

TO LEASH OR NOT TO LEASH THE DOGS OF WAR? THE POLITICS OF LAW AND AUSTRALIA'S RESPONSE TO MERCENARISM 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*¹ 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),² both of which defined ‘mercenary’ in substantially similar terms.³ 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*,⁴ 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.⁵ This article will explicate the above paradox and problematise what various United Nations (‘UN’) fora have called the ‘new modalities of mercenarism’.⁶

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

² *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (‘*Additional Protocol I of the Geneva Conventions*’).

³ See below Part II(A).

⁴ *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* (17 September 2008) <<http://www.icrc.org/eng/resources/documents/publication/p0996.htm>> (‘*Montreux Document*’). See also *Letter Dated 2 October 2008 from the Permanent Representative of Switzerland to the United Nations Addressed to the Secretary-General*, UN GAOR, 63rd sess, Agenda Item 76; UN SCOR, 63rd sess, UN Docs A/63/467 and S/2008/636 (6 October 2008) annex (‘*Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*’).

⁵ See below nn 95–107 and accompanying text.

⁶ *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN GAOR, 3rd Comm, 62nd sess, Agenda Item 69, UN Doc A/C.3/62/L.62 (8 November 2007) Preamble para 10; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 62/145, UN GAOR, 62nd sess, 76th plen mtg, Agenda Item 69, Supp No 49, UN Doc A/RES/62/145 (4 March 2008) Preamble para 9; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 63/164, UN GAOR, 63rd sess, 70th plen mtg, Agenda Item 63, Supp No 49, UN Doc A/RES/63/164 (13 February 2009) Preamble para 9. See also Commission on 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) 6–7 [6]–[7], 9 [15]–[16], 18 [59]; UN Working Group on the use of Mercenaries, *Use of Mercenaries as a Means of Violating Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN GAOR, 62nd sess, Agenda Item 71, UN Doc A/62/301 (24 August 2007) 20 [68].

Corporation provided translators.⁷ 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.⁸ 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.⁹ 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.¹⁰

⁷ Mark W Bina, 'Private Military Contractor Liability and Accountability After Abu Ghraib' (2005) 38 *John Marshall Law Review* 1237, 1244–5; Seymour M Hersh, 'Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far Up Does the Responsibility Go?', *The New Yorker* (online), 10 May 2004 <http://www.newyorker.com/archive/2004/05/10/040510fa_fact?currentPage=all>; Human Rights Watch, *The Road to Abu Ghraib* (June 2004) 1–4, 24–34 <<http://www.hrw.org/sites/default/files/reports/usa0604.pdf>>; David Isenberg, 'The Government Made Me Do It?', *The Huffington Post* (online), 29 April 2010 <http://www.huffingtonpost.com/david-isenberg/the-government-made-me-do_b_557054.html?ir=Australia>. In 2004, General John Abizaid, commander of US Central Command, acting at the request of Lieutenant General Ricardo Sanchez, the then senior US military official in Iraq, assigned Major General Antonio Taguba to investigate allegations of mistreatment and torture of prisoners. For Major General Taguba's report as it relates to private contractors, see Department of Army, United States of America, *AR 15-16 Investigation of the 800th Military Police Brigade (Taguba Report)* (May 2004) annex 90 (Contract Interrogator, 205th MI) <<https://www.aclu.org/sites/default/files/torturefoia/released/a90.pdf>>; Department of Army, United States of America, *AR 15-16 Investigation of the 800th Military Police Brigade* (May 2004) annex 91 (Civilian Interview, 205th MI) <<https://www.aclu.org/sites/default/files/torturefoia/released/a91.pdf>>.

⁸ See, eg, David Johnston and John M Broder, 'FBI Says Guards Killed 14 Iraqis Without Cause', *The New York Times* (online), 14 November 2007 <http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater.html?_r=1&pagewanted=all>; Sudarsan Raghavan and Josh White, 'Blackwater Guards Fired at Fleeing Cars, Soldiers Say', *The Washington Post* (online), 12 October 2007 <<http://www.washingtonpost.com/wp-dyn/content/article/2007/10/11/AR200710110101030.html>>; Jeremy Scahill, 'Making a Killing', *The Nation* (New York), 15 October 2007, 21–4.

⁹ James Risen, 'Before Shooting in Iraq, a Warning on Blackwater', *The New York Times* (online), 29 June 2014 <http://www.nytimes.com/2014/06/30/us/before-shooting-in-iraq-warning-on-blackwater.html?smid=pl-share&_r=1>.

¹⁰ Matt Apuzzo, 'Blackwater Guards Found Guilty in 2007 Iraq Killings', *The New York Times* (online), 22 October 2014 <http://www.nytimes.com/2014/10/23/us/blackwater-verdict.html?_r=1>; Andrew Grossman, 'Jury Finds Blackwater Guards Guilty of Iraq Shootings', *Wall Street Journal* (online), 22 October 2014 <<http://online.wsj.com/articles/jury-finds-blackwater-guards-guilty-of-iraq-shootings-1413994609>>; Spencer Hsu, 'Blackwater Guards Convicted of Killing 14 Unarmed Innocent Iraqis in 2007', *The Sydney Morning Herald* (online), 23 October

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’.¹¹ 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

[e]xperience 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.¹²

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.¹³

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.¹⁴ 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.¹⁵ 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.¹⁶ 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

2014 <<http://www.smh.com.au/world/blackwater-guards-convicted-of-killing-14-unarmed-innocent-iraqis-in-2007-20141022-11a7mu.html>>; Dan Roberts, ‘US Jury Convicts Blackwater Guards in 2007 Killing of Iraqi Civilians’, *The Guardian* (online), 23 October 2014 <<http://www.theguardian.com/us-news/2014/oct/22/us-jury-convicts-blackwater-security-guards-iraq>>. For the jury’s decision, see *US v Slough* (DC, 1:14-cr-107-RCL, 1:08-cr-360-RCL, 22 October 2014).

¹¹ Faiza Patel, ‘New Forces Need New Rules’ (Press Release, Office of the High Commissioner for Human Rights, 25 September 2012) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12579&LangID=E>>.

¹² *Ibid.*

¹³ See below Part II(C)–(D).

¹⁴ This article is not a theory-based analysis of the roots of the ‘politics of law’ thesis in legal realism and critical legal studies; such an analysis is beyond the scope of this article. For the ‘politics of law’ thesis as it relates to international law, see, eg, Martti Koskenniemi, *The Politics of International Law* (Hart Publishing, 2011).

¹⁵ See below Part II(A)–(C).

¹⁶ See below Part II(D).

and international humanitarian law in the marketplace for force.¹⁷ The article then evaluates the politics of law in Australian parliamentary responses to mercenarism and PMSCs.¹⁸ 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’.¹⁹

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.²⁰ 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.²¹ 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.²² 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.²³ 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

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).

²⁰ P W Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press, 2003) 20.

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

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.

²⁵ See, eg, H C Burmester, ‘The Recruitment and Use of Mercenaries in Armed Conflict’ (1978) 72 *American Journal of International Law* 37, 37; Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation*, House of Commons Paper No 577, Session 2001–02 (2002) 6 [3]–[4].

²⁶ See, eg, Hannah Tonkin, *State Control Over Private Military and Security Companies in Armed Conflict* (Cambridge University Press, 2011) 29–30.

²⁷ Lord Diplock, Sir Derek Walker-Smith and Sir Geoffrey De Freitas, *Report of the Committee of Privy Counsellors Appointed to Inquire into the Recruitment of Mercenaries*, Cmnd 6569 (1976) 2 [7] (‘*Diplock Report*’). The *Diplock Report* is an inquiry by a committee of Privy Counsellors into the recruitment of 160 men in the UK to ‘serve with or in support’ of the National Front for the Liberation of Angola against the People’s Movement for the Liberation of Angola.

- (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,²⁸ and regards mercenary activities as criminal offences.²⁹ Likewise, the *Rome Statute of the International Criminal Court*³⁰ outlines '[t]he crime of aggression',³¹ 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*.³²

Legal definitions of 'mercenary' stem from critiques of mercenaries, popularly known as 'whores' and 'dogs' of war,³³ 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.³⁴ Condemnation of mercenarism underpins UN General Assembly Resolution 1514, adopted in December 1960.³⁵ 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.³⁶ The absence of explicit references either to 'mercenaries' or

²⁸ *Mercenaries Convention* arts 1(2)(a)(i)–(ii).

²⁹ *Ibid* arts 2, 3(1), 4(a)–(b).

³⁰ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

³¹ *Ibid* art 5(d).

³² *Ibid* art 8 *bis* (2)(g) (emphasis added). See also *Charter of the United Nations* art 1(1).

³³ Wilfred Burchett and Derek Roebuck, *The Whores of War: Mercenaries Today* (Penguin Books, 1977); Frederick Forsyth, *The Dogs of War* (Viking Press, 1974).

³⁴ Jackson Nyamuya Maogoto and Benedict Sheehy, 'Private Military Companies and International Law: Building New Ladders of Legal Accountability and Responsibility' (2009) 11 *Cardozo Journal of Conflict Resolution* 99, 103.

³⁵ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 15th sess, 947th plen mtg, Agenda Item 87, UN Doc A/RES/1514(XV) (14 December 1960).

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.³⁷ 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’.³⁸ General Assembly Resolution 3103 also referred to the criminal nature of the use of mercenaries to stymie anti-colonial struggles,³⁹ but, as Todd Milliard notes, did not say that ‘mercenaries themselves are outlaws’.⁴⁰ Instead, it

Independence to Colonial Countries and Peoples, GA Res 2189 (XXI), UN GAOR, 21st sess, 1492nd plen mtg, Agenda Item 23, UN Doc A/RES/2189(XXI) (13 December 1966) para 10; *The Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1654 (XVI), UN GAOR, 16th sess, 1066th plen mtg, Agenda Item 88, UN Doc A/RES/1654(XVI) (27 November 1961) Preamble paras 6–7; *The Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1810 (XVII), UN GAOR, 17th sess, 1195th plen mtg, Agenda Item 25, UN Doc A/RES/1810(XVII) (17 December 1962) Preamble para 6. See also *Activities of Foreign Economic and Other Interests Which Are Impeding the Implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples in Southern Rhodesia, South West Africa and Territories Under Portuguese Domination and in Other Territories Under Colonial Domination and Efforts to Eliminate Colonialism, Apartheid and Racial Discrimination in Southern Africa*, GA Res 2288 (XXII), UN GAOR, 22nd sess, 1622nd plen mtg, Agenda Item 24, UN Doc A/RES/2288(XXII) (7 December 1967) paras 3–4, 7, 11; *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res 2131 (XX), UN GAOR, 20th sess, 1408th plen mtg, Agenda Item 107, UN Doc A/RES/2131(XX) (21 December 1965) paras 1–2.

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].

³⁸ *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2465 (XXIII), UN GAOR, 23rd sess, 1751st plen mtg, Agenda Item 23, UN Doc A/RES/2465 (XXII) (20 December 1968) para 8, quoted in Jackson Nyamuya Maogoto and Benedict Sheehy, ‘Contemporary Private Military Firms Under International Law: An Unregulated “Gold Rush”’ (2005) 26 *Adelaide Law Review* 245, 256. Milliard points out that ‘Resolution 2465 received slightly more than half of the General Assembly members’ votes, which suggests an international principle far short of widespread acceptance.’ Todd S Milliard, ‘Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies’ (2004) 176 *Military Law Review* 1, 26.

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.’⁴¹

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,⁴² adopted the *Organization of African Unity Convention for the Elimination of Mercenarism in Africa*.⁴³ The OAU proscribed the use of mercenaries by any ‘individual, group or association’ to suppress movements of national liberation.⁴⁴ 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.⁴⁵ 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.’⁴⁶ (Evidently, though, sufficient impetus existed for the *Rome Statute* to be amended in 2010 to categorise mercenarism as a ‘crime of aggression’.⁴⁷) 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’.⁴⁸ The General Assembly has reiterated that alarm and concern on numerous occasions, when, amongst other matters, drawing attention to the

⁴¹ *Resolution 3103 (XXVIII)*, UN Doc A/RES/3103(XXVIII), para 5.

⁴² *Charter of the Organization of African Unity*, opened for signature 25 May 1963, 479 UNTS 39 (entered into force 19 September 1963) arts II(1)(a), (b).

⁴³ *Organization of African Unity Convention for the Elimination of Mercenarism in Africa*, opened for signature 3 July 1977, 1490 UNTS 95 (entered into force 22 April 1985) (‘*OAU Mercenaries Convention*’).

⁴⁴ *Ibid* art 1(2). The African Union replaced the OAU in 2001.

⁴⁵ Kofi Oteng Kufuor, ‘The OAU Convention for the Elimination of Mercenarism and Civil Conflicts’ in Abdel-Fatau Musah and J ‘Kayode Fayemi (eds), *Mercenaries: An African Security Dilemma* (Pluto Press, 2000) 198, 200–4; Montgomery Sapone, ‘Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence’ (1999) 30 *California Western International Law Journal* 1, 36–7.

⁴⁶ Maogoto and Sheehy, ‘Contemporary Private Military Firms Under International Law’, above n 38, 260. See also Commission on 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) 11 [29].

⁴⁷ *Rome Statute* art 8 bis (2)(g).

⁴⁸ *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 56/232, UN GAOR, 56th sess, 92nd plen mtg, Agenda Item 118, Supp No 49, UN Doc A/RES/56/232 (26 February 2002) Preamble para 6 (emphasis in original).

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

⁴⁹ *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 57/196, UN GAOR, 57th sess, 77th plen mtg, Agenda Item 108, Supp No 49, UN Doc A/RES/57/196 (25 February 2003) Preamble para 6; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 58/162, UN GAOR, 58th sess, 77th plen mtg, Agenda Item 116, Supp No 49, UN Doc A/RES/58/162 (2 March 2004) Preamble para 6; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 62/145, UN GAOR, 62nd sess, 76th plen mtg, Agenda Item 69, Supp No 49, UN Doc A/RES/62/145 (4 March 2008) Preamble para 6; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 63/164, UN GAOR, 63rd sess, 70th plen mtg, Agenda Item 63, Supp No 49, UN Doc A/RES/63/164 (13 February 2009) Preamble para 6; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 64/151, UN GAOR, 64th sess, 65th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/64/151 (26 March 2010) Preamble para 6; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 65/203, UN GAOR, 65th sess, 71st plen mtg, Agenda Item 67, Supp No 49, UN Doc A/RES/65/203 (16 March 2011) Preamble para 7; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 66/147, UN GAOR, 66th sess, 89th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/66/147 (29 March 2012) Preamble para 7; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 67/159, UN GAOR, 67th sess, 60th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/67/159 (26 February 2013) Preamble para 8.

⁵⁰ See generally Deborah D Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge University Press, 2005) 30–1, 35–8, 67, 115, 146; Caroline Holmqvist, 'Private Security Companies: The Case for Regulation' (SIPRI Policy Paper No 9, Stockholm International Peace Research Institute, January 2005) 1–7, 42–50 <<http://books.sipri.org/files/PP/SIPRI09.pdf>>; Anna Leander, 'The Market for Force and Public Security: The Destabilizing Consequences of Private Military Companies' (2005) 42 *Journal of Peace Research* 605, 605–6, 611–13, 616; Clive Walker and Dave Whyte, 'Contracting Out War? Private Military Companies, Law and Regulation in the United Kingdom' (2005) 54 *International and Comparative Law Quarterly* 651, 651–2, 661–2, 688–9.

⁵¹ Francis Fukuyama, *The End of History and the Last Man* (Penguin, 1992).

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.⁵² 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.⁵³

Symptoms of problems with the global–local nexus include the ‘global war on terror’⁵⁴ (or, put differently, ‘a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America’)⁵⁵ and the turmoil of tensions giving rise to outbreaks of ethno-nationalist conflict.⁵⁶ 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’,⁵⁷ it is clear that ‘[w]arfare remains a violent clash of interests between organized groups characterized by the use of force’,⁵⁸ and asymmetries of

⁵² Samuel P Huntington, ‘The Clash of Civilizations?’ (1993) 72 *Foreign Affairs* 22, 22–5. The phrase ‘clash of civilizations’ was coined in Bernard Lewis, ‘The Roots of Muslim Rage’, *The Atlantic Monthly*, 1 September 1990.

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

⁵⁴ George W Bush, ‘President Discusses War on War’ (Speech delivered at the FBI Academy, Quantico, Virginia, 11 July 2005) <<http://georgewbush-whitehouse.archives.gov/news/releases/2005/07/20050711-1.html>>. See also George W Bush, ‘Address to a Joint Session of Congress and the American People’ (Speech delivered at the United States Capitol, Washington, DC, 20 September 2001) <<http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>>; George W Bush, ‘President Bush Discusses Progress in the Global War on Terror’ (Speech delivered at the Cobb Galleria Centre, Atlanta, Georgia, 7 September 2006) <<http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060907-2.html>>.

⁵⁵ Barack Obama, ‘Remarks by the President at the National Defense University’ (Speech delivered at the National Defense University, Fort McNair, Washington, DC, 23 May 2013) <<http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>>.

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].

⁵⁷ Ganesh Sitaraman, ‘Counterinsurgency, the War on Terror, and the Laws of War’ (2009) 95 *Virginia Law Review* 1745, 1747.

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

power and problems with security persist. Counterterrorism policies such as targeted killings and extraordinary rendition are issues of concern in international law, and reflect asymmetries of power between actors, both state and non-state, in a putative liberal democratic world order.⁵⁹

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’.⁶⁰ The crisis is about ‘the status of knowledge’,⁶¹ 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.⁶² Similarly, Herbert Marcuse warned in his 1964 work, *One-Dimensional*

Development Command, Department of the Navy, Headquarters, United States Marine Corps, Washington, DC, 15 December 2006) 1 <http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/fm3_24.pdf>.

⁵⁹ On terrorism and the post-Cold War liberal democratic world order, see Philip G Cerny, ‘Terrorism and the New Security Dilemma’ (2004) 58 *Naval War College Review* 11, 11–14, 22, 23, 25; Georg Sørensen, *A Liberal World Order in Crisis: Choosing Between Imposition and Restraint* (Cornell University Press, 2011) 18–20, 23, 26, 78. On targeted killings, see, eg, Philip Alston, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution, Philip Alston — Addendum — Study on Targeted Killings*, UN Doc A/HRC/14/24/Add.6 (28 May 2010) 3 [1]–[6], 9–27 [28]–[93]; International Human Rights and Conflict Resolution Clinic, Stanford Law School, and Global Justice Clinic, NYU School of Law, *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan* (September 2012) v–x, 1–5, 103–24 <<http://chrgj.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf>>. On extraordinary rendition, see, eg, Committee Against Torture, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America*, UN Doc CAT/C/USA/CO/3-5 (19 December 2014) 4 [11]; Leïla Zerrougui, Chairperson-Rapporteur, *Civil and Political Rights, Including the Questions of Torture and Detention: Report of the Working Group on Arbitrary Detention*, UN Doc E/CN.4/2006/7 (12 December 2005) 18–19 [53]–[59], 20–2 [68]–[75], 23 [80]–[81].

⁶⁰ 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 Saviour* (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.

⁶¹ Lyotard, above n 60, 6.

⁶² 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)].

Man, that relentless mass consumption inexorably produces conformist, ‘one-dimensional’ 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

⁶³ Herbert Marcuse, *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society* (Routledge Classics, 2nd ed, 2002) 68. For the phrase ‘one dimensional’, see Marcuse at 3–21, 79–80, 251–61.

⁶⁴ Lyotard, above n 60, 7–9.

⁶⁵ *Ibid* 3, 7–8, 18, 23–8, 30–1, 39, 43–4, 47, 53–4.

⁶⁶ Jennifer Mitzen, ‘Ontological Security in World Politics: State Identity and the Security Dilemma’ (2006) 12 *European Journal of International Relations* 341, 341.

⁶⁷ Catarina Kinnvall, ‘Globalization and Religious Nationalism: Self, Identity, and the Search for Ontological Security’ (2004) 25 *Political Psychology* 741, 746–9, 752–3; Mitzen, above n 66, 341–4, 351–3; Mikkel Vedby Rasmussen, ‘“A Parallel Globalization of Terror”: 9-11, Security and Globalization’ (2002) 37 *Cooperation and Conflict* 323, 323–4, 327, 331–5.

⁶⁸ Amir Lupovici, ‘Ontological Dissonance, Clashing Identities, and Israel’s Unilateral Steps Towards the Palestinians’ (2012) 38 *Review of International Studies* 809, 814.

⁶⁹ *Ibid* 812 (emphasis in original). See also Mitzen, above n 66, 342–6.

⁷⁰ Jef Huysmans, ‘Security! What Do You Mean? From Concept to Thick Signifier’ (1998) 4 *European Journal of International Relations* 226, 242–4; Mitzen, above n 66, 342–3, 351–2, 360.

⁷¹ Mitzen, above n 66, 348, 359–60.

⁷² *Ibid* 342. See also Huysmans, above n 70, 238–40; Lupovici, above n 68, 811.

⁷³ Thomas K Duncan and Christopher J Coyne, ‘The Origins of the Permanent War Economy’ (2013) 18 *Independent Review* 219, 220–2. See also Casey Borch and Michael Wallace, ‘Military Spending and Economic Well-Being in the American States: The Post-Vietnam War Era’ (2010) 88 *Social Forces* 1727, 1729–31.

the solidification of the ‘permanent war economy’ in the Cold War era.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 *Farewell Address*.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.⁷⁶

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.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.⁷⁸ PMSCs provide an ‘enormously diverse’ array of services, which can be

⁷⁴ Seymour Melman, *The Permanent War Economy: American Capitalism in Decline* (Simon and Schuster, 1974). See also Duncan and Coyne, above n 73, 219–40.

⁷⁵ Dwight D Eisenhower, *Farewell Address* (17 January 1961), 15 <http://www.eisenhower.archives.gov/research/online_documents/farewell_address/Reading_Copy.pdf>.

⁷⁶ See generally Deborah Avant and Lee Sigelman, ‘Private Security and Democracy: Lessons From the US and Iraq’ (2010) 19 *Security Studies* 230, 235–65; Susan Eisenhower, ‘50 Years Later, We’re Still Ignoring Ike’s Warning’, *The Washington Post* (online), 16 January 2011 <<http://www.washingtonpost.com/wp-dyn/content/article/2011/01/14/AR2011011404915.html>>; Charles J G Griffin, ‘New Light on Eisenhower’s Farewell Address’ (1992) 22 *Presidential Studies Quarterly* 469, 469–79; Kaldor, above n 53, 95–118; Alexander Volokh, ‘Privatization and the Law and Economics of Political Advocacy’ (2008) 60 *Stanford Law Review* 1197, 1198–1206, 1240–53.

⁷⁷ See, eg, James Cockayne, ‘Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study’ (Research Paper, International Peace Academy, March 2006) 1–2, 5–6 <http://psm.du.edu/media/documents/reports_and_stats/think_tanks/international_peace_academy_cockayne_commercial_security_in_humanitarian_settings.pdf>; José Luis Gómez del Prado, Chairperson-Rapporteur, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination*, UN Doc A/HRC/7/7 (9 January 2008) 8–11 [23]–[28], 24 [57]; Kathleen M Jennings, ‘Armed Services: Regulating the Private Military Industry’ (Fafo Report 532, New Security Programme, Fafo Institute for Applied International Studies, Norway, 2006) 19–20 <<http://www.fafo.no/pub/rapp/532/532.pdf>>; Oliver R Jones, ‘Implausible Deniability: State Responsibility for the Actions of Private Military Firms’ (2009) 24 *Connecticut Journal of International Law* 239, 246–8; Singer, *Corporate Warriors*, above n 20, 49–50.

⁷⁸ Laura A Dickinson, ‘Military Lawyers, Private Contractors, and the Problem of International Law Compliance’ (2010) 42 *International Law and Politics* 355, 356; Kateryna L Rakowsky, ‘Military Contractors and Civil Liability: Use of the Government Contractor Defense to Escape Allegations of Misconduct in Iraq and Afghanistan’ (2006) 2 *Stanford Journal of Civil Rights and Civil Liberties* 365, 370.

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’).⁷⁹ 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.’⁸⁰

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.⁸¹ 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.’⁸² The corollary here is that privatisation in the international or global sphere has the further potential to ‘hollow out’ state actors.⁸³ 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.⁸⁴

⁷⁹ David Isenberg, ‘Private Military Contractors and US Grand Strategy’ (Report, International Peace Research Institute, Oslo, 2009) 10, 11 <http://file.prio.no/Publication_files/Prio/Isenberg%20Private%20Military%20Contractors%20PRIO%20Report%201-2009.pdf>. See also David Isenberg, ‘A Fistful of Contractors: The Case for a Pragmatic Assessment of Private Military Companies in Iraq’ (Research Report 2004.4, British-American Security Information Council, September 2004) 11 <http://www.wikileaks.org/gifiles/attach/23/23108_Fistfull%20of%20contractors.pdf>; Sarah Percy, ‘Regulating the Private Security Industry’ (Adelphi Paper No 384, International Institute for Strategic Studies, London, December 2006) 13–14; Peter W Singer, ‘The Private Military Industry and Iraq: What Have We Learned and Where to Next?’ (Policy Paper, Geneva Center for the Democratic Control of Armed Forces, November 2004) 2–3 <mercury.ethz.ch/serviceengine/Files/ISN/14132/ipublicationdocument_singledocument/6c72ca8b-2711-4b18-8103-55305e8136e3/en/PP4_Singer.pdf>.

⁸⁰ Isenberg, ‘Private Military Contractors’, above n 79, 12.

⁸¹ Laura A Dickinson, ‘Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law’ (2005) 47 *William and Mary Law Review* 135, 147–52; Jones, above n 77, 240–1, 245–6; Dino Kritsiotis, ‘Mercenaries and the Privatization of Warfare’ (1998) 22 *Fletcher Forum of World Affairs* 11, 11–14; Martha Minow, ‘Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy’ (2005) 46 *Boston College Law Review* 989, 1014–16; Singer, *Corporate Warriors*, above n 20, 6–8.

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

⁸³ *Ibid* 146–7. See also Jon D Michaels, ‘Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War’ (2004) 82 *Washington University Law Quarterly* 1001, 1040–42. See generally Jody Freeman, ‘Extending Public Law Norms Through Privatization’ (2003) 116 *Harvard Law Review* 1285, 1294–5, 1300 (but see Freeman at 1314–52).

⁸⁴ Bernedette Muthien and Ian Taylor, ‘The Return of the Dogs of War? The Privatization of Security in Africa’ in Rodney Bruce Hall and Thomas J Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge University Press, 2002) 183, 183–5. See also Jennings, above n 77, 34–5, 42–5; Virginia Newell and Benedict Sheehy, ‘Corporate Militaries and States: Actors, Interactions, and Reactions’

A related critique is that PMSCs are corporatised mercenaries and deserve moral and legal opprobrium as mercenaries.⁸⁵ 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.⁸⁶ 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.

⁸⁵ Kritsiotis, above n 81, 11, 11–14, 21–2; Sapone, above n 45, 1–5, 7–8, 41–3; Christopher Wrigley, ‘The Privatisation of Violence: New Mercenaries and the State’, *CAAT (Campaign Against Arms Trade)*, March 1999 <<http://www.caat.org.uk/resources/publications/government/mercenaries-1999.php>>. See also Muthien and Taylor, above n 84, 188; Ken Silverstein, ‘Privatizing War: How Affairs of State are Outsourced to Corporations Beyond Public Control’, *The Nation* (New York), 28 July 1997, 12, 17. Cf Percy, ‘Regulating the Private Security Industry’, above n 79, 14; Sarah Percy, ‘Morality and Regulation’ in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford Scholarship Online, 2009) 11, 14–19, 23–4, 28. *Contra* David Shearer, ‘Private Military Force and Challenges for the Future’ (1999) 13 *Cambridge Review of International Affairs* 80, 80–1, 85–6, 88–90.

⁸⁶ For examples of industry codes see, eg, British Association of Private Security Companies, *Charter* <<http://www.bapsc.org.uk/?keydocuments=charter>>; International Stability Operation Association, *ISOA Code of Conduct* (20 October 2011) <<http://www.stability-operations.org/?page=Code>>. For relatively sanguine views on self-regulation, see Andy Bearpark and Sabrina Schulz, ‘The Private Security Challenge in Africa: Problems and Options for Regulation’ in Sabelo Gumedze (ed), *Private Security in Africa: Manifestation, Challenges and Regulation* (ISS Monograph Number 139, Institute for Security Studies, Pretoria, South Africa, 1 November 2007) 73, 82–5 <mercury.ethz.ch/serviceengine/Files/ISN/104907/ichaptersection_singledocument/8b2519e3-9816-496b-a5c4-9a29c91a64cc/en/5.pdf>; Doug Brooks, ‘Messiah or Mercenaries? The Future of International Private Military Services’ (2000) 7 *International Peacekeeping* 129, 130–1, 136–7, 141. Cf Foreign Affairs Committee, *Private Military Companies*, House of Commons Paper No 922, Session 2001–02 (2002) 35 [136]–[137]; Holmqvist, above n 50, 46–50; Nicola Jägers, ‘Will Transnational Private Regulation Close the Governance Gap?’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press, 2013) 295, 307–14; Jennings, above n 77, 58–61; Singer, ‘The Private Military Industry and Iraq’, above n 79, 21–2; UN Working Group 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) 16–18

Service Providers.⁸⁷ 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.⁸⁸

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.⁸⁹ To circumvent the nationality criteria, contracting states can simply deputise the employees of PMSCs to make them nationals of a party to the conflict.⁹⁰ 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

[66]–[74]. Note: Andrew Bearpark is the Honorary Director General of the British Association of Private Security Companies; Doug Brooks founded the International Peace Operations Association (now ISOA) in 2001.

⁸⁷ *International Code of Conduct for Private Security Service Providers* (9 November 2010) <http://www.icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf> (*ICoC*). See also *Draft Charter of the Oversight Mechanism for the International Code of Conduct (ICoC) for Private Security Service Providers* (16 January 2012) <http://psm.du.edu/media/documents/regulations/global_instruments/multi_stakeholder/icoc/icoc_draft_charter.pdf> (*Draft ICoC Charter*); *Second Draft of the Charter for the Oversight Mechanism of the International Code of Conduct for Private Security Service Providers (ICoC)* (30 January 2013) <http://psm.du.edu/media/documents/regulations/global_instruments/multi_stakeholder/icoc/icoc_second_draft_charter.pdf> (*Second Draft ICoC Charter*). At the time of original submission of this article, the *Second Draft ICoC Charter* was still in draft form. The ICoC Association’s (*ICoCA*) General Assembly finalised its vote on the Charter in late June 2015; in turn, news of its unanimous approval of the draft was announced by the ICoCA Secretariat on 3 July 2015. See Human Analytics, ‘Update: Further Progress Made in Finalizing Certification to ICoCA Using PSC.1’ (Press Release, 18 August 2015) <<http://human-analytics.net/update-progress-made-finalizing-certification-icoca-using-psc-1/>>.

⁸⁸ Ellen L Frye, ‘Private Military Firms in the New World Order: How Redefining “Mercenary” Can Tame the “Dogs of War”’ (2005) 73 *Fordham Law Review* 2607, 2637–8, 2646–7; P W Singer, ‘War, Profits, and Vacuum of Law: Privatized Military Firms and International Law’ (2004) 42 *Columbia Journal of Transnational Law* 521, 535–6; Singer, ‘The Private Military Industry and Iraq’, above n 79, 12–13, 21. See also Holmqvist, above n 50, 11–12, 14–15, 21; Leander, above n 50, 605–6, 609–10, 615, 617–19; Angela McIntyre, ‘Weak Governments in Search of Strength: Africa’s Experience of Mercenaries and 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) 68, 68–9, 78–81. Cf Malcolm Patterson, ‘A Corporate Alternative to United Nations ad hoc Military Deployments’ (2008) 13 *Journal of Conflict and Security Law* 215, 215–19.

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 participation 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

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 Conflict’ (2006) 4 *Perspectives on Politics* 507, 510.

⁹³ Frye, above n 88, 2645; Jones, above n 77, 255.

⁹⁴ Singer, ‘War, Profits, and Vacuum of Law’, above n 88, 535.

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 Decision 1996/113*, UN Doc E/CN.4/1997/24 (20 February 1997) 26–7 [85]–[87]; 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 E/CN.4/2004/15 (24 December 2003) 12–15 [37]–[46], 17–18 [52]; Commission on 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

⁹⁸ Ibid 15 [45]. See also Commission on 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) 23 [81].

⁹⁹ *Use of Mercenaries as a Means to Violate Human Rights and to Impede the Exercise of the Right of Peoples to Self-Determination*, ESC Res 1987/61, UN ESCOR, 18th plen mtg, Agenda Item 17, Supp No 1, UN Doc E/RES/1987/61 (29 May 1987) para 5; *Use of Mercenaries as a Means to Violate Human Rights and to Impede the Exercise of the Right of Peoples to Self-Determination*, GA Res 42/96, UN GAOR, 42nd sess, 93rd plen mtg, Agenda Item 91, Supp No 49, UN Doc A/RES/42/96 (7 December 1987) para 8.

¹⁰⁰ *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc E/CN.4/RES/2005/2 (7 April 2005) para 12(e). On self-determination as a human right, see especially *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 1; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) annex ('*United Nations Declaration on the Rights of Indigenous Peoples*') arts 3–4. I discuss the UN Working Group on the Use of Mercenaries in further detail in Part III.

¹⁰¹ *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 3rd Comm, 67th sess, Agenda Item 68, UN Doc A/C.3/67/L.58 (13 November 2012) para 15.

¹⁰² *Summary Record of the 47th Meeting*, UN GAOR, 3rd Comm, 67th sess, 47th mtg, Agenda Items 27, 28, 62, 65 and 68, UN Doc A/C.3/67/SR.47 (29 January 2013) 5–6 [47].

¹⁰³ Ibid 5 [46].

¹⁰⁴ *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 3rd Comm, 68th sess, Agenda Item 68, UN Doc A/C.3/68/L.66 (5 November 2013) para 15.

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’.¹⁰⁵ 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.¹⁰⁶ 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.’¹⁰⁷ 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*¹⁰⁸ 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’.¹⁰⁹ 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.*

¹⁰⁷ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 10 [38]. See also Percy, ‘Regulating the Private Security Industry’, above n 79, 44–5; Juan Carlos Zarate, ‘The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder’ (1998) 34 *Stanford Journal of International Law* 75, 80.

¹⁰⁸ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) annex (‘*Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council*’) (‘*Draft PMSC Convention*’).

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.’¹¹⁰

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,¹¹¹ 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.¹¹² Only ‘three African States were involved (Angola, Sierra Leone and South Africa)’ in its creation, and no Latin American or Caribbean States were involved.¹¹³ 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.’¹¹⁴ 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

¹¹⁰ Hannah Tonkin, ‘Common Article 1: A Minimum Yardstick for Regulating Private Military and Security Companies’ (2009) 22 *Leiden Journal of International Law* 779, 793. See generally Carlo Focarelli, ‘Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble’ (2010) 21 *European Journal of International Law* 125, 125–71; ‘Report of the International Law Commissions on the Work of Fifty-Third Session (23 April – 1 June and 2 July – 10 August 2001)’ [2001] II(2) *Yearbook of the International Law Commission* 1, 26, 31–67.

¹¹¹ *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, UN Docs A/63/467 and S/2008/636, annex.

¹¹² José L Gómez del Prado, ‘Private Military and Security Companies and the UN Working Group on the Use of Mercenaries’ (2009) 13 *Journal of Conflict and Security Law* 429, 443. The *Montreux Document*, as its Preface states at 9:

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.

¹¹³ Gómez del Prado, ‘Private Military and Security Companies’, above n 112, 443.

¹¹⁴ Alexander Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/10/14 (21 January 2009) 11 [44]. See also Gómez del Prado, ‘Private Military and Security Companies’, above n 112, 443. Cf James Cockayne, ‘Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document’ (2009) 13 *Journal of Conflict and Security Law* 402, 425–8.

to register all contracts, apply common standards and monitor the contracts'.¹¹⁵ 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.¹¹⁶

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.¹¹⁷ 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*.'¹¹⁸ Whereas art 47 of *Additional Protocol I of the Geneva Conventions* only applies to international armed conflict,¹¹⁹ the *Draft PMSC*

¹¹⁵ Gómez del Prado, 'Private Military and Security Companies', above n 112, 442. On improving the accountability of PMSCs in the market for force, see Michael Cottier, 'Elements for Contracting and Regulating Private Security and Military Companies' (2006) 88 *International Review of the Red Cross* 637, 637, 638–40, 642–3; Dickinson, 'Government for Hire', above n 81, 171–2, 199–207. Cf Valentina Calderai, 'The Privatization of Military and Security Services and the Limits of Contract Law' (Working Paper, Max Weber Programme, European University Institute, Florence, 2010) 2–4, 9–11 <http://cadmus.eui.eu/bitstream/handle/1814/14558/MWP_2010_31.pdf?sequence=1>; Rakowsky, above n 78, 375–7, 397.

¹¹⁶ Human Rights First, 'Oversight Mechanism Will Promote and Advance Private Security Contractors' Respect for Human Rights' (Press Release, Human Rights First, 25 February 2013) <<http://www.humanrightsfirst.org/2013/02/25/oversight-mechanism-will-promote-and-advance-private-security-contractors%E2%80%99-respect-for-human-rights/>>. See also Cockayne, 'Regulating Private Military and Security Companies', above n 114, 427; James Cockayne and Emily Speers Mears, 'Private Military and Security Companies: A Framework for Regulation' (Policy Report, International Peace Institute, New York, March 2009) 1, 6, 13 <http://www.ipinst.org/media/pdf/publications/pmsc_epub.pdf>. But see Rebecca DeWinter-Schmitt (ed), *Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practice* (November 2013) Center for Human Rights and Humanitarian Law, American University, Washington College of Law, 157–8 <<http://ihrib.org/wp-content/uploads/2013/12/MontreuxFv31.pdf>>; Kristine A Huskey, 'Accountability for Private Military and Security Contractors in the International Legal Regime' (2012) 31 *Criminal Justice Ethics* 193, 204–5.

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

¹¹⁸ *Ibid* art 2(i) (definition of 'Inherently State functions') (emphasis added). Regarding the principles that underpin the *Draft PMSC Convention*, see Huskey, above n 116, 205–7; Nigel D White, 'The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention' (2011) 11 *Human Rights Law Review* 133, 137–41.

¹¹⁹ Emanuela-Chiara Gillard, 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) 88 *International Review of the Red Cross* 525, 564. Cf *Report of the ad hoc Committee on the Drafting of an International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, UN GAOR, 42nd sess, Supp No 43, UN Doc A/42/43 (24 March 1987) 3 [17].

Convention ‘would apply to all situations whether or not the situation is defined as an armed conflict.’¹²⁰ 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

¹²⁰ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 11 [46].

¹²¹ *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 65/203, UN GAOR, 65th sess, 71st plen mtg, Agenda Item 67, Supp No 49, UN Doc A/RES/65/203 (16 March 2011) paras 4–8, 11, 18–19; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 66/147, UN GAOR, 66th sess, 89th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/66/147 (29 March 2012) paras 4–8, 11, 18–19; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 67/159, UN GAOR, 67th sess, 60th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/67/159 (26 February 2013) paras 4–8, 11, 17–18. See also *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 21/8, UN GAOR, 21st sess, 36th mtg, Agenda Item 3, Supp No 53A, UN Doc A/HRC/RES/21/8 (10 October 2012) paras 3–7, 15, 20.

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.

¹²⁴ Faiza Patel, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/21/43 (2 July 2012) 6 [19]. See also José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the*

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.’¹²⁵

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.’¹²⁶ 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’.¹²⁷ 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.¹²⁸ 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.¹²⁹

Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, UN Doc A/HRC/18/32 (4 July 2011) 16 [70]–[72].

¹²⁵ Faiza Patel, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/21/43 (2 July 2012) 7 [22]. See also Gabor Rona, ‘A Tour de Horizon of Issues on the Agenda of the Mercenaries Working Group’ (2013) 22 *Minnesota Journal of International Law* 324, 338–9; UN Working Group 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: Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN GAOR, 67th sess, Agenda Item 69, UN Doc A/67/340 (30 August 2012) 19 [67].

¹²⁶ Abdul S Minty, Chair-Rapporteur, *Report of the 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 on its Second Session*, UN Doc A/HRC/22/41 (24 December 2012) 10 [41], [42]. See also UN Working Group 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) 15–16 [63]–[65].

¹²⁷ UN Working Group 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) 17 [69].

¹²⁸ *Ibid* 16 [66], [68].

¹²⁹ Tonkin, *State Control*, above n 26, 132–7; UN Working Group on the Use of Mercenaries, *Submissions by the Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/WG.10/2/CRP.1 (6 August 2012) 6–10 [13]–[25]; UN Working Group

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.¹³⁰ 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.¹³¹ 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.

¹³⁰ See UN Working Group 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) 15–16 [63]–[65]. See generally David Kennedy, ‘War and International Law: Distinguishing Military and Humanitarian Professions’ (2007) 82 *International Law Studies* 3, 4, 9–10, 28–31; Maogoto and Sheehy, ‘Contemporary Private Military Firms Under International Law’, above n 38, 250–1; Thembani Mbadlanyana, ‘Moralpolitik and Realpolitik: Seeking Common Ground on the Use of Private Military and Security Companies’ in Sabelo Gumede (ed), *From Market for Force to Market for Peace: Private Military and Security Companies in Peacekeeping Operations* (ISS Monograph Number 183, Institute for Security Studies, Pretoria, South Africa, 1 November 2011) 39, 41–2, 52–3, 63 <<http://www.issafrika.org/uploads/Mono183.pdf>>.

¹³¹ See especially Philip Alston and Ryan Goodman, *International Human Rights: Text and Materials* (Oxford University Press, 2013) 845–7, 856; Michael Bothe, ‘Fact-Finding as a Means of Ensuring Respect for International Humanitarian Law’ in Wolff Heintschel von Heinegg and Volker Epping (eds), *International Humanitarian Law*

raises questions about the reliability of international fact-finding.¹³² Facts are epistemologically and politically contestable,¹³³ but rather than use critical legal studies theory¹³⁴ 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,¹³⁵ think-tank¹³⁶ and non-governmental organisation (NGO)¹³⁷ 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.

Facing New Challenges: Symposium in Honour of Knut Ipsen (Springer, 2007) 249, 249–50, 260–7; Antonio Cassese, ‘Fostering Increased Conformity with International Standards: Monitoring and Institutional Fact-Finding’ in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 295, 295–6, 302–3; Todd Landman, ‘Measuring Human Rights: Principle, Practice, and Policy’ (2004) 26 *Human Rights Quarterly* 906, 906–9, 926–31; Diane F Orentlicher, ‘Bearing Witness: The Art and Science of Human Rights Fact-Finding’ (1990) 3 *Harvard Human Rights Journal* 83, 83–6, 108–9, 122.

¹³² M Cherif Bassiouni, ‘Appraising UN Justice-Related Fact-Finding Missions’ (2001) 5 *Washington University Journal of Law and Policy* 35, 35–8.

¹³³ See, eg, Frans Viljoen, ‘Fact-Finding by UN Human Rights Complaints Bodies — Analysis and Suggested Reforms’ (2004) 8 *Max Plank Yearbook of United Nations Law* 49, 51–3.

¹³⁴ See generally David Kennedy, ‘The International Human Rights Movement: Part of the Problem?’ (2002) 15 *Harvard Human Rights Journal* 101, 106–10, 114–19, 123–5; Mark Tushnet, ‘Critical Legal Studies: A Political History’ (1991) 100 *Yale Law Journal* 1515, 1516–23, 1537–44; Roberto Mangabeira Unger, ‘The Critical Legal Studies Movement’ (1983) 96 *Harvard Law Review* 561, 561–76.

¹³⁵ See, eg, DeWinter-Schmitt, above n 116, 7–11, 17–38, 157–8; Scott Jerbi et al, ‘The International Code of Conduct for Private Security Service Providers’ (Academy Briefing No 2, Geneva Academy of International Humanitarian Law and Human Rights, August 2013) 5–7, 25–44 <http://www.geneva-academy.ch/docs/publications/briefing4_web_final.pdf>.

¹³⁶ See, eg, Hans Born, *Parliamentary Oversight of the Security Sector* (July 2013) Geneva Centre for the Democratic Control of Armed Forces, 12–13, 20–2, 44–5 <www.dcaf.ch/content/download/153719/2390045/file/EP_Parliamentary_Oversight_Security_Sector_2013_BOH.pdf>; Isenberg, ‘Private Military Contractors’, above n 79, 5, 7–8, 11–13, 37–9, 47–9.

¹³⁷ See, eg, Amnesty International, *Carnage and Despair: Iraq Five Years On* (March 2008) 1–9, 14–15, 18–19, 21–3 <http://psm.du.edu/media/documents/reports_and_stats/ngo_reports/amnesty_international_carnage_and_despair.pdf>; Human Rights Watch, ‘There Are No Investigations Here’: *Impunity for Killings and Other Abuses in Bajo Aguán, Honduras* (February 2014) 5, 15–16, 26–7, 64–70 <<http://www.hrw.org/sites/default/files/reports/honduras0214web.pdf>>; War on Want, *Corporate Mercenaries: The Threat of Private Military and Security Companies* (November 2006) 8–9, 13–16, 19–21 <<http://www.waronwant.org/attachments/Corporate%20Mercenaries.pdf>>.

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’.¹³⁸ 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.¹³⁹ Under its thematic mandate as a Human Rights Council Special Procedure,¹⁴⁰ and guided by pertinent international legal instruments,¹⁴¹ the UN Working Group: receives communications (including complaints) about PMSCs from governments, NGOs and concerned individuals;¹⁴² holds regional consultations with governments, civil

¹³⁸ *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc E/CN.4/RES/2005/2 (7 April 2005) para 12(e). On self-determination as a human right, see especially *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976) art 1; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) annex (‘*United Nations Declaration on the Rights of Indigenous Peoples*’) arts 3–4.

¹³⁹ See, eg, José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 10 [39], 18 [91]; DeWinter-Schmitt, above n 116, 17–33, 161–4; Singer, ‘War, Profits, and the Vacuum of Law’, above n 88, 521–5, 532–9; UN Working Group on the Use of Mercenaries, *Submissions by the Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/WG.10/2/CRP.1 (6 August 2012) 4 [6]–[7]; Zarate, above n 107, 76–81, 116–34, 145–62.

¹⁴⁰ *Mandate of the Working Group of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 7/21, UN GAOR, 7th sess, 41st sess, Supp No 53, UN Doc A/HRC/RES/7/21 (28 March 2008) Preamble para 3; *The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 24/13, UN GAOR, 24th sess, 34th mtg, Agenda Item 3, Supp No 53A, UN Doc A/HRC/RES/24/13 (8 October 2013) Preamble para 2.

¹⁴¹ *Additional Protocol I of the Geneva Conventions* arts 47, 75; *Charter of the United Nations* arts 1(1), 2(4); *Mercenaries Convention* arts 1–21; *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) arts 1–3.

¹⁴² Amada Benavides, Chairperson, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination on the Resumed First Session (10 to 14 October 2005 and 13 to 17 February 2006) — Addendum*, UN Doc E/CN.4/2006/11/Add.1 (3 March 2006) 4 [2]; *Mandate of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, HRC Res 7/21, UN GAOR, 7th sess,

society actors and PMSC industry representatives, about monitoring and regulating PMSCs;¹⁴³ submits annual reports to the UN General Assembly and the Human Rights Council;¹⁴⁴ surveys national legislation relating to PMSCs;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.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

41st sess, Supp No 53, UN Doc A/HRC/RES/7/21 (28 March 2008) para 2(b); UN Working Group 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/62/301 (24 August 2007) 8 [20].

¹⁴³ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Latin American and Caribbean Regional Consultation on the Effects of the Activities of Private Military and Security Companies on the Enjoyment of Human Rights: Regulation and Monitoring (17–18 December 2007)*, UN Doc A/HRC/7/7/Add.5 (5 March 2008) 5–6 [1]–[9], app I; José Luis Gómez del Prado, Chairperson/Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Regional Consultation for Western European and Others Group on the Activities of Mercenaries and Private Military and Security Companies: Regulation and Monitoring (14 April 2010)*, UN Doc A/HRC/15/25/Add.6 (5 July 2010) 4–5 [6]–[13], app; Alexander Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Eastern European Group and Central Asia Region — Regional Consultation on the Activities of Private Military and Security Companies: Regulation and Oversight (17–18 October 2008)*, UN Doc A/HRC/10/14/Add.3 (26 February 2009) 4 [1]–[4], 7 [18]–[19], 9 [28], app I; Shaista Shameem, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Regional Consultation for Asia and the Pacific on the Activities of Private Military and Security Companies (26–27 October 2009)*, UN Doc A/HRC/15/25/Add.4 (1 April 2010) 4 [1]–[7], app I; Shaista Shameem, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Regional Consultation for Africa on the Activities of Private Military and Security Companies: Regulation and Monitoring 3–4 March 2010*, UN Doc A/HRC/15/25/Add.5 (2 June 2010) 4–5 [4]–[10], app I.

¹⁴⁴ UN Working Group on the Use of Mercenaries, *Annual Reports* <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/AnnualReports.aspx>>.

¹⁴⁵ UN Working Group on the Use of Mercenaries, *National Regulatory Frameworks on PMSCs* <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/NationalRegulatoryFrameworks.aspx>>.

¹⁴⁶ UN Working Group on the Use of Mercenaries, *Country Visits* <<http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/CountryVisits.aspx>>.

timeframes.¹⁴⁷ 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.¹⁴⁸

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’¹⁴⁹ of human rights problems or from lacunae in official cooperation with the UN Working Group¹⁵⁰ — generally, its reports on country visits note the cooperation of

¹⁴⁷ See, eg, Shaista Shameem, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to the United States of America (20 July to 3 August 2009)*, UN Doc A/HRC/15/25/Add.3 (15 June 2010) 4 [1]–[4].

¹⁴⁸ *Joint Written Statement Submitted by the Friends World Committee for Consultation (Quakers), a Non-Governmental Organization in General Consultative Status, Amnesty International, a Non-Governmental Organization in Special Consultative Status*, UN Doc A/HRC/19/NGO/24 (15 February 2012) 2. See generally *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled ‘Human Rights Council’: Letter Dated 18 May 2007 Addressed by the Rector of the United Nations University to the President of the Human Rights Council*, UN Doc A/HRC/5/18 (13 June 2007) annex (‘Lund Statement to the United Nations Human Rights Council on the Human Rights Special Procedures’); Ted Piccone, *Catalysts for Change: How the UN’s Independent Experts Promote Human Rights* (Brookings Institution Press, 2012) 18–44; UN Office of the High Commissioner for Human Rights, *Working with the United Nations Human Rights Programme: A Handbook for Civil Society* (2008) 107–36 <http://www.ohchr.org/EN/AboutUs/CivilSociety/Documents/Handbook_en.pdf>.

¹⁴⁹ See generally Stanley Cohen, ‘Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims’ (1996) 18 *Human Rights Quarterly* 517, 522–34; Thomas Risse and Kathryn Sikkink, ‘The Socialization of International Human Rights Norms Into Domestic Practices: Introduction’ in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 1, 22–4.

¹⁵⁰ Cf Cockayne and Mears, above n 116, 4–5; José Luis Gómez del Prado, Chairperson/Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/18/32 (4 July 2011) 6 [14]; UN Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/15/25/Add.1 (2 September 2010) 4 [10], 6 [27], 9 [46], [49].

governments¹⁵¹ — but rather from dealing with ‘information dispersal’.¹⁵² 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

¹⁵¹ Amada Benavides de Pérez, Chairperson, *Report of the Working Group 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 — Mission to Ecuador*, UN Doc A/HRC/4/42/Add.2 (23 February 2007) 4 [1], 19 [52]; José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Fiji (14–18 May 2007)*, UN Doc A/HRC/7/7/Add.3 (8 January 2008) 4 [1]; José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Peru (29 January to 2 February 2007)*, UN Doc A/HRC/7/7/Add.2 (4 February 2008) 19 [63]; José Luis Gómez del Prado, Chairperson, *Report of the Working Group 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 — Addendum — Mission to Chile (9–13 July 2007)*, UN Doc A/HRC/7/7/Add.4 (4 February 2008) 19 [54]; Alexander Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to the United Kingdom of Great Britain and Northern Ireland (26–30 May 2008)*, UN Doc A/HRC/10/14/Add.2 (19 February 2009) 4 [1]; Shaista Shameem, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Afghanistan*, UN Doc A/HRC/15/25/Add.2 (14 June 2010) 4 [2]; Shaista Shameem, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to the United States of America (20 July to 3 August 2009)*, UN Doc A/HRC/15/25/Add.3 (15 June 2010) 4 [2]. Cf Amada Benavides de Pérez, Chair-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Equatorial Guinea (16–19 August 2010)*, UN Doc A/HRC/18/32/Add.2 (4 July 2011) 11 [34], 15 [52]; UN Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to Honduras (18–22 February 2013)*, UN Doc A/HRC/24/45/Add.1 (5 August 2013) 5–6 [9]–[11].

¹⁵² Philip Alston and Colin Gillespie, ‘Global Human Rights Monitoring, New Technologies, and the Politics of Information’ (2012) 23 *European Journal of International Law* 1089, 1092–5, 1103–4. See also Cass R Sunstein, *Infotopia: How Many Minds Produce Knowledge* (Oxford University Press, 2006) 7–8, 15–16, 18–19.

¹⁵³ Alston and Gillespie, above n 152, 1093.

Legal and political theorists note that, while deliberation is a path to the aggregation of information,¹⁵⁴ processes of, and pressures on, deliberation — arising from ‘hegemonic contestation’¹⁵⁵ — have the potential to skew the reliability and accuracy of knowledge that is aggregated through deliberation.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.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.’¹⁵⁸ The above ‘difficulties’ are pressures that operate on a micro level (as they impact on individuals),

¹⁵⁴ Sunstein, above n 152, 54–5, 60–4. See also Alston and Gillespie, above n 152, 1091–2, 1094. See generally John S Dryzek, ‘Democratization as Deliberative Capacity Building’ (2009) 42 *Comparative Political Studies* 1379, 1381–8; Ian Johnstone, ‘The Power of Interpretive Communities’ in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (Cambridge University Press, 2005) 185, 193–204; Jürg Steiner, *The Foundations of Deliberative Democracy: Empirical Research and Normative Implications* (Cambridge University Press, 2012) 219–46.

¹⁵⁵ Koskeniemi, above n 14, 221–5, 232–5. See also Jose E Alvarez, ‘Hegemonic International Law Revisited’ (2003) 97 *American Journal of International Law* 873, 873–74, 886–7; Detlev F Vagts, ‘Hegemonic International Law’ (2001) 95 *American Journal of International Law* 843, 843–8.

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; Koskeniemi, 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.

¹⁵⁷ See generally Alston and Gillespie, above n 152, 1101–9; Théo Boutruche, ‘Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice’ (2011) 16 *Journal of Conflict and Security Law* 105, 106–7, 110–27, 139–40; Viljoen, above n 133, 81–9. On the ‘reasonable grounds’ standard of proof, see generally Boutruche, above n 157, 112–15; Michael Kirby, Sonja Biserko and Marzuki Darusman, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, UN Doc A/HRC/25/CRP.1 (7 February 2014) 16–17 [67]–[76]; Viljoen, above n 133, 85–9; Stephen Wilkinson, ‘Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions’ (Research Project, Geneva Academy of International Humanitarian Law and Human Rights, 2012) 14, 16, 19–23, 53–4 <<http://www.geneva-academy.ch/docs/reports/Standards%20of%20proof.pdf>>.

¹⁵⁸ Alexander Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Mission to South Africa (10 to 19 November 2010)*, UN Doc A/HRC/18/32/Add.3 (4 July 2011) 12 [38]. See generally Boutruche, above n 157, 120–2.

but are shaped by meso level pressures,¹⁵⁹ including the persistence of ethno-nationalist drivers of conflict¹⁶⁰ and the dynamics of different regime types.¹⁶¹ The tension between state sovereignty and global civil society places further pressure on the efficacy of fact-finding;¹⁶² the tension raises macro level abstractions about the nature of power and influences individual actors via meso level pressures.¹⁶³

C *Where to Next?*

The above manifold pressures on fact-finding are common to fact-finding per se,¹⁶⁴ 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.¹⁶⁵ On the one hand, contracts are a potential tool for contracting states and other contracting clients, including the

¹⁵⁹ To evaluate the matters addressed in the section, it is helpful to use international relations and sociological terminology here, ie, ‘micro’, ‘meso’ and ‘macro’ level dynamics. On micro-meso dynamics, see generally D Brent Smith, Benjamin Schneider and Marcus W Dickson, ‘Meso Organizational Behaviour: Comments on the Third Paradigm’ in Stewart R Clegg et al (eds), *The Sage Handbook of Organization Studies* (Sage, 2nd ed, 2006) 149, 149–50, 152–3, 156; Moshe Hirsch, ‘The Sociology of International Law: Invitation to Study International Rules in Their Social Context’ (2005) 55 *University of Toronto Law Journal* 891, 897–906, 931–9; J David Singer, ‘The Level-of-Analysis Problem in International Relations’ (1961) 14 *World Politics* 77, 77–92.

¹⁶⁰ See above n 56.

¹⁶¹ See generally Freedom House, *Freedom in the World 2014*, 1–5, 15–17 <<http://www.freedomhouse.org/sites/default/files/Freedom%20in%20the%20World%202014%20Booklet.pdf>>; Alex Hadenius and Jan Teorell, ‘Pathways from Authoritarianism’ (2007) 18 *Journal of Democracy* 143, 145–54.

¹⁶² See Alston and Goodman, above n 131, 846, 883–4. On the above tension, see generally Koskeniemi, above n 14, 44–62, 90–1, 219–28, 246–9, 316–18; Christian Reus-Smit, ‘The Politics of International Law’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) 14, 35–43; Wayne Sandholtz and Alec Stone Sweet, ‘Law, Politics, and International Governance’ in Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) 238, 238–41, 245–6, 258–64.

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.

¹⁶⁴ See, eg, Alston and Goodman, above n 131, 846–7, 858, 877–83; Boutruche, above n 157, 107–8, 110–20.

¹⁶⁵ Gómez del Prado, ‘Private Military and Security Companies’, above n 112, 437. See also Holmqvist, above n 50, 18–19, 28, 30–1. On informational transparency, see Cottier, above n 115, 638, 644–5, 660–1; José L Gómez del Prado, ‘A UN Convention to Regulate PMSCs?’ (2012) 31 *Criminal Justice Ethics* 262, 266, 269, 273; DeWinter-Smith, above n 116, 17–18, 19, 28–9, 51–2, 58; Isenberg, ‘Private Military Contractors’, above n 79, 7, 23–7, 44–5, 49; Allison Stanger, ‘Transparency as a Core Public Value and Mechanism of Compliance’ (2012) 31 *Criminal Justice Ethics* 287, 288, 297–300.

UN (which contracts PMSCs when necessary to assist humanitarian and peacekeeping operations),¹⁶⁶ to make PMSCs answerable for their conduct.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰

¹⁶⁶ See, eg, Åse Gilje Østensen, *UN Use of Private Military and Security Companies: Practices and Policies* (2011) Geneva Centre for the Democratic Control of Armed Forces, 8–18, 48, 58–63 <www.dcaf.ch/content/download/45662/678940/file/SSR_PAPER3.pdf>; UN Department of Safety and Security, *United Nations Security Management System: Security Policy Manual — Chapter IV — Security Management, Section I: Armed Private Security Companies* (8 November 2012) 1 [1]–[3] <<http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/UNSecurityPolicyManual.pdf>>; UN Working Group on the Use of Mercenaries, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/68/339 (20 August 2013) 9 [38]–[41].

¹⁶⁷ Cottier, above n 115, 638–40. *Contra* Marcus Hedahl, ‘Unaccountable: The Current State of Private Military and Security Companies’ (2012) 31 *Criminal Justice Ethics* 175, 178–82.

¹⁶⁸ See, eg, Commission on 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) 8 [12]–[14]; José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/7/7 (9 January 2008) 20–1 [50]–[51]; José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 6 [17], 9–10 [34]–[40].

¹⁶⁹ Gómez del Prado, ‘Private Military and Security Companies’, above n 112, 447.

¹⁷⁰ See especially 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) 12–15 [37]–[47]; *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 3rd Comm, 67th sess, Agenda Item 68, UN Doc A/C.3/67/L.58 (13 November 2012) para 15; *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, GA Res 67/159, UN GAOR, 67th sess, 60th plen mtg, Agenda Item

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,¹⁷¹ as are international initiatives to regulate PMSCs.¹⁷² In November 2010, the Human Rights Council created an Intergovernmental Working Group on the ‘possibility’ of creating a legally binding instrument for regulating PMSCs,¹⁷³ 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.¹⁷⁴ 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

67/159, Supp No 49, UN Doc A/RES/67/159 (26 February 2013) para 15. See also Gómez del Prado, ‘Private Military and Security Companies’, above n 112, 439–40; War on Want, above n 137, 18; Zarate, above n 107, 131–5, 159.

¹⁷¹ *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, UN GAOR, 17th sess, 33rd mtg, Agenda Item 3, Supp No 53, UN Doc A/HRC/RES/17/4 (6 July 2011) paras 4–6; John Ruggie, Special Representative, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, John Ruggie — *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, UN Doc A/HRC/17/31 (21 March 2011) annex (‘*Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*’). See also Andrew Clapham, ‘Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups’ (2008) 6 *Journal of International Criminal Justice* 899, 902–7, 912–19; *Contribution of the United Nations System as a Whole to the Advancement of the Business and Human Rights Agenda and the Dissemination and Implementation of the Guiding Principles on Business and Human Rights — Report of the Secretary-General*, 21st sess, Agenda Items 2 and 3, UN Doc A/HRC/21/21 (2 July 2012) 3 [1]–[5], 4–5 [10]–[16], 11–12 [53]–[56], 17–18 [92]–[98].

¹⁷² See above Part II(D).

¹⁷³ *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 (1 October 2010) para 4.

¹⁷⁴ For examples of annual reports, see Anton Katz, Chairperson/Rapporteur, *Annual Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/24/45 (1 July 2013) 3–4 [1]–[10]; UN Working Group 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) 3–5 [1]–[11]. For examples of communications, see Letter from Eileen Chamberlain Donahoe, US Ambassador to the UN, to Faiza Patel, Chair-Rapporteur of the Working Group on the Use of Mercenaries, 1 June 2012, 1–6 <[https://spdb.ohchr.org/hrdb/21st/USA_01.06.12_\(22.2011\).pdf](https://spdb.ohchr.org/hrdb/21st/USA_01.06.12_(22.2011).pdf)>; Alexander Nikitin, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as*

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

a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments, UN Doc A/HRC/10/14/Add.1 (27 February 2009) 3–14 [6]–[51].

¹⁷⁵ UN Working Group on the Use of Mercenaries, *Submissions by the Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/WG.10/2/CRP.1 (6 August 2012) 4 [8]. See generally Gómez del Prado, ‘A UN Convention to Regulate PMSCs?’, above n 165, 272–3, 275, 280–1; José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 9–10 [32]–[41], 11–13 [48]–[56]; Benjamin Perrin, ‘Mind the Gap: Lacunae in the International Legal Framework Governing Private Military and Security Companies’ (2012) 31 *Criminal Justice Ethics* 213, 213–32.

¹⁷⁶ Antonio Cassese, ‘Gathering Up the Main Thread’ in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 645, 672; Orentlicher, above n 131, 83–6. On credible fact-finding, see also Alston and Gillespie, above n 152, 1089, 1094, 1108, 1117–18; Boutruche, above n 157, 105–12; Landman, above n 131, 916–17.

¹⁷⁷ Boutruche, above n 157, 106. See also Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 2nd ed, 2000) 602–10.

¹⁷⁸ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/15/25 (5 July 2010) 6 [13]–[17], 9–10 [32]–[41]; DeWinter-Schmitt, above n 116, 27; Jägers, above n 86, 308–10, 313–14; Faiza Patel, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, UN Doc A/HRC/21/43 (2 July 2012) 6–7 [19]–[22].

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’.¹⁷⁹ Nonetheless, 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,¹⁸⁰ 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 PMSCs¹⁸¹ serve as ‘norm entrepreneurs’ by shaping norms on the role of human rights law and international humanitarian law in the marketplace for force.¹⁸² 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

¹⁷⁹ On the term ‘essentially contestable’, see especially W B Gallie, ‘Essentially Contested Concepts’ (1956) 56 *Proceedings of the Aristotelian Society* 167, 167–9, 171–3, 183–7. See also Gunnar Beck, ‘The Mythology of Human Rights’ (2008) 21 *Ratio Juris* 312, 312–14, 325–46. Cf John Gray, ‘On Liberty, Liberalism and Essential Contestability’ (1978) 8 *British Journal of Political Science* 385, 388–95.

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

¹⁸¹ See above nn 135–7.

¹⁸² See generally Elke Krahnemann, ‘Private Security Companies and the State Monopoly on Violence: A Case of Norm Change’ (PRIF-Reports No 88, Peace Research Institute Frankfurt, 2009) 2–5, 15–17 <http://edoc.vifapol.de/opus/volltexte/2011/2729/pdf/prif88_01.pdf>. But see Sarah V Percy, ‘Strong Norm, Weak Law’ (2007) 61 *International Organization* 367, 367–9, 388–94. On the concept of norm change and its basis in international relations theory, see especially Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organisation* 887, 887–917; Risse and Sikkink, above n 149, 11, 17–35.

from legislative reforms with regard to PMSCs.¹⁸³ 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,¹⁸⁴ 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*,¹⁸⁵ Australian criminal law¹⁸⁶ has extraterritorial application to Australian Defence Force ('ADF') members and 'defence civilians':

defence civilian means a person (other than a defence member) who:

- (a) with the authority of an authorized officer, accompanies a part of the Defence Force that is:
 - (i) outside Australia; or
 - (ii) on operations against the enemy; and
- (b) has consented, in writing, to subject himself or herself to Defence Force discipline while so accompanying that part of the Defence Force.¹⁸⁷

¹⁸³ I wish to acknowledge that Part IV is indebted to Tim McCormack and Rain Liivoja, 'Australia: Regulating Private Military and Security Companies' in Christine Bakker and Mirko Sossai (eds), *Multilevel Regulation of Military and Security Contractors: The Interplay Between International, European and Domestic Norms* (Hart Publishing, 2012) 507; Don Rothwell, 'Legal Opinion on the Status of Non-Combatants and Contractors Under International Humanitarian Law and Australian Law' (Legal Opinion, Australian Strategic Policy Institute, 21 December 2004) <http://www.aspi.org.au/pdf/ASPIlegalopinion_contractors.pdf>; Mark Thomson, 'War and Profit: Doing Business on the Battlefield' (Report, Australian Strategic Policy Institute, March 2005) <http://www.aspi.org.au/htmlver/20937war_and_profit/_lib/pdf/ASPI_War_and_Profit.pdf>. McCormack and Liivoja is an updated version of Tim McCormack, 'Australian Report on National Legislation and Judicial Practice' (PRIV-WAR Report, National Report Series 10/09, European University Institute and Academy of European Law, 20 May 2009) <<http://priv-war.eu/wordpress/wp-content/uploads/2009/05/nr-10-09-aus.pdf>>.

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.

¹⁸⁶ See *Criminal Code Act 1995* (Cth) ch 2 pt 1 div 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’).

¹⁹² Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 2003, 19 814 (Daryl Williams, Attorney-General).

¹⁹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 September 2003, 20 341 (Michael Organ).

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

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

²⁰¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 1977, 342 (Robert Ellicott, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 7 March 1978, 363 (Peter Durack, Attorney-General); Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1978, 597 (Ian Viner).

²⁰² Commonwealth, *Parliamentary Debates*, House of Representatives, 29 March 1977, 693 (Raymond Groom); *Diplock Report*, above n 27, 2 [5]–[6]. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 1977, 343 (Robert Ellicott); Commonwealth, *Parliamentary Debates*, Senate, 31 March 1977, 715 (Thomas Tehan); Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1978, 598–9 (Ian Viner).

²⁰³ The concern was that Australian Croats 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).

²⁰⁵ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 29 March 1977, 684–5, 687 (Lionel Bowen), 688–9 (Reginald Birney), 690, 691 (Keith Johnson), 694–5 (Henry Jenkins), 698 (Albert James), 704 (Gordon Scholes); Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 1977, 750 (Lionel Bowen); Commonwealth, *Parliamentary Debates*, Senate, 31 March 1977, 704 (John Button), 714 (John Wheeldon), 722, 723, 724, 726 (Peter Durack), 724 (Alan Missen); Commonwealth, *Parliamentary Debates*, House of Representatives, 6 April 1978, 1179 (Michael Hodgman).

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:²¹² '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.'²¹³

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

²⁰⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 March 1977, 749 (Lionel Bowen).

²⁰⁷ *Ibid.*

²⁰⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 March 1977, 342 (Robert Ellicott, Attorney-General). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 6 April 1978, 1184–5 (Robert Ellicott). Cf Commonwealth, *Parliamentary Debates*, House of Representatives, 6 April 1978, 1186–7 (Lionel Bowen).

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.

²¹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 March 2004, 27 659 (Philip Ruddock, Attorney-General).

²¹² Cf Commonwealth, *Parliamentary Debates*, House of Representatives, 13 May 2004, 28 599–600 (Steven Ciobo), 28 603–4 (Duncan Kerr). Cf also Commonwealth, *Parliamentary Debates*, Senate, 17 June 2004, 24 170–1 (Joe Ludwig); Commonwealth, *Parliamentary Debates*, House of Representatives, 12 February 2007, 61 (Maria Vamvakinou), 62 (Cameron Thompson).

²¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 31 March 2004, 27 659 (Philip Ruddock).

²¹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 11 February 2014, 2–3 (Dan Tehan); Commonwealth, *Parliamentary Debates*, Senate, 12 February 2014, 276–7 (David Fawcett); Commonwealth, *Parliamentary Debates*, House of

debates about the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014²¹⁵ and Parliamentary Committee Reports on the listing of certain organisations as terrorist groups under s 102.1A of the *Criminal Code Act 1995* (Cth),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.²¹⁷ The initial contract period of US\$36 million dwarfed the

Representatives, 19 March 2014, 2453–4 (Julie Bishop, Minister for Foreign Affairs); Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2014, 34 (Julie Bishop); Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2014, 62 (Julie Bishop); Commonwealth, *Parliamentary Debates*, House of Representatives, 14 July 2014, 7872 (Luke Simpkins), 7873–4 (Michael Danby), 7875–6 (Anthony Byrne), 7877 (Stephen Irons), 7879 (Nicholas Champion); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 August 2014, 54 (Tony Abbott, Prime Minister); Commonwealth, *Parliamentary Debates*, House of Representatives, 25 September 2014, 101–2 (Jason Wood), 105 (Ann Sudmalis); Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 2014, 55 (Julie Bishop), 57 (Michael Keenan, Minister for Justice); Commonwealth, *Parliamentary Debates*, Senate, 25 June 2014, 42 (George Brandis, Attorney-General).

²¹⁵ Commonwealth, *Parliamentary Debates*, Senate, 24 September 2014, 65–8 (George Brandis); Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 2014, 104 (Stephen Irons), 107–8 (Michael Danby); Evidence of Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 3 October 2014, 47, 49 (George Williams), 58 (Phillip Boulton).

²¹⁶ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 26 May 2014, 65–8 (David Irving, Director-General of Security, ASIO); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Listing of Jabhat al-Nusra and the Re-Listing of Six Terrorist Organisations and Review of the Re-Listing of Al-Qa'ida in the Arabian Peninsula* (2014) 1–2, 16–21. Another listed group is Islamic State, formerly known as the Islamic State of Syria and the Levant.

²¹⁷ *Agreement for the Provision of Military Assistance Dated This 31 Day of January 1997 Between the Independent State of Papua New Guinea and Sandline International* (31 January 1997) <<http://coombs.anu.edu.au/SpecialProj/PNG/htmls/Sandline.html>>, cited in McCormack and Liivoja, above n 183, 522.

annual US\$23 million budget of the PNGDF.²¹⁸ The PNG Government deputised Sandline operatives as ‘special constables’, thereby circumventing the legal definition of ‘mercenary’.²¹⁹ 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.²²⁰ Singirok, who had been involved with the contract negotiations with Sandline,²²¹ 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.²²² 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.²²³

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.²²⁴

²¹⁸ Sinclair Dinnen, ‘Money, Guns and Politics — Mercenary Times in Papua New Guinea’ (1997) 9 *Current Issues in Criminal Justice* 170, 175.

²¹⁹ Singer, ‘War, Profits, and Vacuum of Law’, above n 88, 533; UK Foreign and Commonwealth Office, *Private Military Companies: Options for Regulation* (London: Stationary Office, 2002) 7 [6] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228598/0577.pdf>; Ian Wing, ‘Private Military Companies and Military Operations’ (Working Paper No 138, Land Warfare Studies Centre, Commonwealth of Australia, October 2010) 27 n 92 <<http://www.army.gov.au/%20Our-future/DARA/Our-publications/~media/Files/Our%20future/DARA%20Publications/%20WP/wp138.ashx>>.

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

²²¹ Zarate, above n 107, 98.

²²² Dinnen, above n 218, 175, citing *The Sydney Morning Herald*, 10 April 1997, 10. For the citation here, see Craig Skehan, ‘Chan Wanted Elite Guard, Inquiry Told’, *The Sydney Morning Herald* (online), 10 April 1997 <http://newsstore.smh.com.au/apps/viewDocument.ac?page=1&sy=smh&kw=Chan+Wanted+Elite+Guard&pb=all_ffx&dt=selectRange&dr=entire&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=nrm&clsPage=1&docID=news970409_0035_8883>.

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).

²²⁴ Commonwealth, *Parliamentary Debates*, Senate, 25 February 1997, 903 (Dee Margetts). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 6 June 2000, 17 099–100 (Laurie Brereton).

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.²²⁵

The Australian Government regarded the mercenary presence on Bougainville as ‘a retrograde and an extremely regrettable step’²²⁶ and supported a diplomatic solution, not a military solution, to the Bougainville crisis.²²⁷

After the Sandline Affair, the Australian Government, on 14 July 1997, announced that it intended to support the *Mercenaries Convention*.²²⁸ 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 1985,²²⁹ albeit with a hiatus from 1969–72.²³⁰ UN General Assembly Resolution 1654 established the Special Committee in 1961,²³¹ to monitor progress on the application of UN General Assembly Resolution 1514 on the granting of independence to colonial countries and

²²⁵ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Papua New Guinea Update — Report on Proceedings of a Seminar 11 and 12 November 1996, Canberra* (1997) 817.

²²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1997, 2263 (John Howard). See also Commonwealth, *Parliamentary Debates*, Senate, 25 February 1997, 903 (Robert Hill).

²²⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 1997, 3150 (Alexander Downer, Minister for Foreign Affairs); Commonwealth, *Parliamentary Debates*, House of Representatives, 20 October 1997, 9213 (Alexander Downer); Commonwealth, *Parliamentary Debates*, House of Representatives, 18 November 1997, 10 619 (Alexander Downer).

²²⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 September 1997, 7406 (Alexander Downer); Genevieve Ebbeck, ‘Mercenaries and the “Sandline Affair”’ [1998] (133) *Australian Defence Force Journal* 5, 5, 10, 17, 21 n 3.

²²⁹ UN Department of Political Affairs, Trusteeship and Decolonisation, ‘Thirty Years of the Declaration on the Granting of Independence to Colonial Countries and Peoples’ [1990] (39) *Decolonization* 1, 8 <http://www.un.org/en/decolonization/pdf/decolonization/decon_num_26-3.pdf>.

²³⁰ UN Department of Political Affairs, Trusteeship and Decolonisation, ‘Twenty-Five Years of the Declaration on the Granting of Independence to Colonial Countries and Peoples’ [1985] (26) *Decolonization* 1, 40 <http://www.un.org/en/decolonization/pdf/decolonization/decon_num_26-2.pdf>.

²³¹ *The Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1654 (XVI), UN GAOR, 16th sess, 1066th plen mtg, Agenda Item 88, UN Doc A/RES/1654(XVI) (27 November 1961) para 3.

peoples.²³² 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.²³³ 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,²³⁴ and held that Australia had already adopted, with the *CFIR Act*, a strong position against mercenarism.²³⁵ The *CFIR Act* criminalised what the *Mercenaries Convention* would later forbid: namely, the recruitment and training of mercenaries.²³⁶ The *CFIR Act* set out the penalty of imprisonment for 14 years (the penalty is now 20 years)²³⁷ for an Australian who entered ‘a foreign state with intent to engage in a hostile activity in that foreign State’²³⁸ or did in fact ‘engage in a hostile activity in a foreign State.’²³⁹ The penalty for preparatory acts is imprisonment for 10 years.²⁴⁰

²³² *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UN GAOR, 15th sess, 947th plen mtg, Agenda Item 87, UN Doc A/RES/1514(XV) (14 December 1960).

²³³ *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2465 (XXIII), UN GAOR, 23rd sess, 1751st plen mtg, Agenda Item 23, UN Doc A/RES/2465(XXIII) (20 December 1968) paras 1, 8; *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2548 (XXIV), UN GAOR, 24th sess, 1829th plen mtg, Agenda Item 23, UN Doc A/RES/2548(XXIV) (11 December 1969) paras 1, 7; *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2708 (XXV), UN GAOR, 25th sess, 1929th plen mtg, Agenda Item 23, UN Doc A/RES/2708(XXV) (14 December 1970) paras 1, 8. For a concise overview of the above Resolutions, see Maogoto and Sheehy, ‘Contemporary Private Military Firms Under International Law’, above n 38, 255–7.

²³⁴ Thomson, above n 183, 48.

²³⁵ Commonwealth, *Parliamentary Debates*, Senate, 27 September 1989, 1411 (Michael Tate, Minister for Justice). See generally *Summary Record of the 13th Meeting*, UN GAOR, 6th Comm, 42nd sess, 13th mtg, Agenda Item 134, UN Doc A/C.6/42/SR.13 (13 October 1987) 11 [53]; *Summary Record of the 27th Meeting*, UN GAOR, 3rd Comm, 42nd sess, 27th mtg, Agenda Item 160, UN Doc A/C.3/42/SR.27 (28 October 1987) 16 [75]; *The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation: Report of the Secretary-General*, 42nd sess, Agenda Item 9, UN Doc E/CN.4/1986/44 (17 December 1985) 2 [3]. Cf *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) 2 [8].

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

²³⁷ *CFIR Act* s 6(1)(a).

²³⁸ *Ibid.*

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.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?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.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

²⁴¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 19 October 1994, 2432 (Ted Mack); Commonwealth, *Parliamentary Debates*, Senate, 11 December 1996, 7249 (Amanda Vanstone).

²⁴² Commonwealth, *Parliamentary Debates*, Senate, 25 February 1997, 903 (Dee Margetts).

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

²⁴⁴ Office of the High Commissioner for Human Rights, ‘Human Rights — The Impact of Mercenary Activities on the Right of Peoples to Self-Determination’ (Human Rights Fact Sheet No 28) 11–12 <<http://www.ohchr.org/Documents/Publications/FactSheet28en.pdf>>.

²⁴⁵ Australian Government, *Notification by the Depositary Addressed to the ICRC on 24 June 1991*, International Committee of the Cross <<http://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=10312B4E9047086EC1256402003FB253>>. *Additional Protocol I* entered into force for Australia on 21 December 1991.

²⁴⁶ *CFIR Act* s 6.

²⁴⁷ *Ibid* s 7.

²⁴⁸ *Ibid* ss 8–9.

²⁴⁹ *Draft Resolution — The Right of Peoples to Self-Determination and its Application to Peoples Under Colonial or Alien Domination or Foreign Occupation*, 61st sess, Agenda Item 5, UN Doc E/CN.4/2005/L.6 (4 April 2005) 4 [11]. For the voting results, see Diedre Kent, Rapporteur, *Report to the Economic and Social Council on the Sixty-First Session of the Commission: Draft Report of the Commission — Rapporteur: Ms Deirdre Kent (Canada)*, UN Doc E/CN.4/2005/L.10/Add.5 (7 April 2005) 3–4 [14].

activities.²⁵⁰ This Resolution also, inter alia, called for ‘a new legal definition of mercenary’²⁵¹ 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.²⁵²

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.²⁵³ 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”’.²⁵⁴ In its reply of 4 December 2007, the Australian Government noted that Australia had enacted legislation²⁵⁵ to reflect its ratification of the *Rome Statute* and had ‘criminalize[d] in

²⁵⁰ *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 3rd Comm, 67th sess, Agenda Item 68, UN Doc A/C.3/67/L.58 (13 November 2012) para 14. For the voting results, see Suljuk Mustansar Tarar, Rapporteur, *Right of Peoples to Self-Determination: Report of the Third Committee*, UN Doc A/67/456 (7 December 2012) 4–5 [17].

²⁵¹ *Draft Resolution — Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, 3rd Comm, 67th sess, Agenda Item 68, UN Doc A/C.3/67/L.58 (13 November 2012) para 15.

²⁵² 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 E/CN.4/2004/15 (24 December 2003) 13–15 [43]–[47].

²⁵³ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/7/7/Add.1 (13 February 2008) 3–4 [7]–[9]; Dylan Welch, ‘Security Outfit Killed Civilians, Gets Embassy Job’, *The Age* (online), 19 August 2010 <<http://www.theage.com.au/national/security-outfit-killed-civilians-gets-embassy-job-20100818-12f4w.html>>.

²⁵⁴ Alexander Ivanovitch Nikitin, Chairperson-Rapporteur, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled ‘Human Rights Council’: Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/10/14/Add.1 (27 February 2009) 10 [27].

²⁵⁵ *International Criminal Court Act 2002* (Cth).

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

²⁵⁶ José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/7/7/Add.1 (13 February 2008) 5 [18].

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

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

²⁵⁹ Quoted in José Luis Gómez del Prado, Chairperson-Rapporteur, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/7/7/Add.1 (13 February 2008) 5 [22].

²⁶⁰ Alexander Ivanovitch Nikitin, Chairperson-Rapporteur, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council': Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/10/14/Add.1 (27 February 2009) 4 [9]–[10].

²⁶¹ Jessicah Mendes and Scott Mitchell, 'Who is Unity Resources Group?', *ABC News* (online), 15 September 2010 <<http://www.abc.net.au/news/2010-09-15/who-is-unity-resources-group/2261606>>.

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

²⁶² *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/15/25/Add.1 (2 September 2010) 4 [7]–[8].

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.

²⁷¹ Alexander Ivanovitch Nikitin, Chairperson-Rapporteur, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled ‘Human Rights Council’: Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination — Addendum — Communications to and from Governments*, UN Doc A/HRC/10/14/Add.1 (27 February 2009) 10 [27].

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,

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(xxix).

²⁷⁹ Rothwell, above n 183, [33].

²⁸⁰ Elise Edson, 'Section 51(xxix) of the *Australian Constitution* and "Matters of International Concern": Is There Anything to be Concerned About?' (2008) 29 *Adelaide Law Review* 269, 276, 286–95, 302. Cf Sarah Murray, 'Back to ABC After XYZ: Should We Be Concerned About "International Concern"?' (2007) 35 *Federal Law Review* 317, 323–8.

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,²⁸² 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.²⁸³ Given that the Commonwealth already has in place risk analysis and reporting principles in Defence procurement,²⁸⁴ 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

Bjelke-Petersen (1982) 153 CLR 168, 217 (Stephen J); *Polyukhovich v Commonwealth* (1991) 172 CLR 510, 560–1 (Brennan J); *XYZ v Commonwealth* (2006) 227 CLR 532, 572–78 (Kirby J).

²⁸² See generally Simon Fitzpatrick, 'Kelly on Ockham's Razor and Truth-Finding Efficiency' (2013) 80 *Philosophy of Science* 298, 298–9, 302–3; William H Jefferys and James O Berger, 'Ockham's Razor and Bayesian Analysis' (1992) 80 *American Scientist* 64, 64.

²⁸³ On the relationship between political resolve and policy change, see, eg, Ewen J Michael, *Public Policy: The Competitive Framework* (Oxford University Press, 2006) 1–9, 107, 206–12, 216–19.

²⁸⁴ For the above procurement principles, see Department of Defence (Cth), *Defence Capability Development Handbook* (December 2012) <<http://www.defence.gov.au/publications/DefenceCapabilityDevelopmentHandbook2012.pdf>>; Department of Defence (Cth), *Defence Procurement Policy Manual: Mandatory Procurement Guidance for Defence and DMO Staff* (2013) <http://www.defence.gov.au/dmo/gc/dppm/DPPM1Jul2013_Final.pdf>; Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 29 May 2012, 29 (Air Vice Marshall Colin Thorne, Head Aerospace Systems Division, Defence Materiel Organisation, Department of Defence), 29–31, 32 (Harry Dunstall, Deputy Chief Executive Officer, General Manager Commercial, Defence Materiel Organisation), 34 (Warren King, Chief Executive Officer, Defence Materiel Organisation); Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 13 February 2013, 87–8 (Dennis Richardson, Secretary, Department of Defence), 99–100 (Rear Admiral Rowan Moffit, Head Future Submarine Program, Defence Materiel Organisation), 105 (Steve Grzeskowiak, Deputy Secretary Defence Support, Department of Defence); Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 4 June 2013, 64, 64–5 (Major General John Caligari, Acting Chief, Capability Development Group, Department of Defence).

and services,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.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 destruction²⁸⁷ 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.'²⁸⁸

V CONCLUSION

'Cry havoc and let slip the dogs of war',²⁸⁹ Shakespeare wrote epigrammatically in *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

²⁸⁵ McCormack and Liivoja, above n 183, 512–13. See generally Financial Management Group, Department of Finance and Deregulation (Cth), *Commonwealth Procurement Guidelines: Achieving Value for Money* (1 July 2012) 8 [2.3], [2.4], 20 [7.1]–[7.4] <http://www.finance.gov.au/sites/default/files/cpr_commonwealth_procurement_rules_july_2012.pdf>.

²⁸⁶ Australian Human Rights Commission, Submission No 25 to Senate Legal and Constitutional Affairs Legislation Committee, *Migration Amendment (Maintaining the Good Order of Immigration Detention Facilities) Bill 2015 (Cth)*, 7 April 2015, 3 [4], 6–8 [9]–[21], 29 [133]–[136]; Department of Parliamentary Services (Cth), *Bills Digest*, No 86 of 2014–16, 23 March 2015, 18–19; Nick Evershed, 'Mandatory Immigration Detention is a Billion-Dollar Business — Analysis', *The Guardian* (online), 25 August 2014 <<http://www.theguardian.com/news/datablog/2014/aug/25/-sp-mandatory-immigration-detention-is-a-billion-dollar-business-analysis>>; Sarah Whyte, David Wroe and Ben Butler, 'PNG Staff to Keep Security Jobs at Manus Island Detention Centre', *The Sydney Morning Herald* (online), 25 February 2014 <<http://www.smh.com.au/federal-politics/political-news/png-staff-to-keep-security-jobs-at-manus-island-detention-centre-20140224-33d5e.html>>.

²⁸⁷ McCormack and Liivoja, above n 183, 517.

²⁸⁸ Ibid. McCormack and Liivoja draw particular attention to the *Weapons of Mass Destruction (Prevention of Proliferation Act 1995)* (Cth) and the export control mechanism set out in *Customs (Prohibited Exports) Regulation 1958* (Cth). The latter was made under the *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' (*Customs Act 1901* (Cth) ss 112(2)(a), (aa)).

²⁸⁹ T S Dorsch (ed), *The Arden Edition of the Works of William Shakespeare: Julius Caesar* (Methuen, 6th rev ed, 1958) act III, scene 1, line 273.

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 climates. 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.

²⁹⁰ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 6 April 1978, 1181–2 (Allan Holding); Commonwealth, *Parliamentary Debates*, Senate, 25 February 1997, 903 (Dee Margetts).

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*.

²⁹² Commonwealth, *Parliamentary Debates*, House of Representatives, 11 September 2003, 19814 (Daryl Williams, Attorney-General).

²⁹³ See *DFD Act* ss 9, 61.

