the Inca civilization.<sup>28</sup>

## 1.3 Modern Era (1453 – 1800s)

### 1.3.1 The decline of mercenaries and the rise of state

The Thirty Years War (1618-1648) was marked by massive use of mercenary units, with a crucial role in the state-building process. The ultimate result of the Thirty Years War was the concept of sovereignty, introduced in the Treaty of Westphalia in 1648 as “the first great European Charter to establish peace on the basis of a balance of power.”<sup>29</sup> “The

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intervention’ (1998) 316 Adelphi Paper Oxford University Press 14.

<sup>25</sup> Shearer, David, ‘Private armies and military intervention’ (1998) 316 Adelphi Paper Oxford University Press 14.

<sup>26</sup> Uessler, Rolf, *Servants of war; private military corporations and the profit of conflict*, (1st ed, 2006) 101.

<sup>27</sup> Singer, Peter Warren, *Corporate Warriors: the rise of the privatized military industry* (updated edition, 2008) 28.

<sup>28</sup> Uessler, Rolf, *Servants of war; private military corporations and the profit of conflict* (1st ed, 2006), 101-102.

<sup>29</sup> Bernhardt, Rodolf (ed.) *Encyclopedia of public international law: history of*

Treaty of Westphalia of 1648 officially sanctioned state's monopoly on the legitimate use of force" and private individuals were "forbidden from offering military services without express permission of the state."<sup>30</sup>

State citizens made up the armed forces instead of hired foreigners. Although mercenaries were still an important part of warfare, after the Thirty Years War, many that had fought the war were absorbed into standing armies, *militia perpetua* or sent home.<sup>31</sup> The use of force for conflict resolution became the exclusive domain of the state, putting an end to private wars.<sup>32</sup> During the mid-seventeenth and late eighteenth centuries, the state took advantage of war and made it the biggest and most lucrative industry. For instance, the German state of Hesse made a profitable business renting out its citizens, especially for England, one of the largest consumers, who employed thirty thousand Hessian mercenaries trying to suppress the American Revolution in 1776.<sup>33</sup>

The French Revolution was the final point of transition, and although the presence of mercenaries could still be felt, the movement reflected the people and not the kings' desire. In other words, the entire structure of war, which had been waged for personal reasons and by hired armies of foreigners, was beginning to change into the use of standing armies of the impersonal state.<sup>34</sup> National forces changed into popular armies as they were cheaper and citizen-soldiers were more prepared to sacrifice their lives than mercenaries for low wages.

The years at the turn of the seventeenth and eighteenth centuries gave rise to the ideology that the troops of states, on both sides, were not criminals fighting for some private gain but combatants doing their duty and protecting state interests. In 1790, the French National Assembly decided to ban the use of mercenaries in France, and in 1792 declared that officials and soldiers should be treated as prisoners of war.

During the Napoleonic Wars, many Tartars and Mamluks were hired to compose the imperial guard of Napoleon and mercenaries were used in his campaign across Europe. In the Battle of Waterloo, more than 300,000 mercenaries fought under Napoleon's command. Nevertheless, Napoleon was an exception, as most European countries followed France's example

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international law, foundations and principles of international law, sources of international law, law of treaties (1984) vol. 7, 536.

<sup>30</sup> Uessler, Rolf, Servants of war; private military corporations and the profit of conflict (1st ed, 2006) 103.

<sup>31</sup> Van Creveld, Martin, The rise and decline of the State (1999) 160.

<sup>32</sup> Ronzitti, Natalino, Diritto Internazionale dei conflitti armati (2005) 25.

<sup>33</sup> Ibidem, note 44, 106.

<sup>34</sup> Ibidem, note 45.

in constituting their popular armies.

The growing separation between states' armed forces and society, through the eighteenth and nineteenth centuries, manifested in the development of the laws of war, with the prohibition of those who did not form part of standing armies and did not wear a uniform taking part in hostilities.

In 1856, the Declaration of Paris<sup>35</sup> proclaimed four maxims relating to sea warfare. In 1864 there was the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, and in 1868 the St. Petersburg Declaration renouncing the use of explosive projectiles weighing less than 400 grams in time of war.<sup>36</sup> During the same period, military manuals and national laws were enacted, such as the Lieber Code of 1863, inspired by the North-American civil war, the Russian regulations of 1877 and the French regulations of 1859 and 1893.

Although changes were occurring, mercenaries could still be found in several conflicts during the nineteenth century. For example, Bolívar hired more than 5,000 British soldiers to fight in the Spanish colonies' war of independence. In 1830, Brazil hired Irish and German mercenaries to fight against Argentina. The Mexican President López de Santa Anna in 1853 hired Germans for the impending coup de main by sections of the armed forces, but was overthrown before the mercenaries could assist.<sup>37</sup>

### 1.3.2 Trading Companies: embryonic PMSCs

During the sixteenth, seventeenth and eighteenth centuries, mercantile companies under the charter system of trading monopolies were responsible for establishing and maintaining long-distance trade routes and colonies. Two famous companies of that period were the Dutch East India Company, founded in 1602, and the English East India Company, formed in 1599. In both, no citizen operating outside the company could trade in the Indian Ocean area.<sup>38</sup>

Authors such as Singer, Smith and Ortiz establish a link between these overseas trading companies and the PMSCs of today as their closest historical predecessor due to the extensive use of force by trading

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<sup>35</sup> France and England originally signed the Declaration in April 16, 1856. Later, fifty-six more states ratified the document.

<sup>36</sup> Bernhardt, Rodolf (ed.) *Encyclopedia of public international law: use of force, war and neutrality peace treaties* (1982), vol. 4, 317.

<sup>37</sup> Thompson, Janice E., *Mercenaries, pirates and sovereigns: state-building and extraterritorial violence in early modern Europe* (1994) 89.

<sup>38</sup> *Ibidem*, 32-42.

companies in the conduct of their business and also their multinational character.<sup>39</sup> The multinational character of these companies resulted in the evolution of their recruited military forces into PMSCs.

The Government sanctioned these entities through charters. The charter system “stipulated the rules for the governance and constitution of a company and granted a trade monopoly over particular goods and geographical areas of trade.”<sup>40</sup> The trading companies were forces unto themselves with the sovereign powers of a state.<sup>41</sup> They acted to ensure their own military protection, raising an army or a navy, building forts, making treaties and war, governing nationals, and making their own currency.<sup>42</sup> For instance, the Dutch East India Company’s charter expressly granted the company military power to defend itself against the Portuguese armed forces.

In 1661, the charter of the English East India Company was revised to give the company criminal and civil jurisdiction over all persons belonging to the governor or the company. It also allowed the company to wage war or make peace with non-Christian princes.<sup>43</sup>

Other companies proliferated but found little success in the trading business. For instance, in 1640s the Portuguese established the *Companhia Geral para o Estado do Brazil* with the purpose of providing military assistance to the Portuguese fighting the Dutch West Indies Company in Brazil. The Portuguese company was an unsuccessful commercial venture, but the military assistance was essential to saving Brazil from the Dutch.<sup>44</sup>

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<sup>39</sup> Singer, Peter Warren, *Corporate Warriors: the rise of the privatized military industry* (updated edition, 2008); Smith, Eugene B., ‘The new condottieri and US policy: the privatization of conflict and its implications’ (2003) [23] *Parameters*, 4 and Ortiz, Carlos, ‘Overseas Trade in Early Modernity and the Emergence of Embryonic Private Military Companies’ in Thomas, Jäger; Gerhard Kümmel (eds.), *Private Military and Security Companies: changes, problems, pitfalls and prospects* (2007) 11-23.

<sup>40</sup> Ortiz, Carlos, ‘Embryonic multinational corporations and private military companies in the expansion of the early-modern overseas Charter system’ (2006) *Annual ISA Convention*, 3.

<sup>41</sup> Smith classifies trading companies as *staat buiten die staat* (a state independent of the state). Smith, Alan K., *Creating a world economy: merchant capital, colonialism and world trade 1400-1825* (1991) 105.

<sup>42</sup> *Ibidem*, note 52, 34-35.

<sup>43</sup> *Ibidem*, note 52, 36.

<sup>44</sup> Ortiz, Carlos, ‘Embryonic multinational corporations and private military companies in the expansion of the early-modern overseas Charter system’ (2006) *Annual ISA Convention* 5.

The military power conferred to companies was an essential means to protect trade relations with areas outside Europe, since only with that power would they be able to defend their position and ships from hostile states, interlopers or pirates. In addition, the monopoly rights were justified by the high cost companies had to incur to develop the necessary infrastructure for overseas trade.<sup>45</sup> Ortiz correctly highlights this:

Ultimately, the survival of the overseas charter system was dependent upon the use of force, which was exercised extensively by the armies and navies the companies commanded. It was a business first and foremost, but it was a violent one that required systematic use of lethal violence to keep it running.<sup>46</sup>

Trading companies of this period, such as the East Indian Companies, have some similarities with the Private Military and Security Companies of today. First, both have a dual role as public and private entities. Trading companies searched for profit as commercial enterprises (private characters) and were allowed to keep an army and navy and had the right to conclude treaties with sovereignty (public characters).

PMSCs also seek to maximize profits and market share while providing military and security services entering into the arena of the monopoly over the use of force belonging to the state.<sup>47</sup> Second, as multinational enterprises PMSCs develop their military functions mostly outside the countries in which they are based, while trading companies used to develop their business outside the European state system. Third, on several occasions the power of the trading companies coincided with the collapse of local government in colonial areas (Singer, 2008, p. 35).

Mercantile companies' charters gradually became institutionalized, with committees and directors, and one of their sectors had a military function. For instance, the English East India Company had a military secretary.<sup>48</sup> Alongside the trading companies, their armies and maritime

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<sup>45</sup> Blussé Leonard; Gastra, Femme (eds.) *Companies and trade: essays on overseas trading companies during the ancient regime* (1981); and Thompson, Janice E., *Mercenaries, pirates and sovereigns: state-building and extraterritorial violence in early modern Europe* (1994).

<sup>46</sup> *Ibidem*, note 58, 6.

<sup>47</sup> Ortiz, Carlos, 'Overseas Trade in Early Modernity and the Emergence of Embryonic Private Military Companies' in Thomas, Jäger; Gerhard Kümmel (eds.), *Private Military and Security Companies: changes, problems, pitfalls and prospects* (2007) 17, 11-23.

<sup>48</sup> Buchan, P. Bruce, 'A variation on the origin and characteristic of the modern corporation' (1995) 12 *Canadian Journal of administrative sciences* 4, 1-14.

forces made a parallel evolution. They started to offer military services to external agents, as PMSCs; on occasions they became force multipliers.<sup>49</sup> For instance, the French trained small units of sepoys and then offered them to Moguls to assist them in enforcing their territorial sovereignty.<sup>50</sup> Trading companies came to resemble multinational corporations, and their military forces came to resemble PMSCs. Nevertheless, it is important to remember that PMSCs are more sophisticated than the military forces of trading companies, and provide a wide variety of services.

Eventually, the trading companies began to lose power and money, as the political environment started to stabilize. Military power was no longer necessary as the companies' rivals disappeared and then the large military investments stopped paying off; as a consequence companies dissolved.<sup>51</sup> The Dutch East India Company dissolved in 1799, lasting 194 years, while the English East India Company existed until 1857, for 258 years.

## 1.4 Contemporary Era (1800's – until today)

### 1.4.1 Twentieth Century

The concept of sovereignty was spread extensively by the end of the twentieth century, when the large companies were mostly gone. Under the concepts of *jus in bello* and *jus ad bellum*<sup>52</sup> there were only some limitations on the unilateral use of force by states. However, after the bloodshed during the Second World War, the UN Charter of 1945 prohibited the use of force except in very limited circumstances.<sup>53</sup> Afterwards, the use of mercenary units started to be seen as unlawful conduct against the new world order, because mercenaries profited and possibly encouraged war.<sup>54</sup>

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<sup>49</sup> Ortiz, Carlos, 'Embryonic multinational corporations and private military companies in the expansion of the early-modern overseas Charter system' (2006) Annual ISA Convention 11.

<sup>50</sup> Ibidem.

<sup>51</sup> Singer, Peter Warren, *Corporate Warriors: the rise of the privatized military industry* (updated edition, 2008) 36.

<sup>52</sup> "Jus ad bellum refers to the conditions under which one may resort to war or to force in general; jus in bello governs the conduct of belligerents during a war, and in a broader sense comprises the rights and obligations of neutral parties as well." Robert Kolb, 'Origin of the twin terms jus ad bellum/jus in bello' (1997) [footnote 1], International Committee of the Red Cross, <http://www.icrc.org/eng/resources/documents/misc/57jnuu.htm>.

<sup>53</sup> See article 2(4) and article 51 of the United Nations Charter.

<sup>54</sup> Shearer, David, 'Private armies and military intervention' (1998) 316 *Adelphi*

Nevertheless, the decolonization period, in the 1950s and 1960s, saw the most prosperous days of mercenary activities, especially in Latin America, Asia and Africa. For instance, several hundred veterans of the Waffen-SS joined the foreign legion and fought in Indochina.<sup>55</sup>

During the Congo war, in the 1960s, mining firms in support of the Katanga secession hired mercenary units.<sup>56</sup> The most notorious mercenaries during this war were the leaders of The Fifth Commando or Les Affreux – the “terrible ones”: the Irish-born commando “Mad” Mike Hoare; the Frenchman Bob Denard and the Belgian Jean Schramme. This group led Katanganese Gendarmerie rebels against the UN peace-enforcement operation supporting the unity and integrity of the country.<sup>57</sup> Later, Denard acted in Biafra, Chad, Morocco and Rhodesia. Mercenaries started to be seen as agents of the colonial powers, symbols of racism and in opposition to self-determination.<sup>58</sup>

In 1978, Cuban troops fought Somali forces in the conflict in the Ogaden region of Ethiopia and supported the socialist Movimento Popular para Libertação de Angola (MPLA). The Solomon Islands recruited soldiers from Fiji and British officers after gaining independence in 1978. In the 1980s, the United Arab Emirates (UAE) relied almost entirely on mercenary units, recruiting its soldiers mostly from Oman and Yemen. Its officers were from Britain, Pakistan and Jordan.<sup>59</sup>

Since 1831, France has recruited foreigners to fight abroad in the French Foreign Legion, which is regarded as one of the country’s elite forces. The Foreign Legion strength in 1940 was 45,000 troops, but today the Legion provides about 7,699 men in eleven regiments.<sup>60</sup> In 1978, the Second Foreign Parachute Regiment fought in Kolwezi, Zaire, and from 1969 to 1970 the First and Second Foreign Parachute Regiments took part

Paper Oxford University Press 15.

<sup>55</sup> Uessler, Rolf, *Servants of war; private military corporations and the profit of conflict* (1st ed, 2006) 107.

<sup>56</sup> Singer, Peter Warren, *Corporate Warriors: the rise of the privatized military industry* (updated edition, 2008) 37.

<sup>57</sup> *Ibid* note 68, 15.

<sup>58</sup> United Nations General Assembly: “Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, submitted by the Special Rapporteur of the Commission on Human Rights.” 51<sup>st</sup> Session, Item 106, August 29, 1995, <http://www.unhcr.ch/Huridocda/Huridoca.nsf/70ef163b25b2333fc1256991004de370/0681893f28aef031c1256b92003adfcf?OpenDocument>.

<sup>59</sup> Thompson, Janice E., *Mercenaries, pirates and sovereigns: state-building and extraterritorial violence in early modern Europe* (1994) 90-91.

<sup>60</sup> See French Foreign Legion: <http://www.legion-recrute.com/en/?SM=0>.

in the Chad operations.<sup>61</sup> The French Foreign Legion is a remnant of the French Imperial Army. The Nepalese Gurkha regiments served the British and Indian Governments under the Kathmandu Agreement of 1947.<sup>62</sup> Mercenary units are still hired, such as the case of more than 30,000 Russians who fought in several wars in the former Soviet Union, and even in the former Yugoslavia.<sup>63</sup> Although isolated mercenary activities can still be found today, they are more related to criminal activities than to the general development of the provision of private military and security services.<sup>64</sup>

## 1.5 Final Remarks

This brief, fragmented military-historical overview showed that the presence of private actors in war has been a constant in all ages. The idea that states were the only entities entitled to wage war is incorrect. In practice, private actors such as mercenaries, condottieri or privateers have also engaged in warfare in a constant and necessary role. For instance, on several occasions, mercenaries were hired as counselors or elite units. In addition, until four hundred years ago, the sovereign state with a monopoly over force did not exist. Furthermore, non-state violence dominated the international system in the past and was an extremely lucrative enterprise.

Egypt, Greece and Rome relied on foreign experts to increase its military power during war. As the nature of warfare evolved, there could be higher or lower demand for private units. In other words, when the quality of soldiers was more important than the quantity, demand for units of mercenaries was higher. A period that illustrates this conclusion is the Middle Ages, when feudal lords could not rely on poorly trained servants, seasonally available to undertake their private wars.

In the late Middle Ages, the free company condottieri flourished because of the increasing instability of the feudal system. The collapse of the feudal system turned conflicts from being on a regional scale to being on an inter-regional scale and made them last longer. Work as a mercenary became very lucrative for common peasants and very convenient for

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<sup>61</sup> Ibidem.

<sup>62</sup> Thompson, Janice E., *Mercenaries, pirates and sovereigns: state-building and extraterritorial violence in early modern Europe* (1994) 90.

<sup>63</sup> Singer, Peter Warren, *Corporate Warriors: the rise of the privatized military industry* (updated edition, 2008) 37.

<sup>64</sup> Holmqvist, Caroline, 'Private security companies: the case for regulation' (2005) 9 SIPRI Policy Paper 2, 1-59.