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The use of private military and security companies in international society: contestation and legitimation of state practice

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**The use of Private Military and Security Companies
in International Society:**

Contestation and Legitimation of State Practice

Daniel Matteo

A thesis submitted in partial fulfilment of the
requirements of the University of Westminster
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Abstract

The objective of this dissertation is to understand *how the legitimacy of the state's international use of PMSCs is evolving in contemporary international society*. The first part of the dissertation develops an analytical framework that combines theoretical propositions of the English School and the 'German' constructivist strand with a reflective-analyticist philosophical ontology and with content and discourse analytical methods. The empirical part of the dissertation provides an overview of contemporary state practice, investigates how international society has responded to state practice in the UN Security Council and UN General Assembly, and finally analyses the roles of members of world society in creating and shaping this discourse.

The empirical analysis points to two major driving forces behind the increased legitimation of the practice. First, the recursive relationship between behaviour and norms means that widespread use of PMSCs reinforces legitimacy. Second, normative shifts in international society have contributed to the legitimation of the practice. On the one hand, norms that are in tension with an expanded PMSC use have become weaker or sidelined, if still strongly supported by some actors: this is the anti-mercenary norm, and particular understandings of self-determination and the monopoly on the legitimate use of force. On the other hand, and partly linked to the weakening of the latter norms, human rights have gained strength as legitimacy principles. In the contestation over the state use of PMSCs, conflicting moves toward legitimation and delegitimation do not cancel each other out. Rather, structural and more immediate factors put strategic efforts and inadvertent moves of legitimation at an advantage while at the same time marginalizing calls for a reduction or prohibition of the state practice. I examine not only how human rights contribute to the legitimation of the practice, but also why and how actors that seek to limit, contain, or reverse the state practice have increasingly lost ground.

Overall, the dissertation contributes to empirical research by substantiating claims of an increased legitimation of PMSC use. It also contributes to the broader IR discipline by proposing a change in perspective: away from an atomistic focus on norms to a more holistic study of legitimacy and legitimation. The resulting framework is particularly fruitful for the analysis of other controversial issues of international relations.

List of Contents

List of figures	v
Acknowledgements	vi
Author's Declaration	vii
Abbreviations	viii
Chapter 1: Introduction	1
Relevance	4
Contribution to research	6
Structure	8
PART I: Framework for Analysis	11
Chapter 2: PMSCs, mercenaries and an atomistic approach to society	11
PMCs, PSCs, PMSCs – or mercenaries?	11
Limitations of the PMSC literature	18
Norms everywhere – but how do they hang together?	20
The anti-mercenary norm and the legitimacy of PMSC use	23
The concept of legitimacy in the PMSC literature	27
Conclusion	29
Chapter 3: Linking norms and legitimacy: the process of legitimation	31
A constructivist understanding of norms	33
Justification and condemnation of behaviour – and behaviour itself	36
Helping constructivists break out of their ‘atomistic’ approach to society	38
Distinguishing norms from legitimacy	42
The English School and the process of legitimation	47
The role of actors in legitimation	47
Legitimacy beyond the state – international and world society	50
‘German’ IR constructivism and the role of communication	54
Conclusion	58
Chapter 4: Reflective analyticism and a multi-method approach	61
Taking a step back to meta-theory	62
‘Who needs philosophy of science, anyway?’	62
Analyticism	64
A reflective analyticism?	67
Methods, case selection and sources	71
Three strands of empirical legitimacy research	71
A multi-method approach	74
Chapter 5 – illustrative case studies and quantitative data	75
Chapter 6 – International society and the UN	75
Content analysis	78
Chapters 7 and 8 – World society: the ICRC, the UNWG, NGOs and PMSC advocates	80
Discourse analysis	82
Qualitative Interviews	84
Conclusion	84
PART II: Empirical Analysis	85
Chapter 5: The expansion of PMSC use and its implications for legitimacy	85
From mercenaries to the citizen army	86
From ‘soldiers of fortune’ to ‘corporate mercenaries’	92
The expansion of PMSC use in the post-Cold War era	99
Iraq and Afghanistan – a booming industry, the superpower and implications for legitimacy	101
Beyond the US – a global state practice and the role of domestic norms	111

<i>Conclusion</i>	114
Chapter 6: Responses from International Society: Condemnation, justification, or silence?	117
Silence on a widespread state practice?	118
Evaluation: From condemnation of mercenaries to regulation of PMSCs	123
Justification: From self-determination to human rights	129
The rise of human rights: side-lining and weakening other norms	133
Human rights, self-determination, and the anti-mercenary norm	135
Sovereignty in domestic legitimacy discourse	141
Conclusion	143
Chapter 7: The ICRC and the UN Working Group on Mercenaries: Creating and shaping the practice of legitimacy	148
The ICRC, the Montreux Document and the International Code of Conduct	149
Neutrality and not taking a stance on PMSC legitimacy	150
Acknowledging ‘reality’	152
Clarifying the legality of PMSC use	153
Weakening the ‘control objection’ of the anti-mercenary norm	155
Separating PMSC use from mercenarism	156
The ICRC – the unintentional legitimacy entrepreneur	158
The UN Working Group and the UN Draft Convention on PMSCs	161
Condemning PMSC use	162
Linking PMSC use and mercenarism	163
The UN Draft Convention – prohibiting certain PMSC services	169
The West against the ‘rest’? Active opposition meets passive support	175
Conclusion	177
Chapter 8: World Society and the use of PMSCs: Participating in the practice of legitimacy	180
NGOs: adversaries or partners of the industry?	181
Human Rights First: constructive dialogue or unintentional legitimation?	181
Control PMSC	186
PMSCs: Seeking legitimacy	192
Supporting regulation and dodging the ‘mercenary’ label	192
The strategy of ‘humanitarian entrapment’	194
Conclusion	201
Chapter 9: Conclusion	204
Findings	204
Suggestions for future research	208
Critical evaluation of current state practice and its legitimation	209
Bibliography	213
Appendix	258

List of figures

<i>Figure 1: Hierarchical relationship between legitimacy and norms as conceptualized by Ian Clark (2005).....</i>	<i>46</i>
<i>Figure 2. Patrick T. Jackson's (2011: 37) typology of philosophical-ontological commitments in International Relations</i>	<i>64</i>
<i>Figure 3. Analytical framework: drawing on three literatures.....</i>	<i>74</i>
<i>Figure 4. Ratio of civilians to soldiers in US military deployments.....</i>	<i>101</i>
<i>Figure 5. Number of PMSC personnel (total and security services) working for the US in Iraq and Afghanistan</i>	<i>105</i>
<i>Figure 6. Number of US troops and contractors in Iraq and Afghanistan.....</i>	<i>106</i>
<i>Figure 7. Relationship between PMSC use and legitimacy, and the role of the domestic level ...</i>	<i>116</i>
<i>Figure 8. Number of UN Security Council and UN General Assembly resolutions on PMSCs and mercenaries.....</i>	<i>119</i>
<i>Figure 9. The anti-mercenary norm, self-determination and the legitimacy of PMSC use</i>	<i>138</i>
<i>Figure 10. Tension between external self-determination/non-interference and human rights.....</i>	<i>140</i>
<i>Figure 11. Relationship between sovereignty, non-interference and the monopoly of force</i>	<i>141</i>
<i>Figure 12. Web of norms</i>	<i>146</i>

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Author's Declaration

I declare that all the material contained in this thesis is my own work.

82,824 words

Abbreviations

BRS	Brown & Root Services
EDA	Eidgenössisches Departement für auswärtige Angelegenheiten
EU	European Union
HRF	Human Rights First
ICoC	International Code of Conduct for Private Security Service Providers
ICRC	International Committee of the Red Cross
IPOA	International Peace Operations Association
ISOA	International Stability Operations Association
LOGCAP	Logistics Civil Augmentation Program
MPRI	Military Professional Resources Inc.
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organisation
PMC	Private Military Company
PMSC	Private Military and Security Company
PSC	Private Security Company
R2P	Responsibility to Protect
RUF	Revolutionary United Front
SIPRI	Stockholm International Peace Research Institute
OHCHR	Office of the High Commissioner for Human Rights
UK	United Kingdom
UN	United Nations
UNDoSS	United Nations Department of Safety and Security
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNWG	United Nations 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
US	United States
USCBO	United States Congressional Budget Office
USCENTCOM	United States Central Command
USDoD	United States Department of Defense
USDoS	United States Department of State
USGAO	United States Government Accountability Office

Chapter 1: Introduction

International society experienced profound changes in the security environment after the end of the Cold War. The threat of great power warfare declined, attention shifted away from the East-West confrontation to North-South interactions, and bipolarity was replaced by competing logics of US hegemony and multipolarity (Dannreuther 2013). Far from spelling the end of warfare, armed conflict remained an enduring feature of international relations in the post-Cold War era. But rather than understanding war as a ‘contest of wills’ between states, the ‘new wars’ of contemporary international society challenged a classical Clausewitzian view of war by blurring the lines between state and non-state actors, between the ‘private’ and ‘public’ as well as between the ‘external’ and ‘internal’ (Kaldor 2013).

In the midst of these broader developments, the last two decades witnessed the remarkable rise of Private Military and Security Companies (PMSCs). State and non-state actors all over the world are now making widespread use of PMSCs for a variety of services, from the rather mundane running of canteens for deployed military forces to the armed protection of people and property in conflict zones. From its beginnings in the early 1990s to the boom in Afghanistan and Iraq, and beyond: the international use of PMSCs evoked memories of mercenarism, a practice thought to be overcome long ago. In 1994, a pre-eminent scholar on mercenarism asserted that

“the twentieth century has ushered in another stage in which these practices [the use of private force by states; D.M.] are not only prohibited but have become unthinkable. The institutionalised prohibitions against them are taken for granted. Though this cannot be ‘proven’, it would be difficult to imagine that some practices, which were common in the eighteenth century, could be revived today” (Thomson 1994: 146).

As she was writing these words, in 1993 the Angolan government hired Executive Outcomes, a South-African PMSC, to provide combat-support in the fight against rebels who had already taken a large part of the country under their control. One year later, the same company was hired by the government of Sierra Leone that was at the brink of being toppled by the ‘Revolutionary United Front’, a rebel army notorious for the use of child soldiers and responsible for murder, rape and mutilations. These and other cases of

PMSC use in the 1990s already cast doubt on Thomson's assertion. At least since the beginning of the new millennium, in particular with the boom of PMSC services in Afghanistan and Iraq, Thomson's argument can now be seriously challenged. The 'unthinkable' has become commonplace (Avant 2005: 30).

Though commonplace, the international state use of PMSCs remains controversial and contested. PMSCs are accused of human rights violations, of undermining state sovereignty and the democratic control of force. They are portrayed as violent, unrestrained and as the new, corporate version, of 'mercenaries'. For these reasons and others, critics argue, states should discontinue, or at least limit, outsourcing security, which some deem an 'inherently governmental' function. At the same time, widespread use as well as regulation of PMSCs suggests to many, and not only to industry advocates, that the practice is not only legal but also legitimate. In the face of widespread state practice, and its contestation and legitimation, the objective of this dissertation is to understand *how the legitimacy of the state's international use of PMSCs is evolving in contemporary international society*.

I argue that, while contested, there is an increased legitimation of the practice in international society: states increasingly view PMSC use as acceptable state conduct, while strategic efforts and inadvertent moves to legitimate the practice win out over its contestations. There are two major driving forces behind the increased legitimation of states' international use of PMSCs. First, there is the very fact that states have made increasing use of PMSCs: from Angola and Sierra Leone to Iraq and Afghanistan and beyond. Constructivists point out that there is a recursive relationship between behaviour and norms. As such, the widespread state use of PMSCs undermines the proscriptive anti-mercenary norm, and thereby attenuates the norm's negative effect on the legitimacy of PMSC use. Second, normative shifts in international society have contributed to the legitimation of the practice. On the one hand, norms that are in tension with an expanded PMSC use have become weaker or sidelined, if still strongly supported by some actors: this is the anti-mercenary norm, and particular understandings of self-determination and the monopoly on the legitimate use of force¹. On the other hand, and partly linked to the weakening of the latter norms, human rights have gained strength as legitimacy principles.

¹ Henceforth, 'monopoly of force'; the concept will be elaborated in subsequent chapters.

I argue that human rights have pushed state and non-state actors alike towards regulation rather than prohibition of PMSCs. This focus on potentially improving the human rights situation has increasingly marginalized more far-reaching demands to prohibit or significantly curtail the use of PMSCs. The outcome is that the emphasis on regulation effectively normalizes PMSC use as ‘reality’, confirms the legality of the practice, reaffirms state responsibility for the practice, and sharpens the distinction between ‘mercenaries’ and ‘PMSCs’. In addition to their role in establishing regulation as the key tool for managing PMSCs, human rights serve as justification for the expanded use of PMSCs. In particular, industry advocates are utilising the norm in what might be called a strategy of rhetorical entrapment. This involves highlighting the gap between states’ rhetorical commitment to human rights and their inaction in the face of humanitarian emergencies, and seeks to exploit the ‘humanitarian trap’ by suggesting PMSC use as a means to close the gap and uphold human rights. In the contest over the legitimacy of PMSC use, human rights inadvertently contribute to the legitimation of state practice while also empowering the powerful rather than the weak.

Moreover, in the contestation over the state use of PMSCs, conflicting moves toward legitimation and delegitimation do not cancel each other out. Rather, structural and more immediate factors put legitimation moves at an advantage while at the same time marginalizing calls for a reduction or prohibition of the state practice. I examine not only how human rights contribute to the legitimation of the practice, but also why and how actors that seek to limit, contain, or reverse the state practice have increasingly lost ground. Not only do calls for a limitation of state practice run counter to state interests. Critics of PMSC use also base their strategies of delegitimation on norms that have been weakened or sidelined by human rights: the anti-mercenary norm, external self-determination and a republican understanding of the monopoly of force. On the other hand, inadvertent and purposeful moves to legitimise the practice are based on stronger humanitarian concerns and human rights, while also being underpinned by and in line with the trend in state conduct. Finally, efforts to delegitimise PMSC use also have the drawback that they are not embedded in a broad and powerful coalition of state and non-state actors that could effectively curtail contemporary state practice. World society is split on the issue of PMSC use. The surprising result is that supposedly neutral actors like the *International Committee of the Red Cross* (ICRC) and pro-regulation NGOs like

Human Rights First find themselves on one side with PMSC-contracting states as well as PMSC advocates in their roles in legitimising PMSC use.

This project is situated in the International Relations (IR) discipline, and is interested in the normative status of a state practice. The notion that normativity matters in the interaction between states has been the central assertion of social constructivists. It has pitted them against the ‘neo-neo-synthesis’ (Wæver 1996) of neo-realists and neo-liberals. For the latter approaches, international relations are largely determined by material factors – norms play a minor role, at best explaining the residue left over from materialist accounts. This position came under attack from constructivists in the 1990s; but ideas and norms have played a role in earlier accounts, notably in the English School tradition of IR. So this dissertation is concerned with rightful state conduct as it relates to the use of force. In terms of the research subject it is, thus, similar to constructivist work on the chemical and nuclear weapons taboo (Price and Tannenwald 1996), a norm against international assassination (Thomas 2000), or the ban of anti-personnel landmines (Price 1998). What this work has in common is to acknowledge that normative concerns can and often do play a role in the field of security; the use of force is regulated by law or social norms, and does not necessarily suggest the breakdown into a Hobbesian state of nature. Furthermore, constructivists are not necessarily engaged in normative debates on how states *should* behave; empirical analysis can be separated from a normative or transformative position on the issue. Finally, as Finnemore (1996a: 32) has said, there is “nothing inherently ‘good’ about social norms”. What international society regarded as legitimate at one point in time is considered illegitimate today, and ‘good’ norms can inadvertently legitimise a practice that some deem illegitimate.

Relevance

The objective of the dissertation – understanding how the legitimacy of a state practice is evolving – suggests that it is worthwhile studying legitimacy in the first place. In fact, many important effects have been attributed to legitimacy, so much so that legitimacy has been called “the master question of politics” (Crick 1993 [1962]: 150) and “the central issue in social and political theory” (Beetham 1991:41).

The relationship between legitimacy and power in particular is an age-old theme – from Thucydides’ *Melian Dialogue* to Plato’s *Republic* and Aristotle’s *Politics* the question of what makes might right has been a key concern (Zelditch 2001: 34). More recently, it has been epitomised in the title of Beetham’s (1991) *The Legitimation of Power*, Wight (1991: 99) observed that the “fundamental problem of politics is the justification of power”, and in his prominent article on legitimacy Claude (1966: 368) asserts that legitimacy “not only makes most rulers more comfortable [in exerting power; D.M.] but makes all rulers more effective – more secure in the possession of power and more successful in its exercise”. Similarly, Wheeler (2000: 4) sees legitimacy as constraining or enabling state power. A neo-conservative commentator has argued that gaining legitimacy would be as important as power defined in a material sense (Kagan 2004). Especially when it comes to the use of force, legitimacy becomes important. Actors who contemplate the use of force need to consider the legitimacy of their action, if they want to achieve a goal that goes beyond mere physical destruction (Hurrell 2005).

A link has also been established between legitimacy and order, with scholars as diverse as Machiavelli, Marx, Gramsci and Habermas assuming that “a façade of legitimacy is a functional prerequisite of a stable social order” (Zelditch 2001: 47). In the absence of legitimacy, governments would need to rely on coercive methods, but this would strain resources and prove ineffective in ensuring rule in the long-term, in short legitimacy leads to “[e]nhanced order, stability, [and; D.M.] effectiveness” (Beetham 1991: 33). The stability argument has usually been made in the domestic context (Leibfried and Zürn 2005), but it has also been applied to the international realm. An international order that is regarded as legitimate is also said to be stable (Kissinger 1977: 145). Conversely, much talk about a crisis of legitimacy in contemporary international society seems to be spurred by concerns over the stability of international order (Reus-Smit 2007: 170). Finally, although these understandings might suggest a conservative approach where legitimacy privileges some already powerful actors, legitimacy has “modest emancipatory potential” (Thirkell-White 2006: 340): claims to legitimacy can be and are contested – something that is at the heart of the analytical framework presented in this dissertation.

Legitimacy also seems to be crucial in constraining or facilitating the future use of PMSCs. Percy argues that if “the normative objections to mercenary use could be overcome, then the use of private force on a wider scale would be possible” (Percy 2007a:

45). In the case of UN peacekeeping she shows that while “UN officials can see the merits of private force privately, they believe that member states’ dislike of mercenaries would prevent the option from ever being seriously mooted” (Percy 2007a: 224). Patterson (2009: 224) argues that the use of PMSCs in UN peacekeeping hinges on, and is currently limited by member state perceptions of these companies. Similarly, although coming to a different conclusion, Kinsey (2006: 89) establishes the link between “society’s perception of the type of activity acceptable for PMCs to undertake” and the increased use of PMSCs. In the same vein, Krahnmann (2010: 222) argues that “both the UK and US government’s endorsement of the new roles of private military contractors accounts for the growing perception that these contractors are not mercenaries, but a new type of international soldier”. The former UN rapporteur on mercenarism, Enrique Bernales Ballesteros, came to a similar conclusion in 1997 when he said that “attitudes appear to be changing towards the mercenary issue” (E/CN.4/1997/24, para. 94). PMSCs themselves recognize the importance of legitimacy and actively seek to ‘cultivate’ it (Østensen 2011a). A PMSC representative said that although legitimacy was a nebulous concept, we all ‘know when we see it’, and that it mattered all the more if the industry aspired to tap new markets, expand its customer base and range of services.² A debate has emerged on the role that PMSCs can or should play in peacekeeping (Cilliers 2002; Brayton 2002; Lilly 2002; Mayer 2010; Pattison 2014; Spearin 2005, 2011; Gantz 2003; Fitzsimmons 2005). Whether PMSCs will play an expanded role in peacekeeping depends, it seems, on how legitimate PMSC use is regarded. The starting point of the dissertation, therefore, is that legitimacy matters; it matters more generally for domestic politics and international relations, and more specifically for the state’s international use of PMSCs.

Contribution to research

The dissertation provides both an empirical and theoretical contribution to current research on PMSCs. It substantiates empirical evidence on the legitimacy of the state

² Remarks by an industry representative and participant of the conference “Beyond Iraq and Afghanistan – Researching Today’s Private Military and Security Industry” at King’s College, 17 November 2011.

practice. Scholars often find themselves taking part in legitimacy discourse³ by making claims in favour or against the legitimacy of the practice, but not providing or pointing to evidence that would support their claims. Rather than following this approach of assessing legitimacy according to my own ‘legitimacy yardstick’, I try to assess in how far international society regards PMSC use as legitimate. Although the overall argument, that of an increased legitimization of PMSC use, has already been posited by others, this has either lacked empirical support, failed to explain how behaviour legitimises PMSC use or has missed important shifts in the normative structure of contemporary international society that have contributed to the legitimization of PMSC use.

I intend to address the latter two shortcomings with a systematic, theoretically informed analysis of *how* the legitimacy of the state practice is evolving. The focus is thus on legitimization as a process rather than on legitimacy as a fixed property: it examines the roles of actors, the norms serving as legitimacy principles, regulation as a discursive context, and the strategies employed. It seeks to meaningfully combine the English School of IR, the ‘German’ strand of IR constructivism, and the more method-driven empirical research on legitimacy into a framework for analysing how legitimacy is shaped and (re-)created in international society.

It goes beyond the rather atomistic approach of constructivist studies on PMSCs by looking at state practice from the perspective of legitimacy, and, thus analysing how norms and behaviour interact to shape the legitimacy of states’ international use of PMSCs. Legitimacy is broadly conceived of in sociological terms as a social understanding of what a particular society holds to be ‘appropriate’ or ‘right’, where, in this study, the object is a particular state conduct; it acknowledges a normative element of ‘appropriateness’ or ‘rightness’ and it conceives of legitimacy as a social, or collective, understanding that is created and contested in society.

³ For now, discourse is understood as a ‘communicative event’, where “people use language in order to communicate ideas or beliefs (or to express emotion), and they do so as part of more complex social events” (van Dijk 1997: 2).

Structure

Part One of the dissertation sets out the framework for analysis that I apply to the issue of the normative status of PMSC use in Part Two of the dissertation. Part One begins with a conceptual clarification of the private military and security phenomenon. It then provides a critical engagement with the PMSC literature and highlights three limitations. One is that many authors make blanket statements on the legitimacy or illegitimacy of PMSC use without pointing to sufficient evidence. The other shortcoming concerns theory: it is either absent or implicit, or has a rather atomistic approach to international society, which fails to account for how various norms relate to each other and impact on the legitimacy of PMSC use.

Chapter 3 addresses the shortcoming by providing a more holistic approach that draws on the English School of IR and the ‘German’ constructivist strand. The chapter begins with a critique of the atomistic approach of conventional constructivist studies on norms. It argues that a legitimacy approach is better placed to shed light on processes of legitimation in international society; it also argues that constructivists should pay more attention to the often-neglected impact of behaviour on norms. Legitimacy is, then, conceived as a broader concept that draws on a variety of norms that are in tension with each other. The second step is to focus on ‘legitimation’, rather than ‘legitimacy’, and, thus, to understand that legitimacy is continuously (re-)created in an inter-subjective process. Finally, I bring in the ‘German’ strand of IR constructivism to highlight that this process essentially unfolds as a discursive activity.

Chapter 4 has two purposes. The first is to take a step back and situate the analytical framework in the philosophy of science debate. I explain why this is necessary in general, and why a post-positivist ‘reflective analyticist’ philosophical-ontology is a suitable foundation for the dissertation. In the second part I move towards the application of the analytical framework: I justify the selection of cases and sources as well as the choice of methods.

Part Two applies the framework and seeks to substantiate evidence on the legitimacy of PMSC use in contemporary international society. The overall argument is that the state’s

international use of PMSCs is becoming more legitimate in contemporary international society.

In chapter 5, I analyse the evolution of states' use of private force, from the use of mercenaries to today's use of private companies, and what it means for the legitimacy of PMSC use. I argue that the widespread use of PMSCs, particularly by powerful states, contributes to the legitimisation of the practice. It undermines proscriptive norms which attenuates their negative impact on legitimacy. Behaviour, however, is not the only, and probably not the most important, factor influencing the legitimisation of PMSC use.

This leads to Chapter 6 and an analysis of how international society has responded to the widespread use of PMSCs. A qualitative content analysis of UN Security Council and UN General Assembly resolutions and a comparison of discourse on mercenaries with the emerging discourse on PMSCs reveal several trends. The debate on PMSCs has been rather limited when compared to the UN discourse on mercenaries, yet the debate is picking up speed. UN discourse on PMSCs is less condemnatory than the discourse on mercenaries, and critique would usually result in a call for regulation and not prohibition. Finally, there has been a shift in underlying legitimacy principles away from self-determination towards human rights. I show how this is reflective of broader shifts in the normative structure of international society. Norms that are in tension with an expanded use of PMSCs – anti-mercenarism, external self-determination, and a republican understanding of the monopoly of force – are becoming weaker or sidelined, while human rights have gained a more central role in international society.

In chapters 7 and 8 the focus is on agency: the way non-state actors refer to and make use of these norms in processes of legitimisation. Chapter 7 compares the roles of the ICRC and UN *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* (UNWG) in regulating PMSC use. Both the ICRC and the UNWG contribute to the creation of legitimacy discourse by pushing the issue onto the state agenda. But they differ in the way they shape this discourse. The analysis demonstrates that the ICRC, driven by a desire to ensure compliance with humanitarian and human rights law, inadvertently contributes to the legitimisation of PMSC use. The UNWG on the other hand, seeks to delegitimise the practice, but does so on the basis of legitimacy principles that have been weakened or

sidelined in international society. Chapter 8 builds on this and compares the roles of the two NGOs *Human Rights First* and *Control PMSC* as well as the role of PMSCs advocates. It shows how human rights can legitimise the practice, whether indirectly through regulation or in a more straightforward way in strategies of legitimation.

The final chapter discusses the key findings of the dissertation and concludes that both current state conduct as well as shifts in the underlying normative structure contribute to a legitimation of PMSC use in the post-Cold War era; moreover, considering world society's disunity on the issue of PMSCs, this trend is unlikely to be stopped or reversed. The chapter also suggests avenues for future research, and it closes with a critical evaluation of contemporary state practice and its increased legitimation.

PART I: Framework for Analysis

Chapter 2: PMSCs, mercenaries and an atomistic approach to society

This chapter pursues two objectives. The first is to clarify what I mean by ‘Private Military and Security Company’ (PMSC) and ‘international use of PMSCs’. Several different terms are being used for this new phenomenon – from the various acronyms distinguishing between ‘security’ and ‘military’ companies to creative and bombastic combinations of familiar terms such as ‘corporate warriors’ or ‘private army’. A clarification is, thus, necessary; in clarifying the terms, however, I do not suggest that my conceptualization is the closest approximation to empirical reality, e.g. that ‘PMSCs’ are empirically different from mercenaries in any obvious way, but that it is analytically useful and that it is, moreover, flexible enough to cope with the social construction of ‘PMSCs’ as ‘mercenaries’, and vice versa.

The second objective is to provide a review of the PMSC literature with a view to identifying shortcomings. I find that the (il)legitimacy of PMSC use is frequently posited without providing empirical evidence; that the legitimacy of state conduct is straightforwardly inferred from the fact that states make widespread use of PMSCs; and that the broadly constructivist literature on the legitimacy of PMSC use is marred by an atomistic approach to the social world that is itself characteristic and problematic about much of the IR constructivist literature in general. The first shortcoming will be handled in all of Part Two of the dissertation. Chapter 3 tackles the latter two shortcomings by proposing a broader approach to legitimacy.

PMCs, PSCs, PMSCs – or mercenaries?

I will not dwell too long on such terms as ‘corporate warrior’ or ‘private army’ at this point of the dissertation. They may serve well as catchy book titles or to encapsulate a seeming oxymoron. They can also aim at hyping the phenomenon and causing concern over the use of force by private actors; as such they present worthwhile objects of study and I will come back to them in the empirical chapters when looking at how actors involved in legitimation utilize such labels. For now, the goal is to find a suitable working definition for the subsequent analysis, keeping in mind that choosing one definition over

another is not an innocent value-free move. This is going to be a constant theme throughout the dissertation in that the social construction of legitimacy is to some degree a matter of strategically or unintentionally choosing some descriptions and labels for the phenomenon and not others; it is also a matter of acknowledging one's own embeddedness in these processes as a researcher. As a working definition, this study uses the term 'Private Military and Security Companies' (PMSC) to define *businesses that provide military and security services in conflict and post-conflict environments* (Renouf 2011: 14).

Moreover, this is a study on the 'international state use of PMSCs'. This narrows the study down to investigating the use of PMSCs *by states* as well as states' *international* use of PMSC services. The first limitation defines the core of the research objective: to understand how a state practice is evaluated in international society.⁴ The focus is on the legitimacy of *what states do* – using PMSCs –, not on the legitimacy of what companies do or the companies themselves.⁵ It is, therefore, different from investigating more directly the normative status of PMSCs, although both may, of course, be linked. The focus on state practice is inextricably linked with assumptions about the international system – or *international society* – and the place of states within it: that state conduct is evaluated and judged by other states, that states think and care about what constitutes appropriate behaviour;⁶ this will be developed in the theory chapter.

Another implication is that the study eclipses the legitimacy of PMSC use by actors other than states, and, thus, does not directly address whether non-state actors should be able to use PMSC services (Elms and Phillips 2009: 412). The focus on states, furthermore, acknowledges their central role in the provision of security. Although there is nothing natural and timeless about this or, more fundamentally, about the public/private

⁴ The terms 'state practice', 'state conduct' and 'PMSC use' are used interchangeably. PMSC use can be considered a practice (that may or may not be linked with mercenarism, see below) in that specific uses of PMSCs are (inter)subjectively meaningful (e.g. states are not hiring any type of company), even if that meaning is contested, and patterned, i.e. belonging to a recognizable set of state actions in a given social context (Adler and Pouliot 2011: 5).

⁵ The focus on state practice – the 'use of PMSCs' rather than PMSCs as such – necessarily involves somewhat neglecting PMSCs' own agency (Liu 2011), although chapter 8 does examine the involvement of PMSC advocates in the practice of legitimacy.

⁶ Without making a too rigid distinction between the two, this dissertation looks at 'external legitimacy', i.e. how states justify their actions to other states, rather than 'internal legitimacy', i.e. how states justify their actions to their own citizens/domestic audiences (Buchanan 1999).

distinction (Abrahamsen and Williams 2009), the contention is that in contemporary international society the state retains a central role in security, and that there is something qualitatively different between states' and non-state actors' use of the whole range of PMSC services (Fabre 2012: 210). Having said this, the second part of the empirical section will focus on non-state actors as participants in processes of legitimation, i.e. they are involved in the debate on what states should and should not do.

The second limitation concerns *where* states make use of PMSCs. The focus is on conflict and post-conflict environments for two reasons. First, this is the context in which international attention, and thus the possibility for legitimation and contestation, is likely to be the greatest. This would include the use of PMSCs by states in territories other than their own (e.g. US use of PMSCs in Iraq or Afghanistan) or the use of PMSCs by states on whose territory the conflict takes or took place (e.g. Sierra Leone's use of *Executive Outcomes*). On the other hand, the domestic use of PMSCs by a state that is relatively stable would rather involve domestic debates. Second, conflict and post-conflict environments are contexts in which PMSC use potentially involves the use of force, and so the whole spectrum of PMSC services can be studied. In that, the study adopts a systemic IR perspective, albeit one that is open for the interplay between the domestic and the international level.

In regard to the *military and security services* provided by PMSCs, this ranges from logistics, equipment maintenance and intelligence services to military assistance and protection including the use of armed force. These services are often ordered along Singer's (2003: 91) tip-of-the-spear typology on the basis of how close they are to the use of force (Perlo-Freeman and Sköns 2008: 6; Branovic 2011: 26; Kinsey 2006: 10; Avant 2005: 14). It is a useful way to think of the variety of PMSC services. I expect services that involve the use of force to be more heavily contested than services situated at the 'base' of the spear. Overall, this broad definition of services helps grasp the diversity of the industry and state practice.⁷

⁷ When the term 'security' is used in conjunction with PMSCs, in this dissertation it is a shorthand for the range of activities performed by PMSCs. It would go beyond the scope of the dissertation to engage with the literature on the concept of security. But it helps to keep in mind that 'security' is a contested concept (Sheehan 2005). Its meanings, for example, range from objective to (inter)subjective conceptions, hence beyond affecting security objectively, PMSCs can also partake in the intersubjective construction of security (Leander 2005; Olsson 2007). It

One could object, though, that a broad definition poses the problem of vagueness. After all, the provision of armed convoy protection for diplomats in a conflict environment is very different from such services as logistical support or weapon maintenance – in terms of type, scope and, potentially, possible reactions from third parties and normative status in society. Since this is a study on the legitimacy of a state practice that seems so diverse, a working definition has to be flexible enough to make such distinctions when necessary. There is a debate in the academic literature on how to do so. An early scholarly categorization comes from Singer (2003: 91-97) who divides the private military and security industry into three sectors: ‘military support firms’ perform supportive functions such as logistics, technical support or nonlethal aid and assistance (e.g. Brown & Root); ‘military consulting firms’ provide strategic or operational analysis without bearing the operational risks of (post-)conflict environments (e.g. MPRI); ‘military provider firms’ focus on tactical support and “provide services at the forefront of the battlespace” (Singer 2003: 92) (e.g. Executive Outcomes). The problem with distinguishing between types of companies, however, is that one company may provide a range of services across the whole tip-of-the-spear spectrum (Avant 2005: 17). Take G4S for example: it started off as a Danish night guard company in 1901, but then expanded to what is now a global company with 618,000 employees operating in 120 countries; although most of its revenues still stem from the classical manned security services, it also offers, for instance, risk consultancy, and in 2008 it acquired ArmorGroup, a provider of ‘defensive and protective services’ (that include the use of force), as well as the demining PMSC RONCO (G4S 2014).

Similar problems arise with the distinction between ‘Private Military Companies’ (PMCs) and ‘Private Security Companies’ (PSCs), based on the distinctions between ‘military’ and ‘security’, ‘offensive’ and ‘defensive’ or ‘active’ and ‘passive’ in that companies can offer services that are placed on either side of these divisions. What is more, it is unclear where the differences between military and security, offensive and defensive, or active and passive activities lie (Singer 2003: 89-91; Krahmman 2010: 219-222). These lines become increasingly difficult to draw in today’s conflict and post-conflict environments, as I hope to show in the case studies of chapter 5. A PMSC providing armed protection

has also practical implications whether we understand security as a public good or a commodity (Krahmann 2008).

for diplomats or NGOs in a conflict environment may perform a security function to their clients, but if we take into account that this task would otherwise have been – and used to be and continues to be – performed by the military, then the line blurs. The same is true for the other dividing lines. In the mid-1990s the US-PMSC *Military Professional Resources Inc.* (MPRI) allegedly provided military advice to the Kosovo Liberation Army, ostensibly a passive/defensive service; the result, however, was a professionalization and augmentation of the army's offensive capabilities, which was decisive in its successful offensive against Serbian forces. Similarly, trying to distinguish PMCs from PSCs on the basis that the former engage in combat, while the latter do not (Percy 2007a: 58-64), runs into problems. The combat-criterion is not clear-cut in environments with no clear frontline; for example, what started off as the armed protection of a convoy of US Department of State (DoS) officials by Blackwater employees in September 2007 in Baghdad resulted in the shooting and killing of 17 Iraqi civilians.

With these difficulties in mind, a good strategy is to distinguish between the activities that PMSCs perform, and not between the companies themselves, and to keep a broad understanding of PMSC services and specify whenever necessary (Avant 2005; Holmqvist 2005: 6).⁸ This is to accept that many distinctions blur, and “to be open to the idea that what is being studied is the sale of means and services of coercion internationally, independently of the form that these take, the place where they are sold and/or used, the type of actor involved and the legality or illegality of the exchange” (Leander 2006: 54). Similarly, Percy (2007a: 50-52) starts off with a broad definition of ‘mercenary’ to allow for historic shifts in meaning. While historic shifts are likely to play a bigger role in Percy’s historical account of anti-mercenarism in the past millennium than in a study of PMSC use since the 1990s, the solution of starting off with a broad definition and then specifying whenever necessary applies to this study, too. Actors involved in the legitimation and contestation of the state practice sometimes mean different things when they refer to ‘PMSCs’. In fact, part of the legitimation and contestation of the practice consists in defining what kind of services states should be allowed to hire PMSCs for. So a broad definition helps at the outset; when necessary, the

⁸ The term ‘PMSC’ is meant to reflect the whole range of services. The term ‘PMSC’ is also becoming established in practice; the Montreux Document, the UN Working Group and (even critical) NGOs use the term.

distinctions that will follow in this study will usually relate to the services performed by PMSCs, broadly along the tip-of-the-spear spectrum.

Opting for the term ‘PMSC’, then, is a choice against the ‘mercenary’ term. Using two different labels in the first place, suggests that these are two phenomena that can be distinguished, but as Holmqvist (2005: 3) has put it, distinguishing between PMSCs and mercenaries is “at once a complex and straightforward task.” On the one hand, there is a clear international legal definition of mercenaries as set out in Article 47(2) of Protocol I additional to the Geneva Conventions (1949):

- “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 the 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
 - (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.”

It has been pointed out that under this definition and the fact that all of the six criteria need to apply cumulatively, PMSCs and their employees can usually not be considered mercenaries: for example, most do not participate in direct hostilities, they are often locals or nationals of a conflict party, and to prove that they are essentially motivated ‘by the desire for private gain’ is difficult if not impossible (Shearer 1998: 18). So, from a legal perspective, the matter seems to be clear. In fact, many lawyers and scholars of international law deem it ‘uncontroversial’ that mercenaries are different from PMSCs (Beaucillon et al. 2011: 398), and that it should not be surprising to see condemnation of mercenarism, and not so much of PMSC use, because the former is “*per se* a violation of international law whereas the private military and security industry is perfectly legal” (Rona 2014).

Yet, for the purposes and from the theoretical perspective of this study, the matter is not as straightforward. First, the legal definition of what is a ‘mercenary’ or a ‘PMSC’ is not set in stone. Part of the legitimation and contestation of states’ use of PMSCs revolves around these definitions. Second, underlying the legal definition of ‘mercenary’ is a broader, social norm against the use of mercenaries; this proscriptive norm holds that mercenaries do not fight for a cause and are not under legitimate control (Percy 2007a). This is a broader, more flexible understanding of mercenaries, and one that could potentially include PMSCs and their employees. In how far actors try to establish that link and whether the norm can be said to apply to the state practice, will be part of the investigation in the empirical chapters. Finally, that PMSCs are legally registered businesses may set them apart from the 20th century freelance mercenaries, but not necessarily from the mercantile companies or relatively coherent mercenary groups of prior centuries; PMSC use, thus, needs to be understood in its historical context, which will be done in chapter 5.

The difference between PMSCs and mercenaries is far from naturally given and undisputed. It is not a given that “we all know” the distinction, and that when we think of mercenaries we think of “bad things”, as if this was self-evidently not the case for PMSCs (Bearpark 2006: 453). This study keeps the distinction between PMSCs and mercenaries, but not because there is something ‘wrong’, misguided or out-of-date in describing PMSCs as mercenaries (Isenberg 2009: 9). What the designation shows is a deliberate attempt to rub off the illegal, possibly illegitimate, and certainly contested nature of mercenarism on PMSCs; in turn, advocating a clear separation between the two, is an effort to distance one from the other.

These efforts and dynamics need to be investigated, and so trying to make sense of the legitimacy of PMSC use does not mean being blind for this related issue of mercenarism. In the end, the reasons for making this distinction and opting for the term ‘PMSC’ are pragmatic. The term helps focus the study on the relatively recent and extraordinary growth of corporate actors selling military and security services from the 1990s onwards, and the widespread use of these businesses by states in conflict and post-conflict environments. Also, the legitimation and contestation that takes place on the international level is primarily directed at PMSC use as a new phenomenon that is, nevertheless, at

least for some actors, linked to mercenarism. Finally, the term and its derivatives are employed in the academic literature, in which this dissertation is situated.

Limitations of the PMSC literature

Academic research on PMSCs has become less partisan and more diversified since the late 1990s. It has become less partisan than, for example, Musah and Fayemy's (2000) *Mercenaries. An African Security Dilemma* or Doug Brooks' (2000a) *Messiahs or mercenaries? The future of international private military services*. Both were either very critical or strongly in favour of PMSCs, while basing their empirical claims on little evidence and outside of any explicit framework. Some early work (e.g. Shearer 1998) also included case studies of early PMSC activities that would provide the empirical basis for later research. Singer (2003) probably presented the first systematic research on PMSCs; with an effort to systematize the private military and security industry, explain its rise, suggestions for how theoretical frameworks and concepts could be applied to better understand the phenomenon, and with several empirical illustrations.

Later studies would build on this work, with the PMSC literature diversifying over the years and focussing on such aspects as: the impact of PMSCs on state control over the use of force (e.g. Avant 2005); outsourcing practices in countries other than the US, such as the UK (e.g. Kinsey 2006), Germany (e.g. Wolff Metternich 2006), and other European countries (e.g. Leander 2013); explaining the outsourcing of military and security functions through competing theories (e.g. Kruck 2014); assessing national (e.g. den Dekker 2009) regional (e.g. Born et al. 2007) and international (e.g. Buzatu and Buckland 2010) regulation of PMSCs⁹; actual (e.g. Østensen 2011b) and potential (e.g. Hull 2008) outsourcing practices of the UN or of the EU (e.g. Bailes and Holmqvist 2007); or the ethical arguments in favour and against PMSC use (e.g. Pattison 2014). In addition, there is a broadly constructivist literature that studies empirically how norms relate to use of PMSCs – and mercenaries – and, more generally, the normative status of PMSCs in international society. The dissertation falls into this latter category of PMSC research.

⁹ The EU-funded 'Priv-War project' (<http://priv-war.eu>) and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) have published several case studies on national, regional, and international regulation of PMSCs. DCAF is also involved in preparing and hosting the work of the International Code of Conduct Association.

The following critique will, therefore, be directed at the work in this area, but not before briefly touching on two drawbacks of the broader PMSC literature.

The first limitation concerns conjectures about the legitimacy of PMSCs or their use, without elaborating on what this means or providing empirical evidence for that claim. To be sure, this is not a limitation if it is meant as a normative judgment, where, after a careful analysis of PMSCs' impact and role, the author comes to a conclusion as to whether PMSCs should be used and for what purposes. But often, it seems, these are empirical claims about how others, particular actors or society at large, regard legitimacy, as in: "they [PMSCs; D.M.] are increasingly being recognised by governments, civil societies and international organisations as *legitimate actors* [emphasis added; D.M.]" (Kinsey 2006: 4). Similarly, Avant (2005: 69) states that PMSCs are "increasingly accepted as open (and legitimate) forces on the world stage". It is noteworthy that, not only does Avant put 'legitimate' in brackets, but the sentence is placed in a footnote; here, the term is either a synonym of 'openness' or has a different meaning, but the reader is left wondering, or making up his own mind, what this means. This superficial treatment of the concept is surprising, particularly in Avant's more sociological work. Of course, it is perfectly legitimate to use 'legitimacy' in an everyday sense of the word; but this leaves questions open, such as whether a normative judgment or an empirical claim is being made, and if it is the latter, what the evidence is. To be fair, one could infer the evidentiary basis for Kinsey's, and perhaps Avant's, claims: both seem to suggest that because PMSCs are now widely used by states, this shows that they are accepted as legitimate.

This relationship between state behaviour and legitimacy is a common proposition in the IR literature as well as in more policy-oriented think tank reports. The problem, however, and this is the second weakness, is that often the link remains implicit or unquestioned, as if legitimacy flowed straightforwardly from actual behaviour, and as if how states conducted themselves was the only or key determinant for the legitimacy of their behaviour. A think tank report, for example, notes that due to the increased use of PMSCs in Iraq and Afghanistan, the "use of PMSCs in combat operations, it would seem, has since become an acceptable phenomenon, especially in the western world" (Gumedze 2009: 4). Also, Panke and Petersohn (2011: 12) suggest that the 'defensive use of mercenaries' (which, for them, includes PMSC use) is now legitimate, because of the

widespread use of PMSCs in, for instance, Iraq. The latter study works from a constructivist framework, and so is better at elaborating how norm-compliance matters for the strength and longevity of a norm. Yet, they sideline how other factors than compliance come into play. Also, their constructivist focus on norms and superficial use of the concept of legitimacy leave unanswered how norms, legitimacy, and behaviour all relate to each other. A good illustration of the ambiguous use of these concepts is Singer's (2004: 533) assessment that "the fact that PMFs [Privatized Military Firms; D.M.] operate in over fifty states, often on behalf of governments, suggests a basis for arguing *a norm of their legitimacy* [emphasis added; D.M.] and a general acceptance of the phenomenon." It is the purpose of the next chapter to hone our understanding of legitimacy and clarify how legitimacy relates to norms.

*Norms everywhere – but how do they hang together?*¹⁰

The third and main drawback that this dissertation takes issue with, is what can be described as an 'atomistic approach' of the constructivist literature on PMSCs. In their effort to understand how the expansion of PMSC use became possible or why the use of PMSCs is now considered 'legitimate', scholars have referred to norms¹¹, whereby a variety of norms are in one way or the other linked to the state practice. What are these norms?

First, there is the state monopoly of force. Avant (2005) begins her book by quoting Weber's famous definition of a state as a "human community that (successfully) claims the *monopoly of the legitimate use of physical force* [emphasis in original; D.M.] within a given territory" (Weber 1991 [1919]: 78). This norm is at the core of what constitutes a state and although it has always been an ideal, often contested and contradicted, Avant contends that the astonishing rise of the private military and security industry is now seriously calling this norm into question. Avant frames the norm of the state monopoly of force as one of state 'control', but makes clear that there are three dimensions of control: political control, i.e. who decides over the use of force; functional control, i.e. what capabilities exist; and social control, i.e. how the use of force fits with other values and

¹⁰ The expression is borrowed from Dunne (2005) and Searl (1995: xi) amongst others.

¹¹ I will explain the concept in more detail in the next chapter; for now, 'norms' are understood as 'standards of behaviour'.

norms. Instead of looking at the relationship as a question of either/or, Avant argues that the market for force both undermines and provides opportunities to augment the various aspects of a state's control. Avant's (2005) research interest is on how increased PMSC use affects state control over the use of force. Although there is no explicit treatment of how this influences the normative status of PMSC use, there are two clues as to the implications. One is the already mentioned implicit suggestion that increased PMSC use results in increased legitimacy. The other involves Avant's (2005: 253) overall conclusion that, in the long run, expanded use of PMSCs will ultimately undermine states' collective monopoly of force; this means that while individual states may well enhance aspects of their control by using PMSCs, the overall consequence will be an erosion of the international norm. Perhaps, then, increased use of PMSCs and a weaker norm of the state monopoly of force result in the practice becoming accepted as more legitimate. Others are more explicit about the relationship between the strength of the state's monopoly of force as an international norm and the legitimization of PMSC use. Krahnemann (2009: 15), for example, argues that with the diminishing strength of the norm, there is, among Western democracies, "a widespread acceptance of, and even active support for, the shift from public to private forces" and a "growing legitimacy of private security contractors."

Expanded PMSC use has also been consistent with and facilitated by neoliberal norms of market efficiency. The 'privatization revolution' that saw formerly public goods increasingly provided by the market also impinged on states' responsibility for security; privatizing military and security functions was, then, "just the next logical step in this global trend of privatization and outsourcing" (Singer 2003: 70). Against the backdrop of neoliberal ideology, the very fact that PMSCs are private companies has been said to contribute to their authority, and in extension using such market actors is generally accepted (Leander 2010: 479). With the general belief in market efficiency, PMSCs are regarded as more efficient security providers than the public (Avant 2005: 38). PMSCs are also increasingly seen as security experts, which, again, adds to their authority and further legitimates their use (Leander and van Munster 2007).

While the use of PMSCs is a global phenomenon, there is variance in PMSC use across states, which suggests that domestic norms may play a role, too. In comparative studies of the US and Germany, the two countries were shown to have privatized security to varying degrees: although both the US and Germany had a similar security environment,

Germany's strong domestic conception of the sovereign state inhibited the kind of extensive privatization that can be observed in the US (Petersohn 2010; Bürgin 2010). A similar conclusion is drawn in a study on domestic differences between the US, the UK and Germany (Krahmann 2010): the UK and the US had a liberal understanding of the state with limited, or fragmented, governance and security provision; this liberal perspective was more permissive to PMSCs use. Germany, on the other hand, followed a republican model of centralized government; this understanding of democratic control would be in tension with PMSC use. These two models provide two different ways of how to ensure the democratic control of the use of force. These different conceptions of the state, Krahmann (2010) argues, can explain why the US and the UK have embraced and supported the PMSC phenomenon to such a large extent, and why Germany has been quite hesitant in its use of PMSCs. With these domestic variations in mind, there has nevertheless been a system-wide pressure also on 'republican' states like Germany; the latter has been expanding its use of PMSCs and is adopting parts of the liberal model of the US and UK (Krahmann 2010: 192).

In addition to changes in the state monopoly of force, neoliberal norms and different models of democratic control of force, another way of making sense of how the legitimacy of PMSC use is evolving is to posit the emergence of a "new norm legitimising the state use of mercenaries" (Fitzsimmons 2009: 2), which is reminiscent of Singer's 'norm of their legitimacy'. From this view, there is a norm that is in the process of being created, and this new norm is specifically related to the use of mercenaries. Just as there is – or was – a norm delegitimising the use of mercenaries, there is also a norm legitimising the use of mercenaries. This is a different approach from the one taken by the above scholars, who refer to various norms that somehow affect PMSC use, but that are not exclusively focused on PMSCs. Fitzsimmons (2009), on the other hand, conceives of the increased legitimation of PMSC use as a process where essentially a new norm is being introduced in international society. Furthermore, his understanding would also imply that mercenaries and PMSCs are, indeed, the same. The explanation for the emergence of this new norm is utility-based: states used to follow the anti-mercenary norm, because they regarded mercenaries as ineffective; and because modern-day mercenaries, or 'PMSCs', have proven to be successful, states are now increasingly accepting the opposite norm 'legitimising the use of mercenaries'.

Is the legitimation of PMSC use, which is arguably taking place, really all about the emergence of a ‘new norm legitimising mercenarism’? At least superficially, it can be quite unwieldy to talk of a ‘norm legitimising mercenarism’ – would it not be possible to simply speak of a legitimation of mercenarism? More than that, an overreliance on the concept of ‘norm’ becomes constraining for analysis. The tendency to identify ever new norms of this and that, and to largely rely on the concept of ‘norm’ leads to a proliferation of norms in International Relations; it is not clear whether one needs to refer to a new norm to explain what is happening with PMSC use in contemporary international society.

More importantly, this reliance on the concept of ‘norm’ reinforces an atomistic view of the social world that neglects the linkages between norms. Norms do not exist in isolation; rather, if visualized, they would be linked up and take the shape of a web. If it is not a ‘norm legitimising mercenarism’, then which of the other norms identified so far lies behind the legitimation of PMSC use: the weakening state monopoly of force; the spread of neoliberal norms; different, and possibly converging, domestic norms of democratic control of force; or maybe all of them to some extent? Although Fitzsimmons’ argument exemplifies a serious weakness in much of the constructivist literature on PMSCs and constructivism more broadly, the different explanations presented above essentially follow the same approach of seeing the legitimation of PMSC use as a consequence of changes in one particular norm. I argue that a more holistic ‘legitimacy approach’ is required. Also, what ‘legitimation’ or ‘legitimacy’ actually means often remains unclear in constructivist works. And how is the concept of ‘legitimation’ or ‘legitimacy’ linked to the concept of norm? All these issues need elaboration, and this is done in chapter 3.

The anti-mercenary norm and the legitimacy of PMSC use

Another norm that is increasingly being referred to in the literature is the anti-mercenary norm. In her historical study, Percy (2007a) identifies the anti-mercenary norm as the crucial driving force behind the gradual shift from mercenary use to the use of citizen armies. In what is largely a historical investigation of the development of this norm, Percy (2007a: 206-243) concludes her book with a final chapter on the contemporary PMSC phenomenon. She argues that this norm that was responsible for the abandonment of

mercenary use in the 19th century is still strong today, and is affecting the private military and security industry. The early PMSCs of the 1990s were so controversial and eventually went out of business precisely because their activities resembled mercenarism so much and, thus, fell under the scope of the anti-mercenary norm: they were quite openly motivated by financial gain and they operated relatively independent from both their home and contracting state. Percy argues that not only did the anti-mercenary norm lead to the eventual closure of PMSCs in the 1990s, but also that the continued strength of the anti-mercenary norm is expressed in the way today's PMSCs work. She differentiates between PMCs, who may engage in combat and usually do not have a relationship to their home state and are thus only bound to the contracting state through a contract, and PSCs, who do not engage in combat and usually have close ties to their home state (Percy 2007a: 59-61). Percy says that there has been a development away from the PMCs of the 1990s and towards the PSCs of today. The anti-mercenary norm explains this shift. PSCs are less controversial, because they have a close relationship to their home state and do not fight for money.

Panke and Petersohn (2011) disagree with Percy's assertion that the anti-mercenary norm is as strong as ever. They look at three instances of norm degeneration, and argue that the anti-mercenary norm is an example of a norm that has been seeing an incremental degeneration without being substituted by another norm. This last point is contradicting Fitzsimmons' view that there is now a new norm legitimising PMSC use; instead, what has happened is that an already existing norm has been in decline. Although Panke and Petersohn do not see any other norm replacing the waning anti-mercenary norm, it might be too hasty to conclude that "there were no competing norms" (Panke and Petersohn 2011: 18). As the next chapters will show, there were, indeed, competing norms: the anti-mercenary norm is part of a normative structure where different other norms push and pull in different directions. And to an important extent the anti-mercenary norm has become weaker, because it has been weakened by these other norms. This can take place without these norms necessarily 'replacing' the anti-mercenary norm, because norms that are in tension with the latter may have a much broader scope and application.

Panke and Petersohn go on to argue that, since the scope of the norm has never been very precise, there has always been room for arguing who was and who was not a mercenary. As such identifying violation of this norm has never been an unequivocal matter. The US

and the UK, amongst others, have tried to make sure that PMSCs are not labelled mercenaries. Especially when PMSCs offer defensive services, the distinction between the latter and mercenaries has been successful. And due to the difficulty of distinguishing between offensive and defensive services in practice, and because the anti-mercenary norm does not provide a distinction between the two, it is far from sure whether the more offensive type of services fall under the scope of the anti-mercenary norm. This could lead to a more “radical reformulation, eventually culminating in the entire anti-mercenary norm becoming meaningless”, Panke and Petersohn (2011: 12) argue. The authors conclude that it “took just a decade – from the first combat operation in the early 1990s to the broad PSC [meaning PMSCs; D.M.] employment in Iraq – to change a norm that had been in place for almost 200 years. [...] [T]he anti-mercenary norm has incrementally degenerated” (Panke and Petersohn 2011: 13).

While Percy, then, is one of the few scholars to question the ostensible legitimation of PMSC use in contemporary international society by highlighting that the anti-mercenary norm continues to be strong and is now affecting PMSCs, in her concluding remarks she does qualify her assertion. She acknowledges that the anti-mercenary norm may not keep pace with actual developments in state practice, with more and more states seeing them as useful rather than ineffective or morally problematic (Percy 2007a: 242).

More importantly, she briefly touches upon the idea that a key driving force behind the strength of the anti-mercenary norm might become less powerful. In her theoretical chapter, Percy (2007a: 28-31) points out that norms are often related to each other. A norm might thus be weakened or strengthened by other related norms. Percy draws on this constructivist proposition earlier in her book, when she shows how the norm of self-determination strengthened the anti-mercenary norm (Percy 2007a: 185-189). Mercenary activity of the 1960s to 1980s largely took place on the African continent and in a context where mercenaries would usually fight on the side of the rulers and thus against decolonization movements. Those who struggled for decolonization and self-determination despised mercenaries for two reasons. They were accused of not having a ‘right cause’ of their own, and they were perceived as external agents fighting against the cause of self-determination

To support her argument, Percy, therefore, looks at how the norm of self-determination was linked to and hence supported the anti-mercenary norm. Towards the end of her book she opens up the possibility that the link between the two norms might become weaker; if the norm of self-determination were to become weaker, then this would rob the anti-mercenary norm of an important driving force, which then may result in the norm itself becoming weaker. However, she does not further investigate in her book whether this weakening of the link may not already have set in after the ‘golden age’ of decolonization and self-determination. And in a journal article she writes that a “strong norm against mercenary use existed throughout the 1960s, 1970s, and 1980s” (Percy 2007b: 368), without enquiring whether norms that used to be strong back then, do still have the same supporting effect on the anti-mercenary norm today.

To be fair, Percy’s interest is clearly in the anti-mercenary norm, and not in the norm of self-determination or other norms. But in a sense, this is exactly the problem. She adopts a narrow constructivist approach where her focus is on the anti-mercenary norm as such. She does acknowledge that in theory norms may influence each other, and that in practice this has been the case with the norm of self-determination strengthening the anti-mercenary norm at some point in time. She even criticizes Avant (2000) for focusing only on Enlightenment norms in her explanation of the adoption of citizen armies (Percy 2007a: 106). Yet, Percy herself fails to broaden her view of the interconnection between norms. Her interest is in the anti-mercenary norm and references to other norms seem to be made to support her argument. She does not follow the argument through and look more closely at how the norm that she uses to explain a large part of why the anti-mercenary norm was so powerful at one point in time, may have changed since the early 1990s.

In conclusion, a more holistic approach to the normative structure of international society is called for. The usefulness of such an approach can especially be seen when it comes to the normative debates surrounding the use of PMSCs. The practice is controversial and contested, because it encroaches on several norms of international society. Percy (2007a) has acknowledged the broader normative context, but other scholars reviewed in this section have been too quick in focussing on one norm before even looking at how that norm may be embedded in a broader normative structure. The next chapter presents an

analytical framework that provides a fuller and more useful account of how the legitimacy of the state's international use of PMSCs is evolving in international society.

The concept of legitimacy in the PMSC literature

The state of the concept of legitimacy is in no good shape in the PMSC literature. The term is often not defined and usually employed in an everyday sense of the word, as in “security governance has advanced the outsourcing of security tasks as a legitimate option” (Rosen 2008: 83), “[d]uring the 19th century, non-state violence became delegitimized” (Panke and Petersohn 2011: 11) or, of course, talk about a ‘norm legitimising PMSCs’. The problem with a superficial use of the term, especially with such an elusive, critics would say vague, word as legitimacy, is that the reader is left with several important questions unanswered – for example, whether the author makes a normative or empirical assessment, and if it is the latter, what the corresponding evidence is: is a state practice, for instance, becoming more legitimate because it has become so pervasive, because its legality has been acknowledged or is increased legitimacy somehow linked to broader normative shifts in international society?

Apart from such superficial uses, however, there are some indications in the literature that taking ‘legitimacy’ more seriously in the study on PMSCs is a promising undertaking. Most notably, there is a 2012 *Millenium: Journal of International Studies* issue on PMSCs, in which three out of four articles make use of the concept. Berndtsson (2012) studies how PMSCs convey different identities of themselves depending on their clients’ profiles and preferences, all with the goal of constructing themselves as legitimate actors to their clientele. Similarly, in another *Millenium* article, Joachim and Schneiker (2012) look at what PMSCs do to legitimate their services and very existence. What they find is that PMSCs increasingly adopt the humanitarian frame and present themselves as the ‘new humanitarians’; they do so not only to become more acceptable in what is a profitable ‘humanitarian market’, but also more generally to tap into the positive connotations of humanitarians and, thus, rub off the mercenary ‘frame’. Berndtsson (2012) and Higate (2012) look at how identity construction can be put to use for

legitimation, while Joachim and Schneiker (2012) use the concept of frame appropriation, but what they share is a focus on what PMSCs can do to increase their legitimacy.

A similar perspective is taken by Østensen (2011a: 371) who focuses on PMSCs as “active entrepreneurs of their own legitimating processes.” Again, this is an analysis of what PMSCs can do to legitimate themselves, although the author’s account of legitimacy is much richer than in the above articles, in which the concept is not defined or elaborated. Østensen separates between the *democratic* (input, throughput and output) and *moral* legitimacy of PMSCs, a distinction that allows her to make a more nuanced argument about how successful PMSCs are in increasing their legitimacy. The focus remains, however, on PMSCs’ strategies of legitimation and on the legitimacy of PMSCs as actors.¹²

I will draw on these insights in the final chapter when I compare NGO and PMSC strategies of legitimation. The goal is to show how non-state actors’ strategies of legitimation compare to each other; also, rather than looking at these processes from the perspective of identity, ‘frames’ or expert status, I analyse how norms are strategically employed in, and sometimes unintentionally enter, legitimation. The approach to how PMSCs legitimate their services is thus slightly different. The main difference, though, is that the chapter is embedded in a broader analytical framework and empirical study on legitimation that goes beyond a focus on PMSCs’ role in legitimation. As PMSCs try to legitimate themselves and their services, some are contesting and attempting to delegitimise them. There are also underlying normative shifts that need to be included in the analysis, shifts that PMSCs and those who oppose them can exploit but do not control.

Finally, Krahnemann (2012) argues that international legal discourses have reconstructed ‘mercenaries’ as ‘PMSCs’. Because of a similar comparative approach and empirical basis to chapter 7, I will engage with Krahnemann’s article later. Although my conclusions concur with hers to some extent, there are some differences. First, the empirical work raises more doubts as to the changed discourse of the UNWG; the latter’s output and contributions are more heterogeneous and continue to hinge on the image of PMSCs as

¹² Other examples of a focus on PMSCs’ strategies of legitimation and an organizational approach to PMSC legitimacy include Palomba (2009), Cutler (2010), Ranganathan (2010) and Elms and Phillips (2009).

‘mercenaries’. Second, underlying the ostensible reconstruction of mercenaries as PMSCs, there is a clash of competing international norms; these differing underlying principles shape the debate. Third, and consequently, capturing these underlying normative tensions is crucial to understanding legal discourses and legitimation more generally.

Conclusion

There are various ways in which to describe the phenomenon that this dissertation refers to as ‘Private Military and Security Companies’ or simply ‘PMSC’, some of which are more technical than others. After looking at different conceptualizations of the phenomenon in the literature I pragmatically opted for the rather technical term ‘PMSC’, but I made two important clarifications: First, because this dissertation is on rightful state conduct in international society, the focus is less on the companies themselves and more on the legitimation and contestation of states’ international use of PMSCs. Whenever distinctions are necessary, they will be according to the services that PMSCs provide to states, broadly along the tip-of-the-spear spectrum, rather than trying to distinguish between types of companies. Second, since the dissertation follows an English School approach with elements of IR constructivism, it would be mistaken to see this conceptual choice as a statement on what ‘PMSCs’ really are or that they differ from ‘mercenaries’ in any obvious way. ‘PMSCs’ and ‘mercenaries’ are linked to each other, if only in the sense that actors establish a link between them in discourse. It would be beside the point for a broadly constructivist framework to proceed with a rigid definition of ‘PMSCs’ and taking no account of how actors strategically or unintentionally use these labels in discourse to legitimate or contest the practice.

After having tried to clarify these intricate conceptual issues, the second part of the chapter provided a critical discussion of the PMSC literature. The focus was on those studies that try to make sense of the normative status of PMSCs or PMSC use. What I argued was that the broader PMSC literature treats the concept of legitimacy in a superficial way that makes it difficult to infer whether a normative or empirical judgment is being made, and that it, often implicitly, links increased legitimacy to expanded PMSC use. With some notable exceptions, the concept of legitimacy is used in a superficial way, but, more importantly, it is hardly embraced as an analytical device that can help make

sense of the PMSC phenomenon. The problem with not using the concept more explicitly for analysis leads to an (over-)reliance on a concept more familiar to IR constructivists – ‘norm’ – and, as a result, to what Finnemore (1996a: 161) has called an ‘atomistic’ approach to the social world. What is neglected is how norms relate to each other. Several norms may be employed in legitimacy discourse and, thus, matter to varying degrees. It would be wrong to assume that any one of those norms is the most important and *the* crucial norm – and that is it. Not only is that not the whole story. It distorts the story. It assumes that the most relevant driving forces as well as the effects of a norm can be understood by looking at that norm. Especially when several norms pertain to one state practice, as seems to be the case with PMSCs in contemporary international society, and are, moreover, in flux, a sole focus on one norm is insufficient. It then becomes important to adopt a more holistic view of legitimation. The next chapter elaborates on this and suggests a way out.

Chapter 3: Linking norms and legitimacy: the process of legitimation

The central theoretical contention of this thesis is that the controversy surrounding the issue of PMSC use is best approached through the perspective of legitimacy or legitimation. The fact that the use of PMSCs is, in many ways, controversial points to the importance of legitimacy in understanding the issue. Legitimacy becomes important and is discussed when it is contested, when things become unsettled and are not taken for granted anymore. When political systems, actors, policies, practices are deemed 'legitimate', then, ironically, there is seldom any talk of legitimacy; indeed, the term 'legitimate' would not even be used. Once these are questioned, and some claim them to be 'illegitimate', not when legitimacy is secure, but when it is challenged, and "when, in the absence of a consensus, no evident and compelling algorithm can be found for arriving at a decision" (Kratochwil 2006: 304), it is in these instances that legitimacy talk arises.

The controversy surrounding the issue of PMSC use points to underlying clashes of competing legitimacy principles. International norms provide different normative appraisals of contemporary state conduct – some are hostile towards states' use of PMSCs and some are supportive. The controversy and debate on PMSCs is a reflection of these tensions. Actors refer to these competing principles strategically or because they sincerely share them. But their moves to either legitimise or delegitimise state practice are constrained by a normative structure in which legitimation is embedded. As the normative structure changes, so do opportunities and constraints for actors' strategies of legitimation, benefitting some actors and legitimation efforts while marginalizing others.

To grasp these dynamics, scholars need to escape the atomistic approach to the social world that is characteristic of the PMSC literature and of IR constructivists more generally. What is required is a more holistic view of these processes, and in this chapter I argue that this necessitates a move from the concept of norms to the concept of legitimacy, or rather legitimation. This is not a critique of the utility of the concept of norms as such; norms remain an essential element in the analytical framework. But it is to suggest that constructivists need to change perspective, if they want to understand the normative status of, for instance, a particular state conduct. They need to re-frame the problem: away from a focus on norms to a focus on the state conduct that is under

investigation. It is not merely about how one norm evolves, but about how a practice is regarded – and that usually involves several norms at once, particularly with controversial issues. By re-framing the problem as one of legitimacy, rather than one of norm, a more complete picture emerges. It may be less parsimonious than what some conventional constructivists are used to, but it improves our understanding of the issue at hand.

The next section presents the constructivist approach to norms as the common, standard way of approaching empirical issues such as the state use of PMSCs. Then, the approach will be criticized for its narrow approach to ideas and normativity in international relations. This critique provides the basis for presenting the analytical framework. First, the concepts of norm and legitimacy are distinguished. This is a necessary first step, because the confusion that surrounds the relationship between the two concepts both hinders a fruitful application of the legitimacy concept, and prevents constructivist studies on norms from learning from the English School. I explain how the English School provides a more holistic view of legitimate state conduct in international society. Second, rather than looking at legitimacy as such, the focus will be on how legitimacy is (re-)created: the process of legitimation. This is a political activity in which legitimacy actors with different power relationships address audiences by making legitimacy claims, which are based on various norms. These sections will look more closely at the role of legitimacy actors and the concepts of international and world society. Third, to understand the communicative aspects of this process better, the framework draws on the ‘German’ strand within constructivism. In referring to norms, legitimacy actors do not necessarily follow a logic of arguing or engage in what Habermas has termed ‘communicative action’. They may do so, but they may as well act strategically. They may realize that referring to norms and engaging in legitimacy discourse is the best way to maximize their preferences: claiming that a particular action is in line with a commonly shared standard or putting pressure on others, because their behaviour violates such a standard. The resulting framework meaningfully combines different, but overlapping theoretical approaches.

A constructivist understanding of norms

In the following, norms are defined as “shared expectations about appropriate behaviour held by a community of actors” (Finnemore 1996b: 22). While many different understandings of norms exist in the discipline, for constructivists this is a fairly established definition (Katzenstein 1996: 5). The constructivist understanding of norms has several implications. First, norms are ‘shared’ or ‘collective’. They are not subjective, in the sense that they are the property of individuals, nor are they an aggregation of ideas. Norms are social properties and as such they are *intersubjective* (Raymond 1997: 215). Secondly, and relatedly, norms are held by a community of actors. This points to the idea that norms are embedded in a social context, which can be denoted with ‘community’ or ‘society’.¹³ Outside of such a societal context norms would not make sense.

Thirdly, norms deal with behaviour. ‘Principles’ and ‘rules’ are other terms that exist – sometimes uneasily – beside the concept of norms. While some scholars have used these terms synonymously, others have – often implicitly – distinguished between them. In his earlier article on the force of prescriptions, Kratochwil (1984a: 687) used the terms interchangeably, but in *Rules, Norms, and Decisions* (1989: 10) he then applied the distinction which he had indicated in his article: a rule concerns a specified set of behaviours, while a principle is more general in scope. A principle is, thus, more flexible, and it is difficult to determine which forms of behaviour follow from it. Unlike Kratochwil, in *World of Our Making* Onuf (1989) focuses exclusively on ‘rules’, which the book’s subtitle already suggests, and not on ‘norms’. For practical reasons, I use the term ‘norm’ as encompassing both ‘rules’ and ‘principles’, and only make the distinction according to specificity that Kratochwil (1984a: 687) suggested if necessary. Although for some purposes, making a distinction, however difficult in practice, is necessary (Raymond 1997: 219), in this thesis the relationship between ‘norm’ and ‘legitimacy’ is more relevant than those between ‘rules’, ‘norms’ and ‘principles’. Similarly, the concept of ‘institution’ is broader in scope and should rather be conceived as a collection of norms, rules and practices (Finnemore and Sikkink 1998: 891). The institution of sovereignty, for example, has several dimensions to it that can be conceptualised as a set

¹³ The broader sociological debate on the concepts of ‘community’ and ‘society’, and how they relate to each other, has also taken place in the English School (Buzan 2004: 108-118). However ‘thin’ or ‘thick’, a societal context is a necessary condition for norms and legitimacy to make sense.

of norms, rules and practices that can each change in meaning or strength; so for institutions, this dissertation will try to make sense of how its constituent norms, rather than the institution as a whole, interact with other norms. Finally, the term ‘norm’ is chosen, because it is prevalent in the constructivist literature, especially in more recent constructivist studies.

So if norms deal with behaviour, then a large part of the regime literature essentially conceives of norms as ‘normal’ behaviour: norms indicate regularity. In *The Evolution of Cooperation* Axelrod (1984) employed such a behavioural approach to norms to explain how cooperative behaviour could evolve under certain circumstances and over time. He defined norms as existing “in a given social setting to the extent that individuals usually act in a certain way and are often punished when seen not to be acting in this way” (Axelrod 1986: 1097); he justified his behavioural approach by saying that “for many purposes the most important thing is actual behaviour” (Axelrod 1986: 1097).

Constructivists, however, go further than the behavioural approach to norms, and, fourthly, stress the normative – not the ‘normal’ – character of norms. The ‘deontic’ definition that constructivists employ is about *appropriate* behaviour, that is, standards of behaviour instead of standard behaviour (Raymond 1997). Such standards can be phrased in a mandatory form as is the case with the norm of humanitarian intervention (Wheeler 2000), or they can take the form of a prohibition like the anti-mercenary norm (Percy 2007a). Furthermore, what ‘appropriate’ exactly means, points to the content of a norm. Substantive and procedural norms can be distinguished. The anti-mercenary norm and the norm of humanitarian intervention carry a substantive obligation or prohibition, while procedural norms would regulate how, for example, a decision over a humanitarian intervention should be arrived at. Another distinction is often made between moral and legal norms, with the latter usually being more explicit and specific (Kratochwil 1984b: 349-350). Although these typologies fulfil a function in constructivist works, what is more relevant for the subsequent analysis is grasping the relationship between norms and the concept of legitimacy.

For a constructivist understanding of norms, then, the two, appropriateness and behaviour, belong together. It is the normative character of norms that exerts a pull on actors’ behaviour. In fact, a major concern of constructivist works on norms has been to

show that they have an impact on behaviour. And it was the normative character of norms that did the explaining. In that, norms competed with other factors, or ‘variables’, in accounting for actors’ behaviour. ‘Power’ and ‘interest’ were the two major concepts in this respect, and they were advanced by (neo-)realists and neo-liberals alike. The constructivist focus on the impact of norms on behaviour can, thus, to some extent be explained by disciplinary competition. Constructivists tried to show that norms are relevant factors in international relations, not only to the extent that they are an add-on to conventional explanations, and explain the residue left over from accounts based on power and interest. Norms are relevant in a more fundamental way, since they shape actors’ identities and interests. As Wendt (1999: 135) argued, the

“claim is *not* that ideas are more important than power and interest, or that they are autonomous from power and interest. Power and interest are just as important and determining as before. The claim is rather that power and interest have the effects they do in virtue of the ideas that make them up. Power and interest explanations *presuppose* ideas, and to that extent are not rivals to ideational explanations at all [emphasis in original; D.M.]”

The debate, therefore, is not one between norms, on the one hand, and power and interests, on the other. It is more a debate about the relative importance of material versus social factors in the world, and in international relations more specifically. Power and interests have often been defined in material terms, in particular by neo-realists and neo-liberals, or what has been termed the ‘neo-neo-synthesis’ (Waeber 1996: 163-164). Barnett and Duvall (2005) have shown that ‘power’ is a much richer and more elusive concept that is used by scholars from very diverse theoretical backgrounds; by defining power narrowly as (material) capabilities, it loses much of its utility as a concept in the social sciences. Similarly, ‘interest’ is a richer concept that is not determined by material factors alone. As the title suggests, in *National Interests in International Society* Finnemore (1996b) has focused on interests, but she has done so from a constructivist perspective. This sees interests as socially constructed, and, thus, we “cannot understand what states want without understanding the international social structure of which they are a part” (Finnemore 1996b: 2).

On the other hand, it is important to be clear on how far this argument about the importance of the ‘social’ or ‘ideational’ goes: is it ‘all the way down’? Wendt (1999: 92-138) has argued against that view. If properly understood, materialism cannot explain

very much on its own. Seemingly materialist explanations have often implicitly relied on ideas, but once the latter are separated, materialism loses much of its explanatory force (Wendt 1999: 189). Yet, materialism still has its place, and Wendt advocates a less radical form of constructivism that accepts a “rump materialism” (Wendt 1999: 130-135): not everything is ‘socially constructed’, and there is a physical reality out there, only that it does not matter in and of itself and to the extent that materialist theories assert. To be sure, this view of an interplay between material and social factors can be adopted instrumentally without subscribing to the philosophical mind-world dualism that forms the basis of Wendt’s work (more on this in the next chapter) – and it is an important concession to materialism as the following section will make clear. Before proceeding, a final remark is necessary. ‘Material’ and ‘social’ are analytically fruitful categories, and they will be used throughout the thesis. They are not to be found empirically in a pure form, though: “the material and the social contaminate each other” (Onuf 1989: 40), and Onuf has argued against a strict separation. It is important to keep in mind that the distinction is more analytical than empirical. Still, on this point of idealism/materialism, Onuf’s constructivist approach remains similar to Wendt’s (1999), and the one followed in this thesis, because it finds “socially made content dominant in and for the individual without denying the independent, ‘natural’ reality of individuals as materially situated biological beings” (Onuf 1989: 40).

Justification and condemnation of behaviour – and behaviour itself

Trying to explain and understand behaviour evidently is a key exercise in the social sciences. Constructivists have engaged in this exercise and have proposed a different explanation from that of the neo-neo-synthesis, one that has often revolved around norms. Because their focus has been on the impact of norms on behaviour, constructivists have tended to ignore that an inverse relationship exists between the two: behaviour has an impact on norms. Scholars like Axelrod mainly look at behaviour when they study norms. And (neo-)realists who want to prove the inefficacy and irrelevance of norms also look at behaviour in order to show how the two often diverge. On the other hand, it seems constructivists have neglected behaviour in their effort to stress the normative character of norms and free the concept from its limited understanding as ‘regular behaviour’. Yet, as shown above, even within a deontic definition of norms, behaviour remains an essential

element. It is entirely within the bounds of constructivist theory to say that behaviour may have an impact on norm. There is a recursive relationship between norms and behaviour. Norms affect behaviour, which in turn affects norms; this is not a circular relationship that keeps confirming the status quo: as much as norms do not determine behaviour, behaviour does not necessarily and deterministically affect norms (Onuf 1994).

Such behaviour needs to be recurrent and widespread for a norm to be undermined (Kratowil 1989: 63). It is unlikely that one instance of norm violation is sufficient to undermine that norm, and, in any case, such behaviour will not undermine the norm in an all-or-nothing fashion, but rather gradually (Raymond 1997: 218). Norms change over time, and this is a relatively slow process in which the past matters and often is a good indicator for the future. It is unlikely that today's norm is very different from yesterday's norm. At the same time, today's behaviour, if it violates the norm, has an impact on that norm in the future, however small that effect may be. In sum, "the past influences the present, but behaviour in the present changes the norm" (Goertz and Diehl 1992: 646). Still, even if such a process is gradual, is there a point when we can say that a norm is undermined and has lost its prescriptive force?

It is difficult to identify an exact threshold. The constructivist literature has remained rather vague, and it seems that it is a matter of interpretation whether a norm has been undermined or not, for example: "While *above a certain threshold* behavioral violations invalidate norms, occasional violations do not [emphasis added; D.M.]" (Katzenstein 1996: 20). This is because such a threshold heavily depends on the context and on more than just behaviour.

First, it matters who violates a norm. Not all actors are equal. The behaviour of powerful actors is likely to be more relevant than that of less powerful actors (Freedman 2004: 72; Byers 2005: 53). This is where the 'rump materialism' of a less radical constructivism – and the English School for that matter (Neumann 2001) – comes in. Material capabilities are one element of an adequate conceptualization of power, and as such they do play a role when it comes to norm change. Bukovansky (2002) has shown how powerful actors, in part through their material power, are in a position to substantially shape the normative structure of international society. The material and social are linked, and to ignore one is to miss much of the picture. As Kowert and Legro (1996: 491) have aptly remarked,

norms that are “backed by the United States are likely to become more widespread and effectual than otherwise similar norms originating in Luxembourg. While the differing capabilities of these two nations are undoubtedly a matter of interpretation, it is difficult to ignore the overwhelming material contrasts.” This is where geo-politics comes in; as the empirical chapters will argue, it matters that particularly powerful states in international society make use of PMSCs.

Second, in addition to actors’ behaviour, we need to look at how actors justify their behaviour and how their behaviour is assessed by others. This reflects the deontic element of the norm definition according to which norms provide standards for *appropriate* behaviour. Members of a society will feel the need to justify their behaviour, if they violate a particular norm, and other members of that society will respond to that behaviour by, for example, condemning it. These justifications and condemnations by actors produce data that we can study (Finnemore and Sikkink 1998: 892). In reverse, the absence of such data would mean that actors did not justify and condemn a particular behaviour, which would indicate that that behaviour is not seen to violate a norm anymore. There is no specific level of how intense or widespread that justification and condemnation needs to be. Whether a norm really needs to be shared by at least a majority of actors for it to be relevant (Legro 1997: 35), again, depends on context: who shares it, and whether actors actually condemn or justify behaviour in the face of norm violation. To conclude, both actors’ behaviour and actor’s reaction towards and assessment of that behaviour are necessary elements in a constructivist explanation of norm strength and decline (Kratochwil and Ruggie 1986: 768; Goertz and Diehl 1992: 645).

Helping constructivists break out of their ‘atomistic’ approach to society

“the importance of viewing norms not as individual ‘things’ floating atomistically in some international social space but rather as part of a highly structured social context. It may make more sense to think of a fabric of interlocking and interwoven norms rather than individual norms of this or that - as current scholarship, my own included, has been inclined to do.” (Finnemore 1996a: 161)

As shown above, constructivists have looked at norms in order to explain behaviour, and have thereby focussed on one norm at a time. However, they have thereby tended to

ignore the fact that norms do not exist in isolation, but are often closely linked to one another. The implication of this is that norms may be positively or negatively linked, that is they may strengthen or weaken each other. For example, Finnemore (1996a) shows how humanitarian norms have been supported by the norm of decolonization, and vice versa. If a new norm emerges, it will do so within an already existing normative context; if it contradicts already existing norms, this will dampen its rise (Katzenstein 1996: 56).

This idea of a 'fit' between norms, and that norms can consequently support or weaken each other is a key proposition of sociological institutionalism (DiMaggio and Powell 1991). And it is certainly nothing that is new to IR constructivists. Scholars like Kratochwil (1989) and Onuf (1989) have presented constructivist approaches that are more holistic and take the process into account in which norms are referred to and become important. It is more recent constructivist work that has narrowly focused on particular norms. It may be that these constructivist scholars sought to work empirically and found it useful to focus on one individual norm at a time for reasons of expediency. Academic specialization could be seen to call for such a focus.

Also, the schism between 'conventional' and 'critical' constructivists (Hopf 1998), saw the former embark on a course that Keohane (1988) had suggested: to develop a 'research program' akin to that of the discipline's mainstream, essentially made up of neo-liberal and neo-realist research. Once constructivism had been 'mainstreamed', its conjecture that 'norms matter' found broader empirical support (Checkel 1998: 347). But this step had its downside, too. Especially the neo-positivist language, adopted by these constructivists, suggests that one identifies 'variables', i.e. clearly separable entities. This made constructivist research vulnerable to conceiving of norms as isolated entities that are rather fixed in their almost deterministic effect on behaviour (Hofferberth and Weber 2015).

The critique of an atomism in constructivist works carries even more weight when considering that it was constructivists who set out to challenge the atomism, or individualism, in neo-positivist, rationalist IR, but now tend to transpose this atomism to their approach to norms in international society. Buchanan (2003: 19) formulated a similar critique in relation to moral philosophers who attempt "to work on any of these

topics [norms; D.M.] in isolation from the others”, thereby displacing “problems to some location conveniently out of sight, without solving them.”

There is nothing wrong about a focussed, in-depth enquiry of a particular norm, and the legitimacy approach outlined below is not suggested as an alternative, but rather as an approach that encompasses such a focussed study. The study of a particular norm and its effect on behaviour should be preceded by a study of how that norm is embedded in a normative structure: how is that norm linked to other norms, do actors refer to other norms than that in question, how can a focus on that particular norm be justified? These are some questions that the approach outlined below brings up, and that studies on norms rarely ask. The pitfall of proceeding without addressing such questions is twofold. First, the norm in question could be linked with other norms in such a way that a change in its strength and, hence, a change in its effect on behaviour is likely. For example, if those other norms support the norm in question, and the former are becoming stronger, then the latter is likely going to benefit from that development and become stronger as well. And if other norms are negatively linked to, and, thus, weaken the norm in question, and they become stronger, then the norm is likely to become eroded. Merely focussing on one norm and neglecting its links to these other norms bears the risk of ignoring interesting potential developments. And trying to inquire how a particular norm might evolve in the future without looking at how other connected norms develop would only provide a limited understanding.

Second, many different norms may be relevant to one particular behaviour; this makes it difficult to say which norm is most relevant (Kowert and Legro 1996: 486). Nevertheless, one may identify a norm that is particularly influential, but to do that convincingly, one would need to address those other norms, and explain why that particular norm is so important compared to the others. Especially when a particular behaviour is controversial, and there is a lot of debate about it, then often several norms are at play, and this is reflected in actors referring to these different norms. As outlined in more detail below, actors make competing legitimacy claims on the basis of these different norms, and sometimes also on the basis of one and the same norm. A lot would be missed of these contestations, if one only looked at actors’ references – in the form of justifications or condemnations – to one norm.

Constructivist studies on norms rarely refer to the concept of legitimacy, and if they do, they only do so perfunctorily. Wendt (1999: 250) uses the concept as one element amongst others in further elaborating on his approach to norms. He asserts that legitimacy is an attribute of a norm, hence a norm may be 'legitimate' or not, and legitimacy is one of three reasons why actors follow norms, the other two being self-interest and coercion. This reflects Kratochwil's (1984a) take on possible reasons why actors follow norms. Onuf (1989: 198-200) hardly refers to the concept, and where he does, it is mainly in relation to his discussion of the concept of authority. For these three constructivist scholars, legitimacy might be translated with 'acceptance', and both Kratochwil (1989: 103) and Onuf (1989: 198) explicitly make this translation. This is broadly in line with how the term is understood by scholars. But other than that, legitimacy is very much a 'Cinderella concept' in the constructivist IR literature, which has not gone beyond this basic understanding and, thus, has not unlocked the concept's full potential.

If this critique seems more like a caricature of IR constructivism, it is to highlight the difference between approaching normative issues primarily through the prism of 'norm' or through 'legitimacy'.¹⁴ Of course, constructivists have always looked at concepts other than 'norm', such as 'identity' (Katzenstein 1996), and are increasingly paying more attention to 'rights' (Reus-Smit 2013a), or 'habits' (Hopf 2010), but they still "remain keenly interested in studying the construction of social reality by norms" (Adler 2013: 113). The few explicit treatments of legitimacy by leading IR constructivists¹⁵ are exceptions that prove the rule.

Finally, in a footnote on the same page, Finnemore (1996a: 161) points to the English School as a theory that is better able to deal with the social context in which norms are embedded. The English School recognizes, probably much better than other perspectives, that the concern and distinctiveness of IR lies with "the way in which things fit together – what makes the world hang together [...and that] it is an integrating and synthesizing field of enquiry" (Hurrell 2001: 489). In the spirit of Reus-Smit's (2002) case for a

¹⁴ Sandholtz and Stiles (2008) are one exception; their work is situated somewhere between a constructivist and an English School approach: they map the connections between the norms of two major 'normative currents' in international society, one emphasizing state and the other emphasizing individual rights.

¹⁵ Special issues of *Review of International Studies* 31 (1) on „Force and Legitimacy in World Politics“ and of *International Politics* 44 (2/3) on „Resolving International Crises of Legitimacy“.

mutual exchange between constructivists and English School scholars, the following sections will therefore show how both theories can learn from and build upon each other. In particular, I will show that the English School understanding of legitimacy can help certain strands within constructivism to break out of this atomistic approach to society, while a particular ‘German’ constructivist strand can help the English School substantiate its claims about the role of communication in processes of legitimation.

Distinguishing norms from legitimacy

This dissertation broadly conceives of legitimacy as a social understanding of what a particular society holds to be ‘appropriate’ or ‘right’, whether it concerns a political system, a particular actor or a course of action (Suchman 1995: 574). It is a sociological approach in so far as it acknowledges a normative element of ‘appropriateness’ or ‘rightness’ and in that it conceives of legitimacy as a social, or collective, understanding that is created and contested in society. Having said this, the question arises what makes ‘legitimacy’ different from ‘norm’. In fact, a lot of confusion surrounding the concept of legitimacy in IR and the PMSC literature more specifically appears to stem from an inadequate understanding of the relationship between legitimacy and norms. Therefore, rather than attempting to present the literature on legitimacy in its entirety¹⁶, I will discuss some of its main points in developing the framework below, and an essential first step is to distinguish the concepts ‘norm’ and ‘legitimacy’ and explain their relationship. Ian Clark (2005, 2007a) has provided a useful way to do that. It is his conceptualization that forms the foundation of the analytical framework.¹⁷

¹⁶ Some of the key works on legitimacy in an international context include Claude (1966), Franck (1990), Clark (2005, 2007a), Hurd (2007), and Charlesworth and Coicaud (2010). A good overview in the context of the global governance literature can be found in Bernstein (2004). Merquior (1980) presents a history of the legitimacy term, and Mulligan (2006) provides a genealogy as well as a critique of the concept’s application in IR. Zelditch (2001) shows how scholars in philosophy, sociology, psychology, political science and political philosophy have all grappled with questions of legitimacy.

¹⁷ Palomba’s (2009) article is the first to explicitly link Clark’s work to PMSCs. His approach, however, differs in two important ways: his is more narrow in that it concentrates on what PMSCs as legitimacy actors can do to increase their legitimacy, and secondly and importantly, it completely blends out the role of audience, i.e. he does not gauge how an audience assesses the legitimacy of a practice.

The first way in which legitimacy differs from norms is the level of specificity. Norms are standards of behaviour. They can vary in their specificity and leave more or less room for interpretation. 'Rules' and 'principles' indicate different levels of specificity. Yet, a norm, whether in the form of a rule or a principle, addresses a definable, finite set of behaviours. On the other hand, legitimacy is a much broader concept. It can be applied to behaviour, actors, institutions or whole polities. It works on a more general level. A second way in which legitimacy differs is in terms of the concept's substantial content. While norms would have a particular normative content ('you shall not murder', 'you shall not cross against the red light', 'you shall uphold human rights'), legitimacy does not. This is exactly where most other conceptualizations of legitimacy have 'gone wrong'. By equating legitimacy, for example, with 'morality', they have endowed legitimacy with a particular normative content, in this case a particular moral one. This has made it possible, for example in the case of Kosovo, to juxtapose legitimacy and legality. On the other hand, legitimacy has also been defined as legality and has then been juxtaposed to morality.

What this shows is an uncertainty if not a welcome arbitrariness as to the substantial content of legitimacy. It seems that the preferred solutions have been to either embrace this arbitrariness or opt for a particular normative content. While the former solution may be attractive for political actors, a scholar would be criticised for being inconsistent in the use of terms. The problem with the latter solution is that the question arises whether legitimacy has any independent utility as a concept. After all, if legitimacy can be defined as legality or morality, why not use the latter terms in the first place (O'Connor 2008)?

Taking these two issues – the level of specificity and the substantial content – together, Clark (2005) has suggested a different conceptualization. First, instead of locating legitimacy on the same analytical level as norms, this conceptualization acknowledges legitimacy's broader scope and application. Conceptually, legitimacy is placed on a higher analytical level and is hierarchically superior to the concept of norms. This is not a statement about the relative, empirical importance or analytical utility of these two concepts. It is to assert that the concepts work on different analytical levels, and, more specifically, that legitimacy is located on a higher analytical level. It becomes apparent why this is so useful when we turn to the second issue. Instead of defining legitimacy in terms of a particular normative content, the elusive and arbitrary character of legitimacy

is retained, and not defined away. It is, thus, in principle possible for legitimacy to mean different things, for different societies, at different places and in different points in time.

And to make sense of this arbitrariness, the move to place legitimacy on a higher analytical level becomes helpful: neither is legitimacy tied to a particular normative content, nor does it have a particular normative content of its own. What legitimacy does – or what actors do when they use the language of legitimacy – is to draw from different norms (Clark 2005: 226). For instance, some may deem the 2003 Iraq War as ‘illegitimate’, because it contravened international law. Others may deem it illegitimate, because there was no moral basis for the war. And yet others may deem it illegitimate, because it was ineffective in terms of achieving post-war political stability or in terms of causing human suffering.¹⁸ While all these legitimacy claims have the same evaluative form, they differ in regard to the reasons and justifications on which their claims are based. And in giving a reason and justifying their claims, actors draw on norms. The normative quality of legitimacy is thus derived from norms; it does not have “its own substantial content: there is no independent legitimacy scale of values” (Clark 2005: 4).¹⁹

Different norms may be applied and linked to one and the same issue, for example, to a particular state behaviour. If this is the case, then it may well be that these norms prescribe different forms of behaviour. To give an example, Wheeler (2000) has suggested that a norm of humanitarian intervention is becoming established in international society. This norm prescribes states to intervene – if necessary – militarily into another state in order to uphold basic human rights that are violated on a large scale and, thus, avert a ‘humanitarian emergency’. On the other hand, the norm of non-intervention that flows from the institution of sovereignty proscribes such military intervention. There is a clear tension between these norms, because they set diverging standards for behaviour. Actors draw on these two different norms, and as a consequence,

¹⁸ Another study of national legitimacy discourses demonstrates how legality is only one, and not necessarily the most frequently employed legitimacy principle (Wiesner et al. 2006).

¹⁹ Putting moral and legal norms on a par, and postulating that legitimacy can draw equally from both, can be criticised from an ethical perspective on the basis that this questions the supremacy of law: legitimacy is far more flexible than law is, and it is this very flexibility that can be exploited “as an escape from law” by actors who disagree with current law (Roberts 2008: 208). While this is a valid concern, actors’ recourse to legitimacy is also an empowerment to challenge law that contradicts evolving moral views (Popovski and Turner 2008). More importantly, the framework advanced in the dissertation is not an instrument for adjudicating between but rather a model for making sense of conflicting normative views underlying processes of legitimation.

their legitimacy claims will clash. It is not surprising to see that the issue of humanitarian intervention is controversial, if one considers the underlying tension between different norms and the resulting clashes of legitimacy claims.

Both of Clark's (2005, 2007a) studies make the broad point that legitimacy is not static, but changed its meaning over time;²⁰ it did so because the underlying norms, or 'legitimacy principles', evolved: some norms grew in strength, others declined or disappeared, and new ones emerged. A similar view is found in Falk's (1981: 52) *Human Rights and State Sovereignty*, where he presented, and also visualized, these changes as 'ups and downs' of "a series of competing normative logics." These ups and downs reflect the idea that norms grow and fade in strength; in this sense, while a 'hierarchy' between legitimacy and norms is an analytical device, a hierarchy of norms exists, but it is not fixed. Moreover, when competing norms clash, it is not a straightforward exercise to identify beforehand which of them will prevail on the basis that one is stronger than the other (Boekle et al. 1999); this would ignore the process in which actors with different capabilities and strategies pick up and use norms in discourse.

The balance between these norms can shift, and, consequently, so does the meaning of legitimacy. In a sense, legitimacy is "international society's aggregate instrument for seeking an accommodation between competing norms" (Clark 2005: 220). If no such accommodation exists and is still in the making, then the particular issue in question will create controversy, and the language of legitimacy will be prevalent. We can, therefore, expect that the controversy in academic and broader public circles around PMSC use takes place on the basis of a push and pull between different norms, with legitimacy "never in direct tension with other norms: it is amongst those norms that any tension exists" (Clark 2005: 207).

The idea that 'legitimacy' is, in principle, constantly changing its meaning has also been suggested by Mulligan (2006) and Kratochwil (2006), although they have identified a

²⁰ He demonstrates this with historical studies that are typical of the English School and akin to much of the work in historical sociology (Hobden and Hobson 2002; Lawson 2006). While this dissertation acknowledges the long-term, macro trends relevant to PMSCs in chapter 5, the focus lies on a much shorter time-frame of around 20 years in the rest of the thesis, which, although brief when compared to most of the work by English School scholars and historical sociologists, is not less dynamic.

more fundamental arbitrariness of the concept. Not only does the shifting balance between norms change the content of legitimacy, and, hence, what can be considered ‘legitimate’, but also does the meaning of the concept of legitimacy change. To a large extent the concept is so difficult to grasp, because its meaning has evolved. While at some point legitimacy was narrowly related to a child’s birth and indicated whether it was born within a marriage and, thus, held certain rights (Mulligan 2006: 360), it has a much broader application today, and has changed its meaning from “legality to popular approval to moral appropriateness” (Mulligan 2006: 349). Still, and this is an important point to take away, a certain continuity to the use of the concept can be identified: legitimacy has usually been a normative concept that “imputes a positive evaluation to its object” (Mulligan 2006: 355). In that, the continuity of its use reflects the basic character that we have identified above – namely, that legitimacy is a normative concept and suggests the ‘appropriateness’ of a certain object.²¹ Finally, although I do not share a Wittgensteinian approach to the concept of legitimacy (Kratochwil 2006), the approach taken here has some similarities to it. In trying to understand legitimacy better, we have sought to relate it to cognate concepts; the argument has been that legitimacy is closely linked to norms, and in order to understand the former better, we particularly need to differentiate it from the latter.

Legitimacy

Norm

Norm

Norm

Norm

Figure 1: Hierarchical relationship between legitimacy and norms as conceptualized by Ian Clark (2005)

²¹ This also means that the use of the concept by the researcher can have “unintended consequences, as in any statement legitimacy may imply, or state, a more moralistic quality than the author had meant (or expressly sought to argue)” (Mulligan 2006: 368). Legitimacy retains its normative ‘signalling function’ in a social scientific work (Pitkin 1972: 284).

Figure 1 tries to sum up the ideas discussed so far. What this figure captures is that, first, legitimacy is situated on a higher analytical level than norms and that, second, norms relate to each other (black arrows) in a way that is different from the relationship between legitimacy and norms (white arrows). The white arrows that go from norms to legitimacy visualize how legitimacy draws from these norms when actors refer to them in the justifications of their legitimacy claims. In conclusion, this is the first way in which this legitimacy approach differs and goes beyond constructivist studies on norms: legitimacy is a broader concept than the concept of norm; as a more holistic approach it can better account for the interplay between norms.

The English School and the process of legitimation

What figure 1 cannot capture, however, is the political nature of what Clark (2005, 2007a) has termed ‘the practice of legitimacy’, and which is usually referred to as the process – or processes – of legitimation. The figure might suggest that, legitimacy is something fairly straightforward, and that empirical research can straightforwardly say what is and what is not ‘legitimate’. It suggests that, because norms push and pull in different directions and because legitimacy is an accommodation between them, all one need to do in order to know if an object is ‘legitimate’, is to attach a certain value to every norm and then sum everything up. One would then get a value that indicates a certain level of legitimacy. As will be shown in the methodology chapter, some have understood and used the concept in this way. To understand legitimacy in this way, however, would be to “impose a rationalist paradigm upon a politically indeterminate sphere” (Clark 2005: 254). Acknowledging the indeterminacy of the process requires an acceptance of contingency and the possibility of fortuitous events (Price and Tannenwald 1997). Overall, legitimacy is better understood as a process, as legitimation, rather than legitimacy as such, which is rather the outcome of that process (Barker 2001: 23; Charlesworth 2010: 398). And in this process norms are not the only elements.

The role of actors in legitimation

The above understanding would also ignore that this weighing up of norms is done by real-world actors, that norms are actually used – or misused – by actors who pick some of

these up and promote them, while ignoring others (Freedman 2004: 128-129). These are actors who have different interests and identities, and with power relationships existing between them. Norms are principles in the sense that they are ideals, or at least present a picture of an ideal. But as argued above, the ‘ideal world’ and the ‘material’, physical world – if we want to make that distinction – are not separate. Norms are put into practice, they get enmeshed in the ‘real’ world by actors who refer to them (Armstrong and Farrell 2005: 4), whether it is in the form of a condemnation or because they try to justify and seek support for their actions. As such, norms on their own, even if we consider all of them and the links between them, do not determine what can be considered ‘legitimate’: “[t]he attainment of legitimacy is a practical political activity; it can be encouraged by appeal to specific normative principles, but it is not the same as them” (Clark 2005: 255). Therefore, legitimacy is “as much a part of the messy world of politics as of the idealised world of legal or moral debate” (Hurrell 2005: 16). While the above discussion on norms has largely looked at norms as principles and as part of the ideal world, we also need to look at the practice and process of legitimation: who refers to these norms, whom are they addressing, and why are they referring to norms.

Actors that refer to and promote norms have been called ‘norm entrepreneurs’ by constructivists (Finnemore and Sikkink 1998: 893). The term, however, would be too narrow to describe actors that participate in processes of legitimation. This is because it suggests that they may only seek to promote a particular norm. Instead, ‘legitimacy actors’ may seek to legitimise or delegitimise many things; in our case they are concerned with a particular state practice. ‘Legitimacy actors’ is a broader term and the activities of these actors encompass those of norm entrepreneurs. Often, legitimacy actors would refer to norms not to promote the norms themselves, but to use them as a normative basis on which they can claim the (il)legitimacy of a certain object. A legitimacy actor can make use of a variety of norms – and will often focus on one or a few – if they help him in his strategy of legitimation. The point is that while a norm entrepreneur promotes a specific norm, a legitimacy actor will often refer to norms as a means to ‘promote’ something else. Following her prior choice of words, Finnemore (2005: 206) has coined the more adequate term ‘legitimacy entrepreneurs’ for such actors.

The power of actors to successfully shape understandings of legitimacy is influenced by several factors that broadly fall into two categories. The first has already been presented

above and has to do with how actors reinforce or erode legitimacy principles – norms – through their behaviour; material capabilities of actors, but also their social position of authority (Cortell and Davis 2000: 76), or their “proximity to the leadership of the target community (Farrell 2001: 83) are relevant in this regard. The second category concerns actors’ more immediate role in shaping understandings of legitimacy through discourse (Adler 2005: 178). Actors’ ‘skilled use of culture’ (Swidler 1986) manifests itself particularly in the choice of strategies of legitimation and what legitimacy principles they build on and refer to. It is in these two ways that the *power of actors* matters in the practice of legitimacy.

Acknowledging the role of legitimacy actors in processes of legitimation is important, because it prevents us from overemphasizing the constraining and enabling ‘power’ of the normative structure in which such processes are embedded. As a set of norms that push and pull in different directions, normative structure, just like intersubjective understandings in general, can become “solidly sedimented” (Buzan and Waever 1997: 244), so much so that it is taken for granted or accepted as ‘natural’. But, in principle and practice, it is amenable. In picking up norms, actors contest or advance a particular understanding of legitimacy, changing or reinforcing the present normative structure in the process. So even as normative structures can be “a conservative force” (Bernstein 2004: 15), change is possible; and the process of legitimation “describes the process of normative shift in international relations” (Clark 2005: 20). Particularly if one is interested in normative change, the role of actors needs to be studied (Finnemore 1996b: 137), which is done in chapters 7 and 8. The ‘agency-structure debate’ within IR and the social sciences more broadly has produced many writings; much of the debate stems from scholars overemphasizing – or being accused of overemphasizing – either agency or structure to the detriment of the other. Such debates are useful to the extent that they remind us that both elements are necessary. In that, the thesis follows constructivist scholars like Onuf (1989) who have, very early on, made clear that the two belong together and constitute each other.

Whom are legitimacy actors addressing? After all, if the social construction of legitimacy is an intersubjective process, it takes more than legitimacy actors to ‘create’ legitimacy. They are making legitimacy claims, and thereby addressing someone, whose agreement, support, consent they seek. There are various terms to describe such acceptance of

legitimacy claims. The idea that there needs to be some form of acceptance, is common to most works on legitimacy (Mulligan 2006: 364). ‘Consent’ is one element of Beetham’s (1991) conceptualization of legitimacy. Clark (2005: 191-206) speaks of consensus, while also referring to an ‘audience’ that needs to accept legitimacy claims (Clark 2007a: 14).

Interestingly, the idea of an audience extends to other issue areas as well, and is a fundamental characteristic of intersubjective processes, albeit one that is often neglected. For instance, the securitization approach (Buzan et al. 1998) requires that something is only successfully ‘securitized’, and hence becomes a security issue, if an audience accepts it as such; if that acceptance is denied, then the ‘securitizing move’ has failed. One could argue that the idea of acceptance by an audience is bound up with notions of liberal or democratic government. However, to speak of an audience does not amount to making any claims on who the audience is and how it is constituted. Rather, audience should be understood in a general sense, not tied to one specific historical society. Independent of any one specific historical society, there is a “need to ‘bind in’ at least the most significant members among the subordinate, through actions or ceremonies publicly expressive of consent” (Beetham 1991: 19).

Legitimacy beyond the state – international and world society

The focus of this dissertation on the legitimacy of state conduct in international society already points to the relevant audience, which calls for a more explicit treatment of the two English School concepts of international and world society. Before doing so, however, the move to think of legitimacy beyond the state needs to be addressed. After all, legitimacy has traditionally been treated within the state, as a matter between the rulers and the ruled. It is only in the last 20 years or so that legitimacy has received increased attention from scholars interested in legitimacy on the international level (Coicaud 2010: 2). They argued that although no such clear relationship between the rulers and the ruled existed in a supposedly anarchical system, legitimacy became even more important for understanding why states complied with international norms and law in the absence of the kind of enforcement and coercion known from within the state (Franck 1988, 1990; Hurd 1999; Clark 2007b). Even if one comes to accept a more hierarchical view of international relations, legitimacy then matters in similar way as it

does within the state, and the related concept of authority becomes more relevant (Uphoff 1989), as in research on the legitimacy of global governance institutions (Buchanan and Keohane 2006), such as the UN (Hurd 2007) or the EU (Scharpf 1999), or of NGOs (Collingwood 2006; Steffek and Hahn 2010). This dissertation is different from these studies in that it is not so much concerned with the legitimation of actors but that of actions (Coleman 2004: 35-38) or 'rightful conduct', i.e. "how the members of international society should conduct themselves in relation to each other" (Clark 2005: 25).

The basic idea behind the concept of 'international society' is that "just as human beings as individuals live in societies, which they both shape and are shaped by, so also states live in an international society which they shape and are shaped by" (Buzan 2004: 8). The concept differs from 'international system' in that the latter denotes merely an interaction between states; states potentially have an impact on each other's decisions and the behaviour of others is thus part of every state's calculus. In contrast, 'international society' adds a social dimension to that interaction. In a classical English School work, international society is said to exist

"when a group of states conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions" (Bull 2002 [1977]: 13).

The fact that the English School employs this concept, points to some of its substantive theoretical claims. In general, from this perspective, there is more to international relations than the material nature of interactions between pre-constituted actors with given preferences. Similar to constructivists, then, the English School emphasises the social dimension of international relations. Just as constructivists argue that for norms to make any sense, they need to be embedded in a 'society' or 'community' – although some constructivists might not use these terms – English School scholars argue that for legitimacy to make any sense it needs to be embedded in a society (Clark 2005: 6). The English School acknowledges the potential not only for an international society, but also for an international system and a 'world society'. This tripartite division of international relations goes back to Wight (1991) and has been the theory's key characteristic. This

pluralistic approach to IR is arguably its greatest contribution to the discipline (Little 2000), and a big part of what makes it potentially a “grand theory” (Buzan 2001: 481).

While the concept of international society has been fairly well developed, ‘world society’ has been rather neglected by the English School (Buzan 2004). Efforts to take the concept more seriously and develop it within the English School point to the expectations on and the utility of the concept. To shorten what could be a lengthy elaboration of different understandings of world society, Buzan’s (2004) conceptualization is adopted here. In its most basic sense, world society is the realm of various non-state actors forming a society. Although not without criticism (Adler 2005; Dunne 2005), Buzan’s work on world society as an English School concept remains unrivalled. Particularly the clear separation between international society as a society of *states* and world society as a society of *non-state actors* is fruitful. It provides an alternative to an often all-encompassing understanding of world society as including both states and other actors. To be sure, the distinction is not an empirical, but a conceptual one. It is not to say that these two realms do not overlap and interact. The contrary is the case as will be shown in the empirical chapters. But to get at this tension between international and world society analytically, “it is vital to keep the two worlds conceptually distinct” (Buzan 2004: 89). Therefore, in addition to the more holistic character of the legitimacy approach presented here, the second way in which this approach goes beyond a constructivist one is in the explicit application of and distinction between these two English School concepts.

The distinction between international and world society as well as between audiences and legitimacy actors makes a more nuanced argument possible. It allows a focus on international society as an audience, while allowing for members of other societies to be relevant as legitimacy actors. A focus on international society as an audience does, therefore, not mean that other ‘societies’ – domestic societies or world society – are irrelevant to this study. On the contrary, particularly the interplay between international and world society is going to be of interest in this thesis. Drawing on Clark’s (2007a) second book on how world society actors shape states’ understandings of legitimacy, but also looking at the constructivist literature on non-state actors and transnational society (Keck and Sikkink 1998; Florini 2000), chapters 7 and 8 investigate these dynamics.

Proceeding as if audiences could not be delimited from one another is unhelpful and even detrimental for analysis since distinctions between how PMSC use is regarded within the US and Germany, within the NGO community or in mass media and pop culture could not be made. The focus on international society as the audience of interest is a starting point for this thesis. In that, I follow the traditional English School emphasis on international society as the object of inquiry. Whether this focus is justified will only become clear through empirical investigation in subsequent chapters.

Finally, with a focus on international society, the thesis also takes a systemic IR approach. A systemic approach to legitimation processes of PMSC use is different from comparative studies of domestic ideologies and states' use of PMSCs (Krahmann 2010; Petersohn 2010). Essentially, the latter have looked at unit-level characteristics to explain the different behaviour of those units. Being interested in legitimation processes in the international realm, the assumption is that system-level dynamics are most relevant. Studying the society of states to some extent means taking the units of that society, namely states, as given. An inquiry into how international society regards the legitimacy of PMSC use sets certain limits to the investigation of how particular states and their societies regard that state practice. Instead of arguing that these unit-characteristics are irrelevant or – which amounts to the same – that those units are alike, the approach acknowledges that unit-level characteristics may shape and interact with the international level. Just as the approach is open for investigating the relationship between international and world society, it is in principle open to potentially interesting connections between the unit- and system-level. To know more about the unit-level, the thesis draws on comparative studies. But the empirical focus will clearly be on the system level, because important dynamics exist on that level, which are worth studying in their own right.

In conclusion, after having presented the constructivist take on norms and the approach to society that follows from it, the latter has been criticized for being 'atomistic' and thereby ignoring interesting and relevant connections between norms. Not as an alternative, but as an addition to the constructivist focus on norms, this chapter has advanced a particular approach to legitimacy. This was done by, first, distinguishing the concepts of norm and legitimacy, and by explaining their relationship. Second, the political and the process character of legitimacy have been stressed. Legitimacy actors and audiences are key elements in this process; distinguishing between them and then relating them to the two

English School concepts of international and world society will allow a more nuanced argument in the empirical part of the thesis. Before turning to questions of application and methodology, there is one final addition to the approach presented here. In a sense, having gone beyond constructivism, we now need to return to constructivism, and one particular strand within it.

‘German’ IR constructivism and the role of communication

Why are legitimacy actors referring to norms? In order to answer this question it is fruitful to draw on what might be labelled a ‘German’ constructivist strand.²² In particular Risse’s (2000a) and Müller’s (2004) works are a good representation of this strand that focuses on the role of communication and language in processes of social construction. This strand can help make sense of the communicative aspects of legitimation processes that remain somewhat vague and implicit in Clark’s legitimacy approach (2005, 2007a). Clark’s English School approach to legitimacy helps constructivist studies on norms escape their atomistic approach to international society; drawing on the German constructivist strand helps in substantiating the English School understanding of the communicative aspects of legitimation processes.

From this perspective, the process of legitimation is essentially a discursive activity (Steffek 2003). The basic unit of that activity is a legitimacy claim made by actors. Legitimacy claims are composed of an object, an evaluation, and a legitimacy principle (Schneider et al. 2007: 135). In our case, the object is the use of PMSCs by state actors. The evaluation grasps the core meaning of legitimacy, and so the use of PMSCs is evaluated either as ‘legitimate’ or ‘illegitimate’. More important than the actual terms that are being used is the evaluative form of the statement. Finally, with the ‘legitimacy principle’ a reason or justification is given for the evaluative statement; this is where norms come in and function as the basis of a claim to legitimacy. Such justifications are

²² One could object that the demarcation as a ‘strand’ is futile, since the emphasis on language and communication is at the core of constructivism, and as such common to all strands. One could rightly point to classic constructivist works by Kratochwil (1989) or Onuf (1989) for whom language played a very central role in social construction. This ignores, however, that different constructivist strands emphasize different aspects and that some do, indeed, neglect the role that language and communication play. Constructivism is a broad church, and to be clear on what we mean, the identification of such a ‘German’ strand makes sense, also since scholars within that strand can be said to revive and elaborate the communicative aspects of constructivist theory.

an essential element of legitimacy claims and legitimacy discourse more generally: “Claims that something *is* right, i.e., the right thing to do, make necessary the giving of reasons and invites challenges on the basis of intersubjectively shared standards” (Kratochwil 1989: 159). Legitimacy is essentially “about providing persuasive reasons as to why a course of action, a rule, or a political order is right and appropriate” (Hurrell 2005: 24). Kratochwil (1989: 125) has shown how even legal decision-making involves justifications; legal practitioners are required, if they want their judgements to be persuasive, to provide reasons for their decisions. What is true for legal decision-making is even more so for legitimacy actors with no formal authority to make decisions and so is characteristic of international political discourses (Shapiro and Stone Sweet 2002; Chayes and Chayes 1995). Particularly when it comes to the use of force, actors engage in legitimacy discourse and provide reasons for their claims (Freedman 2005: 94).

Establishing that actors make ‘legitimacy claims’, engage in ‘legitimacy discourse’ and refer to norms does not imply that they are following a specific logic of social action. Talking of ‘discourse’ might suggest that legitimacy actors engage in what Habermas (1981) calls ‘communicative action’. German constructivist IR scholars have picked up this idea. In addition to the logic of consequentialism and the logic of appropriateness (March and Olsen 1989), they have proposed a ‘logic of arguing’. This logic of arguing is derived from the idea that the logic of appropriateness incorporates both an unconscious and a conscious process of norm-regulated behaviour. In the former, actors have internalized norms to a degree where they are taken for granted; in the latter, actors need to consciously “figure out the situation in which they act, apply the appropriate norm, or choose among conflicting rules” (Risse 2000a: 6). It is the latter form, the logic of arguing, where actors engage in truth seeking and challenge the validity of their arguments; the goal is to find a mutual understanding and a reasoned consensus, which implies that actors must be willing to question and change their own preferences (Risse 2000a: 2).

Legitimacy discourse, however, does not need to follow the logic of arguing (Steffek 2004: 486; Schneider et al. 2007: 154). The term may evoke the ideal conditions of Habermas’ lifeworld and his discourse ethics. But one need not go so far as to make truthfulness and rational deliberation preconditions for legitimacy discourse (Bjola 2009: 89). Legitimacy actors may as well not be willing to change their preferences and not

want to reach a consensus. And yet they can use legitimacy claims in order to maximise their own preferences, thus, acting strategically, and following a logic of consequentialism (Risse 2000a: 21-22; Armstrong and Farrell 2005: 11; Price 1998). When actors believe that their goals are best achieved through arguing, and not through bargaining, then they will revert to that kind of discourse (Elster 1991). By avoiding strong claims of truthfulness and rational deliberation, one refrains from making an implicit normative argument about how legitimacy discourse *should* unfold (Mulligan 2004: 480). Also, rather than assuming a particular logic of action, one makes competing explanations part of the empirical investigation (Klotz and Lynch 2007: 16).

Legitimacy claims as defined above are only understood as a speech act in a very limited sense. In speech act theory, there has been an overreliance and overemphasis on the illocutionary dimension of a speech act, i.e. what is done by saying something (Searle 1969). On the other hand, the perlocutionary dimension, the effect of a speech act, has been rather neglected (Kratochwil 1989: 29-30). A legitimacy claim obviously has an illocutionary dimension, because by making that claim, one is making an argument about the rightfulness of something. But it is not the case that by making a legitimacy claim something becomes legitimate: “Auto-legitimation is an oxymoron – an actor can jump up and down, declaring loudly that his or her actions are legitimate, but if nobody accepts this, then they are not correctly described as such, even if he or she is making a legitimacy claim” (Reus-Smit 2007: 159). Something becomes legitimate in an intersubjective process where an audience needs to accept something as legitimate, and not because one legitimacy actor says so: “[l]egitimacy is something everyone would like to claim and we should be sceptical when they try to do so” (Thirkell-White 2006: 340). However difficult to discern and ephemeral in character that acceptance may be, it has to be taken into account in a framework that sees legitimacy as an intersubjective construction. This is in tension with an understanding of legitimacy based on speech act theory. It would be confusing to talk of a speech act, because of its close link to illocutionary acts, and because the illocutionary dimension of a legitimacy claim is not central to understanding how something becomes legitimate. Rather, the perlocutionary dimension matters: the consequences and the effects of legitimacy claims on a relevant audience (Perelman and Olbrechts-Tyteca 1969). This will shift the analysis away from a

concentration on the legitimacy claim as such, to a focus on legitimacy actors' social power, audiences, and principles and strategies of legitimation.²³

Schimmelfennig (1995, 1997, 2001) has coined the term 'rhetorical action' to capture the strategic use of arguing. Legitimacy actors can 'shame' other actors into a specific behaviour by pointing out publicly that their behaviour deviates from a norm that they have committed themselves to in the past (Schimmelfennig 2001: 64). Legitimacy actors may, thus, use norms purposefully, recognizing that doing so can help maximize their preferences: "Actors may be well aware of the potential advantages accruing to those who control certain norms" (Kowert and Legro 1996: 492). The idea of rhetorical action shows two things about legitimacy discourse in general. First, whether acting strategically or not, legitimacy is always contested publicly, and it is only in a public discourse that legitimacy is created (Steffek 2003: 265). Second, legitimacy discourse takes place in a 'society'. In regard to rhetorical action specifically, 'shaming' can only work when actors are susceptible to social pressure and care about their identity or standing as a member of a society (Risse 2000b: 188). This is in line with both constructivist and English School assumptions and requirements, the former referring to the role of norms and the latter to the role of legitimacy in 'society'. When actors use legitimacy claims strategically, they can choose which principle to refer to. But their choice is limited by the principles that are present in that particular historical society, and the legitimacy actor "cannot hope to stretch the application of the existing principles indefinitely" (Skinner 1988: 117). Moreover, some legitimacy principles are dominant in any given society (Bukovansky 2002: 43; Mulligan 2006: 361). Both strategic and communicative action will be shaped and constrained by this normative structure. Those legitimacy actors that refer to marginal legitimacy principles have to do so against a prevailing set of principles, "a dispute cannot seek to secure legitimacy simple, but seeks to secure one legitimacy over another" (Mulligan 2006: 369). Again, this points to the importance of acknowledging the tensions and the interplay between agency and structure.

²³ In regard to securitization theory (Buzan et al. 1998), which has to some extent relied on speech act theory, exactly this point has been made. Critics have pointed to the inconsistency of securitization theory when requiring acceptance by an audience while also heavily drawing on a strand of speech act theory that is associated with Searle's (1969) focus on illocutionary acts rather than Austin's (1975 [1962]) broader speech act theory (Balzacq 2005; Stritzel 2007; McDonald 2008).

‘Rhetorical action’, thus, lies somewhere in between a logic of arguing – derived from constructivism – and a logic of consequentialism – derived from rationalism. It confirms empirical evidence that shows that idealism and rationality are more intimately connected than the rationalist-constructivist debate within IR might suggest (Finnemore and Sikkink 1998: 909; Ecker-Ehrhardt 2002: 246). Does it mean that we should play down the ontological differences that have sparked these debates? No, because the rationalist assumption of materially given preferences is incommensurable with constructivist assumptions.²⁴ Only if preferences are understood as constituted in intersubjective processes, can we concede from a constructivist perspective that actors may well act rationally (Kratochwil 1989: 47-56; Bukovansky 2002). In terms of logics of social action, an integration is achieved by establishing a hierarchy where the logics of arguing and consequentialism follow the logic of appropriateness (Müller 2004). Whether legitimacy actors follow strategies of legitimation or refer to norms deliberatively, they are not “let loose from the bonds of society” (Müller 2004: 414).

Conclusion

This chapter has presented the theoretical elements of the dissertation’s analytical framework. It has first presented the constructivist approach to norms. Norms are standards of *appropriate* behaviour, not merely *regular* behaviour. However, behaviour remains an important part of a norm definition. As such, not only do norms influence behaviour, but behaviour may also affect norms. After presenting the constructivist approach, this work was criticized for its ‘atomistic’ view of the international society. Norms are embedded in a normative structure, a web of interrelated norms. To ignore those relationships means attaining only a glimpse of that normative structure, and potentially missing out on interesting normative changes. The in-depth focus on norms should not be discarded, and should remain part of a broader approach. The next step was to present such an approach. First, the challenge was to distinguish the concept of legitimacy from the concept of norm. Drawing on Ian Clark’s (2005, 2007a) conceptualization, legitimacy was found to be a broader concept. While norms may push and pull in different directions, legitimacy is not in tension with any of them, because it

²⁴ Particularly methodologically pluralist approaches, like the English School, can be at risk of discounting the incommensurability of theoretical propositions or research methods (Guzzini 2001: 499); I justify the methodological choices of the dissertation in chapter 4.

works on a higher analytical level. Legitimacy draws its normative content from these norms, and does not have a normative content of its own. It functions as an accommodation between competing norms. Second, because legitimacy is a social construct, to understand it better, it is necessary to look at how it is created: the process of legitimation. This is a political activity in which legitimacy actors with different power relationships address audiences by making legitimacy claims, which are based on various norms, and through strategies of legitimation. Third, to understand the communicative aspects of this process better, the framework draws on the 'German' strand within constructivism. In referring to norms, legitimacy actors do not necessarily follow a logic of arguing or engage in what Habermas has termed 'communicative action'. They may do so, but they may as well act strategically. They may realize that referring to norms and engaging in legitimacy discourse is the best way to maximize their preferences: claiming that a particular action is in line with a commonly shared standard or putting pressure on others, because their behaviour violates such a standard.

A framework that draws on different theories runs the risk of becoming incoherent. Here, this risk has been minimised by drawing on theories that are very close to each other. First, constructivism is a social theory first and foremost. As such it makes very general, or fundamental, claims about the world, about "the nature of human agency and its relationship to social structures, the role of ideas and material forces in social life, the proper form of social explanations" (Wendt 1999: 5). This is why a distinction was made between 'constructivist studies on norms' and a 'German' strand within constructivism. Also, the English School, although it does have some similarities with constructivism (Dunne 1995), not only has its differences vis-à-vis constructivism, but also has different strands within it (Reus-Smit 2002). There is some utility in distinguishing 'theories', 'schools', or 'strands' from one another, since scholars who work within them usually share more with each other than what sets themselves apart. My argument is not that lines do not exist between theories, or that one should not draw such lines, but that these lines overlap. The fact that we started off with looking at constructivist studies on norms, went on to present an English School approach to legitimacy, only to end again with a constructivist strand shows how all overlap and can enrich each other in important ways. And they overlap to such an extent that it makes sense combining them into a 'framework' without creating a new 'theory', 'school' or 'strand'. While such a framework may initially seem less parsimonious than what some conventional

constructivists are used to, in Part Two I hope to show that it is analytically useful. The critique with which this chapter began remains: instead of beginning the analysis by focussing on one norm and, thereby, omitting relevant dynamics, the framework embraces the complexity of legitimation processes to then find significant factors and concentrating on them in subsequent empirical research.

Chapter 4: Reflective analyticism and a multi-method approach

Having outlined the theoretical foundation, this chapter deals with how the framework will be applied in the empirical chapters. Before getting into a discussion of research methods, the first challenge is to make sense of the philosophical assumptions of the dissertation. Following Klotz and Lynch (2007) the easy route would be to state that this dissertation is situated somewhere between a positivist and post-positivist approach, coming close to constructivism's new 'middle ground' (Adler 2013: 112) that has got closer to critical and linguistic approaches. To be more precise and transparent, however, and also to benefit from an understanding of the philosophical constraints and opportunities of the analytical framework, I will first locate the dissertation in the philosophy of science debate. Engaging in particular with Patrick T. Jackson's (2011) *The Conduct of Inquiry in International Relations* and his critics, I hope to show that what I call a 'reflective analyticism' forms the best basis for this study.

Following this, the second challenge is to find adequate methods for the study of legitimation that also align with the English School and IR constructivist elements of the framework. The English School has been said to treat methods "somewhat in the nature of underclothing – assumed to be there but scarcely discussed in polite society" (Navari 2009a: 1). The distinctiveness of IR constructivism, on the other hand, supposedly lies in its theoretical arguments rather than its empirical research strategies (Finnemore and Sikkink 2001). If we take these two statements together and consider that the analytical framework outlined in the previous chapter draws on the English School as well as on a constructivist strand, then a chapter on methodology is desperately needed and perhaps at the same time unusual, at least for the English School. Fortunately, Finnemore and Sikkink's self-critical appraisal was formulated relative to other, mainstream, research and not relative to the English School. A strength of most IR constructivist research vis-à-vis the English School has long been, and probably still is its explicit treatment of methods and methodology (Schouenborg 2011: 41). But rather than revisiting English School methodology (Navari 2009b) or debates between English School scholars and their, usually American, constructivist counterparts (Finnemore 2001), I follow a more straightforward approach: figure out what methods are employed in empirical research on legitimation, and then select those that are coherent with the theory.

Taking a step back to meta-theory

The meta-theoretical, or philosophy of science, debate within IR conventionally distinguishes between ontology (what exists in the world) and epistemology (how we know what exists). Such basic, yet controversial, philosophical questions should not be confounded with the more substantive theoretical debates in IR on world politics, such as the relevance of material versus social factors (norms, identities etc.) or the importance of state and non-state actors. The theory chapter provided some answers to the latter questions, whereas this chapter is on the philosophical basis of this study. But why pay attention to such fundamental questions that have not been solved in the philosophy of science, that have sparked controversy in IR, and that are a further step removed from the actual research objective of this dissertation?

*'Who needs philosophy of science, anyway?'*²⁵

After all, engaging in this discussion presumes that this is somehow necessary or worthwhile. The purpose of this dissertation, however, is very pragmatic: to develop a framework that provides a better understanding for how the legitimacy of PMSC use is evolving in contemporary international society. A more targeted approach would, now that the theoretical elements of the framework have been outlined, proceed first with a presentation of the methods and then with the empirical research. In fact, some have advocated just that: to get on with the research of international relations, to not be obsessed “with method and with questioning philosophical issues at the expense of getting on with a job of actually looking at the world or looking at societies” (Halliday 2000: 247). This pragmatist position is not new (Halliday 1995), but has in recent years gained support in mainstream debates, particularly through Sil and Katzenstein’s (2010) well-elaborated call for an ‘analytic eclecticism’ (Reus-Smit 2013b: 591).

So, ‘who needs philosophy of science, anyway?’ Although I am sympathetic to the pragmatic views expressed by Halliday, Sil and Katzenstein and others, there are at least two reasons for why it is worthwhile not following the pragmatists. First, avoiding these contentious philosophical questions does not make a study devoid of particular

²⁵ Title of an *International Theory* (2009, Volume 1, Issue 3) symposium on the issue.

philosophical commitments. If anything, it pushes them into the background from which they continue to operate. The often tacit strategy of ‘bracketing’ thorny philosophical questions means keeping them implicit, but does not promise an escape from them (Reus-Smit 2013b). So, for reasons of transparency as a means to facilitate scholarly debate, IR research would do well to seek a clarification of assumptions and commitments. Second, ontological and epistemological assumptions enable and constrain theoretical claims and empirical research. A ‘positivist’ study on norms and identities is conceivable, but would be different from a ‘post-positivist’ approach (Jackson 2011: 204), the same being true, of course, for the study of legitimacy and legitimation. A positivist approach to how international society’s understanding of legitimacy evolves, allows the researcher to identify causes for changes, test hypotheses against, possibly quantitative, data, and to generalize such findings.²⁶ A post-positivist approach would likely reject the possibility of causal analysis of the social world, or the idea of generalization, and likely advocate a more contextual, possibly critical, and interpretive ‘thick’ description of individual cases. Philosophical assumptions do not determine the type of research, and it is often difficult to infer the former from the latter (Humphreys 2013: 299).²⁷ But they allow for certain knowledge claims while closing down other avenues of inquiry. And being aware of these potentials and limits to one’s research is not only a matter of transparency for the reader, but also one of utility for the researcher, since s/he can then make a conscious choice of philosophical assumptions according to how well they fit or advance the research interest.²⁸

²⁶ Against the backdrop of the traditional ‘classical approach’ of the English School, some have for example advocated a move towards a positivist English School methodology (Glavind 2009; Mendelsohn 2009).

²⁷ For example, there is disagreement over Waltz’ (1979) philosophical commitments; as a founding father of neo-realism, it is easy to think of him as a positivist, yet he is also been identified as a critical realist (Waever 2009) and an analyticist (Jackson 2011).

²⁸ Not to say that this somewhat strategic choice is easy, since such commitments may often intertwine with the relatively stable personal beliefs and preferences of the researcher. Also, the utility criterion is not neutral and may not be the best ground for a dialogue between meta-theoretical camps in IR. But if philosophical commitments are ultimately a “*means toward another end*”, namely to help “researchers to produce valid knowledge” (Jackson 2011: 191), then it is a good starting point, one that is more open to scrutiny than making philosophical commitments a matter of personal belief that is in no need of justification.

Analyticism

In this spirit, what are the philosophical commitments of this dissertation? There are several labels for the philosophical dividing lines and ‘camps’ in IR, such as ‘problem-solving’ or ‘critical’ theory (Cox 1981), ‘rationalism’ or ‘reflectivism’ (Keohane 1988), an ‘explaining’ or ‘understanding’ mode of social scientific inquiry (Hollis and Smith 1990), or the more widespread distinction between ‘positivism’ and ‘post-positivism’. But I find Jackson’s (2011) fourfold taxonomy a useful starting point, because he builds it on a critique of prior efforts to categorize meta-theoretical commitments and because it offers refined categories, categories that go beyond the confusing and ‘loaded’ labels of positivism and post-positivism (Chernoff 2007: 401). The result is a distinction between neo-positivism, critical realism, analyticism, and reflectivism (figure 2).

	<i>phenomenalism</i>	<i>transfactualism</i>
<i>mind-world dualism</i>	neopositivism	critical realism
<i>mind-world monism</i>	analyticism	reflexivity

Figure 2. Patrick T. Jackson’s (2011: 37) typology of philosophical-ontological commitments in International Relations

I broadly follow what Jackson (2011: 112-155) has labelled an ‘analyticist’ approach. This approach is characterized by its ‘mind-world monism’ and ‘phenomenalism’. ‘Mind-world monism’, according to Jackson, is opposed to the ‘mind-world dualist’ separation between the researcher and the research object. In a dualist conception, knowledge claims are directed at a mind-independent world out there; as such, the researcher’s efforts are “directed toward properly crossing that gap, and valid knowledge must in the end be related to some sort of accurate correspondence between empirical and theoretical propositions on the one hand and the actual character of a mind-independent world on the other” (Jackson 2011: 35). On the other hand, the monist view rejects the separation between ‘mind’ and ‘world’, or researcher and research object, in the first place (Jackson 2011: 36), and rather conceives of researchers with their theories and conceptualizations as “continuous with the world that they are investigating” (Jackson 2011: 114).²⁹ Whereas

²⁹ This non-representational, ‘monist’ view of knowledge production is more conventionally labelled ‘constructivist’ in the philosophy of science; Jackson avoids this term, however, because

dualist assumptions lead (neo-)positivist and critical realist theories to seek an accurate empirical representation of the world, the analyticist approach regards theories and concepts “as a useful account” (Jackson 2011: 198); through organising and simplifying knowledge, research acquires the instrumental value of helping us make sense of the world. Jackson sees Weber’s ideal-typification as the epitome of analyticism, and also locates Waltz’ (1979) *Theory of International Politics* in this line of inquiry (2011: 114). Moreover, the knowledge produced by analyticists does not allow for empirical generalization, but rather for “logical *generality* [emphasis in original; D.M.] – ideal-typical accounts of causal factors, processes, mechanisms, and sequences” (Jackson 2011: 199). Analytical frameworks have logical generality in the sense that they are independent of any one empirical case and can, therefore, help illuminate a wide range of cases. They do not, however, provide empirical generalizations and regularities, i.e. empirical claims that hold across multiple cases (Jackson 2011: 153).³⁰

The second basis for analyticism is its phenomenism, which Jackson (2011: 61) describes as a “more robust descendent of empiricism.” For empiricists, empirical knowledge can only be properly based on sensory impressions. Phenomenism acknowledges the difficulty of relying solely on one’s senses and unmediated perceptions, and instead suggests that knowledge be based on experience, whether unmediated through our senses or mediated by tools that augment our senses or by language, social conventions etc. (Jackson 2011: 60). Phenomenism is juxtaposed to transfactualism that “holds out the possibility of going beyond the facts to grasp the deeper processes and factors that generate those facts” (Jackson 2011: 37).

Jackson’s taxonomy, while useful, is not without its weaknesses. Without getting too embroiled in the philosophy of science debate, I will highlight two criticisms that I think will be fruitful for the subsequent discussions. The first has to do with the phenomenalist commitment of the analyticist approach. Suganami (2013: 260) doubts that analyticists need to be restricted to phenomenism: “There may not be anything contradictory in the

in IR the term is applied more broadly and often refers to a range of substantive theoretical approaches (Jackson 2011: 141).

³⁰ Martha Finnemore, a ‘conventional’ IR constructivist seems to concur; in regard to the case-studies and constructivist approach of her work *National Interests in International Society* she states that the “cases do not and, indeed, cannot ‘prove’ that this approach is ‘right.’ Proof of this kind is impossible in social inquiry. They can, however, demonstrate its utility” (1996b: 5).

idea of an analyticist scientist offering a knowledge claim penetrating the super-empirical realm and at the same time holding the view that (what is said to go on in) this realm is a mental construct.” As long as there is no philosophical-ontological commitment to a mind-independent reality (as in critical realism), analyticists can base their knowledge claims not only on experience but on unobservables, too. Suganami exemplifies this with reference to causal analysis.

If analyticists were limited to phenomenalism, they would have to rely on the same Humean conception of causation as neo-positivists. They would look for causes on the surface level of experiences; a causal relationship would be said to exist when, with some regularity, one event follows another event in time (Danermark et al. 2002: 106). Critical realists, on the other hand, rely on a ‘stratified ontology’ (Bhaskar 1978) that allows them to look beyond the reality of events and experiences to identify unobservable mechanisms on a deeper ontological level that give rise to surface-level events. As a proponent of critical realism in IR puts it, “many causes are unobservable” and “exist in complex causal contexts where multiple causes interact and counteract with each other” (Kurki 2007: 364). Critical realists, therefore, use holistic accounts of causation, where “[d]ifferent kinds of causes (e.g. material, agential or structural) are recognised to cause effects in very different ways: while some causes may ‘push and pull’, others ‘constrain and enable’” (Kurki 2007: 366). What Suganami is suggesting, and what Jackson’s presentation of analyticism seems to allow for, is that analyticists may refer to complex causal mechanisms instrumentally without committing to the same ontological status as critical realists: they can combine “*the language of critical realism with their constructionist view of knowledge*” (Suganami 2013: 261). There is no need, therefore, to throw the baby out with the bathwater: a non-Humean causation is both possible and necessary in IR (Kurki 2008). In fact, even if scholars on the post-positivist divide, constructivists included, do not want to speak of ‘causation’ due to its mechanistic Humean connotations, they do think of causal analysis, even if they use different words (Kratochwil and Ruggie 1986: 767). Drawing on critical realism, therefore, helps thinking about causal complexes as a useful way to make sense of the tension between norms underlying the process of legitimation.

So far, three observations follow for the analytical framework of this dissertation. First, the framework does not necessarily correspond exactly with how legitimation unfolds;

rather, it should be understood as a useful, simplifying instrument to interpret the process. Second, the framework has a *logical generality* and could in principle help illuminate other cases of legitimation, but the *empirical observations* that follow from this dissertation are not generalizable to other processes of legitimation. Third, and more specifically, the idea of a web of and a ‘push-and-pull’ of norms underlying the process of legitimation is just that: a useful way to think about legitimation. It is an analytical tool to think about these processes unfolding on different levels, and *not*, as critical realists might see it, a statement about how norms work on a deeper ontological level to constrain or enable legitimation and actors involved in the process.

A reflective analyticism?

The second qualification of Jackson’s analyticism concerns its relationship to ‘reflexivism’. The latter constitutes a separate meta-theoretical approach in Jackson’s taxonomy. Yet, in a broader sense, ‘reflexivity’ is a chief concern of the whole range of post-positivist approaches; from conventional constructivism and critical theory to postmodernist approaches. It can be understood as a meta-theoretical stance, as a separate research programme, but is, in IR practice, often an important feature in non-positivist IR in general (Hamati-Ataya 2013; Wight 2013). In the analyticist approach, reflexivity plays a role in the procedure of ideal-typification, or more broadly, in construction of analytical frameworks. It involves making the value-commitments on which the framework is built explicit. The values of the researcher or the research tradition are clarified at the very beginning of ideal-type/analytic construction. Once this is done, the knowledge claims that follow from an application of the framework may depend on but are distinct from value-claims (Jackson 2011: 144-145). It is here where the Weberian fact-value distinction of Jackson’s (2011) analyticist approach becomes apparent. This is not a classical ‘objectivity’ that is more commonly found in dualist approaches such as neo-positivism and critical realism (Jackson 2008). In the latter, it is ‘reality’ that serves as a foundation for knowledge-claims; the researcher is trying to access that reality from a place that is separate from the ‘reality’ s/he is studying. The monist move, however, makes a look at the world from ‘outside’ futile (Jackson 2011: 125). Weber’s ideal-typification requires the researcher to take up a stance, and that research “embrace its own perspectival character instead of seeking to dispense with it” (Jackson 2008: 146). This is

not the place to engage in a debate on objectivity and the feasibility of fact-value distinctions in science (Putnam 2002), but to recognize that not all ‘objectivity’ is created equal, and that a monist philosophical-ontology is rooted in a perspective.

There are two adjustments I would make to Jackson’s analyticism. The first is to not only engage in political theory in the form of stating value-commitments so as to get them out of the way for the actual research, but to use it – instrumentally – in the analysis. The purpose of an analyticist approach remains unchanged: to interpret and not to transform the world (Suganami 2013: 263). On this philosophical-ontological basis, I keep the distinction between a social scientific and normative-philosophical approach – in IR in general, in the English School (Adler et al. 2005), and in the study of legitimation (Barker 1990, 2001, 2007; Steffek 2003, 2007). A separation between a social scientific and a normative-philosophical approach to legitimation does not prevent a mutual exchange between them (Beetham 1993). Political theory can help make sense of the ontological substance of a study on legitimation, which is necessarily normative or idealist. For example, political theory can help grasp and recognize normative statements in discourse. It can also shed light on the relationship between various norms. What, for example, is the relationship between human rights and sovereignty? How does an anti-mercenary norm relate to self-determination and human rights? Also, what status do these norms have in contemporary international society? An analytical framework that conceives of legitimation as a process in which actors make use of and are constrained by the underlying normative web of norms, needs to also draw on political theory.

Not only can the social scientific approach to legitimation draw on and benefit from the normative-philosophical approach, the reverse is also true (Barker 2001: 17). Those who want to make a normative argument, for instance, on whether the use of PMSCs is a legitimate state practice, could enrich their prescription by pointing to how the desired outcome could be achieved. But to make that argument, they will need to understand the practice of legitimacy: who are the actors involved in this process, how powerful are they, which strategies do they pursue, on what normative basis do they make their legitimacy claims, i.e. which norms do they refer to, what is the current trend, in which way might all these factors be in a state of flux? These are some of the questions a social-scientific approach, as presented in the previous chapter, addresses. The framework can be criticized for its relativism as to what is legitimate. But this is exactly where political

theory would come in – to provide such normative guidance. What is a weakness for some can also be considered a distinct advantage. It accepts that there are often diverging understandings of legitimacy, based on competing underlying normative principles that society, or particular actors within society, may not share with the political theorist (Barker 1990: 42). Analysing legitimation in such a way can uncover such discrepancies and reveal alternative voices that are marginalized in practice and IR scholarship (Steffek 2004: 489).

Against objections to the contrary (O’Kane 1993), a distinction between the two approaches is possible and does not imply that they cannot inform each other. The purposes may be different, but, as Barker (1990: 11) put it, the “object of study is the same, even if the philosopher’s interest is to identify some ideal or morally justifiable state of legitimacy, and historian’s and political scientist’s to describe legitimacy as, as it were, theory made flesh, embodied in the conduct of observable individuals and communities.” Barker’s historian or political scientist does not analyse these processes of legitimation from ‘nowhere’, though, with which I come to the second adjustment of Jackson’s analyticism.

Instead of limiting the researcher’s self-reflection to the initial stages of research, where the value-commitments of the analytical framework are exposed, and seeing the subsequent application of an analytical construct as a technicality (Jackson 2011: 145), a continuous reflective awareness remains imperative in empirical research (Leander 2008: 25). For example, when looking at the regulatory approaches of the ICRC and the UNWG, it is easy to side with the regulatory efforts of one of these organisations, if one has strong views on the legitimacy of PMSC use. The same is true in chapter 8 when looking at the different roles of *Human Rights First* and *Control PMSC* in the legitimation and contestation of PMSC use, or, for that matter, when analysing the implications of states’ widespread use of PMSCs in chapter 5.

Yet, studying actors with different approaches and perspectives may actually help obtain, or maintain, a ‘detached’ view, an idea that is behind Karl Mannheim’s (1929) concept of the ‘free-floating intelligentsia’. Building on Weber’s view of objectivity Mannheim thought it possible to strive towards a detached and holistic view of society by engaging and juxtaposing a number of different perspectives. As Jackson (2011: 172) puts it, this

epistemological view was “not classically objective in the sense of being a ‘view from nowhere,’ but certainly synthetic by virtue of being located in society but outside of any particular interest within that society.” It is noteworthy that this type of detachment or ‘objectivity’ was ultimately a means to achieve a holistic or ‘total’ picture of society that would help achieve political change. Contra Weber, Mannheim assigned intellectuals a political role (Loader 1985: 122), and thus took an “intriguing intermediate stance in the familiar contest between ‘partisanship’ and ‘value-freedom’” (Pels 1996: 43).

Although this would go beyond the analyticists’ goal of interpreting the world, the basic idea of Mannheim’s “reflexive objectivity, in situations where we are concerned to understand and incorporate, rather than simply endorse or reject, a variety of different perspectives” (Outhwaite 2004: 234) remains valuable. It is particularly useful for a study on the various actors, strategies, and principles involved in the legitimation and contestation of state conduct. What is more, it would go beyond the minimum reflexivity required when constructing an analytical framework and extend to its application. Even though I do not seek a ‘synthesis’ of perspectives or ideologies for the purpose of political change as Mannheim’s intelligentsia would (Mendel 2006: 32), the holistic view proposed by Mannheim certainly aligns with the holistic, if simplifying, analytical framework of this dissertation. Finally, the detached view, or reflexive objectivity, is in line with the IR constructivist notion that “[w]e are always within our constructions, even as we choose to stand apart from them, condemn them, reconstruct them” (Onuf 1989: 43).³¹

The two adjustments to Jackson’s analyticism show that his taxonomy itself is a set of ideal-types or ‘caricatures’ (Humphreys 2013: 300); the fact that the boundaries between analyticism and critical realism (when it comes to causation), and between analyticism and reflexivism (when it comes to the use of normative theory and a more reflexive approach in the application of the framework) become blurred does not invalidate or ‘falsify’ his taxonomy, because the categories remain useful after all. The intention of this section was not to replace the taxonomy, but to adjust it slightly for the purposes of this dissertation. The result, what I would call a ‘reflective analyticism’, forms a solid

³¹ In fact, Weber and Mannheim could be seen as ‘forefathers’ of social constructivism as developed in Berger and Luckmann’s (1966) canonical work *The Social Construction of Reality* (Alvesson and Sköldbberg 2010: 24-25).

philosophical-ontological basis for the legitimation framework and its application in the following chapters. It fits well with the English School elements of the framework: a non-representational view of legitimation, a holistic view of an underlying normative structure, the conceptual distinction between international and world society as well as an interpretive approach. The ‘German’ constructivist strand provides a simplifying, yet useful, account of how legitimation unfolds. It also highlights that the overall framework is embedded in a constructivist understanding of the social construction, both of reality and knowledge (Hamati-Ayati 2013: 679).³²

Methods, case selection and sources

This takes us a step towards the application of the framework. I begin with a brief overview of the three approaches that are typically used in empirical research on legitimacy. While I discard the attitudinal approach, I opt for the behavioural and communicative approaches, with a focus on the latter. I then explore in more detail which methods these approaches entail, and I explain the selection of cases and sources. I do so by looking at each chapter in turn.

Three strands of empirical legitimacy research

There is a broad literature that has employed the concept of legitimacy in empirical research. The concept has not only led to different answers to questions of theory and conceptualization, but has also spurred debates on how to study it empirically. Is legitimacy expressed through attitudes, behaviour, or communication? Three strands can be identified within the literature on empirical legitimacy research, with each focusing on one of these dimensions, and hence applying different methods

From the perspective of public opinion research, the methodological issue has been to find indicators for legitimacy that are appropriate to the survey method, and differ from other well-established and similar concepts. In fact, in this research area work has tended

³² Having said this, the emphasis of this dissertation is making sense of the social construction of legitimacy; a reflexivity concerning one’s own role as IR scholar in knowledge production is necessary but must be secondary to the research objective if one wants to avoid an overly self-referential study.

to first address the concept of political support as developed by David Easton (1965, 1975). Much work has gone into disentangling the two concepts, especially in regard to their respective indicators (Westle 2007). On the other hand, some scholars have tackled the question of how to operationalize legitimacy head-on, and have devised specific measurements for legitimacy (Weatherford 1992; Gilley 2006; Rapkin and Braaten 2009). This work is interesting, because it provides a straightforward measurement of legitimacy. One could, of course, criticize such measures for lacking reliability or validity or, more fundamentally, oppose the positivist and quantitative approach.

The reason, however, why the attitudinal approach, and hence the survey method, is inappropriate is for fundamentally theoretical reasons. Weber (1956 [1919]) suggested an individual and subjective understanding of legitimacy: a *belief* in legitimacy. Whether or not intended by Weber, this understanding is in line with public opinion research on legitimacy. It is, however, at odds with the basic social constructivist view that legitimacy is created through interactions, i.e. *intersubjectively*. Asking an individual about norms or legitimacy would provide us with an individual belief, not a collective understanding, of what is 'right'. Asking several individuals and combining their views does not amount to a collective view (Goertz and Diehl 1992: 644). One could of course try to analyse in how far legitimacy beliefs translate into behaviour or communication, and, thereby, contribute to the social construction of legitimacy. But essentially, the attitudinal approach to legitimacy, together with the survey method, does not fit the theoretical foundation of the framework, and can at best be employed as a way to triangulate the results drawn from the other approaches.³³

A second way in which the concept has been studied empirically is with a behavioural approach. From this perspective, legitimacy is assessed through looking at actors' behaviour. Work on protest movements (Haunss 2007) or, more generally, civil society activities (Putnam 1993) have adopted this approach, although often implicitly. Compliance is seen to affirm if not increase legitimacy. On the other hand, non-compliance is seen as a withdrawal of, if not as an indicator of a lack of legitimacy (Hurrelmann et al. 2007: 7). The problem, however, is that it is difficult to infer a certain level of legitimacy from behaviour alone. After all, compliance may also occur out of

³³ Which is not to say that this instrument is, in principle, incompatible with constructivism and the English School (Rusciano and Hill 2004; Rusciano and Brogan 2009).

self-interest or from coercion (Hurd 1999: 383-389); compliance and legitimacy are, thus, distinct. Large-scale demonstrations, for example, may well be interpreted as a general form of non-compliance and an undermining of the legitimacy of a political system. But they could also be targeted more specifically at certain policies or actors within the system, while leaving the legitimacy of the system as such intact. Haunss (2007) shows how an exclusive focus on such forms of behaviour would limit our understanding and would need to be embedded in the discursive context, i.e. what are the public statements of people taking part in such demonstrations. The same goes for compliance: it is not necessarily an expression of legitimacy, but can be the result of coercion or a cost-benefit analysis.

While a behavioural approach to legitimacy has certain limits, it should not be discarded. Again, this is so for theoretical reasons. There is a recursive relationship between norms and behaviour: norms shape state behaviour, but how states behave can also undermine or confirm norms. From a general understanding of legitimacy as an accommodation between competing norms and the observation that actors draw on these norms in processes of legitimation, behaviour matters indirectly through its relationship with norms, which in turn feed into legitimation. Contrary to the above literature, then, I do not take behaviour as an indicator for legitimacy; rather, how states behave becomes relevant in legitimation, because of how their behaviour impacts on relevant norms.

The communicative approach to legitimacy is the third and final main methodological approach to legitimacy, and one that has been increasingly suggested as a viable alternative (Hurrelmann et al. 2007). Rather than focusing on legitimacy as such, this approach looks at the process through which legitimacy is constructed, and particularly emphasizes the discursive character of this process. The approach is largely constructivist: it focuses on legitimacy discourses, which are regarded as “structured and rules-based products of social and communicative interaction” (Schneider et al. 2007: 131). Though the constructivist theoretical underpinning is clearly there, the focus of this literature is more on questions of methodology than theory. The interest is in empirical work, and so the theoretical foundations of this approach seem to be pushed into the background. The upside is that this literature has generated some constructive methodological discussions on how to grasp legitimacy discourses, which provides this study with a rich and sophisticated toolbox.

A multi-method approach

Following the English School conception of ‘legitimacy’ as an inter-subjective understanding and of ‘legitimation’ as the discursive process by which this understanding is constantly reshaped, the communicative approach to legitimacy, is indeed most suitable to the present study, and will hence be the main methodological approach of this dissertation. If we want to understand how international society regards the legitimacy of a state practice, and how that collective understanding is evolving, then we need to primarily look at what relevant actors say about the practice. It is, therefore, theoretical considerations that drive the methodological choices, in this case in favour of the communicative and, albeit to a lesser degree, the behavioural approach. In terms of methodology, then, this study is not very different from constructivist studies that analyse discourse and behaviour in conjunction (Finnemore 1996b: 24; Kowert and Legro 1996: 485). What follows from the above choices is a multi-method approach that includes discourse analysis at the core of the dissertation, content analysis of UN resolutions in chapter 6, a quantitative analysis of PMSC use in chapter 5, and qualitative interviews as a means of triangulation, clarification and contextualisation.

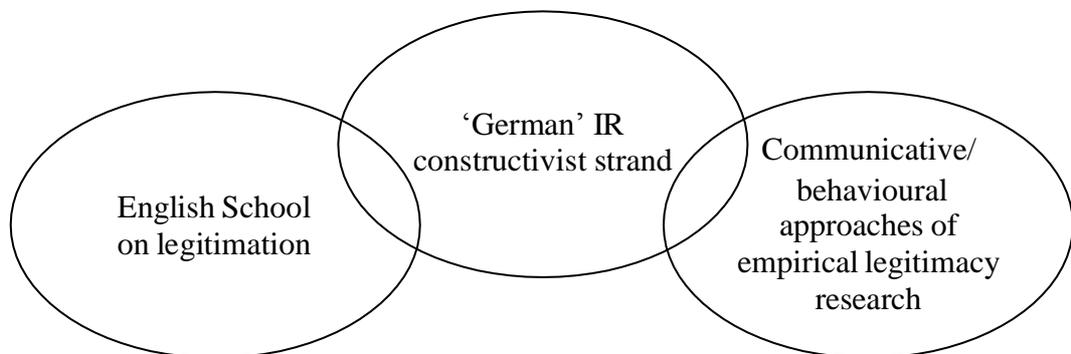


Figure 3. Analytical framework: drawing on three literatures

There are, thus, two ways in which the analytical framework of the dissertation goes beyond Ian Clark’s (2005, 2007a) work on legitimacy. First, and as discussed in the theory chapter, it substantiates our understanding of how processes of legitimation work by bringing in the ‘German’ strand of constructivism. Second, it provides a methodological application of these constructivist insights by drawing on existing empirical research that has studied the communicative dimension of legitimacy. Although the English School understanding of the practice of legitimacy and the communicative

approach within the empirical legitimacy research are not far from each other in terms of ontology and epistemology, one could argue that there is a slight gap between these literatures. The ‘German’ strand within IR constructivism heavily overlaps with both literatures and can be thought of as a useful bridge between them (figure 3).

Chapter 5 – illustrative case studies and quantitative data

Chapter 5 sketches the development in state practice, using both illustrative cases, drawing on secondary literature, and quantitative data. It begins with a brief history of mercenarism to set the context against which the contemporary state use of PMSCs becomes meaningful; after this, the focus is on contemporary state practice, beginning with the end of the Cold War. The chapter is not intended as an exhaustive historical or contemporary account of non-state actors’ involvement in security and military matters. Rather, the goal is to provide a global overview of contemporary state practice – to reveal broad trends in state practice as backdrop for the remainder of the empirical section. It sets up the discussion on how the legitimacy of the state practice is evolving by acknowledging changes in practice and legitimacy as a historical fact and, hence, future possibility, and by analysing how state behaviour shapes legitimacy. I use data on mercenary activity and state use of PMSCs. The quantitative data is mainly on the use of PMSCs by the US in Iraq and Afghanistan, for two reasons: one, data availability – I will discuss possible reasons for the lack of publicly available data on PMSC use by states other than the US – and, two, the boom of the industry as a result of the US-led military interventions in Iraq and Afghanistan. Overall, a quantitative overview of state practice with illustrative cases, fits the purpose more than an in-depth (historical) case study. More explication of the case selection and choice of methods will be required for the subsequent chapters.

Chapter 6 – International society and the UN

In chapter 6, I conduct a qualitative content analysis of UN resolutions to understand how states have responded to the increased use of PMSCs. There are several reasons for looking at UN resolutions. First, the dissertation is on legitimacy in international society, not on legitimacy in domestic societies. As such the issue is how states respond to a

practice vis-à-vis other states, and how they come to an agreement, however tentative and transitory, on the legitimacy of the practice. Analysing domestic debates, e.g. how a national government justifies its use of PMSCs to parliament, even if in a comparative fashion, yields domestic understanding(s) of legitimacy, but not an understanding of legitimacy in international society. Second, although such international debates can take place outside institutional structures, “international organizations, because of their trappings of universality, are the major venue within which the global legitimation struggle over international regimes is carried out today” (Kratochwil and Ruggie 1986: 773). Collectivity is the key aspect of an audience; while some members of the audience will have reservations, acceptance by the audience as a whole is what confers legitimacy onto an object (Suchman 1995: 574). And international organisations are increasingly seen as representing this collectivity (Jachtenfuchs 2005: 50). Particularly the UN, as the most inclusive of international organisations, has been regarded as the primary dispenser of legitimacy (Claude 1966).

The fact that the UN is a political body that it is often used by states to further their national interests (Donnelly 1988: 298), for example singling out Israel’s human rights violations (Curtis 1991: 462), while keeping other violations ‘invisible’ (Vincent 1986: 100), does not change anything about its quality as a discursive arena, and probably the key arena for legitimacy discourse in contemporary international society. Although it requires a reflective approach, asking questions about why particular issues are raised while others are not, legitimacy discourse need not be devoid of clashing interests and instrumental behaviour as argued in the previous chapter. In fact, just as much as we would expect domestic discourse on the legitimacy of a particular practice to be infused with politics, understood as a clash of collective interests, we should not be surprised for it to play a role on the international level. Rather than understanding the UN in “strict legal constitutionalist terms as the authoritative body that can rule on the legality or illegality [and legitimacy or illegitimacy; D.M.] of a particular use of force” (Hurrell 2005: 24), it should be conceived of as a “*site of legitimation* [emphasis in original; D.M.] for state action [...] where states engage in normatively bounded deliberation about legitimate action” (Armstrong and Farrell 2005: 10). Analysing discourse within the UN, then, is not just an appropriate case study because “other, better, forums simply do not exist” (Hurrell 2005: 24), but because the political nature of the UN does not disqualify it as a ‘site of legitimation’ – if anything, it makes it more ‘normal’, more like discursive

arenas in domestic politics. I remain sceptical to claims of the UN being *the* (only) expression of international society. The point I am making is that the UN is an appropriate *case of* the creation of intersubjective understandings of legitimacy in international society.

The focus of chapter 6 is on resolutions, as opposed to other types of documents, because they represent authoritative decisions and preliminary end-points of discussion. In other words, they are snap-shots of how the UN bodies viewed the issue at a particular point in time. They do not necessarily reflect ‘true’ state preferences, but publicly expressed views. Neither do they present individual state views or exchanges between states; at this stage of the research, *collective* expressions is what helps gauge the normative status of PMSC use; this structural, somewhat ‘static’, view is balanced in chapters 7 and 8 where the question of *how* these collective understandings come into being, how they are contested or bolstered through individual state or non-state action takes centre stage. Furthermore, although there is debate on the legal status of GA resolutions vis-à-vis SC resolutions (Curtis 1991: 486), I treat both as authoritative expressions of the UN that, while not necessarily having the same legally binding nature, nonetheless represent intersubjective understandings of UN member states. At the same time I take into account that due to the different institutional set-ups, SC resolutions are probably a better expression of great power consensus than the majority votes in the UNGA. Because voting in the UNGA often takes place along regional or other lines and groups of states may consistently outnumber other groups on a particular issue (Gruenberg 2009: 472), taking voting records into account, helps qualify the degree of consensus amongst states in the UNGA. All in all, comparing these snap-shots over time demonstrates how states’ understandings of legitimacy in these two different institutional settings may have changed.

In addition to this temporal comparative logic, this chapter analyses how two arguably separate discourses compare to each other. There are at least two reasons for studying not only the discourse on PMSCs but also the discourse on mercenaries. First, as argued in chapter 2 and 5, there are good conceptual and historical reasons for not treating mercenaries and PMSCs as two wholly distinct phenomena. As such, comparing how the legitimacy of mercenarism has been regarded by international society with the contemporary discourse on the legitimacy of PMSC use can shed light on different

evaluations and justificatory bases. Second, and this is even more important for chapters 7 and 8, practitioners (and scholars) point out that there is – or, that there is not – such a lineage. This gives rise to a variety of discursive techniques that come down to equating, comparing, distinguishing, or just disregarding any link between the two actors and the practices of hiring them. If, for example, the term ‘mercenary’ is used in a document, and it is clear from the context that what is actually meant is what I define here as ‘PMSC’, then it is mandatory to take this text into account in the analysis and also ask questions about why different terms have been used; a research strategy that narrowly focuses on discourse on ‘PMSCs’ would, at least, miss one key strategy of delegitimation.

Content analysis

The resolutions are analysed through content analysis as a procedure for “assessing the relative extent to which specific references, attitudes or themes permeate a given message or document” (Stone et al. 1966: 5). As such it is a useful instrument for assessing the extent to which positive or negative evaluations of PMSC and mercenary use have prevailed, and the extent to which legitimacy claims have been based on some principles more than on others. It involves quantification (Früh 2011: 29), but it is important to note that content analyses “can range from being more qualitative to more quantitative, depending on whether the focus of attention is on the presence or absence of certain characteristics or on the degree to which the speaker exhibits the characteristics” (Hermann 2008: 156). The content analysis in chapter 6 is situated somewhere in the middle. Assessing the degree of positive/negative evaluation is done in a qualitative fashion, and not, for example, through defining and applying an ordinal scale of evaluative terms. On the other hand, to say something about the salience, breadth, and pervasiveness of themes, some form of quantification can be required (Namey et al. 2007: 143), and is particularly fruitful for analysis objectives such as: gaining an overview of how often certain legitimacy principles have been used relative to others across time and discourses; assessing whether resolutions deal exclusively with PMSCs/mercenaries or with a broader range of topics; or, more fundamentally, comparing how often resolutions have dealt with either the mercenary or the PMSC issue.

Chapter 6 deductively applies the coding scheme of Schneider et al. (2007), with ‘legitimacy claims’ as the basic unit of analysis consisting of three elements: an object of legitimation (a state practice), an evaluation (positive/negative), and a legitimacy principle (a reason proffered for the evaluation). This fairly basic coding scheme is deduced from the theoretical elements of the framework, but otherwise remains quite open: the evaluation does not need to include explicit references to the term ‘legitimacy’ or its derivatives. In fact, what constitutes an ‘evaluation’ is no easy task, and it is here that content analysis starts to blend into the more discourse-analytical approach, where the analyst has to make use of his “common-sense cultural knowledge” to recognize an ‘evaluation’ (van Leeuwen 2007: 98). On the other hand, one advantage of UN resolutions is the common style and, for example, use of emotive words such as ‘concerned’, ‘condemned’ or ‘alarmed’ (Gruenberg 2009: 483). The ‘legitimacy principle’-category, too, is open in that any substantive normative content can serve as justificatory basis. Finally, legitimacy discourse thus understood includes actors’ justifications and condemnations, the two categories most often employed in constructivist studies on norms, as positive/negative evaluations plus respective legitimacy principles.

It is important to stress that the content analysis is meant to provide an overview of evaluations and the relevant norms in discourse, which is the basis for a more detailed investigation of causal complexes in the second part of chapter 6 as well as the discourse analyses in chapters 7 and 8. I am not proposing a ‘measure’ of legitimacy. There is some interesting work done in this respect in organisational legitimacy research (Brinkerhoff 2005); for example, Vergne (2010) proposes a ‘raw legitimacy vector’, which he applies to the global defence industry, using a content analysis of several national newspapers that are representative of their region. There are at least three reasons why this approach is inadequate. First, mass media may reflect public perceptions, but not necessarily understandings of legitimacy in the society of states. But more importantly, such a measure suggests that studying legitimacy empirically is a matter of adding attitudes or public statements up in a certain way that results in a number, and that this number indicates a certain level of legitimacy. The measure ignores much of the context in which these evaluations and statements are made. Finally, it too, is merely a snapshot that can only be a starting point for an investigation of the processes of legitimation.

While chapters 5 and 6 lay emphasis on structural aspects of legitimation – changing state practice and normative shifts – chapters 7 and 8 turn to a more agential analysis of how legitimation processes unfold. Furthermore, the first two empirical chapters look at material and social factors in international society, whereas the last two empirical chapters investigate how members of world society contest and legitimate the state practice. Overall, the key elements of the framework, namely the co-constitution of agency and structure, the interplay between material and social factors, and the contact between international and world society are all brought to bear in the empirical section of the dissertation. The agential and world society focus of chapters 7 and 8, however, require different methods and sources. But before dealing with these issues, why study non-state actors and what was the rationale behind the case selection?

On the first question, there are both empirical and theoretical reasons for analysing the roles of (quasi) non-state actors in legitimation processes. Based on the empirical evidence from chapter 6, states only engage with the issue of PMSCs hesitantly; inter-state discourse on the legitimacy of PMSC use is only slowly picking up speed. Against this background of a relatively passive attitude of states, and drawing on the framework, my hypothesis is that non-state actors are behind current regulatory efforts on the international level and are, thereby, creating the space in which state and non-state actors alike can or are compelled to engage in processes of legitimation. More than that, they are participating in these processes, and they are taking up norms of international society in their efforts to contest or legitimate the state practice. Having said this, if the question of how to study ‘international society’ in chapter 6 seems complex, then this must be even more the case for the diffuse concept of ‘world society’. Fortunately, that is not so; taking a fairly clear-cut view of world society as the realm of non-state actors, and being cautious with inferences the challenge is to pick appropriate *cases of world society*.

In chapter 7 I compare and contrast the roles of the ICRC and the UNWG in legitimation. There are at least three reasons for choosing these two non-state actors. First, they are both actively involved in the two main regulatory efforts on PMSC use on the international level; in fact, they are key actors in driving their respective regulatory initiatives. I assume that the design and objective of regulation will affect the legitimacy

of the state practice. This is based on the theoretical idea that legitimacy is an accommodation of a variety of norms, amongst which are also legal norms. The prohibition of mercenarism in international law, for example, is one important factor behind the illegitimacy of the practice in international society. Second, the ICRC and the UNWG adopt different approaches and pursue different goals in regulation. The presumption is that this translates into different roles in legitimation. Third, the regulatory initiatives are not merely processes by which regulation, whether ‘soft law’ or ‘hard law’, is created. They are also discursive arenas in which legitimation takes place. Beyond the often technical issue of creating adequate ‘law’, they are also, and perhaps primarily, an opportunity for actors to engage in contestation or legitimation of the practice.

The ICRC and the UNWG have an intermediate function; on the one hand, they are inter-state fora for regulation and legitimation, but on the other hand, they are non-state actors with actor-qualities. For this reason, chapter 8 focuses more clearly on the roles of independent non-state actors. The objective is also to look at actors that are more openly critical or supportive, less ‘diplomatic’, due to their relative distance from state actors and the process of rule-making. Moreover, while they may be influenced by or participate in regulation, in their strategies of legitimation these non-state actors are not restricted to the regulatory initiatives as discursive arenas.

Chapter 8 compares the roles of *Human Rights First*, the *Control PMSC* coalition, and the *International Stability Operations Association* (ISOA) in the contestation and legitimation of PMSC use. The three cases are not meant to be representative of ‘world society’ or of non-state actors’ positions on PMSC use in general. Rather, they illustrate the range of differences amongst non-state actors on the issue of PMSC use, from actors that are critical to actors that are supportive of the practice. On one side, there is *Control PMSC*, a group of NGOs, many of which are highly critical of PMSCs and their widespread use by states and other clients. *Human Rights First*, although still critical, has a pragmatic attitude to contributing to better regulation; juxtaposing these two actors exposes the differences that exist even among critical NGOs. On the other side, there is the industry association ISOA, which has the clear task of advancing the interests of its members – PMSCs. Comparing these three non-state actors, sheds light on the various ways in which actors with different positions try to contest or legitimate the practice.

A variety of sources were used in chapters 7 and 8. In chapter 7, the Montreux Document and the Drafts of the UN Convention on PMSCs, had a prominent place in the analysis since they are the central texts that are referred to in debates surrounding their formulation as well as in the secondary literature. Background documents, for example in the form of the official records of debates within the Third Committee of the UN, but also reports and articles that reflect individual perspectives of, for example, members of the UNWG, helped to contextualise key texts and how they came into being. The main sources in chapter 8 were reports and websites of the organisations. ISOA's flagship publication, the *Stability Operations Magazine*, was taken as a 'marketing instrument', rather than as an 'academic journal' as ISOA puts it; as a means through which the organisation conveys a positive image of its members and the practice of PMSC use in general, it presented a particularly apt source for understanding ISOA's strategies of legitimation.

Discourse analysis

The shift away from a focus on the material and normative structures to an investigation of how these structures are reinforced or challenged by actors through legitimation in chapters 7 and 8 also necessitates a change of methods. A close reading of the above texts, which is open to the various ways in which actors may (de)legitimate the state practice, and which also contextualises their roles, is required. Discourse analysis fits that purpose. It "broadly denotes methodologies that capture the creation of meanings and accompanying processes of communication. As long as words and activities are put into context, researchers can categorize, code, or count their use through many different – qualitative and quantitative – techniques" (Klotz and Lynch 2007: 19). The dual focus on the 'creation of meaning' through language and 'accompanying processes', on 'words' and 'activities' is particularly useful for an analysis of legitimation processes as described above. Although it is disputed whether discourse is quantifiable (Schneider et al. 2007: 134), the advantage of discourse analysis lies less in its ability to generalise and simplify a large corpus of texts – this is the domain of content analysis –, and more in its character as an interpretive method that gives more room to a closer, contextualised reading and interpretation.

With its constructivist commitments, discourse analysis is also in line with the theoretical foundation of the framework; Milliken (1999) identifies at least three such constructivist assertions: as a system of signification discourse gives meaning to what is and happens in the world; discourse is (re)productive of the world, and produces actors and practices by defining and enabling or silencing and excluding; these practices of signification and production or creation demonstrate “that things were not always the way they appear now [and; D.M.] makes us aware that they are most probably changing as we speak” (Neumann 2008: 76). The key point is that discourse works with an understanding of language as producing meaning rather than as representing ‘reality’ (Keller 1997: 315).

The difficulty with the rubric ‘discourse analysis’, however, is that it can be understood as a range of methods as well as substantial research programmes in the sense of ‘discourse theory’ or ‘discourse studies’ (Laclau and Mouffe 1985). I adopt a ‘discourse-analysis-as-method’ understanding that need not subscribe to post-structuralist, Foucauldian assumptions as long as it is based on the constructivist commitments identified above. In line with the analyticist approach, discourse analysis is treated as a tool to make sense of legitimation rather than as an emancipatory tool in international relations (Wodak 2001: 10).³⁴ Moreover, I agree that discourse analysis should not be limited “to a critical revelation of hegemonic relations” (Lupovici 2009: 203), but that it can have broader goals. The focus of this study is on how legitimation is expressed in discourse. On the basis of the theoretical propositions advanced in chapter 3, I apply discourse analysis as a ‘tool’, not as a separate or competing theory.

In contrast to the deductive approach of the content analysis in chapter 6, however, an inductive approach to the discourse analyses in chapters 7 and 8 is more fruitful, not to mention that it is also viable due to the limited range of key texts. While the framework provides a simple model for assessing how legitimacy is regarded by states at a particular point in time, it is more open when it comes to how actors’ contestations and legitimations unfold. The model can still help, but applying it exclusively may omit other dynamics and techniques of legitimation. There are various linguistic concepts and categories that discourse analysts have studied and that can enrich our understanding of legitimation. Metaphors and juxtapositions (Milliken 1999: 243) are two such concepts,

³⁴ Neither would the critical realist ontology of critical discourse analysis (Fairclough 2010: 4) fit with the mind-world monism of the analyticist approach.

or the idea that discourse can, for example through ‘us’/‘them’ distinctions or categorizations, ‘produce’ actors and practices. Discourse analysts have suggested other concepts, specifically for the study of legitimation. Van Leeuwen (2007) separates four categories of legitimation – authority, moral evaluation, rationalization, and mythopoesis – while Reyes (2011) develops them into five strategies of legitimation – emptions, hypothetical future, rationality, voices of expertise, and altruism. I will draw on these and other categorizations and concepts in chapters 7 and 8, but the analysis remains inductive; I am open to discard or identify other aspects of legitimation emanating from the texts.

Qualitative Interviews

For clarification and contextualisation of the insights gained through content and discourse analysis, three expert interviews were conducted. The information that was obtained helped triangulate the findings, particularly for chapters 7 and 8. Since, for theoretical reasons, publicly available documents were the main sources, the interviews played a supportive role. The three interviewees were, furthermore, chosen for their roles as representatives of their respective organisations as well as experts with personal opinions on the matter.

Conclusion

A ‘reflective analyticism’ is at the basis of this dissertation. Although I should stress that this should not be confused with the substantive theoretical elements of the framework presented in the previous chapter, the philosophical assumptions do constrain and enable research to some extent. First and foremost, the framework that I apply in the following chapters does not claim to represent what is ‘really’ happening empirically, but rather is a useful way to make sense of legitimation. The tension, for instance, amongst competing norms underlying legitimation or the visualization of a ‘web of norms’ are useful accounts of the world, not representative of empirical reality. Moreover, the methods outlined are not meant to test the framework, but to get the best possible array of evidence systematized into a narrative of how state practice is evolving in contemporary international society. Finally, the reflective approach that was relevant in chapters 2 and 3, will remain an important ingredient in the subsequent empirical discussions.

PART II: Empirical Analysis

Chapter 5: The expansion of PMSC use and its implications for legitimacy

The extraordinary growth of the private military and security industry may appear abnormal to contemporary observers. The fact that private companies offer military and security services, which include the use of force, and that states are often making use of them is at odds with a view that sees ‘security’ and the ‘military’ as responsibilities of the state. Large parts of the IR discipline, in fact, start from the assumption that international relations is primarily about the interaction of sovereign states, and that the monopoly of force is at the core of state sovereignty. This assumption of mainstream IR, however, ignores how state sovereignty varies from state to state – think of today’s ‘quasi-states’ (Jackson 1993) or failed states – and that it developed historically. If, from a contemporary perspective, the current privatization of security seems so unusual, then this is because practices of the last two centuries have been taken for granted as the ‘natural’ state of affairs.

But far from naturally given or timeless, sovereignty and the state’s claim over the legitimate use of force are “distinctively modern” (Thomson 1994: 3). Before the state successfully monopolized its authority over as well as the actual means of coercion, non-state violence was prevalent, sometimes authorized by and in the interest of states and sometimes independent of and contrary to state interests. Sketching this historical development helps demonstrate how both state practice and legitimacy changed over time, opening up the possibility for contemporary and future changes. From such a historical perspective, then, the current privatization of security is not so surprising after all (Rosen 2008: 89). But just as the move towards the citizen army in the 19th century requires explanation so does the move of states towards PMSC use. The first purpose of this chapter, therefore, is to better understand what drove these respective shifts in practice.

While historical studies also shed some light on how legitimacy shifted, a full picture of how the legitimacy of PMSC use is judged in contemporary international society will have to wait until the end of the dissertation. A start will be made in this chapter with an assessment of one of the driving forces behind the legitimation of PMSC use: as shown in

chapter 2, some observers of the private military and security industry conclude that, because PMSCs are now widely employed by states for a variety of services, hiring them has become a 'legitimate' practice. The theoretical chapter, however, has made a distinction between actual state conduct and how that behaviour is judged in terms of its appropriateness in international, world and domestic societies. That states make use of PMSCs internationally does not necessarily mean that international society regards this behaviour as legitimate. There is, of course, a relationship between the two: widespread and persistent use of PMSCs can shape how the legitimacy of that conduct is appraised. But this relationship needs to be investigated, rather than assuming that one automatically follows the other. This is the second purpose of this chapter – to analyse the implications of widespread state conduct for legitimacy in international society.

The structure of the chapter is chronological: it begins with different histories of the shift away from mercenaries to the citizen army; it touches upon the re-appearance of 'soldiers of fortune' in the 1960s in Africa, which sets the scene for the first PMSC activities in the 1990s; and finally an outline of broad trends in PMSC use helps establish the pervasiveness of current state conduct, which forms the basis for discussing how this may shape legitimacy.

From mercenaries to the citizen army

Determining the starting point for a historical overview of mercenarism is not straightforward. A history of mercenarism can begin as early as antiquity, and show how well-trained and experienced Greek mercenaries played a decisive role in military victories of the Egyptian Empire (Ruzicka 2012: 99-113) or in Macedonia's conquest of Asia Minor (Keegan 2004: 259). In contrast, ineffectual and unreliable mercenaries can also be shown to have led to the demise of Carthage at the hands of the Romans (Waterfield 2010: 65-88), while the fall of the Roman Empire several centuries later was arguably due to its growing reliance on 'barbarian mercenaries' to defend Rome's periphery (Ferrill 1988). Such a long-term view certainly puts the contemporary use of PMSCs into perspective: in filling the ranks of their armies, rulers were not limited to their own people. They often bought the armies they needed, usually from neighbouring (e.g. Macedonia's use of Greeks) and sometimes from more distant places (e.g. Britain's

use of Hessians in the American War of Independence). It also elucidates the various forms ‘mercenaries’ took historically. Although the term might evoke the image of the lone ‘soldier of fortune’ for some contemporary observers, the *Condottieri* of the Italian city-states and the Dutch and British mercantile companies were rather cohesive groups, even ‘businesses’ in today’s sense of the word – corporate form is not a distinctive feature of today’s PMSCs.

The purpose of this section, however, is not to give a historical overview of mercenarism as such, but to understand the shift away from widespread mercenary use to the citizen army in the 19th century, because understanding these shifts may shed some light on how contemporary state practice and conceptions of its legitimacy evolve. There are different explanations for the shift to the citizen army and they set in at different points in time. What they share is an understanding of how the organisation of violence at the beginning of the 21st century is inextricably linked with the evolution of the state (Tilly 1990). As part of this process, states made use of mercenaries, privateers and mercantile companies; they augmented states’ military capabilities and offered additional revenue streams. The use of mercenaries was a common and legitimate practice for many centuries. So what led to these changes in state conduct and legitimacy?

Some have pointed to material and systemic changes in the international system to explain the shift towards a citizen army (Posen 1993; Cohen 1985; Gooch 1980). Due to a significant increase in population numbers, states had ample supply of citizens and were now in a position to create and sustain large armies. In order to manage the increased size of their armies, particularly to avoid desertion, statesmen made use of the patriotic fervour of those times to instil in their soldiers a patriotic feeling that would keep them committed to their duties without coercion or the fear of punishment. The citizen army, they argue, proved to be a successful model that put all states in the international system under pressure. If states wanted to be successful internationally and have a chance when in war against states that used citizen armies, they, too, had to use citizen soldiers. But there are several problems with these largely material-based explanations. First, the material conditions that allegedly pushed states away from the use of mercenaries to adopt a citizen army were not decisive. Population growth was not that significant in the 19th century, but had already set in before; also, armies had already increased in size prior to the shift to citizen armies. Second, material conditions per se cannot explain why

citizen armies were preferred. There were alternatives such as larger mercenary armies that would have been plausible options considering the material conditions. Material factors alone cannot explain the shift in state practice (Percy 2007a: 97-105).

Alternative explanations try to bring in normative considerations. Avant (2000) argues that both material and normative factors worked together on a domestic level in a few key countries to bring about the shift to the citizen army internationally. Population growth and territorial expansion on the one hand, and Enlightenment ideas on the other hand were the antecedent conditions for that shift. Enlightenment ideas changed the relationship between the people and the state; they introduced the responsibility of the state towards the citizen and the very idea of the 'citizen' – as opposed to the 'subject'. Taking these underlying conditions together, Avant argues that a mix of external shocks and domestic politics produced change domestically which then translated to system-wide change via modelling and path dependence. After external shocks, in particular after lost wars, countries were more conducive to changes in the organisation of violence. If, in addition to external shocks, countries had less rigid and less conservative domestic coalitions, they were even more prone to make such changes. Once domestic politics in some countries made the change possible, and once a few countries had abandoned mercenary use in favour of the citizen army, other countries followed suit. France and Prussia were the first countries to make that shift. And since the use of a citizen army by these countries was perceived and recognized as a successful practice – namely, that the use of citizen soldiers was more effective than the use of mercenaries – other countries emulated them, such as Britain in 1870. Finally, once Britain had abandoned the use of mercenaries and created a citizen army, the use of citizens had become an established state practice in international society.

What is important in Avant's explanation, is the perception of how successful the practice was; it was not self-evident and objectively given. Domestic actors played a large role in advocating and – because they were successful with it – determining, that the use of citizens was more effective than the use of mercenaries. Also, Enlightenment ideas take an important place in her explanation as they shaped and were employed by domestic actors in their struggle over how to organize the use of force. In these two respects, Avant's (2000) explanation is sociological and goes beyond explanations based on material and systemic pressures. Yet, one might criticize her for not going far enough

down the sociological/constructivist road. Percy (2007a: 107) points out that, first, Enlightenment norms, while important, were not at the normative core of the shift, and that, second and consequently, they were not the most important norms. Avant has looked at how norms helped actors assess and judge the effectiveness of a practice. Percy on the other hand, looks at the shifting morality of state practices: she argues that there was something ‘morally problematic’ about the use of mercenaries and something morally desirable about a citizen army. But while one can criticize Avant for focusing only on one set of norms, as will be shown below the same criticism can be directed at Percy, even if she acknowledges the importance of morality when it comes to the use of force.

Similar to the above explanation, Thomson (1994) identifies a normative change as an important driving force behind the shift in state practice. Thomson differs from Avant’s explanation in three major points. First, it is not Enlightenment ideas but the neutrality norm that accounts for the abandonment of mercenaries and the adoption of the citizen army. Although states had long regarded non-state force as a useful instrument, they sought and established control over non-state force in the 19th century. The development of the neutrality norm in the 19th century reflected a broader transformation of the institution of sovereignty. State sovereignty became tied up with territoriality. Because states mutually accepted their internal authority claims, they could now also be made accountable for violence emanating from their territory. States, therefore, became increasingly wary of the possibility that the actions of mercenaries, mercantile companies, pirates and other non-state actors could violate their neutrality commitments to one another and, thus, drag them into conflict with each other. Second, in contrast to Avant’s explanation, norms matter on the system-level. Changes in sovereignty and neutrality were system-wide changes that affected all states. Statesmen would then use this systemic pressure, essentially the expectations of other states to uphold neutrality commitments, to strengthen their position vis-à-vis their domestic society. Systemic pressure enabled states to better enforce their domestic authority claims and their domestic control over the use of force. Finally, norms play a larger role in Thomson’s account. In Avant’s version, international norms and material pressures – merely – formed antecedent conditions that were then strongly mediated by domestic politics. Norms were not the key factors behind the abandonment of mercenary use; only in conjunction with material factors, external shocks and in particular domestic politics, did they become important. On the other hand, Thomson argues that the international neutrality norm was the major driving force behind

the shift. Interestingly, she points out that “[s]tate leaders did not set out to eliminate mercenarism” (Thomson 1994: 88), but that the delegitimation of mercenarism was the – most likely unintended – consequence of the state’s monopolization of the legitimate use of force, which in turn was supported by the international neutrality norm.

Like Avant and Thomson, Percy (2007a) also looks at the normative driving forces behind the abandonment of mercenarism. In that respect, all three authors share a more or less constructivist perspective that is opposed to the material-based explanation presented above. The difference in Percy’s account is, as indicated above, the norm that she regards as important for the shift in practice. Percy argues that a historical international norm against mercenarism was responsible for the gradual abandonment of mercenary use. This norm, she argues, has two elements: one regards the financial motivation of mercenaries and the other regards the lack of control over mercenaries.

Mercenaries were said to essentially fight for money, and not for an appropriate cause. This lack of appropriate cause was perceived as problematic, because foreign soldiers were increasingly disliked; because a just cause (whether derived from religion or the *raison d’état*) was increasingly needed when force was used; because there was a belief that citizens should fight for their community and the common good; and because mercenaries were thought to be more prone to bad behaviour on the battlefield due to their monetary motivation. That mercenaries were problematic because they lacked a cause was a belief that can be traced back to the 12th century, which goes against the view that mercenarism was “not thought to be a dishonourable or demeaning profession” before the French Revolution (Lynch and Walsh 2000: 133). This element of the anti-mercenary norm is older than the lack of control aspect, and yet it is the latter element of the norm that is, as Percy argues, responsible for the first shift away from mercenary use by the 16th century. Not only did mercenaries cause practical problems for states, as Thomson argues, but their very existence went against the idea that warriors had to have an attachment to a cause, however that cause was defined.

Only when mercenaries were under legitimate control, did the immoral financial motive of mercenaries become less problematic. The question of who would exert such ‘legitimate’ control was answered differently over the last centuries: kings, princes, the nobles, the Church have all had the legitimacy to use force in the past, while in the

modern era it is arguably the state. The first shift away from mercenary use was thus one where rulers sought and established control over them. After the 16th century, mercenaries still existed, but they were under state control and mercenaries were essentially traded between states. Yet, even with state control over mercenaries, their use was still regarded to some extent as illegitimate, because state control did not change anything about the fact that mercenaries fought for money. This financial motivation increasingly became a problem during the time of the French Revolution and after. Financially motivated mercenaries were increasingly at odds with the patriotic fervour of those times where the belief was that citizens should fight for the nation rather than for money. This aspect of the anti-mercenary norm was then responsible for the second shift in mercenary use: the interstate trade of mercenaries was discontinued, and thereby the state use of mercenaries was completely abandoned. Percy thus presents not only a different story of the normative shift, but also corrects the understanding of how the state practice changed: there was a first shift towards tightly controlling mercenary use as early as the 16th century, and the second and final shift in the 19th century saw the complete abandonment of mercenary use.

To sum up, while material and systemic pressures alone cannot account for the abandonment of mercenaries and the adoption of citizen armies, Avant (2000), Thomson (1994), and Percy (2007a) point to normative changes. Avant identifies Enlightenment ideas, mediated by material pressures and domestic politics, as impetus for the change in state practice. Thomson, on the other hand, argues that changes in the international neutrality norm led to an important extent to the change in state practice. Finally, Percy regards the anti-mercenary norm as the best explanation for why states abandoned the use of mercenaries and instead chose to use their own citizens as soldiers.

It is beyond the scope of this chapter to assess these competing historical accounts, but they will inform the subsequent discussion in several ways. First, they all go beyond explanations based solely on material factors. Second, they identify three different norms and so lend some support to the overall theoretical argument that it is worthwhile to investigate the interplay between norms. Third, by looking at what led to the abandonment of mercenarism, they provide some understanding of what might be the normative issue(s) with states' contemporary use of PMSCs. Fourth, the accounts provide

different views as to the relative importance of and the interplay between domestic and international dynamics.

Finally, state conduct and legitimacy do not necessarily develop simultaneously or in the same order. Percy's anti-mercenary norm, the collective understanding that warriors ought to fight for a cause and that they ought to be under legitimate control, preceded changes in mercenary use. First came the norm, and as it gained strength and spread, states gradually changed their conduct accordingly. Thomson's account differs in that the neutrality norm was not directly targeted at mercenarism as such, but was concerned with a changing understanding of sovereignty. This meant that states were increasingly held accountable by other states for external violence emanating from their territories; abandoning and prohibiting mercenarism was a practical solution and "unintended consequence of a number of unrelated instances of strategic interaction" (Thomson 1994: 30). Mercenarism, in Thomson's account, was not said to be 'wrong' in any normative sense but, rather, was a diplomatic problem in the context of a changed understanding of sovereignty. Once mercenarism was abandoned throughout international society, then the "*is* became an *ought*" (Thomson 1994: 152).

From 'soldiers of fortune' to 'corporate mercenaries'

After two devastating world wars involving citizen-armies – and citizens themselves – mercenaries began to re-appear on the world stage in the second half of the 20th century. Inter-state war during this period still saw the use of armies of conscripts and professional soldiers. But in the wake of decolonization, the rise in intra-state wars and the proxy-wars of the Cold War, states once again resorted to the use of mercenaries. The context was one where states sought to influence armed conflicts in their favour without getting directly involved. Whether this was to thwart moves towards decolonization or to bolster the respective sides in the East-West confrontation, with the two often going hand in hand: the covert use of mercenaries became a useful tool for states.

Rather than openly hiring them as 'force multipliers' for their armies or for armed protection, states would call upon mercenaries secretly and usually through their intelligence services, as in the alleged involvement of the CIA and the French intelligence

service in recruiting mercenaries in Angola (Arnold 1999: xi). As Burchett and Roebuck (1977: 7) put it in their book *The Whores of War*, the “present resurgence of the use of mercenaries is caused by the need of governments on military operations, without the support or even sometimes the knowledge of their electorates, against those who have taken up arms to free themselves from colonial or other oppression.” Even when states were not the initiators or recruiters, they had a permissive attitude towards mercenarism when it served their interests. France may have been behind a coup in the newly independent Comoros in 1975, but the same mercenary behind the first coup, Colonel ‘Bob’ Denard, was hired a few years later by the former president and with the “tacit complicity of the major power interest” to stage a second coup (Thomas 1984: 130). Mercenaries would be involved in coup attempts from outside and former colonial powers, and would also be hired on both sides of a conflict as in, for example, the Nigerian civil war (Arnold 1999: 18). This covert use of mercenaries and the practice of turning a blind eye on their activities allowed states to participate in armed conflict while at the same time denying responsibility.

It is easy to see the re-emergence of mercenarism in the 20th century as a Third World, largely African, issue. Yet, the conflicts mercenaries became involved in usually had an international dimension – they were embedded in the Cold War logic and often were efforts against colonial rule. Also, these conflicts often attracted mercenaries from the developed world, usually from the West. The Congo Crisis, for example, that began shortly after the country’s independence from Belgium in 1960 attracted mercenaries from several Western countries, often facilitated by the former colonial power; they signed on for money and for “excitement and danger in reaction to a humdrum life following WWII” (Arnold 1999: 2).

Moreover, although most internal wars with mercenary participation were located in Africa, several other regions had such wars with mercenary involvement between 1950 and 2003. In fact, considering the limited and localized nature of violent conflicts in Europe since the end of WWII, the continent saw the highest proportion of internal wars with mercenary involvement during that period. These were largely violent conflicts erupting after the breakdown of the Soviet Union, particularly in the former Yugoslavia, but also in Russia’s neighbourhood (Abkhazia) and within Russia (Chechnya) (Chojnacki et al. 2009: 15-16). What is more, the collapse of the Soviet Union saw Russian

mercenaries become active in Europe and beyond; not only was this a result of the downsizing of the former Red Army, but also a consequence of the fading control the Soviet Union had once exercised over its citizens (Arnold 1999: 110).

All in all, mercenarism grew steadily in the second half of the 20th century. Mercenaries came from a variety of countries and were involved in internal wars around the world. States either took a permissive approach to their recruitment or hired them in a clandestine fashion. Far from an open state practice, states' use of mercenaries unfolded covertly. This can partly be explained by the Cold War and decolonization contexts, in which states were careful not to be seen to openly intervene in conflicts. It can also be explained by Percy's anti-mercenary norm: that in the face of deeper normative objections to mercenarism in international society, states did not want to bluntly defy understandings of rightful state conduct. The next chapter looks at these issues in more detail, namely how states responded to mercenary and PMSC use respectively. For the purpose of this chapter, it is important to stress the contexts in which states reverted to the use of mercenaries and to highlight the covert manner in which states did so.

These instances of mercenarism set the scene for the appearance of PMSCs in the 1990s. The image of the 'soldiers of fortune' hired to instigate a military coup against the governments of newly independent states, was still attached to what some saw as 'corporate mercenaries'.³⁵ Although Arnold (1999: 109), too, considers PMSCs as the new mercenaries, he does highlight an important difference: states sought to keep their use of mercenaries secret, but usually did not try to do so when hiring PMSCs. In this and other regards, the use of PMSCs in the 1990s constitutes a transition away from 20th century mercenarism to widespread use of PMSCs at the beginning of the 21st century. Stories about the rise of this new private military and security industry usually start with an overview of the profile and the operations of *Executive Outcomes*, probably the most well known PMSC of the 1990s. Indeed, in order to understand the contemporary industry and state practice, it is important to look at the activities of this company in the early 1990s (Kinsey 2006: 58).

³⁵ The next chapter looks more closely at how discourses on mercenaries and PMSCs overlap and differ in the UNSC and UNGA.

The first time *Executive Outcomes* received attention from a wider audience was in 1993 when it was contracted by the Angolan government to train and supply weapons to government troops that were fighting rebels from the *National Union for the Total Independence of Angola* (Kinsey 2006: 62). Importantly, the company was also involved in combat situations and led front-line operations. In a swift assault against the rebels, 80 contractors together with two battalions of the Angolan army captured the town of Soyo, the oil centre of the country. The crucial role of the company became apparent when the rebels were able to recapture Soyo from government troops once *Executive Outcomes* had withdrawn from the town (Shearer 1998: 46). The operation demonstrated the company's effectiveness in combat and its important role in the overall military conflict: the decision to use *Executive Outcomes* and its arrival in Angola "coincided with the exact turning point in the government's war effort" (Singer 2003: 110).

Angola was the ideal publicity for *Executive Outcomes*, and it was what led the Sierra Leone government to hire the company in 1995, after its calls for outside intervention were declined by the UN, US, and UK, and after being deserted by another PMSC that had aborted its contract due to fatal losses (Singer 2003: 112). Similar to Angola, Sierra Leone, a resource-rich country, experienced violent conflict between government troops and rebels, with violence often spilling over to and directed at the civilian population. When *Executive Outcomes* arrived in the country, rebels of the *Revolutionary United Front* (RUF), notorious for their brutality toward the civilian population, had gained control over a large part of the country, all of the important resource-rich areas, and were pushing forward to the capital city. Once the company arrived, it protected Freetown, regained control of diamond fields, and pushed back RUF headquarters. The operations weakened RUF so much that it agreed to a peace settlement that it had declined before. Again, *Executive Outcomes* proved its effectiveness and important role in the country when, after warning the government of a military coup, President Kabbah was ousted only three months after the departure of the company (Shearer 1998: 49-54). Some observers were critical of PMSCs' involvement in resource-rich Sierra Leone and Angola, of what they saw as exploitation and a new form of neo-colonialism (Francis 1999), while others highlighted the company's crucial contribution to the overall situation in the country:

“At a total cost of \$35 million dollars (significantly, just one-third of the government’s annual military budget), the fighting in Sierra Leone had ceased and over one million displaced persons returned to their homes. Suffering less than 20 total casualties, including those from accidents and illness, the private firm had succeeded in bringing stability to two endemically conflict-ridden states” (Singer 2003: 114).

Whether their impact was positive or negative, or whether they had a significant effect on these conflicts at all (Loven 2013), the two cases are exemplary of larger geopolitical developments of the post-Cold War 1990s: eruption of internal wars that had been suppressed by the bipolar logic, and a reduced willingness of states to intervene in them. This created a – as PMSCs would put it – demand-supply gap, and the private military and security industry stepped in. Angola and Sierra Leone also tell us important things about the industry and its clients. In both cases the company provided tip-of-the-spear services and was involved in, that is coordinated or directed, actual combat operations. It was hired by struggling governments of developing, Sub-Saharan countries that felt they had no other option than turning to a PMSC. Calls for outside intervention by the UN and Western states, some of which, as in the case of Sierra Leone, were the former colonial rulers, went unheard. Considering the pressing circumstances, governments did not have any qualms about openly hiring these companies.

The cases also have implications for the legitimacy of PMSC use; the fact that Sierra Leone and Angola hired PMSCs in the 1990s is important for several reasons. First, their behaviour was a model for other countries in the region, perhaps more so than the conduct of states from outside the region, as well as for governments in similarly intricate situations. Rather than great material power being conducive to a state’s leadership role, these cases show that helplessness that is a result of a lack of material power can augment the model character of a state, because it indicates similarity. It is not material power in and of itself, but the meaning attached to it that is the decisive factor.

Second, both the ‘Convention for the Elimination of Mercenaries in Africa’ of the Organization of African Unity (OAU) as well as the UN Mercenary Convention were sought and implemented by African states in particular (Liu 2011: 299). The fact that two African governments then decided to hire PMSCs was an important step in the erosion of the anti-mercenary norm. Their use of PMSCs undermined the norm, because it both represented deviant behaviour from a broader understanding of the norm as encompassing

all types of non-state violence, and by limiting the norm's application to mercenaries and excluding PMSCs from the definition. Because they belonged to a regional society of states that had tried to delegitimise the use of mercenaries, the use of PMSCs by Sierra Leone and Angola had a particularly negative effect on the norm, and, consequently, a positive effect on the legitimacy of PMSC use.

Looking beyond these high-profile interventions, already in the 1990s, the state practice of using PMSCs and the industry as such were more diverse than the above cases suggest. PMSCs were not only hired by struggling developing countries in sub-Saharan Africa, but also by Western governments on the European continent. And they were not only providing tip-of-the-spear services at the front line of conflicts, but also fulfilled advisory and logistical support functions.

The US company MPRI is a case in point. Created by retired senior US armed forces personnel in 1987 MPRI had close ties to the US Department of Defense (DoD), and it had mainly been active on the US domestic military market until the Yugoslav Wars erupted and dragged the US into the conflicts. The company's role included providing border monitors for the DoS, but it was MPRI's contract with the Republic of Croatia that attracted observer's attention (Singer 2003: 124-126). There were two contracts that received the mandatory licence from the DoS; MPRI was to help Croatia become a suitable candidate for the NATO Partnership for Peace programme and to provide the ministry and army with democracy transition trainings (Shearer 1998: 58). But when Croatia launched a remarkably successful, professional NATO-style military operation in the Serb-held Krajina region in August 1995, speculations were that MPRI did more than what was envisioned in its contract, and had trained the Croat army in the use of weapon systems and in combat tactics (Singer 2003: 127). MPRI denied this as did the US government. And so some of the covert nature of prior mercenary use extended to the use of PMSCs. The company's alleged involvement sufficed to provide it with useful publicity for its operational effectiveness – as in the case of *Executive Outcomes* in Angola. The next contract that MPRI received in the region was with Bosnia under the 'Train and Equip' programme, and this time the contract explicitly provided for training combat skills and equipping the military with US military hardware (Shearer 1998: 60).

While the services provided by *Executive Outcomes* included direct combat support, and MPRI's services were of a largely advisory nature, the US company *Brown and Root Services* (BRS) provided services that were furthest away from the tip-of-the-spear. It received large contracts from the DoD for the provision of logistical support for Operation Deny Flight in Bosnia, for NATO's IFOR peacekeeping mission, and, once the war broke out in Kosovo, it operated entire military bases for US armed forces in the country. Logistical services included everything from building the bases from scratch, washing laundry and providing canteens to repairing and maintaining weapons systems and vehicles (Singer 2003: 143-146).

In summary, the end of the Cold War provided the geopolitical context for and driving forces behind the rise of the private military industry in the 1990s. The industry, its client basis and geographical area of operation already showed some of the diversity that was only going to increase in the new millennium. Although *Executive Outcomes'* spectacular involvement in combat operations has received a lot of attention and means that the company "has become emblematic of the overall phenomenon of corporate armies" (Singer 2003: 101), the cases of MPRI and BRS show that PMSCs were already used for a large part of the spectrum of services. Also, PMSCs were not only used by weak states and on the African continent, but also by Western governments and in the immediate neighbourhood of the otherwise stable and affluent European community. While the former turned to PMSCs as a last resort, the latter began to see PMSCs as a useful, efficient way to augment their military capabilities, and sometimes – in continuity with earlier mercenarism – as a means to intervene militarily in a conflict while at the same time denying any involvement.

The case of *Executive Outcomes* is interesting for another reason. The company presented the first face of the new private military and security phenomenon, an industry that tried to distinguish itself from mercenaries. By emphasizing their corporate character, the fact that they were permanent entities with legal status as opposed to mercenaries who were individuals, who may come together in groups in an ad hoc fashion, and who were criminals under international law, early PMSCs tried to free themselves from the 'mercenary' label. The founder of the British PMSC *Sandline International* described a PMSC as a

“permanent structure with a large number of people on its books. It has a permanent presence, it has an office, it uses promotional literature, it has a vetting system, it has a doctrine and it has a training capacity, internally as well as externally. It draws on the normal support that you would expect from a business” (Spicer 1999: 165, cited in Kinsey 2006: 67).

This struggle over which label to apply to the industry continues today, and is of great importance to the legitimacy of the state’s international use of PMSCs. What is important to note at this point is the following: because *Executive Outcomes* was one of the first PMSCs, and was involved in combat operations that easily lend themselves to punchy headlines, the whole industry was affected by the company’s image. And because the type of services the company offered closely resembled the activities of mercenaries, the industry as such was often put under the mercenary label. Yet, irrespective of how certain practices are and were labelled, the industry, and, consequently, the state practice of using PMSCs in the 1990s were already more diverse than *Executive Outcomes*’ operations in Angola and Sierra Leone would suggest. *Executive Outcomes* dissolved in 1999 and observers “took this to mean that such military provider firms that offered implementation and combat services were no longer viable” (Singer 2003: 118). But not only did PMSCs affiliated with *Executive Outcomes* continue their work, but in the 2000s PMSCs still use force and are engaged in situations that closely resemble actual combat – even if their activities are described and presented differently.

The expansion of PMSC use in the post-Cold War era

What began as a scattered and limited practice in the 1990s would accelerate and expand at the turn of the millennium. The geo-political changes had already set in. The end of the Cold War increased both supply and demand for the industry (Singer 2003: 49-60; Shearer 1998: 9). Although states made use of a large part of the spectrum of services as early as the 1990s, the practice has changed quantitatively, making PMSC use a visible and commonplace practice. Projections saw the global security service industry, including largely domestic and commercial security provision, increase from \$139 billion in 2007 to \$244 billion in 2016 (Freedonia 2008, 2012). Private military service providers show a similar upward trend; although their growth rates have slowed down in 2009 and 2010, primarily due to the decrease in US spending in Iraq and Afghanistan, sales of the top 20 companies grew from \$22 billion in 2002 to \$55 billion in 2010 (SIPRI 2015). Industry

growth peaked with Iraq and Afghanistan and has been decelerating in recent years. But underlying these ups-and-downs are more fundamental material and normative shifts.

These trends in industry growth and state practice are also embedded in changes in warfare and perceptions of security threats. PMSCs make an entrance into the ‘new wars’, in which lines between state and non-state actors, the ‘private’ and ‘public’ as well as the ‘external’ and ‘internal’ are becoming blurred (Kaldor 2013). Demands on armies to be more flexible, rapidly deployable abroad and in a variety of contexts rather than oriented towards territorial defence through mass armies favours the use of PMSCs (Singer 2003: 60-62). So does the broadening of what constitutes a ‘security threat’ (Buzan et al. 1998). If more and more issues beyond the military domain are considered ‘threats’ and if the general precept of the ‘risk society’ (Beck 1986) is to conceive of war and security as risks that need to be managed and, ideally, minimised (Coker 2009), then this, too, offers opportunities to PMSCs.

Apart from changes in practice, the relative openness with which states hire PMSCs is noteworthy; by and large, they are not, anymore, trying to hide their use of non-state actors as they did when they were involved in Cold War proxy-wars or their obstruction of decolonization. This move away from the covert, ‘murky’ business of mercenarism in the second half of the 20th century to the open employment of PMSCs at the beginning of the 21st century with the 1990s as a transition phase is a marked change. In 1994 Thomson asserted that while “[e]xploiting nonstate violence remains a powerful temptation for state rulers [...] [u]nlike their nineteenth-century counterparts, however, contemporary state leaders must do this in secret” (152-153). It is clear that this applied to 20th century mercenarism much more than it does to the 21st century practice of hiring PMSCs. The issue of secrecy around a particular state conduct matters for legitimacy, because it indicates the extent to which states see their conduct as consistent with normative principles. If a state is not bent on hiding its use of PMSCs, then it shows that it is willing to justify its conduct to other states; the covert use of mercenaries, on the other hand, demonstrated that states were not prepared to do that. There is still some variance across states in terms of how open and transparent they are with their own use of PMSCs; these differences and what they might mean for states’ conceptions of legitimacy will be analysed below.

In the following, the focus will be on the US employment of PMSCs in Iraq and Afghanistan. The US relies on PMSCs to a considerable degree, and although much of the industry's revenue is generated from logistical services, PMSCs are also using force on behalf of their state clients. The US is 'ahead of the curve' when it comes to contracting PMSCs, and its conduct as a superpower has significant implications for legitimacy. Going beyond PMSC use by the US in Iraq and Afghanistan, however, demonstrates that other states, although still constrained by domestic norms, are following suit; it is becoming a global state practice.

Iraq and Afghanistan – a booming industry, the superpower and implications for legitimacy

The industry experienced a boom with the US-led military deployments in Afghanistan and Iraq, which is why observers' interest in these two cases is justified. The reliance of the US on PMSCs has increased since the 1990s. As can be seen in figure 4, historically, the US has always relied on civilian contractors to some extent. Yet, it is with the wars on the Balkans in the 1990s and the Iraq War of 2003 and its aftermath and the military operation in Afghanistan that the US has reached the historic ratio of one contractor for every member of the armed forces. The ratio is one important indicator for increased use of contractors by the US.

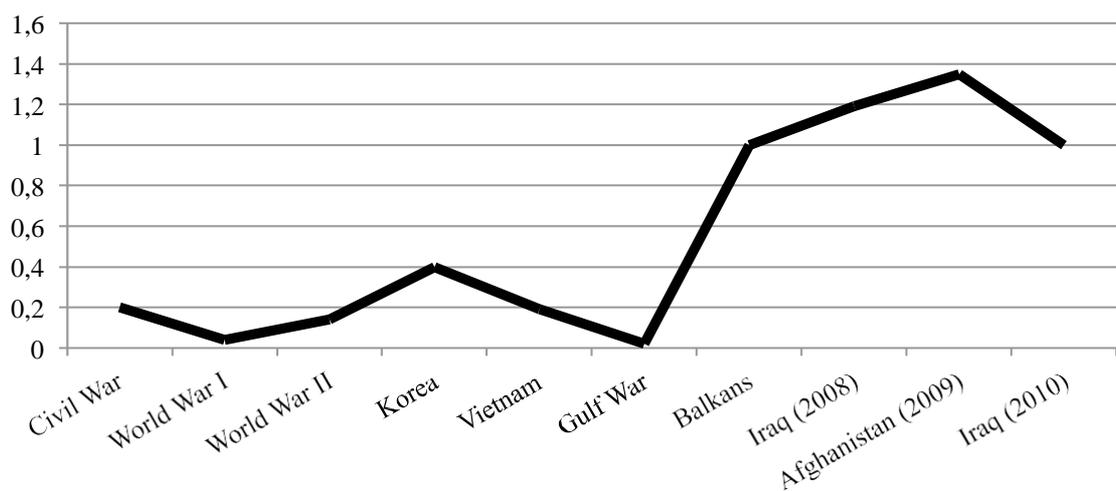


Figure 4. Ratio of civilians to soldiers in US military deployments. Sources: USCBO (2008: 13) and Center for Security Studies (2010: 2).

The above figure does not separate between civilians working as government employees, e.g. as members of the DoS, and contractors. Looking more closely at US operations in Iraq, some other indicators help understand the extent to which the US uses PMSCs. Accurate, reliable data on PMSC use is, however, notoriously difficult to obtain. This is probably even more the case for the use of PMSCs by non-state, private actors, because contracts between private parties are rarely made public. But since the dissertation is on states' use of PMSCs, and public bodies are often required to release some information to the public, and specifically to parliament, some data is available, even if incomplete and piecemeal. For the US, the Congressional Budget Office (USCBO) has provided a comprehensive overview of PMSC use in Iraq for the period between 2003 and 2007 (USCBO 2008).

During this period, the US spent \$85 billion for contracts in Iraq, which is about 20 per cent of all US expenditures for the military deployment in the country (USCBO 2008: 2). Of these overall expenditures, 6-10\$ billion was spent on what the USCBO terms 'private security contractors', that is personnel "providing personal security details for high-ranking officials, security escorts for government and contractor personnel, security for convoys and at fixed sites, and advice and planning related to security" (USCBO 2008: 13). About 19\$ billion fall into a 'Uncategorized or Miscellaneous' category, which means that with these figures a fifth of overall contract spending in Iraq between 2003 and 2007 cannot be classified according to functions (USCBO 2008: 7). This fairly large category might include such tip-of-the-spear services like armed personal or convoy security provision, or more benign services – in the end, it is not possible to tell, because there was no precise reporting of the specific nature of the services in this category.

Also, when looking more closely at which US agency is actually contracting PMSCs, the DoD is clearly the largest client with 90 per cent, that is \$76 billion, of all contract spending by the US (USCBO 2008: 3). It is not surprising that the ministry of defence is the main agency to outsource military functions to PMSCs. However, more interesting than the absolute volume of such contracts, are the services that are being purchased. A large part of DoD contracts are not for tip-of-the-spear services (although the 'uncategorized or miscellaneous' category may well include them); most of the DoD's spending is for logistical services, and the DoD has awarded large logistics contracts,

under the Logistics Civil Augmentation Program (LOGCAP) since the 1990s (USCBO 2008: 7).

The first five-year LOGCAP contract, a volume of \$815 million, went to BRS in 1992, mainly for its services in the Balkans. While BRS continued the logistical support in the Balkans from 1997-2002 – another contract worth \$2,500 million – the second LOGCAP contract went to the US PMSC DynCorp that supported the US armed forces in Bosnia. The third LOGCAP contract for Afghanistan, Iraq and other countries of the region went to BRS and was worth \$15,350 million (USCBO 2005: 3). What this shows very clearly is that, first, the DoD has mainly turned to the industry for logistical services, and that it has, secondly, been a big client for PMSCs providing such services. The LOGCAP contracts have increased in volume since the 1990s, and have exploded with the military deployments in Iraq and Afghanistan. Since the first contracts were awarded as early as 1992, this corroborates the point about a quantitative, rather than a qualitative change in PMSC use.

On the other hand, the DoS, although spending much less on contracts compared to the DoD, is using PMSCs for more tip-of-the-spear functions. Security provision as defined above (USCBO 2008: 13), is the main service that the DoS relies on when turning to PMSCs: 40 per cent of what the DoS has spent on contracts in Iraq in late 2007 went to PMSCs providing such services (USCBO 2008: 11). Blackwater, Triple Canopy and Armour Group – have all had contracts with the DoS, and their employees have been involved in incidents of violent or irresponsible behaviour as reported in many media reports (Schwartz 2011: 15). For example, when Blackwater employees killed 17 Iraqi civilians at Baghdad Nisoor Square, they were tasked by the DoS to protect a convoy of USAID officials.

The DoS and other US government agencies in Iraq rely on armed security services provided by PMSCs since the military cannot always provide for it. In fact, the whole rationale of the DoD in contracting logistical services is to improve the ‘tooth’ to ‘tail’ ratio so that support functions are provided by PMSCs while military personnel can focus on the core mission of the armed forces. This also means that contractors themselves will not, under DoD policy, be protected by the military, unless they deploy with the armed forces or support the military’s mission in a direct way (USGAO 2005: 10). This, in turn,

has meant that PMSCs themselves, particular those that provide logistical services, have often had to subcontract other PMSCs for armed security (USGAO 2010: 35). And because such subcontracts are difficult to track – as they involve confidential contracts between private parties – it is difficult to give an exact number of PMSC personnel providing armed security services in Iraq, as in any other case for that matter. Still, one can get a good idea of the overall number when looking both at figures of government agencies' direct contracting of PMSCs providing armed security and at figures of PMSCs providing logistical services, since the latter will usually need to subcontract armed PMSC personnel.

The reason for distinguishing between DoD and DoS contracts, is to show that the latter relies more on tip-of-the-spear services than the former. The volume of DoS contracts is much smaller than those of the DoD. If one fails to make the distinction between the contracting behaviour of the two agencies, the relatively small DoS contracts would be submerged under the large DoD contracts: one might get the impression that the US largely outsources benign services to PMSCs. This is only partly correct. In terms of volume, the provision of, for example, military logistics is naturally much more expensive than the provision of armed security. A look at the top 30 PMSCs working for US agencies confirms that “the bulk of the revenues of the military service industry is generated by the R&D, technical services and operational support sections of the market” (Perlo-Freeman 2008: 13), and that, consequently, tip-of-the-spear services, and companies that provide them such as Blackwater or Triple Canopy, often do not register in figures that look at the volume of contracts. Compared to those PMSCs that mainly provide benign services, such companies generate much lower revenues. Also, they are often subsidiaries of larger companies, e.g. Northrup Gunman owns the military training company Vinnell and L-3 Communications now owns MPRI (Perlo-Freeman 2008: 11).

Because the volume of contracts can be an insufficient indicator for grasping the change in PMSC use, and turning to a comparison between PMSC use in Afghanistan and Iraq, additional indicators should be considered, such as the number of PMSC personnel, the number of armed forces, and the relationship between these numbers. As can be seen in figure 5, more than 160,000 PMSC personnel were working in Iraq in 2008, but there has been a continuous decline since. The same is true for PMSC personnel providing armed security services, although here the decline was not as steep.

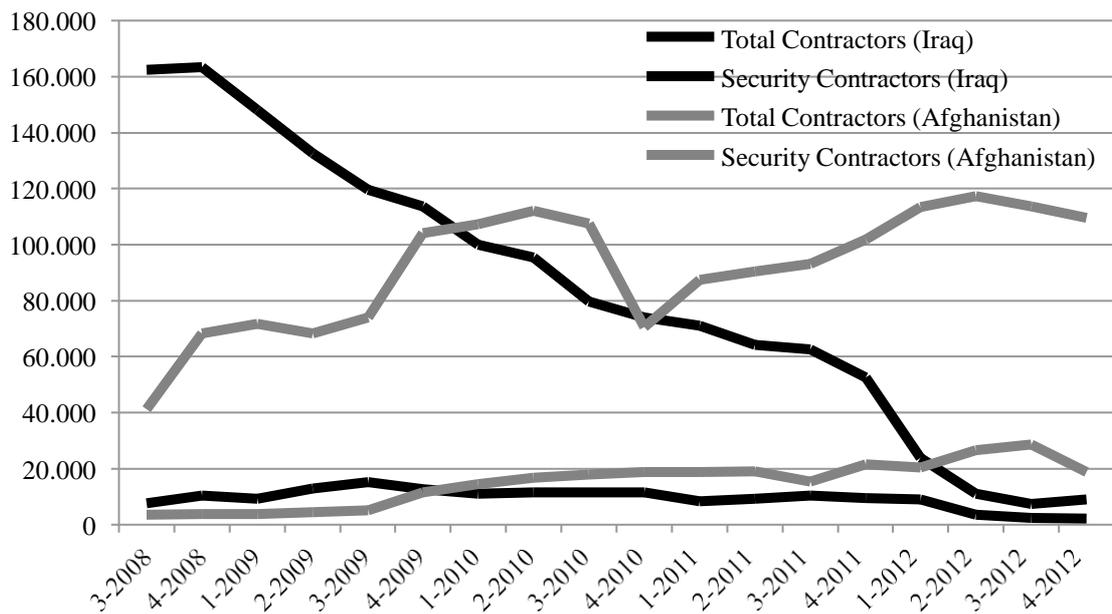


Figure 5. Number of PMSC personnel (total and security services) working for the US in Iraq and Afghanistan. Sources: USCENTCOM Quarterly Contractor Census Report (2008-2012)

On the other hand, in the same period the number of PMSC personnel working in Afghanistan increased, overtaking the figures for personnel in Iraq. Furthermore, both in the case of Iraq and Afghanistan the number of contractors engaged in armed security provision is smaller than the total number of contractors. This confirms the picture from above: the more benign services outweigh the more tip-of-the-spear services both in terms of revenue and employees. However, the percentage of tip-of-the-spear services is higher when one looks at the number of personnel compared to when one looks at revenues. This slightly corrects the picture from above which suggested that tip-of-the-spear services only constitute a fraction of what PMSCs do in conflict zones: more PMSC personnel are engaged in tip-of-the-spear services than what revenue figures alone might suggest.

PMSCs provide armed security services on behalf of their state clients. That this may involve the use of force has repeatedly been illustrated, not only by media reports (Chatterjee 2010). Even if states and most PMSCs claim that this is only for defensive purposes, it is difficult to draw a line between offensive and defensive use of force in

conflicts like those in Iraq and Afghanistan.³⁶ First, these conflicts are characterized by fuzzy frontlines and by non-linear battlefields: PMSC personnel – even those providing logistical services – are “getting closer to the front line” (Kinsey 2006: 158), or rather: they are situated in conflict theatres in which it is very difficult to identify where that front line runs. The insurgents in both countries have not made a distinction between combatants and non-combatants; in turn, the military response often takes place amongst civilians. The conflicts in Iraq and Afghanistan are indicative of broader changes in warfare. The conflicts are fought ‘amongst the people’ as former British General Rupert Smith has put it (Smith 2005). PMSC personnel have not only been the targets of attacks (USCBO 2005: xii), but they have also themselves used force. The Nisoor square incident is an example for how difficult it is to describe the use of force by PMSCs as merely ‘defensive’. Against this background, the distinction between the 1990s and companies like *Executive Outcomes* that provided offensive/combat services and today’s PMSCs that provide defensive/support services is too simple. It neglects broader changes in warfare, and it ignores the simple fact that today’s PMSCs use force – even if they and their clients try to play it down by labelling it as ‘defensive’.

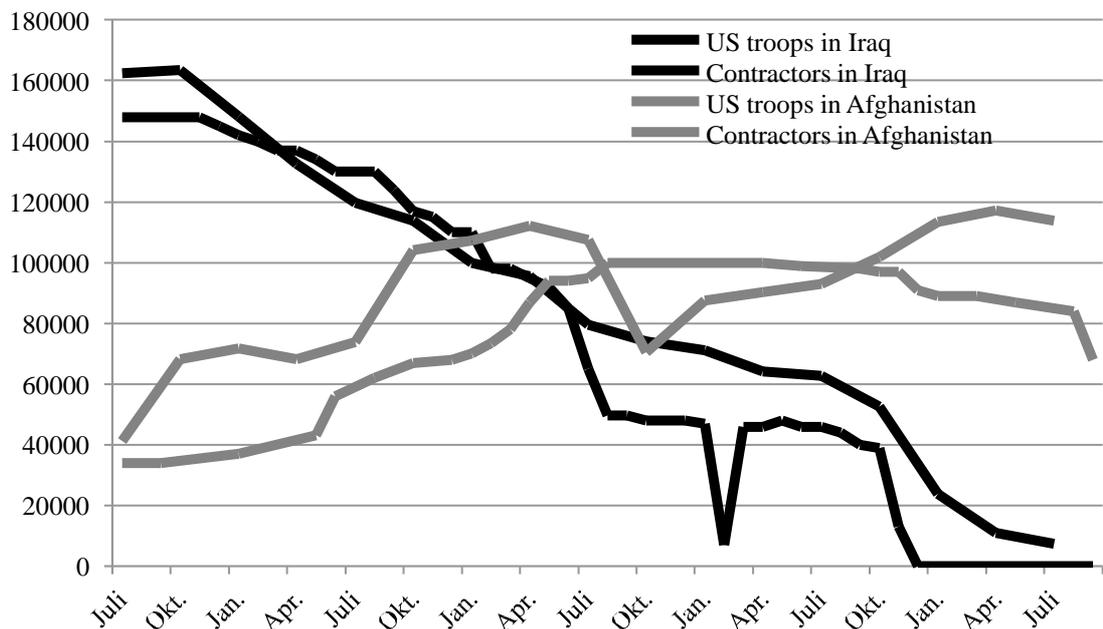


Figure 6. Number of US troops and contractors in Iraq and Afghanistan. Sources: USCENTCOM Quarterly Contractor Census Reports (2008-2012); Brookings Iraq and Afghanistan Indices (2008-2012)

³⁶ It is noteworthy that international humanitarian law does not make a distinction between ‘offensive’ and ‘defensive’ use of force; the ‘defensive’ use of force constitutes direct participation in hostilities (Mancini et al. 2011: 334).

What can be seen from figures 5 and 6 is that a shift has been taking place since 2008. This can be explained by a change of policy from the then new US administration that focused its attention on Afghanistan rather than Iraq. As the US withdrew its troops from Iraq, the number of troops in Afghanistan increased accordingly. The same holds for the presence of PMSC personnel in both countries. From 2008 the US reduced its use of PMSCs in Iraq and increasingly started to employ them in Afghanistan. The fact that the trend lines broadly run in the same direction means that not only does the US military rely on PMSCs, but that, to some extent, the reverse is true as well: PMSCs operate and make business where the US military needs them. The political decision to focus military efforts on Afghanistan had an impact on the industry's operations. Although not alleviating the problem, it slightly corrects the picture that the US military is over-reliant on the industry. And it certainly contradicts the view that the PMSC industry is here to replace the public military. Instead, what we have seen in Iraq and Afghanistan, and particularly in 2008 with the reallocation of military forces, was a state-led use of PMSCs. Rather than replacing the public military PMSCs accompany and support military forces (Kinsey 2006: 97). Similar to the privateering of prior centuries (Tabarrok 2007: 576), the state is behind much of the international activity of PMSCs.

It is important to note, however, that the above figures are from the DoD, and only indicate the use of PMSCs by the DoD. Once US troops had withdrawn from Iraq, the DoS decided to increase its use of PMSCs, because it could not rely anymore on security provided by the armed forces (ISN 2012). Although a large proportion of PMSC personnel did withdraw together with the armed forces, the withdrawal created a gap that the DoS filled by hiring PMSCs. These PMSCs mainly provided tip-of-the-spear services to the DoS. As of 2011 about 5,000 security contractors were employed to protect the US Embassy in Baghdad (Bowman 2011). So while the overall number of PMSC personnel in Iraq decreased, the proportion of tip-of-the-spear services increased, since the DoS remained engaged in Iraq and relied more heavily on such services. The same trend can be observed for Afghanistan; after the withdrawal, PMSCs continue to be used by state and non-state actors alike (Armendáriz 2013).

The overall trend in the aftermath of US military deployments in Iraq and Afghanistan, therefore, is one where the quantity, in terms of the volume of contracts and number of employees, is likely to decrease further, but with the quality of PMSC use changing in a

way that we can expect less logistical support and more tip-of-the-spear and consulting/training activities. Moreover, rather than accompanying the US military, PMSCs are likely to be used in place of the military, for example in training African security forces (Dunigan 2014) and protecting merchant vessels against piracy (Caldwell 2012).

The widespread use of PMSCs, particularly by the US in Iraq and Afghanistan, matters for the strength of norms, and, in extension, for legitimacy. This is because not only do norms shape actors' behaviour, but, conversely, behaviour has an impact on the strength of a norm. If a particular behaviour is in violation of a norm, the latter is weakened. If the state's international use of PMSCs violated a norm or a set of norms, the latter would experience erosion in the face of the pervasiveness and magnitude of the current state practice. Shifts in the strength of norms will then have repercussions for legitimacy.

One of the norms that is most often seen to go against the practice is the anti-mercenary norm. According to Percy (2007a) the anti-mercenary norm has not only been directed at mercenaries of past centuries, but continues to affect today's PMSCs. The anti-mercenary norm may still have the effect of deterring the use of the kind of freelance mercenaries that characterized the second half of the 20th century. Today, this type of private force has all but disappeared. Their occasional reappearance, such as in Libya in 2011 (S/RES/1973), has been met with outright condemnation – this is a reminder that looking at how international society responds to a particular behaviour is crucial when evaluating the legitimacy of a state practice, and that it matters how a phenomenon is labelled.

If, on the other hand, the anti-mercenary norm is seen to have a much broader scope of application that subsumes the use of PMSCs as just another type of non-state violence, then the above analysis would still see room for the continuing effect of the norm. In that case, one way the norm continues to have an effect is by shaping how actors frame the practice. The same offensive/defensive distinction that some scholars use to distinguish the tip-of-the-spear services performed by the industry during the 1990s and the supposedly more benign services provided today, is also often employed by states. State clients stress the benign character of their contractual relationships to PMSCs, and when the use of force is part of such a contract, the defensive nature of the use of force is highlighted.

Yet, this kind of framing does not amount to denying the basic fact that states make use of PMSCs and that today's PMSC activities involve the use of force. Particularly the US has no problem in admitting that it makes extensive use of PMSCs – their behaviour is far from a secret matter. Several US government agencies have published data on their contracts, and have released reports in which they evaluate the costs of outsourcing and PMSC performance. The US is not only making extensive use of PMSCs, it is also relatively open and explicit about it.

Moreover, there is a general tendency today, less pronounced in the US than for example in Europe, to avoid open talk of 'offensive' use of force and rather describe the use of force in different terms. The UN Charter provides the clearest prohibition of the use and the threat of force in international relations. On this basis and also going beyond the letter of the law, there is an erosion of the normative value of force: when states use force, it is as a 'last resort', for 'defence' or for 'humanitarian purposes' (Finnemore 2003). This is a general trend in international society and, therefore, nothing particular to PMSC use; whether they use PMSCs or not, states frame differently and thereby downplay the use of force.

Furthermore, although the anti-mercenary norm may have some influence on how states frame the practice, in terms of influencing the actual behaviour of states, the widespread use of PMSCs for the entire spectrum of services is evidence that the norm has become eroded (Panke and Petersohn 2011: 12). The theoretical debate has not provided a clear-cut answer to the question of how widespread and pervasive a certain state behaviour has to be in order to signal the erosion of certain proscriptive norms, and, in turn, indicate the increased legitimacy of the practice. While it would certainly be futile to define a universal threshold, on a case-by-case basis a variety of benchmarks can help interpret what a certain state behaviour means for how international society regards its legitimacy. Above I have provided several indicators and sufficient evidence to conclude that the use of PMSCs during the early years' of the industry in the 1990s had both a different quality and extent to the use of mercenaries during earlier decades, and that the boom of the industry in the new millennium confirmed and amplified this trend. I have shown how the whole spectrum of services – including the use of armed force – is in demand.

In this sense, one can argue that contemporary state practice has crossed a threshold where the proscriptive anti-mercenary norm is being eroded. As a consequence, the negative effect that the anti-mercenary norm may have had on the legitimacy of the practice has been weakened, which, in turn, means the increased legitimacy of the practice. On the basis of the analytical framework, then, it is not so much the behaviour itself that indicates an increased legitimacy of the state practice. Studies that adopt a behavioural approach to legitimacy would look for the direct influence that behaviour has on legitimacy. Rather, it is through its effect on relevant norms that we can gauge the consequences for legitimacy.

Apart from case-specific indicators for assessing in how far state behaviour has crossed a certain threshold, the role of powerful states is a more general element to look for. The theoretical contention is that the behaviour of powerful states has a greater effect on norm strength and the legitimacy of a practice than the behaviour of less powerful states. Material capabilities are only relevant in so far as a society attaches a certain meaning to that capability. The broader debate about US hegemony illustrates this. The US continues to have extraordinary economic and military capabilities, but it is international society's portrayal of the US as the only remaining superpower and its acceptance of a US leadership role that lends some meaning to the material factors. The increasingly contested nature of US leadership demonstrates the dual nature of hegemony as shaped by both material and social factors. And the rise of the BRIC, particularly of China, is a shift in material capabilities as much as, if not more so than, a challenge to the leadership role performed by the US in international society since the end of the Cold War.

The greater impact of the behaviour of more powerful states on norm strength and the legitimacy of a practice, thus, arises from their social position in international society. By making extensive use of PMSCs, the US signals the legitimacy of the practice; it is leading other states, explicitly or implicitly, also in emulating this particular behaviour. At the same time, the US is creating precedents that even those states that resist and contest US hegemony can point to in order to justify their own use of PMSCs. Therefore, not only does the use of PMSCs by the US constitute a model for those states that accept US hegemony; at the same time, it legitimises the practice in the sense that states who challenge US hegemony can more easily point to those precedents created by what is still

regarded by many states as well as in academia as the US hegemon. The extensive use of PMSCs by the US thus has a crucial effect on legitimising the practice.

Beyond the US – a global state practice and the role of domestic norms

The US is by far not the only state to use PMSCs. A brief overview should suffice to demonstrate that states' international use of PMSCs is, indeed, a global practice. I will focus on Europe since, after the US, most studies have been conducted on the use of PMSCs by European countries. Research on Russia and China is limited, but there are indications that they, too, are using PMSCs or will do so in the near future. Overall, there is variation in the extent to which states make use of PMSCs internationally. While systemic and material changes affect states to a similar degree, domestic norms vary and explain why some states have only hesitantly resorted to the use of PMSCs and why they have remained rather silent when they did.

Beside the US, a lot of research has focused on the UK. Some have stressed the similarities between the US and UK approaches to outsourcing, e.g. how both have a liberal understanding of the state that allows them to embrace the PMSC phenomenon more easily (Krahmann 2010). Others have highlighted the differences between the two approaches, e.g. the way in which the US government has closer ties to US companies while UK PMSCs work more independently from their government (Kinsey 2006). In any case, together with the US the UK belongs to those states that make the most extensive use of PMSCs. Particularly in Iraq, where the UK has been contributing most of the troops after the US, it has relied on PMSCs. Similar to the US, although the British military has not used armed contractors, other UK government agencies have (Hansard 2007).

Although much less is known on outsourcing in other European countries, the trend exists there, too. Indeed, the fact that these countries are hardly transparent about their use of PMSCs, and, thus, data availability is limited, does not mean that these countries do not make use of PMSCs (Leander 2013). The market for defence support services in Germany, for example, is the largest outside the US and the UK (Perlo-Freeman 2008: 8). Despite strong domestic republican norms that emphasize the central role of the state in

providing for and controlling the use force (Krahmann 2010), the country has used the Afghan PMSC *Saladin Security Afghanistan* for armed protection of its military bases and the German embassy (Bundestag 2012: 8), it has hired the German *Rheinmetall Services* to provide maintenance of its HERON 1 drones (Handelsblatt 2010), and it has made extensive use of logistical services by a variety of companies (Bürgin 2010: 130-132). With the end of conscription in Germany, this trend is likely to continue (Krahmann and Friesendorf 2011: 3). Scandinavian countries, too, with their conception of the strong state that ought to provide public services that other, more liberal states would not, are using PMSCs. In Afghanistan, for example, Sweden has used the Swedish *Vesper Group* for the protection of its embassy, the PMSC employees enjoy diplomatic status and can use force in self-defence (Bergman 2010: 7).

Although European states would make the same distinction between offensive and defensive services, and assert that they use PMSCs only for the latter, like the US, European states have hired PMSCs for tip-of-the-spear services in conflict zones where such a distinction is inherently difficult to make. Also, emphasizing that PMSCs are largely hired for logistical support ignores the fact that these companies require armed protection, which is often provided by subcontractors. Of course, the US and the UK are relying more heavily on the private military and security industry, but this is partly due to the fact that they are more actively involved in armed conflicts. European states are more heavily relying on and making use of the industry than one might think and than the respective governments would want their publics to believe. Compared to the US and the UK, most European governments are very restrictive about the information that they release on the state use of PMSCs. Rather than an indication of an absence of PMSC use by these governments, the limited availability of information on outsourcing practices in this field is rather indicative of an uneasiness when it comes to having a domestic debate on whether, and not only how, to use PMSCs in international armed conflicts; this is another difference to the US and UK, where domestic debates have taken place (Leander 2012: 2).

Finally, while certainly a Western-led phenomenon, other states are following suit. Russia and China, in particular, have initially treated PMSCs as an American phenomenon and have been in favour of far-reaching regulation and supportive of the UNWG as is going to be discussed in the next chapters. Yet, they, too, are beginning to see the rise of the

private military and security industry as a ‘business’ opportunity; although in support of stricter regulation and prohibition of tip-of-the-spear services in rhetoric, more substantive support of such initiatives by these countries would certainly have yielded more progress (Gomez del Prado 2014).

Although they have not been involved in Western military interventions, they, too, have reasons to resort to PMSCs, for example, to protect embassies or facilities of government-owned companies abroad. In Russia, there have been calls and legislative initiatives to grant contracts to Russian PMSCs to operate abroad (RIA Novosti 2012; Russian Times 2014). Russian arms and military service companies are already growing faster than their competitors from other countries (SIPRI 2014), and with the trend towards providing ‘integrated solutions’ (Burger et al. 2014), traditional Russian defence companies may increasingly provide military and security services abroad; for example, the Russian *Almaz-Antey*, now at place 14 of the top 100 arms and military service companies worldwide, is providing “training of foreign personnel to carry out” the maintenance of its defence products (Almaz-Antey 2014). Although data on Chinese companies is difficult to obtain, the same rationale holds for China; there have been reports of Chinese PMSCs providing security to “commercial operations in conflict zones, notably in the Sudan and other African countries” (Varin 2015: 2).

The trend towards PMSC use is, thus, global, but there is variation in the extent to which states use PMSCs as well as the openness and transparency around the practice. On the first issue, variation in state use of PMSCs, systemic-materialist accounts fall short. Just as much as historic shifts in states’ use of mercenaries cannot solely be understood through a neo-realist perspective, neither can contemporary moves towards PMSC use. Changes in the nature of warfare, threat perceptions or the demand-supply type arguments in principle affect all states. Varying domestic conceptions of legitimacy have been shown to lie behind the variation in state practice; domestic understandings of the role of the state allow some to make more extensive use of PMSCs while constraining others (Krahmann 2010; Petersohn 2010). Therefore, both systemic, material factors as well as differing domestic conceptions of what constitutes legitimate state conduct are behind contemporary state practice. Expanding state practice, in turn, contributes to changes in international conceptions of legitimacy by undermining, first and foremost, the anti-mercenary norm. The domestic and international levels interact, but are distinct in that,

for example, domestic conceptions of the legitimacy of PMSC use in the US differ from conceptions of legitimacy in international society; the former may shape the latter through actual conduct of the US, but they are not the same.

Different domestic conceptions of legitimacy also seem to be corroborated by how openly states deal with the practice. The scarce data availability on European states' use of PMSCs indicate that they are less comfortable with the PMSC phenomenon – compared to the US, their use of PMSCs is cloaked in secrecy. It remains to be seen how European states will deal with their outsourcing practices in the future. For the moment, the different degree to which the US on the one hand, and European states, on the other hand, make data available, is indicative of how open they are about the practice. Finally, it is interesting to note that the UN and particularly humanitarian organisations show a similar uneasiness when it comes to openly acknowledging their reliance on PMSCs (Østensen 2011b, Stoddard 2008). There is a tension between humanitarian actors' image as impartial and neutral actors, and their increased use of, sometimes armed, PMSC employees (Singer 2006: 69). This uneasiness in regard to the practice of using PMSCs is, therefore, not limited to European states.

Conclusion

The chapter began with different historical accounts of the move towards the citizen army in the 19th century. Although they present different narratives, they can inform our discussion of contemporary changes: they all point beyond material factors; they identify different norms as drivers of change and, thus, lend some support to the theoretical contention that rather than opting for an atomistic view of societal changes, it is fruitful to investigate the interplay between norms; they provide some insight into the normative issues at play with contemporary state practice; they point to the interaction between domestic and international factors; and they illustrate that state conduct and legitimacy do not necessarily develop synchronously. More fundamentally, the historical overview demonstrates that state practice and conceptions of its legitimacy are not carved in stone; they have changed in the past and may well do so in the future.

Material and systemic changes in post-Cold War international society – from favourable supply-demand changes and a broadening of the security agenda – contributed to the rise of the private military and security industry. But there was, and still is, variation amongst states. This variation concerns states' use of PMSCs: Western countries, particularly, the US and the UK are leading the trend. It also concerns the openness with which states employ PMSCs – again, the US and the UK being more open, i.e. releasing data on outsourcing practices and having domestic debates on the issue. Different domestic conceptions of appropriate state conduct lie behind this variation. More specifically, scholars have pointed to competing domestic understandings of the role of the state in controlling the use of force – with liberal and republican traditions enabling and constraining PMSC use respectively. These effects have been summarized in figure 7.

The preceding discussion has been careful, however, not to jump to the conclusion that because states are now widely employing PMSCs the practice is therefore also regarded as legitimate in international society. Instead, the argument has been that pervasive, widespread behaviour undermines the proscriptive anti-mercenary norm. But the conclusion that this, therefore, means that PMSC use is now regarded as legitimate falls short on two accounts. First, it follows an atomistic view of normativity in international society. The anti-mercenary norm may be relevant for understanding how states regard the legitimacy of state conduct, but it is not the only yardstick for assessing legitimacy. PMSC use touches upon other normative considerations, and actors refer to these often competing normative standards when legitimising or contesting state conduct. Which leads to the second shortcoming: namely, that it falls into the behaviouralist trap of conceiving of norms merely as *regular* behaviour instead of grasping the deontic element of norms as standards of *appropriate* behaviour. The *regular* use of PMSCs by states influences but does not determine its *appropriateness*. This appropriateness, in turn, is expressed, judged and contested by actors in discourse.

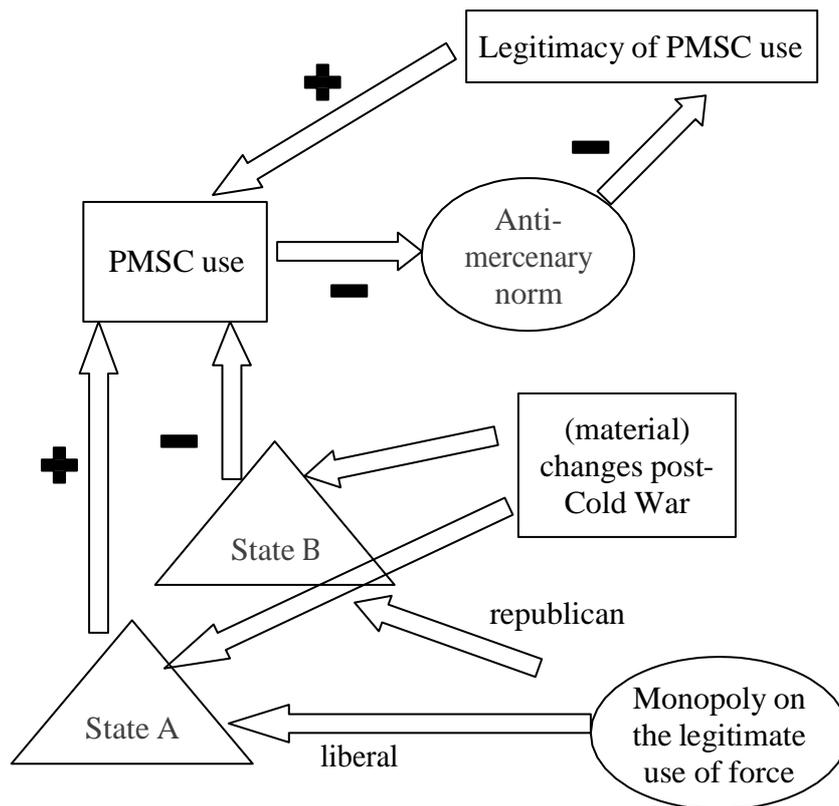


Figure 7. Relationship between PMSC use and legitimacy, and the role of the domestic level

Overcoming these shortcomings requires a broader approach that goes beyond an analysis of one particular norm, and it requires a shift from observing state behaviour to investigating how actors respond to this state conduct. States may increasingly use PMSCs, but until we have not looked at how international society has responded to this practice, all we have is an observation of state practice – not an understanding of its legitimacy in international society. The next chapter, therefore, looks at how states have responded to PMSC use in the UNSC and UNGA.

Chapter 6: Responses from International Society: Condemnation, justification, or silence?

The previous chapter has outlined the widespread use of PMSCs that ensued the end of the Cold War. Some observers will infer the legitimacy of the state practice from behaviour alone: if states are widely employing PMSCs, then this must be evidence that international society accepts the practice as legitimate; usually, this relationship between state behaviour and legitimacy would remain implicit. As the previous chapter has argued, actual state behaviour can undermine norms, which, in turn, affects legitimacy. But widespread state conduct is neither necessary nor sufficient evidence. If states abandoned the use of PMSCs tomorrow, then international society might still consider the past practice legitimate, just as the fact that today's modern armies would not deploy archers does not imply that this means of warfare is considered illegitimate. Neither is it sufficient evidence: in the face of current state behaviour, international society might still regard the use of PMSCs as illegitimate.

This leads us to the subject matter of this chapter: in order to understand how contemporary international society regards the legitimacy of PMSC use, one has to move beyond an investigation of state behaviour and look at international society's reaction towards that behaviour. This reaction is conceived of in discursive terms as described in chapter 4. More specifically, the focus is on the legitimacy discourse surrounding the use of PMSCs. The guiding questions for the subsequent analysis can, therefore, be formulated as: Have states condemned or maybe even welcomed the state practice? If so, on what grounds, that is, which norms and principles have they employed to make their case?

In the following, I will present a content analysis of UN Security Council (UNSC) and UN General Assembly (UNGA) resolutions as well as recorded debates on these resolutions within the two UN organs and their subsidiary bodies. As explained in chapter 4, the UNSC and UNGA can be seen as adequate cases of the creation of intersubjective understandings of legitimacy in international society. If international society regards the use of PMSCs as a potentially illegitimate state practice, we would expect justifications and/or condemnations, in short, legitimacy discourse, to be articulated in UN resolutions and the debates that lead up to them. Throughout the analysis, I will compare and contrast

the discourse on PMSCs with the debate on mercenary use that has taken place in the same UN bodies. Analysing the discourse on mercenary use in conjunction with the discourse on PMSC use promises to reveal continuities and discontinuities.

The first conclusion is that discourse on PMSCs has been rather limited when compared to mercenary discourse. PMSC use has not sparked as much debate as mercenarism, which means less condemnation and less justification of state practice. Compared to mercenarism, PMSC use has been, for some while, somewhat a-legitimate in international society; but the debate has been picking up speed in recent years. Second, while there was an outright condemnation of mercenary use, PMSC use is rather seen as an issue that needs regulation; when condemnation is expressed towards PMSC use it is usually qualified, less outspoken than what we see in the discourse on mercenaries, and the consequences drawn from that condemnation would be regulation and not an outright ban of the practice. Third, there is a shift from self-determination to human rights as the underlying legitimacy principle. This shift is reflective of broader normative changes, which constrain and marginalize calls for a reduction or prohibition of PMSC use, while bolstering moves toward the legitimization of state practice.

Silence on a widespread state practice?

Figure 8 shows the number of UNSC and General Assembly resolutions on PMSCs and mercenaries over time.³⁷ From this quantitative overview alone, some observations can be made. First, considering the whole timeframe, the UN has passed more resolutions on mercenaries than on PMSCs, 116 and 16 respectively. Second, the timing of UN resolutions broadly reflects state practice. The number of resolutions on mercenaries peaked in the 1980s and dropped in the following decades. As a comparatively new phenomenon, before 1990 there were no UN resolutions on PMSCs; the first GA resolution on PMSCs was passed in 1994, and the first SC resolution in 2002. Third, there has been an increase in resolutions on PMSCs, also taking into consideration that for the last decade resolutions have only been counted for the years 2010 to 2012. Particularly

³⁷ Search for SC and GA resolutions from 1946-2012 with the complementary use of the UN's Official Documents System search engine (new and old) and the UNBISnet database. Search for resolutions on mercenaries resulted in 36 SC resolutions and 80 GA resolutions. Search for resolutions on PMSCs resulted in 9 SC resolutions (7 of them unrelated) and 33 GA resolutions (19 of them unrelated). See also Appendix.

the last point puts the first observation into perspective: we may not see as many resolutions on PMSCs yet, but the phenomenon – or at least the new label attached to the phenomenon – is relatively new and the increase in the final period of observation suggests that we can expect more to come. A closer look at the resolutions is, therefore, required to identify differences in the discourses.

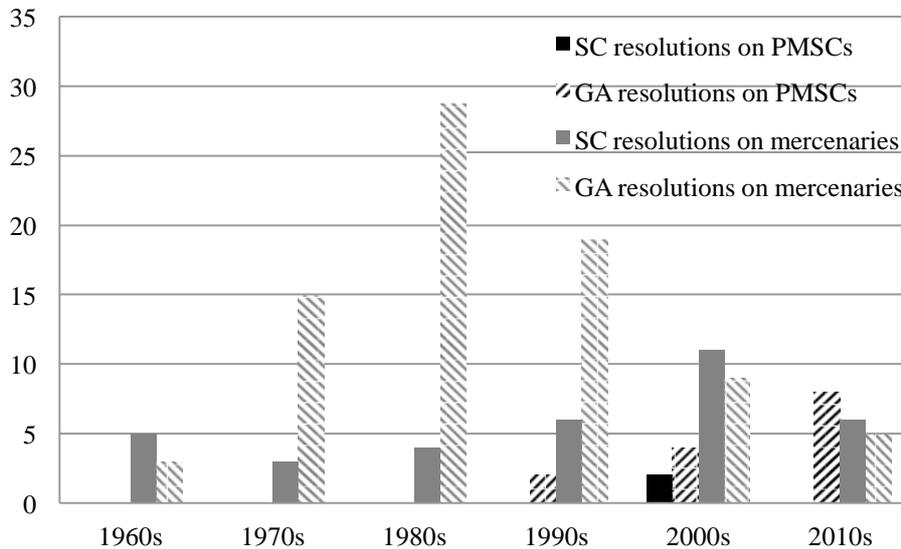


Figure 8. Number of UN Security Council and UN General Assembly resolutions on PMSCs and mercenaries. Source: Appendix.

Another way of looking at the resolutions is to compare their thematic scope. The goal is to get an idea of the breadth and presence that the two issues have in those particular UN resolutions. That is, when mercenaries or PMSCs are being mentioned in UN resolutions, is it the only topic of that resolution or does the resolution go beyond those issues? Comparing the resolutions in this way reveals that most resolutions on mercenaries only have a few mentions of the term and are generally not exclusively on mercenaries; they deal with a variety of issues, and the use of mercenaries is one amongst many. Resolutions on PMSCs, on the other hand, are usually exclusively on the issue of PMSCs and hardly reflect the extensive and varied state use of PMSCs.

First, there is the presence of mercenaries in various conflicts. Resolutions have been adopted on the conflicts in Congo (e.g. A/RES/1599(XV)), Southern Rhodesia (e.g. A/RES/3966(XXX)), Namibia (e.g. A/RES/31/146), the Comoros islands (A/RES/51/30),

and more recently on Libya (A/RES/66/55). In all of these resolutions there are only a few mentions of mercenaries, usually within one paragraph. They deal with the conflicts as such; mercenaries are an important, but not the only issue. These resolutions condemned the use of mercenaries, or mercenaries as such, that is as actors, in specific circumstances: whether demanding the withdrawal of mercenaries from Congo, appealing to states to prevent recruitment of mercenaries for use in Southern Rhodesia and Namibia or to prevent the movement of mercenaries from the conflict in Libya to neighbouring countries, or condemning the ‘invasion’ of the Comoros by “an army of international mercenaries” (A/RES/51/30, preamb. para. 1). The widespread use of mercenaries in a variety of conflicts, in particular during the decolonization period, was reflected accordingly in UN resolutions. By merely reading UN resolutions one gets, at least to some extent, an impression of mercenarism during that period: that it was a widespread phenomenon and that mercenaries were present in a variety of conflicts.

Furthermore, the use of mercenaries is mentioned in a series of resolutions that deal with self-determination on a more general level, and where again the mercenary issue is one amongst many. These resolutions call upon states to implement UN resolutions “regarding the exercise of the right to self-determination and independence by peoples under control and foreign domination” (A/RES/48/94, para. 1). Following this general request, there is a reference to a couple of specific cases and aspects of self-determination. This includes the demand for release of persons who were detained for their struggle for self-determination, the call for more assistance to peoples under colonial rule, South Africa’s apartheid policies, the Israel-Palestine conflict, and a variety of other conflicts. So, in this series of resolutions, the mercenary issue is again only one of many other issues, but it has repeatedly appeared in these resolutions, from the 1970s to 1994.

Contrast this with the breadth and presence of the PMSC issue in UN resolutions: the widespread use of PMSCs is not reflected in UN resolutions to the same extent as the use of mercenaries was. The previous chapter has shown that PMSCs are used by various states and in a variety of conflicts, even if the US has made the most extensive use of PMSCs, particularly in Afghanistan and Iraq. Yet, the ubiquity of this state practice does not have a corresponding presence in UN resolutions: it has not attracted the attention of UN members as much as the mercenary issue had.

In terms of quantity alone, it is noteworthy that while the UNSC has repeatedly passed resolutions on mercenaries, until now there are hardly any relevant UNSC resolutions on PMSCs. Out of a total of 16 UN resolutions on PMSCs, the UNSC passed only one resolution. Moreover, this resolution deals with civilian demining contractors in Ethiopia and Eritrea, but does not have any evaluative language, merely addresses the decision to include demining efforts into the existing UN Mission's mandate, and that PMSCs are part of that effort (S/RES/1430, para. 1). This resolution may be relevant in so far as demining is an important service that is being offered by the industry. But when compared to the extent of PMSC use and type of services that companies offer in conflicts such as Iraq and Afghanistan, demining by the UN mission in Ethiopia and Eritrea is a relatively minor issue. Considering the binding nature of UNSC resolutions, it is significant that the body expressed its position on the mercenary issue; conversely, it is meaningful that no such position has been expressed on PMSC use.

A closer look at the two most prominent cases, the use of PMSCs by the US in Iraq and Afghanistan, confirms the relative absence of UN discourse on the issue. First of all, there are no resolutions, neither by the UNSC nor by the UNGA, on the use of PMSCs in Iraq. Chapter 5 has shown very clearly that there was a boom of the industry in Iraq and Afghanistan and the extent to which the US in particular made use of PMSCs for both logistical and tip-of-the-spear services. Yet, there is no resolution addressing the state use of PMSCs in the case of Iraq. With several UN resolutions from the period after the Iraq War 2003, PMSCs have not been addressed in any of them.

This may support the point that as a political arena the UN has not passed a resolution on PMSCs in this case, because members with the power to do so blocked it. The US, wary about being the target of condemnation, could have blocked any UNSC condemnation of its use of PMSCs in Iraq, or, expecting a US veto, other states may have refrained from tabling resolutions (Gomez del Prado 2014). In fact, the US representative within the Third Committee argued that “it was inappropriate for the Third Committee to spend its valuable time on discussions on that topic, which should take place within the UNSC, since they fall within the context of global conflict.” (A/C.3/61/SR.49, para. 17). Since the US has a more powerful position within the UNSC due to its veto right, and since the latter has hardly passed any resolutions on PMSCs, this attempt to move the debate into the UNSC can be regarded as an attempt to gain control over the debate as well as official

UN positions on PMSCs.

The fact that we see relatively few UN resolutions on PMSCs, and less than what we would expect if we took actual state practice as a yardstick, does not come as a surprise though. The UN, and in particular the UNSC, has looked into some issues, while ignoring other equally if not more relevant issues – at least if, again, actual state practice was the yardstick for how many resolutions the UN passes. For example, the UNSC has passed 25 resolutions on Iraq's annexation of Kuwait while it passed no resolutions on the Vietnam War (Gruenberg 2009: 474). What this comes back to is the nature of debates within the UN, which is not so much an impartial sphere of legal interpretation, but rather a political arena with an unequal distribution of power amongst its members.

Even so, this can explain the absence of UNSC resolutions, but not the lack of UNGA resolutions on Iraq, because neither does the US have a veto right nor do the US and its allies usually have the majority of votes within the UNGA. On the other hand, there are UNGA resolutions on Afghanistan. But as I will explain below, neither are they explicitly referring to the widespread use of PMSCs by states nor do they include a clearly evaluative language that we find in resolutions on mercenaries. Thus, in contrast to resolutions on mercenaries, only a few resolutions address the PMSC phenomenon as it manifests itself in the specific context of a conflict.

To sum up, both in quantitative terms as well as in terms of the thematic scope the legitimacy discourse on PMSCs is more limited than the legitimacy discourse on mercenaries. 'Epochal moments' of major structural change such as the end of the Cold War often lead to a 'battle of ideas' (Parsons 2003: 8). But the widespread and varied use of PMSCs that ensued in post-Cold War international society is hardly reflected in UN resolutions. What does this tell us about the legitimacy of the state practice?

If states hardly engage in the practice of legitimacy and we hardly hear them justify or condemn the state practice, then this might suggest that the state practice, if not legitimate, then at least its legitimacy is not contested. States are increasingly using PMSCs, and we would expect those states to justify their behaviour if they acknowledged that their behaviour violated norms. Also, other states that see norms that they adhere to as being violated by that practice would condemn it. If neither happens, then this is

exactly the inverse of the relationship that IR constructivists look for: “norms prompt justifications for [and condemnation of; D.M.] action and leave an extensive trail of communication among actors that we can study” (Finnemore and Sikkink, 1998: 892). Neither an indicator for legitimacy or illegitimacy, the rather limited nature of discourse on PMSC use in the UN means that the issue has been, for some while, a-legitimate: not an issue that attracted condemnation, or required justification, in short, an issue that did not give rise to legitimacy talk.

This raises the question: why look at the issue of legitimacy at all? That legitimacy plays a role when looking at the phenomenon of PMSCs, has been the starting point of the dissertation. Either that idea was made up out of thin air, because after a first glance at the evidence we make the tentative conclusion that international society does not think about the use of PMSCs in terms of ‘legitimacy’. It could also be that the normative convictions of the author led to the expectation that legitimacy was relevant to such a topic. Or we need to allow for the fact that international society is not the only realm that students of IR should look at if they are interested in questions of legitimacy and normativity in international relations. Before shifting our attention beyond international society, it should also be recalled that there is an increase in the number of PMSC resolutions in the last years of observation, which hints at a possible positive trend in the number of PMSC resolutions, which may in turn indicate that the UN discourse on PMSCs is picking up speed. Because of this a more in-depth analysis of existing discourse is required; I will first look at the evaluative dimension before turning to the underlying legitimacy principles that are employed in the discourse.

Evaluation: From condemnation of mercenaries to regulation of PMSCs

Looking more closely at the evaluative dimension of legitimacy discourse reveals another difference between UN discourse on PMSCs and on mercenaries. While the use of mercenaries is straightforwardly condemned in UN resolutions, the use of PMSCs is not. And when the practice is condemned, it is usually combined with a call for regulation, rather than limitation or prohibition.

There are three very similar GA resolutions on the “situation in Afghanistan”³⁸ in which PMSCs are mentioned. In none of them is there an outright condemnation of PMSC use. Instead, the resolutions address the regulation of PMSCs. In the earliest resolution from 2010, the UNGA “notes the importance of regulating private security contractors operating in Afghanistan” (A/RES/65/8, para. 20). A slightly different formulation is found in the other two resolutions, one from early and the other from late 2012; in both of them the UNGA “notes the efforts made in regulating private security contractors operating in Afghanistan” (A/RES/67/16, para. 21; A/RES/66/13, para. 20). The 2010 resolution speaks of the importance of regulation, while the 2012 resolutions mention efforts that have been made in regulating PMSC activities. The formulation of the first resolution is somewhat stronger, because it is drawing attention to the issue. On the other hand, the 2012 resolutions merely recognize that there have been efforts in regulating PMSC activities, without again stressing the importance of pursuing such regulation. In any case, what the three resolutions share is their focus on regulation, and not condemnation of PMSC activities.

Furthermore, there is only one mention of PMSCs for each of the above resolutions, and in each case the sentence is part of a paragraph, one of more than a hundred, that is not exclusively on PMSCs, but is largely about the duty of Afghan authorities to provide security to the personnel of the UN and of humanitarian organizations. It is in this context of security provision for UN personnel that the issue of PMSC regulation is mentioned. First urging Afghan authorities “to take all possible steps” (A/RES/66/13, para. 20) to provide security to UN personnel and then, within the same paragraph, mentioning PMSC regulation creates the impression that the UNGA accepts PMSC activities in this case, and that they need to be regulated, not outlawed or prohibited. Also, it is not so much that the PMSC issue is a side note in this paragraph, but it is the context in which PMSC activities are mentioned that is telling. There could have been a separate paragraph exclusively on PMSCs to adequately reflect the extensive state use of PMSCs in Afghanistan.

And even if not – the issue of PMSC regulation could have been mentioned in a different context, one where attention is drawn to the various international forces, first and foremost from the US, that make use of PMSCs. For example, two paragraphs earlier, member states are called upon to “continue contributing personnel, equipment and other

³⁸ A/RES/67/16, A/RES/66/13, A/RES/65/8.

resources to the Assistance Force” (A/RES/66/13, para. 18). Here, PMSCs could have been mentioned as an integral component of international forces that thus requires regulation or as an often employed means for states to avoid sending own troops or increasing troop numbers. Instead, PMSCs are mentioned in a context where the Afghan government is held responsible for security provision, making PMSC activities largely a domestic issue limited to the provision of security to UN personnel. In a 2011 report on the situation in Afghanistan the Secretary-General expressed his support for “eventually disbanding all private security companies and for Afghan institutions to take over security”, but at the same time stressed the need to “devise a mechanism that does not adversely affect the security of international organizations or the ability of the international donor community to deliver necessary aid” (S/2011/120, para. 11). There is clearly a worry about the “uncertainty over the provision of adequate security for development projects during the implementation of presidential decree 62 on private security companies” (S/2011/120, para. 77), and that this uncertainty may jeopardize badly needed financial support for the Afghan government. The concern for the consequences of disbanding PMSCs in Afghanistan seems to be greater than the support for the Afghan president’s decision on PMSCs.

PMSCs could also have been mentioned at the very beginning of the resolution where efforts of the Assistance Force (ISAF) to protect the civilian population and to minimize civilian casualties are recognized, while at the same time calling upon the contributing states to cooperate with the Afghan government “in cases where civilian casualties have occurred” (A/RES/66/13, preamb. para. 13). Media reports have tended to focus on cases where PMSCs are involved in indiscriminate use of force against civilians and are not held accountable for it, and this is also a recurrent theme in scholarly work. Again, the use of PMSCs could have been mentioned in this context, but it was not. There would have been room for mentioning PMSC regulation on the basis that they may be involved in cases where civilian casualties occur, and that because of this appropriate instruments need to be in place to hold them accountable. More than calling for *regulation*, there would have been a basis for *condemning* PMSC activities in the context of civilian casualties.

Contrast this with the evaluative language that is used in resolutions on mercenaries. Out of more than one hundred SC and GA resolutions in which mercenaries have been

mentioned, negative legitimacy claims were found in all except of four resolutions³⁹: the UNSC has been “[d]eploring” the use of mercenaries by the Libyan government (S/RES/1973, preamb. para. 16), expressing “its grave concern at the use of mercenaries” in the Ivory Coast and urging the involved parties “to desist from this practice” (S/RES/1584, para. 12), more generally “[e]xpressing concern that the use of mercenaries and presence of armed militias continues to contribute to instability in Africa” (S/RES/1170, preamb. para. 14) and being “deeply concerned over the danger which international mercenaries represent for all States, in particular the smaller ones” (S/RES/419, preamb. para. 2).

The context in which mercenaries are being mentioned is also revealing. For example, mercenaries have been linked to illegal trafficking in small arms as another threat for peace and security, and as a cause for human rights violations (S/RES/1467). This puts mercenary activities on a level with the illegal activity of arms trafficking. In the 1980s, the UNSC has also linked mercenary activities to South Africa’s interventions in its neighbourhood. It has “[s]trongly warn[ed] the racist regime of South Africa against committing any acts of aggression, terrorism and destabilization against independent African States and its use of mercenaries” (S/RES/581, para. 2). In this paragraph, the use of mercenaries is associated with aggression, terrorism and destabilization. More than that, it is specifically addressing the South African government’s use of mercenaries, a ‘racist regime’ that had repeatedly been condemned by the UN for its apartheid system.

On the other hand, in only five out of fourteen resolutions on PMSCs is there a somewhat negative evaluation of PMSC use or PMSCs as such, all of which are part of a larger series of GA resolutions on the “Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”. This series dates back to the 1980s, and PMSCs were first mentioned in 2008. The resolutions have been re-adopted every year, with some notable changes and additions. As highlighted in the previous section, most UN resolutions on PMSCs deal with the general phenomenon of PMSC use, rather than with the use of PMSCs in specific conflicts, and the same applies to this series. It should be stressed that of all of the resolutions that contain negative evaluations of the state practice belong to this series of resolutions; the next chapter will therefore look more closely at their origination process in the UNWG.

³⁹ S/RES/463(1980); S/RES/460(1979); A/RES/51/45A(1997); A/RES/50/70(1996).

Overall, even though negative legitimacy claims can be found in these resolutions, they corroborate the point made above: while the use of mercenaries is altogether and unequivocally condemned in UN resolutions, the use of PMSCs is regarded as a practice that requires regulation. The clearest instances of claims against the legitimacy of PMSC use can be found in the two most recent resolutions. The UNGA has expressed its

“utmost concern about the impact of the activities of private military and security companies on the enjoyment of human rights, in particular when operating in armed conflicts, and notes that private military and security companies and their personnel are rarely held accountable for violations of human rights” (A/RES/65/203, para. 7).

This is a negative legitimacy claim that is based on the – negative – impact PMSC activities have on human rights, and on the lack of accountability of PMSCs and their employees. The 2012 resolution is more pronounced with its criticism of PMSC use, and points to the

“alleged involvement of mercenaries, as well as employees of some private military and security companies with mercenary-related activities, in serious human rights violations, including summary executions, enforced disappearances, rape, torture, cruel, inhuman or degrading treatment, arbitrary arrests and detentions, arson, pillaging and looting” (A/RES/66/147, preamb. para. 10).

Here, the UNGA goes beyond the criticism expressed in the first paragraph in that it talks of *serious* human rights violations, and then goes on to specify the criminal activities PMSC employees have allegedly been involved in.

What is interesting to note about the second paragraph is that the critique of PMSC activities is being qualified. While the criticism is directed at mercenaries as such, the claim only addresses “employees of *some* private military and security companies *with mercenary-related activities* [emphasis added; D.M.]” No distinction is made in the case of mercenaries, to say, for example, that some mercenaries are involved in human rights violations while others are not. With PMSCs, on the other hand, such a distinction is made. Although the criticism expressed in this second paragraph is much stronger compared to the first, it is at the same time weakened, because it specifically addresses employees of *some* PMSCs, implying that employees of most PMSCs remain unaffected by the critique. The separation of ‘PMSCs’ and ‘employees of PMSCs’ is a further

qualification. Addressing the employees, as opposed to the companies as such, suggests that the behaviour of employees and the employer might diverge. It allows for the possibility that employees act contrary to the instructions given by their employer. In this case, their employer, the PMSC, could be criticized for failing to prevent human rights violations by their employees, but it would not be criticized for instructing such behaviour.

But there is a more fundamental way in which both of these negative legitimacy claims lose their strength. The consequences drawn from the critique are for states “to establish regulatory national mechanisms for the registering and licensing of those companies” (A/RES/67/159, para. 6) and to contribute to the intergovernmental working group working on a possible “international regulatory framework on the regulation, monitoring and oversight” (A/RES/65/203, para. 18) of PMSC activities. The call for regulation is based on a supposed lack of accountability of PMSCs for human rights violations, and regulation is meant to establish such accountability. If a national and/or international system is in place that makes PMSCs and the states using them accountable for violations of human rights, then the critique loses its basis. The accusations are not based on legitimacy principles that would be more difficult to remedy. The use of PMSCs is not regarded as inherently problematic; it causes concern, because human rights violations of employees of some PMSCs go unpunished, but once that is changed the legitimacy claims made above have lost their justificatory basis.

Finally, since 2012 there has been a debate about the appropriateness of employing PMSCs in UN operations. Although not strictly about the state practice, the debate surrounding the organisation’s use of PMSCs is noteworthy, because it echoes the two themes that have emerged above. First, similar to the discourse on the state practice, the debate on the UN’s use of PMSCs demonstrates an uncertainty as to the legitimacy of the practice. Actors do not unequivocally argue against or in favour of using PMSCs, but rather adopt a more inquisitive approach and discuss under which circumstances the UN should hire PMSCs: in 2012 the UNGA requested the Secretary-General to “review the *appropriateness* of the use of private security personnel” by UN organisations (A/RES/66/246, para. 113; emphasis added: D.M.). Furthermore, just as UN discourse on the state’s use of PMSCs is more about regulation than condemnation of the state practice, so does the discourse on the organisation’s use of PMSCs focus on the criteria

and guidelines for contracting the companies.⁴⁰ The policy and guidelines regulate the organisation's use of PMSCs; they specify when and under what circumstances the use of armed private security – and by implication the potential use of force by private actors – is 'appropriate'. Repeated references are also made to the need to ensure compliance with national and international law (A/67/539, para. 8; A/67/624, para. 28; A/C.5/67/SR.19, para. 34). Although several restrictions are thus put in place, mainly the principle of last resort and that force should only be used for protection, with its current internal regulation the UN acknowledges that the use of private force by UN organisations may be legitimate under certain circumstances.

Although the UN has “over 20 years avoided discussion on the topic”⁴¹, it has reflected and elaborated explicit policies on its use of PMSCs in recent years. This also calls the ‘puritanical’ effect of the anti-mercenary norm into question, at least as it is directed at the UN's use of PMSC. The contention is that the anti-mercenary norm has obtained a puritanical characteristic in that it prevents open debate about the “merits of private force” (Percy 2007a: 224). But not only does actual UN practice show that PMSCs are used for tip-of-the-spear services. With the 2012 resolution that called for a review of the appropriateness of PMSC use and the ensuing debate and elaboration of policies, the UN has started – if not yet completed – a process of deliberation on the issue. And as it stands, similar to the discourse on the state practice, the debate on the UN's use of PMSCs is characterized by a call for and a focus on regulating, and not condemning or prohibiting the use of PMSCs.

Justification: From self-determination to human rights

So far, the analysis has shown that the discourse on PMSCs is relatively limited, but has picked up speed in recent years. Moreover, it has demonstrated that this discourse is characterised by a focus on regulation of PMSCs, and that in those cases where a clearly evaluative language is used in relation to PMSC use and where the practice is condemned, the consequence of that condemnation would be a call for regulation, and not

⁴⁰ UN DoSS, Chapter IV Security Management, Section I “Armed Private Security Companies”, 08 November 2012; UN DoSS, Guidelines on the Use of Armed Security Services from Private Security Companies, 08 November 2012.

⁴¹ James Paul, executive director of the Global Policy Forum, cited in Jurriaans (2012).

outright prohibition. The final element of legitimacy discourse that requires analysis concerns the underlying legitimacy principles.

Looking at those resolutions with a clear evaluative language as well as the debates that have preceded them in the relevant subsidiary bodies, one can detect a *shift in the legitimacy principles* provided. The norms and principles that are used to justify the condemnation of PMSC use differ from those used to condemn the use of mercenaries. The use of mercenaries was deemed illegitimate, primarily because it was in tension with or opposed to self-determination and national liberation movements. When PMSC use is deemed illegitimate, it is primarily because PMSCs violate human rights.

Of course, there are also other legitimacy principles employed in both discourses. In particular in the discourse on mercenaries a plethora of legitimacy principles can be found, and most of the resolutions would include more than one. For example, mercenary use has been condemned, because it violates states' "territorial integrity and sovereignty" (A/RES/2395(XXIII), para. 9), because it simply constitutes a crime (e.g. A/RES/2465(XXIII), para. 8) or because of the "pernicious impact" that it has on international peace and security (A/RES/35/48, preamb. para. 5). In some cases legitimacy principles apply to a specific context only; for example, the "grave situation" in the Congo was partly attributed to the presence of mercenaries (A/RES/1599(XV), preamb. para. 3), and with respect to South Africa's involvement in Namibia, mercenary use is linked to "colonialism, racism and *apartheid*" (A/RES/40/56, para. 17; emphasis in original).

Still, the two legitimacy principles are most prevalent in the respective discourses. The Appendix shows that of all legitimacy principles, self-determination and human rights are mentioned the most. Also, most resolutions on mercenaries are included in two series of resolutions that have the terms in their title:

- "Importance of the universal realization of the right of peoples to *self-determination* and of the speedy granting of independence to colonial and peoples for the effective guarantee and observance of *human rights*", and
- "Use of mercenaries as a means of violating *human rights* and impeding the exercise of the right of peoples to *self-determination*".

Although the two legitimacy principles occur in the titles of both resolutions as well as within the resolutions, a closer look reveals that self-determination is the dominant legitimacy principle in the discourse on mercenaries, while human rights is the dominant legitimacy principle in the discourse on PMSCs.

The first series of resolutions is clearly more on self-determination than on human rights. On average, there are more mentions of the former, in the plenary the resolutions are regularly presented under the item “Rights of peoples to self-determination” (A/RES/48/94, para. 28), ‘human rights’ are only referred to in the narrow context of self-determination (e.g. A/RES/48/94, para. 22), and in paragraphs on mercenaries it is self-determination and not human rights that is used as the basis for condemnation (e.g. A/RES/48/94, para. 24).

In contrast to the many legitimacy principles employed in resolutions on mercenaries, human rights is not only the dominant but also one of the few principles used in regard to PMSC use. We have already looked at some of these negative legitimacy claims above. In the most recent resolution within the UNWG series, the UNGA has expressed its concern for “serious human rights violations” (A/RES/67/159, preamb. para. 11) by some PMSC employees, has called for international regulation to “ensure their accountability for human rights violations” (A/RES/67/159, preamb. para. 12) as well as for national regulation “to ensure that imported services provided by those private companies neither impede the enjoyment of human rights nor violate human rights in the recipient country” (A/RES/67/159, para. 6), and emphasized its “utmost concern about the impact of the activities of private military and security companies on the enjoyment of human rights [...] and notes that private military and security companies and their personnel are rarely held accountable for violations of human rights” (A/RES/67/159, para. 7).

In the same resolution, whenever the use of mercenaries is condemned, it is primarily because it violates self-determination and goes against national liberation movements. In the preamble, the UNGA recalls previous resolutions that “condemned any State that permitted or tolerated [...] the use of mercenaries with the objective of overthrowing the Governments of States Members of the United Nations, especially those of developing countries, or of fighting against national liberation movements” (A/RES/67/159, preamb. para. 2), urges states to “take the steps necessary and to exercise the utmost vigilance

against the menace posed by the activities of mercenaries [...] designed to impede the right of peoples to self-determination” (A/RES/67/159, para. 4), condemns “recent mercenary activities [...] and the threat they pose to the integrity of and respect for the constitutional order of those countries and the exercise of their peoples to self-determination” (A/RES/67/159, para. 10), requests the UN High Commissioner for Human Rights “to publicize the adverse effects of the activities of mercenaries on the right of peoples to self-determination” (A/RES/67/159, para. 16).

It is striking how self-determination, on the one hand, and human rights, on the other hand, apply to mercenaries and PMSCs respectively. When mercenaries are condemned, the underlying legitimacy principle is usually self-determination. PMSCs, however, are usually condemned for their violation of human rights. This breakdown is not only to be identified in the above resolution, but in all resolutions of the series on the “Use of mercenaries” since 2008 when PMSCs were first included in the series, and, hence, in all cases where I could detect negative legitimacy claims directed towards PMSC use.

This change in legitimacy principles in the UN discourse on mercenaries and PMSCs is reflective of broader normative changes in international society. These broader changes, although complex and exceedingly difficult to portray in their entirety and in detail, have to be appreciated if we are to make sense of how the legitimacy of states’ international use of PMSCs is evolving in contemporary international society. Both material and social factors shape the legitimacy of the state practice, and in their current configuration social factors contribute to the increased legitimacy of PMSC use. Although material factors may be more easily grasped as seen in chapter 5, it does not make social factors less important. If simplification helps create insights, then there are good reasons to break down the broader normative changes that are so relevant for this study.

Human rights and self-determination are two principles that are explicitly referred to in UN resolutions. So the following discussion will draw on the relevant literature to identify their relative salience in contemporary international society. Moreover, it will analyse more closely how these two norms relate to each other: in what way, if at all, are they different, and do they complement or contradict each other? In addition to human rights and self-determination, the following discussion will also examine the positions and functions of sovereignty and the anti-mercenary norm in the overall ‘web of norms’,

particularly how they relate to human rights, self-determination and each other. Although, the principle of sovereignty and the anti-mercenary norm are usually not explicitly referred to and play a secondary role in most of the UN resolutions, they are crucial in understanding the normative shifts that contribute to the legitimation of PMSC use in contemporary international society.

The rise of human rights: side-lining and weakening other norms

Human rights norms have become particularly salient normative standards in international society (Forsythe 2012). Today, there is a strong human rights regime with a more expansive understanding of human rights, an increase in the number of human rights treaties and a wide network of human rights NGOs participating in and shaping states' discourse and agenda (Goodhart and Mihr 2011: 4). Human rights norms have also diffused widely, with more and more states adopting treaties and participating in the human rights regime (Dunne and Hanson 2013). Human rights have become the "dominant normative or moral discourse of global politics and a major standard of international legitimacy" (Goodhart 2013: 2), and "the major form of political argumentation, nationally as well as internationally" (Matlary 2002: 33). That human rights are employed in discourse on PMSCs within the UN is thus a reflection of the increased salience of human rights in international society more generally.

Humanitarianism and human rights have the common *telos* of protecting the rights of individuals, and so the dissertation works with a complementary understanding of the two (Forsythe 2005: 258; Bhuta 2008).⁴² It is not necessary to enter the debate on the respective origins of the human rights and the humanitarian movements – and in how far these are distinct endeavours (Ignatieff 2000; Barnett 2011). Neither is the legal question of how the two bodies of international law relate to each other, e.g. whether human rights law can apply to situations of armed conflict, central to the purposes of the dissertation. The subsequent chapters will include a discussion of the clashes between a human rights-based humanitarianism of organisations like *Médecins Sans Frontière* clashes and the traditional ICRC humanitarianism. But generally, the emphasis is less on their differences, and more on some of their common characteristics, like universality,

⁴² Therefore, whenever it is not specified otherwise, 'human rights' is broadly understood to include humanitarian norms.

generality, and obligations to right-holders (Buchanan 2003: 77), and how this set of norms can come into conflict with statist principles.

The idea and practice of human rights, then, have a long trajectory (Hunt 2007, Neier 2012, Ishay 2008, Tomuschat 2008, Roberts 2015); its genealogy and history, however, need not be set out at this point of the dissertation to appreciate the gradual strengthening of human rights in law and practice in the recent past. The aftermath of WWII gave the norm a major impetus; the signing of the Genocide Convention and the Universal Declaration of Human Rights, for example, were also a response to the atrocities of the war. But while human rights disseminated in law and, to a more limited extent, in oversight mechanisms thereafter, it was the end of the Cold War that gave human rights norms the “real momentum” (Barnett and Weiss 2008: 27). In the 1990s, in particular, human rights became a key justification for military intervention. The aftermath of 9/11 saw setbacks in the strength of human rights norms, particularly with violations of human rights treaties in the name of the Global War on Terror. The role of the US in both violating human rights treaties and shifting the discourse and attention away from human rights to national security and counterterrorism is of particular importance considering the position of the US as superpower and liberal-democratic state that supported the human rights regime in the 1990s. Still, 9/11 did not constitute a turning point in the development: despite some setbacks, “human rights have not been forced into the background, let alone systematically co-opted and corrupted by combination of national interests and overriding ideological concerns” (Donnelly 2013a: 13-14).

The greater weight of human rights norms in contemporary international society has two broad implications for the legitimacy of PMSC use. First, as human rights become ‘hegemonic’ (Donnelly 2013b: 55-57), they side-line other norms in discourse. As shown above, within UN discourse, human rights are increasingly used as justifications for legitimacy claims on PMSC use. In fact, the development is such that human rights have displaced other norms, particularly the norm of self-determination, as primary legitimacy principle, and this is also happening in PMSC discourse outside of the UN. The shift in legitimacy principles matters because norms restrict at the same time as they open up possibilities in legitimacy discourse, and different norms pose different constraints and opportunities.

Although, within the UN, human rights have been employed to delegitimise the practice by pointing to how it often violates the norm, human rights can, in principle, also be brought to bear in an effort to legitimise the practice. Far from necessarily balancing each other out, chapter 8 shows how human rights might be more easily and effectively used for positive legitimacy claims. What is more, even when they are employed in negative legitimacy claims, such critiques of PMSC use will usually go hand in hand with efforts to regulate, and not curtail or prohibit, the practice. Chapter 7 shows that because claims that PMSC use often violates human rights are usually coupled with calls for regulation, they marginalize demands for more far-reaching limitation or prohibition of the practice – demands that are usually based on other legitimacy principles than human rights.

The second implication for legitimacy, the focus of the remainder of this chapter, is that human rights do not merely side-line, but they also contribute to a weakening of other norms. In turn, the norms that are thus weakened can only exert a diminished effect on the legitimacy of a particular state conduct. In the face of a strengthened human rights regime, other norms, in fact the overall normative structure, have not remained unchanged. Human rights, even as they have gained in prominence, are not isolated normative standards that necessarily and deterministically shape actors' identities, interests, and behaviour. On the contrary, in international society a plethora of normative standards compete and, sometimes, combine in affecting states. Since human rights are part of a larger web of other norms, their increased significance needs to be put into context and has to be considered relative to other norms. Human rights weaken particular conceptions of self-determination and the anti-mercenary norm.

Human rights, self-determination, and the anti-mercenary norm

Just as much as the move towards human rights is reflective of broader normative changes in international society, so is the relative decline in the norm of self-determination. But in what way, if any, has there been a decline in the norm of self-determination in international society? And how can there be a decline in the norm of self-determination and a concurrent strengthening of human rights, if self-determination *is* a human right?

On the second question, self-determination is, indeed, conceived of as a human right in international law – first with its codification in the UN Charter and later in the International Covenant on Civil and Political Rights. Particularly the inclusion of self-determination in the Covenant as a treaty on human rights was, however, contested, pitting the Western stress on fundamental and individual human rights against the Soviet and Third World view of the collective right of self-determination as a precondition for the enjoyment of individual human rights (Cassese 1995: 47-51). The basis for juxtaposing human rights and self-determination in the following, however, is not that the latter is not or should not be regarded as a human right, but rather that subsuming self-determination under the category of human rights easily obscures the concept's internal and external dimensions. If the internal dimension refers to the relationship between the people and their own state, external self-determination concerns the relationship between the people and other states or people (Thornberry 1993). Internal self-determination points to the peoples' right to rule themselves, and is thus associated with the principle of democracy. When Woodrow Wilson famously called for the right of peoples to self-determination, essentially he meant the right of peoples to democratically choose their own government – at its core, self-determination meant self-government (Cassese 1995: 19-21). By contrast, external self-determination points to the peoples' right to be free from external rule or coercion; claims to self-determination can, then, also be claims to non-interference from outside.

In the decolonization period, claims to self-determination took on an external dimension, and implied three things: “the fight against colonialism and racism [...], the struggle against the domination of any alien oppressor illegally occupying a territory [...], the struggle against all manifestations of neo-colonialism and in particular the exploitation by alien Powers of the natural resources of developing countries” (Cassese 1995: 45-46). It was in this context that mercenarism clashed with the principle of self-determination. In the decolonization context, self-determination meant the fight against colonialism, and because mercenaries were seen as part of that external rule, the principle could be brought to bear against them.

The above analysis has shown, however, that in contemporary international society the principle is not associated to PMSC use as closely as it was linked to mercenary use. Although it is conceivable that PMSCs might be seen as a manifestation of external rule

and as undermining the self-determination of, for example, Iraqis and Afghans, no such association could be found in the discourse on PMSCs in UN bodies. Instead, when negative legitimacy claims are made toward PMSC use, they are based on human rights. Although self-determination is a human right according to international law, it is noteworthy that the relevant resolutions on PMSCs refer to both self-determination and human rights, as if the latter would not include the former. Also, whenever such claims against PMSCs are specified, it becomes clear that it is not self-determination that they violate; rather, the assertion is that they commit basic human rights violation such as torture, rape or summary executions. On the other hand, whenever claims against mercenarism were elaborated, as for example in the Mercenary Convention, assertions of a violation of self-determination went hand in hand with allegations that mercenaries threaten 'sovereign equality', 'political independence' or the 'territorial integrity' of states (A/RES/44/34).

This is not to rule out that self-determination may play a more central role in contemporary domestic discourses, particularly in places where PMSCs operate. But this goes beyond the scope of this dissertation, and, at same time, underlines a central argument of this dissertation: that international and domestic discourses and understandings of legitimacy need not be the same, and thus need to be kept distinct, just as much as discourses and understandings of legitimacy within international society are different from those within world society.

Self-determination has also been replaced as primary legitimacy principle in the discourse on PMSCs due to its decline in contemporary international society – and this has repercussions for the strength of the anti-mercenary norm. Percy (2007a) has argued that the two norms supported each other in the decolonization context. If the self-determination norm becomes weaker, its positive effect on the anti-mercenary norm would diminish. This, in turn, would weaken any negative effect the anti-mercenary norm may still have on the legitimacy of PMSC use. With an understanding of how norms such as the anti-mercenary norm are embedded in a web of interrelated norms, we can see how not only state behaviour may challenge a norm, but also how changes in one part of that normative web can have ramifications for other parts, with all the implications for legitimacy. Figure 9 shows how any negative effect that the anti-mercenary norm may

still have on legitimacy is attenuated, if the supporting norm of self-determination is in relative decline.

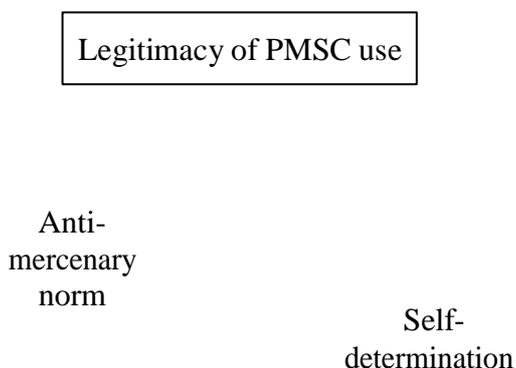


Figure 9. The anti-mercenary norm, self-determination and the legitimacy of PMSC use

Although people still struggle for self-determination and although the principle can still serve as a powerful justification for political change, the norm has experienced a relative ‘decline’ in three different ways. First, there has only been a ‘selective and limited’ acceptance of the principle of self-determination in international law (Cassese 1995: 317). In international law, although there is no restriction of the right of self-determination to peoples under colonial rule, neither is there a clear basis for extending it beyond this context, and in practice, international jurisprudence has only acknowledged the right in such instances (Barnsley and Bleiker 2008: 126).

Second, once political independence had been achieved by the former colonies, the principle of self-determination was only cautiously raised by the elites of newly independent states, because it retained its revolutionary character thereafter. A critic warned of the principle’s “incalculably explosive and disruptive” (Emerson 1964: 63) nature. In fact, the concept is both “radical, progressive, alluring, and, at the same time, subversive and threatening [...]”. Once realized, enthusiasm dies fast, since henceforth it can only be used to undermine perceived internal and external stability” (Cassese 1995: 5-6). Claims to self-determination were, therefore, “only sparingly and haphazardly considered” (Barnsley and Bleiker 2008: 127), since they jeopardized the hard-won sovereignty. It helps explain why self-determination, while still alive and claimed for by several peoples today, has lost its prominence in the contemporary society of states.

Finally, external self-determination is increasingly challenged as a norm. With external self-determination taking the meaning of non-interference, the norm comes close to and overlaps with the principle of sovereignty.⁴³ Frost (1996: 106-109) conceives of self-determination as one of several sovereignty norms. Many of the African states that had upheld the principle, then, may, in the post-colonial context, “simply be more honest than the rest of the world in admitting that self-determination *of the state* has replaced the theoretical self-determination of peoples” (Hannum 1990: 47). Latin American states, on their part, while on the whole seeing the principle as largely irrelevant for their region, would have insisted on a right to self-determination conceived of as non-intervention and sovereignty (Hannum 1990: 48). This is how, even though self-determination is considered a human right in international law, a particular external understanding of the concept can come into conflict with an individual conception of human rights (Gutman 2001: xv).

Self-determination and sovereignty can, therefore, be understood as ‘correlative concepts’ in that their external dimensions overlap (Dahbour 2013) (figure 10). The principle of non-interference is not the only expression of an essential meaning of sovereignty (Suganami 2007); a brief glance at some of the more prominent studies of the concept of sovereignty in IR reveals its manifold and elusive character, which gives rise to different approaches and conceptualizations (Jackson 1993, Weber 1994, Krasner 1999). But it is useful to regard it as the external dimension of sovereignty, with internal sovereignty referring to the internal authority claims of a state (Lake 2003). External and internal sovereignty are linked, of course, in that “[r]eference to the idea of state sovereignty no longer provided an automatic and impenetrable shield against international action on issues once regarded as essentially domestic” (Forsythe 2012: 29). Human rights, then, affect internal sovereignty by setting limits to what a state is allowed to do on its own territory (Matlary 2002: 242). And human rights weaken a particularly absolute understanding of state’s external sovereignty, that is, the principle of non-interference by making the right of non-interference conditional: human rights “disable the sovereignty argument against political sanctions and military interference by outsiders in the affairs of a state” (Cohen 2012: 14), and impose ever more intrusive measures on states – from

⁴³ While there is some striking overlap between the concepts, they are, of course, not perfectly congruent, since one refers and applies to ‘people’ and the other to ‘states’; but such distinctions should not be overdrawn due to the fuzzy nature of the term ‘people’, due to conceptions of ‘popular’ sovereignty, and due the way the principle aligns with state sovereignty in practice.

compliance reports and the judicial activity of international courts to the possibility of military action under the evolving Responsibility to Protect (Bellamy 2010).

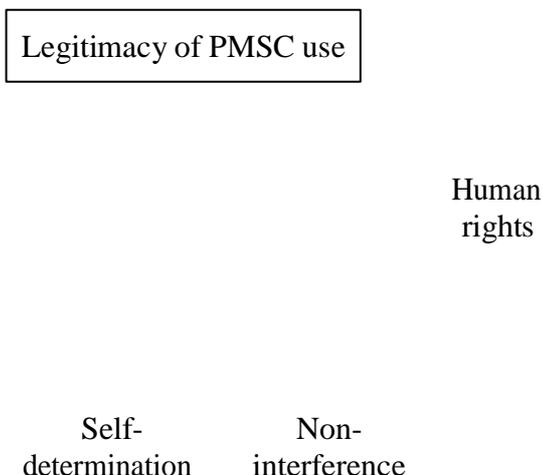


Figure 10. Tension between external self-determination/non-interference and human rights

It is important, however, not to exaggerate conceptions of ‘absolute’ and unconstrained ‘Westphalian’ sovereignty that are now called into question. Sovereignty has never been absolute and unconditional in any strict sense, but, on the contrary, limited in one way or the other throughout history (Brown 2002: 247). Historical accounts of the evolution of states and the state-system have shown the great variance in sovereignty (Thomson 1994; Reus-Smit 1999), and the ‘Westphalian myth’ so prevalent in IR has been debunked: neither was absolute sovereignty introduced nor did the anarchical state system emerge in 1648 with the Treaty of Westphalia (Osiander 2001; Teschke 2003). Even Bodin’s concept of sovereignty as ‘absolute and perpetual power’ did not trump the ‘laws of God’ or natural law, and Vattel’s defence of non-intervention had its limits: foreign powers could legitimately come to the aid of ‘oppressed people’ (Suganami 2007: 512-513).

So rather than a demise of sovereignty, it is better to think of this change as a transformation or reconfiguration of sovereignty (Levy and Sznajder 2006). And human rights have a significant effect in driving this change. The meaning of sovereignty is changing in such a way that sovereignty becomes conditional on states’ respect for basic human rights (Risse 2000b: 178; Ignatieff 2001: 17). In the past, states had to meet

‘standards of civilization’ to be recognized by other states as sovereign – today human rights are acquiring that status (Donnelly 1998). Although it is still contested what the implications are or should be when states fail to meet these standards, the way sovereignty has become more restricted and more conditional after the end of the Cold War clearly sets this period apart from the practice of prior decades (Donnelly 2013b).

Sovereignty in domestic legitimacy discourse

Despite the weakening of particularly absolute conceptions of sovereignty, internal sovereignty continues to lend itself as a legitimacy principle in the discourse on PMSCs. Internal sovereignty is not exhaustively defined by states’ human rights obligations, of course: on a variety of other issues, there are debates on the nature and extent of state authority. When it comes to PMSC use a key concern relates to state authority with regard to the use of force, that is, how the state ought to exercise its monopoly of force; the monopoly of force can thus be conceptualized as an important element of states’ internal sovereignty (figure 11).

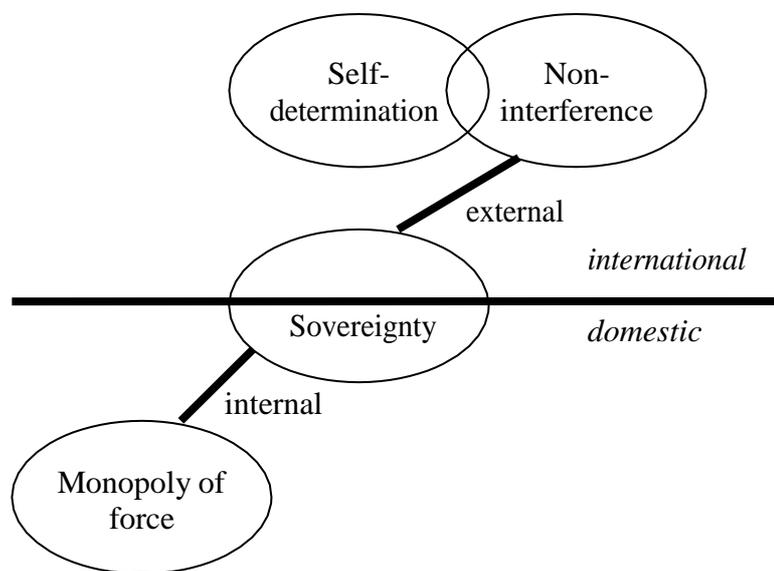


Figure 11. Relationship between sovereignty, non-interference and the monopoly of force

While debates on the concrete configuration of the monopoly of force take place both on the international and domestic levels, they are more prevalent and more successfully employed in domestic discourses. Chapter 5 has demonstrated that sovereignty plays a

key role on the domestic level in the way that different domestic understandings of state sovereignty influence societies' outsourcing decisions. Within the context of state-centric normative expectations about how the state should deliver and control the use of force (White 2010: 11), societies find different answers to the question of PMSC use: 'liberal' interpretations allow for a more permissible approach to PMSC use, while 'republican' interpretations result in a more cautious approach (Krahmann 2010; Petersohn 2010). The subsequent chapters will show that while particular, usually 'republican', interpretations of the state monopoly of force are employed in international debates, they do not succeed as well as human rights in shaping understandings of legitimacy in international society.

What is important to note, therefore, is that discourses take place on different levels. There is, of course, an interplay between the domestic and international levels. For example, if liberal domestic norms have an influence on the US decision to use PMSCs, then the resulting state behaviour, particularly that of a superpower, will to some extent have an impact on relevant norms as well as on how other states regard the practice. Similarly, neo-liberal understandings of cost-efficiency and the prominence of market mechanisms may shape a state's decision to use PMSCs, and the resulting international behaviour would affect how other members of international society regard the legitimacy of the practice. On the other hand, a rigid bottom-up view of how domestic norms determine state behaviour is misplaced. The use of PMSCs by Norway, for example, shows that a state's use of PMSCs might go against domestic norms (Østensen 2013: 33). Domestic discourses and norms do not deterministically shape state behaviour; international society's understanding of what is appropriate may be a more relevant factor for some states and in some circumstances (Abrahamsen and Williams 2011: 219; Thomson 1994: 105).

Furthermore, the analytical separation between the two levels is necessary because how domestic societies and international society regard the legitimacy of PMSC use are really two different things, as can be seen, for example, in how the Afghan population regards PMSC use in the country (Rimli and Schmeidl 2007). South Africa's stance towards PMSCs is another case in point. In 1997, the South African government sought to delegitimise PMSC use, and PMSCs as such, through strict regulation that effectively amounted to a prohibition of many PMSC activities (Taljaard 2006: 169). However, as Avant (2005: 177) has pointed out, although the government's "de-legitimation strategy

preserves political processes in South Africa, it has not undermined PSCs' *international* legitimacy [emphasis in original; D.M.]" and "South Africa alone has not been able to delegitimize the industry" (Avant 2006: 510).⁴⁴ The industry and the practice are global in character, and as such go beyond the control of one government. Moreover, a government may be successful in delegitimising the practice nationally, but doing so internationally requires a different approach, and it is unlikely to be successful if carried out by one state, particularly if it is not a superpower or great power, alone.

In summary, while the anti-mercenary norm, external self-determination and a republican understanding of the monopoly of force are still at play when it comes to PMSC use, these norms have been weakened and side-lined by human rights, which is becoming a key legitimacy principle in international society. The next two chapters demonstrate how human rights are picked up by actors and how they compete with alternative principles in shaping legitimacy in international society.

Conclusion

There are three observations from the above analysis of UN legitimacy discourse on PMSCs. First, there is a rather limited discourse on PMSCs as compared to mercenary discourse in quantitative terms and in terms of thematic scope; however, the debate has been picking up speed in recent years. Second, while there was an outright condemnation of mercenary use, PMSC use is rather seen as an issue that needs regulation; the condemnation that is expressed towards PMSC use is usually qualified, less outspoken than what we see in the discourse on mercenaries, and the consequences drawn from that condemnation would be regulation and not an outright ban of the practice. Third, when PMSC use is condemned, human rights would usually be the underlying legitimacy principle employed to justify negative legitimacy claims, while in the discourse on mercenaries, the underlying legitimacy principle would have been self-determination. What are the implications of these three findings for how international society regards the legitimacy of PMSC use?

Taking the first two points together, while the discourse on PMSC use indicates that the

⁴⁴ In fact, current legislative efforts in the country now seem to align with the dominant international approach to regulate and not prohibit PMSC services (Juma and Tsabora 2013).

practice is not regarded as illegitimate as the use of mercenaries was, this is not to say that it is, therefore, legitimate. Rather, because of the limited discourse it is more adequate to see it still as somewhat ‘a-legitimate’: the language of legitimacy is not as prevalent as in mercenary discourse and the practice is not challenged to the same extent. The limited debate on PMSCs in the international arena is a reminder that international society has a different agenda from world society and from domestic audiences. This state of affairs can be criticised on the basis that on all levels there ought to be a public debate on a key issue that is likely to become more relevant in the future (Moesgaard 2011: 2). The point remains that one should be careful not to infer that because there is a public debate in one country or because one particular world society actor addresses the issue that this is also the case for international society.

The same holds true for the evaluation of PMSC use: a particularly prominent view in media coverage and popular culture is that mercenaries and PMSCs are essentially part of the same illegitimate phenomena in contemporary world politics. But this is not representative of how the UN, and, in extension, international society regards the legitimacy of the practice. It shows that discursive arenas have to be differentiated, and that what international society and parts of world society hold to be legitimate vary. Making a broad claim about the illegitimacy of PMSC use is either a normative assessment or, if intended as an empirical statement, a failure to distinguish between understandings of legitimacy by various world society actors on the one hand (Rimli and Schmeidl 2007: 7), and understandings of legitimacy in central discursive arenas of international society on the other hand.

Because the debate in international society has been picking up speed, which increases the likelihood for more genuine *legitimacy* discourse, it was also necessary to investigate the underlying legitimacy principles, that is, the reasons proffered for legitimacy claims. What the discourse within the UN already points to, and what the next two chapters are going to show in more detail, is that human rights are the dominant justifications for legitimacy claims in discourse on PMSCs. This is in line with much of the constructivist research that has determined an increasing importance of human rights norms more generally in the last two decades.

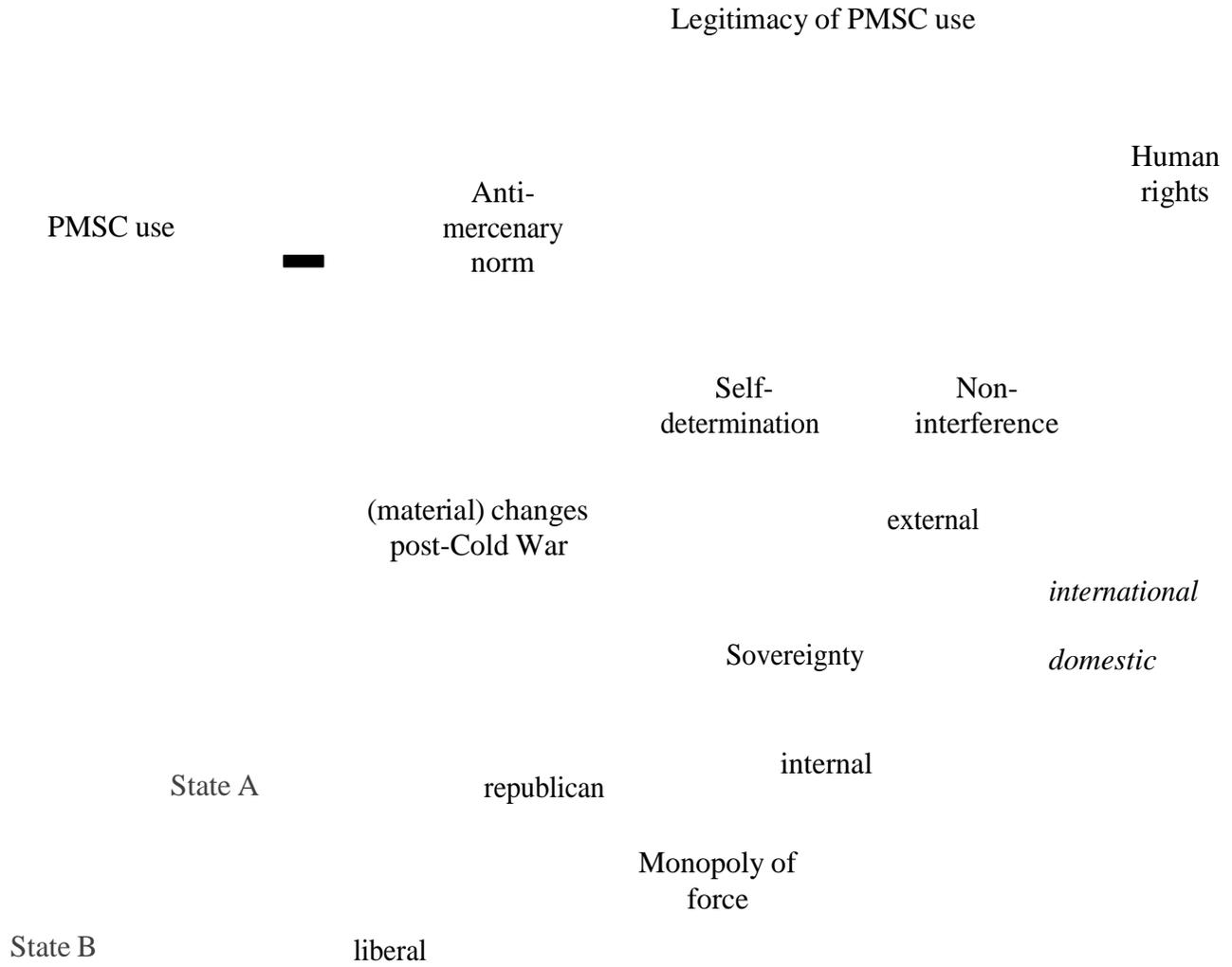
This broader normative development has two implications for the legitimacy of PMSC

use. First, human rights side-line and displace other norms in discourse; this matters because norms restrict and enable efforts of (de)legitimation differently. The marginalization of external self-determination, the monopoly of force and the anti-mercenary norm by human rights in international legitimacy discourse contributes to the legitimation of PMSC use. Industry advocates defend the practice by pointing to how PMSC use can help promote human rights. But even when state use of PMSCs is condemned for its violation of human rights, such negative legitimacy claims would only result in calls for ensuring that the practice is in compliance with human rights; they side-line more far-reaching calls for a limitation and prohibition of the practice that are more easily based on principles of external self-determination, anti-mercenarism, and a republican view of the monopoly of force.

The second implication for legitimacy is that human rights do not merely side-line, but they also contribute to a weakening of other norms. In the face of a strengthened human rights regime, other norms, in fact, the overall normative structure, have not remained unchanged. Human rights have weakened particular conceptions of self-determination and the anti-mercenary norm. Since the norm of self-determination has reinforced the anti-mercenary norm in the past, the former's relative decline means that the latter's effect on legitimacy will be attenuated. Moreover, the negative association between mercenaries and self-determination, has not been re-established with contemporary PMSC use, suggesting that 'PMSCs' are not conceived of as 'mercenaries'. Importantly, this chapter has not been a story about the weakening of the anti-mercenary norm, but part of the story about the legitimation of PMSC use – the decline of the anti-mercenary norm is only one element of that story.

Overall, the UN discourse on PMSCs takes place in a context of broader normative changes. These normative changes contribute, in various ways, to the increased legitimacy of PMSC use in international society. These changes are interlinked, and the development of one norm affects the development of another. Understanding how one norm shapes the legitimacy of a state practice requires being open for these connections and indirect effects amongst norms. The result is a web of norms that I have tried to summarize using a visual aid (figure 12).

Figure 12. Web of norms



The figure, just as the analysis, provides a broader view of the normativity of a practice that cannot be obtained when narrowing down to an analysis of an isolated norm. It is important to note that the illustration does not imply a rationalist or deterministic approach; legitimacy cannot be calculated. It is not meant as an accurate representation of how the push and pull between different normative standards play out to produce a particular understanding, or even level, of legitimacy. Rather, it is a simplified way of making sense of the underlying normative structure in which legitimation unfolds; on this basis, actors contest, struggle for and inadvertently affect legitimacy – the subject matter of the two final chapters.

Chapter 7: The ICRC and the UN Working Group on Mercenaries: Creating and shaping the practice of legitimacy

Against the background of increased PMSC use as well as normative shifts: how have actors tried to legitimate or contest the practice? This chapter focuses on the two major initiatives of the last years to regulate the industry, the actors behind them, and what their regulatory proposals and activities mean for the legitimacy of PMSC use. The ICRC was behind the process that led to the signing of 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* (Montreux Document) and the *International Code of Conduct for Private Security Service Providers* (ICoC), and the UNWG made proposals for a UN Draft Convention on PMSCs. These initiatives and frameworks are meaningful in two ways. They created fora, in which contestation and legitimation of PMSC use could unfold. The debate on the state's international use of PMSCs has been picking up speed, and the two non-state actors have contributed in an important measure to the *creation* of the discourse within and beyond the UN. But they have also *shaped*, in different ways, understandings of legitimacy: their different regulatory objectives, their different understandings of the relationship between PMSCs and mercenaries, and the respective normative principles underlying them, all amount to competing views on the legitimacy of PMSC use.

The competing normative principles at the heart of the respective initiatives are reflections of the broader normative changes and underlying normative tensions described in the previous chapter. At first glance, both the ICRC and the UNWG are driven by concerns for human rights and make proposals for how to ensure their protection in the case of increased use of PMSCs. Human rights play a role in both cases, which corroborates the centrality of the norm in contemporary international society. The ICRC's main concern is, indeed, compliance with existing international humanitarian and human rights law, and the Montreux Document and the ICoC aim at ensuring state and PMSC compliance. But while the UNWG has adopted some of the human rights language in the UN Draft Convention on PMSCs and beyond, the normative concern is mainly with what functions the state can and cannot outsource to PMSCs; in defining 'inherent governmental functions' it presents a particular understanding of how states should exercise their monopoly of force.

So while it is true that much of the impetus for regulating PMSCs has come from concern over their human rights impact (Falco 2011: 299), this chapter shows that contemporary state practice can in principle, and has in practice, been looked at from other normative lenses than human rights, and that this has resulted in different proposals for how to deal with PMSC use. This chapter, then, is not so much a detailed analysis of the regulatory processes as such – this has been done elsewhere (Cockayne 2009; White 2011). Rather, it shows that it is through regulatory processes that non-state actors can participate in processes of legitimation. Regulation is not merely a legal process of interpreting law or creating the most ‘suitable’ or ‘effective’ legislation in a neutral fashion; it is a political arena, and, importantly, it is an opportunity for legitimation and delegitimation. The chapter looks at the ways in which the ICRC has inadvertently contributed to the legitimation of the state practice; how the UNWG has sought to delegitimise the practice, first and foremost but not only through its proposal for a UN Draft Convention; and, finally, how states have reacted to each of these initiatives.

The ICRC, the Montreux Document and the International Code of Conduct

In 2006, the Swiss Government and the ICRC launched the ‘Swiss initiative’, a process of negotiations and consultations that led to the signing of the Montreux Document in September 2008. The Montreux Document clarified states’ already existing legal obligations in regard to the activities of PMSCs and suggested, non-binding, good practices that states and other actors could follow. An analysis of the process as well as the final outcome will, firstly, demonstrate that the ICRC had an important role in *creating* an important part of the legitimacy discourse on PMSCs in international society, and, secondly, show how it *shaped* the discourse in such a way as to inadvertently contribute to the legitimation of the state practice.

By launching the process, the Swiss Government and the ICRC created an important part of the legitimacy discourse on PMSCs in international society. Together with efforts of the UNWG, which I am going to analyse below, the Montreux process was one of the few instances and opportunities in which substantial – and documented – legitimacy discourse occurred on the international level. It is also a reminder that although the UN is the primary forum where we would expect such a discourse to unfold, intergovernmental

discussions on a matter related to security and the use of force can, and in the case of the Montreux process, did take place outside of the UN. Looking at this process, thus, provides a useful balance to the analysis of legitimacy discourse in the UN. But this is not merely a question of research design, an analysis of the process is also necessary, since Montreux was the only other major discourse on PMSCs in international society, and, more importantly, in many ways, the process and the outcome themselves constitute a balance to the UN discourse in terms of their implications for the legitimacy of PMSC use.

The foreword of the Montreux Document already highlights that although “several diplomatic initiatives were launched to clarify what the role of PMSCs in armed conflicts is and should be [...] it was only with the Montreux Document [...] that the discussion around PMSCs was carefully brought to a first conclusion.” (Montreux Document: 5). It was the expressed intention of the initiative to enable ‘interstate dialogue’ (EDA 2006), and “[i]n view of the absence of an intergovernmental process [...] facilitate and contribute to an intergovernmental dialogue on how to ensure and promote respect for international humanitarian and human rights law by states and private military and security companies operating in conflict areas” (EDA 2007: 2).

Neutrality and not taking a stance on PMSC legitimacy

While it was the express intention to create a ‘dialogue’, particularly the ICRC did not want the initiative and the outcome to be seen as verdicts on or as having repercussions on the legitimacy of the practice – it wanted a ‘dialogue’, and not create ‘legitimacy discourse’. Since the ICRC was a driver behind the initiative, this intention of the ICRC can at the same time be seen as the intention of the whole Montreux process. Even though it was the Swiss Federal Department of Foreign Affairs that came up with the idea for the initiative (ICRC 2008), the Montreux process was ultimately a ‘joint initiative’ (Montreux Document: 5) of Switzerland and the ICRC. More than just a participant, the ICRC was one of the two initiators of the process. For the ICRC to take a leading role in such a controversial matter was remarkable considering that the organisation “carefully protects its reputation as a neutral and impartial humanitarian actor” (Cockayne 2009: 417-418). The fact that the ICRC repeatedly stressed that the process was not a judgment on the

legitimacy of PMSC use was, thus, a reflection of the organisations' character as a humanitarian, neutral actor. The condition for joining the Swiss Government as initiator of the Montreux process was that it "was clearly designated as *not* intended to legitimize the industry" [emphasis in original; D.M.] (Cockayne 2009: 418).

Throughout the Montreux Document and all the way through the process, the intention not to make a judgement on the legitimacy of the practice was reiterated. The foreword clearly states that the document does not take "a stance on the much broader question of the legitimacy and advisability of using PMSCs in armed conflicts – a matter on which debate is no doubt important and necessary" (Montreux Document: 5). This is repeated in the preface: "this document should not be construed as endorsing the use of PMSCs in any particular circumstances but seeks to recall legal obligations and to recommend good practices if the decision has been made to contract PMSCs" (Montreux Document, Preface para. 7). The potential effect on legitimacy is excluded by downplaying the implications of the document and reminding that the document is non-binding and not creating new law, but, merely, clarifying already existing obligations as well as making recommendations on how actors can ensure the respect for international humanitarian law and human rights law. And, finally, the explanatory comments attached to the end of the document once again deny that the document legitimises the practice and that the Montreux Document "does not take a stance on the question of PMSC legitimacy" (Montreux Document: 41).

Instead of wanting to legitimise the practice, then, the initiators said they pursued a pragmatic and humanitarian approach. The Montreux Document was meant to be a practical instrument for those affected by the activities of PMSCs, with the ultimate goal of enhancing the respect for international human rights law and humanitarian law. With this humanitarian approach the initiators wanted to achieve "tangible and practical results" (Montreux Document: 42); it explains why the final output was a clarification of existing law and recommendation of good practices, rather than a new international treaty that would have been more difficult to negotiate. Finally, it was to "acknowledge the reality on the ground" (Montreux Document: 5), and accept that "PMSCs are present in conflicts and will likely remain so" (Montreux Document: 41). This pragmatic approach is in line with the ICRC's traditional focus on 'humanitarian minima': rather than pushing for sweeping improvements in the human rights situation that are hardly attainable, the

ICRC opts for more modest objectives that still constitute improvement but can also be expected to be adhered to by governments (Forsythe 2005: 165). As Christopher Deschard of the ICRC put it, upholding international humanitarian law in situations of armed conflict, in which PMSCs were active, was more important than the question of whether PMSC use was legitimate or not (defenceWeb 2010) – that issue had to be bracketed off for the sake of promoting human rights.

It is telling how anxiously the ICRC has emphasized mantra-like that the Montreux process and Document were not intended to legitimise the practice. It might have been apprehensive of the potentially legitimising effect that the initiative could have. Its effort to remain neutral and blend issues of legitimacy out, need also to be seen in light of the organisation's general doctrine of neutrality. This traditional stance of the ICRC has been questioned by organisations like Médecins sans Frontières as well as from within the ICRC. The contention is that it is not possible to remain neutral in armed conflicts. Rather than staying out of the conflict and thus being able to work with all parties, one inevitably becomes involved in the conflict and may end up aiding or failing to aid one side (Ignatieff 1998: 124). Furthermore, cooperating with, rather than playing the adversary of public authorities, means that “[n]eutral motivation does not automatically guarantee a neutral impact” (Forsythe 2005: 176).

Although it was not the intention of the ICRC to legitimise PMSC use, it was the unintended consequence of its regulatory efforts. Through its efforts to regulate, or clarify existing regulation, the ICRC contributed to the legitimation of PMSC use. It did so, firstly, by ‘acknowledging reality’, and thereby normalizing PMSC use, secondly, by clarifying the legality of the practice, thirdly, by weakening the anti-mercenary norm, and, fourthly, by divorcing PMSC use from mercenary activities.

Acknowledging ‘reality’

To begin with, by accepting the increased presence and use of PMSCs in armed conflicts as ‘reality’, the ICRC is contributing to a normalization of the practice. Instead of questioning, criticizing or condemning it, the ICRC takes the phenomenon as it is and applies international humanitarian law to it. PMSCs and their employees are treated like

other actors involved in armed conflicts. They are part of a rule-governed environment; whether in their capacity as combatants or civilians, they have certain rights and duties. The same categories that are used for soldiers of state militaries and civilians are applied to PMSC employees; they thus become a “legitimate party to the conflict” (Krahmann 2012: 354-355).

Considering the increased use of PMSCs in contemporary international society, dealing with the issue through regulation while trying to remain neutral is difficult if not impossible. *Not* condemning the practice does not mean remaining neutral. PMSCs are increasingly used, and as argued in chapter 5, this has implications for legitimacy. The widespread and increased use of PMSCs means that norms that proscribe the practice are increasingly being undermined. State behaviour itself has a positive impact on the legitimacy of the practice by weakening those norms that proscribed it. Deliberately remaining silent on the issue of legitimacy, does allow the ICRC to not take an active role in legitimising the practice. But being passive in the face of a trend towards increased legitimacy, the ICRC is allowing the process of legitimation of PMSC use to unfold. Choosing to clarify existing regulation on PMSC use essentially means an accommodation with the phenomenon. Although it is a passive approach in terms of legitimacy discourse, it is not a neutral one.

Clarifying the legality of PMSC use

More than that, and this is the second way in which the ICRC has contributed to the legitimation of PMSC use, thinking about how to regulate the use of PMSCs implies that its use was legal as long as it followed the rules that were set up. Legality is not equal to legitimacy, but legitimacy draws on legal and other norms. Clarifying that the use of PMSCs is not necessarily illegal contributes to the legitimacy of the practice, and the Montreux Document does just that. While the ICRC remains passive in its legitimacy discourse, its action – namely, pushing for a clarification of existing regulation – contributes to a clarification that, indeed, PMSC use is a legal activity as long as it follows the rules set by international humanitarian law and international human rights law. If we, thus, shift the attention from what the ICRC says to what it does, from its

discourse to its behaviour, then the ICRC can be said to have contributed to the legitimization of the use of PMSCs by clarifying the legality of the practice.

Only a few limitations are put on PMSC services by existing law; the Montreux Document clarifies these, and makes some further recommendations. For example, under international humanitarian law, states are not allowed to outsource the internment of civilians or the oversight over prisoner-of-war camps to PMSCs (Montreux Document, Part I para. 2). PMSC use is also not a way to circumvent the UN Charter: the principle of the non-use of force in international relations applies whether states use their own military or PMSCs (Montreux Document: 32). There are certain activities that cannot be outsourced to PMSCs, but the list is very limited. Since the Montreux Document is a clarification of existing law, and not a new treaty, it is not adding any other services to this list – in contrast to the UN Draft Convention on PMSCs advocated by the UNWG. The recommendations in the second part of the Montreux Document are, firstly, non-binding, and, secondly, do not make any suggestions on which services states should or should not outsource, but leaves it up for states to decide this. The Document merely recommends that states “determine which services may or may not be contracted out to PMSCs” (Montreux Document, Part II para. 1), a useful reminder for states to have a clear policy worked out in advance, rather than engaging in unguided *ad hoc* outsourcing.

Still, only a very limited number of services, if they were to be provided by PMSCs, would be illegal. Most of the services provided by PMSCs, as seen in chapter 5, are not affected and are, thus, legal under existing international law. The Montreux Document clarifies this – an important step considering the uncertainty that existed as to the legal status of the practice. By doing so it removes doubts, and signals that with the exception of a few activities, most PMSC services are legal as long as they are in line with international humanitarian law and international human rights law. As such, the approach to dealing with PMSCs is not very different from the more general human rights regulation of transnational corporations – PMSCs are businesses that ought to comply with human rights.

Weakening the 'control objection' of the anti-mercenary norm

The ICRC's regulatory efforts have also contributed to the legitimacy of PMSC use by weakening the anti-mercenary norm. Regulation accounts for the control dimension of the anti-mercenary norm, and, thereby, removes an important source of proscriptive force that the norm may have had on the practice, namely the idea that the use of force should be placed under legitimate control. The goal of regulation is just that. The main goal of the Montreux Document, and this became clear early on in the process (EDA 2006), was to clarify that under existing international law states are responsible for and thus ultimately exert control over PMSCs. Although a new phenomenon, PMSCs do not operate in a legal vacuum. Rather than establishing new law, Montreux reaffirmed the responsibility of states, in particular the contracting states, for the activities of PMSCs.

The move towards a clarification of regulation through the Montreux Document as well as the creation of new law on the use of PMSCs as suggested by the UNWG have parallels to states' efforts to establish control over the use of mercenaries between the 12th and 17th century – not so much in the sense that recent efforts will necessarily lead to a similar outcome, but in the sense that they at least challenge the objection that PMSCs are not accountable and not controlled by a legitimate authority. Montreux reinforces the impression that the contemporary practice is state-led. The responsibility for activities of PMSCs lies with contracting states as well as with states on whose territory PMSCs operate and states where PMSCs are registered and incorporated (Montreux Document, Part I para. 9 and 14). Only in a few instances does international humanitarian law or human rights law have direct implications for PMSCs and their employees (Montreux Document, Part I para. 22-26); ultimately, they are accountable through national law. Far from being illicit and outside of legitimation processes, “the privatization of security frequently occurs at the instigation of the state” (Abrahamsen and Williams 2011: 28-29) and PMSCs “function *through* the state and practices of global governance” (Abrahamsen and Williams 2011: 170). The central position of states in international law is reflected in the Montreux Document's state-centric approach to PMSC regulation, which reaffirms that this practice is, at least, state-controlled, if not state-led.

Although the UN Draft Convention on PMSCs may have a similar effect as Montreux in that it reaffirms state control over PMSC services, as I argue below, because the Draft

Convention prohibits many of the services offered by today's industry, the delegitimising effect of prohibition overshadows that potentially positive effect on legitimacy. The UNWG's call for and efforts to establish regulation do not "unintentionally strengthen the overall legitimacy levels of PMSCs" (Østensen 2011a: 384). In contrast to the ICRC, the intention of the UNWG's regulatory efforts – delegitimation – is in line with its output. Finally, even if Montreux constitutes a small contribution to regulation, regulation alone can rebut the 'loss of control' objection against PMSC use (Frost 2008; Fabre 2012: 226-229), but it does not change 'deeper' normative objections that have to do with undermining 'communal bonds' amongst citizens of a state (Pattison 2010a) or the inappropriateness of fighting without a 'right cause' (Percy 2007a). Clarification that states are responsible for PMSC activities is only one mechanism through which the practice is legitimated; it is only when coupled with other inadvertent and strategic moves as well as with broader material and normative shifts that one can talk of a legitimation of state practice.

Separating PMSC use from mercenarism

The fourth and final way in which the ICRC has contributed to the legitimation of PMSC use is by clearly distinguishing between 'PMSCs' and 'mercenaries' – or rather: the mercenary issue is largely disregarded, and the term is to be found nowhere in the Montreux Document. The authors deemed it necessary, however, to provide an explanation for whether PMSCs are 'mercenaries' in the attached explanatory notes. The explanation points to the difficulties in applying the Mercenary Convention to PMSC employees, difficulties such as assessing whether employees are motivated by private gain, whether they do earn a higher wage than soldiers, or the fact that most employees do not "fight in an armed conflict" (Montreux Document: 40). However, neither in the main part of the document nor in the informal summary is the mercenary issue mentioned, not even a reference to the Mercenary Convention as one, albeit problematic, piece of international law that could potentially be applied under certain circumstances.

By working towards a clarification of the regulation on the use of PMSCs, a separation was thus made between mercenaries and PMSCs. The use of the former is illegal according to the UN Mercenary Convention – the latter was not, but needed to be

regulated. Also, while Art. 47 of the Additional Protocol I to the 1949 Geneva Conventions denied mercenaries combatant or prisoner of war status, PMSC employees – as long as they are not labelled mercenaries – do enjoy that status with all the rights and duties it involves. The linguistic and legal separation between ‘mercenaries’ and PMSCs and their employees has real implications (Krahmann 2012: 345).

The legal response to mercenaries was outright prohibition of the practice and criminalization of mercenaries as such. The legal response to PMSCs is regulation: clarifying what is to be regarded legal and illegal PMSC use. Contrary to Percy (2007a: 9), then, there is a difference between how mercenaries and how PMSCs are regarded, and the Montreux Document is an expression of this difference. While mercenaries have, indeed, been treated as inherently objectionable in international law and have been prohibited as consequence, the Montreux Document amounts to a distinction between ‘good’ and ‘bad’ PMSC use. There is nothing inherently objectionable about PMSC use. According to the Montreux Document, PMSC use is legal as long as it does not violate other relevant international law. On the other hand, there is no ‘good’ or ‘bad’ use of mercenaries in the eyes of international law; the actors and the practice are illegal as such, irrespective of their behaviour and the way in which they are used. The Montreux Document, thus, marks a shift in how the legitimacy of private actors in armed conflicts is evaluated: away from a consideration of their characteristics as actors towards a view of their particular behaviour (Krahmann 2012: 350). While international law looked at the “shameful character of mercenary activity (ICRC 1987: 574), what matters for PMSC use in terms of legitimacy is whether PMSCs – and the states that use them – adhere to international law. The Montreux Document, thus, echoes a good/bad distinction that the private military and security industry itself is very much keen on utilizing (Bearpark 2006: 457).

As I have argued before, talking of ‘PMSCs’ instead of ‘corporate soldiers’, ‘mercenary armies’ or, simply, ‘mercenaries’ matters. I have justified my choice of terms for this dissertation, but I have also pointed out and tried to problematize that even though my approach to legitimation is a social scientific and not a normative-philosophical one, talking of ‘PMSCs’ is not an innocent move. The Montreux Document, however, seems to be ignorant of the basic constructivist insight into the power of language in creating reality. The document defines PMSCs as

“private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.” (Montreux Document, Preface para. 9).

It justifies its choice, again, from a ‘humanitarian’ perspective, saying that “the relevant question is not how a company is labelled but what specific services it provides in a particular instance” (Montreux Document: 38). This may well be a useful, pragmatic definition. But it is not as innocent as the ICRC – as the advocate of a humanitarian approach to PMSC regulation – might want to believe. Looking at efforts of the UNWG and various NGOs to relate PMSCs to mercenaries and the respective counter-efforts of PMSCs to distance themselves from the label below, and considering that the intention of the Montreux Document is not to legitimise PMSC use, the question of ‘how a company is labelled’ is not irrelevant. Finally, the ICRC’s humanitarian approach has been applied to PMSCs, but not to mercenaries. The ICRC did not see mercenarism as a ‘reality’ that had to be accepted; on the contrary, the ICRC “provided important legitimacy for [...] efforts to contain them [mercenaries; D.M.] in international law” (Krahmann 2012: 350).

The ICRC – the unintentional legitimacy entrepreneur

In conclusion, the ICRC has created as well as shaped the legitimacy discourse on PMSC use. As a non-state actor as well as the guardian of humanitarian law it gave an important impetus to the process when it decided to initiate it in partnership with Switzerland. The Montreux process provided a forum where state and non-state actors could debate the new phenomenon. Without such a forum, international legitimacy discourse could not emerge in the first place. Furthermore, although the ICRC intended not to engage in legitimacy discourse, I have argued that it inadvertently contributed to the legitimization of PMSC use through the Montreux Document. The ICRC refrained from explicit legitimacy claims in favour or against the practice. But in its behaviour as well choice of words, it contributed to the legitimization of PMSC use. The ICRC normalized PMSC use by accepting it as ‘reality’ – something it had not done in the case of mercenarism – and remaining passive in the face of increased PMSC use was not equal to remaining neutral.

It removed any doubts as to the legality of the practice by clarifying that the practice was legal and that states were responsible for any breaches of international law. It weakened the delegitimising effect that the anti-mercenary norm might have had on the practice by affirming that PMSCs were ultimately under the control and authority of states. Finally, it cut the connection between inherently objectionable mercenarism and the legal practice of using ‘PMSCs’.

In fact, the Document was also perceived to legitimise the practice by state and non-state actors alike. Most notably, the International Code of Conduct for Private Security Providers (ICoC) is a direct follow-up to the Montreux Document that endorsed its principles (ICoC, para. 2), was meant to substantiate the suggestions in the second part of the Montreux Document, and can be said to “offer PMSCs increased legitimacy” (Cockayne 2013). Like Montreux it reaffirmed that PMSCs were under legitimate control and by establishing an oversight mechanism it has created a practical way of exercising that control. The language of the ICoC goes even further than the Montreux Document in normalizing the practice as well as distinguishing it from mercenary use. The ICoC states that PMSCs “play an important role in protecting state and non-state clients” and that “the activities of PSCs can have potentially positive and negative consequences for their clients, the local population in the area of operation, the general security environment, the enjoyment of human rights and the rule of law” (ICoC, para. 1). Their ‘important role’ is recognized and they are not inherently objectionable but can have ‘potentially positive’ consequences – this is markedly different from the language on mercenaries (Krahmann 2012). And in terms of the specific services PMSCs are allowed to offer, the ICoC requires companies to “take all reasonable steps to avoid the use of force” (ICoC, para. 30), but acknowledges that the use of force can become necessary “in self-defence or defence of others against the imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life” (ICoC, para. 31); the bottom line is that signatory companies may use force, and the ICoC does not prohibit it, which is in line with the suggestions of the Montreux Document.

The Montreux Document was welcomed by the industry (IPOA 2008), and the ICoC was to date signed by 708 companies from 70 countries (ICoC 2014) – both signs that PMSCs perceive both documents to be in their favour, and that this part of companies’ “PR work” (Rosemann 2008: 7). In contrast, some countries, like Norway, have not signed the

Montreux Document, which “may stem from perceptions that state regulation of PMSCs implies a degree of endorsement of such companies” (Østensen 2013: 24). Russia, too, did not sign the Montreux Document although it was involved in the process; it relativizes the Russian representative’s defence of the initiative against worries of some that the initiative may have a “potentially legitimizing impact” (Cockayne 2009: 420). Gomez del Prado (2009: 444), the chairperson of the UNWG has criticized that the Document “stamped its seal of legitimacy to PMSCs” and “legitimises the services the industry provides”. He also remarked that the “commercial logic of the industry has been behind the document” (Gomez del Prado 2009: 446), and pointed to the IPOA press release as an indication that the industry perceived the Document to be in its interests (Gomez del Prado 2009: 443). Finally, the ICRC’s repeated assertions that it was not the intention of the initiative to legitimise PMSC use, is an indication that the ICRC was afraid that its intention might not match the outcome of the Montreux process.

The intention of the ICRC was, without doubt, a ‘humanitarian’ one. The ICRC is the guardian of international humanitarian law. In a process that was meant to deal with the impact that the new phenomenon has on human rights, it was an important move to get the ICRC on board as an initiator. Throughout the process the ICRC belonged to those actors who pushed for a stronger human rights language (Cockayne 2009: 421). It followed a logic of appropriateness: respect for and compliance with international humanitarian law in particular and human rights more generally, was what pushed the ICRC to become initiator of the process and to pursue a clarification of regulation on PMSCs. Human rights, thus, played a role in the motivation of the ICRC, getting the organisation to become active in the process. The outcome, as I have argued above, was a legitimization of PMSC use. In a sense, human rights are located at the beginning of a chain of causality that led the ICRC to become an initiator that subsequently shaped the discourse in such a way that ultimately contributed to the legitimization of the practice. Motivated by enhancing respect for human rights, the ICRC eventually and inadvertently legitimised PMSC use. The increased importance of human rights in international society, thus, manifests itself in the ICRC’s regulatory efforts. But while human rights worked in motivating the ICRC, with the unintentional outcome described above, the norm played a more instrumental role in regulatory efforts of the UNWG.

The UN Working Group and the UN Draft Convention on PMSCs

The UNWG, too, has both contributed to the creation and has shaped the legitimacy discourse on PMSCs. It has provided states with a discursive forum and has spurred debate through its own inputs. The UNWG was created in 2005 and replaced the mandate of Special Rapporteur on the use of mercenaries that had been serviced by Enrique Bernales Ballesteros from 1987 to 2004 and Shaista Shameem from 2004 to 2005 (OHCHR 2015). The Rapporteurs and then later the UNWG were behind many of the UNWG resolutions already analysed in chapter 6, particularly the series of resolutions titled “Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.” The mandate of the UNWG was extended in 2008 to include an investigation into the role and impact of PMSCs. When the UN Human Rights Council set up an inter-governmental working group that was to work on a possible Convention on PMSCs, the UNWG informed the latter through ‘resource persons’ as well as in drafting a text for the convention (A/HRC/WG.10/2/CRP.1, para. 4). Particularly through its resolutions and the input into the UN Draft Convention on PMSCs, but also through discussions at its meetings and various other contributions of its members, the UNWG actively created legitimacy discourse and was itself a discursive arena of international society. But more than being a passive discursive arena of international society and a neutral actor enabling debate on the issue, as a UN body it also had actor-qualities, particularly in the form of its chairmen, and should, thus, be seen as a non-state actor, a member of world society.

Consequently, more than creating and enabling discourse, the UNWG has also shaped it, and consciously played a more active role in it than the ICRC, which did not intend to participate in legitimacy discourse. While the ICRC unintentionally contributed to the legitimization of PMSC use, the effect of the UNWG on the legitimacy of the state practice is not as clear. It is true that the UNWG has not been as critical towards PMSCs as it had been towards mercenaries, that it also started to distinguish between the two, and that it, like the ICRC, pursued a regulation and not outright ban of PMSC use. But, on the other hand, the condemnatory language remains, a link between mercenaries and PMSCs is still being established, and although it does not seek an outright ban of PMSC use, the far-reaching understanding of what constitutes ‘inherently governmental’ functions would effectively mean a ban of most PMSC activities. Overall, then, the UNWG, particularly

through its proposal of UN Draft Convention on PMSCs, is still contributing to the delegitimation of PMSC use. Similar to the ICRC, the UNWG, too, uses human rights as justification for its regulatory approach. But the UNWG's use of human rights is more instrumental. It pursues a subtle strategy, where the goal is not so much to ensure respect with human rights, but to effectively limit much of today's use of PMSC. And this goal is driven by a commitment to anti-mercenaryism and a republican understanding of the monopoly of force.

Condemning PMSC use

First of all, the conclusion of chapter 6 that the discourse on PMSCs within the UN is markedly different from that on mercenaries remains valid. The outspokenly critical and condemnatory language that we find in resolutions on mercenaries is not replicated in resolutions on PMSCs. Since most of the UNGA resolutions on PMSCs were drafted from within the UNWG, it is fair to say that the UN body's "approach to the issue of PMSCs has not been so prescriptive" (White 2011: 136). Yet, the UNWG has certainly been more prescriptive than the ICRC, which has not openly uttered legitimacy claims. Furthermore, the texts of the draft resolutions are less critical than remarks made by the chairmen of the UNWG. As argued in chapter 6, the former, having been endorsed by the majority of states in the UNGA, are ultimately a reflection of how international society regards PMSC use. On the other hand, remarks by UNWG members that accompanied discussions, such as those on UNGA resolutions, reflect more genuinely the position of the Group itself.

In a journal article from 2009, Gomez del Prado, a particularly active member of the UNWG, considers the status of PMSC employees and comes to the conclusion that "[n]either civilians nor combatants, these 'private soldiers' are in fact 'unlawful combatants'. Paramilitaries and terrorists could claim the same legitimacy as these 'private soldiers'" (Gomez del Prado 2009: 436). This statement is in contrast to the Montreux Document that clarifies that the status should be evaluated on a case-by-case basis and that PMSC employees may well be classified as civilians or combatants, depending on the situation. Also, he is essentially denying them legitimacy by comparing them to paramilitaries and terrorists. In similar contribution, Gomez del Prado (2011:

134) reiterates the formulation found in GA resolutions that PMSCs “have been involved in grave human rights violations”, and then goes on to say that “[t]hese companies pose a real problem to human rights”. Besides these contributions outside of the UNWG, the chairman has also used the UNWG meetings to describe PMSCs as a “new threat” (A/C.3/63/SR.34, para. 7). These formulations go a step further than what is found in the UNGA resolutions. The formulation ‘threat’, for example, had been reserved for mercenary or mercenary-like activities in the resolutions; but here, the former chairman is using the term in relation to PMSCs.

Linking PMSC use and mercenarism

The remarks are not only more critical than the language of the resolutions; the link between mercenaries and PMSCs is also more apparent than in the resolutions. The question of whether and in how far the UNWG has really differentiated mercenaries and PMSCs is important for at least two reasons. First, as seen above the two labels have different legal implications. Second, more than legal categories, they carry normative meaning; as Percy (2007c) has argued, the mercenary label is fraught with negative connotations. PMSCs and the states that use them try to distance themselves from the label, for both the legal implications as well as the delegitimising effect it has. The allegation that one side to a conflict has made use of ‘mercenaries’, for example, is intended to delegitimise the opponent’s actions. We have already seen this at work in chapter 6, where national liberation movements accused former colonial powers of using mercenaries, while the liberation movements themselves clarified that their “legitimate struggle can in no way be considered as or equated to mercenary activity” (A/RES/48/92, preamb. para. 4). It can, for example, be seen in Armenia’s allegations against Azerbaijan (A/C.3/64/SR.37, para. 55) or Georgia’s allegations against “Russian armed forces operating jointly with separatist militias and foreign mercenaries” (A/C.3/64/SR.36, para. 76), the UNSC accusing the Taliban of “using foreign mercenaries in hostile actions” (S/RES/1390: 1), and in today’s Ukraine conflict (Reuters 2014; RIA Novosti 2014).

On the one hand, there is evidence that the UNWG has separated mercenaries from PMSCs. Before the mandate of the UNWG was formally extended in 2008 to cover PMSCs, there was already a development where the UNWG looked into the PMSC

phenomenon. In the series of resolutions on the “Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination”, 2008 was the first time the term ‘PMSC’ was used, indicating the formal change in the UNWG’s mandate. Before that various other terms were already in use to describe the phenomenon. In 1994 (A/RES/48/92), the term ‘mercenary-related’ was used for the first time. It opened up the category and allowed for the possibility that an activity or individual could be labelled mercenary without necessarily matching the legal definition. At the same time, it can be seen as a move away from exclusively dealing with mercenaries and looking into related phenomena. The introduction of the term ‘private company’ in 2004 (A/RES/58/162) suggests that a distinction was gradually being made between mercenaries and PMSCs. Focusing in particular on the former Special Rapporteur Ballesteros, and analysing his reports, Krahnmann (2012: 359) identifies a “major transformation in his discourse”, and, thus, largely ascribes the changing discourse of the UN to the changing discourse of Ballesteros.

But, despite the change, Ballesteros stuck to negative legitimacy claims and also continued to establish the link to mercenarism. In 2003, a year before the end of his mandate, he clarified that “the fact that it may be a government which hires mercenaries, or hires companies which in turn recruit mercenaries, for its own defence and political purposes within its country or to bolster positions in armed conflicts, does not change the nature of the act or its illegitimacy” [emphasis added; D.M.] (A/58/115, para. 54i). Finally, Ballesteros’ work was certainly important in that one can see how the UN first dealt with the PMSC phenomenon when it came up in the late 1990s. But his mandate ended in 2004, and it is after his mandate ended that the debate picked up speed and became concrete in the form of the discussions around a new PMSC convention.

Shaista Shameem, who followed Ballesteros as Special Rapporteur in 2004, adopted a more pragmatic approach, issuing a joint statement with PMSC representatives that advised the UN to “re-examine the relevance of the term ‘*mercenary*’” because “this derogatory term is completely unacceptable and is too often used to describe fully legal and legitimate companies” (A/60/263, Annex II). Explaining in 2010 that mercenarism “was less common than it had been in the 1980s and 1990s, [but; D.M.] it did still exist and must be taken into account” (A/C.3/64/SR.36, para. 42), suggests that Shameem did not equate the widespread use of PMSCs with mercenarism, and that she clearly saw

them as two distinct phenomena. When an expansion of the UNWG's mandate to include PMSCs was debated, Shameem advocated a limitation of the mandate, saying that "mercenaries, terrorists, freedom fighters, volunteers, part-time soldiers, rebels defending a cause and private security companies should not be lumped together" (A/C.3/59/SR.35, para. 40).

But, similar to Ballesteros, the relevance of Shameem's work and discourse should also not be overemphasized. This is first of all, because her mandate as Special Rapporteur ended in 2005 and thus only lasted one year. Although she was appointed as chair of the UNWG, that position was less significant than the role of the Special Rapporteur; because the chair was elected for one year only, a UNWG chair could not enhance her standing as an expert on the topic through seniority as was possible for Ballesteros who served as Rapporteur for 17 years. Formally, the UNWG members were more on an equal footing; it is thus not about who was chair, but a matter of how active members were in discourse, a good example being Gomez del Prado who played an important role in key contributions of the UNWG – such as the 2010 report discussing a PMSC convention (A/HRC/15/25) – as well as in various contributions beyond the UN. So while a distinction between PMSCs and mercenaries was made in the resolutions already analysed in chapter 6, and while Shameem – more than Ballesteros – might have played a role in it, looking at the debates surrounding the resolutions and contributions around the new PMSC convention, UNWG members have often failed to distinguish or have, indeed, attempted to connect the two.

This can be seen in the critical stance of the US and European countries against the UNWG's engagement with PMSCs. Whenever draft resolutions from the series on the "Use of mercenaries" were tabled in the Third Committee of the UNGA, they would speak out against the link between mercenaries and PMSCs. European representatives were against including PMSCs in the resolutions, because it "would be false and misleading to equate the employees of private military and security companies that operated in strict compliance with international law with mercenaries" (A/C.3/66/SR.45, para. 38). The US, too, would, although not as regularly as European countries, express its opinion that it "was important not to confuse such companies with groups of mercenaries" (A/C.3/63/S.34, para. 10). As a sign of discontent with the work of the Special Rapporteur, and probably also its investigation into the role of PMSCs, the US

called for the mandate of the rapporteur to be terminated (A/C.3/56/SR.50, para. 8). Although this opposition against ‘lumping’ mercenaries and PMSCs together, thus, came not only from Shameem but also Western states, the fact that the latter repeatedly talked and voted against draft resolutions that nevertheless passed, means that a majority of states either accepted or actively encouraged the link. It was not a faulty interpretation of the draft resolutions by Western states to see a link between mercenaries and PMSCs, where there was none, but it was a conscious effort by UNWG members and the sponsor of the resolutions.

A sponsor of many of the resolutions of the series, Cuba’s remarks are particularly important as they shed light on the intent of the resolutions in regard to the mercenary/PMSC distinction. It starts with Cuba seeking an expansion of the UNWG’s mandate (A/C.3/61/SR.38, para. 50); the Cuban representative referred to Ballesteros’ previous studies of PMSCs and asked the new Special Rapporteur to “continue to explore the question of the links between the activities of mercenaries and terrorists, as well as the question of private security firms, which were not supervised by Governments or by international organizations” (A/C.3/59/SR.35, para. 45). It expressed its concern over “new and dangerous forms” of mercenary activities, and that the UNWG should thus “focus attention on the activities of certain international private security companies, the latest metamorphosis of mercenarism on a global scale” (A/C.3/65/SR.40, para. 6). The sponsor of the draft resolutions clearly sees PMSCs as the new mercenaries. It consequently points to the threat posed by both mercenaries and PMSCs (A/C.3/64/SR.41, para. 43), and thus tries to equate the two with all the legal implications as well as negative effects this would have for the practice’s legitimacy. Cuba’s amalgamation of mercenaries, PMSCs, and terrorists is also noteworthy. It had asked the UNWG to investigate the links between mercenaries and terrorists, because the two often overlapped, saying that “Cuba had been victimized by groups based in the United States that were both mercenary and terrorist” (A/C.3/59/SR.35, para. 44). Cuba also welcomed the work of the inter-governmental working group on a Convention on PMSCs, and compared the issue of PMSC regulation with the criminalization of terrorism (A/HRC/WG.10/2/CRP.1, para. 38). Cuba puts the three actors and practices in one basket; it not only equates PMSCs with the illegal use of mercenaries but with the equally criminalized practice of terrorism. Its comparison of efforts to regulate PMSCs with the international criminalization of terrorism, furthermore, already hints at the idea,

elaborated below, that rather than just seeking a regulation of PMSC activities, important actors within or close to the UNWG have sought to effectively ban PMSC use.

Cuba's usage of the mercenary term clearly shows that it intended to delegitimise PMSC use by establishing that link. It accused the US of recruiting mercenaries to carry out its policies of "annexation to make life even more difficult for the heroic Cuban people" (A/C.3/63/SR.31, para 48), and for financing what the US would call 'human rights defenders' but which were, according to Cuba, "mercenaries in the service of a foreign Power" (A/C.3/63/SR.24, para. 51); the same critique was directed at the EU which "portrayed mercenaries seeking to undermine Cuba's right to self-determination, as human-rights defenders" (A/C.3/60/SR. 32, para. 68). These remarks demonstrate Cuba's awareness of the negative connotations and instrumental use of the mercenary term; in accusing the US and the EU, it re-labels their support of 'human rights defenders' as mercenaries and accuses them of directly using the latter. Some of Cuba's remarks, particularly its side blows against Western states might seem odd and not on-topic within the context of a debate on mercenaries and PMSCs. But they reinforce the conclusion that Cuba's UN representatives are aware of the negative connotations of the mercenary term, and know how to make use of it. That Cuba may be politically motivated and interested in discrediting the US in particular does not disconfirm the above. Rather, it supports the view that Cuba knows of the illegitimate standing of mercenaries and thus makes use of it in the debate on PMSCs and in its condemnation of US foreign policy. It is also a good illustration of the UN being a political arena rather than a neutral juridical body where international law is interpreted. More broadly, it attests to the strategic and instrumental character of legitimacy discourse that does not necessarily conform to a logic of arguing, where actors seek a mutual understanding and reasoned consensus. The efforts of Cuba to establish a link between mercenaries and PMSCs and thus delegitimise the latter, are important and the remarks from above, e.g. "new forms of mercenary activities" (A/RES/66/147), found their way into UNGA resolutions. Several other actors, including UNWG members, echo Cuba's remarks.

In 2007, Gomez del Prado referred to PMSC use as "new forms of mercenarism, in which 'traditional' mercenaries were being absorbed by private security companies" (A/C.3/62/SR.37, para. 37), and as "disturbing new manifestations of mercenarism in the twenty-first century" (A/C.3/62/SR.37, para. 43). This view of PMSC use being a new or

different form of mercenarism is the same as that espoused by Cuba that sees PMSCs as a ‘metamorphosis’ of mercenaries; the addition of the word ‘traditional’ to mercenaries suggests that there is such a thing as non-traditional mercenaries in the form of PMSCs. The former Chairman also wrote a report on how the Mercenary Convention might apply to PMSC employees. He concluded that many of the contracts the UNWG had studied “included terms closely related to those stipulated in the 1989 Convention. Independent contractors from the countries visited had been recruited abroad and motivated by material gain” (A/C.3/62/SR.37, para. 39). Gomez del Prado elaborates on this and says that although the “activities carried out by PMSCs [...] do not fall under the ‘traditional’ legal definition of a mercenary” (Gomez del Prado 2009: 440), PMSC employees “operate in a grey area and may be assimilated to mercenaries or irregular fighters” (Gomez del Prado 2009: 445). While much of the impetus for regulation – or clarification thereof as in the case of the Montreux Document – stems from the realisation that the Mercenary Convention does not usually apply to PMSCs and their employees, it seems that the former UNWG chair challenges that understanding by pointing to a ‘grey area’ and the possibility that PMSC employees may well be defined as mercenaries. Also, putting the word ‘traditional’ in front of the definition suggests that he would prefer that the Convention actually encompassed and was valid for PMSCs as well, which he expresses when lamenting that there were “many loopholes through which the behaviour of mercenaries, private contractors, private guards, PMSCs slip through as water through a sieve” (Gomez del Prado 2009: 447), again lumping the actors together. Although now a former member of the UNWG, Gomez del Prado (2014) shared his personal view with the author, which corroborates the above: “I thought and I still think that these companies are mercenaries, most of them. They are mercenaries.”

In a similar vein, in 2012, Patel, another UNWG member, noted that “the problems posed by mercenaries were still a live issue. Mercenaries and private security companies posed a threat not only to security, but also to human rights and the right of peoples to self-determination. It remained crucial that States should cooperate to eliminate the phenomenon” (A/C.3/67/SR.28, para. 32). We are told that mercenaries are still a ‘live issue’ and in the next sentence it becomes clear that PMSCs are included and form one phenomenon together with mercenaries. Again, they are perceived as a threat that needs to be ‘eliminated’, which points to the intention of the new UN Draft Convention. Assurances of the UNWG that their work actually involved making a distinction between

mercenaries and PMSCs are not entirely convincing when considering not only the above remarks and passages in resolutions, but also that the very next sentence after such an assurance negates that distinction:

“While drawing a sharp distinction between the legal essence of mercenary activities and that of private military and security companies, he noted that the Working Group had devoted almost half its work to studying cases involving the sometimes illegal recruitment of mercenaries. In addition to the civilian population of the countries where they operated, mercenaries themselves were sometimes victims of human rights violations because of the conditions in which they had to work in such countries as Iraq and Afghanistan” (A/C.3/63/SR.34, para. 14).

This statement by a UNWG member was a reaction to the complaint made by a US representative that the UNWG was simplifying the situation on the ground when portraying civilians merely as victims of PMSCs (A/C.3/63/SR.34, para 10). Nikitin, a former UNWG member, acknowledges that PMSC employees, too, are victims of human rights violations, but the point being that he refers to them as ‘mercenaries’ and not as employees of PMSCs.

In 2013 at a follow-up conference to the Montreux process to which the UNWG was invited, the UNWG defended itself against criticism that it had failed to distinguish between mercenaries and PMSCs (Rona 2013). Against the background of the various remarks presented above, however, it should come as no surprise that this point is raised against the UNWG. The UNWG may have acknowledged a difference between mercenaries and PMSCs in legal terms (Krahmann 2012); hence its efforts to devise a new convention. But this is not the same as acknowledging their legitimacy. On the contrary, associating PMSC use with mercenarism in its discourse remains an important part of the Group’s contestation of state practice.

The UN Draft Convention – prohibiting certain PMSC services

The third and final way in which the UNWG is contributing to the delegitimation of PMSC use is through the type and extent of regulation it seeks with the UN Draft Convention on PMSCs. The previous chapter has shown how discourse on PMSCs within the UN has been much less condemnatory and whenever PMSC activities were criticised,

the conclusion would have been a call for regulation, and not an outright prohibition as was the case with mercenaries. I have, therefore, concluded that although PMSC use might still not be regarded as ‘legitimate’ by international society, it is not ‘illegitimate’ and certainly enjoys more legitimacy than mercenarism did. With its work on the Draft PMSC convention, however, the UNWG is seeking to delegitimise much of the practice. This is not in contradiction to the above. First, not all regulation is created equal. The ICRC’s approach is different from that of the UNWG (White 2011: 138). The UNWG might refrain from wanting to impose “a blanked ban on PMSC activities” (A/HRC/WG.10/2/CRP.1, para. 7). But through its regulatory approach of defining ‘inherently governmental’ functions that states should not outsource, it is effectively trying to prohibit much of states’ contemporary use of PMSCs. Second, that the UNWG as a non-state actor is trying to delegitimise PMSC use does not negate that international society has a different, more positive understanding of the practice’s legitimacy, but rather, demonstrates the contested nature of the practice.

The approach of the UNWG to PMSC regulation is very different from that of the Montreux Document. First of all, the latter was limited to a clarification of existing regulation, and, consequently, it did not impose additional restrictions on the practice. The approach of the UN Draft Convention, in contrast, is to create “new, binding international rules on PMSCs”, and thereby “address[ing] accountability issues which are not adequately covered by existing initiatives” (Rona 2013). These binding rules define “functions that are permitted but should be regulated, and functions that belong to the state and cannot be privatized” (Gomez del Prado 2011: 146). It is thus already clear that the UN Draft Convention amounts to a mix of regulation and prohibition. The guiding principle for determining which services should be prohibited is the idea of ‘inherently governmental functions’. Agreement on what that would entail is not easy, seeing that it is difficult to find one interpretation domestically (Cockayne 2009). The UN Draft Convention defines these functions as:

“direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees” (A/HRC/15/25, Annex, Article 9).

This list is more comprehensive than the “specific ban on such companies intervening in armed conflicts or actions to destabilize constitutional regimes” (A/RES/58/162, para. 5), provided for in UNGGA resolutions from 2004 onwards. It includes services already provided by PMSCs (White 2011: 138). It is fair to say, that the “stated negative purpose of the convention – not to ban the companies – is therefore contradicted by the specification of the functions that they should not be allowed to undertake” (Moesgaard 2011: 3). On the one hand, then, the UNWG has been less critical towards PMSCs and has also not called for an outright ban of the practice. But on the other hand, although it states that it does not seek to ban the practice, its proposal for a UN Draft Convention effectively amounts to just that. Rather than openly seeking a ban of the practice, the UN Draft Convention takes a more subtle approach.

Remarks from UNWG members prompt this conclusion. Gomez del Prado (2009: 440) refers to the relative failure of the Mercenary Convention in banning mercenarism, saying that it “does not seem realistic that the activities of PMSCs will be dealt with by the 1989 Convention.” The lessons learned from the Mercenary Convention, thus, clearly inform efforts to create a new convention for PMSCs. It is a more ‘realistic’ approach that is to take into account the political opposition the Mercenary Convention encountered, particularly from the West. Also, as argued above, it is once again mercenaries and prior efforts to regulate them that inform the UNWG’s work on PMSCs.

In another instance, the UNWG argued that although there is no prohibition in international law of what states can and cannot outsource, “there are multiple indications of disapproval of some types of outsourcing, particularly with regard to direct participation in hostilities”, and that “such condemnation is reflected in the [...] Mercenary Convention” (A/HRC/WG.10/2/CRP.1, para. 9). The UNWG is bringing to bear the Mercenary Convention as an indication of what international society might have to say about PMSCs. It is also referring to national legislation in South Africa as well as the ‘Stop Outsourcing Security Act’ that was submitted to the US Congress in 2011 – but was, importantly, voted down – as “indications of disapproval of private actors participating in hostilities”, again pointing out that “there is no clear international legal norm prohibiting such activities” (A/HRC/WG.10/2/CRP.1, para. 11). South African legislation is, as seen in a previous chapter, probably the most far-reaching national legislation on PMSCs. It is telling that the UNWG referred to that type of legislation,

seeing that the UN Draft Convention on PMSCs would ultimately lead to a similar restriction of the practice – only on a global scale.

It was the intention of the UN Draft Convention “to change the international community’s perception of private military and security companies as business as usual, fostering instead the view that such companies’ work consisted of the provision of highly sensitive services requiring specific supervision and oversight by Governments, civil society and the international community” (A/C.3/65/SR.36, para. 76). The UNWG, thus, took a very different approach to the ICRC. The latter accepted the PMSC phenomenon as a ‘fact’, a ‘reality’ that one had to deal with. The UNWG, on the other hand, does not take the contemporary state use of PMSCs as a given, but as something that can be questioned and challenged. Hence it is not ‘normalizing’ the practice as the ICRC does, but it is contesting it. More than that, taking the above points into consideration, particularly the fact that the UNWG continues to link PMSCs to mercenaries and that its proposal for a UN Draft Convention on PMSCs would effectively amount to a ban of many PMSC services provided to states, the UNWG is bent on more than problematizing the issue. It wants to ‘change the international community’s perception’ of PMSCs, but to change it in such a way as to deny many of today’s PMSC activities’ legitimacy. This is exemplified in a remark from a Cuban representative, where PMSC regulation is compared to criminalization of terrorism

“an international convention serves to highlight the commitment of the international community to address the issue of PMSCs. We often face situations where robust national legislation is vital and we use international mechanisms to get us there. For example, the attacks of September 11th highlighted the danger posed by terrorist attacks carried out by non-State actors. A critical part of preventing such attacks was to ensure that countries adopted and enforced national legislation. The route chosen was, however, an international one: the UN Security Council adopted a resolution to ensure that States passed legislation to control and criminalize their activities” (A/HRC/WG.10/2/CRP.1, para. 38).

Although the comparison might just serve the point to illustrate the need for an international approach to regulation, because this can spur implementation in national law, it is telling that what is meant to be a *regulation* of PMSC use is compared to the *criminalization* of terrorism. Even though this is coming from a state representative, the comparison sheds light on the intention of the UNWG’s approach: on the face of it, the

UN Draft Convention is meant to *regulate*, but it is, *de facto*, *prohibiting* much of the practice.

The UNWG's references to and usage of human rights, therefore, have to be seen in light of its efforts to prohibit much of the practice. The ICRC first struggled in its decision to join the Swiss initiative – for reasons of neutrality – but eventually decided to become co-initiator, because it wanted to enhance the respect for human rights in cases where PMSCs were involved – this was its expressed goal as well as being the overall mission statement of the organisation. While the ICRC was driven and motivated by ensuring and promoting compliance with human rights, the UNWG's use of human rights has been more instrumental. The primary goal of the UNWG's regulatory efforts have been to limit the use of PMSCs, not ensure their compliance with human rights. Of course, ensuring respect for human rights ranked amongst the goals of the UNWG and its proposal for UN Draft Convention; but the text has other, equally, if not more important goals. Article 1 of the UN Draft Convention states two its the purposes as being to

“reaffirm and strengthen State responsibility for the use of force and reiterate the importance of its monopoly of the legitimate use of force within the comprehensive framework of State obligations to respect, protect and fulfil human rights, and to provide remedies for violations of human rights” (A/HRC/15/25, Annex Article 1.1.a)

and

“to identify those functions which are inherently State functions and which cannot be outsourced under any circumstances” (A/HRC/15/25, Annex Article 1.1.b).

The protection of human rights is a function of State responsibility for the use of force and the state's monopoly of force. If these two principles are strengthened, and that would be the goal of a Convention, so is the protection of human rights. The reaffirmation of state responsibility for the use of force, and, thus, for some instances of PMSC use is what the Montreux Document does as well. The UN Draft Convention, however, goes further in ‘reiterating the importance’ of states’ monopoly of force, with the intention of identifying what the latter means in practice by identifying ‘inherently state functions’ as already seen above.

Moreover, the self-determination/sovereignty language that the UNWG had traditionally employed in its UNGA resolutions remains in the UN Draft Convention: it further undermines the idea that the UN Draft Convention is primarily about the protection of human rights. The prohibition of “the direct participation of PMSCs and their personnel in hostilities, terrorist acts and military actions” (A/HRC/15/25, Annex, Article 8.1) – note, again, the link to terrorist activities – is not primarily sought to avoid negative consequences for human rights, but because such activities would usually result in “(a) The overthrow of a Government [...]; (b) The coercive change of internationally acknowledged borders of the State; (c) The violation of sovereignty, or support of foreign occupation of a part or the whole territory of State” (A/HRC/15/25, Annex, Article 8.1). Only thereafter does the convention raise the possibility that PMSCs’ direct participation in hostilities could result in the targeted or unintended assault of civilians. The first three points are clearly geared towards external self-determination/sovereignty. The direct participation of PMSCs in hostilities ought to be prohibited, because it is primarily understood as a threat to state sovereignty, not to human rights.

More specifically, while the above passages of the UN Draft Convention primarily point to the threat that PMSC use can pose to external sovereignty, the provisions concerning inherently governmental functions allude to internal sovereignty, in the sense of the monopoly of force. When asked why regulation of PMSCs should go beyond the human rights/humanitarian approach of the Montreux Document, Gomez del Prado (2014) saw this as a “fundamental question” and “a question of respecting democracy”, that the “government that has the power to use force, legal force, cannot just outsource or privatize what we have given them.” Although he refers to the principle of ‘democracy’, this comes very close to what Krahmman (2012) has conceptualized as competing understandings of how to ensure the democratic control of the use of force; his sceptical attitude toward outsourcing shows Gomez del Prado’s ‘republican’ views. Although the UN Draft Convention makes use of human rights language, then, beneath the surface, sovereignty principles have an important effect on shaping the Group’s regulatory approach to PMSC use.

Against this background, human rights language in the UN Draft Convention also serves an instrumental purpose. It is in line with broader normative changes in international society and the strengthening of the human rights regime. With human rights becoming

more important in guiding and shaping state behaviour, the use of human rights language in the UN Draft Convention may serve the purpose of bringing it into line with important norms and making the document more acceptable to states. In this respect, the UNWG may well refer to human rights instrumentally, but it is still driven by a logic of appropriateness: only that its understanding of appropriateness is shaped by a republican view of the monopoly of force and external self-determination as well as by a commitment to anti-mercenaryism, and not by human rights like with the ICRC. If the overall purpose of the convention had been the protection of human rights, then the regulatory approach should not have been to define inherently governmental functions, but making sure that effective oversight mechanisms were put in place (Cockayne 2009: 3) – the route taken in Montreux and consequently with the ICoC.

The West against the ‘rest’? Active opposition meets passive support

How successful the UN Draft Convention is going to be and whether it is going to fare better than the Mercenary Convention remains to be seen. The UNWG’s ‘realistic’ approach to refrain from blatantly banning PMSC use, but instead looking for more subtle ways to prohibit a major part of PMSC activities has triggered mixed reactions. While Russia, China and developing states met the UN Draft Convention with approval, the US and the EU have opposed it (White 2011: 151). Western states have criticised that the UNWG has repeatedly established a link between PMSCs and mercenaries, and its traditional focus on the latter means that the “Draft Convention is arguably tainted by its creator’s history” (White 2011: 136). In the discussions on draft texts of the convention, the US spoke against the “inappropriately broad draft convention” (A/C.3/66/SR.45, para. 41), recognizing that although only a selection of services would be banned under the convention, it would still encompass too many services that are in demand today. The US also asked “to hear the views of a wider representation of international experts [...] including a wider geographic representation as well as more diversified expertise” (A/C.3/66/SR.45, para. 41). Against the Convention, Western states expressed their support for the Montreux Document (A/C.3/66/SR.45, para. 39; A/HRC/WG.10/1/4, para. 61), with the UK pointing out that there were “*already existing* legal obligations” [emphasis in original; D.M.] (A/HRC/WG.10/1/4, para. 54) that states needed to respect.

For advocates of the UN Draft Convention, of course, ‘already existing’ regulation is insufficient and they thus reject this objection of the West. It is, moreover, doubtful whether accommodating the West with their other objection and making concessions on the list of non-outsourcable services, would sway them into signing an eventual PMSC Convention. Rather, it seems Western countries “are still opposed to the concept of a convention, and not merely opposed to the text of the present draft” (Rona 2014). When the open-ended intergovernmental working group on PMSCs discussed the way forward at its August 2014 meeting, the US and EU countries “wanted to paralyse the discussions” and tried to prevent the group from submitting concrete proposals to the Human Right Council any time soon (Daza 2014).

This is also corroborated by Gomez del Prado who, when chair of the UNWG, sought to involve Western countries in the elaboration of the UN Draft Convention. With strong opposition coming mainly from the US and the UK, initially countries like Italy and Spain showed willingness to compromise. But this changed as European countries, too, increasingly came to see PMSCs as a ‘business’ that they had an interest in: they would vote against UNWG resolutions *en bloc* and refrain from engaging in discussions. If the Western group really wanted to change the UN Draft Convention, Gomez del Prado argues, they should have entered into discussions and could have reasonably expected to lower the UN Draft Convention’s regulatory standards and obligations. But “they don’t want any dialogue, no dialogue” (Gomez del Prado 2014).

Finally, while the West is actively opposed to regulation as suggested by the UN Draft Convention, other countries show only weak, or superficial, commitment and support for more binding and stricter regulation. Russia, China and other non-Western states continue to support UNWG resolutions in voting and speak in favour of the UN Draft Convention. But perhaps with the notable exception of Cuba that has played a substantive role in sponsoring UN resolutions on PMSCs, support is limited. It does not amount to pushing and investing resources into bringing the UN Draft Convention, or any alternative framework for that matter, to fruition as Western states have done with Montreux and the ICoC. If Russia and China were “really interested”, they would have been more actively supporting the UNWG and its proposals, and one would have observed more progress with the UN Draft Convention (Gomez del Prado 2014). Others, like South Africa and Columbia, would welcome more binding regulation and actively participate in

discussions at conferences and meetings of the intergovernmental WG, but “after that they are quite inactive. In their behaviour they are not as active as in their rhetoric” (Daza 2014). Whether this weak support is due to non-Western states recognizing the industry as a ‘business’ opportunity, too, or simply not seeing the issue as a priority cannot be answered at this point. Although insufficient evidence, chapter 5 has shown that there are some indications of Russia and China in particular, using or developing their own PMSCs.

The point remains that the passive support that non-Western states extend to regulation that would curtail and limit much of today’s state practice cannot offset the increased legitimation of PMSC use. Not only has the West made extensive use of PMSCs and thereby partially contributed to the legitimacy of the practice, and not only has there been a weak and qualified condemnation of this behaviour in the UN, but the West has also successfully supported a regulatory framework that leaves enough room for current state use of PMSCs, while, so far, blocking more far-reaching regulation. The Montreux Document and the ICoC present an opportunity for the West to demonstrate its willingness to ‘do something’ about the regulation of PMSCs, but nothing that would significantly change what states are currently doing anyway.

Conclusion

This chapter has investigated the roles of the ICRC and the UNWG in the processes of legitimation on PMSC use. Both actors have contributed to the *creation* of these processes by pushing the issue, albeit for different reasons, onto the agenda of international society. International society has been rather slow in dealing with PMSC use and its implications, but world society, in the form of the ICRC and UNWG, has influenced the state-agenda: states joined the Montreux process, and, whether they liked it or not, states debated UN resolutions on PMSCs, UNWG reports, and draft texts for a new UN Convention on PMSCs. This is in line with much of the constructivist literature that sees NGOs, ‘transnational’ or ‘global’ society as agenda-setter, even in the field of security (Price 1998: 622-623; Florini 2000: 212). International society is not the only realm that students of IR should look at if they are interested in questions of normativity in international relations.

More than contributing to the creation of legitimation processes, both actors have also *shaped* them. The ICRC has, through its role in the Montreux process, contributed to the legitimation of PMSC use by acknowledging the phenomenon as ‘reality’ and, thus, normalizing the practice; by clarifying that the use of PMSCs is, indeed, legal in most cases; by weakening the anti-mercenary norm, and, finally, by distinguishing between PMSCs and mercenaries. Although committed to what its critics say is an untenable, even naïve position of impartiality, the ICRC has inadvertently contributed to the legitimation of PMSC use. Its commitment to human rights broadly defined, pushed the ICRC to become active and support regulation intended to uphold the norm. As is often the case in the social world, in international relations and in humanitarianism in particular, intentions and outcomes do not always converge (Kennedy 2004).

On the other side, the picture is not as clear with the UNWG and the effect of its work on the practice’s legitimacy. This is because although its discourse on PMSCs is different from the way it had historically tackled the mercenary issue, there is some continuity in its discourse. When looking not only at the output of the UNGA in the form of resolutions, but also at the debates that accompanied them as well as at the debates on a new UN Convention on PMSCs, and when looking at the remarks and contributions from several UNWG members – not only from Ballesteros whose mandate as Special Rapporteur ended in 2004 and Shameem who was one of several UNWG members – then a different picture emerges: overall, in terms of legitimacy the UNWG has been playing the counterpart to the ICRC. Through its condemnatory language, its recurring representation of PMSCs as mercenaries, and its far-reaching understanding of inherent state functions that should be banned from being outsourced to PMSCs, the UNWG has contributed to the delegitimation of PMSC use.

This might well change in the future: the composition of the UNWG changed in 2013 and group members now distance themselves from the more condemnatory approach of their predecessors as well as pointing out that the current draft for a UN Convention was prepared by the former UNWG members and that there is “nothing particular in that draft that makes it either the baseline or the guide-post” (Rona 2014) for a future convention. At the time of writing, it also looks as if the UNWG is not pushing the current draft as much as it did in the previous constellation (Daza 2014). Nevertheless, the draft analysed

in this chapter remains the basis for discussion so far, and hence continues to shape debates accordingly.

The ICRC and UNWG may be adversaries in the process of legitimation, but they both refer to and make use of human rights. The ICRC's intention in regulating the practice of PMSC use was to promote respect for international humanitarian law. It joined the Montreux process as co-initiator in order to make clear that the new phenomenon was not outside of international humanitarian law and human rights law. The UNWG made use of human rights, too, but did so in a more instrumental way. Its intention was to limit and delegitimise PMSC use – it was not primarily about promoting respect for and ensuring compliance with human rights but to limit a practice that was seen to go against the principles of external self-determination, anti-mercenaryism and a particular understanding of the state's monopoly of force. Both regulatory efforts and their use of human rights language reflect the increased importance of the norm in international society – in the case of the ICRC this was expressed in the organisation's intention of promoting compliance with the norm, and in the case of the UNWG it manifested itself in the group's instrumental use of the norm.

Chapter 8: World Society and the use of PMSCs: Participating in the practice of legitimacy

Whilst the previous chapter analysed how human rights and competing principles of external self-determination, anti-mercenarism and the monopoly of force create and shape the regulatory efforts of the ICRC and the UNWG respectively, this chapter investigates how underlying norms shape strategies of legitimation that are not necessarily directed at or part of regulatory initiatives. Regulation is, of course, a ‘focal point’ for legitimation that non-state actors take part in (Florini 2000: 225), but it is not the only context in which legitimation strategies are developed. Moreover, the focus of this chapter is on how members of world society try to shape international society’s understanding of legitimacy. Although the ICRC and the UNWG are non-state actors, they play an intermediary function in regulation on PMSCs. They provide a forum and hence enable inter-state debate on PMSCs while at the same time shaping it – usually implicitly and inadvertently in the case of the ICRC and rather covertly in the case of the UNWG. Human rights NGOs and PMSC advocates, on the other hand, are often more overt with their evaluations.

This chapter discusses the roles of two NGOs, *Human Rights First* (HRF) and *Control PMSC*, as well as that of the *International Stability Operations Association* (ISOA), an industry association of PMSCs. Far from being unified in their position on PMSC use, world society is probably even more divided than international society over the question of whether and how states should use PMSCs in international armed conflicts, and how regulatory responses could look like. There is not only, as one would expect, disagreement between NGOs and PMSC advocates on the issue; even amongst NGOs there is disagreement, pitting NGOs that adopt a less critical and more pragmatic approach like HRF against much more critical and categorical opposition from members of the Control PMSC coalition. Underlying the divergent positions and strategies are, again, competing normative principles that actors draw on. Moreover, even though all of the actors under investigation refer to human rights, the norm does not have the same weight in their strategies of legitimation and the norm is used both to legitimise and delegitimise contemporary state practice.

Overall, the following discussion corroborates that there is a dividing when it comes to the legitimacy of the state's international use of PMSCs, and that this line cuts across the two societies: in terms of legitimation, Western states, the ICRC, PMSC advocates and to some extent NGOs like HRF find themselves on one side, while states like China, Russia, and the Group of 77, and the UNWG and NGOs like Control PMSC form the other camp. The result of the disunity of non-state actors, as I argue in the conclusion, is that they are going to be less likely to induce fundamental changes to contemporary state practice.

NGOs: adversaries or partners of the industry?

Civil society organisations have followed and partly been involved in the regulatory efforts analysed in the previous chapter. While it is easy to see civil society as a counterweight to state and industry preferences in negotiations, far from being a homogenous block, there is considerable disagreement amongst civil society organisations. What is at issue is how they should engage with the industry and on how far-reaching their calls for regulation should be (Pingeot 2013: 16). There are those organisations that have adopted a pragmatic approach similar to that of the ICRC. They are primarily interested in contributing to more effective regulation of the private military and security industry. HRF is one of the more established NGOs that falls into this camp. On the other hand, some, like the Control PMSC coalition call for more substantial and more binding regulation. They also adopt a much more critical position that is driven by opposition to the industry. In the following, I will look at HRF and the Control PMSC coalition in turn. Both organisations employ human rights in their legitimacy claims. The former is willing to legitimise PMSC use to the extent that more effective regulation is achieved, while the latter is a more principled adversary of the industry whose position is shaped not only by a concern for human rights but also by a commitment to anti-mercenaryism and a republican understanding of the monopoly of force.

Human Rights First: constructive dialogue or unintentional legitimation?

HRF is a US-based NGO that sees itself as an “advocacy and action organization that challenges America to live up to its ideals” and presses “the US government and private companies to respect human rights and the rule of law” (HRF 2015). It has dealt with

PMSCs since around 2005. In line with its mission statement, HRF has “engaged in efforts to promote greater accountability for, and government oversight of, abuse by private security providers” (Roggensack 2013). It published two major reports on PMSC’s human rights performance and accountability, one in 2008 and the other one two years later as a reappraisal of the first report. In addition to its publications, HRF has actively contributed to regulatory efforts in the context of the ICoC. As one of three NGOs in the Steering Committee of the ICoC, it was directly involved in elaborating the ICoC governance and oversight mechanism charter. This charter is meant to give substance to the provisions of the ICoC and ensure that companies adhere to it. HRF was thus one of a few NGOs that were at the forefront of this recent and probably most substantial piece of regulation. Meg Roggensack of HRF is described as one of the ‘key architects’ (Cockayne 2013), and HRF more generally has shown an active participation in ICoC working groups. With its pragmatic and constructive approach to PMSC regulation, HRF brought civil society interests into the elaboration of the ICoC charter. While some may, and do, criticize HRF for partnering with PMSCs, it is clear that HRF spoke out against the industry when it needed to.

Particularly early on in its engagement, HRF was critical of human rights abuses by PMSCs and their lack of accountability. In its 2008 report titled ‘PSCs at War: Ending the Culture of Impunity’, HRF noted the “dramatic and expanded use by the United States of private security contractors in Iraq, Afghanistan and elsewhere” with an increasing number of “serious incidents” that caused “severe problems” (HRF 2008: iii). There was hardly any accountability for the “serious crimes” committed by PMSCs in Iraq and other conflict zones (HRF 2008: 3). The report refers to specific examples of misconduct by PMSC employees, such as the abuses of prisoners in Abu Ghraib, which involved contractors from the two companies CACI International and Titan Corporation (HRF 2008: 52). In contrast to media reports and some of the other critical assessments of the industry analysed below, the HRF report is substantiated by references to documents such as the ‘Serious Incident Reports’ filed by contractors and released by the US Army. They are listed in an annex to the report and document some aspects of contractor misconduct in Iraq. HRF’s criticism of PMSC use in this particular report is, thus, backed up by evidence, more so than reports from other organisations.

Importantly, HRF criticizes both PMSCs' violation of human rights as well as the lack of accountability, which, it argues, is to a large extent due to missing instruments of the US as a contracting state. The report makes concrete recommendations for closing that accountability gap, mainly through national regulation. The approach of HRF can, therefore, be described as pragmatic in that it not only identifies human rights violations by PMSCs, but also provides actionable steps towards preventing or accounting for violations. These recommendations concern more effective prosecution, contractual agreements to respect human rights, civilian compensation, more transparency, and congressional oversight. They do not address the issue of which services are 'inherently governmental', and thus should not be outsourced to PMSCs. In view of controversial debates on that question, and that prohibiting a practice is more difficult than regulating it, the choice to leave the issue aside corroborates the pragmatism of HRF.

The second report by HRF from 2010 has a similar tone and intention. It criticizes human rights violations, notes that some progress has been achieved in holding PMSCs accountable for human rights violations, but that gaps remain and need to be closed. Like the 2008 report, the criticism is accompanied by concrete suggestions for how to improve the human rights impact of PMSCs. The 2010 report repeats earlier recommendations and adds further advice in regard to international regulation: the US government is called upon to support and adhere to both the Montreux Document and the ICoC (HRF 2010: 14-15). This is another indication of HRF's pragmatic approach. Both initiatives, which are linked to each other, have sufficient support from contracting states and the industry – the two types of actors that regulation would primarily be targeted at. Both have accepted the need for regulation and the industry has been calling for it for a long time. Making suggestions for how to improve the respect for human rights in the context of the Montreux and ICoC initiatives will likely prove more successful than focusing on other regulatory initiatives. In fact, neither of the reports even mentions the efforts of the UNWG in drafting a proposal for a UN Convention on PMSCs, nor does HRF as an organisation take a position on the UN Draft Convention (Rona 2014).

The focus is very much on the Swiss initiatives, and HRF has stressed its participation in these processes (Roggensack 2013; HRF 2013). When the ICoC Association, which is responsible for ensuring compliance with the ICoC, was formally established in September 2013, HRF declared that it was "actively involved" in the process "to ensure

that private military and security companies operating in armed conflicts and other challenging environment protect human rights and comply with applicable international law” (HRF 2013). Although Meg Roggensack of HRF made clear that the governance and oversight mechanism of the ICoC would need continued support from all stakeholders so that the ICoC provisions would really be implemented, she also expressed her optimism that the ICoC charter had the “right structure to do the job” (Roggensack 2013). But for the provisions of the ICoC, which is ultimately non-binding and a self-regulatory approach that depends on companies signing up to the code, to be successful, continued engagement from civil society organisations would be necessary; this is why HRF and its partners from the ICoC Steering Committee called on NGOs to contribute to the ICoC (Roggensack et al. 2012). HRF’s pragmatism is, thus, not only expressed in its own contributions, but also in its view of the role of civil society at large. The cautious optimism towards the ICoC is balanced with an understanding that the ICoC can only improve PMSC’s human rights impact if civil society is engaged in regulation.

It is not only HRF’s pragmatic approach to regulation that puts its criticism of PMSC’s human rights abuses in perspective; the organisation has also made clear that it is not opposed to the industry *per se*. As early as 2008, HRF stated that “[m]ost private security contractors can be expected to do their jobs conscientiously and courageously. But they operate in an environment in which the U.S. government has failed to develop the capacity, resources, or legal framework to discipline or punish those contractors who commit serious crimes” (HRF 2008: 6). This was echoed during HRF’s participation in the ICoC: “Let us be clear: we do not oppose PSPs [private security providers; D.M.]. PSPs provide a valuable service to our national security and take great pains to ensure that they are in full compliance with the law” (Roggensack 2013). The critique expressed by HRF is, thus, not all-encompassing; rather, it is specifically targeted at those instances in which PMSCs fail to comply with human rights standards.

Human rights violations are, moreover, portrayed as exceptions. Most PMSCs comply, but some do not. As seen above, for those PMSCs that do not comply, effective regulation needs to be in place to punish or deter such behaviour; thus, part of the critique is directed at state institutions for failing to establish such regulatory frameworks.

Moreover, it acknowledges the benign character of contractors and the positive impact that PMSCs can have in conflict zones. This acknowledgment of a positive role of PMSCs is congruent with the language of the ICoC text itself, which is not surprising considering HRF's active involvement in the ICoC initiative. HRF has also acknowledged the positive role of companies working on the ICoC Steering Committee (HRF 2013). Triple Canopy and Aegis are two of the PMSCs represented on the Steering Committee that HRF explicitly referred to in the press release; in light of human rights abuses that both companies were involved in the past (HRF 2008: 48-49), this is a noteworthy concession, and one that is not usually made by NGOs.

Another, final indicator that helps situate HRF's role in the practice of legitimacy is how it labels the industry. As seen in the previous two chapters the choice of terms matters, and there is some variation on how actors refer to the industry. HRF recognizes that the term 'mercenary' is used pejoratively (HRF 2008: 1), and, therefore, explicitly opts for a 'functional' definition. Leaving the mercenary label and company self-descriptions aside, HRF identifies the term 'Private Security Contractors' as the most useful definition of activities then performed by contractors in Iraq and Afghanistan – essentially security missions involving the, often armed, protection of people and things (HRF 2008: 1). HRF is consistent in its use of terms in that it does not refer to 'mercenaries' or similar descriptions in its subsequent dealings with PMSCs. Like the ICRC and many Western states, HRF refrains from using a term that would equate PMSCs with the illegal and, in many respects, illegitimate use of mercenaries.

What this all amounts to is that HRF is not seeking to delegitimise PMSC use. Its criticism is specific to instances of human rights abuse and is also addressed at state institutions for failing to establish effective regulatory frameworks. It adopts a pragmatic approach that is geared towards preventing and holding PMSCs and states accountable for violations; it wants to regulate, not prohibit PMSC use. Finally, it opts for a more 'descriptive' label for PMSCs; the fact that it finds the mercenary term pejorative and thus tries to avoid it, shows that it does not intend to delegitimise PMSC use.

Control PMSC

The Control PMSC coalition shares HRF's goal to improve the human rights impact of PMSCs and their clients. Although it is a coalition of several NGOs, what the coalition has in common and what distinguishes it from HRF is a much more critical view of PMSCs, and that they call for stricter, binding regulation on and a reduction of PMSC use. On the first issue, their use of negative evaluations of PMSCs, the declaration of the coalition states that "PMSCs have had a dramatic impact on human rights [and; D.M.] violations include[d] torture, indiscriminate killing of civilians, and the breaches of contractors' labour rights" (Control PMSC 2015). This trend, described as a "growing crisis of PMSC misconduct and impunity" (Control PMSC 2015), was continuing and states had failed to respond adequately. To some extent, these evaluations go further than how HRF describes the industry. While HRF talks of a 'dramatic' expansion of PMSC use, the coalition describes PMSC's impact on human rights as 'dramatic'. On the other hand, HRF, too, talks of 'severe' problems. It also lists some of the violations PMSCs have been involved in, and does so in a more comprehensive way than the coalition has done in any of its publications. But because HRF does so in a factual manner in the annex of its 2008 report, and the coalition refers to these crimes at a prominent place in its 'mission statement', it seems that the coalition is more intent on portraying PMSCs as violating shared normative standards. The difference to HRF becomes more apparent when analysing reports and statements of members of the Control PMSC coalition.

The UK NGO War on Want is probably the most outspokenly critical member of the coalition. It has been trying to delegitimise PMSC use with a consistently negative portrayal of PMSCs that has equated them with mercenaries, failed to differentiate between those companies that violate human rights and those that do not, and did not attribute any positive function to the industry.

The subtitle of one of its main reports presents PMSCs as a 'threat' (Mathieu and Dearden 2006), and a more recent publication from 2012 describes them as a "deadly industry" (War on Want 2012: 3) and promises to look deeper "into the murky underworld of private military and security companies" (War on Want 2012: 2). War on Want bases its claims of illegitimacy on the idea that PMSCs accept human rights abuses in their efforts to maximize profit. The 'privatization of war' is seen as a phenomenon

where companies profit from conflict and instability; while people suffer, PMSCs “thrive off conflict” (Mathieu and Dearden 2006: 1), and are, therefore, “complicit in human rights abuses across the world” (War on Want 2012: 2). Human rights abuses by PMSCs are not an unintended exception to the rule, but rather a logical consequence of the profit motive. Cases that involved violations by companies such as Blackwater and Dyncorp, or Titan and CACI Int. in Abu Ghraib prison are said to “do no more than scratch the surface of PMSCs’ violations of human rights and international humanitarian law” (Mathieu and Dearden: 15). They are also said to play an active role in these abuses. For example, rather than an accidental incident as part of their contractual obligations, War on Want presents the infamous Nisoor Square incident as one where “Blackwater [...] massacred 17 civilians” (War on Want 2012: 2). This portrayal of PMSCs’ deliberate abuses and aggressive stance is reinforced by a picture on the following page showing a contractor pointing a rifle and shouting at a group of protestors in Baghdad (War on Want 2012: 3).

Another way in which War on Want attempts to delegitimise PMSC use is by employing the ‘mercenary’ label. Its first report on PMSCs is titled ‘corporate mercenaries’ and argues that “[m]ercenaries must not be allowed to threaten peace and security around the world in the name of corporate profit” (Mathieu and Dearden 2006: 1). Sometimes the terms are used interchangeably; sometimes they are used together such as in “Blackwater mercenaries” or “PMSC mercenaries randomly shooting automatic weapons at civilian cars on the road to Baghdad airport” (Mathieu and Dearden 2006: 14). At the same time, PMSCs are understood as the successors of or as the ‘new’ mercenaries. Today’s PMSCs were different from mercenaries of the past in that they “are not just individual soldiers of fortune. They are corporations, providing a range of services above and beyond what the traditional mercenary could offer” (Mathieu and Dearden 2006: 3). By also focusing on the offensive nature of PMSC activities, the link to mercenarism is reinforced; because PMSCs offer armed security and often find themselves in situations where they need to use force, they are, it is argued, no different from mercenaries. Especially in conflict environments like Iraq, no distinction could be made between combat and non-combat roles (Mathieu and Dearden 2006: 2). PMSCs may want to stress the defensive, non-combat nature of their services, but would often find themselves in a combat role due to the environment in which they operate. The emphasis on the violent nature of PMSC activities also comes through in phrases like “mercenary armies” (Mathieu and Dearden 2006: 1), and the way the general phenomenon of private security and military is

described as a ‘privatisation of war’ (War on Want 2012). Using the ‘PMSC’ and ‘mercenary’ terms interchangeably, establishing a historical link between the two and focusing on the offensive services provided by today’s industry, therefore, demonstrates an obvious attempt to rub the illegal and illegitimate standing of mercenaries off on PMSCs. The same strategy that is employed by some states and members of the UNWG in the context of discussions on UN resolutions and the UN Draft Convention on PMSCs is also used by NGOs like War on Want.

Control PMSC’s participation in the ICoC Steering Committee should be seen against the background of a more pronounced criticism of PMSC use and efforts to delegitimise the practice. It is far less active than HRF and has not contributed as much substantially in the preparatory work of the charter of the ICoC Association. In fact, besides its more critical stance towards PMSCs, Control PMSC differs from HRF in that it deems self-regulation insufficient and calls for a general reduction of PMSC use; in turn, these two differences might explain its less active engagement with the ICoC. The first, perhaps surprising, difference to HRF is that it participates in the ICoC formally, while at the same time emphasizing that the ICoC as a voluntary code of conduct is insufficient to effectively preventing human rights abuses and holding PMSCs accountable (Control PMSC 2015). Together with other civil society organisations, of which HRF was not a part, it made some suggestions for how the certification, monitoring, reporting and complaint mechanisms of the ICoC could be improved, but concluded that even if these issues were taken up, the ICoC “which envisions termination of membership as the ultimate sanction for non-compliance, is not equipped to deal with serious human rights violations, such as murder and torture” (Control PMSC 2013a). Control PMSC does not see the ICoC as a sufficiently robust regulatory framework, but merely conceives of and welcomes it as a “multi-stakeholder dialogue process and opportunity to raise visibility and increase transparency” on the industry (Control PMSC 2013b). Instead, it calls for binding regulation on national and international levels; the ICoC could then be a helpful step towards starting a discussion on such regulation (Control PMSC 2013a).

Closely linked to these calls for binding national and international regulation are Control PMSC’s demands for a reduction of PMSC use. It deems the ICoC insufficient, partly because of its voluntary nature, but also because it disagrees with the range of services PMSCs are allowed to perform according to the ICoC document (Control PMSC 2013b).

The coalition regards ‘security’ and the use of force as an inherently governmental function that should not be outsourced, and it believes that “States, international organizations and corporations should drastically reduce their reliance on PMSCs” (Control PMSC 2015). This not only explains its sceptical approach towards the ICoC, but also why it calls for binding regulation, which it essentially understands as limiting the range of services offered and performed by today’s industry.

War on Want is very clear on this; it campaigns for binding regulation in the UK that would prohibit much of today’s PMSC services. According to War on Want legislation should “outlaw PMSC involvement in all forms of direct combat and combat support, understood in their widest possible senses” (Mathieu and Dearden 2006: 2). ‘Combat support’, of course, can include a wide variety of services, especially if it is explicitly stated that it should be interpreted broadly. And when looking, for example, at War on Want’s campaign against G4S and its involvement in prison detention in Israel or the UK, it immediately suggests that the NGO has a very broad conception of the type of services that should be outlawed.

The linkage between calls for binding regulation and a reduction of PMSC use is reminiscent of the UNWG’s approach to have a UN Convention on PMSCs. Like the UNWG, Control PMSC seeks regulation of PMSCs that would effectively amount to a ban on many services provided by today’s companies. In fact, the very first paragraph of the coalition’s declaration, which can be understood as a sort of mission statement states: “calls for the adoption of binding international and national regulations to limit the privatization of warfare and security, to regulate the activities of private military and security companies and hold these companies accountable for their human rights abuses and violations of the law” (Control PMSC 2015).

Holding PMSCs accountable for human rights abuses is one goal amongst others, but an equally important, if not more prominent goal is the limitation of PMSC use. This is not only because limiting PMSC use is mentioned as a first thing and then repeatedly throughout the declaration. It is because of Control PMSC’s approach to deem non-binding regulation, which improves PMSCs’ human rights performance and accountability while not leading to an extensive curtailment of today’s practice, insufficient. It explains why the organisation has participated in the concrete work of the

ICoC Steering Committee only half-heartedly – because it has two goals that require different actions. Limiting PMSC use may be a way to improve the human rights situation, but it requires further regulatory steps that go beyond what the ICoC covers and stands for.

Pursuing one goal, regulation within the ICoC, may jeopardise efforts to reach the other goal, a reduction in the use of PMSCs. Control PMSC member organisation War on Want has explained that it is mistrustful of the ICoC because it “will be used by companies to legitimise the industry, and will stand in the way of proper controls” (War on Want 2012: 3). HRF, in contrast, has one key goal, and that is to improve companies’ human rights performance and accountability. Because it believes that the ICoC can contribute to this goal, it has invested substantial efforts in making the ICoC more effective.

The call for a reduction of PMSC use is driven by the idea that there are inherently governmental functions that would, if outsourced, undermine the state’s monopoly of force. Control PMSC agrees with the list of such inherent government functions suggested in the UN Draft Convention. Moreover, like Gomez del Prado, Felipe Daza, a representative of the coalition, justified the call for a limitation of PMSC use by a concern that the practice would undermine sovereignty and the “democratic mechanisms of our societies” (Daza 2014). Similar normative standards lie beneath and consequently result in similar regulatory approaches and, more broadly, strategies of legitimation. While both human rights and sovereignty figure in the discourse of Control PMSC, it is a particular understanding of internal sovereignty that leads to the call for a limitation of PMSC use, and, hence marks the difference between Control PMSC and HRF. For the Control PMSC coalition, PMSC use has implications not only for human rights, but also for sovereignty. The coalition’s statements and activities certainly demonstrate a concern for the human rights implications of PMSC use. There is also a sense in which the instrumental utility of referring to and justifying in terms of human rights is recognized: “if you speak from a human rights perspective you have legitimacy” (Daza 2014). But overall, even if human rights violations are a genuine concern, in its approach to PMSCs the coalition goes beyond a narrow human rights focus that characterises HRF, and also addresses the implications of contemporary state practice for sovereignty.

What becomes clear, then, is that there is not a coherent alliance of NGOs that acts in concert in regulating the industry. When it comes to states' use of PMSCs, world society can hardly muster the sort of alliance that brought about a ban on landmines in the 1990s. The International Campaign to Ban Landmines (ICBL) saw one thousand NGOs from more than sixty countries united in their efforts and supported by organisations like the European Parliament and individuals like the Dalai Lama; the ICRC, too, actively supported the ban (Price 1998). The unity of the ICBL went hand in hand with a broad agreement amongst the activists that there should be a total ban on landmines (Mekata 2000: 155). Similarly, advocates of the prohibition of chemical weapons called for a total ban (Price 1995: 90). In both cases, actors wanted to prevent loopholes, anticipate the use of e.g. 'smart' landmines, and generally avoid legitimising particular applications not covered by the ban. On PMSC use, however, the ICRC and the UNWG, HRF and Control PMSC find themselves on different sides of the debate. Some 37 NGOs are part of the Control PMSC coalition, and only some of them want far-reaching prohibition of PMSC use.

There are, thus, important elements of disagreement amongst members of world society on the question of how to deal with the increased use of PMSCs in contemporary international society. Some, like, HRF, while critical of PMSCs' human rights abuses, adopt a pragmatic approach that focuses on how to improve the human rights performance and accountability of PMSCs through the ICoC. HRF is, thus, very much in agreement with the ICRC's pragmatic contribution to the Montreux Document, which is, after all, the basis for the ICoC. On the other hand, Control PMSC shares a much more critical view of PMSC use with the UNWG. The latter seek to delegitimise PMSC use partly by condemning their human rights violations, which are often the result of companies profit motive; by labelling companies as 'mercenaries'; and, most importantly, by pursuing a regulatory approach that is shaped by a concern for a particular understanding of state sovereignty and that effectively amounts to a ban on a wide range of services performed by PMSCs today.

The divide in world society, in fact, even runs through the Control PMSC coalition. The coalition statement expresses a compromise between the more principled opposition to the industry and state practice of War on Want and other members, and the more pragmatic approach of, for example, Novact, that is at the helm of coordinating the

coalition. While the coordinators of the coalition acknowledge that putting a ban on the industry is not feasible, and, thus, seek a pragmatic, “diplomatic” approach “oriented toward the international debate”, others like War on Want pursued a more confrontational approach as expressed, for instance, in the campaign against the activities of G4S (Daza 2014). The coalition’s goal ‘to limit’ outsourcing, therefore, expresses a compromise formula between outright prohibition and pragmatic acknowledgment of contemporary state practice (Daza 2014). The coalition continues to support the limitation of PMSC services as expressed in the current UN Draft Convention. At the same time, however, there is a realization that the debate is moving on and probably moving beyond the proposals of the current UN Draft Convention, and that the coalition needs to adapt and engage in discussions on other mechanisms to regulate the industry (Daza 2014).

In conclusion, this division amongst non-state actors means that sweeping changes to the status quo of today’s increased PMSC use are unlikely to come from world society, particularly if we take into account that PMSC advocates, too, are involved in processes of legitimation and are intent on legitimising the practice.

PMSCs: Seeking legitimacy

If NGOs are criticising PMSCs for their violation of human rights, and are partly trying to delegitimise the practice on that basis, it may come as a surprise that PMSCs and their advocates are utilizing the same norm to legitimise the practice. The same norm is used for different, opposing purposes. In the following, I will have a closer look at how advocates of PMSCs make use of human rights in their effort to legitimise the practice.

Supporting regulation and dodging the ‘mercenary’ label

While I focus on human rights, it is clear that PMSCs legitimise the practice on the basis of other principles such as their technical and security expertise (Cutler 2010; Leander and van Munster 2007). They also see regulation of PMSC use as well as distancing themselves from the mercenary label as avenues for gaining legitimacy; I am mentioning these two issues again, because they are linked to human rights. As shown in the last chapter ISOA has welcomed the Montreux Document and ICoC, PMSCs have been

actively involved in the latter, and critics of the two regulatory documents have, in turn, opposed what they see as industry-friendly regulation that adds to the practice's legitimacy without limiting it effectively. ISOA has also seen regulation as a way to improve companies' human rights performance, and blamed states and international organisations which did not acknowledge those efforts as "doing a disservice that undermines peace operations in Africa and beyond" (Brooks 2009a: 6). The industry had an interest in higher standards and effective regulation, which they had contributed to; critics, PMSC advocates argue, would need to accept this and reconsider their opposition.

Distancing themselves from the mercenary label is another key legitimisation strategy. The previous chapters have already shown how terminology is contested and continues to be used strategically by state and non-state actors. Of course, PMSCs themselves try to not be labelled as mercenaries, which they mainly do by selecting alternative and favourable descriptions of their industry. ISOA is a case in point. The industry association was founded as the 'International Peace Operations Association' in 2001 before changing its name to the International Stability Operations Association to account for the broader spectrum of activities that its member organisations were involved in (ISOA 2015). ISOA's flagship publication, which is better seen as a marketing instrument rather than academic journal (Renouf 2011: 168), the *Stability Operations Magazine* (referred to as ISOA publication in the following) saw similar name changes, and ISOA's logo changed from the original sleeping lion to a shield in 2010.

On the one hand, then, the industry complains about being labelled 'mercenary' by the UNWG, NGOs like War on Want and others; it is a wholly pejorative term, they say, that did not accurately describe today's industry. Industry advocates hold that there was nothing wrong in providing security for profit, just as one could not expect effective humanitarian help to be exclusively provided on a voluntary basis in places like Haiti (Messner 2010: 38). Again, there is the link to human rights – PMSCs provide valuable, paid, services that help uphold human rights worldwide, and critics should not denounce that work as 'mercenary' because of it. Also, if companies were labelled 'mercenary' because of their profit motive, then UN peacekeepers from most developing countries should be referred to as 'mercenaries', because they, too, have financial motives (Messner 2008: 24). So PMSCs and their advocates oppose such, in their view, purportedly inaccurate and biased descriptions.

On the other hand, they clearly see the utility of using benign company names or industry descriptions, including the words ‘peace’ or ‘stability’, that are arguably not “neutral, descriptive and accurate” (Brooks 2010: 4). Along with actors like the UNWG and NGOs like War on Want, PMSCs and their advocates are, therefore, also involved in this struggle for words, which is an important part of the legitimation process around PMSC use.

The strategy of ‘humanitarian entrapment’

Beside these two key legitimation strategies, industry advocates have also sought to legitimise PMSC use by more directly employing human rights. This has, for example, happened in the form of ‘frame appropriation’, where PMSCs portrayed themselves as and adopted the identity of humanitarians (Joachim and Schneiker 2012). This has also happened, as I argue in the following, through efforts to make use of what can be called a ‘humanitarian trap’. In a different empirical context, Schimmelfennig (2001) has shown how Central and Eastern European governments were successfully exploiting the idea of ‘rhetorical entrapment’ in gaining support for the EU’s 2004 enlargement to the East. Western European governments found themselves in a situation where their sceptical attitude and hesitance toward enlargement was inconsistent with their prior commitment to common norms. They found themselves in a ‘trap’ in that Central and Eastern European governments shed light on this inconsistency and urged EU governments to adhere to common norms and give up their opposition to early enlargement.

In a similar vein, PMSCs, through their industry association, seek to ‘entrap’ Western governments. Here, the ‘trap’ consists of Western government’s rhetorical commitment to a human rights regime that is supposedly contradicted by their failure to commit resources to military and non-military interventions geared at upholding human rights. The normative pull exerted on states stems from the notion that states care about their identity as ‘good’, responsible members of international society who adhere to their normative commitments. Highlighting the divergence of rhetoric and behaviour puts states under pressure by challenging their identity as ‘norm-abiding’ members of society. The dissertation’s analytical framework would assume that this effect generally applies in

international society, although case-specific analyses would be necessary to assess to what extent states feel and act on this pressure.

There are two mechanisms through which the strategy of humanitarian entrapment, specifically, can affect legitimacy. First, the potency of this strategy arises from the particular character of human rights and what one does when referring to them. Human rights claims express “a capacity gap – where the rights holder is held to lack the capacity of acting on their own behalf – therefore an external agent is held to be required to enforce these rights” (Chandler 2009: 113). The perlocutionary effect of human rights claims is to raise the issue of protection and enforcement: human rights discourse amounts not only to a “demand for respect, but also of protection” (Fabri 2008: 41). The ingress of human rights discourse in the practice of legitimacy on PMSC use may, therefore, have an unintentional and adverse effect in the eyes of the ICRC and NGOs like War on Want respectively. It provides a context in which PMSCs, too, invoke human rights; they do so while more explicitly calling for enforcement of the right. Since, as they argue, states are not willing or able to enforce the right, they can then put the ‘PMSC option’ forward as a solution to the question of enforcement.

The second way in which the strategy affects legitimacy is through eroding an important element of the anti-mercenary norm, namely the idea that private force is wrong because it is motivated by financial gain, not by a ‘higher’ cause. What regulation does to the objection that PMSCs are not under legitimate control, reference to human rights does, to some extent, to the objection that PMSCs are essentially profit-driven. The strategy does not change PMSCs underlying incentives, but it allows them to divert attention away from motive to positive humanitarian impact. It ties into what Joachim and Schneiker (2012) have observed about PMSCs’ humanitarian frame appropriation. But it goes further than assuming the humanitarian frame: humanitarian entrapment creates a stark contrast between states’ inaction in the face of human rights abuses, and PMSCs’ own willingness to do something. It is in this juxtaposition of action and inaction that PMSCs’ financial motive fades into the background.

From 2004 to 2012, ISOA’s publication saw several articles pointing to humanitarian needs, presenting the ineffectiveness of current measures as well as Western unwillingness to do more, arguing how this was in contradiction with fundamental norms

that the West shared, and then suggesting the use of PMSCs as a way to uphold human rights and, thus, aligning rhetorical commitment to norms with actual behaviour.

Several articles in the journal, while not explicitly referring to PMSCs, describe humanitarian emergencies and situations in which human rights are threatened, and, thereby, lay the foundation for the suggestion to make more use of PMSCs. From Haiti, where the UN would need to “maintain a security and development presence for at least a decade” (Forman 2010: 8) to ‘Africa’ as a whole, for which UN peacekeeping will remain a reality and ‘growth industry’ in the foreseeable future (Cohen 2011: 41): the publication provides portraits of conflicts without necessarily expanding on the (potential) role of PMSCs. Usually, articles would also highlight the failure of the UN to improve the human rights situation in conflicts. These would involve reviews of UN failure in cases like the Rwandan genocide (Brooke and Hedlung 2007), but also analyses of on-going conflicts. In 2004, for example, the UN failed to prevent rebels from capturing towns and monitoring borders and airspace in the DRC, partly because it had only received a fraction of troops from member states that the UN Secretary-General had deemed necessary for the mission (Mason 2004: 7). In Lebanon, the UN mission had difficulties getting peacekeeping forces together due to member states’ sensitivities as to soldiers’ country of origin; the author concludes that not only would the UN risk failing to keep the ceasefire, but “also its own legitimacy in the world system” (Schenkel 2006: 8). Similarly, blue helmets from Fiji would come from a state that was hardly democratic, with the author criticising this stance as a ‘luxury’ the UN could not afford (Messner 2009a: 36). Examples of UN failure abound – what is noteworthy is that the ISOA publication highlights them, only to then utilize a situation that is portrayed as inadequate for upholding human rights.

A common theme of articles that point to UN failure is the unwillingness of the West to contribute to current operational efforts. In a 2007 article, ISOA Director of Programs and Operations Messner poses the rhetorical question ‘Where’s the West?’ and notes that unless “the nations of the West experience a collective epiphany sometime soon, it is unlikely that Western participation in UN peacekeeping will improve in the short- to mid-term” (Messner 2007: 28). Several other authors echo this. The West was “shamefully reluctant” to send its own militaries to UN missions, and due to its “general abrogation of its responsibilities to contribute to peace operations in places such as the DRC, Congolese

citizens continue to die at a rate of more than 1,000 per day, a mortality rate that far exceeds that of Iraq and Afghanistan combined” (Wright 2006: 20). To relieve the ‘misery of millions’, all countries would need to contribute their fair share and send well-trained troops to UN missions, but unfortunately, “this is not the world we live in” (Reid 2007: 20). The unwillingness of the West is explained by their aversion to casualties. When they deploy, it is under their own national or EU/NATO command and for a limited duration. What this would show is that conflicts like the one in the DRC are not “important enough to risk putting Western soldiers permanently under MONUC command [UN mission in DRC; D.M.]. It also feeds perceptions that two classes of operations exist: missions with Western troops and those without” (Williams 2009: 12). ISOA president Doug Brooks writes on the same case and first describes the dire humanitarian situation in the country in bleak words:

“the civilian death toll rises by hundreds or thousands every day. Most victims aren’t shot or knifed but instead are chased away from their farms and homes by armed thugs. The most vulnerable, especially the very young or weak, simply die of starvation or disease in the bush. Ethnic cleansing, systematic rape, cannibalism, child soldiers and massive illegal exploitation of natural resources are all outrages of this war” (Brooks 2009b: 19).

Brooks then finds that the UN peacekeeping mission in the country was “badly overstretched” and the “limited deployment of these Western nations in DRC unfortunately does little to fundamentally alter the country’s brutal conflict” (Brooks 2009b: 19). A stark contrast is thus created between a desperate humanitarian situation in many conflicts around the world, with a particular focus on Africa, and the failure of the UN and unwillingness of the West to do more.

What follows from this, then, is the almost inevitable call to close the gap, and the industry, is, of course, all set to do just that – but not before stressing how states’ current behaviour contradicts fundamental norms. The contention is that the West does not want to invest the material resources and troops needed to support UN missions, because if it was “really serious about peacekeeping operations succeeding” (Messner 2008: 24), its actions would match words. Max Boot puts this idea in a nutshell when criticising states’ lack of support for UN and African Union efforts in Darfur:

“If the so-called civilized nations of the world were serious about ending what the U.S. government has described as genocide, they would not fob off the job on the U.N. They would send their own troops. But of course they’re not serious. At least not that serious” (Boot 2006: 9).

The author then suggests the use of PMSCs like Blackwater to ‘stop the genocide’, before, again, criticising “the moral giants who run the United Nations. They claim it is objectionable to employ private security companies. More objectionable, it seems, than passing empty resolutions, sending ineffectual peacekeeping forces and letting genocide continue” (Boot 2006: 9). One way in which the gap between norms and congruent action is highlighted is postulating what ‘civilized’ nations would do. Another way in which this is done is through pointing out how states put their ‘national interest’ before their compliance with norms. Brooks describes it as a ‘reality’ that “the West has largely abandoned international peace operations which do not directly support their national interests” (2008: 10). States fail to act as ‘civilized’ nations and instead put their ‘national interests’ first. PMSC use, then, becomes a means to overcome parochial national interests.

But when the focus is on states’ reasons for not acting, PMSCs’ motive for acting becomes secondary. More than that, their motive is less important than what they could achieve. The human rights ‘fairy tale’ (Benthall 1993: 188-191) of the victims, the villains and the saviour is adopted by PMSC advocates – with the difference that the ‘West’ is idly standing by, while PMSCs are the saviours that could come to the rescue. There is an interesting parallel here to what Krahnemann (2012) has observed in regard to mercenaries’ reconstruction as ‘PMSCs’ in international law, namely that PMSCs’ motivation becomes negligible for their legal classification. It seems that PMSCs can and do contribute to this process via the strategy of humanitarian entrapment.

Boot’s (2006) article incorporates all elements of the ‘humanitarian trap’: he describes the dire humanitarian situation in Darfur, explains the ineffectiveness of current UN measures and lack of political will on behalf of (Western) states to contribute more, he succinctly highlights how this lack of action runs counter to human rights norms and then presents the use of PMSCs as a way out. It is interesting to see that he attacks the unwillingness to consider the use of PMSCs from a normative position: for Boots, the moral thing to do is to ‘stop genocide’ by using PMSCs. For him, it is immoral to put normative objections to

the use of PMSCs over the moral requirement to ‘do something’ in Darfur. A similar evaluation comes from Messner, only that he talks of an “irrational aversion” (Messner 2008: 24) to the use of PMSCs. It is ‘irrational’ in the eyes of the contributors, because it is permitting large-scale and widespread violation of human rights to unfold while it could be prevented. It would also be partly inconsistent with current UN practice that allows for the protection of facilities but not of people (Brooks 2009b: 20). A more pragmatic approach was called for, one that worries less about PMSCs and the possible drawbacks of using them, and more about solving humanitarian crises. Rather than worrying about PMSCs “with lofty philosophical arguments that do nothing than score debating points at policy forums in Geneva, London or New York” (Messner 2009b: 40), international society had to finally recognise that PMSC use was a viable and necessary option. Part of the ‘lofty philosophical’ debate, of course, concerns PMSCs’ profit motive, which is, in this view, far less important than solving the problem at hand.

The solution, then, was to make more extensive use of PMSCs in UN missions with the goal of upholding basic human rights. PMSCs were not a threat to states, nor to the UN, but a resource they should use. Humanitarian organisations, advocates say, understand that in order to make lasting improvements to the human rights situation in a country, security had to be established first, which PMSCs could ensure – and not only did PMSCs provide security more effectively and cost-efficiently, but they often had a better ‘human rights record’ than national militaries and peacekeeping forces (Brooks 2006a: 2). As Brooks puts it, the private security and military industry was ultimately about “lives, not money: more successful peace operations mean more people will be alive to enjoy the future” (2005: 2). To achieve a more “humane world” (Brooks 2011: 34), PMSCs needed to make even further improvements to their performance in the future, but they were already providing “very real humanitarian value” (Brooks 2010: 4).

While many in the West, for example, saw Executive Outcome’s operation in Sierra Leone in 1994 as the worst episode of PMSC activities, they forgot about the “exuberant cheering that greeted Executive Outcomes throughout Sierra Leone” (Messner 2009b: 39); the suggestion is that people on the ground appreciate PMSCs’ positive humanitarian role that was often neglected elsewhere. Another advantage of PMSC use was that they did not bring up some of the issues that have hamstrung UN peacekeeping, such as political sensitivities concerning the origin of peacekeepers.

More effective, cheaper, a better human rights record than most public militaries, less political limitations, and most importantly: willing. What the West lacks, PMSCs have: the willingness to operate in dangerous environments (Schenkel 2006: 8). If states were unwilling to meet their obligations, not only in humanitarian emergencies but also in providing security more generally, then “what else can be done?” (Mohlin 2008: 14). Ultimately, PMSCs were a ‘realistic’ option that states and the UN should consider. This was particularly so against the background of continuing humanitarian crises, which were met by generally ineffective peacekeeping forces as well as an unwilling West. Proponents of an expanded use of PMSCs argue that while the West may not be willing to commit its own soldiers to such missions, it would still have the resources to fund UN missions that were supported by the industry (Wright 2006: 20). This argument, encapsulated in the motto ‘write a cheque, end a war’ (Brooks 2000b) is simple and has some cogency. If states fail to live up to their responsibility this may be easier for them to justify if it is a matter of putting one’s soldiers at risk. But if it is a matter of either contributing financially or not doing anything in the face of humanitarian emergencies, then the assessment has changed: it is just a ‘cheque’ after all that is required to stop people’s suffering. The choice is, PMSCs suggest, as simple and straightforward as that. PMSCs are “readily available resources” and if they are not used it “would be positively ruthless” (Brooks 2006b: 4).⁴⁵

It is not entirely clear where the strategy of humanitarian entrapment would be located on a spectrum from the traditional ICRC humanitarianism to the human-rights based ‘new humanitarianism’. The latter seeks the long-term ‘greater good’ as opposed to short-term relief, and encompasses a range of instruments, which includes military intervention (Fox 2002: 22). On the one hand, the strategy of humanitarian entrapment stresses the urgency of humanitarian crises and thus fits with the short-term relief associated with classical humanitarianism. But advocates also see the use of PMSCs as one element in a long-term strategy to improve the human rights situation. What clearly separates the strategy from classical humanitarianism is the departure from the principle of neutrality as well as the emphasis on military means to achieve humanitarian outcomes.

⁴⁵ The proposition, and, indeed, current practice of PMSCs (and other companies) acting in a humanitarian capacity or in support of humanitarian goals, whether this entails logistical support or tip-of-the-spear services, raises thorny questions about what humanitarianism means today (Hopgood 2008), and how the ‘traditional’ humanitarians ought to interact with PMSCs (Spearin 2007; Bjork and Jones 2005).

In these two respects, the strategy is embedded in and PMSCs can take advantage of the trend toward a ‘new humanitarianism’. When military intervention is conducted under the umbrella of humanitarianism, PMSCs are yet another element of the ‘armed humanitarian’ phenomenon (Hodge 2011). This broader trend as well as the general fuzziness of the concept of humanitarianism (Joachim and Schneiker 2012), helps the strategy. And so does the human rights-focus in regulatory efforts and the practice of legitimacy more generally: not only do human rights side-line more far-reaching regulation, but industry advocates also make use of the norm to legitimise the use of PMSCs.

Conclusion

Members of world society are actively involved in the process of legitimation. They try to delegitimise or legitimise states’ international use of PMSCs, and they do so by grounding their claims and strategies of legitimation on human rights, a particular understanding of the monopoly of force and anti-mercenarism. In this chapter I have focused on two NGOs, Human Rights First and Control PMSC, and one PMSC advocate, the International Stability Operations Association. These non-state actors all refer to human rights, but they do so for different purposes. While Control PMSC member organisation War on Want claims that the state practice is not legitimate because it violates human rights, ISOA argues the exact opposite: in the face of UN ineffectiveness and Western unwillingness to do more, more extensive use should be made of PMSCs to uphold human rights. The former delegitimise and the latter legitimise the practice, but both invoke human rights. The norm, thus, serves different purposes in processes of legitimation, which demonstrates the equivocal nature of the norm.

It is also evidence for the norm’s prominent place in international society. Non-state actors either follow a logic of appropriateness or they look at the norm more strategically, realising the cogency of the norm in international society. Human Rights First belongs to the former. It is driven by the desire to improve the human right situation around PMSC use, and consequently adopts a pragmatic approach to regulation. It works for tangible improvements in regulation and does not have reservations when it comes to working together with PMSCs in the ICoC framework. Far from questioning the legitimacy of

PMSC use, it takes the practice as it is, and looks for ways how the companies and their clients can ensure a better human rights performance and how they can be held accountable. What is more, its critique of PMSCs' human rights abuses is specific to those very instances. It does not generalize its criticism to the whole industry, and does not label companies as 'mercenaries'. It even acknowledges the positive role of PMSCs in international society. Human Rights First does not see regulation as an arena for legitimising or delegitimising PMSCs use, but as a means to improve the human rights situation.

This is different from Control PMSC, particularly for its member organisation War on Want. The latter is much more critical of PMSC use; it generalizes its critique to the whole industry, and since companies were out to make a profit, human rights abuses were the rule, not the exception. It equates PMSCs with 'mercenaries' in a different disguise, but essentially as violent, profit-motivated and illegitimate as ever. Although the coalition as such is less outspokenly critical, its opposition against the practice comes through in its regulatory demands. It regards the ICoC as insufficient, which explains its less active participation in the ICoC Steering Committee. And it calls for binding regulation that amounts to a prohibition of many services provided by today's industry – in that it is not primarily driven by concern for human rights but by a commitment to a republican understanding of the monopoly of force.

PMSC advocates share NGOs' references to human rights, and try to legitimise the practice by exploiting the 'humanitarian trap'. ISOA has used its flagship publication to highlight how ineffective UN missions and the unwillingness of the West to contribute more, has led to widespread and large-scale human rights violations. It argues that this lack of necessary action was contradicting human rights norms that states had committed to. If one was really serious about upholding human rights, then PMSCs offered an easy way out: states would need to pay, but not risk their own soldiers, for PMSCs to get involved and help uphold human rights around the world. The strategy benefits not only from the trend towards a 'new humanitarianism' and the fuzziness of the concept of humanitarianism, but also exploits the human rights-centred debate on PMSC use. Where critics point to PMSCs' human rights abuses, PMSCs can, in turn, deflect that critique with a strategy of humanitarian entrapment that comes to the exact opposite conclusion:

that the companies help uphold human rights, and, are thereby in the service of a ‘good cause’.

In summary, PMSC advocates and Control PMSC lie on opposing sites of a spectrum of non-state actors trying to legitimise or delegitimise the state practice, with Human Rights First somewhere in between. PMSC advocates’ strategy of humanitarian entrapment is not merely directed at changing state behaviour. On a deeper level, it challenges the idea that there is something inherently wrong about PMSCs, something that would justify not using this ‘readily available resource’ to stop humanitarian emergencies. Whether the strategy of humanitarian entrapment is going to prove successful in changing state behaviour or whether states will continue to have “ample capacity for accepting shame” (Sandholtz and Stiles 2008: 288) requires a more in-depth analysis of PMSC-state interaction in specific cases that went beyond the scope of this chapter.⁴⁶ But it is, in principle, an adequate legitimisation strategy based on an increasingly important norm.

The opposing strategies and legitimacy claims of the three actors investigated in this chapter clash, but they do not offset each other. The concluding chapter will discuss what the likely outcome of these processes of legitimisation and delegitimation is going to be.

⁴⁶ For example, Kruck and Spencer’s (2013) analysis shows that PMSCs’ various self-narratives largely fail to arrive in public media discourse (four US and British newspapers were analysed), with their self-image as ‘experts’ resonating better than that of the ‘humanitarians’ or ‘patriots’.

Chapter 9: Conclusion

The first purpose of this concluding chapter is to summarize the dissertation's main findings. This is followed by a reflection on how the analytical framework advanced in this dissertation could be applied to other issues of international relations. The chapter concludes with a critical evaluation of current state practice and its legitimation in contemporary international society.

Findings

The overarching finding of the dissertation is that in contemporary international society there is an increased legitimation of states' international use of PMSCs. There are two main drivers behind this process. First, the increased and widespread use of PMSCs by states contributes to its own legitimation by undermining proscriptive norms, particularly the anti-mercenary norm. In the face of the current scale and breadth of the practice, such proscriptive norms are increasingly being eroded and consequently they lose much of their negative force on overall legitimacy. The extensive use of PMSCs by the US is particularly important in this regard; the conduct of a state with great material capacities as well as a key social role in international society carries more weight in eroding norms. European states are following suit, even if they are less open about the practice, and there are indications that China and Russia, make use of PMSCs or are likely to do so in the future. The practice is, therefore, increasingly global, and, with a variety of non-state actors hiring PMSCs, too, not limited to states.

IR constructivists tend to focus on how norms shape state conduct, but they acknowledge that how states behave, in turn, can affect norms. Embedding this relationship in a legitimation framework prevents us from jumping to conclusions. For it would have been premature to conclude, as some observers do, that since states make widespread use of PMSCs that the practice is therefore considered legitimate in international society. First of all, it would be to fall into the behaviouralist trap of conceiving of norms as *regular* rather than *appropriate* behaviour, and thereby fail to investigate how the appropriateness of a particular behaviour is expressed, judged and contested in society. What is more, it would have assumed an atomistic view of normativity, and ignored that there are several, often competing, normative yardsticks for assessing legitimacy. In fact, the contestation

and legitimation around PMSC use highlight that despite its ubiquity, the legitimacy of contemporary state practice is far from settled. To grasp the clash of normative principles and the contest for legitimacy, a more holistic approach to normativity is necessary.

This is where the English School understanding of legitimation comes in. Its application reveals the second driving force behind legitimation that has to do with changes in the normative structure of international society. An analysis of UN discourse on PMSCs and mercenaries finds less condemnation on the former compared to the latter; demonstrates that critique of state practice would usually add up to calls for regulation rather than an outright ban; and detects a shift in underlying legitimacy principles away from self-determination towards human rights. The first two insights show that in terms of evaluation and policy proposals, efforts to delegitimise mercenarism were much more pronounced than they ever were with regard to PMSC use. The third insight points to the shifting justificatory basis for legitimation and contestation. This shift is also reflective of broader normative changes: norms that are in tension with an expanded use of PMSCs – self-determination, anti-mercenarism, and a republican understanding of sovereignty – are becoming weaker or side-lined, while human rights have gained a more central role in contemporary international society.

It is in this normative structural context that agency unfolds; on the basis of underlying and conflicting normative principles the more visible contest for the legitimacy of state practice plays out. Moves to legitimise or delegitimise state practice – whether they follow a logic of appropriateness or a logic of consequences, whether they are intentional or inadvertent – are constrained and facilitated by these norms. Competing efforts of legitimation and delegitimation do not cancel each other out, however. Since the practice of legitimacy is embedded in a particular material and normative structure, legitimation is likely to be more successful. This is so for at least three reasons.

First, inadvertent (in the case of the ICRC and HRF) and purposeful (in the case of PMSC advocates) moves to legitimise the practice are underpinned by the trend in state practice. States that make use of PMSCs, therefore, support Montreux and the ICoC. The UN itself, or rather those bodies ultimately responsible for peacekeeping and humanitarian missions, supports the initiatives, and has made ICoC certification a requirement for its contractors. By and large, these regulatory frameworks provide states with enough leeway

to continue using PMSCs for a range of services. On the other hand, the UNWG and NGOs like Control PMSC call for a limitation of the practice and propose regulation that would effectively prohibit the provision of many services that states rely on today. This is counter to today's practice and states' interests, shaped by both material factors and normative considerations, in employing PMSCs.

Second, legitimation is based on an increasingly important norm in international society. Regulation of PMSC use is based on and tries to further human rights. PMSC advocates' strategy of humanitarian entrapment, too, is in line with this norm, albeit rather instrumentally when compared to the regulatory efforts of the ICRC and Human Rights First. Conversely, efforts of the UNWG and Control PMSC to delegitimise the practice are based on principles that have become weaker or that play a more prominent role domestically: the anti-mercenary norm, external self-determination, and a rather comprehensive understanding of the monopoly of force. Shifts in the normative structure of international society contribute to the legitimation of PMSC use, and they make it harder for efforts to delegitimise the practice. These structural changes, therefore, benefit human rights-driven regulatory approaches like Montreux and the ICoC as well as the rhetorical action of PMSC advocates, while at the same time placing the UNWG and Control PMSC at a disadvantage.

The 'German' IR constructivist strand reminds us that the practice of legitimation is not necessarily characterised by actors engaging in truth-seeking, trying to establish a consensus on the appropriate course of action or on what normative principles apply to a given situation. The ICRC and UNWG assumed different norms and showed little effort to reconcile their approaches; the former followed a logic of appropriateness, where it applied, as a matter of course and coherent with its overall mission, human rights to the issue of PMSC use, whereas the latter went ahead looking at PMSC use through the prisms of external self-determination, a rather comprehensive understanding of the monopoly of force and anti-mercenarism. A similar dividing line separates HRF from Control PMSC. The latter has been more explicitly critical of current state practice; to the extent that it has made references to human rights, it has engaged in rhetorical action: using the norm to achieve a limitation of PMSC use. Similarly, but with the opposite intention, PMSC advocates have instrumentalised human rights when blaming the West

and the UN for inaction while suggesting the recourse to their companies as a fruitful way for states to meet their normative commitments.

Competing norms and the absence of a logic of arguing when it comes to an international (regulatory) response to PMSC use mean disunity in international and world society. This is the third and final reason for why legitimation, not delegitimation, of state practice is the likely outcome in contemporary international society: to confront the trend in state practice and the favourable normative context in which it takes place, a broad coalition of state and non-state actors would be necessary. At the moment, no such coalition exists. Several states, including the US, have announced their opposition to the most prominent challenge to contemporary state practice – the UN Draft Convention on PMSCs. Still less is there an alliance capable of successfully challenging the more fundamental question of the practice's legitimacy. To do so would, as argued above, require strategies of delegitimation that are not based on declining norms. It would also require a broader coalition of state and non-state actors.

On PMSC use, however, world society is split. The ICRC, HRF and others are interested in advancing human rights; for them, a prohibition or limitation of PMSC use are not necessary conditions for achieving that goal. The UNWG, Control PMSC and others want to at least curtail the practice, partly because they believe that only this would ensure effective protection of human rights, but more so for other normative principles: to uphold a particular conception of state sovereignty, to prevent interference with the rights of people to self-determination, and, notably, by equating PMSCs with mercenaries, to reaffirm the illegality and illegitimacy of mercenaries and mercenarism.

As for the role of states: with the notable exceptions of Switzerland, which launched the Montreux process with the ICRC, and Cuba, which sponsored many of the PMSC-related UN resolutions, they have been rather silent on the issue. They have been reactive, either voting on UN resolutions or signing up to Montreux and working on the ICoC. Against this background of a passiveness of states, here, too, there is a split. On the one hand, the US, the UK and other European states make widespread use of PMSCs. They have also signed up to the Montreux Document and support the ICoC. On the other hand, China, Russia and the G77 have supported the UN Draft Convention on PMSCs. But other than that, they are quite passive when it comes to pushing the issue; this role is played by the

UNWG and groups like Control PMSC. Therefore, states may sign up to one or the other regulatory initiative, but other than that, it is world society that is actively working on regulation and inadvertently or purposefully trying to either legitimise or delegitimise the practice.

Yet, the difference between the ‘West’ and the ‘rest’ is this: the former is creating facts by employing PMSCs, which the latter does not do to the same extent. Perhaps involuntarily, then, in terms of their role in the practice of legitimacy the West, the ICRC, NGOs like Human Rights First and PMSC advocates all find themselves on one side; China, Russia and others, the UNWG and NGOs like Control PMSC find themselves on the other side. The former group is contributing to the legitimation of PMSC use by making widespread use of PMSCs, inadvertently through efforts to improve the human rights situation and by benefitting from and partly adapting their strategies of legitimation to shifts in the normative structure of international society. The latter is failing to delegitimise PMSC use, because of a lack of substantial and broad support for their regulatory initiatives, and because they base their strategies of delegitimation on declining norms.

Suggestions for future research

There are two broad areas for future research. One would be to analyse, on a case-by-case basis, how important international legitimacy is relative to other factors when states decide whether and how to use PMSCs. This dissertation already pointed to systemic material pressures and domestic norms as factors in states’ decision-making. How important *international* legitimacy is relative to *domestic* legitimacy, and how these normative considerations interact with material calculations can only be answered through an analysis of a specific decision-making process leading to a PMSC contract. It is, for example, conceivable that international legitimacy matters more when PMSCs are hired as part of a UN peacekeeping mission, while domestic normative and material considerations could play a larger role in unilateral or defensive military operations. The expectation is that increased PMSC use will be facilitated by the increased legitimation of the practice in international society – not that one will deterministically follow the other.

A second area for research would be to apply the analytical framework to other issue areas. The framework is particularly suitable for analysing controversial issues: its holistic English School approach to normativity helped shed light on the clash of normative principles in the debate on PMSC use; its German constructivist elements highlighted the discursive nature of contestation and legitimation and that norms can be used instrumentally, while a reflective analyticism underlines the non-representational view of legitimation as well as proposing a detached view of the researcher.

These key elements of the framework can prove useful in the analysis of similarly controversial issues of international relations. Drone warfare, humanitarian intervention, extrajudicial killings, and digital surveillance are some of the issues that an analytical framework as suggested in this dissertation could help shed light on. They all involve clashes between competing normative principles, often along the broader sovereignty-human right division. The framework's utility, however, does not hinge on whether the empirical findings of this dissertation can be generalised to other empirical issues; rather, the framework proves its generality to the extent to which its categories and conceptualizations help grasp how the issues are legitimated and contested.

For example, another set of norms may well be relevant and will certainly form a different web of clashing and supportive norms. Some of the above issues will also overlap in interesting ways, not least with the PMSC issue. Other actors will likely play a role, perhaps with states taking a more active role in the process. It is also conceivable to see a different mix of logics of social action, perhaps less strategic and more geared to truth-seeking. Finally, the reflective analyticism would mean trying to not confound one's own normative commitments with those of particular actors or trends in society at large.

Critical evaluation of current state practice and its legitimation

The findings of the dissertation could be interpreted as casting doubt on the relevance of legitimacy and legitimation in international relations. After all, if the trend of legitimation is in line with dominant state practices, does this not invite a realist paraphrase of 'legitimacy is what states make of it' (Wendt 1992)? Do states ultimately pursue their

interests, rather than doing what is ‘right’, and mould legitimacy to fit those interests? There are some objections to such an interpretation.

To begin with, it is misleading to juxtapose the notion of ‘interest’ on the one hand, and the concepts of norm and legitimacy on the other hand. State interests are shaped by both material and normative factors. If states have an interest in using PMSCs, this is due to material factors as well as domestic and international normative considerations. The weight of each of these factors in the concrete decision-making over whether and how to use PMSCs needs to be investigated on a case-by-case basis. But there is nothing *per se* about state interests and legitimacy that would see them in opposition to each other.

Moreover, although current state practice and legitimation align, legitimacy is only to a limited extent what states make of it. Agency unfolds in a material and normative context. This context favours legitimation of PMSC use while placing delegitimation at a disadvantage; states act within this context. When actors refer to norms, they can shape understandings of legitimacy, but these efforts are at the same time constrained and enabled by how strong the norm is relative to others. Neither does the fact that actors sometimes refer to norms instrumentally invalidate the dissertation’s analytical framework. On the contrary, instrumental behaviour takes place in a social context. When norms are used instrumentally, they are employed *because* they carry weight in international society. What is more, states are not the only actors to shape legitimacy. In fact, this dissertation concludes that states have been relatively passive, and that non-state actors really made PMSC use an issue for debate – and regulation – and consequently participated in legitimation. We should, therefore, direct our critique both at state and non-state actors as well as be sceptical towards the role of supposedly ‘good’ norms in international society.

As Finnemore (1996a: 32) has put it, there is “nothing inherently ‘good’ about social norms” – this is certainly also true for human rights. Despite my sympathies for the principle and much of the practice of human rights, one should not turn a blind eye to the dark side of the norm’s role in contemporary state practice. Overall, a case can certainly be made that human rights serves the powerless (Ignatieff 2001), but when it comes to PMSC use, it is also empowering the powerful. The West benefits from human rights-centred regulatory frameworks since they do not come with substantial changes to what

states are already doing. PMSC advocates, too, support such regulation; moreover, they invoke human rights and try to capitalize on the gap between states' rhetorical commitment to human rights and their inability or unwillingness to uphold them. The case of the ICRC's role in regulation alerts us to the possibility of unintended consequences: the intention of not taking a position on the legitimacy of PMSC use does not match the outcome of its regulatory initiative. Moreover, the human rights-centred Montreux Document and ICoC sideline calls for stricter regulation and put those who contest contemporary state practice at a disadvantage. Human rights play a more prominent role in contemporary international society, and by underpinning the legitimation of PMSC use, neither are they necessarily 'good' nor do they serve the powerless.

States, on the other hand, should be criticized not necessarily and categorically for their recourse to PMSCs, but for the long-term consequences of doing so, or rather: the haphazard way, in which PMSCs are employed today without thinking about long-term effects. In the short-term, the practice is likely to remain contentious in regions that have seen the presence of PMSCs for over a decade. PMSCs could, once more, play a more central role in Iraq, bolstering the faltering Iraqi army, in support of humanitarian aid, and in a more tip-of-the-spear function as they encounter ISIS. Afghanistan, on the other hand, is seeing a similar shift that characterised the military withdrawal from Iraq: away from labour-intensive, largely logistical services for the military to tip-of-the-spear security provision for embassies and other installations. Increased legitimation also facilitates PMSC use in new regions and by other states – figuring in Russia's hybrid warfare, or safeguarding China's energy interests in Africa.

However one evaluates these developments, PMSC use can certainly have positive outcomes in the short-term; in that, I share the pragmatic approach of Human Rights First. For example, for those who applaud the idea behind the R2P, there is some cogency to the argument, advanced not only by the PMSC industry (Patterson 2009; Baker and Pattison 2010), that companies should intervene, even in a more tip-of-the-spear function, to prevent mass atrocities on behalf of a group of states or the UN, if the latter are otherwise unable or unwilling to do so. States cannot or do not always want to be a 'force for good'; to the extent that this is true, the 'cosmopolitan militaries' of the 21st century (Elliott and Cheeseman 2004) will remain more a concept than reality. PMSCs can be a useful tool to

overcome well-known hurdles – and ‘outsourcing the R2P’ may well be morally justifiable (Pattison 2010b).

But apart from creating new and immediate problems on the ground, a more serious objection concerns long-term effects, which have to do with the nature of sovereignty and more fundamentally, with the nature of international society. As Thomson, Tilly and others have shown, the historic monopolization of violence in the hands of the state was a gradual process, where decision-making authority was monopolized first, after which ownership of the means of violence shifted, until the state finally replaced market allocation of violence. With the ‘market for force’ being a reality today, and private companies owning the means of violence, might we be witnessing the reverse of that historical process and, at some point, see a shift in states’ authority over violence and, hence, an erosion of an important part of states’ *de jure* sovereignty? So far, states’ juridical sovereignty remains intact: their formal right to play the inter-state game is not affected by hiring PMSCs. Neither are PMSCs modern forms of the Dutch or English East India Companies. But with the extraordinary growth of the industry, the expansion of PMSC use by states and the increased legitimation of that practice in the last two decades, it is both fascinating and worrying to think about what the future holds. Whether proposals of a multi-level (Wulf 2006) or a global public monopoly of force (Pattison 2014) are viable responses to the trend, needs serious contemplation. At the very least, governments would do well to heed the warning that, when they use PMSCs, the short-term gain in empirical sovereignty of their own state comes at the expense of states’ collective monopoly of force in the long-run (Avant 2005).

Something that has long been taken for granted is being challenged. For a long time, the idea that states would use private force was precluded. It *appeared* natural that states used a citizen or a professional army, and that they would not use private force. But it would only appear natural from the vantage point of a society from a specific time in history. If one recognizes the historicity of such societal understandings, and that they can be altered by actors who are embedded in a changing material and normative context that constrains and enables them, then one is prepared to acknowledge how something that appeared impossible has now become not only possible, but normal and increasingly accepted as legitimate.

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Interviews

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Gomez del Prado, Jose. 2014. Video call with Mr Jose Gomez del Prado, former Chair and Member of the UNWG. 22 August 2014.

Rona, Gabor. 2014. Telephone call with Mr Gabor Rona, International Legal Director at Human Rights First and Member of the UNWG. 1 August 2014.

Appendix

List of UNSC and UNGA resolutions on mercenaries and PMSCs, with information on number of mentions, topics, object of legitimation, evaluation, and legitimacy principle

SC Resolutions on PMSCs	Mentions	Topic	Object	Evaluation	Principle
S/RES/2046(2012)	1	Sudan	unrelated (AU PSC)	none	none
S/RES/1997(2011)	1	Sudan	unrelated (AU PSC)	none	none
S/RES/1958(2010)	3	Iraq	unrelated (contractor)	none	none
S/RES/1923(2010)	1	Chad	unrelated (contractor)	none	none
S/RES/1838(2008)	1	Somalia/piracy	possibly related (maritime contractors)	neutral	none
S/RES/1828(2008)	1	Sudan	unrelated (AU PSC)	none	none
S/RES/1538(2004)	1	Iraq	unrelated	none	none
S/RES/1507(2003)	1	Ethiopia/Eritrea	unrelated (contractor)	none	none
S/RES/1430(2002)	1	Ethiopia/Eritrea	civilian demining contractors	neutral	neutral
Total: 9					
Unrelated: 7					
Logistics: 2					
PMSCs: 0					

GA Resolutions on PMSCs	Mentions	Topic	Object	Evaluation	Principle
A/RES/67/16(2012)	1	Afghanistan	reg. of private security contractors	none	none
A/RES/66/246(2012)	1	Budget	use of private security personnel	none	none
A/RES/66/237(2012)	1	administration	unrelated (contractors)	none	none
A/RES/66/147(2012)	several	WG on use of mercenaries	activities of PMSCs, regulation	negative	human rights
A/RES/66/13(2012)	1	Afghanistan	reg. of private security contractors	none	none
A/RES/65/289(2011)	1	cross-cutting issues	rations contractors	none	none
A/RES/65/269(2011)	several	capital master plan	unrelated (contractors)	none	none
A/RES/65/247(2011)	1	human resources	unrelated (contractors)	none	none
A/RES/65/203(2011)	several	WG on use of mercenaries	activities of PMSCs, regulation	negative	human rights
A/RES/65/8(2010)	1	Afghanistan	reg. of private security contractors	none	none
A/RES/64/233(2010)	2	administration	unrelated (contractors)	none	none
A/RES/64/228(2010)	3	capital master plan	unrelated (contractors)	none	none
A/RES/64/151(2010)	several	WG on use of mercenaries	activities of PMSCs, regulation	negative	human rights
A/RES/63/270(2009)	1	capital master plan	unrelated (contractors)	none	none
A/RES/63/250(2009)	2	human resources	unrelated (contractors)	none	none
A/RES/63/164(2009)	several	WG on use of mercenaries	activities of PMSCs, regulation	negative	human rights
A/RES/62/214(2008)	1	sexual abuse	unrelated (contractors)	none	none

A/RES/62/145(2008)	several	WG on use of mercenaries	activities of PMSCs, regulation	negative	none
A/RES/61/244(2007)	2	human resources	unrelated (contractors)	none	none
A/RES/60/121(2006)	2	Congo	unrelated (contractors)	none	none
A/RES/59/296(2005)	3	administration	unrelated (contractors)	none	none
A/RES/59/266(2005)	2	human resources	unrelated (contractors)	none	none
A/RES/58/277(2004)	1	UN outsourcing	unrelated (contractors)	none	none
A/RES/57/305(2003)	3	human resources	unrelated (contractors)	none	none
A/RES/57/292(2003)	1	budget	unrelated (contractors)	none	none
A/RES/57/141(2003)	1	piracy	enforcement personnel	potentially positive	contributing to prevent and combat piracy and armed robbery at sea
A/RES/56/12(2001)	1	piracy	enforcement personnel	potentially positive	contributing to prevent and combat piracy and armed robbery at sea
A/RES/55/258(2001)	1	human resources	unrelated (contractors)	none	none
A/RES/54/13B(2000)	3	financial report	unrelated (contractors)	none	none
A/RES/53/221(1999)	5	human resources	unrelated (contractors)	none	none
A/RES/49/233B(1995)	1	administration	local contractors (logistics)	none	none
A/RES/48/263(1994)	several	law of the sea	unrelated (contractors)	none	none
A/RES/48/149(1994)	1	El Salvador	Act on Private Security Services	none	none
Total: 33					
Unrelated: 19					
Logistics: 2					
PMSCs: 12					

SC Resolutions on mercenaries	Mentions	Topic	Object	Evaluation	Principle
S/RES/2045(2012)	1	Cote d'Ivoir	mercenaries as such	negative	none
S/RES/2000(2011)	2	Cote d'Ivoir	activities of mercenaries	negative	danger of renewed violence toward civilliance + illegal
S/RES/1980(2011)	1	Cote d'Ivoir	mercenaries as such	negative	none
S/RES/1975(2011)	1	Cote d'Ivoir	activities of mercenaries	negative	violence against UN personnel, thus obstructing UN help to citizens
S/RES/1973(2011)	several	Libya	use of mercenaries (3), provision of mercenaries (3), mercenaries as such	negative	violation of obligations under S/RES/1970(2011)
S/RES/1970(2011)	1	Libya	provision of mercenaries	negative (with exception!)	none
S/RES/1643(2005)	1	Cote d'Ivoir	use of mercenaries	negative	linkeage between illicit trade of resources (diamonds) and use of mercenaries --> exacerbating conflicts in West Africa
S/RES/1625(2005)	1	Africa	use of mercenaries	negative	disturbing UN conflict prevention
S/RES/1607(2005)	2	Liberia	use of mercenaries	negative	exacerbating conflicts
S/RES/1584(2005)	1	Cote d'Ivoir	use of mercenaries	negative	none
S/RES/1521(2003)	1	Liberia	mercenaries as such	negative	threat to peace and security in West Africa, to peace process in Liberia

S/RES/1479(2003)	2	Cote d'Ivoir	movement of mercenaries across borders, use of mercenaries	negative	undermine security and territorial integrity of Cote d'Ivoir
S/RES/1478(2003)	1	Liberia	activities of mercenaries	negative	none
S/RES/1467(2003)	several	West Africa	activities of mercenaries, support for mercenary activities, link between mercenary activities illicit arms trafficking and violation of arms embargo	negative	threat to peace and security in West Africa, prolong conflicts
S/RES/1464(2003)	1	Cote d'Ivoir	movement of mercenaries across borders	negative	undermine security and territorial integrity of Cote d'Ivoir
S/RES/1390(2002)	1	Afghanistan	use of mercenaries by Taliban	negative	none
S/RES/1295(2000)	1	Angola (UNITA)	mercenaries as such	negative	none
S/RES/1237(1999)	2	Angola (UNITA)	provision of mercenaries	negative	none
S/RES/1231(1999)	1	Sierra Leone	provision of mercenaries	negative	none
S/RES/1170(1998)	1	Africa	use of mercenaries	negative	contributing to instability in Africa
S/RES/1097(1997)	1	Great Lakes region	mercenaries as such	negative	working against peace plan
S/RES/1064(1996)	1	Angola (UNITA)	use of mercenaries	negative	none
S/RES/1008(1995)	1	Angola (UNITA)	mercenaries as such, repatriation of mercenaries	neutral/pos?	formation of new armed forces, freedom of movement

S/RES/581(1986)	1	South Africa	use of mercenaries	negative	destabilization against Southern African States
S/RES/507(1982)	several	Seychelles (South Africa)	mercenary aggression, recruitment/support/use of mercenaries	negative	loss of life, substantial damage, danger for all states, danger for stability and independence of African States, territorial integrity and independence, overthrowing governments
S/RES/496(1981)	2	Seychelles (South Africa)	mercenary aggression, support of mercenaries	negative	none
S/RES/463(1980)	2	Zimbabwe	mercenaries as such	none	none
S/RES/460(1979)	1	Zimbabwe	mercenaries as such	none	none
S/RES/419(1977)	several	Benin	mercenaries as such	negative	destabilization, violate territorial integrity, sovereignty and independence
S/RES/405(1977)	5	Benin	recruitment of mercenaries (3), mercenaries as such, use of mercenaries	negative	overthrow of governments, danger for territorial control, destabilizing states, violate territorial integrity, sovereignty, and independence
S/RES/289(1970)	1	Guinea	mercenaries as such	negative	none
S/RES/241(1967)	several	Congo	mercenary aggression, support of mercenaries	negative	serious situation, threat to territorial integrity and independence

S/RES/226(1966)	3	Congo	support of mercenaries	negative	interfering in domestic affairs
S/RES/199(1964)	2	Congo	mercenaries as such	negative	intervening in domestic affairs
S/RES/169(1961)	4	Congo	mercenaries as such, mercenary activities	negative	sessionist activities
S/RES/161(1961)	1	Congo	mercenaries as such	negative	danger of civil war
Total: 36					
GA Resolutions on mercenaries	Mentions	Topic	Object	Evaluation	Principle
A/RES/67/70(2012)	1	Central Africa	movement of mercenaries	negative	peace and security in Central Africa
A/RES/66/147(2012)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/66/55(2011)	1	Libya, Central Africa	cross-border movement of mercenaries	negative	none
A/RES/65/203(2011)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/64/151(2010)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/63/164(2009)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/62/145(2008)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination

A/RES/61/151(2007)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/59/178(2005)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/58/162(2004)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/57/196(2003)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/56/232(2002)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/55/234(2001)	2	Programme planning	unrelated	none	none
A/RES/55/86(2001)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/54/151(2000)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/53/135(1999)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/52/112(1998)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/51/83(1997)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/51/30(1997)	1	Comoros islands	mercenary behaviour	negative	disrupt the constitutional order, state institutions, pol, econ., soc. order of the country

A/RES/51/45A(1997)	1	illicit transfer and use of conventional arms	mercenaries as such	none	none
A/RES/50/138(1996)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/50/70(1996)	1	illicit transfer and use of conventional arms	mercenaries as such	none	none
A/RES/49/150(1995)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/49/31(1995)	1	small states	mercenaries as such	negative	danger for small states
A/RES/48/94(1994)	4	self-determination	use, recruitment, financing, training, transit, serving as mercenaries	negative	against sovereign states and national liberation movements
A/RES/48/92(1994)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/48/75(1994)	1	international arms transfer	arms in the hands of mercenaries	negative	threat to security and political stability of affected states
A/RES/47/84(1993)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/47/82(1993)	4	self-determination	use, recruitment, financing, training, transit, serving as mercenaries	negative	against states and national liberation movements

A/RES/46/87(1991)	4	self-determination	use, recruitment, financing, training, transit, serving as mercenaries	negative	against states and national liberation movements
A/RES/46/89(1991)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/45/130(1990)	4	self-determination	use, recruitment, financing, training, transit, serving as mercenaries	negative	against states and national liberation movements
A/RES/45/132(1990)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/45/33(1990)	1	self-determination	recruitment, financing, training, transit of mercenaries	negative	against national liberation movements
A/RES/44/81(1989)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/44/34(1989)	several	Convention against mercenaries	use of mercenaries, mercenaries as such	negative	self-determination
A/RES/43/106(1988)	4	self-determination	use, recruitment, financing, training, transit, serving as mercenaries	negative	against states and national liberation movements
A/RES/43/107(1988)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/43/168(1988)	several	Draft convention	activities of mercenaries	negative	international peace and security

A/RES/42/95(1987)	4	self-determination	use, recruitment, financing, training, transit, serving as mercenaries	negative	against states and national liberation movements
A/RES/42/96(1987)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/42/14(1987)	1	Namibia	recruitment, financing, training, transit of mercenaries	negative	none
A/RES/42/155(1987)	several	Draft convention	activities of mercenaries	negative	contrary to non-interference, territorial integrity, independence, self-determination, int. peace and security
A/RES/41/101(1986)	4	self-determination	use, recruitment, financing, training, transit, serving as mercenaries	negative	against states and national liberation movements
A/RES/41/102(1986)	several	WG on use of mercenaries	use of mercenaries, mercenarism	negative	self-determination
A/RES/41/39(1986)	1	Namibia	recruitment, financing, training, transit of mercenaries	negative	none

A/RES/41/80(1986)	several	Draft convention	activities of mercenaries	negative	contrary to non-interference, territorial integrity, independence, self-determination, int. peace and security
A/RES/40/56(1985)	1	self-determination	recruitment, financing, training, transit of mercenaries	negative	national liberation movements, freedom, independence, colonialism, racism, apartheid
A/RES/40/97(1985)	1	Namibia	recruitment, financing, training, transit of mercenaries	negative	none
A/RES/40/25(1985)	4	self-determination	use, recruitment, financing, training, transit, serving as mercenaries	negative	against states and national liberation movements
A/RES/40/74(1985)	several	Draft convention	activities of mercenaries	negative	contrary to non-interference, territorial integrity, independence, self-determination, int. peace and security
A/RES/39/84(1984)	several	Draft convention	activities of mercenaries	negative	contrary to non-interference, territorial integrity, independence, self-determination, int. peace and security

A/RES/39/50(1984)	1	Namibia	recruitment, financing, training, transit of mercenaries	negative	none
A/RES/39/17(1984)	4	self-determination	use, recruitment, financing, training, transit, serving as mercenaries	negative	against states and national liberation movements
A/RES/38/137(1983)	several	Draft convention	activities of mercenaries	negative	contrary to non-interference, territorial integrity, independence, self-determination, int. peace and security
A/RES/37/109(1982)	1	Namibia	recruitment, financing, training, transit of mercenaries	negative	none
A/RES/37/233[A](1982)	several	Draft convention	activities of mercenaries	negative	contrary to non-interference, territorial integrity, independence, self-determination, int. peace and security
A/RES/36/121[B](1981)	2	Namibia	use of mercenaries	negative	undermining independence
A/RES/36/76(1981)	several	Draft convention	activities of mercenaries	negative	contrary to non-interference, territorial integrity, independence, self-determination, int. peace and security

A/RES/36/9(1981)	several	self-determination	use, recruitment, financing, training, transit, serving as mercenaries	negative	against states and national liberation movements
A/RES/35/48(1980)	several	Draft convention	activities of mercenaries	negative	contrary to non-interference, territorial integrity, independence, self-determination, int. peace and security
A/RES/35/35A-B(1980)	4	self-determination	use, recruitment, financing, training, transit, serving as mercenaries	negative	against states and national liberation movements
A/RES/34/140(1979)	several	Draft convention	financing, use of mercenaries	negative	overthrowing gover, against national liberation movements
A/RES/33/76(1978)	1	Nicaragua	recruitment, participating of nationals as mercenaries	negative	conflict interference
A/RES/33/182A-C(1979)	1	Namibia	recruitment, financing, training, transit of mercenaries	negative	none
A/RES/33/183[M](1979)	2	South Africa	recruitment, financing, training, transit of mercenaries	negative	assistance of apartheid regime
A/RES/33/38[A](1978)	2	Souther Rhodesia	recruitment, training, transit of mercenaries	negative	none

A/RES/33/24(1978)	4	self-determination	use, recruitment, financing, training, transit, serving as mercenaries	negative	against states and national liberation movements
A/RES/32/116[A](1977)	1	Souther Rhodesia	recruitment, training, transit of mercenaries	negative	none
A/RES/31/146(1976)	1	Namibia	recruitment, financing, training, transit of mercenaries	negative	none
A/RES/31/34(1976)	4	self-determination	use, recruitment, financing, training, transit, serving as mercenaries	negative	against states and national liberation movements
A/RES/31/91(1976)	1	non-interference	recruitment, sending mercenaries	negative	interference, intervention in internal and external affairs of states
A/RES/31/154[A](1976)	1	Souther Rhodesia	recruitment, training, transit of mercenaries	negative	none
A/RES/31/6[I](1976)	3	South Africa	mercenaries and their organizations, encouraging mercenary activities, recruitment, training, financing, transit of mercenaries	negative	participate in acts of aggression of S Africa against African people
A/RES/3396(XXX)(1975)	1	Souther Rhodesia	advertisement, recruitment of mercenaries	negative	none

A/RES/3103(XXVIII)(1973)	2	Colonies	use of mercenaries	negative	crime, against national liberation movements, yoke of colonialism and alien domination
A/RES/2708(XXV)(1970)	2	Colonies	recruitment, financing, training of mercenaries	negative	crime, against national liberation movements
A/RES/2465(XXIII)(1968)	2	Colonies	recruitment, financing, training of mercenaries	negative	crime, against national liberation movements
A/RES/2395(XXIII)(1968)	1	Portoguese colonies	recruitment, training of mercenaries	negative	violation of territorial integrity of sovereign independent African states
A/RES/1599(XV)(1961)	3	Congo	mercenaries as such	negative	central factor in the grave situation in Congo
Total: 80					

Notes: „several“ = more than 5