Private Military and Security Companies in Iraq:
An Analysis of the Deployment of Private Military and Security Companies in Iraq in the Period 2003-2009 from a Just War Perspective

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ii. List of Abbreviations

API Addition Protocol I to the Geneva Conventions
DoD Department of Defence
DoS Department of State
HRL Human Rights Law
IHL International Humanitarian Law
JWT Just War Tradition
LOGCAP Logistics Civil Augmentation Program
MNC Multi-National Corporation
NATO North Atlantic Treaty Organisation
PMF Private Military firm
PMSC Private Military and Security Company
PSC Private Security Company
SSR Security Sector Reform
UAV Unmanned Aerial Vehicle
UN United Nations
UNSC United Nations Security Council
1. Introduction

The nature of conflict has changed significantly since the end of the Second World War, as large interstate wars have been replaced by smaller intrastate conflicts. Besides the nature of the conflicts, have the actors involved in conflicts also changed. Non-state actors such as freedom fighters, terrorists, insurgents, and warlords have entered the battlefield. Especially, the arrival of one type of non-state actor, Private Military and Security Companies (PMSCs), has generated a significant debate among academic scholars, policymakers, the military, and human rights groups among others.¹

PMSCs differ from these other group of actors, as they take part in conflicts for commercial reasons. Moreover, the use of PMSCs, to project state power – states are defined here as: an actor that possesses a territory, a population, has effective control over both, and is it enjoying its freedom from external control² – appears to undermine the state monopoly on the legitimate use of force. This principle, which Weber calls: ‘the [state] monopoly of the legitimate use of physical force…’³, has been the cornerstone of twentieth century thinking about the use of force, and forms one of the basic principles of the UN-system.⁴ Furthermore, the participation of non-state actors in conflicts erodes the distinctions between combatants and non-combatants, and the means by which those participating in hostilities can be held accountable. Therefore, the use of PMSCs has raised a number of moral questions.

These moral issues are of significant importance as use of force without moral and legal restraints is nothing more than the application of brute force.⁵ This thesis aims to uncover the moral boundaries for the deployment of PMSCs and test them in a case study on their deployment in Iraq. To this end a contemporary understanding of the Just War Tradition (JWT) will be used. The JWT consists of a centuries old debate on the moral and legal constrains, to wage war (Jus ad Bellum), on the fighting itself (Jus in Bello), and on the end of fighting (Jus post Bellum).⁶ It offers a common language based on an overlapping consensus that can be used to debate and judge the

¹ See: Carmola, Kateri. Private Security Contractors and New Wars: Risks, Law and Ethics. Abingdon: Routledge,
⁴ Carmola, 2010: 4.
⁶ Bellamy 2008a: 114.
legitimacy of the decision to use force and its execution. It therefore provides an ideal framework to both debate and analyse the deployment of PMSC’s. The book *Just Wars: From Cicero to Iraq* by Alex J. Bellamy will be used as a starting point for the theoretical framework.

The main research question of this thesis will be: *To what extent, does the deployment of Private Military Security Corporations in Iraq challenge the moral boundaries, formulated on the basis of a contemporary understanding the Just War Tradition?* This thesis will argue that the use and deployment of PMSCs in Iraq crosses these moral boundaries, due to the absence of a legal framework to control and hold PMSCs accountable, as PMSCs are often not incorporated into the hierarchical state structure of the armed and security forces. This lack of accountability and the absence of an effective mechanism to hold PMSCs and their employees accountable enhances the risk of immoral behaviour and forms one of the fundamental problems of the privatisation of the security sector. It will therefore be argued that in a large number of instances PMSCs should be incorporated into the hierarchical structure of the state armed and security forces, so that they are on equal footing with regular members of the armed and security forces and can be held accountable when needed.

Research on this subject is needed, to further identify the ramifications of this problem and to contribute to a possible resolution of this problem. Authors such as P.W. Singer and Christopher Kinsey have kick-started this much-needed debate but further scholarly work is required as many questions remain unanswered. A number of authors have analysed the legal implications of, and controls over PMSCS under existing International Humanitarian Law (IHL), and Human Rights

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7 Bellamy 2008a: 229.
8 Singer 2003.
Although, most of them argue that the existing laws apply at least partly to PMSCs, remains full application difficult because as Singer notes: “… the international laws of war that specifically deal with their presence are largely absent or ineffectiv. e”12 Sharing this observation, many scholars have called for tighter legislation on PMSCs,13 but the required international legislation process is slow, and once in place, often difficult to enforce.14 This is illustrated by the development of the Montreux document and the United Nations Working Group on the use of mercenaries, which are both welcome first steps in this legislation process, but only sort limited effect due to it limited number of signatories and non-binding character.15

Using the existing consensus in the JWT to formulate moral boundaries for PMSC will provide a short-cut, as the norms derive from an already existing consensus, and can thus be applied directly on PMSCs. Moreover, in those cases where this thesis argues that PMSCs must be incorporated into the hierarchical structure of the state armed and security forces, PMSCs can than be held accountable through the existing disciplinary systems of those armed and security forces. In this way, this thesis will not only provide a short-term solution for some of the problems that arise with the use of PMSCs, but also contribute to the legislation debate by providing a moral perspective to the deployment of PMSCs. Legislation remains needed, as binding rules are after all more effective than moral appeals.

This thesis will, due to the limited space and time available, only focus on the role of PMSC’s in Iraq between 2003 and 2009. The main reason to pick a case study is that it provides a systematic way to look to events and analyse information, and it will contribute to a better and sharper understanding of the deployment of PMSC’s in Iraq during that period. The choice for Iraq is quite straightforward, as it was the first major conflict in which PMSC’s played such a significant role.16 The specific

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14 Cockayne 2008.
timeframe has been chosen as it intersects with the main presence of the coalition forces responsible for hiring PMSC’s in Iraq.\footnote{Nordland, Rod, and Timothy Williams. "Iraq Force Soon to Be a Coalition of One." The New York Times, 7 28, 2009.}

1a. Structure
This thesis is divided into five parts. The first part will provide an overview of the context in which PSCMs have developed. Both the social-economic environment and the historical context will be uncovered so that a broad overview of the context in which PMSCs developed will be provided to the reader. The second part will provide a description of both the identity of PMSCs since a clear definition of PMSCs is lacking and heavily debated among scholars.\footnote{See: Carmola 2010: 9-30, Singer 2003: 42-8 & Kinsey, Christopher. "Private Security Companies: Agents of Democracies or Simply Mercenaries?" In Private Military and Security Companies: Chances, Problems, Pitfalls and prospects, by Thomas Jaeger and Gerhard Kuemmel, 87-105. Wiesbaden: VS Verlag für Sozialwissenschaften, 2007: 70.} By focusing on the different tasks and services that PMSCs provide, it will be possible to analyse the moral boundaries of PMSCs later on in the thesis. This approach will give a more detailed insight as it focuses on the specific tasks and services provided by PMSCs and also a more comprehensive approach. Before it is possible to analyse the moral implications of the tasks and services provided by PMSCs, it is necessary to develop a theoretical framework to structure the analysis. The theoretical framework will be developed in the third part and will provide a comprehensive overview of the consensus that exists among contemporary Just War Tradition-scholars. In order to limit the length of this section a sociological approach will be taken. By focussing not so much on the nature of their moral values and beliefs, but more on their moral values and beliefs as a group or community. Using this theoretical framework, the provision of the different tasks and services by PMSCs, to both state and non-state actors, will be analysed in the fourth part of the thesis. In that part the ethical boundaries of the tasks and services provided by PMSCs will be established. In the final chapter, the deployment of PMSCs in Iraq in the period 2003-2009 will be tested along the moral boundaries established in the preceding chapter. Finally, in the conclusion a summary of the arguments put forward in this thesis will be presented with some concluding remarks.

2. The Context of Privatization
The provision of security, both internally and externally, has been the primary role and core competence of the state from the outset. National security forces and especially armies have been the ultimate symbol of this task. The provision of both external and internal security has become one of the main state responsibilities after monopolizing the use of force. To understand why parts of this public task have been transferred from the state to the private sector, it is fundamental to understand both the origins and consequences of this transfer.

This chapter is divided into two parts. The first part will give an insight in the socio-political forces that have shaped the context in which PMSCs have emerged. It will uncover the political, economic, and social driving forces behind the privatisation of security. The second part provides an overview of the historical developments that have contributed to the rise of PMSCs. Both parts combined, provide a comprehensive picture of the context in which PMSCs have emerged.

2a. Socio-political Forces
The rise of neoliberalism as the dominant political-economic perspective in the Western world has been an influential driving force behind the rise of PMSCs. At the end of the 1970s, the stresses on the then popular Keynesian state model gained force, as the state’s ability to provide public goods decreased due to fiscal constrains. The neo-liberal alternative offered by politicians, such as the British Prime Minister Margaret Thatcher and US President Ronald Reagan, gained ground. They argued that the marketplace would be able to organise a large number of public tasks more efficient than the state and at a fraction of the costs. This view not only gained legitimacy during this period, but also became the de facto international model for governments after the Cold war.

During the 1970s, the private sector, also faced with difficult economic times, had started already to outsource tasks that were not their ‘core business’, making their operations more effective and cutting costs by using market forces. Triggered by the success of the private sector in their efforts to become more efficient and cut costs, military leaders, confronted with cuts of their governments, began advocating the outsourcing of tasks to the private sector. Initially, only tasks where the military was merely copying what the private sector was already doing (like maintenance, logistics and catering) were outsourced. Nonetheless, the private sector gained access to an area that until than had been exclusively reserved for state actors.

During the same period, police forces started outsourcing tasks close to their core business, such as the surveillance of shopping malls and industrial areas. This was the first step in outsourcing the core competence of the state, namely the provision of security. As police forces withdrew from some parts of society and repelled certain tasks, opportunities grew for the private sector to enter the security market and fill the gaps. This gave rise to so called Private Security Companies (PSC), which identified a niche in the market and filled those gaps. They offered security solutions, for corporate buildings and gated communities, money transports services, and in some countries even run complete prisons systems. In this way, PSC have become an integrated part of the security provision on a global level, as these services are offered to both the general public in Western countries and the elites, who can afford them, in the South.

At the same time, the demand grew for security in Western societies, as feelings of insecurity grew among civilians and attitudes towards crime changed. Crime was not longer perceived as the result of socio-economic inequality but as the result of rational choices of criminals, who used the available opportunities to commit crimes. Preventing opportunities for criminals became key in the approach to security. This change in attitude has given rise to what Ulrich Beck calls the risk society, which views the world as a place where risks – socially constructed

28 ibid: 69-76.
29 ibid: 217.
30 ibid: 69-76.
perceptions of future threats – can be managed. As result of the growing individualisation and the retreating state, individuals were made more responsible for the organisation of their own security and managing these risks has become a private affair. The transfer of liability from the state to the public has offered a niche for PSC to explore. They offered services to manage these security risks in an efficient and cost effective way, tacking away the responsibility from the client. As result of these developments, security has become a commodity that is free available on the world market.

The development of this commodity has been spurred on by globalisation. PSCs acquired the capacity to act on a global scale and the private security market became a global multi-billion euro market. The upshot is that private and public actors work together in complex partnerships to provide security to the public. The private security sector has become a part of our daily lives and is globally accepted as a provider of security.

The discussion above has focussed on the provision of security of a non-military character in non-conflict areas; such as the protection of private property (e.g. shopping malls, industrial complexes) and surveillance by PSC’s in countries in Western Europe and North America. Entering conflict areas and outsourcing military tasks is considered the next logical step, or as P.W. Singer concludes: “It is simply a more aggressive manifestation of the market’s force into formerly state-dominated spheres.” However, this new step cannot be explained alone by socio-economic developments in the world. Historical developments, and in particular the end of the Cold war, have had a profound impact on the creation and rise of PMSCs. The next section will therefore focus on how historical developments further contributed to the development of PMSCs.

36 The private security market was estimated to be worth around 100 billion euro. Employing around two million people worldwide in 2008, see: Group, Ecorys SCS. "Study on the competitiveness of the EU security industry.” Directorate-General Enterprise & Industry, European Commission, 2009: V.
38 Abrahamsen en Williams 2007: 217.
39 Singer 2003: 70
2b. Historical Developments

Some scholars have traced the roots of PMSCs to the mercenaries of medieval times and even further and it is important to provide some historical understanding about them here. As long as war exists, people have offered themselves as mercenaries to the highest bidder and fought for whoever was willing to pay them. However, a more accurate historical parallel has been drawn between PMSCs and the seventeenth century overseas trading companies, such as the Dutch and English West Indies Companies. These trading companies were granted, by charter of their authorities, the right to raise their own military and naval power and used it whenever they deemed necessary. Like PMSCs, the armed wing of these companies was able to provide and exercise force on a military scale in order to protect the commercial investments of the company. Their workforce consisted of security experts from different countries, and just as the majority of current PMSCs, these overseas trading companies were joint stock-enterprises listed on the stock markets. Using force to protect profitable overseas investments and connecting military power to economic power – what made these overseas trading companies so successful – is a formula that is still successful today, as shown by the success of PMSCs today.

From the seventeenth century onwards, the development of the nation state made hired forces less attractive and by the end of the nineteenth century their role in international affairs had been marginalised, almost non-existent. Their revival came during the era of decolonisation, as colonial powers retreated, and a power vacuum emerged in many former colonies, providing new opportunities for hired soldiers. Mercenaries were hired by actors who wanted to exploit this vacuum, sometimes even by the former colonial power to retain influence in the era. Most notable examples of this were ‘Mad Mike’ Hoare, a former British soldier and Bob Denard a former French soldier who fought in post-colonial conflicts in Congo, Biafra, Chad, Morocco.

40 ibid:19-39
41 ibid
44 ibid: 25
and Rhodesia. Their practices became the symbol of post-colonialism and strengthened the international opinion against the use of mercenaries. This eventually led to a United Nations General Assembly-resolution and the addition of the term mercenary in the First Additional Protocol (AP I) of the Geneva Conventions. However, their applicability to PMSCs and their employees is problematic, due to the strict definition of a “mercenary” used in both.

The transition from loose bands of mercenaries into a corporate based approach began when PSCs entered the security market on a global scale and tried to distinguish themselves from mercenaries. They tried to sell themselves as legitimate businesses that provided security solutions to multinationals operating in dangerous areas. In particular companies in the extractive industries, such as oil and diamond companies, which often operate in unstable regions, started to use PSCs to secure both their investments and their staff. Examples of this are Sandline and Executive Outcomes, which have worked for oil companies like Chevron and Pretainoil in Angola.

Their success was further fostered by the rise of international terrorism during the 1970’s. Terrorist organisations began to develop into international organisations operating across borders, targeting the ‘threat of Western imperialism’ and its symbols, creating fears among multinationals and their staff. Multinationals had to look for other solutions, as states appeared to have no answer and for the protection of investments and staff of these corporations against the threat of terrorism. These new threats combined with the dominant attitudes towards risk management and

50 Holmqvist, 2005: 44.
54 Kinsey 2007: 21-23
socio-economic policy, created a large international market for PSCs and resulted in a rapid development of the private security industry.

The transition from security to military services was made after the end of the Cold war, when a number of PSCs started to offer military services. The most notable examples of this are Executive Outcomes and Sandline, who offered combat services in Angola, Sierra Leone, and Papua New Guinea.\(^5\) Other services included the training and modernisations of armies by PMSCs and tactical support.\(^6\) The difference between PSCs and PMSCs is difficult to make since there is a considerable overlap in the services provided.\(^7\) These differences and overlaps will be discussed more elaborate in chapter 3, important for this moment to note is the shift that was made towards offering military services. These tasks entail: the training of armies, tactical and operational support services, and the maintenance and operating of weapon systems.

This shift was facilitated by a number of developments that resulted from the end of the Cold war. The threat of a nuclear war between the two superpowers had diminished\(^8\) and armies around the world responded by downsizing their armies and started to demobilise large numbers of troops and equipment.\(^9\) As their armies downsized, many Western armies ended the use of conscripted soldiers and professionalised their army. However, also large numbers of careers soldiers were demobilised.\(^10\) The demobilisation of this last group was problematic for many soldiers since many of them had little other to offer to the labour market than their military skills. These skills made them particularly attractive for PMSCs, who could offer them jobs in an environments they were familiar with and at higher wages too.\(^11\) Beside the large number of soldiers, also vast quantities of weapons were demobilised and flooded the market. With both dropping prices and little or no control over who obtained them, many of these weapons fell into the hands of non-state actors.\(^12\)

Beside these so-called ‘push-factors’, there were also a number of ‘pull-factors’ that further contributed to the rise of PMSCs. During the Cold war, most of the (potential) conflicts in the (Third) world had been carefully managed by the

\(^7\) Abrahmsen en Williams 2011: 39.
\(^9\) Carmola 2010: 41.
\(^11\) ibid: 43-4.
\(^12\) ibid: 53-5.
superpowers or suppressed through financial and military support to local autocratic leaders. After the Cold war, Western states became reluctant to intervene and restore order in troubled regions of the world, like Africa. With the backing of the superpowers gone, opportunities for rebels, criminals, insurgents, and warlords arose. The actors in these conflicts are, in contrast to traditional conflicts where ethnic or ideological difference are a big driving factor, often motivated by economic gains and aimed at the existing redistribution of the socio-economic divide. These non-state actors challenged their weakened governments, while making use of the cheap weapons available. Government security forces were often unable to resist these challenges, as they were ill trained, while their equipment inferior to those their opponents had bought on the world market. With large parts of the Third world spiralling into conflict and Western powers reluctant to intervene and restore order, a niche was created for PMSCs. They could provide the much-needed military force that their own armies were unable offer and the Western armies were not willing to offer. Not only governments from weak states made use of the services of PMSCs for their security problems. PMSCs provided also Western states an opportunity to intervene without using their own troops.

The Western world’s reluctance to intervene was largely motivated by risk aversion. The political, social, and economic risks of such interventions for Western states and the negative effect that they could have on the political, economic, and social stability of Western states are too high for political leaders to wage. Not only is there the military risk of asymmetric warfare, but even more important the (negative) public opinion back home, that has become very critical in recent decades towards the use of military power to intervene in conflicts abroad. The horrors of the Second World War, and the failure of the US in Vietnam and other debacles (e.g. Somalia), have shaped the attitudes towards war in the Western world and made the

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63 ibid: 50-1.
66 Carmola 2010: 41.
67 ibid.
general public in Western states suspicious of war.\textsuperscript{70} In particular, when there are no vital interests for Western states at stake.\textsuperscript{71} Therefore, leaders carefully weigh the risks of such an intervention before taking action. They not only calculate the potential military risks but also the political and economic risks. These risks make war a dangerous business and form an important restraint on war, as leaders’ ability to wage war is restricted by the aversion of those risks. In particular, in democratic states war is openly debated and leaders are forced to persuade the general public. Diminishing or even completely removing those risks would enable political leaders to wage war with fewer or even without restrictions. This can be dangerous as it could lead to immoral behaviour of political leaders, as there are no risks for which they can be held accountable.

Furthermore, states can intervene without openly choosing a side and directly getting involved, by providing military training or expertise through hired PMSCs to a party in a conflict.\textsuperscript{72} Most notable example of this, are the services provided by MPRI in Croatia.\textsuperscript{73} Hiring PMSCs reduced the risks for leaders, as they did not have to send their own troops into battle, evading the much-feared body bags.\textsuperscript{74} Besides preventing casualties for Western armies, the deployment of PMSCs – instead of national forces – enables states to act outside the control of their democratic institutions.\textsuperscript{75} In this way the regular checks and balances of democratic institutions are undermined, as governments can deploy military force without the approval of parliament, to which they are accountable when deploying national armies.

In contrast to conventional armies, PMSCs make use of a highly mobile workforce drawing from vast database of former security and military service personnel. Often personnel is enlisted with various companies as PMSCs will only hire the personnel from their database that meet the exact requirement of the contract or mission. This makes PMSCs more flexible and therefore more competitive in comparison to regular forces, since they do not have to maintain large numbers of
troops. This flexibility means that states can save costs on training, education, maintenance, and pensions when hiring.

With the end of the Cold new forms of conflict emerged, as the large interstate conflicts were replaced by smaller intrastate conflicts. These conflicts changed the face of warfare as they were fought with small arms and forces made use of dual-use technology. In response to these developments, Western armies needed to transform their armies from Cold-war armies to armies able to face the new threats posed by insurgents and terrorists. To stay ahead and retain the advantage on the battlefield, Western powers started to invest in cutting-edge technology. By making use of technology, Western armies reduce risks for their soldiers, reducing the risks for their political leaders at home as well. Since both knowledge and funding lacked to develop the required technology themselves, they had to turn to the private sector where most of this technology was developed.

Another advantage of outsourcing these tasks to the private sector was that the military had more personnel available to focus on its core duty, namely performing actual combat tasks. Armies around the world needed their soldiers for these tasks since they were short-staffed due to the enormous cuts they have faced since the Cold war. Some commentators even claim that operations, like the 2003 invasion in Iraq, are not possible anymore without the support of PMSCs. Kinsey even claims that the US military created a fertile ground for PMSCs, due to the lack of attention given to post-war planning and the insufficient numbers of troops deployed to maintain law and order after the invasion.

Both the impact on the modern battlefield and the essential role that PMSCs play in supporting both governments and non-state actors should not be underestimated. As Kinsey points out: “The reality is, contractor support currently

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76 Holmqvist, 2005: 6
78 Singer 2003.
85 Kinsey 2009a: 47.
forms a crucial part of the military’s force structure... [T]hey have become strategic assets sometimes able to significantly shape the nature of a military operation in a way that political/military elites can no longer ignore.” Moreover, large numbers of actors benefit from the work of PMSCs as Kramer points out. For governments of strong states, PMSCs provide opportunities for their military to focus on combat duties as they no longer have to worry about logistical supporting tasks such as the delivery of food, laundry and maintenance services. Furthermore, it provides them with opportunities run covert operations and training missions in other countries without using their own military. For weaker states, they provide opportunities to strengthen both their internal and external security. While for multinationals, PMSCs provide opportunities to work safely in dangerous areas, something that will also benefit the state in that region, as the state will receive income through tax revenues. Finally, also international and humanitarian organisations benefit from the services of PMSC, as they are also dependent on a secure environment to do their work. The wide use of PMSCs among many different actors makes it unlikely that they will disappear in the near future and that their services will be taken back by state agents.

These changes in the socio-political attitudes, towards the organisation of the state, and the historical developments since the end of the Cold war have contributed to the rise of PMSCs. At the same time, it is important to pay attention to the consequences of the privatization of security. The provision of security and the thereby required use of force traditionally has been the monopoly of the state. This monopoly has been broken, as parts of the responsibility for the security provision within states have been (partly) transferred to the private sector. The private security sector has further extended its portfolio with services that due to their nature can be labelled as exclusive military services. This erosion of the state monopoly on the legitimate use of force and the nature of the services provided by PMSCs have raised both moral and legal questions. Like: which tasks are morally and legally permissible for PMSCs? To what extent can they be held accountable? And who is responsible for their actions? However, before these questions can be addressed, it is important to provide an inclusive insight in the tasks and services that PMSCs provide.

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86 Kinsey 2009a: 143.
87 Kramer 2007: 29.
3. PMSCs: a description

This chapter will provide a comprehensive description of PMSCs and give an overview of the tasks performed by PMSCs, in order to provide a better understanding of the activities of PMSCs, and there moral consequences and legal implications. PMSCs provide a wide variety of services to their customers and are, in contrast to mercenaries, commercial, benefit-oriented companies, registered under private law, and highly organised organisations that provide military and security services. As noted in chapter two, some of their tasks and services have a clear military character, while others are more of a civil/policing nature. The military services provided by PMSCs contain military training, strategic planning, military support operations, and Operational & Tactical support, while security services are more focussed on the protection of property and persons, policing, interrogation and translation services. Most PMSCs have the flexibility to provide both military and security services and switch from one service to the other and provide the service that is then most profitable for them. This wide variety of services offered by PMSCs makes their identity protean and difficult to define.

Furthermore, a clear definition of PMSC’s is lacking and various authors have proposed and use different definitions. Some distinguish between PSCs and PMCs on the basis that PMCs provide active military assistance in contrast to PSCs, whereas others include PSCs within PMCs. Singer opted for a different term – namely Private Military Firm (PMF) – and for him: “They are business organizations that trade in professional services intricacy linked to warfare”. The broader term PMSC will be used here, as this covers all security and military services that they offer. Moreover, as O’Brien and Percy point out, among others, PMSCs have protean identity due to the wide variety of tasks and services that they provide. This makes it difficult to analyse PMSCs as a whole and it is therefore more sensible to look to the

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90 Schreier and Caparini 2005: 36.
92 Carmola 2010: 39.
94 Percy 2006: 14-5.
95 Singer 2003: 8.
specific tasks and service that PMSCs provide, when analysing their moral and legal implications.

Hence, some authors have already tried to classify/categorise the tasks and services provided by PMSCs. Singer uses the metaphor of the spear to classify PMSCs according to the services that they provide and the potential use of force, in which the tip-of-the-spear represents toe frontline. The three types of firms that Singer distinguishes are: military provider firms, military consultant firms, and military support firms. The first type of companies – tip-of-the-spear – provide services at the frontline; the second type provide principally advisory and training services; while the third are used for non-lethal aid and assistance.97

**Figure 1**

![Diagram of P.W Singer ‘Tip of the Spear’ Typology](image)

Kinsey goes a step further and adds the element of ownership, setting out private against public ownership on the horizontal axis and the means used to secure the object on the vertical axis, creates four quadrants. (See figure 2) In the bottom two quadrants, the level of force used is passive, while in the top two quadrants force is used for offensive purposes. The object secured – set out on the horizontal axis – in the right two quadrants is publicly owned, while on the left side it is privately owned, where axis intersect, security is provided in a private public partnership.98 In the

98 Kinsey, 2006: 10-3
version below, the letters represent PMSCs providing certain tasks and services, with the exception of A, B & C, which represent classic state institutions.

Figure 2

The advantage of this approach, over the approach taken by Singer, is that it draws attention to the ownership of the object that is protected. In the light of the state monopoly on legitimate use of force, this is a relevant point for the analysis as it establishes a connection between the level of force used and on behalf of which actor. The actor on whose behalf force is used is an important variable in the moral and legal restraints on war and its conduct and lies at the heart of the JWT-debate. Therefore, this question will be discussed in more detail in the next chapter.

Moreover, in his analysis Kinsey places PMSCs in a fixed place in the table to
illustrate which type of tasks must be placed where in the table. Although, he acknowledges that companies can move around the axis, his main point remains that they will remain focussed on their core competence, which reduces market risks for the company and benefits their image as a reliable partner.99 This thesis tends to disagree with this approach as companies offer a broad range of services and adapt to the demand generated by the market.100

Though, both approaches are useful to analyse the tasks performed by PMSCs, there are also downsides to their approaches. In her critique on Singer, Holmqvist points out that only focussing on the lethality of actions taken by PMSC’s neglects the fact that even by providing non-lethal services, such as advice or intelligence, the impact of PMSC’s on the ‘security environment’ may be significant.101 This critique is also valid for the approach taken by Kinsey, as the use of force is also a one of the key component of his analysis.

The way in which PMSCs provide their service may alter due to changes in the security environment where they operate and can be best illustrated with a little thought experiment. Imagine, a PMSC working for the private sector (e.g. a mining company) now located at point G, currently working unarmed guards, might be forced to arm its guards, as the security environment deteriorates. As a consequence of this development, point G would move upwards along the vertical axis and could even end up at point I. Furthermore, what is considered a defensive task under one set of circumstances could well be perceived as an offensive task under other circumstances.102 Imagine an armed bodyguard of a diplomat and note that there is a significant difference between protecting his client in Brussels or Bagdad. Not only is it more likely that he needs to use his weapon in Bagdad than in Brussels, but being armed in either a conflict situation or peace situation also has a significant impact on his status as either a combatant or non-combatant. Which in itself is already an important difference in particular in relation with the JWT. It is therefore important to also pay attention to the environment in which a certain service or tasks is provided.103 To sum up, the focus of the analysis should lie on the specific tasks performed by the PMSC in certain security environments.104 The following table

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99 Kinsey 2006: 30-1  
100 Gillard 2006: 529-530  
101 Holmqvist 2005: 5  
102 Holmqvist 2005: 5  
103 Percy 2006: 14  
(Figure 3) tries to give a more complete oversight over the different tasks performed by PMSCs.

**Figure 3**

<table>
<thead>
<tr>
<th>Services provided by PMSCs</th>
<th>Tasks/ Services and their impact</th>
<th>Nature of tasks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Logistical Support</td>
<td>Delivery of food and equipment, laundry services and maintenance of military bases</td>
<td>Civil</td>
</tr>
<tr>
<td><strong>Operational &amp; Tactical support</strong></td>
<td>Development and support of weapons systems, <em>operate weapons systems (e.g. missile guidance systems, UAV's), planning and implementation of combat missions</em></td>
<td>Civil/military</td>
</tr>
<tr>
<td>Security &amp; Policing</td>
<td>Providing security for convoys, individuals, industrial, military and political installations and assets, <em>providing and training police services, interrogation and translation service, intelligence gathering and analysis</em></td>
<td>Civil/military</td>
</tr>
<tr>
<td>Military Advice &amp; Training</td>
<td><em>Assistance by reforming or the setting up of armies, training of armed and auxiliary forces</em></td>
<td>Military</td>
</tr>
</tbody>
</table>

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= Potential Use of Lethal Force  
= Use of Lethal Force  
*Italics* = impact on the security environment by: potential direct participation in hostilities, decision-making capabilities, or influence in the chain of command.

The services provided by PMSCs are divided in to four types using the classification made by Percy, set out in column one.\(^{105}\) The second column tries to give an insight in (potential) lethality and influence that the different services performed by PMSC have on the security environment. In this way, it becomes possible to identify the potential moral and legal implications of the different services provided. In the final column, the different tasks performed by PMSC are classified by their nature, either military of civilian. As can seen in the table, the difference between the two is difficult to make and sometimes there is even a considerable overlap between the two. It becomes also clear that despite that some of the services performed by PMSCs are not directly lethal, their influence on the security environment can be significant. This raises a number of moral and legal dilemmas, which will be explored here in more detail.

\(^{105}\) Percy 2006: 11-3.
The first service that is provided by PMSCs is *Logistical Support*. The tasks and services provided under this heading entail the delivery of food and equipment, laundry services and diverse maintenance tasks and are merely the result of outsourcing civilian tasks. Due to their civilian nature these were the first services that were outsourced to the public sector. When looking first hand at the provision of *Logistical Support*, there seem to be no moral and legal dilemmas. However, the presence of civilians or non-combatants on the battlefield, accompanying combatants raises a number of significant moral and legal questions. In the light of the JWT, the status of PMSC-employees, as either civilians or combatants, is of importance, because the status of a person on the battlefield determines if one can participate in the hostilities and if a person can be a legitimate subject of an attack.

The second group of services provided by PMSC’s, *Operational & Tactical Support*, entail both services at the tip-of-the-spear and in the supply chain with development of weapon systems. Due the high-level of technology used by most types of modern weapon systems, armies often lack the qualified personnel to both maintain and operate them, and PMSCs offer contracts in which the development, maintenance, and support of weapon systems are all included. Sometimes they even operate the systems for the army, such as unmanned aircraft also know as UAVs. In this way, PMSCs differ from regular weapon manufacturers in that they not simply deliver the weapons but also maintain them in service and even operate them. The other services they offer at the tip-of-the-spear besides operating weapon systems are planning and the implementation of combat missions, in which PMSCs and their employees get actually involved in the fighting at the frontline.

By providing *Security & Policing* services, PMSCs also have a significant impact on the security environment. The services that fall into this category are the physical protection of convoys, individuals, industrial and military assets. Plus the

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111 Tonkin 2011: 49-51.
provision and training of police forces, the provision of interrogation and translation services, and the gathering and analysis of intelligence. Not only is there the potential use of force, which has its moral and legal consequences, but also the significant impact that they have on how the security environment is shaped. For instance the training of new police recruits, often part of a Security Sector Reform (SSR) programme, gives PMSCs the ability to shape the way a police force is working and will have a significant impact on the security environment of the future. Having this impact and taking over part of the state role in the provision of security creates a moral responsibility. The other tasks in this category such as the gathering of information and interrogating prisoners can also have a significant impact on the security environment. The question raised here is: is it permissible that private companies have such a significant impact on the security environment? Furthermore, what kind of control mechanisms are there and can PMSCs and individual contractors be held accountable?

The final group of services provided, Military Advice & Training, entail assistance with the reforming and setting up of armies and the training of army and auxiliary forces. This service raises many of the same moral and legal questions mentioned above. In particular services like the assistance in setting up of a military structure and the provision of training, which are often provided as part of a SSR-programme, have a significant impact on the conduct of war and the security environment of the future as well. Furthermore, the ways the chain of command, and the control mechanism over the army are set up, are fundamental for the control over the army. Being part of the so-called ‘military doctrine’ of an army, which determines how and when military force is used. Moreover, military training is central for soldiers to developing good ethical standards. Before soldiers go to war, they need to develop an understanding for what is morally and legally permissible in the conduct of war as this restrains the inherent evils of war and military.

112 Tonkin 2011: 45–46.
114 Tonkin 2011: 45-7.
knowledge of military ethics and the accompanying set of skills is part of the professionalization of the military. Therefore, PMSCs can – if they are made responsible for this training and professionalization of soldiers – have a significant impact on what is going to happen on the battlefield without being there. They have equipped the soldiers with knowledge on how to do their duty and at the same time should have thought them about the moral and legal restraints on war and its conduct.

To sum up, this chapter has tried to give an insight in the broad range of services provided, and tasks performed by PMSCs. By their presence on the ground and by the provision of their services, PMSCs can have a significant impact on the security environment. They can directly contribute to the war effort in numerous ways, even without taking directly part in the hostilities. In the next chapter, the theoretical framework based on the contemporary understanding of the JWT will be elaborated. Using this framework the moral boundaries along which PMSCs should operate can then be uncovered. In the final chapter of the thesis, the deployment of PMSCs in Iraq in the period 2003-2009 will be tested along the moral boundaries established in the preceding chapter and will the hypothesis be tested in the conclusion of the thesis.
4. The Just War Tradition
This thesis uses the broad interpretation of the JWT as formulated by Alex Bellamy in his book: *Just War: From Cicero to Iraq* (2006) as a starting point for the theoretical framework. By using this interpretation, the JWT offers a framework, with a common language based on an overlapping consensus that can be used to debate and judge the legitimacy of going to war (*Jus ad Bellum*) and its conduct (*Jus in Bello*).\(^\text{118}\) It incorporates the elements of three different sub-traditions of the debate on war and its conduct. These three sub-traditions are positive law, natural law, and realism.\(^\text{119}\)

Using the arguments formulated by the different sub-traditions, the JWT provides a broad normative landscape to discuss war and related issues. Its broad use among politicians, the military, and academic scholars who use the JWT to reflect on, and motivate their decisions and policies, have proved the added value of the JWT as a tool for debate and analysis.\(^\text{120}\) A first reading of the JWT would suggest that the tradition is only focussed on the question of going to war and its conduct but by using the JWT as a broad tool for debating the legitimate use of force, the tradition can also be used for debating the deployment of PMSCs in security environments other than war. Moreover, the JWT has already influenced other debates, such as the way the security forces should be trained\(^\text{121}\) and how the civil control over the security forces should be arranged.\(^\text{122}\)

The JWT is, like most concepts in social science, not a concept that is marked by clear boundaries, nor is it a static concept. It is the result of an on-going debate between the traditions mentioned above.\(^\text{123}\) Despite the fact, that the debate is ongoing and that its broad range of sources make the JWT widespread and varied, the tradition has been able to develop a consensus on certain basic principles that aim to constrain war and its conduct.\(^\text{124}\) There is a lively debate among people in the JWT-community

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\(^{118}\) Bellamy 2008: 229.
\(^{119}\) ibid 4.
as they differ in their interpretation of, and placing nuances within the JWT.\(^{125}\) Despite these differences, these scholars – just as the rest of the people involved in the Just War debate – share a common language and frame of reference. Therefore, they form a ‘Just War’ community that share a common understanding that recognizes one another.\(^{126}\) Due to this protean structure, the JWT should not be seen as a set of definitive answers, but rather as a tool that can help structure the decisions of the military and decisions-makers and provide a common language for those who want to discuss the moral and legal implications of the decisions of war and its conduct.\(^{127}\)

Since morality plays an important role in this thesis, it is therefore important to define what is meant when using the term morality. Armstutz refers to morality as: “\(^{128}\)”Values and beliefs about what is right or wrong, good and bad, just and unjust.” Since this is a broad definition, it would be tempting to further explore the nature of these different values and beliefs, as this is an interesting debate in itself. However, the time and space for such an endeavour is lacking. In order to still provide the reader with a good understanding of the moral boundaries of the JWT, a sociological approach towards morality will be used. Central to this approach is the question why certain groups of people have particular moral views and values.\(^{130}\) This will focus the attention on the moral values and beliefs of the JWT-community as a group and how they have developed their moral standings. The central moral belief that unites the JWT-community is that the resort to the use of force should be limited and that the conduct of the use of force should be as humane as possible.\(^{131}\) Behaviour that is in contrast these values will thus be considered immoral by the JWT-community.

Many of the JWT-community’s values and beliefs have been codified in to international law as well. Therefore, many of the JWT-principles do not only create a moral but also a legal commitment, while at the same time any legal commitment creates a moral commitment not to break it. Whenever the term morality is used in the

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\(^{125}\) ibid.
\(^{126}\) O’Driscoll 2008: 109-113
\(^{128}\) Amstutz 2008: 8.
\(^{129}\) It must be acknowledged that the question to the nature of different moral beliefs in international politics is an interesting one. For a comprehensive overview, see Amstutz 2008 chpt. 1-3.
\(^{130}\) Abend 2008: 87.
\(^{131}\) Bellamy 2008: 125-6.
remainder of this thesis, it refers to the values and beliefs of the JWT-community, while the term legal refers to those values and beliefs codified into positive law.

The following of this chapter will provide an understanding of the existing consensus in the contemporary JWT-debate. By pointing out the common grounds that exist in the contemporary debate, it will be possible to identify the guiding principles for both the resort to war (Jus ad Bellum), and conduct of war (Jus in Bello). Due to space constrains and to keep the focus on the legal and moral dilemmas that arise with the use of PMSCs, some principles will be discussed in more details that others. Jus post Bellum, will briefly be discussed at the end.

4a. Jus ad Bellum

The part that governs the decision to go to war (Jus ad Bellum) is formed by six principles. These principles, here in the order used by Bellamy are: (1) Right Intention, (2) Just Cause, (3) Right Authority, (4) Proportionality of Ends (5) Last Resort and (6) Declaration.\textsuperscript{132} This part of the JWT aims to restrain the resort to war by providing a framework, which can be used to debate the resort to war, and help to determine if the resort to war is justified. Such a debate will have a variety of participants, such as political leaders, diplomats, scholars, opinion makers, and journalists, among others. Taken together they can be called the ‘international community’ and act as jurors of the JWT.\textsuperscript{133} By making use of the principles of the JWT, they debate the justification for the resort to war is given by the actor. The principles of the JWT could thus be seen as a ‘burden of proof’, which must be provided by an actor to justify its use of force.\textsuperscript{134} It would be naïve to expect that the jurors will be unanimous in their views on the proof presented to them, as their background, interests, and points of departure may differ from each other.\textsuperscript{135} But, their influence is of importance as they provide a moral barrier, which restrains the use of force.

The first principle Right Intention guards the motivation for going to war. Legitimate intentions include motivations such as creating, restoring, or keeping a just

\textsuperscript{132} Bellamy 2008: 122-4.
\textsuperscript{133} Bellamy 2008: 126.
\textsuperscript{135} Bellamy 2008: 126-8.
peace, righting wrongs and protecting the innocent.\textsuperscript{136} Excluding unjust motivations, such as a leader's personal, or national gain, hatred, and revenge and attempts to enslave or convert other cultures, ideologies, or religions.\textsuperscript{137} \textit{Right Intention} mean that a war is started for good reasons and that the interference in the country that is attacked or invaded is reduced to the minimum necessary.\textsuperscript{138} It is of course difficult to be completely sure about the real intentions of an actor and most of the time actors have more than one reason that motivate their actions. Nevertheless, this principle is important, as wars fought for primarily the wrong motives will lead to an unjust peace, and are likely to seed further conflict.\textsuperscript{139}

\textit{Just Cause}, the second principle, is closely related to the principle of \textit{Right Intention}. This principle requires that a war are fought with a \textit{Just Cause}, in the classical perception this includes, self-defence, the defence of others (collective security) and the defence of rights, the restoration of peace and the punishment of wrongdoers.\textsuperscript{140} In an attempt to further restrain the resort to war, various steps have been taken after the Second World War to limit the \textit{Just Causes} for war. The United Nations (UN) Charter is the clearest example of this. Under the UN-system, self-defence, the defence of others and international peace have been viewed as the only \textit{Just Cause} for war.\textsuperscript{141} The UN has tried, by using the UN Charter and the authorisation of the Security Council (UNSC), to limit the \textit{Just Causes} for war to these situations and become the most important juror.\textsuperscript{142} However, the inability of the UN-system to respond to a number of crisis’s, when there was a \textit{Just Cause} for the use of force to intervene, the reluctance of powerful states to abide to this rule, and the development of new threats perceived as \textit{Just Causes}, have led to a debate to expand the scope of \textit{Just Cause}.\textsuperscript{143}

Some have argued that an imminent threat to international peace, a state, or a political community, can be a \textit{Just Cause} for a pre-emptive war.\textsuperscript{144} In an attempt to summarize this debate, which gained force in the run up to and after the 2003

\begin{thebibliography}{99}
\bibitem{136} Whetham 2011: 77
\bibitem{139} Whetham 2011: 77-8
\bibitem{140} Bellamy 2008: 122 & Hayden 2005: 168
\bibitem{141} Coverdale, 2004: 231
\bibitem{142} United Nations Charter, art 51
\bibitem{143} O'Driscoll 2008: 14-8.
\end{thebibliography}
American and British intervention in Iraq, Cian O’Driscoll concludes that there is a consensus among Just War scholars that currently defined parameters on the right to self-defence and anticipation are inadequate to cope with new threats such as terrorism. Bellamy largely concurs with this view and illustrates in three case studies how the pre-emption argument is used and some times even misused in his view. Pre-emption and in particular its interpretation remains thus a point of debate.

Other ideas to expand the scope of Just Cause – humanitarian intervention and punitive war – have also received renewed attention following the invasion in Iraq. However, both Bellamy and O’Driscoll conclude separate from each other in their studies that a consensus on these three principles – pre-emption, humanitarian intervention, and punitive war – is far from being reached among the JWT-community. Therefore, the principle of Just Cause remains one of the most heavily debated principles within the JWT. But being one of the fundamental principles of the JWT, it is also important for PMSCs to consider if the resort to the use of force was just. In the next chapter this point will be discussed in more detail.

The third principle, Right Authority also know as Legitimate Authority, requires that exclusively a competent authority, which has the right to do so, can wage war. In general, states are considered to be the Right Authority when it comes to waging war. Though, both the development of the UN and the process of decolonisation have challenged the perception of the state being the only competent authority for waging war. The UNSC has tried to establish itself, as the Right Authority when it comes to authorizing the use of force. Although, its challenge to replace states as the only Right Authority for war has largely failed, it cannot be denied that the UN-system has had its influence as important juror of the internal community in shaping the behaviour of, and relations between, sovereign states.

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146 Bellamy 2008: chpt 8.
The decolonisation wars were fought largely by non-state actors and by acknowledging that their cause was just – fighting for self-determination – challenged the perception of the state being to only Right Authority.\textsuperscript{152} By claiming that only states can be legitimate actors would make any struggle for freedom and independence by non-state actors illegitimate. It has been argued that political communities, that strive for self-determination or fight against repression, can be recognized as Right Authority in the JWT.\textsuperscript{153} If the political community represents, and has authority over a defined group of people and territory and has shown and learned, in its struggle for independence, the virtues needed for meaningful freedom, it has thus acquired ‘state like’ capabilities. Walzer calls this process the ‘self-help test’.\textsuperscript{154} Despite these changes the right to wage war remains the monopoly of certain organised political actors.\textsuperscript{155}

Being recognized as a Right Authority also creates a responsibility for leaders to also respect the domestic procedures that guard the authorization of the use of force.\textsuperscript{156} Ordering the use of force without the proper authorisation should be considered immoral as the leader has bypassed or undermined the procedures that not only govern the use of force but also restrain it.\textsuperscript{157} This point is of particular relevance as PMSCs can be hired and deployed using government contracts that fall outside the regular procedures, which are used to govern the deployment a Right Authorities security forces. In the next chapter this will be analysed in more detail.

The fourth and fifth principles, Proportionality of Ends and Last Resort, will be discussed together as they are closely related. Both demand that before resorting to war an assessment is made if war is proportionate to restore justice and that all other means short of war have been exhausted to correct the injustice.\textsuperscript{158} It is difficult to make a proper assessment of the evils of war in advance but it requires prudence of

leaders before resorting to the use of force. This similar requirement is valid for the principle Last Resort, as there is always something else that can be done. There is no uniform way to establish objectively that indeed all other means short of war have been exhausted. However, leaders should not resort to the use of force, if other reasonable options are still available. A certain level of realism is necessary here, since this moral decision should be taken in the light of the political and military reality. Waiting too long to restore justice could make an effective remedy costly, even impossible and have injustice as a consequence. This balancing act should therefore be the result of an informed moral debate in which the good and the bad of the use of force have been weight against each other.

The last principle of Jus ad Bellum that Bellamy uses, Declaration, is used to test if the resort to use of force has been justly. A declaration of war will raise the attention of the actors’ peers and start the necessary debate on the legitimacy of the use of force. Since many actors value the opinion of their allies greatly, especially in important cases such as war, they will try to convince the international community that all principles of Jus ad Bellum have been fulfilled and that their decision to resort the use of force is legitimate. This step restrains the use of force, as states first have to convince the jurors of the international community that war is legitimate and failing to do so may deter states from using force. Though, it must be acknowledged that this mechanism is more effective on weak states than on powerful states, but they also value to this system. This is illustrated by the efforts by the Bush-administration in the wake of the 2003 Iraq war, and by NATO before intervening in Kosovo in 1999, to convince the international community that their resort to the use of force was just.

Another reason why Declaration is of importance is that it marks the watershed between war and peace. The significance of this is that it marks the moment from which the rules on the conduct of war, Jus in Bello, are valid.

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160 Walzer 2006a: 86.
161 Fotion 2007: 14.
164 Bellamy 2008a: 124
167 Bellamy 2008a: 124.
particular, in modern interstate conflicts, fought by mostly non-state actors, such a declaration can provide the necessary clarity to protect the rights of both combatants and non-combatants. 168

To sum up this overview of *Jus ad Bellum*, it has become clear that the principles set out above have only been codified partly in positive law. It was not until after the two world wars that states tried to restrain war through codifying *Jus ad Bellum* via the UN Charter. 169 Moreover, the codified restraints appear to be weak as states override them regularly, but this does not mean that the *Jus ad Bellum*-principles have no value at all. The principles are not aimed to be a checklist that can be ticked off to justify the use of force. This is also impossible since many of the principles give some leeway for interpretation and opinions about, meaning, and weight of the principles differ.170 Nevertheless, the JWT-principles require of actors that they have given due consideration to the principles and take note of the opinions of the actual juries and judges of the international community before they use force. 171 Used in this way, the JWT does not forbid the use of force or resort to war, but it forms, if used correct, as an effective mechanism to restrain it.

4b. *Jus in Bello*

This part of the JWT attempts to regulate the conduct of war itself and enables us to make moral judgements about the way a war is fought. 172 The version of Bellamy, uses three principles (1) *Discrimination*, (2) *Proportionality*, & (3) *Abiding by Conventions*, this in contrast to most other writers who only use the first two principles. 173 The principles of *Jus in Bello* are largely codified into positive law, into two sets of conventions also known as the international law of armed conflict. 174

The first principle, *Discrimination*, determines who and what can be legitimate targeted in the conduct of war. 175 Legitimate targets are those targets that

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168 Evans 2005b: 204-5.
169 Weeks 2010: 22-5.
171 Bellamy 2008: 126.
172 Bellamy 2008: 124 & Walzer 2006a: 300-3
are members of the armed forces, combatants, or of a military nature or those targets that contribute to the war-effort of the enemy and may be targeted directly. Illegitimate targets on the other hand, are civilians or non-combatants and those targets that are have a clear civilian nature and targeting them directly is an illegitimate act of war. This distinction is unfortunately not so clear in real-life as both the military and civilians use largely the same infrastructure and are sometimes located in close proximity of each other.¹⁷⁶ This dilemma can be resolved using the doctrine of double-effect, which will be explained in more detail below.

But who qualifies as a legitimate combatant? An individual is a legitimate combatant when (s)he is part of a hierarchical group, wears a distinctive uniform or emblem, bears its arms openly, and obeys the rules of war.¹⁷⁷ Being a combatant provides individuals with certain rights, of which the most important is the right to participate in hostilities without being subject to criminal prosecution. Non-combatants have no right to participate in hostilities and if they do so, their special protection can be suspended, making them legitimate targets in the conduct of war.¹⁷⁸ Furthermore, their unlawful participation in hostilities may be subject to criminal prosecution, since they had no rights to participate in the hostilities.¹⁷⁹ However, guerrilla and other irregular forces, which occupy the modern battlefield do not distinguish themselves as combatants, and are considered illegitimate combatants.¹⁸⁰ This separation between legitimate and illegitimate combatants is also of importance for PMSCs and contractors as will be shown later on in this thesis.

Legitimate combatants have to be part of a hierarchical structure so that they can be held accountable for their actions.¹⁸¹ Although, people can still obey the law of armed conflict and fight in a just way without being part of such a hierarchical system, these should combatants still be identified as illegitimate, because a system is lacking to hold them accountable when they break the law of armed conflict. After all, a Right Authority does not control them, as they are not part of a hierarchical structure. Even if they claim to represent a Right Authority, their status is problematic due to the lack of accountability to this authority as a mechanism for direct control is lacking.

¹⁷⁷ Frowe 2011: 101-3 & Walzer 2006a:144-151
¹⁷⁸ Schaller 2007: 348-9
In non-international conflicts, or intrastate conflicts the definition of combatants, and the separation between legitimate and illegitimate combatants, is more ambiguous. Nevertheless, there seems to be a consensus on which groups are legitimate combatants in non-international conflicts. Legitimate combatants in non-international conflicts need to be member of a hierarchical structure and represent a political community that has authority over a defined group of people and territory. They are thus fighting on behalf of a Right Authority that should be able to control and discipline them. This requirement excludes terrorists, mercenaries, and insurgents, and separates them from those involved in a legitimate struggle for independence.

It is difficult to mark a clear line between those that directly participate in hostilities and those that contribute to the war effort, since a clear definition on direct participation in hostilities is lacking. A significant group of these civilians, called ‘monition workers’ by Walzer, fall in the grey area between combatants and civilians as they preform those tasks and services that are indispensable for the functioning of the security forces and the war effort without fighting themselves. Especially, with the arrival of PMSCs, the number of civilians accompanying the armed forces has risen significantly. Article 4a of the third Geneva Convention recognizes these individuals as: ‘Persons who accompany the armed forces without actually being members…’, also know as civilians accompanying the armed forces. This article grants them the Prisoner of War status when captured, but does not explicitly forbid them to be armed or carry weapons. However, when armed they operate in a grey area between combatants and non-combatants and could thus be considered illegitimate combatants. This position is morally problematic, since it diffuses the separation between the two classes and it remains uncertain how they can be held accountable.

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186 Walzer 2006a: 146.
188 Geneva Conventions III relative to the treatment of Prisoners of War. art. 4a. 4
This will be discussed further in the next chapter, when the status of PMSC-employees is analysed in detail.

*Proportionality*, the second principle of *Jus in Bello* requires that the level of force used is proportionate to the objective one tries to achieve.190 Damages, losses and injuries resulting from any military action, should not be excessive in relation to the military objective one expects to gain.191 Military commanders have the obligation to use proportionate force to achieve their military goals.192

Nevertheless, even in the modern day and age it remains impossible to completely prevent civilian casualties or damages. The doctrine of double effect can then be used to assess if a certain action can be morally justified despite having immoral side effects. An act is morally justifiable if the act is good in itself and the direct effect is morally acceptable. It also requires that the actor may only aim at the acceptable effect and the negative effect (e.g. civilian casualties) is not one of his ends, nor the means to his ends. The final requirement is that the good effect sufficiently compensates the evil effect.193 This creates a responsibility for military commanders to assess the consequence of their decisions carefully and be prudent in their decision-making.194 The *Right Authority*, has the responsibility to discipline those under its command and hold them accountable when necessary.195

To this end the final principle, *Abiding by Conventions*, is of importance, as it guards that the restraints on war are implemented and enforced. States have under International Humanitarian Law (IHL) and Human Rights Law (HRL), a positive obligation to ensure that everyone under their jurisdiction can enjoy their rights and can take action against anyone within their jurisdiction who violates IHL and HRL.196 If state actors fail to do so, they can be held responsible for failing

191 Whetham 2011: 81
193 Walzer 2006a 153.
194 Guthrie and Quinnan 2007: 40.
to fulfil their positive obligation. Only with a system that ensures that the principles of Jus in Bello are respected, there can be an effective restraint on the use of force.

4c. Jus post Bellum
The principle of Jus post Bellum is without a doubt one of the most controversial parts of the JWT and for classical scholars not even part of theJWT. This part of the JWT is concerned with in the aftermath of war. In particular the recent reconstruction efforts – notably Iraq and Afghanistan – have regenerated the interest in this part of Just War Thinking. Despite being controversial, it is nevertheless needed to provide some attention to this part of the JWT, as PMSCs often operate in post-war or reconstruction environments. They are hired to provide security during those periods and also assist and train new security forces in post-conflict states. Bellamy identifies two positions towards Jus post Bellum. The first, the minimalist approach sees Jus post Bellum as a series of restraint on what a victor is allowed to do after the war. This could prohibit the victor from imposing a government upon a state without the consent of its population or protect minorities against prosecution. The maximalist approach argues that victors acquire certain additional responsibilities they need to fulfil in order for the war to be just, thus making the victor responsible for the reconstruction of a country after war. The active role of PMSCs in post-conflict reconstructions, often paid by donors, suggests that the maximalist approach is gaining force. Without going to much into the details of the (on-going) debate, it is important to point out here that in the current debate there is a sense of urge among scholars, that the ending of war should receive equal attention

4d. Concluding remarks
In conclusion of this overview of the JWT-principles, it is important to note that a mechanism or system to uphold the principles is key in order to guard that the principles are upheld and violators be held accountable. Only than will the JWT form

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199 Bellamy, The Responsibilities of Victory: Jus Post Bellum and the Just War 2008
201 Walzer, Arguing about War 2004: 164
an effective mechanism to constrain the use of force and it conduct. The absence of such a mechanism will lead to immoral behaviour of actors, both in their decision to resort to the use of force and in their conduct of force. Whereas the international community functions as the primary judge to guards the principles of *Jus ad Bellum*, are *Right Authorities* responsible for upholding the principles of *Jus in Bello* through the hierarchical structure of their military and security services. To this end, the status of the individual as either legitimate or illegitimate combatant is key, as only legitimate combatants are member of the armed or security forces of a *Right Authority* that disciplines them and is able to hold them accountable.
5. Establishing the Moral Boundaries

Using the contemporary understanding of the JWT, it will be possible to identify the legal and moral boundaries along which PMSCs should operate. In this way it can be determined if and how PMSCs can operate legitimate and it will provide a comprehensive oversight of the moral implications of the deployment of PMSC’s. The analysis is split in a separate analysis on the moral boundaries for PMSCs when hired by state actors and another analysis when hired by non-state actors. The boundaries uncovered in this chapter will be used in the last chapter of this thesis in a case study on the deployment of PMSCs in Iraq between 2003 and 2009.

5a. The Key Variables

Before analysing the provision of tasks and services by PMSCs to both state and non-state actors separately, it is useful to briefly outline the key variables that determine if the provision of a certain tasks or service is legitimate. These variables are: the task that is performed, actor hiring, and the security environment and status of the security environment in which the PMSC operates.

It was argued in the first chapter that each of the tasks and services provided by PMSCs should be analysed separately, due to the protean structure of PMSCs and the wide variety of tasks and services that they provide. The moral and legal implications of these tasks and services vary, as the level of force used and impact on the security environment may vary as well (see figure 3). It would be tempting to only focus on those tasks and services where lethal force is used, since the moral and legal implications are most clear here. However, this would create an incomplete image as those tasks and services, which despite being non-lethal have a profound impact on the security environment, were neglected in the analysis.

The second point, the actor hiring the PMSC, is of importance because according to the JWT, the nature of the actor and its possession of Right Authority determine if the use of force is legitimate. But also the legitimacy of services that influence the security environment without the use of force depends to a large extent on the nature of the hiring entity. The nature of the hiring actor will thus largely determine if the provision of a certain tasks or service is legitimate.

The final variable is the security environment and status of the security environment in which the PMSC operates. Just like the wide variety of tasks and services performed by PMSCs varies, the security environment in which they operate
varies as well. In a stable security environment, during peacetime, PMSC are likely to provide security without or with minimum use of force, while more unstable security environments, such as a conflict zones, require a higher level of force to ensure that they fulfil their tasks. Whether or not PMSCs can legitimate use force is thus dependent on the nature of the hiring actor and the status of the security environment in which PMSCs operate. In figure four below, the main characteristics of both stable and unstable security environments are listed in a table to provide an overview.

**Figure 4**

<table>
<thead>
<tr>
<th>Security environment</th>
<th>Stable</th>
<th>Unstable</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>State control</strong></td>
<td>Strong</td>
<td>Weak or absent</td>
</tr>
<tr>
<td><strong>Legal System/ ability to uphold the Rule of Law (RoL)</strong></td>
<td>Effective</td>
<td>Ineffective or absent</td>
</tr>
<tr>
<td><strong>Level of force required to maintain order</strong></td>
<td>Low</td>
<td>High</td>
</tr>
</tbody>
</table>

By status of the security environment is meant if the security environment can be described as either in peace or in conflict. In the later case, it is also of importance what kind of conflict the PMSC is operating in, either in an international conflict or in a non-international conflict. As was pointed out before, the definitions of legitimate combatants are more clearly in international conflict than in non-international conflicts. Moreover, in a stable security environment there is often an authority or government that can regulates the deployment of PMSC and the use of force, as they have a legal system and the power to enforce the law, while in an unstable security environments such a system is often lacking or not functioning. PMSCs are often hired in such unstable regions to assist in improving the security environment.

5b. State Actors

The identity of the actor on whose behalf a PMSC operates or provides services is important because it directly relates to the JWT-principle of Right Authority. As noted before, states are no longer perceived as the only entities possessing Right Authority in the contemporary reading of the JWT. Non-state actors can also be perceived as legitimate actors, possessing Right Authority, according to the contemporary reading.

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205 Heinze en Steele 2009: 10.
However, actors still need to possess ‘state-like’ capabilities and pass the ‘self-help’ test before they can legitimately resort to the use of force. This excludes multinationals (MNCs), insurgents, and terrorist organisations.

Having ‘state-like’ capabilities and being recognized as possessing Right Authority by the international community thus has significant implications for the rights and entitlements that an actor can make under the JWT. As the rights and entitlements under the JWT of state actors and ‘state-like’ non-state actors can be considered equal to each other, will they be treated as similar in the remainder of this thesis. By the use of the word state or state actor, both state actors and non-state actors with ‘state-like’ capabilities and recognized as Right Authority are meant.

Being a state actor and being recognized as such does this not mean that everything is permissible, nor that PMSCs can put the burden of fulfilling the principles of the JWT completely on the state hiring them. Considering the nature of the tasks and services that they provide, PMSCs have the moral obligation to consider if such action is legitimate before accepting a contract. After all, PMSCs are free to choose if they get involved or not, as they are only guided by the economic realities of their business, when deciding to participate in certain conflicts or battles.

This argument can be illustrated using the following analogy of the multinational (MNC). Just as a multinational decide which conditions (e.g. using child labor or polluting production methods) it produces its products, can PMSCs decide themselves where they operate and under which circumstances they deem acceptable. The MNC may face moral dilemmas when making these decisions. Although, part of the responsibility rests with the costumer, who may accept certain production processes and justifies those by buying the product. There remains an undeniable responsibility for the multinational to make a moral informed decision. PMSCs have a similar, if not larger responsibility when taking into account the influence their decisions to accept a certain job can have on the security environment in a certain region and the lives of the people living there.

Also at the individual level is there a responsibility, as PMSCs-employees have, due to the loose structure of PMSCs explained in first chapter, the opportunity to choose if they accept a certain job or not. This might be in contrast with the general existing view that combatants cannot be held responsible for the decision of going to
war. Though, this point of view is not uncontested and debated on its own merits, of relevance here is the argument on which this point of view largely hinges. Namely, that regular soldiers cannot choose themselves for war, since they are conscripted by their government or are part of a standing army and the penalty for deserting is most of the times the penalty of death. PMSC-employees on the other hand can choose themselves since the vast majority of them are hired on contract base by the PMSCs, making them flexible to choose to accept the job or not. Having this opportunity to choose thus creates also for them the moral responsibility on the individual level to make an informed decision, as they cannot point to the argument that they are conscripted or part of a standing army, simply obeying orders.

Having established the moral responsibility of PMSCs and their employees, it is now time to analyse the specific tasks and services provided by PMSCs. The categorization of Percy, as used in figure 3, will be used to analyse each group of services in a structured way. These are: Logistical Support, Operational & Tactical Support, Security & Policing, and Military Advice & Training. Using this method will provide a structured analysis of the different tasks and services PMSCs provide to state actors and enable moral boundaries to be established.

5c. Logistical Support

Logistical Support was the first set of tasks and services to be outsourced to the private sector. These services are merely in support of the security forces and however vital, the provision of these services has little direct impact on the security environment itself nor is there any potential use of lethal force when performing these tasks. The moral dilemma that arises is thus, if it is morally permissible to support the security services of a certain state actor. This can be considered morally problematic if, for example by providing these services to a state actor, more troops become available for an unjust war. Therefore, the PMSC has to consider if it is morally

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209 Holmqvist, 2005: 6
211 Singer 2003: 68.
permissible to work for a certain state, before providing the tasks and services that are considered *Logistical Support*. Especially, when the actor is in the build-up to, or already involved in a conflict, it is important to test if the resort to the use of force by that actor was just.

A second important question relates to the status of the contractors while providing these services and under what conditions they operate. Considering the two classes of status there are and the civilian nature of the tasks and services provided under *Logistical Support*, it would follow that they should be considered to be civilians accompanying the armed forces. In order to be recognized as such and to adhere to the laws of armed conflict, PMSC-employees providing the *Logistical Support* need to carry an identity card conform the Geneva Convention, because only then can the they be awarded the prisoner of war status upon capture.\textsuperscript{212} Denying them such identity cards and status must be considered immoral, as in such a situation PMSC-employees would fall in the grey area between combatants and civilians.

This gets even more complicated when PMSCs are allowed to carry small weapons for self-protection, a practice that is allowed within the US Military.\textsuperscript{213} Though, not explicitly forbidden under the Geneva Convention, it is the opinion in this thesis, that such a practice would consist a violation of the law of armed conflict, as they carry arms on the battlefield without becoming legitimate combatants. They are illegitimate combatants because they carry arms without being part of the hierarchical structure and do not distinguish themselves as such.\textsuperscript{214} Moreover, the article 4a granting them the prisoner of war status upon capture, as persons who accompany the armed forces, explicitly states: [W]ithout actually being members thereof…\textsuperscript{215} This should be interpreted as excluding them to carry weapons, because by being armed they enter the grey zone between legitimate combatants and civilians. Therefore, armed PMSC-employees should be integrated in the armed forces and become part of the armed forces, even though the services provided fall under *Logistical Support*.\textsuperscript{216} Unarmed they can remain as civilians who accompany the armed forces.

\textsuperscript{212} see: Geneva Conventions III art. 4a. 4
\textsuperscript{215} Geneva Conventions III art. 4a. 4
\textsuperscript{216} Voyame, Maurice. "The Notion of 'Direct Participation in Hostilities' and Its Implications on the Use of Private Contractors under International Humanitarian Law." In Private Military and Security Companies: Chances,
5d. Operational & Tactical Support

The second group of services provided by PMSC, Operational & Tactical Support, raises significantly more questions. The tasks and services provided under this group are the development, support, and operation of weapon-systems and the planning and implementation of combat missions. First, an analysis will be made of the development and support of weapon-systems by PMSCs, before turning to the analysis of the tasks and services in which the PMSCs are directly involved on the frontline at the tip-of-the-spear, as Singer would call it.217

The first question that a PMSC must answer is if it is morally feasible to provide, and to maintain the weapons-(systems) for the state requesting them. Here the analogy of the multinational is useful to provide guidance, as PMSCs should be concerned to whom they deliver their product. The difficulty here is that the arms trade is highly lucrative, which enhances the risks of unethical behaviour.218 Although, public interest is growing and pressure is piling on PMSCs to adhere to ethical standards when supplying weapon-(systems), a coherent overview system is lacking and most deals are influenced by political motives.219 Nevertheless, in order to be moral actors, PMSCs should respect such standards, and this thesis joins others in calling upon PMSCs to do so.220 Furthermore, when PMSCs develop and maintain weapon-systems, these weapons should also fulfil the requirements of Proportionality and Discrimination to ensure that the weapons developed and delivered are conform the different weapon treaties and conventions.221

Part of the contract, the maintenance of these weapon-systems, will not exclusively take place in the safe environment of the home base. During conflicts, the maintenance of these weapon-systems has to take place in theatre, creating the same dilemma that arises with the provision of logistical support. In principle the PMSC-employees contracted for the task are civilians accompanying the armed forces.

However, if involvement of the contractor goes beyond the maintenance of the weapon-systems and involves the execution of operational tasks, or if they carry arms on the job, they should be considered as being combatants. In order to be legitimate combatants, they should then become part of the armed forces of the state actor hiring them and become subordinate to the existing hierarchical structure.

Now turning to the services at the tip-of-the-spear, these services involve PMSCs directly at the front-line. These front-line services, operating weapon-systems, the planning, and implementation of combat missions raise significant moral and legal questions, since these are the kind of tasks and services in which PMSCs actively use lethal force and have a significant impact on the security environment in which they operate. Therefore, PMSC should be completely ensured that the principles of *Jus ad Bellum* are satisfied by the state actor that is hiring them, as was pointed out by the analogy of the multinational.

However, this is only the first step in determining if PMSCs can provide these kinds of services to state actors legitimate. The answer to the question if PMSCs can legitimatively use force when hired by state actors is also influenced by the JWT-principles of *Right Authority* and *Discrimination*. It is generally recognized under the JWT that state actors possess or are the *Right Authority*, when it comes to the legitimate use of force. However, to be able to operate legitimately it is not enough that an actor possessing the Right Authority hires PMSCs. The security forces of the state are legitimate actors to use force since society has delegated these powers to the security forces through the state monopoly on the legitimate use of force.\(^\text{222}\) Having these rights separates them from the rest of society and helps to create the separation between combatants and non-combatants. In order to be legitimate combatants, they need to fulfil a number of criteria set under the principle of *Discrimination* and codified under law of armed conflict. Only when PMSCs can fulfil those criteria mentioned here, can they be considered legitimate actors on the battlefield and can they provide those services on the tip-of-the-spear in a legitimate way.

Another reason why it is important that PMSCs become legitimate combatants is that otherwise they can become proxy armies of the state and undermine the whole principle of civil control of the armed forces. This principle of civil control over the armed forces is of fundamental importance, as it ensures that force is only used when

the civil authority has decided to do so. It is one of the cornerstones in the efforts to restrain the use of force.\textsuperscript{223} In particular in democracies, this principle is of paramount importance and the use of PMSCs outside the democratic decision making process would undermine those democratic controls designed to restrain the use of force.\textsuperscript{224} Bypassing such a decision-making process might be beneficial for politicians and military leaders from a utilitarian point of view because it allows intervening quickly somewhere without too much involvement. Nonetheless, it must be considered immoral, as it not only consists of law breaking but also undermines the aim of the JTW, namely restricting the use of force.

A final important question is, if it is morally permissible for states to use PMSCs for war or offensive action? This question is of relevance as the shift from mercenary armies, which were used in the Middle Ages, towards state citizens armies during the nineteenth century was inspired by both practical and normative incentives.\textsuperscript{225} Part of the arguments used rested on the practical and normative arguments – the ability to control the security forces – discussed above, while other arguments against the use of hired forces focused on the motivations of such forces. The use of hired forces became morally rejected because they were not fighting for the right cause, as they are inspired by financial gains.\textsuperscript{226} In contrast to national soldiers, who are considered to be motivated by patriotism, ideology, or idealism and are therefore seen morally superior to those fighting for financial gains as they are fighting for something larger than themselves.\textsuperscript{227}

Though, this is a powerful argument, the question here is how relevant this still is in a time where many soldiers – particular of Western countries – are career soldiers, who are in the army as a result of a career choice.\textsuperscript{228} Furthermore, the current PMSCs and their employees differ in many aspects from the mercenaries that occupied the battlefields of the Middle Ages, as pointed out in chapter 2. Moreover, in some cases, PMSCs and their employees are in better shape and more professional than the security forces they are working with.\textsuperscript{229} Though, the motivation of PMSCs

\textsuperscript{224} Leander 2007: 51-2
\textsuperscript{225} Tonkin 2011: 10-2 & 15.
\textsuperscript{226} Tonkin 2011: 18.
\textsuperscript{228} Singer 2003: 53.
remains problematic, it would be inaccurate to simply say that they are amoral because they are motivated by financial gains. It cannot be denied that financial gains play an important role for PMSC-employees, but at the same time is this true for an increasing number of career soldiers. These gains are not the result of looting and plundering – immoral behaviour that made mercenaries notorious – but a simple pay check at the end of the month.

To sum up, the provision of *Operational & Tactical Support* by PMSCs remains one of the if not the most controversial tasks and services that PMSCs provide. It was pointed out in this part that the provision of these tasks and services can be legitimate if the state actor hiring the PMSCs has fulfilled the demands set by the *Jus ad Bellum* part of the JWT. Moreover, the individual contractors need to be incorporated into the hierarchical structure of the state, in order to become legitimate combatants.

5e. Security & Policing

The third group of services or tasks provided by PMSCs is *Security & Policing*. A further subdivision can be made between those services that entail the potential use of lethal force, called here protective services – providing security to convoys, individual, industrial installations, and assets and the provision, and training of police forces – and those services – interrogation and translation services and intelligence gathering and analysis – that focus on acquiring situational awareness, grouped under the name intelligence services. Though, the latter type of services are of fundamental importance for the success of the first type of services, they will be separately analysed here, as the moral dilemmas that they raise differ.

The first type of services called protective services raises similar questions as were raised under the-tip-of-spear services analysed above. Just as the-tip-of-spear tasks, security and in particular policing can be seen as a classical state task. However, the fundamental difference here is the security environment in which these services are provided. Whereas the-tip-of-spear services are often provided in very unstable security environments during conflicts, these policing and security services are in general provided in more stable regions in peace, although the degree of stability may vary widely. Furthermore, the level of force used here will in principle be lower than the level of force that will be used when PMSCs provide tip-of-the-spear services, as
those services have an offensive character while the protective services have a defensive nature.

The variety in security environments, ranging from stable, – think of the earlier mentioned security guard in front of the embassy in Brussels – to very unstable – that same guard providing security to an embassy in Bagdad – is also reflected in the level of force used, as shown by our little thought experiment in chapter one (figure 2) with PMSC providing security services for a mining company in a deteriorating security environment. The questions if and how PMSCs can legitimately provide security and police services will largely depend on the level of force required for an effective provision of security and the way in which the PMSC can be held accountable.

Unstable security environments are often caused by the absence or breakdown of an effective system of law enforcement and are therefore characterised by lawlessness (see figure 4).\(^ {230}\) The state monopoly on the use of force has often broken down in those regions and to assist governments with the restoration of this monopoly PMSCs are hired.\(^ {231}\) It is hard to control PMSCs in such areas and hold them accountable for their actions, due to the absence of an efficient system to enforce and uphold the law. This leads to a paradox, as the actor hired to assist in restoring the state monopoly and providing security can self not be held accountable. Incorporating the PMSCs into the security services of the state that is hiring them could resolve this. In this way they become subordinate to hierarchical structure of those forces and can be held accountable when necessary. Although, the quality of the security forces and their ability of the weak state to uphold the IHL and HRL is often limited, it must be deemed better than accepting complete lawlessness and allowing PMSCs to provide protective services without any form of control at all.\(^ {232}\)

There are two further arguments that support his point of view. First of all, the nature of their tasks is in principle civilian, but could change to a more militarised character depending on the security environment. Integrating PMSCs in the hierarchical structure of the state actor prevents a lack of oversight and control, if the security environment deteriorates. Secondly, while performing these tasks, it could be argued that they take over an inherent state function – the provision of security – and

\(^ {231}\) Branović 2011: 10-2.
therefore the state remains responsible for their conduct.\textsuperscript{233} Since the hiring state actor remains responsible for their conduct, it would seem logical that the state actor should have a mechanism to hold the PMSC and their employees accountable. Incorporating PMSC-employees into the hierarchical state structure would therefore resolve potential problems and create clarity for all parties involved.

On the other side of the spectrum, a stable security environment in which the state is able to uphold the state monopoly on the use of force, the PMSCs can be legislated and controlled by the state (see figure 4). In such cases, the state has the power to determine under what conditions PMSCs are legitimate actors, which protective service are delegated to them and the level of force PMSCs may use while providing those services. Even more important here is that there is an effective system in place that can hold the PMSC and their employee’s accountable if they violate the relevant laws. Therefore, it is possible to allow PMSCs to operate outside the hierarchical structure of the state, if there is a system in place able to uphold the law and hold individuals under its jurisdiction accountable. Moreover, in such an environment it is less likely that PMSCs are forced to use lethal force in order to fulfil its task. In other words, PMSCs can only operate legitimate when they can be held accountable for their actions. Therefore, they can only operate outside the hierarchical structure of the state if there is a system in place that can hold them accountable for their actions and if needed punish unlawful behaviour of PMSCs and their employees. Knowing that immoral behaviour will be punished will at the same time deter individual from doing so.

The way in which PMSCs can legitimately provide protective services to state actors will thus largely depend upon the security environment in which they operate and the level of control there is over their actions, in particular, when the tasks of the PMSCs changes from purely defensive towards more offensive tasks. In conflicts where a clear front-line is lacking and such a division is difficult to make, PMSCs can easily become part of, and involved in front-line battles, incorporating PMSCs into the hierarchical state structure would create clarity and help to prevent immoral behaviour.\textsuperscript{234} Moreover, the restoration of the state monopoly and the provision of security in those instances can be seen as a classical state task. It would therefore be


\textsuperscript{234} Tonkin 2011: 33 & Holmqvist 2005: 5-6.

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logical if PMSCs would become part of the hierarchical structure of the state when providing these tasks. Only in stable security environments where a sufficient mechanism for oversight is in place can PMSCs operate outside the hierarchical structure.

The final service that is offered by PMSCs under protective services is the training and reforming of police forces. This service is often part of a larger SSR-programme and set up in a post-conflict situation. These programmes are of significant importance for the future stability of a country or region. This creates a significant moral responsibility for the PMSCs providing the training, as they must ensure that the training adheres to ethical standards of good policing. At the same time, it is important that the actor hiring the PMSC has good oversight over the programme offered by the PMSCs and can intervene when necessary. Only when those two conditions are met, can the provision of this service by PMSCs be considered morally sound.

While providing these services, the PMSC-employees retain the status of civilian, since they do not use physical force themselves and most of the training will be provided on an enclosed military base. However, if they provide practical training in the field and accompany recruits in the field, there is a possibility that they need to use or give guidance on the use of force. Having this option and responsibility, they should be incorporated in the hierarchical structure of the state. This will ensure that their status is clear and that they can be held accountable when necessary.

The other half of the services provided under Security & Policing – interrogation and translation services and intelligence gathering and analysis – here called intelligence services, involves no direct use or potential use of force. These services are merely supportive tasks for the security services, but nevertheless can they have a significant impact on the security environment, as these services influence and inform decisions on the frontline. The central moral question that arises here is to what extend are PMSCs and the employees accountable for the decisions that are made on the basis of the information that they provide? Three answers are possible here, the first one is that they merely provide information to the state actor hiring them and that the hiring actor bears the responsibility for the decisions made on the basis of information provided by the PMSC. In such case the state agent taking the

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decision bears the responsibility. The second possible approach is to argue that PMSCs bear a significant responsibility because the information they provide, inform and influence the decisions at the tip-of-the-spear. Supporting this approach would take away the responsibility of the decision-maker and could lead to immoral decision-making. The third and best solution would therefore be, a shared responsibility of both the PMSC providing the intelligence and the state agent who takes a decision based on the intelligence provided. In order to ensure that there is a sufficient oversight mechanism in place to hold PMSCs and contractors accountable, they must be integrated in the hierarchical structure of the security forces. Not only will such a system ensure that contractors can be held accountable, but it will also streamline the decision-making process, as they have become part of the same hierarchical structure as their military colleagues.

A second question that arises is, if it is permissible to delegate such a state task to PMSCs? With the exception of translations services, the gathering and analysing intelligence and the interrogation of detainees can be considered a traditional state task. Outsourcing such tasks to the private sector raises some significant questions. Most of the questions however, relate to the desirability of having a non-state actor providing such a task in the light of state security. Since this is not the focus this thesis, will focus be on the ethical dilemmas that arise when PMSCs perform these tasks. Due to the relative importance of these services and because of the impact they can have on the security environment, is it important that PMSCs are prudent when offering these services. Not only in the selection of their clients to whom they provide these services, – again the analogy of the multinational is of relevance – but even more important is the way in which they provide their services. When PMSCs interrogate detainees, they bear significant moral and legal responsibility, as they have to respect HRL and IHL when performing these tasks. In particular, since some of these rights such as the prohibition of torture are absolute and non-derogable. These issues may also arise when PMSCs gather and analyse

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intelligence. To ensure that both sets of rights are respected, effective control and oversight is necessary to prevent and in a worse case punish violations. States have an active role to play, as they are responsible to uphold both sets of right, even when private actors violate those rights. The most straightforward way to ensure that the HRL and IRL are respected when these tasks and services are provided, is to incorporate those PMSCs into the armed forces and make use of the existing chain of command.

5f. Military Advice & Training

The final group of services or tasks performed by PMSCs is Military Advice & Training, often part of the earlier mentioned SSR-programmes. Before offering these services to a state actor it is important that the PMSC determines if it is permissible to offer such services to the requesting state. Although, the PMSCs will not participate on the frontline itself, the impact of these services on future the security environment can be significant. This is illustrated by the earlier mentioned assistance by the MPRI to the Croatian army, which was able to significantly alter the security environment in former Yugoslavia after being trained by MPRI. At the same time, it should be noted that PMSCs offer assistance and train ill-disciplined and ill-trained armies. By providing these services, as part of the so called SSR-programme, PMSC can help to improve the way the armies are set-up and controlled, which would benefit the civil control over those armies and their ability to respect the laws of armed conflict. Attention to these laws is a fundamental part of the military training and when they are not part of the curriculum, the training provided should be considered as incomplete. The same point is valid for the assistance that PMSCs provide when

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240 Tonkin 2011: 42.


reforming or even completely setting up new armies. In such a programme attention should be given to the way in which the armed forces are controlled and held accountable. This is of fundamental importance to ensure that the use of force is restrained and that it only will be used when authorized by a Right Authority. Of course the state actor hiring the PMSC has a responsibility too, even more so when the PMSC is hired and paid for by a donor as part of a SSR-programme.\textsuperscript{243} Another positive consequence of proper military training could be that as armies become better trained, they become more effective, shortening conflict and often able to fight ‘cleaner’, preventing unnecessary casualties.

Concerning the status of the PMSC-employees providing these services, a distinction should be made between those who provide training and advice at the base in peacetime and those who provide the same services while being active in theatre. The services of the latter have such a direct impact on the security environment that these should be considered to Operational & Tactical Support, as discussed earlier. Being civilian advisors and trainers, there is no necessity to integrate them into the hierarchical structure of the state since they are not to take part in the hostilities nor using force themselves. Nevertheless, the hiring actor should have sufficient oversight over the training programme and have the possibility to intervene if necessary.

To sum up this section, which developed moral boundaries for PMSCs hired by state actors, a few observations can be made. The first observation is that in principle all services and tasks can be provided to state actors by PMSC. It is important to point out here once again the importance of control and oversight mechanisms to ensure that PMSCs respect the existing moral and legal constrains on the use of force and that redress of HRL and IHL violations by PMSCs is possible. In particular regarding those tasks or services in which a high level of violence is used, this is important. A second important point to make here is that PMSCs have a responsibility when selecting their clients and accepting contracts. PMSCs must establish before accepting a contract if executing the contract would be morally acceptable. As pointed out with the analogy of the multinational, PMSCs have the free choice to provide a service to a client. Having this opportunity to choose creates thus responsibilities for the PMSCs and their employees. Having analysed the tasks

\textsuperscript{243} Avant, Deborah. “Privatizing Military Training.” Foreign Policy in Focus, 2002 & Holmqvist 2005: 16-7
and services that PMSCs provide to state actors, the next section the same analysis will be made but then for non-state actors.

5g. Non-State Actors
In this section the provision of services by PMSCs to non-state actors, lacking state-like capabilities and that have failed to pass the self-help test, will be analysed. It should be underlined that a number of these non-state actors, such as multinationals and mining companies, do not have the intention to attain the entitlements of a Right Authority. Nevertheless, PMSCs provide services to such non-state actors.

The provision of Logistical Support, Operational & Tactical Support, and Military Advice & Training will be analysed together. What these services have in common that they cannot be provided to non-state actors that are not be recognized as a Right Authority, because lack the ability to fulfil all the requirements of Jus ad Bellum. According to the JWT, such non-state actors may therefore not use force nor may they possess the possibility to project such force. Enabling them to project such force, by the services mentioned above, is thus illegitimate. Those that are permissible for non-state actor will be analysed in more detail here.

The provision of the tasks and services of Security & Policing to non-state actors, on the other hand, can be morally permissible under certain conditions. The earlier made division between protective services and intelligence service will be used again here. The first group entails the provision security to convoys, individual, industrial installations, and assets, while intelligence services entail translation services and intelligence gathering and analysis.

The provision of protective services to non-state actors and the demand for such services is the direct result of the rise of the earlier mentioned ‘risk-society’. Individuals have been made co-responsible for their own security, and combined with a retreating government, security has become a commodity that can be traded. While the regular or state security services are controlled and held accountable through the hierarchical structure of the state, such oversight is not possible with PMSCs. Especially, if they work for non-state actors that lack ‘state-like’ capabilities. When working for non-state actors, PMSC are accountable to the actor that has contracted them and secondly to their shareholders. Accountability to the state and to society at large is of lesser importance.

Moreover, strong states, besides hiring PMSCs themselves, have created a
market for PMSCs by repelling certain security tasks, handing them over to the private sector. They knowingly accept that PMSCs provide these services to non-state actors, but also have the resources to uphold the rule of law (RoL) and hold PMSCs accountable when required. In other words, strong states are able to legislate and ensure that PMSCs adhere to the RoL and states can hold them accountable. Even in cases where they are not hired by the state themselves, strong states are able to execute some form of control over the PMSCs under their jurisdiction, simply because their state institutions are strong enough to do so.

Weak states, on the other hand, often have difficulties to uphold the RoL, as their state institutions are too weak. Their inability to control PMSCs, hired by non-state actors operating outside their direct sphere of control, can be problematic which might lead to amoral behaviour of PMSCs and their employees. These states are simply too weak to uphold the RoL, let alone be able to hold PMSCs accountable. This could ultimately lead to private police forces or militias formed by PMSCs, who operate outside the law. The moral implications depend on the security environment in which the tasks and services are provided and effective control that there is to ensure that the RoL is respected. The risk of to immoral behaviour of PMSCs and their employee’s increases when these services are provided in complete lawlessness and without any effective control over PMSCs.

Moreover, since security contractors in unstable security environments like conflict zones are often armed, they run the risk to become illegitimate combatants, since they are carrying arms in a conflict situation without being part of the armed forces of a Right Authority. The provision of protective tasks to these non-state actors should therefore be considered illegitimate in unstable security environments and only permissible in stable security environments where there is sufficient oversight.

The second group of services, intelligence services, is often considered as a state task and the question can be asked if such services should be provided to non-state actors. Therefore, the provision of intelligence services to non-state actors seems problematic at first glance. However, this is largely depended on the nature or purpose of the gathered intelligence, as there are instances in which offering these services to non-state actors can be permissible. An example of this could be a large multinational that before investing in a certain country would like to know what the security
implications are of operating in that country. Hiring a PMSC to make an analysis of the security environment would thus seem logical. In other words, the moral implications of providing these services are largely depended on the nature and purpose for which the intelligence is used. Using PMSCs to gather and analyse intelligence for civilian or non-offensive purposes, such as a security analysis before investing in a certain country, must be considered morally permissible.

5h. Concluding Remarks
In has been argued in this chapter that the nature of an actor hiring the PMSCs determines to a significant degree if the provision of a services or tasks is morally and sometimes even legally permissible. This is caused by the significant value that the JWT attaches to having ‘state-like’ capabilities and having passed the self-help test. Moreover, it has drawn attention to the necessity of a sound mechanism for oversight and the capability to hold PMSCs and their employees accountable. Having established the moral boundaries of the tasks and services, these can be legitimately provided to both state actors and non-state actors. It is now time to perform the case study to the moral and of the deployment of PMSCs in Iraq between 2003 and 2009.


In this chapter, the case study made to the deployment of PMSCs in Iraq between 2003 and 2009 will be presented. Besides being useful for answering the main research question of this thesis, this case study will also provide some vivid examples of the work of PMSCs in practice and implications of the tasks and services provided by PMSCs.

PMSCs formed the second largest contingency of what President George W. Bush called the “coalition of the willing”. An estimated 190.000 contractors were employed in Iraq on US funded contracts at the beginning of 2008, of which 25.000-30.000 as private security contractors. Via by more than three hundred PMSCs from across the world, performing a wide variety of tasks to many different actors. Before going to the analysis of the actual provision of tasks and services, which mostly relates to the Jus in Bello part of the JWT, it is necessary to pay some attention to the Jus ad Bellum decision of the US-led Iraq War of 2003. After all, the analogy of the multinational, introduced in the previous chapter, has illustrated that although PMSCs and their employees are not responsible for the war decision itself, they cannot escape the moral burden of justifying their involvement in the war.

Much has been written about the 2003 Iraq War and its justification given by George W. Bush and Tony Blair. They aimed to eliminate the threat posed by Iraq and to overthrow the regime of Saddam Hussein to establish a free and democratic Iraq. Certain is that the invasion has revitalised the interest in the JWT, and without going too much into the actual debate, a consensus has emerged among JWT-scholars that the US-led invasion in Iraq was illegitimate and lacked justification. The reasoning used by scholars differs. Albert Weeks concludes that the US did not meet the criteria of Jus ad Bellum, as the Right Authority principle was not met, since the Bush administration failed to fully inform and misled the democratic institutions in the US that control the armed forces. Walzer has argued that other options short of war were still available, and that therefore the principle of Last Resort has not been

249 Weeks 2010: 67, 114-7
respected. Furthermore, the intention of regime change is not a Right Intention, nor is the Iraqi refusal to cooperate with the international community and the perceived threat of Iraqi Weapons of Mass Destruction (WMD) a Just Cause for war, as the threat posed by Iraq was not sufficient. Bellamy largely shares this point of view and argues that the claim of pre-emptions – even in a broad interpretation – must be rejected as the US failed to demonstrate that the threat posed by Iraq was imminent and other policy options short of war were still available. Moreover, the claim that the invasion can be justified as a humanitarian invasion can be rejected as well, since the conditions in Iraq in the beginning of 2003 were not that bad to justify such an invasion. Cian O’Driscoll, concludes in his study on the three justifications given by both US President Bush and UK Prime-minister Blair for the invasion – as either an anticipatory war, a punitive war or a humanitarian invasion – that accepting those justifications would require a more expansive approach to Jus ad Bellum than is currently accepted among the JWT-community.

The international community was also unconvinced by the arguments of Bush and Blair, as attempts to get an UNSC-resolution authorizing the invasion for not complying with earlier resolutions failed. In the absence of this new resolution, the US, the British and Australian governments argued that an invasion was already authorised by the Security Council, using a broad interpretation of the existing Security Council resolutions. However, this line of reasoning failed to convince the other members of the Security Council and most other members of the UN. In the absence of both proper grounds to justify the invasion, combined with the inability of ‘the coalition of the willing’ to convince the international community at large, that an invasion could be justified, it can be concluded that the invasion in Iraq was unjust and failed to fulfil the principles of Jus ad Bellum.

Acknowledging that the US-led invasion in Iraq was unjust has consequences for the moral guilt of the PMSCs supporting the invasion, but also for the justness of the peace after the invasion and the reconstruction of Iraq. The first point is

250 Walzer 2004: 143-162.
251 Bellamy 2008a: 177-8.
252 Bellamy 2008a: 219-21
253 O’Driscoll 2008: 87.
straightforward, as was pointed out by the analogy of the multinational. PMSCs cannot escape moral responsibility, as they have a free choice to accept a contract or not. Moreover, the key role that they played, since the US-military was heavily relying on them\textsuperscript{257}, could be seen as another argument why PMSCs share in the moral responsibility for the invasion.

The latter point is more difficult to assess, as it can be argued that the peace, following an unjust and illegitimate invasion plus the forced regime change, should be considered as unjust. However, the establishment of a democratic and inclusive government that, despite its difficulties and challenges by insurgents, seems to enjoy legitimacy among the Iraqi people could be seen as proof that a just peace is in the making.\textsuperscript{258} It remains to be seen if indeed a lasting and just peace can be established in post-invasion Iraq and only time will tell if their efforts created a just peace.\textsuperscript{259} This thesis is therefore of the opinion that, it is too soon to judge if the reconstruction of Iraq is unjust.

Before the analysis can be made it is necessary to clarify the status of the security environment in which PMSCs operated during the period under review here. As was pointed out before, the status of the security environment – either an international or non-international conflict – decides which of the laws of armed conflict are valid. The invasion in Iraq started out as an international conflict and after the handover of sovereignty back to the Iraqi people on the 28\textsuperscript{th} of June 2004 changed into a non-international conflict.\textsuperscript{260}

6a. Logistical Support
Since 1985, the logistical support of the US army, during missions has been contracted out to the private sector under the so-called Logistics Civil Augmentation Program (LOGCAP).\textsuperscript{261} Creating a permanent overarching structure for the

\textsuperscript{257} Singer 2005: 122
\textsuperscript{261} The US Navy and Air Force have a similar contracting programme called respectively the Air Force Contract Augmentation Program (AFCAP) and Navy Global Contingency Construction Contract (GCCC) and Global Contingency Services Contract (GCSC).
contracting of civilian support services for the US army in wartime and other contingency situations.\textsuperscript{262} The PMSCs Kellogg, Brown & Root (KBR) won the contract in 2002 and is since then responsible for the logistical support of the US Army. In Iraq, KBR provided the U.S. Army with support services, such as sanitation, laundry, and food, among other services such as fire protection.\textsuperscript{263} Moreover, in preparation of the invasion of Iraq, PMSCs have built complete military bases that functioned as launch pad for the invasion.\textsuperscript{264} By contracting these tasks out, the military could free up personnel for its key task, the actual combat operations itself.

Not only the US military made use of the \textit{Logistical Support} services of PMSCs. Also the British military was in the build-up, during and after the invasion heavily depending on PMSCs for their \textit{Logistical Support}.\textsuperscript{265} In the aftermath of the intervention and looking to the current situation, it has been argued that the British military is currently unable to do any overseas intervention without relying on PMSCs for their logistics.\textsuperscript{266}

Turning to the moral implications of the provision of these services, it is clear that the since the invasion was unjust, there is a considerable moral guilt on the shoulders of the PMSCs providing these tasks. At the same time, the execution of the LOGCAP by KBR does illustrate, how PMSCs can be bound by existing contracts, limiting their ability to reach their own moral decision. However, this does not excuse the individual employees of PMSCs, as they have the opportunity to make their own decision, due to the loose structure of most PMSCs. During the build up to the invasion, vast numbers of contractors were hired under LOGCAP. These contractors could all take the individual decision to accept the contract; therefore it is undeniable that these contractors share in the moral guilt of the unjust invasion in Iraq.

Turning to the status of the actual contractors themselves. During the period under analysis the contractors were not part of the armed forces and they remained civilians that accompany the armed forces. However, in the US military it is up to the local military commander to decide if a contractor may be armed to defend himself.\textsuperscript{267} Although, the number of armed contractors providing logistical support is very

\begin{itemize}
  \item \textsuperscript{263} Kinsey 2009: 77.
  \item \textsuperscript{264} Singer 2005: 122.
  \item \textsuperscript{265} Kinsey 2,009: 102.
  \item \textsuperscript{266} Kinsey 2009: 111.
  \item \textsuperscript{267} Congessional Budget Office 2008: 19.
\end{itemize}
limited the consequences are significant. The presence of armed civilians on the battlefield blurs the distinction between combatants and non-combatants, and such behaviour should therefore be considered as immoral. However, since this only occurred in limited cases, it can be concluded that the provision of *Logistical Support* in Iraq in the period under review in general did not override the moral boundaries as established in this thesis.

6b. Operational & Tactical Support

There is no evidence that suggests that PMSCs were hired to implement combat missions or participated in the hostilities during the initial invasion in Iraq, nor is there proof that coalition forces hired PMSCs to assist them with the planning of their operations. Nonetheless, PMSCs got directly involved in hostilities, be it as a result of being attacked while guarding military objectives, such as convoys and bases. Therefore, this will be analysed further while in the paragraph on *Security & Policing*.270

Although, PMSC-employees were absent from the direct frontline as combatants, PMSCs did maintain and sometimes even helped to operate many of the most sophisticated weapon-systems in the military during the invasion. These weapon-systems – like the overwhelming majority of the weapons used by the allied forces – are provided by the private sector to the allied forces.271 While supporting and maintaining the weapon-systems used by the US army a number of issues arose. Although, these contractors were not incorporated in the military forces and chain of command, a number of the contractors wore a US military uniform on the job, which makes it even harder to distinct them from legitimate combatants.272 Moreover, the support service provided by PMSCs to some of these weapon-systems went beyond supportive tasks, as they helped to operate the US Army’s Patriot and US Navy’s Aegis missile systems.273 In other words, they were actively engaged with the US military, helping them to operate those systems during the invasion (international

268 As of 28 Feb. 2008 638 contractor employees were armed in both Iraq and Afghanistan in: Congessional Budget Office 2008: 19  
273 Singer 2005: 122-123.
conflict situation) and the reconstruction of Iraq (non-internal conflict situation). Unfortunately, detailed information on the level of involvement of those PMSC-employees is lacking, so it remains unclear to what extent they were in control of the weapon systems and to what extent they could make important life and death decisions. The British military did not make use of PMSCs support for their weapon-systems at the same level as the Americans did. Both the in theatre maintenance of the different weapon-systems and the operation of them was kept firmly in the hands of the British military, but the question remains how long this is still possible looking to the increasing dependency on advanced technology of Western armies.\textsuperscript{274}

Despite the lack of transparency, in particular to the level of operational support to the US military by PMSCs, it is still possible to make an analysis of the moral implications of the provision of these services. As noted in the previous chapter, contractors must be incorporated into the armed forces if they become involved in the operation of weapon-systems. If they operate outside the hierarchical structure it will be difficult to hold them accountable and to keep control over the use of force. Moreover, when PMSCs are operating weapons outside the hierarchical structure of the state, they could become proxy armies undermining the civil control over the armed forces.

It can thus be concluded that the deployment of PMSCs in the field of Operational \& Tactical Support, although only a limited number of services were provided, raises serious moral dilemmas. Not only bear they some considerable moral guilt for supporting the unjust invasion in Iraq, but they operated in the grey area between combatants and non-combatants. In particular, the use of military uniforms and operation of weapon-systems by PMSC-employees not incorporated into the security forces should be considered immoral, as it diffuses the watershed between combatants and civilians accompanying the armed forces.

6c. Security \& Policing

First the services at the-tip-of-the-spear or protective services will be analysed before turning to the provision of intelligence services by PMSCs in Iraq. During the period under review here, an estimated 25-30.000 armed security contractors were working

\textsuperscript{274} Kinsey 2009a:104
in Iraq. The demand for these guards was generated by the unstable security environment, which arose after the main combat operations had ceased and was caused by at lack of sufficient coalition troops on the ground to secure the country and the disbanding of the Iraqi security forces. This absence of law and order created a power vacuum that was exploited by insurgents, gangs, and militias and provided an opportunity for PMSCs, that could provide the security that was needed in post-invasion Iraq. In this very unstable security environment, security contactors were carrying more than just simple side-arms to protect themselves and their clients; some companies like Blackwater were even using their own armed helicopters. Both state-actors and non-state actors hired PMSCs in Iraq. The use of security contractors by state actors (US and Great Britain) in Iraq will be analysed, followed by an analysis on security contractors hired by non-state actors.

Both the United States and the United Kingdom used the protective services of PMSCs to protect their diplomats and other government staff working in Iraq on the reconstructing of the country. The main contract for the protection US government staff working in Iraq went to Blackwater, making use of the earlier mentioned armed helicopter to protect Paul Bremmer head of the Coalition Provisional Authority (CPA), but a number of other PMSCs, Dynacorp, International LLC and Triple Canopy also made significant contributions. The British government used mainly the services of Control Risk Group and Armor Group for the protection of their employees.

While the US governments used PMSCs to secure all their employees, the British government used PMSCs only for their civilian personnel, and provided military staff their own protection. Nevertheless, despite being armed, and in the case of the US even protecting military installations and personnel, the security contractors hired were not incorporated into the armed forces of both countries. They remained civilian guards that due to the unstable security environment and the objects that they protected were heavily armed, and operating in a conflict area.

276 Kinsey 2009a: 34-40
277 Kinsey 2009a: 42-5
278 Singer 2005: 123
they fell outside the military command structure they could operate largely independently and with great impunity from coalition commanders.\textsuperscript{283} Another important factor that contributed to the impunity by which PMSCs could act in Iraq was CPA order 17. In June 2003 the CPA handed out this order, which gave Coalition contractors, sub-contractors and their employees not normally resident in Iraq immunity from the Iraqi legal process for the acts they committed in the execution of the official duties and in accordance with the terms and conditions of the contract. While acts outside the contract or official duty could only be omitted by legal process to them with the written permission of the head of the CPA.\textsuperscript{284} When the Interim government took over from the CPA in June 2004, the order was revised giving the coalition forces the power to prevent acts of serious misconduct and detaining contractors pending turnover to the appropriate authority of the sending state. Moreover, instead of the CPA the sending state was now made the appropriate authority to waive immunity, if sought by the Iraqi authorities.\textsuperscript{285} In practice however, the immunity of contractors largely remained in tact, since the chances that a state is willing to waive the immunity of one of its nationals and to hand them over to a state with a barely functioning legal system are minimal.

The oversight that remained was the civilian oversight mechanisms of the governments that hired the PMSCs. While the US had an overarching procurement structure for security contracting, the British government used a case-by-case approach when handing out contracts to PMSCs.\textsuperscript{286} These different approaches had some impact on the oversight on PMSCs in Iraq, but overall there was limited oversight over the PMSCs operating in Iraq. The PMSCs working for the US government were barely monitored and by the different authorities, as the Department of Defence (DoD) was responsible for the PMSCs hired by the army and the Department of State (DoS) for those hired by them. There were also significant differences between the two departments in the way the oversight was organised.\textsuperscript{287} Additionally, the oversight that was in place was weak, due to a shortage of contracting officer’s responsible for supervising the contracted work.\textsuperscript{288}

\textsuperscript{284} Kinsey 2009a: 118-119  
\textsuperscript{285} ibid  
\textsuperscript{286} ibid: 107.  
\textsuperscript{287} ibid: 61-63.  
\textsuperscript{288} Elsea en Serafino 2010: 155.
It was not until the PMSC Blackwater became the centre of a controversy after shooting seventeen civilians in September 2007 in an event known, as the Nisour Square Incident, that both DoD and DoS realised that closer cooperation between the two was needed to improve the oversight over PMSCs.\(^{289}\) The organisation of the oversight on the PMSCs hired by the British government was not much better, but the contracts were smaller, making them easier to monitor. Nonetheless, it was also here a shooting incident involving Iraqi civilians that raised awareness in Britain and pleads for better oversight mechanisms were voiced.\(^{290}\) All in all, it is fair to conclude that oversight and control by both governments over the security contractors that they hired was lacking. Moreover, the CPA and the successive Iraqi interim government were not able to hold the contractors accountable due to CPA order 17, which was only repealed by the end of 2007.\(^{291}\)

Now turning to the security guards hired by non-state actors in Iraq. The non-state actors hiring PMSCs in Iraq between 2003 and 2009 were all non-state actors, lacking 'state like' capabilities. Non-state actors such as construction companies and humanitarian organisations, which worked on the reconstruction of Iraq, hired many of these guards. These non-state actors did not have the hierarchical structure in place to discipline these PMSC or the capacity to hold them accountable. Therefore, the primary responsibility to ensure that PMSCs abide to the law and are held accountable when necessary lies with the state in which they operate, in this case Iraq. However, as was pointed out above, both the CPA and successive the Iraqi interim government were not able to hold the coalition hired PMSCs accountable and this was also true regarding the PMSCs hired by non-state actors as the government was simply too weak to uphold the RoL.

When analysing the moral implications of the use of security contractors in Iraq a few observations can be made. The first and foremost observation is that the contractors were able to operate in almost complete lawlessness. The mechanisms in place were too weak to prevent serious misconduct of PMSC employees in Iraq, let alone hold those responsible accountable.\(^{292}\) Secondly, the use of armed security contractors in both the international and non-international conflict situation in Iraq

\(^{292}\) Kinsey 2009a: 141.
raises serious moral questions due to their questionable status. Especially, in an unstable security environment such as post-invasion Iraq, where a clear frontline is lacking, the presence of armed security contractors not being part of the armed forces diffuses the separation between combatants and non-combatants. As pointed out in the previous chapter, armed security contractors should be incorporated into the armed forces, as this ensures that they are held accountable. Only when the security environment is stable enough and there is a system in place that can provide sufficing oversight can security contractors operate outside the hierarchical state structure. Since this was not the case in Iraq, during the 2003-2009 period, the deployment of these contractors cross the moral boundaries set out in this thesis.

Besides providing security, PMSCs were also hired to contribute to the SSR-programme in Iraq. Two of the largest contracts under the SSR-programme, under Security & Policing were the training of the Iraqi Police Service (IPS) and the development of a special oil industry protection force. Training of the IPS after the collapse of Saddams’ Ba’ath-regime was contracted out to the PSMC DynCorp. Reforming the IPS was necessary in order to break with the past, turning the corrupt and repressive police force of the Ba’ath-regime into a force on which the Iraqi’s could trust, that respected human right, and showed good police practices. During the execution of the contract, a number of flaws arose. It became apparent that the demands formulated under the original contract did not meet the requirements of the current security environment in Iraq. The problems were mainly caused by the limited number of civilian-trainers available, which resulted in cutting training time from 24 to 8 weeks, while completely cancelling the additional 24-weeks field training. Moreover, the military trainers who filled in for the shortage of civilian trainers, paid limited attention to human rights issues and treatment of suspects, which is important for good policing. Unable to meet the demands of the security environment in Iraq,

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293 Congessional Budget Office 2008: 22.
296 Ibd: 230.
which was very unstable and can be characterised as a non international conflict, a second police organisation was established called the National Police (NP). \(2^{98}\)

The NP was a more robust military police force, aimed to counter the threat posed by the insurgency and therefore trained by the military. \(2^{99}\) Good policing practices were non-existent with the NP and allegations of serious human rights abuses and sectarian bias created distrust among the Iraqi people. \(3^{00}\) By 2007 it was concluded in a report to the US Congress that the NP should be drastically reformed or even completely disbanded. \(3^{01}\) Nonetheless, the NP remains to exist beyond 2009, although it names changed and reforms were underway to create better ethics among the officers. \(3^{02}\)

The image sketched of the IPS in the same report was not much rosier either, as it was concluded that: “The Iraqi Police Service is incapable today of providing security at a level sufficient to protect Iraqi neighbourhoods from insurgents and sectarian violence… To be effective in combating the threat…, the Iraqi Police Service must be better trained and equipped.” \(3^{03}\) Although, undeniably in both cases the contracted PMSCs made mistakes while executing the contract, the main problems were caused by the DoS, which ordered the contracts. The original contracts did not adequately address the security needs of the country and while in place were completely mismanaged as the PMSCs executing the contracts were excluded from the operational and strategic planning. \(3^{04}\)

The second important contract of the SSR-programme was awarded to Erinys, who was made responsible for the protection of the valuable Iraqi oil infrastructure and building a local force capable of that task. The initial contract in 2003 was aimed at raising and training a 6,500 strong Iraqi guard force that could protect the 140 fixed oil sites throughout the country within two years. \(3^{05}\) Due to a lack of overview and coordination between the different stakeholders, this proved to be unrealistic. \(3^{06}\) At the end, it took over 15,000 Iraqi security contractors and 350 foreign staff to protect

\(3^{00}\) Ibid: 59
\(3^{01}\) Jones 2010: 115.
\(3^{03}\) Jones 2010: 15.
\(3^{04}\) Kinsey 2009: 59.
\(3^{05}\) Ibid: 79.
\(3^{06}\) Ibid: 79-82.
the oil-infrastructure, before handing over the responsibility of the forces to the Iraqi ministry of Oil in 2005.  

It becomes clear from the analysis of the projects analysed that the execution of the different SSR-contracts, under Security & Policing, by PMSCs in Iraq has been largely troubled. The training provided did not meet the demands on the ground and in an attempt to free up sufficient numbers security forces to stabilize the country training-time was cut down and fundamental attention to ethics was neglected. The problems were mainly caused by limited oversight, lack of sufficient resources to address the needs on the ground and limited coordination between different stakeholders. As a result, the newly trained security forces were mistrusted by the Iraqi people, which contrasts with the aims of the SSR-process. The goals of the SSR-contracts were not immoral in itself, however the lack of attention to ethics and human rights, leaded to immoral behaviour of the recruits. 

Turning away from the tasks and services provided at the tip-of-the-spear, to the provision of intelligence services comes into focus. The US military depended heavily on PMSCs, as a result of scale-enlargement in the intelligence sector following the 9/11 attacks, after which the US government started to invest heavily in the intelligence sector and more than doubled its staff, funding and other resources. These investments created an enormous flow of intelligence that needed to be analysed. The military lacked the capacity and they turned to the private sector the for extra manpower they needed. During the invasion contractors of different PMSCs were embedded in Headquarters of the military and worked there alongside regular officers of the US military. The PMSC AEGIS was contracted for the provision of intelligence during the reconstruction efforts in Iraq, providing daily updates on attack trends, route security, and local political developments. Besides providing and analysing intelligence, PMSCs were also hired to provide translation services as the US military lacked sufficient numbers of Arabic translators.  

In several instances these translators exceeded their briefs, and performed interrogation tasks breaching US military standards regulations that require such jobs

\[309\] Priest and Arkin 2010 & Donald 2008: 134  
\[310\] Donald 2008: 133  
\[311\] Donald 2008: 133  
to be filled by government employees. The contractors were untrained for these tasks, which resulted in immoral behaviour and human rights violations, of which the Abu Ghraib scandal is the most notable example. Both US hired contractors and US military were involved in the scandal. However, action was only taken against the military personnel involved since the contractors, as civilians, were not part of the hierarchical military structure and criminal proceedings were not pursued by the US government at the time of writing.

Since the level of involvement of private contractors in the intelligence gathering of the US military remains undisclosed to the public, it will be difficult to make an assessment of the moral implications. However, the Abu Ghraib scandal, in which untrained contractor’s interrogated and tortured Iraqi prisoners, forms more an excess than common practice, illustrates the case the dangers that arise when civilian contractors get involved in a principally government task, while a sufficient oversight and control mechanisms are lacking. Especially, when contractors are involved in government tasks in which good ethics and respect for human rights are of fundamental importance. Moreover, the case illustrates the problems that arise trying to hold contractors accountable when they are not incorporated in the hierarchical system of the armed forces.

6d. Military Advice & Training

As part of the SSR programme the Iraqi military was reformed and trained by PMSCs. The main contract to provide the military training was awarded to the Vinnell Corporation, for the training of nine battalions of the Iraqi army. Although not executed, the contract also contained the option for Vinnell Corporation to train the remaining eighteen battalions as well, creating a twenty-seven battalion strong Iraqi army. From the outset there was critique on the performance of Vinell Corporation and despite the fact that not all of the critique was justified, a few observations can be made. The new army was trained for traditional tasks and

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318 Spearin 2008: 225.
therefore ill-prepared to fight the insurgency in the country and of the first battalion trained more than half of the recruits deserted when forced into action.\textsuperscript{319} Displeased with the quality of the training, the US military decided to take over the training themselves helped by other armed forces of the ‘coalition of the willing’.\textsuperscript{320} Although, the quality of the Iraqi military has steadily improved in the 2003-2009 period, and despite the handover of the responsibility, a large US force remains present to ensure the security of Iraq\textsuperscript{321} Moreover, the human rights record of the Iraqi army remains worrying as cases of unethical behaviour by the Iraqi military continue to occur on a regular basis.\textsuperscript{322}

To reform and train the post-Saddam Iraqi army as part of the SSR programme is in itself a moral sound thing to do. In particular, as it aims to create a force loyal to the democratically elected government of Iraq and break with its dictatorial past. However, the part of the contract that was executed delivered disappointing results – ill-prepared troops that deserted in large numbers – and the responsibility for the training of the Iraqi military was taken over by the Coalition forces. The failure of the Vinnell Corporation to adapt the training to the demands in the field, to sufficiently train and discipline the recruits, and prepare them sufficiently for their fighting insurgents may have led to unethical behaviour in the field.

However, the Vinnell Corporation was not singlehandedly responsible for the failure, as resources available under the contract were severely limited by the US, and the original aim of the contract – to develop a military apparatus capable of defending Iraq form outside threats – differed from the actual deployment of the army.\textsuperscript{323} It would therefore be unfair to accuse the Vinnell Corporation of unethical behaviour, but this case study does illustrate the necessity of good communication and coordination between the PMSC and the actor hiring them. As noted before, SSR programmes are among the key programmes of post-conflict reconstruction, and the risks attached to the failure of such a programme are severe. Therefore, both the PMSC providing the training and assistance and the actor hiring the PMSC have a moral obligation to ensure that the SSR programme is successful. In the case of Iraq, they have clearly failed to do so during the period under review here.

7. Conclusion
This thesis was set out to uncover the moral boundaries for the deployment of PMSCs. To this end, a case study has been made on the use of PMSCs in Iraq in the period 2003-2009, hence the following research question: To what extent, does the deployment of Private Military Security Corporations in Iraq between 2003-2009 challenge the moral boundaries, which can be formulated using a contemporary understanding the Just War Tradition? This thesis has argued that the current use and deployment of PMSCs crosses these moral boundaries, due to the absence of a legal framework to control and hold PMSCs accountable, as PMSCs are often not incorporated into the hierarchical state structure of the armed and security forces. This lack of accountability and the absence of an effective mechanism to hold PMSCs and their employees accountable, which enhances the risk of immoral behaviour and forms one of the fundamental problems of the privatisation of the security sector. It was therefore argued that in a large number of instances PMSCs should be incorporated into the hierarchical structure of the state security forces, so that they are on equal footing with regular members of the armed and security forces and can be held accountable when necessary through the existing disciplinary system of those armed and security forces.

In the case study, the deployment of PMSCs in Iraq in the period 2003-2009 was tested to the moral boundaries established in the preceding chapter. It has become apparent in the case study that, due to the absence of an effective system of oversight, the decision to let PMSCs operate outside the hierarchical structure of the security forces, irrespective of the services they provided, and decision to grant contractors immunity by CPA order 17, the deployment of PMSCs in Iraq during the period under review has crossed the moral boundaries set out in this thesis. The arming of contactors and the use of armed civilian security contractors without integrating them into the hierarchical military structure, and the use of military uniforms by contractors blur the distinction between combatants and non-combatants and undermine the principle of discrimination. Moreover, the impunity by which they could operate has not only spurred immoral behaviour, as any restraints were absent, but also the fact that those responsible for the atrocities ‘escape’ unpunished. These practices challenge the existing moral boundaries and the appalling results and examples from the case study illustrate not only the added value of these moral boundaries but also the need to respect them.
In order to come to this conclusion, the first part of this thesis has uncovered how changing the socio-political attitudes, towards the socio-economic organisation of the state and the military, combined historical developments of the end of the Cold War have contributed to the development of PMSCs. The Neo-liberal socio-political attitudes encouraged the privatisation of government services. Faced with fiscal constraints, governments began to even outsource security tasks and the practice of outsourcing was introduced to the military. Moreover, the end of the Cold War gave rise at to a growing demand for security as large parts of the world spiralled into conflict while Western states, downsizing their armies, became reluctant to intervene. In this context, PMSCs were able to develop and established themselves as an answer to the security problems of both state and non-state actors in the world.

It has been argued in the second part of the thesis that any analysis on the moral implications of PMSCs should focus on the specific tasks and services that they provide instead of PMSCs at large. Since a proper catch all definition of PMSCs is lacking and due to the protean structure of PMSCs, such an analysis would be inaccurate as the moral impact of different tasks and services provided are far apart from each other. Moreover, it has been argued that a number of the tasks and services provided by PMSCs have a significant impact on the security environment, despite the absence of the use of force while providing these tasks and services.

The theoretical framework was constructed based on a contemporary understanding of the JWT, introduced in the third part. Using this framework, the fourth part of this thesis has established the moral boundaries within which PMSCs can operate. Having established the moral responsibility of both PMSCs and the individual contractors, using the analogy of the multinational, it was argued that the nature of the actor that hires the PMSCs and the entitlements that the actor can make under the JWT are fundamental for the legitimacy of the different tasks and services. State actors and those non-state actors with ‘state like’ capabilities possess the important JWT-principle Right Authority, and may therefore legitimately use force, in contrast to non-state actors lacking those capabilities. Furthermore, it was pointed out that sound oversight and control mechanisms are essential to ensure that PMSCs and individual contractors are held accountable when providing their services. Finally, it has there been argued that incorporating PMSCs and their employees into the hierarchical structure of the states security forces is essential, as this will preserve the division between legitimate combatants and civilians, and ensure that the principle of
discrimination will be respected. Allowing PMSCs to have an unclear status and to operate in the grey area between combatants and non-combatants undermines and puts pressure on the principle of discrimination and should therefore be considered immoral. Furthermore, incorporating PMSCs into the hierarchical structure of the state security forces will enhance the mechanism by which state actors are able to hold PMSCs accountable.

The question remains what to do next? As noted in the introduction, actors can implement the moral boundaries formulated in this thesis straight away and have a moral obligation to do so as they are based on the existing consensus in the JWT. The analyses of the deployment of PMSCs during the invasion in Iraq and problems that have emerged during the invasion and the reconstruction of Iraq only support this point of view.

As this thesis has provided an analysis from a moral perspective on the deployment of PMSCs, it has contributed to the debate by providing some new insights, arguments and even some possible solutions. Furthermore, this thesis has also raised a number of relevant points which can be codified in future legislation on PMSCs or at least provide new insights for the debate. Especially, the attention that was raised to the erosion of the principle of discrimination and the blurring of the distinction between combatants and non-combatants, on which the use of PMSCs in Iraq have had a negative impact, is of importance. The proposed solution of incorporating PMSCs employees into the armed forces on a number of occasions, making them full-fledged legitimate, would not only provide more clarity on the actual status of the individual contractors, but would also strengthen the way by which PMSCs could be controlled. Nevertheless, as the debate on PMSCs, their use, and deployment remains heated further research to this topic is needed.
Bibliography


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