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Companies of Past and Present: Lessons from the East India Company on the Use and Regulation of Private Forces Today

Katerina Galai[†]

This article considers issues of international legal classification in the historical and contemporary context of the use of private military by states and non-governmental organisations. There is more to these questions than contemporary practices can reveal, so this enquiry begins with a historical approach, tracing the lineages of private security through centuries. Particular focus will be on the status and composition of the colonial army of the English East India Company, drawing parallels with the current private military company (PMC) regulation. This article raises questions about the customary notions of 'public' and 'private' in order to draw attention to the changing nature of military norms and to build a stronger case for regulation. Building upon British colonial activities in India, the article demonstrates the importance of maintaining control and revising codification of new irregular military forces.

Keywords: Army of the East India Company, codification of irregular military forces, Private Military Companies, public and private violence.

1. INTRODUCTION AND OVERVIEW

In the 1990s there were fifty military personnel for every one contractor, now the ratio is ten to one.¹ 'Coupled with the current general trend towards

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globalisation and privatisation, and the failures of the international community to respond to each and every massive humanitarian crisis effectively, it is little wonder that we are witnessing substantial growth in private security today.²

This article begins by scrutinising the relationship between the state and the military, which highlights the importance of understanding the historical variability of the normative approaches to public and private military power in order to regulate contemporary PMCs, and to codify new types of private forces under international law.

Then, we analyse the governmental construct of the British Empire in India with a particular focus on state administration, financial, and legal structures that were deeply involved in military ideas and practices. To address regulatory constraints, it is not enough merely to identify the leading contemporary norm. We also need to understand what form of governance it applies to, as the normative aspects are only indicative of broader shifts, revealing little on their own.³

Next, this article analyses the army of the East India Company through the lens of power and legitimacy, and examines its composition, role within the Empire, and its relationship with the sovereign in order to determine if such colonial army should be considered a public or a private force. Finally, the article puts forward some normative arguments as to why the Crown preferred to outsource, which allowed for inherently stately functions, such as local administration and the military, to be governed by a private trading organisation for over a century. The historical example of the British colonial army highlights the importance of regulation, mirroring the current issue with PMC classification.

The so-called ‘public’ monopoly on armed forces in the context of the nineteenth-century imperial European state did not derive from within state borders or even from within Europe. Imperialism added a new, legally undefined, type of military force to the existing choice of mercenaries and citizens – access to imperial troops.⁴ In the era when states were consciously moving away from using foreign mercenaries, this article suggests that it was because of the lack of laws and customary norms that colonial armies became a viable and popular alternative.

¹ P. W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press, 2004).

² K. O’Brien, ‘What should and what should not be Regulated?’ in S. Chesterman and C. Lehnard (ed), *From Mercenaries to Market. The Rise and Regulation of Private Military Companies* (Oxford: OUP, 2007), 33.

³ T. Barkawi, ‘State and Armed Force in International Context’ in A. Colas and B. Mabey (eds.), *Mercenaries, Pirates, Bandits and Empires. Private Violence in Historical Context* (London: Hurst & Company, 2010), 50–51.

⁴ P. Owens, ‘Distinctions, Distinctions. Public and Private Force?’ in Colas and Mabey (ed.), 25–26.

The article concludes by deliberating the concepts of ‘public’ and ‘private’ force through Weber’s definition of state in the context of contemporary PMC regulation issues, and raise questions about the importance of classification and codification of irregular forces under national and international laws.

2. BRITISH EAST INDIA COMPANY

While most accounts use the post-Westphalian nation-state as the starting point for the norm against the use of mercenaries, my analysis builds upon historical examples of different forms of governance in order to trace transformations of irregular military forces in each of those constructs.

What constitutes a ‘legitimate’ military? A legitimate military for absolute monarchies was the emergence of a standing army — the salaried professional army of Spain, Sweden, and Prussia. In republican thought it is a citizen militia of Italian city-states, advocated by Machiavelli’s idealised Roman republic. The nation-state of revolutionary France gave birth to a national army, while the army of the British Empire was predominantly composed of colonial subjects.

Following the Peace of Westphalia in 1648 and the rise of the modern State, the trend to use mercenaries was fading away making strategic space for standing armies. The Napoleonic wars of the end of the eighteenth century marked the pinnacle of this transition. Given the lack of military organisation of the non-European states and the absence of any legal limitations on a state’s ability to commence a war, it was inevitable that European colonial empires expanded through the conquest of large parts of Asia and Africa.⁵

‘Empires brought with them a need for specialised troops in permanent readiness for colonial duty. Of all these the most remarkable was the East India Company’s army.’⁶ Founded in 1600, the English East India Company⁷ was run by a Court of twenty-four directors. With its key focus on competitive trade, by the first half of the eighteenth century the Company achieved a status of a respectable commercial body, connected with City of London banking

⁵ A. Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’ (1999) 40(1) Harvard International Law Journal 51.

⁶ V. G. Kiernan, *Colonial Empires and Armies 1815–1960* (Stroud: Sutton Publishing, 1998), 23.

⁷ Literature of the East India Company: C. H. Philips, *The East India Company 1784–1834* (Manchester: Manchester University Press, 1961); B. Gardner, *The East India Company: a History* (London: Granada Publishing Limited, 1971); H. V. Bowen, *The Business of Empire: the East India Company and Imperial Britain, 1756–1833* (Cambridge: CUP, 2006); J. Keay, *The Honourable Company. A History of the English East India Company* (London: Harper Collins, 1993).

and the Stock Exchange.⁸ Originally, the East India Company had a determinedly pacifist outlook and was mainly preoccupied with commerce.⁹ Later, the Anglo-French struggles of early- to mid-eighteenth century were an important factor to Company's territorial expansion and assertion of governing power in India.¹⁰

With the power of the Mughal dynasty¹¹ dominating throughout the sixteenth and the seventeenth centuries, the Indian Empire was the second greatest power in the East, following that of Peking.¹² Whether the accession to power of the British in India was made possible by the factions in the Mughal rule¹³, the Hindu-Muslim tensions¹⁴ or the emergence of a new order in eighteenth-century India,¹⁵ the British lost an opportunity to create a much stronger form of sovereignty that originated from trade and effective organisation of local resources. Furthermore, there was no Indian nation *per se*, and no sentiment of national unity which made it possible for external powers to interject and impose their rule, simultaneously offering a new form of unity. 'There was no political discourse in eighteenth-century India to construe resistance to the foreigners as a national war for the defence of the country.'¹⁶ In the absence of centralisation, numerous forces fought for dominance over different parts of India. Moreover, these forces often preferred British rule to the authority of one another.¹⁷ The needs of Indian rulers for cash and troops met the British ambitions to play a political role as military commanders and bankers to the State.¹⁸

When Bengal became a British-ruled province it granted the Company's servants possession of vast territories, authority over about twenty million people, as well as access to three million pound sterling in revenues.¹⁹ What was extraordinary about this colonial example was the way the Company achieved its sovereign status. The Company was penetrating beneath the surface by building up its strength not on commerce alone. It used the local

⁸ D. K. Fieldhouse, *The Colonial Empires: a Comparative Survey from the Eighteenth Century* (London: Weidenfeld and Nicolson, 1966), 140.

⁹ M. Ferro, *Colonization: a Global History* (London: Routledge, 1997), 55.

¹⁰ See Fieldhouse, 166–167.

¹¹ Also known as 'Mogul'.

¹² See Fieldhouse, 162.

¹³ Ibid.

¹⁴ P. Spear, *India. A Modern History* (New York: University of Michigan Press, 1961), 186.

¹⁵ P. J. Marshall (ed): *The Oxford History of the British Empire. The Eighteenth Century* (Oxford: OUP, 1998), 493; See Fieldhouse, 163.

¹⁶ R. K. Ray, 'Indian Society and the Establishment of British Supremacy, 1765-1818' in Marshall, 519.

¹⁷ See Spear, 228; The Marathas preferred British rule to Muslim; the Rajputs, British suzerainty to Maratha; and the Muslims, British rule to Hindu.

¹⁸ See Marshall, 497.

¹⁹ See Marshall, 492.

resources—popular, administrative and military—to establish its rule and then to expand it, while retaining the formal control of the territory.²⁰ It also held control over military resources. However, those forces were not under direct rule of the British Empire. These were privately managed, locally sourced and funded by the profits of the Company, taxes raised through Indian administrative systems, or, bribes received directly from Indian aristocrats.²¹

3. BRITISH INDIAN STATE

Who was governing and what was being governed? In the south, the British occupation created a new state; whereas in Bengal, the Company operated within a state that was already formed.²² It dealt directly with the local power,²³ respecting the local customs and focusing on economic rather than cultural imperialism. ‘Indian princes, who contributed men and money to the Imperial effort, were treated as valuable allies—to be protected, if necessary, against the protests of their own subjects.’²⁴ Sovereign status came to the British Indian state in 1765 (also known as the Company Bahadur). The treaty between Robert Clive²⁵ and Emperor Mir Jafar delimited the frontiers in a parallel administration, while the parliamentary enquiries at home served the legitimising purpose of enforcing responsibility on the governors.²⁶ ‘Government by committee, or Council, was one of the many legacies of its commercial origins that survived the East India Company’s transformation into a ruling power.’²⁷ Interests of administrative service were predominantly private which reflected in the way the trade was regulated, or more accurately, dominated by the Company and its servants.²⁸

Just as the Indian states were built on the taxation levied from the cultivators of the land, the British Empire in India was built on the same premise.²⁹ The dynamic private sector bound the Indians and the British through active trade and voluntary subordination of wealthy Indian merchants to the Europeans in exchange for security and stable commerce.

²⁰ See Fieldhouse, 164.

²¹ Indians who wished to hire the Company's troops had to pay the Company, as well as to reward their officers privately.

²² See Marshall, 502.

²³ See Spear, 194.

²⁴ See Washbrook, 402.

²⁵ Also known as Clive of India; he was a British officer who established the military and political supremacy of the East India Company in Bengal.

²⁶ See Spear, 203.

²⁷ See Ray, 513.

²⁸ Ibid., 515.

²⁹ See Marshall, 504.

Legitimacy had to be established in order to claim power over the new territories, and that would not be possible without the introduction of the rule of the law in the English Presidencies, following the India Act of 1784.³⁰ The British became administrators of Indian law, presiding over courts in which issues of rights to land and distribution of revenue were decided³¹. However, in military and administrative practice, just like in trade, the local traditions had to be respected if the Company was to stand a chance of becoming the new sovereign. The common denominator amongst administrative, financial and legal functions was the ever-growing role and presence of the military apparatus, rooted at the core of the state and the society.³²

4. THE ARMY

While gradually becoming the central infrastructure of the British Indian state, and a regional military force that had no match, the army of the East India Company had a rather complex constitution full of contradiction and inequality. The historical composition of the army—the way it was raised and organised—created ambiguity around its status.

Should the colonial army be considered public or private? The significance of this distinction lies in the contemporary claim that post-Westphalian states chose to move away from mercenaries and alternative types of military force to a national standing army. Furthermore, historical classification issues highlight parallels applicable to current PMC regulation.

As the army was directly controlled by a private organisation—the East India Company—it is especially important to examine the notions of public and private in the contemporary military context. The unequal application of sovereignty between the Metropole and the Empire also highlights the gap, potentially suggesting the exclusion of colonial subjects from the public, civic, as well as military spheres.

The eighteenth century marked a shift in the Great Power struggles from European issues to markets and territories that ranged across the globe.³³ To compete in this new global arena and to establish supremacy in India, Britain had to exceed Dutch and French military and commercial efforts on the subcontinent. Administration of vast overseas territories was expensive and

³⁰ The India Act was then implemented in India after 1786 by the reforming Governor-General Lord Cornwallis; see Ray, 520–521.

³¹ See Marshall, 504.

³² From the mid-1820s the government of India maintained ‘sixteen European regiments of the line as well as a permanent standing army of 170 sepoy regiments, totalling 235,000 men.’ See Washbrook, 402.

³³ P. Kennedy, *The Rise and Fall of the Great Powers. Economic Change and Military Conflict from 1500-2000* (London: Fontana Press, 1989), 195.

impractical unless ‘use was made, wherever possible, of existing political structures and resources.’³⁴

In order to save costs and preserve already low numbers of the British soldiers, the Company chose to obtain its military manpower from local sources.³⁵ The indigenous population, although lacking training and the unity of a professional army, could be had at a much lower price than British soldiers. Although the French had piloted the sepoy³⁶ conscription following the compulsory enlistment structure at home, Britain soon realised the great advantages local armies could bring. Following the French example, the British raised their own sepoy forces, grouping these into battalions in Bengal and Madras by the late 1750s.³⁷

Unlike the French, who used coercion as a method of enlistment, the British offered voluntary service, which was a much more attractive alternative for the sepoys. As the voluntary service was an accepted norm by this time for free-born Britons, conscription was hardly ever formally employed to subject peoples across the empire.³⁸ To make the enlistment contract between the soldier and the Company more lasting, as well as to attract recruits and to purchase their quiescence during service, British policymakers deployed material incentives.³⁹

Until the European invasions, Indian military culture was predominantly feudal, with private mercenaries serving a different warlord based on pay and opportunity. French and British imperialists introduced an effective mechanism that gave the sepoys a military framework and a sense of job security, while simultaneously ensuring a constant supply of military manpower for the Empire. This European pseudo-standing army created a real sentiment of fraternity by offering the sepoys discipline, uniforms, and a regular pay that also guaranteed their loyalty to the Company. Furthermore, the use of more advanced fire arms made the sepoys stronger and more effective than their local opposition.⁴⁰ Equality ended there, however, as no sepoy, however long his tenure, could ever rise above the rank of a ‘native officer’.⁴¹

While most armies and some navies still contained elements of international ‘service’ mercenary nobility,⁴² standing armies prevailed across

³⁴ D. Held and A. McGrew et al (ed), *Global Transformations. Politics, Economics and Culture* (Cambridge: Polity, 1999), 41.

³⁵ See Kiernan, 16.

³⁶ Sepoys comes from the Persian word *sipahi*, meaning ‘soldier’; see Omissi, 3.

³⁷ Ibid.

³⁸ See Kiernan, 16.

³⁹ See Omissi, 48.

⁴⁰ See Spear, 191.

⁴¹ See Kiernan, 26.

⁴² Mann (1993), 420.

European nation-states and empires. However, there was one more little known — yet extraordinary — element to the East India Company army that puts in question its status as a public force. The Company's army was formed from the sepoy regiments and the Royal Army. Although controlled by a national command, the Company's European troops consisted of large non-national European numbers. In 1781, the British East India Company hired two Hanoverian regiments.⁴³ These German auxiliary troops were hired out by a prince to the British, amongst other imperial powers, under a subsidy treaty stipulating the number of troops, the term of service, the geographical area, and the missions they could be used for, in return for financial and political benefits.⁴⁴ The presence of auxiliary troops, although regulated, brings a mercenary facet to the composition of the East India Company army.

5. NORMATIVE ANGLE: WHY DID THE CROWN CHOOSE TO OUTSOURCE?

With the crystallisation of the concept of a nation-state, standing armies flourished and grew in strength and size. The new political relationship between citizens and state meant that citizens were perceived as representatives of their home country. As citizen armies became the new norm, states also began to pass neutrality laws, which prohibited their citizens' enlistment in foreign armies. The rise of this institution of neutrality was also driven by state rulers' interest in controlling their power over society.⁴⁵ In the latter half of the nineteenth century, according to Thompson, the great powers preferred to reserve the national population for their own uses, as the main military focus on the continent turned to building mass national armies.⁴⁶ For Barkawi, this combination of the institution of neutrality and the imperatives of nation-state building, on Thompson's account, meant that mercenarism declined as an institution.⁴⁷ According to Owens,

[T]he full import of the mobilisation of imperial soldiers by both trading companies and national armies, incredibly significant in terms of numbers and 'control' for nineteenth

⁴³ C. Tzoref-Ashkenazi, 'German Auxiliary Troops in British and Dutch East India Companies' in N. Arielli, and B. Collins (ed), *Transnational Soldiers: Foreign Military Enlistment in the Modern Era* (Basingstoke: Palgrave. Macmillan, 2013), 32–33.

⁴⁴ See Tzoref-Ashkenazi, 32; also see Kiernan, 16.

⁴⁵ See Singer, 31.

⁴⁶ J. E. Thompson, *Mercenaries, Pirates and Sovereigns. State-Building and Extraterritorial Violence in Early Modern Europe* (Chichester: Princeton University Press, 1994), 96.

⁴⁷ See Barkawi, 38.

century world politics, is passed over in a largely ‘normative’ explanations for the decline and delegitimisation of the ‘private military market’ in this period.⁴⁸

The same argument is actively promoted by Percy;⁴⁹ however, the example of the greatest imperial army questions the validity of this trend.

The context of colonial history alludes to a broader geo-political conditionality that played a significant role in the new military configuration. This conditionality arises from the availability of disposable cost-effective colonial resources. In addition, the brutal and legally dubious — nature of colonialism makes it problematic to consider the move away from mercenaries to be a norm driven by morality.

While national sovereignty⁵⁰ became an established notion in Europe, power and legitimacy of overseas empires could be instilled in other apparatuses than just the state. Empires followed a different logic whereby the state was not the sole institution that possessed military power and the tools of legitimacy. The East India Company is a vivid example where the main state functions had been outsourced to an offshore organisation that had little direction or constraint from the ruling governmental body at home. The East India Company ascended to power through trade, ingenious use of local resources, and the backing of the government at home. It established the rule of the British Empire through Company methods and carried it out through Company’s servants. It had discovered and secured the jewel that the Crown was long to cherish, yet not, in fact, control.

In the time when ‘war and the military were central to state leadership and foreign policy’,⁵¹ the British Empire was, in essence, outsourcing the sovereignty, administrative, and military authority to a trading organisation. Why did the British state not show any interest in assuming responsibility over the Indian territories?

Several explanations can be found. The British Parliament had little knowledge of India and the population and, while it may seem unimportant on the grand scheme of colonialism, it was exactly the knowledge and uninterrupted of the local culture that granted the Company its prevalent authority. To a great extent, the Company had a firm hold on the local infrastructures and was able to build connections that were fruitful not only for Company servants, but for the Empire as well. Hence, there was no advantage to interfering with the successful management of affairs of the

⁴⁸ See Owens, 27.

⁴⁹ S. Percy, *Mercenaries. The History of a Norm in International Relations* (Oxford: OUP, 2007), 121–122.

⁵⁰ Here meant also as territorial sovereignty.

⁵¹ M. Mann, *The Sources of Social Power: Volume 2, The Rise of Classes and Nation-States, 1760-1914*, (Cambridge: CUP, 1993), 413.

Company. At the same time, however, unceasing disapproval of the Company servants' behaviour suggested that urgent action was needed to regulate various aspects of British activity in India. 'To assist with this process, two committees of inquiry were established in the House of Commons to review the recent history and current state of the Company's affairs.'⁵²

On one hand, resistance from the Company was a significant obstacle to Crown's assertion of power and authority in India. Company servants were making fortunes of private arrangements with the local princes and merchants, and their reluctance to give it up to the British government was evident and robust. On the other hand, ministers in the Metropole wanted to avoid imperial responsibilities. The legal status of the Company's possessions had not been clarified, and while numerous assertions of the state's right to the Indian revenues had been made by ministers, these had not been supported in law or statute.⁵³

Negative perception of colonialism was another prominent norm and it had both political and ethical roots. For example, there was a strong reluctance from the British state to compromise its virtue. In addition, Armitage suggests that 'the attributed character of the Second British Empire – as an empire founded on military conquest, racial subjection, economic exploitation and territorial expansion – rendered it incompatible with metropolitan norms of liberty, equality and the rule of law, and demanded that the Empire be exoticised and further differentiated from domestic history.'⁵⁴ This logic supports the ethical vision as to why the governance and the military functions of the Crown were outsourced to a private company.

These elements contributed to the structure of colonial relationship that was handled at arm's length, removing direct responsibility from the Crown by creating a buffer of supposed legitimacy between the morally advanced Britain and the 'backward' colonial regime. The tactic of outsourcing military functions to a non-governmental body is something states use to this day in order to bypass the rules and sanctions of international law, therefore transforming the East India Company 'from an historical curiosity into a highly relevant case study.'⁵⁵

6. STATE MONOPOLY OF FORCE

Though there was little doubt that the British military had moved away from the use of foreign, private, or irregular forces, the Indian Army was often

⁵² See Bowen, 537.

⁵³ Ibid.

⁵⁴ D. Armitage, *The Ideological Origins of the British Empire* (Cambridge: CUP, 2000), 3.

⁵⁵ *The Economist*, 17 December 2011 at <http://www.economist.com/node/21541753>.

referred to as mercenary. Formed of colonial subjects and two German auxiliary regiments, the enlisted soldiers fought for pay—not to selflessly defend the Raj.⁵⁶

At what point does this disjointing take place? The two concepts, mercenaries and colonial army, were purposefully separated by the layers of imperial and Orientalist logic to manage British public opinion at home whilst successfully pursuing colonial goals abroad. This same approach is often deployed today by states using PMCs as part of their foreign policy.

We will now examine some of the key aspects of a nation-state in terms of customary international law in the context of contemporary world order. To what extent does the description fit the reality? Does the international legal system that was built on the premise of such states continue to serve a good purpose? To narrow this question, we focus on the notions of state responsibility, the decline of Westphalian sovereignty and dilution of state power by the new emerging non-state actors, all in the context of the use of force.

According to Max Weber, ‘a society is organised as a state where there is a successful monopolisation of the exercise of legitimate violence. ‘The State’ is simply whatever agency it is that discharges that function.’⁵⁷ While there is no doubt that the British Empire was a fully formed State in Weberian terms, the Crown did not hold the monopoly of violence. The governmental construct of British India was a classic case of what has been called ‘sub-imperialism’, that is, of the dominance of local interests over metropolitan ones.⁵⁸ The source of authority was determined by men actually in India, as opposed to Company directors in London, or even more so, the Parliament. This is a question of responsibility.

7. STATE RESPONSIBILITY

Should these colonial troops be considered a public force or a private force outsourced by the Empire? Either choice opens a debate on accountability and ownership of the military force. Quasi-state-owned, these troops existed under the imperial rule and the extended sovereign capacity of the hegemon. The empire had broadened the scope of its power to incorporate new territories and the resources that came with it. The British Empire could, therefore, be perceived to have retained the formal control of the use of force within the

⁵⁶ See Omissi, 47.

⁵⁷ R. Geuss, *History and Illusion in Politics* (Cambridge: CUP, 2001), 15.

⁵⁸ See Marshall, 498–499.

territory.⁵⁹ Under such interpretation, the modern state can also be said to retain formal control of the use of force, as it can allow military and security firms to operate from its territory and mobilise them to pursue own ends.⁶⁰

However, accountability lies with the Company for two key reasons. India was ruled directly by a small number of Company's servants heavily reliant on the local political and administrative structures and a locally raised Indian army. It was also controlled indirectly, through Indian princes, treaties, troops and resident advisers (the source of *de facto* authority). In effect, until the sovereign power was officially transferred to the Crown in 1858, the British Indian army, alongside the administration of the British India itself was fully governed by a private company.

Unfortunately, Weber's definition makes no distinctions between 'public' and 'private' violence, leaving it open for states to interpret the boundaries of legitimacy. Equally, these notions have evolved over time, and the divide between public and private is a modern phenomenon that has taken on a variety of meanings.⁶¹ Commonly associated with the state and centralised governmental remit, 'public', in a military context, ought to represent the force that is controlled by the sovereign. What if the sovereign chooses to use 'a mostly foreign and private force for one purpose (CIA covert operations), a foreign and public force (colonial armies, foreign legions), and a domestic and private one for yet some other (US private contractors in Iraq)'⁶²? Another basic feature of the notion of a public monopoly of force is the assumption that only citizens can form the armed forces, with the citizenship rules governed by each individual state. However countries like the US, the UK and France have legal mechanisms that enable foreign citizens to serve in their militaries.⁶³ Are states in a position to choose different configurations based on cost, resource availability, and other factors, as long as there is appropriate control mechanism in place for their responsibility to be invoked?

The mere fact that a state conducts its policies through proxies should not render international law inapplicable.⁶⁴ The rationale behind the attribution of authority, codified in International Law Commission Article 8⁶⁵, is to ensure

⁵⁹ N. White and S. MacLeod, 'EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility' (2008) 19 (5) *The European Journal of International Law* 969.

⁶⁰ See Owens, 27.

⁶¹ See Avant, 23.

⁶² See Barkawi, 50–51.

⁶³ *Ibid.*, 47.

⁶⁴ C. Lehnard, 'Private Military Companies and State Responsibility' in Chesterman and Lehnard (eds), 143–144.

⁶⁵ ILC Article 8, Conduct directed or controlled by a State: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.

that a state does not evade its responsibility by transferring its functions to a private entity. Whether one accepts the view that states retain the monopoly of force today, or that the privatisation of violence is challenging that monopoly, much of the current debate is constrained by a Eurocentric image of the territorial state in which force is organised behind the sovereign borders.⁶⁶

7.1. Decline of Sovereignty

By its nature, private force upsets conventional understandings of state monopoly of force. This theory is a prerequisite for a nation-state, which arguably has been slowly eroding since the end of the Cold War.⁶⁷ In practice, contemporary manifestation of a state monopoly of force is also limited, as we see PMCs being widely used both for humanitarian and belligerent goals. Furthermore, the decline of the Westphalian notion of state sovereignty must be taken into account when looking for an appropriate function for private force in conflict resolution and post-conflict reconstruction.

According to White and MacLeod, the traditional Westphalian narrative of states as the sole subjects of international law prevails, rendering corporations ostensibly devoid of international legal constraint.⁶⁸ But does the Westphalian nation-state construct prevail? Looking back at history, a wide range of differing governmental constructs can be identified, the nation-state being only one of many. Perhaps it is worth a critical examination of the contemporary state system and comparing it to the definition and practice of what the nation-state stood for in its origins. Perhaps the state system we have today has moved along and transformed into a new format, whereby states are no longer strictly bound by borders (e.g., Shengen, EU, Commonwealth, CIS), but rather grouped by economic and political interests, happy to trade in a portion of their sovereignty in exchange for another kind of security. So, is it possible that the conservative view of international law no longer fits this new form of governance and the idea of state monopoly of violence becomes more diluted amongst the actors who have access to security recourses?

⁶⁶ F. Halliday, *Rethinking International Relations* (Vancouver: University of British Columbia Press, 1994), 78–79.

⁶⁷ S. McFate, *The Modern Mercenary. Private Armies and what they mean for the World Order* (Oxford: OUP, 2014), 74.

⁶⁸ See White and MacLeod, 968.

7.2. Dilution of State Control

State monopoly of force is one of the widely accepted Weberian concepts that helps to define the boundaries of legitimate violence. Further to the narrative of public and private violence, there is an important feature to the contemporary monopoly of power — it no longer belongs to states alone. While it is true that states continue to be the main owners and users of military power, the growing number of operational⁶⁹ and advocacy⁷⁰ NGOs, multinational corporations⁷¹ and global political players such as the UN and NATO, has changed the political and legal dynamic by adding new actors to the international arena. It is important also to mention terrorist organisations, who, not only claim authority, but also change the political landscape by resorting to asymmetric warfare. This is yet another non-state actor that controls the means of power and violence, typically in parallel to a formal government.⁷²

‘In coping with the changing role of the PMCs, at least in the short term, a repositioning of the public-private parameters that determine state responsibility for private conduct might be the most viable solution.’⁷³ The changing role of PMCs cannot be viewed in isolation. The exponential growth of private military activity is directly linked to the current globalised state system. Whether failing or co-dependent, states no longer uphold the same extent of sovereignty as they did throughout the most part of the twentieth century. Moreover, they are overarched by global legal and political institutions and undercut by multinational corporations, shifting states further from the Westphalian concept of monolithic entity that comprises all governmental functions behind the sovereign borders. To that end Sean McFate speaks of Neomedievalism⁷⁴, a term coined by Hedley Bull. Neomedievalism suggests an alternative to a Westphalian state system that is characterised by technological unification of the world, the regional integration of states, the rise of transnational organisations, the disintegration of states, and the restoration of private international violence.⁷⁵ All of these elements suggest a shift from a Westphalian state system and highlight the decline of territorial sovereignty.

⁶⁹ For example, Medecins sans Frontieres, Oxfam and the Red Cross; see McFate, 79–80.

⁷⁰ Advocacy NGOs that hired PMCs include, but are not limited to: Save the Children, CARE, CARITAS, GOAL, IRC, and Worldvision. McFate, *Supra*, 80.

⁷¹ Such as ExxonMobil and Walmart.

⁷² More on the new actors on the international arena see McFate, 77–89.

⁷³ See Lehnard, 156.

⁷⁴ Neomedievalism is a metaphor loosely based on the world order of the European high Middle Ages, but it does not portend a literal return to the medieval period. An alternative to the Westphalian system researched by Philip Cerny, Mark Duffield, Jorg Friedrichs, Stephen Kobrin and others.

⁷⁵ See McFate, 75.

Finally, the growing presence of the private military industry today indicates that the market for force is shifting, marking a decline of state monopoly of force.

8. NOTIONS OF PUBLIC AND PRIVATE

With some of the power and legitimacy elements considered on the side of the state, we turn to the military aspect to scrutinise the notions of private and public violence. In the absence of clear regulation, the line between public and private tend to be blurred. The example of the British Indian army is a testament to this ongoing issue.

Colonial armies fostered the spread of the empires and made their existence sustainable, providing a legitimate and accessible substitute for foreign mercenaries. While the Western hemisphere was consciously building national armies and moving away from mercenaries, colonial troops could easily be deployed due to an existent legal loophole. The areas where charter companies took on military functions fell outside the established order of the European state system.⁷⁶

A similar issue arises today with PMCs operating in an environment regulated by a number of international and domestic legal provisions, often incomplete and conflicting. Several international organisations have attempted to bring clarity and order into the complex and fast evolving realm of international security. To this point, according to the Global Policy Forum, UN efforts to regulate the private security industry have been largely inadequate, mainly because the nations that are most likely to use PMCs have not ratified the Convention.⁷⁷ A tragic example that demonstrates this was the genocide in Rwanda. Executive Outcomes approached Kofi Annan at the outbreak of Rwandan atrocities in 1994. Ironically, the UN was firmly set against using a private military company to address the crisis. The inability mobilise public forces in a timely manner, and the reluctance to defer to a PMC resulted in over 800,000 casualties, which exceeds the combined number of victims in Iraq and Afghanistan.⁷⁸

Even when international law tries to accommodate the changing world order, its power of enforcement is conditional. It can only be applied if the states subscribe to regulation. An evolving exception to this rule is the

⁷⁶ See Singer, 35.

⁷⁷ Global Policy Forum, PMSCs & the UN at <<https://www.globalpolicy.org/pmscs/50225-pmscs-a-the-un.html>>.

⁷⁸ See McFate, 38.

International Criminal Court that, in some cases, may investigate and try citizens of states that have not signed and ratified the Rome Statute.⁷⁹

Doswald-Beck argues that the most significant change from the 1949 Geneva Convention, applicable to the use of mercenaries, is the blurring of the lines between the regular armed forces and other armed groups.⁸⁰ While Protocol Additional I to the Fourth Geneva Convention of 1977 provides the most widely accepted international definition of a mercenary⁸¹, some states have not endorsed it and are instead governed by the previous Convention where the definition of combatant, and therefore prisoner of war, is more inclusive.

For example, the United States is not party to Protocol Additional I and is bound by a combatant and prisoner of war requirements outlined in the Third Geneva Convention, allowing for private troops to be considered combatants. To a certain extent, states can pick and choose their participation in the Conventions depending on the criteria, therefore leaving enough room for political interpretation to execute operations like Blackwater.

‘Some forms of violence are *made* public and others are *made* private through historically varying ways of organising and justifying force.’⁸² The lack of coherent international regulation and codification of private military forces creates room for interpretation for those upholding power and legitimacy. Furthermore, in the absence of a clear and widely accepted separation between public and private violence, and, if the nuances of private violence are not explicitly codified, powerful states can bend the rules of interpretation to their advantage on a case by case basis.

During the Coalition Provisional Authority (CPA) administration in Iraq,⁸³ a legal framework was established stipulating the regulation of PMC activities:

‘In accordance with international law, the CPA, Coalition Forces and the military and civil personnel accompanying them, are not subjects to local law or the jurisdiction of local courts. With regard to criminal, civil, administrative or other

⁷⁹ Ibid., 78; on ICC jurisdiction over citizens of non-parties see J. Elsea, *International Criminal Court: Overview and Selected Legal Issues* (Congressional Research Service, 2002), 25–26.

⁸⁰ L. Doswald-Beck, ‘PMCs under International Humanitarian Law’ in Chesterman and Lehnard, 120.

⁸¹ The Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts, Protocol I, Article 47, June 1977; Some countries, including the United States do not support The Protocol.

⁸² See Owens, 32.

⁸³ 21 April 2003 – 28 June 2004.

legal process, they will remain subject to the exclusive jurisdiction of the State contributing them to the Coalition.’⁸⁴

The reference to international law does not seem to bear any judicial or practical meaning as it was not mentioned at all during the proceedings of the Blackwater Trial,⁸⁵ making a clear statement about the civilian status of PMC contractors and disabling the vehicle of International Humanitarian Law. Such legal configuration puts the blame on the company and the contractors, entirely bypassing international law and leaving the hiring state free from responsibility.

Another attempt for regulation of the PMCs has been put forward by the International Committee of the Red Cross. At the fourth meeting on the ‘Swiss Initiative’ in September 2008, the Montreux Document was finalised and adopted by consensus of the participating governments.⁸⁶ The Montreux Document is an intergovernmental document intended to promote respect for international humanitarian law and human rights law whenever PMCs are present in armed conflicts.⁸⁷ While insisting that PMCs do not operate in a legal vacuum, the Montreux Document seeks no binding authority from the participating states or the non-state actors using the private security services. It elaborates on different agreements (interstate, belonging to international organisations, national laws, etc.⁸⁸) that stipulate state behaviour in relation to the PMCs. The issue arises from the lack of clarity on the legal prevalence in the private security sector. As most international legal regulations function in conjunction with one another, the lack of clear legal guidance on this matter is nothing novel. What is of interest, however, is the state-oriented approach to a network-based private field of activity.

The multitude of regulations creates a ‘legal vacuum’⁸⁹ as well as hinders standardisation of the sector. Many of these companies are no longer mercenaries in legal terms; they are registered and operating openly under a certain license. However, the remit of their legitimate activities is still under question and the liability issue remains unresolved.

⁸⁴ Office of the Administrator of the Coalition Provisional Authority Baghdad, Iraq; Public Notice regarding the Status of Coalition, Foreign Liaison and Contractor Personnel, 26 June 2003.

⁸⁵ J. Stewart, ‘Inside the Blackwater Trial,’ Conference paper presented at the Institute for Global Law and Policy, Harvard Law School, June 2015.

⁸⁶ Federal Department of Foreign Affairs, Section for International Humanitarian Law at <http://www.eda.admin.ch/psc>

⁸⁷ The Montreux Document, 31.

⁸⁸ Ibid., 20, 24.

⁸⁹ T. Catan, ‘Private Armies March into a Legal Vacuum’, *Financial Times*, 10 February 2005; P. W. Singer, ‘War, Profits and the Vacuum of Law: Privatized military Firms and International Law’ (2004) 42 (2) *Columbia Journal of Transnational Law*, 521–550.

9. THE IMPORTANCE OF CODIFICATION

The term ‘mercenary’ has been used to describe everything from individuals killing for hire, to troops raised by one country working for another, to private security companies (PSC) providing military services to their own country.⁹⁰

Looking at historical examples of nation-states and empires, a shift away from mercenaries cannot be viewed in isolation from the terminology that differentiates the nuances of various types of military power.

For example, some historical accounts⁹¹ view the use of colonial armies merely as the sovereign’s choice of military power. However, a deeper differentiation between ‘public’ and ‘private’ challenges such a view. While Britain may have ceased hiring private mercenary companies for its own national army after the Crimean War⁹², it fielded hundreds of thousands of foreign soldiers before and after 1854 in the form of colonial armies⁹³ (not forgetting the recruitment of German auxiliary troops who acted as part of the royal army). So, in reality there may not have been a conscious shift away from the use of mercenary or private forces; the lack of regulation and the novelty of colonial armies was a lucrative ground for raising a cost-effective mass army through the legitimate use of non-national forces.

Contemporary private military forces fall into a similar category, as the lack of comprehensive regulation and clear codification makes it impossible for PMCs to operate without facing significant criticism, often being labelled immoral and illegitimate. ‘Unless a regulatory framework places home states PMCs under the same level of scrutiny – both in the public eye and in government – as national soldiers, then those companies can still be criticised for threatening citizens’ control over the use of force.’⁹⁴

The only reasonable argument as to why they may not be breaking international law is simply because PMCs are not currently defined or bound by it. ‘The difficulty is that moral objections to private force reveal there are very clear lines of descent from mercenaries through the PMCs and to the private security companies of today. While PMCs can, and have, worked hard to avoid the ethical objections about killing for money, they run into the same objections about tyranny as their predecessors.’⁹⁵ Although mercenaries are defined in the Geneva Conventions, there is no specific mention of PMCs in International Humanitarian Law treaties or in the customary international law.

The distinction between individuals acting as mercenaries and those working for companies under a certain contractual obligation is important for

⁹⁰ See Avant, 22.

⁹¹ See Fieldhouse, *supra*, and Kiernan, *supra*, and White and MacLeod, *supra*.

⁹² See Percy, 148.

⁹³ See Barkawi, 40.

⁹⁴ S. Percy, ‘Morality and Regulation’ in Chesterman and Lehnard, 27.

⁹⁵ *Ibid.*, 28.

attributing responsibility and defining legality. If an individual (or a group of individuals) chooses to resort to belligerent activities without an overarching authority of a state (national army, police) or a licensed company (PMC), and those activities are not conducted in self-defence or in the context of civil war, this individual ought to be classified as a mercenary and his activities should be deemed illegal under national and international laws (international humanitarian law, human rights law, international criminal law).

While the purpose of this article is not to define the boundaries of legality of non-state military actors, it draws upon historical example of colonial armies in order to demonstrate the criticality of making those distinctions.

Similar to current peacekeeping operations fielding the multitude of resources supplied by private military and security companies, British colonialism in India provided context for a new, unclassified type of military force. Thompson calls it 'extraterritorial violence',⁹⁶ referring to foreign military manpower, as well as the existence of private military forces of various kinds such as those employed by the great trading companies of the early period of European expansion.

10. CONCLUSION

To conclude, private security takes various forms. Whether it is a colonial power, auxiliary troops incorporated into a state army, or a private military company of today — all of these are a deviation from the norm that needs a certain legal context in order to exist and to be used properly. It is not enough to say that PMCs are unethical and should be banned. Rather, an industry worth over \$100 billion a year⁹⁷ should not remain unregulated. An adequate separation between legitimate and criminal initiatives must be established.

My unique analysis of British colonial activities illustrates the legal gaps in classification and organisation of military power. On one hand, it mirrors contemporary state behaviours in their attempts to bypass the law through outsourcing the military functions to a non-state organisation. On the other, it highlights the importance of codification of undefined military forces today. Breaking through the customary notions of 'public' and 'private' helps to reveal the private military sector as an inherent form of force used by states throughout history rather than a new phenomenon. While the institutionalisation of the national army created a strong rationale against the use of mercenaries and foreign legions, marking their normative decline and delegitimisation, colonial ambitions introduced European powers to a brand

⁹⁶ See Thompson, 37.

⁹⁷ B. Yeoman, 'Soldiers of Good Fortune' (2003) *Mother Jones* at <<http://www.motherjones.com/politics/2003/05/soldiers-good-fortune>>.

new pool of unclassified military resources. Neither mercenary nor national, these forces formed an integral part of colonial armies, highlighting the differentiation between public and private in a military context. as a legal and normative paradox, this is one historical example that demonstrates states' methods of removing responsibility in the pursuit of their sovereign needs.

There are without a doubt numerous hurdles to overcome on a national and international level to implement a viable regulatory structure. In recent years the UN General Assembly Working Group on the use of mercenaries has been following the development of the Policy and Operations Manual on the use of armed services from private security companies. Furthermore, the Working Group is engaging with the Department of Safety and Security in order to contribute to the development of a coherent, human rights-compliant policy framework for the procurement and use of armed private security companies by the United Nations organs and bodies.⁹⁸ Despite all efforts however, currently neither the UN Human Rights Council nor the General Assembly distinguishes between mercenaries, PMCs and PSCs, hindering international community's ability to formulate the norms.

While the diffusion of state control poses significant challenges to the regulation of PMCs, it also demonstrates the need for such regulation. Looking back through history, the only types of governance that achieved successful monopoly of public violence were those entirely powered by, and engrossed in, state militarism. Perhaps in our contemporary international state system, private forces would naturally find room to exist? In the political and legal context of declining state sovereignty and with the rise and active participation of non-state actors, private military companies are thriving and expanding their clientele from states to international corporations.

Finally, appropriate codification under international law, and increased state responsibility, would allow for effective regulation of the private security sector. This would leave only legitimate players in the market and draw a clear line, for both states and individuals, under the rules of employing mercenaries.

⁹⁸ A/HRC/24/45, para. 11, 4–5.