

Introduction

AT THE CORE of this book is a radical idea: the law creates and maintains situations of impunity. This is an idea that is difficult to articulate and argue, let alone accept, given the fundamental assumption that ordinary legal processes function precisely to assert responsibility and to impose accountability. The purpose of this book is to erode this assumption by proposing an alternative approach to the law that views ordinary legal processes as an integral part of the problem. In doing so, this approach demonstrates that situations of impunity need not be deliberately cultivated by any specific legislator who seeks to shield a particular actor or activity from legal control. Rather, situations of impunity can be the default consequence of the repetitive exclusion from the processes that are relied upon to allocate responsibility. This approach does not, of course, discount more traditional avenues to situations of impunity which arise from the lack of political will, the effects of prosecutorial discretion, and extra-legal settlements. As these more overt routes are well known, however, these will only be discussed in passing. Here the focus is to elucidate the systemic defects of ordinary juridical processes which are both more imperceptible, and potentially more pervasive.

This book explores the question by analysing the relationship between the law and its processes and the concept of impunity through the challenges posed by the modern Private Military Company (PMC). This is because the PMC has been demonstrated to be potentially governed by a plethora of applicable laws that should have assigned responsibility to the PMC and imposed accountability for its actions. Yet, the observed persistence of PMC impunity raises questions as to how the law has failed to fulfil these expectations and in doing so, asks what role the law itself plays in creating and maintaining the structures of impunity that benefit the PMC.

The problem of PMC impunity was initially framed by what I term the orthodox legal approach. This sought to explain the lack of PMC responsibility and the failure to impose accountability for its actions by the dearth of applicable laws that govern the industry. The implicit assumption underlying this approach is that impunity cannot persist where legal processes function, so PMC impunity must necessarily subsist within the *lacunae* in existing laws or between the current reaches of different bodies of law. Viewing law and impunity as mutually exclusive, the orthodox legal approach would suggest that overcoming PMC impunity would be a simple matter of filling in the gaps within the law and bridging the gulfs between different systems of the law. Yet, the recidivist practices of the

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industry, which continue to be embroiled within allegations of impunity despite the potential regulation by current law and the introduction of new laws, challenge the validity of the orthodox approach. The persistence of PMC impunity in the face of potentially applicable law suggests that legal processes are themselves implicated within the structures that organise impunity for the industry. This would mean that more law, at least by itself, cannot provide the solution as the orthodox legal approach might suggest.

An original approach to the issue of PMC impunity is adopted here which inverts the orthodox legal approach. Instead of seeking to demonstrate that impunity arises from the gaps within or between existing laws, I argue that it is the *law itself that creates and maintains the structures of impunity* that are enjoyed by the PMC. The structure of this argument is similarly reversed, taking impunity as the point of departure for exploration, rather than the conclusion that the argument works towards. This reversal is necessary because the question is not whether PMCs enjoy impunity, but instead asks how that impunity is legally structured, organised and applied to the industry. This approach promises to reinvigorate the debate surrounding the question both by examining the nature of impunity and by broadening the field of analysis. I will also demonstrate that the response made through the orthodox legal approach can only be counterproductive by showing how legal processes inherently generate PMC impunity and how the functioning laws can be suspended or circumvented to prevent accountability. The response fuelled by the orthodox legal approach can only entrench PMC impunity because it will continue to develop and refine the very laws that are the source of the problem.

The argument is made by developing the concept of legalised impunity which comprises of two complementary dimensions: passive impunity which is generated by the structural and organisational characteristics inherent within the ordinary legal process; and active impunity whereby this ordinary legal process is circumvented or suspended. As such, this book seeks to develop an analytical framework through which to study the ways in which impunity is structured and to understand how its processes operate. This illuminates the limitations of the law for overcoming impunity in order to open the debate concerning the appropriate legal reaction to new actors and emerging practices. While it is the law's creation of impunity for the PMC that will be discussed at length in this book, both its framework and its approach will be capable of broader application in situations where the law appears to struggle in according responsibility or ascribing accountability in novel situations.

But what is the PMC and why focus on it in this context? The PMC is the latest manifestation of organised mercenary activity because it provides personnel for direct participation in hostilities through the for-profit business

model. Thus, the emergence of the PMC and the subsequent prosperity of the industry has challenged our contemporary understanding of how armed force may be organised, the purposes towards which coercive violence may be deployed, and has significantly undermined the mechanisms of responsibility that govern the conduct of hostilities. These can be expressed by emphasising the three inherent characteristics that distinguish the PMC which are signified by each component of the term. First, the *private* military company underscores the mercenary origins of the industry and concern whether violence can lawfully or legitimately be used by private actors or be deployed in pursuit of private purposes. Second, the *private military* company emphasises its proximity to armed conflict and its ability to inflict severe harm in a direct manner. Third, the *private military company* stresses its juridical personhood which is legally separate and independent from the association of natural persons of which it is composed.

These three distinguishing features of the PMC are shown to frustrate the dominant bodies of law that regulate the fields of activity within which they operate: Human Rights Law (HRL), International Humanitarian Law (IHL) and International Criminal Law (ICL). First, HRL was formulated to protect the individual in their hierarchical relationship against State power. The private dimension of the PMC suggests, at least formally, a horizontal relationship between the PMC and its victims because State action is absent, thereby excluding the applicability of HRL to its activities. Despite the control over coercive force by the PMC and the concomitant risks of violating HRL principles, the private nature of the PMC undermines its capacity to bear HRL obligations, let alone its ability to be accountable for any actual violation. Second, the military nature of PMC activities suggests that IHL, which governs the conduct of hostilities, would act as operative law. But because IHL was conceived and developed during an era when the State possessed the monopoly over the legitimate use of force, it only created obligations for, and regulated the conduct of, States within armed conflict. Furthermore, the subsequent expansion of IHL to encompass non-international armed conflict and to embrace certain categories of non-State actor neither explicitly addressed the PMC nor implicitly regulated its conduct. Thus, the orientation of both HRL and IHL towards State action thwarts their unambiguous regulation of the PMC. Third, ICL was developed to impose individual criminal responsibility for those most responsible for egregious international crimes. The jurisdiction of ICL is exclusively over natural persons because it was developed by the International Military Tribunal at Nuremberg as a counter-reaction to previous forms of collective criminal responsibility. The result is that the PMC cannot be liable under current manifestations of ICL because of its juridical corporate personhood, and even the susceptibility of PMC contractors is diminished because the focus of ICL is on those who are the most responsible for the worst crimes.

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The response forwarded by the orthodox legal approach has been to bridge the gap between HRL and IHL on the one hand and the PMC on the other. One approach in this vein attempted to connect PMC activity with that of the State, while another sought to clarify specific industry obligations under HRL and IHL in order to forge a direct link with the PMC. In relation to ICL, the response was to highlight the ability of individual PMC contractors to bear ICL responsibilities even when the PMC remained immune to its provisions. This enabled the orthodox legal approach to posit that the PMC did not operate within a legal black hole, but instead to show that PMC activity is regulated by a wide range of potentially applicable law. The shortcomings and inadequacies of this response were strikingly demonstrated in the recidivist practices of the PMC industry, thereby anchoring the need to take a new tack on the issue. The book is structured as follows:

Chapter one develops the concept of impunity and begins by exploring its indeterminate and contested nature. After identifying the core themes that underlie impunity, the chapter dissects the passive and active dimensions of legal impunity that provide the theoretical framework for analysing the function of the law within PMC impunity. Passive impunity, on the one hand, concerns structural characteristics inherent within the law and is further divided into six sections. The first concerns the compartmentalisation of law that is evident in the split of legal regulation among separate juridical fields for any activity. The second considers the overextension of law as it seeks to regulate armed conflict. The third analyses the tendency of the law towards hegemony that magnifies any failure of the law to regulate the activities of the PMC activities. The fourth discusses the legal nature of irresponsibility. To do so, it segregates the component concepts of responsibility in the law to demonstrate that impunity inheres within the legal preoccupation with role responsibility and the downplaying of outcome responsibility. The fifth is concerned with the function played by the law in the denial of wrongdoing: because the law is instrumental in recognising and categorising harm, it becomes vulnerable to manipulation that seeks to deny or downplay the very existence of a wrong. The sixth explores the role played by the law with regard to the polar opposite of denial, assertion, and how impunity might arise as a result of the claims the PMC is able to make through the consequences of legal recognition.

The active dimension of impunity, on the other hand, concerns legal exceptionalism which occurs by suspending or circumventing the ordinary legal process, and may be seen as a more orthodox view of impunity. These concern the retrospective mechanisms of amnesty and pardon, and the atemporal device of immunity. The chapter considers whether IHL can broadly be considered as an active impunity mechanism before examining states of exception whereby the legal paradigm is partially or completely suspended. The contribution of this chapter is that it unifies disparate

expressions of the inadequacies and shortcomings of law in order to form the passive dimension of impunity, demonstrating in the process the creation of impunity through ordinary juridical processes. The flaws in legal architecture are structured alongside the orthodox understanding of impunity as the absence of law in order to present an integrated and nuanced theoretical framework of legalised impunity.

Chapter two studies the modern PMC by painting a contemporary portrait of the industry and its activities by examining the functions they fulfilled in the conflicts in Iraq and Afghanistan. The factual basis of the claim that the PMC enjoys impunity for its actions will be made by demonstrating that PMCs have allegedly perpetrated a range of atrocities in these conflicts, repeatedly and without accountability. This is further underscored by evidence of persistent recidivism and PMC involvement within different categories of violation. Accountability considerations will be shown to focus upon issues of fiscal waste and fraud, despite widespread evidence that the industry has been involved with serious human rights abuses. The judicial and legislative responses to these allegations of impunity will also be shown to be inadequate. This raises the debate between the two UN Special Rapporteurs on the Use of Mercenaries who respectively considered the PMC as a criminal enterprise and as a potentially legitimate business. The PMC industry is then considered in greater detail, from the emergence of Watchguard International, the first modern PMC, and the pressures that sustain the industry and which foster its growth. The remainder of the chapter is devoted to categorising the types of entity that are potentially encapsulated within the term 'Private Military Company'. After illustrating the flexibility of PMCs and the diversity of their services, the main typologies that have been developed to understand the industry are analysed. These typologies sustain two broad effects: they distract attention away from the fact that the PMC industry provides organised private violence that is clearly criminal within other contexts; and that the organisation of this violence potentially raises the severity level of its activities to the plane of international crime. In order to redress these effects, a revised typology is proposed that seeks to emphasise the criminality of the PMC. This typology will adapt the IHL principle of distinction and focus both upon the level of violence offered or controlled by a PMC, and the directness with which their services engage, or their contractors participate, in armed conflict. The main contribution of this chapter is this revised typology which underscores the aberrantly violent nature of the PMC within the predominantly civilian context of the corporation.

Chapter three examines the treatment of mercenary activity under international law, arguing that the law has both failed to marginalise the individual mercenary or criminalise the broader practices of mercenarism. Thus, this chapter demonstrates the passive dimension of impunity in

operation. First, although the capability of the law in criminalising organised private violence is demonstrated in its approach to the threat posed by maritime piracy, its treatment of mercenary activity failed to adopt this model. Mercenaries are then shown to have been historically prevalent, but to have gradually declined with the rise and eventual domination of the modern State. Before examining mercenary activity in law, the difficulty in differentiating between mercenaries and soldiers is considered. The chapter then showcases the difficulty of defining a mercenary in law, arguing that a restrictive definition fosters impunity by isolating the stigma into a category that has no practical application. Laws seeking to marginalise the individual mercenary are shown to run against both the history and purpose of IHL, which in turn raises questions for its purported customary international humanitarian law status. The alternative approach of criminalising the practice of mercenarism is shown to be limited to the specific historical context of decolonisation and the struggle for political self-determination, thereby limiting its contemporary relevance. This context also restricted the scope of international support such that mercenarism failed to crystallise into an international crime. Ultimately, the failure of law to decisively determine the status of mercenary activity enabled the emergence of the PMC, and these legal ambiguities continue to facilitate the claims of the industry in distancing themselves from allegations that they engage in unlawful activities. The contribution of this chapter is in overturning the questionable consensus that mercenaries and mercenary activity are unlawful, at least under international law. This close examination reveals that mercenaries and mercenarism were subjected to separate legal regimes which pursued distinct purposes and were mired in practical problems of application.

Chapters four and five examine in detail the structure of legalised impunity as it relates to the PMC. Chapter four first lays the groundwork for analysing passive impunity by setting out the developments that led to the recognition of the corporation as a juridical person before moving to discuss a range of important consequences this led to under contract law. Chapter four then departs from the predominant focus upon *Jus in Bello* (JIB) conduct considerations to account for PMC impunity for 'violations' of *Jus ad Bellum* (JAB) decision to use force. The contemporary focus upon the conduct of the PMC industry by commentators has skewed the frame of debate, largely obscuring the question of whether the PMC should be operating in the first instance. The contemporary neglect of the JAB dimension will foster PMC impunity because it will neither be responsible for violations of the prohibition of the threat or use of force, nor be accountable for what would amount to acts of corporate aggression. Passive impunity is also demonstrated through a number of barriers which obstruct the application of the doctrine of command responsibility to PMC contractors. Chapter five then examines the active impunity mechanisms

that suspend ordinary laws from applying to the PMC or its contractors. It begins by framing the nature of the corporation and illustrating that the criminal law does not apply to the corporate juridical person, thereby immunising the PMC from indictment. To examine the operation of active impunity in greater detail, recourse is made to the jurisprudence of US federal courts. This is both because there is extant legislation that has been deployed by victims of PMC activities, and because of attempts to amend legislation to close the perceived *lacunae* in the laws that regulate their activity. In criminal law, the exemption of the PMC itself is accompanied by significant discrepancies between soldiers and PMC contractors in their indictment. This difference suggests that the latter category benefit, at least in a relative sense, from active impunity mechanisms. Active impunity is also shown to operate within the civil remedies that are purportedly available under the Alien Tort Claims Act and the Torture Victim's Protection Act. These are the centrepieces of US legislation that have been utilised by victims of human rights violations at the courts and initially appear to overturn allegations of impunity by providing a clear avenue for suit. A closer examination, however, reveals a range of impunity paradoxes operating in tandem to prevent the success of PMC victims using these laws. The contribution of this chapter is that it reveals the operation of the legalised impunity mechanisms that effectively protect the PMC and its contractors from responsibility and liability. By clearly demonstrating that the ordinary legal processes contribute to and create powerful situations of impunity, I argue that the efficacy and appropriateness of the orthodox legal approach is undermined.

Chapter six discusses the future of PMC impunity through analysing, and extrapolating from, the nascent mechanisms that are emerging on the international plane to regulate PMCs. This examination reveals that these regulatory mechanisms are in fact informed by starkly divergent approaches to the issue of responsibility. These mechanisms are shown to be divided upon their temporal orientation towards responsibility: one primarily establishes prospective standards while the other focuses upon ensuring retrospective accountability. This bifurcation of responsibilities within the very mechanisms that are being developed to regulate the industry is likely to structure PMC impunity into the future because blind spots result from taking such a narrow focus. The chapter then charts the preference for self-regulation in the United Kingdom, as a precursor to similar developments at the 'international' level which is then outlined, before turning its attention to the international legal approaches to the issue. Chapter six then proposes to incentivise robust self-regulation, given the current dominance of this approach for regulating PMC activities, by developing forms of collective responsibility for self-regulatory bodies. The chapter concludes by providing four dimensions along which to measure the adequacy and efficacy of developing regulatory regimes that

can be readily applied beyond the narrow PMC issue. The contribution of this chapter is to show the existence of impunity for PMC activity beyond the areas that are currently under scrutiny and to suggest that the regulatory regimes that seek to overcome impunity have instead incorporated its structure within them.

This book is liable to face an uphill struggle by trying to articulate an issue which has received much recognition, to give some form to the imperceptible and to do all of this against the grain of accumulated and entrenched orthodoxy. Three points need to be made clear at the outset to avoid misunderstanding and overreach. First, this book is not intended as an outright assault upon the law or the way ordinary legal processes function. Rather, the aim here is to illuminate a systemic flaw within juridical processes that, identified, may be remedied through restructuring that may be capable of strengthening and adapting the law in face of emerging challenges. Second, while the book's claim is broadly phrased to reflect the possibility that similar effects may occur in other domains, the intent here is not to condemn all law, and certainly not to do so based upon such a limited case study. Indeed, the effects identified in this book, where they occur, are likely to be found at the margins of the law and in particular where it is extended in attempts to regulate new actors or activities. The third is to answer Susanna Lindroos-Hovinheimo's observation that splitting a dichotomy is not necessarily helpful because such an approach fails to differentiate between the degrees of the effect and overlooks aspects that might be salvaged or remediated.¹ By considering in depth the particular challenges wrought by the modern Private Military Company (PMC), whose characteristics have repetitively excluded its activity from legal regulation, this book tries to identify the factors involved in generating and maintaining impunity.

Chapter 4.III below

¹ S Lindroos-Hovinheimo, 'Is Law Necessarily Unjust' (2009) 6 *No Foundations—Journal of Extreme Legal Positivism* 69, 85–86.

III. PASSIVE IMPUNITY FOR THE PMC UNDER CONTRACT LAW

A critical aspect of the passive impunity mechanisms enjoyed by the PMC that flows from its adoption of the corporate form, and through the consequent possibilities for interpretive denial, is the reliance placed upon softer forms of regulation when compared with the armed forces of the State. While the potential for impunity inherent in this approach is explored in greater detail in chapter six, it is readily evident in the attempts of developing self-regulation that the foreground contract law mechanism is the primary means through which PMC behaviour is regulated. This reliance upon contractual mechanism to incorporate and enforce human rights standards constitutes the logical end-point in treating PMCs as no more and no less than an ordinary corporation, providing a powerful passive impunity mechanism shielding the PMC.

This section challenges the possibility and prudence of relying upon contractual provisions to ensure that PMCs protect and promote human rights in the course of their operations. While few commentators to date have considered the regulatory potential of contract law in this regard,³⁵

³⁵ Scholars that have, however, generally discuss specific contractual issues arising from military contracting practice, but have not considered the role that contract law might play in the protection of human rights more broadly: see eg S Schooner, 'Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government' (2005) 16 *Stanford Law & Policy Review* 549. The notable exception is L Dickinson, 'Contract as a Tool for Regulating Private Military Companies' in S Chesterman and C Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press, 2007). Dickinson, however, advocates for an expanded role for contract by highlighting its potential.

a critical analysis is necessary here because the framers of developing initiatives aimed at regulating the PMC have positioned contractual mechanisms as the centrepiece of their efforts. Notably, the Montreux Document suggests as good practice for States '[t]o include contractual clauses and performance requirements that ensure respect for relevant national law, international humanitarian law and human rights law by the contracted PMSC'.³⁶ In a similar vein, the International Code of Conduct (ICoC) requires that 'Signatory Companies will make compliance with this Code an integral part of contractual agreements with Personnel and subcontractors'.³⁷ Anne-Marie Buzatu expresses the faith that the ICoC has invested into contractual mechanisms in no uncertain terms: 'The ICoC uses contractual mechanisms to impose human-rights compliant standards *directly on the companies themselves, regardless of where they are operating*'.³⁸ While recourse to contract law holds the potential to circumvent significant jurisdictional hurdles affecting other regulatory efforts,³⁹ the increased reliance placed upon contract law to regulate PMC activities within the substantive scope of international humanitarian, human rights and criminal law is likely to magnify both the potential and problems inherent within contract law itself.

Laura Dickinson seeks to demonstrate the potential of contract law in this area when she argues that contracts are 'the vehicle of military privatisation', and so could import 'the norms and values of public international law into the "private" sector'.⁴⁰ In particular, she suggests that '[c]ontracts could be drafted to explicitly extend relevant norms of public international law to private contractors, provide for enhanced oversight

³⁶ Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict 2008, pt II, para A.IV.14 and 15.

³⁷ Swiss Federal Department of Foreign Affairs, 'International Code of Conduct for Private Security Service Providers' paras 18–23. Henceforth the ICoC.

³⁸ A-M Buzatu and B Buckland, 'Private Military & Security Companies: Future Challenges in Security Governance' (DCAF, 2010) DCAF Horizon 2015 Working Paper No 3 23. Emphasis original. Buzatu, who has been influential in the development of the ICoC through her work at the Geneva Centre for the Democratic Control of Armed Forces (which is itself under mandate from the Swiss government convening the ICoC initiative to facilitate its development), had emphasised her view that contract law mechanisms are integral to the protection of human rights in the PMSC context because of the direct legal enforceability of contractual provisions. Personal communication, 19 October 2010, Washington, DC.

³⁹ See esp C Bakker and M Sossai (eds), *Multilevel Regulation of Military and Security Contractors: The Interplay Between International, European and Domestic Norms* (Hart Publishing, 2012); L Cameron and V Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press, 2013).

⁴⁰ Note, however, that it is only the weaker possibility of norms and values that can be incorporated, rather than the stronger possibility of binding obligations and legal duties: Dickinson, 'Contract as a Tool for Regulating Private Military Companies' (n 35) 218. See generally L Dickinson, 'Public Law Values in a Privatized World' (2006) 31 *Yale Journal of International Law* 383; and L Dickinson, *Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs* (Yale University Press, 2011) 69–101.

and enforcement, and include more specific terms such as carefully drafted training and accreditation requirements':⁴¹ this advice appears to have been heeded by those drafting both the Montreux Document and the ICoC. Among the benefits of implementing relevant human rights and IHL rules as contractual provisions is the possibility of direct enforcement through contract law, thereby avoiding the hurdle of demonstrating that the PMC functions as an extension of government in order to satisfy the State action requirement.⁴² The thrust of Dickinson's argument is that reform of the PMC contracting process is required, and she accepts that the reform of the contractual terms themselves can only serve as one avenue of PMC industry regulation reform among many.⁴³ Indeed, Dickinson's treatment of contract law as a regulatory tool for PMCs is devoted to overcoming the inertia associated with contractual reform, and with providing supporting evidence that contemporary PMC contracting practices are woefully inadequate.

This section takes up this debate by emphasising the shortcomings of contract law in adequately fulfilling the regulatory roles recently urged upon it by soft law instruments seeking to regulate the PMC industry. The aim of highlighting the inadequacies of contract law in this context is not to undercut Dickinson's proposals for contractual reform, but rather to re-evaluate the ability for contract law to carry the regulatory burden entrusted to it, and in particular to play the role that soft law has cast for it. In this regard, the general lack of debate about the merits and failures of contract law for regulating PMCs does not bode well for the regulatory efficacy of soft law mechanisms which rely upon its functioning.

The impetus of this section rests upon the characteristics of contract law that result in it microscoping towards the minutiae of bipartite agreements rather than telescoping to the cosmos of concerns beyond mere contractual provisions (as human rights law does). This inward-looking quality of contract law, discussed in the following section, undermines its usefulness as a mechanism to take into consideration effects that are beyond contractual terms, including issues of human rights and IHL. Even to the extent that contractual provisions are made to encompass humanitarian and human rights concerns, the egocentric nature of contract law transmutes those concerns into sterile terms whose sole force arises from the fact that they were subject to agreement by the contracting parties. Put in other words, when viewed through the lens of contract law, the protection and promotion of human rights need not have meaning, purpose or effect beyond that intended and agreed upon by the contracting parties.

⁴¹ Dickinson (n 35) 218.

⁴² *ibid* 220–21. Satisfaction of the State actor requirement, however, may accord immunity from certain types of legal suits leading to a Catch-22 situation. This is discussed further in ch 5.

⁴³ *ibid* 237.

The immediate and pervasive effect of contract law's myopia is twofold. First, the range of responsibilities and obligations borne by the parties to the contract are limited because all considerations that are not expressly incorporated as contractual terms are excluded. Second, contract law confines the range of entities to which obligations are owed to the contractual parties only. Thus, the overall effect is that contract law curtails both the content and scope of responsibility.

Invoking contract law as a regulatory mechanism for the PMC industry introduces incidental issues that militate against its success. These can be grouped into three broad categories: the privity of contracts limits the likelihood of enforcement; the horizontality defining contractual relations circumvents existing responsibility mechanisms reliant upon hierarchies and effective control; and the remedies available under contract law are inappropriate responses to breaches of international humanitarian, human rights and criminal law.

A. Freedom of Contract and its Consequences

In sketching out the contours of contract law for this section, it is important to emphasise that the freedom of contract is the fundamental underlying concept: 'The notion is that parties ... should have an *unhindered right to enter legally binding arrangements*, without regard as to whether the terms of the agreement seem to others to be wise or fair'.⁴⁴ Thus,

[t]he basic ideal of contract law, freedom of contract, indicates that contract law is an area in which *parties can set their own rules, creating rights and obligations that apply only to the contracting parties, and only because of the contract that they have entered*.⁴⁵

This concept informs the justification that agreements should be enforced, and while it has been expressed through competing analytical frameworks,⁴⁶ these nuances detract from the central point that contract law concerns the protection of consensual agreements between the contracting parties.⁴⁷

⁴⁴ B Bix, *Contract Law: Rules, Theory, and Context* (Cambridge University Press, 2012) 11. Emphasis added. The UNIDROIT Principles, art 1.1 (Freedom of Contract) provides that 'The parties are free to enter into a contract and to determine its content': M Bonell, *Unidroit Principles in Practice: Caselaw and Bibliography on the Unidroit Principles of International Commercial Contracts* (Transnational Publishers, 2006) 69–70. The commentary states that 'The principle of freedom of contract is of paramount importance in the context of international trade'.

⁴⁵ Bix, *Contract Law* (n 44) 110. Emphasis added.

⁴⁶ For an overview, see *ibid* 132–36.

⁴⁷ There remain distant limits, generally concerning the prohibition of impermissible choices, beyond which there is wide consensus that agreements cannot and should not be enforced: Craswell, R, 'Promises and Prices' (2011) 45 *Suffolk University Law Review* 735, 746. For a concise discussion of freedom of contract, see Druzin, B, 'Restraining the Hand of Law' (2014) 117 *West Virginia Law Review* 100, 130.

The historical evolution of contract law itself further underscores its exclusive focus of enforcing consensual agreements. Jay Feinman sketches the traditional image of contract law: during the eighteenth century 'contractual liability was not sharply differentiated from liability arising out of nonconsensual situations, such as injury (tort) or status relations. Contractual obligation arose not solely or even principally from agreement, but from implied community standards of behaviour'.⁴⁸ Indeed, David Ibbetson provides supporting historical evidence that the different claims available in medieval times were a mixture of the modern categories of contract, tort and property.⁴⁹ At this developmental stage, the most that could be said was that an assortment of rules on different types of contracts existed, still far from what could be identified as a law of contract.⁵⁰

This traditional image eventually gave way to the '[c]lassical contract law [which] conceived of contract as a field of private ordering in which parties created their own law by agreement' that is more familiar today.⁵¹ It is interesting to note the emergence of contract law as a distinct discipline, as Feinman puts it:

Classical theorists saw real, objective differences between contract law, in which *liability was imposed only through the consent of the parties*, and other private law fields, in which liability was imposed for causing injury to another (tort) or for violating another's entitlement (property).⁵²

Stephen Hedley phrases this succinctly when he writes that 'the Victorians *invented* the idea that the law will enforce contracts as such'.⁵³ The upshot of this brief historical overview is to demonstrate that contract law was carved out as a distinct legal area relatively recently in order to pursue and protect business and consumer transactions, and thus was designed largely for commercial work.⁵⁴ The developmental trajectory of contract law underscores the idea that it is exclusively concerned with only the narrow set of issues that revolve around how consensual agreements are concluded and

⁴⁸ He anchors this position by writing that: 'The world view reflected in eighteenth century beliefs about contract law emphasized the relations between the individual and the community ... In contrast to later times, individuals themselves had limited ability to define standards through contract': J Feinman, 'Critical Approaches to Contract Law' (1982) 30 *UCLA Law Review* 829, 831.

⁴⁹ D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) 1–10. For the gradual emergence of contract law, see *ibid* 21–23.

⁵⁰ S Hedley, 'Keeping Contract in Its Place—Balfour v Balfour and the Enforceability of Informal Agreements' (1985) 5 *Oxford Journal of Legal Studies* 391, 402.

⁵¹ Feinman, 'Critical Approaches to Contract Law' (n 48) 831–32.

⁵² *ibid* 832. Emphasis added. Michael Moore suggests that 'one might think contract law to be defined by its function of getting people to keep their promissory obligations, obligations that are distinct from the non-promissory obligations dealt with by criminal law and torts': M Moore, *Placing Blame* (Oxford University Press, 2010) 20.

⁵³ Hedley, 'Keeping Contract in Its Place' (n 50) 402. Emphasis original. For a broader historical perspective, see Ibbetson, *A Historical Introduction to the Law of Obligations* (n 49) ch 11 'Foundations of the Modern Law of Contract'.

⁵⁴ Hedley (n 50) 402.

enforced, and with remedying breaches to contractual terms. This characterises contract law as egocentric and inward-looking, unconcerned with issues external to the contractual terms or third parties to the contract.

In addition to curtailing the content and scope of responsibilities, a cynical view of the freedom of contract might be that it allows the parties to inscribe only the responsibilities that are sufficiently beneficial (or at least those which are benign) as to be agreeable to both parties. Because contractual terms are up for negotiation between both parties, attempts such as that made by the ICoC to mandate that 'Signatory Companies will adhere to this Code, *even when the Code is not included in a contractual agreement with a Client*',⁵⁵ will be futile under contract law. Bluntly put, a client of a PMC will not be able to rely on the provisions of the ICoC directly unless those provisions have been explicitly incorporated into the contractual agreement.

Another related difficulty concerning the clarity of contractual obligations arises in the particular context of PMC contracts because flexibility can be useful or 'necessary to cope with the exigencies and security concerns inherent in the sorts of environments where PMCs are likely to be used'.⁵⁶ Laura Dickinson reports particular problems with current US practice whereby PMC contracts 'possess so few guidelines, requirements, or benchmarks that they effectively contain no meaningful evaluative criteria whatsoever'.⁵⁷ Diluting contractual specificity further is the practice of the US in procuring PMC services through 'blanket purchase agreement', effectively an open agreement under which particular services can be requested subsequently as the need arises.⁵⁸ The foundational notion of freedom of contract empowers the conclusion of such vague and open-ended agreements because neither formal nor substantive requirements can be mandated, provided of course that the contract is lawfully concluded. This remains the case even if these turn out to be difficult to monitor and assess and thus almost impossible to enforce.

This gives rise to a broad conceptual objection to protecting human rights through contract law. Where the norms and principles of human rights become incorporated into bilateral agreements, contract law transmutes these principles into contractual terms. This gives rise to three intolerable consequences. First, the meaning and purpose of human rights norms and principles are lost in translation as they are reduced to sterile contractual terms. The underlying concepts that compel the protection of human rights are collapsed into the confines of the contractual agreement,

⁵⁵ Swiss Federal Department of Foreign Affairs, 'International Code of Conduct for Private Security Service Providers' (n 37) 19. Emphasis added.

⁵⁶ Dickinson (n 35) 220.

⁵⁷ *ibid.*

⁵⁸ *ibid* 221 and 224.

thereby losing both their context as well as their content. The second is the tension between the sources of the rights: whereas human rights are the expression of ‘the inherent dignity and ... the equal and inalienable rights of all members of the human family’,⁵⁹ contractual rights arise from the conclusion of voluntary bipartite relations. This incompatibility can be seen through the prism of contract law, which is only capable of upholding human rights protection on the basis of bilateral consensus. In the conversion to contractual provisions, the inherent dignity of the individual that is the source of universal and inalienable nature of human rights is replaced by a vision of rights that has the agreement of two parties as its origin. Third is the issue of consequences: a violation of human rights is ontologically different from a breach of contract. This perspective reveals the poverty of employing contract law to protect human rights because it is incapable of articulating the wrong at stake. In short, human rights cease to be *human* rights, but are sterilised into contractual rights.

B. Doctrine of Privity and its Limitations

A converging approach to this conclusion can be charted through the doctrine of privity. Despite the possible effects of a contract or its performance upon third parties, under English contract law (and transplanted to many common law jurisdictions), the doctrine of privity stipulates that the terms of a contract can neither impose obligations nor confer benefits to a third party.⁶⁰ While the imposition of duties through contractual agreement upon a third party absent his consent would amount to ‘an unwarranted infringement’ of his liberty and justifiably remains unaltered,⁶¹ this rule controversially prevented third parties from asserting the benefits they would receive by virtue of contractual performance. This rule was conclusively established only as recently as 1861,⁶² culminating in the famous exposition by Viscount Haldane LC that

in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* [a right of action exercisable by a third party] arising by way of contract.⁶³

⁵⁹ Preamble of the Universal Declaration of Human Rights 1948 (UNGAR 217 A (III)) para 1.

⁶⁰ Law Commission, *Privity of Contracts: Contracts for the Benefit of Third Parties* (Law Com No 242, 1996) para 2.1. Perhaps shockingly, the Law Commission notes that the privity doctrine had the effect of immunising parties to the contract from third-party tort claims arising from negligence in performing the contract prior to *Donoghue v Stevenson* [1932] AC 562 (HL).

⁶¹ *ibid* (n 60) 2.1.

⁶² *Tweddle v Atkinson* (1861) 1 B&S 393 (QBD).

⁶³ *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 (HL) 853.

A line of historical cases prior to 1861 that *allowed* a third party to enforce a contractual provision made to benefit, and intended to be enforced, by him question the apparently firm foundations of this doctrine under the common law.⁶⁴ Furthermore, the appropriateness of this doctrine has been undermined by its dilution through statute in recent times.⁶⁵ Yet, it is worth noting two persistent points despite these challenges: first, that the contractual parties retain the power to determine the content and scope of third parties to enforce contractual terms;⁶⁶ and second, that the standing granted to the class of third parties to enforce a contractual provision is very narrow, being restricted to *intended beneficiaries*.⁶⁷

Three disconcerting conclusions flow from these observations. First, it is clear that the possibility of third-party legal action on a contractual term remains a privilege to be granted by the contracting parties, rather than a right that can be relied upon more generally. While the third party need not be identified,⁶⁸ this immediately limits the class of potential claimants under a contract. Furthermore, the possibility for a third party to sue on a contractual term rests upon the *intention* of the parties to the contract to confer a benefit upon that third party. Thus, the second conclusion is that intention is necessary (or at the very least there should not be evidence contrary to such intention). This implies that the onus is upon the

⁶⁴ These are provided per Denning LJ in *Drive Yourself Hire Co (London) Ltd v Strutt* (1954) 1 QB 250 (CA) 272. The Law Commission suggests that there was no firm rule either way by the mid-nineteenth century: Law Commission (n 60) 2.4–2.5.

⁶⁵ In the UK, see Contracts (Rights of Third Parties) Act 1999 (c31). See for a commentary, M Dean, 'Removing a Blot on the Landscape—The Reform of the Doctrine of Privity' [2000] *Journal of Business Law* 143. For additional background, see Law Commission, *Privity of Contracts* (n 60).

⁶⁶ Note especially the convergence with UNIDROIT Principles, art 5.2.1(2) of which provides that 'The existence and content of the beneficiary's right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement': Bonell, *Unidroit Principles in Practice* (n 44) 271.

⁶⁷ To adopt the differentiation drawn by the American Law Institute, as expressed in s 302 of the Restatement (Second) of the Law of Contracts 1981, which differentiates intended beneficiaries from incidental beneficiaries. This opens the possibility for the former category only to have a right of action under a contractual term. Similarly for the UK, s 1(1) of the Contracts (Rights of Third Parties) Act 1999 enables a third party to a contract to enforce a term of the contract in his own right, provided either that the term expressly provides for this, or that the term purports to confer a benefit on him (unless it appears that the parties to the contract did not intend the term to be enforceable by the third party).

⁶⁸ While s 308 of Restatement (Second) of the Law of Contracts does not require that an intended beneficiary is identified, the commentary notes that the lack of identification may influence the determination of whether a beneficiary is intended or incidental; and s 1(3) of the Contracts (Rights of Third Parties) Act 1999 states: 'The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into'.

third party to demonstrate such intention, thus reinforcing the notion that the class of potential third-party beneficiaries is limited for any particular contract.⁶⁹ It is the third conclusion, however, that has the broadest ramifications for relying upon contract law to protect and promote human rights. Because *benefit* is the critical nexus for third-party legal action on a contractual term, contract law is effectively blind to the *burdens* imposed upon third parties by bilateral contractual agreements.⁷⁰ This is the critical point: contract law is indifferent to claims within the substantive orbit of human rights because such claims do not involve the conferral of benefits, but conversely concern remedies for injury and injustice. The overall result is that third parties suffering from human rights violations arising from contractual performance will not have an automatic right of action under contract law. This indifference of contract law is reinforced by the limitations inherent within the mechanisms of enforcement and the nature of available remedies, discussed in detail below.

C. Direct Enforcement by Contractual Parties

The doctrine of privity holds two main implications for the potential to regulate PMCs through contract law: exclusive enforcers and limited incentives. Foremost among these problems is the fact that the power of enforcement is invested almost entirely within the contracting parties, in turn raising two further problems. First, because a contract creates an internal law between the parties to it, the parties possess complete discretion as to which provisions, if any, they want to enforce. While it is conceded that some criminal justice systems allow for unfettered prosecutorial discretion, this is justified because it allows for the allocation of precious prosecutorial resources, lays the foundation for plea-bargaining and gives scope for leniency. Juxtaposed against prosecutorial discretion, however, the decision of a party to enforce a contractual term need not be based upon anything more than pure self-interest.

This leads directly to the second problem of incentives for a party possessing such discretion to enforce a contract. Indeed, enforcement might tarnish that party's reputation by association by revealing and publicising allegations of PMC misconduct that might otherwise remain obscure. A more concrete, and chilling, example is provided by an episode that

⁶⁹ This is not to include more specific limitations, such as that provided under s 313 of Restatement (Second) of the Law of Contracts, which restricts the possibility of third-party suits in the case of contracts with the government under US law.

⁷⁰ While it is impermissible under the doctrine of privity of contract for *obligations* to be imposed through contractual agreements upon third parties, this need not limit the distribution of disbenefits and other externalities.

occurred during the US State Department's contract with Blackwater, just prior to the Nisour Square massacre discussed in chapter two.⁷¹ James Risen reports that a State Department investigation indicated that Blackwater had violated the contract in numerous ways and 'concluded that Blackwater was getting away with such conduct because embassy personnel had gotten too close to the contractor'.⁷² During the course of this investigation, the head of Blackwater operations in Iraq directly threatened one of the investigators by saying that he 'could shoot, and kill [him] here in Iraq and no one would do anything about it'.⁷³ The lack of incentive for embassy officials, to whom Blackwater was performing the contract, to enforce the contractual terms is readily apparent when they ordered the investigators to leave Iraq, because they were 'unsustainably disruptive to day-to-day operations and created an unnecessarily hostile environment for a number of contract personnel', ending the investigation.⁷⁴

Perhaps more unsettling is the fact that the US State Department effectively *rewarded* Blackwater with more than a billion dollars' worth of contracts after this incident,⁷⁵ indicating both the severe lack of incentive to enforce contractual terms and the absence of non-legal forms of enforcement.⁷⁶ The reasons forwarded to justify the continuing relationship between the US State Department and Blackwater suggest that it is rooted in self-interest: Blackwater has largely been successful in protecting American diplomats.⁷⁷ Because the contract serves the parties, the discretion and incentives in enforcing its terms depend largely upon whether the interests of the parties are indeed served, irrespective of the impact of

⁷¹ J Risen, 'Before Shooting in Iraq, a Warning on Blackwater' *The New York Times* (29 June 2014) www.nytimes.com/2014/06/30/us/before-shooting-in-iraq-warning-on-blackwater.html. See also New York Times, 'State Department Documents on Blackwater Episode' *The New York Times* (29 June 2014) www.nytimes.com/interactive/2014/06/30/us/30blackwater-documents.html.

⁷² Risen, 'Before Shooting in Iraq, a Warning on Blackwater' (n 71).

⁷³ New York Times, 'State Department Documents on Blackwater Episode' (n 71) 332–011. Corroborated, *ibid*, 332-016–332-017. See also, 332-002–332-005.

⁷⁴ Risen (n 71).

⁷⁵ D McCabe, 'State Department Awarded Blackwater More Than \$1 Billion After Threat on Investigator's Life' *Huffington Post* (10 July 2014) www.huffingtonpost.com/2014/07/10/blackwater-state-department-contracts_n_5572355.html.

⁷⁶ Laura Dickinson notes the paucity of instances where the US government exercises its power to terminate a contract. Instead, an earlier example of PMSCs being effectively rewarded financially in the wake of being implicated in human rights abuses is provided by the expansion of CACI's contract after its involvement in the Abu Ghraib prisoner abuse scandal: Dickinson (n 35) 224 and 235.

⁷⁷ McCabe, 'State Department Awarded Blackwater More Than \$1 Billion After Threat on Investigator's Life' (n 75).

that contract on others. This effect is summarised by Anne-Marie Buzatu: 'The private contractual nature of these services means that PMSC contracted security obligations run to their clients, but not to the public at large'.⁷⁸

This episode points to the problems inherent in contract law's dependence upon contractual parties to enforce the agreement. Where the interests of both parties are sufficiently aligned, it is likely that infractions that are inconsequential to the core interests of the parties will remain unremedied. This effect may be refined with PMCs because their provision of security and other services related to coercion and organised force place their clients in a position of practical dependence in often volatile environments. A client that is reliant upon a PMC for protection may be unable to effectively monitor or control the behaviour of that PMC in the field, and is unlikely to risk displeasing that PMC if avoidable. In addition to exacerbating the lack of the third-party oversight and accountability, the alignment of interests between the PMC and its client may incentivise, or at least induce indifference towards, the disproportionate use of force if that is perceived to further their interests.

D. Limitations of Third-Party Enforcement

The second main implication of the doctrine of privity arises from the general exclusion of third parties to the contract. Laura Dickinson is optimistic that third-party beneficiary rights can be developed and implemented in order to incorporate third-party influence and participation and to open the possibility for grievance procedures for victims.⁷⁹ She views the flexibility of the contractual form as being the key to this process because '[b]eneficiaries could be defined differently depending on the context'.⁸⁰ Unfortunately, a stumbling block quickly springs up. Giving the example of the prisoner abuse scandal by L-3/CACI pursuant to a contract to perform interrogation work,⁸¹ Dickinson suggests that the relatively high risk of physical harm posed to the detainees would warrant the availability of grievance mechanisms. Yet, as discussed above, the doctrine of privity grants only a narrow exception to allow *intended beneficiaries* the possibility of legal action on a contractual term. While the

⁷⁸ Buzatu and Buckland, 'Private Military & Security Companies' (n 38) 18. Furthermore, she suggests that this leads to asymmetric situations of security provision and that the availability of purchased security may erode the idea that the provision of security is a 'common good': Buzatu and Buckland (n 38).

⁷⁹ Dickinson (n 35) 233–34.

⁸⁰ *ibid* 233.

⁸¹ See generally P Chatterjee, 'Outsourcing Intelligence in Iraq: A CorpWatch Report on L-3/Titan' (CorpWatch, 2008) www.corpwatch.org/article.php?id=15253.

'intention' component might be remedied by express contractual provisions to that effect (although in light of the discussion in the previous section, it is difficult to see why either party to the contract would desire to shoulder such obligations), it is paradoxical and even perverse to label the victims of human rights violations 'beneficiaries' to the contract that gave rise to their abuse.

Put differently, the core of Dickinson's claim is that the government entered into contract with a PMC to provide a benefit to the individuals for whom the government programme or policy was designed. This would mean that those individuals should be able to enforce the contract if its terms are breached. It is notable, then, that the workable examples provided by Dickinson involve actual benefits: contracts to clear landmines and remove other hazards.⁸² But this form of PMC work is categorically different from PMC activities that jeopardise the human rights of third parties, such as the provision of interrogation or security services which involve coercive relationships or the projection of organised force. This challenges both the applicability and appropriateness of creating third-party beneficiary rights to enable the right of legal action to the victims of contractual (non-) performance.

Beyond such contradictions, Brian Bix suggests that under US law, 'courts are far less likely to allow third-party enforcement in contracts with the government'.⁸³ He notes that third parties who might otherwise appear to have a claim are often refused if the government is a contractual party. First, this is because a company providing services to the general public may be potentially open to massive liability, and second, because the choice over when to enforce an agreement might be part of a policy choice to be retained by government officials and not to be dispersed by third-party enforcement suits.⁸⁴ The American Law Institute is clear about the constriction of third-party beneficiaries where the government or governmental agency is involved in the contract under section 313 of the Restatement (Second) on Contract Law.⁸⁵ Overall, the doctrine of privity diminishes the likelihood that contractual provisions expressing human rights principles will be enforced by the parties themselves, and excludes the possibility of legal action for third-party victims.

⁸² Dickinson (n 35) 234.

⁸³ Bix (n 44) 125.

⁸⁴ *ibid* 112.

⁸⁵ Restatement (Second) of the Law of Contracts (n 67). The commentary explains the rationale: 'Among factors which may make inappropriate a direct action against the promisor are arrangements for governmental control over the litigation and settlement of claims, the likelihood of impairment of service or of excessive financial burden, and the availability of alternatives such as insurance'. It should be noted that s 313 generally contemplates governmental contracts that 'do an act for or render a service to the public', and therefore may have limited consequences for PMSC contracts.

E. The Horizontality of Contract: Equal and Independent Parties

Beyond the limitations inherent within the core concepts of contract law are other factors that detrimentally alter the nature of responsibility. This section discusses the horizontal relationship that characterises the contractual relationships, and its consequences. Implicit within the freedom of contract ideal is the assertion that contractual parties are independent entities that are equal in standing and status *inter se*. The three main consequences that flow from this assertion are discussed in turn. First, contract law disturbs well-settled legal fields by introducing what appear to be new actors and by conferring the semblance of legitimacy upon them. This is evident in the discussion over the status of PMC personnel under IHL because of their (non-IHL) appellation as ‘contractors’. Second, the equality among contractual parties relegates the position occupied by the State, or depending upon your perspective, elevates the status of the PMC. The formally horizontal relationship between the State and the PMC strikes a delicate balance that enables the State to exert organised violence through the PMC without being attributed or ascribed responsibility for the consequences. Third, the enforcing power of the State is diminished through the equality imposed by contract law. While the State as Leviathan enforces the criminal law,⁸⁶ the power of the State to enforce contracts arises only from its much-diminished status as a party to that contract (and relatedly, the role of even the ‘minimal State’ as the enforcer of contracts).⁸⁷ It is unclear why the State, with its legitimacy over coercive force leading to the possibility for it to regulate by imposition, would seek to rely instead upon its commercial influence.

F. Contract’s Creation and Legitimation

While IHL provides a comprehensive and coherent framework covering all persons embroiled in situations of armed conflict, the introduction of PMC personnel through contracts has muddied once clear waters. While it is clear that IHL does (and should) not provide special status for PMC personnel,⁸⁸ this status has become the source of contention and

⁸⁶ T Hobbes, *Hobbes’s Leviathan: Reprinted from the Edition of 1651* (Oxford University Press, 1929) bk II.

⁸⁷ See R Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) Preface, ix.

⁸⁸ L Cameron, ‘Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation’ (2007) 88 *International Review of the Red Cross* 573, 593–94.

debate.⁸⁹ The confusion introduced by PMCs into IHL is most apparent in the suggestion, reported by James Cockayne, ‘that PMSC personnel should enjoy protections and privileges additional to those afforded civilians—for example it is suggested that they should enjoy the right to participate directly in hostilities without losing the protections that civilians enjoy from attack’,⁹⁰ despite it being clear that such a position would contradict the fundamental tenants of IHL. The status of ‘the contractor’ has been the subject of much debate, and it is sufficient to note here that this confusion is largely due to the contractual status of both the PMC and its personnel, and that the semblance of legitimacy is conferred through the contract.

It needs to be noted briefly that contractual relations presuppose the independent existence of the parties. As corporations possessing legal personhood, PMCs are immediately distinguished from less structured and dependent forms of organisation, such as mercenary bands or groups.⁹¹ This has consequences for attributing responsibility through existing mechanisms presupposing hierarchical relations, dependence and effective control. The International Court of Justice expresses this reasoning in discussing the implications of Nicaragua’s contention that:

[T]he *contras* are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that *they have no real autonomy* in relation to that Government. Consequently, any offences which they have committed *would be imputable* to the Government of the United States.⁹²

The implication, then, is that more temporary and less structured organisations such as mercenary groups are more dependent upon their employers, who in turn justifiably bear greater responsibility for the activities of their employees. The following section develops this point further by concretely illustrating how horizontal contractual relations frustrate attempts to impute responsibility and accountability under international law. In turn, the availability of residual enforcement mechanisms becomes a critical issue in light of the obstacles to enforcement through contract law presented above.

⁸⁹ Cameron, ‘Private Military Companies’ (n 88); E-C Gillard, ‘Private Military/Security Companies: The Status of Their Staff and Their Obligations under International Humanitarian Law and the Responsibility of States in Relation to Their Operations’ in A Alexandra, D-P Baker and M Caparini (eds), *Private Military and Security Companies: Ethics, Policies, and Civil-Military Relations* (Routledge, 2008).

⁹⁰ J Cockayne, ‘Private Military and Security Companies’ in *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2014) 627.

⁹¹ There were strong links existing between early PMSCs and mercenaries: C Kinsey, ‘Private Security Companies: Agents of Democracy or Simply Mercenaries?’ in T Jäger and G Kummel (eds), *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects* (VS Verlag für Sozialwissenschaften, 2007).

⁹² *Military and Paramilitary Activities* (1986) 1986 ICJ Rep 14 (ICJ) [114]. Emphasis added.

G. Relative Equality of Contractual Parties: State and Command Responsibility

The independent status of each contracting party and their relative equality within the contract flows as a consequence of the freedom of contract ideal, transforming the nature of responsibility. At a superficial level, the responsible entity has changed where States contract for PMC services for the simple reason that, absent the contractual relationship, the State would be acting directly and therefore would unambiguously bear responsibility. Through PMC contracts, however, this responsibility becomes blurred: (both) the State and/or the PMC may be responsible for consequences arising from the contract, depending on the factual specifics of the situation. Furthermore, both domestic and international public law mechanisms are subverted by the contractual relationship involving a private entity.

This point can be examined through the question of whether the internationally wrongful acts of a PMC can be attributed to the State. It is worth noting at the outset that Max Weber was concerned with the State retaining the monopoly over the legitimate use of force, and as such it does not necessarily preclude the State from authorising or allocating this monopoly to other entities. This can be inferred from his definition of the State as the monopoly holder over legitimate use of force including the possibility for the State to delegate its monopoly.⁹³ While the State may still be seen to allocate force through contracts with PMCs, States lose their hierarchical position in relation to PMCs because the State and the PMC both become essentially private parties negotiating a contract.⁹⁴ This has implications for State responsibility, because international law generally requires State action, authorisation or acquiescence to the act in question before ascribing responsibility to the State. In short, the horizontal nature of contractual relations subverts the operation of international legal mechanisms that depend upon the State occupying the position of command and control.

The commentary to Chapter II of the International Law Commission (ILC) Articles on State Responsibility stipulates that

the general rule is that *the only* conduct attributed to the State at the international level is that of its organs of government, or of *others who have acted under the direction, instigation or control of those organs*, i.e. as *agents* of the State.⁹⁵

⁹³ '[T]he right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it': M Weber, *From Max Weber: Essays in Sociology* (HH Gerth and C Wright Mills eds, Routledge and Kegan Paul, 1946) 78.

⁹⁴ Evidence that the State acts a private party in contractual relations is provided by para 6 of the commentary to art 4, which states that 'the breach by a State of a contract does not as such entail a breach of international law': International Law Commission, 'Report of the International Law Commission: Fifty-Third Session' (UNGA, 2001) A/56/10 87.

⁹⁵ *ibid* 80. Emphasis added. Note that the commentary continues by stating that, '[a]s a corollary, the conduct of private persons is not as such attributable to the State': *ibid* 81.

This rule is reflected within the Articles themselves: Article 4 provides the basic rule of attributing the conduct of State organs to the State; Article 5 deals the attribution to the State of the conduct of entities empowered to exercise the governmental authority; and Article 8 attributes responsibility to the State for conduct carried out on State instructions or under its direction or control.⁹⁶

It is now possible to be more explicit about *how* the delicate balance is struck whereby the State can avoid being attributed responsibility for any internationally unlawful conduct perpetrated by a PMC contracted with that State.⁹⁷ Unless the PMC is incorporated into an organ of the State, at which point contract law ceases to be relevant, Article 4 does not have bearing upon attribution so the analysis under Articles 5 and 8 becomes critical. The existence of a contract in both instances undermines the contention that the State will be responsible for any internationally wrongful conduct committed by a PMC. This is because attribution under Article 5 depends upon the PMC being empowered to exercise governmental authority, and State instruction, direction or control are the lynchpins for Article 8. Because the commentary states that '[t]he formulation of article 5 clearly limits it to entities which are empowered by internal law to exercise governmental authority',⁹⁸ it would be a contrived argument to suggest that a contract for PMC services would fall into the ambit of Article 5. Article 8 provides more traction, in particular because it recognises the scope for States to authorise private persons to act, an example being the recruitment of 'auxiliaries' to their police and armed forces, but who remain outside the formal organisation of the State.⁹⁹ The high bar set by international jurisprudence,¹⁰⁰ which has to be satisfied in order to attribute the conduct of private persons acting under the instructions of, or under the direction or control, of the State makes this prospect practically impossible where contractual obligations are concerned. A cynical view of this position might be that, because of their contractual relationship, the State no longer orders the PMC, but rather connives with the PMC. As international law is blind to the prospect of States conspiring with private entities where internationally wrongful acts are concerned, the contract

⁹⁶ International Law Commission, 'Report of the International Law Commission: Fifty-Third Session' (n 94) 84–109.

⁹⁷ This discussion excludes the question of attributing responsibility to the State for its failure to take necessary measure to prevent the effects caused by the conduct of private parties: *ibid* 81. See for a broader discussion, Tonkin, *State Control Over Private Military and Security Companies in Armed Conflict* (n 26).

⁹⁸ International Law Commission (n 94) 94.

⁹⁹ *ibid* 104.

¹⁰⁰ See esp *Military and Paramilitary Activities* (n 92) [115]. This is analysed below in the context of the prohibition on the threat or use of force.

that regulates their relationship essentially immunises the State against the attribution of responsibility under international law.¹⁰¹

This immunising effect can also be seen in the manner in which contracts collapse the doctrine of superior responsibility under international criminal law, a doctrine which in turn reflects IHL's requirement that armed groups must be hierarchically organised.¹⁰² The Montreux Document, reflecting existing international law, states in no uncertain terms that '[s]uperior responsibility is not engaged solely by virtue of a contract'.¹⁰³ This does not, however, preclude the possibility that superior responsibility might be engaged by a contractual relationship so further analysis is necessary. As the passive impunity issues raised by the doctrine of superior responsibility in relation to the PMC are discussed separately towards the end of this chapter, only a sketch is provided here in order to illustrate the additional difficulties introduced by contractual arrangements.

The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) enumerated the constitutive components necessary to establish superior responsibility, foremost of which is 'the existence of a superior-subordinate relationship'.¹⁰⁴ The Appeals Chamber of the ICTY held that 'effective control' is the crucial ingredient of the superior-subordinate relationship,¹⁰⁵ and rejected influence short of the ability to prevent or punish subordinate offences.¹⁰⁶ It must, however, be conceded that in order to keep this doctrine applicable to civilian superiors, the ICTY accepted the replacement of the ability to impose sanctions with the ability to submit reports to the authorities that might lead to an investigation.¹⁰⁷ This opens the possibility for superior responsibility mechanisms to apply to the parties of a contract, insofar as the 'effective control' criterion is diluted, but the doctrine of *superior* responsibility is likely

¹⁰¹ Another way of viewing this problem is through the UN Guiding Principles on Business and Human Rights. Here, States are responsible for exercising adequate oversight and for promoting respect for human rights in the business enterprises that they contract with: J Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (UNGA, 2011) A/HRC/17/31 10, points 5 and 6.

¹⁰² The Commentary to API, art 43 provides: 'All armed forces, groups and units are necessarily structured and have a hierarchy, as they are subordinate to a command which is responsible to one of the Parties to the conflict for their operations. In other words, all of them are subordinate to a command and to a Party to the conflict ... for it is not permissible for any group to wage a private war': ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, 1987) para 1672. See also art 4(2)(a) of the Third Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949.

¹⁰³ Montreux Document (n 36) pt I.

¹⁰⁴ *Prosecutor v Delalic (Trials Chamber)* [1998] ICTY Trial Chamber IT-96-21-T [346].

¹⁰⁵ *Prosecutor v Delalic (Appeals Chamber)* [2001] ICTY Appeals Chamber IT-96-21-A [303]. This is discussed in detail below.

¹⁰⁶ *ibid* 266.

¹⁰⁷ *Prosecutor v Aleksovski (Trials Chamber)* [1999] ICTY Trial Chamber IT-95-14/1T [78]. Subsequently reaffirmed in *Prosecutor v Blaskic (Trials Chamber)* [2000] ICTY Trial Chamber IT-95-14-T [302].

to require evidence of a superior-subordinate relationship that will be defeated by the horizontal nature of contractual relations.¹⁰⁸

Thus, the hierarchical organisation required by IHL has been subverted by the horizontal contractual relationship both between the State and the PMC and the PMC and its personnel. This has two major consequences where PMCs are implicated in activities within the purview of international criminal law. First, the absence of 'effective control' both between the PMC and its client and within the structure of the PMC (through the employment contract) suggests that the potential to prevent or repress the commission of international crimes will be diminished where organised force is contractually allocated. Second, both the client of the PMC and senior members of the PMC would be able to point to the lack of sanctioning powers available under contract law to avert allegations of superior responsibility over the commission of any international crime. The overarching effect of horizontal contractual relationships, therefore, is that these immunise against the possibility of 'contracting' responsibility.

Given the horizontal relationship between the client and the PMC, and between the PMC and its personnel, the provision of the ICoC that 'Signatory Companies will not, and will require that their Personnel do not, invoke *contractual obligations*, [or] superior orders ... as a justification' for engaging in conduct proscribed by the ICoC is especially incongruent.¹⁰⁹ This provision effectively attempts to equate contractual obligations (arising from consensual agreement) with the defence of superior orders (expressing a hierarchical relationship characterised by 'effective control'), evincing a fundamental misunderstanding about the limitations of contractual provisions in protecting human rights.

H. The Indifference of Contract Law

The final set of difficulties with attempts to protect human rights through contract law arises out of their ontological incompatibility. The myopic and inward-looking nature of contract law has already been discussed. In comparison, human rights law might be considered contract law's diametric opposite: human rights law expresses universal values that are

¹⁰⁸ It is interesting to note in this regard a suggestion made by Charles Garraway that: 'The increasing use of contractors and other civilian experts undoubtedly blurs traditional military chains of command, but where there is any superior/subordinate relationship, that relationship will be caught by the wide phrasing of article 28. It should be possible therefore to include new forms of relationships, including contractual ones': C Garraway, 'The Application of Superior Responsibility in an Era of Unlimited Information' in D Saxon (ed), *International Humanitarian Law and the Changing Technology of War* (Martinus Nijhoff, 2013) 202. The present analysis illustrates this suggestion as a paradox for the simple reason that a contractual relationship cannot be characterised by 'effective control' or possess other attributes of the superior-subordinate relationship.

¹⁰⁹ Swiss Federal Department of Foreign Affairs (n 37) 23. Emphasis added.

inherent within and inalienable from the individual and confers these rights without imposing concomitant duties or obligations. In arguing for the development of a global community grounded in a core of human rights, Antonio Cassese suggested that '[a]s for values, one should emphasize the existence of peremptory rules of international law (*jus cogens*) on human rights, which are at the summit of the international legal order and may not be derogated from by any state'.¹¹⁰ Placing human rights as the core is justified because '[t]he doctrine of human rights has aspired from the outset to be universal, to be a doctrine that applies everywhere to everyone, irrespective of nationality, culture, tradition, ideology, or social conditions'.¹¹¹ This opposition can be seen from another perspective: purpose. At root, the function of contract law is enabling, such that it is both non-judgemental and limitless (with the tiny caveat that some impermissible choices might not be enforced). In contrast, the *raison d'être* of human rights law is restrictive in setting normative boundaries on acceptable treatment. In this light, it is difficult to see how contract law can provide for the adequate protection of human rights.

Before turning to demonstrate the inadequacies of contractual remedies for human rights violations that flow from this tension, it is necessary to show the possibility for reduction where contractual provisions purport to express or incorporate external (legal) obligations. This is readily evident in two of the Montreux Document's good practices. First is the suggestion that it is good practice for contracting States '[t]o determine which services may or may not be contracted out to PMSCs'.¹¹² Juxtapose this contractual approach against a human rights perspective: Article 9 of the Draft of a Possible Convention on Private Military and Security Companies requires State parties to 'specifically prohibit the outsourcing to PMSCs of functions which are defined as inherently State functions', and includes an enumerated non-exhaustive list of activities.¹¹³ Second, while the Montreux Document suggests States '[t]o include contractual clauses and performance requirements that ensure respect for relevant national law, international humanitarian law and human rights law by the contracted PMSC',¹¹⁴ the Draft Convention requires that

[e]ach State party shall take legislative, judicial, administrative and other measures *as may be necessary to ensure* that PMSCs and their personnel are held

¹¹⁰ A Cassese, 'A Plea for a Global Community Grounded in a Core of Human Rights' in A Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press, 2012) 136.

¹¹¹ *ibid.*

¹¹² But note that this provides for the guidelines for determining any such boundaries, rather than actually imposing any concrete limitations: Montreux Document (n 36) pt II.

¹¹³ Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council 2011 (A/HRC/WG10/1/2) 9. See further arts 8–11 for specific prohibitions on PMSC activities.

¹¹⁴ Montreux Document (n 36) pt I. Emphasis added.

accountable in accordance with this Convention and to ensure respect for and protection of international human rights and humanitarian law.¹¹⁵

These comparisons between the contractually-orientated Document and the human rights-centric Draft Convention indicate the opposing thrusts of these legal fields.

I. Inadequacy of Contractual Remedies

Another approach to the indifference of contract law is provided by an analysis of the nature of contractual remedies in comparison with the repercussions arising from human rights violations. It is worth noting at the outset the maxim *ubi jus ibi remedium* (for the violation of every right, there must be a remedy), and that the possibility of enforcement can be considered a defining characteristic of a right.

The Montreux Document serves as a useful point of departure:

‘Contractual clauses may also provide for the Contracting State’s ability to terminate the contract for failure to comply with contractual provisions. They may also specify ... that appropriate reparation be provided to those harmed by the misconduct of PMSCs and their personnel’.¹¹⁶

Two deductions can be made: first that the termination of contract is the most severe ‘punishment’ possible under contract law, and second that victim reparation is discretionary. These are expressions of the purpose of remedies under contract law, as Brian Bix summarises:

The basic principle is that damages should compensate the innocent party for moneys lost due to the breach. This compensatory principle is both the *objective* and the *limit* of contract damages: the courts should try to ensure that parties are compensated, but they also are *to guard that damages do not go beyond compensation*.¹¹⁷

This principle indicates that the nature of contractual remedies is financial and that its purpose is restitution. Moreover, the restitution of contractual remedies look only to the parties: ‘The basic objective of breach of contract remedies [is] to place the *nonbreaching party* in the same position it would have been in had the contract been fully performed or had the contract never been entered’.¹¹⁸ Together, this explains why the provision of

¹¹⁵ Draft of a Possible Convention on Private Military and Security Companies (n 113) art 7. Emphasis added.

¹¹⁶ Montreux Document (n 36) pt II.

¹¹⁷ Bix (n 44) 87. Emphasis added.

¹¹⁸ *ibid* 92. Emphasis added.

compensation to victims *can only* be discretionary in the Montreux Document: the victim is not countenanced in the bilateral nature of contractual remedies.

The gross inadequacy of contractual remedies in the context of protecting human rights is revealed in comparison with the UN Basic Principles on the Right to a Remedy.¹¹⁹ The scope of the obligation comprises of four duties: to prevent, to investigate, to provide access to justice and to provide remedy for victims.¹²⁰ Turning to the substantive scope of remedies within the right, the

[a]dequate, effective and prompt reparation is intended to *promote justice by redressing* gross violations of international human rights law or serious violations of international humanitarian law. *Reparation should be proportional to the gravity of the violations and the harm suffered.*¹²¹

The Basic Principles require ‘full and effective reparation ... which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition’.¹²² In order to facilitate comparison with contractual remedies, below, it should be noted that under the Basic Principles, restitution seeks to restore the victim to their original situation before the occurrence of the gross violations through a broad spectrum of available actions, and that appropriate and proportional compensation should be provided for economically assessable damage.¹²³

Thus, three main characteristics of human rights law remedies can be drawn out. First, remedies under human rights law serve broader purposes beyond mere economic restitution. The promotion of justice, the purpose which remedies serve, alluded to in the Basic Principles comprises of: compensatory and remedial justice, condemnation and retribution, deterrence, and restorative and reconciliatory forms of justice.¹²⁴ Second, remedies under human rights law express normative and moral dimensions, embodied through satisfaction and guarantees of non-repetition, communicating that injuries rather than mere wrongs are at stake.¹²⁵ This reinforces the need to have a wide range of available remedies under human rights law. Third, the different purpose pursued by remedies under human rights law mean that these should also be proportional and

¹¹⁹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005.

¹²⁰ *ibid* 3.

¹²¹ *ibid* 15. Emphasis added.

¹²² *ibid* 18. See further Principles 19–23 for the specific content of these remedial forms.

¹²³ *ibid* 19 and 20.

¹²⁴ D Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2006) 10–16.

¹²⁵ For a critical analysis of this distinction, see S Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Routledge-Cavendish, 2007) 85–92.

appropriate, leading to the possibility of punishing transgressions that censure the wrongdoer. Indeed, proportional punishment can mandate sanction under criminal law,¹²⁶ and in the case of gross human rights violations, even impose a duty to investigate and prosecute.¹²⁷ Contrast these characteristics with the goal of economic restitution underlying contractual remedies, and the inadequacy and inappropriateness of collapsing the protection of human rights into contract law become clear. In this light, it is significant that '[p]unitive damages are not available for breach of contract cases',¹²⁸ suggesting that a breach of contract carries with it insufficient injury to warrant deterrence, let alone punishment.

Until this point, the discussion has only addressed the substantive concept of remedy under human rights law and so constitutes half of the story at most. As Dinah Shelton explains:

The word 'remedies' contains two separate concepts, the first being procedural and the second substantive. In the first sense, remedies are the processes by which arguable claims of human rights violations are heard and decided, whether by courts, administrative agencies, or other competent bodies. The second notion of remedies refers to the outcome of the proceedings, the relief afforded the successful claimant.¹²⁹

Despite the advantage of contract law to directly impose human rights obligations touted by its advocates,¹³⁰ the denial of procedural justice can be added to the list of remedial defects. Situated within the right to an effective remedy, the limitations imposed by the doctrine of privity could be asserted to conflict with, perhaps even violate, the right to access justice.¹³¹ Despite the existence of parallel avenues for victims to access justice which contract law does not preclude, such as through tort or criminal law, the doctrine of privity excludes the possibility for victims of human rights abuses a right to legal action under the contract. Under ordinary circumstances where contract law is confined to regulating commercial transactions, this may be unproblematic. But where contract law is elevated to the keystone of PMC regulatory mechanisms designed to protect and promote human rights in situations of armed conflict and instability, however, any restriction to the right to access justice compounds the inadequate nature of substantive remedies available under contract law.

¹²⁶ Shelton, *Remedies in International Human Rights Law* (n 124) 12–13.

¹²⁷ Principles and Guidelines on the Right to a Remedy (n 119).

¹²⁸ Bix (n 44) 98. With narrow exceptions in some jurisdictions relating to insurance claims. It should be noted that punitive damages for a breach of contract may be available if it can be characterised through an independent tort claim: *ibid* 94.

¹²⁹ Shelton (n 124) 7.

¹³⁰ Buzatu and Buckland (n 38) 23.

¹³¹ Principles and Guidelines on the Right to a Remedy (n 119).

J. Denial Through Contract Law?

While something positive might be said about the possibility for contract law to circumvent the jurisdictional obstacles to PMC regulation, this section has presented several approaches towards the conclusion that there are conceptual, pragmatic and consequential arguments militating against employing contract law mechanisms to protect human rights. These concerns may once have been academic, but the reliance that developing PMC regulation places upon contractual mechanisms has magnified the importance of these issues. Yet, both this reliance upon contract law and its implications have gone unnoticed.

An argument could be advanced that contract law might usefully serve to fill the remaining gaps in the regulation of PMCs under international law that would remain even if all relevant instruments were deemed applicable to them.¹³² While contractual reforms are likely to be necessary in the effort to improve oversight and accountability for PMC activities, it is worth underscoring the hazards that lie along this path. An initial objection arises from the argument that reversing privatisation is unlikely and that regulatory effort is better expended upon reform.¹³³ Instead, it is likely that attempts at reformation will legitimise, entrench and expand privatisation because of the effort invested in these directions, thus enhancing the system at the source of the problem.

Yet, the use of contract law as the basis to protect and promote human rights in the course of PMC operations might yield more disquieting implications: denial. This conclusion may serve as a second iteration of the interpretive denial afforded to the PMC, building upon the earlier analysis in relation to the PMC adopting the corporate form. Strained through the cloth of contract law, there is the potential that prisoner abuse or indiscriminate use of lethal force perpetrated by a PMC will be understood as a breach of contract because '[p]owerful forms of interpretive denial come for the language of legality itself'.¹³⁴ While the actions might remain the same, '[t]he harm is cognitively reframed and then allocated to a different, less pejorative class of event'.¹³⁵ In this case, a human rights violation *is the same* as a breach of contract.

The possibility for contract law to function as a mechanism for interpretive denial might culminate in the adoption of 'magical legalism', whereby the formal illegality of an activity is presented as proof that the alleged activity could not possibly have occurred.¹³⁶ While it may appear fanciful

¹³² Dickinson (n 35) 237–38. It is worth noting that Dickinson does not propose contractual reform as a regulatory panacea, but rather only as one avenue to be pursued.

¹³³ *ibid* 237.

¹³⁴ Cohen (n 29) 107.

¹³⁵ *ibid* 106.

¹³⁶ *ibid* 108.

now, it is not inconceivable to think that PMCs of the near future would point to their membership of the ICoC and to provisions in their contract to conclusively prove the falsity of allegations made against them. Even if this were not appealed to outright, the inclusion of human rights obligations into contractual terms would likely facilitate the isolation of any alleged abuse perpetrated by PMCs. In such instances, the denial falls neither upon the occurrence of the event nor on shouldering responsibility for it: rather the denial is that the event was neither systematic nor routine.¹³⁷ If contractual terms protecting human rights were regularly incorporated into PMC contracts, this will allow for subsequent violations to be compartmentalised, to be viewed as exceptions to generally compliant behaviour.