TO LEASH OR NOT TO LEASH THE DOGS OF WAR?
THE POLITICS OF LAW AND AUSTRALIA’S RESPONSE
TO MERCIENARISM AND PRIVATE MILITARY AND
SECURITY COMPANIES

ABSTRACT
The growth in the number of private military and security companies (‘PMSCs’) in the post-Cold War era has been exponential. An oft-raised concern regarding this growth is how to deal with PMSCs in relation to international anti-mercenary norms. Some would say that PMSCs are little more than corporatised mercenaries and deserve moral and legal opprobrium as mercenaries. Others maintain that PMSCs are legitimate military and security service providers, capable of self-regulation under industry codes and international regulatory initiatives on PMSCs. Others argue that even if PMSCs do not fit the mercenary tag, they pose problems for stability in weak or failing states, which often lack the means to make PMSCs accountable for their actions. This article focuses on evaluating Australian responses to international concerns about the modalities of mercenarism both past and present. The critical core of the article is the argument that achieving progress on building legal frameworks to regulate the privatisation of war is inextricably linked with the politics of law.

I INTRODUCTION
It seems paradoxical that Australia declined to support the International Convention Against Recruitment, Use, Financing and Training of Mercenaries in 1989 and yet in 1991 ratified the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International

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1 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, opened for signature 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001) (‘Mercenaries Convention’). The Mercenaries Convention entered into force when it attained the required number of 22 ratifications under art 19(1).
Armed Conflicts (Protocol I), both of which defined ‘mercenary’ in substantially similar terms. Australia still had not become a party to the Mercenaries Convention in 2008 when it supported The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, and is unlikely to sign the Mercenaries Convention as it is ill-suited to dealing with the privatisation of war in the post-Cold War era. This article will explicate the above paradox and problematise what various United Nations (‘UN’) fora have called the ‘new modalities of mercenarism’.

The ‘new modalities of mercenarism’ refers to the activities of private military and security companies (‘PMSCs’) in conflict and post-conflict settings. Mistreatment and torture of prisoners throughout 2003–04 in Abu Ghraib prison, near Baghdad, is a frequently cited example of how the excesses of PMSCs are said to infringe human rights; in this example, CACI International provided interrogators, while Titan

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3 See below Part II(A).


5 See below nn 95–107 and accompanying text.

Another frequently cited example is the Nisour Square massacre. On 16 September 2007, Blackwater personnel, escorting a convoy of United States (‘US’) diplomats, fired into commuter traffic at Nisour Square, Baghdad, killing 17 people and injuring scores more. Blackwater claimed that their personnel had fired in self-defence after having come under fire from insurgents, but this claim has been widely discredited. In response to its notoriety, Blackwater, founded in 1997, rebranded itself as Xe Services in 2009 and then as Academi in 2011; it now goes by the name Constellis Holdings, which was formed in June 2014 when Academi merged with a rival company, Triple Canopy. On 22 October 2014, a US Federal District Court jury convicted four Blackwater personnel of, variously, murder, manslaughter and weapons charges for their involvement in the massacre.

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According to Faiza Patel, a member of the UN Working Group on the Use of Mercenaries, episodes such as the Nisour Square massacre and the use of contractors in Abu Ghraib show that ‘new forces need new rules’. This comment was made in a press release in September 2012, where the author discussed the ‘critical lesson’ to be drawn from the US military presence in Iraq and Afghanistan — the lesson being that

experience with security contractors in Iraq and Afghanistan has shown that their personnel often lack discipline and can commit violent crimes. But the international community lacks the tools and political will to control them or bring them to book when they abuse human rights.

For Patel and others, the ‘new rules’ ought to take shape not simply in self-regulation under industry codes but instead in a legally binding convention on the use and regulation of PMSCs.

The myriad responses to the old and new modalities of mercenarism evince the politics of law; that is, law, as this article argues, is not neutral but is inherently political in its origin, development and application. This article begins by outlining the state of affairs with regard to mercenarism and PMSCs. Rather than survey the long history of mercenarism or examine the neoliberal underpinnings of the privatisation of war, the article will evaluate how the increasing reliance on PMSCs in the ‘market for force’ challenges the anti-mercenary norm in international law. International initiatives to create ‘new rules’ to clarify the legal status of PMSCs are themselves challenged by, and the product of, the flux of interactions between actors (state and non-state) and institutions in the post-Cold War world. UN efforts, regarding fact-finding on mercenarism and PMSCs, are likewise the product of, or at the very least are inextricably linked with, pressures arising from and relating to the flux of interactions between actors and institutions. Importantly, fact-finding parties serve as ‘norm entrepreneurs’ by shaping norms on the role of human rights law.
and international humanitarian law in the marketplace for force. The article then evaluates the politics of law in Australian parliamentary responses to mercenarism and PMSCs. This article contends that Australian laws on the old modalities of mercenarism are interwoven with certain intractable political issues — such as how to give voice to moral disquiet about mercenary activities and yet respond in a timely manner to exigencies of politics — and that these issues resonate in the inchoate Australian legislative response to PMSCs and the ‘new modalities of mercenarism’.

II Mercenaries and Private Military and Security Companies

A What is a Mercenary?

The mercenary enterprise pre-dates the emergence of the national armies that arose with the creation of the modern Westphalian state system by several thousand years. From early in human history, it was clear that organised violence offered ‘great advantages of scale’ in protecting society. Early urban civilisations, Greek city-states, the Carthaginian Empire and Rome all relied upon hired soldiers and built up their native forces with trained foreign specialists. Historically, mercenaries have been defined by reference to the desire for private gain and by factors such as country of origin and ideology. Where individual mercenaries in Medieval and Renaissance Italy banded together under the leadership of military captains to fight for city-states, footloose bands of mercenaries in later times came to be seen as potentially threatening to the emerging European nation-states and their creation of professional armies. Nonetheless, mercenary activity was not eliminated and did not otherwise cease; instead, mercenaries were a resource to be harnessed. In the face of manpower shortages and to maintain the imperial project, the European imperial powers supplemented their national armies with foreign soldiers and indigenous recruits. Additionally, mercantile companies, such as the Dutch East India Company and the English East India Company, employed their own military forces to protect their trading interests. As the nation-state system moved towards the end of the 19th century, and colonial land grabs in Asia and Africa continued unabated, mercenaries remained a resource to be harnessed. Associated risks (for example, nationals of a country being recruited to enlist in the armed forces of another country without

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17 See below Part III(A)–(D).
18 Discourse analysis of the politicisation of the very term ‘mercenary’, which parliamentarians often use to impugn the ethics of their opponents, is, however, beyond the scope of this article.
19 See below Part IV(A)–(C).
21 Ibid 20–1.
22 Ibid 22–6, 30–1.
23 Ibid 34–7.
the permission of authorities in their own country) were technical problems to be either managed or ameliorated through legislation.24

In common parlance, a mercenary is a volunteer who fights for a foreign armed force for monetary gain or other personal gains.25 The legal definition is more technical. For instance, satisfying the subjective ‘motivation’ element is notoriously difficult.26 As the 1976 Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries noted,

any definition of mercenaries which required positive proof of motivation would, in our view, either be unworkable, or so haphazard in its application as between comparable individuals as to be unacceptable. Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it.27

Article 47(2) of Additional Protocol I of the Geneva Conventions stipulates six criteria that must be cumulatively fulfilled for a person to be classified as a mercenary:

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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24 An early example of a legislative restriction on ‘the non-commercial liberties of intercourse and recruitment’ (David Riesman, ‘Legislative Restrictions on Foreign Enlistment and Travel’ (1940) 40 Columbia Law Review 793, 793) is the British Foreign Enlistment Act 1819, 59 Geo III, c 69, later amended by Foreign Enlistment Act 1870, 33 & 34 Vict, c 90.


(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.

Similarly, art 1(1) of the Mercenaries Convention repeats all but criteria (b), though as art 3(1) of the Mercenaries Convention stipulates:

A mercenary, as defined in article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention.

The Mercenaries Convention specifies that mercenaries are people who undermine legitimate governments, and regards mercenary activities as criminal offences. Likewise, the Rome Statute of the International Criminal Court outlines ‘[t]he crime of aggression’, which includes ‘[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State’ in violation of the Charter of the United Nations.

Legal definitions of ‘mercenary’ stem from critiques of mercenaries, popularly known as ‘whores’ and ‘dogs’ of war, plying their trade in Cold War proxy wars in decolonisation conflicts in Africa and Asia. During the Cold War, ‘wild geese’ mercenaries plagued the African continent, suppressing movements of national liberation at the behest of former colonial powers. Condemnation of mercenarism underpins UN General Assembly Resolution 1514, adopted in December 1960. Resolution 1514 and General Assembly Resolutions adopted throughout the 1960s on the progress of Resolution 1514 did not mention the very terms ‘mercenaries’ or ‘mercenarism’ as such, but the critical thrust of the Resolutions was clear: the resort to violence to delay progress on achieving independence is inimical to international peace and stability. The absence of explicit references either to ‘mercenaries’ or

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28 Mercenaries Convention arts 1(2)(a)(i)–(ii).
29 Ibid arts 2, 3(1), 4(a)–(b).
31 Ibid art 5(d).
32 Ibid art 8 bis (2)(g) (emphasis added). See also Charter of the United Nations art 1(1).
36 Ibid Preamble paras 4, 7, 9; Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 2105 (XX), UN GAOR, 20th sess, 1405th plen mtg, Agenda Item 23, UN Doc A/RES/2105(XX) (20 December 1965) Preamble para 9; Implementation of the Declaration on the Granting of
to ‘mercenarism’ may have been a reflection of the reluctance of former colonial powers to forswear the use of force to secure natural resources as well as a reflection of the then embryonic status of international efforts to rally against the use of mercenaries to stymie anti-colonial struggles. In 1968, General Assembly Resolution 2465 explicitly referred to mercenaries as ‘outlaws’, and called for all States ‘to enact legislation declaring the recruitment, financing and training of mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries’. General Assembly Resolution 3103 also referred to the criminal nature of the use of mercenaries to stymie anti-colonial struggles, but, as Todd Milliard notes, did not say that ‘mercenaries themselves are outlaws’. Instead, it

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37 With regard to early debates on drafting an international convention against mercenarism, see UN GAOR, 34th sess, 104th plen mtg, UN Doc A/34/PV.104 (14 December 1979) 1945–9 [405]–[447].


39 Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Régimes, GA Res 3103 (XXVIII), UN GAOR, 28th sess, 2197th plen mtg, Agenda Item 96, UN Doc A/RES/3103(XXVIII) (12 December 1973) Preamble paras 5–6 (‘Resolution 3103 (XXVIII)’).

40 Milliard, above n 38, 29.
said that the use of mercenaries against national liberation movements ‘is considered to be a criminal act and the mercenaries should accordingly be punished as criminals.’

In 1977, the Organization of African Unity (‘OAU’), established in 1963 as an expression of regional ‘unity and solidarity’ against ‘all forms of colonialism’ in Africa, adopted the *Organization of African Unity Convention for the Elimination of Mercenarism in Africa*. The OAU proscribed the use of mercenaries by any ‘individual, group or association’ to suppress movements of national liberation. Yet, while an OAU Member State cannot use mercenaries to interfere with the territorial integrity of another Member State or with its efforts to achieve self-determination, a Member State is not prevented from using mercenaries to crush an insurrection within its own borders. Therefore, as Jackson Maogoto and Benedict Sheehy note, the regional focus of the *OAU Mercenaries Convention* has limited its ‘role in creating added impetus in international circles towards criminalising and punishing mercenarism.’ (Evidently, though, sufficient impetus existed for the *Rome Statute* to be amended in 2010 to categorise mercenarism as a ‘crime of aggression’.) Notably, concerns about mercenarism in Africa persist in the new millennium. In 2002, the UN General Assembly declared in Resolution 56/232 that it was ‘alarmed and concerned’ at the danger that the activities of mercenaries constitute to peace and security in developing countries, in particular in Africa and in small States.’ The General Assembly has reiterated that alarm and concern on numerous occasions, when, amongst other matters, drawing attention to the

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41 *Resolution 3103 (XXVIII)*, UN Doc A/RES/3103(XXVIII), para 5.
47 *Rome Statute* art 8 bis (2)(g).
persistence of mercenarism as a threat to peace, stability and self-determination in postcolonial states. 49

B Security and Conflict

To contextualise the precise problem posed by PMSCs in relation to the legal definition of mercenary, it is instructive to consider how post-Cold War era concerns about mercenarism have morphed into discourses about security and globalisation and, as the following section explains, have been paralleled by debates about the accountability of corporate military and security entities. 50 The post-Cold War era has witnessed not Francis Fukuyama’s prophesied ‘end of history’ and triumph of liberal democracy, 51 but instead conflict and disorder in relation to the global–local


nexus. Samuel Huntington contended in his 1993 article, ‘The Clash of Civilizations?’ that accounts such as Fukuyama’s failed to give due consideration to the role of civilisational dynamics in shaping the post-Cold War world. Huntington warned that patterns of conflict in the post-Cold War world were highly likely to be shaped by the clash between Western and non-Western civilisations. Even if civilisational differences, for example, regarding religious values and control of territory, have re-emerged in the wake of the fall of the Iron Curtain, patterns of conflict cannot be ascribed solely to inter-civilisational differences; instead, intra-civilisational differences, coupled with the emergence of non-state actors, have become particularly salient aspects of contemporary global politics.

Symptoms of problems with the global–local nexus include the ‘global war on terror’ (or, put differently, ‘a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America’) and the turmoil of tensions giving rise to outbreaks of ethno-nationalist conflict. Although the ‘kill-capture’ strategy of the global war on terror has shifted to counterinsurgency efforts, namely, to ‘a win-the-population strategy that is directed at building a stable and legitimate political order’, it is clear that ‘[w]arfare remains a violent clash of interests between organized groups characterized by the use of force’, and asymmetries of

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53 See, eg, Mary Kaldor, New and Old Wars (Policy, 2nd ed, 2006) 182–5; Singer, Corporate Warriors, above n 20, 50–2.


56 See generally Implementing the Responsibility to Protect — Report of the Secretary-General, UN GAOR, 63rd sess, Agenda Items 44 and 107, UN Docs A/63/677 (12 January 2009) 4–8 [1]–[10]; Responsibility to Protect: Timely and Decisive Response — Report of the Secretary-General, UN GAOR, 66th sess, Agenda Items 14 and 117; UN SCOR, 66th sess, UN Docs A/66/874 and S/2012/578 (25 July 2012) 1–3 [1]–[6].


58 Department of Army, United States of America, Counterinsurgency (Field Manual No 3–24, Headquarters, Department of the Army, Washington, DC; Marine Corps Warfighting Publication No 3–33.5, Headquarters, Marine Corps Combat

It is useful to turn briefly here to philosophical dimensions of discourses about security and globalisation. The compression of time and space due to the sheer speed of communication linkages and cross-border flows of goods, services and ideas in the globalising world has produced what may variously be described as a ‘crisis of modernity’ and the ‘postmodern condition’. In the ‘postmodern condition’, says Jean-François Lyotard, the truths or ‘grand narratives’ of modernity, including the faith in the capacity of scientific knowledge to provide for material and social progress, that once served to undergird society, have given way to a crisis of ‘legitimation’.\footnote{Lyotard, above n 60, 6.} The crisis is about ‘the status of knowledge’,\footnote{Marshall Berman, All That Is Solid Melts Into Air: The Experience of Modernity (Verso, revised ed, 2010) 15–16, 28–9, 87–105; Karl Marx and Friedrich Engels, The Communist Manifesto (Samuel Moore trans, Penguin Books, 1967) 83 [trans of: Das Kommunistische Manifest (first published 1848)].} and was foreshadowed in Karl Marx and Friedrich Engel’s claim in The Communist Manifesto that ‘[a]ll that is solid melts into air’ under capitalism, due to the ceaseless movement of capital across the globe.\footnote{Jean-François Lyotard, The Postmodern Condition: A Report on Knowledge (Geoff Bennington and Brian Massumi trans, Manchester University Press, 1984) 3–9, 12, 27–41, 64–5 [trans of: La Condition Postmoderne: Rapport sur le Savoir (first published 1979)]. For an alternative diagnosis of the ‘crisis of modernity’, see Leo Strauss, ‘The Three Waves of Modernity’ in Hilail Gildin (ed), An Introduction to Political Philosophy: Ten Essays by Leo Strauss (Wayne State University Press, 1989) 81, 81–98.} Similarly, Herbert Marcuse warned in his 1964 work, One-Dimensional
Man, that relentless mass consumption inexorably produces conformist, ‘onedimensional’ individuals, who are not so much individuals (if at all) as they are ‘cogs in a culture-machine which remakes their content’ into a homogenised whole.63 The postmodern condition is, in short, both a crisis about knowledge qua knowledge and a crisis about the legitimacy of the power wielded by legal and political institutions to decide what knowledge ought to be.64

Further discussion of postmodern ruminations on power, knowledge and alternatives to ‘scientific knowledge’65 is beyond the scope of this article, but it is instructive to note here the issue of the dissonance between certainty and uncertainty. In the globalising world, satisfying the need for ontological security, namely, ‘security of the self’,66 pervades inter-state and intra-state relations.67 Identity dissonance, which can be defined as the ‘clash between an identity and the practices that are expected to result from it’,68 has the potential to lead to ontological dissonance when threats to identity cannot be resolved or ameliorated and actors are unable ‘to assure themselves of who they are.’69 Just as individuals, through forming relationships with others, seek not only personal or physical security but also ontological security, so, too, do collective actors such as states.70 States seek to resolve their ontological insecurities through routines of ‘competitive’ interactions with other states and actors.71 However, the risk of such routines is that states ‘become attached to conflict’ and prefer conflict to resolving their uncertainties of identity.72 Attachment to conflict, amongst other matters, underpins what some call the ‘military Keynesian zeitgeist’73 of the Great Depression era and

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64 Lyotard, above n 60, 7–9.
65 Ibid 3, 7–8, 18, 23–8, 30–1, 39, 43–4, 47, 53–4.
69 Ibid 812 (emphasis in original). See also Mitzen, above n 66, 342–6.
71 Mitzen, above n 66, 348, 359–60.
72 Ibid 342. See also Huysmans, above n 70, 238–40; Lupovici, above n 68, 811.
the solidification of the ‘permanent war economy’ in the Cold War era.\textsuperscript{74} Pragmatic yet principled concern with the dangers of institutionalising attachment to conflict can be seen in President Eisenhower’s prescient warning about the ‘military industrial complex’ in his 1961 \textit{Farewell Address}.\textsuperscript{75} Then as now, a pragmatic concern about the war economy is its economic sustainability; a principled concern is about the influence of industrial interests on electoral politics and the quality of democratic governance.\textsuperscript{76}

\textit{C How to Conceptualise PMSCs}

PMSCs have flourished in the post-Cold War era as standing armies have been reduced in size and former soldiers have sought alternative employment. It is in this context that PMSCs have taken on a greater role in providing security in conflict and post-conflict zones.\textsuperscript{77} Illustrating the growth in the use of PMSCs are changes in the ratio of soldiers to PMSC personnel: the ratio was 50 to 1 in the first Gulf War; 10 to 1 in the 2003 Iraq War; and by 2008, the ratio was almost 1 to 1 in Iraq.\textsuperscript{78} PMSCs provide an ‘enormously diverse’ array of services, which can be

\begin{itemize}
\item Seymour Melman, \textit{The Permanent War Economy: American Capitalism in Decline} (Simon and Schuster, 1974). See also Duncan and Coyne, above n 73, 219–40.
\end{itemize}
classified into three broad categories, providing: combat-capable forces; military consultancy services (including training and bodyguard services); and non-lethal support (including ‘intelligence collection and analysis’). How sharply defined the categories are in practice can be questioned, because PMSCs ‘can do more than one task and offer more than one capability at any given time.’

Military focused PMSCs as well as ostensibly security focused PMSCs that offer military capabilities perform functions formerly thought to be within the state’s exclusive domain. As Laura Dickinson explains, ‘[p]erhaps no function of government is deemed more quintessentially a “state” function than the military protection of the state itself.’ The corollary here is that privatisation in the international or global sphere has the further potential to ‘hollow out’ state actors. Those inclined to reject privatisation of core government functions underscore what they see as the pernicious impact of neoliberal economic ideology and contend that the privatisation of military and security services emasculates the state’s monopoly on legitimate violence.


82 Dickinson, ‘Government for Hire’, above n 81, 147.


A related critique is that PMSCs are corporatised mercenaries and deserve moral and legal opprobrium as mercenaries. Others take a more sanguine view of the precise challenge posed by PMSCs, particularly in light of their divergence from the traditional and legal conceptualisations of mercenaries, and maintain that PMSCs are legitimate military and security service providers, capable of self-regulation under PMSC industry codes and international regulatory initiatives on PMSCs. One such initiative is the Swiss Government organised International Code of Conduct for Private Security (2006) 41 Texas International Law Journal 67, 68–70, 74, 77–8. Cf James Cockayne, ‘Make or Buy? Principal-Agent Theory and the Regulation of Private Military Companies’ in Simon Chesterman and Chia Lehnardt (eds), From Mercenaries to Market: The Rise and Regulation of Private Military Companies (Oxford Scholarship Online, 2009) 196, 199–200, 202–5, 207–8; Chia Lehnardt, ‘Private Military Companies and State Responsibility’ in Simon Chesterman and Chia Lehnardt (eds), From Mercenaries to Market: The Rise and Regulation of Private Military Companies (Oxford Scholarship Online, 2009) 139, 139–42, 146–7, 150.


Service Providers. Others argue that even if PMSCs do not fit the mercenary tag, they pose problems for stability in weak or failing states, which often lack the means to make PMSCs accountable for their actions.

Contestation aside, the precise challenge posed by PMSCs stems from how PMSCs challenge the traditional conception and legal definition of ‘mercenary’ as outlined in the Mercenaries Convention, Additional Protocol I of the Geneva Conventions and the OAU Mercenaries Convention. Satisfying the subjective ‘motivation’ criteria of the definition is notoriously difficult, as PMSC employees can be motivated by a range of interests and not just material gain. To circumvent the nationality criteria, contracting states can simply deputise the employees of PMSCs to make them nationals of a party to the conflict. The corporate form of PMSCs is a further reason why the definition of mercenary is limited in its application to PMSCs; as Singer puts it, ‘it is the corporatization of military service provision’ that distinguishes PMSCs from

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89 See, eg, Singer, Corporate Warriors, above n 20, 41.

90 This occurred in the Sandline Affair. See below n 219 and accompanying text.
mercenaries.91 Where individual mercenaries adopt an ad hoc structure, PMSCs ‘are
ordered along pre-existing corporate lines’.92 If a PMSC is incorporated in a country
with a regulatory regime to monitor PMSC activities that proves to be less than
welcoming to their activities, then the PMSC can reincorporate in a more hospitable
country93 or otherwise ‘transform’ to a more respectable corporate mien.94

Notwithstanding the contested views about how to conceptualise PMSCs, this much
is clear: the strictness of the definition of ‘mercenary’ limits its use for regulating
PMSCs in a full range of conflict and post-conflict settings.95 In December 2003,
Enrique Bernales Ballesteros, in his final report as the UN Special Rapporteur on the
Question of the Use of Mercenaries, pointed out:

International legislation [regarding the legal definition of mercenary] contains a
number of loopholes regarding the requirements relating to nationality, residence,
changes in nationality to conceal identity as a mercenary, the participation of
mercenaries in illicit trafficking or in organized crime, and, lastly their participa-
tion in terrorist acts.96

To close the loopholes, Ballesteros proposed a redefinition of mercenary. One aspect
of the proposal was that mercenary activity be regarded as ‘a crime in and of itself and
be internationally prosecutable, both because it violates human rights and because it
affects the self-determination of peoples.’97 Another core aspect of the proposal was that

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91 Singer, Corporate Warriors, above n 20, 45 (emphasis in original).
92 Ibid. See also Deborah Avant, ‘The Implications of Marketized Security for IR
Theory: The Democratic Peace, Late State Building, and the Nature and Frequency of
93 Frye, above n 88, 2645; Jones, above n 77, 255.
95 See, eg, Enrique Bernales Ballesteros, Report on the Question of the Use of
Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the
Right of Peoples to Self-Determination, Submitted by Mr Enrique Bernales Ballesteros,
Special Rapporteur, Pursuant to Commission Resolution 1995/5 and Commission
Enrique Bernales Ballesteros, Use of Mercenaries as a Means of Violating Human
Rights and Impeding the Exercise of the Right of Peoples to Self-Determination;
Report Submitted by Mr Enrique Bernales Ballesteros, Special Rapporteur, UN Doc
Human Rights, The Right of Peoples to Self-Determination and its Application to
Peoples Under Colonial or Alien Domination or Foreign Occupation, UN ESCOR,
61st sess, 3rd mtg, Agenda Item 5, UN Doc E/CN.4/2005/23 (18 January 2005) 7 [7];
Holmqvist, above n 50, 3–5; Leander, above n 50, 610–11.
96 Enrique Bernales Ballesteros, Special Rapporteur, The Right of Peoples to Self-
Determination and its Application to Peoples Under Colonial or Alien Domination or
Foreign Occupation: Use of Mercenaries as a Means of Violating Human Rights and
Impeding the Exercise of the Right of Peoples to Self-Determination; Report Submitted
by Mr Enrique Bernales Ballesteros, Special Rapporteur, UN Doc E/CN.4/2004/15
(24 December 2003) 13 [40].
97 Ibid 13 [43(c)].
the redefinition avoids the cumulative criteria of existing definitions.98 (The individual mandate of the Special Rapporteur on the Question of the Use of Mercenaries, established in 1987,99 was replaced by the UN Working Group on the Use of Mercenaries (‘UN Working Group’) in July 2005; the UN Working Group was established to investigate, inter alia, how PMSCs impact ‘on the enjoyment of human rights, particularly the right of peoples to self-determination’.100) In a draft resolution in November 2012, the Third Committee of the General Assembly recommended, inter alia, that the definition be changed in line with Ballesteros’ proposal.101 The resolution, sponsored by Cuba, was adopted with widespread support from Member States from the African Group, Asia-Pacific Group and Latin American and Caribbean Group in the General Assembly; however, many Western States voted against it, including European Union (‘EU’) Member States.102 EU Member States explained their vote by arguing, amongst other matters, that ‘the Third Committee and the Human Rights Council were not the proper forums for addressing mercenary activity’.103 A year later, the Third Committee again recommended in a draft resolution that, inter alia, Ballesteros’ proposal be implemented.104 The resolution was adopted, but again many Western states voted against it. EU Member States explained their voting decision by arguing that the UN Working

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103 Ibid 5 [46].

Group, with its mandate to investigate both mercenary and PMSC activities, was not drawing a sufficiently ‘clear distinction between the use of mercenaries and the lawful activities of private military and security companies’. EU Member States further argued that the UN Working Group ought to be more ‘open-minded’ about forms of regulating PMSCs other than by way of a convention. Despite Third Committee resolutions and calls from the UN Working Group for all UN Member States to support Ballesteros’ proposal, the Mercenaries Convention retains the cumulative definition of mercenary.

D International Initiatives to Regulate PMSCs

Not surprisingly, the UN Working Group has noted that PMSCs largely elude the legal definition of mercenary, which ‘does not generally apply to the personnel of PMSCs legally operating in foreign countries.’ The Montreux Document and the Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council both seek to address shortcomings with the efficacy of the strict legal definition of mercenary as it relates to the regulation of PMSCs. The Montreux Document, initiated by the Swiss Government and the International Committee of the Red Cross, outlines ‘Pertinent International Legal Obligations Relating to Private Military and Security Companies’ and ‘Good Practices Relating to Private Military and Security Companies’. A good practice for Home States is, for instance, to ‘evaluate whether their domestic legal framework … is adequately conducive to respect for relevant international humanitarian law and human rights law by PMSCs and their personnel’. The Montreux Document itself is non-binding, but it encapsulates principles of international humanitarian law and human rights law, pertinent to the use of PMSCs by states, that are binding. For instance, Common Article 1 of the Geneva Conventions stipulates, ‘[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’. In light of Common Article 1, standards

\[105\] Summary Record of the 47th Meeting, UN GAOR, 3rd Comm, 68th sess, 51st mtg, Agenda Items 27, 28, 65 and 68, UN Doc A/C.3/68/SR.51 (16 January 2014) 8 [58].
\[106\] Ibid.
\[109\] Montreux Document pt 2 div C, introduction.
of conduct vis-à-vis respect for international humanitarian law that are obligatory for all Parties apply also, it could be argued, to contractual relationships between state actors and non-state actors such as PMSCs — with a contracting state bearing the ‘obligation … to exercise due diligence and take reasonable measures within its power to prevent and repress violations of IHL by PMSCs.’

The Montreux Document provides a timely summation of principles for regulating PMSCs, but questions may be asked about the extent of how international it is in terms of its support from a wide range of state actors. The Montreux Document has been presented in the UN General Assembly and the Security Council, but it was not formulated under UN frameworks such as the Sixth (Legal) Committee of the General Assembly, and was mostly the creation of Western States, due to their ‘heavy involvement’ in the privatisation of war. Only ‘three African States were involved (Angola, Sierra Leone and South Africa)’ in its creation, and no Latin American or Caribbean States were involved. Given the overrepresentation of Western States in the Montreux consultation process, the Montreux Document, as the UN Working Group notes, ‘has … failed to address the regulatory gap in the responsibility of States with respect to the conduct of PMSCs and their employees.’ A related aspect of the said ‘gap’ pertains to contract law and marketplace dynamics. Contract law and market mechanisms seem to have the potential to improve the accountability of PMSCs in the market for force, but the Montreux Document, as José Luis Gómez del Prado, a member of the UN Working Group from 2005–10, argues, ‘fails to require a centralised office responsible

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was developed with the participation of governmental experts from Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America.


to register all contracts, apply common standards and monitor the contracts’. For other commentators and scholars, the Montreux Document is a ‘yardstick’ by which states can measure their practices on the use and regulation of PMSCs, and is a ‘significant step’ towards ensuring that PMSCs respect human rights.

In July 2010, the UN Working Group submitted the Draft PMSC Convention to the Human Rights Council, with a view to banning PMSCs from providing ‘inherently State functions,’ especially core military activities. These functions, as the Working Group noted, ‘are consistent with the principle of the State monopoly on the legitimate use of force and that a State cannot outsource or delegate to PMSCs under any circumstances.’ Whereas art 47 of Additional Protocol I of the Geneva Conventions only applies to international armed conflict, the Draft PMSC

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117 Draft PMSC Convention, UN Doc A/HRC/15/25, annex arts 1(b), 2(i), 4(3), 6(2), 9, 19(1).


Progress on garnering international support for the Draft PMSC Convention seems, however, to consist mainly of General Assembly Resolutions calling for all states to support the regulatory initiative and, for states that have not already done so, to become parties to the Mercenaries Convention.121

Clearly, then, building a regulatory regime on PMSCs requires coordinating inputs from states, civil society, industry stakeholders and other interested individuals and organisations.122 In October 2010, the Human Rights Council established ‘an open-ended intergovernmental working group with the mandate to consider the possibility of elaborating an international regulatory framework’ on PMSCs.123 In a parallel initiative to the Draft PMSC Convention, the UN Working Group has recognised the ICoC and Draft ICoC Charter, both of which were developed through consultations between a range of state and non-state actors (including industry stakeholders), ‘as a means of improving the adherence of private military and security companies to international humanitarian and human rights standards’.124 The Working Group


122 Cockayne and Mears, above n 116, 3–5.

123 Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies, HRC Res 15/16, UN GAOR, 15th sess, 34th mtg, Agenda Item 3, Supp No 53A, UN Doc A/HRC/Res/15/26 (7 October 2010) para 4. Originally the mandate was to last for two years but it has been extended for a further two years: Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies, HRC Res 22/33, UN GAOR, 22nd sess, 50th mtg, Agenda Item 3, Supp No 53A, UN Doc A/HRC/Res/22/33 (22 March 2013) para 1.

recommends, though, that the ICoC and Draft ICoC Charter be ‘strengthened’ by externally administered mechanisms such as ‘field audits’, because ‘self-regulatory mechanism[s] … can never replace accountability through the law.’

The above regulatory initiatives ‘provide important guidance’ for how to deal with PMSCs; however, in the case of the Montreux Document, ICoC and Draft ICoC Charter, they do not ‘stipulate meaningful consequences in cases of non-compliance.’ Proponents of a legally binding instrument for regulating PMSCs argue that the Montreux Document, ICoC and Draft ICoC Charter are ‘only some of the elements required for an international system to regulate the activities of private military and security companies’. The fundamental elements relate to the obligations imposed on States: a legally binding instrument, as the UN Working Group contends, would be ‘the most efficient way to regulate’ PMSCs, for instance, by creating ‘general due diligence-related obligations’ for PMSCs and contracting states. If a PMSC carried out its due diligence obligations but human rights violations nonetheless occurred in the course of its activities does not mean, however, that that PMSC or the contracting State could automatically avoid liability for complicity for violations committed by PMSC personnel or related parties.

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127 Ibid 16 [66], [68].

128 Ibid 16 [66], [68].

Given that the above three initiatives are recent, it would be premature to evaluate their efficacy in a definitive manner. Nonetheless, it is apparent that tensions between realpolitik and moral disquiet about mercenarism pervade the milieu of the initiatives, if not the initiatives themselves. The persistence of tensions between realpolitik and moral disquiet about mercenarism underscores the difficulty of transforming emerging norms into law, in this case, transforming the normative significance of UN and civil society appeals to regulate PMSCs into a convention with widespread international support.

III Fact-Finding on Mercenaries and PMSCs

A Why Conduct Fact-Finding on PMSCs?

Fact-finding regarding the activities of PMSCs and their impact on human rights is itself a case study of the politics of law. Fact-finding on PMSCs, as this section argues, cannot be understood in isolation to its institutional milieu and broader political environment. The search for probative facts on human rights violations has taken on increasing prominence in recent years. Humanitarian crises and occurrences of ethnic cleansing, mass killings and genocide illustrate the need for fact-finding missions in addressing human rights violations. Yet, the politicised nature of the UN system on the Use of Mercenaries, Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, UN Doc A/68/339 (20 August 2013) 18–19 [70]–[73]. See generally Identical Letters Dated 25 February 2013 from the Secretary-General Addressed to the President of the General Assembly and to the President of the Security Council, UN GAOR, 67th sess, Agenda Item 69; UN SCOR, 67th sess, UN Docs A/67/775 and S/2013/110 (5 March 2013) annex (‘Human Rights Due Diligence Policy on United Nations Support to Non-United Nations Security Forces’); Sabine Michalowski, ‘Due Diligence and Complicity: A Relationship in Need of Clarification’ in Surya Deva and David Bilchitz (eds), Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect? (Cambridge University Press, 2013) 218, 236–7.


raises questions about the reliability of international fact-finding. Facts are epistemologically and politically contestable, but rather than use critical legal studies theory to analyse the possibilities for developing future applications of fact-finding per se, this section will instead evaluate the said possibilities vis-à-vis a salient example of fact-finding, namely, determining the impact of mercenarism and mercenary-related activities on human rights. Although academic, think-tank and non-governmental organisation (NGO) reports on PMSCs are pertinent to an analysis of pressures on fact-finding, including the pressure of collecting information from dispersed sources, this section will focus on UN fact-finding on mercenarism and PMSCs.

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The UN Working Group, comprised of five independent experts, was established by the Commission on Human Rights in July 2005 to investigate, inter alia, how PMSCs impact ‘on the enjoyment of human rights, particularly the right of peoples to self-determination’. The ubiquity of the privatisation of force raises far-reaching questions about how to regulate, or whether to prohibit, an industry that has been implicated in human rights abuses in conflict and post-conflict zones. Under its thematic mandate as a Human Rights Council Special Procedure, and guided by pertinent international legal instruments, the UN Working Group: receives communications (including complaints) about PMSCs from governments, NGOs and concerned individuals; holds regional consultations with governments, civil

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society actors and PMSC industry representatives, about monitoring and regulating
PMSCs;\textsuperscript{143} submits annual reports to the UN General Assembly and the Human
Rights Council;\textsuperscript{144} surveys national legislation relating to PMSCs;\textsuperscript{145} and has carried
out fact-finding missions in Afghanistan, Chile, Ecuador, Equatorial Guinea, Fiji,
Honduras, Iraq, Peru, Somalia, South Africa, the United Kingdom and the United
States of America.\textsuperscript{146} The UN Working Group tends to carry out country visits by
two group members, meeting a wide range of state and non-state actors, within short

\begin{thebibliography}{9}
\item \textsuperscript{144} UN Working Group on the Use of Mercenaries, \textit{Annual Reports} <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/AnnualReports.aspx>.
\item \textsuperscript{145} UN Working Group on the Use of Mercenaries, \textit{National Regulatory Frameworks on PMSCs} <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalRegulatoryFrameworks.aspx>.
\item \textsuperscript{146} UN Working Group on the Use of Mercenaries, \textit{Country Visits} <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/CountryVisits.aspx>.
\end{thebibliography}
timeframes. As both the Quakers and Amnesty International have noted of Human Rights Council Special Procedures in general, country visits are one of the most effective means by which the Special Procedures can assess the protection of human rights at the national and local level and articulate clear, measurable and relevant recommendations.

B Pressures on Developing Reliable and Accurate Fact-Finding on PMSCs

UN fact-finding on mercenarism and PMSCs is a microcosm of the manifold pressures on developing credible — reliable and accurate — fact-finding. Fact-finding is important for reasons discussed above, but pressures on fact-finding challenge its effectiveness. Arguably, the pressures on in-country fact-finding and regional consultations stem not from discourses of ‘official denial’ of human rights problems or from lacunae in official cooperation with the UN Working Group — generally, its reports on country visits note the cooperation of

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governments but rather from dealing with ‘information dispersal’. This term refers to how there is a much broader array of actors relevant to any given human rights situation who possess highly relevant information which is not able to be made available in a meaningful way and injected into the broader information database on which decisions are based.


153 Alston and Gillespie, above n 152, 1093.
Legal and political theorists note that, while deliberation is a path to the aggregation of information,\textsuperscript{154} processes of, and pressures on, deliberation — arising from ‘hegemonic contestation’\textsuperscript{155} — have the potential to skew the reliability and accuracy of knowledge that is aggregated through deliberation.\textsuperscript{156} In other words, and the importance of the UN Working Group’s mandate notwithstanding, the question can be raised as to whether the pressures of coordinating data collection from a range of actors in what are often conflict and post-conflict zones — using the ‘reasonable grounds’ standard of proof when making factual determinations — undercuts the reliability of the data.\textsuperscript{157} Indeed, as the UN Working Group has noted vis-à-vis concerns raised about PMSC activities in Iraq and Equatorial Guinea, ‘there have been serious difficulties in collecting evidence and finding witnesses in the countries concerned, especially in conflict areas.’\textsuperscript{158} The above ‘difficulties’ are pressures that operate on a micro level (as they impact on individuals),

\begin{footnotes}


\footnotetext[156]{Sunstein, above n 152, 57–8. See also Alston and Gillespie, above n 152, 1092–4, 1099, 1103–4. See generally Dryzek, above n 154, 1396–9; Koskenniemi, above n 14, 110–11; Steiner, above n 154, 125–7, 153–66. But see Lyotard, above n 60, 8, 27–31, 35–6, 46–7.}


but are shaped by meso level pressures, including the persistence of ethno-nationalist drivers of conflict and the dynamics of different regime types. The tension between state sovereignty and global civil society places further pressure on the efficacy of fact-finding; the tension raises macro level abstractions about the nature of power and influences individual actors via meso level pressures.

C Where to Next?

The above manifold pressures on fact-finding are common to fact-finding per se, however, some pressures are specific to fact-finding on the old and new modalities of mercenarism. Pressures on informational transparency regarding PMSCs stem, for example, from the difficulty of unravelling the ‘labyrinth of layers of contracts and subcontracts’ under which PMSCs operate. On the one hand, contracts are a potential tool for contracting states and other contracting clients, including the

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160 See above n 56.


163 See, eg, Sandholtz and Sweet, above n 162, 245–6. On macro level dynamics, see generally Smith, Schneider and Dickson, above n 159, 149–57.


UN (which contracts PMSCs when necessary to assist humanitarian and peacekeeping operations), to make PMSCs answerable for their conduct. On the other hand, complicating the prospects for improved informational transparency is how the transnational scope of PMSC contracts can make it difficult to establish individual responsibility for human rights transgressions brought to light by fact-finding efforts. Further complicating the prospects for improved informational transparency is the omission from the Montreux Document of the creation of a ‘central registry’ of PMSC contracts. Pressures on informational transparency have also arisen from the lack of widespread international support for the Mercenaries Convention and the reluctance of Western states to heed repeated requests from the UN Working Group to amend the strict definition of mercenary to reflect the privatisation of force.


The manifold pressures on fact-finding are, put differently, pressures on the discursive boundaries for the possibilities of future fact-finding. The status of corporate human rights compliance is inchoate, as are international initiatives to regulate PMSCs. In November 2010, the Human Rights Council created an Intergovernmental Working Group on the ‘possibility’ of creating a legally binding instrument for regulating PMSCs, but such an instrument has yet to come to fruition. Follow-up on fact-finding by the UN Working Group occurs inasmuch as it, inter alia, delivers annual reports on its actions to the Human Rights Council and the UN General Assembly and receives communications from governments in response to the Working Group’s requests for information about PMSC activities. Yet, significant gaps in international law vis-à-vis PMSCs persist — the ‘gaps’ being the lack of ‘provisions’ in international law regarding ‘the outsourcing of State functions to


172 See above Part II(D).


PMSCs’, and the lack of specificity in ‘general international law obligations’ upon states ‘to ensure that PMSCs do not violate humanitarian and human rights law’.175 Whether the gaps will be closed in the near future is unclear, but it suffices to say that the very existence and persistence of the gaps underscores the pressures on the efficacy of future fact-finding on PMSC activities.

As a way of bearing witness to transgressions of human rights and international humanitarian law, credible fact-finding is paramount.176 Delineating a way forward with regard to fact-finding methodology per se is beyond the scope of this article, but it is worth adding here that fact-finding methods of various human rights organisations warrant close scrutiny with regard to epistemic and procedural matters — as Théo Boutruche explains, ‘for any type of fact-finding to be meaningful it needs to be credible.’177 The pressures of dealing with the exigencies of information dispersal, for instance, gathering data in conflict and post-conflict zones, problematises the prospects of PMSCs being held accountable for human rights violations.178

The question, then, is whether the possibilities for developing reliable and accurate fact-finding in the future are real or chimerical, or somewhere on a spectrum

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between the two poles. The persistence of pressures on fact-finding per se and on fact-finding on PMSCs in particular, coupled with existence of gaps in international law regarding corporate business actors and PMSCs, suggests that future directions on developing reliable fact-finding are ‘essentially contestable’. Nevertheless, fact-finding is a key part of the architecture of emerging norms on the new rules on PMSCs. Given the nature and scope of the mandate of the UN Working Group as a Human Rights Council Special Procedure (and considering the role of civil society actors in shaping emerging norms on the international regulation of PMSCs), this much can be said about identifying the need to find a way forward: by virtue of carrying out fact-finding missions in post-conflict and other situations and engaging in follow-up undertakings to gauge the transparency of state action vis-à-vis cooperating with its various fact-finding endeavours, the UN Working Group encourages state and non-state actors involved in contracting PMSCs to adopt new rules on the use of force. The UN Working Group and other fact-finding parties regarding PMSCs serve as ‘norm entrepreneurs’ by shaping norms on the role of human rights law and international humanitarian law in the marketplace for force. Whether norm entrepreneurship is not just a necessary condition but also a sufficient condition for achieving progress on efforts to form new rules to deal with PMSCs is an open question — and efforts to shape those conditions, whether sufficient or necessary, point to the ineluctable nexus between politics and law.

IV The Politics of Law in Australian Responses to Mercenarism and PMSCs

A Australian Domestic Law Regarding Mercenaries

Just as it can be argued that international law would benefit from reforms to clarify the status of PMSCs, it can be argued that Australian domestic law would benefit

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180 For those endeavours, see above nn 141–7.

181 See above nn 135–7.

from legislative reforms with regard to PMSCs. Australian domestic law addresses key legal issues about mercenarism, including how to apportion responsibility for mercenary activities; however, the legislative history of domestic laws on mercenarism shows that achieving progress on dealing with mercenarism is the product of the politics of law. In light of recent international initiatives to regulate PMSCs, there is, as this section further argues, scope for improvement with regard to clarifying the status of PMSCs in Australian domestic law.

Australia does not have the exact equivalent of New Zealand and South African anti-mercenary legislation, but has laws that are relevant to dealing with mercenarism, which may also help regulate PMSCs. Those laws include the Crimes (Overseas) Act 1964 (Cth) (‘CO Act’), Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth) (‘CFIR Act’) and Defence Force Discipline Act 1982 (Cth) (‘DFD Act’). Under ss 9 and 61 of the DFD Act, Australian criminal law has extraterritorial application to Australian Defence Force (‘ADF’) members and ‘defence civilians’:

\[
\text{defence civilian means a person (other than a defence member) who:} \\
\text{(a) with the authority of an authorized officer, accompanies a part of the} \\
\text{Defence Force that is:} \\
\text{(i) outside Australia; or} \\
\text{(ii) on operations against the enemy; and} \\
\text{(b) has consented, in writing, to subject himself or herself to Defence Force} \\
\text{discipline while so accompanying that part of the Defence Force.}\]
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184 Mercenary Activities (Prohibition) Act 2004 (New Zealand); Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 2006 (South Africa), repealing Regulation of Foreign Military Assistance Act 1998 (South Africa).

185 DFD Act s 61, as repealed and substituted by Defence Legislation Amendment (Application of Criminal Code) Act 2001 (Cth) sch 1 pt 1.


187 DFD Act s 3(1) (definition of ‘defence civilian’).
PMSC personnel accompanying the ADF on deployments may be regarded as ‘defence civilians’ if they choose to be so designated and were contracted by the ADF and not by other Commonwealth agencies.188

Parliamentary debates on the Crimes (Overseas) Bill 1964 (Cth) dwelled not on mercenarism as such but instead on giving effect to arrangements between the Commonwealth and the UN for Australians to serve with the UN in Cyprus. Australian criminal law was to cover Australian police serving with the UN in Cyprus, prosecuting them for breaches of the law committed in Cyprus as if the breaches had been committed in Australia.189 In essence, the broad purpose of the Bill was ‘to deal with offences committed outside Australia by Australian civilians in other countries for the performance of our international obligations.’190

Importantly, the CO Act was amended in 2003 to give extraterritorial application of Australian criminal law to ‘Australians’ (Australian citizens and permanent residents)191 in foreign countries in ‘certain situations’, viz ‘generally … humanitarian or security operations.’192 Second reading arguments on the Crimes (Overseas) Amendment Bill 2003 (Cth) questioned whether the Bill was ‘excessively legalistic’ and ‘complicated and tortuous’,193 or just ‘a technical amendment’.194 These arguments indicate tensions in Parliament about the Bill’s logic and scope. The legislation195 applies to Australians with diplomatic, consular or similar immunity196 and to Australians undertaking tasks in a foreign country ‘under a relevant agreement or arrangement’197 or for the Commonwealth.198 The legislation does not apply to ADF members or to staff members of the Australian Secret Intelligence Service (‘ASIS’), Defence Imagery and Geospatial Organisation (‘DIGO’) or Defence Signals Directorate (‘DSD’).199 According to Tim McCormack, Rain Liivoja and Don Rothwell, the operation of the CO Act is sufficiently expansive to apply to employees of Commonwealth agencies (but not the ADF.

188 McCormack and Liivoja, above n 183, 519; Rothwell, above n 183, [34]–[36].
189 Commonwealth, Parliamentary Debates, House of Representatives, 29 October 1964, 2478–9 (Billy Snedden, Attorney-General).
190 Commonwealth, Parliamentary Debates, Senate, 12 November 1964, 1725 (Lionel Murphy). See also Commonwealth, Parliamentary Debates, House of Representatives, 29 October 1964, 2479 (Billy Snedden).
191 CO Act s 3 (definition of ‘Australian’).
194 Ibid 20 345 (Daryl Williams).
195 See especially CO Act s 3A, as inserted by Crimes (Overseas) Amendment Act 2003 (Cth) sch 1 item 16.
196 CO Act s 3A(1).
197 Ibid ss 3A(3)–(4).
198 Ibid ss 3A(5)–(6).
199 Ibid s 3A(10).
ASIS, DIGO and DSD) and encompasses the personnel of PMSCs ‘engaged’ by the agencies (also with the above exceptions).200

Parliamentary debates on the Crimes (Foreign Incursions and Recruitment) Bill 1977 (Cth) drew critical attention to mercenarism. The Bill lapsed at the end of the 30th Parliament (which closed on 8 November 1977) and was reintroduced in 1978. The Bill’s broad purpose, in both versions, was twofold: ‘to prohibit persons preparing for or engaging in incursions into foreign countries’ and ‘to prohibit the recruiting in Australia of persons to serve in armed forces in a foreign country.’201 The Australian Government, like the 1976 Diplock Report, declined to distinguish between different types of motives. At the time, it was deemed too difficult to define differences in motives ‘between the professional free-lance soldier and the soldier of conscience.’202 The CFIR Act does not define or even mention the term ‘mercenary’; however, what loomed large in its second reading debates were concerns about preventing the recruitment in Australia of Australians to fight abroad as mercenaries against recognised states, such as Yugoslavia203 (which had happened in 1963 and 1972204), or in independence conflicts in Africa (for instance, on behalf of Ian Smith’s white minority regime in the guerrilla war in Rhodesia.205) Coupled with moral

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200 See McCormack and Liivoja, above n 183, 519; Rothwell, above n 183, [39]–[40].


203 The concern was that Australian Croatians would seek to overthrow the Tito regime or assassinate President Tito: see Commonwealth, Parliamentary Debates, House of Representatives, 29 March 1977, 686 (Lionel Bowen), 688–9 (Reginald Birney), 691, 692 (Keith Johnson), 695 (Henry Jenkins), 698 (Albert James), 704 (Gordon Scholes); Commonwealth, Parliamentary Debates, House of Representatives, 30 March 1977, 744 (Gordon Bryant), 752–3 (Lionel Bowen); Commonwealth, Parliamentary Debates, Senate, 31 March 1977, 708 (James McClelland), 713 (John Wheeldon), 720 (Peter Durack); Commonwealth, Parliamentary Debates, House of Representatives, 6 April 1978, 1180 (Michael Hodgman), 1181–2 (Allan Holding).

204 Commonwealth, Parliamentary Debates, Senate, 31 March 1977, 720 (Peter Durack).

disquiet about the problem of mercenarism in Africa was, it seems, the pragmatic consideration of maintaining Australia’s international image. In the words of one parliamentarian, ‘[w]e do not want Australians engaging in actions throughout the world where they can be an embarrassment to this country.’\(^{206}\) The concern here was that Australians risked placing ‘themselves into a position where they are subject to trial for war crimes or because they were mercenaries.’\(^{207}\)

Parliamentary debates in 1977 and 1978 on the Crimes (Foreign Incursions and Recruitment) Bill also raised concerns about Australians engaging in acts of terrorism overseas. The incursions the legislation sought to proscribe included ‘acts of terrorism by Australians in other countries.’\(^{208}\) In 2004, three years after the capture of David Hicks in Afghanistan by Northern Alliance fighters,\(^{209}\) the **CFIR Act** was amended to make it an offence for an Australian to enter a foreign state to support a ‘prescribed’ — viz. terrorist — organisation,\(^{210}\) even if it ‘was part of the armed forces of a foreign state’.\(^{211}\) In his second-reading speech of the Anti-Terrorism Bill 2004 (Cth), the then Attorney-General, Philip Ruddock, did not mention David Hicks by name. Clearly, though, the Bill sought to deal with the reoccurrence of a Hicks-like situation: ‘Engaging in hostile activities while in or with a prescribed organisation will not be excused on the basis that the organisation was part of the armed forces of a foreign state under the regime to be introduced here.’\(^{212}\)

Outcomes of applying the **CFIR Act** with respect to Australians fighting for anti-regime forces in the continuing conflict in Syria remain to be seen. It would appear, though, from parliamentary debates regarding Australians fighting in Syria,\(^{214}\) parliamentary

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207 Ibid.


209 See McCormack and Liivoja, above n 183, 514.

210 **CFIR Act** ss 6(5)–(8), as inserted by *Anti-Terrorism Act 2004 (Cth)* sch 1 item 15.


debates about the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014\textsuperscript{215} and Parliamentary Committee Reports on the listing of certain organisations as terrorist groups under s 102.1A of the \textit{Criminal Code Act 1995} (Cth),\textsuperscript{216} that Australian authorities are concerned here not with the very phenomenon of mercenarism as such (in either its old or new modalities) but instead with the radicalisation of Australians and what Australians fighting for either side of the conflict in Syria might do with their fighting skills upon returning to Australia.

B The Sandline Affair

Australia’s own geographical sphere of influence has not been immune from the spectre of mercenarism. On 31 January 1997, after years of secessionist ferment from the Bougainville Revolutionary Army, which had taken control of Bougainville Island in 1990, the Papua New Guinea (‘PNG’) Government signed a contract with Sandline International, a London-based military consultancy company, to provide logistical, intelligence gathering and operational support to the PNG Defence Force (‘PNGDF’). The Government’s aim was to re-establish PNG’s control over the Panguna copper mine on Bougainville.\textsuperscript{217} The initial contract period of US$36 million dwarfed the


annual US$23 million budget of the PNGDF. The PNG Government deputised Sandline operatives as ‘special constables’, thereby circumventing the legal definition of ‘mercenary’. On 16 March 1997, the PNGDF’s commander, Brigadier General Jerry Singirok, and other senior officers, upset at the treatment of their soldiers, who had been receiving inadequate pay and equipment for months, refused to cooperate with Sandline, which had contracted Executive Outcomes (a South African company) to supply mercenaries. On 17 March, Singirok called for the resignation of the Prime Minister, Sir Julius Chan. Singirok, who had been involved with the contract negotiations with Sandline, later claimed that Sandline was motivated more by the prospect of gaining natural resource concessions on Bougainville than by resolving the conflict on Bougainville Island. The PNG Cabinet dismissed Singirok on 17 March, a decision that the Australian Government supported as being within the purview of a democratically elected government.

Questions were raised in the Australian Parliament at the time of the Sandline Affair as to whether the Australian Government in decrying the use of mercenaries on Bougainville was not so much reacting out of moral disquiet about mercenarism as it was concerned about maintaining regional stability and Australia’s international image.

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220 See McCormack and Liivoja, above n 183, 523.

221 Zarate, above n 107, 98.


223 Commonwealth, Parliamentary Debates, House of Representatives, 18 March 1997, 2263 (John Howard, Prime Minister). In addition to the above cited sources in this paragraph, I have drawn upon Sinclair Dinnen, Ron May and Anthony J Regan (eds), ‘Challenging the State: The Sandline Affair in Papua New Guinea’ (Pacific Policy Paper No 30, National Centre of Development Studies, Australian National University; Regime Change/Regime Maintenance Discussion Paper No 21, Department of Political and Social Change, Australian National University).

However, it is a matter of record that the Australian Government regarded the Bougainville crisis as deeply troubling:

"Australia, of course, recognises that Papua New Guinea is a sovereign state and its affairs are its own matter, but we cannot stand idly by and see the employment of assassination groups to solve what are essentially political problems."

The Australian Government regarded the mercenary presence on Bougainville as "a retrograde and an extremely regrettable step" and supported a diplomatic solution, not a military solution, to the Bougainville crisis.

After the Sandline Affair, the Australian Government, on 14 July 1997, announced that it intended to support the Mercenaries Convention. However, when the Mercenaries Convention entered into force on 20 October 2001, Australia still had not acceded to it (and still has yet to do so). This was despite Australia having participated in an early UN effort to deal with decolonisation issues, including matters relating to mercenarism: Australia was a member of the General Assembly Special Committee on Decolonization from 1961 to January 1985, albeit with a hiatus from 1969–72. UN General Assembly Resolution 1654 established the Special Committee in 1961 to monitor progress on the application of UN General Assembly Resolution 1514 on the granting of independence to colonial countries and

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Reaffirming Resolution 1514, the UN General Assembly in 1968, and again in 1969 and 1970, called for all states to implement measures and enact laws that proscribe the recruitment and use of mercenaries. Arguably, the Australian Government declined to support the Mercenaries Convention in 1989 because it believed that the Mercenaries Convention would be ‘of little practical use’ due to the cumulative definition of mercenary, and held that Australia had already adopted, with the CFIR Act, a strong position against mercenarism. The CFIR Act criminalised what the Mercenaries Convention would later forbid: namely, the recruitment and training of mercenaries. The CFIR Act set out the penalty of imprisonment for 14 years (the penalty is now 20 years) for an Australian who entered ‘a foreign state with intent to engage in a hostile activity in that foreign State’ or did in fact ‘engage in a hostile activity in a foreign State.’ The penalty for preparatory acts is imprisonment for 10 years.

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234 Thomson, above n 183, 48.


236 CFIR Act ss 8–9; Mercenaries Convention art 3.

237 Ibid.

238 Ibid s 6(1)(a).

239 Ibid s 6(1)(b).

240 Ibid s 7.
A further explanation for why Australia declined to support the **Mercenaries Convention** in 1989 is that supporting it may have been inconsistent with certain aspects of Australian foreign policy of the time. On 24 July 1989, the then Attorney-General, Lionel Bowen, published a notice in the Commonwealth Gazette declaring that the PNG Government would be allowed to recruit Australians in Australia to serve in the PNGDF to service Iroquois helicopters supplied by the Australian Government.\(^\text{241}\) Section 9(2) of the **CFIR Act** stipulates:

> If the Minister has, by instrument signed by the Minister and published in the *Gazette*, declared that it is in the interests of the defence or international relations of Australia to permit the recruitment in Australia, either generally or in particular circumstances or subject to specified conditions, of persons to serve in or with a specified armed force, or to serve in or with a specified armed force in a particular capacity, subsection (1) does not apply, or does not apply in those circumstances or where those conditions are complied with, as the case may be, to or in relation to recruitment to serve, or the publication of an advertisement containing information with respect to service, in or with that armed force, or in or with that armed force in that capacity, as the case may be.

Essentially, sub-s (1) proscribes the recruitment in Australia of Australians to serve in the armed forces of a foreign state. Referring to the above notice of exemption from s 9(1), Senator Dee Margetts said in Parliament in 1997:

> Does this issue not highlight the hypocrisy of both the current government and the previous government in giving support for mercenaries, for the blockade of Bougainville and for our continuing military support for the Papua New Guinea defence forces despite repeated evidence of atrocities being committed by these forces on the island of Bougainville?\(^\text{242}\)

Senator Robert Hill replied thus:

> We do not give support for mercenaries, and I did not realise that the previous government gave support for mercenaries. I will otherwise continue to raise the issues that you mention and see if I can get further information.\(^\text{243}\)

**C The Politics of Law: Whither to Now with PMSCs?**

Exigencies of politics have shaped, if not attenuated, parliamentary action on the myriad of legal issues regarding mercenarism. The above survey of Australian responses to mercenarism shows that Parliament’s response to the old modalities of mercenarism encompasses what the UN regards as key legal issues about


\(^{243}\) Ibid (Robert Hill).
mercenarism. These issues include: how to define the term ‘mercenary’; whether to prohibit or to regulate mercenarism; whether mercenarism is a ‘specific offence’ or can be dealt with by existing criminal law; and how to apportion responsibility for mercenary activities (‘to the mercenaries themselves or, in addition, those who recruit, use, finance and train them?’).

244 Australia lodged its ratification of *Additional Protocol I of the Geneva Conventions* on 21 June 1991, and did not lodge a reservation to art 47,245 which defined ‘mercenary’. Australian legislation that predates Australia’s ratification of art 47 defined various elements of the term mercenary but without using the very term mercenary: the *CFIR Act* apportions responsibility for mercenary activities to Australians recruited in Australia who engage in incursions into foreign states for hostile purposes246 (or prepare to do so)247 and to those who recruit Australians in Australia for hostile foreign incursions.248

Australian responses to matters raised in various UN fora on how to deal with mercenarism and PMSCs further underscores the interplay between exigencies of politics and how to take action on the legal issues in question. In April 2005, Australia voted against a draft resolution introduced by Cuba in a meeting of the Commission on Human Rights. The Resolution, adopted 35 votes to 15 (with two abstentions), recommended, inter alia, that the UN Special Rapporteur on the Question of the Use of Mercenaries be replaced by a Working Group on the Use of Mercenaries.249 In November 2012, Australia voted against another draft resolution introduced by Cuba in a meeting of the Third Committee. This Resolution, adopted 122 votes to 52 (with five abstentions), welcomed the initiatives to frame a legally binding international regulatory framework to deal with PMSCs and their

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246 Ibid s 6.

247 Ibid s 7.

248 Ibid ss 8–9.

activities. This Resolution also, inter alia, called for ‘a new legal definition of mercenary’ in line with the proposal that Enrique Bernales Ballesteros had outlined nearly a decade earlier, in his final report as the UN Special Rapporteur on the Question of the Use of Mercenaries.

Critical questions may be, and have been, asked about the tenor of Australian Government responses to the matter of regulation of PMSCs. Unity Resources Group (‘URG’) is an Australian owned PMSC based in the United Arab Emirates, in Dubai, which was founded by a retired Australian Special Air Services commander, Gordon Conroy, in 2000. In 2006, a URG operative shot dead an Australian-Iraqi academic at a checkpoint in Baghdad, believing him to be a suicide bomber. In 2007, URG operatives were involved in two shooting deaths in Baghdad; civilians in a taxi had strayed too close to a URG-protected convoy and URG operatives fired upon the taxi after its driver ignored warnings to move away from the convoy. On 25 October 2007, the UN Working Group wrote to the Iraqi and Australian Governments regarding the 2007 deaths. In its reply of 13 March 2008, the Iraqi Government noted that URG had made unsuccessful efforts to contact the victims’ families with offers of compensation, and that ‘[t]he investigating judge decided to “close the case definitively”’. In its reply of 4 December 2007, the Australian Government noted that Australia had enacted legislation to reflect its ratification of the *Rome Statute* and had ‘criminalize[d] in

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Australian domestic law the crimes over which the International Criminal Court has jurisdiction’.256 I would add here, though, that div 268 of the Criminal Code Act 1995 (Cth) does not explicitly refer to what the Rome Statute calls ‘crimes of aggression’;257 instead, div 268 addresses ‘genocide’, ‘crimes against humanity’, ‘war crimes’ and ‘crimes against the administration of the justice of the International Criminal Court’.

Given Australia’s support for the Montreux Document, an opportunity exists to create a new legal regime on PMSCs.258 Yet, in the letter of 4 December 2007 (mentioned above) the Australian Government had stated: ‘There are no legislative initiatives in Australia which are aimed at further regulating and providing oversight of PMSCs and their employees.’259 This statement is telling against the likelihood of political resolve to deal with PMSCs gathering significant further momentum. Also telling are the at times tardy responses of the Australian Government to requests for information from the UN Working Group, with regard to Australian involvement in PMSC activities. On 14 July 2008, the UN Working Group contacted the Australian Government to determine whether the Government had verified the nationality of the URG personnel involved in the Baghdad shooting deaths;260 yet, ‘over two years’ later, the Government still had not replied to the UN Working Group’s request for information about the matter.261 On 11 February 2010, the UN Working Group again contacted the Australian Government, this time with regard to Fijian guards working in PNG for an Australian-based security company, Allied Gold Limited, at a gold mine in Port Moresby. A month earlier the guards had been hired, ‘reportedly’, after ‘disputes with local landowners’, and the Working Group was concerned about reports that the guards were ‘in


257 Rome Statute arts 5(d), 8 bis (2)(g).

258 McCormack and Liivoja, above n 183, 507–8, 526.


possession of firearms.' 262 On 2 September 2010, the UN Working Group noted that it had not received a reply from the Government.263

The parliamentary response to the Montreux Document seems not to have progressed beyond the level of Parliamentary Committees questioning whether Government agencies comply with criteria of the Montreux Document.264 Salient criteria include that a Home State ought to ensure the probity of PMSCs265 and that a Contracting State ought to ensure that a contracted PMSC has ‘no reliably attested record of involvement in serious crime.’266 On 19 October 2010, the Senate Standing Committee on Foreign Affairs, Defence and Trade questioned whether the Department of Defence had fully investigated URG before awarding it the contract to provide security protection for the Australian Embassy in Baghdad.267 URG, which used ‘about 60 Chilean veterans’ for the contract,268 had declared in its tender that Iraqi authorities had cleared the company of any wrongdoing over the 2006 and 2007 shooting deaths.269 Iraqi authorities labelled URG as ‘reckless’,270 but declined to pursue court action against URG,271 and URG had, as the Senate Committee noted, ‘observed and complied with’ the Montreux Document.272

A lacuna of authority to legislate with regard to PMSCs does not explain the apparent lack of significant progress on creating a specific legal regime on PMSCs. It is highly

263 Ibid 4 [10].
264 Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 18 October 2010, 44–7 (Richard Rowe, Acting First Assistant Secretary, International Organisations and Legal Division and Senior Legal Adviser); Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Supplementary Budget Estimates Hearing, 19 October 2010, 42–4.
265 Montreux Document pt 2 para 57.
266 Ibid pt 2 para 6(a).
267 Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Supplementary Budget Estimates Hearing, 19 October 2010, 42–4.
268 Mendes and Mitchell, above n 261.
269 Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Supplementary Budget Estimates Hearing, 19 October 2010, 44.
270 Mendes and Mitchell, above n 261.
272 Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Supplementary Budget Estimates Hearing, 19 October 2010, 44.
doubtful that such a lacuna exists. As Tim McCormack and Rain Liivoja point out, a precedent for regulating PMSCs is evident as Parliament already places stringent export controls on general military hardware and militarily applicable technology, and specific measures are in place to control the export of both goods and services that may assist the proliferation of weapons of mass destruction. Thus, there appears to be no legal impediment to legislation controlling the export of military services in general.273

These controls and measures give voice to Australia’s ratification of various conventions on weapons of mass destruction.274 For instance, the Nuclear Non-Proliferation (Safeguards) Act 1987 (Cth) implemented Australia’s obligations under the Treaty on the Non-Proliferation of Nuclear Weapons.275 As Don Rothwell points out, the overseas trade and commerce,276 corporations277 and external affairs powers278 in the Constitution provide a footing for laws on PMSCs that operate in the vein of the CFIR Act.279 Importantly, capacity to impact on foreign relations is itself a ‘matter of international concern’;280 hence, if failure to regulate PMSCs ran afoul of Australia’s international human rights obligations and affected Australia’s relations with other countries, the external affairs power may be enlivened to support the creation of a domestic legal regime on PMSCs.281 If Australians working as PMSC personnel,

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273 McCormack and Liivoja, above n 183, 515–16, quoting Thomson, above n 183, 49.
274 McCormack and Liivoja, above n 183, 516. See especially Measures to Eliminate International Terrorism: Report of the Secretary-General — Addendum — Part 2: Measures Taken at the National and International Levels Regarding the Prevention and Suppression of International Terrorism and Information on Incidents Caused by International Terrorism, 54th sess, Agenda Item 160, UN Doc A/54/301/Add.1 (28 October 1999) 1–2 [1]–[7].
275 McCormack and Liivoja, above n 183, 516. See especially Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) (‘Nuclear Non-Proliferation Treaty’); Nuclear Non-Proliferation (Safeguards) Act 1987 (Cth) s 4(1) sch 2 (definitions of ‘Agency Agreement’ and ‘Non-Proliferation Treaty’).
276 Constitution s 51(i).
277 Constitution s 51(xx).
278 Constitution s 51(2xxix).
279 Rothwell, above n 183, [33].
281 Rothwell, above n 183, [27]–[33]. See generally Thomson, above n 183, 47–9, 55–6; Leslie Zines, ‘The Tasmanian Dam Case’ in H P Lee and George Winterton (eds), Australian Constitutional Landmarks (Cambridge University Press, 2003) 262, 268–71. Regarding the above constitutional principles, see Commonwealth v Tasmania (1983) 158 CLR 1, 131–2 (Mason J), 172 (Murphy J), 258–60 (Deane J); Koowarta v
for instance, on behalf of an Australian government agency or a foreign non-state actor (such as a humanitarian organisation), were alleged to have been involved in criminal acts (that is, acts that are criminal under the domestic legal system of the host country in question) or human rights abuses, or both, and Australian authorities did not facilitate efforts to hold accused Australians accountable for alleged offences, it is not inconceivable that foreign relations could suffer as a result.

Using Ockham’s razor as a heuristic tool, one might attribute the glacial pace of legislative progress on the Montreux Document to a simple explanation: the Australian Government believes that effective legislative steps (discussed above) against mercenarism have already been taken and that those measures coupled with policy measures as regards government outsourcing are appropriate for regulating PMSCs. The corollary is Parliament lacks the resolve to produce a specific legal regime on PMSCs. Generally, policy development, implementation and evaluation requires political resolve to transform opportunity for policy change into concrete action. Given that the Commonwealth already has in place risk analysis and reporting principles in Defence procurement, and has outlined procurement rules, including requirements to keep detailed records on the expenditure of public funds, with which all government agencies must comply when procuring goods

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and services,\textsuperscript{285} perhaps Parliament regards legislating with respect to PMSCs as redundant. On the one hand, whether the Commonwealth needs, then, to formulate a specific Australian legal regime for dealing with PMSCs is open to question. Yet, recent experiences regarding the use of PMSCs by Australian authorities in relation to immigration detention facilities raises questions about the need for legislation to provide for independent scrutiny of how private contractors operate immigration detention facilities.\textsuperscript{286} A distinction could be made, though, between PMSCs deployed in conflict and post-conflict zones and PMSCs only involved in security or immigration detention. On the other hand, the Commonwealth’s ‘comprehensive yet specific’ legislative response to weapons of mass destruction\textsuperscript{287} shows, as Tim McCormack and Rain Liivoja note, what can come when resolve exists to create a decisive policy outcome: ‘If a similar level of resolve existed in relation to the particular problem of the legal regulation of the activities of PMSCs, there is no doubt that an effective legal regime could materialise.’\textsuperscript{288}

\section*{V Conclusion}

‘Cry havoc and let slip the dogs of war’,\textsuperscript{289} Shakespeare wrote epigrammatically in \textit{Julius Caesar}, prophesying bloody fury and strife when monarchs order their soldiers to give no quarter to the enemy. The phrase now denotes moral opprobrium

\begin{thebibliography}{99}
\bibitem{287} McCormack and Liivoja, above n 183, 517.
\bibitem{288} Ibid. McCormack and Liivoja draw particular attention to the \textit{Weapons of Mass Destruction (Prevention of Proliferation Act 1995} (Cth) and the export control mechanism set out in \textit{Customs (Prohibited Exports) Regulation 1958} (Cth). The latter was made under the \textit{Customs Act 1901} (Cth) s 112, which confers power on the Governor-General to prohibit, inter alia, ‘the exportation of goods [from Australia] absolutely’ or ‘in specified circumstances’ (\textit{Customs Act 1901} (Cth) ss 112(2)(a), (aa)).
\bibitem{289} T S Dorsch (ed), \textit{The Arden Edition of the Works of William Shakespeare: Julius Caesar} (Methuen, 6\textsuperscript{th} rev ed, 1958) act III, scene 1, line 273.
\end{thebibliography}
of mercenaries. The legal definition of mercenary shares that opprobrium, but the strictness of the definition has limited, and continues to limit, its use for regulating PMSCs and dealing with the impact of mercenary-related activities on human rights. The Montreux Document, Draft PMSC Convention, ICoC and Draft ICoC Charter seek to fill that regulatory gap, but the initiatives are recent in origin and, therefore, their efficacy remains to be seen.

Australia’s legal regime for dealing with mercenarism stems from moral disquiet about mercenarism and political disquiet about damage to Australia’s reputation arising from the recruitment in Australia of Australians for mercenary activities. Parliament has questioned whether the primary motivation for the regime is moral disquiet or pragmatic politics (such as maintaining Australia’s international image).290 Political motivations aside, it is clear that the CFIR Act, though it does not mention the very term ‘mercenary’, was, as its second reading debates show, designed to counter the mischief of Australians being recruited in Australia to engage in mercenary activities overseas.291 The CO Act was not originally aimed at that mischief, but early in the new millennium, the CO Act was amended to give extraterritorial application of Australian criminal law to Australians in ‘humanitarian or security operations’ overseas.292 Hence, the CO Act is pertinent to the regulation of PMSCs and their personnel, as is the DFD Act, which provides for extraterritorial application of Australian criminal law to ‘defence civilians’ on overseas deployments with the ADF.293

That Australia supported the Montreux Document in 2008 but had declined to support the Mercenaries Convention in 1989 (and still has not acceded to it) and yet had ratified Additional Protocol I of the Geneva Conventions in 1991 may be, then, not a real paradox but instead a conundrum arising from differences in legal and political climes. Leaving in abeyance whether the CO Act, CFIR Act and DFD Act are necessary or sufficient for Australian authorities to regulate PMSCs in the absence of a specific legal regime on PMSCs, what is clear is that achieving legislative progress is inextricably linked with the politics of law.

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291 An interesting postscript to this article is that the passage of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 makes a range of amendments to a number of Acts, including the CFIR Act, which has been repealed and its provisions re-enacted in the Criminal Code Act 1995 (Cth) pt 5.5. However, because the passage of the Bill through both Houses of Parliament on 3 November 2014 occurred after this article was submitted for publication, the article does not evaluate the Bill or amendments to the CFIR Act.


293 See DFD Act ss 9, 61.