

# The devolution of the sovereign right to use violence

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*“Neither a wise man nor a brave man  
lies down on the tracks of history  
to wait for the train of the future to run over him.”*

Dwight D. Eisenhower <sup>1</sup>

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<sup>1</sup> National Affairs: Foreign Policy: Ike. (1952). *Time Magazine*, (Vol. LX No. 14).

## Introduction

What is commonly understood is that only States may legally use violence since they have a monopoly on the legitimate use of physical force. Internal security and foreign military operations are public services traditionally performed by police forces and militaries in the employ of States. Scholars across various disciplines have called this the State's "monopoly on violence", and it is regarded as one of the core concepts of modern public law. Since the tragic events of 9-11 and the subsequent invasions of Afghanistan and Iraq, however, seemingly new players have emerged in the arena of warfare which have unsettled this notion of the State's monopoly on violence and even assumptions about the State itself.

Functions traditionally performed by the security or military apparatuses of states have increasingly been contracted out to Private Military and Security Companies (PMSCs). Most of these companies offer services such as logistical support, training or administrative tasks, but some offer armed security and military services and even specialize in direct combat operations. Such PMSCs are referred to as Private Military Companies (PMCs).<sup>2</sup> The focus of this thesis is on PMCs due to their direct involvement in combat activities. Most PMCs are companies registered and managed according to corporate law; they take part in economic transactions, bid for government contracts and offer their services on an open market. Their corporate business form is arguably their most distinctive feature.<sup>3</sup> PMCs are legally registered companies who recruit what

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<sup>2</sup> Gillard, E.C. (2006) "Business Goes to War: Private Military/security Companies and International Humanitarian Law," *International Review of the Red Cross*, 88(863), p. 526.

<sup>3</sup> Singer, P. W. (2002) "Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security" *International Security*, 26(3), p. 190; Some scholars such as

are commonly understood as mercenaries. Once they are hired, however, they are officially no longer regarded as mercenaries, and as such, the dividing line is very thin. The past two decades have seen a plethora of commentaries by experts on the lack of accountability and regulation of PMSCs. Legal scholars would usually analyse matters such as responsibility and jurisdiction, and what status PMC contractors have in International Humanitarian Law. Accordingly, recommendations would be given for national and international legislation in order to regulate PMSCs in the hope to prevent or, if required, remedy human rights abuses and other crimes.<sup>4</sup> This thesis, however, will focus its attention on a neglected aspect of the debate, which is the danger of military outsourcing vis-à-vis state sovereignty. Recognizing this research gap, Winston Nagan and Craig Hammer have advocated “a total reconsideration of the fundamental realities of the world order implications of PMCs in the context of combat functions.”<sup>5</sup>

As such, the analytical problem of this thesis is: *‘The revived practise of devolving the sovereign right to use violence to the private sector is leading to an erosion of statehood.’* As such, this thesis revolves around two topics of legal theory: 1) *The devolution of the right to use violence to the private sector;* 2) *Sovereignty and Statehood.* In order to come to a conclusion, it will answer the following three research questions: 1) *Why and how have states throughout history devolved the use of violence to the private sector?;* 2) *What role did ‘private to public’ military reorganizations play in*

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Peter Singer prefer to use the term Private Military Firm (PMF), but for the sake of consistency, this thesis will only use PMC.

<sup>4</sup> Nagan, W. P. and Hammer, C. (2008) “The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process,” *Maine law review*, 60(2), pp. 431-432.

<sup>5</sup> *Ibid*, p. 432.

*the formation of statehood?; 3) How will the reemergence of 'public to private' devolution to private military firms affect state sovereignty?*

The methodology chosen for this thesis is based on the *New Haven School* (NHS) of International Law<sup>6</sup> which was developed by Professors Myres S. McDougal, a lawyer, and Harold D. Lasswell, a political scientist.<sup>7</sup> They regard international law not just a set of rules made in the past, but as an authoritative and controlling process of decision-making undertaken by all relevant world actors and not just states. McDougal and Lasswell have termed this 'The World Constitutive Process of Authoritative Decision'.<sup>8</sup> As such, the NHS has become known as the 'process' or 'policy-orientated' school. The process theory views international law primarily as a political process and a constant interaction of policy, context and authoritative past decisions.<sup>9</sup> Furthermore, the NHS regards international law as an ongoing process which takes into account past decisions, current affairs, and the future.<sup>10</sup>

In order to answer the research questions in a clear and coherent way, this thesis will, as much as possible, follow a chronological order. It will first explain that the assumption that warfare has always been the prerogative of public militaries is not correct. In fact, the practise of hiring mercenaries is as old as war itself, has been the

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<sup>6</sup> The New Haven School is notable due to five basic intellectual commitments: 1) interdisciplinarity; 2) the study of process; 3) promotion of normative values; 4) policy-oriented jurisprudence; and 5) a recognition of the importance of transnational law (Koh, 2007, pp. 561–565).

<sup>7</sup> Reisman, W. M., Wiessner, S. and Willard, A. R. (2007) "The New Haven School: A Brief Introduction" *The Yale Journal of International Law*, 32(2), p. 575; Koh, H. H. (2007) "Is There a 'new' New Haven School of International Law?" *The Yale Journal of International Law*, 32(2), p. 560.

<sup>8</sup> McDougal, M. S., Lasswell, H. D. and Reisman, W. M. (1967) "The World Constitutive Process of Authoritative Decision," *Journal of legal education*, 19(3), pp. 253–300.

<sup>9</sup> Orford, A., Hoffmann, F. and Clark, M. (eds) (2016) *The Oxford Handbook of the Theory of International Law*. First edn. Oxford, United Kingdom: Oxford University Press, pp. 427-451; Cali, B. (ed) (2010) *International law for International Relations*. Oxford UK: Oxford University Press, p. 79.

<sup>10</sup> Cali, B. (ed) (2010) *International law for International Relations*. Oxford UK: Oxford University Press, p. 79.

norm throughout history, and lasted until the mid-nineteenth century.<sup>11</sup> In fact, the practise predates Westphalian sovereignty and the modern state system, which only date back to the mid-seventeenth century.<sup>12</sup> The process of state consolidation and formation, however, started much earlier and is intricately linked to how states organized the means of warfare. Therefore, in order to understand why states have revived the practise of devolving their sovereign right to use violence, Chapter 1 will provide a brief history of the main forms of outsourcing and an analysis of state motives. Chapter 2 will then analyze the role of 'private to public' military reorganizations in the formation of statehood. During a process that spans many centuries, states started to move away from using private forces by centralizing and professionalizing their militaries under a bureaucratic state until the norm changed to exclusively public militaries.<sup>13</sup> Chapter 3 will provide a brief overview of the historical concept of Sovereignty and the Westphalian state system.

In order to make this analysis of historical process relevant to the present, Chapters 4 and 5 will discuss and analyze two case studies; The East India Company and Blackwater respectively. The motivation for choosing these two case studies is as follows. Peter Singer has argued that the most distinctive feature of modern PMCs vis-à-vis other forms of military outsourcing is their corporate form.<sup>14</sup> Economic historians have pointed out that modern corporations began with the rise of chartered joint-stock

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<sup>11</sup> Percy, S. V. (2007) *Mercenaries: the history of a norm in international relations*. Oxford: Oxford University Press, p. 1.

<sup>12</sup> Nagan, W. P. and Hammer, C. (2008) "The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process," *Maine law review*, 60(2), p. 433.

<sup>13</sup> Percy, S. V. (2007) *Mercenaries: the history of a norm in international relations*. Oxford: Oxford University Press, p. 121.

<sup>14</sup> Singer, P. W. (2002) "Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security" *International Security*, 26(3), p. 190.



companies. In fact, the East India Company is regarded by many scholars as the very model of the modern corporation.<sup>15</sup> Nevertheless, the EIC, was for all intents and purposes a 'Company-State' rather than a purely business enterprise.<sup>16</sup> It had at times a larger navy than the Crown and engaged in actual warfare with states, but also with rival companies and privateers. In this age of globalization and growing power and influence of Trans-National Corporations (TNCs), however, the EIC serves as a dire warning from history as to the dangers of giving corporations the legal means for conducting warfare. Blackwater was not the first Private Military Company, nor was it the biggest. In fact, it was one of many thousands PMCs that served in Afghanistan and Iraq. However, Blackwater is perhaps the most well known and notorious of all modern PMCs, and is featured in virtually every contemporary study on the topic.<sup>17</sup> Its founder and former CEO Erik Prince is regularly invited to academic debates and by the media and is regarded as a de-facto industry spokesperson.<sup>18</sup>

The first five chapters serve as what the New Haven School calls 'a map of community processes'.<sup>19</sup> In each historical period policy decisions were made based on the social, political and economic context of the time. McDougal and Lasswell call this the 'world constitutive process'. In their seminal essay on the NHS process theory, they

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<sup>15</sup> O'Brien, J., O'Kelley, C. R. and Clarke, T. (eds) (2019) *The Oxford Handbook of the Corporation*. First edn. Oxford, United Kingdom: Oxford University Press, p. 75; Robins, N. (2012) *The corporation that changed the world: how the East India company shaped the modern multinational*. 2nd edn. London: Pluto Press, p. 174.

<sup>16</sup> Stern, P. J. (2012) *The Company-State: corporate sovereignty and the early modern foundations of the British empire in India*. Oxford: Oxford University Press, p. 1.

<sup>17</sup> Moyakine, E. (2014) *The Privatized Art of War: private military and security companies and state responsibility for their unlawful conduct in conflict areas*. Tilburg: Tilburg University, p. 7.

<sup>18</sup> Head to Head (2019) *Transcript: Erik Prince on Iraq, privatising wars, and Trump*. [online] Al Jazeera.

<sup>19</sup> Reisman, W. M. (1992) "The View from the New Haven School of International Law," *Proceedings of the Annual Meeting (American Society of International Law)*, 86, p. 121.

argued that “The changing features of ‘world constitutional law’ are to be understood by perceiving the intimacy of interplay between law and the entire social process of the world community.”<sup>20</sup> From Chapters 1 and 4, it follows that the socio-economic system of a time period was the decisive factor for states organizing and funding the means of warfare. Involving the private sector would reduce cost and channel private resources into the war effort. From Chapter 2, it follows that ‘private to public’ military reorganisations combined merging norms against the use of private force culminated into the formation and increasingly centralization of states. From Chapter 3, it follows how historical ideas about sovereignty justified the State’s internal monopoly on violence and externally vis-à-vis other states. Finally, from Chapters 5 and 6, it will follow that the current socio-economic system of globalized free-market capitalism is an important factor, but that funding and cost reduction play a significantly lesser role. Instead, in today’s world where International Law prohibits the use of force<sup>21</sup>, states increasingly turn to PMCs as flexible foreign policy tools, and in particular to reduce political risk vis-à-vis their citizenry and other states. This thesis will conclude these current trends are eroding statehood by undermining state sovereignty and the international state-system.

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<sup>20</sup> McDougal, M. S., Lasswell, H. D. and Reisman, W. M. (1967) “The World Constitutive Process of Authoritative Decision,” *Journal of legal education*, 19(3), p. 255.

<sup>21</sup> Article 2(4) of the UN Charter contains the central rule on the use of force; the prohibition of the threat or use of force. “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” (Evans, 2015, p. 10)

## Chapter 1: A history of outsourcing warfare

*“Private Military Firms are businesses that provide governments with professional services intricately linked to warfare; they represent, in other words, the corporate evolution of the age-old profession of mercenaries.”<sup>22</sup>*

**Peter W. Singer - Political scientist**

### 1.1 Mercenaries and Mercenary entrepreneurs

Every empire from antiquity to the era of European colonialism has made use of foreign troops in some form or another.<sup>23</sup> Private military actors have been fundamental to warfare long before modern nation-states were considered to be the predominant actors in the international system.<sup>24</sup> Mercenaries as such fighters would be called, would usually imply individuals brought in from abroad to fight on behalf of the highest bidder. In some periods, however, mercenaries would form highly organized groups. The commonality between both was the goal of making profit, derived from the act of fighting.<sup>25</sup> During the Middle Ages, the use of mercenaries was very common and would continue in the early modern period. Entire military formations would hire themselves out to any state that would pay them.<sup>26</sup>

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<sup>22</sup> Singer, P. (2005). *Outsourcing War*. [online] The Brookings Institution.

<sup>23</sup> Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry*. Updated edn. Ithaca, N.Y.: Cornell University Press, p. 19.

<sup>24</sup> Nagan, W. P. and Hammer, C. (2008) “The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process,” *Maine law review*, 60(2), p. 433; Moyakine, E. (2014) *The Privatized Art of War: private military and security companies and state responsibility for their unlawful conduct in conflict areas*. Tilburg: Tilburg University, pp. 40-41.

<sup>25</sup> Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry*. Updated edn. Ithaca, N.Y.: Cornell University Press, p. 19.

<sup>26</sup> Tonkin, H. (2011) *State control over Private Military and Security Companies in armed conflict*. Cambridge: Cambridge University Press (Cambridge Studies in International and Comparative Law), pp. 8-9.

During the Thirty Years War (1618-48), military demands were met through different forms of military organization and control. Rulers and governments combined elements of public and private resources in particular military partnerships.<sup>27</sup> During most of the 17th century, however, the majority of forces fighting in Europe were recruited and managed by an extensive system of private entrepreneurs rather than the states themselves. Such 'military entrepreneurs' were in control of their own armies, operated at their own risk, and hired their services to one or more powers. Military entrepreneurs from Switzerland and the South of Germany in particular, would maintain cadres of trained troops which they could mobilize at short notice.<sup>28</sup> The most well known military entrepreneur was Albert of Wallenstein.<sup>29</sup> In both 1625 and 1631, Wallenstein recruited an astonishing army of 25,000 men for the Holy Roman Emperor through his own networks and resources.<sup>30</sup> These large troop numbers were partially due to the fact that private military contractors had to recover their expenses by forcing contributions from local populations.<sup>31</sup> Though providing impressive results at times, the basis of Wallenstein's military set up proved unsustainable. His armies were never, except on a few occasions, independent of the financial support of the Emperor.<sup>32</sup> Hired

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<sup>27</sup> Parrott, D. (2012) *The business of war: military enterprise and military revolution in early modern Europe*. Cambridge: Cambridge University Press, p. 102.

<sup>28</sup> Percy, S. V. (2007) *Mercenaries: the history of a norm in international relations*. Oxford: Oxford University Press, pp. 83-90; Parker, G. (1995) *The Cambridge Illustrated History of Warfare: the triumph of the West*. Cambridge: Cambridge University Press, p. 148.

<sup>29</sup> Percy, S. V. (2007) *Mercenaries: the history of a norm in international relations*. Oxford: Oxford University Press, pp. 88-89.

<sup>30</sup> Parrott, D. (2012) *The business of war: military enterprise and military revolution in early modern Europe*. Cambridge: Cambridge University Press, p. 101; Parker, G. (1995) *The Cambridge Illustrated History of Warfare: the triumph of the West*. Cambridge: Cambridge University Press, pp. 148-149.

<sup>31</sup> Bobbitt, P. (2003) *The Shield of Achilles: War, Peace, and the Course of History*, Alfred A. Knopf, New York, NY, p. 119.

<sup>32</sup> Parrott, D. (2012) *The business of war: military enterprise and military revolution in early modern Europe*. Cambridge: Cambridge University Press, pp. 103-104.

mercenaries would also prove to be unreliable at critical moments and refuse to fight if they were led too far afield or would find their fellow countrymen among the opposing forces, but above all else, if they were not paid on time.<sup>33</sup> The use of self-serving mercenaries with their lack in military strategy, is considered by historians to be in part responsible for the brutality, destructiveness and duration of the war.<sup>34</sup>

## 1.2 Reprisals, Letters of Marque and Privateering

Private state-sanctioned force against foreigners had been legal since the Middle Ages under the law of reprisals.<sup>35</sup> If a person traveling abroad was physically injured or his property was illegally deprived from him, the victim first had to try and obtain satisfaction from the wrongdoer or try and pursue him in the court of the state in which the wrongdoing occurred. If justice was denied to the victim, he could then request from the ruler of his home state an authorization to seize property from any fellow-national of the wrongdoer. This express consent of the victim's sovereign came in the form of a 'letter of reprisal'.<sup>36</sup> Reprisals were subject to strict rules and continuing judicial oversight however. Many medieval lawyers have made analogies between the reprisal process and 'just wars' due to similar requirements; the authorization from the sovereign, establishment of a just cause, the exemption of certain categories of persons, the actual

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<sup>33</sup> Parker, G. (1995) *The Cambridge Illustrated History of Warfare: the triumph of the West*. Cambridge: Cambridge University Press, pp. 149-150.

<sup>34</sup> Parrott, D. (2012) *The business of war: military enterprise and military revolution in early modern Europe*. Cambridge: Cambridge University Press, p. 101.

<sup>35</sup> Fassbender, B and Peters, A. (eds) (2014) *The Oxford Handbook of the History of International Law*. Oxford, United Kingdom: Oxford University Press, p. 594.

<sup>36</sup> Neff, S. C. (2005) *War and the Law of Nations: a general history*. Cambridge: Cambridge University Press, pp. 77-78

value of the damages incurred by the victim.<sup>37</sup> In *Tree of Battles* (c. 1382-87), Honoré Bonet concluded that reprisals constituted ‘a kind of war’.<sup>38</sup> Stephen Neff argues, however, that early forms of reprisals constituted a form of delegated law enforcement rather than qualifying as wars. Nevertheless, he argues, certain types of reprisals did in fact approach warfare.<sup>39</sup> In *The Principles of Political Law* (1725), J.J. Burlamaqui distinguished between ‘perfect’ and ‘imperfect’ wars. He argued that imperfect wars are generally called reprisals and described them as “acts of hostility, which sovereigns exercise against each other, or, with their consent, their subjects by seizing the persons or effects of the subjects of a foreign commonwealth.”<sup>40</sup>

Sometimes reprisals would authorise holders to seize property on the high seas, which is outside of the territory of the ruler issuing the letter. Seizing property on the high seas would normally be regarded as an act of piracy, but if done under the authority of a letter of reprisal, it would be regarded as a true act of war. Letters of reprisals authorizing the seizure of property on the high seas would become known by the term ‘letter of marque’, but sometimes the expressions marque and reprisal would be used interchangeably or synonymously.<sup>41</sup> Furthermore, a letter of marque could also be sub-delegated to persons with prior experience in seizing private property on the high seas. These letters of marque would at times be the only distinguishing feature

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<sup>37</sup> Neff, S. C. (2005) *War and the Law of Nations: a general history*. Cambridge: Cambridge University Press, pp. 79-80.

<sup>38</sup> Bonet, H., cited in Neff, S. C. (2005) *War and the Law of Nations: a general history*. Cambridge: Cambridge University Press, p. 80.

<sup>39</sup> Neff, S. C. (2005) *War and the Law of Nations: a general history*. Cambridge: Cambridge University Press, p. 80.

<sup>40</sup> Moss, K. B. (2008) *Undeclared war and the future of U.S. foreign policy*. Washington, DC: Woodrow Wilson Center Press, p. 22.

<sup>41</sup> Neff, S. C. (2005) *War and the Law of Nations: a general history*. Cambridge: Cambridge University Press, pp. 80-81.

between straightforward piracy and lawful war-making.<sup>42</sup> In the United States, prior to the US Constitution, individual states were able to issue these letters, but it was feared that these licensed private agents could pull the United States into a war. Both Thomas Jefferson and Alexander Hamilton therefore argued that the power to authorize reprisals rested with Congress, since it was the branch responsible for declaring war, and not the President.<sup>43</sup> Article 1, Section 8 of the US Constitution reads: “The Congress shall have Power ... To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”<sup>44</sup> This clearly indicates that the Framers of the US Constitution regarded the issuance of such letters as war-related.<sup>45</sup> According to Louis Fisher “The phrase ‘letters of marque and reprisal’ came to refer to any use of force short of a declared war.”<sup>46</sup>

Moreover, the practice of reprisals had evolved from ‘special reprisals’ to ‘general reprisals’. The first was the old practise of the actual victim of an injustice seizing property from a fellow-national of the wrongdoer. The latter, however, was an authorisation to all nationals of the reprisal-taking state to seize property from any person from the target country. And instead of seizing property equalling the loss suffered by the victim, general reprisals allowed unlimited confiscation of property from enemy nationals. General reprisals were acts of war, and as such, their issuance was

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<sup>42</sup> Neff, S. C. (2005) *War and the Law of Nations: a general history*. Cambridge: Cambridge University Press, p. 81.

<sup>43</sup> Moss, K. B. (2008) *Undeclared war and the future of U.S. foreign policy*. Washington, DC: Woodrow Wilson Center Press, p. 31.

<sup>44</sup> United States Senate (1787). *Constitution of the United States*. [online] Available at: [https://www.senate.gov/civics/constitution\\_item/constitution.htm](https://www.senate.gov/civics/constitution_item/constitution.htm) [Accessed 25 Apr. 2019].

<sup>45</sup> Moss, K. B. (2008) *Undeclared war and the future of U.S. foreign policy*. Washington, DC: Woodrow Wilson Center Press, p. 31.

<sup>46</sup> Fisher, L. cited in Moss, K. B. (2008) *Undeclared war and the future of U.S. foreign policy*. Washington, DC: Woodrow Wilson Center Press, p. 31.

regarded as an actual declaration of war.<sup>47</sup> States would issue letters of marque as general reprisals during times of war in order to strengthen their naval capacity on short notice. Private vessels holding these letters would then function as auxiliaries to their State's naval forces. Such 'letter-of-marque ships' would, if an opportunity presented itself during the course of normal trading, capture enemy vessels in return for a share of the proceeds.

When private entrepreneurs started fitting out ships specifically for capturing enemy property at sea, the practise evolved into what became known as 'privateering'.<sup>48</sup> In practise, privateers were no more than state-sanctioned mercenaries. They differed with pirates only in the fact that their actions were sanctioned by the higher authority of the State and their motivations were not always entirely for private gain.<sup>49</sup> During the late 17th century, privateering was closely connected with the policy of blockade. The English and Dutch governments attempted to cut off France from importing grains from the Baltic. By 1696 neither France nor England was able to afford the upkeep of their main fleets and increasingly turned to privateering.<sup>50</sup> Privateers financed their own operations and did not receive government funding.<sup>51</sup> It also increased private capital

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<sup>47</sup> Neff, S. C. (2005) *War and the Law of Nations: a general history*. Cambridge: Cambridge University Press, p. 108.

<sup>48</sup> Neff, S. C. (2005) *War and the Law of Nations: a general history*. Cambridge: Cambridge University Press, p. 109; Rodger, N. A. M. (2006) *The Command of the Ocean: a naval history of Britain, 1649-1815*. London: Penguin Books, pp. 156-157.

<sup>49</sup> Fassbender, B and Peters, A. (eds) (2014) *The Oxford Handbook of the History of International Law*. Oxford, United Kingdom: Oxford University Press, p. 594.

<sup>50</sup> Rodger, N. A. M. (2006) *The Command of the Ocean: a naval history of Britain, 1649-1815*. London: Penguin Books, p. 156.

<sup>51</sup> Moss, K. B. (2008) *Undeclared war and the future of U.S. foreign policy*. Washington, DC: Woodrow Wilson Center Press, p. 33.



investment and expertise from private shipowners to sustain the naval war.<sup>52</sup> The strategy of privateering proved very successful.<sup>53</sup>

### 1.3 Joint-Stock Companies

Chartered joint-stock companies are incorporated associations with investors or shareholders for the purpose of exploration, trade, and colonization.<sup>54</sup> These corporations were often granted monopolies over trade with a specific territory abroad in return for payments to the treasury.<sup>55</sup> As large taxable business enterprises, they were important sources of state revenue, and because they acted as tax collecting agents on behalf of the state. They would also help reduce expenses which states would normally have to carry themselves, by covering the costs of maintaining forts, military and trade facilities and embassies for example.<sup>56</sup> The early chartered trade corporations had two organizational forms; regulated corporations, and joint-stock corporations. The former was usually involved in short distance trade and the latter in long distance trade.<sup>57</sup> The first joint-stock company was the Muscovy Company which received its charter in 1555, and although it was unsuccessful, the idea led to many imitators seeking trade monopolies.<sup>58</sup> The most famous and successful were the English (later British) East

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<sup>52</sup> Rodger, N. A. M. (2006) *The Command of the Ocean: a naval history of Britain, 1649-1815*. London: Penguin Books, pp. 158-159.

<sup>53</sup> For example: In 1695, French privateer René Duguay-Trouin took three ships owned by the East India Company off the coast of Ireland, and in the period from 1689 to 1713 they took an approximate 12,000 prizes of all sorts from their enemies (Rodger, 2006, p. 158).

<sup>54</sup> Harris, R. (2005) "The English East India Company and the History of Company Law," *Law of business and finance*, Vol. 6, pp. 220-221.

<sup>55</sup> *Ibid*, p. 221.

<sup>56</sup> *Ibid*, p. 222.

<sup>57</sup> *Ibid*, pp. 222-223.

<sup>58</sup> *Ibid*, p. 223; Micklethwait, J. and Wooldridge, A. (2005) *The Company: a short history of a revolutionary idea*. London: Phoenix, p. 26.

India Company (EIC)<sup>59</sup> and the Dutch East India Company (VOC), which were incorporated by State charters in 1600 and 1602 respectively.<sup>60</sup> Both the EIC and VOC were involved in oceanic trade in high value goods between Europe and Asia, and are considered to be the forerunners of the modern public corporation.<sup>61</sup> They were set up in order to challenge Portuguese domination of the trade in spices and Far Eastern textiles.<sup>62</sup> For the EIC and VOC, profit maximization was the central objective, unlike the Portuguese and Spanish trade organizations before them.<sup>63</sup> The VOC was not established as a warmachine, since there would not have been enough political support for such an endeavour. During the Dutch War of Independence (1568–1648), however, the Dutch States-General recognized overseas trade as an opportunity to put pressure on its enemy Spain. As a result, necessity and self-preservation combined with the rhetoric of the Dutch Revolt against Spanish rule were transposed onto the domain of overseas trade.<sup>64</sup> In 1664, France founded its own East India Company as a commercial Imperial enterprise in order to compete with the EIC and VOC in the East Indies. Remarkably, due to the East Indies' distance from Europe, the European East India Companies were always partly disconnected from the quarrels between European sovereigns. They were mostly concerned with their relations with the Indian princes and

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<sup>59</sup> Chapter 4 will discuss the EIC in more detail as one of the case studies.

<sup>60</sup> Harris, R. (2005) "The English East India Company and the History of Company Law," *Law of business and finance*, Vol. 6, p. 219.

<sup>61</sup> Heckman, J. J., Nelson, R. L. and Cabatingan, L. (eds) (2010) *Global perspectives on the rule of law*. London: Routledge (Law, development and globalization), pp. 147-150; O'Brien, J., O'Kelley, C. R. and Clarke, T. (eds) (2019) *The Oxford Handbook of the Corporation*. First edn. Oxford, United Kingdom: Oxford University Press, p. 75; Robins, N. (2012) *The corporation that changed the world: how the East India company shaped the modern multinational*. 2nd edn. London: Pluto Press, p. 174.

<sup>62</sup> James, L. (1998) *The rise and fall of the British empire*. London: Abacus, p. 25.

<sup>63</sup> Harris, R. (2005) "The English East India Company and the History of Company Law," *Law of business and finance*, Vol. 6, p. 219.

<sup>64</sup> Fassbender, B and Peters, A. (eds) (2014) *The Oxford Handbook of the History of International Law*. Oxford, United Kingdom: Oxford University Press, p. 342.

their own rivalries.<sup>65</sup> At times their home states would be at war with one another while they had peaceful relations amongst themselves, and at times they would be at war with one another while their home states were at peace. In a constant struggle to attain trade dominance, the East India Companies would find themselves fighting battles against states, rival companies and privateers and sometimes all at once.

#### **1.4 Modern mercenaries**

Mercenaries are private individuals hired in an open market for force. They can conduct autonomous military campaigns, offensive operations and force projection, and generally select clientele based on profit margin rather than ideology.<sup>66</sup> According to Peter Singer, modern mercenaries are distinguished from other combatants and military organisations by the following characteristics. A mercenary: 1) is not a citizen or resident of the state in which he is fighting; 2) is not integrated into any national force for the long term and is by contract bound only to his employer; 3) fights for monetary gain, not for potential or religious goals; 4) is brought in by oblique and circuitous ways to avoid legal prosecution; 5) is an individual soldiers grouped together in ad-hoc units; 6) lacks prior organization and focuses primarily on combat service for single clients.<sup>67</sup>

Mercenaries have been largely absent from the international system since the Crimean war but have emerged on a smaller scale since the 1960s, particularly in

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<sup>65</sup> Rodger, N. A. M. (2006) *The Command of the Ocean: a naval history of Britain, 1649-1815*. London: Penguin Books, p. 274.

<sup>66</sup> McFate, S. cited in Leander, A. and Abrahamsen, R. (eds) (2017) *Routledge handbook of private security*. London: Routledge, p. 121.

<sup>67</sup> Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry. Updated edn*. Ithaca, N.Y.: Cornell University Press, p. 43, Table 3.1.

African civil wars following decolonization.<sup>68</sup> According to Sarah Percy<sup>69</sup>, international law prohibits mercenarism in four main ways: 1) General Assembly and Security Council resolutions proscribing or condemning mercenarism; 2) the Organization of African Unity Convention for the Elimination of Mercenaries in Africa; 3) Article 47 of Protocol I additional to the Geneva Conventions; 4) United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries.<sup>70</sup> In the Protocol Additional to the Geneva Conventions Article 47, mercenaries are defined as follows:

1. *A mercenary shall not have the right to be a combatant or a prisoner of war.*
2. *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 essentially 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*

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<sup>68</sup> Percy, S. V. (2007) *Mercenaries: the history of a norm in international relations*. Oxford: Oxford University Press, p. 167.

<sup>69</sup> *Ibid*, p. 169.

<sup>70</sup> United Nations (1990) "International Convention Against the Recruitment, Use, Financing and Training of Mercenaries," *International Legal Materials*, Cambridge University Press, 29(1), pp. 89–97.

*(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.*<sup>71</sup>

This definition, however, is cumulative, which means that only if all the above applies can someone be termed a mercenary.<sup>72</sup> Singer argues that the result of these vague and restrictive requirements is that there are few instances where all the criteria would fit, and it is very difficult to prosecute anyone based on the existing anti-mercenary laws.<sup>73</sup>

## **1.5 Private Military and Security Companies**

Scholars across various disciplines have attributed the rise of Private Military and Security Companies to neo-liberal free market economics, corporate globalization, and the trend toward privatisation and outsourcing.<sup>74</sup> These economic trends combined with the end of the Cold War resulted in the global downsizing of national militaries and Security Sector Reform (SSR) programmes, which in turn caused an explosion in PMSCs due to the large pool of suddenly unemployed ex-military personnel.<sup>75</sup>

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<sup>71</sup> International Committee of the Red Cross (ICRC), *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, 1125 UNTS 3.

<sup>72</sup> Moyakine, E. (2014) *The Privatized Art of War: private military and security companies and state responsibility for their unlawful conduct in conflict areas*. Tilburg: Tilburg University, p. 165-166.

<sup>73</sup> Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry. Updated edn*. Ithaca, N.Y.: Cornell University Press, p. 238.

<sup>74</sup> Moyakine, E. (2014) *The Privatized Art of War: private military and security companies and state responsibility for their unlawful conduct in conflict areas*. Tilburg: Tilburg University, p. 54; Nagan, W. P. and Hammer, C. (2008) "The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process," *Maine law review*, 60(2), p. 434; Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry. Updated edn*. Ithaca, N.Y.: Cornell University Press, pp. 66-68.

<sup>75</sup> Holmqvist, C. (2005) *Private Security Companies: The Case for Regulation*. SIPRI policy paper, No. 9. Solna, Sweden: Stockholm International Peace Research Institute, p.2; Leander, A. and Abrahamsen, R. (eds) (2017) *Routledge handbook of private security*. London: Routledge, p. 119; Chesterman, S. and Lehnardt, C. (2007) *From Mercenaries to Market: the rise and regulation of private military companies*. Oxford: Oxford University Press, p. 168.

Transformation of warfare and technological developments in weapons systems further increased reliance on the private sector.<sup>76</sup> The Clinton and Bush Jr. administrations both used outsourcing as a way to downsize the military, while the latter even regarded outsourcing as one of his top priorities.<sup>77</sup> While the number of civil servants employed by the government had been capped by congress, there was no limit regarding personnel employed through private companies. This has allowed the government to hide the true size of the federal government from public view.<sup>78</sup> Subsequently, US military planners adopted this strategy and turned increasingly in favour of outsourcing support services to PMSCs.<sup>79</sup> Samuel Huntington famously said: “While all professions are to some extent regulated by the state, the military profession is monopolized by the state.”<sup>80</sup> This era, however, was now officially over.

Private Military and Security Companies (PMSCs) are legal registered businesses with corporate organisational structures.<sup>81</sup> Currently, most PMSCs are based in the United States, the United Kingdom, South Africa, and Israel.<sup>82</sup> They provide their services primarily for profit rather than for political motivation. Despite common perception, however, most PMSC employees are not mercenaries. Military

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<sup>76</sup> Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry*. Updated edn. Ithaca, N.Y.: Cornell University Press, pp. 49-70.

<sup>77</sup> Minow, M. (2005) “Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy,” *Boston College law review*, 46(5), p. 1001.

<sup>78</sup> *Ibid*, p. 1001.

<sup>79</sup> Advisory Council on International Affairs (2008) “Employing Private Military Companies: A Question of Responsibility, Advisory Report No. 59, December 2007” *Netherlands International Law Review*, 55(1), p. 14.

<sup>80</sup> Huntington, S. P. (1957) *The Soldier and the State: the theory and politics of civil-military relations*. Cambridge, Massachusetts, Harvard University Press, p. 37.

<sup>81</sup> Moyakine, E. (2014) *The Privatized Art of War: private military and security companies and state responsibility for their unlawful conduct in conflict areas*. Tilburg: Tilburg University, p. 85.

<sup>82</sup> House of Commons (2006) *Private Military Companies: Options for Regulations*, London, United Kingdom: The Stationary Office, p. 11.

Support Companies and Military Consulting Companies, provide non-combat services such as logistics and training, but also mundane services such as providing meals and washing the laundry.<sup>83</sup> Peter Singer, divides PMSCs into three categories. Using the “tip-of-the-spear” metaphor, Singer breaks down the variations of PMSCs based on their closeness to actual fighting.<sup>84</sup> Military Support Companies such as Brown & Root, provide non-lethal aid and assistance such as logistics, intelligence, technical support, supply, and transportation. This sector is the largest in scope and revenue and has a wide variety of subsectors. However, they do not engage in direct combat activities.<sup>85</sup> Military Consulting Companies such as MPRI, provide advisory and training services such as restructuring armed forces and offering strategic, operational and organizational analysis. Their presence can critically alter the strategic and tactical environment through reengineering local forces, but they may not engage in direct combat activities.<sup>86</sup> The category which is of particular concern to this thesis is that of Private Military Companies (PMC). PMCs are defined by their focus on the tactical environment and engage in actual combat activities.<sup>87</sup> David Isenberg argued that in practice there are only two distinguishable types of PMSCs, namely “those with guns and those without.”<sup>88</sup> Industry advocates argue that they only provide security services, only act out of self defence, and strictly do not engage in offensive combat operations. The fact is, however, that both PSCs and PMCs hired to provide “security” in Iraq and

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<sup>83</sup> Avant, D. (2004) “Think again: Mercenaries” *Foreign policy*, 143(143), p. 20.

<sup>84</sup> Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry. Updated edn.* Ithaca, N.Y.: Cornell University Press, p. 91.

<sup>85</sup> *Ibid*, p. 97.

<sup>86</sup> *Ibid*, p. 95.

<sup>87</sup> *Ibid*, pp. 92-93

<sup>88</sup> Bryden, A., Caparini, M. (eds) (2006) *Private actors and security governance.* Geneva: Switzerland. Geneva Centre for the Democratic Control of Armed Forces, p. 155.

Afghanistan, operate in a war zone or “tip-of-the-spear” and are subject to attack. Subsequently, PMC personnel have frequently been engaged in direct battles with insurgents and have even committed war crimes against civilians.

During the 1990s, the US military ‘consultancy’ company ‘Military Professional Resources Inc.’ (MPRI) was licensed for contracts in Croatia and Bosnia where they were tasked to train and equip Bosnian and Croatian forces. Although the United States did not have an official presence or position in the Yugoslav conflict, the Pentagon referred the Croatian Defense Minister to MPRI. The idea was to strengthen the Croat forces and ally them with the Bosnians in order to balance Serbian power.<sup>89</sup> In August 1995, the Croat army launched a massive attack which completely caught the Krajina Serbs off guard due to its scale and sophistication, and was a major turning point in the war. After this success, MPRI began training the Bosnian army. What is unusual about this case is that while the contracts were directly between MPRI and the Croat and Bosnian governments, they were paid for by third party countries in the Middle East. As such, the US government was able to provide covert military assistance by way of a US registered PMSC and avoid political risk.<sup>90</sup> The Bosnian Prime Minister reportedly said that having MPRI work for his government was “the next best thing” to official US military assistance.<sup>91</sup>

South African PMC ‘Executive Outcomes’ (EO) would hire former elite units of the apartheid-era military to fight in several conflicts Africa throughout the 1990s.<sup>92</sup> EO

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<sup>89</sup> Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry. Updated edn.* Ithaca, N.Y.: Cornell University Press, p. 125.

<sup>90</sup> *Ibid*, pp. 122-128.

<sup>91</sup> *Ibid*, p. 122.

<sup>92</sup> Chesterman, S. and Lehnardt, C. (2007) *From Mercenaries to Market: the rise and regulation of private military companies.* Oxford: Oxford University Press, p. 168.



was officially a subsidiary of a larger South African venture-capital company called Strategic Resources Corporation (SRC). EO had tight links with mining businesses and oil corporations such as Branch-Heritage mining group and Diamondworks.<sup>93</sup> In most places where EO conducted major operations, it would set up stay-behind security companies which would then be hired by firms like Branch-Heritage to guard its mining operations. If certain countries would not be able to afford EOs services, deals would be made for mining concessions to EOs business partners, which would in turn pay for EOs 'security' services.<sup>94</sup> What sets the case of EO apart from US PMCs is the fact that the South African government tolerated its operations but did not use it as a foreign policy tool. EO set its own agenda and was hired directly by states and companies. After Executive Outcomes ceased its operations in 1998, the use of PMCs in offensive combat operations practically disappeared.<sup>95</sup> Currently, the South African PMSC industry is regulated by the 1998 'Foreign Military Assistance Act' (FMAA), which prohibits mercenarism but seeks to regulate 'foreign military assistance'.<sup>96</sup> The FMAA, however, is minimally enforced, and only a few cases have been brought under it and all settled by plea bargain.<sup>97</sup> Today, offensive mercenary companies such as EO are

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<sup>93</sup> Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry*. Updated edn. Ithaca, N.Y.: Cornell University Press, p. 104.

<sup>94</sup> Ibid, pp. 104-105.

<sup>95</sup> Seiberth, C. (2014) *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, England: Intersentia.

<sup>96</sup> South African Government (1998) *Regulation of Foreign Military Assistance Act* [online] Gov.za. Available at: <https://www.gov.za/documents/regulation-foreign-military-assistance-act> [Accessed 14 Jun. 2019].

<sup>97</sup> Chesterman, S. and Lehnardt, C. (2007) *From Mercenaries to Market: the rise and regulation of private military companies*. Oxford: Oxford University Press, pp. 169-170.

largely absent, but companies like Blackwater certainly approach the mercenary side of the PMSC industry.<sup>98</sup>

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<sup>98</sup> Leander, A. and Abrahamsen, R. (eds) (2017) *Routledge handbook of private security*. London: Routledge, p. 121.

## Chapter 2: Military revolutions and the rise of states

*“All empires and all lordships find their origin in war.”*<sup>99</sup>

**Count Jean de Bueil - 1466**

### 2.1 The Institutionalization of War

In his seminal work, *Capital and European States* (1992), Charles Tilly argued that the requirements of warfare forced states to consolidate their administrative and economic apparatus, and by institutionalizing the practice of war it became an intrinsic part of the state.<sup>100</sup> According to Tilly, this was because the creation of armed forces generated durable state structures. Armies subsequently became important organizations within the state and their construction and maintenance was facilitated by complementary organizations such as treasuries, supply services, mechanisms for conscription and tax-collection agencies.<sup>101</sup> Tilly pointed out that from the 10th century onward, war mobilizations were the chief occasions during which states expanded, consolidated their power, and would often create new forms of political organization in the process.<sup>102</sup> Tilly argued, however, that no state passed through the same internal process of state formation. Instead, he points to variable relations between force, capital, and major

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<sup>99</sup> De Bueil, J. (1466), cited in Parker, G. (1995) *The Cambridge Illustrated History of Warfare: the triumph of the West*. Cambridge: Cambridge University Press, p. 103.

<sup>100</sup> Leander, A. and Abrahamsen, R. (eds) (2017) *Routledge handbook of private security*. London: Routledge, p. 12.

<sup>101</sup> Tilly, C. (1992) *Coercion, Capital, and European States, AD 990-1992*. Rev. edn. Cambridge, Massachusetts: Blackwell (Studies in social discontinuity), p. 70.

<sup>102</sup> *Ibid*, p. 70.

power holders in each state and emphasized the different international context in which states arose.<sup>103</sup>

## 2.2 The Age of Feudalism

In medieval Europe, between the 9th and 15th centuries, the preponderant socio-economic system was that of feudalism, which was a combination of legal and military customs and obligations between lords and vassals. In exchange for certain privileges such as land held as a tenant or fief, knights would be obliged to offer military support. In feudal society not only the warrior aristocracy was bound by vassalage; peasants were bound by manorialism and the estates of the Church.<sup>104</sup> The political centralization by states started during feudalism when feudal rulers were in fierce competition with their rivals.<sup>105</sup> Kings and lords would often claim sovereignty over the same territories, which resulted in a pattern of competing power networks described by historians as “feudal anarchy”. As a result, Kings would often engage in ‘private wars’ against rival lords in the country.<sup>106</sup> Geoffrey Parker argued that state-formation and preservation depended on maintaining access to soldiers.<sup>107</sup> The decline of feudal obligations to serve in war, however, coupled with the prolongation of conflicts and the unwillingness of soldiers to fight for anything other than financial reward led to the common practise of paid military service. Since this involved huge sums of money, which only the central

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<sup>103</sup> Colas, A and Mabee, B. (ed.) (2010) *Mercenaries, pirates, bandits and empires: private violence in historical context*. London: Hurst & Company, pp. 35-36.

<sup>104</sup> Davies, N. (1996) *Europe: a history*. Oxford: Oxford University Press, pp. 311-316

<sup>105</sup> Leander, A. and Abrahamsen, R. (eds) (2017) *Routledge handbook of private security*. London: Routledge, p. 13.

<sup>106</sup> *Ibid*, p. 13.

<sup>107</sup> Parker, G. (1995) *The Cambridge Illustrated History of Warfare: the triumph of the West*. Cambridge: Cambridge University Press, p. 103.

authority was able to raise by way of taxation. As such, the ruler became the direct employer and paymaster of those who served him. This custom was formalised by way of military contracts known as “indenture” in England, “lettre de retenue” in France, and “condotta” in Italy. The use of such indentures had enormous practical and symbolic significance. It presupposes that the state has the right to decide on war and peace. Furthermore, rulers could now explicitly claim the right to appoint commanders and insist on standards which would lead to efficiency. Soldiers in the employ of the state were obliged to train and serve out the length of service agreed to in the contract.<sup>108</sup>

### **2.3 The Emergence of Modern States**

Between the 12th and 16th centuries, modern states gradually arose in England, France, Spain, and Portugal. States levied taxes, raised and commanded armies, made laws, established courts and ensured law and order.<sup>109</sup> They were characterized by centralized power structures which had exclusive political and moral authority over the population and by having a monopoly on violence within their own territories. Between 1530 and 1630, military innovations such as the introduction of gunpowder, improvements in fortress design, and the immense increases in the sizes of armies had completely transformed European warfare. Wars occurred more often, lasted much longer and involved far more soldiers.<sup>110</sup> The excesses of this period, wherein the slaughter was so great and the chaos so terrifying, resulted in widespread anti-war

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<sup>108</sup> Parker, G. (1995) *The Cambridge Illustrated History of Warfare: the triumph of the West*. Cambridge: Cambridge University Press, p. 103.

<sup>109</sup> Fassbender, B and Peters, A. (eds) (2014) *The Oxford Handbook of the History of International Law*. Oxford, United Kingdom: Oxford University Press, p. 49.

<sup>110</sup> Parker, G. (1995) *The Cambridge Illustrated History of Warfare: the triumph of the West*. Cambridge: Cambridge University Press, p. 163.

sentiment. A revulsion towards war felt by political leaders and ordinary people alike, resulted into a cultural and political climate favourable to the development of absolute states. Throughout Western Europe, political elites recognized the need for armies to be better controlled.<sup>111</sup> They acknowledged that this control should be exercised by the state, and preferred paying high taxes to a monarch over endless contributions to unaccountable mercenary armies.<sup>112</sup>

## 2.4 Standing Armies

During the 16th and 17th centuries, Europe saw more belligerence than in any other period in its history, with only ten years of complete peace across the continent.<sup>113</sup>

States could no longer rely on traditional methods of raising and managing troops due to the sheer size of their armies. Governments met this challenge by taking control of the recruiting, equipping, and supplying of troops, and subsequently established permanent standing armies combined with substantial military and administrative expansion. This series of radical changes in military strategy and tactics resulted in major lasting changes in governments and society. This theory is termed “the Military Revolution” and was first put forward by military historian Michael Roberts.<sup>114</sup>

Governments funded this ‘constitutional centralization’ by sophisticated credit and financial systems which are fundamental characteristics of the modern State.<sup>115</sup> The

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<sup>111</sup> Percy, S. V. (2007) *Mercenaries: the history of a norm in international relations*. Oxford: Oxford University Press, p. 90.

<sup>112</sup> Parker, G. (1995) *The Cambridge Illustrated History of Warfare: the triumph of the West*. Cambridge: Cambridge University Press, p. 163.

<sup>113</sup> Ibid, p. 146.

<sup>114</sup> Black, J. (1988) “The Military Revolution.” *Teaching History*, no. 52, p. 34.

<sup>115</sup> Bobbitt, P. (2003) *The Shield of Achilles: War, Peace, and the Course of History*, Alfred A. Knopf, New York, NY, p. 117.

prominence of nation-states in Europe was particularly apparent in the area of war due to the establishment of standing armies.<sup>116</sup> In 1659, France won the war against Spain and subsequently became the preeminent land power in Europe. When in 1661, Louis XIV assumed full authority (he came to the throne as a boy), he inherited a large but poorly organized force of about 70,000 men consisting of guard units, mercenaries and local militias. During the war the army had expanded to 125,000, which had overstretched the treasury and resulted in unpaid and unfed troops ravaging the French countryside. Louis XIV then reorganised his army into a disciplined and professional force of permanent regiments, centralised control and improved military administration. A powerful standing army was created and a new pattern for Europe was set. The new regimental system was subsequently adopted by states throughout Europe.<sup>117</sup> This military revolution brought about the modern style of warfare and with it the modern State.<sup>118</sup>

## 2.5 The Nation in Arms

However, the processes of making and remaking the means of warfare saw its climax in the French Revolution and the advent of mass national conscription known as “levée en masse”.<sup>119</sup> According to Samuel Huntington, the concept of “the nation in arms” was a

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<sup>116</sup> Neff, S. C. (2005) *War and the Law of Nations: a general history*. Cambridge: Cambridge University Press, p. 87.

<sup>117</sup> Parker, G. (1995) *The Cambridge Illustrated History of Warfare: the triumph of the West*. Cambridge: Cambridge University Press, p. 164.

<sup>118</sup> Bobbitt, P. (2003) *The Shield of Achilles: War, Peace, and the Course of History*, Alfred A. Knopf, New York, NY, p. 117.

<sup>119</sup> Avant, D. (2000) “From Mercenary to Citizen Armies: Explaining Change in the Practice of War,” *International Organization*, 54(1), p. 41.

product of the rise of nationalism and democracy.<sup>120</sup> For the first time in many hundreds of years, the use of foreign mercenaries virtually disappeared from European armies.<sup>121</sup> The 'wars of kings' were separated from the 'wars of people', and states began to fight wars using exclusively their own citizens.<sup>122</sup>

## 2.6 Universal Service and Professionalism

The next dramatic shift in military organisation occurred in Prussia, when in 1814, it became the first country to professionalize its officer corps and was the first to institute a permanent universal service.<sup>123</sup> A law that was passed on the 3rd of September 1814, required all Prussians to serve five years in its standing army and fourteen years in the militia. This basic system remained in place until the First World War. Only after France's defeat after the Franco-prussian war did it professionalize and adopt a mass army. Prussia's victory over the French also led the British to rethink and reform its military and officer corps.

## 2.7 The end of Privateering and Mercenarism

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<sup>120</sup> Huntington, S. P. (1957) *The Soldier and the State: the theory and politics of civil-military relations*. Cambridge, Massachusetts, Harvard University Press, p. 37.

<sup>121</sup> Percy, S. V. (2007) *Mercenaries: the history of a norm in international relations*. Oxford: Oxford University Press, p. 94.

<sup>122</sup> Tonkin, H. (2011) *State control over Private Military and Security Companies in armed conflict*. Cambridge: Cambridge University Press (Cambridge Studies in International and Comparative Law), pp. 9-10.

<sup>123</sup> Huntington, S. P. (1957) *The Soldier and the State: the theory and politics of civil-military relations*. Cambridge, Massachusetts, Harvard University Press, p. 37; Moyakine, E. (2014) *The Privatized Art of War: private military and security companies and state responsibility for their unlawful conduct in conflict areas*. Tilburg: Tilburg University, pp. 48-49.



Between 1815 and 1853, privateering had not been much debated but the idea that it should be outlawed gained wide acceptance. The idea of a convention against privateering was first drafted by the British Foreign Office in 1854. During the Crimean War (1853-56) rumours were spread by newspapers about alleged Russian privateering schemes in the US and actual naval preparations. Insurers analyzing the war risks for certain shipping routes were shocked by these revelations and found it impossible to calculate insurance rates because they could not accurately determine the risks involved. As a result, they simply increased their rates for all routes and raised the cost of global transport and the economy to such an extent that it triggered international calls for abolition of privateering. Britain's motive for the suppression of privateering was strategic, but for small neutrals the logic was commercial. While many had benefited from privateering it was widely acknowledged that in an age of scheduled steamer connections and dense commercial entanglement, the continued practice of privateering would make the increasingly high insurance rates untenable. Suppressing privateering became a necessity for global commerce. When the 'Paris Declaration Respecting Maritime Law' passed on 16 April 1856, the seven major European powers of the time agreed on a revolution in maritime law by abolishing privateering.<sup>124</sup> The Declaration was written by France and Britain but signed by 55 nations. Privateers were restricted to the ports of their home nations, were prevented from buying supplies or fuel and from selling their loot. After states withdrew logistical support and joined the global abolition regime privateering became unsustainable. When a state threatened to revoke the ban,

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<sup>124</sup> Lemnitzer, J. M. (2014) *Power, law and the end of privateering*. Basingstoke: Palgrave Macmillan, pp. 173-178.

other state signatories would combine spontaneously and threaten to use force to uphold this principle and important norm of international law. It was no longer deemed acceptable that private raiders who were only interested in personal profit were allowed to be involved in interstate violence and henceforth all military action should be conducted by state forces.<sup>125</sup>

Over the past centuries, there has been no straightforward distinction between public and private force since they were always intertwined and varied across time and place. Long after the consolidation of states, privateers were used in a wide range of settings, and long after the rise of nationalism, states continued to use foreigners for their armies. Moreover, private joint-stock companies were a central component of European colonial ventures. Sovereign states, therefore, have not emerged when they completely stopped using private force. Rather, as states emerged, they slowly began centralizing and professionalizing their militaries and the role of private force changed. Janice Thomson has purported that states initially did not set out to eliminate mercenarism because most of them benefited from it.<sup>126</sup> According to Thomson, the decline of mercenarism was due to “interstate relations” and “systemic forces” such as the institution of neutrality. This in turn empowered state-builders to monopolize the authority to wage war by implementing new controls on their citizens. She argues that the idea of state sovereignty in international geopolitics led states to address and eliminate the problem of private force, by nationalizing their armies and outlawing

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<sup>125</sup> Ibid, pp. 173-178; The United States, however, did not sign the Declaration because it regarded privateering as a way to reinforce its naval capabilities. Only at the Hague Convention did it officially renounce privateering and letters of marque and reprisal (Moss, 2008, p. 33).

<sup>126</sup> Thomson, J. E. (2001) *Mercenaries, Pirates, and Sovereigns: state-building and extraterritorial violence in early modern Europe*. Princeton: Princeton University Press, p. 88.

privateering, leading to further consolidation of state power. However, despite the fact that states increasingly monopolized the means of warfare and became the only units able to legitimately wage wars, it does not mean that private force disappeared altogether.<sup>127</sup> Nevertheless, states had a common interest in building state power vis-à-vis their citizens and this led to an international norm against mercenarism. The last time a state raised an army of mercenaries was in 1854, when Britain hired 16,500 foreign mercenaries to fight in the Crimean War, despite the fact that the war ended before they even arrived.<sup>128</sup>

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<sup>127</sup> Leander, A. and Abrahamsen, R. (eds) (2017) *Routledge handbook of private security*. London: Routledge, p. 18.

<sup>128</sup> Thomson, J. E. (2001) *Mercenaries, Pirates, and Sovereigns: state-building and extraterritorial violence in early modern Europe*. Princeton: Princeton University Press, p. 88; Percy, S. V. (2007) *Mercenaries: the history of a norm in international relations*. Oxford: Oxford University Press, p. 167.

## Chapter 3: Sovereignty and the Westphalian system

*“Sovereignty is more than anything else a matter of legitimacy.”*<sup>129</sup>

**Immanuel Wallerstein - Sociologist**

### 3.1 Jean Bodin and Thomas Hobbes

The works of two political philosophers have been particularly influential for the conceptualization of sovereignty, namely Jean Bodin (1576) and Thomas Hobbes (1651).<sup>130</sup> Jean Bodin was the first to analyze the concept of sovereignty systematically. His seminal work *Les Six Livres de la République* (1576) was intended to deal with the structure of authority within the modern state and based his study upon his perception of European politics rather than theoretical discussions.<sup>131</sup> According to Bodin, sovereignty is indivisible, and as such, the high powers of government should not be shared or distributed to other agents.<sup>132</sup> Bodin held that the French high magistrates by right of office did not ‘hold’ the power to impose capital punishment, but exercised by delegation only. The sovereign is the supreme legislator.<sup>133</sup> This led Bodin to theorise

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<sup>129</sup> Wallerstein, I. (2004) *World-systems analysis: an introduction*. Durham, NC: Duke University Press, p. 44.

<sup>130</sup> Evans, G. and Newnham, J. (1998) *The Penguin Dictionary of International Relations*. London: Penguin (Penguin reference).

<sup>131</sup> Shaw, M. N. (2014) *International law. Seventh Edition*. Cambridge, United Kingdom: Cambridge University Press, p. 15.

<sup>132</sup> Bodin, J. and Franklin, J. H. (1992) *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*. Cambridge: Cambridge University Press (Cambridge texts in the history of political thought), p. xiii.

<sup>133</sup> *Ibid*, p. xiv.

the necessary characteristics of sovereignty. In his essay, he argued that one of the most important aspects of sovereignty is the power to declare war or make peace, since it can be a cause for the ruin or the preservation of a state.<sup>134</sup>

In his classical book *Leviathan*, written during the English Civil War and published in 1651, Hobbes argues how the pre-political state of nature can be described as a place of indiscriminate violence, which we escape by forming a political society and submitting ourselves by way of a 'social contract' to the centralized authority of the State which can then claim a monopoly on the legitimate use of violence.<sup>135</sup> According to Hobbes, power must be conferred to one man or one assembly because otherwise it cannot be enforced. This 'Leviathan', whether a man or assembly, is the Sovereign. Hobbes argued that although such a sovereign may be despotic, the dangers of anarchy were far worse than despotism.<sup>136</sup> Subsequently, if the sovereign is not able to protect its citizens, the citizens are no longer obliged to submit to the sovereign's authority.<sup>137</sup>

### **3.2 Internal and external sovereignty**

Internal sovereignty is the supreme authority within a state. This means that any institution, person, or body having the ultimate authority within the state to impose and alter laws holds sovereign authority. The political nature of the state determines who holds sovereign authority and how it is exercised. The executive, legislative and judicial

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<sup>134</sup> Ibid, p. 59.

<sup>135</sup> McLean, I. and McMillan, A. (2003) *The Concise Oxford Dictionary of Politics*. 2nd edn. Oxford: Oxford University Press, p. 560.

<sup>136</sup> Russell, B. (1961) *History of Western philosophy and its connection with political and social circumstances from the earliest times to the present day*. 2nd edn. London: Allen & Unwin, pp. 535-536 .

<sup>137</sup> Ibid, p. 538

powers in most countries are exercised by different bodies. It is possible that one of these bodies is able to control the others, thereby retaining sovereignty.<sup>138</sup> It should be noted, however, that there is much controversy and debate on this topic. Regarding the definition of sovereignty, Lassa Oppenheim famously said: "There exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon."<sup>139</sup> What is clear, however, is that sovereignty is a legal claim with major political consequences, both internally within states and internationally between states.<sup>140</sup> Sovereignty is the claim by the state to full self-government within its territory. Internationally, it serves as the basis for exchanges of recognition based on legal equality. The mutual recognition of claims to sovereignty is the basis of the International System, and as such the basis of diplomacy and International Law.<sup>141</sup> Reciprocal recognition is a fundament of the interstate system. Immanuel Wallerstein argued that many entities have proclaimed sovereignty but failed because they were not recognized by other states. Without interstate recognition, the proclamation of sovereignty would be worthless, even if the entity controls a certain territory.<sup>142</sup>

### 3.3 The Westphalian state system and International Law

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<sup>138</sup> Martin, E. A. and Law, J. (2006) *A Dictionary of Law. 6th edn.* Oxford: Oxford University Press, p. 504.

<sup>139</sup> Oppenheim, L. (1905) *International law: a treatise.* London: Longmans, Green, p. 103.

<sup>140</sup> Wallerstein, I. (2004) *World-systems analysis: an introduction.* Durham, NC: Duke University Press, pp. 45-46.

<sup>141</sup> McLean, I. and McMillan, A. (2003) *The Concise Oxford Dictionary of Politics. 2nd edn.* Oxford: Oxford University Press, pp. 502-503

<sup>142</sup> Wallerstein, I. (2004) *World-systems analysis: an introduction.* Durham, NC: Duke University Press, p. 44.

Hans Morgenthau asserted, in his seminal work on political realism, *Politics Among Nations* (1948), that the Treaty of Westphalia established certain rules of international law and made the territorial state the cornerstone of the modern state system.<sup>143</sup> The doctrine of sovereignty such as those propounded by Bodin and Hobbes developed in Europe as part of its transformation of the medieval system into the modern state system and culminated in the Treaty of Westphalia in 1646 and coincided with the development of legal positivism.<sup>144</sup> According to Hobbes, the peoples of the world formed political societies and collectively transferred their natural rights to the sovereign, and gradually these political units formed the various nation-states.<sup>145</sup> Hobbes regarded sovereignty as the major feature of modern States and held it to be a necessary condition for their existence.<sup>146</sup> The anarchic state of nature, however, still existed among these nation-states and war was the norm of interstate relations. Peace was the exception and had to be consciously crafted and nurtured by treaties between states.<sup>147</sup> With the emergence of the nation-state system during the seventeenth and eighteenth centuries came modern international law. In 1625, Hugo Grotius made a decisive contribution in his famous treatise *On the Law of War and Peace*. Two particular innovations in his treatise are important to this thesis; firstly, international law focuses on the rights and duties of states and is applicable only to states, and secondly,

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<sup>143</sup> Morgenthau, H. J. (1985) *Politics Among Nations: The Struggle for Power and Peace*. 6th ed. Revised and edited by Kenneth W. Thompson. New York: McGraw-Hill, p. 294.

<sup>144</sup> Shaw, M. N. (2014) *International law. Seventh Edition*. Cambridge, United Kingdom: Cambridge University Press, p. 18.

<sup>145</sup> Neff, S. C. (2005) *War and the Law of Nations: a general history*. Cambridge: Cambridge University Press, p. 134

<sup>146</sup> Fassbender, B and Peters, A. (eds) (2014) *The Oxford Handbook of the History of International Law*. Oxford, United Kingdom: Oxford University Press, p. 51.

<sup>147</sup> Neff, S. C. (2005) *War and the Law of Nations: a general history*. Cambridge: Cambridge University Press, p. 135.

it concentrates on the external actions of states.<sup>148</sup> The Grotian tradition regards international politics as taking place in an international society bound by rules of prudence and expediency and the imperatives of morality and law. It contemplates a constitutional approach to the study of international politics in that it focuses on the rules that constitute and govern political life within and between sovereign states.<sup>149</sup>

### **3.4 Modern States and the Monopoly on Violence**

A discussion regarding the definition of modern statehood often starts with Max Weber's essay, *Politics as a Vocation* (1919), which is considered by scholars across many disciplines to be the defining conception of the state.<sup>150</sup> Weber argued that in well-ordered societies, private violence is illegitimate, and although conflict in absolute terms is not illegitimate, it cannot rightfully be resolved by private violence.<sup>151</sup> Therefore, the modern state is the only human community that can successfully claim the monopoly of legitimate force for itself and that other associations or individuals are only granted the right to use physical force to the extent that the state itself permits this. As such, violence may only be applied by the central political authority, and those to whom it delegates this right.<sup>152</sup> Today the monopoly of the legitimate use of physical force is a core concept of modern public law. International law came to define state sovereignty

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<sup>148</sup> Neff, S. C. (2005) *War and the Law of Nations: a general history*. Cambridge: Cambridge University Press, p. 85.

<sup>149</sup> Cutler, A. C. (1991) "The 'Grotian Tradition' in International Relations," *Review of International Studies*, 17(1), p. 41.

<sup>150</sup> Gellner, E. (1983) *Nations and nationalism*. Oxford: Blackwell (New perspectives on the past), p. 3; Tonkin, H. (2011) *State control over Private Military and Security Companies in armed conflict*. Cambridge: Cambridge University Press (Cambridge Studies in International and Comparative Law), p7.

<sup>151</sup> Gellner, E. (1983) *Nations and nationalism*. Oxford: Blackwell (New perspectives on the past), p. 3.

<sup>152</sup> Weber, M. and Dreijmanis, J. (2008) *Max weber's complete writings on academic and political vocations*. New York: Algora Pub (Classics series), pp. 127-130.



as the right to exercise complete jurisdiction on its own territory, as well as a right to be independent and autonomous in foreign policy and international relations.<sup>153</sup>

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<sup>153</sup> Viotti, P. R. and Kauppi, M. V. (2007) *International Relations and World Politics: security, economy, identity*. 3rd edn. Upper Saddle River, N.J.: Pearson/Prentice Hall, p. 318.

## Chapter 4: Case study - The British East India

### Company

*“It is strange, very strange, that a joint stock society of traders [...] should be entrusted with the sovereignty of a larger population, the disposal of a larger clear revenue, the command of a larger army, than are under the direct management of the Executive Government of the United Kingdom.”<sup>154</sup>*

**Thomas Babington Macaulay - EIC employee and statesman.**

#### 4.1 Incorporation

In the 16th century, an explicit and direct authorization by the monarch by way of a Royal Charter was the only mode of incorporation in England.<sup>155</sup> Corporations were subject to judicial review; if they were found abusing their charters, a Court could have them forfeited and unauthorised corporations could be dissolved.<sup>156</sup> In September 1599, a group of eighty merchants and adventurers met at the Founders Hall in the City of London and decided to petition Queen Elizabeth I to set up a chartered company to trade with the East Indies.<sup>157</sup> Finally, in late December 1600, ‘the Governor and Company of Merchants trading to the East Indies’ was granted a charter for a period of

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<sup>154</sup> Stern, P. J. (2012) *The Company-State: corporate sovereignty and the early modern foundations of the British empire in India*. Oxford: Oxford University Press, p. 3.

<sup>155</sup> Harris, R. (2005) “The English East India Company and the History of Company Law,” *Law of business and finance*, Vol. 6, p. 219.

<sup>156</sup> Ibid, p. 220.

<sup>157</sup> Micklethwait, J. and Wooldridge, A. (2005) *The Company: a short history of a revolutionary idea*. London: Phoenix, p. 29.

15 years and renewable thereon.<sup>158</sup> Although a state corporation, it had a total of 215 private shareholders.<sup>159</sup> In 1609, King James I renewed the EIC's Charter indefinitely; the EIC shall "for ever be and shall be one body corporate and politick."<sup>160</sup> The EIC was allowed to possess and align lands, to conduct court litigation, and to have a common seal. For all intents and purposes, the EIC was a government over its own employees and corporators by way of how it was organized. Upon incorporation it was granted a monopoly over English trade beyond the Cape of Bona Esperanza to the Straits of Magellan.<sup>161</sup> Philip Stern has pointed out, however, that EIC was never only about trading because since its inception it claimed sovereignty and jurisdiction over all trade and traffic of English goods, ships, and subjects to and from East Asia, and took legal action against other British subjects who traded without its permission.<sup>162</sup> Furthermore, Stern argues, the State itself was only one corporation among others and did not yet have a monopoly on sovereignty, because legally and conceptually, the early modern national state and even the monarchy itself were forms of corporation.<sup>163</sup> By the second half of the 17th century, the EIC had become a colonial proprietor and governed a

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<sup>158</sup> Micklethwait, J. and Wooldridge, A. (2005) *The Company: a short history of a revolutionary idea*. London: Phoenix, p. 30.

<sup>159</sup> Shaw, J. (1887) *Charters relating to the East India Company from 1600 to 1761*. Reprinted from a former collection with some additions and a preface for the Government of Madras. Madras, Printed by R. Hill at the Government Press, pp. 1-2.; Sahni B.P (2013) "A Legal Analysis of the British East India Company," *Acta Juridica Hungarica*, 54(4), p. 317.

<sup>160</sup> Shaw, J. (1887) *Charters relating to the East India Company from 1600 to 1761*. Reprinted from a former collection with some additions and a preface for the Government of Madras. Madras, Printed by R. Hill at the Government Press, p. 2; Harris, R. (2005) "The English East India Company and the History of Company Law," *Law of business and finance*, Vol. 6, p. 226.

<sup>161</sup> Micklethwait, J. and Wooldridge, A. (2005) *The Company: a short history of a revolutionary idea*. London: Phoenix, p. 30; Harris, R. (2005) "The English East India Company and the History of Company Law," *Law of business and finance*, Vol. 6, p. 226.

<sup>162</sup> Stern, P. J. (2012) *The Company-State: corporate sovereignty and the early modern foundations of the British empire in India*. Oxford: Oxford University Press, pp. 7-8.

<sup>163</sup> *Ibid*, p. 7.

growing network of plantations and their populations in Asia and the South Atlantic. Like any early modern government, the EIC erected and administered laws, made claims to jurisdiction over land and sea, provided protection, inflicted punishments, collected taxes, regulated the economy, conducted diplomacy and waged wars.<sup>164</sup>

#### **4.2 EIC rule over India**

After the Glorious Revolution of 1688, the EIC frequently came under attack by political opponents and prospective competitors (interlopers) who received support from a strengthened Parliament.<sup>165</sup> In 1692, the Commons even petitioned the King to revoke the EIC's Charter. Moreover, in 1698, a new and rival East India company was incorporated as 'The English Company Trading to the East Indies', but after complex negotiations they merged into one United East India Company in 1708.<sup>166</sup> In the mid-1740s the war between Britain and France spread to India and the EIC subsequently developed from a purely commercial enterprise into a military power. The Company was victorious in battles against rival European trading companies and local rulers which culminated in the Battle of Plassey in 1757, and the subsequent seizure and control of the province of Bengal. The Nawab of Bengal Siraj Ud Daulah surrendered his dominions to the EIC and it became an occupying power and de-facto government of India. In 1765, when the EIC was granted the diwani (the right to collect revenue in

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<sup>164</sup> Ibid, pp. 3-6.

<sup>165</sup> Roukis, G. S. (2004) "The British East India Company 1600-1858: A Model of Transition Management for the Modern Global Corporation," *Journal of Management Development*, 23(10), p. 943; Harris, R. (2005) "The English East India Company and the History of Company Law," *Law of business and finance*, Vol. 6, p. 227.

<sup>166</sup> Harris, R. (2005) "The English East India Company and the History of Company Law," *Law of business and finance*, Vol. 6, p. 228.

Bengal and Bihar) which resulted in great excesses, malpractices and atrocities in the name of tax collection. During the 1770 Bengal Famine, between 1 and 10 million Indian died of starvation.<sup>167</sup> According to Stern, the diwani represented not just represented “rights to revenue and urban jurisdiction but of sovereign administrative and juridical authority over the great expanse of eastern India and its great populations of peasants and landlords.”<sup>168</sup> To rule this vast territory, the EIC needed an army. Manpower resources were scarce because importing large European forces to India was impossible. Subsequently, the EIC began to employ local mercenary troops called Sepoys in huge numbers. By 1782, the EIC maintained a 115,000 man army, which consisted of 90 percent Bengali Sepoys.<sup>169</sup> The EIC became fabulously rich but corruption amongst EIC officials (nabobs) was rampant. The nabobs made vast fortunes in a few years and were resented back home. There was also a growing opposition against the EIC’s trade monopoly, specifically by British manufacturers which wanted access to the Indian market.

### 4.3 The Industrial Revolution

Ron Harris has argued aptly that legal historians have failed to recognize the legal-economic nexus and the relationship between the Financial Revolution, the development of joint-stock companies and the Industrial Revolution.<sup>170</sup> The East Indies

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<sup>167</sup> Robins, N. (2012) *The corporation that changed the world: how the East India company shaped the modern multinational*. 2nd edn. London: Pluto Press, p. xv.

<sup>168</sup> Stern, P. J. (2012) *The Company-State: corporate sovereignty and the early modern foundations of the British empire in India*. Oxford: Oxford University Press, p. 206.

<sup>169</sup> Parker, G. (1995) *The Cambridge Illustrated History of Warfare: the triumph of the West*. Cambridge: Cambridge University Press, p. 179.

<sup>170</sup> Harris, R. (2003) “The Encounters of Economic History and Legal History,” *Law and History Review*, 21(2), pp. 297–346.

was traditionally an exporter of cotton goods and the EIC had amassed great fortunes by selling Indian products back home. With the development of the Industrial Revolution, the sectional interests of the EIC were increasingly subordinated to the general interests of British Industry, which needed India as a market and not as a competitor.<sup>171</sup> Industrial interests in Britain prevailed, however, and pressed back the East India mercantile interests. India was systematically deindustrialized and subsequently became an importer of British cotton. It was a landmark in world history; since time immemorial, Europe had imported more from the East than it had sold there, but the Industrial Revolution had for the first time reversed this relationship.<sup>172</sup> One of the EIC's early critics, Adam Smith, argued that without its privileges, the inferiority of the EIC vis-a-vis individual merchants would be manifest, and that the monopolistic nature of the EIC was anachronistic to capitalism.<sup>173</sup> James Mill, another fierce critic, would continue attacking the EIC's monopoly and called for separating the EIC's territory and trade functions.<sup>174</sup> The writings of such political economists in favor of free trade were used to the utmost by the EIC's opponents.<sup>175</sup>

#### 4.4 Regulating the EIC

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<sup>171</sup> Hobsbawm, E. J. (1995) *The Age of Revolution: Europe 1789-1848*. London: Abacus, p.199.

<sup>172</sup> Ibid, p.51.

<sup>173</sup> Smith, A. (1776) *An Inquiry into the Nature and Causes of the Wealth of Nations*. 5th edn. London: A. Strahan & T. Cadell; Erikson, E. (ed.) (2015) *Chartering capitalism: organizing markets, states, and publics*. First edn. (Political power and social theory, volume 29.) Bingley, United Kingdom: Emerald Group Publishing Limited, pp. 22-23.

<sup>174</sup> Harris, R. (2005) "The English East India Company and the History of Company Law," *Law of business and finance*, Vol. 6, p. 241.

<sup>175</sup> Ibid, p. 243.

Increased hostilities with the French in South India and the Nawabs of Bengal in Eastern India forced it to request help from the British royal navy and troops. Subsequently, the EIC, was increasingly absorbed into, and finally replaced by, the British state apparatus.<sup>176</sup> This began when parliament imposed a series of administrative and economic reforms by way of the East India Company Acts of 1773<sup>177</sup> and 1784<sup>178</sup>. The Act of 1773 asserted Parliament's control and sovereignty over the company: "acquisition of sovereignty by the subjects of the Crown is on behalf of the Crown and not in its own right". And the Act of 1784 established the offices of Governor General and Council, and a Supreme Court.<sup>179</sup> By the 18th century resentment grew against the corrupt practises and growing influence of the affluent nabobs. Edmund Burke and others indicted the EIC's entire system by starting the impeachment of Warren Hastings its first governor-general. The trials of Warren Hastings began in 1787 and lasted for seven years.<sup>180</sup> In his protracted opening speech, Burke argued that the EIC was no longer "merely a Company formed for the extension of the British commerce, but in reality a delegation of the whole power and sovereignty of this kingdom sent into the East."<sup>181</sup>

#### 4.5 The end of the EIC

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<sup>176</sup> Hobsbawm, E. J. (1995) *The Age of Capital: 1848-1875*. London: Abacus, pp.151-152.

<sup>177</sup> Also known as The Regulating Act of 1773.

<sup>178</sup> Also known as Pitt's India Act.

<sup>179</sup> Roy, T. (2016) *The East India company: the world's most powerful corporation*. Gurgaon, Haryana, India: Portfolio, Penguin, p. 225; Harris, R. (2005) "The English East India Company and the History of Company Law," *Law of business and finance, Vol. 6*, pp. 243-244.

<sup>180</sup> Stern, P. J. (2012) *The Company-State: corporate sovereignty and the early modern foundations of the British empire in India*. Oxford: Oxford University Press, p. 209.

<sup>181</sup> Burke, E. (1991) *The writings and speeches of Edmund Burke, volume 6*. Oxford: Clarendon, p. 282-283.

In 1857, a rebellion began as a mutiny of Bengal Sepoy soldiers.<sup>182</sup> Rumours had spread that cartridges used by the Bengal army were greased with pig and beef fat and was regarded as a deliberate provocation of religious sensibilities. The mutiny quickly turned into a popular insurrection in Northern India. People rose against EIC rule because they held it responsible for the ruthless destruction of the Indian way of life, but the rebellion was violently suppressed.<sup>183</sup> Nevertheless, the rebellion forced the British Government to pass the Government of India Act 1858 which called for the liquidation of the British East India Company and the transference of its functions to the British Crown which would then assume direct control of the Indian subcontinent in the form of the new British Raj.<sup>184</sup> The new government took over the EICs governmental functions and absorbed its navy and armies. On the 1st of June 1874, the East India Company finally came to an end when it was officially dissolved as a result of the East India Stock Dividend Redemption Act of 1873. The aftermath of the Crimean war had already witnessed the end of privateering and mercenarism, but the era of private warfare had now finally come to a close.

#### **4.6 The end of Mercantilism**

From the 16th to the 18th century, mercantilism was the dominant national economic policy in most parts of modern Europe. Mercantilism was not meant to benefit private entrepreneurs; its ultimate objective was to provide resources that could be used for war

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<sup>182</sup> Robins, N. (2012) *The corporation that changed the world: how the East India company shaped the modern multinational*. 2nd edn. London: Pluto Press, pp. 162-163.

<sup>183</sup> Hobsbawm, E. J. (1995) *The Age of Capital: 1848-1875*. London: Abacus, p.152.

<sup>184</sup> Harris, R. (2005) "The English East India Company and the History of Company Law," *Law of business and finance*, Vol. 6, pp. 244-245; Stern, P. J. (2012) *The Company-State: corporate sovereignty and the early modern foundations of the British empire in India*. Oxford: Oxford University Press, p. 209.



and conquest.<sup>185</sup> The economic and political zeitgeist grew increasingly in favour of 'free trade' and the era of trade monopolies finally came to an end.<sup>186</sup> An 'imperialism of free trade' began to emerge; the forceful interposition of British free trade had created 'informal empires' around the globe.<sup>187</sup> The EIC's history exemplifies the evolution of the political and economic divide in Europe; politics became the exclusive domain for states, and corporations were confined to the economic realm.

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<sup>185</sup> Viotti, P. R. and Kauppi, M. V. (2007) *International Relations and World Politics: security, economy, identity*. 3rd edn. Upper Saddle River, N.J.: Pearson/Prentice Hall, p. 65.

<sup>186</sup> Robins, N. (2012) *The corporation that changed the world: how the East India company shaped the modern multinational*. 2nd edn. London: Pluto Press, p. 173.

<sup>187</sup> Erikson, E. (ed.) (2015) *Chartering capitalism: organizing markets, states, and publics*. First edn. (Political power and social theory, volume 29.) Bingley, United Kingdom: Emerald Group Publishing Limited, p. 16.

## Chapter 5: Case study - Blackwater in Afghanistan and Iraq

*"All I want to say is that there was "before" 9/11 and "after" 9/11.*

*After 9/11 the gloves come off."*<sup>188</sup>

**Cofer Black - Former CIA Counterterrorism Director**

### 5.1 The Rumsfeld Doctrine

On September 10th 2001, one day before the 9/11 attacks, Donald Rumsfeld delivered one of his first major addresses as Secretary of Defense. Rumsfeld called for a wholesale shift in running the Pentagon based on a new model based on the private sector.<sup>189</sup> After the attacks the following day, the world had irreversibly changed and Rumsfeld's vision would soon be put to practise. The Pentagon's new policy would really heavily on Special Forces, covert action, sophisticated weapons, contractors and the private sector.<sup>190</sup> In a 2002 article for *Foreign Affairs* magazine titled 'Transforming the Military', Rumsfeld explained that "we must promote a more entrepreneurial approach" and "behave less like bureaucrats and more like venture capitalists."<sup>191</sup> The attacks on 9/11 and the subsequent War on Terror brought about a complete

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<sup>188</sup> U.S. Congress, Joint House/Senate Intelligence Committee (2002) *Statement of Cofer Black: Joint Investigation Into September 11: September 26, 2002*. [online] Available at: [https://fas.org/irp/congress/2002\\_hr/092602black.html](https://fas.org/irp/congress/2002_hr/092602black.html) [Accessed 25 Mar. 2019].

<sup>189</sup> Garamone, J. (2001) *News Article: Rumsfeld Attacks Pentagon Bureaucracy, Vows Changes*. [online] Defense.gov. Available at: <http://archive.defense.gov/news/newsarticle.aspx?id=44916> [Accessed 12 Apr. 2019].

<sup>190</sup> Scahill, J. (2008) *Blackwater: the rise of the world's most powerful mercenary army*. New York: Nation Books, p. xv.

<sup>191</sup> Rumsfeld, D. H. (2002) "Transforming the Military," *Foreign affairs*, 81(3), p. 20.

turnaround in the political zeitgeist.<sup>192</sup> It altered ideas about warfare to such an extent, that in December 2001, US congressman Ron Paul even submitted a bill suggesting to reauthorize the old practise of privateering.<sup>193</sup> An explosion of a \$100 billion for-profit industry would follow and with it came the rise of PMCs such as Blackwater.<sup>194</sup> By 2013, the United States employed a staggering 100.000 contractors in Afghanistan alone, approximately 1.6 contractors for every U.S. soldier.<sup>195</sup> At one point, PMC presence in Iraq grew to such an extent that one US government official told the Washington Post that "Each private firm amounts to an individual battalion," and that "Now they are all coming together to build the largest security organization in the world."<sup>196</sup> Since the end of the Crimean War there has not been a single conflict where private contractors have played such prominent roles as in the wars in Afghanistan and Iraq. It was also the first time that PMCs had tactical roles alongside the US military.<sup>197</sup>

## 5.2 The Rise of Blackwater

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<sup>192</sup> A poll taken in 2005 found that only 11 percent of Americans opposed the idea of using private soldiers to hunt down terrorist leaders (Singer, 2008, p. 232).

<sup>193</sup> Paul, R. (2001). *Congressional Record, Volume 147 Issue 166 (Tuesday, December 4, 2001)*. [online] Government Publishing Office. Available at: <https://www.govinfo.gov/content/pkg/CREC-2001-12-04/html/CREC-2001-12-04-pt1-PgE2202-3.htm> [Accessed 13 Jul. 2019].

<sup>194</sup> Scahill, J. (2008) *Blackwater: the rise of the world's most powerful mercenary army*. New York: Nation Books, p. 41.

<sup>195</sup> Corn, G. S., VanLandingham, R. E. and Reeves, S. R. (eds) (2016) *U.S. Military Operations: Law, Policy, and Practice*. Oxford, UK: Oxford University Press, p. 454.

<sup>196</sup> Priest, D. and Flaherty, M.P. (2014) *Under Fire, Security Firms Form An Alliance* [online] The Washington Post Available at: <https://www.washingtonpost.com/archive/politics/2004/04/08/under-fire-security-firms-form-an-alliance/f45e26df-c61e-410a-9fdd-f3a6bbc2ba63/> [Accessed 22 May 2019].

<sup>197</sup> Singer, P. (2004). *Warriors for hire in Iraq*. [online] Salon. Available at: <https://www.salon.com/2004/04/15/warriors/> [Accessed 27 Mar. 2019].

In December 1996, Erik Prince incorporated 'Blackwater Lodge and Training Center'.<sup>198</sup> At the time it started off as a military consultancy company similar to MPRI, providing security and firearms training to government agencies. According to Blackwater USA's official website, Erik Prince had set up Blackwater in order to 'train' military and law enforcement personnel in order to keep the United States secure.<sup>199</sup> It's 7,000 acre US headquarters in North Carolina is said to be the world's largest private military facility.<sup>200</sup>

In January 2002, Erik Prince incorporated 'Blackwater Security Consulting' which would soon become Blackwater's biggest moneymaker.<sup>201</sup> The difference between this new legal entity and its predecessor is that 'Blackwater Security Consulting' is a Military Provider Company that operates within warzones. The big moment for 'Blackwater Security Consulting' came when Prince acquired a high-profile contract for providing bodyguards to the "viceroy of Iraq" Ambassador L. Paul Bremer. Blackwater was suddenly deployed in the front lines and became an essential part of the Bush administration's war on terror armada.<sup>202</sup> Blackwater also owned other corporate entities such as Greystone Limited. But instead of incorporating Greystone in the US, Prince registered it offshore in the Caribbean island-nation Barbados. Subsequently, it was classified as a 'tax-exempt corporate entity' by the US government. According to its own promotional literature, Greystone offered a wide arrange of services such as training,

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<sup>198</sup> Scahill, J. (2008) *Blackwater: the rise of the world's most powerful mercenary army*. New York: Nation Books, p. 32.

<sup>199</sup> Ibid, p. 27.

<sup>200</sup> Ibid, p. xviii.

<sup>201</sup> Ibid, p. 43.

<sup>202</sup> Ibid, p. 47.

asset protection, recovery and even “defensive and offensive small group operations” by “proactive engagement teams”.<sup>203</sup>

### 5.3 Afghanistan and Iraq

From the beginning of the war in Afghanistan, PMCs personnel played key roles. They were deployed with US military forces and CIA paramilitary units and were even involved with covert CIA operations attempting to hunt down Osama bin Laden along the Pakistan-Afghanistan border.<sup>204</sup>

When in March 2003, the United States army entered Baghdad, they were accompanied by the largest army of private contractors ever deployed in a war. By 2006, there were an estimated 100,000 private contractors in Iraq, almost as many as active U.S. soldiers.<sup>205</sup> It's difficult to say how many private contractors were employed by Blackwater, since many of its contracts were secret. Blackwater was working with the Defense Department, the State Department and the Central Intelligence Agency. However, Blackwater's president Gary Jackson, said some of their contracts were so secret that they were not allowed to tell one federal agency about the business they were doing with other agencies.<sup>206</sup> At one point, Blackwater was doing so well, it could no longer find enough American contractors for its operations. Prince began hiring and

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<sup>203</sup> Ibid, p. xxiii.

<sup>204</sup> Moyakine, E. (2014) *The Privatized Art of War: private military and security companies and state responsibility for their unlawful conduct in conflict areas*. Tilburg: Tilburg University, p. 16; Singer, P. (2004). *Warriors for hire in Iraq*. [online] Salon. Available at: <https://www.salon.com/2004/04/15/warriors/> [Accessed 27 Mar. 2019].

<sup>205</sup> Scahill, J. (2008) *Blackwater: the rise of the world's most powerful mercenary army*. New York: Nation Books, p. xvii.

<sup>206</sup> Ibid, p. 47.

subcontracting former Chilean commandos responsible for kidnappings, torture and killings of defenseless civilians during the Pinochet regime.<sup>207</sup>

#### **5.4 The Fallujah Incident**

In March 2004, four American ‘civilians’ were killed in Fallujah Iraq after being ambushed by Iraqi insurgents. A New York Times headline read: “*Enraged Mob in Falluja Kills 4 American Contractors*”, noting that the mob of angry locals then jubilantly dragged the burned bodies through the streets of downtown Fallujah, hanging the corpses from a bridge over the Euphrates River.<sup>208</sup> The incident subsequently triggered a major battle in the Iraq war. U.S. Marines attacked the Fallujah in what was called Operation Vigilant Resolve. As more details of the incident became known, it turned out that the ‘civilians contractors’ were Blackwater employees. Prior to the Fallujah incident, most of the world had never heard of ‘private military companies’ and almost overnight, the name Blackwater became synonymous with the private military industry.

#### **5.5 The Nisour Square shootings**

In September 2007, Blackwater contractors employed by the Department of State (DoS), shot and killed seventeen Iraqi civilians and wounded twenty others in Nisour Square Baghdad.<sup>209</sup> The Blackwater contractors were escorting a convoy of DoS diplomats to a meeting in Baghdad and claimed they were ambushed and opened fire in

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<sup>207</sup> Ibid, p. 200.

<sup>208</sup> Gettleman, J. (2004) *Enraged Mob in Falluja Kills 4 American Contractors*. [online] The New York Times. Available at: <https://www.nytimes.com/2004/03/31/international/worldspecial/enraged-mob-in-falluja-kills-4-american.html> [Accessed 22 Jun. 2019].

<sup>209</sup> Corn, G. S., VanLandingham, R. E. and Reeves, S. R. (eds) (2016) *U.S. Military Operations: Law, Policy, and Practice*. Oxford, UK: Oxford University Press, p. 455.

self-defense. The Iraqi government investigated and concluded that the killing spree was unprovoked. An investigation by the FBI concluded that at least fourteen fatalities were without cause.<sup>210</sup> In September 2008, the Department of Justice charged five of the Blackwater guards with fourteen counts of manslaughter, twenty counts of attempted manslaughter, and a firearms violation.<sup>211</sup> A U.S. district judge, would however, one year later, dismiss all charges because the cause was built on immunized testimony. In April 2011, a U.S. federal appeals court reinstated the manslaughter charges against some of the defendants which resulted in numerous convictions against the four guards.<sup>212</sup>

In late 2014, former Blackwater Worldwide security guards, Paul A. Slough, Dustin L. Heard, Nicholas A. Slatten and Evan S. Liberty, were convicted and jailed for their roles in the deadly Nisour Square shooting in 2007. A jury in Federal District Court found that the shooting which resulted in the deaths of 17 Iraqis was not a battlefield tragedy, but the result of a criminal act.<sup>213</sup> During the hearings it was also revealed that the contracts of 122 Blackwater employees have been terminated for improper conduct.<sup>214</sup> The Nisour Square incident sparked a serious international debate and highlighted the

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<sup>210</sup> Johnston, D. and Broder, J. (2007). *F.B.I. Says Guards Killed 14 Iraqis Without Cause*. [online] Nytimes.com. Available at: <https://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html> [Accessed 19 Apr. 2019].

<sup>211</sup> Moyakine, E. (2014) *The Privatized Art of War: private military and security companies and state responsibility for their unlawful conduct in conflict areas*. Tilburg: Tilburg University, p. 8.

<sup>212</sup> Corn, G. S., VanLandingham, R. E. and Reeves, S. R. (eds) (2016) *U.S. Military Operations: Law, Policy, and Practice*. Oxford, UK: Oxford University Press, p. 456.

<sup>213</sup> Apuzzo, M. (2014). *Blackwater Guards Found Guilty in 2007 Iraq Killings*. [online] The New York Times. Available at: <https://www.nytimes.com/2014/10/23/us/blackwater-verdict.html> [Accessed 22 May 2019].

<sup>214</sup> Moyakine, E. (2014) *The Privatized Art of War: private military and security companies and state responsibility for their unlawful conduct in conflict areas*. Tilburg: Tilburg University, p. 12.

political, military, legal and ethical risks associated with private military contracting.<sup>215</sup> A total of 195 shooting incidents involving Blackwater forces occurred since 2005, and in most of these incidents Blackwater contractors fired first.<sup>216</sup>

## 5.6 Jurisdiction

What was remarkable was that the Department of Justice, and not the Military, had to charge the Blackwater guards. The problem is that Article 2 of the Uniform Code of Military Justice (UCMJ) does not cover non-DoD U.S. agencies, and neither does the Military Extraterritorial Jurisdiction Act (MEJA). Blackwater worked for the Department of State and the DoS does not work for the DoD.<sup>217</sup> Despite the DoJ's successful convictions of some of the Blackwater guards involved in the Nisour square incident, under current law, contractors working for U.S. agencies other than DoD are able to operate with virtual impunity because federal prosecutors face difficult jurisdictional challenges.<sup>218</sup>

## 5.7 After Blackwater

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<sup>215</sup> Advisory Council on International Affairs (2008) "Employing Private Military Companies: A Question of Responsibility, Advisory Report No. 59, December 2007" *Netherlands International Law Review*, 55(1), p. 9.

<sup>216</sup> Fleming, S. (2007). *Blackwater involved in 195 shootings: report*. [online] Reuters. Available at: <https://www.reuters.com/article/us-iraq-usa-blackwater/blackwater-involved-in-195-shootings-report-idUSN0150129520071002> [Accessed 14 Jun. 2019]

<sup>217</sup> Corn, G. S., VanLandingham, R. E. and Reeves, S. R. (eds) (2016) *U.S. Military Operations: Law, Policy, and Practice*. Oxford, UK: Oxford University Press, pp. 454-457.

<sup>218</sup> *Ibid*, p. 457.



Incidents such as the Nisour Square shootings damaged Blackwater's reputation so severely the company had to be renamed twice.<sup>219</sup> CEO Erik Prince eventually sold Blackwater to a group of private investors and left the US for Abu Dhabi.<sup>220</sup> Since then, Blackwater (Academi) merged with its competitor Triple Canopy to form Constellis Group. Since Blackwater, Erik Prince set up many other companies and has already been lobbying for a complete privatization of the war in Afghanistan.<sup>221</sup> Prince has also been involved in the GCC coalition's war in Yemen. It has been reported that hundreds of Latin American fighters are present in Yemen, which have been hired by a private security company co-founded by Prince and employed by the United Arab Emirates.<sup>222</sup> Furthermore, Prince recently held private meetings in the United States and Europe for advocating his plan to deploy 5,000 mercenaries to Venezuela on behalf of opposition leader Juan Guaido.<sup>223</sup>

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<sup>219</sup> It was renamed Xe Services in 2009 and Academi since 2011 after the company was acquired by a group of private investors.

<sup>220</sup> Leander, A. and Abrahamsen, R. (eds) (2017) *Routledge handbook of private security*. London: Routledge, p. 124.

<sup>221</sup> Sengupta, K. (2018). *Exclusive: Blackwater founder's plan to privatise America's \$76bn, 17-year war in Afghanistan*. [online] The Independent.

<sup>222</sup> Davidson, C. M. (2016) *Shadow Wars: the secret struggle for the Middle East*. London: Oneworld Publications, p. 353.

<sup>223</sup> Roston, A. and Spetalnick, M. (2019). *Exclusive - Blackwater founder's latest sales pitch: mercenaries for Venezuela*. [online] Reuters.

## Chapter 6: PMCs vs state sovereignty

*“The security structure and the production, financial and knowledge structures constantly interact with each other and cannot therefore be analysed in isolation.”<sup>224</sup>*

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### 6.1 Incorporation and regulation

During the 16th and 17th centuries, chartered joint-stock companies could only be set up by Royal Charter. And as Chapter 4 has shown, despite the fact that these chartered joint-stock companies were immensely powerful, assumed state-like features and even claimed sovereignty for itself; even the mighty East India Company was ultimately brought under public control and was eventually dissolved. Today, however, the process of incorporation is quick, simple and low cost; anybody can set up a limited company online in a matter of minutes. Companies can be incorporated in countries with lower tax-rates and less regulation. Take the example of Greystone Limited from Chapter 5; whereas Blackwater was registered in Delaware in the United States, Greystone was registered in Barbados, completely outside US jurisdiction and congressional oversight. The same holds true with EO's practise of setting up local 'stay behind' subsidiaries, mentioned in Chapter 1; these new and separate corporate entities

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<sup>224</sup> Strange, S. (1999) "The Westfailure System" *Review of International Studies*, 25(3), p. 346.

were outside South African government jurisdiction which effectively shielded EO from home-state oversight. The ability of modern PMCs to move headquarters from nation to nation and to be bought and sold on an international market is a dangerous feature and exemplifies the transnational nature of the industry, and the capricious relationship between PMCs and their home-states. Furthermore, TNCs also frequently hire PMCs for securing facilities in high-risk areas or in countries where the state is struggling with insurgency or organized crime. In such types of Business-to-Business (B2B) arrangements, local governments are either unable or unwilling to provide oversight. What makes matters worse is that many firms such as Blackwater are ultra-secretive and are not publicly traded, the result is that it is extremely difficult to assess the full scale of the PMC industry.<sup>225</sup> Astonishingly, nobody even seems to know exactly how many PMCs operate in Iraq or what they are doing there, not even the Pentagon. Even less is known about PMC involvement in Afghanistan.<sup>226</sup>

## 6.2 The United States

Under current US law, the private military industry is regarded as an export, and is governed by the Arms Export Control Act of 1976.<sup>227</sup> Companies wishing to provide private military services must register with the Department of State's Office of Defense

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<sup>225</sup> Scahill, J. (2008) *Blackwater: the rise of the world's most powerful mercenary army*. New York: Nation Books, p. 158.

<sup>226</sup> Advisory Council on International Affairs (2008) "Employing Private Military Companies: A Question of Responsibility, Advisory Report No. 59, December 2007" *Netherlands International Law Review*, 55(1), p. 9.

<sup>227</sup> Arms Export Control Act (1976). *U.S. Code, Title 22, Chapter 39 - Arms Export Control*. [online] Legal Information Institute. Available at: <https://www.law.cornell.edu/uscode/text/22/chapter-39> [Accessed 1 Jun. 2019]. It states that the president "is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services."

Trade Controls. If a contract for defense articles, training or services is valued at \$50 million or more, the administration must file a report with Congress.<sup>228</sup> The problem is, however, that the \$50 million threshold is a large loophole. As long as a contract is below this threshold, any US PMC can work abroad without congressional notification requirement.<sup>229</sup> Furthermore, PMCs can divide larger projects into separate and smaller amounts in order to stay below the \$50 million threshold and avoid the required report to Congress.<sup>230</sup> Some scholars have suggested that the Letters of Marque and Reprisal clause in Article 1, Section 8 of the US Constitution provides the framework for congressional control over PMCs.<sup>231</sup> Arguably, the difference between PMCs and privateers is that the former relies on government funding while the latter is self-financed. Kenneth Moss has argued, however, that even if the parallel between privateers and PMCs would not withstand close scrutiny, it is clear that the Framers of the Constitution intended to prevent a president from relying on privately funded military resources in order to circumvent congressional authority.<sup>232</sup> The fact of the matter is that this has already occurred. As has preceded in Chapter 1, the US government used MPRI to train Croat and Bosnian forces as a balance against Serbian power, while the funding came from third party countries. Furthermore, EO was paid for by client states or even mining companies, its operations weren't even funded by the South African government at all.

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<sup>228</sup> Moss, K. B. (2008) *Undeclared war and the future of U.S. foreign policy*. Washington, DC: Woodrow Wilson Center Press, p. 194.

<sup>229</sup> Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry*. Updated edn. Ithaca, N.Y.: Cornell University Press, p. 238.

<sup>230</sup> Moss, K. B. (2008) *Undeclared war and the future of U.S. foreign policy*. Washington, DC: Woodrow Wilson Center Press, p. 194.

<sup>231</sup> Ibid, p. 193.

<sup>232</sup> Ibid, p. 193.

### 6.3 New technologies and asymmetrical warfare

PMCs have been increasingly involved with new weapons technologies such as predator drones. Drones predominantly conduct surveillance missions but they have become known for their ability to drop bombs on terrorism suspects. The Pentagon has at least 7,000 drones under its control and form a core part of the US arsenal in the War on Terror.<sup>233</sup> They are an important military innovation because not only can the US military avoid putting troops in harm's way, the actual operator does not even have to enter hostile airspace. Private military contractors play a central role in the operation of drones. A 24-hour combat air patrol by a Predator and Reaper drone requires up to 350 personnel, and private contractors participate in virtually every task during a drone mission. PMCs provide maintenance and logistical support services, and have reportedly fueled them and even loaded ammunition onto them. Furthermore, private contractors also help operate and sometimes actually steer drones. And while the US Air force has denied that contractors pilot drones during the targeting portion of their missions, they do, in fact, assist with takeoffs and landings. And while the US Air Force has denied that contractors make targeting decisions, contractors do, in fact, collect and analyze the data gathered by drones. Moreover, contractors assist combat missions by reviewing live footage and providing evaluative judgments that may affect targeting decisions.<sup>234</sup> The use of such new weapons systems has shaken up domestic and

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<sup>233</sup> Dickinson, L. A. (2018) "Drones, Automated Weapons, and Private Military Contractors: Challenges to Domestic and International Legal Regimes Governing Armed Conflict," *New technologies for human rights law and practice*. Cambridge: Cambridge University Press, p. 93.

<sup>234</sup> Ibid, pp. 97-98.

international existing legal frameworks for regulating the use of force abroad.<sup>235</sup>

According to Laura Dickinson, few legal studies have addressed the challenges arising from the use of drones and automated weapons operated by PMCs.<sup>236</sup>

#### **6.4 Globalization and the Constitutive Process**

The Private Military Industry is only one symptom of a larger challenge to the system of nation-states and world order.<sup>237</sup> The nation-state is under threat by the accelerated integration of national economies into a single global market. The increasing power of modern Trans-National Corporations (TNCs) have led many analysts to suggest that the Westphalian system is over and that the role of states in the international system is decreasing.<sup>238</sup> Globalization enables Trans-National Corporations (TNCs) to operate in multiple jurisdictions and states are often not inclined to hold them accountable for human rights abuses because they fear losing foreign investments.<sup>239</sup> States once controlled markets but increasingly markets are controlling states.<sup>240</sup> A comparison of the revenues of states and the twenty-five largest TNCs reveals that only six states have revenues larger than the nine largest TNCs.<sup>241</sup> According to Philip Bobbitt, the nation-state form of organization is completely withering away, and he even predicts the

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<sup>235</sup> Ibid, p. 93.

<sup>236</sup> Ibid, p. 95.

<sup>237</sup> Minow, M. (2005) "Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy," *Boston College law review*, 46(5), p. 1026.

<sup>238</sup> Kegley, C. W. and Blanton, S. L. (2011) *World Politics: trend and transformation*. 2010-2011 edn. Boston: Wadsworth Cengage Learning, p. 176-186.

<sup>239</sup> Moeckli, D., Shah, S., Sivakumaran, S. and Harris, D. J. (eds) (2018) *International human rights law*. Third edn. Oxford, United Kingdom: Oxford University Press, pp. 533-534.

<sup>240</sup> Ritzer, G. (2012) *Globalization: the essentials*. Malden (MA): Wiley-Blackwell, p. 109.

<sup>241</sup> Forsythe, D. P. (2018) *Human rights in international relations. Fourth edn*. Cambridge, United Kingdom: Cambridge University Press (Themes in international relations), p. 191.

emergence of a new kind of state which he has termed the Market-State.<sup>242</sup> This utopian idea of anarchical laissez faire capitalism is not realistic however; despite the fact that neoliberalism is the predominant economic theory governing world trade, this does not hold true for specific states.

Political scientists of the Realist School would argue, however, that state sovereignty is absolute and TNCs and PMCs do not pose any challenge to statehood. Moreover, Malcolm Shaw argues that despite the rise of globalisation, states remain by far the most important legal persons in the international legal system. Despite an increasing number of actors and participants, states remain the primary focus of mankind's social activity and consequently for international law. In practice, however, it is less clear if this position has been maintained; International organisations, chartered companies and religious orders were all at times considered to possess the capacity to become international persons.<sup>243</sup> In fact, Juan Zarate has argued that PMCs are private entities that can qualify as quasi-State actors in the international arena.<sup>244</sup> Constitutions are continuous outcomes of power relations, and the managing of power is subsequently the foremost function of any constitution. As such, armed conflicts constitute some of the greatest challenges to the stability of an international constitutional system.<sup>245</sup> Winston Nagan and Craig Hammer argue that the constitutive implications of outsourcing military operations to PMCs are particularly grave, because

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<sup>242</sup> Bobbitt, P. (2003) *The Shield of Achilles: War, Peace, and the Course of History*, Alfred A. Knopf, New York, NY, p. 31.

<sup>243</sup> Shaw, M. N. (2014) *International law. Seventh Edition*. Cambridge, United Kingdom: Cambridge University Press, pp. 143-144.

<sup>244</sup> Zarate, J. C. (1998) "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), p. 145..

<sup>245</sup> Nagan, W. P. and Hammer, C. (2008) "The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process," *Maine law review*, 60(2), p. 430.

they enable political leaders to avoid scrutiny by operating outside public view, and consequently circumventing critical norm-generating forces, government oversight, and domestic and international law.<sup>246</sup> State practice demonstrates that Customary International Law does not prohibit the use of Private Military Companies. States, NGOs, NATO, the UN, and even Transnational Corporations (TNCs) all make extensive use of the services of PMCs.<sup>247</sup> Deborah Avant argues that PMCs undermine States' collective monopoly on violence. Nations opposed to military contracting find it difficult to restrict PMCs based in their country, due to the fact that the US, UK, and even the UN hire such firms. Civil wars in Africa, for example, have led corporations such as mining companies and even NGOs to hire PMCs for security. Avant argues that such practices can lead to a reduction in state control over national territories and complicate conflict resolution by creating overlapping claims to authority.<sup>248</sup> Singer has argued that while PMCs can indeed lead to an erosion of State Sovereignty, they can also have an opposite effect,<sup>249</sup> citing the example of EO and Sandline stopping the two coup attempts against the Sierra Leone government.<sup>250</sup> Other scholars such as Avant concur that PMCs can in some cases, indeed, enhance the power of individual states. Even powerful states with strong militaries, like the United States, increasingly use PMCs.

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<sup>246</sup> Ibid, p. 433.

<sup>247</sup> Jones, O. R. (2009) "Implausible Deniability: State Responsibility for the Actions of Private Military Firms," *Connecticut Journal of International Law*, 24(2), p. 259.

<sup>248</sup> Avant, D. (2004) "Think again: Mercenaries" *Foreign policy*, 143(143), pp. 20–29.

<sup>249</sup> Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry. Updated edn.* Ithaca, N.Y.: Cornell University Press, pp. 198-200.

<sup>250</sup> In 1995, Executive Outcomes stopped two coup attempts against the Sierra Leone government. When in 1996, a new government was elected, it decided it no longer needed EOs services. In less than 100 days after EOs contract was terminated, disgruntled army officers toppled the government. Only after the government hired Sandline was it able to re-seize power (Singer, 2008, pp. 110-115); Sandline was a PMC registered in the Bahamas but had its head office in the UK (Tonkin, 2011, p. 14).



They regard PMCs as ‘flexible foreign-policy tools’ that ‘ease the political restraints typical among democracies’.<sup>251</sup> The use of PMCs allows for a reduction of official troop numbers while actually increasing overall personnel, and a way to avoid concerns about casualties and public disillusionment.<sup>252</sup> Public attention for contractor deaths are noticeably less than for troops, which means the government is less accountable to the public and Congress.<sup>253</sup> Moreover, the US government is not even required to disclose information about contractor deaths.<sup>254</sup> Many analysts have focussed on national legislation as a means to regulate PMCs. Since the United States is particularly involved in the industry, much attention is given to US laws and jurisdiction. What is important in the context of this thesis, however, is the transnational normative effect of PMC usage. Peter Singer has pointed out that states and other international actors tend to emulate successful military practises.<sup>255</sup> As such, if the United States continues to use PMCs, other states will follow. Moreover, Singer argues, even rebel movements and other non-state actors might hire PMCs in order to bolster their forces, and due to the absence of international laws regulating the industry, there is little to stop them.<sup>256</sup> Recently, the private military industry has particularly grown in Russia. It has been reported that as many as 2,000 Wagner Group personnel are fighting in Syria.<sup>257</sup> Emmanuel Dreyfus

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<sup>251</sup> Avant, D. (2004) “Think again: Mercenaries” *Foreign policy*, 143(143), pp. 20–29.

<sup>252</sup> Moss, K. B. (2008) *Undeclared war and the future of U.S. foreign policy*. Washington, DC: Woodrow Wilson Center Press, pp. 192-197.

<sup>253</sup> Phelps, M. L. (2014) “Doppelgangers of the State: Private Security and Transferable Legitimacy,” *Politics & Policy*, 42(6), p. 834.

<sup>254</sup> Moss, K. B. (2008) *Undeclared war and the future of U.S. foreign policy*. Washington, DC: Woodrow Wilson Center Press, pp. 192-193.

<sup>255</sup> Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry*. Updated edn. Ithaca, N.Y.: Cornell University Press, p. 231.

<sup>256</sup> Ibid, p. 321.

<sup>257</sup> Reynolds, N. (2019) *Putin’s Not-So-Secret Mercenaries: Patronage, Geopolitics, and the Wagner Group*. [online] Carnegie Endowment for International Peace. Available at:

argues that the Wagner Group is unlike Western PMCs such as Blackwater and is not really a PMC. According to Dreyfus, the Wagner Group is closely integrated with Russian armed forces and has participated in armed operations. Furthermore, it acts on behalf of Moscow in places where it does not want its military to be implicated, and as such, it resembles a mercenary group rather than a PMC.<sup>258</sup> As Chapters 1 and 5 have shown, however, PMCs vary from company to company, but the overall tendency of PMCs to work as ‘flexible foreign policy’ tools in often secretive and sometimes downright covert operations is indicative of the entire industry.

## 6.5 China’s Rise and State Capitalism

The rise of state capitalism, Ian Bremmer aptly pointed out, might result in the end of the free market as we know it. Bremmer argues that ‘free market’ countries will find it increasingly difficult to compete with ‘state capitalist’ powerhouses such as China.<sup>259</sup>

State capitalism, is a system in which the government controls its economy by ownership of market-dominant companies. Such governments have access to large pools of excess capital and they use these for advancing their geo-political interests; China’s ‘Belt and Road Initiative’ which could reach a total investment of \$1.2–1.3 trillion by 2027, is a case in point.<sup>260</sup> Whatever the case, Beijing’s increasing global

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<https://carnegieendowment.org/2019/07/08/putin-s-not-so-secret-mercenaries-patronage-geopolitics-and-wagner-group-pub-79442> [Accessed 2 Aug. 2019].

<sup>258</sup> Dreyfus, E. (2018). *Research Paper No. 63 (Translation)*. [online] Institute of Strategic Research of the Ecole Militaire. Available at: <https://www.irsem.fr/institut/actualites/research-paper-no-63-2019-private-military-companies-in-russia-not-so-quiet-on-the-eastern-front.html> [Accessed 12 Aug. 2019].

<sup>259</sup> Bremmer, I. (2010) “The End of the Free Market: Who Wins the War between States and Corporations?” *European View*, 9(2), pp. 249–250.

<sup>260</sup> Chatzky, A. and McBride, J. (2019). *China’s Massive Belt and Road Initiative*. [online] Council on Foreign Relations. Available at: <https://www.cfr.org/backgrounders/chinas-massive-belt-and-road-initiative> [Accessed 15 Jul. 2019].

engagement has left little doubt regarding its intent to assume greater responsibilities in the international system.<sup>261</sup> Though ‘the end of the free market’ may never happen, an awareness of China’s rise and state capitalism is of particular importance to this thesis.

Between 2009-2010, private security firms were legalized in China by legislation which allowed companies to provide armed security services to domestic businesses.<sup>262</sup> Under Chinese state capitalism, PMSCs do not primarily have a profit motive because they are controlled by the government and can be regarded as semi-private. Under this arrangement, the provision of security is still centralized under the Chinese state and as such, it retains the Weberian ‘monopoly on violence’.

The growth of the Chinese private security industry is in part because China wants to protect its assets abroad but wishes to avoid accusations of having an imperial foreign policy. Beijing has been reluctant to get involved foreign policy adventures abroad due to its long-held policy of non-interference.<sup>263</sup> But increasing attacks and abductions of Chinese overseas workers have put pressure on the government to provide security. The protection of nationals abroad has now emerged as a diplomatic priority for China.<sup>264</sup> It is now slowly shifting away from its decades-old doctrine of non-interference, towards a more pragmatic and incremental adaptation in order to meet

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<sup>261</sup> Zhang, W., Alon, I. and Lattemann, C. (eds) (2018) *China's Belt and Road initiative: changing the rules of globalization*. Cham: Palgrave Macmillan (Palgrave studies of internationalization in emerging markets), pp. 17-28.

<sup>262</sup> Clover, C. (2017) *Chinese private security companies go global*. [online] The Financial Times; State Council (2009) *Order No. 564 of the State Council - Regulation on the Administration of Security and Guarding Services*. [online] State Council.

<sup>263</sup> Clover, C. (2017) *Chinese private security companies go global*. [online] The Financial Times.

<sup>264</sup> Duchatel, M. (2014) *Protecting China's overseas interests: the slow shift away from non-interference*. SIPRI policy paper, No. 41. Solna, Sweden: Stockholm International Peace Research Institute, pp. 40-43; Arduino, A. (2018) *China's Private Army: Protecting the New Silk Road*. United Kingdom: Palgrave Macmillan.

new challenges to its economic and security interests.<sup>265</sup> Considering China's state-capitalism and its inevitable rise to become the world's preeminent superpower, the idea of armies of Chinese state-corporations assuming East India Company style powers is far from implausible.

## **6.6 State authorization to use force**

Private military industry advocates argue that PMCs cannot act out of their own accord. This, however, does not always hold true. Take the example of Executive Outcomes; it was based in South Africa but did not act on behalf of its government. The governments of Sierra Leone and Angola hired EO directly, which is a completely different scenario from being hired to officially substitute a host state's military. The host state has a responsibility to make sure the PMC operating from its soil is complying with international law since it has licenced it to bare arms and export its services abroad. But it is perfectly possible that a host state is willing but not capable of controlling the PMCs behaviour due to either lacking the physical ability or it is politically unwilling to do so. The Mandela government was publicly against PMC activity, but in private, it quietly tolerated and even facilitated recruitment of these forces. The rationale was that this would remove forces from South Africa which could have a destabilizing effect on the

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<sup>265</sup> Duchatel, M. (2014) *Protecting China's overseas interests: the slow shift away from non-interference*. SIPRI policy paper, No. 41. Solna, Sweden: Stockholm International Peace Research Institute, p. vi.

forthcoming multi-racial elections.<sup>266</sup> PMCs would act like a pressure release valve by keeping demobilized or recently retired and often disgruntled soldiers busy.<sup>267</sup>

## 6.7 State Practise and International Law

Currently, there are no established legal structures that maintain discipline and respect for human rights, and PMC actions and violations of human rights are not subject to public oversight.<sup>268</sup> Fred Schreier and Marina Caparini have pointed out that “the term private military company (PMC) does not exist within any current international legislation or convention.”<sup>269</sup> Current International Law mechanisms are not applicable to PMCs because they focus on individual mercenaries. The requirements of Article 47 of the 1977 Additional Protocols to the Geneva Conventions and the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, are so restrictive that it is nearly impossible to find anyone who fits all the criteria.<sup>270</sup> According to Antonio Cassese, particularly African states, have used the process of the creation of international law to simultaneously protect themselves from mercenary attacks, while retaining the option to use mercenaries themselves.<sup>271</sup> Furthermore, in

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<sup>266</sup> The racial element in the South African PMC industry clearly undermines the sovereignty of the post-apartheid South African state. EOs leadership and most of its officers were white Afrikaners, and even today, most South African PMC officers have links to the apartheid regime. At present, the Private Military and Security industry in South Africa outstrips both the army and the police (Eastwood, 2013).

<sup>267</sup> Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry. Updated edn.* Ithaca, N.Y.: Cornell University Press, pp.203-204.

<sup>268</sup> Jones, O. R. (2009) “Implausible Deniability: State Responsibility for the Actions of Private Military Firms,” *Connecticut Journal of International Law*, 24(2), p. 249.

<sup>269</sup> Schreier, F., Caparini, M. (2005) *Privatising Security: Law, Practice and Governance of Private Military and Security Companies* Geneva: Switzerland. Geneva Centre for the Democratic Control of Armed Forces, p. 17.

<sup>270</sup> Singer, P. W. (2008) *Corporate warriors: the rise of the privatized military industry. Updated edn.* Ithaca, N.Y.: Cornell University Press, p. 238.

<sup>271</sup> Percy, S. V. (2007) *Mercenaries: the history of a norm in international relations.* Oxford: Oxford University Press, p. 169.

situations involving official military personnel, political responsibility and legal liability is always clear. PMCs, however, are hired by many different agencies and actors, it is often unclear who is ultimately responsible, which makes democratic control extremely difficult.<sup>272</sup> As such, it remains unclear whether responsibility for wrongful acts committed by PMCs lie with the Private Military Company and its employees, or the State, International Organization or NGO that has contracted the PMC. Scholars and commentators have often referred to Max Weber's idea of the state's monopoly of violence to argue that PMCs erode State sovereignty. Although this thesis argues with that general premise, it does not always hold true. As discussed in Chapter 3, Weber argued that violence may only be applied by the central political authority, but also by those to whom it delegates this right.<sup>273</sup> Martha Phelps has argued that states can transfer legitimacy to private actors if these are perceived as being controlled by the state.<sup>274</sup> However, this can only happen when host states take full command and responsibility for PMCs operating in the theatre of war. If PMCs are left in this legal vacuum, both the public and other states will lose its overall confidence in states for their security. One might argue that such a Hobbesian anarchy is unlikely, but in certain parts of the world this is already occurring; the private military and security industry in South Africa already outstrips both the army and the police.<sup>275</sup> UN Special Rapporteur

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<sup>272</sup> Advisory Council on International Affairs (2008) "Employing Private Military Companies: A Question of Responsibility, Advisory Report No. 59, December 2007" *Netherlands International Law Review*, 55(1), p. 14.

<sup>273</sup> Weber, M. and Dreijmanis, J. (2008) *Max weber's complete writings on academic and political vocations*. New York: Algora Pub (Classics series), pp. 127-130.

<sup>274</sup> Phelps, M. L. (2014) "Doppelgangers of the State: Private Security and Transferable Legitimacy," *Politics & Policy*, 42(6), pp. 834-836.

<sup>275</sup> Eastwood, V. (2013) *Bigger than the army: South Africa's private security forces*. [online] CNN. Available at: <https://edition.cnn.com/2013/02/08/business/south-africa-private-security/index.html> [Accessed 21 Jul. 2019].

on mercenaries, Enrique Ballesteros, argued aptly that “[PMCs] should not participate actively in armed conflicts, ... much less attempt to replace the State in defending national sovereignty, preserving the right of self-determination, protecting external borders or maintaining public order.”<sup>276</sup> States might find the unregulated aspect of the private military industry useful, but the normative effects of these careless policy decisions on the world constitutive process will result in ever increasing private violence. As has preceded in Chapter 2, private to public military revolutions caused the formation of the modern state. If policy makers continue to choose the short-term benefits of outsourcing warfare over the long-term normative effects of state practise, this will result in a reversal of the state system and the erosion of state sovereignty. Perhaps Jean Bodin said it best when he wrote: *“The best expedient for preserving the state is never to grant a prerogative of sovereignty to any subject, much less a stranger, for it is a stepping stone to sovereignty.”*<sup>277</sup>

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<sup>276</sup> Ballesteros, E. cited in Nagan, W. P. and Hammer, C. (2008) “The Rise of Outsourcing in Modern Warfare: Sovereign Power, Private Military Actors, and the Constitutive Process,” *Maine law review*, 60(2), p. 438.

<sup>277</sup> Bodin, J. and Franklin, J. H. (1992) *On Sovereignty: Four Chapters from The Six Books of the Commonwealth*. Cambridge: Cambridge University Press (Cambridge texts in the history of political thought), p. 71.

## Conclusion

Throughout history, the use of private actors in warfare has been the norm. In each period, the socio-economic system was the decisive factor for states organizing and funding the means of warfare. Involving the private actors reduced cost and channeled private resources into the war effort. Private to public military reorganisations culminated into the formation of modern states which eventually led to the concepts of sovereignty and the monopoly on the legitimate use of physical force. The current pervasive socio-economic system of neo-liberalism has stimulated states to outsource various state-functions which led to a reemergence of the private military industry. Current geopolitical events have created state demand for flexible foreign policy tools and reduction of political risks. Powerful states such as the United States, Russia and China are increasingly using PMCs and are willingly or unwillingly eroding statehood by undermining state sovereignty and the international state-system. States as authoritative decision makers have an immense impact on the world constitutive process. If the international community fails to regulate or prohibit the use of PMCs entirely, the normative effects of state practise will result in a reversal of the state system and the erosion of state sovereignty.



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