

# THE HISTORY OF PRIVATE VIOLENCE

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## 1. Introduction

Since the very beginnings of organized violence armed force (loosely speaking) has been applied through the use of professional *ad hoc* soldiers, often of foreign origin. Yet in the last few centuries the idea that men should not take part in armed conflict for monetary compensation has come to be an almost unquestionable fact of life. Contracted combatants, including mercenaries, are almost universally condemned and the word itself is highly pejorative. To accuse somebody of being a mercenary is to make a moral statement about the person's character and occupation. This chapter will briefly explain mercenarism in a wider historical context. It would be difficult to understand the practice of using private citizens in warfare without knowledge of the social and historical context in which this activity takes and has taken place.

Another reason for describing the history of the use of mercenaries in some detail is to show that the monopolisation of violence into the public sphere is a rather recent trend. The best example, of course, is the fact that the basic social institution in international relations – the nation state – is merely a few hundred years old. During this short time of the nation state's existence it has become the dominant player in international affairs as well as the primary subject of international law, but it would be wrong to assume that this has always been, or that it will necessarily continue to be, the case.<sup>1</sup> Standing armies are very much connected with the nation state and consequently they are also relatively new in the history of warfare. This chapter demonstrates that non-state actors, both foreign and domestic, have been taking part in military ventures throughout history. Very often they have had dominant positions in state armies, and states have generally been quite willing to buy their armies. From a historical perspective it is only very recently that this trend has changed and, taking the larger historical context

<sup>1</sup> James Cockayne put it aptly, that “the system of territorial states, recognized and constituted by international law, is so central to our lived experience that it is very difficult to imagine how violence might otherwise be organized”. **James Cockayne**. 2008. The Global Reorganization of Legitimate Violence: Military Entrepreneurs and the Private Face of International Humanitarian Law. – International Review of the Red Cross, Vol. 88, No. 863, p. 459.

into consideration, it seems that the state's monopoly on violence is merely an exception to the rule. Nowadays, however, the success of the nation state is so deeply embedded in political ideology that one generally assumes its legitimacy for monopolising violence without much further thought; this historical exception has, in the last few centuries, undoubtedly been crystallised into being the new rule.

## 2. The Pre-nation State

### 2.1. *The Ancient World*

Warfare has been a part of human nature ever since social constructions were formed, and references to mercenary soldiers are as old as records of warfare itself.<sup>2</sup> The oldest known human mummy, Ötzi the Iceman who was found in the Alps on the border of Italy and Austria in 1991, is thought to have been a warrior.<sup>3</sup>

Mercenaries were commonly used in Ancient Egypt and during the 19th Dynasty foreign mercenaries were in the majority in the Egyptian army.<sup>4</sup> The 22nd and 23rd Dynasties were ruled by the descendants of Libyan mercenaries that had settled in Egypt generations before.<sup>5</sup> In the first recorded battle, the Battle of Kadesh in around 1290 BC,<sup>6</sup> the Egyptian army, led by pharaoh Ramesses II, used Numidian troops to fight the Hittites.<sup>7</sup> Also, the Bible contains many tales of foreign soldiers including former shepherd and failed musician David who, after killing Goliath (a Philistine soldier) with a sling, realised his potential as a soldier and became a great mercenary

<sup>2</sup> **Peter W. Singer.** 2003. Corporate Warriors: the Rise of the Privatized Military Industry. Ithaca, NY: Cornell University Press, p. 20. For an anthropological account of history of warfare, see **Lawrence H. Keeley.** 1997. War Before Civilization: The Myth of the Peaceful Savage. Oxford: Oxford University Press.

<sup>3</sup> DNA testing has shown that there were traces of blood in his spear belonging to several other humans. Also, his body was bruised and his hands were cut. It is thought that he died in battle. See **Michael Lee Lanning.** 2005. Mercenaries: Soldiers of Fortune, from Ancient Greece to Today's Private Military Companies. New York, NY: Presidio Press.

<sup>4</sup> **Singer** 2003, p. 20–22.

<sup>5</sup> **Anita Stratos.** n.d. The Evolution of Warfare: Part I. – <[www.touregypt.net/featurestories/war.htm](http://www.touregypt.net/featurestories/war.htm)>.

<sup>6</sup> There appears to be some controversy regarding the year of the battle; different sources quote different years but all of them are in agreement that the battle took place around 1290 BC.

<sup>7</sup> **James Larry Taulbee.** 1998. Reflection on the Mercenary Option. – Small Wars & Insurgencies, Vol. 9, No. 2, p. 145; **Lanning** 2005, p. 4–6.

warrior for his former enemy, the Philistine army.<sup>8</sup> When this army met the Israeli forces, David encountered hostility and mistrust from his fellow commanders. They felt, not unreasonably, that David might change sides (again).<sup>9</sup> This accusation is common in mercenary history and mercenaries have indeed often been known to change sides. Considering David's past, this accusation was not completely unwarranted and in fact David was later crowned King of Israel in approximately 1006 BC.

The use of mercenaries was also common practice in Ancient Greece and there is a wealth of information regarding mercenary activities during this era.<sup>10</sup> Several historical studies have been conducted on the history of mercenarism in this period. Probably the most famous mercenaries in Ancient Greece were the "Ten Thousand", a band of mercenaries consisting mainly of Hoplites, hired by the Persian Prince Cyrus the Younger to attack Persia (401–400 BC) in order to claim the crown from his brother Artaxerxes. After Cyrus was himself killed in the early stages of the battle an Athenian mercenary called Xenophon took control of the Ten Thousand and led their retreat.<sup>11</sup> The stories of Greek mercenaries have been well recorded and there is no need to repeat them here.<sup>12</sup> What is important, however, is to consider the role that they played in Greek society. Matthew Trundle's work is of considerable importance as it sheds light on the use of mercenaries as a social phenomenon (rather than a military one). According to Trundle, Greek mercenaries were not just soldiers of fortune but were accepted in Greek society. This is an interesting proposition since the modern view of mercenaries is quite the opposite and the word "mercenary" itself is often used in a pejorative sense. Greek mercenaries were not terribly highly paid and this pay was often quite irregular. As with other ancient mercenary troops, the spoils of war were often a more lucrative source of income for mercenaries. According to Trundle, there were different kinds of mercenaries in Ancient Greece and these different types were largely motivated by different considerations.

<sup>8</sup> The Bible, Old Testament, 1 Samuel 27.

<sup>9</sup> The Philistine commanders complained of David that "he must not go with us into battle, or he will turn against us during the fighting. How better could he regain his master's favor than by taking the heads of our own men?" The Bible, Old Testament, 1 Samuel 29:4.

<sup>10</sup> For example, **Herbert William Parke**. 1933. Greek Mercenary Soldiers from the Earliest Times to the Battle of Ipsus. Oxford: Clarendon Press; **G. T. Griffith**. 1935. The Mercenaries of the Hellenic World. Cambridge: University Press. For a more recent account, see **Matthew Trundle**. 2004. Greek Mercenaries from the Late Archaic Period to Alexander London: Routledge.

<sup>11</sup> Xenophon recorded the story of the Ten Thousand in a book *Anabasis*. The story was also turned into several fiction books and a Hollywood movie.

<sup>12</sup> For references, see note 11.

Private gain was certainly an important part of mercenary activity but it often expressed itself in the form of sustenance, just like in any other work.<sup>13</sup> According to Xenophon, loyalty and other rewards that might flow from military service were considered more important among generals and captains than monthly wages. People with a higher social status (and thus having no need to earn wages) were often inspired by noble and honourable motives and the social status that comes with being a famous military commander.<sup>14</sup>

Greek literature also contains discussions on mercenary morality, as evidenced by Plato's *Laws* and Aristotle's *Nichomachean Ethics*.<sup>15</sup> Both writers were against the idea of using mercenaries. Plato considered mercenaries to be insolent, unjust and violent men, whereas Aristotle thought them to be unreliable as warriors. As we will see later, these accusations commonly repeat themselves in discourses about mercenaries.

## **2.2. The Dark and Middle Ages**

Mercenary trade also flourished in the Dark and Middle Ages (roughly from the 5th to 15th centuries). In feudal England knights could avoid military service by paying a sum of money, “scutage”, to the king. This money was used to pay for mercenary troops.<sup>16</sup> One of the oldest constitutional documents, the Magna Carta, signed in 1215, also had provision for mercenaries. According to Article 51:

As soon as peace is restored, we will remove from the kingdom all the foreign knights, bowmen, their attendants, and the mercenaries that have come to it, to its harm, with horses and arms.<sup>17</sup>

The Magna Carta was signed in response to disagreements over the rights of the King. The English barons made King John sign the Magna Carta, promising certain rights and freedoms to the people. Many of these are still valid and enforceable by law today and many consider it to be one of the

<sup>13</sup> Trundle 2004, p. 42.

<sup>14</sup> *Ibid.* p. 43.

<sup>15</sup> **Plato.** 360 BCE. *Laws*. – Benjamin Jowett, transl. <[classics.mit.edu/Plato/laws.html](http://classics.mit.edu/Plato/laws.html)>; **Aristotle.** 350 BCE. *Nichomachean Ethics*. – W. D. Ross, transl. <[classics.mit.edu/Aristotle/nicomachaen.html](http://classics.mit.edu/Aristotle/nicomachaen.html)>.

<sup>16</sup> **Anthony Mockler.** 1969. *The Mercenaries*. New York, NY: Macmillan, p. 26.

<sup>17</sup> In the original Latin version the text does not have numbered articles. Rather, the text reads continuously. See the website of the British Library, at <[www.bl.uk/treasures/magnacarta/magna.html](http://www.bl.uk/treasures/magnacarta/magna.html)>.

earliest bills of rights. According to Kiernan, the mercenary provision in the Magna Carta was created in response to the use of Flemish mercenaries by King John (John Lackland)<sup>18</sup>. The English had had bad experiences with mercenaries, for example in the Battle of Hastings (1066) where mercenaries with specialist skills in using crossbows played a major part.<sup>19</sup> Despite this general contempt for mercenaries, the British were not put off from the practice of hiring mercenaries when it suited their interests. The most notable mercenary episode was the hiring of Hessians to fight in the American War of Independence.<sup>20</sup> As we will see later, the use of Hessian mercenaries played an important role in ending mercenary trade in Europe.

The Middle Ages also saw the first private military companies. The Treaty of Bretigny (1360) between England and France marked the end of the first phase of the Hundred Years' War (1347–1453). It also marked the rising of “Free Companies”. An important factor was also the decline of feudal society and the increasing importance of a centralised monarchy. Feudal societies could offer very little to those who proved excellent soldiers but were not of noble origin as society was fairly inflexible about the rights and obligations of people from different classes. The Free Companies of the 14th century provide an important historical case to consider. Particularly relevant is the point that they operated completely outside of any state authority. Not only were they foreign for those who hired them, but more importantly they took their commission in a purely private capacity as a commercial company, not as tools of foreign policy. This factor distinguishes them from many other “mercenaries” in history. We will see, for example, how Swiss mercenaries (often considered to be the most famous mercenaries of all) were typically hired out by the Cantons for political or economic reasons. The Free Companies acted outside of state authority and decided who to work for themselves. They were, in the contemporary sense of the word, true mercenaries.

According to Temple-Leader and Marcotti, great numbers of military commanders were dismissed at the conclusion of the Treaty of Bretigny (1360) but, having become “too accustomed to the excitement of fighting and setting ransom in an enemy's country”, they were unwilling to go back to England where feudal society did not have much to offer. Temple-Leader and Marcotti note, however, that most English officers from the rank of captain upwards, laden with the spoils of war, obeyed the order of peace and

<sup>18</sup> V. G. Kiernan. 1957. Foreign Mercenaries and Absolute Monarchy. – Past and Present, Vol. 11, p. 69.

<sup>19</sup> Lanning 2005, p. 36–38.

<sup>20</sup> For example, see Edward J. Lowell. 1884. The Hessians and Other German Auxiliaries of Great Britain in the Revolutionary War. New York, NY: Harper & Brothers.

dismantled accordingly. Those who had not yet made their fortune continued in the form of Free Companies. John Hawkwood, the “enemy of God, of pity and of mercy”,<sup>21</sup> was to become a leader of one such enterprise: the “White Company”.<sup>22</sup>

Regarding the legal position of these companies, the medieval jurist Bartholomew of Saliceto wrote that: “There is no doubt about their position, for they are robbers ... and therefore as robbers they should be punished for all the crimes they have committed.”<sup>23</sup> Considering how the Free Companies pillaged Italian cities and the French countryside, this statement might not be completely unwarranted. However this statement is not a comment on their status as soldiers, it merely condemns the Free Companies for being criminals outside of proper conflict. Mockler notes that the Free Companies were aware of and concerned about their status. When they were serving princes in public wars they would be legitimate, but by continuing the life they had chosen beyond the end of hostilities they became bandits and criminals.

### ***2.3. The Italian Renaissance***

It was also seen as important that the war in which they were participating should be just.<sup>24</sup> The Catholic tradition of righteous war had already been expressed by St. Augustine and Thomas Aquinas. For both writers, one of the central elements of just war was that it is waged by order of proper authority. The right of participation was an important question and Free Companies therefore had to be careful in choosing their commissions. Naturally, some were more scrupulous than others and those who chose to ignore this consideration risked their lives. One of the terms of the Treaty of Bretigny (1360) was that the Free Companies should be dissolved and Edward III eventually implemented this by sending princes to France to seek out those who had not so dissolved in order to enforce this requirement.<sup>25</sup>

One of the first highly successful Free Companies was the Grand Catalan Company, established at the turn of the 14th century by Roger di Flor. Their first important commission was for the Byzantine Empire to fight the Turks at the beginning of the 14th century. This company was successful and its commander, Roger di Flor, married the Byzantine princess and was made

<sup>21</sup> Mockler 1969, p. 42.

<sup>22</sup> John Temple-Leader & Giuseppe Marcotti. 1889. Sir John Hawkwood: A Story of a Condottiere. Leader Scott, transl. London: T. F. Unwin, p. 9, 10.

<sup>23</sup> Quoted in Mockler 1969, p. 32.

<sup>24</sup> Mockler 1969, p. 32.

<sup>25</sup> Mockler 1969, p. 34.

grand duke. Di Flor was assassinated in 1305 but the company remained in operation. This shows that even as early as the 1300s a corporation had already been considered as a separate legal person that could survive its individual members. This point is important to note because the claim of legal personhood is one of the arguments used by modern companies to legitimise their business.<sup>26</sup> The Grand Catalan Company avenged the death of their commander by pillaging over a period of two years. Later, when it took a commission in 1310 with the Duke of Athens and after again being highly successful in battle, their employer sought to terminate the commission without pay. The company turned against the Duke and took over control of Athens in the battle of Halmyros in 1311, ruling Athens until 1388. According to Mockler, no other mercenary company has ever had so much political power and has managed to hold onto it for so long.<sup>27</sup> Its success is one that is yet to be matched by any other mercenary or private military company. The case of the Grand Catalan Company provides a somewhat rare example of military power turning into political power, something that has not happened since on a scale comparable to the ruling of Athens by the Grand Catalan Company. With the rise of private military companies in the late 19th century this consideration emerged again, especially in Africa where private companies could have superior military power compared to their employer.

Private military companies were also highly eminent in 13th and 14th century Italy. Conditions for the military profession were fundamentally more favourable there than in feudal societies. An essential element of the Italian city-states was commerce. Unlike in feudal society, wealth was not tied to the land and was more easily exchangeable for goods and services. In addition, the Italian city-states were very wealthy and cultured. It was considered wasteful to spend one's time in battle. The vast number of powerful city-states practically guaranteed continuous warfare. Their considerable wealth, on the other hand, made it possible to buy private armies called "condottieri".<sup>28</sup> Renaissance Italy provides an interesting historical case to

<sup>26</sup> According to Spicer, "PMCs are permanent structures, corporate entities, which are run like a business". See **Tim Spicer**. 1999. *An Unorthodox Soldier*. Edinburgh: Mainstream, p. 41. This corporate existence is major factor in the minds of private military companies, as an essential fact that they often use to distinguish themselves from traditional mercenaries. Further discussion will demonstrate, however, that this argument is ill-considered.

<sup>27</sup> **Mockler** 1969, p. 54.

<sup>28</sup> According to a former UN Special Reporter on mercenaries, Mr. Ballesteros' mercenary activities occur "in inverse proportion to peace, political stability, respect for the legal and democratic order, the ability to exploit natural resources in a rational manner, a well-integrated population and a fair distribution of development which prevents extreme poverty. Where all these factors coincide, the risk of mercenary activity is minimal". See Report on

consider because a typical element of most mercenary activities in the 20th century was that they took place in areas plagued with extreme poverty such as Angola, Sierra Leone, the Congo, Papua New Guinea, *et cetera*. Renaissance Italy has two elements that aptly characterise it: wealth and culture. Usually, when these two elements coincide the risk of mercenary activity is low. Yet the history of Renaissance Italy cannot be accurately told without reference to the condottieris.<sup>29</sup> Perhaps the countervailing factors included a high degree of fragmentation among different city-states and the lack of political stability. Foreign mercenaries had already been used in the Italian peninsula in the 13th century Tuscan armies. According to Caferro:

The successive invasions of Italy by foreign armies in the first half of the fourteenth century brought a sharp increase in the number of mercenaries. The 1310 invasion by Henry VII of Luxembourg, whom Dante Alighieri viewed as the savior of Italy, left a residue of German, Flemish, and Brabantine soldiers, who banded together in the armies of the great Luccan exile Castruccio Castracane. The arrival of Ludwig of Bavaria seventeen years later brought additional German soldiers, while the descent of Louis of Hungary into Italy in 1347 introduced bands of Hungarian mercenaries.<sup>30</sup>

Discussing the Free Companies and condottieris during Renaissance Italy, Mockler importantly observes that the relationship between employer (the prince) and mercenary company was purely a matter of business. Contracts stipulated the terms of service, number of men, salary, the term of the contract, *et cetera*.<sup>31</sup> This also conforms to the modern idea of the mercenary in the sense that the relationship between a mercenary and his employer is purely commercial. The aspiration for private gain and lack of political motivation is so strong that, in a modern legal sense, a person is not considered a mercenary if he is inspired by the right ideological zeal. According to Temple-Leader and Marcotti, the mercenary companies employed treasurers, bankers, attorneys, secretaries, notaries and registrars to run their business, just as modern private military companies do.<sup>32</sup> William Caferro's study on Hawkwood showed that in 1381 when Hawkwood served Florence he was

the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN Doc E/CN.4/1999/11, 13 January 1999.

<sup>29</sup> Mockler 1969, p. 43.

<sup>30</sup> William Caferro. 1998. Mercenary Companies and the Decline of Siena. Baltimore, MD: Johns Hopkins University Press, p. 3.

<sup>31</sup> Mockler 1969, p. 44–45.

<sup>32</sup> Temple-Leader & Marcotti 1889, p. 45.

paid 4,000 florins a year. The highest-paid Florentine civil servant Coluccio Salutati, Chancellor of Florence, had an annual income of a mere 100 florins per year.<sup>33</sup> According to Caferro, Hawkwood was acting primarily on monetary motivation and when the payments stopped so did he.<sup>34</sup>

Many Free Companies, including the White Company, saw their glory days in Renaissance Italian city-states. Sometime around 1361, Hawkwood crossed the Alps into Italy with his White Company and served various city-states including Pisa, Siena and Perugia. The tactics of the White Company resembled those of the Swiss mercenaries a few centuries later. They advanced in big, compact groups on foot with their lances lowered towards the enemy. There was no element of surprise and their method has been described as defensive even in offence. Temple-Leader and Marcotti note that it was a convenient method for those who did not particularly wish to end the conflict decisively and saw it merely as a trade or profession.<sup>35</sup> Their work also lends support to Machiavelli's accusations regarding these mercenaries fighting bloodless wars. In particular, Temple-Leader notes that the White Company would not attack a fortress or enemy that offered real resistance.<sup>36</sup>

In Italy, where free companies were particularly active, Niccolò Macchiavelli launched a furious attack against mercenaries. He wrote:

Mercenaries and auxiliaries are useless and dangerous. And if one holds his state based on these arms, he will stand neither firm nor safe; for they are disunited, ambitious and without discipline, unfaithful, valiant before friends, cowardly before enemies. ... The fact is, they have no other attraction or reason for keeping the field than a trifling stipend, which is not sufficient to make them willing to die for you.<sup>37</sup>

Macchiavelli further states that victory gained by the arms of others is no true victory. In short, Macchiavelli's opposition to mercenaries contains Plato's principled objections as well as Aristotle's pragmatic concerns. Not

<sup>33</sup> **William Caferro.** 2006. John Hawkwood: An English Mercenary in Fourteenth-Century Italy. Baltimore, MD: Johns Hopkins University Press, p. 16. It is unclear whether this figure takes into account that Hawkwood had several subcontracts which had to be paid for.

<sup>34</sup> *Ibid.* It could be argued that this is one of the essential *practical* problems with mercenaries.

<sup>35</sup> *Ibid.*, p. 40–41.

<sup>36</sup> *Ibid.* Despite having acted against Florence on many occasions, Hawkwood was in his later years granted Florentine citizenship (despite having previously led campaigns against Florence on several occasions) and in 1394 upon his death was granted a state burial, something denied earlier to the Florentine poet Dante Alighieri.

<sup>37</sup> Niccolò Machiavelli. 1532. *The Prince*. – W.K. Marriot transl.  
<[www.gutenberg.org/files/1232/1232-h/1232-h.htm](http://www.gutenberg.org/files/1232/1232-h/1232-h.htm)>.

everyone, however, was as opposed to the use of mercenaries. Thomas More in his *Utopia*, for instance, discussed the many advantages of using mercenary warriors. He considered there to be two main advantages in using mercenaries. First, this would spare Utopians from such dangerous activity. The second reason was economic. Mercenaries would be sent to the most difficult battles so that few would survive to collect their pay. Like most other writers, More considered mercenaries to be “lewd and vicious sort of people” so having them die in battle was no great loss to humanity.<sup>38</sup>

#### **2.4. Catholic Just War Theory and Diplomatic Pragmatism**

Discussion on mercenaries arose also in the Catholic just war tradition. Francisco de Vitoria argued in *De Bello* that:

Those who are prepared to go forth to every war, who have no care as to whether or not a war is just, but follow him who provides the more pay, and who are, moreover, not subjects, commit a mortal sin, not only when they actually go to battle, but whenever they are thus willing.<sup>39</sup>

Vitoria’s assumption is that mercenaries are *a priori* greedy and immoral and that the wars in which mercenaries participate are unjust.<sup>40</sup> Vitoria does not, however, consider the question of mercenaries participating in just wars. Could this be legitimate? Just war, of course, was one that was waged by authority of the Church. Vitoria’s position rests on the consideration that participating in war for private gain is unacceptable. Private gain as motivation for war participation is morally problematic and thus rejected by Vitoria.

Francisco Suárez, on the other hand, was of the opinion that individual soldiers would not have to inquire into the justness of a war provided that it

<sup>38</sup> Thomas More. 1516. *Utopia*. – Gilbert Burnet transl.  
<[www.gutenberg.org/files/2130/2130-h/2130-h.htm](http://www.gutenberg.org/files/2130/2130-h/2130-h.htm)>.

<sup>39</sup> **Vitoria.** *De Bello*. Art. I, para 8, quoted in **L. C. Green**. 1985. *Status of Mercenaries in International Law*. – L. C. Green. *Essays on the Modern Law of War*. Dobbs Ferry, NY: Transnational, p. 530.

<sup>40</sup> Some doubt can be cast on Vitoria’s position on mercenaries where he argues that anyone, including foreigners, may offer help to the Spanish king in defending a city of which he is in possession (*ibid.*), it appears that for Vitoria such a battle involving a king of Spain is *a priori* a just one. Something similar happened some 400 years later in Geneva when it was decided that ideologically-motivated mercenaries are not really mercenaries after all, but those who serve for the sake of money, if not quite committing a mortal sin, nevertheless unlawfully participate in conflicts.

was unclear whether the war was unjust.<sup>41</sup> Regarding mercenaries, the question was more complicated. The main issue for Suárez was the “giving of the conscience in the keeping of the prince”. For this reason, soldiers were not required to inquire into the justness of the war (unless it was clearly unjust). In normal circumstances they were allowed to trust that the prince had already made this judgement. Suárez examines the question of whether this principle can also apply to mercenaries, especially given that they are not subjects of the prince. He concludes that to require a mercenary to inquire into the justness of the war would be “contrary to all custom, and humanly speaking … impossible”.<sup>42</sup> Suárez opined that, from a moral point of view, subjects and non-subjects (i.e., mercenaries) are not in different positions. Also, he saw no moral distinction between selling one’s military labour on a temporary or permanent basis. By committing themselves to the prince, whether for pay or loyalty, temporarily or permanently, mercenaries have the authority of the prince which, according to Suárez, is a principle that guarantees great probability that the war is just.<sup>43</sup> This is a crucial difference in the way Vitoria and Suárez considered the legal position of mercenaries. For Suárez, by selling his skills to another a mercenary was merely exercising his right to enjoy the fruits of his labour, an idea later espoused by liberal and libertarian thinkers such as John Locke and many others. Furthermore, the idea of soldiers not having to inquire into the justness of the cause is of course accepted in modern international law. Hence the separation of *jus in bello* and *jus ad bellum*. This distinction, reflected in normative thought but based on morality, that it is possible to fight unjust wars justly and just wars unjustly, is a position of common sense as well as legal reality. Accordingly, any soldier who fights in an unjust war need not be a war criminal, and any soldier who fights in a just war can be.<sup>44</sup> For Suárez the same separation is true. There is nothing *a priori* unjust in using mercenary soldiers. If the cause is just, motivation is not important and it does not matter who gets on with the job.

Another commentator joining the discussion was the Swiss jurist Emerich de Vattel. The Swiss had already established themselves as leaders in the European mercenary market in the late 14th century when, after the Battle

<sup>41</sup> In **Francisco Suárez**. 1944. Selections from Three Works of Francisco Suárez. Gwladys L. William & Henry Davis, eds. Oxford: Clarendon Press, p. 832.

<sup>42</sup> *Ibid.*, p. 834.

<sup>43</sup> *Ibid.*, p. 835.

<sup>44</sup> It should be noted that the word “just” is used here merely in purely descriptive sense, not to refer to any notion of the Just War theory as such.

of Sempach, they became known as “bestial mountaineers”<sup>45</sup> Swiss cantons would hire out units of soldiers to whoever wanted to buy them. The logic behind this practice was fundamentally different from that of the Free Companies, for example. Swiss soldiers were hired out and paid by the cantons. They were therefore not acting in a private capacity but in modern terms were “sent by the state” to do their job. Despite the fact that Swiss dominance of the “mercenary” market had already ended, Vattel discussed the issue at length in his classic *Law of Nations*. Unlike many other jurists of his time and before him, he saw no moral impediment to using mercenaries. On the contrary, Vattel encouraged mercenarism and considered it to be beneficial to the mercenary’s nation state as well. By engaging in warfare mercenaries learnt an art of war – an art that Hugo Grotius complained had no place among useful arts<sup>46</sup> – and thus became an even more useful citizen in serving his own country. Vattel wrote that:

the tranquillity, the profound peace which Switzerland has so long enjoyed in the midst of all the commotions and wars which have agitated Europe, – that long repose would soon become fatal to her, did not her citizens, by serving foreign princes, qualify themselves for the operations of war, and keep alive their martial spirit.<sup>47</sup>

From the home state’s point of view, mercenarism was not only allowed but positively encouraged. Vattel attributed Switzerland’s peace to its mercenaries who, by serving foreign princes, trained themselves in an art of war, making Switzerland an unappealing target for foreign invaders. Vattel also saw the mercenary question purely as a contractual matter between the mercenary and the employer and that this contractual stipulation should be “religiously observed”.<sup>48</sup> He was sympathetic to mercenaries who refused to fight on account of not having been paid. Citizens had this duty, but not mercenaries. Vattel considered such complaints against mercenaries ridiculous and unjust on the grounds that contractual provisions should not be more harshly enforced on one party than on the other.<sup>49</sup> He also considered the essential question of whether the mercenary profession is in itself lawful or

<sup>45</sup> Mockler 1969, p. 75.

<sup>46</sup> Hugo Grotius. 1625. *De Jure Belli ac Pacis*, Book II, chapter 25, ix.

<sup>47</sup> Emerich de Vattel. 1758/1883. *Law of Nations*. Joseph Chitty, transl. Philadelphia, PA: T. & J. W. Johnson, p. 399.

<sup>48</sup> *Ibid.*, p. 398

<sup>49</sup> He further states, “whenever he fails to perform what he has promised, the foreign soldiers are discharged from any further duty to him”. *Ibid.*

not. The answer to him was simple: without the tacit or express prohibition of the sovereign, a man is free to join any society he wishes, “make its cause his own, and espouse its quarrels”.<sup>50</sup> As already noted above, Vattel in fact encouraged sovereigns to permit their subjects to serve foreign powers in the hope that they would learn the art of war and thus become more useful (a cynical mind would also say profitable) to the sovereign. Vattel does not consider the mercenary issue from a moral point of view, but he does state that if a war is “evidently unjust” a mercenary may relinquish his service; he does not say, nevertheless, that mercenaries cannot serve in unjust wars at all. That Vattel was not overly concerned about the morality of serving a foreign power is further illustrated by his comment that a sovereign should permit his citizens to serve foreign powers “indiscriminately for money”.<sup>51</sup> On the question of mercenaries fighting in unjust wars, Vattel sides with Suárez or can be said to go even further, rejecting the views of Grotius and Vitoria. The lawfulness of the mercenary profession is thus a matter to be decided by each individual sovereign. Because the levying of troops was considered to be a sovereign right, enlisting troops in a foreign country without the consent of the sovereign was considered a crime for which, according to Vattel, the recruiters should be “hanged without mercy, and with great justice”.<sup>52</sup> Vattel considered that it was lawful to serve as a mercenary in the absence of any specific prohibition to do so. On the other hand, foreign states could recruit mercenaries in a country other than their own only with the consent of their ruler.

## 2.5. Swiss “Mercenaries” and German Landsknechte

No nation has been ever been as renowned for its mercenaries as Switzerland. The Swiss Confederation was established in 1291 when the cantons of Uri, Schwyz and Unterwalden came together and signed the Federal Charter under which they would be united against the Habsburg rule of the Holy Roman Empire. The Swiss army gained its notoriety in the battle of Sempach (1386) where they defeated the Austrian troops of Duke Leopold III. The battle was also noted in France and Italy where the Swiss became known as “bestial mountaineers”.<sup>53</sup> The Swiss were particularly known for using

<sup>50</sup> *Ibid.*, p. 399.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*, p. 400.

<sup>53</sup> **Anthony Mockler**. 1985. The New Mercenaries: The History of the Hired Soldier from the Congo to the Seychelles. London: Sidgewick & Jackson, p. 8, For a full account of Swiss mercenaries, see **Mockler** 1969, pp. 74–104.

pikes. For about two centuries they dominated the European military market, being especially active in France and Italy. They would migrate as a single unit, usually composed of men from a particular valley or village.<sup>54</sup> With their common background, these troops were more efficient a unit than they would otherwise have been.<sup>55</sup> The Swiss cantons hired out these troops and the employer would pay the canton directly.<sup>56</sup> This is somewhat different from the modern use of private actors in war and, accordingly, the true private nature of Swiss mercenaries can be called into question. It was the cantons who committed their armies to foreign service just like how, in contemporary practice, the UN Member States commit their troops for UN enforcement and peacekeeping missions. One of the most essential characteristics of a mercenary is that he participates in a purely private capacity. Thus, Cuban soldiers fighting with the MPLA forces in Angola were not considered mercenaries (except for, perhaps, in politically motivated rhetoric). The typical Swiss mercenary is therefore not a mercenary at all. They were certainly foreign fighters but they also had the political backing of their cantons, thus making the troops more comparable to mercantile companies or privateers than the traditional mercenary type in the contemporary sense of the word. Although Swiss mercenary soldiers probably fought for private gain, they did so on public authority. Similar arrangements have been made throughout history, including in the 20th and 21st centuries. The most notable example of this is of course the Nepalese Gurkhas in the British and Indian armies. However there is one important difference between the Swiss mercenaries and the Nepalese Ghurkhas: the latter form part of the British and Indian regular armed forces. They are not contracted for specific missions but remain in the armed forces of these countries whether there is any ongoing conflict or not. The Swiss, on the other hand, could be bought for individual conflicts.

The glory of the Swiss mercenaries started fading in 1515 when French troops, together with German mercenaries called *Landsknechte*, won a decisive battle against them defending Milan from French invasion. The next year, France and the Swiss Confederate signed a Perpetual Peace treaty which prohibited the Confederate from hiring out mercenaries to France's

<sup>54</sup> Singer 2003, pp. 26–27.

<sup>55</sup> The use of modern private military companies provides an interesting comparison. It has been argued that one of the reasons why Executive Outcomes was so successful in their operations in Angola was that the employees nearly all came from the South African Defence forces, thereby sharing a common military and cultural background. See David Shearer. 1998. Outsourcing War. – Foreign Policy, Vol. 112, p. 73.

<sup>56</sup> Mockler 1985, p. 8.

enemies.<sup>57</sup> What is more, developments in personal firearms and artillery came to mark the decline of these Swiss mercenaries who were still known for their skilled use of pikes. The Swiss showed little enthusiasm for adopting these new technologies and were soon unable to match their northern colleagues, the German *Landsknechte*.<sup>58</sup> The supremacy of the new military firearms became apparent in the Battle of Bicocca in 1522 when Swiss mercenaries again suffered defeat to the *Landsknechte* fighting for Spain. Nevertheless, some two decades later there were still almost 20,000 of them stationed in France.<sup>59</sup>

In general, by the end of the 16th century, according to military historian Michael Howard, war was an international profession that lured in adventurous entrepreneurs from various classes of society.<sup>60</sup> Great military success, whilst making Count Albrecht of Wallenstein the wealthiest man in Europe in the early 16th century, did not generally translate into political power. By ruling Athens in the 14th century, the Grand Catalan Company provided an exception to the rule in mercenary history that mercenaries have not generally held much political power.

## 2.6. Mercantile Companies

The 16th century marked an interesting development in the history of non-state violence. Mercantile companies, the most famous being the British East India Company and the Dutch East India Company, were delegated the responsibility of conducting trade with colonies and establishing new ones. These companies were given very wide powers. According to Thomson, mercantile companies:

were, as a rule, granted full sovereign powers. In addition to their economic privileges of a monopoly on trade with a given region or in a particular commodity and the right to export bullion, they could raise an army or a navy, build forts, make treaties, make war, govern their fellow nationals, and coin their own money.<sup>61</sup>

<sup>57</sup> *Ibid.*, p. 103.

<sup>58</sup> Michael Howard. 1976. War in European History. Oxford: Oxford University Press, p. 28.

<sup>59</sup> Kiernan 1957, p. 72.

<sup>60</sup> Howard 1976, p. 28.

<sup>61</sup> Janice E. Thomson. 1994. Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe. Princeton, NJ: Princeton University Press, p. 35.

The power given to these companies was extraordinary and clearly displayed many of the characteristics of full sovereignty, chief amongst them being the capacity to raise armies, wage war, draw up treaties and govern nationals – all typical hallmarks of sovereign power. It may be thought that these mercantile companies were given such powers due to the lack of developed communication systems at that time. However, in the event of a threat (of any sort), requiring companies to wait for the sovereign's instructions would probably not have been a viable option so one can see why sovereign powers like those described above would be necessary to allow the mercantile companies to function properly.

The purpose of these companies was not only to engage in commerce but also to disrupt other countries' commerce with far-off nations. Also, in establishing colonies it was necessary to have the proper means of violence at one's disposal in order to protect the colonies from foreign aggression and to maintain internal order.<sup>62</sup> The mercantile companies' armies often had large foreign contingents.<sup>63</sup> After consideration of the political effects these mercantile companies had, their demise has been attributed to a myriad of unintended consequences. The British and Dutch East India Companies were engaged in warfare against each other in 1618 in the Malay Archipelago, an area that is now composed of countries such as the Philippines and Indonesia. Despite the fact that they signed a peace accord in 1619 and fought together against the Portuguese fleets in the early 1620s, these two companies continued to have an uneasy relationship, culminating in the Amboina Massacre of 1623 in which the soldiers of the Dutch East India Company tortured and killed 20 members of the British East India Company. Another reason for the fall of the mercantile company was that the wars waged by these companies were not always in alignment with the wishes of their home states. Companies would even fight each other when their home countries were at peace.<sup>64</sup> Displeasure with instructions from their governments resulted in the mercantile companies breaking away from these home governments' political policies. For example, the Dutch East India Company was of the opinion that "the places and strongholds ... in the East Indies should not be regarded as national conquests but as the property of private merchants".<sup>65</sup> On the other hand, when home governments were at war with each other

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<sup>62</sup> *Ibid.*, pp. 36, 37.

<sup>63</sup> Singer 2003, pp. 34, 35.

<sup>64</sup> Thomson 1994, p. 61.

<sup>65</sup> *Ibid.*, p. 62.

their respective mercantile companies would maintain peaceful relations if it suited their interests.

In the end, too much friction existed at many levels. On one level, the mercantile companies proved problematic to their home governments. The companies would engage in war regardless of the home government's wishes; they would co-operate in times of war with companies from enemy states. Their private property interests often conflicted with the political interests of their home state. As a result, problems arose between companies, between their home governments and between the companies and their governments. The Dutch East India Company finally dissolved in 1796, starting the general demise of the mercantile company. In England the government claimed sovereignty over the East India Company's territories in 1813. Two decades later the company was ordered to cease its commercial activities; it then became an agency through which Britain governed India.<sup>66</sup> The 19th century effectively marked the end of mercantile companies as important players in the international arena.

Mercantile companies represent an interesting phenomenon of non-state actors. Like the Swiss mercenaries, they were backed by public authority. Unlike the Swiss, they were endowed with considerable sovereign powers, unlike others in the history of non-state military affairs. It may be difficult to compare these mercantile companies to modern-day private military companies. The differences are self-evident. The modern-day companies do not have the same political power and their mandates are more limited in scope and time. The following discussion will show, however, that in certain circumstances concern over the political influence of today's private military companies might be warranted. The potential consequences of relying on mercantile companies and mercenaries, including private military companies, appear similar and lead to similar types of problems, namely the loss of central control over violence. This claim is often made against private military companies, especially when they are contracted by weak governments. The mercantile company example empirically shows that such accusations have merit. Even the strong governments of the time (British and Dutch) found it difficult to control these companies who were, after all, their own subjects.

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<sup>66</sup> *Ibid.*, p. 101.

### 3. The Dawn of Enlightenment and the French Revolution

Like other wars of that time, the Thirty Years' War was fought by nations relying to a very large degree on hired foreign forces.<sup>67</sup> Originally the dispute was between the Protestants and the Catholics, but very soon all major powers were involved. Following the Peace of Augsburg treaty in 1555, the German princes could choose between Lutheranism and Catholicism and their subjects were obliged to follow that religious choice: *cuius regio, eius religio*. Further to the dispute between Lutherans and Catholics, the Calvinists were not included in this treaty; on the contrary, they were explicitly excluded from its scope.<sup>68</sup> The Peace of Westphalia (1648) which ended the Thirty Years' War marked an important development: it reiterated the right of a prince to choose the religion of his state and gave the freedom to his subjects either to follow that religion or dismiss it. Because the Thirty Years' War was largely based on religious intolerance, it is not surprising that religious matters were high in the peace treaties' concerns. Importantly, the Peace of Westphalia distanced international law from religion and instead promoted a religious equality which included Calvinism for the first time.<sup>69</sup> Until then international law, and in particular the just war theory, had been dominated by Catholic thinkers such as St. Augustine, Francisco de Vitoria, Francisco Suárez, *et cetera*. For the Catholic Church the Peace of Westphalia was "a public act of disregard of the international authority of the Papacy".<sup>70</sup> The Treaty of Westphalia<sup>71</sup> contained many aspects which now have an established place in the international sphere: rules regarding the use of force,<sup>72</sup> use of waterways,<sup>73</sup> liberty of commerce,<sup>74</sup> settlement of disputes,<sup>75</sup> collective security and collective sanctions against aggressors.<sup>76</sup> While these

<sup>67</sup> Kiernan 1957, pp. 77–78.

<sup>68</sup> Peace of Augsburg, Article 17.

<sup>69</sup> Leo Gross. 1948. The Peace of Westphalia, 1648–1948. – American Journal of International Law, Vol. 42, p. 26.

<sup>70</sup> John Eppstein. 1935. The Catholic Tradition of the Law of Nations. London: Burns, Oates & Washbourne, p. 192, quoted in Gross 1948, p. 28.

<sup>71</sup> The Treaty of Westphalia, 1648, ended the Thirty Years War (1618–1648) and established a new political order based on the sovereignty of the state. See e.g. Cicely V. Wedgwood. 1938. The Thirty Years' War. London: Jonathan Cape.

<sup>72</sup> Sections V and CXXIV.

<sup>73</sup> Sections LXX and LXXVIII.

<sup>74</sup> Sections LXX and LXXXIX.

<sup>75</sup> Section XXX.

<sup>76</sup> Sections CXXIII and CXXIV.

were important aspects for the development of international law, they are not the concern of the present study. The main aspect of the Westphalian model for present purposes is the sovereign equality it established among the states and rulers and its consequences on military affairs.

After the Treaty of Westphalia a new type of army emerged, an army that Kiernan calls a “national-mercenary” army organisation.<sup>77</sup> According to this new model, foreigners would be incorporated into national armies and kept on the list permanently. Again, it was initially a union between the Swiss and the French. Soon, however, the model spread around Europe. According to Thomson, around the mid-1700s there were still considerable foreign elements in the Prussian, British, French and Spanish armies.<sup>78</sup>

Although the Enlightenment was not fertile ideological soil for mercenaries, their use did not come to an end. They were despised but useful. An example of this is the matter of the British use of mercenaries in their handling of American revolutionaries. This was expressed well by Lord Egremont in 1756, saying that “I shall never be for carrying a war upon the continent of Europe by a large body of national troops, because we can always get foreign troops for hire. This should be our adopted method in any war on the continent of Europe”.<sup>79</sup> As in the Italian renaissance cities and on the imaginary island of Utopia, it was felt that it was better to spare the local population for something more productive and useful, or perhaps the reason might have been that war, as a brutal affair, was not suitable for an Englishman. When the American War of Independence broke out in Lexington on 19 April 1775 the British regular army of 30,000 men did not have sufficient manpower to fight on its own. As the Hessian mercenaries were crossing the Atlantic, the Declaration of Independence condemned the British for “transporting large Armies of foreign mercenaries to compleat the works of death, desolation, and tyranny”.<sup>80</sup> The use of mercenaries was viewed with great scepticism, but pragmatism won out over idealism in the end. In battle the presence of German mercenaries made little difference. They fought much like the British, proved neither better nor worse, more loyal nor disloyal. When the news of 1,000 Hessian mercenaries surrendering to the Americans hit Europe it was universally welcomed. The general attitude towards using

<sup>77</sup> Kiernan 1957, p. 78.

<sup>78</sup> Janice E. Thomson. 1990. State Practices, International Norms, and the Decline of Mercenarism. – International Studies Quarterly, Vol. 34, p. 25. For example, according to Thomson, in 1701, 54% of the British army was foreign, whereas in Prussia the same figure in 1743 was 66%.

<sup>79</sup> Quoted in Green 1985, p. 537.

<sup>80</sup> The Declaration of Independence, 4 July 1776 (United States).

mercenaries was changing. When Colonel Faucett tried to recruit more mercenaries in Europe he found the task nearly impossible. Mercenary trade was almost unanimously condemned. Frederick the Great of Prussia wrote that he would not furnish the Crown with any mercenaries even if he was offered “all the millions possible”.<sup>81</sup>

The French Revolution fundamentally changed late 18th century society. One important development was the abolition of feudal remnants and the rejection of absolute monarchy with the divine rights of the king. The Declaration of the Rights of Man (1789) called for a new concept of sovereignty. It provided that all sovereignty resides in the nation and that no-one may exercise any public authority that does not derive from the people.<sup>82</sup> The declaration also called for the establishment of national armed forces. It stated that:

The security of the rights of man and of the citizen requires public military forces. These forces are, therefore, established for the *good of all and not for the personal advantage of those to whom they shall be intrusted.*<sup>83</sup>

This declaration’s principles were largely incorporated into the French constitution of 1791 which rooted sovereign power with the people.<sup>84</sup> It also established national armed forces (*la force publique*) to defend the state and prohibited the establishment of any national guards by private citizens or the use of any troops within France without the express authority of a requisition.<sup>85</sup> Also, the question of having foreign troops present in French territory, including the admission of foreigners into the service of the kingdom, was one for parliament rather than the king.<sup>86</sup> The French revolution caused great disturbances in other European monarchies and was followed by “warfare on a scale unprecedented since the barbarian invasions” between 1792 and 1815.<sup>87</sup> At the beginning of 1792 when war broke out between Austria and Prussia the French army was numerically inadequate and they had to turn to requisitions and conscription to make up the numbers.<sup>88</sup> The following year the National Convention decreed that “from this moment until that when the

<sup>81</sup> Mockler 1969, p. 127.

<sup>82</sup> Declaration of the Rights of Man, 26 August 1789 (France), Article 3.

<sup>83</sup> *Ibid.*, Article 12 (emphasis added).

<sup>84</sup> Constitution, 3 September 1791 (France), Title III.

<sup>85</sup> *Ibid.*, Title IV.

<sup>86</sup> *Ibid.*, Title III, Chapter III.

<sup>87</sup> Howard 1976, p. 75.

<sup>88</sup> Maurice K. Wise. 1944. Requisition during the French Revolution (1789–1815). – Louisiana Law Review, Vol. 6, at p. 50.

enemies shall have been swept from the territory of France, all Frenchmen are on permanent requisition for the service of the armies".<sup>89</sup> Conscription was prescribed in law in 1798 and all Frenchmen over the age of 20 were made soldiers in service to the nation.<sup>90</sup> Napoleon used this conscript army, a "nation in arms", to battle with almost all major European powers and was successful until his disastrous campaign in Russia ended in retreat in 1813, eventually losing Paris to the Allied armies of Russia, Austria and Prussia. Historian Michael Howard argues that the rise of the Napoleonic armies also lead to conscription in Prussia.<sup>91</sup> Prussia's encounters with the Napoleonic armies during the First and Fourth Coalitions led to decisive victories for Napoleon and, by virtue of the Treaty of Tilsit (1808), Prussia suffered major territorial losses with its army being limited to 42,000.<sup>92</sup> After Napoleon's defeat in Russia the situation changed. Prussia introduced universal conscription in 1814 and joined the Sixth Coalition.

#### 4. Early Domestic Legal Regulation

Ideological and political developments also had normative consequences on domestic legal systems. In this historical context, the most important one was the adoption of various laws concerning neutrality and foreign enlistment. Legal norms dealing with mercenaries *per se* did not come about for almost another two hundred years. These foreign enlistment and neutrality laws are important predecessors because they deal with the hiring of personnel into a foreign nation's armed forces. On the other hand, it would have been impossible to have neutrality laws before the nation state had consolidated its dominance in the military market. According to Lobel, the increasing internal and external control over violence was a condition precedent to neutrality laws.<sup>93</sup> The United States was the first country to pass a neutrality law as

<sup>89</sup> Quoted *ibid.*, p. 54.

<sup>90</sup> **Paul R. Hanson.** 2004. Historical Dictionary of the French Revolution. Lanham, MD: Scarecrow Press, p. 83. Conscription proved largely unpopular and its enforcement led to an uprising in 1798.

<sup>91</sup> See **Howard** 1976, p. 86. Prussia had already had a powerful standing army since the 17th century. According to Singer, more than half of Prussia's professional army was composed of foreigners during Frederick the Great's rule in late 18th century. See **Singer** 2003, p. 32.

<sup>92</sup> **Editors.** 1942. The History of Selective Service. – Indiana Law Journal, Vol. 7, p. 301.

<sup>93</sup> **Jules Lobel.** 1983. The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy. – Harvard International Law Journal, Vol. 24, p. 10.

early as 1794. The purpose of the neutrality and foreign enlistment laws was to regulate how the citizens of a country could (or rather, could not) take part in armed activities for a foreign power. The first neutrality act was enacted in the aftermath of the American War of Independence and it has survived with relatively few modifications since then. The purpose of the neutrality acts was to make sure that private individuals would not act in any way that might compromise foreign policy.<sup>94</sup> Some argue that violating the neutrality act is not merely a crime but rather an usurpation of congressional power.<sup>95</sup>

An important point in the neutrality laws is not only their effect *vis-à-vis* third states, but also the relationship between the government and its own people.<sup>96</sup> From a historical point of view, the importance of the neutrality laws is that they brought the issue of controlling physical violence into the public domain. The issue is therefore one of sovereignty, both internal and external. The US Neutrality Act prohibited US citizens from accepting commissions to serve in a foreign state's war if that war is against a state with whom the US is at peace. Secondly, it prohibited anyone within the US to enlist as a soldier in a foreign country's military service. The third offence dealt with taking part in private military expeditions against states with whom the US was at peace. The offence would not only be committed by those taking direct part in those expeditions, but also by those funding it. Moving abroad voluntarily and enlisting as a mercenary has been held by the US Supreme Court as lying outwith the scope of the act.<sup>97</sup> Thus, ideologically motivated fighters are not covered by this prohibition. According to former Attorney General Robert Kennedy, "the neutrality laws were never designed to prevent individuals from leaving the United States to fight for a cause in which they believed".<sup>98</sup>

The British followed suit a few decades later by enacting a string of Foreign Enlistment Acts during the 19th century.<sup>99</sup> The current legislation in force is the Foreign Enlistment Act of 1870. This legislation made it an offence for British subjects to accept commissions or engagements in the military service of foreign states when they are at war with countries with

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<sup>94</sup> According to Thomas Jefferson it was important to guarantee that wartime decisions should be left for the central government. He argued that the decision whether or not to go to war must not be taken on the authority of individual citizens.

<sup>95</sup> **Lobel** 1983, p. 62.

<sup>96</sup> *Ibid.*, p. 24.

<sup>97</sup> See *Wiborg v. United States*, 163 U.S. 632 (1896).

<sup>98</sup> Quoted in **Edward Kwakwa**. 1990. The Current Status of Mercenaries in the Law of Armed Conflict. – Hastings International & Comparative Law Review, Vol. 14, p. 80.

<sup>99</sup> Green 1985, pp. 542–543.

whom the UK is at peace.<sup>100</sup> The term “foreign state” includes naturally independent states but also persons exercising governmental authority over *part* of a country.<sup>101</sup> This could mean rebel forces who are in territorial control of a certain area of a country. That being said, such legislation in both the US and UK has been left largely unenforced. According to a report by the British Foreign and Commonwealth Office there have as yet been no prosecutions for unlawful enlistment or recruitment.<sup>102</sup>

## 5. The Decline of Mercenarism

Mercenarism ended for about hundred years from the mid-19th century and several theories have been put forward to explain this. Sarah Percy argues in *Mercenaries: The History of a Norm in International Relations* that mercenarism came to an end at that time because of the existing anti-mMercenary norm. The rule was effectively based on a moral question:

As the concept of citizen duty to the state grew, and patriotism and nationalism became increasingly seen as desirable and practical for armies, a selfish and financial motivation became morally inappropriate and practically inferior.<sup>103</sup>

The main argument Percy makes in her study is that the change was a *moral* one. According to Percy, this anti-mMercenary norm expressed itself differently at different times but is nevertheless the most plausible explanation for why mercenaries were replaced by national armies in America, France, Prussia and England. In America, the revolutionaries “understood their project in explicitly moral terms, and these terms made the use of mercenaries by the other side heinous, and made the option of using mercenaries for the revolutionary cause unthinkable”.<sup>104</sup> The problem was not the use of foreigners as such but it was seen as problematic to use foreigners who did not share the

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<sup>100</sup> Foreign Enlistment Act 1870 (United Kingdom), section 4.

<sup>101</sup> *Ibid.*, section 30.

<sup>102</sup> **UK Foreign and Commonwealth Office**. 2002. Private Military Companies: Options for Regulation. London: The Stationery Office, <[www.globalsecurity.org/military/library/report/2002/mercenaries.pdf](http://www.globalsecurity.org/military/library/report/2002/mercenaries.pdf)>, p. 20.

<sup>103</sup> **Sarah Percy**. 2007. *Mercenaries: The History of a Norm in International Relations*. New York, NY: Oxford University Press, p. 121.

<sup>104</sup> *Ibid.*, p.123.

revolutionary cause.<sup>105</sup> The whole war effort was dependent on the contribution of the citizens, a consideration that made hiring mercenaries difficult.<sup>106</sup> In France the anti-mMercenary norm also developed from this changed concept of the state and the citizen. Here the problem, according to Percy, was that the use of mercenaries posed a risk to the liberty of the people because mercenaries took orders from the leader of the state, instead of “thinking about the needs of the polity itself”.<sup>107</sup> Based on the enlightened values of the time, “patriotism and republicanism had become so morally powerful that it obscured the fact that conscription was inherently coercive”.<sup>108</sup>

In Prussia, argues Percy, the American revolutionary war played a major role in turning public opinion against the use of mercenaries. She continues that Prussia and France had both abandoned mercenaries, but for different reasons. In Prussia the goal was to build a state that would be better able to defend itself. Its focus was not necessarily on guaranteeing citizen rights or replacing the old regime with a new one; rather, the goal was to make the old regime stronger. What makes Prussia’s abandonment of mercenaries remarkable, according to Percy, is the fact that it broke a Prussian military tradition of hundreds of years, and it came with a huge social cost to boot.<sup>109</sup> This decision Percy explains by the existence of the anti-mMercenary norm. Finally, in the United Kingdom the situation was different again because of the existence of a strong norm against standing armies. The British had used mercenaries in the past, partly because national sentiment against standing armies ensured that there were no effective domestic institutional structures and this made it difficult to find suitable soldiers otherwise.<sup>110</sup> The norm against standing armies was the key factor that made the British use mercenaries and postpone creating national standing armed forces. During the American War of Independence and the Crimean War mercenaries came to be seen as morally unacceptable for various reasons.<sup>111</sup> The main objection was their improper motivation.

The problem with Percy’s argument is that it is founded only upon this moral norm against the use of mercenaries and ignores or downplays many

<sup>105</sup> As seen above, the Declaration of Independence made explicit reference to mercenaries, saying that they were being transported to America to “compleat the works death, desolation, and tyranny”.

<sup>106</sup> Percy 2007, p. 127.

<sup>107</sup> *Ibid.*, p. 129.

<sup>108</sup> *Ibid.*, p. 133.

<sup>109</sup> *Ibid.*, p. 145.

<sup>110</sup> *Ibid.*, p. 151.

<sup>111</sup> *Ibid.*, pp. 152–163.

other plausible explanations. What is more, it is not only in the 18th and 19th centuries that mercenaries were viewed as morally questionable. They have been condemned in almost all eras and usually on similar grounds. Janice Thomson in *Mercenaries, Pirates and Sovereigns* sees the decline of mercenarism as relating to the question of neutrality:

But if the state's right to buy and sell armies was well established, the right of individuals to enlist in foreign armed service was not settled. At issue was the state's responsibility for the actions of its subjects or citizens. Could a state claim neutrality in a particular international conflict while people within its jurisdiction chose to serve in the armed forces of one of the belligerents?<sup>112</sup>

Thomson argues that mercenarism ended because it produced unintended consequences for states. In particular, she argues that it became a nuisance to supply states with mercenaries because they could find themselves in a position where the right to claim neutrality was put at risk. Unlike Percy, Thomson does not consider that the problem was one of demand, arguing that states were still perfectly happy to hire mercenaries.<sup>113</sup> She put forward that it was the supply that was drying out. Deborah Avant criticises this by asserting that if this was indeed the case there should be instances of states trying to buy mercenaries but failing, and there is little evidence of that.<sup>114</sup> According to Thomson, in order to address the problems mercenaries posed for state neutrality, states started enacting neutrality laws. However, this argument does not fully explain the decline of mercenarism. Thomson's second argument is called the "state building" argument. Here, according to Thomson, the objective is to consolidate the interstate control of violence. The neutrality laws did not only prohibit military service in foreign forces, but also the setting up of private armies within the state.<sup>115</sup> As noted above, one important aspect of the neutrality laws was to put control of violence into the public domain, only to be used for public purposes. Accordingly, the issue here is one of sovereignty, i.e., the sovereign's control over its citizens. The decline of mercenarism, according to Thomson, also followed from the

<sup>112</sup> Thomson 1994, p. 55.

<sup>113</sup> *Ibid.*, p. 59.

<sup>114</sup> Deborah Avant. 2000. From Mercenary to Citizen Armies: Explaining Change in the Practice of War. – International Organization, Vol. 54, p. 67, footnote 112. However, Avant fails to refer to British experiences during and after the American War of Independence. According to Mockler, supply was indeed drying out and there were many instances of the British trying to buy mercenaries and failing.

<sup>115</sup> *Ibid.*, p. 86.

state asserting control over violence both domestically and internationally. Unlike Percy, Thomson argues that states took a normative approach to the use of mercenaries because of the practical problems they posed, not because the mercenaries were considered morally questionable.

Avant contends that the decline of mercenarism can be partially attributed to the realist argument that states choose strategies that win wars, and to sociological institutional arguments concerning how ideas shape state behaviour and how states act in a way that best reflects their notions of state identity; but she adds that neither position fully explains why mercenarism ended *when* it did.<sup>116</sup> Avant argues that path dependency theory better explains the decline in the use of mercenaries. According to this theory:

One state's solution to the underlying material and ideational challenges that looks successful (wins wars, fits with the prevailing ideas) can become the international model, making the solution more likely to be replicated in other countries. Once a path becomes an international model, it provides a new commonsensical starting point.<sup>117</sup>

For Avant the new focal points were the French and, perhaps more aptly, the Prussian experiences, in particular the loss of Prussian troops to the French citizen army in Auerstadt and Jena. Avant's argument proposes that the shift from mercenary armies towards citizen armies required material and ideological changes (for example, new values or military strategies), exogenous shock (defeat in battle) as well as the domestic conditions that allowed reform to take place (divergent interests and ideas on military issues). Especially in relation to Prussia, Avant is quick to dismiss Thomson's argument that the ending of supply played any significant role in transforming the Prussian army. Avant contends instead that this change was due to the Prussian belief, based on the French example, that a citizen army would perform better.<sup>118</sup> The strength of Avant's argument, overall, lies in the fact that, unlike Percy, she does not try to limit the cause for the decline of mercenarism to just one factor. Rather, she realises that material and ideological changes also played an important role, but that they could not explain the shift by themselves.

Many factors contributed to the decline of mercenarism. The above section has sketched out some explanations and prevalent theories on the

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<sup>116</sup> **Avant** 2000, p. 41.

<sup>117</sup> *Ibid.*, pp. 42–32. Percy argues that this does not explain why states reject other equally good or better solutions to begin with. For her, the answer to this question lies in norms. See **Percy** 2007, p. 108.

<sup>118</sup> **Avant** 2000, p. 67.

question of why the use of mercenaries came to an abrupt end in the mid-19th century. This was in order to understand the necessary conditions for the existence of mercenaries as well as the conditions that might make them less likely to be used. There is no one simple answer to the question of why mercenarism died out when it did. It was probably a combination of several phenomena: aspects of material changes; the ideological shift in the relationship between the state and the individual; developments in military tactics and technology; favourable domestic conditions in political life that made reform possible; and possibly many other factors as well. The most pertinent point to note is that the decline and cessation of the use of mercenaries began when nation states became more powerful in both the domestic and international spheres, and also when notions started taking hold of how state sovereignty and legitimacy lay with the people rather than with the ruler.

## 6. Summary

This brief history of mercenarism brings up many relevant aspects for modern discourse. Majority opinion has generally been very sceptical of mercenaries even in the day when they were the norm.<sup>119</sup> From a larger historical perspective, one should keep in mind that the rise of national armies broke the age-old tradition of using paid professional soldiers, both foreign and domestic. Throughout all history warfare has been dominated by non-state actors, often foreign in origin, but the success of the nation state was so rapid and overwhelming that, up until a few hundred years after its inception, virtually nobody dared question the state monopoly of violence or the role national armies played in the execution of warfare.

But, to borrow from Fukuyama, of course history did not end in the mid 19th century. Mercenaries resurfaced in the 1960s in the Congo and soon thereafter in other decolonisation conflicts, and they have probably been present in almost all conflicts since then. From the 1960s onwards they were mainly individual former professional soldiers recruited by African rulers to organise their fighting forces. Many of these men, such as Mike Hoare and Bob Denard to name but two, became famous for their participation in various conflicts in Africa.

Nowadays, most attention is focused on private military companies and the role they play in providing military force or at least in supporting regular combatants in many combatant-like roles. There is currently great

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<sup>119</sup> See above. This included writers such as Plato, Aristotle, Grotius, Vitoria, Macchiavelli and More.

uncertainty over what roles contracted combatants will play in future conflicts and how their legitimacy will be assessed. Companies such as Executive Outcomes and Sandline International offered full-scale combat services in the 1990s, but they both quickly faded away for various reasons. Since then, most private military companies seem to focus on support rather than direct combat roles. However, lines are not always that easy to draw between exactly what constitutes combat and what constitutes mere support. Many of the services offered by private military companies hover around this important grey area. The private military industry is now clearly pausing for breath while it seeks the appropriate services to offer. Which way the industry will ultimately turn – support or combat – is yet to be seen. Whilst the focus is currently on support roles, there have been reports that the United Arab Emirates has hired Eric Prince, founder of Blackwater USA, to provide elite forces for the oil-rich Gulf state.<sup>120</sup> Whether this will happen, and whether other states will follow suit, the future will tell.

## Domestic Legal Instruments

Foreign Enlistment Act 1870 (United Kingdom).

Magna Carta Libertatum 1215 (England).

The Declaration of Independence, 4 July 1776 (United States).

Declaration of the Rights of Man, 26 August 1789 (France).

Constitution, 3 September 1791 (France).

## Cases

*Wiborg v. United States*, 163 U.S. 632 (1896).

## UN Documents

Report on the question of the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, UN Doc E/CN.4/1999/11, 13 January 1999.

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<sup>120</sup> See **Mark Mazzetti & Emily B. Hager**. 2011. Secret Desert Force Set Up by Blackwater's Founder. – The New York Times, 14 May, <[www.nytimes.com/2011/05/15/world/middleeast/15prince.html](http://www.nytimes.com/2011/05/15/world/middleeast/15prince.html)> (accessed 6 December 2011).

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