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To legislate or not to legislate, that is the question:

a critical study of the contemporary legal debate on the Global Security Industry

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Abstract:

This essay presents the contemporary research debate on if and how to regulate the use of PMSCs. Providing an extensive overview of the current arguments for and against the regulation of this market, this essay focuses specifically on the legal dimension of this question. Presenting arguments for and against new legislation in this area, the essay investigates the question of applicability of existing international conventions against mercenaries and the problem with classification of the PMSCs. Further, the essay attempts to provide an explanation for the current shape of the research debate. It is a difficult subject to investigate, since this area of research is fairly new and there is basically no jurisprudence in the area. In a very simplified analysis, two camps seem to be formed, with one side advocating that the current rules can be applied, while the other side regards new legislation as a necessity.

Keywords:

Private Military and Security Companies, Mercenaries, Blackwater, Global Security Industry

Characters:

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Table of contents:

List of abbreviations:

CSR	Corporate Social Responsibility
DCAF	Geneva Centre for the Democratic Control of Armed Forces
DOS	Department of State
ILC	International Law Commission
INGO	International Non Governmental Organisation
GSI	Global Security Industry
MNC	Multinational Corporation
NGO	Non Governmental Organisation
PIL	Public International Law
PMC	Private Military Company
PMSC	Private Military and Security Companies
PSC	Private Security Company
UN	United Nations
US	United States

1. Introduction

1.1. Opening remarks

State use of Private Military and Security Companies (PMSCs) has increased exponentially during the past ten years, leading to a rapidly expanding Global Security Industry (GSI) which offers a wide array of services to governments over the entire world. Outsourcing services, which in the past fell exclusively within the competence of the state, have proved to be an effective way of dealing with the changing reality of both domestic and international politics. From the perspective of the state, enthusiasm for the GSI and the services it provides has been almost uniform. However, global civil society and the academia have offered a somewhat more nuanced view of this business, illustrating the need for further investigations into the current practice of outsourcing core competences to private contractors. Despite their critical eye on the GSI, several problems still exists both concerning the global market, state use of PMSCs and the academic debate regarding these topics.

Approaching this area of research calls for an open mind, neutral and objective investigations and rapid action, if the investigations are to keep up with the swiftly changing industry. In order for this to be possible, several changes are needed, both concerning the government policy, transparency in the GSI and a more critical approach to the current research debate. Although there are several difficulties in examining a subject that is comparatively new and does not have much empirical data or primary material to rest the research on, this is an area that should be of immense interest for anyone with the ambition of understanding contemporary security politics.

Despite the complexity of the use of PMSCs and the government's relation to the GSI, much of the research debate is focused on whether the current Public International Law (PIL) legislation has the ability to tackle the potential problems associated with the contactors, or if new legislation is needed in order to address certain areas such as accountability for violations of PIL. The polarised debate lacks focus in several areas that needs to be investigated and discussed, as the discussion mostly regards enforcing the current laws or creating new laws, while failing to problematise basic assumptions behind these standpoints. As the GSI grows and becomes more important for government policies, several questions need to be raised if

we are to understand the extent of this trend and identify both the "chances, problems, pitfalls and prospects"[1] of this phenomenon.

1.2. Purpose

The aim of this essay is to investigate a selection of the contemporary research debate over the PIL concerning the legislation of the PMSCs when employed by a state.

1.3. Research question

Does the contemporary debate on regulating the PMSCs manage to address the complexities of the legislation? The complexities will here be limited to the question of accountability for violations of PIL, the question of command responsibility, lack of jurisprudence, the question of applicable laws and alternative methods of regulation of the GSI.

1.4. Limitations

This study will only focus on the GSI in relation to the state. Thus, other employers than the state will be completely excluded from this essay. Also, only articles from the past ten years will be analysed, since the earlier debate is not of particular relevance for the contemporary research debate. Since the focus is the emerging discussion on the regulation of the GSI, it is only relevant to focus on the contemporary material and not dwell deeper into the past research than is necessary. The study will also focus especially on those companies that are contracted to use force in their missions. Although companies working with the logistics are of some importance, this is not the most problematic area of the debate. Thus, this dimension will be excluded because of the limited space of this essay.

The focus will be completely directed at the international law concerning this topic, since the limited time and space does not allow for a thorough investigation of the possibilities of national legislation. Discussion will be limited to responsibility for crimes under PIL, theories regarding PMSC regulation, classifications of PMSCs under PIL, jurisdiction and potential international forums for sanctioning violations of PIL, as these are recurring topics in the debate regarding legislation.

[1] Jäger and Kümmel (eds) (2007), *Private military and security companies: chances, problems, pitfalls and prospects*, VS Verlag für socialwissenschafften, Wiesbaden.

Although there are several cases and nations that could be used as interesting examples to illustrate several of these points, the case of Iraq is consistently the most suitable for exemplifying the current use of PMSCs. Reasons for this choice is mostly because this is a country that continues to surface in almost every aspect of the discussion of the GSI. Material is accessible and it is fairly trustworthy, since the eyes of the world have focused especially on Iraq since the US invasion of the country 2003. As the literature continuously refers to the same situations and companies, these examples surely are helpful for illustrating the current debate.

Since there is limited space and time given for this essay, the realist school of thought concerning the subjects of PIL will be adopted. This means that only the states will be seen as carriers of obligations under international law. The states will also be the only subjects of international law, and thus will be the only entities with the power to establish or change the international law. The practice of other entities such as Multinational Corporations (MNCs), the United Nations (UN), Non-Governmental Organisations (NGOs) etc, which could potentially also be included in the set of actors, will not be given any space in this discussion, although it undoubtedly would have been interesting to include this aspect as well.

Collisions of national and international norms will not be considered in this investigation. Neither will questions of sovereignty be considered to a large extent, although these are extremely important questions to be answered for any future attempts at regulating the industry.

2. Method

2.1 Material

This essay will be an overview of the current research debate on the subject of the regulation of PMSCs. Because of this, the essay will be based on the literature concerning this topic, which consists mostly of anthologies, articles and an occasional in-depth study of the question of regulation for the GSI. Using this material is beneficial in several ways, as it is often easily accessible and fairly easy to get an overview of. After investigating which authors contribute to the debate, you get a quite good idea of the driving forces behind the contemporary debate.

Books regarding the subject have the advantage of allowing the author the space to thoroughly present their views and draw their own conclusions regarding the material. Articles are on the other hand more difficult to use for presenting a contribution to the current debate, since this form of expression allows only a minimum of space in which the author is forced to present only a shortened amount of information. Several contributions to the debate have also been made in policy papers and other material, so this essay has also made an overview of these types of materials. This material is very important, since for instance the Geneva Centre for the Democratic Control of Armed Forces, helped in developing the Montreaux Document from 2009 on best practices in the usage of PMSCs. Although the Document is not legally binding, it still is the only pseudo-legal document that currently exists.

It is important to note that not all the material used is a direct contribution to the research debate. Regardless, all material within reach has been included, in order to get a more comprehensive view of the current discussion concerning the regulation of the GSI. News articles and journalistic depictions of the GSI have been included for gathering the facts behind events such as the Nisour Square incident. Material from state organs is important for the critical eye, since this gives an indication of state practice and thus a hint of the direction of development of the international law. NGO and INGO reports have also been used as they are often good at describing certain situations, such as the violation of human rights, since they provide a more objective view of some events and often have been used as sources for the international debate.

2.1. Qualitative analysis

The essay will rely on certain events in Iraq to compare and contrast the different legislative perspectives on the GSI. Reasons for selecting this country is that the international community's focus on this case means that there is a lot of information for this case. The largest advantage of this case is that few contractors have been charged or convicted for alleged crimes. Investigations are still being made to determine what the PMSCs and their employees could be responsible for. Simply the fact that the cases exist and hopefully will be brought before a court is a victory for those wishing to strengthen the rule of law relating to the GSI. The fact that the cases have not yet been settled leaves room for an analysis of the situations, without the author being influenced by a court judgement. Although some of the current cases seem to be investigated at a national level, and have been brought before a

national court, this does not mean that the use of PIL is excluded, since the national courts are obligated to follow PIL as well as national law.

Only existing PIL will be considered in the analysis and opinions in doctrine or UN Resolutions will not be considered to a larger extent, since this is evidence and not a source of PIL.[2] The primary material in the form of laws is the most important source in establishing how PMSCs are currently regulated. Viewpoints of other authors will be considered for the interpretation of the laws but it is important for the reader to note that this is not a source of PIL. Therefore, they are not legally binding and they will have a very limited influence over the interpretation of the current PIL. Conclusions in this essay will compare the different interpretations and analyses of the PIL, while investigating if these solutions cover the entire spectrum that needs to be regulated at an international level.

As this is an essay aimed at offering an analysis of the current research debate, both the selection of the sources as well as the assessment of the relevance of the viewpoints presented in the essay will be subjective. Despite good intentions, it is impossible for the researcher to stay completely neutral when studying the material, as the final judgement will inevitably be made by the author of this essay. Although it is important to note that it is not the objective of this essay to arrive at a conclusion of how productive the research debate has been this far, it is within the scope of this essay to evaluate if the right questions have been asked in order to thoroughly illustrate the complexities of the GSI and their relation to the states and the current international law.

2.2. Definitions

GSI: "a complex web of commercial providers of guarding and protection services; operational support in combat, intelligence, interrogation, and prisoner detention services; and advice to or training of local forces and security personnel"[3]

PMSC: "businesses that offer specialised services related to war and conflict, including combat operations, strategic planning, intelligence collection, operational and logistical support, training, procurement and maintenance".[4]

[2] Brownlie (2008), *Principles of Public International Law*, 7th ed, Oxford University Press, Oxford, p. 24-25.
[3] Cockayne et. Al (2009), *Beyond market forces: regulating the global security industry*, International Peace Institute, New York, p. 16

3. Criticism

It is important to note that this study is purely an amalgamation and further development of some of the current theories of the problem of PMSCs. This essay is by no means intended to be treated as a primary source of information or interpretation of the current laws. Since it was not based on primary material, there are several instances in which the result could be subjective according to the views of the different authors and my interpretation of the data. Although qualitative studies always entail a risk of author bias, this risk is further strengthened by the lack of access to primary sources.

Access to quality material secondary material has been quite good, even if it is always good to read one more book or article on the subject of interest. However, the overview of the contemporary debate has been quite reasonable, including a wide array of books and articles. Given the limited time allotted for this assignment, the overview is fairly extensive and offers a good insight in the current research debate. It is important to notice that this essay only presents some of the common points made by each of the authors and does not attempt an in depth analysis on any of the theories presented in these sources. Instead, the main focus is the entire debate and the common traits in the arguments presented by each view. This means that the entire essay presents an extremely simplified view of the current research debate and does not give a fair overview of the complexities regarding the GSI. Nevertheless, if this essay manages to provide the reader with some interest in, and a critical eye, to the debate in this newly developed area of research, the essay will have made its point.

The available literature had several shortcomings for this particular subject, since there is not an abundance of researchers focusing on the particular area of international regulation of the GSI. Whether this is because the area is not yet very developed and thus does not have any substantial cases in contemporary international law cannot be determined in this essay. However, it is important to notice that there is a regulating problem at the global level. This problem is not likely to disappear simply because there is a lack of research debate concerning

[4] Geneva Center for the democratic control of armed forces(DCAF) (2006), "Private military Companies", *DCAF Backgrounder*, p. 1. There is no consensus in the definition of a PMSC (Weigelt and Märker, p. 391). However, there are few substantial differences between the definitions. What is contested is often how specific the definition should be, dividing the corporations between security, military and companies who are involved in both practices. However, here a broader definition is used to encompass all these definitions. This definition is used by several authors and is thus widely recognized.

this topic at the moment. Legislation can be imposed in several ways, and being able to have some kind of universality in the laws is essential to build up a system that is effective, since the industry is global.[5] Given this fact, it is not enough with national legislation and it is doubtful whether voluntary principles and a monitoring organ would be more than a paper tiger.

4. The Industry

4.1. Reasons for growth of the GSI

Governments all over the world are outsourcing a multitude of tasks that were previously carried out exclusively by the state. Services offered by the PMSCs range from providing logistical assistance and intelligence to carrying out armed attacks against insurgency strongholds. Although not all PMSCs provide the entire spectrum of services, several PMSCs still hold an immense amount of power in their hands as the governments continue to rely more on these services. Arguments for contracting out frequently include cost-efficiency, money-saving, allowing the army to focus on core competences, the use of PMSCs are to a certain extent considered to be less politically contentious and does not have the same political costs as using the national military for dangerous operations.[6]

Using PMSCs have been an easy way for the governments to keep a more favourable public opinion to the military operations. The deaths of PMSC personnel are not counted in the official death toll, which helps to create a more favourable public opinion at the home front.[7] This has been especially beneficial for the US, where the public opinion of the war has shifted on several occasions depending on the number of soldiers killed in action. While the deaths and abductions of PMSC employees make headlines, they are still not considered in the overall evaluation of the war. When the media buzz dies down, the loss of their lives more or less loses importance for future decision makers, especially since the GSI often advocates a

[5] Schneiker, "National regulatory regimes for PMSCs and their activities: benefits and shortcomings" (2007), p. 407-418, in Jäger and Kümmel, *Private military and security companies: chances, problems, pitfalls and prospects*, VS Verlag für socialwissenschafften, Wiesbaden, p. 417.
[6] Avant,(2006), *The Market for Force: the consequences of privatizing security*, Cambridge University Press, Cambridge, p. 4-5.
[7] Singer (2008), *Corporate Warriors: the rise of the privatized military industry*, Cornell University Press, Ithaca, (New York), p. 245.

stronger military response instead of revoking deployed troops. Thus, the impact of the deaths of PMSC personnel is not considered to a large extent when making policy decisions.

Perhaps one of the largest advantages for the US is that the government administration does not need the approval of congress for the hiring of PMSCs, as long as contracts do not involve more than 50 million dollars. This means that the executive branch can make decisions about sending contractors to conflict situations without the checks and balances that are in place of the government would send troops to Iraq or Afghanistan. After the first process of Congressional approval for a contractor establishing a business relationship with Saudi Arabia, which illustrated the disadvantages of the approval process, no other contracts over 50 million dollars have been signed. Instead, the agreements are divided up into several smaller pieces and approved without the Congress signing off on the plans. The consequences of this approach is that it weakens the democratic system and also demeans the purpose behind the laws demanding that representatives of the populace have an oversight of such sensitive matters as sending PMSCs to conduct affairs of the state abroad. Since these practices would otherwise be open to approval and a possible Congressional veto, the government retains a stronger control over the military. However, there is a democratic loss associated with this that could potentially serve to hollow the democratic institutions and the entire democratic process in the entire country. The government can in this way co-opt the public opinion by reducing the death toll and creating a more favourable view of the ongoing wars, while at the same time politically monopolising the power of these issues in their own hands. This could cause huge implications for the legitimacy of the country and the state institutions could potentially lose their legitimacy as well.[8]

Many PMSCs have successfully established close relations with governments around the world.[9] Thus, they gain an influence over the policies recommended and information gathered by the companies are often used as a basis for further actions concerning areas in which the companies already have contracts. PMSCs in this way come to have a monopoly of information in certain areas, which is not favourable for the government as they often rely on this information when making policy decisions. Since it is in the interest of the PMSCs to make the external threats seem larger and more pressing, this speaks against the suitability of

[8] Scahill(2008), *Blackwater: världens mäktigaste privatarmé*, Norstedts, Stockholm, p. 53, 62-65.
[9] Advisory council on international affairs (2007), "Employing private military companies: a question of responsibility", No. 59, p. 10

using these reports when making policy decisions. Despite this, governments all over the world still relies on these reports as a source of information and make their decisions based on the interests that are sometimes diametrically opposed to the interest of the state. Cooperation with and use of PMSCs is becoming increasingly political. This creates a paradoxical condition in which the government power is co-opted from the populace, which the government is accountable to, while at the same time the government's monopoly of violence and the control over their forces is decreased.[10]

4.2 Disadvantages of not regulating the industry

Although PMSCs carry the brunt of the workload in for instance Iraq, they do have a lot of disadvantages compared to the national military. Loyalties lie primarily to the company and not to the mission they are contracted to do. Also, several PMSCs have withdrawn from their missions as they have been regarded too dangerous to carry out. This demonstrates the necessity of loyalty and the importance of having a regular army in addition to employing contractors. Individual motivation is also a factor that must be taken into account before deciding to outsource services to the GSI. Frequently, it is assumed that the private contractor is performing a service motivated by financial gain and in this way, they are assumed have less motivation for the cause than their military counterparts. Ideology as a motivation is assumed to be a decisive factor in the allegiance of troops and it is assumed that financial gain cannot match this motivation. The motivation could be yet another example for international regulation, since this could create uniformity and abolish the practice of having to choose between following the rules of the contracting state or the territorial state.[11]

However, there is a problem with this kind of reasoning, since motivation often is made up of several reasons. One current area of debate also concerns the "brain and brawn drain" from the actual military forces. As a private contractor can make as much as 4,000$ a day, while a regular US army troop make the same amount of money in a month, there is a substantial appeal for the soldiers to return for service as private contractors rather than finishing another tour for the army. These individuals will be motivated by profit but will hopefully still

[10] Scahill(2008), p. 66-67.

[11] Drutschmann (2007), "Informal regulation: an economic perspective on the private security industry", in Jäger and Kümmel (eds.), *Private military and security companies: chances, problems, pitfalls and prospects*, VS Verlag für socialwissenschafften, Wiesbaden, p. 444-447, Percy (2007), *Mercenaries: the history of a norm*, Oxford University Press, Oxford, p. 69, Sheehy et. al.(2009), *Legal control of the private military corporation*, Palgrave Macmillan, New York, p. 54.

represent American values and be loyal to both the US and the PMSC. This type of "labour poaching" often lures the best and brightest to the PMSCs, as there is a significant difference in the profits made. Another important point to make is that even contractors from other states could adopt the values of the contracting state as there are market incentives for doing so, for instance building a bond of loyalty to the employer. The government will in this way benefit from regulating against this type of activity, since they lose money and personnel by employing PMSCs rather than their own military.[12]

For instance, it could be argued that the torture in Abu Ghraib committed by Titan and CACI employees was caused by this "brain drain" and the lack of training of the employees in interrogation techniques and in international law could no doubt have contributed to the torture and abuse of the prisoners.[13] Provided that the employees had learned interrogation techniques, they would have been more skilled in extracting information out of the prisoners. This means that the likelihood of the employees using harsher measures against the inmates would have decreased as a result of the interrogations being successful by the use of legitimate techniques. If the chain of command was clear, it would be much easier to address these problems, since the perpetrators could be identified and punished.[14] In the long run, these sort of events lead to an unfavourable public opinion of the PSCs and the government who uses them.

Despite all these disadvantages, PMSCs continue to be used as one of the most important tools for governments today. In Iraq, it is estimated to be more contractors than militaries today. Even if the statistics are highly debated, and it is claimed that not even the US government are aware of the number of contractors in Iraq, an estimated number is 100 000 persons, while the government troops consists of around 60 000 persons. This clearly illustrates the importance of the PMSCs in the US foreign policies, as they probably would be forced to relinquish control over both Iraq and Afghanistan without the contractors. Given that not even the government can accurately assess the number of troops under their

[12] Singer (2008), p. 77, Avant (2007), ""Selling security: trade-offs in state regulation of the private security industry", in *Private military and security companies: chances, problems, pitfalls and prospects*, VS Verlag für socialwissenschafften, Wiesbaden, p. 428.
[13] Aman (2009), "Private prisons and the democratic deficit" in Chesterman and Fischer, *Private security, public order: the outsourcing of public services and its limits*, p. 89-90.
[14] Singer (2008), p. 255.

employment[15], this also exemplifies the extreme lack of control over these forces. Also, the problem of transparency becomes evident, because if the government is not aware of how many contractors they have, they cannot pass any information on to those wishing to investigate the government or the companies. Legitimacy of both the government and the companies could be questioned because of this, since the government often has an obligation to the public to allow them access to certain documents pertaining to government affairs.

5. Analysis of the research debate

5.1. Determining the status of the PMSCs

5.1.1. Mercenaries or individual contractors?

Mercenaries and how to regulate them have been discussed about as long as wars have been fought. Berndtsson describes the development from the use of hired soldiers in the medieval times to today's PMSCs. Although this description primarily is intended for illustrating the connection between the privatisation of security and the state control of force, it is very beneficial to get an understanding of the historic development of the business. He argues that the term "mercenary" did not become a derogatory term before the decolonisation period, when troubles arose regarding the use of mercenaries on the African continent. Also, at the end of the Cold War, the problem with unemployment of soldiers and proliferation of weapons meant that there was a potential market for those skilled enough to use their work experience in the corporate form.[16]

Since the current GSI is very reluctant to be associated with mercenaries, several researchers have excluded using the term altogether in referring to the GSI. However, several voices still argue that international laws regarding mercenaries should be applied to mercenaries. Some

[15] Isenberg (2004), "A fistful of contractors: the case for a pragmatic assessment of private military companies in Iraq", British American Security Information Council, Research report 2004.4. p. 8-9.

[16] Berndtsson (2009), *The privatisation of security and state control of force*, Intellecta Docusys AB, Göteborg p. 43, Buchner, "Private military companies and domestic law in South Africa, p. 395-406, in Jäger and Kümmel, *Private military companies: chances, problems, pitfalls and prospects*, VS Verlag für socialwissenschafften, Wiesbaden, p. 398.

make in casu judgements of the employees of the companies are to be regarded as mercenaries on specific missions or in specific situations. Judgements are most often based on the three international instruments that regulate the use of mercenaries and are discussed in basically every presentation of the legal issues related to the GSI. The Geneva conventions have provisions relating to mercenaries, although this is not the primary topic of the documents. There are also two specific legal documents pertaining to the use of mercenaries. These are the International Convention against the Recruitment, Use, Financing and Training of Mercenaries from 4th December 1989 and the OAU's Convention for the Elimination of Mercenarism from 22nd April 1985.[17]

Several attempts have been made at classifying the contractors, although no consensus seems to have been reached concerning this problem. Determining the status of the companies is of vital importance when determining which set of rules is to be applicable to the PMSCs. There are almost as many conclusions on how to classify the companies as there are authors and the classification seems quite arbitrary in some cases. Since the criteria put forth in each of the definitions of mercenaries are cumulative, which means that they all have to be fulfilled before an individual can be classified as a mercenary, the past has illustrated that it is very difficult to apply this set of rules to any individual, much less a company.[18] The classification of the companies and their individual representatives also have a vital importance since if the individuals are considered mercenaries, they are regarded as combatants. If they are considered contractors, a discussion regarding if they are to be considered state representatives and therefore a part of the armed forces, or if they are to be considered civilians, follows.

Since the classification process seems to be made based on the circumstances in each specific case[19], a further discussion of these necessary conditions are fulfilled is unproductive for this essay, given the limited space and time. It is important to note that there is a relative consensus of the need to investigate these questions further, given the uncertain outcome for

[17] Drews (2007), "Private military companies: the new market mercenaries? – an international law analysis", p. 331-344, in Jäger and Kümmel, *Private military companies: chances, problems, pitfalls and prospects*, VS Verlag für socialwissenschafften, Wiesbaden, p. 331-334.

[18] Best (1980), *Humanity in warfare*, Willmer Brothers Limited, Merseyside, p. 375: "any mercenary who cannot exclude from this definition [in Article 49, AP1 to the Geneva Convention of 12th August 1949] deserves to be shot – and his lawyer with him!".

[19] Voyame (2007), "The notion of 'direct participation in hostilities' and its implications for the use of private contractors under international humanitarian law, p. 361-376, in Jäger and Kümmel, *Private military companies: chances, problems, pitfalls and prospects*, VS Verlag für socialwissenschafften, Wiesbaden,"p. 376.

the individual, since it is not even certain if there are any rules to apply. However, the problems of regulation would still not be addressed if it was possible to apply these conventions efficiently to the individuals of the PMSCs. Like sentencing an individual government official for a single instance of abuse for a prisoner, when the state systematically tortures imprisoned persons, punishing a single individual for a crime which the very structure of the international and state system enables and maybe even in some instances actively encourages would not solve the actual problem. The companies in their current form makes it possible for illicit practices and impunity, and this problem needs to be addressed in order for the regulation to be effective.

As long as the international community allows the impunity to continue, there will be states and companies who take advantage of these loopholes if they consider this to be the most efficient way to deal with the situation. Companies benefit from the lucrative contracts and states manage to outsource their dirty business at a low political cost despite violating human rights and the laws of war. Solutions involving "name and shame" practices, such as the UN Committees watching over each country's adherence to the international documents on human rights, could be one way of focusing the public's attention to what their governments are doing. This is of course contingent on the political will of the governments and will probably not mean drastic changes in the short run, despite earlier predictions by the academics.[20] Long term changes may on the other hand be possible, especially if both the states and the companies are given some sort of incentive for adhering to the rules. In connection to the morality argument made by for instance Percy and Avant, this type of regulation could benefit both the governments and the PMSCs.[21]

5.1.2. Can a PMSC have obligations and be responsible under PIL?

Although there is much debate about justice being served to the victims of the PMSCs, it is of pivotal importance to note that the PMSCs as such cannot be brought to justice. Only a physical person, and not a legal person, can be brought to justice before the international law. This means that it is probably the board of directors that is responsible for the actions of the PMSCs. Other relevant stakeholders, such as shareholders, could also be implicated in certain

[20] Drutschmann, p. 443-444.

[21] Percy (2007), p.18-23, Percy (2007) "Morality and regulation", p. 11-28, in Chesterman and Lehnardt, *From mercenaries to market: the rise and regulation of private military companies* and Avant, p. 30-37, Sheehy et. al, p. 54.

instances. However, establishing responsibility for actions could become difficult as establishing adequate causality between the decisions of a board or directors and the actual actions of the military personnel in a conflict situation. A director of the company would for instance only be accountable to the corporation, which would probably be difficult given the Business Judgement Rule.[22]

States are basically the only subjects of international law. Only states can create laws and only states are required to make sure that the subjects within their jurisdiction adheres to the laws.[23] This monopoly of the legislative power is highly advantageous for several reasons. It is always possible for the states to decide what matters to regulate, so the development of the laws are governed by political will, which in this case seems to be lacking. If the laws of war are applicable to the PMSCs, they would have immunity for actions perpetrated at times of war, if they were considered part of the military forces, since then they would not have killed unlawfully. As civilians, they would be responsible for crimes such as murder. Despite the continued efforts to interpret the Geneva conventions teleologically, no consensus has been reached on how to determine the status of the companies under public international law. This illustrates the need for the company form to be more thoroughly investigated, if we want to apply any coming international regulation directly on the companies. Since they already have internal rules which could potentially exclude responsibility for certain corporate actors, these obstacles need to identified in order to be avoided. Yet only Sheehy et. al. devotes a chapter to these questions and continue to include this perspective throughout the entire book.[24]

5.1.3. Implications of the classification of PMSCs

There is a fundamental lack of discussion about what criteria could be used to determine the status of PMSCs in several situations. Perhaps this is primarily because any discussion will be mainly hypothetical, since only a few cases concerning PMSCs have reached courts and even fewer has been decided by international courts/arbitration. States are the only entities with the capability of establishing international law and any pre-emptive examination would not attributed much weight in the development of a system of rules for this industry. However, the

[22] Sheehy et. al. (2009), p. 44.
[23] Schneiker (2007), "National regulatory regimes for PMSCs and their activities: benefits and shortcomings", p. 407-418, in Jäger and Kümmel, *Private military companies: chances, problems, pitfalls and prospects*, VS Verlag für socialwissenschafften, Wiesbaden, p. 408.
[24] Sheehy et. al (2009). chapter 2.

regulation could potentially face serious difficulties as it is being established, as these questions have not even been contemplated before attempting to establish an international framework for regulating the GSI. In general, it could be stated that PMSCs have connections with the government that are close enough so that the actions of the corporations can be attributed to the state.[25]

5.2. Lacking in theories?

Several authors concerned with the GSI have been thoroughly criticised[26] for not using a thoroughly developed theoretic perspective during their investigations into the business. Especially the legal debate is devoid from strictly theoretic debates and often does not have a firm legal theory as a basis for the arguments. Perhaps this is because it is not especially productive to confine the legislative debate within a certain theoretical framework, since the reality which is discussed changes very rapidly. However, when studying the material, it seems clear that several authors have been imprinted by certain philosophers in their past. Sometimes, this is clear throughout the book but it is not discussed explicitly. For instance, Sheehy (et. al.) in several instances makes it clear that they subscribe to the Hobbesian notion of the state being the primary threat.[27]

Often, the theories that have made an impact on the authors remain in the footnotes and are fairly anonymous throughout the books or articles. Given the current state of the debate, this is not a strange phenomenon, since the research debate on regulating the GSI is very young. There simply has not been time to formulate decisive theories tailored specifically to the modern GSI. The theories that exist in the current debate are almost exclusively old theories that have been applied to this new type of legal entity. These theoretical frameworks are often applied when trying to convince the reader that there have been few changes since this debate started. Often, the theoretical framework also consists of just war theory or an ethical or moral theory concerning the use of PMSCs.[28]

[25] Sheehy et. al, (2009) p. 162.
[26] Percy (2007), p. 4.
[27] Sheehy et. al. (2009), p. 107, 161.
[28] Pattison uses just war theory in his article, while Percy discusses the morality of using PMSCs in Chesterman and Lehnardt.

However, this does not mean that there is a complete lack of theoretical base for the research debate concerning the GSI. Rather, it could suggest that since few of the older theories are directly applicable on the GSI, the authors instead pick and choose the most suitable parts from the existing theories and apply them on the relevant aspects of the industry. Since there is not much primary material concerning the international regulation of PMSCs, it is difficult to create a pattern in how this question should be solved. Several theories have been constructed concerning other areas of the GSI, for instance regarding state control of force and the contracting out of the monopoly of violence. [29] However, although this debate is also interesting, it does not relate directly to the industry's problems of regulation in international law, since this is primarily a matter for national regulation.

5.3. Analogous application of existing conventions

If the international community were to rely on the existing regulation of PMSCs, for instance the analogous application of the conventions concerned with mercenaries, there are several pitfalls associated with this approach. Firstly, analogous interpretations should always be made with special care and are not as legally viable as the directly applicable laws. This entails that the precedents set by the use of this framework from regulation will not be considered as reliable for future regulation. Secondly, the GSI is reluctant to any attempt to compare them with mercenaries, since they have received a bad reputation internationally. Since the GSI has strong connections with the governments, this will probably deter states that rely on PMSCs for their day-to-day operations from driving the legislative process further, as they also are stakeholders in regulation process. However, the opposite perspective has been taken by Sheehy and Cockayne, who argue that the market force can be a positive force of change, striving for legitimacy and pressing the government to regulate the industry to create goodwill and legitimacy for the corporations.[30]

There are several differences between mercenaries and PMSCs that could potentially inhibit the analogous application of the existing rules on PMSCs. First of all, the GSI consists of companies, while mercenaries are individuals. Mercenaries are also distinctly different from corporations, since individuals are primarily loyal to themselves, while the companies have to be concerned about a range of business concerns. Companies are often in the business for a

[29] Among others, Avant in ch. 2, 5 and 6 and Berndtsson, in ch. 3-9 discuss state control of force at length.
[30] Sheehy et. al. (2009), p. 171, Cockayne, p. 253.

long-term deal, while reputation is not that important to the individual.[31] Although companies have such broad voluntary principles like CSR, they are not the direct subjects of PIL. Further, there are no international forums with the power to sanction the practices of companies breaking their seemingly altruistic promises of adhering to a voluntary code of conduct. The risk of being excluded from these voluntary clubs does not seem to be a deterrent of immense importance, even to companies who are dealing with rather less sensitive operations than the PMSCs.[32]

Unless international opinion is firmly locked on the GSI, it is probably unlikely that this problem will be solved by self-regulation and voluntary codes. Since the governments also have an interest in these matters being handled without transparency, it is highly unlikely that reliable information about sensitive matters is going to be provided as a base of complaints and a source for the international community to rest its allegations on. This lack of transparency is one of the most appealing qualities of using PMSCs to carry out state operations.[33] While most states have at least a certain degree of transparency and an obligation to allow the public access to some government documents, PMSCs have no such responsibility. States can thus freely contract out to the GSI, with the advantage of knowing that their secrets will be concealed. The GSI is also favoured by this arrangement, as their position gives them the ability to monopolise their unique position and advise the government according to their own interests. PMSCs and governments have become co-dependent in this way and the current legal situation favours them both in several instances.

5.4. Responsibility under international law:

5.4.1. State responsibility

Largely, there is a lack of depth in the discussion regarding the chain of command when establishing responsibility. For instance, the question if the actions of PMSCs are to be attributed to the contracting state, because the company is used as a state organ, is not sufficiently problematised in the research debate. Louise Doswald-Beck does attempt to

[31] Sheehy et. al. (2009), p. 156.
[32] Cockayne (2009), p. 255, Sheehy et. al. (2009), p. 174-176.
[33] Cockayne (2007), ”Principal- agent theory and regulation of PMSCs”, p. 196-216, in Chesterman and Lehnardt, From mercenaries to market: the rise and regulation of private military and security companies, Oxford University Press, Oxford, p. 206

include command responsibility in her analysis, as does Sheehy et al. While the effort is admirable, there is limited space for analysis in the anthology.[34] Often, the debate jumps directly to discussing the ILCs draft convention on state responsibility for internationally wrongful acts.

Discussions have referred to the ILC Draft Resolution on state responsibility, which is often used when assessing if state responsibility could be established for actions of the PMSCs. However, these discussions tend to base their arguments on the assumption that this document will have some legal clout in case there would be a trial against a state or a PMSC. This discussion thus largely excludes, among other things, the question of jurisdiction, competent courts, applicable laws and other prerequisites for these rules to become applicable. Also, the debate fails to take into account that responsibility for internationally wrongful acts is not easy to establish in practice, even if there are applicable rules. Often, it also fails to take into account the difficulties in establishing effective control over the troops. According to the International Court of Justice case Nicaragua v. United States of America from 1986, this requires authorisation by the state for each and every act for the non-state actor's actions to be attributable to the state.[35]

Although the argument could be made that the draft resolution is merely a codification of the customary international law, there are elements of progressive development in the resolution. Currently, the draft is not binding and thus not a legitimate binding source of PIL. Proving the customary international law in the area of state responsibility would probably be difficult, especially as regards PMSCs, since they are not a subject of international law. Thus, PMSCs does not even have an obligation under PIL that they can violate, which means that it would be largely impossible for the companies to be responsible according to international law.[36]

When discussing the status of PMSCs, the focus is instead on comparing them with mercenaries and determining what similarities the modern companies have to their ancestors. Although this discussion is certainly relevant, at least when trying to understand what sort of entities PMSCs actually are, it does shift focus away from other problems simply by taking up

[34] Doswald-Beck (2007), "Private military companies under international humanitarian law", p. 115-138, in Chesterman and Lehnardt, *From mercenaries to market: the rise and regulation of private military and security companies*, Oxford University Press, Oxford, p. 134-136, Sheehy et. al., p. 162-170.
[35] Sheehy et. al. (2009), p. 156-162.
[36] Sheehy et. al. (2009), p. 53,

space. Instead, the focus should shift towards investigating several aspects of the possible classifications of PMSCs. Perpetuating this discussion would not lead to a productive discussion on how to regulate the industry. Since even those advocating that PMSCs may fall under the current legislation on mercenaries recognise the gap in the legislation governing the GSI. Mercenaries must by definition actively engage in the armed conflict in some way, whether it is in self-defence or in an active attack. Thus companies such as CACI or Titan, who participated in the abuse of the prisoners in Abu Ghraib but did not actually participate directly[37] in the hostilities, are currently operating in a legal vacuum. Public international law here does not have any method for sanctioning the behaviour of the companies.

National law usually does have rules governing the lawful behaviour of companies. Questions of jurisdiction are often of importance in regulating MNCs and while these questions are often answered by bilateral agreements between nations, these are often regulated by the stronger party. As most PMSCs in Iraq are employed by the US, this means that they often dictate the terms of agreements, leading to an unfavourable outcome for the other party. For instance, after the Nisour Square incident, the Iraqi government was extremely aggravated and promised to revoke Blackwater's license and drive the company out of the country. This illustrates several extremely important points concerning the GSI and the failure on several levels of regulation. First of all, Blackwater did not even have a license that could be revoked, so the promise instantly became impossible to fulfil.[38] Secondly, Bremer had already signed a document stipulating immunity for PMSCs in Iraq.[39] Thirdly, the complete and utter failure of the system to make this information accessible even to the highest government officials in Iraq illustrates the complete and utter failure in cooperation between the US and Iraqi governments. Fourthly, it illustrates a complete lack of a chain of command between Blackwater and the US, and between the (the US and Iraq) and Iraq and Blackwater. Fifth, despite this diplomatic crisis, Blackwater was not excluded from operating in Iraq and long after retained their favourable position in Iraq, gaining even more contracts. Sixth, the weakness of the Iraqi government was clearly illustrated by the US directly opposing the Iraqi government by refusing to remove Blackwater from Iraq, threatening that their security could

[37] Voyame (2007), s. 369: *Direct participation in hostilities*: performing "an act directed and intended to cause, by their nature and purposes, actual harm to enemy, personnel or material"
[38] Singer (2008), p. 254-255.
[39] Order 17, Schaller (2007), "Private security and military companies under the international law of armed conflict", p. 345-360, in Jäger and Kümmel, *Private military and security companies: chances, problems, pitfalls and prospects*, VS Verlag für socialwissenschafften, Wiesbaden, p. 358-359.

not be managed without Blackwater, despite the Iraqi governments fairly desperate move to stand up to Blackwater and the US.[40]

This is not to say that individual or state responsibility in completely excluded in principle. Individual responsibility is still possible under international law but is contingent upon applicable laws and the political will of states such as the US to either prosecute the persons under national law or their political will to ratify for instance the Rome statute. State responsibility is also possible, if the link between the state and the security companies can be established. However, it is this uncertainty regarding the chain of command that is one of the main problems. It is also this piece that is missing from the debate and jurisprudence, which is why the guesswork and hypotheses continue to spread.

5.4.2. Individual responsibility

Nevertheless, there is a strong indication that individual responsibility could be established for violations of PIL, as this is comparatively clearly regulated in international law.[41] However, the chain of command should be more problematised, even if the individuals can be held responsible despite receiving direct orders from their superiors. It could be discussed if the primary objective should be to target the individuals according to the already existing rules of PIL. However, this would not put an end to the industry given the fact that so few contractors have been prosecuted. For instance, Titan and CACI personnel participated in violating the prisoners of Abu Ghraib. Despite this being clearly documented, no contractor has been prosecuted for the crimes, while several US soldiers have been prosecuted and convicted of the abuse of the prisoners.[42]

Here, there is a fine line between abuse and torture, which apparently was not perceived to have been crossed since the immunity granted for the PSC soldiers was upheld. Although the reasons for describing the actions of the Abu Ghraib soldiers as abuse rather than torture can be discussed, the treatment of the prisoners might as well have been called torture. Universal jurisdiction could then had applied, which entails that the government in Iraq could have prosecuted the personnel despite the US protests, even if this probably would have been

[40] Scahill (2008), p. 18-46.
[41] Ratner and Abrams (2001), Accountability for human rights atrocities in international law: beyond the Nuremberg legacy, Oxford University Press, Oxford, p. 331-336.
[42] Sheehy et. al. (2009), p. 123-124, 143, 158.

diplomatically unfeasible. Thus, in order to establish responsibility for individuals at an international level, a violation of a peremptory international norm would be needed, if the Geneva Conventions are not applicable.[43] Depending on the investigation and how the violations are classified, the individual contractors have a chance at escaping into a jurisdictional grey zone, where impunity seems to be an established principle.

5.4.3. Immunity and impunity:

Reasons for a failure to prosecute companies or their employees are often political but also concerns evidentiary problems. Governments have frequently granted PMSCs immunity, for instance the US, via Paul Bremer in 2005, granted immunity to private contractors by of the Coalition Provisional Authority.[44] Granting immunity strengthens the perception of impunity towards the PMSCs and prevents the examination of the government, the PMSCs and their business transactions. The legitimacy of this practice can be questioned and this could in the long run also hollow the legitimacy of the entire government, since the rule of law will not be applied equally to all citizens. This also illustrates the problem of when the contracting state has the responsibility to also be a watchdog.[45] Prosecuting a company that is a substantive reason to why you are able to fight a war, and being aware of that without that company, you will stand without direct protection and threat of death, would probably be extremely intimidating, even to militaries like Bremer.

Although the practice of granting immunities is well established in the international system, offering this privilege to contractors within the GSI, such as has been made in Iraq, seems to be an unusual practice. Usually, heads of state and diplomats are granted immunity as a prerogative following their privileged position. Immunity is one of the most beneficial privileges that can be offered by the state and is often granted very restrictively.[46] Granting the GSI immunity implies their function is of extreme importance to the US and their overseas contingency operation in Iraq and that they have a bargaining chip that is of comparable worth for exchange against immunity. Even though the state also has the power to waive the immunity, this does not appear to happen, despite PMSCs and their personnel has violated

[43] Weigelt and Märker (2007),"Who is responsible? The use of PMCs in armed conflict and international law", p. 361-376, in Jäger and Kümmel, *Private military and security companies: chances, problems, pitfalls and prospects*, VS Verlag für socialwissenschafften, Wiesbaden, p. 380-381.
[44] Ryngaert (2008), "Litigating abuses committed by private military companies", p. 1035-1053, *in The European Journal of International Law*, Vol. 19, No. 5, p. 3, Schaller, p. 358-359.
[45] Scahill (2008), p. 131.
[46] Brownlie (2008), p. 359-363.

their contracts or committed crimes.[47] If the assumption that diplomatic immunity and the immunity granted to the GSI in Iraq works relatively similar, it would be possible to assume that these will be used in related ways.

5.4.4. Violations of jus cogens

Nevertheless, immunity cannot be granted for violating peremptory norms of international law. These norms are often referred to as jus cogens and are also regarded as erga omnes crimes, i.e. crimes against humanity. Violations of jus cogens falls under universal jurisdiction and thus any state has the ability to try the alleged criminals before any court which is deemed competent by the state. Agreements of immunity for a violation of jus cogens would probably be regarded as opposing the principle of ex injuria non oritor jus[48], i.e. no benefit can be derived from an illegal act. It could be argued that contracts stipulating impunity for violations of peremptory norms of PIL would be illegal and thus null and void, since there is an obligation to prosecute these violations and an obligation to refrain from violating these norms.[49] Nevertheless, states have proven reluctant to waive immunity once it has been offered.[50] However, a contract of this nature would only bind the contracting state and the contractor, which entails that other states may still have the legal right to prosecute the contractor, since agreements can only bind the contracting parties.[51] Nevertheless, as the US is one of the GSIs largest customers, and the leading world power, prosecuting violations of one of these norms are probably not politically feasible for any country that does not wish to have a bad diplomatic relationship to the only remaining superpower.

Although violations of jus cogens have been known to incur direct responsibility for the violations on both individuals and corporations, the disputed chain of command prevents the effective allocation of blame and guilt, which slows the legal process to a halt. Instead of allocating responsibility, perpetual investigations are made and often, these investigations rarely amount to charges being filed.

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[47] Dixon (2007), *Textbook on International Law*, 6th ed., Oxford University Press, Oxford, p. 184-185.
[48] Brownlie (2008), p. l.
[49] Dinstein (2005), *War, aggression and self-defence,* Cambridge University Press, Cambridge, p. 99-102, Sheehy et. al., p. 51-52.
[50] Dixon (2006), p. 184-185.
[51] Dixon (2006), p. 75.

5.5. Alternative methods for regulation

5.5.1. Voluntary clubs and codes

Voluntary participation in clubs and voluntary codes of conduct are frequently discussed as a measure for imposing global regulation. This would give the states and the industry the ability to continue to develop the current business, while at the same time installing some checks and balances into the current practices. When discussing alternative was for regulating the business, this is the option that is chosen by most authors. Not all authors successfully manage to make an argument for installing this kind of monitoring mechanism. It would of course be marvellous if the business would be able to act according to CSR and voluntarily adhere to the rules of both the contracting state and the territorial state. Given the previous history of granting immunities to private contractors, this does not seem to be an alternative that is viable for the industry. If they already adhered to the rules of CSR and respected human rights, why would they need immunity and why would the state have an incentive for granting them immunity? As the chain of command is still unclear, it would also still be difficult to attribute specific violations to the companies and not to the states.[52]

5.5.1.1. Applicable rules

It would also have to be determined in which states or on which locations hearings to determine breaches of the "gentlemen's agreement" are to be held. The status of these committees must be made absolutely clear, although it could be assumed that the committees would not act as courts. Several questions regarding jurisdiction, the risk of double jeopardy and how to ensure that the committee would have access to relevant contracts, documents and data would also have to be answered. Since this has not been thoroughly investigated, it is not possible to foresee how this institution would work in practice. As these courts would not have the ability to sanction the companies other than excluding them from the club, the effectiveness of this penalty will rest entirely on the exclusiveness and legitimacy of the club.

Agreeing over what rules should be applied and adhered to would also be s topic of intense debate for the states and companies before deciding to join any potential club. Cockayne et. al. advocates the use of the Montreaux document as a starting point for judging the adherence to

[52] Cockayne (2009), p. 252-261.

international standards.[53] Since this text is not legally binding and primarily a political document, it could potentially be used in this context.

5.5.1.2. Funding

Most importantly, the assumption made in the debate is that this will get funding from the states. It has been suggested that the UN could have a supervisory role for these kinds of clubs. As the UN is already underfunded and inevitably is wracked with problems concerning contributions from states such as the US, it is doubtful whether the states will have the incentive to contribute with the financial resources to this project.[54] Suggestions to overcome this threat have been made by making the entry into the clubs contingent on the payment of a membership fee. This logic is based on the assumption that participation in these clubs will be coveted as a sign of legitimacy for the companies and for the entire GSI. Although this is undoubtedly a valid point, this assertion could be questioned by using the argument that it is exactly the illegitimacy and the ability to conduct operations outside the law that makes this business so lucrative for the companies and so valuable for the states. Surely, the public debate concerning state use of the GSI would be very negative for certain countries. However, it is primarily in a country where the government will have to answer to the public.

6. Reasons for the shape of the current debate

6.1. Closely confined debate on a new regulatory challenge

What is more interesting than criticising the current debate is to investigate why it seems to be limited to such a limited array of topics. This is not a question that can be answered in this essay but it would be possible to provide a few reasons as to why this seems to be the case. Although mercenaries have been used for several hundreds of years, and the use of these individuals have been examined for as long, the GSI is something fundamentally different. Using the old legislation for an analysis is a completely useless endeavour, since the outcome will depend on politics and not on law if these rules are applied.[55] New technology and the

[53] Cockayne (2009), p. 252-261.
[54] Sheehy et. al. (2009), p. 60.
[55] Sheehy et. al. (2009), p. 51.

capitalist system have enabled the establishment of MNCs specialising in providing services that in the past were exclusively managed by the state. Several reasons to the rapid growth of the GSI have been presented but there are few arguments for the lack of full examination of this growth. Whether this is a problem for the states who outsource these services, or the academic world, which has not managed to keep up with the rapid development of this business[56], there clearly is a need for a thorough examination of the GSI.

6.2. Lack of jurisprudence and established practices

Legal issues are especially difficult to settle, since the states are the only actors who can make international law. Given very poor track-record of states when trying to address the problem of mercenaries, it is doubtful whether we will have a legal document codifying the international law at all. Not even state practice has been decisive in establishing methods for regulating the GSI. At present, only thirteen countries have ratified the convention against mercenaries. Britain, the US or South Africa, who are the world's primary users of PMSCs have not ratified the convention and there is so far no indication of an intention to do so. Since it is doubtful that the current law is applicable to PMSCs, at least in every aspect of their operations, it might not even be meaningful with universal ratification of this instrument. What would be needed is a new way of regulating these businesses and establishing some kind of uniform rules in the use of PMSCS. Since state practice concerning this topic is not yet established, this will probably take a long time to formulate.[57]

7. Suggestions for development of the debate and future research

It would be interesting to follow the developments of the international law after several cases have been judged in international tribunals. However, material of this sort has been extremely rare considering the frequency in which the companies have been used. Although this is in some ways surprising, it is also fairly evident that establishing customary international law further opinion juris in this way is not yet of value to the states. When this possibility arises, it will nevertheless be an extremely interesting area of investigation as the research debate

[56] Taulbee (2002), "The privatization of security: modern conflict, security and weak states", p. 1-24, Civil Wars, Vol. 5. No. 2, p. 16.
[57] Drews (2007), p. 342-343.

continues to evolve and begins to formulate theories and conclusions based on actual established state practice and not on hypotheses or projections from the past.

It would also be interesting to investigate the possibility of the development of regional regulatory systems. If progress could be made in these arenas, as have already been made in Africa, this could serve as a spark for international regulation. Because regional cooperation often works very well among the EU member states and also quite well among the countries in the Americas, this alternative arena could work as a forum for discussion and potential regulation in the world.

It would also be of interest to investigate the motivation to the UNs campaign against mercenaries, as they to this date are the only source of the development of the international law in the form of opinion juris. The persistent efforts to ban the use of mercenaries have taken the form both of Security Council Resolutions but perhaps mostly in the form of General Assembly Resolutions.[58] An examination of why the UN persists in this struggle and manages to pass resolutions on the subject would be interesting. Since individual states still fail to ratify conventions and does not live up to their individual commitments, it would perhaps help to illustrate why political will seems to be thriving in one context but at the same time be rejected when action is needed by the states. Despite agreeing that there is a need for a more consistent regulatory approach, there still is no apparent political will among the states to actually rectify the situation. Although projections have been made, based on the promises of states and the GSI to increase the legitimacy of their practices, it remains to be seen whether these promises will be kept.[59]

8. Summary and conclusion

This essay has given the reader an insight in the current regulatory debate concerning state us of PMSCs. It has stated that the research area is fairly new, which is the reason to why there is not much primary material. Another reason for this is the lack of transparency of the governments, who are currently using this opportunity to outsource certain tasks that are

[58] Sheehy et. al. (2009), p. 144-147.
[59] Nemeth (2005), *Private security and the law*, Elsevier Butterworth-Heinemann, Burlington (Massachusetts), p. 59.

deemed to cost too much political capital if regular government troops were to be used for these tasks. This seemingly perfect fit does not come at a low cost, since the government is often forced to pay large amounts of money for these services, despite the GSI argument that their services have the benefit of saving the government money and allowing them to concentrate on their core competences.

In order to come to terms with these difficulties, there is a need for a universal regulation for the GSI, as the current gray areas can be construed as a potential threat to the state monopoly of violence. At the same time, there is also a governance gap as the populace are robbed of the ability to influence government decisions, since they often avoid the constitutional checks and balances of parliament, who usually approves military operations. Universal regulation could take several forms, however given the indications from the material reviewed in preparation for this essay, the most likely outcome, which has been described by almost all the authors of the books, have leaned towards a voluntary system of regulation as laid out by Cockayne et. al. Whether this approach has been chosen because of the apparent lack of political will of the government remains to be seen. However, as this field or research is still fairly new, this debate will continue for several years to come, hopefully with a debate as heated and interesting as the current one.

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