HIRED GUNS AND HUMAN RIGHTS: ARBITRAL JUSTICE FOR VICTIMS OF PRIVATE MILITARY AND SECURITY COMPANIES

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APRIL 10, 2017

A THESIS SUBMITTED TO MCGILL UNIVERSITY IN PARTIAL FULFILLMENT OF THE REQUIREMENTS OF THE DEGREE OF DOCTOR OF CIVIL LAW (D.C.L.)

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Abstract

This dissertation addresses the matter of global governance and access to remedies in the private military and security industry (PMSI). More specifically, it addresses the matter of how to provide a more efficient and effective remedial mechanism for victims of human rights violations by private military and security companies (PMSC). At present, victims who have suffered harm at the hands of PMSCs face significant jurisprudential and practical challenges in attaining recourse for that harm, whether through state or non-state, judicial and non-judicial mechanisms. Moreover, such challenges are made more acute by the reality of underdeveloped regulation within the PMSI across all of its governance levels – the national, the international, and the transnational. The regulation lacks consistency, cohesion, and congruence.

In response to such challenges, this dissertation proposes the introduction of a new adjudicative mechanism for the global PMSI modelled on international arbitration. The creation of such a mechanism entails, first, the creation of a new global governance framework in which all actors within the global PMSI can convene to create a new regulatory infrastructure that can create uniform and harmonised laws for the industry. Second, those laws then provide the procedural and substantive bases by which the mechanism can be facilitated for the benefit of all potential victims of PMSC harm, irrespective of their location. As such, the mechanism will be globally administered and locally accessible. This approach towards the design of remedial or grievance mechanisms presents an alternative orthodoxy for the regulation of global industries away from one which is founded upon the predominance of state-based institutions towards one that embraces a much more inclusive and participatory form of global governance.

Résumé

Cette thèse aborde le sujet de la gouvernance mondiale et de l'accès à la justice dans l'industrie militaire et de la sécurité privée (IMSP). En particulier, elle s'interroge sur la manière de fournir des mécanismes de réparation efficaces et opérationnels pour les victimes de violations des droits de la personne commises par des entreprises militaires et de sécurité privées (EMSP). Actuellement, les victimes ayant subis un préjudice aux mains d'EMSP font face à d'importants défis jurisprudentiels et pratiques dans la poursuite de recours pour ce préjudice, que ce soit à travers les mécanismes étatiques, privés, judiciaires ou non-judicaires. De plus, ces défis sont exacerbés par la réglementation déficiente au sein de l'IMSP à travers les différents niveaux de gouvernance les concernant (national, international et transnational). La réglementation manque de consistance, de cohésion et de congruence.

Pour répondre à ces défis, cette thèse propose d'introduire un nouveau mécanisme de règlement des différends pour l'IMSP mondiale basé sur l'arbitrage international. La création d'un tel mécanisme implique en premier lieu la conception d'un nouveau cadre de gouvernance mondiale au sein duquel tous les acteurs au sein de l'IMSP mondiale pourront se réunir pour créer une nouvelle infrastructure réglementaire pouvant produire des lois uniformes et harmonisées pour l'industrie. En deuxième lieu, ces lois pourront fournir les bases procédurales et substantielles permettant de faciliter le mécanisme au profit de toutes les victimes potentielles de préjudices causés par des EMSP, peu importe leur emplacement. Ainsi, le mécanisme serait administré à l'échelle mondiale et accessible localement. Cette approche de la conception des mécanismes de réparation ou de griefs présente une orthodoxie alternative pour la réglementation des industries mondiales. Elle se distance d'une approche fondée sur la prédominance des institutions étatiques, adoptant plutôt une forme de gouvernance mondiale résolument inclusive et participative.

Acknowledgments

My, what a journey this has been. While it is hard to sum up in a few words, there are many people along the way who have helped me get to this point, and for that I am incredibly grateful. In the first instance, I would like to thank my supervisor, Professor Fabien Gélinas. I took my first class with Professor Gélinas in Fall 2010 as an LL.M student, and I have had the privilege of learning from and working with him since then. He provided me with guidance, thought provoking discussions, funding, and the space to write and develop my ideas. He helped me to develop into a young academic, and for that I am grateful. Professors Andrea Bjorklund and Frédéric Mégret served as members of my supervisory committee and provided me with additional guidance on my thoughts and writing as they developed. Dr. Rebecca DeWinter-Schmitt provided me access to the world of private military and security companies, commented multiple times on my work, and was always available to discuss developments within the industry. And many thanks to the McGill Law Graduate and Postdoctoral Office that generously provided me with funding to pursue my research.

The Faculty of Law became a second home to me as I spent most of my time there. Many colleagues there became very dear friends, providing me with the opportunity laugh, think, drink, eat, dance, and discuss. Of the many in this group, particular thanks go to Marika Giles Samson, Kate Glover, Juan Camilo Pinto, Francis Lord, Priscilla César, Laure "Amelie" Fouin, Laurent "Bazooka" Boukobza, Alexandra Klein, Timiebi Aganaba-Jeanty, Tamara Thermitus, Michelle Sarrazin, Libby Parker, Jeffrey Smith, Professor Richard Janda, Carlos Rueda, Charles Stotler, Mike Leach, John Hursh, Enrique "Iglesias" Boone Barrera, Paul Fitzgerald, Lasantha Hettiarachchi, and Frederick Pinto. They know me to be a man of few words, and so I will stay true to that – thanks for the good times guys! It's been a trip.

I would like to thank Emily Grant, who edited my dissertation with remarkable attention to detail, and Laura Dehaibi, who did the translation for the dissertation abstract. Many, many thanks to the incredible staff at the Nahum Gelber Law Library – Maryvon Côté, Anne Avery, Mila Bozic Erkic, Brock Cummings, Ramon Lasso, Mary Lourenço, Sonia Smith, and Kathleen Vandernoot. You guys were great.

Finally, I wish to thank my parents. I never would have gone down this path if it was not their encouragement. The love and support from them has never wavered. I dedicate this dissertation to them. Mazvita! Ndinotenda!

Introduction

PMSCs Step into the Spotlight

In 2003, Amnesty International released reports of alleged torture committed by US forces at the Abu Ghraib prison in Iraq. The photographs and video documentation showed detainees being sexually assaulted, beaten, electrically shocked, stripped, starved, deprived of sleep, and attacked by military working dogs. In one instance, a detainee died. The findings were confirmed in a leaked confidential report by US Army Major General Anthony Taguba, in which he found that there were "numerous incidents of sadistic, blatant, and wanton criminal abuses" inflicted on detainees.[1] This conclusion was also reached by a subsequent report, the Fay Report, conducted by US Army Major General George Fay and Lieutenant General Anthony Jones.[2] Implicated in the scandal along with several low-ranked military personnel were contractors from two private security companies that had been hired to provide translation services and assist in interrogations, Engility Corporation (formerly L-3 Services and Titan Corporation) and CACI International. While several of these low-ranked military personnel have been held criminally accountable for the abuse, none of the contractors have. And this is now more than ten years later.[3]

A few years after the reports of torture at Abu Ghraib, on September 16, 2007, contractors working for another security company, Blackwater, opened fire in Nisour Square, Baghdad, killing

[1] *Taguba Report: AR 15-6 Investigation of the 800th Military Police Brigade* (2004), online: The National Security Archive < http://nsarchive.gwu.edu/NSAEBB/NSAEBB140/TR3.pdf>.
[2] *Fay Report: Investigation of 205th Military Intelligence Brigade's Activities in Abu Ghraib Detention Facility* (2004), online: https://www.thetorturedatabase.org/document/fay-report-investigation-205th-military-intelligence-brigades-activites-abu-ghraib.
[3] "Will Anyone Pay for Abu Ghraib?", Editorial, *The New York Times* (5 February 2015); Noah Bierman, "Few have faced consequences for abuses at Abu Ghraib prison in Iraq", *The Los Angeles Times* (17 March 2015).

17 people and injuring 20 others.[4] The contractors had been providing security for a US State Department convoy when they allege that they came under an ambush. FBI investigators, however, found no evidence of this and concluded that the contractors had recklessly used lethal force in an area populated with civilians.[5] Significant outrage swiftly ensued in Iraq. The Iraqi government revoked Blackwater's license to operate in Iraq and called for the prosecution of the contractors in Iraqi courts. International law, however, through a status of forces agreement between the United States and Iraq, gave primary jurisdiction over the matter to US officials.[6] It took seven years for four of those contractors to be tried in US federal courts and for convictions to be reached—one was found guilty of murder and the other three of manslaughter and other firearm-related charges.[7] As recently as February 1, 2016, however, the contractors lodged an appeal to quash their convictions, thus showing that the saga is far from being over.[8]

These two very public incidents brought to light a phenomenon that very few people had realised was happening—the emergence and prolific rise of private military and security companies (PMSCs). PMSCs are private business entities that provide military and/or security services, irrespective of how they describe themselves. Their military and security services include, in particular, armed guarding and protection of persons and property, such as convoys and

[4] James Glanz & Alissa Rubin, "From Errand to Fatal Shot to Hail of Fire to 17 Deaths", *The New York Times* (3 October 2007), online: <www.nytimes.com>.
[5] David Johnston & John Broder, "FBI Says Guards Killed 14 Iraqis Without Cause", *The New York times* (14 November 2007), online: <www.nytimes.com>.
[6] See R Chuck Mason, "Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?" (2008) US Congressional Research Service Report for Congress RL34531.
[7] Matt Apuzzo, "Blackwater Guards Found Guilty in 2007 Iraqi Killings", *The New York Times* (2 October 2014) online: <www.nytimes.com>.
[8] Eric Tucker, "4 Ex-Blackwater Contractors Appeal Convictions in Shooting", *Associated Press* (1 February 2016) (QL).

buildings; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.[9]

PMSCs emerged with the end of the Cold War and independence movements across Africa. The cessation of hostilities between the world's two superpowers, the United States of America and the Soviet Union, presented an opportunity for latent tensions and frozen conflicts both within and between states to renew themselves and resurface through fresh hostilities. Smaller states that had relied upon the patronage of either the US or the Soviets soon found themselves with considerably less resources to manage their already weak public institutions and governance infrastructure, thus resulting in significant volatility and susceptibility to ethnic and religious tensions and violence. Concurrently, the end of the Cold War brought about substantial demilitarisation which produced a glut of cheap armaments and skilled yet unemployed soldiers with the training and the desire to do little else other than wage conflict. Collectively, these factors fuelled the forces of both supply and demand that created a new market and opportunity for the provision of security.[10]

It was around the late 1980s and early 1990s that PMSCs began to sprout and to become involved in conflicts around the world—fighting for and providing military and security advice to governments, rebel groups, and companies that could afford them. Prominent and infamous examples of such PMSCs include the South African company Executive Outcomes, which was directly involved in conflict in Sierra Leone and Angola, and the UK's Sandline International, which was hired by the Papua New Guinea government to quell conflict in Bougainville. None of

[9] "Preface", *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*, online: ICRC < http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf>. [Montreux Document]
[10] See in general Peter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca & London: Cornell University Press, 2008) at 49-58.

these services were cheap. For its work in Sierra Leone, Executive Outcomes received a paycheck of $35 million.[11]

It is without doubt that, in recent years, the private military and security industry (PMSI) has grown significantly to global proportions. PMSCs are active across every continent in a range of capacities and for a multitude of clients coming from both the private and public sectors. They have assisted states such as Haiti and Croatia in the training of military and police forces;[12] they have conducted a series of security and humanitarian operations for UN agencies and NGOs;[13] they have protected investments for transnational enterprises around the world;[14] and in some cases, they have even participated in attempted coups d'état.[15]

Yet, the implications of hiring PMSCs in contemporary theatres of war can be difficult to measure. While most contracts remain confidential, the figures that emerge from publicly available sources show that there are very large numbers in play. For example, from FY2007 to FY2012, the US Department of Defense alone had contract obligations for operations in Iraq and Afghanistan, worth approximately $160 billion, for private contractors that constituted more than 50 per cent of the total military force.[16] The rise of PMSCs marks rapid degradation of the state's monopoly on violence, that final bastion that Weber considered to be sacrosanct to the state.[17] And

[11] David Shearer, "Outsourcing War", *Foreign Policy* (15 September 1998), online: <www.foreignpolicy.com>.
[12] Singer, *Corporate Warriors*, *supra* note 10.
[13] Lou Pingeot, *Dangerous Partnership: Private Military & Security Companies and the UN* (Global Policy Forum, 2012).
[14] See e.g. Jana Hönke, *Transnational Companies and Security Governance: Hybrid Practices in a Postcolonial World* (New York: Routledge, 2013).
[15] Kim Sengupta, "An African Adventure: Inside Story of the Wonga Coup", *The Independent* (11 March 2008); David Pallister, "Mann accuses Mark Thatcher of key involvement in African coup plot", *The Guardian* (19 June 2008). The articles detail Simon Mann and Mark Thatcher's attempt to overthrow the President of Equatorial Guinea in 2003.
[16] Moshe Schwartz & Jennifer Church, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* (US Congressional Research Service, 2013) online: https://www.fas.org/sgp/crs/natsec/R43074.pdf.
[17] According to Weber, one of the essential characteristics of a state is that it "successfully upholds a claim to the monopoly of the legitimate use of physical force in enforcement of its order." See Max Weber, *Theory of Social and Economic Organisation*, translated by AM Henderson (New York: Free Press, 1964) at 154.

yet, regulation within the industry, across national jurisdictions and in international law is worryingly still nascent and underdeveloped.

PMSCs have been plagued consistently with accusations of operating in legal vacuums devoid of regulation and thus also of acting with impunity.[18] Indeed, far from being baseless, there is some merit to these allegations as the international legal framework only recently began to respond to PMSCs through the introduction of the *Montreux Document* in 2008.[19] Even now, there is significant divergence among states as to how we should respond to and regulate PMSCs. In order to really understand why there is such inadequate law and regulation regarding PMSCs, one must consider the history of attempts to create international regulation for mercenaries, the pre-metamorphosed state of PMSCs.

A Brief History of Mercenaries in International Law

Before there were PMSCs, there were mercenaries, and while the latter's history extends back to the beginning of war itself,[20] the former are a relatively new phenomenon. Mercenaries and PMSCs differ in form and function. PMSCs, as corporations in the twenty-first century, are much more sophisticated, can be publicly listed on a stock exchange, and offer a much wider range of services than mercenaries can. But international law and regulation have typically focused on mercenaries because that was the nature of the threat until recently (and in some cases it still is, for example, in the cases of individuals joining the armed, non-state actor group, ISIS, in Syria).

[18] Peter Singer, "War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law" (2004) 42 Col J Transnatl L 521.
[19] *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*, online: ICRC < http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf>.
[20] Singer, *Corporate Warriors*, *supra* note 10 at 19ff.

Prior to 1945, the basis for governing mercenary activity was founded in customary international law and centred on the principle of neutrality.[21] According to commentators:

> It had long been the practice of states within the international community that a state honour an obligation to the effect that when neutral *vis-à-vis* another state, that state should remain impartial in respect of the internal affairs of the other state. Violation of the obligation of neutrality, through permitting the recruitment or enlistment of mercenaries within one's national territory with the purpose of armed activity in another state, was considered to constitute an act of belligerence; which belligerence, in turn, invited claims for belligerent retaliation.[22]

This practice was eventually codified in Articles 4 and 6 of the *1907 Hague Convention regarding the Rights and Duties of Neutral Powers and Persons in Case of War on Land* (*Hague Convention No. V of 1907*).[23] The obligations were of a purely public international nature to the extent that they did not impose any criminal liability on an individual who did leave his home state to join the forces of another state engaged in conflict.[24] The only consequence of relevance to the individual was that under Article 17 of *Hague Convention No. V of 1907*, the individual would be unable to avail himself of the neutrality of his home state.[25]

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[21] Lassa Oppenheim, *International Law: A Treatise*, 7th ed (London: Longmans, 1948) at 260.
[22] Garth Abraham, "The Contemporary Legal Environment" in Greg Mills & John Stremlau, eds, *The Privatisation of Security in Africa* (South African Institute of International Affairs, 1999) at 88. See also HC Burmester, "The Recruitment and Use of Mercenaries in Armed Conflicts" (1978) 72 Am J Intl L 37 at 42.
[23] *Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907, 205 Parry's TS 395.
[24] Oppenheim, *supra* note 21 at 261.
[25] Art. 17**.** A neutral cannot avail himself of his neutrality

(a) If he commits hostile acts against a belligerent;

This indirect regulation of mercenary activity continued after 1945, up to a point. At that time, a state's obligation with respect to preventing the cross-border movement of mercenaries changed and was considered to fall under Article 2(4) of the *UN Charter*—the duty to prevent the threat or use of force against another state's territorial integrity.[26] And while mercenary activity continued, it was not considered to be a significant problem in the context of post-World War II reconstruction. Things only took a turn when a wave of liberation movements began to sweep across the African continent. The 1960s and 1970s were marked by conflicts involving the heavy use of mercenaries in the Congo, Nigeria, Guinea, Angola, and other countries.[27] Most states assessing the situation called for a reaffirmation of Article 2(4) of the *UN Charter*, but as the conflicts intensified, a more concerted political response was both desired and required by African states.[28] This resulted in the issuance of *General Assembly Resolution 2465 of 1968* (*Resolution 2465*). Paragraph 8 of the resolution declared:

> ... that the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and that the *mercenaries themselves are outlaws*, and calls upon the Governments of all countries to enact legislation declaring the recruitment, financing and training of

(b) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.

In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.

[26] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.
[27] Paul Mourning, "Leashing the Dogs of War: Outlawing the Recruitment and Use of Mercenaries" (1982) 22 Va J Int'l L 589 at 599-605; Abraham, *supra* note 22 at 93.
[28] See Burmester, *supra* note 22 and James Taulbee, "Myths, Mercenaries & Contemporary International Law" (1985) 15 Cal W Int'l L J 339 at 361.

mercenaries in their territory to be a punishable offence and prohibiting their nationals from serving as mercenaries.[29]

After *Resolution 2465* came a flurry of other resolutions. First came the 1968 *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States*,[30] then *Resolution 2548 (XXIV)*,[31] *Resolution 2708 (XXV)*,[32] *Resolution 3103 (XXVIII)*,[33] and *Resolution 3314 (XXIX)*.[34] These resolutions aimed to advance the discussion on how to better resolve the political quagmire of mercenaries, but did so only a piecemeal fashion.

In 1971, the Organisation for African Unity (OAU) released the *Declaration on the Activities of Mercenaries in Africa*,[35] which culminated in the signing of the *OAU Convention for the Elimination of mercenaries in Africa* (*OAU Convention*) in 1977.[36] Notwithstanding the fact that the convention was particular to Africa, it was significant because it was the first time that an international legal instrument provided a definition of a mercenary and attributed individual criminal responsibility for the act of mercenarism. Article 1 of the convention provides that:

A mercenary is any person who:

a) is specially recruited locally or abroad in order to fight in an armed conflict;

b) does in fact take a direct part in the hostilities;

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[29] *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2465, UNGAOR Supp, 18 at 4, emphasis added.
[30] GA Res. 2625 UNGAOR Supp. 28
[31] of 11 December 1969
[32] of 14 December 1970
[33] of 12 December 1973
[34] of 14 December 1974
[35] CM/St. 6(XVII), 15-19 June 1971.
[36] *Convention for the Elimination of mercenaries in Africa*, 3 July 1977, OAU CM/817 (XXIX), Annex II Rev. 1 (entered into force 22 April 1985).

c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;
d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
e) is not a member of the armed forces of a party to the conflict; and
f) is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.

The definition of "mercenary" was crafted as a direct response by African states that were seeking to challenge the practice of foreign and colonial powers hiring mercenaries to combat legitimate liberation movements.[37] As a result, it is evident that the definition is particularly narrow in its scope. It focuses on motivation, nationality, and acts of joining another state's armed forces, criteria that can easily be skirted. As the United Kingdom's *Diplock Report* had noted:

> Any definition of mercenaries which required positive proof of motivation would … either be unworkable, or so haphazard in its application as between comparable individuals as to be unacceptable. Mercenaries, we think, can only be defined by reference to what they do, and not by reference to why they do it.[38]

At this point in the history, there was clear tension and divergence in the political interest and approaches toward the regulation of mercenaries between the East and the West. For example, the contentious paragraph on mercenaries in the UN General Assembly's *Resolution 2465*, which had

[37] Burmester, *supra* note 22 at 40.
[38] *Report of the Committee of Privy Counsellors appointed to inquire into the Recruitment of Mercenaries* (August 1976) Cmnd 6569 at para 7.

catalysed further action at the UN and on the international level, had been introduced by the Soviet Union on behalf of a number of Eastern European states at the end of the session.[39] Western European states only voiced reservations, however, after realising that the resolution had been adopted as a whole, without debate on that paragraph. Consequently, with no immediately apparent point of conciliation between the two sides, the challenge of how to regulate mercenaries continued to a political issue that required sustained international attention and engagement.

The 1976 *Luanda Draft Convention on the Prevention and Suppression of Mercenaries* is an example of the continued attention and importance that was attached to tackling the question of states' regulation of mercenaries. The draft convention condemned mercenarism as "part of a process of perpetuating by force of arms racist colonial or neocolonial domination over a people or State."[40] The draft convention, prepared by a commission convened by the revolutionary Marxist government of Angola in Luanda, was released on the same day that an Angolan court sentenced three convicted mercenaries to death and nine others to lengthy prison sentences.[41]

Progress on a much broader geographic scale only came later in the collective form of *Additional Protocol I to the Geneva Conventions* (*Additional Protocol I*),[42] which was drafted between 1974 and 1977 at the Diplomatic Conference of Humanitarian Law, and the *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries* (*1989 Convention*), drafted between 1980 and 1989.[43] It is somewhat surprising, or perhaps not, that the two instruments diverge in their approaches toward mercenaries, despite the fact that they were

[39] Abraham, *supra* note 22 at 91.
[40] Luanda Convention, Preamble, para 2.
[41] Laura Dickinson, "Mercenarism & Private Military Contractors" in M Cherif Bassiouni, ed, *International Criminal Law: Sources, Subjects and Contents*, 3d ed (Leiden: Martinus Nijhoff Publishers, 2008) at 360.
[42] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 (entered into force 22 April 1985).
[43] *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, 4 December 1989, 2163 UNTS 75 (entered into force 20 October 2001).

drafted in close succession and debated in fora that extend beyond the OAU. To this extent, Laura Dickinson describes the General Assembly's approach on the matter as "schizophrenic".[44] "On the one hand, concerns about the use of mercenaries to combat wars of national liberation, particularly among the developing states of the south, prompted treaty language that penalizes mercenaries. Yet, due to many states' fears about the possibility of outlawing all uses of private military contractors, the treaties define mercernarism in a way that is ultimately difficult to establish."[45]

The definition of "mercenaries" in Article 47 of *Additional Protocol I* ignored foreigners who integrated into the armed forces of another state, such as the Ghurkas in the British Army or the French Foreign Legions, who were motivated by politics or ideology, as well as individuals who acted as trainers and advisers but nevertheless had an impact on the conflict. This definition, which could be viewed as a closer reflection of customary international law, as it stood, on the matter, worked toward the interests of Western colonial states. The definition in the *1989 Convention*, by contrast, is much more inclusive. It is not limited to international armed conflict, and individuals need not take part in the hostilities to be considered mercenaries,[46] unlike the definitions in *Additional Protocol I* and the *OAU Convention*. Taulbee discusses some of the background positions leading to the production of these instruments. When it came to defining mercenaries for *Additional Protocol I*, the United States, the United Kingdom, and other OECD countries were steadfast in their position that criminal liability could only arise from particular acts of war. Delegates from the Soviet Union and other socialist states, by contrast, sought a broader definition that would criminalise an individual who fulfilled the relevant criteria, and thus also

[44] Dickinson, *supra* note 41 at 358.
[45] *Ibid.*
[46] See Article 47(2)(b) of the *1989 Convention*.

mere enlistment without the commission of particular acts of war.[47] This latter position was adopted in the *1989 Convention*.

This brief cursory overview serves to highlight some of the challenges that have arisen for state in trying to develop an appropriate legal framework for mercenaries, and now also for PMSCs. The lone universal international treaty in the area, the *1989 Convention*, was only able to attract 34 state party signatories, which do not include any of the larger PMSC contracting or home states. And with the shift from mercenaries to PMSCs as the latter began to emerge at the end of the Cold War, the task has not become any easier. Many of the definitions provided for mercenaries are not applicable to PMSCs due to the nature of the services that they provide, the range of clients that they work for, and the circumstances and situations within which they operate. More importantly, while PMSCs and their contractors may have engaged in armed conflict on behalf of a state or even have been integrated into a state's armed forces during the earlier periods of their history, this rarely happens today, if at all.[48]

In the meantime, the UN has made further efforts to try to grapple with PMSCs.[49] At present, the two UN working groups in this area are the WG on the Use of Mercenaries[50] and the Open-Ended Intergovernmental WG.[51] Further, with the annual value of the global PMSI

[47] Taulbee, *supra* note 28 at 353-354.
[48] Or so they claim. Singer, *Corporate Warriors*, *supra* note 10 at 95, citing Daniel McGrory & Nicholas Woods, "Soldiers for Sale", *London Times* (9 May 1998) reports of a retired former major from the British Parachute Regiment, who then worked for a PMSC, as saying, "If we do operate in civil wars, we are there as 'advisers' or 'trainers'. But, of course we are on the frontline, and the excuse is so that we can see if our training is working."
[49] This includes the Special Rapporteur on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self Determination, in 1987, the UN Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self Determination, which replaced the Special Rapporteur in 2005, and then the Open-ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies, which was founded in October 2010.
[50] The UN Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self Determination was established by Resolution 2005/2 of the Commission on Human Rights.
[51] The Open Ended Working Group was established by UNHRC Resolution 15/26.

estimated to be well into the multi-billion-dollar mark,[52] it is safe to say that PMSCs are here to stay. Consequently, in this thesis, I do not intend to discuss the morality of the PMSI or whether it is a good or a bad thing. I take PMSCs' presence and growth as a fact. And if that is the case, then we need to know how to respond appropriately through the development of appropriate and adequate regulatory frameworks and, in particular, grievance mechanisms for harm inflicted by PMSCs in the course of doing business.

Paving a Way Forward

This thesis focuses on and contributes to the development of a remedial mechanism for victims of human rights abuses by PMSCs. Criminal prosecution is an important process in responding to harm committed against persons or property, but so is civil recourse. While the former addresses society's response to a particular illegal action, the latter attempts to provide redress to the victim for the harm that they may have suffered personally. In the context of PMSC transgressions, the reality is that more attention has been given to addressing the criminal aspects over the civil. This lack of attention can and does result in acute practical and jurisprudential challenges for victims seeking civil remedies for harm committed by PMSCs, particularly in fragile and conflict-affected states where PMSCs tend to operate.

For example, in the wake of the Nisour Square incident, victims had to pursue Blackwater's contractors in American courts rather than Iraqi courts in order to obtain a civil remedy.[53] The

[52] Experts are all in consensus that it is difficult to value the size of the market for a multitude of reasons, but in particular because of the non-disclosure of contracts or the complete and known registration of PMSCs around the world. However, estimates from industry experts have varied between annual revenues of $20 billion to $100 billion. See e.g. Sean McFate, *The Modern Mercenary* (New York: Oxford University Press, 2014) at 19 citing, for those two figures respectively, "Interview with Doug Brooks", *Frontline*, 22 March 2005 and "Interview with Peter Singer", *Frontline* (22 March 2005).

[53] *Estate of Himoud Saed Abtan et al. v. Prince et al.*, 1:09cv615, 1:09cv616, 1:09cv617, 1:09cv618, 1:09cv645, 1:09cv1017, 1:09cv1048 (6 January 2010).

inability to obtain a remedy in their home courts due to a status of forces agreement that gave primary jurisdiction to US courts over Iraqi courts must have presented considerable obstacles of both a practical and jurisprudential nature. These obstacles may have arisen through the time, travel, cost, and probable cultural shock of pursuing litigation in the United States as opposed to Iraq; the procedural legal challenges of consolidating the claims of 22 injured Iraqi nationals and the families of eight deceased individuals into a single case; the challenge of presenting evidence and witness testimony so far away from the place of the incident; and/or the challenge of having to present substantive arguments on the basis of idiosyncratic American legal principles.[54] Similarly, in the Abu Ghraib cases, little progress has been made in the victims' quests to attain compensation for the well-documented abuse that took place at the prison. After eight years of litigation, which commenced in 2008 in the Eastern District of Virginia on behalf of only four victims from Abu Ghraib, the matter is still yet to be resolved.[55] CACI International denies any wrongdoing and claims that, in any case, they are not liable for alleged torture because they were acting under the complete control of the military.[56]

Perhaps the difficulty in achieving appropriate laws and regulatory frameworks could be boiled down to a failure to communicate: an inability to achieve consensus among states at the international level. But this view would assume that a response at the international level alone can fix the problem—an incorrect assumption. International law as a product of primarily state-based interaction is a necessary but insufficient tool for achieving appropriate regulation in the global PMSI. As is the case with all global business sectors, there are now a multitude of both state and

[54] As it so happens, the case was settled on January 6, 2010, for an undisclosed amount. *Ibid*, online: *https://ccrjustice.org/sites/default/files/assets/1.6.10%20Order%20dismissing%20case%20due%20to%20settlement_2.pdf.*

[55] *Al-Shimari v CACI International*. For a summary of the case proceedings, visit the Center for Constitutional Rights website, online: http://ccrjustice.org/home/what-we-do/our-cases/al-shimari-v-caci-et-al.

[56] "Will Anyone Pay for Abu Ghraib?", Editorial, *The New York Times*, 5 February 2015; Bierman, *supra* note 3.

non-state actors in the global PMSI acting and interacting in a global normative space in a manner that defies current Westphalian, state-centric approaches to regulation. There are a multitude of actors in this industry with a stake in its operation and continued existence. Those actors are not merely passive "law abiding" entities. The failure to hold PMSCs to account pays testament to this fact. Rather, they are also influential and experienced "law inventing" actors, actors with the capacity to create law. Recent transnational governance frameworks founded upon codes of conduct such as the *International Code of Conduct for Private Security Service Providers*[57] (ICoC) and its oversight body exemplify this law-creating function. Consequently, rather than assume that states alone have the capacity, expertise, and legitimacy to regulate this global business sector, there needs to be a paradigmatic shift to a post-Westphalian approach to regulation that recognises the importance of communicating and collaborating with the PMSI's non-state actors in paving the way forward.

My overall approach to addressing this matter, that is, how we can provide efficient, effective, and consistent access to legal remedy, is in two steps. In the first step, I outline a global governance framework that I term a "global regulatory network" (GRN). The GRN would provide the PMSI with an appropriate global governance framework that captures and is responsive to the nature of global business sectors and the multitude of actors and practices that constitute them. In the second step, the GRN then provides us with an institutional framework within which a remedial mechanism can be designed on the basis of clear, uniform laws and standards that are applicable to PMSCs. As such, this proposal goes beyond existing proposals for the use of international arbitration for business and human rights related matters to the extent that it provides for a much more robust, inclusive, and participatory governance system to support the effective operation of

[57] The International Code of Conduct for Private Security Providers, online: <http://icoca.ch/>.

the remedial mechanism.[58] The thesis is divided into nine chapters that develop this two-step approach.

Chapter One focuses on the current avenues available to a claimant to seek reparations for harm suffered at the hands of a PMSC. Its aim is to demonstrate the difficulties posed by these avenues, which are of two main strands: the jurisprudential and the practical. The jurisprudential aspect of the chapter discusses how remedies vary depending on whether the PMSC is providing services on contract to a state or non-state actor. I use a comparative approach across national laws and classes of actors (states, international organisations, corporations) to show how remedies vary due to issues of jurisdiction and applicable law (national or international law). I also discuss the problems with current grievance mechanisms offered by PMSCs. Subsequently, I identify associated practical obstacles to attaining a remedy. These include factors such as the cost of pursuing legal action; inaccessibility of courts; lack of state resources for judiciaries; lack of trust in state judicial mechanisms; lack of sensitivity to gender-based violence and crimes; and others.

Chapter Two assesses the current state of regulation in the industry across its multiple governance levels—the national, the transnational, and the international. I show how part of the challenge in attaining civil recourse is due to divergent approaches to regulation and an inability to achieve congruence across the governance levels. This has the effect of rendering the process for obtaining legal remedies inefficient, ineffective, and inconsistent.

[58] See e.g. the proposal put forward by Claes Cronstedt & Robert Thompson, *An International Arbitration Tribunal on Business and Human Rights* (2015), online: <https://business-humanrights.org/sites/default/files/documents/Tribunal%20Version%205.pdf>. The proposal is still very much in its development stages. Further, as the remedial mechanism envisaged in this dissertation forms a pivotal part of an operative governance system, its reach goes beyond singular issues, as was the case with Barrick Gold's grievance mechanism focus at its Porgera mine on crimes of sexual violence committed by its security personnel. See e.g. Yousuf Aftab, *Pillar III on the Ground: An Independent Assessment of the Porgera Remedy Framework* (2016), online: <http://www.enodorights.com/assets/pdf/pillar-III-on-the-ground-assessment.pdf>.

In Chapter Three, I begin to describe how we could reform the industry's regulatory framework through the development of a GRN. The GRN is an inclusive global governance framework that unites all industry participants in the enterprise of creating relevant law. As such, it provides not only appropriate, uniform substantive laws for industry participants, but also procedural laws for implementing those substantive laws in a way that promotes efficiency and effectiveness. The GRN is unique in the way that it allocates responsibility for functions to actors not on the basis of their status as public or private, but rather on their capacity to carry out these functions. The chapter employs a comparative methodology and draws from frameworks used to regulate anti-doping, international civil aviation, and safety in the maritime industry.

Chapters Four and Five discuss the law of the GRN. At present, there is much debate surrounding the legality of the norms produced in frameworks such as the GRN. I argue that the norms produced within the GRN are legal: that they are law. I reach this conclusion on the basis of the nature of the interactions among participants, the shared agreements reached, and the expectations that they have of one another as a result of those interactions. Collectively, these observations point to an enterprise of lawmaking as expounded by Lon Fuller. The classification of these norms as law is important because it grants greater legitimacy to the norms both within and without the GRN, and enhances the nature of the obligations that industry participants assume. Further, acknowledging the GRN as a legal order that is jurisprudentially equal to any other legal order, such as the public international legal order, provides us with the opportunity to invest in an alternative to the predominant Westphalian, state-centred regulatory frameworks that are increasingly failing to keep up with the evolving nature of global business sectors more generally.

With the legal normativity of the GRN having been established, Chapter Six lays the groundwork for the adjudication of "business and human rights" violations outside of state-based

legal institutions. This is a proposition about which some people have reservations, and this chapter is meant to allay those fears by providing a series of arguments as to why we should not be afraid to make that leap.

Finally, Chapters Seven to Nine deal with the proposed grievance mechanism itself. I provide a procedural outline for the mechanism, based on international arbitration, and show how its flexibility can allow us to overcome some of the challenges raised in Chapter One. As such, the chapters discuss the conceptualisation of the grievance mechanism within the GRN (Chapter Seven), the jurisprudential specificities that overcome challenges of jurisdiction and applicable law (Chapter Eight), and other associated features that respond to access to justice concerns (Chapter Nine).

Throughout the course of drafting this thesis, I have often been asked why I think PMSCs would sign up to this mechanism and more regulation. The answer, I think, is counterintuitive. PMSCs rake in significant annual revenues, notwithstanding the fact that they are mired in bad press and perceived sceptically, at best. However, they stand to earn significantly more if they can show themselves to be a transparent and accountable industry that abides by relevant laws and takes issues such as doing the right thing and righting wrongs seriously. If they can do that, then the legitimacy bestowed on their industry will provide so many more business opportunities for them. After all, it was only in 2005 that Kofi Annan, as the then UN Secretary General, was considering using PMSCs as UN peacekeepers, but then decided against it, reasoning that "the world may not yet be ready to privatise peace".[59] Thus, adopting a grievance mechanism such as

[59] UN Press Release SG/SM/6613/Rev.1 26 June 1998. See also Victor-Yves Ghebali, "The United Nations and the Dilemma of Outsourcing Peacekeeping Operations" in Alan Bryden & Marina Caparini, eds, *Private Actors and Security Governance* (Zurich: Lit Verlag, 2006).

the one proposed in this thesis may be viewed as a step that industry participants could take to achieve greater accountability, legitimacy, and profitability.

In concluding this Introduction, two final points should be noted. First, while I place a heavy emphasis on trying to develop a legitimate grievance mechanism that is responsive to the needs and concerns of victims, I did not conduct any formal fieldwork or engage with PMSC victims directly. This thesis is largely the product of desktop-based research and what I perceived to be gaps in the literature and policy-discussion. Second, this thesis is a modest attempt to contribute to the paradigmatic field of business and human rights. While I focus on PMSCs, I bear closely in mind that PMSCs are just an example of transnational enterprise. There has been considerable progress made through the promulgation and widespread adoption and endorsement of the *UN Guiding Principles on Business and Human Rights*,[60] but more yet still needs to be done in terms of implementation. Consequently, in proposing a regulatory framework and associated grievance mechanism, I hope that the insights gained from my theoretical and practical innovations can advance the academic and policy discussions on governance and access to remedies in global business sectors more broadly.[61]

[60] Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, UN HRCOR, 2011, UN Doc A/HRC/17/31 (21 March 2011), online: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.
[61] See e.g. OHCHR, *OHCHR Accountability and Remedy Project: improving accountability and access to remedy in cases of business involvement in human rights abuses*, online: <http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx>.

Chapter One: The Current Avenues to Recourse against PMSCs

Introduction

This chapter concerns the remedial avenues that are currently available to victims of harm by PMSCs. In providing a cursory overview of these avenues, which include state and non-state, judicial and non-judicial mechanisms, I aim to show how collectively the remedies available are inconsistent, inefficient, and ineffective. Given the fact that the PMSC is a service provider, its varying contractual relations with a range of public and private actors could provide alternative remedial avenues for victims seeking redress. These may include actions against contracting states for violations of state responsibility under international law through attribution; claims against territorial or contracting states for failure to ensure standards set out in international human rights law through a duty of due diligence; or claims against other corporations and NGOs for complicity in those violations. But, while pursuing civil action against these actors may provide additional avenues for recourse, albeit with challenges of their own, considering the whole gamut would detract from trying to solve a focal issue that continues to perplex regulators, activists, and enforcement authorities. Consequently, while there may be multiple avenues for pursuing reparation arising from harm committed by a PMSC, I am going to focus solely on the avenues available against the PMSC directly.

I have structured the chapter to reflect the same structure as that employed for the Third Pillar of the *UN Guiding Principles*' 'Access to Remedy'. As such, there are four sections to this chapter. In the first section, I use a comparative methodology to present a short exposition of the challenges in seeking remedies through state-based judicial mechanisms, that is, the courts. Given that civil actions are typically pursued in either the PMSC's home state or in the territorial state,

the state where the PMSC was conducting its operations, I have chosen a few jurisdictions where there have been significant developments involving PMSCs to show impressionistically how access to remedies varies across national jurisdictions. In the second section, I assess the performance of a prominent state-based non-judicial mechanism, the *OECD Guidelines for Multinational Enterprises*' National Contact Point system. The third section discusses the state of recourse offered by PMSCs directly through their own grievance mechanisms. And finally, the fourth section raises the issue of "access to justice", a problem that affects both the efficiency and effectiveness of all of these mechanisms.

I. Claims Against the PMSC through State-Based Judicial Mechanisms: The Courts

This section considers civil remedies against PMSCs within state courts. Injured parties tend to pursue legal action against PMSCs within two kinds of state judicial fora: either the home state, where the PMSC is incorporated, or the territorial state, the jurisdiction in which the PMSC operates. Effective civil recourse typically relies upon a functioning court with jurisdiction and a relevant applicable law that provides a cause of action. The challenge with civil recourse against PMSCs in territorial state courts, however, is that the violation tends to take place in a fragile or conflict-affected state where the court's system capacity may be either limited or non-existent, and in some cases the courts may not even have the jurisdiction to hear the case due to a status of forces agreement. As such, the majority of victims of PMSC harm face significant practical hurdles in accessing a remedy through the alternative home state courts.[62]

[62] I discuss these practical challenges in the final section of the chapter, "The Problem of 'Access to Justice'".

In order to illustrate, this section provides a cursory overview of relevant states where there have been significant reported developments relating to PMSCs. It considers the jurisprudential elements necessary for a civil claim in the various sample jurisdictions, that is, (1) the establishment of jurisdiction; (2) consideration of *forum non conveniens*; (3) the determination of applicable law; and (4) the identification of an appropriate cause of action. Where relevant, I will highlight some of the instances in which contracts with state actors can affect the situation, in order to demonstrate the inconsistency and arbitrariness currently inherent in the remedies available. The last subsection provides a summary of potential remedies that are available uniquely through the United States of America judicial and military systems, given that these are also state-based.

a. The Establishment of Jurisdiction

When a claimant seeks to bring an action against an individual through civil proceedings in any judicial forum, the claimant must first establish whether the forum chosen for the claim has the adjudicative authority or jurisdiction to hear the claim.

i. Establishing Jurisdiction in the PMSC's Home State

In general, the courts of the PMSC's home state will have jurisdiction to hear claims against the PMSC by virtue of that state being the PMSC's place of incorporation, domicile, or principle place of business. In the United States of America, for example, a significant consumer PMSC services and the home state to many PMSCs,[63] general (personal) jurisdiction can be established over PMSCs that are either

[63] See e.g. United States Central Command (CENTCOM), *Quarterly Contractor Census Reports* (Deputy Assistant Secretary of Defense Program Support, 2017); Elke Krahman, "Choice, Voice, and Exit: Consumer Power and the Self-Regulation of the Private Security Industry" (2016) 1:1 EJIS 27; and Moshe Schwartz & Jennifer Church, *Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* (US Congressional Research Service, 2013) online: https://www.fas.org/sgp/crs/natsec/R43074.pdf.

incorporated or have their principal place of business there. Interestingly, in the case of *International Shoe Co. v State of Washington*, the United States Supreme Court has also ruled that 'specific' or 'general' jurisdiction *in personam* may be granted in particular cases involving foreign corporations.[64] There, the Supreme Court ruled that a state court may assert specific jurisdiction "when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on".[65] Alternatively, 'general jurisdiction' may be found where "the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising form dealings entirely distinct from those activities."[66]

In Canada, the mix of laws generated by nine common law provinces and one civil law province provides for slightly diverging requirements for jurisdiction. Canada's Supreme Court has determined that in order to establish jurisdiction in a Canadian court, there must be a "real and substantial connection" to the jurisdiction.[67] Such a connection may be established "between the subject-matter of the action and the territory where the action is brought," "between the jurisdiction and the wrongdoing," "between the damages suffered and the jurisdiction," "between the defendant and the forum province," "with the transaction or the parties," or "with the action."[68] When translated into the requirements for each province, the requirements are fairly stringent and restrictive, given that the type of activity being considered is most likely to occur outside of the province. For example, in the civil law jurisdiction of Quebec, Article 3148 of the *Civil Code* provides that jurisdiction is established where the defendant has his domicile or residence in Quebec; the defendant is a legal person, is not domiciled in Quebec but has an establishment in Quebec,

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[64] *International Shoe Co.* v. *Washington*, 326 US 310 (1945).
[65] *International Shoe Co.* at 317. This was further elaborated in the more recent case of *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US _ (2011) at 2 per Ginsburg J., citing *International Shoe Co.* v. *Washington*, 326 US 310 at 317, where she stated that "a [state] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State" "and that activity gave rise to the episode-in-suit." See also *Daimler AG* v *Bauman*, 571 US _ (2013).
[66] *International Shoe Co.*, *supra* note 64 at 318.
[67] *Toloson v. Jensen* 146 [1994] 3 SCR. 1022 at 1049, 77 OAC 81 at 108.
[68] *Morguard Investments v De Savoye* [1990] 2 SCR 1077.

and the dispute relates to its activities in Quebec; a fault was committed in Quebec; damage was suffered in Quebec; an injurious act occurred in Quebec; or the defendant submits to Quebec's jurisdiction.[69]

Finally, another region with a high concentration of registered PMSCs is the European Union. Within the European Union, all member states must entertain civil actions against PMSCs domiciled in their state as per Article 2 of *Brussels I*.[70] Article 2 provides:

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

As can be noted from this impressionistic overview of states with a high concentration of incorporated PMSCs, the initial hurdle for establishing a civil claim against a PMSC is relatively straight forward. Jurisdiction can be established simply on the basis of the PMSC being incorporated, domiciled, or having its principal place of business. The challenge, as will be discussed later in the chapter, however, lies in the practical obstacles of bringing the case in the PMSC's home state forum when the harm took place in another state.

[69] Section 3148, Civil Code of Quebec, CQLR c C-1991. See also David Antonyshyn, Jan Grofe & Don Hubert, "Beyond the Law? The Regulation of Canadian Private Military and Security Companies Operating Abroad" (2009) PRIV-WAR National Reports Series 03/09 at 15 [PRIV-WAR Canada] at 16.

[70] EC, *Council Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2001] OJ, L 12/1 [*Brussels I*].

ii. Establishing Jurisdiction in the Territorial State

Most civil action against PMSCs takes place in the home state as it is usually a more stable territory with a relatively developed framework governing PMSCs. Nevertheless, litigation in the territorial state is always still an option available to victims. This option is, however, often replete with procedural difficulties that may be compounded by contexts of political instability, fragility, or armed conflict. Given that the territorial state is often the jurisdiction where the harm occurred, its courts can claim jurisdiction over the ensuing litigation in most cases. The qualification of "most cases" is used because of the potential for a status of forces agreement (SOFA) to change that in some cases where a PMSC is providing services to a state.

A SOFA is an agreement concluded between a host country and one or more foreign states that are stationing forces in the host country. SOFAs establish the rights and obligations of the troops of the "sending state" and cover matters such as the wearing of uniforms, the carrying of arms, the entry and exit of personnel and property, and issues of criminal and civil jurisdiction.[71] The most important issue in any SOFA usually pertains to criminal and civil jurisdiction over actions committed by the foreign military or diplomatic personnel.

There are two kinds of jurisdiction that may be exercised under a SOFA — "exclusive" or "shared" jurisdiction. Where the states have agreed upon exclusive jurisdiction, this will mean that one state will retain jurisdiction over all acts of its personnel at all times. By way of example, one can consider the US-Mongolia SOFA.[72] Article X of that document provides, in part:

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[71] See Hannah Tonkin, *State Control over Primate Military and Security Companies in Armed Conflict* (Cambridge: Cambridge University Press, 2011) at 167. See also Mason, *supra* note 6; and Aurel Sari, "Status of Forces and Status of Mission Agreements under the ESDP: The EU's Evolving Practice" (2008) 19:1 EJIL 67.

[72] TIAS, *Agreement on Military Exchanges and Visits Between The Government of the United States of America and The Government of Mongolia*, 26 June 1996, online: US Department of State <http://www.state.gov/documents/organization/105696.pdf>.

> [The] United States military authorities shall have the right to exercise within Mongolia all criminal and disciplinary jurisdiction over United States Personnel conferred on them by the military laws of the United States. Any criminal offenses against the laws of Mongolia committed by a member of the U.S. forces shall be referred to appropriate United States authorities for investigation and disposition.
>
> …

The Mongolian government may request that US authorities waive their right to jurisdiction, but the US need only give "sympathetic consideration" to that request.

By contrast, where the states have agreed upon shared jurisdiction, if a law particular to a signatory state has been violated, that state may choose to exercise exclusive jurisdiction over that matter. Another signatory state may request a waiver of that exclusive jurisdiction, but there is no obligation on the state entitled to primary jurisdiction to waive it. It only needs to accord "sympathetic consideration" to the request. Where multiple states share a law that has been violated, further qualifications may be agreed upon by the signatory states in order to determine how jurisdiction will be allocated. For an example of such a framework, consider the NATO SOFA.[73]

[73] 4 UST 1792; TIAS 2846; 199 UNTS 67. Article VII:

> 1. Subject to the provisions of this Article,
>
> (a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;
>
> (b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the law of that State.
>
> 2.— (a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offenses,

Following the initiation of the Iraq and Afghanistan wars and the significant increase in PMSC activity that these brought with them, the current situation with SOFAs when it comes to PMSC liability is far from desirable. SOFAs have the effect of reducing the available legal avenues for victims seeking compensation and making these avenues significantly more onerous in practical terms. In two prominent instances where PMSC abuses have surfaced, that is, the Blackwater shooting of 37 unarmed Iraqi civilians in Nisour Square,[74] and the torture at Abu

> including offenses relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.
> (b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian components and their dependents with respect to offenses, including offenses relating to the security of that State, punishable by its law but not by the law of the sending State.
> (c) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include
>
> (i) treason against the State;
>
> (ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.
>
> 3. In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply:
> (a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
>
> (i) offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent;
>
> (ii) offenses arising out of any act or omission in the performance of official duty.
>
> (b) In the case of any other offense the authorities of the receiving State shall have the primary right to exercise jurisdiction.
> (c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.
>
> 4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.

[74] See Peter Singer, "Can't Win with 'Em, Can't Go to War without 'Em: Private Military Contractors and Counterinsurgency" (2007) Brookings Institute Policy Paper Number 4.

Ghraib prison,[75] the PMSCs involved benefitted from blanket immunity from Iraqi law by virtue of *Coalition Provisional Authority Order 17* (*CPA Order No. 17*).[76] This lack of accountability for PMSC abuse incensed many Iraqis.[77] Moreover, the situation was made worse, first, when the US State Department renewed its contract with Blackwater (under the new name of Xe Services) in 2008[78] and, second, when it became clear at the time that the US government had not taken any action against the PMSCs for these abuses even though they disciplined their own military personnel.[79] For many years, the Iraqi government challenged the validity and legality of *CPA Order No. 17*. It was only in 2008, when the US and Iraqi governments finally renegotiated the status of US troops in Iraq and then signed the Iraq-US SOFA, which took effect on January 1, 2009, that tensions were assuaged. The new SOFA recognises Iraq's primary jurisdiction over US contractors.[80]

b. *Consideration of* Forum Non Conveniens

Even where a claimant is able to establish a basis for jurisdiction, the claim may yet be turned away on the basis of the *forum non conveniens* doctrine. *Forum non conveniens* is a doctrine whereby a court may decline jurisdiction over a matter if the court deems that an alternative forum is more appropriate. While widely prevalent in common law jurisdictions, the doctrine is largely

[75] See George R Fay, *Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, (August 2004).
[76] *Coalition Provisional Authority Order No. 17 (Revised), Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq* [Iraq], No. 17 (Revised), 27 June 2004, online: RefWorld <http://www.refworld.org/>.
[77] Timothy Williams, "Iraqis Angered as Blackwater Charges Are Dropped", *New York Times* (2 January 2010).
[78] Mike Baker & Brian Murphy, "Blackwater Out of Iraq? No, Not Yet", *Washington Times* (20 April 2009).
[79] See *Saleh v Titan Corp.*, (2009) 580 F (3d) (DC Cir) 1 at 3.
[80] Article 12, *Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq* (17 November 2008).

unknown in civilian jurisdictions. In the latter, the jurisdiction of the court either exists or it does not, and discretion on the part of the judge as to the actual exercise of jurisdiction over a defendant against whom a suit has been filed is generally excluded.[81] One exception to this civilian tradition is the Canadian province of Quebec.[82] But even there, only two cases have been dismissed on the basis of *forum non conveniens*.[83]

Forum non conveniens is determined through a two-pronged test.[84] First, the court must determine whether an alternative forum for the matter before it is available and adequate. Should these determinations be in the affirmative, the court then proceeds to a second stage by assessing both the private interests of the parties to the dispute and the public interests of the court and society.

Forum non conveniens as a doctrine serves two purposes. The first is to prevent international forum shopping. Koebele notes that this purpose is one that is particular to and well-defended by the American legal system. The system's various features, including laymen jurors, contingency fees, punitive damages, and extensive discovery, mean that corporate defendants may often be at a significant disadvantage due to the costs involved and the bias against them.[85] This is

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[81] Michael Koebele, *Corporate Responsibility under the Alien Tort Statute: Enforcement of International Law through US Torts Law* (Leiden: Martinus Nijhoff Publishers, 2009) at 323 [Koebele]. It should be noted that in the province of Ontario, Canada, the Ontario Court of Appeals in the case of *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84 recognised a doctrine of 'forum of necessity', whereby a court may be able to claim jurisdiction where there is no "real and substantial" connection between the claim, the defendant and the forum. This doctrine, however, which is limited to exceptional circumstances, is yet to be addressed by the Supreme Court of Canada.

[82] Section 3135 CCQ.

[83] *Recherches Internationales du Québec v. Camior Inc.*, CS [1998] QJ no. 2554 (QL) and *Bil'in (Village Council) and ors v. Green Park International Inc. and ors*, Superior Court of Quebec, no. 500-17-044030-081 (18 September 2009).

[84] Koebele, *supra* note 81 at 325, citing three landmark US decisions: *Gulf Oil v Gilbert*, 330 US 501 (1947); *Koster v Lubermens Mut. Cas. Co.*, 330 US 518 (1947); and *Piper Aircraft v. Reyno*, 454 US 235 (1981). It should be noted that the tests for *forum non conveniens* in the US and in Canada differ from each other.

[85] Koebele, *supra* note 81 at 325, fn 13.

particularly the case in large international class action suits. In order to protect some level of fairness between the disputing parties, therefore, US courts readily accept *forum non conveniens* arguments if they are warranted. The second purpose of the doctrine is to prevent the court system from being overburdened at significant cost to the US taxpayer.[86]

Within the context of PMSC litigation, it is useful to note that a court may choose to deny a defendant's *forum non conveniens* application if the court finds that even though there is an alternative court, that court's country is embroiled in riots or civil chaos, that the country does not offer a reliable and functioning judicial system, that plaintiffs' lives might be in danger, or that the claim cannot be brought due to lack of legislation.[87] Given that the burden of proof lies with the party seeking to dismiss the case on the grounds of *forum non conveniens*, the doctrine may be less of a jurisdictional hurdle for PMSC victims. Indeed, in the case of *In re Xe Services*, the district court refused to apply the doctrine, on the basis that the defendant was unable to identify the availability of an alternative forum.[88] But as Symeonides notes in his recent annual choice of law survey, "[i]t is common knowledge that, when a foreign plaintiff sues in the United States in a case arising from a tort committed in whole or in part in a foreign country, the chances of dismissal on *forum non conveniens* (FNC) grounds are far greater than in comparable actions filed by American plaintiffs."[89]

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[86] *Ibid*.

[87] Lindsey Cameron & Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (New York: Cambridge University Press, 2013) at 651. See also Koebele, *supra* note 81 at 332.

[88] *In re XE Services Alien Tort Litigation*, 665 F Supp (2d) 569 (ED Va 2009) at 602.

[89] Symeon C Symeonides, "Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey" (2016) 64:1 AJCL (forthcoming).

c. Determination of Applicable Law

Where there is an international or foreign aspect to a civil litigation, courts must refer to their "conflict of laws" or "private international law" rules in order to determine which law will be applicable to the merits of the case at hand. Private international law rules are of national origin and are thus found in the laws of a state.[90] As such, the rules of private international law vary from country to country.[91] While this presents many opportunities for states to reflect particular public policy goals in the design of their private international law rules, this disparity across rules and their designation of applicable laws does not translate into the provision of consistent remedies for victims of PMSC harm.

For example, in the EU, the private international law regime for the determination of applicable law for extracontractual matters is governed by the *Rome II* regulation.[92] The general rule in *Rome II* is set out in Article 4 and has three tiers. It stipulates that (1) the *lex loci damni* applies unless,[93] (2) the person harmed and the person allegedly liable both have a habitual residence in the same country, in which case that country's law applies; but (3) if it is clear from all the circumstances that the tort is distinctly more closely connected with the law of another country, then the law of that country will apply. In contrast, Canada applies the law of the place where the tort was committed (*lex loci delicti*),[94] and the United States, under the current American *Restatement*, applies the "proper law of the tort" approach.[95] This latter approach requires a balancing of all relevant contacts for the purpose of determining the law with which the incident

[90] Michael Bogdan, *Private International Law as Component of the Law of the Forum* (The Hague: Hague Academy of International Law, 2012) at 27.
[91] *Ibid.*
[92] OJ [2007] L199/40.
[93] Lex loci damni refers to the law of the place where the injury occurs.
[94] *Tolofson v Jensen* (1994) 120 DLR (4th) 289.
[95] American Law Institute, *Restatement (Second) of the Conflict of Laws* §145 (1971).

has the strongest connection.[96] Further, while this is the most common approach in the United States, one must be cognisant of the complexity in this area of law that is posed by United States' federal system interacting with the individual prerogatives of each of its fifty states.[97] Symeonides has found that there are seven different methodological camps which include "traditional, significant contacts (or center of gravity), Restatement (Second), interest analysis, *lex fori*, better law, and "combined modern" approaches.[98] Finally, Australia applies the law of the place where the tort was committed in the case of intra-Australian torts, but its courts are more open when they consider what law to apply to torts committed outside of Australia.[99]

Litigants in PMSC cases will try to argue for the application of law from a jurisdiction where there is sophisticated and victim-friendly legislation particular to PMSC incidents.[100] That outcome, however, is not guaranteed. Subsequently, this limited sample of choice of law rules across a few jurisdictions serves to demonstrate how the remedial outcome for victims can potentially be inconsistent due to the fact that the law applicable to two cases where the harm suffered is the same will vary depending on the conflict rules that are applied in each case.

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[96] It should be noted that litigation in the United States is relatively distinct among jurisdictions due to the possibility of applying international law under ATCA, which has been the preferred route among litigants in cases against PMSCs.

[97] See Symeon Symeonides, *Choice of Law* (New York: Oxford University Press, 2016). At 17, Symeonides provides, "[w]hether by accident or by design, the states are the primary actors in the choice-of-law arena. They are, in principle, free to enunciate legislatively or judicially their choice-of-law rules (or approaches) and to resolve interstate or international conflicts of laws without federal approval. But in so doing, the states must remain within the outer limitations imposed by the federal Constitution, as interpreted by the United States Supreme Court."

[98] *Ibid* at 145ff.

[99] *John Pfeiffer Pty Ltd v. Rogerson* [2000] HCA 36.

[100] See the next chapter for a discussion of the current state of regulation and regulatory approaches across national jurisdictions.

d. Identification of an Appropriate Cause of Action

Once there has been a determination of the law that will be applicable to the merits of the case, a claimant must show that he or she has a valid cause of action under that law. A cause of action is the basis upon which claimants can allege that a legal right to which they are entitled has been violated by another person. Within most jurisdictions, legislation pertaining specifically to PMSCs has tended to focus on the regulation of the PMSC, with criminal consequences for the action of the PMSC and its contractors.[101] Legislation pertaining to civil remedies, by contrast, remains underdeveloped. Consequently, most causes of action in this regard fall under the remit of the general law of tort, delict, or extracontractual obligations, depending on the legal system. Indeed, every system, in some form or other, holds actors responsible under a law of civil remedies where that actor causes harm to another.[102] What is important in these cases is not so much the intention of perpetrators but rather their foresight or knowledge of the risk that the action they would engage in might cause harm to another individual. As such, courts generally tend to focus on the following questions when analysing questions of tortious liability:

- Was harm inflicted to an interest of the victim that is protected by law?

[101] See generally "Part V: Criminal and Civil Liability of Private Military and Security Companies and their Employees" in Francesco Francioni & Natalino, eds, *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (New York: Oxford University Press, 2011).

[102] See International Commission of Jurists, *Corporate Complicity & Legal Accountability*: *Volume 3: Civil Remedies* (2008) [International Commission of Jurists] at 10: "For a cross section of relevant laws in civil law jurisdictions see: Article 1382, and 1383 French Civil Code; Article 823, German Civil Code; Article 1, Section 1, Chapter 2, Finnish Tort Liability Act; Article 2043 Italian Civil Code; Article 1.089, Spanish Civil Code; Article 106, Section 1, Chapter VI, General Principles of the Civil Law of the Peoples' Republic of China; Article 20, Chapter 2, Philippines Civil Code; Article 1058 (1) and (2), Section 1, Division 9, Chapter 60, Armenian Civil Code; Article 2314 (read with Article 2284) Chilean Civil Code; Article 2341 Colombian Civil Code; Article 927 Brazilian Civil Code; *Air Canada v Mcdonnell Douglas Corp.*, [1989] 1 SCR 1554, Canadian Supreme Court. In common law jurisdictions there are often no general legislative/code provision which capture the instances in which tort liability can arise, rather the law is to be found in judicial decisions. See for example, in England and Wales on negligence: *Donoghue v Stevenson* [1932] AC 562; *Caparo Industries Plc v Dickman* [1990] 2 AC 605. For a comparative analysis of European legal systems see Article 1 (101), *Principles on European Tort Law*, online: European Group on Tort Law <http://www.egtl.org>."

- Did the individual's conduct contribute to the infliction of the harm?
- Did the individual know or would a prudent individual in the same circumstances have known that its conduct posed a risk of harm to the victim?
- Considering this risk did the individual take the precautionary measure a prudent individual would have taken in order to prevent the risk from materialising? [103]

The type of harm generally recognised may be to life, liberty, dignity, physical and mental integrity, or property. This is consistent with the "state law torts" or "common law tort claims" that were alleged in the US PMSC cases of *Saleh* and *Abtan*.[104]

e. Three Other Remedial Avenues through the United States: the *Alien Tort Claims Act*, *Federal Tort Claims Act*, and the *Foreign Claims Act*

The United States of America stands unique from other states to the extent that it offers three other potential remedial avenues for victims of PMSC harm that should also be mentioned in this discussion: the *Alien Tort Claims Act (ATCA)*,[105] the *Federal Tort Claims Act (FTCA)*,[106] and the *Foreign Claims Act (FCA)*.[107]

ATCA (also known as the *Alien Tort Statute*) is an interesting and topical alternative avenue that potentially allows for foreign claimants to take action against foreign corporations in an unrelated judicial forum for torts based on violations of international law. A federal statute enacted in 1789, ATCA provides that "[t]he district courts shall have original jurisdiction of any

[103] International Commission of Jurists, *supra* note 97.
[104] *Abtan et al. v. Blackwater Lodge and Training Centre, Inc. et al.* (1:07-cv-01831 (RBW)).
[105] 28 USC §1350.
[106] 28 USC §1346.
[107] 10 USC §2734.

civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." After a long period of dormancy, the statute was revived in the 1980 case of *Filártiga v Pena-Irala* when the Court of Appeals for the Second Circuit (Second Circuit) ruled that a non-US citizen could sue another non-US citizen for torts committed outside of the United States.[108] In that case, however, the action was brought against a state official for torture and unlawful killing, and so the statute's applicability against private parties was not addressed. Given the developments since then, there are three primary questions that are pertinent in the context of actions against PMSCs: first, whether ATCA is merely a jurisdictional statute or whether it grants a cause of action; second, the extent of its reach, that is, whether it has extraterritorial effect; and third, whether ATCA applies to actions against private parties.

In *Sosa v Alvarez-Machain*,[109] the US Supreme Court tackled the first of those three questions. It determined that ATCA is only jurisdictional and does not provide a cause of action for any violation of international law. The statute grants non-US citizens standing to assert claims based on tortious violations of international law as provided for under the federal common law. However, given the evolving state of the common law and the "law of nations" since the time of the statute's drafting, the court determined that alleged violations must be "specific, universal and obligatory" norms of international law such as the three mentioned by Blackstone at the time of the statute's drafting—violations of safe conduct, infringement of the rights of ambassadors, and piracy. In *Sosa*, therefore, while the court found that arbitrary detention had not reached the required threshold in international law, the court observed, *obiter*, that prohibitions of torture and extrajudicial killing had reached such a threshold for the purposes of ATCA.[110] The "specific,

[108] (1980) 630 F (2d) 876.
[109] (2004) 542 US 692; 124 S Ct 2739.
[110] *Sosa*, *ibid* at 732-33.

universal and obligatory" test in subsequent cases has, however, posed considerable difficulty for lower courts seeking to determine which torts fall within its remit.[111]

Given these difficulties, the Supreme Court further elaborated on the test in the later case of *Kiobel v Royal Dutch Petroleum Co*.[112] The court explained that the question "is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law."[113] It is not entirely clear how this elaboration makes the determination any easier for lower courts, but what can be drawn from it is that the norm of international law that is relied upon should be actionable by virtue of its being recognised under US law as a sufficiently specific, universal, and obligatory norm of international law.

With respect to the second question, the extent of the statute's territorial reach, the Supreme Court limited the application of ATCA to domestic acts on the basis of the presumption against extraterritoriality.[114] Due to the separation of powers principle, whereby the court restrains itself from overreaching into matters that affect foreign policy and fall under the remit of either the legislature or the executive, the court said that it required a clear indication of intended extraterritorial application under all interpretations of the statute. After considering the statute's text, history, and purpose, it found no such intention. Consequently, and contrary to the belief

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[111] See *Mora v. New York*, (2008) 524 F (3d) (2d Cir) 183 at 208; *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, (2008) 517 F (3d) (2d Cir) 104 at 117-23; *Bigio v. Coca-Cola Co.*, (2000) 239 F (3d) (2d Cir) 440 at 448; *Filártega v. Pena-Irala*, 630 F (2d) (2d Cir) 876 at 880.

[112] *Kiobel v Royal Dutch Petroleum Co.* (2013) 133 S Ct 1659.

[113] *Ibid* at 8.

[114] "That canon provides that '[w] hen a statute gives no clear indication of an extraterritorial application, it has none," *Morrison v. National Australia Bank Ltd.,* 561 US 247 (2010) (slip op., at 6), and reflects the "presumption that United States law governs domestically but does not rule the world," *Microsoft Corp.v. AT&T Corp.*, 550 US 437 (2007) at 454. This presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian American Oil Co.*, 499 US 244, 248 (1991) (Aramco)" per Chief Justice Roberts at 4.

following *Filártiga*, the court decided that it had no alternative but to limit the application of the statute. However, the court did leave open the possibility for plaintiffs to rebut ATCA's presumption against extraterritoriality if they could demonstrate that their claims "touch and concern the territory of the United States, …[and] do so with sufficient force."[115] In delivering the opinion of the court, Chief Justice Roberts remarked that "[t]here is no indication that ATCA was passed to make the United States a uniquely hospitable forum for the enforcement of international norms."[116]

Many states share this idea of a selective or limited form of universal jurisdiction for international torts. This shared acceptance is reflected in the *amicus curiae* briefs that were submitted by the United Kingdom, the Netherlands, and the European Union in *Kiobel*.[117] This limitation, though, is an unfortunate outcome for potential third-party victims of harm caused by PMSCs, particularly in light of the fact that the United States is the home state for a large proportion of the most active PMSCs.

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[115] *Kiobel*, *supra* note 112 at 1669 – "And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."

[116] *Kiobel, supra* note 112 at 12. See also *United States v. The La Jeune Eugenie*, 26 F Cas 832, 847 (No 15,551 (CC Mass 1822) per Justice Story, who said, "No nation has ever yet pretended to be the custos morum of the whole world…".

[117] Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and the Kingdom of the Netherlands as *Amici Curiae* in Support of the Respondents, 569 US (2013) (No 10-1491) at 2: "…just as international law imposes human rights obligations on States, it imposes restraints on the assertion of jurisdiction by one State over civil actions between persons that primarily concern another State. Jurisdictional restraints are a fundamental underpinning of the international legal order and are essential to maintaining international peace and comity. The Governments are, therefore, opposed to broad assertions of extraterritorial jurisdiction over alien persons arising out of foreign disputes with little, or no, connection to the United States ("U.S."). Such assertions of jurisdiction are contrary to international law and create a substantial risk of jurisdictional and diplomatic conflict. They may also prevent another State with a greater nexus to such cases from effectively resolving a dispute." See also Brief of the European Commission on Behalf of the European Union in Support of Neither Party, 569 US_(2013) (No 10-1491) at 4.

With regard to the third question, of whether one can pursue a claim against private persons under ATCA, there is still an unsettling air of inconclusiveness. In *Kadic v Karadzic*, the Second Circuit found that private actors could have an action brought against them under ATCA.[118] A similar conclusion was reached by the Court of Appeals for the Ninth Circuit in *Doe I v Unocal.*[119] But a few years later, the Second Circuit took a U-turn in the *Kiobel* case when it dismissed a complaint against the respondent, a corporation, on the basis that "the law of nations does not recognize corporate liability."[120] It was hoped that the Supreme Court would settle this question when it granted *certiorari*. Unfortunately, this did not turn out to be the case, as the question on actionable persons was overshadowed by the question of extraterritorial application. But perhaps some comfort can be drawn from *obiter* remarks by Chief Justice Roberts, in which he did not preclude the possibility of action against corporations under ATCA.[121] Notwithstanding these remarks, the courts ruled that claims could not be brought against private actors under ATCA in the two PMSC civil action cases prior to this Supreme Court decision.[122] This persisting ambiguity is troubling when one considers the prominence of US-registered PMSCs and their expanding reach and activities.

[118] (1995) 70 F (3d) (2d Cir) 232, 239.
[119] (2002) 395 F (3d) (9th Cir) 932.
[120] (2010) 621 F (3d) 111. A similar decision was reached in *Tel-Oren v. Libyan Arab Republic*, (1984) 726 F (2d) 774 (DC Cir) when the court found that the law of nations does not apply to private actors under D.C. Circuit law.
[121] In qualifying the applicability of ATCA, Chief Justice Roberts said, "Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices." at 14 of *Kiobel*. On this basis, I would reason that he would entertain an action against a corporation if it had a sufficiently strong connection to the United States. This would still be a high threshold to overcome as mere registration in the United States for a large multinational enterprise with activities around the world would not suffice.
[122] In *Saleh v Titan Corp.*, (2009) 580 F (3d) (DC Cir) 1, Senior Circuit Judge Silberman, giving the opinion of the court, said at 5 "Following our decisions in *Tel-Oren v. Libyan Arab Republic* (Edwards, J., concurring), and *Sanchez-Espinoza v. Reagan*, (1985) 770 F (2d) 202 (DC Cir), the district court held that because there is no consensus that *private* acts of torture violate the law of nations, such acts are not actionable under ATCA's grant of jurisdiction."

Where the PMSC has been operating under a contract with the US government as opposed to with a private actor, claimants may also be able to avail themselves of a remedy under the *Federal Tort Claims Act* (FTCA)[123] or the *Foreign Claims Act* (FCA).[124] The former statute provides a remedy against a PMSC where the contractor's employees are under a service contract and integrated into a military operational mission, whereas the latter provides for compensation to the inhabitants of foreign countries who have been caused injury, either to their person or property, by US armed forces overseas.[125] These remedies must be sought against the US government as opposed to the PMSC itself. There had also been hope that the *Torture Victims Protection Act of 1991* (TVPA)[126] would provide another potential remedy against PMSCs, but this was not to be the case following the Supreme Court's decision in *Mohamad v Palestinian Authority*.[127] The TVPA creates a cause of action against individuals in relation to torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." In *Mohamad*, however, the Supreme Court held that actions under the TVPA were restricted to natural persons in light of the statute's use of the word "individual", thus precluding claims against organisations or corporations.

This section has attempted to provide a cursory, impressionistic overview of some of the challenges that arise when pursuing recourse against PMSCs using state-based judicial mechanisms, that is, courts. The challenge arises primarily from the myriad number of state

[123] 28 USC Pt VI Ch171 and 28 USC §1346(b).
[124] 10 USC §2734.
[125] For a discussion of the FCA in relation to PMSCs, see Kristine A Huskey & Scott M Sullivan, "The American Way: Private Military Contractors & U.S. Law After 9/11" (2009) PRIV-WAR National Report Series 02/08 [Huskey & Sullivan] at 28-29. They note that out of hundreds of cases between 2001 and 2007, only one claim of killing or injury by contractor personnel has been brought forward. That claim was denied because "contractors are not governmental employees".
[126] PL 102-256, 106 Stat 73.
[127] 132 S Ct 1702; 566 US (2012).

judicial systems and their individual requirements both procedurally and substantively that may also potentially produce different outcomes and remedies for victims. While jurisprudentially this may seem straight forward enough to an international lawyer, there is a complexity to this process that makes accessing the remedy challenging for victims intending to pursue international litigation, particularly if they are coming from fragile and conflict-affected states. This section, therefore, is the first step in an argument as to why a much more uniform and harmonised dispute resolution process is required.

In the following section, I will discuss another kind of state-based mechanism that attempts to overcome some of the challenges presented by pursuing actions in state courts—the National Contact Point system under the *OECD Guidelines for Multinational Enterprises*. Based on an international treaty, the system should theoretically provide greater harmonization of applicable laws for claimants, as all states must adhere to the obligations contained within the legal instrument. In practice, however, this is far from the case.

II. Claims Against the PMSC through State-Based Non-Judicial Mechanisms: The National Contact Point (NCP) System

a. Outlining the Structural Framework

The *OECD Guidelines for Multinational Enterprises* (*OECD Guidelines*) are a set of international human rights and environmental standards recommended by states to multinational

enterprises.[128] They are a part of a wave of other international corporate social responsibility instruments, such as the *UN Global Compact*, the *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights 2003*,[129] the *Rio Declaration on Environment and Development 1992*,[130] and the *ILO Tripartite Declaration on Multinational Enterprises and Social Policy*.[131] These instruments have been developed to try to create a framework of voluntary principles and standards so as to ensure responsible business practices and good corporate citizenship. As so-called soft law, however, the instruments are non-binding with respect to states and corporations alike, and merely represent aspirations or, at best, ethical obligations upon the actors to whom they are directed.[132]

But this issue of the non-binding nature of soft law is where the *OECD Guidelines* positively distinguish themselves in two respects from these other instruments. First, while the guidelines themselves are not binding against corporations directly, they are an annex to the OECD *Declaration on International Investment and Multinational Enterprises* and thus binding upon the OECD member states and participating governments. Second, and as a result of this binding nature, the *OECD Guidelines* provide for the establishment of National Contact Points (NCPs) in each

[128] The guidelines themselves are a part of the OECD *Declaration on International Investment and Multinational Enterprises*, an international legal framework established to govern investment activity among the OECD's member states and adhering governments. As such, the framework addresses matters such as national treatment, conflicting requirements, and issues pertaining to investment incentives and disincentives.
[129] Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, 26 August 2005, UN Doc E/CN4/Sub.2/2003/12/Rev.2 (2003).
[130] *1992 Rio Declaration on Environment and Development*, 3-14 June 1992, UN Doc A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).
[131] ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 4th ed, online: International Labour Organization <http://www.ilo.org>.
[132] Alan Boyle, "Soft Law in International Law-Making" in, Malcolm D Evans, ed., *International Law*, 2d ed (Oxford: Oxford University Press, 2006). I am critical of the term "soft law" because it is a misnomer—either something is law or it is not. I elaborate further upon the difficulties of using this term in Section *I(b)(ii)* of Chapter Five. For further criticisms, see Christine Chinkin, "The Challenge of Soft Law: Development and Change in International Law" (1989) 38 ICLQ 850.

adhering state in order to facilitate and promote adherence to the guidelines.[133] More importantly, though, the NCPs, as a system of national offices, are meant to provide access to remedies for people harmed by companies' noncompliance with the guidelines. They received a grand endorsement from the G7 in June 2015 when the group's communiqué stated that the G7 "commit[s] to strengthening mechanisms for providing access to remedies including the National Contact Points (NCPs) for the OECD Guidelines for Multinational Enterprises. In order to do so, the G7 will encourage the OECD to promote peer reviews and peer learning on the functioning and performance of NCPs. We will ensure that our own NCPs are effective and lead by example."[134]

The *OECD Guidelines* lay out the operative framework for the NCPs through their "Procedural Guidance". The relevant section of the Procedural Guidance on remedies and dispute resolution provides:

> The NCP will contribute to the resolution of issues that arise relating to implementation of the Guidelines in specific instances. The NCP will offer a forum for discussion and assist the business community, employee organisations and other parties concerned to deal with the issues raised in an efficient and timely manner and in accordance with applicable law. In providing this assistance, the NCP will:

[133] Section I of the *Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises*, June 2000, provides that: "Adhering countries shall set up National Contact Points for undertaking promotional activities, handling inquiries and for discussions with the parties concerned on all matters covered by the Guidelines so that they can contribute to the solution of problems which may arise in this connection, taking due account of the attached procedural guidance. The business community, employee organisations, and other interested parties shall be informed of the availability of such facilities."

[134] G7 Leaders' Declaration arising from annual summit in Germany in June 2015.

1. Make an initial assessment of whether the issues raised merit further examination and respond to the party or parties raising them.
2. Where the issues raised merit further examination, offer good offices to help the parties involved to resolve the issues. For this purpose, the NCP will consult with these parties and where relevant:
    a. Seek advice from relevant authorities, and/or representatives of the business community, employee organisations, other non-governmental organisations, and relevant experts.
    b. Consult the National Contact Point in the other country or countries concerned.
    c. Seek the guidance of the Investment Committee if it has doubt about the interpretation of the Guidelines in particular circumstances.
    d. Offer, and with the agreement of the parties involved, facilitate access to consensual and non-adversarial means, such as conciliation or mediation, to assist in dealing with the issues.
3. If the parties involved do not reach agreement on the issues raised, issue a statement, and make recommendations as appropriate, on the implementation of the Guidelines.

The NCPs began to receive complaints from people harmed by corporations in 2000. Before addressing how well the NCPs have performed, however, I would like to point out several structural shortcomings inherent in this remedial mechanism. First, the effectiveness of the NCP system is hampered by its geographical constraints. Only adhering states are legally bound to

establish NCPs, and at present, these are the 34 OECD states and 12 non-OECD states.[135] Informally known as the "rich country club", the OECD's list of members does not include countries with complex environments where PMSCs are most likely to be operating. Consequently, while transnational enterprises based in states adhering to the *OECD Guidelines* will also be encouraged to adhere to them,[136] there will be no NCPs in non-adhering states that victims may readily access.

Second, while the *OECD Guidelines* may provide a set of voluntary principles for good corporate practice in line with international human rights and environmental standards, there is no universal standard applicable to multinational enterprises. The guidelines' "General Policies" provide that enterprises should "[r]espect the human rights of those affected by their activities consistent with *the host government's international obligations and commitments*."[137] In effect, this means that while OECD states hope that their corporations will adhere to the standards in the guidelines, the only real standards that corporations are bound by are those of the host state. Yet, some host states may have governance gaps as well as out-of-date or insufficiently rigorous national legislation in areas such as human rights, the prevention of bribery, or the environment.[138]

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[135] The 34 OECD countries are Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. The 12 non-OECD countries are Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Latvia, Lithuania, Morocco, Peru, Romania, and Tunisia.

[136] See para 2, 'Concepts and Principles', *OECD Guidelines for Multinational Enterprises*.

[137] See para 2, 'General Policies', *OECD Guidelines for Multinational Enterprises*. [emphasis added]

[138] UNHRC, *Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN HRCOR, UN Doc A/HRC/8/5 (2008) at 3, online: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>; UNHRC, *Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN HRCOR, UN Doc A/HRC/17/31 (2011) , online: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>; EarthRights International, *A Governance Gap: The Failure of the Korean Government to hold Korean Corporations Accountable to the OECD Guidelines for Multinational Enterprises Regarding Violations in Burma* (2009), online:<http://www.earthrights.org/sites/default/files/publications/A-Governance-Gap-Report.pdf>; see generally Georgette Gagnon, Audrey Macklin & Penelope Simons, eds, *The Governance Gap* (London: Routledge, 2009).

Consequently, people in these host states may not be benefitting from the full potential of the *OECD Guidelines*.

Finally, and perhaps most importantly, the NCPs do not guarantee a remedy. While their central objective may be to "further the effectiveness of the Guidelines," their method of dispute resolution involves merely providing a "forum for discussion", an offer of "good offices", and if the disputing parties agree, access to mediation and conciliation services. The entire process is premised upon trying to facilitate a rapprochement between the parties. This aspect of the *OECD Guidelines* is further debilitated by the fact that the determination of whether a claim will receive the NCP's assistance is made by unsuitable persons. The decision makers at first instance in this process are neither chosen by the parties, as would be the case in arbitration, nor by members of a judiciary. There are no criteria mandating that they be experts in a relevant field or have some legal training or education.[139] As such, I would submit that the NCP has no formal procedure that can inspire trust or to enable it to establish legitimacy as a remedial mechanism.

b. An Assessment of the NCP System's Performance

The NCP system has been the subject of damning reports from NGOs such as Amnesty International and OECD Watch.[140] OECD Watch, after reviewing 250 complaints filed by

[139] The Procedural Guidance on the institutional arrangements for NCPs provides that the NCP, "[m]ay be a senior government official or a government office headed by a senior official. Alternatively, the National Contact Point may be organised as a co-operative body, including representatives of other government agencies. Representative of the business community, employee organisations and other interested parties may also be included."
[140] OECD Watch, *Remedy Remains Rare* (2015) and Amnesty International, *Obstacle Course: How the UK's National Contact Point handles human rights complaints under the OECD Guidelines for Multinational Enterprises* (2016), online: <https://www.amnesty.org.uk/sites/default/files/uk_ncp_complaints_handling_full_report_lores_0.pdf>.

communities, individuals, and NGOs over the course of the NCP system's 15-year history, concluded that the NCP system is chronically weak. In particular, OECD Watch found that NCPs need to address several issues that include "practical and procedural barriers that prevent potential complainants from filing a complaint; a perceived lack of independence and impartiality of some NCPs; policies that prioritise confidentiality over transparency; frequent nonconformity with procedural timelines; and outcomes that are incompatible with the Guidelines."[141] In most cases, NCPs were found to be inaccessible because they imposed additional admissibility criteria beyond those stated in the guidelines' Procedural Guidance section and required claimants to meet excessively high standards of proof at the initial assessment stage. And for those claims that were considered, full remedies were not provided. OECD Watch defined a full remedy as consisting of three parts: cessation of the violence; reparation of harm that has occurred; and adoption of measures to prevent future violations. As OECD Watch found that the most common action taken by respondent corporations as a result of the process was to make changes to internal corporate policy, the group found that full remedies under this system are rare.[142] In the 250 complaints spanning 15 years of operation, only 35 cases (14%) have had some beneficial results that may have provided some measure of remedy. Further, and noting that some cases may fall into more than one category, only 20 cases (8%) have resulted in a statement either by the NCP or the company acknowledging wrongdoing; 20 cases (8%) have resulted in an improvement in corporate

[141] OECD Watch, *ibid* at 5.

[142] That said, OECD Watch found two cases where more action was taken. The first case involved Nidera, a Dutch agricultural company, which made concrete improvements to working conditions at its operations in Argentina: see *CEDHA et al. vs. Nidera*, OECD Watch Case Database, available at http://oecdwatch.org/cases/Case_220. The other case involved oil exploration in Virunga National Park, a UNESCO Heritage Site in the Democratic Republic of Congo (DRC), by SOCO International. In this latter case, SOCO International committed not to undertake any further oil exploration within the park unless UNESCO and the DRC government agreed that such activities were not incompatible with the park's World Heritage status. See *WWF vs. SOCO*, OECD Watch case database, online: <http://oecdwatch.org/cases/Case_307>.

policy or due diligence procedure, or both; only 3 cases have directly improved conditions for victims of corporate abuses; and none have resulted in compensation for victims.[143]

Amnesty International is equally critical of the system, and more specifically of the UK NCP. While touted as one of the more sophisticated NCPs, the UK NCP is criticised for lacking predictability, accessibility, and compatibility with the *OECD Guidelines*. Amnesty International's report finds that the admissibility criteria for claims are set inappropriately high, with two out of three claims being either rejected or referred to other NCPs, and that the claims that are admitted are evaluated against standards not congruent with the guidelines. For example, in a case related to PMSCs, *Lawyers for Palestinian Human Rights v G4S*, Amnesty International found that the NCP rejected one of the allegations because it found that the company's security equipment and services did not make a "substantial contribution" to the violations that were being committed in certain Israeli government facilities and operations.[144] But this test, as formulated by the UK NCP, is not reflected in the *OECD Guidelines*. Rather, the guidelines' "Commentary to the Human Rights" chapter states that "where an enterprise contributes or may contribute to such an impact [adverse human rights impact] it should take the necessary steps to cease or prevent its contribution."[145] This implies a lower threshold of culpability than the "substantial contribution" test that was adopted by the NCP.[146]

As a state-based non-judicial mechanism, the NCP system has the potential to be an effective remedial avenue for victims of PMSC harm. But Amnesty International and OECD

[143] OECD Watch, *supra* note 140 at 19, where the cases are also cited. Between 2012 and 2015, only 4 cases (4%) resulted in a statement of wrongdoing by either the NCP or the company; six cases (6%) resulted in an improvement in corporate policy or due diligence procedures, or both; one case (<1%) led to a direct improvement in conditions for victims of corporate abuses; and no case resulted in compensation for victims.
[144] Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises, Complaint from *Lawyers for Palestinian Human Rights v G4S, May 2014*, para 29.
[145] OECD, *OECD Guidelines for Multinational Enterprises*, Chapter IV, Commentary on Human Rights.
[146] Amnesty International, *supra* note 140 at 5.

Watch have shown that this is not the case for the time being. Both organisations have made similar recommendations to improve the structure and functioning of NCPs. These recommendations include the introduction of independent panels of experts from the fields of human rights and environmental law; the introduction of third-party oversight of the NCPs' operations; greater consistency with the *OECD Guidelines*' admissibility criteria and substantive standards; and the delivery of remedies as more meaningful outcomes.[147]

III. Claims Against the PMSC through Non-State-Based Non-Judicial Mechanisms: PMSC Grievance Mechanisms

It is also possible for victims of harm by PMSCs to obtain redress directly from the PMSCs themselves through their grievance procedures. This option, however, is not always available as PMSCs are under no international legal obligation to provide a grievance procedure. All international instruments that speak to the matter of grievance mechanisms, such as the *UN Guiding Principles on Business and Human Rights*,[148] only ever mention the provision of corporate grievance mechanisms as an ethical obligation. Rather, it is the expansion of transnational regulatory efforts that have made the most progress on this front, with the *International Code of Conduct for Private Security Providers* (ICoC)[149] being at the forefront of this movement.

[147] *Ibid* at 8-9 and OECD Watch, *supra* note 133 at 6-7.
[148] *The International Code of Conduct for Private Security Providers*, online: <http://icoca.ch/>.
[149] Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, UN HRCOR, 2011, UN Doc A/HRC/17/31 (21 March 2011), online: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

The ICoC is a product of a Swiss government initiative and the International Committee of the Red Cross and has been supported by regional PMSC associations such as the International Stability Operations Association,[150] the Pan-African Security Association,[151] and the Security in Complex Environments Group.[152] The ICoC is a progressive and commendable attempt to improve regulation within the global PMSI. It provides clear human rights standards that must be incorporated into PMSCs' internal corporate governance policies and become applicable to PMSCs in their operations and their subcontracts.[153] A grievance mechanism is provided for in paragraphs 66 and 67 of the ICoC.[154] It is meant to be supervised by the ICoC's oversight body, the International Code of Conduct for Private Security Providers Association (ICOCA), a

[150] International Stability Operations Association, online: ISOA <http://stability-operations.org/>.
[151] Pan-African Security Association, online: PASA <http://www.pasa-africa.org/>.
[152] Security in Complex Environments, online: SECG <http://www.sceguk.org.uk/>.
[153] Paras 16-19, ICoC.
[154]

66. Signatory Companies will establish grievance procedures to address claims alleging failure by the Company to respect the principles contained in this Code brought by Personnel or by third parties.

67. Signatory Companies will:

    a. establish procedures for their Personnel and for third parties to report allegations of improper and/or illegal conduct to designated Personnel, including such acts or omissions that would violate the principles contained in this Code. Procedures must be fair, accessible and offer effective remedies, including recommendations for the prevention of recurrence. They shall also facilitate reporting by persons with reason to believe that improper or illegal conduct, or a violation of this Code, has occurred or is about to occur, of such conduct, to designated individuals within a Company and, where appropriate, to competent authorities;
    b. publish details of their grievance mechanism on a publically accessible website;
    c. investigate allegations promptly, impartially and with due consideration to confidentiality;
    d. keep records about any such allegations, findings or disciplinary measures. Except where prohibited or protected by applicable law, such records should be made available to a Competent Authority on request;
    e. cooperate with official investigations, and not participate in or tolerate from their Personnel, the impeding of witnesses, testimony or investigations;
    f. take appropriate disciplinary action, which could include termination of employment in case of a finding of such violations or unlawful behaviour; and
    g. ensure that their Personnel who report wrongdoings in good faith are provided protection against any retaliation for making such reports, such as shielding them from unwarranted or otherwise inappropriate disciplinary measures, and that matters raised are examined and acted upon without undue delay.

multistakeholder association composed of PMSCs, states, and civil society organisations.[155] This mechanism, particular to the PMSI, has the potential to improve access to remedies for victims of PMSC harm. In its current state, however, the mechanism is riddled with shortcomings that need to be addressed.

Firstly, there is no prescribed procedure for the grievance mechanisms offered by PMSCs. Individual PMSCs are contractually obliged to offer such mechanisms, but they are currently allowed to fashion them as they please. Granted, the "[p]rocedures must be fair, accessible and offer effective remedies, including recommendations for the prevention of recurrence," but without any consistent, coherent, and publicised procedures, it will be difficult for potential claimants to assess and consider the mechanism as engendering any of those principles. This will also result in a significant lack of predictability, certainty, and reliance upon the grievance mechanism. Victims can never really know what to expect from each individual PMSC as the remedial process will vary from PMSC to PMSC.

Second, the grievance mechanism does not currently provide for a third-party decision maker at any stage of the process. Rather, each PMSC is responsible for conducting its own investigations and reaching a conclusion on the remedy and actions that it considers to be appropriate.[156] Such a process, irrespective of the principles that guide it, will suffer from at least a perception of lacking impartiality, objectivity, and independence. Without structural changes that can guarantee due process and procedural fairness, it will be difficult for the grievance mechanism to be considered truly accessible and legitimate in the eyes of the claimants that it hopes to serve.

[155] For a list of ICOCA members, see International Code of Conduct Association, "Membership", online: ICOCA <http://icoca.ch/en/membership>.
[156] Para 67(c) ICoC.

Third, and as a result of the previous two points, there is no guarantee that the remedies available at the end of this process will be full remedies. The ICoC merely provides that PMSCs should "have sufficient financial capacity in place at all times to meet reasonably anticipated commercial liabilities for damages to any person in respect of personal injury, death or damage to property."[157] There is no provision regarding how remedies should be conceived or delivered, as suggested by OECD Watch, which advocates that remedies should assure cessation of the violence; reparation of the harm that has occurred; and adoption of measures to prevent future violations. And for those PMSCs that will also become members of the ICOCA, the provisions in the ICOCA's *Articles of Association* do not provide any better recourse for victims. Where it sees that a remedy may not be appropriate, the ICOCA offers to recommend alternative avenues that the claimant may pursue, or actions that the PMSC may take. Where the PMSC has not acted in good faith, the ICOCA reserves the right to take action against the PMSC, which may include suspension or expulsion from the ICOCA. The ICOCA categorically refuses to impose an award on the disputing parties.[158] While some disciplinary action can be taken against the PMSC, the claimant would still be left trying to pursue access to an effective remedy.

The ICoC's grievance mechanism is a step in the right direction toward increasing access to remedies for victims of PMSC harm. Much more, however, needs to be done to make it satisfactory, given some of the shortcomings that have been identified above.

[157] Para 69 ICoC.
[158] Para 13.2.5 ICOCA Articles of Association.

IV. The Problem of "Access to Justice"

The final aspect to be considered in an assessment of the current avenues available to victims of PMSC harm, an aspect that affects all of the avenues that have already been discussed, is the broad matter of "access to justice". The United Nations Development Program (UNDP) defines "access to justice" as "the ability of people, particularly from poor and disadvantaged groups, to seek and obtain a remedy through formal and informal justice systems, in accordance with human rights principles and standards."[159] While access to justice concerns can be defined simply, responding to them is a complex and difficult challenge. In the context of PMSC harm, there are two factors that should be noted when assessing concerns about judicial and non-judicial mechanisms. First, as the claimants are likely to be poor and disadvantaged, it is equally likely that they may not be aware of their rights and thus of how to vindicate them. Second, the matter of vindicating those rights will be complicated by the fact that claimants may be living in complex environments. Complex environments are areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, where the rule of law has been substantially undermined and in which the capacity of the state authority to handle the situation is diminished, limited, or non-existent.[160] Beyond these two factors, there are particular access to justice concerns posed by the different kinds of mechanisms.

Beginning with state-based judicial mechanisms, that is, the courts, some researchers have found that local communities in countries with high levels of PMSC activity tend to be sceptical of courts and to favour more traditional, non-state justice fora.[161] The formality of courts tends to

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[159] UNDP, *Sharing Experience in Access to Justice: Engaging with Non-State Justice Systems & Conducting Assessments* (2010) at iii.

[160] 'Definitions', ICoC.

[161] See e.g. GSDRC, *Safety, Justice and Security: Topic Guide* (July 2016) at 13; UN WOMEN, "Non-State Justice Systems", online: <http://www.endvawnow.org/en/articles/1585-non-state-justice-systems.html>; UN WOMEN,

be viewed as being very foreign in comparison to more local conceptions of justice. Local claimants, therefore, may place little trust in state-based judicial institutions. Second, with the courts often being based in countries' urban centres while the majority of the population lives in rural areas, access to the courts can involve an onerous journey. Claimants living in the rural areas can easily become dissuaded from pursuing legal recourse because of the time and cost of pursuing the claim. This concern is particularly grave where the legal action may have international components to it due to matters of jurisdiction and international law. The international element would complicate issues of finding legal representation in the foreign jurisdiction and the logistical challenges of facilitating witness testimonies, evidence collection, and other procedural steps. Finally, courts in complex environments may not have the resources to support claimants through schemes such as legal aid, thus further diminishing claimants' chances of attaining a remedy.

Non-judicial mechanisms, at least if I consider the NCP system and the PMSC grievance mechanism, share similar issues in the context of "access to justice".[162] A primary concern that both have to address is that of accessibility—in many cases, claimants do not even know that the mechanisms exist or are available to them. Consequently, there is much work that needs to be done in terms of outreach and education of the local communities on the other options that are available to them besides the courts. This work, however, requires a significant investment in resources that may not always be available to these mechanisms. Second, once they know about these mechanisms, potential claimants may still not be able to access them because they are not well located or simply few and far between. Third, and in a fashion similar to state-based mechanisms, there may be a tension between international and local conceptions of justice. The NCP and the

UNICEF & UNDP, *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement* (September 2012).

[162] Several of the concerns raised here are reflected in the effectiveness criteria for non-judicial grievance mechanisms as provided in Principle 31 of the UN Guiding Principles.

ICoC are products of legislative processes occurring beyond local communities, and so the procedures involved may foster apprehension and distrust among local communities, thus further dissuading them from using these mechanisms. Relatedly, local communities may be hampered in their use of these mechanisms because of international staff who may clash with the local communities. This clash could be caused through failures to communicate. Both OECD Watch and Amnesty International have reported that NCPs often require claimants to bear the cost of translating their evidence and documents in order to submit their claims. Such added costs are an unnecessary burden for claimants utilising these mechanisms. Fourth, international staff may not understand or appreciate the particularities of the local context, which may impede their ability to serve claimants well. Viewed from the perspective of claimants, the international staff's failure to appreciate adequately the political, social, economic, gender, religious, or cultural intricacies of the local context may limit the appeal of these mechanisms for local communities.

Conclusion

This chapter has served to provide the backdrop for the rest of the thesis. In providing a cursory exposition of the current remedial avenues available to victims directly against PMSCs for harms caused by PMSCs, it has aimed to demonstrate how these avenues are riddled with challenges both jurisprudentially and practically. It has shown how the current remedial avenues, which include state and non-state, judicial and non-judicial mechanisms, can be inconsistent, inefficient, and ineffective. Victims therefore face significant challenges in trying to seek recourse against PMSCs. In the next chapter, I take a look at the state of regulation across the PMSI to show how divergent approaches to regulation have helped to cause this situation.

Chapter Two: Regulation in Disarray

Introduction

The need for access to remedies for victims of harm committed by PMSCs is a symptom of a nascent and underdeveloped regulatory framework across the industry. Indeed, commentators' criticisms of PMSCs operating in "legal vacuums"[163] is supported by a dearth of both civil and criminal cases against PMSCs as well as growing numbers of reports of PMSC wrongdoing.

The difficulty in developing appropriate regulation can perhaps be attributed to two primary factors. First, there is a divergence in the approaches to regulation taken by states. This divergence is reflected in the varied regulatory frameworks within states and has also resulted in a failure to produce a widely endorsed and applicable international convention specific to the PMSI.[164] As a consequence, PMSCs are able to profit from governance gaps within states through regulatory arbitrage. Second, while there has been a positive response to this problem by private actors within the industry, which have countered governance gaps through the promulgation of transnational regulation, there is perhaps too much transnational regulation and too much of it that lacks teeth. As a result, there has developed a kind of legitimacy crisis hampering the potential effectiveness of this transnational regulation. And these two factors, when considered together, demonstrate a lack of communication and congruence among actors regarding the global governance of the PMSI. It is regulation in disarray.

In order to present this situation of disarray, this chapter proves an overview of the current state of regulation within the global PMSI at the different levels of governance—the international

[163] See for e.g. Singer, "War, Profits, and the Vacuum of Law", *supra* note 18.
[164] See "Introduction" Chapter.

(Section I), the national (Section II), and the transnational (Section III). In doing so, the exposition will demonstrate the diversity in regulatory standards, the divergence in regulatory approaches, and the resultant lack of congruence across the governance levels. The type of regulation discussed in this chapter is broader than the matter of access to remedies, which was discussed in the previous chapter, as it also includes aspects pertaining to certification, licensing, vetting, and monitoring. It is also important to add that when considering the development of regulation, the method or the approach is just as important as the output, if not more so.

I. International Initiatives toward PMSC Regulation

While mercenarism may be regarded as the second oldest profession in the world, the modern representation of that profession, in the form of a corporate actor, is a phenomenon new to international law. And international law, unfortunately, has been slow to catch up and to respond to this corporate actor, the PMSC.[165] There is no international convention regulating the use of PMSCs. Rather, there is a codification of states' existing international legal obligations regarding PMSCs, the *Montreux Document*, and there is work being done by the UN to prepare and conclude a *Draft International Convention on the Regulation, Oversight and Monitoring of PMSCs*.[166]

The *Montreux Document* is a product of the collaboration between the Swiss government and the International Committee of the Red Cross (ICRC) and was drafted in response to growing concerns that PMSCs and the states that hired them were operating within a legal vacuum. As

[165] See "Introduction" Chapter.
[166] Drafted 13 July 2009. Its development is currently under the mandate of a UN Human Rights Council Open-ended intergovernmental working group, online: <http://www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/OEIWGMilitaryIndex.aspx>.

such, it is a codification of existing international legal obligations with respect to PMSCs. It is neither a legally binding international legal instrument nor does it create any new obligations for states. Its significance lies in the fact that it was a public affirmation by states that international human rights and humanitarian laws applied to PMSCs, that there is a *lex lata* of states' existing duties to protect human rights and to respect the laws of war when dealing with PMSCs, and thus that there is no legal vacuum.[167] Participation in the *Montreux Document*'s scheme has grown to fifty-four states from its original seventeen,[168] and three international organisations have joined through communications of support. They are the European Union, the Organization for Security and Co-operation in Europe (OSCE), and the North Atlantic Treaty Organization (NATO). The *Montreux Document* itself is divided into two parts. The first part provides what obligations a state may have, depending on its classification as a home, contracting, or territorial state. In the second part, the document provides 73 "good practices" that may allow states to meet those obligations.

The *Montreux Document*, however, suffers from a few structural weaknesses. First, it is primarily focused on and applicable to cases of armed conflict, as is stated within its Preface.[169] This is problematic given the range of clients to which PMSCs cater, the services they may offer, and the situations within which they may operate. Second, while its good practices may offer means for states to better adhere to their international legal obligations, they are still relatively

[167] James Cockayne, "Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document" (2009) 13:3 JC & SL 401.
[168] The original seventeen states were Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America. They have since been joined, in chronological order, by the Former Yugoslav Republic of Macedonia, Ecuador, Albania, Netherlands, Bosnia and Herzegovina, Greece, Portugal, Chile, Uruguay, Liechtenstein, Qatar, Jordan, Spain, Italy, Uganda, Cyprus, Georgia, Denmark, Hungary, Costa Rica, Finland, Belgium, Norway, Lithuania, Slovenia, Iceland, Bulgaria, Kuwait, Croatia, New Zealand, Czech Republic, Luxembourg, Japan, Ireland, Monaco, Madagascar, and Estonia.
[169] See para 2, "Preface", *Montreux Document*, which provides that, "this document recalls existing legal obligations of States and PMSCs and their personnel (Part One), and provides States with good practices to promote compliance with international humanitarian law and human rights law during armed conflict (Part Two)".

vague and could benefit from greater detail and clarity, which could be enhanced by other PMSI actors. Finally, while the *Montreux Document* has received the backing of large home and contracting states, such as the United States of America and the United Kingdom, there are not many territorial states that have done the same. The challenge this presents is that if territorial states tend to be those that are experiencing high PMSC activity due to conflict, fragility, and or political instability, then they are the countries that need the regulation the most. Their noticeable absence from the Montreux process is a worrying sign and could suggest that little is being done to ensure active compliance with their international legal obligations. This is the case in conflict zones across Africa and Latin America. A recent report that assessed the effectiveness of the *Montreux Document* five years after its launch in 2008 noted that "[i]n Latin America and the Caribbean region only four countries have endorsed the *Montreux Document*: Chile, Costa Rica, Ecuador, and Uruguay. The lack of interest of the region in the Montreux process is surprising considering PMSCs in the region are the most armed in the world."[170]

There has been some work undertaken to improve the state of international law in this area at the UN through the creation of several working groups[171] and the drafting of a UN-proposed international convention.[172] Progress, however, has been sluggish due to diverging national

[170] Rebecca DeWinter-Schmitt, ed., *Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document Legal Obligations and Good Practices* (2013) at 33, citing Graduate Institute of International and Development Studies, *Small Arms Survey 2011: States of Security* (2011), online: http://www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2011.html.

[171] This includes the Special Rapporteur on Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self Determination in 1987, the UN Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self Determination, which replaced the special rapporteur in 2005, and then the Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies, which was founded in October 2010.

[172] *Draft International Convention on the Regulation, Oversight and Monitoring of PMSCs*, drafted 13 July 2009. Its development is currently under the mandate of a UN Human Rights Council open-ended intergovernmental working group, online: <http://www.ohchr.org/EN/HRBodies/HRC/WGMilitary/Pages/OEIWGMilitaryIndex.aspx>.

positions on how the convention should be developed. At present, the two UN working groups in this area are the WG on the Use of Mercenaries[173] and the Open-Ended Intergovernmental WG.[174]

The WG on the Use of Mercenaries has been collating reports of regulatory frameworks in national PMSIs and has prepared the initial draft of a possible convention on PMSCs.[175] The Open-Ended Intergovernmental WG took over this project and is now working toward elaborating that draft convention. The draft convention advances discussions on the international regulation of PMSCs to the extent that it establishes an acceptable definition of PMSCs, it provides for both individual criminal liability and state responsibility, and it introduces an international committee for the registration and oversight of PMSCs. That said, the draft convention's grievance procedure among states is weak, it does not elaborate a sufficiently strong remedial procedure for PMSC victims, and it controversially attempts to delimit activities that can and cannot be outsourced to PMSCs through the creation of non-delegable "inherently governmental functions".

Reports from the Open-Ended Intergovernmental WG's first two meetings show that, while all states were in favour of improving regulation within the global PMSI, there were significant divergences on what they considered to be the best approach.[176] Some state delegations, coming largely from the Global South, such as those from Nigeria, Algeria, and Honduras, supported the elaboration of an international legally binding instrument to address current problems.[177] Others

[173] The UN Working Group on the Use of Mercenaries as a Means of Impeding the Exercise of the Right of Peoples to Self Determination was established by Resolution 2005/2 of the Commission on Human Rights.
[174] The Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies was established by UNHRC Resolution 15/26.
[175] UN Doc A/HRC/WG.10/1/2.
[176] UNHRC, *Summary of the First Session*, UN Doc A/HRC/WG.10/1/CRP.2 (2011) [Open-ended Intergovernmental WG 1st Session] and UNHRC, *Report of the Open-ended Intergovernmental Working Group to Consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies on its second session*, UN Doc A/HRC/22/41 (2012) [Open-Ended Intergovernmental WG 2nd Session].
[177] Open-Ended Intergovernmental WG 1st Session, *ibid* at paras 56-58, 60 & 62.

were open to the idea but thought that the conversation was premature; not enough had yet been done to clarify what the existing law on the subject matter was and how effective it was.[178] In so doing, they gave tacit support to the *International Code of Conduct for Private Security Providers* and the *Montreux Document*. And then states such as the United Kingdom and the United States of America, situated at the other end of the spectrum, were opposed to the idea of developing an international treaty.[179]

The divergences in regulatory approaches are emblematic of each country's history and relationship with PMSCs.[180] The regulatory approaches reflect competing politics regarding PMSCs, which become diffuse legal questions, as is often the case in public international law. This paragraph from the Open-Ended Intergovernmental WG's *First Session Report* exemplifies this:

> In relation to legal considerations relating to the elements in the draft convention, some delegations expressed concerns about the fact that some of the principles incorporated in the draft convention seem to run counter to existing legal principles, or principles that have been identified or are on the agenda of other fora, in particular the International Law Commission. Some delegations pointed out that it is problematic that the draft convention attempts to solve legal problems that remain under discussion by Member States, including in areas such as State responsibility, the implementation of the principle of the responsibility to protect, the regulation of the notion of legitimate self-defence and the use of force in international law. One delegation pointed out that the draft convention may prevent States from contracting out certain core State

[178] *Ibid* at paras 42.
[179] *Ibid* at paras 54 & 59;
[180] See Section II of this chapter.

> functions, the scope of which remains unclear and may vary from State to State. In addition, it was noted that the creation of a new treaty monitoring mechanism was inopportune at a time when the whole system of treaty bodies was being reviewed. Finally, it was mentioned that the draft convention did not take fully into account other legal frameworks that are currently being negotiated, such as the draft arms trade treaty. [181]

Such impasses are a common feature of multilateral instrument negotiations, which is why the incorporation of actors outside of the public international legal order into negotiations could help to better steer the conversation on issues that do or do not matter within a particular industry beyond the confines of the public international legal order. The inability to reach a consensus is reflected in the individual national approaches to PMSI regulation, and it is to these that I now turn.

II. State-Level Responses to PMSC Regulation

There is a vast discrepancy in the sophistication of regulatory frameworks for PMSCs across national jurisdictions. Key contracting and home states, such as the United States and the United Kingdom, tend to have more developed regulation because of the size of the PMSI within their countries and the value that PMSCs generate in their economies. Conversely, states that have a large number of PMSCs operating within their territories tend to be poorer countries with underdeveloped or poorly functioning regulatory frameworks. This underdeveloped regulation is

[181] Open-Ended Intergovernmental WG 1st Session, *supra* note 162 at para 43.

of particular concern because it is in these territorial states with complex environments that PMSC misconduct tends to be reported and not fully redressed.[182] Such an imbalance across states does not allow for the effective regulation of a global industry.

This section presents a few examples that demonstrate the spectrum of regulatory approaches and challenges across national jurisdictions. It approaches the question of national legislation through themes such as how various states view the legitimacy of the industry, their history with the industry, and their capacity to regulate it in order to draw out the diverging regulatory approaches among states. Consequently, this short exposition on national laws and approaches to PMSC regulation highlights some of the obstacles to effective global regulation that may arise from this divergence.

a. <u>On the Matter of Legitimacy</u>

First, states differ in their perceived legitimacy of the PMSI. While the United States and the United Kingdom look favourably upon the use of PMSCs, states such as Afghanistan and South Africa are in favour of limited use, if not an outright ban on their use. Consider the United States' history with PMSCS. The United States of America is the largest home and contracting state within the global PMSI. While the US government had previously made use of PMSC services during engagements in Somalia, Haiti, and Kuwait during the 1990s,[183] as well as the Kosovo War in 1998, more serious engagement with PMSCs began after the United States entered Afghanistan in

[182] 'Definitions', ICoC. Complex environments are "areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, where the rule of law has been substantially undermined, and in which the capacity of the state authority to handle the situation is diminished, limited, or non-existent."
[183] Singer, *Corporate Warriors*, *supra* note 10 at 143ff.

2001 and Iraq in 2003.[184] The exponential growth of engagement with PMSCs arose due to problems of poor planning, insufficient troop numbers, and the fear of having to admit these situations to the American public in the run up to the 2004 presidential elections.[185] Notwithstanding that it is widely accepted that this surge in PMSC contracting occurred, ascertaining precise figures regarding its size has proven quite challenging. Statistical reporting from US government sources has been complicated by challenges such as actually defining what a PMSC is, given the range of services that PMSCs can provide to the functionally different arms of the government, each of which is an institution of its own.[186] That said, the Congressional Research Service has reported that, between 2007 and 2012, the Department of Defense (DoD) had contract obligations in both Iraq and Afghanistan that were worth approximately $160 billion.[187] Contractors in those two theatres of war accounted for more than 50 per cent of the total military force, with the peak number of DoD contractors (US nationals, third-country nationals, and local nationals) in Iraq reaching 163,591 in December 2007 and in Afghanistan reaching a peak of 117,227 in March 2012.[188] Further statistics show that the US Agency for International Development (USAID) and the Department of State (DoS) spent $5 billion and $4 billion, respectively, in Iraq between 2003 and 2007.[189] Suffice it to say, the United States has been rather keen on the use of PMSCs with no signs of abatement of this trend.

[184] See Huskey & Sullivan, *supra* note 118.
[185] Singer, *Corporate Warriors*, *supra* note 10 at 243ff.
[186] Huskey & Sullivan, *supra* note 118 at 8-12; see also DeWinter-Schmitt, *Montreux Five Years On*, *supra* note 156 at 17.
[187] Moshe Schwartz & Jennifer Church, "The Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis & Issues for Congress" (2013) Congressional Research Service R40835 at 2.
[188] *Ibid* at 2, 24 & 25 (noting that these numbers include logistical support services not included in the MD definition of PMSCs.
[189] US Congressional Budget Office Report, *Contractors' Support of U.S. Operations in Iraq* (2008) at 3.

Similar usage and approbation of PMSCs can be found in the United Kingdom. The United Kingdom is the second largest home state for PMSCs, with 18 of the foreign PMSCs operative in Iraq between 2003 and 2011 having been registered there.[190] Among these PMSCs are some of the world's largest, such as G4S and Aegis World. The UK government is also a large consumer of PMSC services as demonstrated by the UK Foreign and Commonwealth Office's spending of almost £161 million in conflict zones between 2010 and 2013.[191]

South Africa, on the other hand, takes a starkly different approach toward regulating its PMSI. South Africa is home to a large number of PMSCs, many of them sprouting into existence at the end of apartheid in 1994. At that time, there was a readily available supply of highly skilled soldiers from the South African Defence Forces. And from this pool of soldiers emerged companies such as Executive Outcomes, which rose to a level of international recognition, or notoriety rather, due to operations in Angola and Sierra Leone.[192] According to Abraham, this development of the PMSI was at odds with the envisaged image and essence of the new South Africa. He comments that "[t]he export of South African nationals the world over as mercenaries in support of often dubious regimes clearly posed a source of major embarrassment for a government committed to upholding an international image reflective of the country's newfound status as human rights champion."[193] This involvement in the internal affairs of postcolonial African states and beyond helped to shape the South African regulatory approach to PMSCs: an outright ban on the export of mercenary services.[194]

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[190] DeWinter-Schmitt, *Montreux Five Years On*, *supra* note 156 at 20.
[191] UK Foreign & Commonwealth Office, *Response to Freedom of Information Act 2000 Request Ref: 0669-12* (6 September 2012), online at: Gov.uk <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/35502/0669-12.pdf>.
[192] Singer, *Corporate Warriors*, *supra* note 10 at 106-115.
[193] Abraham, *supra* note 22 at 85.
[194] Amelia Bester & Faustin Z Ntoubandi, "The Regulatory Context of Private Military and Security Services in South Africa" (2009) PRIV-WAR Report – National Report Series 18/09 at 3.

b. Diverging Regulatory Approaches

The United States, the United Kingdom, and South Africa are major players within the global PMSI but have different takes on the legitimacy of PMSCs. And thus there is divergence in how they manifest these positions on the legitimacy of PMSCs, with some advocating for strong legislation to regulate and others opting for self-regulation. In this instance, the United States and South Africa have adopted strong legislation, but the UK, which views PMSCs more favourably, has opted for a more *laissez-faire* regulatory approach.

In order to facilitate such extensive outsourcing, the US government has implemented a relatively sophisticated contracting process that spans several agencies and officials. The Office of Management and Budget (OMB) provides central guidelines to government departments and agencies as to what functions may be contracted out primarily through *OMB Circular A-76*.[195] Beyond this, there is a web of regulations and guidelines that provide for the licensing and registration of PMSCs as well as their conduct during operations.[196] Further, depending on the nature of the service being provided, there are associated criminal and civil law instruments that are made applicable to PMSCs and their contractors.[197]

South Africa similarly has strong legislation on PMSCs, but on the opposite end of the spectrum in the form of its absolute ban. This came first through the *Regulation of Foreign Military Assistance Act of 1998*,[198] and then the *Prohibition of Mercenary Activities and Regulation of*

[195] *OMB Circular No A-76: Performance of Commercial Activities (Revised 1999)* (superseded) (Washington, DC: White House Office of Management and Budget, 1999).
[196] See generally Huskey & Sullivan, *supra* note 118 at 12ff.
[197] See Section I(e) of Chapter One. Other instruments include the *Military Extraterritorial Jurisdiction Act*, and the solatia payments system. See generally Huskey & Sullivan, *supra* note 118.
[198] *Regulation of Foreign Military Assistance Act 15 of 1998* (SAfr) [RFMA].

Certain Activities in Country of Armed Conflict Act 2006.[199] Although the 2006 act was meant to amend the 1998 act, it should be pointed out that it is not yet in force, and there is no indication of when it will be, despite the fact that it was assented to by former President Thabo Mbeki in 2007.[200] The 2006 act is also supplemented by the *Private Security Industry Regulation Act 56*, which established the Private Security Industry Regulating Authority (PSIRA).[201] The PSIRA is responsible for the registration of private security providers, as well as the promulgation and implementation of national standards for recruitment, training, and overall policing of the private security industry in South Africa.

Standing apart from these two positions is the British approach to regulation. The British government is more concerned with facilitating the export of British PMSC services and thus adopts a more free-market, *laissez-faire* approach. Consequently, while there is a framework within which PMSCs must operate in the United Kingdom,[202] it is fashioned toward ensuring that British PMSCs, the majority of which are small- and medium-sized enterprises (SMEs), can be competitive in a global market.[203] This factor may explain why the UK government has supported self-regulation within the global PMSI on multiple occasions.[204]

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[199] *Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 26 of 2006*.
[200] DeWinter-Schmitt, *Montreux Five Years On*, *supra* note 156 at 144.
[201] *Private Security Industry Regulation Act 56 of 2001* (SAfr), ch 2. This has since been amended, in part, by the *Private Security Industry Regulation Amendment Bill 2012* (SAfr), B27-2012.
[202] See Kerry Alexander & Nigel White, "The Regulatory Context of Private Military and Security Services in the UK" (2009) PRIV-WAR National Report Series 01/09.
[203] See Clive Walker & Dave Walker, "Contracting Out War? Private Military Companies, Law and Regulation in the United Kingdom" (2005) 54 ICLQ 651.
[204] Richard Norton-Taylor, "Foreign Office to Propose Self-Regulation for Private Military Firms", *The Guardian* (24 April 2009); DeWinter-Schmitt, *Montreux Five Years On*, *supra* note 156 at 22; Henry Bellingham, Parliamentary Under-Secretary for Foreign & Commonwealth Affairs Announcement, *Promoting High Standards in the Private Military and Security Company Industry* (21 July 2011), online at: Gov.uk <www.gov.uk> (considering regulation on the PMSI as part of its broader policy of "increasing the UK's exports and attracting inward investment"); UNHRC, *Open-Ended Intergovernmental Working Group to Consider the Possibility of Elaborating an International Regulatory Framework on the Regulation, Monitoring and Oversight of the Activities of Private Military and Security Companies*, *Summary of the First Session*, UN Doc A/HRC/WG.10/1/CRP.2 (2011) at para 54.

c. On the Matter of Capacity to Regulate

Finally, beyond the states that differ in their regulatory approaches, there are those states in particular that have tried to implement strong legislation given the presence of PMSCs within their jurisdictions but have lacked the resources to enforce that legislation effectively. This is usually the case with territorial states that may be in the throes of conflict or political instability, such as Iraq, Afghanistan, and Somalia. But some home states, such as South Africa, also find themselves in this situation. In the case of South Africa, we find that the PSIRA, the national regulator, faces challenges in the enforcement of its mandate due to bureaucratic obstacles: a lack of resources and communication with other national PMSI regulators. Del Prado reports that between 2,000 and 4,000 South Africans were working in Iraq in 2010.[205] Another South African news article reported that 450,000 South Africans were working in conflict areas, despite South Africa's prohibition of PMSCs, and thus deemed South Africa's legislation to be "toothless".[206] Figures such as these hint at why the South African government might be open to a normative shift in its approach. Juma and Tsabora comment that, following the release of the *South African Defense Review* of 2012, the government has decided to move from a position of prohibition to regulation of PMSCs in light of wider international regulatory initiatives and the sustained growth and impact of the PMSI.[207] Notwithstanding this development, I think South Africa's foray into regulation will be slow and cautious, given its history with the industry. It may have been one of

[205] José L Gómez del Prado, "A U.N. Convention to Regulate PMSCs?" (2012) 31:3 Crim Just Ethics 262 at 266.
[206] Fadela Slamdien, "SA Mercenary Legislation Remains Toothless", *West Cape News* (25 November 2010).
[207] Laurence Juma & James Tsabora, "The South African Defence Review (2012) and Private Military/Security Companies (PMSCs): Heralding a Shift from Prohibition to Regulation?" (2013) 16:4 PELJ 232.

the first countries to sign up to the *Montreux Document* in 2007, but its support is only on paper.[208] It is more in favour of creating binding legal state obligations particular to the global PMSI.[209]

Other instances where a shortage of resources to regulate is more likely to have a crippling effect occur in territorial states, such as Iraq, Afghanistan, and Somalia, where there is a high level of PMSC activity and as yet unclear, underdeveloped, or inexistent regulation in the sector.

Iraq's government outsources a large proportion of its security operations as it attempts to transition from an unstable conflict zone to a stable post-conflict state. Of note in that respect is the large number of PMSCs that are registered and incorporated in Iraq. The UN WG on the Use of Mercenaries, while on a visit to Iraq in 2011, found that 89 out of the 117 PMSCs registered at the time were Iraqi companies.[210] Yet despite this high level of activity, Iraq has yet to introduce a legal framework for PMSCs, even after the dissolution of *Coalition Provisional Authority Order 17* (*CPA Order 17*).[211]

CPA Order 17 established general immunity for PMSC contractors from Iraqi law. Following incidents such as the killings at Nisour Square in 2007 and outrage due to the immunity of the contractors from prosecution in Iraqi courts, the Iraqi government pushed for a change to the arrangement with coalition forces. In 2008, a status of forces agreement (SOFA) was signed between the US and Iraqi governments and came into force in 2009.[212] While the SOFA extended Iraqi jurisdiction over American contractors, this only applied to contractors that were working

[208] DeWinter-Schmitt, *Montreux Five Years On*, *supra* note 156 at 145.
[209] *Ibid* at 145.
[210] UNHRC, *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Mission to Iraq*, UN Doc A/HRC/18/32/Add.4 (2011) [Working Group on Mercenaries Addendum: Mission to Iraq] at 6.
[211] *Ibid* at 8 ff.
[212] See R Chuck Mason, "US-Iraq Withdrawal/Status of Forces Agreement: Issues for congressional Oversight", Congressional Research Service Report for Congress, 13 July 2009, at 5.

under a contract or subcontract with the United States forces. The provision did not include any of the other US departments or agencies, such the DoD or DoS.[213] As such, PMSCs not hired by the US forces still operate under the immunity rules governed by *CPA Order 17*.[214] This gap in the withdrawal of immunity was of significant concern to the UN WG on the Use of Mercenaries, which visited the country in June 2011.[215] A draft law for PMSC regulation was introduced in 2008 to try to rectify the situation, but this is still before the Council of Representatives and yet to be adopted.[216] And with conflict intensifying due to advancements by non-state actors such as the Islamic State of Iraq and the Levant (ISIS), the Iraqi government will have limited capacity to implement and oversee this legislation.

Much like in Iraq, the conflict and political instability in Afghanistan have made the use of PMSCs a necessity for international organisations, governments, and private companies looking to protect their staff and assets. A weak, under-resourced regulatory framework, however, means that there is poor vetting of the individuals who join these companies. The UN WG on the Use of Mercenaries' *Mission to Afghanistan* reported that:

> 16. Former armed elements, whether considered to be warlords or anti-Government elements, could either join the Government armed forces (Afghan National Police or Armed Forces), disband under the Disbandment of Illegal Armed Groups (DIAG) programme, transform into a public protection force in an arrangement with local authorities (in specific regions), join the border

[213] Under Article 2 of the SOFA, "United States contractors" and "United States contractor employees" are defined as "non-Iraqi persons or legal entities, and their employees, who are citizens of the United States or a third country and who are in Iraq to supply goods, services, and security in Iraq to or on behalf of the United States Forces under a contract or subcontract with or for the United States Forces."
[214] See Mason, "US-Iraq Withdrawal/Status of Forces Agreement", *supra* note 198 at 7.
[215] Working Group on Mercenaries Addendum: Mission to Iraq, *supra* note 196 at para 28.
[216] Working Group on Mercenaries Addendum: Mission to Iraq, *supra* note 196 at 8ff.

> monitoring brigades or register as employees of one of the officially licensed private security companies. Some also continued operating individually or in small groups as armed elements, and some were hired to provide security services, by international forces *inter alia*.
>
> 17. In Jalalabad, for example, the Working Group was informed that the Afghan National Police in the province of Nangarhar had counted 500 private security entities operating in the eastern region which were not registered with the [Ministry of Interior]. These illegal entities, with a minimum of five men, fall under the definition of illegal armed groups and should be dismantled. [217]

The danger that arises from such contracting is not only the potential for human rights abuses, but also a lack of transparency and accountability if former militiamen are falling under the command and control of governmental forces. The fear here is that existing links between former militiamen and warlords may work to further destabilise the Afghan government.[218] Further problems that the Afghan government faces in this regard include the large number of unregistered weapons, the government's inability to monitor the few PMSCs that it does have registered, and the inability to investigate and prosecute reported crimes and abuses.[219]

In response, the Afghan government began work toward the development of a regulatory framework in late 2004, which finally culminated in the production of a *Procedure for Regulating Activities of Private Security Companies in Afghanistan* in February 2008.[220] The procedure

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[217] UNHRC, *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Mission to Afghanistan*, UN Doc A/HRC/15/25/Add.2 (2010) [Working Group on Mercenaries Addendum: Mission to Afghanistan] at para 16-17.
[218] *Ibid* at para 19.
[219] *Ibid* at paras 32, 48, and 49.
[220] *Procedure for Regulating Activities of Private Security Companies in Afghanistan* (2008), online: Private Security Monitor

established, among other things, a regulatory board known as the High Coordination Board (HCB). The HCB would be responsible for monitoring the activities of PMSCs, awarding licences, and carrying out investigations in case of violation of the procedure.[221] While the introduction of such legislation is a positive step forward, the UN WG on the Use of Mercenaries noted the importance of investing sufficient resources so as to ensure adequate oversight.[222]

It is evident from a cursory overview of a few countries that there is a spectrum when it comes to the level of sophistication of PMSC regulatory frameworks. Not only do some countries have more or better regulation, but there is also a distinction in the approaches toward the PMSI. Such inconsistency and incoherence cannot help the regulation of a global business sector, where companies registered in one jurisdiction conduct business in another, for actors from another, with employees from yet another. There is a need to facilitate better communication and coordination among competing regulators so as to ensure a uniform application of universally accepted standards. But adopting such standards while maintaining the current global configuration can only have a limited impact. Somalia and many other countries that find themselves in any stage ranging from conflict to post-conflict and reconstruction will still face significant developmental obstacles as they try to restore the rule of law and sufficiently capable governance frameworks. They will not have the resources necessary to effectively manage a regulatory framework for the PMSI within their borders. Yet PMSCs will continue to play a role at all stages of those processes of conflict and reconstruction. The configuration of global regulatory governance needs to change.

<http://psm.du.edu/media/documents/national_regulations/countries/asia_pacific/afghanistan/afghanistan_draft_regulations_on_psc_2008-english.pdf>.

[221] See Articles 8 & 9 of the *Procedure for Regulating Activities of Private Security Companies in Afghanistan*, online: Private Security Monitor <http://psm.du.edu/media/documents/national_regulations/countries/asia_pacific/afghanistan/afghanistan_draft_regulations_on_psc_2008-english.pdf>.

[222] Working Group on Mercenaries Addendum: Mission to Afghanistan, *supra* note 203 at paras 73-77.

An obstacle to achieving a reconfiguration of global governance is the current intransigence of national governments. Beyond the economic argument that so often appeals to state governments is the ambition of achieving successful foreign policies that, from their perspective, should drive and necessitate concerted and coordinated state action toward global regulation. If, for example, there are warlords or former militiamen operating shell PMSCs and the territorial state is unable to vet, licence, and monitor them, then this will pose a serious threat to all stakeholders. Regarding the potential threat to all stakeholders posed by one state's inadequate regulatory system, one need only consider the current practice of European nationals crossing borders into Iraq, Syria, and Afghanistan to join armed groups in conflicts and then returning to their home countries only to pose threats to internal security. This transnational threat is the very same one that the *Diplock Report* of the Committee of Privy Counsellors into the recruitment of mercenaries in the United Kingdom had to grapple with in 1976.[223] The problem is the same as it has been for generations:[224] states cannot afford to have weak links.

It is for reasons such as these that a global regulatory network is required, whereby resources necessary for different aspects of the regulatory process, such as vetting, registering, and monitoring, need not be provided or located solely within a particular state. Rather the global network would allow for a range of other actors to perform different regulatory functions on behalf of the state, thus facilitating an effective division of labour. This division of labour should balance out the cost of regulation and lessen the burden on all PMSI actors. I elaborate on this idea in the next chapter on the development of a global regulatory network, but prior to that, let me highlight

[223] *Report of the Committee of Privy Counsellors appointed to inquire into the Recruitment of Mercenaries* (1976) Cmnd 6569.
[224] See Burmester, *supra* note 22; Taulbee, *supra* note 28.

some of the transnational initiatives that private actors have engaged in to try and overcome shortcomings in national regulation.

III. Transnational Regulatory Initiatives

The goal of transnational regulation is to better facilitate the actions and interactions of global actors within a specific industry where national and international regulation may have failed.[225] Transnational regulation attempts to respond to problems of fragmented market rules that result both in and from divergent national regimes, through the introduction of uniform private rules.[226] The active participation of private industry actors outside of national and international regulatory processes aims to provide the technological and technical expertise that state-based regulators may be lacking. This was most certainly the case for private actors in the PMSI as they came together to draft the *International Code of Conduct for Private Security Service Providers* (ICoC).[227] The problem that can arise from transnational regulation, however, is that there can also be multiple competing regulators of varying, overlapping scope on the transnational level.

Within the global PMSI, transnational regulators have emerged in a range of sizes and configurations. National and regional associations such as the International Stability Operations

[225] See Fabrizio Cafaggi, "New Foundations of Transnational Private Regulation" in Colin Scott, Fabrizio Cafaggi & Linda Senden, eds, *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates* (Chichester: Wiley-Blackwell, 2011) and Kenneth Abbott & Duncan Snidal, "Governance Triangle" in Walter Mattli & Ngaire Woods, eds, *The Politics of Global Regulation* (New Jersey: Princeton University Press, 2009) at 50.
[226] See David Leebron, "Lying Down with Procrustes: An Analysis of Harmonization Claims" in Jagdish Baghwati & Robert Hudec, eds, *Economic Analysis of Fair Trade and Harmonization* (Cambridge: The MIT Press, 1996).
[227] Anne-Marie Buzatu, *Towards an International Code of Conduct for Private Security Providers: A View from Inside a Multistakeholder Process*, Geneva Centre for the Democratic Control of Armed Forces (2015).

Association,[228] the Security in Complex Environments Group,[229] and the Pan-African Security Association[230] provide standards and regulations for their members through codes of conduct and conditions for membership.[231] Like many other private trade associations producing codes of conduct, these associations have often not been able to achieve the legitimacy required to be seen as effective regulators because of their limited representation of other relevant stakeholders.[232] To the extent that the initiative on "Voluntary Principles on Security and Human Rights" brings together states, firms, and NGOs, this is an advancement compared to solely private trade associations.[233] This initiative is limited in its regulatory scope, however, to the extent that it primarily covers private and public security provision within the extractive industry. Further, the Voluntary Principles lack enforcement capacity. The more promising transnational regulator within the global PMSI, which seeks to incorporate all industry participants into its governance

[228] The International Stability Operations Association (ISOA) is "a global partnership of private sector and nongovernmental organizations providing critical services in fragile environments worldwide." It has its mission four key points: (1) to promote ethical standards in operational contractor support through the ISOA Code of Conduct; (2) to build key relationships within and across sectors in the stability operations space by identifying common interests; (3) to advocate for the effective utilization of private sector services in fragile environments; and (4) to facilitate business development opportunities for our members by leveraging the exclusive ISOA network. See ISOA, *Our Mission*, online: <http://stability-operations.org/>.

[229] "The Security in Complex Environments Group (SCEG) is a Special Interest Group, within ADS, which was formed in January 2011 to define, develop and facilitate robust, internationally recognised professional standards for the UK Private Security Sector operating abroad." See SCEG, *About SCEG*, online: <http://www.sceguk.org.uk/about-sceg/>.

[230] "The objective of [the Pan-African Security Association] PASA is to ensure that security and related contracts in Africa are solely discharged by legitimate companies complying with internationally accepted regulatory standards and the laws and regulations of African States. PASA is a non-profit association with the sole purpose of promoting the goals above. Companies applying for membership have to undergo a thorough vetting process. Upon admission as members companies have to pledge to adhere to the PASA Code of Principles, Code of Conduct and any other rules and procedures governing the Association." See PASA, *Welcome to PASA*, online: <http://www.pasa-africa.org/default.aspx>.

[231] For a list of other industry initiatives, see Private Security Monitor, *Industry Initiatives*, online: Private Security Monitor <www.psm.du.edu>.

[232] For an exposition on legitimacy, see Mark Suchman, "Managing Legitimacy: Strategic and Institutional Approaches" (1995) 20:3 Academy of Management Review 571 and Julia Black, "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes" (2008) 2 Regulation and Governance 137.

[233] *Voluntary Principles on Security and Human Rights*, online: Voluntary Principles <www.voluntaryprinciples.org>.

structure is the International Code of Conduct for Private Security Providers' Association (ICOCA).

The ICOCA is a multistakeholder initiative that is constituted by states, PMSCs, and civil society organisations (CSOs). It was established in September 2013, following the launch of the ICoC in November 2010. Serving as the independent oversight mechanism of the ICoC, the ICOCA is registered as an association in the Swiss Canton of Geneva and is governed by Articles 60 and following of the *Swiss Civil Code* (SCC). It is granted legal personality by and through a declaration in its *Articles of Association*, as required by Article 60 SCC.[234] Its purpose is "to promote, govern and oversee implementation of the International Code of Conduct for Private Security Service Providers and to promote the responsible provision of security services and respect for human rights and national and international law in accordance with the [International Code of Conduct]."[235] Members submit themselves to the authority of the ICOCA through the act of their membership, payment of membership dues,[236] and passing the certification process.[237] Under the certification requirements, PMSCs agree to "provide a written, public declaration of their intent to adhere to the Code with such language as the Board may prescribe, and to participate fully in the Association's activities."[238] States commit themselves to pursuing adherence with the *Montreux Document* as well as incorporating the ICoC into their procurement processes.[239] And CSOs commit to maintaining their independence and promotion of human rights protection.[240]

[234] Article 60(1) of the *Swiss Civil Code* provides that "[a]ssociations with a political, religious, scientific, cultural, charitable, social or other non-commercial purpose acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association." See also Article 1(1) of the ICOCA's *Articles of Association*.
[235] Article 2.2 ICOCA's *Articles of Association*.
[236] Article 14.2 ICOCA's *Articles of Association*.
[237] Article 11 ICOCA's *Articles of Association*.
[238] Article 11.2.3 ICOCA's *Articles of Association*.
[239] Article 3.3.2 ICOCA's *Articles of Association.*
[240] Article 3.3.3 ICOCA's *Articles of Association.*

The ICOCA is constituted by a General Assembly, a Board of Directors, and a Secretariat under the supervision of an executive director. Membership is constituted by three different pillars: the PMSC pillar, the CSO pillar, and the government pillar.[241] Members have participatory roles on two levels. On a first level, all members of the association form part of the General Assembly, the supreme governing body of the association, and are entitled to equal voting rights.[242] The powers of the General Assembly include approval of the Board of Directors' decisions on amendments to the ICoC,[243] the *Articles of Association*,[244] and terms of membership.[245] On the second level, each pillar is entitled to one-third representation on the Board of Directors, or four out of twelve seats. The board is the executive decision-making body of the ICOCA and is thus responsible for the operations and management of the association.[246]

The ICOCA has been relatively successful in building its membership base since its inception. The United Nations has already incorporated the ICoC into its *Security Management Operations Manual* as a condition for PMSCs to be selected for service,[247] and so has the US Department of State.[248] The US Department of Defense and the British government have also both indicated their support for the ICoC.[249] In terms of putting the ICoC into practice, the code's provisions have already been converted into an American management system standard drafted by

[241] Article 3.1 ICOCA's *Articles of Association*.
[242] Article 6.5 ICOCA's *Articles of Association*.
[243] Article 6.4.1 ICOCA's Articles of Association.
[244] Article 6.4.2 ICOCA's *Articles of Association*.
[245] Article 6.4.3 ICOCA's *Articles of Association*.
[246] Article 8 ICOCA's *Articles of Association*.
[247] UN Department of Safety and Security, *Guidelines on the Use of Armed Security Services from Private Security Companies* (2012). Paragraph 25(a) provides: "The APSC must be a member company to the International Code of Conduct for Private Security Providers". See also paragraphs 34 and 35 of the same.
[248] US Department of State, Media Note, "State Department to Incorporate International Code of Conduct into Worldwide Protective Services Contracts" (16 August 2013), online: US Department of State <www.state.gov>.
[249] Office of the Deputy Assistant Secretary of Defense, *Program Support: Private Security Companies*, online: Office of the Deputy Assistant Secretary of Defense < http://www.acq.osd.mil/log/PS/psc.html>; Written Statement to UK Parliament from Mark Simmonds, "International Code of Conduct for Private Security Providers Association" (15 October 2013), online: Gov.uk <www.gov.uk>.

ASIS International[250] and recognized by the American National Standards Institute[251] (ANSI) through ANSI/ASIS.PSC.1. It is accompanied by an operational manual for certification bodies, ANSI/ASIS.PSC.2, conducting the auditing process for PMSCs wanting to demonstrate conformance to ANSI/ASIS.PSC.1. Certification to ANSI/ASIS.PSC.1, along with some additional human rights related information, is currently one route to ICOCA certification. Although the ANSI has some traction as an industry standard setter, it is still only a national body. It is therefore encouraging that the International Standards Organisation (ISO) has now released an international compliance standard ISO.18788, which is based on ANSI/ASIS PSC.1.[252]

Yet, despite these advancements, the ICOCA still faces a series of challenges. Like most transnational regulators, it competes with other regulators operating within the transnational space for regulatory reach both geographically and empirically, in terms of adherents. The danger that can arise from this is a proliferation of standards, similar to the case of having multiple national standards. And if there is a proliferation of regulators and standards, then it is likely that the resources available for effective monitoring, enforcement, and remedial action will be thinly spread across the industry and thus less efficient and effective. Consequently, it is necessary for regulators in global business sectors to cooperate and collaborate in the regulatory process so as to achieve appropriate and adequate coverage.

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[250] "ASIS International is the leading organization for security professionals worldwide. Founded in 1955, ASIS is dedicated to increasing the effectiveness and productivity of security professionals by developing educational programs and materials that address broad security interests, such as the ASIS International Annual Seminar and Exhibits, as well as specific security topics. ASIS also advocates the role and value of the security management profession to business, the media, government entities, and the public." See ASIS International, *About ASIS*, online: <https://www.asisonline.org/About-ASIS/Pages/default.aspx>.

[251] "The [American National Standards Institute] oversees the creation, promulgation and use of thousands of norms and guidelines that directly impact businesses in nearly every sector: from acoustical devices to construction equipment, from dairy and livestock production to energy distribution, and many more. ANSI is also actively engaged in accreditation - assessing the competence of organizations determining conformance to standards." See American National Standards Institute, *About ANSI*, online: <https://www.ansi.org/about_ansi/overview/>.

[252] ISO 18788:2015, *Management System for Private Security Providers*.

Conclusion

This chapter has provided an overview of the state of regulation across the PMSI. By exhibiting the diversity in regulatory standards, the divergence in regulatory approaches, and the resultant lack of congruence across the governance levels, I have attempted to show how, ironically, there is both too much and too little regulation. It is a picture of regulation in disarray, resulting in governance gaps and a lack of accountability. Industry participants need to find a way to collaborate and agree on a framework that provides clear, uniform, and universal laws that can be efficiently and effectively overseen in a legitimate manner. Such a regulatory framework could help to limit PMSC wrongdoing and ensure access to effective remedies in cases where violations may arise. They need to create a global regulatory network.

Chapter Three: The Development of a Global Regulatory Network

Introduction

The challenges of attaining a remedy for harm committed by PMSCs can be boiled down to three factors. The first is a failing Westphalian international legal system. A Westphalian international legal system is founded and depends upon its primary actor, the state. And within this system, states are deemed to have the authority and primary responsibility to regulate and coordinate activities occurring among themselves and within their territorial borders. Globalisation, however, has stretched the state's capacity and ability to regulate effectively.[253] Individually, it is difficult for a state to manage the growing number of actors whose actions and interactions are increasingly sophisticated and cross-border in nature. And for states as political collectives operating in the form of international organisations, the challenge is not any easier as these organisations can be crippled by a shortage of resources, limited expertise, and jurisdictional restrictions.[254] States, confined to their territorial borders, are struggling to address new, shared problems with tools that are better suited for old, contained problems. They are failing to coordinate and produce appropriate regulatory frameworks that can effectively recognise and capture activity in global business sectors.

The second factor is a burgeoning and inchoate system of transnational regulation that is mired in scepticism and carried out by private actors that are perceived as lacking lawmaking and regulatory authority. The inability or unwillingness of states to regulate has spurred a broad

[253] Vivien A Schmidt, "The New World Order, Incorporated: The Rise of Business and the Decline of the Nation State," (1995) 124:2 Daedalus 75; Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (New York: Cambridge University Press, 1996).
[254] Spencer Zifcak, "Globalizing the Rule of Law: Rethinking Values and Reforming Institutions" in Spencer Zifcak, ed, *Globalisation and the Rule of Law* (New York: Routledge, 2005).

regulatory drive by private actors on the transnational level across a range of fields, such as banking and finance, labour standards, advertising, and e-commerce.[255] Fabrizio Cafaggi has defined this as "transnational private regulation": "a new body of rules, practices, and processes, created primarily by private actors, firms, NGOs, independent experts like technical standard setters and epistemic communities, either exercising autonomous regulatory power or implementing delegated power, conferred by international law or by national legislation."[256] In many instances, the state has been willing to accept, support, or co-opt these regulatory initiatives, for example, by simply allowing them to happen, adopting international treaties to facilitate them, or directly incorporating their work product into their laws.[257] By doing so, states have been able to increase the resources available to them for regulatory functions, to cover greater geographic scope, and to better tailor their regulatory responses to relevant activities. However, there are two problems with this trend. First, there is a lack of coordination among private actors within global business sectors, resulting in a proliferation of standards emanating from as many private regulatory associations. Such proliferation can cause competition among regulators and thus diminish the impact that these regulatory initiatives could have. [258] Second, and more broadly, the perceived necessity of the state intervening or participating in these regulatory schemes of frameworks is symptomatic of an underlying scepticism of private actors' abilities to create

[255] See Philipp Pattberg, "The Institutionalization of Private Governance: How Business and Nonprofit Organizations Agree on Transnational Rules" (2005) 18:4 Governance: An International Journal of Policy, Administration, and Institutions 589 and Virginia Haufler, "Private Sector International Regimes" in Richard A. Higgott, Geoffrey RD Underhill & Andreas Bieler, eds, *Non-State Actors and Authority in the Global System* (London: Routledge, 2000).
[256] Cafaggi, *supra* note 211 at 20.
[257] See e.g. Errol Meidinger, "Multi-Interest Self-Governance Through Global Product Certification Programs" (2006) Buffalo Legal Studies Research Paper No. 2006-016 at 17ff.
[258] This observation has been made in the context of several global industries such as the food and forestry markets. See for e.g. Errol Meidinger, "The Administrative Law of Global Private-Public Regulation: The Case of Forestry" (2006) 17:1 EJIL 47. In the case of PMSCs alone, consider the competition between the International Code of Conduct, the Voluntary Principles on Security and Human Rights, the BIMCO Standard for the Employment of Security Guards on Vessels, the Pan-African Security Association Code of Conduct, and others.

legitimate, legal regulatory frameworks. There is still a pervasive and, dare I say it, nefarious perception that the authority to create law and to regulate must lie with public actors. Such a perception can have a deleterious impact on the overall goal of constructing appropriate and alternative regulatory frameworks that capture global business sectors.

The third factor, which is somewhat implicit within the first two mentioned above, is a lack of coordination and concerted effort among actors within global business sectors to collectively produce the required regulatory frameworks. The current state of regulation within the global PMSI is a good example of this. Regulation within the global PMSI is being developed on multiple governance levels—the national, the transnational, and the international. This tiered governance is necessary because of the assortment of actors involved and the varying range of legal rules and systems that are applicable to those actors at any given moment. On an international level, states have their own public international legal obligations as codified within the *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict* (*Montreux Document*).[259] At the transnational level, we have a multitude of codes of conduct, which are slowly being replaced in prominence and primacy by the *International Code of Conduct for Private Security Providers* (ICoC). And at the national level, we have domestic regulatory frameworks that vary in their efficacy, efficiency, and sophistication.[260] It is clear that all of the actors have attempted to respond to allegations of there being a "legal vacuum" within which PMSCs operate, by trying to produce

[259] *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict*, UN Doc A/63/467–S/2008/636 (2009) online: ICRC < http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf>.

[260] See Chapter Two of this thesis. See also 'National Legislation Studies' conducted by the UN Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, online: <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/WGMercenariesIndex.aspx>; see also DeWinter-Schmitt, *Montreux Five Years On*, *supra* note 156.

appropriate laws and standards.[261] However, they have as yet been unable to collaborate in a manner that avoids inconsistency, disunity, and regulatory arbitrage. And thus, what we have is a patchwork of regulations that has yet to achieve congruence and cohesiveness across these levels of governance in order to permit the effective regulation of a global PMSI holistically.

This chapter proposes to address these issues through the development of a GRN for the global PMSI. A GRN is constituted by complex collaborations among constellations of public and private actors in different capacities, at different levels, and for different functions, each represented as a node, all working together to produce a cogent, efficient, and effective whole.[262] Its utility is founded not only upon ensuring that each actor has appropriate rights and obligations regarding the way that they conduct their activities within the industry, but also on the appropriate allocation of regulatory responsibility. As such, there are two pivotal features of a GRN. The first is the creation of a central, harmonising legal instrument that can connect regulation at the three governance levels—the national, the transnational, and the international—and provide procedural and substantive uniform applicable standards. And second, a GRN allows for the possibility of competitive auxiliary markets for the provision of regulatory services where some actors tasked with particular legal responsibilities to regulate may not have the capacity to carry them out.

The allocation of rights, obligations, and responsibility on multiple levels—national, international, and transnational—aims to address two issues. First, it responds to the problem of the "governance gap" that was identified by the UN Special Representative on Business and

[261] For more on the allegations of there being a "legal vacuum" within the PMSI, see Singer, "War, Profits, and the Vacuum of Law", *supra* note 18 and Caroline Holmqvist, "Private security companies: The case for regulation", SIPRI Policy Paper No. 9 (2005).

[262] The concept of a "governance network" has already been explored from a political science perspective. See e.g. Jacob Torfing, "Governance Networks" in David Levi-Faur, ed, *The Oxford Handbook of Governance* (Oxford: Oxford University Press, 2012). The concept of a regulatory network considers a similar arrangement of actors but from a legal perspective, in terms of form, function, and output.

Human Rights, John Ruggie.[263] The governance gap refers to the difficulty that states have regulating transnational enterprises because of the latter's composition, which is not fully recognised in law,[264] their power relative to some states,[265] and the nature of their cross-border activities. The engagement of a regulatory model across multiple levels also ensures that all actors within the sector can have appropriate rights and obligations accorded to them through applicable uniform legal instruments, which can then ideally be enforced in different adjudicative fora within the network. Second, the design of the GRN aims to ensure that the overall, systemic regulatory process can be conducted in a manner that responds to the capacity and capabilities of different actors. This proposal challenges the traditional public-private divide regarding regulation through a promise of improved efficiency and effectiveness. It posits that responsibility for regulatory functions should be allocated to actors not on the basis of their arbitrary categorisation as either public or private, but rather on the basis of an actor's knowledge, capacity, and capability to perform a particular role. It thus advances the discussion of governance in global business sectors where borders are both relevant and irrelevant; states both capable and incapable; and private regulatory initiatives both encouraged and discouraged.

The chapter is divided into three subsequent sections. First, in light of the disparities in regulatory sophistication and the gaps that arise from the incohesive patchwork of regulations in

[263] UNHRC, *Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc A/HRC/8/5 (2008) at para 3; UNHRC, *Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc A/HRC/17/31 (2011); and see generally Georgette Gagnon, Audrey Macklin & Penelope Simons, eds, *The Governance Gap* (London: Routledge, 2009).

[264] François Rigaux, "Transnational Corporations" in Mohammed Bedjaoui, ed, *International Law: Achievements and Prospects* (Paris and Dodrecht: UNESCO & Kluwer Academic Publishers, 1991) at 121.

[265] See e.g. Noreena Hertz, *The Silent Takeover* (London: Arrow Books, 2001) at 8, who reports that in 2001, fifty-one of the 100 largest economies in the world were corporations, while the other forty-nine were states; the largest one hundred corporations controlled 20 per cent of global foreign assets; the general sales of Ford and General Motors were greater than the GDP of the whole of sub-Saharan Africa.

the global PMSI, I discuss the necessity of harmonisation and of adopting a global approach to the regulation of global business sectors. In the subsequent section I provide an outline of the envisaged GRN for the global PMSI. And finally, in the last section, I provide examples of three governance-framework models to illustrate how the GRN for the global PMSI could be actualised with the ICOCA at its core. The first case study presents the World Anti-Doping Agency (WADA) as an example of a GRN that was developed under the leadership of a transnational body in circumstances of seemingly irreconcilable political differences within the sporting world. The second and third models are from the maritime and civil aviation industries. I use them to support the proposal of competitive auxiliary markets for the provision of regulatory functions on behalf of under-resourced states that lack administrative and enforcement capabilities in light of the legal obligations imposed on them to regulate particular aspects within the GRN.

I. The Importance of Harmonisation

As is evident from the exposition on the state of regulation within the global PMSI, there are significant divergences in the approaches to regulation and the state of its development in this industry. Regulation within the global PMSI, therefore, could be described as nascent, incongruent, and largely ineffective. The introduction of clear standards through a process of harmonisation, however, could provide some consistency and uniformity within the industry. Indeed, harmonisation within global business sectors can bring several advantages.

First, harmonisation can have the effect of filling legal vacuums by providing rules for situations that were previously overlooked or not catered to. The UNCITRAL *Model Law on International Commercial Arbitration* (*Model Law*), for example, has been the foundational text

through which many states have introduced rules for the facilitation of international arbitrations.[266] Prior to the introduction of the *Model Law*, not only were the rules inconsistent across jurisdictions, but some jurisdictions simply did not have any legislation in the subject area at all. The global PMSI faces a similar challenge. States with differing market sizes have varying levels of regulatory sophistication. This regulatory gap includes but is not limited to aspects of vetting contractors, having appropriate import and export laws for the provision of security services, and licensing weapons and contractors. As such, the introduction of a harmonising instrument could have the benefit of providing rules for cases where states with little or no legislation are experiencing increased PMSC activity.

Second, harmonisation has the advantage of providing a single set of rules in the place of multiple sets of rules that tend to proliferate rapidly as jurisdictions experience greater activity within a given industry. This minimisation of legal diversity has several advantageous mini-components for different actors within the global PMSI. For PMSCs, first, a minimisation of legal diversity can lead to the reduction of search and navigation costs.[267] Search and navigation costs are those that are incurred by an actor to find out which rules apply to its cross-border activities, as well as the manner in which those rules are enforced. Once the knowledge is attained, the actor may further incur negotiation costs as it attempts to secure the application of a particular governing law for its contract. The removal of these costs through the introduction of a single set of rules provides industry participants with greater predictability, transparency, and certainty when contracting. A corollary to this is the reduction of compliance costs for PMSCs. That is, PMSCs

[266] Legislation based on the Model Law has been adopted in 72 states in a total of 102 jurisdictions. Online: UNCITRAL <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html>.
[267] Gary Low, "The (Ir)Relevance of Harmonization and Legal Diversity to European Contract Law: A Perspective from Psychology" (2010) 2 ERPL 285 at 288.

will incur fewer costs when ensuring that they are compliant across all of the jurisdictions in which they are active, because they will rely less upon local counsel to keep them informed of varying local regulations.

This particular cost reduction could also be viewed as one less barrier to market entry for a PMSC. Indeed, the introduction of a single set of rules for the industry could have the effect of instituting a common, global regulatory framework and market for PMSC services. Such a common market could benefit from greater competition, thus spurring greater choice and innovation in the delivery of security solutions, all to the benefit of the consumer.[268]

Third, removing legal diversity and introducing uniformity lowers the number of instances where the application of private international law may be required. The introduction of a unifying set of rules will allow judges and arbitrators to refer consistently to a single source of law as opposed to trying to determine the appropriate governing rules for a transaction under a conflict of laws analysis. This benefit to judicial decision makers engenders another positive effect to the extent that their reflection upon a single set of rules and their reference to the decisions of other courts and tribunals on the same subject matter can produce a more uniform corpus of

[268] That said, while PMSCs could benefit from the implementation of a single set of rules through the benefits of lower transactions costs, the extent to which they would benefit is tempered by two particular factors. First, costs could be mitigated depending on the size of the actor. Large PMSCs have more resources at their disposal and benefit from economies of scale. The availability of those resources enables them to hire local lawyers at a comparatively cheaper rate than smaller firms, thus giving them a greater market advantage over smaller firms. Given that PMSCs can be constituted by very small groups of contractors, the expense of seeking local counsel due to legal diversity can serve as a barrier to market entry particularly for small PMSCs. A second factor that may limit the impact of such costs concerns whether the relevant rules in a jurisdiction are default rules, and thus open to amendment within contracts, or if they are of a mandatory nature, such as particular public policy requirements. Where parties are able to contract out of particular default rules, they can possibly minimise their compliance costs.

jurisprudence. This, in turn, can generate greater predictability and certainty for all parties, counsel, and judicial decision-makers.

Fourth, victims can benefit from the existence of clearly identifiable rules and regulations, which translate into actionable rights. At a minimum, these rights should be enforceable in their home national courts, but with global business sectors, it is increasingly hoped that recourse may be sought in courts and tribunals across different jurisdictions and legal orders.

Finally, harmonisation in the global PMSI can be of benefit to states by providing guidelines that assist in liability mitigation. The contracting of PMSCs by states necessarily brings in to play elements of public international law, as does the general provision of their services within a particular jurisdiction. While the material sources of international law may be easily identifiable, the open-textured nature of public international legal provisions often makes it difficult for states to know how to ensure compliance with those provisions. In this case, the provision of uniform provisions for states can be an effective way for them to know what is required of them. The guidelines provided within the *Montreux Document* are a basic example of this, as they partially detail ways in which states can be in compliance with their international obligations depending on their relationship to PMSCs in a given case. While more still can yet be done, the *Montreux Document* guidelines help to minimise a state's chances of being subjected to legal action for the commission of an internationally wrongful act within this domain.

II. The Outline of the Global Regulatory Network

So what might a GRN within the global PMSI look like? As has already been stated, a GRN is constituted by complex collaborations among constellations of public and private actors

in different capacities, at different levels, and for different functions, each represented as a node, all working together to produce a cogent, efficient, and effective whole. In the case of the PMSI, I envisage a much more expanded and pivotal, central role of the ICOCA. At present, the ICOCA and the ICoC are primarily limited to regulation at the transnational level. However, the ICOCA already has the basic institutional infrastructure upon which more can be built in order to better connect the three governance levels which are currently disconnected. Consequently, building on from what we already have, the starting point and core of the global PMSI's GRN are the ICoC and the ICOCA's *Articles of Association*. These two documents would serve as the focal harmonising instruments, complementing each other. On one hand, the ICoC is the central document that provides for the applicable substantive PMSC standards and obligations across the industry. In order to ensure holistic regulation, it would have to be effectuated across all levels of governance within the industry. On the other hand, the ICOCA *Articles of Association*, as the contractual instrument that binds all participants within the global PMSI together as members, would serve as the central document providing for the procedures that govern the operation of the ICoC across the proposed GRN as well as the relationships among members. The two instruments, therefore, would work hand-in-hand to facilitate the GRN.

As mentioned, the ICoC would be the central instrument providing for applicable PMSC obligations that must take effect across all governance levels within the industry. Internationally, the ICoC would become the basis of an international convention that creates international legal obligations for states. The convention would serve to impose the obligations required in order to ensure that states are monitoring PMSC activity within their jurisdictions. As an effect of the international convention, states would also have the obligation to transpose those obligations to regulate PMSCs, in accordance with the ICoC, into national law. Nationally, therefore, there would

be a regulatory framework applicable to PMSCs, providing for elements such as their registration and licensing with national authorities; ensuring adherence to certification processes; and the registration of arms and relevant equipment. And transnationally, the ICoC would take effect within PMSCs by contract, which would result in fundamental changes to their corporate governance structures and internal corporate policies, as well as through applicability to sub-contracts. In essence, therefore, when considered from all of these governance levels, the ICoC would become the standard applicable across all legal orders.

Procedurally, the operation of the ICoC and its applicability to actors across the industry would be provided for by the ICOCA *Articles of Association* and the oversight body established by the articles, the ICOCA. As a multistakeholder association, it would serve as the epicentre of the network through which all actors should be contractually bound as members. Its *Articles of Association* would provide for decision-making procedures and wider governance structures, the procedural elements of the GRN's functioning. In its ability to bind the industry actors together, it would demonstrate how a GRN is constituted by multiple legal orders and also constitutes a legal order itself. In order to better facilitate this global governance framework, the ICOCA, as a central, global secretariat, would also have a network of national offices across member states whose central objective would be to further the effectiveness of the ICoC.[269] Collectively, the network of offices would work to ensure the effective administration of the GRN and adherence to the ICoC at all governance levels.

So far, the outline of the GRN has only accounted for a partial structuring of the governance framework, that is, how the actors come together and how their legal obligations would be

[269] This is will be further discussed in Chapter Nine, Section IV on "The Role of the National Office".

allocated. Another important feature of the GRN is the possibility of responsibility for the regulation of particular aspects being allocated to private actors. The significance of this point is meant to set the GRN apart from more parochial conceptions of regulation that consider regulation as a prerogative or responsibility reserved for public actors. On an issue such as PMSCs, where the subject matter involves the use of force, there may be a greater tendency to assume that only the state should be regulating these entities. However, this is to assume that the state is always willing and able; that it has the necessary resources and expertise readily available to perform this function. This is a challenge that has beset the matter of "business and human rights" more broadly, whereby states have not always been the most effective regulators of corporate actors.[270] Consequently, in order to overcome this problem, the GRN would allow for the creation of competitive auxiliary markets for the provision of regulatory functions. By this, I mean that private actors would have the possibility of regulating particular aspects of PMSCs where states may be either unwilling or unable, or where private actors may be most suited for the job. This proposal challenges the traditional public-private divide on regulation through a promise of improved efficiency and effectiveness. It posits that responsibility for regulatory function should not be allocated to actors on the basis of their arbitrary categorisation as either public or private, but rather based on an actor's knowledge, capacity, and capability to perform a particular role.

[270] Human Rights Council, Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN HRCOR, 2008, UN Doc A/HRC/8/5 (7 April 2008) at 3, online: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>; Human Rights Council, Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN HRCOR, 2011, UN Doc A/HRC/17/31 (21 March 2011) , online: < http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>; EarthRights International, A Governance Gap: The Failure of the Korean Government to hold Korean Corporations Accountable to the OECD Guidelines for Multinational Enterprises Regarding Violations in Burma (15 June 2009), online:<http://www.earthrights.org/sites/default/files/publications/A-Governance-Gap-Report.pdf>; see generally Georgette Gagnon, Audrey Macklin & Penelope Simons, eds, *The Governance Gap* (London: Routledge, 2009).

In order to demonstrate how the proposed GRN could emerge, I will draw from three different global governance models, each chosen to demonstrate different elements. The first case study, involving the World Anti-Doping Agency (WADA),[271] was selected specifically because of the leadership and centrality of a transnational, non-state actor in the creation of this regulatory network. In providing this leadership role, which is typically assumed by states, the example of WADA demonstrates how a series of seemingly conflictual actors with different interests and experiences can be brought together to regulate a subject area in a manner that best utilises each actor's capacities and capabilities. The second and third case studies involving the classification societies of the maritime industry and the international civil aviation industry, respectively, demonstrate how actors engaged in a regulatory network can better assist each other in performing their regulatory function by shifting that responsibility to an actor that is better suited for that role, irrespective of whether they are a public or private entity.

III. The Case Studies

a. Case Study One: The Global Regulation of Anti-Doping in Sport

i. The Structure of the Olympic Regime and the Relationship between Sporting Institutions and Public Authorities

The anti-doping regime for sport operates within a truly global network. Unified and coordinated by a private transnational body, WADA, public and private actors on multiple levels

[271] "The World Anti-Doping Agency (WADA) was established in 1999 as an international independent agency composed and funded equally by the sport movement and governments of the world. Its key activities include scientific research, education, development of anti-doping capacities, and monitoring of the World Anti Doping Code (Code) – the document harmonizing anti-doping policies in all sports and all countries." See WADA, *Who We Are*, online: <https://www.wada-ama.org/en/who-we-are>.

of governance work seamlessly to regulate the actions of athletes around the world. States and the entire Olympic Movement[272] are formally linked through the *World Anti-Doping Code* (WADC), which provides a constitutional framework for this regime, allocating rights and obligations to all parties. The WADC's significance was underlined by the Court of Arbitration for Sport (CAS) in 2005, when it observed that the instrument is "an original and unique piece of international legislation in that it reflects the intents of both public and private sectors in sport."[273] But such unified purpose in regulatory policy never used to exist, notwithstanding the longstanding existence of doping. Rules varied across sports and federations with inconsistent levels of monitoring and enforcement, much like in the global PMSI. As Richard Pound, the first president of WADA, commented, "Athletes were confused as to which rules were in force when and where, and what substance and methods they were allowed to use and which were prohibited. Coaches and advisors had the same problems. Officials charged with enforcing the rules seldom knew where to turn. The confusion led to a public perception that no one was serious about doping, despite what they might say in public. Something had to be done."[274] So what changed?

Tensions have always existed between sporting regulatory institutions, such as the International Olympic Committee (IOC), and governmental authorities.[275] Indeed, this tension, essentially between private and public institutions, has played out in many arenas[276] and

[272] According to Art. 1 of the *Olympic Charter*, the Olympic Movement is constituted by the International Olympic Committee (IOC), International Sports Federations (IFs), National Olympic Committees (NOCs), national federations, and associations and clubs belonging to the IFs and NOCs, as well as the athletes, coaches, judges, referees, and other sports officials and technicians.

[273] Court of Arbitration for Sport, 26 April 2005, *Advisory Opinion upon request of CONI*, CAS 2005/C/841 at 9, online: <http://www.doping.nl/media/kb/150/CAS%202005_C_841%20Advisary%20Opinion%20CONI%20S-FS.pdf>.

[274] Richard Pound, *Inside Dope* (Mississauga: John Wiley & Sons, 2006) at 96.

[275] Thomas Humphrey, "The Politics of Sport: The Why, When and How of Sports Law Development and Implementation" (2008) 2-3 ISLR 30-36.

[276] For example, the vice-president of the International Amateur Athletics Federation (IAAF), explaining why the federation had refused to recognise the US courts, in *Reynolds v IAAF*, 841 F Supp 1444 at 1452 (1992) (SD Ohio) and banned the American Butch Reynolds from international competition stated: "'Courts create a lot of problems for

manifested itself in significant constitutional documents such as the *Olympic Charter*.[277] The *Olympic Charter* attempts to delimit the reach of state intervention by characterising sporting events at the Olympic Games as occurring on a private or personal basis as opposed to involving athletes engaging in public or national representation.[278] And while there must inevitably be some form of cooperation with states, it is evident from the organisational structure of the Olympic Movement that sporting institutions try to keep this to a minimum.[279] Within the Olympic Movement, the IOC serves at the pinnacle of the organisational structure as the "supreme authority".[280] Just beneath the IOC are the International Federations (IFs) and the National Olympic Committees (NOCs). The IFs serve as the global rule and standard setters for each sport and the NOCs serve as the national authorities in each country for the Olympic Movement. Beneath the IFs sit the national federations (NF), which regulate each sport at the national level. Their jurisdiction is over clubs, associations, coaches, players, officials, and any others serving or performing within the sport in a particular country or region. The involvement of the state arises to the extent that the activities of Olympic Movement members occur within state jurisdictions,

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our anti-doping work, but we say we don't care in the least what they say. We have our rules, and they are supreme." Cited in Ken Foster, "Is There a Global Sports Law" in Robert CR Siekmann, & Janwillem Soek, eds, *Lex Sportiva: What is Sports Law?* (The Hague: TMC Asser Press, 2012) at 36.

[277] International Olympic Committee, *Olympic Charter* (Lausanne: International Olympic Committee, 2015).

[278] See for example, Art. 6.1 of the *Olympic Charter*, "The Olympic Games are *competitions between athletes in individual or team events and not between countries*. They bring together the athletes selected by their respective NOCs, whose entries have been accepted by the IOC. They compete under the technical direction of the IFs concerned." [emphasis added] Art. 27.6 of the *Olympic Charter*, regarding the Mission and Role of NOCs: "The NOCs must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter." And Art. 28.4 of the *Olympic Charter*, regarding the composition of NOCs: "Governments or other public authorities shall not designate any members of an NOC. However, an NOC may decide, at its discretion, to elect as members representatives of such authorities."

[279] See Lorenzo Casini, "Global Hybrid Public-Private Bodies: the World Anti-Doping Agency (WADA)" (2009) 6 IOLR 421.

[280] Art. 1.1 *Olympic Charter*.

thus making them subject to state law. NOCs are also often public bodies with delegated state powers.[281]

ii. The Development of the Anti-Doping Regulatory Regime

Doping emerged as a noticeable problem in the sporting world back in the 1950s. At the time, the response to it was rather sporadic and disparate across IFs and national governments, even as its practice became both more prominent and sophisticated.[282] IFs responded only to the extent that was necessary to protect their sports' appearance, and states only implemented regulatory responses where there was a cause for national embarrassment. As such, anti-doping regulation developed in a piecemeal fashion. Signs of concerted governmental action only began to emerge in the 1990s, when doping was increasingly becoming a public policy concern and states were able to identify the necessary resources for an appropriate strategy to respond to the concern. Countries such as Canada and Australia, having suffered national embarrassments, were very much at the forefront of this.[283] Gradually, state responses turned into small, disparate regional agreements. The Council of Europe developed doping-control standards for its members, and this was followed by a *Nordic Anti-Doping Convention*—an alliance involving Norway, China, Cuba, Germany, and the Baltic states. For its part, the IOC was not seen to be doing much to promulgate new standards or direct IFs. Its legitimacy was slowly being eroded as it was accused of

[281] For e.g. in Italy. See also Casini, *supra* note 279 at 427.
[282] Barrie Houlihan, "The World Anti-Doping Agency: Prospects for Success" in John O'Leary, ed, *Drugs and Doping in Sport: Socio-Legal Perspectives* (London: Cavendish Publishing, 2001).
[283] Charles Dubin, *Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance* (Ottawa: Canadian Government Publishing Centre, 1990); Australian Government, *Drugs in Sport: Interim Report of the Senate Standing Committee on the Environment, Recreation and the Arts* (Canberra: Australian Government Publishing Service, 1989).

suppressing positive test results, not taking action after positive results were found, and generally being more concerned with the commercialisation of the Olympic Games than the problem of doping.[284] In addition to this, there were further general gripes from governments and the media concerning corruption and in-fighting among the sporting federations.[285] Tensions as to who had the responsibility and legitimacy to regulate against doping was fomenting both between and within the public and private spheres.[286]

This tension finally reached a tipping point in 1998 during the Tour de France. The Festina cycling team's physiotherapist, Willy Voet, was found to be carrying large quantities of doping substances as he attempted to cross the Franco-Belgian border. Voet was arrested, and the French government took charge of the investigations, sidelining the cycling IF, the UCI (*Union cycliste internationale*), which was seen as either helpless or incompetent. With the sport's IF unable to handle the situation and the IOC's moral authority eroded, the IOC decided to host an international conference in order to address anti-doping regulation. The World Conference on Doping in Sport (Lausanne Conference) was set to be hosted in Lausanne, at the IOC's headquarters, with an agenda and regulations prepared in advance by the IOC. The aim of the conference was to reassert and enhance the authority of the IOC as the leading regulatory authority in sport and on doping. The IOC wanted to keep regulation out of the public sphere and maintain it within the realm of sporting institutions.[287] This, however, was not to be the case.

The Lausanne Conference ended up being a public relations disaster for the IOC. After what seemed to be a good start to the conference, IOC President Juan Antonio Samaranch and his

[284] Dag Vidar Hanstad, Andy Smith & Ivan Waddington, "The Establishment of the World Anti-Doping Agency" (2008) 43:3 International Review for the Sociology of Sport 227 at 231.
[285] *Ibid* at 237.
[286] Houlihan, "The World Anti-Doping Agency", *supra* note 282 at 134-135.
[287] Hanstad *et al*, *supra* note 284.

organisation were subjected to a tirade of criticism from governments. Barry McCaffrey, director of the White House Office of National Drug Policy, and Tony Banks, the British sports minister, led a coalition of governments in lambasting the IOC for its past inaction on doping and proposals for tackling it.[288] It was on this basis that the IOC's proposal for an Olympic Movement Anti-Doping Agency (OMADA) was initially rejected. The proposal sought to concentrate power within the IOC, to the exclusion of all other actors. The OMADA was envisaged, "as a foundation under Swiss law ... to be headquartered in Lausanne, governed by a council presided over by the IOC President, consisting of three representatives each of the IOC, the International Federations, the National Olympic Committees, athletes designated by the IOC Athletes Commission, international governmental organisations and three persons representing sponsors, the pharmaceutical industry and the sporting goods industry."[289] But the governments wanted more. They wanted greater stakeholder engagement, accountability of the agency, and most importantly, independence of the new agency from the IOC. Rather than OMADA, therefore, the conference ended with the *Lausanne Declaration*, which contained a proposal for a new, independent International Anti-Doping Agency.[290] This was the genesis of the World Anti-Doping Agency.[291]

WADA was created as an independent, central coordinating institution that would direct the efforts of Olympic Movement officials and governmental authorities. This mandate is explicitly stipulated in its *Articles of Association*.[292] Following the Lausanne Conference,

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[288] *Ibid* at 237, citing Barrie Houlihan, "Anti-doping Political Measures: The New Approaches after the Lausanne Meeting on Doping", Scientific Workshop, *The Limits of Sport: Doping* (Institut d'Estudis Catalans, 1999).
[289] IOC, *Financial Considerations: Summary of Conclusions from the Meeting of the Working Group* (1998) at 1.
[290] Council of Europe, *Lausanne Declaration on Doping in Sport* (1999) GR-C(99)5, art. 4.
[291] IOC, Press Release, (9 September 1999). The title "World Anti-Doping Agency" was preferred to the original suggestion ("International Anti-Doping Agency") because of the possibility of the acronym "IADA" causing confusion with the *International Anti-Doping Arrangement*, which is a multilateral agreement among a group of states.
[292] *Statuts de l'Agence Mondiale Antidopage – World Anti-Doping Agency, fondation à Lausanne*, Article 4 – But:

La foundation a pour buts:

therefore, sporting officials met with governmental officials to create a common forum and consensus-based regulatory code. Whereas both public and private regulators had previously failed to work in concert and had been competitive and ad hoc in their approaches to anti-doping regulation, they were now acting in unison and making the most of the common forum. Richard Pound describes how a recalcitrant Olympic Movement benefited from the collaboration, as it meant that the cost of running the agency could be shared and that the legislative and regulatory tools of governments could be proactively employed.[293] The joint working groups of sports and government officials circulated multiple draft proposals for a new agency to all relevant and interested stakeholders. Upon its completion, the *World Anti-Doping Code* (WADC) received the full financial and political backing of states through the 2003 *Copenhagen Declaration*. In this regard, the *Copenhagen Declaration*, while not legally binding, was a significant political document because of the commitments that it contained.[294] It culminated in the signing of the 2005 *UNESCO International Convention Against Doping in Sport* (*UNESCO Convention*), which has

1. de promouvoir et coordonner, au niveau international, la lutte contre le dopage dans le sport sous toutes ses formes, notamment par des tests antidopage en compétition et hors compétition; pour cela, l'Agence coopérera avec les organisations intergouvernementales, les gouvernements, collectivités publiques et autres organismes publics et privés se consacrant à la lutte contre le dopage dans le sport, y compris notamment le Comité International Olympique (C.I.O), les Fédérations Internationales de sports (F.I.), les Comités Nationaux Olympiques (C.N.O.) et les athlètes; elle suscitera et recuillera de tous ceux-ci l'engagement moral et politique de suivre ses recommandations;

3. d'établir, adapter, modifier et tenir à jour, à l'intention de tous les organismes publics et privés concernés, entre autres le C.I.O., le F.I. et les C.N.O., la liste des substances et méthodes prohibées dans la pratique du sport; l'Agence publiera cette liste au moins une fois par an, avec effet au premier janvier de chaque année, ou à toute autre date fixée par l'Agence si la liste est modifiée en cours d'année;

4. de favoriser, soutenir, coordonner et entreprendre lorsque c'est nécessaire, en pleine coopération avec les organismes publics et privés concernés, l'organisation de contrôles hors compétition sans préavis;

5. d'élaborer, harmoniser et unifier des normes et procédures scientifiques, techniques et relatives aux prélèvements en matière d'analyses et d'équipement, y compris l'homologation des laboratoires, et de créer un laboratoire de référence.

[293] Pound, *supra* note 274 at 94. See also Art. 6 of *the Lausanne Declaration*.
[294] *Copenhagen Declaration on Anti-Doping in Sports*, clauses 4, 6, and 7.

since been ratified by 176 states.[295] WADA played a critical role during the negotiation and drafting stages of the convention. It provided expertise and access to any sport-related resources that the negotiators required, and helped shepherd the process to its conclusion.[296]

Through WADA's stewardship and promulgation of the WADC as a harmonising instrument on multiple levels, public and private actors have been able to create a global regulatory network.[297] The network works so as to accord appropriate rights and obligations to relevant actors in a manner that ensures effective collective regulation. The WADC is the basis of an international convention, the *UNESCO Convention*; transnational rules applicable through contracts in federations; and relevant national legislation and regulatory frameworks. At the international level, the *UNESCO Convention* imposes multiple obligations on state parties, with the WADC playing a central role. Under Article 4(1), states explicitly commit themselves to the WADC principles, and under Article 5, they accept the obligation to adopt appropriate measures to facilitate the implementation of the WADC. Articles 3(c) and 13 to 16 create a framework for collaboration and cooperation among all relevant actors, public and private, to support the mission of WADA and to implement its regulatory procedures. This support involves not only measures within and among states, but also, more directly, support of WADA through the provision of funding.[298] All of these obligations were then transposed into national laws, thus becoming directly applicable to actors that are subject to state parties' jurisdictions. To that end, Article 7 of the *UNESCO Convention*

[295] *UNESCO International Convention Against Doping in Sport*, 19 October 2005, entered into force 1 February 2007.
[296] Pound, *supra* note 274 at 101-102.
[297] WADA, *World Anti-Doping Code 2015*, "Purpose, Scope and Organization of the World Anti-Doping Program and The Code": "The *Code* is the fundamental and universal document upon which the World Anti-Doping Program in sport is based. The purpose of the *Code* is to advance the anti-doping effort through universal harmonization of core anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required, yet general enough in other areas to permit flexibility on how agreed-upon anti-doping principles are implemented. The *Code* has been drafted giving consideration to the principles of proportionality and human rights."
[298] *UNESCO Convention*, Arts. 15 and 17.

obligates states to work with relevant sports bodies and authorities to implement and comply with convention obligations. Finally, on the transnational level, the most significant element furthering WADA's mission is the *Olympic Charter*. Under Article 43 of that instrument, subscription and adherence to the WADC is made mandatory for all members of the international Olympic Movement. IFs, the global regulators and standard setters for each sport, are forced to incorporate and ensure adherence to the WADC within their sports lest they risk exclusion from the Olympic Games, funding, and revenues from TV licensing, or the embarrassment of being named and shamed as not wanting to comply with a universally applicable, multistakeholder instrument that aims to combat doping in sport. The WADC provisions are made directly applicable to athletes, coaches, clubs, and other members of the Olympic Movement through their membership to particular associations that mandate adherence to the WADC, or through various employment or participation contracts. To the extent that the WADC provisions are contractually applicable and further recognised in national legislation, athletes face potential criminal and civil liability for violations of the WADC. The obligation for each of these actors to either adhere to or implement the WADC, as well as details of their roles in the regulatory network, is provided in the WADC itself under Article 20.

WADA is legally seated in Lausanne but physically located in Montreal.[299] It is governed by a Foundation Council that is constituted by forty members equally split between representatives from both the Olympic Movement and states or state-based institutions.[300] The agency's daily management is overseen by a twelve-member Executive Council. The Executive Council is chaired by the president and the vice-president of the Foundation Council, with the other ten

[299] *Statuts de l'Agence Mondiale Antidopage – World Anti-Doping Agency, fondation à Lausanne*, Art. 2.
[300] *Statuts de l'Agence Mondiale Antidopage – World Anti-Doping Agency, fondation à Lausanne*, Art. 6.

members appointed to their positions by the Foundation Council. As previously stated, the agency plays the central coordinating role within the regulatory network.[301] As such, it is tasked with publishing the annual international standard of substances and methods that are prohibited in competition, out of competition, and in particular sports, albeit after comment and consultation has been received from all signatories and governments.[302] The work of testing and analysis of doping controls is facilitated by a network of laboratories around the world that must be accredited and approved by WADA.[303] There are currently 32 of them, and they may be under either private or public control.[304] In order to receive accreditation, laboratories must meet the criteria stipulated within the *International Standard for Laboratories* and its related technical documents. Once a laboratory is approved, WADA coordinates the work of the laboratories as well as the overall management of results.[305] The cooperation among laboratories is further assisted and facilitated by state parties to the *UNESCO Convention* under Article 16(e). This assistance is of particular significance because not only do the states help facilitate the work of the laboratories, but states with more sophisticated and resourceful laboratories are obligated to help states with fewer resources to acquire the experience, skills, and techniques necessary to establish their own laboratories, should they so desire. Finally, WADA, working in collaboration with its signatories and governments, works to coordinate and promote education and international research into anti-doping.[306]

WADA has been lauded for the speed and manner with which it has been able to put both public and private parties on an equal footing in the governance process. The small period of time

[301] See *Statuts de l'Agence Mondiale Antidopage – World Anti-Doping Agency, fondation à Lausanne*, Art. 4.
[302] *World Anti-Doping Code 2015,* Art. 4.
[303] *World Anti-Doping Code 2015,* Art. 6.
[304] WADA, *Accredited Laboratories*, online: <www.wada-ama.org>.
[305] *World Anti-Doping Code 2015,* Article 7.
[306] *World Anti-Doping Code 2015,* Article 18.4.

between the Lausanne Conference, held in the wake of the Tour de France scandal and leading up to the establishment of WADA, in 2001, and the signing of the *UNESCO Convention* in 2005 is quite remarkable. The regime is marked by its ability to overcome the arbitrary distinctions between private and public actors and the roles that these actors should play in a regulatory process, so as to facilitate the development of a GRN that is both efficient and effective.

This case study shows how a similar GRN came into existence and thus presents a potential path forward as to how actors in the global PMSI could begin to collaborate and coalesce. While there are more pointed lessons that could be gleaned from this case study, I would like to save those for later in the chapter once I have presented a much more complete picture of the envisaged GRN through the remaining case studies. The WADA case study demonstrated how global business sector participants could come together and draft the necessary instruments that provide for the institutional infrastructure of a GRN. While this is a significant achievement in and of itself, the important steps of implementation and enforcement would still remain once we have overcome the initial hurdle of drafting, signing, and ratifying the relevant instruments. This is particularly so with regards to the international treaty that is important for two out of the three governance levels – the international and the national. Indeed, the effect of the potential treaty within states experiencing conflict and political instability, which result in, and are manifested by, high PMSC activity, would be negated if we do not provide them with necessary resources. Fragile, conflict-affected states that would become parties to the proposed treaty would still remain so after ratifying the treaty. Without additional interim resources, actors within their domestic security sectors would continue to be inefficiently and ineffectively regulated, thus resulting in minimal progress toward strengthening the rule of law and access to justice for transgressions committed by PMSCs. The case of Somalia serves as a poignant example of how this could be the case.

In Somalia, where the situation remains tense due to ongoing attacks from Al-Shabbab, as well as the Galgala insurgents, militias, and pirates, PMSCs are constantly engaged to provide armed security and protection.[307] Their services are further employed so as to train local police forces and provide risk analyses. Regulation, oversight, and enforcement, however, are minimal. The provision of these services in Somalia, where there are internal political and territorial divisions, has been of concern to the UN Working Group on Mercenaries, which visited the country in 2012. Somalia is divided into three regions: Somaliland (a self-proclaimed independent state that is not internationally recognised), Puntland (a semi-autonomous region), and the South Central Region. While these divisions themselves are a cause for concern, concerns are further fuelled by reports not only of the Puntland Maritime Police Force (PMPF) being trained and armed by a PMSC in violation of an arms embargo,[308] but of serious human rights violations occurring at a PMPF camp that was being run by a PMSC called Saracen in conjunction with activities against the president of Puntland's political opponents.[309] In order to address regulatory gaps in light of international criticism surrounding Saracen, a ministerial decree was issued on October 20, 2012, after a new constitution was adopted in August 2012. The ministerial decree provides for a new registration procedure for Somaliland-based security companies and stipulates that foreign security companies may not own more than 30 per cent of Somaliland security companies.[310] Armed private security companies are banned from Somaliland. The federal government has also instituted a national commission that is tasked with setting up rules and

[307] UNHRC, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, *Mission to Somalia*, UN Doc A/HRC/24/45/Add.2 (2013) [Working Group on Mercenaries Addendum: Mission to Somalia] at paras 14-18.
[308] UNSC Resolution 1425, UN Doc S/RES/1425 (2002).
[309] Working Group on Mercenaries Addendum: *Mission to Somalia, supra* note 307 at paras 28-36. ("Reports indicate that in late 2011, Saracen's assets personnel and operations were transferred to Sterling Corporate Services, a company registered in the Middle Est, which continued to provide large-scale military training, technical assistance and support to the PMPF.")
[310] *Ibid* at paras 54-57.

regulations for PMSCs. The challenge for Somalia, however, even if it were to further join the GRN, would be to implement and enforce these regulations with the limited resources that it has.

One way to assist states such as Somalia as they build state administrative, judicial, and policing capacity within the security sector is to enable private actors to temporarily provide those same services. Indeed, it is possible to assist under-resourced states by creating a transnationally regulated, competitive auxiliary market for the provision of administrative security-sector services.

At present, the ICoC envisages a system whereby PMSCs undertake contractually to adhere to and internalise international human rights and humanitarian law standards in their company policies and structures.[311] This undertaking is to be certified by private organisations that have been accredited by the ICOCA.[312] Technically and legally, however, this certification remains a private contractual arrangement between PMSCs and the ICOCA on a transnational level. The issue of state responsibility remains tangential. States' international legal obligations to act with due diligence and to protect, respect, and fulfil international human rights law, for example, remain squarely on states' shoulders, unaffected by this transnational arrangement. While PMSCs voluntarily undertake to respect the rule of law, under-resourced states remain handicapped in trying to fulfil their roles as national arbiters and guardians of the rule of law.

Consequently, the proposal here is twofold: first, to allow private companies to provide and manage state administrative mechanisms for the implementation and enforcement of state obligations regarding the regulation of states' domestic security sectors where states may require

[311] See Section F, ICoC.

[312] Art. 11, ICoC *Articles of Association*. Pursuant to Article 11.2.1, the ICoC Association's Board of Directors recently recognised ANSI/ASIS PSC.1-2012 as a national standard that is consistent with the ICoC for certification purposes. At present, failure to comply will result in suspension and possible termination of membership to the ICOCA.

such services; and second, to do this through the already constituted ICOCA. The ICOCA would serve as the global secretariat that would accredit private actors who wish to perform this function. It would vet the private actors to ensure that they have the necessary resources and expertise to perform state functions in accordance with international law's requirements. Moreover, by conducting this process through the ICOCA, we are able to leverage the legitimacy of the global industry's broad, participatory multistakeholder initiative, and to ensure both uniformity and universality in the development of regulatory standards applied in all states. The necessary connection would be for the ICoC and an eventual international convention to be in direct communication, citing, complementing, and supplementing each other. Their cross-citation would link actors, actions, and standards together across governance levels, thus further strengthening the efficacy of the global PMSI's regulatory network. As a demonstration of how this could look, the following sections will draw in part from safety models within the maritime and international civil aviation regimes. The maritime safety model highlights the legal framework and the civil aviation model shows us the potential benefits to under-resourced states.

b. Case Study Two: Ensuring Safety Standards in the Maritime Industry

The maritime industry is regulated by the *International Convention for the Safety of Life at Sea Convention 1974* (*SOLAS Convention*).[313] It ensures that ships travelling under the flag of a state party to the convention comply with minimum safety standards regarding construction, equipment, and operation. These safety standards are maintained by "classification societies"—

[313] 1184 UNTS 3 [SOLAS]. Other applicable conventions include the *International Convention on Load Lines 1966*, the *International Convention for the Prevention of Pollution from Ships, 1973* as modified by the protocol of 1978, and the *International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978*.

nongovernmental organisations that establish and maintain the requisite maritime industry standards.[314] To be clear, while states maintain international legal obligations aimed at ensuring the safety of ships travelling under their flag,[315] states are able to delegate the performance of these obligations to private actors—the classification societies. This is provided for in the 1998 amendment to the *SOLAS Convention*:

> In addition to the requirements contained elsewhere in the (SOLAS) regulations, ships shall be designed, constructed and maintained in compliance with the structural, mechanical and electrical requirements of a classification society which is recognised by the Administration in accordance with the provisions of Chapter XI/1,[316] or with applicable national standards of the Administration which provide an equivalent level of safety. [317]

The delegation of this responsibility, however, is conditional upon the flag state notifying the International Maritime Organisation (IMO) of the specific responsibilities and conditions of the authority delegated to the classification society.[318] Moreover, flag states that choose to exercise this option must ensure that the nominated classification society has adequate resources in terms of technical, managerial, and research capabilities to accomplish the tasks being assigned, in accordance with the *Minimum Standards for Recognized Organizations Acting on behalf of the*

[314] See International Association of Classification Societies, *Classification Societies: What, Why and How?* (2011).

[315] UN Convention on the Law of the Sea, *Duties of the Flag State*, Art. 94.

[316] SOLAS Chapter XI, Special measures to enhance maritime safety, Regulation 1, Authorization of recognized organization.

[317] SOLAS Chapter II-1, Part A-1, Reg. 3–1.

[318] SOLAS Chapter 1, Part B, Surveys and certificates, Regulation 6 (b)(ii), Inspection and survey: "The Administration shall notify the Organization of the specific responsibilities and conditions of the authority delegated to nominated surveyors or recognized organizations."

Administration.[319] Once these procedural requirements have been fulfilled, the nominated classification society is cleared to conduct the necessary safety inspections and to issue certificates of seaworthiness.

As evidenced by these international maritime instruments, private actors can be incorporated into the formal legal framework for the purposes of administering state responsibilities imposed by international law. Private actors, with the right legitimate, institutional assurances, can and do play a role in regulating and administering state functions. Through the provision of information about the nominated private party to the IMO, there is an attempt to provide assurances that an international minimum standard of seafaring safety is attained.

Given that this system is already provided for by the international instruments, it is difficult to assess the benefit to states that would otherwise not have the resources to conduct these safety audits on their own. Thus, to assess the potential of private actors to provide this kind of service to states, statistics from the international civil aviation safety regime could be useful.

c. Case Study Three: Ensuring Safety Standards in the International Civil Aviation Safety Regime

The maintenance of safety in international civil aviation is provided for in the *Convention on International Civil Aviation of 1944* (*Chicago Convention*).[320] According to Article 37 of the *Chicago Convention*, states are expected to ensure that they maintain "the highest practicable degree of uniformity in regulations, standards, [and] procedures ... in all matters in which such

[319] IMO Resolution A.739(18), Annex. 2.1

[320] Convention on Civil Aviation ("Chicago Convention"), 7 December 1944, 15 UNTS 295.

uniformity will facilitate and improve air navigation." In order to help achieve this goal, Article 37 further provides that the International Civil Aviation Organisation (ICAO) "shall adopt and amend from time to time … international standards and recommended practices ... concerned with the safety, regularity, and efficiency of air navigation as may from time to time appear appropriate."[321] Consistent with its obligation to implement safety standards, in 1999, ICAO established the Universal Safety Oversight Audit Programme (USOAP). The programme aims to assist states in achieving global aviation safety by determining the extent to which states have been able to implement ICAO's Standards and Recommended Practices (SARPS) within the area of civil aviation safety.[322] The USOAP provides that each state is responsible for ensuring that its civil aviation framework meets the international minimum standard *inter alia* by implementing its own safety audit programmes, which airlines and their aircraft must undergo.

The period following the establishment of the USOAP was marked by a proliferation of auditing standards both nationally and transnationally. The International Air Transport Association (IATA), a private trade association, saw a market opportunity and set out to develop an auditing programme that would "standardise, harmonise and rationalise existing airline audits and auditing standards" in the international civil aviation industry.[323] Between 2001 and 2003, it worked with twelve task forces, each composed of suitably qualified IATA member airlines and regulatory authorities, to produce the IATA Operational Safety Audit (IOSA). The IOSA is an internationally recognised evaluation system that assesses the operational management and control systems of an airline. It has two aims: (1) to improve airline operational safety through the audit programme

[321] Art. 37 Chicago Convention.

[322] See ICAO, *Making an ICAO Standard: Implementation of SARPS/Universal Safety Oversight Audit Programme*, online: <www.icao.int>.

[323] IATA, *Terms of Reference: IATA Operational Safety Audit (IOSA) Advisory Group (IAG)* (International Air Transportation Association, Montreal, 2001) at 1.

using internationally harmonised standards; and (2) to improve airline efficiency by eliminating redundant audits.[324] By and large, the IOSA programme has been able to achieve these goals, as it is recognised and accepted by national civil aviation authorities and has, in many cases, removed the need for airlines within this programme to satisfy the requirements of other audit programmes.[325]

Under the IOSA programme, IATA accredits an audit organisation (AO) to conduct the audit of the airline.[326] The AO's team is composed of suitably qualified experts who are certified by IATA. Prior to conducting the audit, the AO pays IATA an accreditation fee and a flat fee for each audit that it conducts,[327] and the airline undergoing the audit pays an audit fee to the AO. After the audit is completed, the AO submits the audit report to IATA, and this is then entered into a central IOSA database so that any interested party can refer to and utilise the report to fulfil its own audit requirements regarding the relevant airline.[328] The results of the audit are then entered into the IOSA registry and are valid for a period of twenty-four months.[329]

The IOSA programme has been of benefit in many ways. Beyond assisting in the harmonisation of safety auditing, its stringent criteria have relieved states of the burden of conducting audits of airlines themselves in order to be compliant with their international legal obligations. Moreover, the cost of auditing is incurred by the airline as the audit is a condition of

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[324] Tanveer Ahmad, *Adapting the Existing Regime for the Contemporary World to Achieve Global Civil Aviation Safety: A Developing Country Perspective* (LL.M Thesis, McGill University Institute of Air and Space Law, 2009) [unpublished].

[325] David Hodgkinson, "IOSA: The Revolution in Airline Safety Audits" (2005) 30:4-5 Air & Space Law 302 [Hodgkinson].

[326] IATA, *IATA Operational Safety Audit Programme Manual*, 2nd ed (International Air Transport Association, Montreal, 2004), clause 7. [IATA APM]

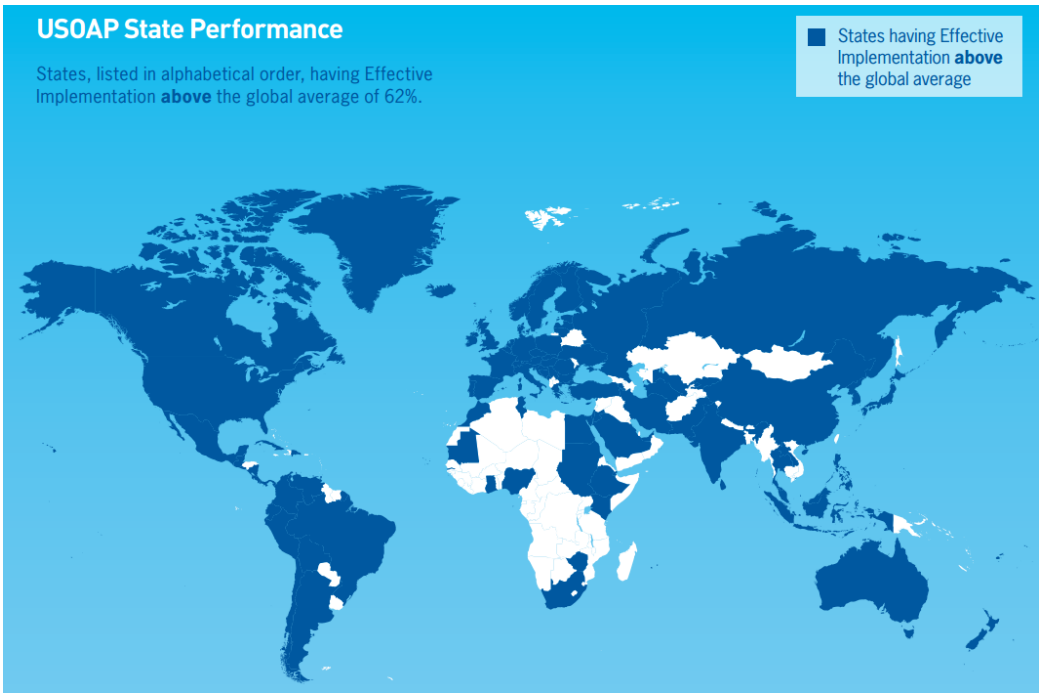
[327] *Ibid* at clauses 8(b), 11, 12 and Schedule C. Clause 1 of the accreditation agreement provides that "Accreditation Fee" means the fee payable by an AO to IATA in relation to accreditation.

[328] Hodgkinson, *supra* note 325 at 302.

[329] Hodgkinson, *supra* note 325 at 327.

its membership to IATA. This can be of significant benefit to states struggling with a lack of resources. But beyond cost, there are clear safety benefits too. Figure One, below, from the ICAO's 2015 report shows regions where national civil aviation authorities' safety standards fall below the USOAP global average.

(**Figure One: USOAP State Performance 2015**)



If left to their own devices, states with under-resourced civil aviation authorities would be responsible for more aircraft accidents. This is a conclusion that can be drawn from the 2014 IOSA report. It shows how IATA members from underperforming regions have better safety records than their counterparts that are not members.[330] This difference is particularly noticeable in the regions

[330] IATA Safety Report 2014, issued April 2015.

where states have sub-average USOAP scores, that is, scores below what is expected of them under the *Chicago Convention* (see **Fig. Two**).

(Figure Two: IOSA-Registered Airlines vs. Non-IOSA –

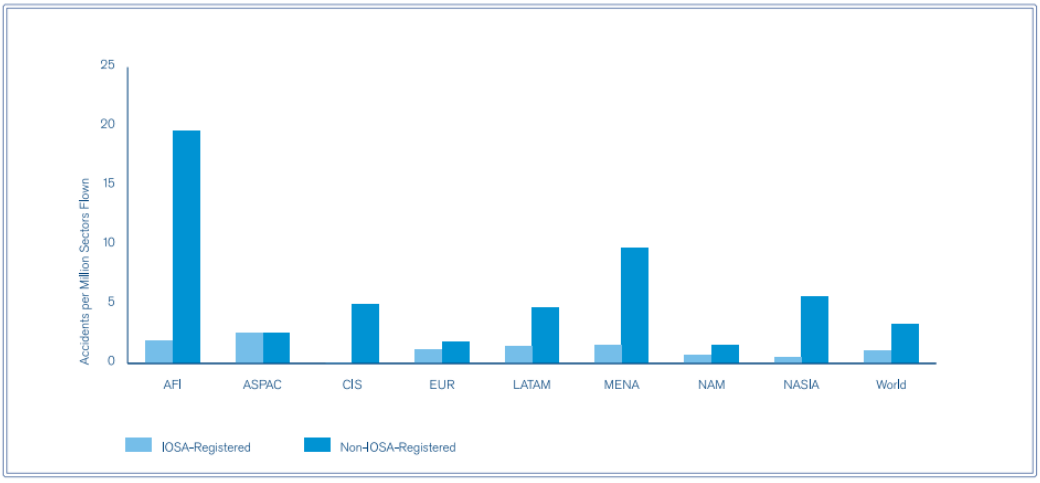
Total Accidents and Fatalities by Region)

IOSA-Registered Airlines vs. Non-IOSA – Total Accidents and Fatalities by Region

In an effort to better indicate the safety performance of IOSA-registered airlines vs. non-IOSA, IATA has determined the total accident rate for each region and globally.

IOSA-registered airlines outperformed non-IOSA in every region. The IOSA-registered airline accident rate was three times lower than for non-IOSA airlines in 2014.

2014 Accident Rate: IOSA-Registered Airlines vs. Non-IOSA



Discussion & Conclusion

This chapter has attempted to address the perennially enigmatic question of regulation in global business sectors, where borders are both relevant and irrelevant; states capable and incapable; and private regulatory initiatives both encouraged and discouraged. To date, the current global politics remain at odds as to how to proceed within the global PMSI, and so the proposed GRN within this chapter attempts to provide a roadmap forward. The proposed regulatory network provides for three parts: first, that all actors within the global PMSI have appropriate rights and obligations allocated to them; second, that the PMSI make use of the collective knowledge,

capacity, and capabilities from its actors when devising appropriate regulatory standards and practices; and third, that the responsibility of regulatory functions be allocated to actors not on the basis of their arbitrary categorisation as either public or private, but rather upon a mutual consensus that acknowledges an actor's knowledge, capacity, and capability to perform a particular role.

The case studies discussed in this chapter provide a basis from which we could envision and begin to realise such a regulatory model. Here are a few lessons that can be gleaned from them collectively. First, it helps for the global PMSI to be cognisant of the fundamentally global nature of PMSCs and their contractors. In the case of anti-doping, the mobility of elite athletes increasingly necessitated a harmonised regulatory system.[331] For example, African athletes often spend most of their time competing in Europe and North America, and Australian skiers and cyclists follow a similar pattern. Inconsistencies in anti-doping regulations made it easier for athletes and their collaborators to exploit loopholes across various countries and among the domestic affiliates of international sporting federations.[332] Countries tried to form regulatory coalitions to tackle doping, but they soon realised the futility of doing so without other states taking part. The global PMSI faces a similar challenge. PMSCs and their contractors operate comparably, with a PMSC often being registered in one jurisdiction and operating in another with contractors of different nationalities. For example, if one considers the mere operation of a drone by a PMSC contractor in one country conducting operations in another, the parallels become self-evident.

Second, with the regulatory burden still considered to lie with states, particularly given the nature of the services that PMSCs offer, the cost of implementing individual national PMSI policies and regulatory frameworks is high. A parallel can be drawn with the regulation of doping.

[331] Houlihan, "The World Anti-Doping Agency", *supra* note 282 at 129.
[332] *Ibid* at 129.

In the case of doping, this cost becomes much greater as the doping techniques used become more sophisticated, and authorities have to invest in the research and methods of testing before, during, and after competitive events. For PMSCs, the costs involved for registration, licensing, and monitoring of PMSCs will rise as the market and the range of services and technology employed continue to expand. It only makes sense, therefore, to create a forum where resources can be pooled and the burden shared across relevant stakeholders.

Third, to the extent that a global regulatory approach requires the assistance of multiple actors operating within different yet relevant legal orders, it is necessary to ensure that all actors have adequate representation and participation in decision-making and governance procedures. Beyond the important goal of appeasing the necessary actors, having wider participation and transparency lends greater legitimacy to the institution and this helps it in achieving its regulatory mission. It is the very essence of inclusive global governance.

Admittedly, the subject matter across the examples differ, but we must bear in mind that these are just possible models that could be tailored to fit the specificities of the global PMSI. The global PMSI is a global business sector like any other. Consequently, we may legitimately consider and learn from comparable models that are working in order to break the current regulatory paralysis in the global PMSI and advance the discussion. That said, there are, implications and challenges that I would like to point out if we were to adopt this model.

The first involves enforceability.[333] How and where would the rights, duties and responsibilities pronounced within this network be enforced? Or more jurisprudentially, if this

[333] I would be remiss if I did not add a few words about the recent Russian doping scandal during the 2016 Rio Summer Olympic Games. Reports indicate that the problem was limited to Russia. (See e.g. Rebecca Ruiz, Juliet Macur & Ian Austen, "Even With Confession of Cheating, World's Doping Watchdog Did Nothing", *The New York Times* (15 June 2016)) WADA, as an agency, had failed to oversee and manage a wayward state member in a significant way. As such, this is indeed a problem that needs to be addressed. That said, two points should be borne in mind. First, WADA,

network could be defined as a legal order, where and how could disputes arising within it be best resolved? If the aim of regulation in this case is to ensure that PMSCs behave more responsibly, then a primary concern must be the third party victims of PMSC harm – how would this network better provide for the actioning of claims against network actors who have violated their obligations? Second, what is the nature of the norms produced within this network, and can they be distinguished from norms emanating from existing major legal orders, such as domestic law and public international law? Finally, given the predominance of states and their role in international regulation, what impact will their participation in networks such as these have on the development of public international law, and the recognition of non-state actors within that order? These questions form the basis of the subsequent chapters.

as an association, may be the central coordinator, but we must not forget that its membership base and executive organs are constituted by a large and diverse body of actors that include states and all those within the Olympic Movement. Subsequently, addressing the problem should be an issue of concern to all of these actors, not just WADA. Second, one should be careful not to throw away the baby with the bath water. By this, I mean that the global anti-doping regulatory framework, in theory at least, represents a significant advance in the design of global regulatory institutional infrastructure. It has provided a means for global business sector participants to coalesce and collectively engage in the enterprise of lawmaking in a manner that can have a holistic impact across the various governance levels. As such, in contemplating ways in which we can advance past this incident, we should consider the fact that it may be more so a change in politics or an increase in resources that is required, rather than solely reform to the institutional hardware, if that at all.

Chapter Four: The Law of a Global Regulatory Network: Part One; The Micro View

Introduction

In the previous chapter, I introduced the concept of a GRN. The idea behind the concept was to formalise links among all actors operating within the global PMSI. This formalisation is made possible substantively through the ICoC and procedurally through the ICOCA *Articles of Association*. These two centrally coordinating instruments, two contracts, serve two primary purposes. First, they apportion responsibilities so as to guide the conduct of actors within the PMSI. Second, the instruments allocate the various responsibilities for conducting regulatory functions within the industry to different actors not solely on the basis of their status as a public or private actor, but also based on their capacity to perform specific regulatory tasks. Cognisant of the fact that some actors who have regulatory responsibility allocated to them might not be able to perform as required, I introduced the idea of auxiliary markets for the provision of regulatory services. This idea involves the outsourcing of regulatory services to the private sector in a manner that is consistent with the industry's coordinating instruments and overseen by its executive association.

This chapter is the first of two that consider the laws of a GRN. I say laws in the plural sense because GRNs are both constituted by legal orders and constitute a legal order. The matter of legality and the capacity of non-state actors to create law when operating in a global space is subject to much debate and thus not without contention. This contention is rooted primarily in the obstinacy of state legal centralists, who reserve the ability to create law exclusively to the state, and secondarily in the disagreement as to how non-state actors do make law if we refute the

premises of state legal centralists. Over the course of this chapter and the next, I engage in this discussion by rejecting the idea of state legal centralism in favour of legal pluralism and then by providing a conception with which we can better understand the process of lawmaking among actors in a global normative space. I do this by considering individual actors' interactions from both micro and macro perspectives.

In this chapter, I begin with the micro perspective. I look at the process of lawmaking among actors within the GRN with the aim of demonstrating the legality of the norms produced by those interactions. I want to show that the central coordinating instruments, the product of private- and public-actor interactions, are law. This is important for two related reasons. First, actors operating within the global PMSI need to be able to establish the significance of the commitments that they have made to one another as well as the norms that they have chosen to govern their conduct. The concept of law is a loaded one, and the designation of a norm as legal, as opposed to moral or regulatory, gives it significant weight. As such, legal norms must have a distinctive form. The mere labelling of an instrument or arrangement as legal cannot on its own merit provide a sufficient justification for why the arrangement is legal and thus why the parties must comply with the obligations contained therein on that basis. Second, establishing the GRN's central instruments as law gives the parties a body of law that they can easily identify and rely upon when challenging other actors for violating specific obligations. This is particularly important in the case of third-party victims of PMSI activity, who currently have to navigate through a myriad of legal rules and systems. Having a single body of rules should simplify the remedial process and increase their access to justice.

In order to establish the central instruments as both law and constitutive of a legal order, I will draw from Lon Fuller and a few other authors who have expanded on his thoughts and

writings. Fuller conceived of law as "the enterprise of subjecting human conduct to the governance of rules."[334] This conception, which is based on a collaborative enterprise among mutually respecting parties, helps us to explain a basis for legal obligation. His theory shuns conceptions of law that presume a one-way, hierarchical relationship between lawmakers and subjects, conceptions that suggest that individuals are merely subject to the law as if they were only to be directed and managed by it.[335] Rather, Fuller founds his conception of law on the interaction and resultant shared understanding that exists among actors. Critical to this interaction is the presupposition that individuals are moral agents, agents with the capacity for responsibility and with an inherent dignity. If we presuppose that actors hold such agency and dignity, then we can acknowledge that there is and must be a mutual respect among the actors regarding the nature of the demands that they make and the expectations that they have of one another. And it is this acknowledgement of agency and respect among the participants that provides the basis for the criteria that constitute the legality of an obligation, and thus demonstrates the "inner morality" of law. Fuller postulates that it is the criteria of generality, promulgation, prospectivity, clarity, non-contradiction, practicability, constancy, and congruence between official action and the declared rule that allow actors to pursue their actions and interactions through, and be guided by, law.[336]

Fuller's reasoning is instructive to the extent that it provides a means for understanding how actors in any setting can produce legal obligations that will govern their conduct. It is particularly instructive where there is no apparent overarching enforcement mechanism. Indeed, the identification of a norm or obligation as legal cannot be founded solely on enforcement. Rather, it must be rooted in the capacity of one actor to engage with another, the capacity and willingness

[334] Lon Fuller, *Morality of Law*, 2d ed (New Haven: Yale University Press, 1964) at 106.
[335] *Ibid* at 207-210 and 212-213.
[336] See David Dyzenhaus, "Fuller's Novelty" in Willem J. Witteveen & Wibren van der Burg, *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) at 97.

to assume responsibility, and the acceptance of a distinct form of obligation established between actors. As Fuller himself puts it, the enterprise of law must involve "a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults."[337] The creation and applicability of law, therefore, must acknowledge and respect the agency and autonomy of the individual to follow the law for reasons other than the use or threat of force.

The utility of this line of reasoning can be taken still further to aid our approaches to global regulation. Social orderings such as global business sectors can be highly complex and technical in nature. Their ability to function and achieve stable governance is dependent upon not only the compliance of actors with the industry's governing norms but also the capacity of those actors to contribute to the constitution and interpretation of those norms. This contribution stems from their experience and expertise gained while acting and interacting both within and without the sector. Consequently, rather than only require a capacity for responsibility and respect for the autonomy of actors as a condition precedent for the formulation and operation of law, we must also recognise the knowledge that actors hold and the role that this plays in the continual process of defining, interpreting, and sustaining legality within complex social orderings. As such, we must acknowledge that actors within the GRN are both "law inventing" and "law abiding".[338] Understanding the role of actors, public and private, in the creation, implementation, and sustenance of law in this manner, particularly on a global scale, can have a significant impact on our approach to the regulation of transnational enterprises. At present, there is a significant challenge in overcoming the governance gap and developing appropriate regulatory frameworks

[337] Fuller, *supra* note 334 at 162.
[338] Martha Kleinhans & Roderick Macdonald, "What is a *Critical* Legal Pluralism?" (1997) 12 Can JL & Soc 25 at 38-39.

for transnational enterprises. However, if we are able to view transnational enterprises as responsible agents that have the capacity to create and engage with the law through interaction with other actors, then we can shift the paradigm that suggests that they are only subject to the law. Rather, as agents that participate in the creation of law, they can also show fidelity to the law and have a responsibility to engage with other actors and communities through respectful reciprocity.

This chapter has three main sections. In the first, I begin by describing the dynamics of the GRN as an epistemic community. My focus will be on the individual actors and the nature of their interactions. In the second section, I build on concepts developed in the first. My aim will be to show how the interactions and shared understandings among actors in a GRN constitute legality, fidelity to law, and reciprocity. I describe how interactions in an epistemic community can produce legal norms. In the third section, I comment on some observations made against Fuller's inner morality of law and how they affect lawmaking in a global normative space. In particular, I home in on the limitations of Fuller's presupposition of actors coming to the law with agency and dignity. This presupposition is applicable to natural persons but not evident in the case of legal persons that are not natural persons, such as corporations and states. As such, I will assess the possibility of non-natural legal persons' capacity for agency and thus fidelity to the law. Finally, I conclude by discussing how Fuller's conception of law presents the opportunity for a new paradigm for the regulation of transnational enterprises in a manner that is consistent with and in support of the widely endorsed *UN Guiding Principles on Business and Human Rights*.

I. The Global Regulatory Network as an Epistemic Community

In the previous chapter, I defined a GRN as the constitution of complex collaborations among public and private actors in different capacities within international, transnational, and national legal orders for the purpose of regulating a global business sector. The actors, both public and private, each representing a node within the network and bound by contract, perform different regulatory functions that collectively produce a cogent, efficient, and effective whole. Through its enterprise of producing norms that govern the actors' conduct, the network establishes itself as both being constituted by a multiplicity of legal orders and constituting a legal order. To better understand this process, though, it might be helpful to explain how a GRN is an epistemic community of actors. This will help to elucidate how the interactions and shared understandings among these actors in the global PMSI produce law and fidelity to law.

Haas defines an "epistemic community" as:

> a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area. Although an epistemic community may consist of professionals from a variety of disciplines and backgrounds, they have (1) a shared set of normative and principled beliefs, which provide a value-based rationale for the social action of community members; (2) shared causal beliefs, which are derived from their analysis of practices leading or contributing to a central set of problems in their domain and which then serve as the basis for elucidating the multiple linkages between possible policy actions and desired outcomes; (3) shared notions of validity – that is, intersubjective, internally defined criteria for weighing and validating knowledge in the domain of their

> expertise; and (4) a common policy enterprise – that is, a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence. [339]

The global PMSI is founded upon the provision of security and security-related services to a host of public and private clients operating primarily in complex environments. In providing these services, PMSCs play an important role in facilitating a range of activities that include recovery and reconstruction efforts, as well as commercial operations and those related to diplomacy and the military. Given that these tend to occur in complex environments, the challenge for all actors is to ensure that these activities are conducted in a manner that is consistent with the observance of human rights and the rule of law when local authorities might be suffering from diminished governance capacity. Cognisant of the fact that the industry is continually growing, the actors within it are aware of the need to construct a regulatory framework that can sustainably facilitate that growth.[340] The increasing supply of and demand for private military and security services on a global scale require appropriate laws that will ensure transparency, accountability, and legitimacy.

In moving toward the development of that regulatory framework, actors within the PMSI began to introduce legislative instruments in a piecemeal fashion at different instances.[341] The opportunity for a centrally coordinating instrument came through the production of the ICoC. The significance and purpose of the code can be seen from its Preamble, which states that:

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[339] Peter M Haas, "Introduction: Epistemic Communities and International Policy Coordination" (1992) 46:1 International Organization 1 at 3.
[340] See Anne-Marie Buzatu, *Towards an International Code of Conduct for Private Security Providers: A View from Inside a Multistakeholder Process*, Geneva Centre for the Democratic Control of Armed Forces (2015).
[341] These are discussed in Chapter Two.

[t]hose establishing this Code recognize that this Code acts as *a founding instrument for a broader initiative to create better governance, compliance and accountability*. Recognizing that further effort is necessary to implement effectively the principles of this Code, Signatory Companies accordingly commit to work with states, other Signatory Companies, Clients and other relevant stakeholders after initial endorsement of this Code to ...:

a) Establish objective and measurable standards for providing Security Services based upon this Code, with the objective of realizing common and internationally-recognized operational and business practice standards; and

b) Establish external independent mechanisms for effective governance and oversight, which will include Certification of Signatory Companies' compliance with the Code's principles and the standards derived from the Code, beginning with adequate policies and procedures, Auditing and Monitoring of their work in the field, including Reporting, and execution of a mechanism to address alleged violations of the Code's principles or the standards derived from the Code;

and thereafter to consider the development of additional principles and standards for related services, such as training of external forces, the provision of maritime

security services and the participation in operations related to detainees and other protected persons (emphasis added). [342]

In addition to this extract is a commitment to the responsible provision of security services in a manner that is both consistent with and supportive of the rule of law, respectful of human rights, and protective of client interests. The code's language is indicative of a clear, shared understanding as well as common values among the actors within the PMSI; it is a commitment toward the collaboration necessary to achieve the goal of a responsible and accountable PMSI. The vehicle to help facilitate all of this is the ICOCA. In Article 2 of its *Articles of Association* (AoA), it is stated that the purpose of the association is to promote, govern, and oversee the implementation of the ICoC. The association can do this by engaging in all activities and taking all appropriate actions to carry out this purpose in accordance with its articles. Critical to achieving this is the role of its membership, which is constituted of states, PMSCs, and civil society organisations (CSOs). Collectively, these actors form a network with the purpose of achieving sustainably efficient and effective regulation in the global PMSI.

The idea behind this overview of the GRN is to recognise the value that each actor within the network contributes toward the creation of knowledge that sustains the continual development of the network's operational efficiency and effectiveness. Each of the actors in the network is a node or knowledge site that can be tapped into for information. The diversity of actors' knowledge bases results from the uniqueness of their experiences, which colours their perspectives and thus places their knowledge value on a level of parity with all other actors within the network. As such, the network is constituted by actors in dialogical and dialectical relationships that depend on one

[342] Preamble, *ICoC* at para 7.

another if they are to work effectively in the production of new knowledge.[343] Their collaboration, which produces a richer discourse and more legitimate outcome, is tied to an appreciation of each actor as having "epistemic agency".

Epistemic agency is the attribution of responsibility to individual agents for knowledge that they both have and do not have.[344] According to Marlene Scardamalia and Carl Bereiter, attaining epistemic agency involves active processes in which individuals engage in knowledge-building activities that seek to create and improve ideas.[345] In such processes, individuals take responsibility for seeking to engage with and examine alternative knowledge bases so as to enrich their own. To this we add the notion of "sharedness". The notion of sharedness in agency presupposes intersubjectivity in an interaction between participants who are united in their focus on a common knowledge object.[346] The survival and enhancement of the network depend on the necessary dialogue between and among nodes, operating in dialectic relationships to consider ideas that result in the production of new knowledge. Individually and collectively, therefore, the actors need to negotiate ways of working together so as to develop and progress in their understanding of the shared knowledge object. This, for example, could be a relevant regulatory standard. In this regard, Yasmin Kafai rightly indicates that a person's individual knowledge can serve as a resource for other people's learning.[347] Karen Stephenson also adds that "[e]xperience has long been

[343] Black, *supra* note 232. Black, by contrast, discusses dialogical and dialectic relationships in the context of legitimating communities: what actors in polycentric regulatory regimes are required to focus on to generate and sustain legitimacy to regulate. Legitimacy does, however, play a part for our purposes. The connection and collaborative effort with other actors serves to legitimise the work product that is produced.
[344] Baron Reed, "Epistemic Agency and the Intellectual Virtues" (2001) 39 The Southern Journal of Philosophy 507 at 522.
[345] Marlene Scardamalia & Carl Bereiter, "Knowledge building: Theory, pedagogy, and Technology" in Keith Sawyer, ed, *Cambridge Handbook of The Learning Sciences* (New York: Cambridge University Press, 2006).
[346] Crina Damşa & Jerry Andriessen, "Shared Epistemic Agency for Knowledge Creation: An Explorative Case Study" in Anne Moen, Anders I MØrch, & Sami Paavlova, eds, *Collaborative Knowledge Creation: Practices, Tools, Concepts* (Rotterdam: Sense Publishers, 2012) at 206.
[347] Yasmin B. Kafai, "Constructionism" in R. Keith Sawyer, ed, *The Cambridge Handbook of the Learning Sciences* (New York: Cambridge University Press, 2006).

considered the best teacher of knowledge. Since we cannot experience everything, other people's experiences, and hence other people, become the surrogate for knowledge."[348]

This limited foray into processes of knowledge creation merely aims to emphasise how states, PMSCs, and CSOs can and should collaborate to produce an appropriate regulatory framework, given their different knowledge bases, experiences, and capabilities. States' experience and capabilities regarding domestic regulation should be combined with the industry know-how and expertise of PMSCs. The result of that collaboration should be both supported and tempered by actively engaged CSOs, whose ability to serve as watchdogs, representation of community interests, and involvement with other social responsibility initiatives should be valued.

The ICoC is an example of regulatory standards produced by collaborative knowledge processes within the global PMSI.[349] It is meant to be internalised into all PMSC corporate governance and compliance structures,[350] included in all contracts with clients, subcontractors, and employees,[351] and adhered to nevertheless where it is excluded in a client contract.[352] Yet, the ICoC itself explicitly states that it "creates no *legal* obligations and legal liabilities on the Signatory Companies."[353] Rather, the signatory companies commit "to operate in accordance with this Code" and, by doing so, to publicly affirm their responsibility to respect the human rights of and fulfil

[348] Karen Stephenson, *What Knowledge Tears Apart, Networks Make Whole* (1997), online: Internal Focus <http://www.netform.com/html/icf.pdf>.
[349] It should be noted that the initial push towards creating the instrument came from the Swiss government and the International Committee of the Red Cross (ICRC). There was wider participation in the instruments' elaboration as time went on. For account of this process, see Deborah Avant, "Pragmatic Networks and Transnational Governance of Private Military and Security Services" (2016) 60:2 International Studies Quarterly 330.
[350] Para 44 ICoC: "Signatory Companies will incorporate this Code into Company policies and internal control and compliance systems and integrate it into all relevant elements of their operations."
[351] Para 18 ICoC: "Signatory Companies will make compliance with this Code an integral part of contractual agreements with Personnel and subcontractors or other parties carrying out Security Services under their contracts."
[352] Para 19 ICoC: "Signatory Companies will adhere to this Code, even when the Code is not included in a contractual agreement with a Client."
[353] Para 14 ICoC.

humanitarian responsibilities toward all those affected by their business activities.[354] This is quite the conundrum. On one hand, a literal reading of the provision would suggest exactly what it says—that there are no legal obligations created among the parties to the code. And yet on the other, there are indications of shared understandings and a commitment toward the production of a text to guide the parties' conduct and create legitimate expectations of adherence with that text.[355] It is here that Lon Fuller's conception of law is perhaps most illuminating in explaining how the result of this interaction and the subsequent congruent actions are actually the creation of law among the parties.

II. The Global Regulatory Network as a Legal Order

The challenge that we are confronted with here is to properly understand the aspirations of the parties to the ICoC and the impact that the product of those aspirations is meant to have on their conduct and social ordering. Law, according to Fuller, is the enterprise of subjecting human conduct to the governance of rules.[356] It has a distinctive form that is founded upon a mutual respect between a lawmaker and the subject of that law: a respect for the agency and autonomy of the individual subject to accept law.[357] As such, the enterprise of creating law is one which entails, in part, the production of conduct-governing norms results from an interactive relationship among mutually respecting parties in positions of procedural parity. GRNs' legal orders are the result of

[354] Para 6 ICoC. See also International Code of Conduct for Private Security Providers, *ICoC Signatory Companies*, online: <www.icoc-psp.org>.
[355] For example, consider this provision from leading PMSC, Triple Canopy's *Code of Ethics and Business Conduct* (5th rev. 2012), online: <http://www.triplecanopy.com/assets/tc-ethics-business-conduct-02212012-WEB_new.pdf>: "[a]s a signatory to the ICoC, Triple Canopy must follow the ICoC's guidance, and the Company must ensure that it operates in accordance with the standards and principles it contains."
[356] Fuller, *Morality of Law*, *supra* note 334 at 106.
[357] See Colleen Murphy, "Lon Fuller and the Moral Value of the Rule of Law" (2005) 24 Law and Philosophy 239.

continual interactions among their participants who produce conduct-governing norms. The necessary corollary to this enterprise is the subsequent congruence between the agreed norms and the parties' actions. An assessment of the existence of applicable law, therefore, does not entail an evaluation of pedigree criteria but rather of the parties themselves, their shared intentions, and their actions.

As has already been stated, the PMSI's envisaged GRN is founded upon the ICoC and the ICOCA AoA. The ICoC, which serves as the network's central text of substantive obligations, is the product of interactions among its signatory parties. Through the ICOCA AoA, the ICoC signatories who subsequently also became members of the ICOCA agreed to engage with various other stakeholders to create an institutional structure, an independent governance and oversight mechanism, that would oversee the implementation of the ICoC. True to that commitment, PMSCs engaged with states and CSOs to establish the ICOCA. The ICOCA is the result of broad engagement within the sector; the product of a process of mutual construction among a host of public and private actors. It is non-hierarchical with no apparent overarching enforcement mechanism. All of its members take part in the production of its governing norms. And as such, all of the parties to this association are simultaneously both regulators and regulatees; they are the authors and subjects of regulation. But at what point can we declare these norms to be law, if there is indeed a "point" at all, so to speak?

Fuller posited that law or the legality of a norm is established through adherence to what he termed the "inner morality of law".[358] The inner morality of law is a reflection of Fuller's belief that certain criteria must be met in order to allow individuals to pursue their purposes through law

[358] Fuller, *Morality of Law*, *supra* note 334 at 42.

and for law to guide their actions and interactions.[359] If any one of these criteria, generality, promulgation, prospectivity, clarity, non-contradiction, practicability, constancy, or congruence between official action and declared rule, is not met, then the attempt to create law, individually or systemically, fails.[360] The attempt fails because the lawmaker has not respected the subject's agency, autonomy, and capacity to comply with law. I would submit that the most important criterion in the context of the global normative space, given the focus on lawmaking in the GRN, is the final criterion: congruence between official action and declared rule. The reference to "official" action situates the principle within a domestic or national lawmaking context. This is not the context in discussion. Subsequently, having already established how all individuals can and do take part in the lawmaking process, it is critical they also ensure that subsequent actions are congruent with the agreements resulting from the interactive lawmaking process. If this and the other principles are met, then the norm in its given context will be acknowledged for its legality and will attract adherence to itself, or "fidelity", and a mutual practice of reciprocity.[361] And it is this practice of reciprocity, founded on fidelity to the law, which binds the parties together in legal relationships and forms legal orders.

Inherent to the practice of legality, which is founded upon fidelity and reciprocity, is a process of continual interaction among the parties. Through this interaction, the parties generate legal norms and then constantly reinterpret and redefine those norms. This is important for two

[359] Jutta Brunnee & Stephen Toope, "An Interactional Theory of International Legal Obligation" (2008) University of Toronto Faculty of Law, Legal Studies Research Series No 08-16 at 15.
[360] Fuller, *Morality of Law*, *supra* note 334 at 34. In his tale about the hapless legislator, King Rex, Fuller describes how, through a failure in different instances to create law, King Rex failed absolutely. "Rex was resolved ... to make his name in history as a great lawgiver. It was his unhappy fate to fail in this ambition. Indeed, he failed spectacularly, since not only did he not succeed in introducing the needed reforms, *but he never even succeeded in creating any law at all*, good or bad" (emphasis added). Further, at 39, Fuller adds, "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all."
[361] See Fuller, *Morality of Law*, *supra* note 334 at 39-41. See also Lon L Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart" (1958) 71 Harv L Rev 630.

reasons. First, it is indicative of how law is an enterprise. It is an activity whose system is "the product of a sustained purposive effort."[362] Second, it is demonstrative of the fact that the parties construct the norms mutually—they are both "law inventing" and "law abiding".[363] These two features are easily identifiable within the GRN. Clearly, the ICoC is the result of the parties' interaction. Each party in the network holds a body of knowledge and experiences that they share with other parties through their continual interactions, and this is the basis upon which the code's conduct-governing norms are reinterpreted and redefined. Law is not a static social fact whose determination lies solely in the authority of a hierarchically superior official. Rather, it is an enterprise that is founded upon mutually respecting parties with shared understandings and commitments interacting toward the construction of rules that will govern their conduct.[364] Consequently, contrary to the statement denying the legality of the norms and commitments within the ICoC and the ICOCA, the practice of the signatory parties suggests that they did create law and a legal order. The statement denying legality could be interpreted as a declaration that the signatories did not intend to give conventional force to the text; it still remains a statement of intent which, if it is backed by action, will acquire the status of law. Perhaps much of the confusion here lies in the unconscious adoption of a formal test of legality which associates the text with the law. It is never the text which is law. The text is a formulation of what is accepted as law for the time being.[365] And thus not only did they create law, but they continue to do so, though not always completely or effectively.

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[362] Fuller, *Morality of Law*, *supra* note 334 at 106. See also Lon L Fuller, "American Legal Philosophy at Mid-Century" (1954) 6 J Legal Ed 457 at 467 ("…law is not a datum, but an achievement that needs ever to be renewed").
[363] Kleinhans & Macdonald, *supra* note 338 at 38-39.
[364] See also Janet Koven Levit, "A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments" (2005) 30 Yale J Int'l L 125.
[365] This is an argument that I credit to my doctoral supervisor, Professor Fabien Gélinas, which arose in one of our many conversations on the subject matter.

Fuller postulated that law's inner morality is a "morality of aspiration".[366] Implicit in his conception of law is the subject as a moral agent worthy of respect from the lawmaker. In order to accord the subject the respect that she deserves, the lawmaker is under pressure to produce laws that are clear, constant, and general; laws that are prospective and not retrospective; laws that are practicable and that do not contradict themselves; and laws that are congruent between what they declare to be a rule and how they are applied. But producing such laws is not always easy because of the difficulty in discerning the point at which the lawmaker has achieved those objectives. This is particularly so where achievement can only really be assessed using a qualitative rather than a quantitative or empirical measure. As such, the lawmaker can only ever strive to do her best to achieve these "desiderata" of legality, knowing that she might fail to hit the mark, that she may be close, but not quite there.[367] In attempting to produce legal norms within the GRN, the actors as both lawmakers and subjects are under a constant pressure to produce norms with sufficient mutual respect for one another and that strive to adhere to law's inner morality. This is why Fuller concludes that if the inner morality of law is something that one strives for and yet cannot always be achieved, then "[i]ts primary appeal must be to a sense of trusteeship and to the pride of the craftsman."[368] This is important in the context of the GRN. It is easy to see how an actor may propose a new safety practice or procedure that contradicts existing requirements or would demand the impossible from other PMSCs. More specifically, these could be particular audit requirements or licensing procedures that are too onerous for some PMSCs, or even for some states to implement and oversee. Reaching agreement on a provision that is feasible for all parties to a degree that protects the observance of human rights and respect for the rule of law would therefore be the

[366] Fuller, *Morality of Law*, *supra* note 334 at 5, 42-43 and 122-123.
[367] *Ibid* at 122, "[B]oth rules of law and legal systems can and do half exist. This condition results when the purposive effort necessary to bring them into full being has been, as it were, only half successful."
[368] *Ibid* at 43.

challenge of the interactional process. Indeed, reaching that agreement would re-emphasise the conception that law is an enterprise and its order is the product of a sustained, purposive effort.[369]

III. A Few Reflections on Fuller's "Inner Morality of Law"

As illuminating as Fuller's conception of law is, there are some areas that require further consideration in the context of global actors and complex social orderings. In this short section, I discuss two of those areas. The first subsection considers the make-up of the eight criteria, or "desiderata", and offers two comments. The second assesses the applicability of the inner morality of law to non-natural juridical persons.

i. The Eight "Desiderata"

There is some concern with the eight "desiderata" that constitute Fuller's "inner morality of law". One of the more well-known critiques is the "efficiency" argument, or the classification of Fuller's inner morality of law as mere "principles of legality". This rebuke, levied by both Hart and Raz, argued that Fuller's eight criteria were all valid points only if one wanted to ensure the efficiency of a law. According to them, the criteria had nothing to do with a notion of law's morality. To illustrate this, Raz raised the example of a knife that ceases to serve its purpose as a knife the blunter that it becomes.[370] And for his part, Hart raised the case of "the morality of poisoning."[371] He attempted to show how, if one was receiving directions on how to poison

[369] *Ibid* at 106.
[370] See Joseph Raz, "The Rule of Law and its Virtue" in Joseph Raz, *The Authority of Law*, 2d ed (New York: Oxford University Press, 2009) at 225-226.
[371] HLA Hart, Book Review of *The Morality of Law* by Lon Fuller (1965) 78 HLR 1281 at 1285-1286.

someone that include "Avoid poisons however lethal if they cause the victim to vomit," or "Avoid poisons however lethal if their shape, color, or size is likely to attract notice," this only makes the goal and process of poisoning someone more efficient, and in no way can these directions be described as principles of "the morality of poisoning."[372]

Commentators sympathetic to Fuller's cause have found clever responses to these critiques. For example, Brunnée and Toope have said that there are circumstances where a knife can still be a "knife" while completely blunt. Such instances include the significance of a beautiful, jewel-encrusted dagger that is gifted to a young boy, from a vacation in Tunisia, or a Kirpan that is worn by orthodox Sikh males for ceremonial purposes but cannot physically be withdrawn from its sheath.[373] As a "knife" can have value aside from its function, so can law beyond its instrumentality.[374] Rundle presents an equally convincing rebuttal to the reading of Fuller's inner morality as one based on efficacy. She argues that "[t]he only way that an efficacy reading of the value served by observance of the internal morality of law can make sense is if it is attached to a top-down, essentially coercive conception of law in which the role of the subject is merely to serve the superior's ends."[375] Indeed, Fuller was critical of the analytical positivist position, which perceives law as a one-way projection of authority where the law acts upon the subject but does not engage with the subject.[376] A top-down conception of law is more easily imagined in a national

[372] *Ibid*.
[373] Jutta Brunnée & Stephen Toope, "An Interactional Theory of International Legal Obligation" (2008) University of Toronto Faculty of Law, Legal Studies Research Series No 08-16 at 18.
[374] *Ibid* at 18.
[375] Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Oxford: Hart Publishing, 2012) at 122.
[376] Fuller, *Morality of Law*, *supra* note 334 at 192.

context where there is an overarching authority in the form of the state. This, however, is not the case in a global setting where there is no such authority.[377]

The second comment on Fuller's inner morality of law pertains to its apparent limitation in application to national legal systems. The eight criteria seem more suited to the promulgation of laws through state-based institutions such as a legislature or a commission. The eighth criterion of congruence between an official's actions and a declared rule is particularly indicative of this. In Fuller's discussion, much mention is made of national courts and judge-made law, statutes, and constitutions.[378] However, in light of complex social orderings beyond the state, we need to adapt the concept to alternative forms of lawmaking. These can include agreements, custom, international arbitral case law, or trade usages.

ii. The Application of Law's Inner Morality to Non-Natural Legal Persons

Fuller's inner morality of law provides a useful and meaningful way of understanding the bases for legal obligation and legal orders. This is particularly the case for legal orders that are distinct from the state and its legal institutional structures. Further elaboration beyond its substantive criteria is required, however, on the presuppositions that it makes with respect to legal subjects. Fuller argues that the conception of law is dependent upon "a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults."[379] In order to better understand this, Rundle proposes that we consider

[377] See for e.g. Brunnee & Toope's, *supra* note 359 where they espouse an interactional theory of international legal obligation, founded on Fuller's inner morality of law, to account for a legal system where there is no structural, overarching authority.
[378] Fuller, *Morality of Law*, *supra* note 334 at 81-91.
[379] *Ibid* at 162.

what Fuller means when he refers to an "agent". This is "a person 'capable of purposive action', in possession of her capacities, and who is to be regarded as an end in herself."[380] Rather than being viewed as a subordinate subject upon whom the law acts, "[s]he is instead a bearer of dignity, with a life to live of her own."[381] Pivotal to this view is the understanding that the legal subject comes to the law in this state, "in the sense that law's form not only respects and speaks to her status as such, but presupposes it."[382] This is a fine way to consider actors and the value that they have in terms of the creation and sustenance of the law. The problem, however, is that this assumes that we are only considering *natural* persons, that is, flesh-and-blood human beings.[383] Yet, complex social orderings such as the GRN are constituted by legal persons—both natural and non-natural. Such non-natural legal persons include corporations, CSOs, international organisations, and states. The question is, therefore, can we make the same presupposition of moral agency and dignity for non-natural legal persons? That is, can we view corporations as "real" persons?

While an interesting question, I do not think that it is necessary for me to adopt all of Fuller's theory. He was writing in both a different time and context. Fuller was concerned primarily with questions on the nature of law in a national context. The matter of dignity as it pertains to natural persons in that lawmaking context is an important one. Consequently, by extension, it is important to consider how non-natural juridical persons, or group actors, can have a will of their won and be bearers of dignity for the specific context of lawmaking in a global normative space. As such, I shall present a short discussion theorising one way in which group actors could be

[380] Rundle, *supra* note 375 at 10.
[381] Rundle, *supra* note 375 at 10.
[382] Rundle, *supra* note 375 at 10.
[383] See Fuller, *Morality of Law*, *supra* note 334 at 181-184. Fuller has a section entitled "The Problem of Defining the Moral Community", and in it he asks, "Who are embraced in the moral community, the community within which men owe duties to one another and can meaningfully share their aspirations?" His response, at 183, is clear: human beings. Having defined the 'inner morality of law as a morality of aspiration, he states that "[t]he morality of aspiration is after all a morality of *human* aspiration. It cannot refuse the human quality to human beings without repudiating itself."

conceptualised as a moral agent – "a bearer of dignity, with a life to live of her own." This is pivotal because "[o]nce we recognise a collective entity as an agent, we can interact with it, criticize it, and make demands on it, in a manner not possible with a non-agential system."[384]

As Victor Muniz-Fraticelli rightly points out, the point of departure for this discussion is an assessment of an association's claim to have its personality recognised as a matter of right, not of privilege or concession. Further, it is an assessment of whether this claim is being made by the association as an agent itself or as the members that constitute it in furtherance of their own individual rights.[385] As such, we are considering the association's claim to personality antecedent to law, not through the theories of concession or fiction. Indeed, to proceed within the confines of these theories, which are uniquely associated with the supremacy of the state as a personality-granting authority, would be a non-starter, a contradiction, even. After all, the state itself is also an association that is constituted by individuals.[386] Instead, we must begin by attempting to identify what the determinative characteristics of real personality are.

A survey of the literature shows that there is no real consensus on such criteria, as different epistemological approaches all seek to achieve different ends. Some recurring evaluative criteria include the capacity of the association to form intentions that are ontologically distinct from those of its members; the capacity to sustain an identity over time notwithstanding a fluid and changing membership base; a capacity to act rationally in the world and engage with other actors with the potential to obligate oneself; and others of this sort. That said, one criterion that often tends to arise

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[384] Christian List & Philip Pettit, *Group Agency. The Possibility, Design, and Status of Corporate Agents* (New York: Oxford University Press, 2011) at 5.
[385] Victor Muniz-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (Oxford: Oxford University Press, 2014) at 199.
[386] The famous legal historian, Frederick Maitland, rightly stated that "the State's possession of a real will is insecure if no other groups may have wills of their own." See Frederick Maitland, "Introduction" in Otto von Gierke, *Political Theories of the Middle Age* (Union, NJ: The Lawbook Exchange Ltd, 2002) at xlii.

irrespective of whether an author is arguing for or against an association's real personhood is the capacity for the association to have its own "will". Put more succinctly, this is the capacity for the association to act out its own "personal dramas",[387] or to live a life of its own.[388]

To be sure, there are collectives of individuals where this can be a hard criterion to meet because of the looseness and informality of the group. But it will be neither useful nor relevant to consider the breadth of such collectives in this instance. Rather, I will focus on group agents that are more particular to the global PMSI and my envisaged GRN. More specifically, I will focus on the corporation as a group agent given that the PMSC is the central actor that I am looking to engage with.[389] In attempting to demonstrate the corporation's capacity for independent "will", I shall assess its internal and external constitutions. An assessment of the internal constitution considers the role of structures and processes within the person, and the outside constitution pertains to the role of social recognition in the making of the person.[390] Let me begin by discussing the corporation's external constitution.

The external constitution of a corporation is akin to the recognition of states in international law and relations.[391] Here we are interested in the extent to which the corporation is acknowledged as an independent actor within its various social contexts, and I do not think that there is much contestation in this regard. Corporations are often personified in the media, the literature, and our everyday discourse. Frequently, and in most cases without second thought, we refer to corporations

[387] See David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997) at 241: "Groups can only be persons as individuals can be persons if they are capable of acting out their own personal dramas."
[388] Rundle, *supra* note 352 at 10.
[389] Notwithstanding that states are in a similar position. That said, addressing the real personality of states is less of a concern in light of a predominant Westphalian system.
[390] See Alexander Wendt, "The State as Person in International Theory" (2004) 30 Review of International Studies 289 at 293 ff.
[391] *Ibid*.

as individuals without reference to the many individuals that constitute them. Nike, Nestlé, Dell, and Shell—these are all faceless, household brands that everyone is familiar with. And for their part, corporations represent themselves to the world as distinct individuals. This is most noticeable in areas that require them to engage with various stakeholders in the course of business and not by law, such as in corporate social responsibility (CSR) initiatives. In these cases, one need only consider the pledges that are made by various corporations to their local communities and reported in their annual CSR reports. This almost invariably results in legitimate expectations that corporations will adhere to their promises. Where these promises are not kept, NGOs such as Greenpeace and Amnesty International have been quick to condemn corporations, and some individuals have successfully taken them to task in court.[392] The case of corporate real personality from an external perspective, therefore, is relatively easy to establish. What is more challenging is the internal aspect, that is, a demonstration that the internal constitution of the corporation is not reducible to the individuals through which it acts.

When considering the internal aspect of the corporation, there are three positions that emerge from the literature. These are the emergentist, the reductivist, and the supervenience arguments. The emergentist position enjoys a strong line of formidable proponents harking back to the likes of Hobbes,[393] Gierke,[394] Maitland,[395] Figgis, Laski, and Cole.[396] The emergentist position holds that where a group of people come together with shared purpose and intention, the

[392] *Kasky v. Nike Inc.* (2002) 119 Cal Rptr (2d) 296; 27 Cal (4th) 939; 45 P (3d) 243.
[393] Thomas Hobbes, *Leviathan*, (Richard Tuck, ed.) (Cambridge: Cambridge University Press, 1996) at 114: "A multitude of men, are made *One* Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the *Unity* of the Representer, not the *unity* of the Represented, that maketh the Person *One*. And it is the Representer that beareth the Person, and but one Person: And *Unity*, cannot otherwise be understood in Multitude."
[394] Gierke used the concept of the *Genossenschaft* (or "fellowship") to describe group persons.
[395] Frederick W Maitland, "Moral Personality and Legal Personality" in David Runciman & Magnus Ryan, eds, *Maitland: State, Trust, and Corporation* (Cambridge: Cambridge University Press, 2003) at 65: "The group can be a person: co-ordinated, equiparated, with the man, with the natural person."
[396] See Runciman, *supra* note 387, Parts One and Two; Muniz-Fraticelli, *supra* note 385 at Chapters 9 and 10.

group forms a personality that is separate and distinct from the collective of individuals that constitute it. The language used by proponents of this position to describe this distinct group person varies from terms such as "artificial", or "fiction", all the way up to more organicist metaphors where the group person was indeed considered to be an actual person. As an example of the latter, Figgis described such group persons as the "unity of life and action" that grew out of an association's "collective, not individual ... constitution."[397]

The attraction of the emergentist position stems from its easy embrace of pluralism. It allows us to envisage with ease how corporations and other associations should be considered separate entities operating on a global normative landscape independent of the individuals that constitute them. There are, however, some concerns regarding this approach. The first is the tendency to anthropomorphise the corporation. Hobbes used metaphors of body and spirit to describe his commonwealth person,[398] and more recently, Peter French has attempted to demonstrate rational corporate intentionality based upon his argument of corporate internal decision-making structures.[399] This has come under sharp rebuke by authors such as Manuel Velasquez, who claims that "[p]rocedures and policies, however simple or complex, cannot create group mental states or group minds in any literal sense."[400] In addition, Dewey is critical of the lack of unity in the arguments presented for corporate personality. The multitude of positions all trying to prove the same thing, he argues, is merely demonstrative of the fact that the various authors were all trying to defend vested interests or achieve specific goals during their respective times in history.[401] And this is arguably true. Hobbes's *Leviathan*, which presents the idea of the

[397] John Figgis, *Churches in the Modern State* (Bristol: Thoemmes Press, 1997) at 69.
[398] See Runciman, *supra* note 387 at Chapter One.
[399] Peter French, "The Corporation as a Moral Person" (1979) 16:3 American Philosophy Quarterly 207.
[400] Manuel Velasquez, "Debunking Corporate Moral Responsibility" (2003) 13 Business Ethics Quarterly 545 at 545.
[401] John Dewey, "The Historic Background of Corporate Legal Personality" (1926) 35:6 Yale LJ 655.

commonwealth person, was written in a time of concern for preventing civil war and fostering unity through early social contract theory; Figgis was attempting to defend the personality of the Church;[402] and Gierke was attempting to defend Germanics against Romanics in the midst of a cultural struggle between the two.[403] The final critique of the emergentist position is that there is insufficient attention given to the role of the individual in this process. Christian List and Philip Pettit pick up on this in their account of supervenience,[404] but before I address that view, let me turn to the other end of the spectrum on the debate about corporate personality.

If the emergentist tradition can be placed on one end of a spectrum, then the reductivist position can be placed on the opposite end. This latter approach holds that associations are merely the aggregate of individual interactions or transactions, and that associations can always be reduced to the individual interests that constitute them. As such, reductionists espouse the most physicalist approach to associations. The need to reduce associations to individual units, however, is also the weakness of the reductivist position. Alexander Wendt provides several criticisms that demonstrate the impracticality of this approach.[405] First, he argues, reductionism is circular, as its accounts of individualism have a tendency to include unreduced groups. For example, in considering the set of individuals that comprise a state person, one would probably identify citizens, but the class of citizens is a group itself. Second, group intentions can be insensitive to individual intentions and can be maintained even if there is a one-hundred per cent turnover in the group membership. An example of this could be a parliament's decision to go to war with another state when not all members of parliament agree with this decision, and moreover that the decision can be maintained even if every member of parliament is replaced. Third, groups can do things

[402] *Ibid* at 671.
[403] See Runciman, *supra* note 387, Chapter Two.
[404] List & Philip, *supra* note 384.
[405] Wendt, *supra* note 367 at 299-300.

that individuals cannot, thus making some group intentions indivisible. For example, "[s]anctions, war, and humanitarian intervention are all highly complex social practices that no individual can perform by herself."[406] And finally, in order to have an intention to do X, X must be something that an actor can control, yet individuals cannot always control the actions of a group. Consequently, it is for reasons of impracticality such as these that the reductivist theory falls short of discrediting real corporate personality.

The supervenience approach adopts a middle position between the emergentist and reductivist schools of thought. Using the model espoused by List and Pettit, this position holds that group rationality supervenes doxastically on the individual rationality of the group's members.[407] By this, List and Pettit mean that while a group's intentions cannot be reduced to those of its individual members, the group's intentions cannot be formed without some of its members holding that intention. As such, the relationship between the two is structural and not causal. They illustrate this position by describing the constitution of shapes through dots:[408]

> Think of the relationship between the shapes made by dots on a grid and the positions or coordinates of the dots. The positions of the dots do not cause the shapes to be such and such, as there is no lag between the dots assuming those positions and the shapes materializing. Nothing causal needs to happen in order for the positions to give rise to the shapes; suitably positioned, the dots simply constitute the shapes and are not distinct enough to be causes. But although the

[406] *Ibid* at 299.
[407] List & Philip, *supra* note 384 at 64ff.
[408] *Ibid* at 65.

> positions of the dots do not causally determine the shapes, they still determine those shapes.

Or put another way:

> A supervenience relation leaves open the possibility that while the "lower-level" pattern determines the "higher-level" pattern, the higher-level pattern may be realized in a number of ways. [409]

This is the appeal of the supervenience position: it is able to separate group intentionality from its membership base and yet maintain the relationship between the two.

What remains now is to consider the corporation as a bearer of dignity. It is without doubt that the concept of dignity can be considered as infinite with no limit. And thus the implications of declaring corporations as bearers of dignity are far and wide ranging. That notion and its implications merit a tome unto themselves, and so I shall not attempt to address them here directly. Rather, I will argue that corporations are bearers of dignity to the extent that they allow individuals to act and express their dignity collectively.[410] Agency is a critical ingredient of human dignity which law attempts to secure for us all. But individual agency without coordination does not, in social settings, secure dignity for all. Law therefore tries to achieve coordination, as well as the stabilisation of expectations, notably by creating frameworks – secondary rules such as contract law, the law of associations, and corporate law – through which individuals can exercise agency collectively. Thus the human dignity at the core of the argument depends on the availability of the legal constructs that are associations and corporations and their recognition as agents.

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[409] *Ibid*.

[410] This is an argument that I credit to my doctoral supervisor, Professor Fabien Gélinas, which arose in one of our many conversations on the subject matter.

In summary, by adopting the supervenience approach toward real corporate personality, we are able to demonstrate the corporation's capacity to form and take responsibility for its own will. Through such will, as well as the corollary conception of corporations as vehicles for human dignity, it is reasonable to say that corporations fit the criteria of the moral agent that Fuller envisages coming to the law: a moral agent that is willing and able to engage with other actors in the creation of law. And when viewed from this perspective within the context of the GRN, this presents an opportunity for us to shift our paradigm of corporate regulation from one where we view business enterprises as merely being subject to law to one where they engage with the creation and sustenance of law.

Conclusion

In this chapter, I expanded on the concept of a GRN. I attempted to show how actors operating in global business sectors can collaborate with one another to create law that can govern their conduct outside of traditional state-based legal infrastructure. In doing so, I demonstrated how the GRN is constitutive of an epistemic community and how the practices within such a community translate into the creation of legal obligations. Drawing from Lon Fuller's conception of law was particularly helpful in this regard. The particularities of his conception, however, are not only explanatory but also potentially reformative. Indeed, through an inquiry into his conception of a legal subject, I demonstrated the capacity for a corporation to have moral agency and thus the capacity to participate in the creation and sustenance of law in a global normative space.

At present, the regulation of transnational enterprises poses a significant challenge to many states. Business enterprises can have an inordinate amount of power in comparison to states, and this has resulted in a "governance gap". Part of the difficulty of responding to this problem lies in our current approach toward the regulation of business enterprises. We are still largely stuck on the idea that the state is meant to regulate corporations in a traditional top-down fashion and to forcefully secure compliance. This approach, however, is becoming both ineffective and outdated. That said, we also remain sceptical of the alternative model of corporate "self-regulation".

The idea of a GRN provides us with a middle way. It is a cooperative governance model that incorporates all relevant stakeholders into its regulatory processes and ensures that they all take part in the creation, sustenance, and enforcement of law.[411] Corporations stop being "subject" to the law and come to "engage" with the law. As "law inventing" and "law abiding" actors, we can now develop legitimate expectations that they will take greater responsibility for their social realities precisely because they are the co-authors of those realities.

[411] I should add that participation in the PMSI's GRN is perhaps not as broad as it could be. At present, it is disproportionately composed of actors from the Global North. On one hand more needs to be done to incorporate actors from the Global South into this framework, but on the other those from the Global South need to push forward and become engaged with the GRN through acts such as positively endorsing the ICoC and signing up to both the Montreux Document and the ICOCA.

Chapter Five: The Law of a GRN (Part Two): The Macro View

Introduction

Having explained how the interactions among actors within the global PMSI constitute law and a legal order, there remains the question of where or how this legal normativity fits into the wider picture. Put differently, if the laws of the GRN are neither purely national law nor international law, what are they? In a global normative landscape that is populated by actors interacting with one another, how can we best conceptualise and understand the creation and existence of legal orders in relation to one another? More pointedly, how should we be conceiving legal normativity for the purpose of capturing this interactivity within global regulatory frameworks? These questions are important because they play a role in establishing the legitimacy and effectiveness of alternative regulatory frameworks beyond those dominated by the state. One cannot deny the enhancing effect of categorising something as 'law' or 'legal' as opposed to not. As such, these questions require us to reconsider our understandings of the constitution of legal orders and their situation in a global normative landscape that is characterised by heterarchical interactions among actors with no superordinate authority.

At present, there are four broad approaches toward interpreting and understanding global legal normativity. The first and most traditional conceptual framework for understanding global interactions is the Westphalian, state-based model. This entails analysis through a bounded framework that is limited to an international-national law dichotomy. Pursuant to this traditional position, states are the primary actors and full subjects of an international legal order and all other actors are objects relegated predominantly to the jurisdiction of national legal orders. And within national legal orders, the national laws of private international law determine which rules will

govern the international situations of non-state actors. A second group, the "reformists", however, contest the views of these "traditionalists". They view traditionalists as having antiquated conceptions that are disconnected from modern realities. Reformists contend that the increasing levels of cross-border transactions with and among public and private global actors should necessitate an expansion of our conceptualisation of international law. But while the reformists may be calling for a more inclusive international legal order, they remain within a dualistic framework of international law and national law. The third group, the "transnationalists", tries to break away from this. Transnationalists argue for the existence and applicability of laws and legal methods that emanate from outside the state. And finally, there are the "social scientific legal pluralists", those who approach law from a social scientific rather than jurisprudential perspective and attempt to make sense of these normative arrangements on a global scale. Social scientific legal pluralists posit the existence of legal orders distinctly beyond the state and the international legal order.

While each group has particular merits and is able to capture an aspect of the assorted arrangements and interactions that occur in a global normative landscape, they all suffer from different strains of the same shortcoming. In the context of global interactions among public and private actors, they have difficulty identifying who makes law and to whom it is applicable. Pierre Schlag calls this "the problem of the subject."[412] The problem of the subject challenges us to confront the question of "who or what thinks or produces law."[413] Each of the positions outlined above, when confronted with the process of globalisation, experience difficulties in identifying

[412] Pierre Schlag, "The Problem of the Subject" (1991) 69 Tex L Rev 1627.
[413] *Ibid* at 1629.

who takes part in the process of creating law in a particular legal order, whom the law in that order can allow a claim against, and who should be responding to it.

The problem of the subject serves as a theoretical approach to not just describe actions and interactions generally, but also to assess them jurisprudentially.[414] And by using this theoretical approach, I modestly propose that one way that we could gain a better understanding of how an arrangement like the GRN fits into the wider normative landscape is to adopt a Fullerian perspective of legal orders. This entails a focus on the individual actors and the nature of their interactions. Through the lens of this interactive process, which relies upon Fuller's inner morality of law as a determinant of law, it becomes evident that actors can engage with different actors simultaneously and thus be engaged in multiple legal orders concurrently. Actors are the foundational units of legal orders—they constitute the law and the law applies to them; they are both "law inventing" and "law abiding".[415] Three important implications arise from this. First, if we accept group agents such as states, corporations, and international organisations as actors that interact with other individual actors in a global normative space, we come to realise that there can be no *a priori* legal orders—individual actors create and sustain legal orders. Second, if there can be no *a priori* legal orders, then the labels of "public international law" and "transnational law" are merely descriptive of particular kinds of lawmaking interactions between particular kinds of actors. They are not indicative of grand legal systems *per se*. In this way, we reorient the narrative that has given primacy and dominance to the Westphalian, state-based system toward a more open,

[414] Martii Koskenniemi has identified a growing trend in international legal scholarship that imports an increasing vocabulary from international relations scholarship, which results in a shift to less certain terms e.g. from 'law' to 'norms'. Consequently, as I will argue in the chapter, it is important to ensure that as lawyers we stay faithful to a jurisprudential analysis so as to accurately identify where law is being made. Should we do this, it quickly becomes apparent that there is plenty of law being made beyond and without the state in a global normative landscape. See Martii Koskenniemi, "Miserable Comforters: International Relations as New Natural Law" (2009) 15:3 European Journal of International Relations 395.

[415] See Kleinhans & Macdonald, *supra* note 338.

expansionist, and liberal interpretation of law and legal orders. As such, legal orders are seen to be of equal normative legal value, irrespective of the actors that have constituted them. And finally, a Fullerian approach to law enables us to envision alternative regulatory frameworks on a global scale, as it allows various assortments of actors to construct frameworks by which they can regulate through *law*.

This chapter is divided into two sections. In the first section, I outline the general premises of the four approaches toward understanding law as it exists on a global scale. In doing so, I select a few prominent authors who have adopted those positions and then assess some of the inconsistencies that arise regarding each position for the purposes of thinking about regulation through law on a global scale. After outlining these four approaches, the second section of the chapter suggests one way that we could conceptualise law and interactivity among actors on a global normative space. Basing the approach on Fuller's conception of law, I build on my interpretative analysis in the previous chapter and apply it to interactions on a macro scale. Finally, I conclude the chapter by discussing a few implications of my proposed approach for the potential of alternative regulatory frameworks on a global scale and how we can begin to imagine a remedial mechanism operating within those regulatory frameworks.

I. The Four Camps

a. The Traditionalists

Let me start by outlining the "traditionalists", the position from which analyses of global interaction have historically tended to begin. According to this position, the framework for analysis

of global interactions is rudimentarily restricted to two "planes"—the national and the international. And on each plane, the dominant unit of analysis is the state. The Peace of Westphalia in 1648 ushered in the state actor, and this state-actor paradigm became the basis upon which any form of international community and relations were considered.[416] As such, international law was constructed for states as the primary actors and subjects.[417] The corollary of this is that all other actors are classified as "objects", actors who can only indirectly be the focus or beneficiary of international law and cannot be full holders of rights and obligations in international law.[418] And while, over the course of the last century, we have seen a vast expansion in the types and number of actors operating in the global landscape and interacting with states, states remain the dominant figures of world politics. This is largely ensured by positivistic, pedigree-based theories of international law that grant states the power to determine which other actors can take part in the creation, development, and enforcement of international law. The International Court of Justice affirms this position in the *Reparations* case,[419] where it was held that:

> Fifty states, representing the vast majority of the members of the international community, have the power, in conformity with international law, to bring into being an entity possessing objective international personality and not merely

[416] Richard Falk, "The interplay of Westphalia and Charter Conceptions of the International Legal Order" in Richard Falk & Cyril Black, eds, *The Future of the International Legal Order* (Princeton: Princeton University Press, 1969).
[417] Lassa Oppenheim, *International Law: A Treatise* (London: Longman's, Green & Co, 1905) at 341, "Since the Law of Nations is a law between states only and exclusively, states only and exclusively are subjects of the Law of Nations"; Malcolm Shaw, *International Law*, 6th ed (New York: Cambridge University Press, 2008) at 45, "States are the original and major subjects of international law. Their personality derives from the very nature and structure of the international system."; Robert McCorquodale, "The Individual and the International Legal System" in Malcolm Evans, ed, *International Law*, 2d ed (Oxford: Oxford University Press, 2006) at 308; and Antonio Cassese, *International Law*, 2d ed (New York: Oxford University Press, 2005) at 3.
[418] Georg Schwarzenberger, *International Law*, Vol 1, 3d ed (London: Stevens and Sons Limited, 1957) at 140-142.
[419] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, [1949] ICJ Rep 174 at 185.

personality recognised by them alone, together with capacity to bring international claims.

Pursuant to this position, we find that the international legal personality of international organisations was only recognised for the first time in that same *Reparations* case. Since then, individuals have been granted limited international legal personality through international human rights and investment agreements; "peoples" have been recognised for instances of self-determination; and non-state actor "groups" have been recognised in cases of international conflict and terrorism. The remaining majority of cross-border situations, therefore, are relegated to national law, where they fall under the rubric of private international law or "conflict of laws". However, this perspective of international law and its development has been criticised, in the face of greater global interconnectivity, for its unwavering dogmatism and adherence to formalism.

b. The Reformists

The reformists challenge the traditionalists. They argue that the range of actors operating across borders and producing a plethora of normative legal texts necessitates a re-evaluation of the international-national dichotomy in law. More specifically, they argue for an expansionist conception of international law. In so doing, they rely upon two areas for which they claim the traditionalists are unable to provide satisfactory accounts—the matters of subjecthood and of sources.

i. The Problem of Subjecthood

Over the last century, there has been a significant increase in prominent actors on the international plane. These include non- and inter-governmental organisations, transnational enterprises, individuals, and multistakeholder associations such as the Forest Stewardship Council or the ICOCA. And each, due to their engagement, may have been granted international legal personality of varying degrees.[420] Reformists allege, however, that the current classifications, which includes distinctions such as objective and qualified legal personality;[421] full and partial legal personality;[422] and "substate", "suprastate", and "nonstate" personality,[423] can be confusing.[424] I am inclined to agree. The growing nomenclature of legal personality is the international legal system's attempt to accommodate an increasing number of actors. The system operating on this basis, however, is overloaded and unsustainable. But more pointedly, the reformists charge that the international legal system's focus on state-centricity and supremacy as reflected in its unwavering formalism prevents global actors from having the rights and, perhaps more importantly, obligations that should be appropriately applicable to them. The determined exclusivity of restricting full subjecthood to states, espoused by traditionalists who are reluctant to acknowledge the current reality, results in a disconnect between theory and practice.[425]

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[420] Christian Walter, "Subjects of International Law", *Max Planck Encyclopedia of International Law*, online: Max Planck Encyclopedia of International Law <http://www.mpeil.com>.
[421]Malcolm Shaw, *International Law*, 5th ed (Cambridge: Cambridge University Press, 2003) at 242 [Shaw].
[422] Walter, *supra* note 420.
[423] Anne-Marie Slaughter, "Breaking Out: The Proliferation of Actors in the International System" in Yves Dezalay & Bryant Garth, eds, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Michigan: University of Michigan Press, 2005).
[424] See also Christoph Schreuer, "The Waning of the Sovereign State: Towards a New Paradigm for International Law?" (1993) 4 EJIL 447. Schreuer discusses how international law is not as uniform as it represents through reference to unitary state actors. Rather, states are constituted by varying and multiple levels of organisation, each interacting and participating in the international legal system.
[425] Anne Claire Cutler, "Critical Reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy" (2001) 27 RIS 133.

ii. The Problem of Sources

Article 38(1) of the *Statute of the International Court of Justice* lists the various sources that are widely held to constitute international law. These include treaties and conventions, international custom as generated by state practice, general principles of law, judicial decisions, and the writings of prominent jurists in the field. The activity behind each of these sources is premised largely upon state action. With the expansion of actors transacting on an international plane with states and other actors, however, reformists argue that we should reconsider what the sources of international law are. Global actors have produced a spate of normative legal texts that shape conduct in the global normative space. These include instruments such as the *Uniform Customs and Practice for Documentary Credits* (UCP 500), the International Chamber of Commerce (ICC) *Incoterms*, the *UNIDROIT Principles of International Commercial Contracts*, and a raft of voluntary codes of conduct for labour, the environment, and trade.[426] Produced by public and private global actors, these instruments do not strictly qualify as either international law or domestic law. Due to the indeterminate legal status of their authors as interactive collectives, which often include states and their officials, there is a distinct difficulty in determining the status of the norms produced by these actors.[427] So far, the appellation settled upon for these norms in international law is "soft law", non-binding legal norms that are contrasted with "hard law", or binding legal norms. Such a classification, however, is problematic. Not only does it call into question the validity and legitimacy of the legal norms that global actors choose to guide their

[426] See for e.g. Adelle Blackett, "Global Governance, Legal Pluralism and the Decentred State: A Labor Law Critique of Codes of Corporate Conduct" (2001) 8:2 Ind J Global Legal Studies 401.
[427] Janet Levit, "A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments" (2005) 30 Yale J Int'l L 125.

conduct, but it also fails to clearly account for who is involved in the production of international legal norms and upon whom those norms claim to have effect – the problem of the subject. Let me elaborate on these difficulties.

First, if international law is alleged to be a system created for and by states, then the distinction of "soft" and "hard" law turns out to be an attempt to reserve primary lawmaking competence to state actors. Indeed, if states are the primary actors and subjects of international law, then there is a presumption that legal norms are produced for and by them. By introducing a distinction between "soft" and "hard" law, and limiting the production of norms with binding effect, "hard" law, to states, the international legal system is effectively denying all other global actors lawmaking competence. Non-state global actors are therefore recognised but relegated to subordinate, secondary roles with a capacity to produce only weaker norms with limited effect.

Second, the classification is inconsistent and borders on contradictory. As "soft" law, these instruments are considered aspirational or worthy of demanding compliance for moral or political reasons, but not legal ones.[428] But how can we reconcile states' desires to produce normative texts that they hope will guide the conduct of non-state actors on the international plane if they classify texts such as the *UN Global Compact* and the *OECD Guidelines for Multinational Enterprises* as "soft" law? Should we deny the binding legality of norms produced in global multistakeholder schemes in which states participate and through which they seek to secure actors' compliance such as the Kimberley Process Certification Scheme, the Forest Stewardship Council, and the ICoC discussed in this chapter? Either it is law or it is not. Indeterminate responses to questions such as

[428] Alan Boyle, "Soft Law in International Law-Making" in, Malcolm D Evans, ed, *International Law*, 2d ed (Oxford: Oxford University Press, 2006).

these, reformists would argue, are indicative of the international legal system's formalistic, constrained, and anachronistic parameters.

In response to these problems, there is a growing body of reformist literature that is calling for a restatement of international law to reflect its current reality. Prominent in this regard is the work of the New Haven School, led by Professors Myre McDougall and Harold Lasswell.[429] Their approach to social processes, including law, calls for an alternative focus on actors, or "participants", who play a role in influencing the decisional outcomes of those processes. Dame Rosalyn Higgins, a former president of the International Court of Justice, subscribes to and is an advocate of this approach. Commenting on the current system, she writes that "the whole notion of 'subjects' and 'objects' [in international law] has no credible reality, and, in my view, no functional purpose. We have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint."[430] She proposes that we return to a view of international law as a decision-making process, discard the terms "subjects" and "objects", and acknowledge relevant actors as "participants".[431] In this way, individuals are participants in the international legal order in the same way that states and international organisations are all "participants", distinguished only by the fact that they have interests in different parts of the international legal field. For example, whereas states may be interested in the management of corridors on the high seas or territorial border disputes, and international organisations may be interested in facilitating regional trade cooperation, individuals may be concerned with investment expropriation and human rights

[429] See Michael Reisman, Siegfried Wiessner & Andrew Willard, "The New Haven School: A Brief Introduction" (2007) 32 Yale J Int'l L 575; Colin Warbrick, "States and Recognition in International Law" in Malcolm Evans, ed, *International Law*, 2d ed (Oxford: Oxford University Press, 2006) at 229.
[430] Rosalyn Higgins, "Participants in the International Legal System" in Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (Oxford: Clevedon Press, 1994) at 50; see also Rosalyn Higgins, "Conceptual Thinking about the Individual in International Law" (1978) 4 BJIS at 5 [Higgins, "Conceptual Thinking"].
[431] *Ibid.*

claims. These latter rights and interests, Dame Higgins would say, "are not simply exceptions conceded by historical chance within a system of rules that operates as between states. Rather, they are simply part and parcel of the fabric of international law, representing the claims that are naturally made by individual participants in contradistinction to state-participants."[432]

Robert McCorquodale similarly suggests that we look not to the formal status of actors but rather at their functions. In assessing the state of the international legal system, he is critical of the fact that it is not living up to its aspirations as set out within the *Charter of the United Nations*.[433] The system, as currently structured using a subject-object dichotomy, fails to acknowledge the distinct international rights and responsibilities of individuals; it privileges the voice of states, international law's primary subjects, and sidelines alternative voices.[434] McCorquodale therefore calls for a more inclusive legal system: "an international legal system where non-state actors are participants, the practice of these actors, their role in the creation, development, and enforcement of law, and their actions within their national communities (which can become part of 'state practice'), can, and should, form a part of customary international law and the general principles of law."[435]

Daniel Patrick O'Connell also rejects the relegation of individuals to mere "objects". O'Connell's support for this proposition is founded upon two arguments, one based in legal philosophy and the other in "capacities". His legal philosophy argument holds that we cannot deny individuals the right to participate in a legal community because, when all is considered, the

[432] Higgins, "Conceptual Thinking", *supra* note 430 at 5.
[433]Robert McCorquodale, "An Inclusive International Legal System" (2004) 17 LJIL 477 [McCourquodale, "An Inclusive International Legal System"].
[434] *Ibid*. Further to this point, he cites the feminist critiquing work of Hillary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester University Press, 2000) and critical legal scholar Martii Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press,1989).
[435] McCourquodale, "An Inclusive International Legal System", *supra* note 433 at 498.

enterprise of law is conducted so as to secure the good of the individual.[436] Beyond this central philosophical claim, O'Connell argues that individuals are international legal persons on the basis of their capacities in international law. As O'Connell states, "In short theory and practice establish that the individual has legally protected interests, can perform legally prescribed acts, can enjoy rights and be the subject of duties under municipal law deriving from international law, and if personality is no more than a sum of capacities, then he is a person in international law, though his capacities may be different from and less in number and substance."[437]

These proposals are both well founded and well meaning. There are, however, a few concerns that would require further consideration. The first pertains to the problem of trying to delineate roles or responsibilities that we think only states should have. If we were to include everyone as "participants" in international law, then does that mean that everyone will have the right to go to war? Admittedly the ICJ has stated in the *Reparations* case that it is normal for all subjects of a legal order not to have the same rights, powers, and responsibilities.[438] And at present, states hold full rights and powers almost to the exclusion of any other international actor. Implicit in the reformist arguments, however, is an argument against this reality. They are arguing, to varying degrees, for the recognition of a minimum threshold, albeit on the basis of varying criteria, whereby all actors can be granted the status of being a full subject of international law. This, however, would not be a good idea because the very same actors for whom status-based parity is

[436] Daniel Patrick O'Connell, *International Law* (London: Stevens and Sons, 1965) at 118 ["The individual as the end of community is a *member* of the community, and a member has status: he is not an object."].
[437] *Ibid*.
[438] *Reparation for Injuries*, *supra* note 419 at 178: "The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. … But to achieve these ends the attribution of international personality is indispensable."

sought do not have to live up to the same demands of public administrative justice as states currently do—those of transparency, democratic accountability, and legitimacy. Moreover, according to Jonathan Charney, transnational corporations do not particularly want the elevation either.[439]

The second concern is about the nature of the international legal order. The public international legal order, I would argue, is primarily an international *public* order—it is a political order that is there to serve the international community as represented through state units. Within this order, there are specific powers and responsibilities that should remain within the realm and competence of states. These include the ability to impose trade sanctions, the ability to manage national currencies and monetary policies, or the ability to extradite individuals for alleged crimes committed in other countries. To allow procedural equality in the constitution of public international law for all actors whose activities have a cross-border element, therefore, would be shortsighted.

The main concern for reformists, I think, is about trying to make sure that actors are recognised for their global presence and interactions, and thus accorded appropriate rights and obligations. This is particularly the case in the debate on transnational enterprises and the applicability of human rights.[440] Recognising the validity and legitimacy of other legal orders through a Fullerian perspective, however, could be an attractive alternative path that would allay reformists' concerns.

[439] Jonathan Charney, "Transnational Corporations and Developing Public International Law" (1983) Duke LJ 748.
[440] Peter Muchlinski, "Human Rights and Multinationals: Is There a Problem" (2001) 77:1 Int'l Aff 31 and Stephen Kobrin, "Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms and Human Rights" (2009) 19:3 Business Ethics Quarterly 349.

c. The Transnationalists

Proponents of "transnational law" stand apart from the traditionalists and the reformists to the extent that they envisage the existence of law and legal orders beyond state-based legal systems. In this manner, they accept the existence of a legally pluralistic global normative space. Within this category, we find references to practices, processes, or bodies of law that include *lex mercatoria*, *lex sportiva*, international arbitration, transnational labour law, and many more. When discussing transnational law, my usage of the terms "practices, processes or bodies of law" should not be overlooked, for this, I think, is the fundamental problem with "transnational law": no one really knows or agrees on what it is. Like a catch-all provision, it is used to refer to almost any form of legal normativity that does not fit comfortably into the dominant and current conceptions of either international or national law. In this way, most accounts of transnational law suffer from the "problem of the subject"—they are unable to provide clear accounts of who or what is thinking about or producing "transnational law", as well as upon whom it is making a claim. A few brief accounts of different conceptions of transnational law demonstrate this.

Philip Jessup is credited with coining the term "transnational law".[441] It is evident from his Storrs Lectures, delivered at Yale Law School, that Jessup was unsatisfied with the law's inability to develop in a manner that made globalisation an easier process to manage. He was somewhat perplexed by the incessant need to classify and theorise international interactions in a way that made little sense.[442] For Jessup, international law was about more than just the state as a unitary actor, and the use of the term "international" in international law failed to reflect the totality of actors and their interactions in "the complex interrelated world community ... beginning with the

[441] Philip Jessup, *Transnational Law* (New Haven: Yale University Press, 1956).
[442] *Ibid* at 7.

individual and reaching on up to the so-called 'family of nations' or 'society of states.'"[443] The legal lexicon at the time did not have a term that captured this totality. And so, Jessup proposed that he would use, "instead of 'international law,' the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories."[444] In a more expanded version of his notion, Jessup writes:

> Transnational law then includes both civil and criminal aspects, it includes what we know as public and private international law, and it includes national law, both public and private. There is no inherent reason why a judicial tribunal, whether national or international, should not be authorized to choose from all of these bodies of law the rule considered to be most in conformity with reason and justice for the solution of any particular controversy. The choice need not be determined by territoriality, personality, nationality, domicile, jurisdiction, sovereignty, or any other rubric save as these labels are reasonable reflections of human experience with the absolute and relative convenience of the law and of the forum – *lex conveniens* and *forum conveniens*.

Jessup's conception of transnational law is a project in the pursuit of universality.[445] It is clear from the three exemplifying dramas in his first lecture that the distinction between national and international law is an arbitrary and artificial one. And he is right. There are a host of actors

[443] *Ibid* at 1.
[444] *Ibid* at 2.
[445] His first Storrs Lecture was entitled, "The Universality of Human Problems".

interacting on an international plane, and there is little to explain the applicability of different laws to different actors in like or similar situations. However, his conception does little to help us understand the mechanics at play in the process and production of law. While it gives us an opportunity to imagine an alternative approach outside of the tightly bounded rubric of the international-national law dichotomy, it says very little about who or what produces transnational law and upon whom it makes a claim.

Over the last sixty years, the discussion surrounding transnational law has both expanded and evolved. The idea of legal rules that "do not wholly fit into standard categories" has been embraced in a broad variety of practice communities, such as sport, finance, and international trade. Equally, the discussion has evolved in the sense that, while there is still debate about the existence of transnational law, the focus has shifted more to the particular, that is, its sources, methods, and legitimacy. An area perhaps most exemplary of this evolution is the phenomenon of the new *lex mercatoria* (NLM), in which the discussion has oscillated between transnational law as rules versus transnational law as a method.[446]

The early prominent proponents of the NLM were Berthold Goldman and Clive Schmitthoff. Notwithstanding the rivalry that usually arises between the French and the English, the civilian and the common law traditions, Goldman and Schmitthoff were allies in the project of distinguishing the rules and practices of international trade and commerce as forming a separate legal order. Goldman first pronounced on the issue in a 1956 *Le Monde* article that discussed the legal personality of the Suez Canal Company (SCC). Likening it to other bodies such as the World Bank and the Red Cross, he classified the SCC as "une société internationale, relevant directement

[446] See Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (The Hague: Kluwer Law International, 1999) [Berger, *The Creeping Codification*].

de l'ordre juridique international."[447] While the company could be associated with multiple countries' legal orders through its territorial attachments, that is, its places of incorporation, business, and control, it was its distinct capital and internal management structure as well as the nature of its international public engagement that gave it a transnational character.[448] Goldman was pointing toward the existence of legal normativity not fully anchored in state legal orders.

Clive Schmitthoff was a contemporary of Goldman's and an equally influential proponent of legal normativity beyond the state. Schmitthoff believed in the emergence and existence of an autonomous set of rules governing international trade and commerce drawn from business practices and customary trade usages.[449] This autonomous law, Schmitthoff argued, was necessary for the promotion and development of international trade, and to create a uniform and harmonised platform among and across developed and developing economies, and civil and common legal systems. To this extent, Schmitthoff proclaimed that:

> [t]he evolution of an autonomous law of international trade, founded on universally accepted standards of business conduct, would be one of the most important developments of legal science in our time. It would constitute a common platform for commercial lawyers from all countries, those of planned and free market economy, those of civil law and common law, and those of fully

[447] Berthold Goldman, « La compagnie de Suez : société internationale » *Le Monde*, 4 octobre 1956.
[448] *Ibid*. See also Klaus Peter Berger, "Berthold Goldman and the Dijon School: The Rebirth of the Lex Mercatoria" *Trans-lex.org*, online: <http://www.translex.org> and Berger, *The Creeping Codification*, *supra* note 446.
[449] Clive M. Schmitthoff, "The Law of International Trade, Its Growth, Formulation and Operation" in Chia-Jui Cheng, ed, *Clive M. Schmitthoff's Select Essays on International Trade Law* (Dordrecht: Martinus Nijhoff Publishers, 1988) [Schmitthoff, "The Law of International Trade"]; Clive M. Schmitthoff, "The Unification of the Law of International Trade" in Chia-Jui Cheng, ed, *Clive M. Schmitthoff's Select Essays on International Trade Law* (Dordrecht: Martinus Nijhoff Publishers, 1988).

> developed and developing economy, which would enable them to co-operate in the perfection of the legal mechanism of international trade.[450]

The autonomous international law of trade described here was constituted by trade usages, standard contracts, and model laws; rules compiled by international organisations such as the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), and the ICC, as well as international conventions and legislation.

Jean Stoufflet, Philippe Khan, and Philippe Fouchard in later years contributed to this development of a new *lex mercatoria* or autonomous international law of trade.[451] Working as doctoral students under the supervision of Berthold Goldman, their research focused on the practice of international trade and commerce through the development of transnational rules. Stoufflet focused on documentary credits as financial instruments of international commerce; Khan considered the growth and development of an international society of buyers and sellers engaged in international commerce; and Fouchard, building on the work of Khan, elaborated on the substantive and procedural internationalisation of commercial arbitration by a community[452] of international commercial actors.[453] Part of the reason behind the significance of their work was the fact that they were not out to prove the existence and applicability of these rules. According to Khan, it happened almost accidentally as a result of their academic, yet practice-oriented

[450] Schmitthoff, "The Law of International Trade", *supra* note 426 at 139.
[451] See Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (Alphen aan den Rijn: Kluwer Law International, 2010).
[452] Fouchard opted for the word "community" rather than the more inflammatory term "society", which caused many legal positivists and supporters of the primacy of state law to take offence.
[453] Philippe Khan, « Vers la Quête de la Lex Mercatoria : L'apport de l'école de Dijon, 1957-1964 » in Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (Alphen aan den Rijn: Kluwer Law International, 2010).

research.[454] Indeed, it was the empirical focus on the documents arising from practice that was able to show the existence of legal normativity beyond state legal processes. For this contribution, the three researchers along with their supervisor came be to known collectively as the "Dijon School".

The focus on "rules", however, has been a major source of criticism and a difficult challenge for proponents of the NLM to overcome. Critics argue that the NLM does not and cannot constitute law or a legal order as it lacks the necessary certainty, completeness, structure, and sophistication. This criticism has been sharply expressed by Lord Mustill.[455] He contends that NLM proponents often fall short of providing adequate answers to certain questions: What is the *lex mercatoria*? What kind of law is it? When does it apply? Does it enable the arbitrator to decide in equity, according to his own inclinations? How does the *lex mercatoria* relate to national law? What are its sources? How are its rules to be ascertained? And what are the rules, when so ascertained? In many ways he is right—there is too much ambiguity and uncertainty in the concept of NLM, and the transnationalists would concede this. Even as a group, there is too much divergence among them.

Emmanuel Gaillard takes on the challenge of trying to establish transnational law, or *lex mercatoria*, as a separate legal system. [456] At first, his response is to point to the existence of transnational rules as codified by organisations such as UNCITRAL and UNIDROIT. But ultimately, realising that this might not be the strongest position, his approach aims to sidestep direct, frontal attacks. Rather than call it a legal system, Gaillard argues that *lex mercatoria*

[454] *Ibid*.
[455] Michael Mustill, "The New Lex Mercatoria: The First Twenty Five Years" (1988) 4 Arb Int'l 86.
[456] See Emmanuel Gaillard, "Transnational Law: A Legal System or a Method of Decision Making?" (2001) 17:1 Arb Int'l 59.

functions *like* a legal system. And in this respect, therefore, he argues that the correct way to understand transnational law is as a "decision-making system" that identifies and employs "general principles of law" and "trade usages" through a "comparative legal methodology".[457]

An understanding of transnational law as a legal system constituted by an identifiable body of rules is a conclusion not easily reached. And as a result of this difficulty, other prominent authors have presented conceptions of transnational law as a process rather than as a body of rules. Harold Koh, for example, has advocated an understanding of transnational law as "transnational legal process". According to Koh, "Transnational legal process describes the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce and ultimately, internalize rules of transnational law."[458] Relatedly, Peer Zumbansen conceives of transnational law as a methodological approach through which we can better understand the sociology of law in a global normative space.[459] He writes that "[t]ransnational law ... is a way of questioning and reconstructing the project of law between places and spaces, where – in other words – places and spaces do not necessarily have to map onto territorial or geographical substrata or be divisible somehow into national or international. This perspective raises hopes for a realization of the project

[457] *Ibid*; see also Emmanuel Gaillard & John Savage, eds, *Fouchard Gaillard Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) at 802.
[458] Harold Hongju Koh, "Transnational Legal Process" (1996) 75 Neb LR 181 at 183.
[459] Peer Zumbansen, "Defining the Space of Transnational Law" (2011) Osgoode CLPE Research Paper 21/2011, Vol. 07 No. 05 at 5: "Going beyond early work in international legal theory and partly drawing on the insights from 'transnational' commercial law we can begin to understand 'transnational law', above all, as a methodological approach and less as a distinctly demarcated legal 'field' such as, say, contract law, or administrative law. Transnational law, from the here taken perspective, emerges foremost as a *methodological* lens through which we can study the particular transformation of legal institutions in the context of an evolving complex society." This perspective is influenced by Saskia Sassen's work on spaces

of law, whereby law would necessarily have to be understood as having a recoverable, revivable emancipatory potential."[460]

Koh and Zumbansen present interesting conceptions that try to help us to make sense of the interactions among actors in a global normative space. By shifting some pieces of the puzzle around, they attempt to show how (and why) actors comply with norms (Koh), and how we can visualise new kinds of law on the basis of interactions that are not confined to territorially based conceptions of law (Zumbansen). My concern, however, is that they too fail to address the "problem of the subject". They fail to identify who is engaging in the process of thinking about and creating law, as well as whom the law is making its claim upon. I agree with Koh that transnational law is non-traditional, dynamic and normative. But this description does not go far enough to identify actors' lawmaking capacities.[461] The description fails to satiate the inquiry on the specific jurisprudential mechanics of non-state actor lawmaking capacity in a global normative space. Zumbansen's conception too is unable to determine the law's scope of application, that is, whether a particular actor is subject to a given law. He endorses a sociological description of these interactions and so fails to provide an adequate account of who is making the law and how. This is a criticism that I also make against the social scientific legal pluralists in the next section.

Moreover, if we do agree to conceive of transnational law as a methodological process or approach, then there is always the problem of trying to figure out which sources are to be consulted. How is such a determination of applicability to be made? Is it similar to the discernment of general

[460] Peer Zumbansen, "Transnational Legal Pluralism" (2010) 1:2 TLT 141 at 169.

[461] See e.g. Koh, *supra* note 458 at 184, where on the matter of normativity, Koh states, "From this process of interaction, new rules of law emerge, which are interpreted, internalized, and enforced, thus beginning the process all over again. Thus, the concept embraces not just the descriptive workings of a process, but the *normativity* of that process. It focuses not simply upon how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions: in short, how law influences why nations obey." The description reflects practice, but it does not go far enough so as to determine whether and which actors are actually making law and which are not.

principles in public international law? There is an implicit assumption in methodological approaches that participants will know the answers to these questions, but this is not always necessarily the case.

Finally, methodological approaches fail to provide satisfactory accounts of how we should conceptualise and understand the nature of transnational associations, such as the ICOCA and the Forest Stewardship Council, as well as the legality of their normative instruments. This is why Lord Mustill's critique, although thirty years old, is still relevant today. It asks hard questions about transnational law.

d. The Social Science Legal Pluralists

In this final subsection, I discuss the admittedly broad category of "social science legal pluralists", that is, contemporary social scientists who have engaged in the study of global legal pluralism. This group of scholars has made significant contributions to our understanding of normative orders on a global scale. They contest the state's claim of an exclusive monopoly on the production of legal norms and advocate for the existence of legal orders both within and without the state. However, as I will discuss, the fact that they approach law from a social scientific perspective means that they are often unable to satisfactorily delineate legal orders from any other kind of normative order, for instance, social, economic, or moral orders. Indeed, while they may focus on situations in which norms appear to govern actors' conduct, they are often unable to distinguish between norms that are legal and non-legal; they struggle with the question, What is

law?[462] Admittedly, while there may never be a definitive answer to this question, social scientific approaches to law are more concerned with external, descriptive enquiries of law as a phenomenon within wider societal contexts, rather than as jurisprudence, or an internal theory of the nature and mechanics of law.[463] Thus, while the contemporary social science legal pluralists may readily point to the existence of normative legal orders, their inability to distinguish law from other kinds of normative legal order negates the intrinsic value and gravitas of law when considering questions of regulation. If I am to successfully make a claim against staunch state legal positivists and for the potential of alternative regulatory frameworks through alternative legal orders, then there must be a compelling stance taken on what one considers law to be. And more importantly, there needs to be an understanding about who is creating that law, upon whom the law is making its claim, and who is responding to it – the problem of the subject.

My point of departure in considering contemporary social science legal pluralists is in the 1960s and 70s, when the works of Sally Falk Moore and John Griffiths brought this academic field to prominence. The premise of legal pluralism is that there is more than one legal order in a social

[462] See Brian Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism" (1993) 20:2 Journal of Law and Society 192. See also Brian Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 Syd LR 375 [Tamanaha, "Understanding Legal Pluralism"]. In Brian Tamanaha, "Law" in Stanley Katz, ed, *Oxford International Encyclopedia of Legal History* (Oxford: Oxford University Press, 2008) Tamanaha attempts to explain why the question of 'what is law?' cannot be resolved.

[463] John Griffiths, "The Idea of Sociology of Law and its Relation to Law and to Sociology" in Michael Freeman, ed, *Law and Sociology* (Oxford: Oxford University Press, 2006) at 50, stating that "[s]ociology of law is a part of sociology, not a sort or a part of legal scholarship." And at 59, "for the purposes of the sociology of law we should not try to define 'law' as a distinct type of social control. 'Law' so conceived is a concept that belongs to the internal point of view – the point of view of lawyers who do their work must distinguish 'legal' from other considerations such as morality and politics. For external, empirical purposes it is more useful to treat social control as the fundamental object of study, with continuous variation in the extent of differentiation therein as a key variable. Sociology of law is, hence, the study of social control and of differentiation therein an in particular – if one likes – of the more highly differentiated forms of social control." This statement by Griffiths is significant because of his previously held views on the nature of legal pluralism. This will be discussed a little later in this section. See also Roger Cotterrell, *The Sociology of Law: An Introduction* (London: Butterworths, 1984). For example, at 5, Roger Cotterrell writes that "[s]ociology is concerned with the scientific study of social phenomena. Its concern is explanatory and descriptive. The lawyer is essentially a man of affairs entrusted with part of the apparatus of regulation of social relations. The sociologist remains a relatively uncommitted observer."

field. Griffiths was probably the most forceful proponent of this position. In his seminal work, *What is Legal Pluralism?*, Griffiths launched a polemic against what he called "the myth of legal centralism."[464] Legal centralism, according to Griffiths, is the view that all law and lawmaking capacity belongs exclusively to the domain of the state. Therefore, to the extent that other normative orders may claim to produce norms that influence conduct, these are of lesser significance and hierarchically subordinate to the state's normative order. Griffiths decried the dominance and prevalence of this conception of law, as well as its deleterious effect on communities and other normative orderings. Arguing thus against legal centralism, Griffiths proclaimed that:

> [l]egal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion. Nevertheless, the ideology of legal centralism has had such a powerful hold on the imagination of lawyers and social scientists that its picture of the legal world has been successfully to masquerade as fact and has formed the foundation stone of social and legal theory. A central objective of a descriptive conception of legal pluralism is therefore destructive: to break the stranglehold of the idea that what law *is*, is a single, unified and exclusive hierarchical normative ordering depending from the power of the state, and of the illusion that the legal world actually looks the way such a conception requires it to look.[465]

[464] John Griffiths, "What is Legal Pluralism?" (1986) 24 J Legal Plur 1 [Griffiths, "What is Legal Pluralism?"].
[465] *Ibid* at 4-5.

In presenting an alternative portrait of law and its plurality within social fields, Griffiths appropriated Sally Falk Moore's concept of "semi-autonomous social fields" (SASF).[466] For her part, Moore was attempting to describe how a plurality of social orderings, or SASFs, existed within the state. SASFs are characterised by their capacity to generate rules for and induce conformity among their members. Their internal normativity, however, is affected by external forces such as politics, economics, and culture, but most importantly, by state law. Moore demonstrates this by using two case studies: the garment industry in New York and the Chagga of Mount Kilimanjaro. In both cases, she shows how there is an interplay between internal and external, legal and non-legal forces within these social fields. As such, she represents SASFs as demarcated social groups in society that implicitly evoke an imagery of porous spheres of normativity that overlap, influence, and often conflict with one another.

Griffiths builds on this concept in two ways. First, he expands it to include social orderings beyond the state. He calls this a "strong" version of legal pluralism, as it contests the dominance of legal centralism. The inverse, which Moore adopts, "weak" legal pluralism, envisages a plurality of legal orders within the confines of the state and thus implies a degree of acceptance by the state of their legitimacy and validity. It implicitly subscribes or remains restricted to the myth of legal centralism, and Griffiths contests this. Second, Griffiths attributes the label of "law" to the norms produced within SASFs. He declares that "law is the self-regulation of a 'semi-autonomous social field'."[467] While Griffiths' first point, as a proposition, can stand up to debate, this second point has been both the cause and the symptom of a much deeper problem within the social science legal pluralist camp, that is, the determination of what law is. Indeed, almost in the same breath that

[466] See Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study" (1972) 7 L & Soc Rev 719.
[467] Griffiths, "What is Legal Pluralism?", *supra* note 464 at 38 (italics in original).

Griffiths declares what law is, he also writes that "the self-regulation of law as a semi-autonomous social field can be regarded as more or less 'legal' according to the degree to which it is differentiated from the rest of the activities in the field and delegated to specialized functionaries."[468] This is clearly confused and partly contradictory. Having declared the norms to be law, how can they also be "more or less 'legal'"? For her own part, Moore stands at odds with Griffiths on this point, expressly declaring the norms of a SASF to be *non-legal* in a later article.[469] She was critical of Griffiths' inability to distinguish the nature and provenance of the norms produced in social fields from other norms, which thus results in a situation where all norms have a legal quality. She opted, therefore, for use of the more technical term "reglementation" to describe SASF norms.[470]

Griffiths' work on legal pluralism is both progressive and instructive. There is much to be commended in the vigour of his arguments against legal centralism. The view that legal normativity can only be produced within the confines of the state is a difficult one to hold, particularly during current times, when the level of global interactivity in sectors that cut across territorial state boundaries is unprecedented. The challenge that Griffiths and other social science legal pluralists have faced, however, is in finding a suitable concept of law that is in accordance with their discipline. This concession was made by no less than Gordon Woodman, a long-time editor of the *Journal of Legal Pluralism*, in an article where he assessed nearly twenty years of discussion on the subject.[471] The difficulty, I would argue, arises from the fact that social scientific

[468] *Ibid* at 38.
[469] Sally Falk Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999" (2001) 7:1 Journal of the Royal Anthropological Institute 95 at 107.
[470] Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge and Kegan Paul, 1978) at 18.
[471] Gordon Woodman, "Ideological Combat and Social Observation: Recent Debate About Legal Pluralism" (1998) 42 Journal of Legal Pluralism 21, especially at 45.

approaches to law are interested in law from an empirical, external perspective and as a phenomenon to be studied within a societal context. They are less interested in the internal mechanics of law, that is, in law as jurisprudence and the elements that give it the quality of law. This conclusion is supported in part by Griffiths' own admission in an article he published after many years and considerable reflection on the topic. He wrote that:

> further reflection on the concept of law has led me to the conclusion that the word 'law' could better be abandoned altogether for purposes of theory formation in sociology of law. Sociology of law can best be simply considered the study of social control, with differentiation a key variable.

And further:

> The age-old problem of a concept of law suitable for empirical purposes can be solved by no longer considering 'law' the theoretical object of the sociology of law. The theoretical object of sociology of law is social control. It also follows from the above considerations that the expression 'legal pluralism' can and should be reconceptualized as 'normative pluralism' or 'pluralism in social control'. 'Law' is not a theoretical concept in the sociology law. [472]

Despite the weight of this realisation, many current and prominent global legal pluralists continue to work on conceptualising global legal orders without necessarily considering what their conception of law is and how they might distinguish legal orders from other kinds of orders. In fact, Paul Schiff Berman has called it an "ultimately fruitless debate".[473] And having skipped over

[472] John Griffiths, "The Idea of Sociology of Law and its Relation to Law and to Sociology" in Martin Freeman, ed, *Law and Sociology* (Oxford: Oxford University Press, 2006) at 63.
[473] Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (New York: Cambridge University Press, 2012) at 56: "…the important point is that scholars studying the global legal scene need not rehash

the question, Berman proceeds to advocate a cosmopolitan pluralist framework as a basis for understanding hybrid legal spaces in the global arena;[474] a framework that recognises our membership in multiple communities that are both local and global, territorial and epistemic, but with no clear delineation between the legal and the non-legal.[475] Alternatively, Andreas Fischer-Lescano and Gunther Teubner, taking an approach similar in part to those of both Moore and Griffiths, employ a Luhmannian systems theory in which the global legal arena is considered to be fragmented, polycentric, and developing around sectors rather than within territories.[476] Both of these views rely upon a conceptualisation of normative legal orders that are overlapping and often conflicting in a global normative space.

While this too may also be interesting and illuminating work, their analyses confound our attempts to try and understand the mechanics and processes of legal normativity on a global scale. They fail to address the "problem of the subject"—who is thinking about and making law, upon whom is that law making its claim, and who is (and should be) responding to it. There is agreement among these positions that legal normativity should be assessed on a sectoral basis rather than through a traditional, territorial analysis, but this is complicated by the conflation of public international, national, and transnational law. The approach fails to take into consideration the status of actors and the nature of the obligations that they have regarding particular legal orders and their relevant tribunals. Moreover, it fails to provide an appropriate explanation of why, if a

long and ultimately fruitless debates (both in philosophy and in anthropology) about what constitutes law and can instead take a nonessentialist position: treating as law that which people view as law. This formulation turns the what-is-law question into a descriptive inquiry concerning which social norms are recognized as authoritative sources of obligation and by whom."

[474] See generally Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (New York: Cambridge University Press, 2012).

[475] *Ibid* at 11.

[476] Andreas Fischer-Lescano & Gunther Teubner, "Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" (2004) 25 Michigan J Int'l L 1999.

state participates in the creation of an international convention on the environment, this is a matter of public international law, but if the very same state produces a substantively similar instrument under the auspices of the Forest Stewardship Council, this is not public international law but rather transnational law, global law, soft law, or any of the other alternative appellations out there. And so while Fischer-Lescano and Teubner's approaches are theoretically reformative, their failure to delineate the provenance and operation of norms as things currently stand makes the implementation of their ideas difficult from a legal perspective. Put differently, if we are talking about regulation through law, whatever the nature and place of the activity, we need to know who is producing the law, for whom, and if the intended subject should be responding to it. This is not readily apparent from social scientific approaches to law.

II. A Fullerian Approach to Understanding Legal Orders

The challenge that we are confronted with in this chapter is that of how to appropriately conceptualise legal orders in a global normative space for the purpose of developing appropriate *legal* regulatory frameworks that can respond to the current demands and realities of globalisation, or more specifically, global business sectors. This reality entails recognition of the fact that public and private actors are interacting at unprecedented levels and producing law to govern their conduct in a multitude of situations. The reformists, the transnationalists, and the social scientific legal pluralists are alive to this reality and have presented a multitude of ways that we could conceptualise law and legal orders to best understand what guides and constrains this activity. However, one shortcoming that is common to all, I would argue, is insufficient attention to the

"problem of the subject": the problem of considering who or what thinks about or produces law, upon whom that law makes a claim, and who is or should be responding to it. The problem of the subject is a critical one when considering questions of regulation precisely because it is the conduct of the subject that we are trying to affect. Consequently, it is imperative that the individual actor form the foundation and be the departure point of our analysis.

In this final section, I want to present one way of conceptualising law and legal orders on a global scale for the purpose of constructing appropriate legal regulatory frameworks to meet the demands of globalisation. My proposal builds on the interpretative analysis of the previous chapter by applying Fuller's conception of law and focusing on the centrality of the individual actor to that analysis. Using the previously outlined case study on the global regulation of anti-doping in sport in Chapter 3, I will attempt to show how the GRN is both constituted by multiple legal orders and constitutes a legal order, with all orders possessing the same intrinsic legal value.

a. Revisiting the Global Regulatory Network for Anti-Doping

In the third chapter of this thesis, I outlined the framework for the global regulation of anti-doping in sport. The production of law in multiple fora and its application to a broad range of actors in sport, demonstrated the global scope of this regulatory framework, or GRN as I termed it. GRNs are both constituted by multiple legal orders and constitute a legal order. And acting within these legal orders are a broad range of actors. In the case of the anti-doping regime, these actors include individuals (athletes, coaches, referees, etc.), national federations, international federations, states, and the International Olympic Committee, among others. As has been previously discussed, however, there is a difficulty in classifying the status of some of these actors

and the product of their interactions under the prevalent and dominant conceptions of international law and national law.

One way to better understand what is going on is to place the actor at the heart of the analysis: what are actors doing and with whom are they interacting? Are they in the process of making law? If so, to whom is that law meant to apply? When operating on a global scale, I not only want to make sure that every actor who participates within the sector is subject to appropriate legal rights and duties, which can be enforced in appropriate judicial fora, but also that actors know where and how each applicable obligation arose, so that they can accord it due respect.

The instrument of central importance to the anti-doping regime is the *World Anti-Doping Code* (WADC). The WADC was drafted collaboratively by public and private actors—primarily states, sporting organisations, athletes, and relevant sporting officials. Collectively they constitute the signatories of the WADC and thus have mandatory obligations placed upon them.[477] Of particular interest in this regard is Article 23.2.1 of the WADC, which states that "[t]he Signatories shall implement applicable Code provisions through policies, statutes, rules or regulations according to their authority and *within their relevant spheres of responsibility*."[478] In conjunction with Article 23 as a whole, signatories agree to devote resources to ensuring that the provisions of the WADC are made applicable to all members falling within their jurisdiction. This plays out in several ways.

States drafted and signed the *UNESCO International Convention against Doping in Sport* (*UNESCO Convention*). Under the WADC, states were required to sign the 2003 *Copenhagen Declaration on Anti-Doping* and to ratify the *UNESCO Convention*. Further, they each had to

[477] See Article 23.1 World Anti-Doping Code 2015.
[478] Article 23.2.1 World Anti-Doping Code 2015 (emphasis added).

create a national anti-doping organisation and draft and implement relevant legislation that would ensure cooperation among anti-doping organisations and relevant public and private institutions both within and without the state.[479] The International Olympic Committee was bound to ensure that international federations in the Olympic Movement signed on to the WADC and to ensure that they were compliant with it.[480] This is reflected in Article 43 of the *Olympic Charter*. Similar obligations were demanded of other members of the Olympic Movement, and this is reflected in their own charters as conditions of membership and participation in relevant sports. And finally, the World Anti-Doping Agency (WADA), the multistakeholder association that was constituted by representatives of the signatories, is obligated to monitor and ensure signatories' compliance with the WADC.[481] This too is mirrored in the WADA's *Articles of Association*.[482]

There is a clear flurry of normative texts and instruments being produced around the sector of anti-doping regulation on a global scale. While the WADC sits at the centre, multiple legal orders are implicated through the interaction and engagement of the signatories and the commitments that they have made to one another. The reformists would argue for a wider conception of international law in order to recognise the entirety of the actors and their interactions; the transnationalists would point to the WADC as an example of transnational rules around which a community of practitioners or participants has formed to create an autonomous legal order; and the social scientific legal pluralists would probably delineate the contours of the anti-doping sector and place it as its own legal order in a global normative space because of the strong normativity within it. These perspectives capture elements of the regulatory process but fall short when we need to really assess where legal norms are coming from and to whom they are being made

[479] See Article 22 World Anti-Doping Code 2015.
[480] See Article 20.1 World Anti-Doping Code 2015.
[481] Article 20.7 World Anti-Doping Code 2015.
[482] See Article 4 World Anti-Doping Agency Articles of Association.

applicable. To understand the mechanics of regulation from a jurisprudential perspective, we need to consider the nature of the individual subject herself as well as whom she is interacting with.

Actors have multiple roles. In the previous chapter, I showed how, through a process of interaction, shared agreements, and congruent subsequent actions, individuals create law and legal orders. Their capacity to create law is not restricted to doing so with one individual, but rather can be with as many as they choose. It is their participation that generates legal normativity. Consequently, and before moving on, two important conclusions can be drawn and should be highlighted. First, actors can engage with different actors simultaneously and thus be engaged in multiple legal orders concurrently. And second, actors are the foundational units of legal orders—they constitute the law and the law applies to them—they are "law inventing" and "law abiding".[483]

If we apply this to the context of the state in the anti-doping regime, for example, this becomes clearer. Let us consider four situations.

Situation One:

States draft and conclude an agreement among themselves. The agreement's substantive provisions are those provided for by the WADC. The agreement, however, can be distinguished from the WADC because of the actors among which the obligations were made. States entered into an agreement with one another and created legal obligations for one another—it just so happens that the provisions reflect those of the WADC.

[483] See Kleinhans & Macdonald, *supra* note 338.

Situation Two:

States enter into an agreement to draft the WADC with a range of other actors that includes but is not limited to other states. The provisions of this agreement might be contained within the agreement concluded in Situation One, but the obligations have been created by and for a completely different set of actors.

Situation Three:

States enter into an agreement with other states by which they implement their obligations within their "spheres of responsibility", through processes of ratification and legislation, and using other administrative instruments.[484] While the law applicable within a given state is meant to reflect the provisions of the WADC, each state still retains some authorship over how the law is implemented as it engages in its own lawmaking process with its member-subjects.

Situation Four:

Sporting organisations within the Olympic Movement, such as the International Olympic Committee, the national Olympic committees, the international and national federations, and associated sporting clubs enter into an agreement with states and one another to produce the WADC. As part of that agreement, each organisation agrees to implement the provisions of the

[484] Article 7 of the *UNESCO Convention* provides that, "States Parties shall ensure the application of the present Convention, notably through domestic coordination. To meet their obligations under this Convention, States Parties may rely on anti-doping organizations as well as sports authorities and organizations." The exact process will depend on whether the State adopts a monist or dualist interpretation of international law.

WADC within their internal structures and "spheres of responsibility". As such, all individuals who are members of these organisations or group agents become subject to the WADC through the law of the organisations of which they are members. Each organisation further agrees to include the provisions of the WADC in any relevant future legal relationships within the sport sector.

These are all distinct, yet qualitatively equal legal orders. In each situation, what we have are individuals interacting with one another in attempts to create law and legal obligations. Whereas some accounts might provide that Situation One, for example, is a case of public international law because of the label that we have attached to the law produced, this, I would argue, is putting the proverbial cart before the horse. If we accept that group agents such as states, corporations, and international organisations constitute individual actors, consistent with the Fullerian interpretation that I outlined in the previous chapter, then I submit that legal orders in a global normative space cannot exist *a priori*, for it is individuals that constitute and sustain them.[485] Brunnée and Toope adopt a similar approach with their interactional theory of international legal obligation.[486] While they apply this approach to the "international legal order", I take a more expansionist view by considering actors in heterarchical relationships on a global normative space

[485] I would therefore opine that the 'fragmentation' of international law could be seen as a misnomer – it assumes that international law is a pre-existing unitary whole. However, there is the possibility of conceiving the regimes of 'international environmental law', international trade law, international space law, as distinct legal orders founded through interaction among the parties with some law produced through written agreements and some through custom. As is often found in international conventions, however, this is not to say that pre-existing agreements in other situations are rendered void. For example, Article 6 of the *UNESCO International Convention Against Doping* provides that, "This Convention shall not alter the rights and obligations of States Parties which arise from other agreements previously concluded and consistent with the object and purpose of this Convention. This does not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention." Constructivist conceptions of IR are also helpful in this regard. They acknowledge the fact that individuals can have many identities, and the experiences gained from interactions in these various identities form a part of the individual's knowledge and can come to bear on subsequent interactions with other actors.

[486] See for e.g. Brunnée & Toope, *supra* note 359.

that is not only limited to states. But, in both these cases, the generator of legal normativity remains the same—it is the individual actor. An implication of using this approach is the rejection of the conceptualisations of legal orders as "spherical", "overlapping", and conflicting, viewing them rather as a series of interactional relationships among participating actors. And it is the mass of these relationships that, from an aerial, external perspective, might give the *appearance* of spherical legal orders. The imagery of overlapping legal orders implicitly means that the actor is merely and passively subject to different legal orders; the analysis is still rooted and initiated from a system perspective. The aim, here, is to switch that and to place the focus on the actor. The beginning of legal normativity and the basis of legal obligation depends upon the individual's active engagement in an interactive, law making process.[487]

The implications of this realisation can have a liberating effect. If all actors can engage in interactive processes with the potential to produce law, then all actors, when interacting with other actors, can create law. It follows, therefore, that there is no difference between the laws produced by a state in any of its various interactions: state-to-state law is the same as individual-to-state law, which is the same as individual-to-individual law. In this way, "international law" and "transnational law" are not *a priori* legal systems but rather labels that have been used to describe interactions that occur between and among particular kinds of actors. In the case of international law, it is states interacting exclusively with other states in the lawmaking process, and in transnational law, it is any configuration of actors.

This, however, should not be too startling a revelation. The dominance of the prevailing narrative that comes with the Westphalian, state-based system harks back to the state-building

[487] For example, Fischer-Lescano & Teubner, *supra* note 476 at 1006, in describing the operation of "global functional systems" write, "Through their own operative closure, global functional systems create a *sphere* for themselves in which they are free to intensify their own rationality without regard to other social systems…" [emphasis added].

project. It is the same narrative that Griffiths decried as the "myth of legal centralism". Tamanaha aligns with Griffiths on this point, writing that there was a point when the strength of the state-building project had the effect of subordinating all other kinds of law.[488] On the point of relegation, he writes:

> In the 17th and 18th centuries, a sharper distinction emerged between the public and the private realms. State law became the pre-eminent form of law; international law and natural law were also recognised, but mainly in virtue of and on the terms set by state law. Customary norms and religious law were, in effect, banished to the private realm. They did not disappear, but a transformation in their status did come about. Some of these norms and institutions continued to obtain recognition and sanction from state legal systems; other norms continued to be observed and enforced in strictly social or religious contexts. The key characteristic they lost over time was their former, equal standing and autonomous *legal* status. Once considered independently applicable bodies of *law*, owing to the takeover of state law they rather became *norms*, still socially influential, but now carrying a different status from that of official state law. Customary and religious norms, it must be emphasised, often were more efficacious than state law in governing every day social affairs…[489]

[488] Tamanaha, "Understanding Legal Pluralism", *supra* note 462 at 379: "The fact that we have tended to view law as a monopoly of the state is a testimony to the success of the state-building project and the ideological views which supported it, a project which got underway in the late medieval period. For almost the entirety of the medieval period, the state system we are now familiar with was not in place in Western Europe."
[489] *Ibid* at 380-381 [emphasis in original].

Robert Cover, in his influential article, stated both boldly and accurately that "[w]e inhabit a *nomos* – a normative universe. ... No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."[490] The historic circumstances that necessitated an end to war and that ushered in the Peace of Westphalia in 1648 facilitated the growth and predominance of the state. That was the narrative upon which traditionalist conceptions of law and legal institutions were founded. In the current state of globalisation and interactivity, however, those circumstances have changed. To continue to analyse global legal normativity by reference to the international-national law dichotomy is outdated and unhelpful. In line with this, I would further argue that to classify every form of law that does not emanate from state-based legal institutions, such as sports law, *lex mercatoria*, or *lex electronica*, under the umbrella of "transnational law" or "global law" (e.g. Situations Two or Four), for example, in contrast to national law (Situation Three) or international law (Situation One), which stand on their own, merely serves to perpetuate the subordination of these forms of law to state-based law and thus maintain the predominance of state-based law. And to that extent, while I will not make the argument here, I think that we should start to re-think the labels of "public international law", "national law", and "transnational law".

Consequently, a multistakeholder association is a legal order that is constituted through an interactive process among its contracting parties to produce law applicable to its contracting parties. When acting as a central coordinator within a sector, multistakeholder associations make use of multiple other legal orders in order to constitute and facilitate an effective and efficient GRN. Signatory states may draft and conclude a separate agreement for the implementation of the

[490] Robert M Cover, "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative" (1983) 97 Harv LR 4 at 4. See also Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973) at 5, "[M]an is an animal suspended in webs of significance he himself has spun."

provisions of the central instrument within their state jurisdictions, thus expanding the applicability of the provisions. And the same central instrument may require its other signatory parties to include its provisions within their own internal structures as well as in other future agreements that will have relevance to the initially agreed-upon subject matter.

Conclusion

This chapter builds on the previous chapter on the law or laws of a GRN. While the previous chapter considered the process of lawmaking and the creation of legal orders on a micro scale in the context of the PMSI, this chapter considers that dynamic from a macro perspective. More specifically, this chapter takes up the matter of how to conceptualise regulation through law on a global scale, and thus how actors interact with one another on the global scale. I provide one way of doing this through a Fullerian approach to law. Questions of regulation through law need to have a focus on the actor, as actors are the active unit in that process as both the producer and the subject of law. Schlag's "problem of the subject" is helpful in this regard. It forces us to consider who or what thinks about or produces law, upon whom the law is making a claim, as well as who should and does respond to it.

Using a Fullerian approach to law, we are able to see how individual actors engage in a process of lawmaking to create legal orders, as well as how law becomes applicable to actors, the same actors who take part in that creative process. By consequence, this shows how actors are both "law inventing" and "law abiding". More importantly, it also shows how legal orders come into being in a global normative space with actors interacting in a heterarchical fashion and with no

superordinate structures or authorities. This approach refutes the existence of *a priori* legal orders on a global scale, as those orders can only come into being through the interaction of actors.

This is a significant realisation for our approaches to regulation through law. By recognising the possibility that different or unorthodox legal orders could regulate particular sectors or activities that are not state-based, we grant legitimacy to alternative regulatory paradigms. We grant them the same value, force, and gravitas of law as is found in state-based legal institutions and processes. It is a reorientation of the narrative that has facilitated the predominance of the now inadequate Westphalian system, toward the realities of globalisation. And this reorientation then paves the way for us to construct a global remedial mechanism that is founded in law and operates through the multiple legal orders that constitute the GRN.

Chapter Six: The Case for Adjudicating "Business and Human Rights" Violations outside of State-Based Legal Institutions

Introduction

In the preceding chapters, I pieced together and proposed a legal regulatory framework beyond the state that could have a significant impact on how we regulate global business sectors. The success of that framework would be partly dependent upon how we oversee and enforce the legal, conduct-governing norms that are produced within the framework. Its success would also depend upon how we provide remedies to claimants who suffer harm in the course of business activities, or more specifically for our purposes, human rights violations. Yet, the idea of administering a human rights system that can facilitate investigations, adjudication, and the provision of remedies to claimants outside of state-based institutions is not an intuitive one for most people. It is not easily or readily legitimated or accepted. In order to tackle the increasing threats to human rights that arise within the course of global business activities, however, we need not only to consider possible alternative tools that are appropriate in that context, but also to challenge the conceptions that might impede our ability and willingness to use them.

This chapter therefore aims to present the case for the use of non-state-based arbitral mechanisms to respond to business-related human rights violations. The idea of human rights is based on the protection of an individual's dignity and autonomy from oppressive power. Predominant conceptions of human rights in the aftermath of World War II, as manifested in human rights laws, however, are rooted in a unitary, vertical relationship between the state and an individual. These conceptions are largely premised on the idea that the sovereign is the only oppressive power acting on the individual. In this view, the sovereign, if left unchecked and

unrestrained, wields socio-economic and legal power that is disproportionately greater than an individual's and threatens the individual's dignity and autonomy.[491] The international law of human rights, therefore, imposes obligations on states to respect individuals within states' spheres of influence. Similarly, national legal systems have been structured to provide constitutional protections on the basis of this conception and to incorporate international human rights law so as to protect individuals from the state.

But states are not the only perpetrators of human rights violations. Indeed, there can be more than one source of oppressive power.[492] As Roderick Macdonald lucidly puts it, "[i]n our day, the most grievous and most frequent abuses of civil liberties occur in the exercise of private power. The occasions for discriminatory state action are both comparatively few and subject to relatively formalized procedures for their exercise, when contrasted with an employer's power to dismiss, a landlord's power to exclude the needy, or an entrepreneur's refusal to provide services."[493] Cases of harm and negative externalities in the course of transnational enterprises (TNEs) conducting business, particularly in developing countries, are widespread, well-documented, and accepted as a cause for concern.[494] The continued attribution of human rights

[491] See Frances Raday, "Privatising Human Rights and the Abuse of Power" (2000) 13:1 CJLJ 103.
[492] See Robert McCorquodale, "Non-State Actors and International Human Rights Law" in Sarah Joseph and Adam McBeth, eds, *Research Handbook on International Human Rights Law* (Cheltenham, UK & Northampton, MA: Edward Elgar Publishing Ltd, 2010); Dawn Oliver & Jorg Fedtke, eds, *Human Rights and the Private Sphere: A Comparative Study* (London: Routledge-Cavendish, 2007); Aharon Barak, "Constitutional Human Rights and Private Law" in Daniel Friedmann and Daphne Barak-Erez, eds, *Human Rights in Private Law* (Oxford, UK: Hart Publishing, 2001); Andrew Clapham, *Human Rights in the Private Sphere* (New York: Oxford University Press, 1993); and Manfred Nowak & Karolina Miriam Januszewski, "Non-State Actors and Human Rights" in Math Noorman, August Reinisch & Cedric Ryngaert, eds, *Non-State Actors in International Law* (Oxford & Portland, Oregon: Hart Publishing, 2015).
[493] Roderick Macdonald, "Postscript and Prelude – The Jurisprudence of the Charter: Eight Theses" (1982) 4 Sup Ct Rev 321 at 347.
[494] For an up-to-date running tab of activities, see the website of the London-based Business and Human Rights Resource Centre, online: <http://www.business-humanrights.org/UNGuidingPrinciplesPortal/Home>.

obligations on the basis of an actor's status as either public or private,[495] therefore, is neither theoretically justifiable nor congruent with societal realities today.[496]

The history of human rights as a concept long predates that of the state. Human rights find their roots in the geneses of religions and within the practices of ancient civilisations. As such, the notion of human rights, when considered along a temporal spectrum, is a fluid and constantly evolving one.[497] But while the concept may exhibit religious, cultural, or political variance, at the core of such variance is a constant: the protection of an individual's dignity and autonomy from oppressive power. Indeed, as part of this chapter, I will argue that the current focus upon the state as the source of oppressive power is merely a stage in the evolution of human rights as a concept, and that the concept is metamorphosing. The state-building project that occurred in the wake of the Peace of Westphalia was very successful at both centralising and monopolising the supply of public goods and services, and thus it permitted states to wield significant power over the individual. In this way, the state was established as the "provider", occupying the superior position in a hierarchical relationship with its citizens. However, as the state increasingly outsources many of its functions to the private sector, the risk of human rights violations increases with the number of private-sector providers carrying out these functions. And as such, the source of oppressive power multiplies and fragments, and private actors can once again be recognised for their capacity to violate human rights.

That said, adapting national and international legal systems to reflect this capacity of private actors has been challenging. When it comes to human rights, all roads still lead back to the

[495] My use of the public-private dichotomy in this chapter will be synonymous with the state-versus-non-state divide.
[496] Clapham, *supra* note 492 at 134 comments in this regard that "there should be protection from all violations of human rights, and not only when the violator can be directly identified as an agent of the State."
[497] See Micheline Ishay, *The History of Human Rights* (Berkley and Los Angeles, CA: University of California Press, 2004).

state, but two trends are of particular interest in this regard. The first is the increasing application of human rights protection, whether from constitutional or international law, to private-party interactions. And the second is the voluntary assumption of human rights obligations by private actors that unite to regulate global business sectors where they sense that state regulatory action has been inadequate. Examples of this second trend can be found in multiple sectors such as private security, [498] textiles,[499] and natural resources.[500] These are positive steps forward. But to fully benefit from these actions, there needs to be appropriate mechanisms to both facilitate and ensure adherence to these commitments.

Non-state-based arbitration is one of those mechanisms. Indeed, its distinguished history shows that it was regularly used to resolve conflicts involving human rights issues. Its retreat to the background and the rise of court litigation coincide with the rise of the state.[501] The proposal that we revive arbitration as a means of resolving disputes involving human rights violations by TNEs, therefore, is neither novel nor threatening. Moreover, it should not be interpreted as proposing a binary, "either-or" choice between state-based justice and non-state-based justice. Rather, the proposal for a non-state-based arbitral mechanism should be considered as a welcome supplement and complement to state courts.[502] Indeed, by offering additional adjudicative fora that are tailored to the global business context, there is opportunity to provide greater access to justice,

[498] The International Code of Conduct for Private Security Providers, online: International Code of Conduct Association <http://icoca.ch/>.
[499] The Accord on Fire and Building Safety in Bangladesh, online: <http://bangladeshaccord.org>.
[500] Voluntary Principles on Security and Human Rights, online: <http://www.voluntaryprinciples.org>.
[501] Frank Emerson, "History of Arbitration Practice and Law" (1970) 19 Clev St L Rev 155 at 157.
[502] See e.g. Edward Powell, "Settlement of Disputes by Arbitration in Fifteenth-Century England" (1984) 2:1 ASLH 21. Powell argues that contrary to predominant accounts of arbitration in fifteenth-century England, arbitration and court litigation were neither mutually exclusive nor substitutes for each other. Rather, they complemented each other, each with its own particular attributes, thus helping to provide a more complete strategy for the resolution of a dispute.

a stronger rule of law, and a more holistic approach to regulation. This proposition can be justified in six sub-arguments that I will present in the sections below.

In the first section, I expand on the evolving concept of human rights and how it needs to be understood temporally in order to argue for its application to harm committed by TNEs. In the second section, I discuss examples of private parties being subjected to human rights obligations within national jurisdictions. The idea of imposing human rights obligations on private parties can be perplexing when considered under the sharp rubric of the allocation of such obligations based on a public-private distinction. Indeed, this is the success of the state-building project. But legal systems need to be coherent; they are governed by principles of universal application that neither can nor should be applied only in public law and not in private law. As such, by showing the practice and precedent of applying human rights obligations to private-party interactions in some national laws, this section should help to reduce any aversion to the idea of attributing human rights obligations to TNEs. In section three, I argue that non-state-based judicial mechanisms should be viewed as a legitimate alternative to state courts for civil justice matters, supplementing and complementing them in the task of assuring access to justice and effective remedies, particularly where the state may be unable to do so. In the fourth section, I highlight some of the recent support for the resolution of business-related human rights violations outside of state courts. This section demonstrates the political willingness to forge ahead with this legal innovation. In the fifth section, I examine some of the advantages of employing non-state-based arbitration to facilitate the provision of civil remedies for victims of human rights violations by TNEs. Finally, I conclude by discussing some areas that must be further considered so as to realise the operation of this mechanism, as well as some of the implications of such a mechanism. I should add that my discussion in this chapter is not limited to PMSCs. PMSCs can be a form of TNE, and so that

extent, I would like to speak to the broader subject of TNEs. The arguments made here, therefore, can be of wider applicability and utility in the discussion of access to remedies in global business sections.

I. Re-considering the Evolving Concept of Human Rights

TNEs have risen to a state of significant socio-economic and political power that, if not constrained, can threaten the dignity and autonomy of individuals. Yet, the idea of making human rights obligations applicable to them is not without its detractors because of TNEs' status as private actors. Private actors, so the defence goes, should not be constrained in the exercise of their freedom. Public actors, by contrast, must be constrained because of the threat that their oppressive power poses to individuals. The state has come to represent the sole source of oppressive power that poses a distinct threat to individuals' human rights. But this is a recent phenomenon in the evolution of human rights.

In this section, I employ a historical approach in order to temporally contextualise modern conceptions of human rights and their affiliation to the state. I aim to challenge the rigid, state-based prism through which some tend to understand human rights, and to show the contestation surrounding when human rights were founded, how they are conceived, and how they are enforced. In so doing, I argue that if there is such contestation around something that is widely believed to be universally and narrowly conceived, then the idea of human rights as attached to the state is not as fixed as some might believe. And thus for conceptual and functional purposes, there is no reason why we should not extend the application of human rights obligations to private parties in order to improve corporate accountability.

The modern concept of human rights is widely believed to draw from several wide-ranging sources and influences. Indeed, the principal drafters of the *Universal Declaration of Human Rights*, who were members of the UN Human Rights Commission, all came from starkly different origins but were able to find universal principles that transcended their myriad differences. They included the Chinese Confucian philosopher, diplomat, and commission vice-chairman Pen-Chung Chang; the Lebanese existentialist philosopher and rapporteur Charles Malik; and the French legal scholar and later Nobel Prize laureate René Cassin.[503] In considering the product of their deliberations, it is evident that they drew from sources ranging from the Bible's Old Testament and Hammurabi's Code to notions of universal goodness espoused by Plato, Aristotle, and Cicero.[504]

But while the modern concept of human rights may draw from this array of sources, there is disagreement as to when this concept was founded. Some commentators mark World War II as the watershed moment at which there was a significant shift in the understanding of human rights. Whereas human rights had previously been conceived within and as a part of building nations, as a means of creating and fortifying notions of citizenship within the national polis, World War II shifted that conception to one of human rights as a means of restraining sovereign states, as actors within an international polity, from inflicting harm against individuals. World War II, and the Holocaust more specifically, rallied nations around the world to recognise the dignity of

[503] Ishay, *supra* note 474 at 17.
[504] See generally Ishay, *supra* note 497 at 16-27. For example, at 19, Ishay quotes Cassin as noting that we must not lose sight of fundamentals, and that "the concept of human rights comes from the Bible, from the Old Testament, from the Ten Commandments. Whether these principles were centred on the church, the mosque, or the polis, they were often phrased in terms of duties, which now presume rights. For instance, Thou shall not murder is the right to life. Thou shall not steal is the right to own property, and so on and so forth." Alternatively, one could also consider the influence of the first five Buddhist and Hindu tenets of social assurances: freedom from violence (*Ahimsa*), freedom from want (*Asteya*), freedom from exploitation (*Aparigraha*), freedom from early death and disease (*Armritava* and *Arogya*).

individuals and the threat that a state could pose to its own citizens. As reflected in the Preamble of the UDHR, [505] states pledged never to let this happen again.[506] But this was in 1948.

The UDHR was and still is only a political statement that is aspirational in spirit. Consequently, others might argue that the more significant transition occurred in the mid-1960s when the UDHR was converted into binding international law through the drafting of the *International Covenant for Civil and Political Rights* (ICCPR) and the *International Covenant for Economic, Social and Cultural Rights*.[507] By transitioning from "soft law" to "hard law", there was a formalisation and crystallisation of the understanding of those upon whom human rights obligations would be placed and how these rights would be administered and enforced. By creating an international UN system of committees, courts, and tribunals within a Westphalian framework, there was a further concentration of power and responsibility within state actors. The human rights system became a formal, state-based system.

Alternately, Samuel Moyn distinguishes himself from these accounts in his revisionist book, *The Last Utopia*, in which he declares that any account stating that the 1940s were the crucial era of breakthrough for human rights is part of "the most universally repeated myth about their origins."[508] Moyn contends that the modern concept of human rights only came into fruition in the 1970s. Before then, historical precursors such as that of universalism in Greek philosophy or of

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[505] Consider, for example, "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" Preamble, Universal Declaration of Human Rights.

[506] See for e.g. Johannes Morsink, *The Universal Declaration of Human Rights: Origins Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 2000) at 36: "At the First Session of the Drafting Committee, Geoffrey Wilson, a United Kingdom delegate, reminded his colleagues "of the historical situation in which the Committee met. It was one, he said, where Germany and other enemy countries during the war had completely ignored what mankind had regarded as fundamental human rights and freedoms. The Committee met as a first step toward providing the maximum possible safeguard against that sort of thing in the future."

[507] Thomas Buergenthal, "The Normative and Institutional Evolution of International Human Rights" (1997) 19 Hum Rts Q 703.

[508] Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Massachusetts: Harvard University Press, 2010) at 6.

Roman Stoicism, the rights of man as enunciated in the American *Declaration of Independence* or the French *Declaration of the Rights of Man and Citizen*, or even the UDHR itself, are considered to be too far removed and irrelevant to how we understand human rights today. For Moyn, these precursors were all utopias that failed to deliver on their promises, and thus the current conception is a new and distinct utopia that may also fail one day.

While these accounts of when the modern conception of human rights came into being certainly make for interesting reading, the important point to draw from them is the contestation surrounding when and how the conception came into being. They show how the genesis of the modern concept of human rights is far from settled and so cannot be firmly attached to a paradigm centred on the state as the central actor bearing these particular obligations. The current paradigm is merely a part of an evolution in the concept and this is further reflected in the way that human rights have been vindicated over the centuries.

The current means of enforcing human rights are through individual petitions, communications, or applications to a relevant court or treaty body. This system reflects the current conception of human rights as those accorded to all individuals *qua* human beings so as to protect them from the oppressive power of the state. As such, these are rights granted by states to individuals under international human rights law, based on specific treaty provisions. But this system of protection is relatively recent. For example, individuals were only able to bring direct actions against a state for alleged violations of international human rights law under the ICCPR beginning in 1976.[509] And under the *European Convention on Human Rights* (ECHR), individual petitions only became compulsory for all state parties to the ECHR as late as 1998, through

[509] The ICCPR's individual complaint mechanism is contained in the First Optional Protocol. *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976), GA Res 2200 (XXI), 21 UN GAOR, Supp (No. 16) 59, UN Doc A/6316 (1966) [Optional Protocol].

Protocol 11. Prior to this system, individuals effectively had to engage in armed struggles in order to vindicate their rights.[510] The American *Declaration of Independence* and the French *Declaration of the Rights of Man and Citizen* were each a part of a nation-building project. Rights at that time were conceived not as a means of constraining states within an international legal system, as rights accorded to and actionable by individuals, but rather as a means of constructing notions of citizenship within national polities secured through national revolutions. And as such, while some rights may have been listed in these declarations, there were no obvious ways for an individual to vindicate those rights in a judicial forum, thus highlighting how far the concept of human rights has evolved both procedurally and substantively.[511]

It is evident that there has been an evolution in the concept of human rights, in terms of those to whom we assign the obligations and the means by which we vindicate the concordant rights. To be so stuck on the idea of human rights obligations being accorded only to states would make us short-sighted. The past evolution of human rights toward a paradigm focused on the state as an oppressive power fit the circumstances and needs of the time. As TNEs similarly show themselves to be capable of posing an acute threat to individual liberties, it makes sense that we should extend the application of human rights obligations to them. This is particularly so in cases where states outsource operations to private actors who, in turn, increasingly perform inherently governmental functions.[512]

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[510] Moyn, *supra* note 508 at 23-27.

[511] Moyn, *supra* note 508 at 27. As Moyn lucidly comments on the period, "What now seems like a natural assumption, that the very point of asserting rights is to restrict the activities of the state by providing a courtroom forum for their protection, was not what revolutionary rights were about. Instead, the main remedy for the abrogation of revolutionary rights remained democratic action up to and including another revolution. And while no nongovernmental organizations now contemplate that extreme recourse, it was the only response imaginable at the time in the name of the rights of man."

[512]There is a lot of debate as to what the term "inherently governmental function" means. While there is a general idea, the specifics and the contours vary. See e.g. Kate Manuel, "Definitions of 'Inherently Governmental Function' in

States are increasingly hiring private actors to perform tasks and roles that have typically been provided by the state in modern times.[513] Education, health, immigration, prisons, tax collection, policing, and military operations are all examples of fields where private actors are playing more pivotal and strategic roles in the delivery of government services. Indeed, where once these services were centralised and performed by the state, we are now witnessing a gradual process of decentralisation and fragmentation of traditional governmental functions. As such, where private actors are now performing the exact same roles that the state performed and where the state could have been liable for violating human rights in the course of performing those roles, private actors should also fall within that remit of legal responsibility. There is little to justify a continued distinction between "torts" and "human rights violations" when the exact same harm is inflicted by two individuals who are distinguished only by the fact that one is a government employee and the other a private contractor.[514]

Federal Procurement Law and Guidance" (2014) *Congressional Research Service R42325* at i, where she discusses this term in relation to US Federal Procurement Law:

> Two primary definitions of *inherently governmental function* currently exist in federal law and policy. One is a statutory definition, enacted as part of the Federal Activities Inventory Reform (FAIR) Act of 1998. This definition states that an *inherently governmental function* is "a function so intimately related to the public interest as to require performance by Federal Government employees." The other is a policy-oriented definition contained in Office of Management and Budget (OMB) Circular A-76. This definition states that an inherently governmental activity is "an activity that is so intimately related to the public interest as to mandate performance by government personnel." These two definitions arguably do not differ significantly in and of themselves. However, both the FAIR Act and OMB Circular A-76 include further elaboration and expansion upon the meaning of *inherently governmental function* that differ in certain ways. … In addition to these definitions, there are numerous statutory, regulatory, and policy provisions designating specific functions as inherently governmental or, alternatively, commercial.

See further Simon Chesterman, "'We Can't Spy … If We Can't Buy!': The Privatization of Intelligence and the Limits of Outsourcing 'Inherently Governmental Functions'" (2008) 19:5 EJIL 1055.

[513] See Koen de Feyster & Felipe Gómez Isa, eds, *Privatisation and Human Rights in the Age of Globalisation* (Antwerp; Oxford: Intersentia, 2005).

[514] Clapham, *supra* note 492 at 134 comments in this regard that, "there should be protection from all violations of human rights, and not only when the violator can be directly identified as an agent of the State."

This distinction was made, for instance, in the case of *Al Shimari v CACI*, where allegations of torture were brought against private military contractors for abusing detainees, along with US soldiers.[515] The applicants founded their claim on the bases of common law tort and torture, but the district court stated that the claim of torture was only permissible by virtue of the *Alien Tort Statute*'s specific inclusion of international law as applicable grounds. Barring this allowance, the harm inflicted would have been classified solely as a tort and not as a human rights violation. A claim against such contractors is further complicated by the fact that the claimant must prove that the private actor was performing an "inherently governmental function". And even if this was the case, the defendants would then be able to challenge any claim against their actions in US courts on the grounds of the "political question doctrine". The political question doctrine bars courts from reviewing the merits of a claim on the grounds of lacking subject-matter jurisdiction—the claim is deemed to be non-justiciable.[516] This is what happened in *Al Shimari*. The court accepted CACI's claim that the court lacked subject-matter jurisdiction as CACI was acting under the "direct" and "plenary" control of the US military and because national defense interests were "closely intertwined" with the military decisions governing the defendant's conduct.[517] Weaving

[515] *Al Shimari v CACI*, Case No. 1:08-cv-00827-GBL-JFA (2015).

[516] "The political question doctrine, at its core, recognizes as nonjusticiable any question whose resolution is committed to a coordinate branch of government and whose evaluation by a court would require the application of standards judicially undiscoverable or judicially unmanageable." *Al Shimari I*, 658 F (3d) at 421; see *Baker v. Carr*, 369 US 186, 198 (1962); see also *Vieth v. Jubelirer*, 541 US 267, 277 (2004). In *Baker*, the hallmark political question doctrine case, the US Supreme Court set forth the boundaries of the political question doctrine. Baker, 369 U.S. at 209. The court defined a political question as any case that presented one of the following attributes: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) "a lack of judicially discoverable and manageable standards for resolving it;" (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;" (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;" (5) "an unusual need for unquestioning adherence to a political decision already made;" or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." Baker, 369 U.S. at 217. This is also cited in *Al Shimari v CACI*, Case No. 1:08-cv-00827-GBL-JFA at 7.

[517] *Al Shimari v CACI*, Case No. 1:08-cv-00827-GBL-JFA. This was the two-factor test developed by the US Court of Appeals for the Fourth Circuit, in light of *Baker*, for cases involving government contractors in *Taylor v. Kellogg Brown & Root Services, Inc.*, 658 F (3d) 402 (4th Cir 2011). The court noted that an affirmative answer to either of these two parts would render the claim non-justiciable. More specifically, the court held that "if a military contractor

private-party actions into governmental function in this manner serves to absolve private actors of responsibility for human rights violations, to perpetuate the idea that only public actors can commit human rights violations, to undermine the rule of law, and ultimately, to deny claimants' access to justice.

II. The Growing Precedent for Applying Human Rights Obligations to Interactions among Private Parties: The Application of Constitutional Protections and International Human Rights Law in National Private Law

Contrary to any long held scepticism, the application of human rights obligations to interactions among private parties is not a new practice or phenomenon. Within national legal systems, human rights are protected through both the state's constitution and the application of international human rights law. The applicability of human rights obligations to all actors within a legal system makes sense. Legal systems must be coherent wholes that are founded upon universal principles, and these latter must be made applicable to all. Notions of human rights, allowing for the protection of individuals' dignity and autonomy, are at the core of national legal systems. Therefore, it would make little sense to have these values be applicable only in public law and not in private law. Each state, however, due to its own unique history and legal system, applies human rights protection to private-party interactions in different ways and to varying extents.

The applicability of constitutional human rights protection can be classified into three categories: direct application, indirect application, and non-application.[518] Direct application refers

operates under the plenary control of the military, the contractor's decisions may be considered as de facto military decisions." 658 F (3d) at 410.

[518] See Jan Arno Hessbruegge, "Human Rights Violations arising from Conduct of Non-State Actors" in Andrew Clapham, ed, *Human Rights and Non-State Actors* (Cheltenham, UK & Northampton, MA: Edward Elgar Publishing Ltd, 2013) at 91. Hessbruegge uses the analogous language of vertical, diagonal and horizontal obligations.

to instances where obligations are placed directly upon private parties and their interactions with other private parties. Human rights obligations are thus both applied and secured in horizontal relationships. Indirect application covers instances where obligations are not placed directly on private parties but are made applicable to their interactions through the law or regulatory framework within which they operate. This application through legislation or judicial interpretation constrains private parties' conduct so as to ensure its consistency with human rights values and principles. And finally, the non-application model describes the situation in which constitutional human rights protections are only guaranteed in interactions with the state and are thus secured in a vertical relationship.

The non-application model reflects where we have predominantly believed that the threat to an individual's liberties is most likely to arise: in interactions with the state. An example of this model can be found in the United States.[519] In the United States, the constitution and the jurisprudence of the Supreme Court provide that reliance upon constitutional protections is only available in cases involving actions of the state or public authorities.[520] Private parties are only bound by constitutional protections in their interactions with one another if their acts are supported by or linked to state authority.[521]

[519] Eric Brandt, "Chapter 13: The United States and Canada: State Action, Constitutional Rights and Private Actors" in Dawn Oliver & Jörg Fedtke, eds, *Human Rights and the Private Sphere: A Comparative Study* (London: Routledge-Cavendish, 2007).
[520] *Civil Rights Cases* 109 US 3 (1883); Section 1, 14th Amendment (1868) which provides that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person ... the equal protection of the laws."
[521] See e.g. *Rendell-Baker v Kohn*, 457 US 830 (1982) where it was held that private conduct is not state action because the private entity serves a public function. In that case, it was held that even though the school received 90% of its funding from public funds, the school could dismiss teachers without due respect for constitutional rights because it was privately governed.

One criticism of the non-application model is that it draws too sharp a distinction between the public and private sectors in terms of the threat that they pose to human rights.[522] Whereas the conceptions of oppressive power—socio-economically, culturally, and legally—may have been limited to the state, there is a growing realisation that relationships among private parties may also have disparate power balances.[523] This echoes critiques made by feminists such as Catharine MacKinnon who analogise the public-private divide to the gender divide.[524] According to MacKinnon, the public sphere is the "men's sphere", and the private sphere, the sphere of family and domestic affairs, is the "women's sphere". And by maintaining the application of a vertical human rights policy that protects men who suffer public, state-sponsored torture, we fail to recognise the equally grievous harm that can be inflicted against women in the closed, intimate, private space that is the home. Some states have become aware of these kinds of disparities and have recognised the need to limit the power of private parties in their relationships with one another. There is an acknowledgment that threats to individuals' liberties and autonomy can emanate from beyond the arms of the state. And this, in turn, has resulted in an evolution of varying degrees toward the limited protection of constitutional rights in interactions between private parties, in the form of the indirect, or diagonal, model.

An oft-cited example of the indirect-application model of constitutional protection is the one in Germany, with its principle of *Drittwirkung*.[525] The principle allows for the application of constitutional rights protection to all parties in private disputes with one another. This is expressly

[522] Aharon Barak, "Constitutional Human Rights and Private Law" in Daniel Friedmann and Daphne Barak-Erez, eds, *Human Rights in Private Law* (Oxford, UK: Hart Publishing, 2001); and Clapham, *supra* note 492 at 28-29.
[523] See Raday, *supra* note 491.
[524] See e.g. Catharine MacKinnon, "On Torture: A Feminist Perspective on Human Rights" in Kathleen Mahoney & Paul Mahoney, eds, *Human Rights in the Twenty First Century: A Global Challenge* (London: Martinus Nijhoff Publishers, 1993) at 21.
[525] Jörg Fedtke, "Chapter 4: *Drittwirkung* in Germany" in Dawn Oliver & Jorg Fedtke, eds, *Human Rights and the Private Sphere: A Comparative Study* (London: Routledge-Cavendish, 2007).

decreed in the provisions of the *Basic Law*, the country's constitution of 1949 (*Grundgesetz*), which is founded upon the inviolability of human dignity.[526] The *Basic Law* binds all courts to respect the human rights provisions and applies these provisions to interactions among all parties.[527] This is achieved through the interpretation of law in the light of human rights considerations.

The doctrine was first set by the German Federal Constitutional Court in the 1958 *Lüth* case.[528] Veit Harlan was a prominent film director who gained notoriety for the anti-Semitic films that he produced for the Nazi regime. Consequently, when he produced a new film after the end of the war, he became subject to a lot of criticism. One of his critics was Eric Lüth, a high-ranking public official from Hamburg, who called for people to boycott Harlan's film. But Harlan's producer and distributing company were able to apply successfully to the Hamburg Court of Appeal (*Landgericht*) for an injunction against Lüth's boycott petition. The court held that the petition would have a negative impact on Harlan's financial interests.[529] On appeal to the Federal Constitutional Court, however, the court vacated the Court of Appeal's decision as it infringed Lüth's right to free speech as provided for by Article 5(1) of the *Basic Law*.[530] The Federal Constitutional Court held that while constitutional protections take direct effect in public law, the

[526] Article 1(1) & (2) Basic Law: (Protection of human dignity).

(1) The dignity of man inviolable. To respect and protect it is the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

[527] Article 1(3) Basic Law: The following basic rights bind the legislature, the executive and the judiciary as directly enforceable law.
[528] *Lüth-Urteil*, BVerfGE 7, 198.
[529] Pursuant to §826 BGB: "A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage."
[530] Article 5(1) Basic Law (Freedom of expression), "Everyone has the right freely to express and to disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by radio and motion pictures are guaranteed. There shall be no censorship."

values embodied within them have a "radiating effect" on the operation of private law. As such, fundamental rights protected by the *Basic Law* serve as an "objective system of values" that must be taken into consideration by both the legislature and the courts when considering private law matters. [531] That said, the court did also mention that there would be a lower level of stringency in private law cases than in public law cases. This is to respect and give some consideration to the private autonomy of the parties and the expression of contractual freedom that is associated with it.

The final model of private law constitutional protection to be considered is the direct application model. Under this model, private parties are directly subject to the obligations contained within constitutional human rights protections and therefore can be liable for violating them. This is the model used in Ireland. The Irish constitution and jurisprudence have been developed so as to provide for the liability of private actors who violate constitutional norms through a cause of action known as the "constitutional tort". [532] This cause of action was first provided for by the Irish Supreme Court in the case of *Meskell v CIE*.[533] The court determined that an employee who was dismissed for refusing to sign a new employment contract that would require

[531] At 205, the Federal Constitutional Court held:

> But far from being a value-free system, the Constitution erects an objective system of values in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. *It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit*. (emphasis added).

(Translation available from University of Texas at Austin, Institute for Transnational Law, online: <http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=1477>.

[532] See Tony Kerr & Thomas Cooney, "Constitutional Aspects of Irish Tort Law" (1981) 3 DULJ 1. The remedies available under this cause of action can take the form of either injunctive relief or damages.

[533] *Meskell v CIE* [1973] IR 121 at 133 per Walsh J, "if a person has suffered damages by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right."

him to join one of four labour unions had been subject to a violation of his constitutional right to freedom of association. However, as the employer, CIE, was a fully nationalised Irish public transport company, it was unclear whether the decision could be applied to private parties. This matter was later resolved in the subsequent decision of *Glover v BLN Ltd*, where the Court required the directors of a private company to conduct an inquiry to ascertain whether the plaintiff was in breach of his contract with them as a matter of constitutional justice.[534]

So far, I have only considered cases where private parties have been subjected to human rights obligations through national constitutional law, but there is also precedent for international law having the same effect. The manner in which this effect is achieved, however, is highly dependent upon the particular state's legal system and its relationship to international law. It is helpful at this point to remember that the international law of human rights consists of legal obligations that are assumed primarily by the state. States then commit themselves to ensuring that their public officials comply with those obligations. One of the ways that they do this is through the principle of due diligence, whereby states commit to take preventive steps in order to ensure adherence to their international legal obligations.[535] This commitment can have an indirect effect of constraining private-party actions as states seek to ensure that their actions comply with international human rights obligations. Where private parties fail to conduct themselves in accordance with those obligations, as may be provided for in a national law, this can result in the state breaching its international legal obligations.[536] For example, in the case of *Velasquez*

[534] *Glover v BLN Ltd* [1973] IR 388.
[535] Susan Marks & Fiorentina Azizi, "Responsibility for Violations of Human Rights Obligations: International Mechanisms" in James Crawford, Alain Pellet & Simon Olleson, eds, *The Law of International Responsibility* (New York: Oxford University Press, 2010) at 729-731.
[536] Antonio Cassese, *International Law*, 2d ed (New York: Oxford University Press, 2005) at 250.

Rodriguez v Honduras, the Inter-American Court of Human Rights held that state responsibility may arise:

> not because of the act itself, but because of a lack of due diligence to prevent the violation or to respond to it as required by [the human rights treaty] ... [the] state is obligated to investigate every situation involving a violation of rights under the [*American Convention on Human Rights*]. If the state apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the state has failed to comply with its duty to ensure the free and full exercise of those rights to persons within its jurisdiction. *The same is true when the state allows private persons or groups to act freely and with impunity to the detriment of the rights recognized in the Convention*.[537]

Similarly, in *A v UK*, the European Court of Human Rights found the United Kingdom to be in breach of its convention obligations for failing to provide adequate protection for a boy who was caned by his stepfather.[538] The stepfather's actions were found to be legal at the time, as the then applicable national legislation allowed for "reasonable chastisement". As a result, the United Kingdom had failed to protect the child and thus had violated its international legal obligation.[539]

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[537] *Velasquez Rodriguez v Honduras* (1989) 28 ILM 294 at [172] and [176] emphasis added.
[538] *A v United Kingdom* (1999) 27 EHRR 611.
[539] Other examples of state responsibility where the state failed to constrain private-party actions and ensure their consistency with international human rights law include *Young, James & Webster v UK Eur Ct* Series A, Vol 44: UK government must outlaw or prohibit union infringement of the right of individual employees not to associate and their right not to join a trade union in closed shop arrangements; *Y v. United Kingdom*, Application. 14229/88; Report of 8 October 1991: state held responsible for breach of obligation under the ECHR in that the English legal system did not prohibit the corporal punishment of pupils in private schools; *Airey v Ireland*, Eur Ct (1979) Series A, Vol 32: state held responsible for not guaranteeing access to justice for a wife abused by her husband; and *X and Y v The Netherlands*, Eur Ct (1985) Series A, Vol 91: state responsible for not providing effective procedures for private initiation of prosecution proceedings against the son-in-law of the director of a private nursing home for his sexual assault of a sixteen-year-old, mentally handicapped inmate.

How international legal obligations take effect within national law depends on the particular state's legal system. And as is the case with constitutional human rights protection, international human rights law can take effect on private parties either directly or indirectly. For example, the United Kingdom and Denmark both adopt an indirect-application model.[540] Due to their dualistic systems, they must first give effect to the given international instrument by ratifying it, that is, incorporating it into their national legal systems through legislative approbation.[541] With the ECHR, for example, their courts, as state organs, give effect to its provisions by interpreting national legislation, as far as possible, so as to be compatible with ECHR rights.[542] Much like in the case of Germany's practice of *Drittwirkung*, this operates to provide an indirect horizontal effect within the private sphere.

By contrast, France provides for direct horizontal application of international human rights law on the basis of the ECHR.[543] As a dualist country, France also needs to take legislative steps to give effect to international law. This is achieved through Article 55 of the French constitution.[544] Article 55 allowed for the application of the ECHR in French private law in the 1996 case of *Mel Yedei*.[545] In that case, the *Cour de cassation* intervened to protect a tenant's right to have "*ses*

[540] See Jonas Christoffersen, "Denmark: *Drittwirkung* and Conflicting Rights – Viewed from National and International Perspectives" and Dawn Oliver, "England and Wales: The Human Rights Act and the Private Sphere" in Dawn Oliver & Jorg Fedtke, eds, *Human Rights and the Private Sphere: A Comparative Study* (London: Routledge-Cavendish, 2007).
[541] For a discussion of monist versus dualist conceptions of law, see Eileen Denza, "The Relationship between International and National Law" in Malcolm Evans, ed, *International Law*, 2d ed (New York: Oxford University Press, 2006).
[542] For example, see Section 3(1) of the *Human Rights Act 1998* in the UK: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."
[543] See Myriam Hunter-Henin, "France and Horizontal Application and the Triumph of the European Convention on Human Rights" and Andrea Rodriguez Liboreiro, "Spain: A Jurisdiction Recognising the Direct Horizontal Application of Human Rights" in Dawn Oliver & Jorg Fedtke, eds, *Human Rights and the Private Sphere: A Comparative Study* (London: Routledge-Cavendish, 2007).
[544] See also Emmanuel Decaux, "France" in Dinah Shelton, ed, *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (New York: Oxford University Press, 2011).
[545] Cass Civ 3ème, 6 March 1996, *OPAC de la ville de Paris v. Mme Mel Yedei*, (1997) D, 167.

proches" live with her in her home on the basis of Article 8 of the ECHR, the right to privacy and family life, which had been restricted by the terms of her tenancy agreement. As the landlord in the *Mel Yedei* case was a quasi-public body tasked with providing housing to low-income individuals, some uncertainty remained regarding the question of direct horizontal applicability. But the uncertainty was soon put to rest in the 1999 *Spileers* decision, where the *Cour de cassation* again invoked Article 8 of the ECHR to protect an employee's decision to choose where he would locate his family's home against his corporate employer's attempt to dismiss him.[546]

This brief overview shows that the idea of imposing human rights obligations on private parties is neither new nor without precedent. There is an increasing cognisance and reaction toward the growing threat to human rights from sources beyond the state. A shortcoming in state responses, however, lies in the diversity of approaches toward this matter across national legal systems. There is divergence in approaches due to the use of either constitutional fundamental freedoms as protection or reliance upon the international law of human rights. Allowing for the direct application of human rights obligations to TNEs, with claims to be resolved through arbitration, could help to provide greater legal certainty and access to justice beyond the constraints of national legal systems. And as will be elaborated in the next section, there is growing support for this.

III. State- and Non-State-Based Judicial Mechanisms: Not an either-or Question

The strength of the state-building project should not be underestimated. The sharp dichotomy between "state" and "non-state" in international legal theory in effect subordinates all

[546] Cass Soc, 12 January 1999, *Spileers v SARL Omni Pac*, (1999) D, 635.

actors that are not the state to a subsidiary and secondary status. It "reinforce[s] the assumption that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve."[547] More specifically for current purposes, the juxtaposition of "state" with "non-state" can make it seem as if these two alternatives are stark choices in competition with one another, and as if the former is better than the latter. But this should not be the case, particularly when it comes to dispute resolution procedures. In matters of civil justice, that is, legal action between private parties, it should be possible for the parties to resolve the dispute as they see fit, notwithstanding the fact that the substance of their dispute may relate to human rights violations. Indeed, the fact that it is human rights violations that are in question should result in us trying to increase the potential avenues by which claimants may achieve legal recourse against perpetrators. The current association of "human rights", as a concept, with the state should not restrict the avenues available to claimants seeking civil justice. As such, the use of non-state-based judicial mechanisms for the purposes of resolving human rights claims between private parties should not be disparaged or deemed to be unfit for the matter at hand. Rather, non-state-based judicial mechanisms should be viewed as a legitimate alternative to state courts for civil justice matters, supplementing and complementing them in the task of assuring access to justice and effective remedies, particularly where the state may be unable to do so.

Indeed, in the context of business and human rights, it has already been discussed how the state may be unwilling or unable to regulate TNEs, or to provide access to effective remedies. That we should try to conceive of alternative regulatory paradigms and construct or promote non-state-based judicial mechanisms is an acknowledgment of that fact. Further, the aim is not to deny the

[547] Philip Alston, "The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors" in Philip Alston, ed, *Non-State Actors and Human Rights* (New York: Oxford University Press, 2005) at 3.

significance of the state or, worse yet, to argue that the state is impotent and irrelevant; rather, it is to be cognisant of the fact that we need to recognise the role that other legal orders beyond the state can play in confronting the challenges of TNE regulation. Without diminishing the juridical value of these other legal orders, it is important to note two pivotal roles that the state plays in the context of dispute resolution procedures: the protection of third parties and the enforcement of awards emanating from other legal orders. In the first role, the state could protect third parties from disputes between two other parties. For example, the state could intervene in situations where A, who has obtained an arbitral award for monetary damages against the insolvent B, attempts to take money from C because C owes B money. And in a related second role, the state could help A to recover assets from B where B refuses to comply with an enforceable arbitral award in favour of A against B.

Consequently, arbitration should be considered neither as a lesser option compared to state courts nor to be in competition with them. Arbitration and state courts are merely two forms of dispute resolution that could be utilised as parties see fit to resolve private, civil justice matters between them, irrespective of the subject matter.[548] Working in tandem, the two can help to provide greater access to justice and effective remedies for human rights violations by TNEs. It helps to recall that arbitration has a long history before the inception of the state, harking back to Biblical times when, for example, King Solomon is recounted to have resolved the dispute over a baby between two women by threatening to split the baby in two.[549] Writing in 1970, when there was unease surrounding the use of arbitration, Frank Emerson counseled that "[i]t is important to recall these early uses of arbitration at this time when, in the midst of a rising tide of controversy, doubts

[548] Excluding criminal activities. That goes without saying.
[549] *The Bible*, I Kings, chapter 3, verses 16-28. For more historical examples of arbitration, see Emerson, *supra* note 501 and Earl Wolaver, "The Historical Background of Commercial Arbitration" (1934) 83:2 University of Pennsylvania Law Review and American Law Register 132.

arise. Arbitration is sometimes thought to be something new, untried, and hazardous to good public relations; or its organization seems to be detrimental to judicial institutions that seem older, but are in reality next-of-kin."[550]

IV. The Support for the Resolution of Business-Related Human Rights Violations outside of State Courts: The *UN Guiding Principles on Business and Human Rights*

Global actors have been trying for many years to reach an accord on the increasingly pressing matter of transnational business and human rights: to reach a consensus between state and non-state actors on the appropriate approach toward the regulation of transnational business.[551] A brief discursive history of regulation within the area shows an oscillation between, first, the use of "soft law" instruments to try and coax powerful TNEs into becoming good corporate citizens, and then, once frustration took hold, calls for harder, legally binding obligations. Examples of the early "soft" instruments include the *ILO Tripartite Declaration on Multinational Enterprises and Social Policy*,[552] the *OECD Guidelines for Multinational Corporations*,[553] and the later *UN Global Compact*.[554] The instruments were received with much fanfare but were often derided by civil society groups that wanted to see more hard law at work. As such, the regulation oscillated back in another direction with the drafting of the UN's *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regards to Human Rights* (*UN Norms*).[555]

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[550] Emerson, *supra* note 501 at 156.
[551] John Gerard Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights" (2014) 20 Global Governance 5.
[552] ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 16 November 1977, 17 ILM 422 (1978).
[553] These were published in 1976 as an annex to the OECD Declaration on International Investment and Multinational Enterprises.
[554] UN Global Compact, online: <https://www.unglobalcompact.org/>.
[555] *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 26 August 2005, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) [UN Norms].

There was much hope for the *UN Norms*, but the instrument's attempt at internationalising and legalising corporate social responsibility proved to be futile. Corporations were to have "the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law," the same obligations that states would assume.[556] But the top-down imposition of legal obligations on corporations was not proving to be very effective. In 2005, therefore, Professor John Ruggie was appointed to the position of UN Special Representative of the Secretary-General to try to pave a way forward on the matter. After six years and two renewals of his position, Professor Ruggie produced the *UN Guiding Principles on Business and Human Rights* (*Guiding Principles*).[557] The *Guiding Principles* were unanimously adopted by the UN Council for Human Rights and swiftly embraced by governments, standard-setting bodies, corporations, and civil society organisations.[558]

The *Guiding Principles* are structured around the "Protect, Respect and Remedy" framework, which consists of three pillars:

(1) The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;

[556] Article 1 *UN Norms*.

[557] UNHRC, *Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc A/HRC/17/31 (2011), online: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> [Guiding Principles]

[558] For an up-to-date running tab of activities, see the website of the London-based Business and Human Rights Resource Centre, online: <http://www.business-humanrights.org/UNGuidingPrinciplesPortal/Home>. Prominent examples of their usage include the new provisions in the OECD *Common Approaches for Export Credit Agencies* requiring assessments of social risks, which affect access to capital at the national level; the new *International Finance Corporation Sustainability Principles and Performance Standards* as well as the associated *Equator Principles*; and the *ISO26000*, a new social responsibility guidance adopted by the International Organisation for Standardisation (ISO). The *Guiding Principles* have also been endorsed by the European Commission, as well as the United States through Section 1502 of the *Dodd-Frank Wall Street Reform Act*, and will soon be endorsed by the Association of Southeast Asian Nations (ASEAN) as well as the African Union. See also John Gerard Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights" (2014) 20 Global Governance 5 at 11-12.

(2) An independent corporate responsibility to respect human rights, which means to avoid infringing on the rights of others and address adverse impacts with which companies are involved; and

(3) The need for greater access by victims to effective remedy, both judicial and nonjudicial.[559]

The pillars reflect the general consensus and desire among global actors to collaborate on the issue of business and human rights. Pillar One is a codification of existing international legal obligations upon states; Pillar Two represents the moral responsibility of corporations to be good corporate citizens, as is expected of them; and Pillar Three is a call for both of those groups to provide access to remedies to victims of human rights violations.

In the context of the general argument in favour of adjudicating human rights violations by TNEs through arbitration, several of the *Guiding Principles* reflect the political support necessary for achieving this aim. Beyond the foundational principle and obligation for states to protect against violations is the obligation for states to ensure access to effective remedies.[560] More specifically, Principle 28 calls for states to "consider ways to facilitate access to *effective non-State-based grievance mechanisms* dealing with business-related human rights harms."[561] This is bolstered by the commentary to the principle, which provides:

> One category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group. They are non-judicial, but may use

[559] Para 6, UN Guiding Principles.
[560] Principle 25, UN Guiding Principles: "As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."
[561] Emphasis added.

> adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. *These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach*.[562]

For their part, under Principle 29, corporations are requested to "establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted."

As is evident from the *Guiding Principles* and the endorsement that they received, there is political and corporate willingness to provide an alternative, non-state-based remedial avenue for victims of harm committed by TNEs. Going back to my initial remark about oscillations in this area, however, I should note that there is a group of states and civil society organisations that have called for the drafting of an international treaty on business and human rights.[563] In September 2013, Ecuador, backed by a group of governments, proposed a binding legal instrument for TNE operations at a meeting of the UN Human Rights Council.[564] While this group endorsed the progress that had been achieved by the *Guiding Principles* as a progressive first step, they argued that, without a legally binding instrument, the *Guiding Principles* would remain just that: a "first step". On their own, they further argued, the *Guiding Principles* are only a partial answer to the problems of a lack of TNE accountability and inadequate legal remedies for victims. These arguments held sway and so, on July 14, 2014, the UN Human Rights Council adopted *Resolution*

[562] Commentary to Principle 28, UN Guiding Principles (emphasis added).
[563] See the Treaty Alliance's *Global Movement for a Binding Treaty*, online: <http://www.treatymovement.com>.
[564] Statement on behalf of a Group of Countries at the 24th Session of the UN Human Rights Council, online: <http://business-humanrights.org/sites/default/files/media/documents/statement-unhrc-legally-binding.pdf>.

26/9 calling for "the Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights."[565]

Two points should be considered in light of this development. First, the drafting of an international treaty will take time. It will require consensus among a group of states that are already divided on what the best regulatory approach should be. Consequently, there is a need to have interim mechanisms that are both relatively easier and quicker to achieve, while negotiations and drafting take place. Second, "hard law" in the form of an international treaty is a necessary but insufficient tool for the regulation of a global business sector. There needs to be a broader approach in terms of the tools that are developed and utilised. As such, the debate should not be seen in binary terms, as advancing either the treaty or the *Guiding Principles*. Rather, we should press ahead with developing tools that both complement and supplement one another so as to achieve a holistic approach to regulation as seen within a global regulatory network. Remedial alternatives to state-based judicial systems that include mechanisms such as arbitration and mediation should therefore also be encouraged and seized upon.

V. The Benefits of the Arbitral Mechanism

The use of non-state-based remedial mechanisms such as arbitration would respond to many of the challenges that have been described in the discussion so far. Five clear benefits can be highlighted.

[565] UNHRC, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights,* UN Doc A/HRC/RES/26/9 (2014), online: <http://www.ihrb.org/pdf/G1408252.pdf>.

First, non-state-based remedial mechanisms can alleviate the governance gap. They can have an important impact in developing states, where there can be a greater tendency for business-related human rights violations to both occur and not be remedied. Many states suffer from weak governance, conflict, or political instability, which often results in under-resourced, overburdened, and ineffective national judicial systems. Having the option of non-state-based arbitration could therefore be cheaper, quicker, and more effective for all stakeholders. Its availability would increase access to justice for victims as well as the accountability of TNEs.

Second, by providing only civil remedies, non-state-based arbitration stays within the confines of public policy. To borrow from more familiar national law vocabulary, the arbitral mechanism should only be responding to claims of a tortious or delictual nature. Criminal law issues would remain within the remit of the state. As such, the arbitral mechanism would only be providing a forum for the parties to resolve a private dispute, and any award rendered would be no different from out-of-court settlements as can be found in national legal systems.[566] Moreover, the resolution of the dispute in this manner is undergirded by an arbitral agreement between the parties; it is an expression of the autonomy and freedom to contract that law and public policy must both protect and promote.

Third, non-state-based arbitration would reduce the problem of diverse idiosyncrasies in the laws of national legal systems surrounding corporations and torts, thus providing potential claimants with greater consistency and legal certainty. This consistency would be made possible through the use of legal codes of conduct with global coverage that would become applicable to the conduct of TNEs, irrespective of the jurisdiction within which they conduct business. All

[566] I further elaborate on the kinds of award that the grievance mechanism will issue in Chapter Nine, Section III.

stakeholders could therefore benefit from greater consistency and certainty in the application of law.

Fourth, as the principle of *res judicata* frees the court system from further litigation of a matter that has been arbitrated, courts would be free to resolve other issues and ultimately to be both more efficient and effective. Arbitration between the parties is meant to provide a final and binding resolution to the parties' dispute, and the principle of *res judicata* aims to ensure this. As has been noted by several courts and commentators, *res judicata* is a general principle of law that is rooted in public policy and aims to prevent the re-imposition of costs and risks of litigation, as well as to maintain the credibility and resources of our judicial systems.[567] Moreover, it is supported by Article III of the UN *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, which provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles [particularly Article V]."[568]

Finally, and related to the previous two points, the resolution of a claim in this manner does not extinguish claimants' rights to pursue other potential accomplices of a defendant through alternative avenues. Considered from the perspective of Hohfeld's claim-right, the claimant is exercising her claim-right against the duty that the corporation from which she is seeking a remedy owes to her—a duty of care, a duty not to commit harm, or a duty to respect her human rights, for

[567] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1953) at 336-372; Gary Born, *International Commercial Arbitration*, 2d ed (Alphen aan den Rijn: Kluwer Law International, 2009) at 2881ff.; Emmanuel Gaillard & John Savage, eds, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) at para 1419.
[568] 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).

example.[569] The fact that she exercises her right in this instance through the arbitral mechanism does not extinguish any of the other claim-rights that she may have against other duty holders. Seen from this perspective, therefore, the arbitral mechanism serves as a supplementary and complementary tool in the resolution of disputes and pursuit of justice.

Conclusion

This chapter aims to present the case for the use of non-state-based arbitral mechanisms to respond to business-related human rights violations. It raises some of the pressing matters that exist around the commission of business-related human rights violations and examines the challenges that claimants face in trying to achieve remedies for the harm suffered.

The idea of applying human rights obligations to TNEs is one with growing traction, but also one that has met resistance for reasons of jurisprudence and vested interests. There is legitimate concern that simply saying that private actors should be subject to human rights obligations is much easier than actually making it happen. This is true. The concept of human rights as it currently stands under international law is much broader than just prohibitions or negative obligations. The 'respect, protect, ensure' framework applicable to human rights entails both negative and positive obligations. States have obligations to "adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations."[570] Concurrently, states also have the right to limit individuals' rights and apply exceptions to the application of human rights. It is therefore difficult to imagine how private actors

[569] See Leif Warner, "Rights" in Edward Zalta, ed, *The Stanford Encyclopaedia of Philosophy* (Fall 2011 Edition), online: Stanford Encyclopaedia of Philosophy <http://plato.stanford.edu>.
[570] UNHRC, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 1326 (2004) at para 7.

could assume the entirety of these obligations or be granted the prerogative to limit an individual's human rights, notably because as private actors they cannot do so in a manner "prescribed by law" and for reasons "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[571] They do not have the democratic legitimacy or authority to do so in the same way that states do. But this does not negate the broadly shared view that private actors, or corporations more specifically, should have human rights obligations. Rather, it forces proponents of that notion to think hard about what that obligation should look like and how it would work. This is not an insurmountable challenge. For the time being, the contractual model of corporations subjecting themselves to negative human rights obligations through instruments such as the ICoC is both a feasible and encouraging approach, but more will need to be done in order to achieve systemic change and broader applicability of human rights obligations to private actors.

Nevertheless, in demonstrating the application of international human rights law and constitutional protections to private-party interactions, I have attempted to show how the application of human rights obligations to private parties is already happening. There is precedent for it, albeit to varying degrees. Moreover, there is support for the idea from political and corporate sectors. The drafting and reception of the UN *Guiding Principles* pay testament to this. The remedial frameworks to facilitate applying these obligations to TNEs are available too. State and non-state participants in global business sectors are uniting and developing regulatory networks beyond the state to create both appropriate legal, conduct-governing norms and the infrastructure to ensure their enforcement. This infrastructure comes with grievance procedures that foresee the use of arbitration, mediation, and other judicial or non-judicial mechanisms. Examples include

[571] This is the typical language for limitations in the ICCPR. This is drawn from Article 18(3) ICCPR.

commitments and associations established in the global private security industry through the International Code of Conduct for Private Security Providers Association;[572] commitments in the global textiles industry through the *Fire and Building Safety Accord* in Bangladesh[573] or the Fair Wear Foundation;[574] and from a multi-industry perspective, through the Ethical Trading Initiative.[575]

A challenge to be overcome at this stage, however, concerns procedural legitimacy: can we and how do we grant legitimacy to these mechanisms? There is still an overwhelming conviction that something as serious as human rights violations should be managed through state-based systems. But, as has been noted in the chapter, the association of human rights violations with the state is only a recent phenomenon in the history of human rights.[576] And if we have established that the threat to human rights can emanate from oppressive powers wielded by parties other than the state, then we should consider alternative avenues for addressing the sources of these threats in their entire plurality. One way of doing that will be to ensure that international standards and principles are maintained in the procedural architecture of these mechanisms. This is the subject of the next chapter.

[572] International Code of Conduct Association, online: <http://www.icoca.ch>.
[573] Bangladesh Accord, online: <http://bangladeshaccord.org>.
[574] Fair Wear Foundation, online: <http://www.fairwear.org>.
[575] Ethical Trading Initiative, online: <http://www.ethicaltrade.org>. For more examples, see Caroline Rees and David Vermijs, *Mapping Grievance Mechanisms in the Business and Human Rights Arena*, Corporate Social Responsibility Initiative Report No. 28 (Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2008).
[576] See generally Ishay, *supra* note 474.

Chapter Seven: Outline of the Mechanism

Introduction

Article 13 of the ICOCA *Articles of Association*, in conjunction with Articles 67-69 of the ICoC, provides for the establishment of individual grievance mechanisms by PMSCs that will be monitored by the ICOCA. The guidance about procedure and overall conceptualisation of the mechanisms under the ICOCA regime, however, is scant and underdeveloped. As things stand, the ICOCA can neither decide on a complaint nor award any reparations. The ICOCA can only provide advice on the effectiveness of PMSCs' mechanisms and suggest alternative remedial avenues to complainants in the event that the remedy proffered by a PMSC is unsatisfactory. A recent NGO report on access to redress in the global PMSI has decried this arrangement, calling it "fig leaves for the PMSC industry to legitimise its actions,"[577] as "in practice this means that the victims of human rights violations are unable to seek redress via the ICOCA."[578]

In her account of how the ICoC came into being, Anne-Marie Buzatu discusses how industry participants considered the gamut of possible grievance mechanisms.[579] The possibilities included mechanisms with a referral function, mediation, and fact-finding. Arbitration was discussed but ultimately rejected because it was deemed to be both too complicated and expensive. The result of these deliberations, however, was a system in which the ICoC contains no real grievance mechanism that can garner the legitimacy that the industry needs in order to grow sustainably and responsibly. Without a legitimate grievance mechanism, PMSCs cannot seek new

[577] War on Want, *Mercenaries Unleashed: The Brave New World of Private Military and Security Companies* (2016) at 11.
[578] *Ibid* at 12.
[579] Anne-Marie Buzatu, *Towards an International Code of Conduct for Private Security Providers: A View from Inside a Multistakeholder Process*, Geneva Centre for the Democratic Control of Armed Forces (2015) at 48-50.

business opportunities in a transparent and accountable way. The provision of security is certainly a critical service in any society, which can therefore make it a very lucrative pursuit for service providers. But any service provider within an industry has a legal obligation not to commit harm and to remediate any harm that it does. To the extent that industry participants have taken a bold step forward in reimagining regulation within their global business sector, they should take the next necessary step of providing legitimate, efficient, and effective remedies through their grievance mechanism. The political will, I think, is there. As Buzatu comments on the sentiment during the deliberations, "rather than an indication of bad faith or 'corporate capture' of the initiative, the ambiguity of the code on the oversight and grievance mechanism reflected the lack of a clear common vision among the multistakeholder participants as to how the code's approach to handling grievances could work."[580]

In light of the resultant dissatisfaction in all quarters, the next three chapters concern the design of a grievance mechanism based on international arbitration that can be made available to victims who have suffered harm at the hands of PMSCs.[581] The grievance mechanism aims to overcome the principal challenges outlined above and discussed extensively in Chapter One. These challenges broadly concern matters of jurisdiction, applicable law, and "access to justice". The grievance mechanism addresses the issue of jurisdiction through the structural guiding principle of being "globally administered and locally accessible"; it resolves questions of applicable law by using the ICoC and harmonising the relevant procedural law; and the final challenge of "access to justice" concerns are addressed through the operation of a network of national offices that will

[580] *Ibid* at 43.
[581] James Cockayne makes a similar proposal to use international arbitration within the industry, but it is of much broader applicability to a wider range of disputes. It also offers less detail on the mechanism's procedural elements. See James Cockayne et al, *Beyond Market Forces: Regulating the Global Security Industry*, International Peace Institute (2009) at 245-248.

help to ensure the efficiency, effectiveness, and responsiveness of the mechanism to claimants' needs.

The grievance mechanism would be facilitated by and would be an integral part of the global regulatory network (GRN) for PMSCs. Its role and function could be compared to that of the judiciary in the classic tripartite system of state governance alongside the legislature and the executive.[582] It draws its authority, inspiration, and operative guidance from five principal legal instruments:

1. The ICoC[583]
2. ICOCA *Articles of Association*[584]
3. The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of 1958 (*New York Convention*)[585]
4. The *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* (*UN Basic Principles and Guidelines on the Right to a Remedy*)[586]
5. *UN Guiding Principles on Business and Human Rights* (*UN Guiding Principles*)

[582] Yet, it should be noted that I am not using the state as a qualifying benchmark. I use this popular reference only to underscore the role and importance of the grievance mechanism within the GRN as a legal order.
[583] This will be the governing law applicable to disputes.
[584] The *Articles of Association*, which would allow for membership to the GRN, will ensure that PMSCs are formally connected to the network. This will provide for the easier application of laws, standards, and best practices as they develop. These developments will be of broad applicability to practice across the global PMSI but also, more specifically, to the operation of the grievance mechanism on the ground.
[585] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, UNTS vol. 330, p.3.
[586] UN Commission on Human Rights, *Resolution 2005/35 on 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*, E/CN.4/RES/2005/35 (2005).

This chapter merely provides the contours of the mechanism. It, first, situates the grievance mechanism within the framework of the GRN and, second, provides a normative exposition as to why it should be considered as a judicial mechanism. Chapters Eight and Nine will expand upon some of these aspects in greater detail. Chapter Eight discusses the hard elements of the mechanism, the legal features that ensure the mechanism's actual functioning and its delivery of the product output for which it is designed, while Chapter Nine explores the mechanism's soft elements, that is, the more human aspects of the mechanism.

I. The Contours of the Mechanism

The mechanism's operation can be conceptualised along two scales of legal pluralism: the global and the local.

a. The Global Scale

On the global scale, the mechanism would be situated at the heart of the GRN. The structural principle that underlies the mechanism is that of it being "globally administered and locally accessible". This principle draws on the fundamental nature of the GRN as both being constituted by legal orders and constituting a legal order. As such, the GRN's operation and applicability are dependent upon all actors operating within the GRN. This global nature manifests itself in two important operative features of the grievance mechanism: a network of national offices and the role of insurance providers in the process of recognising and enforcing arbitral awards.

Globally, the mechanism would be overseen by a central office—the ICOCA, the GRN's epicentre. This central office, or secretariat, would connect a network of national offices across

participating states. The secretariat and national offices would be engaged in a dialogic relationship as information flows back and forth between them. In one direction, the secretariat would communicate substantive and procedural law and practices that must be uniform across the network. In some sense, the secretariat would emulate the role of treaty bodies.[587] It would oversee the development of global best practices in dispute resolution so as to ensure some uniformity in practice. Much like the UN Human Rights Committee, which monitors the international application of the *International Convention on Civil and Political Rights*, for example, the secretariat would monitor the application of the ICoC and issue general comments that provide authoritative interpretations of its provisions as they evolve with practice and developments within the global industry.[588] This development would then be taken on board by the national offices and, where appropriate, tapered so as to fit local contexts and particularities.[589] As disputes are resolved, awards and reports would be communicated back to the secretariat for processing, and the reflexive process of adaptation to developments would continue. In this way, the grievance mechanism should be able to provide recourse to claimants, wherever the alleged harm is claimed to have been committed, with some degree of consistency and while remaining responsive to local realities.

To ensure a swift and effective resolution of disputes, insurance providers formally linked to the GRN would be on standby to assist with reparation payments if and when they might be required. Each claim would be tiered, in that there would be a preliminary mediation, and if this

[587] See Nigel Rodley, "The Role and Impact of Treaty Bodies" in Dinah Shelton, ed, *The Oxford Handbook of International Human Rights Law* (New York: Oxford University Press, 2013).
[588] This is already included in the ICOCA's *Articles of Association* at Article 13.3: "From time to time the Board shall publish guidance to Members on best practice and compliance with paragraphs 66, 67 and 68 of the Code, based on a review of complaints brought to the Association and claims brought to Member companies, and other relevant developments."
[589] Where and how these local particularities may come in to play will be expounded upon in sections of subsequent chapters pertaining to, for example, the functions of the national office (Chapter Nine, Section IV), the selection of arbitral tribunals (Chapter Nine, Section I), and the nature of the awards issued (Chapter Nine, Section III).

were to be unsuccessful, then the claim would proceed to arbitration. In accordance with the ICoC, each PMSC is required to have sufficient finances to resolve any claims made against it.[590] PMSCs would have to demonstrate this to the ICOCA as part of their periodic certification process. In the event of an award being made against the PMSC that entails a pecuniary element, therefore, the PMSC would have to make a payout there and then. Should the PMSC not have its own funds, an insurance provider linked to the GRN and with whom the PMSC has a plan could make the payout to the claimant on its behalf. The PMSC may then need to pay a top-up fee or contributory sum to the insurance provider in some cases. Where it is unwilling to do so, the insurance provider could use the arbitral award to obtain recognition and enforcement in an alternative jurisdiction to claim those funds from the PMSC. The process of recognition and enforcement of arbitral awards, therefore, would differ from the typical practice in international commercial or investment arbitration.[591] In this case, the successful claimant would not vindicate the award herself in the courts of another jurisdiction, if necessary. Rather, it is the insurance company that would take on this role. This is the second feature of legal pluralism at the global scale. The idea behind this proposal is to limit the victim's exposure to more complex litigation processes and to let actors with greater resources at their disposal deal with them where necessary.

[590] Para 69 ICoC: "Signatory Companies will ensure that they have sufficient financial capacity in place at all times to meet reasonably anticipated commercial liabilities for damages to any person in respect of personal injury, death or damage to property. Sufficient financial capacity may be met by customer commitments, adequate insurance coverage, (such as by employer's liability and public liability coverage appropriately sized for the scale and scope of operations of the Signatory Company) or self-insurance/retention. Where it is not possible to obtain suitable insurance cover, the Signatory Company will make alternative arrangements to ensure that it is able to meet such liabilities."
[591] See "Chapter 11. Recognition and Enforcement of Arbitral Awards" in Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, 6th ed (New York: Kluwer Law International; Oxford University Press, 2015).

b. The Local Scale

In implementing this globally administered grievance mechanism, it is important to be cognisant of legal systems already in play within national jurisdictions. Alongside state judicial mechanisms there may exist non-state judicial mechanisms that are also regularly used. Examples of the latter, which may be tribal, as well as community- or town-based, include the traditional *gacaca* courts in Rwanda, the *Jirga* in Afghanistan, and the *shalish* in Bangladesh. These non-state mechanisms are important for understanding the operation of the grievance mechanism on the local scale, given that it will be influenced by and must account for local particularities of a social, economic, cultural, political, or religious variety that may affect the administration of justice. The challenge for the grievance mechanism, therefore, will be twofold: first, to situate itself within the local legal context with a certain degree of harmony; and second, to develop sufficient trust among the local population so that its members feel confident in using the mechanism.

These two challenges could be overcome by appropriately constituting the arbitral tribunal, by providing sufficient flexibility in the nature of the award issued, and by utilising the national office as a coordinator across systems. The tribunal should be made up of appropriately qualified individuals who can be nominated by the parties from a closed list constituted by the ICOCA. The roster of potential arbitrators would be curated by the national office of the ICOCA, to ensure that candidates are appropriate choices, and submitted to the ICOCA head office. Having a roster of suitably qualified arbitrators and mediators should enable the grievance mechanism to better fit the unique circumstances of human rights arbitration in complex environments. Given that it is a closed list, it will be important to ensure that the procedures for composing that list will guarantee the independence and impartiality of arbitrators and mediators. This is something that I will expand upon in the section below.

Finally, the national office would serve as the local administrator in order to help overcome "access to justice" concerns. The national office would be best placed to respond to issues of accessibility; to train relevant officials to respond to local barriers of a social, economic, political, cultural, religious, or gender-based variety; to administer local complaints; and to liaise with the central office. In tune with the multistakeholder constitution of the ICOCA, the national office would be constituted by PMSC, state, and civil society representatives. To enhance the global nature of the mechanism and the framework within which it operates, I would even advocate that representatives within national offices should be of different nationalities. In providing administrative services, the national office would be a source of assistance to the arbitral tribunal, as it should house experts familiar with international human rights law and the global PMSI. In sum, the national office would straddle the two scales of legal pluralism and attempt to ensure some form of harmony between the global and the local systems.

II. Classifying the Process as Judicial

The discussion above describes the grievance mechanism as a form of dispute resolution with both global and local dimensions. However, in the wider discussion of business and human rights, there is a tendency to distinguish remedial mechanisms on the basis of their being either "state" or "non-state", "judicial" or "non-judicial". Such prototypical classification is notably reinforced by the *UN Guiding Principles on Business and Human Rights*. In the previous chapter, I discussed the collaborative role that non-state-based remedial mechanisms could play: how they could complement and supplement state courts in the provision of remedies for violations of human rights by non-state actors. However, as has also been discussed in various other parts of the thesis, there is an unjustifiable primacy accorded to state legal institutions in this area that can have

a deleterious effect on the development and promotion of alternative approaches to the regulation of global business sectors. There is an implicit primacy that is accorded to "judicial" processes in comparison to a "non-judicial" process that is similar in both form and function, with the two processes differing only in their source of competence and authority—for example, a constitution versus a contract, two legal instruments resulting from interaction among parties. Consequently, while I will not advocate a new terminology, I will argue that it is important to classify the proposed grievance mechanism, based on international arbitration, as judicial, or at least to begin to imagine a new orthodoxy where it can be.

Before I get into the details of this argument, it is necessary for me to specify what I mean when I say "judicial", as not every grievance mechanism is judicial. I classify as judicial any process of dispute resolution that involves an independent and impartial third party who is authorised to issue a final and binding decision on the dispute between conflicting parties after hearing them. A critical and distinguishing criterion of judicial processes is the binding nature of the third party's independent decision. This binding nature should be distinguished from the situation in mediation, for example, where a third party is involved in the process of resolving the dispute, but the result reached is essentially an agreement concluded by the parties themselves with the assistance of the third party. Thus, when considering the role of a judge or an arbitrator, it is important to note that they both serve the same function—each is a third party intervener to a dyadic relationship, charged primarily with providing an authoritative, final, and binding decision to resolve the dispute at hand.

Beyond the inherently similar functions of arbitrators and judges, there are other reasons why this grievance mechanism based on international arbitration should be classified as judicial. First, classifying the awards issued by the arbitral tribunal as judicial accords them greater

legitimacy, even if this is achieved merely by way of appellation or discourse. The *New York Convention* provides for the recognition and enforcement of arbitral awards by national courts.[592] These awards' acceptance and promotion by 156 state parties is a wide endorsement of their effectiveness as a legitimate form of dispute resolution. It must also be noted, however, that whereas most international commercial arbitrations are not subject to public scrutiny, I think the private adjudication of alleged human rights violations may attract a bit more attention. This is particularly so given that arbitrators will be applying public law jurisprudence and principles in a private law setting and framework. As such, the ability to identify their deliberative process and award as "judicial" will provide greater legitimacy in the public eye.

Second, awards rendered by arbitrators have persuasive precedential value and contribute to the development of a body of jurisprudence. Much like judgments, arbitral awards contribute to the development of law and provide greater predictability, stability, and legal certainty for actors. As the grievance mechanism's system of dispute resolution would be globally administered and locally accessible, there may be some variation in the nature of awards issued at the local level. This variation, however, should not be considered as an inconsistency in the precedential value of the awards but rather as a pedagogical source for the development of best practices across the network.[593] Further, this body of case law would feed into the GRN and help the law within the regulatory framework evolve with the practice of its participants. Giving value to the development of norms would further enhance and legitimise the grievance mechanism as a judicial process.

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[592] A comparative analysis of national jurisprudence by Blackaby et. al., *Redfern & Hunter*, *supra* note 591, shows that a decision reached by an arbitral tribunal is classified as an award only when it provides a final and definitive resolution to the dispute submitted and thus leads to an end of the proceedings. See section 9.09 – 9.13.

[593] See UNGP 31(g) as one of the "effectiveness criteria for non-judicial grievance mechanisms," which provides that the mechanisms, both state-based and non-state-based should be "[a] source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms."

Third, classifying the proposed process as judicial is important for the further institutionalisation of the GRN as a formal governance framework. If we make further use of the comparison with state courts, treating the grievance mechanism as the judicial arm of the GRN, then it is possible to see how the GRN's continued use and dependence on the grievance mechanism as a preferred, efficient, and effective means of dispute resolution would both strengthen and legitimise the work of the GRN's legislature and executive. A similar line of reasoning can be found in Alec Stone Sweet and Florian Grisel's explanatory account of how "judicialisation"—institutionalised triadic lawmaking—constitutes governance.[594] Their account is premised upon two conditions that can be met in this proposed grievance system: "First, future contractants must perceive that they are better off in a world with [triadic dispute resolution (TDR)] than without it, and they must evaluate their relationships in light of the latter's decisions. Second, dispute resolvers must understand their decisions as having some prospective, pedagogical authority on future dispute resolution."[595] Should these two conditions be met, they theorise that, "the more TDR is activated within a community of contractants—if the flow of cases is steady or rising over time—then judicial lawmaking will inexorably become a mechanism of institutional evolution, and dyadic contracting and disputing will gradually but inevitably be placed in the shadow of TDR and case law. As decisions accumulate, the corpus of applicable rules and procedures steadily deepens and expands, becoming more elaborate and differentiated, which will then help to organize future interactions, conflict, dispute resolution, and institutional change."[596]

[594] Alec Stone Sweet & Florian Grisel, "The Evolution of International Arbitration: Delegation, Judicialization, Governance" in Walter Matlii, ed, *International Arbitration and Global Governance* (Oxford: Oxford University Press, 2014) at 24 – 26.
[595] *Ibid* at 26.
[596] *Ibid*.

Fourth, classifying the process as judicial, and thus the award as a judgment, will allow the principle of *res judicata* to take effect. As a form of dispute resolution, use of the grievance mechanism should be able to preclude the claimant from raising the matter again before a different court or tribunal, as the award issued will be final and binding on the parties.

Finally, it is important to classify the process as judicial for the benefit of the parties themselves, and more specifically, the victim. The gravity of alleged human rights violations requires us to treat the matter with significant formality, which can be found, in part, in judicial processes and the delivery of a legal remedy.

This series of arguments is meant to present a few advantageous reasons as to why we should consider the arbitral process to be judicial, or at least to begin to imagine a new orthodoxy where it can be. Granted, there are differences that exist between state courts and arbitrations in terms of procedure, substance, and foundation. Further, there is a difference in the ability of those two adjudicative processes to compel the parties over whom they preside to comply with their orders. However, I submit that the two processes share more similarities than differences. Their shared adjudicative function is an expression of the legal pluralism within our societies, and such pluralism should not entail juridical hierarchy or subordination, whether implied or explicit. As I have tried to demonstrate throughout this dissertation, it is important for us not to make such a distinction for both normative and functional purposes. In recognising the shortcomings of the state and its related institutions to regulate global business sectors and ensure effective access to remedies, it is important for us to critically assess every aspect of the current system in order to make changes necessary for progressive reform.

Conclusion

This chapter aimed to set out the contours of the GRN's grievance mechanism within a global framework and emphasise the importance of classifying it as judicial. In the following two chapters, I expand upon more specific elements of the mechanism, which aim to address the difficulties raised in Chapter One regarding the challenge of attaining a remedy for harm committed by PMSCs, both jurisprudentially and as a matter of access to justice.

Chapter Eight: The Jurisprudential Elements

Introduction

In this chapter, I begin to focus on how some of the more specific elements of the proposed grievance mechanism respond to jurisprudential challenges raised in Chapter One. In Chapter One, I showed how remedies may vary depending on whether the victim was accessing a state or non-state based, judicial or non-judicial mechanism. This involved discussing challenges that touch upon issues such as jurisdiction, applicable law, and the sophistication of national law on the matter of PMSCs. In the following sections of this chapter, I address how to overcome these issues by discussing three key operative elements of the grievance mechanism: the extension of third-party rights to arbitrate the dispute through the creation of pre-dispute contractual arbitration clauses; the use of a uniform applicable law and seat of arbitration for disputes; and the importance of a harmonised system for the recognition and enforcement of awards.

I. Pre-dispute Contractual Arbitration Clauses

a. The Extension of Arbitration to Third Parties

In order to begin an arbitration, there must be a valid arbitration agreement between the disputing parties. The obstacle confronting potential third-party claimants in the grievance mechanism that I have proposed is thus that they would lack privity with respect to the GRN's contractual framework. This is due to the fact that they would be signatories to neither the ICOCA *Articles of Association* nor the service contracts between PMSCs and their clients or

subcontractors. Consequently, they would not be able to avail themselves of the provisions allowing for the operation of the grievance mechanism.

To overcome this obstacle, I would include within the ICoC a standing agreement by PMSCs to arbitrate disputes arising from the ICoC with third-party claimants. This proposal draws on the notion of "arbitration without privity", that is, the creation and extension of standing consent to arbitrate a future dispute with third parties who are not originally privy to the contract.[597] The agreement to arbitrate between the PMSC and the third party claimant would thus be made when the claimant accepts the PMSCs offer to arbitrate, through the standing consent, by filing a claim to arbitrate.

At this juncture, there are two possibilities for incorporation of the standing offer. The first possibility would be to incorporate the provision into the ICoC and then rely upon unilateral adherence to the offer by PMSCs that are not signatories to the ICOCA *Articles of Association* but nevertheless incorporate the ICoC into their contracts with clients and subcontractors. In this case, the grievance mechanism could operate as an ad hoc arbitration. The PMSC and the claimant could agree to a set of arbitration rules, such as the UN Commission on International Trade Law (UNCITRAL) *Arbitration Rules*, or opt for a set of institutional rules, such as those of the International Chamber of Commerce, the London Court of International Arbitration, or the International Centre for Dispute Resolution.[598]

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[597] Jan Paulsson, "Arbitration Without Privity" (1995) 10:2 Foreign Investment LJ 232. See also Alan Redfern, *The Law and Practice of International Commercial Arbitration* (2004) at 66; Blackaby et al., *supra* note 591 at 1.217; Andrea K Bjorklund, "Contract Without Privity: Sovereign Offer and Investor Acceptance" (2001) Chicago J Int'l L 183; and James Hosking, "The Third Party Non-Signatory's Ability to Compel International Commercial Arbitration: Doing Justice Without Destroying Consent" (2003-2004) 4 Pepp Disp Resol LJ 469.

[598] Similarly, and perhaps more creatively, one could also envisage the ICOCA offering a service similar to the International Centre for Settlement of Investment Disputes (ICSID) Additional Facility whereby it assists PMSCs that are not members to facilitate arbitrations in accordance with the ICoC. But these are ruminations for if and when the system was to become much more developed.

Alternatively, the standing offer could be incorporated into the ICOCA *Articles of Association* and thus be part of a more institutionalised form of dispute resolution through the PMSC's membership in the ICOCA and thus its participation in the GRN. This second option is akin to some multilateral treaties that provide for third-party dispute resolution within a wider system of governance. Examples include dispute resolution under the *North American Free Trade Agreement*,[599] the *Energy Charter Treaty*,[600] some human rights treaties such as the *European Convention on Human Rights*,[601] and international investment treaties more generally.

Of these two possibilities, the preferred method of extending third-party rights to arbitrate would be the second option, through membership in the ICOCA. This is for four principal reasons. First, membership in the ICOCA would promote the development of a more expansive and effective GRN. It would better integrate PMSCs into a broader regulatory framework that extends beyond the provision of dispute resolution, in the form of a global governance regime that provides for normative standards of conduct and, as a certification system, the future ability to bid for contracts. Second, dispute resolution through ICOCA membership can make the evolution of law as a result of the development of case law easier to incorporate across the network given the GRN's

[599] Article 1120 of the *North American Free Trade Agreement* provides:

> (1) Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:
> a. the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
> b. the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
> c. the UNCITRAL Arbitration Rules.
> (2) The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

[600] Article 26(3)(a) of the *Energy Charter Treaty* provides: "Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article."

[601] Article 34 of the *European Convention on Human Rights*, regarding individual petitions, provides: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

institutional framework. Third, and relating to the second point, dispute resolution through membership in the ICOCA can better account for the dual role that PMSCs play, as both potential respondents to claims and signatory-participants in the development of law within the GRN through the ICOCA.[602] Finally, knowing that there is a specialised institution that is familiar with practices in the industry can make the dispute resolution process easier for the parties to use and rely upon, rendering it slightly freer of hassle.

Let me now take a brief moment to touch upon the related matter of consent. Consent is integral to arbitration. After all, arbitration is founded upon the autonomy of the parties to settle a private dispute as they see fit. However, there have been concerns in some quarters such as sport, labour relations, and consumer contracts that there is no valid consent by the athletes, employees, or consumers to the arbitration agreement that is forced upon them or embedded in their contracts. This is a legitimate concern and ongoing debate that merits further investigation. This concern, however, in not applicable in the context of the mechanism being proposed here and its arbitration agreement. Here, victims are given the choice of whether they want to pursue legal action against a PMSC through arbitration or through state courts. PMSCs merely offer the option of arbitration, but victims are in no way bound to accept it if they do not want to.

b. Classes of Third Parties

There are two classes of third party to whom I would grant standing to pursue claims through the grievance mechanism: direct victims and indirect victims. Regarding the first class, a victim alleging to have suffered direct harm as a result of a PMSC's actions would be granted

[602] See Anthea Roberts, "Power and Persuasion in Treaty Interpretation: The Dual Role of States" (2010) 104:2 AJIL 179.

standing. In the event of his or her death, those with a sufficiently close connection to the alleged victim, such as the next of kin, should be able to pursue the action against the PMSC on behalf of the alleged victim, as an indirect victim. And finally, I would consider allowing for class actions or joinders where there are several claimants but the cost of bringing individual actions may be too high or inefficient. Consolidation into a single application would reduce transaction costs and promote efficiency in litigation.

II. Procedural Law and Importance of the Seat of Arbitration

In Chapter One, I identified how attaining a remedy for harm resulting from a PMSC could involve multiple systems of law and depend upon variables such as where the harm was suffered or to whom the PMSC was contracted. To overcome this challenge, the grievance mechanism would provide for a uniform applicable law to govern the arbitral proceedings and the merits of the dispute.

The procedural elements of the grievance mechanism would be determined by the law of the arbitration agreement. Under Articles II(1), II(3), and V(1)(d) of the *New York Convention*, and as a general principle of international arbitration, the parties are granted the autonomy to select one or more laws or rules that will govern the arbitration agreement. In cases where a selection has not been specified by the parties, considerable uncertainty can result as to what law or rules will apply.[603] Consequently, in order to provide some uniformity, certainty, and consistency in arbitral proceedings within the GRN, the law governing the arbitration agreement will be the law of the

[603] Gary Born, *International Commercial Arbitration*, 2d ed (Alphen aan Den Rijn: Kluwer Law International, 2009) at 472ff.

arbitral seat. Further, there will only be one seat applicable to all arbitral proceedings, irrespective of where the hearings may occur. It is important to note that the concept of the arbitral seat is a legal construct and not a geographic or physical location. The seat of arbitration is an important element in the procedural framework of the arbitration because it can determine the internal procedures of the arbitration as well as the relationship between the internal arbitral process and the national courts.[604]

Given the parties' autonomy to fashion arbitral procedure as they may choose, it will be important to have a waterfall clause within the arbitration agreement that mandates compulsory mediation before the parties may proceed to arbitration. Mediation is a useful process within the mechanism as it would allow the parties to try to resolve the dispute before investing substantial resources in the arbitral process. Moreover, given the local particularities that must be considered, mediation would give the parties a chance to find solutions that may be more suited to local conceptions of justice but that may not fall within the more restrictive confines of international human rights law. The mediator would be appointed by agreement of the disputing parties. Where they are unable to agree upon a mediator, the ICOCA would appoint one for them.

III. Choice of Applicable Substantive Law

The substantive law upon which the merits will be determined is the ICoC. The human rights provisions in the ICoC reflect the current understanding of human rights obligations as being particular to public actors and thus have been tailored to suit the private actors that they address.

[604] *Ibid* at 1530.

This alteration clarifies some doubts that could arise in terms of how the provisions could apply in light of state prerogatives to limit rights or to derogate from their obligations. For example, the provision prohibiting torture and cruel, inhuman, or degrading treatment states:

> 35. Signatory Companies will not, and will require that their Personnel not, engage in torture or other cruel, inhuman or degrading treatment or punishment. *For the avoidance of doubt, torture and other cruel, inhuman or degrading treatment or punishment, as referred to here, includes conduct by a private entity which would constitute torture or other cruel, inhuman or degrading treatment or punishment if committed by a public official.*
>
> 36. Contractual obligations, superior orders or exceptional circumstances such as an armed conflict or an imminent armed conflict, a threat to national or international security, internal political instability, or any other public emergency, can never be a justification for engaging in torture or other cruel, inhuman or degrading treatment or punishment. [emphasis added]

Using the ICoC as the substantive law applicable to the dispute would have a harmonising effect across the global PMSI. It serves as a single, uniform text that would be applicable in all potential actions against PMSCs. In light of the multiple regional human rights tribunals whose jurisprudence could serve as a source of law, if only for interpretative and consultative purposes, I envisage that the grievance mechanism's arbitral tribunals would apply a comparative methodology to determine applicable standards, as an international judge would. And as awards are redacted and published, this would generate a body of jurisprudence particular to the grievance mechanism itself. The secretariat would then use this jurisprudence to publish general comments on the state of the law as it stands in relation to practice within the industry.

IV. Recognition and Enforcement of Awards

I have already outlined some details about how awards will be recognised and enforced across different jurisdictions by insurance companies that may need to take further action against PMSCs. However, it is at this stage where a significant degree of uncertainty could potentially arise for two reasons. The first pertains to matters of public policy and the second to issues of reservations under the *New York Convention* about "commerciality" and reciprocity.

a. Public Policy Matters

The first concern at this later stage of the arbitral process relates to whether the award will fall foul of the public policy requirements of the law of the state where recognition and enforcement are sought. Article V(2) of the *New York Convention* provides:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> a. The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
> b. The recognition or enforcement of the award would be contrary to the public policy of that country.

References to public policy under the *New York Convention* are widely understood to mean "international public policy".[605] The International Law Association's final report on "public policy as a bar to enforcement" has recommended that "'[i]nternational public policy' is to be understood in the sense given to it in the field of private international law; namely, that part of the public policy of a State which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award. It is not to be understood ... as referring to a public policy which is common to many States (which is better referred to as 'transnational public policy') or to public policy which is part of public international law."[606] As of yet, there is no accepted definition of "international public policy", but the expression of the concept that is most referenced in this regard is that of Judge Joseph Smith in the case of *Parsons & Whittemore*, in which he stated that enforcement of a foreign award should be denied "only where enforcement would violate the forum state's most basic notions of morality and justice."[607]

There are two kinds of public policy that can be considered: substantive and procedural.[608] Substantive public policy pertains to the "recognition of rights and obligations by a tribunal or enforcement court in connection with the subject matter of the award."[609] Alternatively, procedural

[605] International Law Association, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, (2002) at para 10 [ILA Report] and Albert Jan van den Berg, "The New York Convention of 1958: An Overview" (2008), at 18, online: <http://www.arbitration-icca.org/media/4/69405158666624/media012125884227980new_york_convention_of_1958_overview.pdf>. See also Peter Goldsmith, "An Introduction to International Public Policy" in Devin Bray & Heather Bray, eds, *International Arbitration and Public Policy* (New York: JurisNet, 2015) at 7; Richard Kreindler, "Standards of Procedural International Public Policy" in Devin Bray & Heather Bray, eds, *International Arbitration and Public Policy* (New York: JurisNet, 2015) at 9.
[606] ILA Report, *supra* note 605 at para 10-11.
[607] *Parsons & Whittemore Overseas Co., Inc. v Société Générale de l'Industrie du Papier RAKTA and Bank of America* 508 F (2d) 969 (2nd Cir 1974) at 974.
[608] ILA Report, *supra* note 605 at para 19.
[609] Vesselina Shaleva, "The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia" (2003) 19:1 Arb Int'l 67 at 76.

public policy refers to the process by which the dispute was adjudicated, that is, whether the procedure adhered to recognised standards of due process.[610]

The uncertainty in all of this arises from the fact that each state may have different criteria when it comes to determining what subject matter is capable of settlement by arbitration as well as when defining its own public policy.[611] Most states have adopted a pro-enforcement approach to international arbitral awards and thus refuse recognition and enforcement only in limited circumstances.[612] Nevertheless, this support does not negate the fact that courts could refuse enforcement as the wording of Article V(2) gives courts a discretionary power to do so in a manner that is particular to the law of their forum. The *New York Convention*'s inability to provide some manner of uniformity at the recognition and enforcement stage would thus result in a similar outcome to the one examined in Chapter One relating to inconsistencies in the remedies available to victims due to the possible application of multiple systems of law.

b. The Matter of Reservations

The problem of systemic uncertainty under the *New York Convention* can also be found with respect to reservations.[613] Under Article I(3) of the *New York Convention*, states have the possibility of making reservations about either what their conception of a "commercial"

[610] This is in reference to Articles II(1) and V(2) of the *New York Convention*. See also ILA Report, *supra* note 605 at 253 and 256.
[611] ILA Report, *supra* note 605 at para 21. See also Karl-Heinz Bockstiegel, "Public Policy as a Limit to Arbitration and Its Enforcement" (2008) 2 DRI 123 at 124.
[612] Born, *supra* note 567 at 3411 and Blackaby et. al., *supra* note 591 at 11.37.
[613] For a list of declared reservations and notifications made under the *New York Convention*, see United Nations Treaty Collection, Chapter XXII, 'Commercial Arbitration', online: UNTS <http://www.treaties.un.org>.

transaction is or whether they will apply the convention on the basis of reciprocity. Article I(3) states:

> When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

This reciprocity provision gives states the option of restricting their enforcement of foreign arbitral awards to those that originate from states that have also become parties to the *New York Convention*. The commerciality provision located in the second sentence of Article I(3) gives states the option of choosing whether or not they will limit the application of the convention to "commercial" disputes, however they may define that. The reference to "commercial" has typically included a broad range of transactions relating to international trade, finance, investment, and related economic dealings.

The issue with reservations is that they are particular to individual states as they depend on whether states choose to make a reservation and on what basis they may choose to do so substantively. Consequently, much like the concern raised with regard to public policy above, the range of possible outcomes can create considerable uncertainty, which can affect the global operation of the grievance mechanism.

Fortunately, the broader structure and framework of the GRN would help to overcome these two obstacles of varying public policy considerations and declared reservations.[614] As has been stated before, the GRN is both constituted by legal orders and constitutes a legal order. Based on two central instruments, the ICoC and the ICOCA *Articles of Association*, the GRN would be facilitated by initiatives at multiple levels of governance—the international, the national, and the transnational. The ICoC would be supported at the international level through the drafting of an international convention that would then be transposed into national legislation. The national legislation would pertain not only to the establishment of a regulatory framework for PMSCs domestically but also to the operation of the grievance mechanism. As such, the national legislation should allow for the arbitration of alleged human rights violations by PMSCs under this mechanism. Such allowance within national jurisdictions, coupled with the wider international consensus and participation in the GRN by states, should prevent the operation of the mechanism and its resultant arbitral awards from falling foul of either the commercial requirement for reservations under Article I(3) or the public policy requirements in Article V(2). This approach is supported by Article VII(1) of the *New York Convention*,[615] as well as the *UN Basic Principles and Guidelines on the Right to a Remedy*, which provides that "States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should

[614] For a list of declared reservations and notifications made under the *New York Convention*, see United Nations Treaty Collection, Chapter XXII, 'Commercial Arbitration', online: UNTS <http://www.treaties.un.org>.
[615] "The provisions of the present Convention shall not affect the validity of the multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon."

provide under their domestic laws effective mechanisms for the enforcement of reparation judgements."[616]

It has already been argued that there is general consensus and support in favour of the notion of corporate respect for human rights and the provision of access to effective remedies where those rights have been violated.[617] Substantively, therefore, there will be little gripe about the application of international human rights law, as reflected within the ICoC, being applied to PMSCs through the grievance mechanism. The matter of greater concern likely to result in greater scrutiny with regard to public policy would be in the procedural elements of the grievance mechanism. It is important to ensure within the design and operation of the grievance mechanism, as an adjudicatory mechanism that handles private law disputes, that general principles of due process and procedural fairness are both respected and adhered to.

V. Annulment Procedures

The final jurisprudential elements to be considered in this chapter are appeals and annulment procedures, and whether these should be allowed under the grievance mechanism's system. Appeals on the merits would allow parties to contest the tribunal's decision and essentially get "a second bite at the cherry." I would caution against the provision of an appeals system.

Some of the hallmark features of international arbitration are that it is meant to be time efficient, low in cost, and final.[618] These are exactly the features that are required of the proposed

[616] *UN 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,* UNGA Res 60/147, UN Doc A/RES/60/147 (2006) at para 17.
[617] See Chapter Six; *UN Guiding Principles* and *OECD Guidelines*.
[618] Eugenia Bouras, "To Appeal or Not to Appeal in International Arbitration" (2012) 16:2 Ontario Bar Association.

grievance mechanism. The potential third-party claimants that would be making use of the mechanism are not corporate entities with substantial financial resources to expend on the dispute resolution process. By opting for the grievance mechanism's process, third-party claimants would be choosing a more customised dispute resolution system in lieu of the courts. They would relinquish their rights to pursue civil action against the PMSC for the same incident in national courts. And where a final and binding decision is reached by the arbitral tribunal, the principle of *res judicata* would preclude the third-party claimant from seeking further recourse. Having an appeals system permitting review of the merits would detract from the overall efficiency of the grievance mechanism and render it the same as going to court.

Under the *New York Convention*, the annulment of international arbitral awards can only be sought in the courts of the seat of arbitration.[619] Given the drawbacks of an appeals system, the availability of an annulment process on the basis of procedural irregularity should suffice to ensure some balance between competing notions of fairness and finality. To facilitate this balance, it will be important to ensure that the courts of the seat of arbitration are sufficiently experienced with hearing challenges to arbitral awards on the basis of procedural unfairness.

A significant cause of concern for some commentators who advocate for an appeals system is the potential for inconsistency and a lack of predictability in awards, due to the fact that there is no tribunal that can clarify questions of law and interpretation. This is indeed a legitimate concern. To address this concern in the grievance mechanism, as I have already stated, the global secretariat would take on the role of publishing redacted arbitral awards, consolidating them, and providing regular advisory updates on the interpretation and application of laws in light of practice across

[619] Article V(1) of the *New York Convention*. See also Rowan Platt, "The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?" (2013) 30:5 J Int'l Arb 531 and Bouras, *supra* note 618.

the global PMSI. It is also important to remember that some variation is to be expected, due to the necessity of integrating local conceptions of justice into the dispute resolution process.

I also question the utility of an appeals system for adjudication in this context. The main issue of concern in disputes relating to business and human rights is often not pecuniary. Rather, the concern may be about deeper issues in an acrimonious relationship between corporate actors and local communities, which the proposed grievance mechanism, with its tailored dispute resolution process, may be well-suited to resolve. As such, what is important is that the grievance mechanism's procedure must allow for ample opportunity to address the harm that has been committed and to provide a remedy for it. Procedurally, mediation is more likely to assure that outcome than an appeals system would be.

Conclusion

The challenges that I have sought to address in this chapter are all manifestations of a Westphalian international legal system that is ill-suited to remediate human rights violations inflicted by actors in the course of doing business in a global industry. International arbitration presents an opportunity to overcome some of these structural obstacles. With the *New York Convention* as it currently stands, however, there is much more that needs to be done. The *New York Convention* is the central international legal instrument that has facilitated the growth and acceptance of international arbitration as a form of dispute resolution. Yet, notwithstanding its success, it is still an international treaty. As a treaty among states, the *New York Convention* caters

to a Westphalian conception of international relations. It caters to notions of territorial sovereignty. As such, it is not perfectly suited to capture activities within global business sectors that give little deference to territorial boundaries and associated idiosyncratic national laws.

The challenge in regulating global business sectors is trying to provide uniformity in the laws and norms that are applicable to participants within them, irrespective of where these participants may be located. In terms of the proposed grievance mechanism, therefore, the challenge is to try to harmonise its procedural and substantive laws so as to provide greater certainty, predictability, and stability for actors who may choose to use it, irrespective of where they may be located. At present, there are a plurality of laws that may be applicable to the arbitration agreement under the grievance mechanism and particularly so at the stage of recognising and enforcing arbitral awards. In this chapter, therefore, I have shown how changes to the arbitration agreement and the operation of the GRN can overcome these difficulties. In the next chapter, I turn my attention away from the more jurisprudential, "hard" elements of the grievance mechanism, to address the "soft" matters of "access to justice" that could hinder its effectiveness.

Chapter Nine: Addressing "Access to Justice" Concerns

Introduction

In this final chapter, I address how particular features of the structure and operation of the grievance mechanism proposed in Chapter Seven could respond to the "access to justice" concerns that were raised in Chapter One. These are the soft elements of the mechanism, the more human aspects. The United Nations Development Program (UNDP) defines "access to justice" as "the ability of people, particularly from poor and disadvantaged groups, to seek and obtain a remedy through formal and informal justice systems, in accordance with human rights principles and standards."[620] This definition, as one out of a highly politicised plethora, is apt in the context of this thesis as it broadly captures the local realities of potential users of the grievance mechanism. PMSCs tend to operate in complex environments, that is, "areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, where the rule of law has been substantially undermined, and in which the capacity of the state authority to handle the situation is diminished, limited, or non-existent."[621]

Judicial institutions in complex environments can be characterised by two broad problems, both of which increase the necessity and appeal of the proposed grievance mechanism. On one hand, people have little trust in state judicial mechanisms. This lack of trust may be due to a host of reasons such as the mechanisms' perceived or actual corruption; their inability to resolve disputes efficiently or effectively; their location within urban centres when most people live in rural areas; or their seeming "foreignness" to the lifestyle and practices of local populations. As a

[620] UNDP, *Sharing Experience in Access to Justice: Engaging with Non-State Justice Systems & Conducting Assessments* (2010) at iii [UNDP, *Sharing Experiences*].
[621] ICoC, "Definitions", at 5.

result, local populations tend to rely upon non-state or "informal" judicial mechanisms to resolve their disputes.[622] These mechanisms, on the other hand, can be replete with problems. In some cases, their edicts may violate national or international laws; in some instances, they may exclude women; and in others, they may suffer from local elite capture or patronage.[623] Two examples that demonstrate this tension between state and non-state judicial mechanisms are those of the *Jirga* in Afghanistan and the *shalish* in Bangladesh.

The *Jirga*, as an institution, originated within and is mostly used by the Pashtun majority, who constitute half of the Afghan population.[624] However, it has a national significance that is deeply rooted in the culture and history of Afghanistan and can be traced to institutions used by other peoples within the country, such as the Tajiks, the Hazaras, and the Uzbaks.[625] The *Jirga* is a dispute resolution mechanism that has primarily served to resolve tribal conflicts in accordance with tribal customs.[626] As a dispute resolution mechanism, the *Jirga* enjoys great appeal in comparison to state judicial mechanisms. Its historic and cultural significance thus poses a

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[622] See e.g. Neamatollah Nojumi, "The Merits of Non-State Justice: An Effective Mechanism for a Stable Afghanistan" (2014) Harvard Human Rights Journal Online Symposium, online: <http://harvardhrj.com/wp-content/uploads/2014/11/HHRJ-Nojumi-11-2-14.pdf>.

[623] See e.g. cases of non-state judicial mechanisms in South East Asia as reported in UNDP, *Sharing Experience*, *supra* note 597. Similar concerns have been reported regarding mechanisms in Afghanistan and Pakistan. See Thomas Barfield, Neamat Nojumi & Alexander Thier, "The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan" (2006) United States Institute of Peace Report; and Nojumi, *supra* note 599.

[624] Ali Wardak, *Jirga - A Traditional Mechanism of Conflict Resolution in Afghanistan* (2003) at 3-4 (citing Louis Dupree, *Afghanistan* (Princeton: Princeton University Press, 1980); Robert Canfield, "Ethnic, Regional, and Sectarian Alignments in Afghanistan" in Ali Banuazizi & Myron Weiner, eds, *The State, Religion and Ethnic Politics: Afghanistan, Iran and Pakistan* (New York: Syracuse University Press, 1986); Anthony Hyman, *Afghanistan Under Soviet Domination*, 3d ed (Hampshire: Macmillan, 1992); Bernt Glatzer, "Is Afghanistan on the Brink of Ethnic and Tribal Disintegration?" in William Maley, ed, *Fundamentalism Reborn? Afghanistan and the Taliban* (New York: St. Martins, 1998); and Ali Wardak, "The Tribal and Ethnic Composition of Afghan Society" in Edward Girardet & Jonathan Walter, eds, *Afghanistan: Essential Field Guides to Humanitarian and Conflict Zones*, 2d ed (Geneva: Crosslines Ltd.. 2003).

[625] Their equivalent, the *shura*, shares many similarities with and draws heavily from the *Jirga*: "'A *shura* is a group of individuals which meets only in response to a specific need in order to decide how to meet the need. In most cases, this need is to resolve a conflict between individuals, families, groups of families, or whole tribes.'" See Ali Wardak, "Jirga - A Traditional Mechanism of Conflict Resolution in Afghanistan" at 5.

[626] Ali Wardak, *Jirga - A Traditional Mechanism of Conflict Resolution in Afghanistan* at 4.

challenge to the competing authority of state courts, the constitution they are founded upon, and the central government administration of which they form a part. For the majority of Afghans who live in rural areas, those same state courts are considered to be inaccessible, expensive, and foreign. Moreover, the government officials and judicial officers who operate within them are viewed as corrupt and misaligned with traditional conceptions of how justice should be dispensed. Some research has even suggested that 80 to 90 per cent of disputes, both criminal and civil, are resolved outside of the state court system.[627] Neamatollah Nojumi describes the context aptly:

> For most Afghans, ... their understanding of the non-state justice system is based on their local experiences, which outweigh the opinion of the Afghan government. They view the system as an affordable and functional mechanism for settling disputes and resolving potentially deep-rooted communal grievances. As a result, this perception of justice, rooted in the local understanding of accepted social norms and mixed with the basics of religious teachings and traditional rituals, has developed, evolving into a system of rights and limitations that guide them to distinguish right from wrong, fair from unfair. This system of rights and limitations acts as an unwritten constitution that confirms the code of conduct of those trusted to adjudicate disputes or mediate a conflict. Indeed, the violations of individual rights due to decades of wars, the rise of armed extremist groups and warlordism remain vivid in the memories of Afghans. *In this context, local experience of non-state justice is often perceived*

[627] See The Asia Foundation, *Afghanistan in 2006: A Survey of the Afghan People* (2006) finding that only 16 per cent of Afghans would go to a government court to resolve their disputes, online: < https://asiafoundation.org/resources/pdfs/AGsurvey06.pdf>.

as significant, enhancing communal harmony in the form of restorative justice.

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Another popular non-state justice mechanism, but this time located in South Asia, is the *shalish* in Bangladesh. The traditional *shalish* is "a community-based, largely informal Bangladeshi process through which small panels of influential local figures help resolve community members' disputes and/or impose sanctions on them. (It also can refer to the panels themselves.)"[629] The mechanism allows for disputes to be resolved by either mediation, arbitration, or a blend of the two, depending on the disputing parties' preferences.[630] Parties can submit civil, family, or even criminal disputes to the *shalish*.[631] And much like with the *Jirga*, the *shalish* is a popular form of dispute resolution because of the inaccessibility, cost, and scepticism associated with state courts, which are situated primarily in urban areas.[632]

Unfortunately, however, the *shalish* also suffers from substantive and procedural problems. The *shalish* is a patriarchal system that is presided over exclusively by men. Women, therefore, are often discriminated against. And the independence and impartiality of the *shalish* has been called into question in light of allegations of corruption and elite capture.[633] This potential for bias

[628] Neamatollah Nojumi, "The Merits of Non-State Justice: An Effective Mechanism for a Stable Afghanistan" (2014) Harvard Human Rights Journal Online Symposium, at online: http://harvardhrj.com/wp-content/uploads/2014/11/HHRJ-Nojumi-11-2-14.pdf. [Emphasis added]
[629] Stephen Golub, "Non-state Justice Systems in Bangladesh and the Philippines", Paper prepared for the United Kingdom Department for International Development (2003) at 3.
[630] *Ibid*.
[631] *Ibid*.
[632] *Ibid*.
[633] Harry Blair, "Civil Society and Pro-Poor Initiatives in Rural Bangladesh: Finding a Workable Strategy" (2005) 33:6 World Development 921.

has negative impacts on the poor, who often do not have the resources to go to state courts if and when they bring claims against individuals belonging to the upper strata of the local community.

These two examples, the *jirga* and the *shalish*, demonstrate that non-state judicial mechanisms remain a popular option for large swathes of populations in some countries. Yet, there are significant procedural and substantive elements within these mechanisms that are in need of reform. The challenge here, therefore, is to find a way to reconcile the appeal of traditional dispute resolution mechanisms with the standards of international human rights law. Indeed, the challenge is to resolve a dispute between PMSCs and victims in a manner that can ensure the building or rebuilding of harmonious relations between these corporations and the local communities within which they have to operate.

This chapter is divided into four sections, each of which deals with a feature of the grievance mechanism that responds to some of these challenges. The main concern is to use examples such as the *Jirga* and the *shalish* in order to identify which particular features of popular non-state judicial mechanisms should be considered for the design of the grievance mechanism. What can be drawn from the examples at this point is that the mechanism needs to inspire trust through legitimacy. Beyond developing trust through accessibility and regular usage over time, these examples show how important it is to try and keep decision-making as local as possible; to try and create a sense of ownership of the process. This is part of the appeal of using arbitration for the grievance mechanism – the wide latitude and autonomy granted to the disputing parties in terms of how they resolve their dispute. In the remaining four sections of this chapter, I try to detail how the grievance mechanism could enhance its appeal. In the first section, I begin by laying out the basic principles for the constitution of arbitral tribunals. Section two goes on to discuss the importance of ensuring independence and impartiality of arbitral tribunals throughout the process

so as to inspire trust and build legitimacy. Section three considers the procedural and substantive elements particular to the nature of the award that the arbitrators could issue so as to peacefully resolve conflicts in a manner appropriate to local realities and in accordance with global legal principles. Finally, in the last section, I discuss the role of the ICOCA national office. The national office's central objective is to further the effectiveness of the ICoC. As such, it acts as the local facilitator and administrator of the grievance mechanism, ensuring that the mechanism is accessible, efficient, and responsive. Moreover, as an administrative node within the GRN, the national office would help to manage the relationship between the global and the local contexts.

I. The Constitution of Arbitral Tribunals

As a starting point, each party to the dispute should be granted the right to select an arbitrator from a closed list of arbitrators. This is consistent with the principle of procedural autonomy that is accorded to parties in international arbitration. The two party-appointed arbitrators would then choose a chairperson for the tribunal. Should they not be able to agree upon a choice, then the ICOCA, through its national office, would step in and appoint an appropriate chairperson.

The national offices would play two key roles with respect to the selection of arbitrators. First, each national office would keep a curated list of potential arbitrators, who must all be vetted to ensure their appropriate moral and professional propriety in their respective communities. Second, the national office would have to ensure that arbitrators are sufficiently qualified and have

received appropriate training to fulfil their roles as adjudicators.[634] According to William Park, a former president of the London Court of International Arbitration and a renowned arbitrator, there are four principal obligations of arbitrators.[635] First, the arbitrators must strive to render an accurate award that is faithful to the law and context of the bargain between the parties. Second, arbitrators must respect and adhere to standards of procedural and arbitral jurisdiction. Third, they must avoid undue costs and delays. Finally, they must aim to produce an enforceable award. How the national office would provide training regarding these elements, where required, will be further discussed in the section on "The Role of National Offices", below.

II. The Independence and Impartiality of Arbitrators

It is a fundamental tenet of international arbitration and adjudication that the decision maker should be independent and impartial. This is particularly important in the present case, as I have advocated the use of party-appointed arbitrators to be selected from a closed list curated by the ICOCA.

I advocate a closed list of arbitrators so as to ensure, first, that arbitrators will have the requisite expertise regarding the relevant subject matter, local contexts, and particularities of the global PMSI. This reasoning is similar to that in sector-specific arbitration procedures, such as sports arbitration through the Court of Arbitration for Sport or, more recently, international investment arbitration through the Canada-Europe *Comprehensive Economic and Trade*

[634] The new Canada-Europe *Comprehensive Economic and Trade Agreement* also requires arbitrators to have specific qualifications in order to be a member of the tribunal—see Article 8.27.14. A similar provision can also be found in Article 2 of the ICJ Statute.
[635] William Park, "The Four Musketeers of Arbitral Duty: Neither One-For-All Nor All-For-One" in Yves Derains & Laurent Lévy, eds, *Is Arbitration only as Good as the Arbitrator? Status, Powers and Role of the Arbitrator* (Paris: ICC Dossiers, 2011).

Agreement. Second, having a closed list of arbitrators can partly even the playing field between the more resource-rich and sophisticated PMSC that will be up against the victim claimant. The field is levelled by virtue of the fact that claimants will be able to choose from a list of potential arbitrators who are all qualified, thus reducing the burden of having to seek out an arbitrator on their own.

I also propose the use of party-appointed arbitrators in order to help to build trust among the grievance mechanism's users and to create a sense of ownership in the process. This issue of trust is an important one, as demonstrated by the examples of traditional dispute resolution in Afghanistan and Bangladesh, if the mechanism is to have any chance of succeeding. The claimant should feel as though there is a person on the panel who understands their position, their reality, and who will be able to incorporate this understanding into the proceedings. Perhaps Lowenfeld frames this best:

> As I see it, party-appointed arbitrators in international controversies perform two principal and overlapping functions.
>
> First, I think the presence of a party-appointed arbitrator gives some confidence to counsel who appointed him or her, and through counsel to the party-disputant. At least one of the persons who will decide the case will listen carefully-even sympathetically-to the presentation, and if the arbitrator is well chosen, will study the documents with care. That fact alone is likely to spur the other arbitrators to study the documents as well, whether or not they would have done so in any case. Thus the presence of a well chosen party-appointed arbitrator goes a long way toward promising (if not assuring) a fair hearing and a considered decision.

> Second, in an international case a party-appointed arbitrator serves as a translator. I do not mean just of language, though occasionally that is required as well, as even persons highly skilled in the language of the arbitration may be confused by so-called *faux amis* (false friends)-words that look the same but have different meanings in different languages. I mean rather the translation of legal culture, and not infrequently of the law itself, when matters that are self-evident to lawyers from one country are puzzling to lawyers from another. [636]

Collectively, therefore, the combination of a closed list and party-appointed arbitrators has the potential to build the trust and legitimacy required to make the grievance mechanism effective for local communities in complex environments. The challenge, however, is in ensuring that the arbitrators will be independent and impartial throughout the arbitral process.

The concepts of independence and impartiality can be difficult to delineate, but delineated they can be. Gélinas states that "independence refers to the external characteristics of an adjudicator or tribunal that work to ensure the ultimate goal of impartiality, which in turn refers to a state of mind."[637] As such, the aim here is to ensure that there is an appearance of arbitrators operating at arm's length from the parties and presiding over proceedings in a fair and just manner that does not prejudice any of the disputing parties. The two areas where this is likely to cause some concern are the procedures for selecting arbitrators and financing.

The procedures for selecting arbitrators from closed lists have frequently come under scrutiny. The criticism levied against the practice is that one of the parties to the dispute, typically

[636] Andreas Lowenfeld, "The Party-Appointed Arbitrator in International Controversies: Some Reflections" (1995) 30 Tex Int'l LJ 59 at 65.
[637] Fabien Gélinas, "Independence of international Arbitrators and Judges" (2011) 24:1 NY Int'l L Rev 1 at 5.

the individual, has very little input on the composition of the closed list by an institution and, thus, the arbitrators that will preside over the dispute resolution process. This lack of input calls into question the neutrality of the arbitrators. It has been a problem in the case of sports arbitration.[638]

Athletes need to join a federation in order to be able to participate in a particular sport. Included in their membership to the federation, however, is a mandatory arbitration clause. The arbitration clause requires all athletes to resolve their disputes within the Court of Arbitration for Sport (CAS) system. The problem with this arrangement, however, and notwithstanding issues of whether an athlete has freely consented to arbitration, is that sport governing bodies have had a disproportionately greater role in the selection of arbitrators than athletes have had. The ongoing litigation concerning Claudia Pechstein, the internationally successful German speed skater, has brought this issue back to the fore.[639] Pechstein was banned from competition by the International Skating Union when it was discovered that she had high levels of reticulocytes in her blood, indicative of blood doping, after competing in the world championship in 2009. The ban derecognised her wins and prohibited her from competing (and training) for the duration of the ban, which would include the Olympic Winter Games of 2010 in Vancouver. She appealed the decision to the German national governing body for speed skating, the CAS, the Swiss Federal Court, and then the Munich Regional Court. At each of these instances, her appeals were denied. It was only at the Munich Higher Regional Court that the decision went in her favour. In setting aside the previous decisions, the Munich Higher Regional Court found that there had been an abuse of market power by sport governing bodies because athletes have lesser powers over the selection and appointment of arbitrators, as manifested by two factors. The court found, first, that the

[638] See e.g. Stephen Kaufmann, "Issues in International Sports Arbitration" (1995) 13 BU Int'l LJ 527.
[639] OLG München, 15 January 2015, U 1110/14 Kart.

procedure for the selection of CAS arbitrators suffers from a "structural imbalance" that gives greater preponderance to the governing bodies and, second, that the governing bodies are able to appoint the chairperson of an arbitral panel through the president of the CAS Appeals Division (who is nominated by the International Council of Arbitration for Sport (ICAS)) if the parties to the arbitration are unable to agree on a chairperson. Collectively, this can have the effect of eroding the opposing party's trust in the process as well as the objective impartiality of the tribunal.

To appreciate the Munich court's reasoning, one needs to consider how arbitrators are nominated to CAS's closed list of arbitrators. The CAS is managed by ICAS. The purpose of ICAS is to facilitate the resolution of sports-related disputes through arbitration or mediation, and to safeguard the independence of CAS and the rights of the parties. It is also responsible for the administration and financing of CAS.[640] In addition, ICAS appoints the arbitrators who constitute the list of CAS arbitrators, and the mediators who constitute the list of CAS mediators, from which all parties making use of the CAS system must select their appointees.[641] ICAS is composed of 20 members. Four of these members are taken from the international sports federations, four from the national Olympic committees, and four from the International Olympic Committee. These twelve members name four further members with a view to the safeguarding of the interests of the athletes. Finally, these sixteen members name four members that are independent of the bodies designating the other members of ICAS.[642] ICAS members make their decisions by way of majority votes cast.[643] At the time of the *Pechstein* dispute, the 2004 version of the *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes* (*Statutes*) were in place.[644] These provided that ICAS

[640] S2 of the *Statutes of the Bodies Working for the Settlement of Sports-Related Disputes*. [hereafter "he Statutes"]
[641] See R33 para. 2 of the Procedural Rules and S6 no. 3 of the Statutes.
[642] See S4 of the Statutes.
[643] See S8 para. 1, 2nd sentence of the Statutes.
[644] These have been replaced. See the newer version of the *Statutes*, below.

members, in establishing the list of CAS arbitrators, shall respect, in principle, the following distribution:

- 1/5th of the arbitrators selected from among the persons proposed by the International Olympic Committee, chosen from within its membership or from outside;
- 1/5th of the arbitrators selected from among the persons proposed by the International Sports Federations, chosen from within their membership or outside;
- 1/5th of the arbitrators selected from among the persons proposed by the National Olympic Committees, chosen from within their membership or outside;
- 1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes; and
- 1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.

Upon reviewing this selection process, the Munich Higher Regional Court in the *Pechstein* case determined that the sport governing bodies maintained a structural predominance in disputes with the athletes and therefore placed the neutrality of the CAS fundamentally into question. The court elaborated as follows:

> With twelve of the named members, the governing bodies appoint the majority of the members of ICAS. As a result of the fact that decisions are made by ICAS by way of majority votes cast, there is a predominance that enables a decisive

influence on the composition of the list of arbitrators. Furthermore, when naming the further eight members, their independence from the governing bodies is not guaranteed through an appropriate procedure due to the majority involvement of the twelve members named by the governing bodies. Even the Statutes themselves assume a dependence of the majority of both the members of ICAS and the persons included on the list, because it only foresees independence from the governing bodies responsible for naming the others for the last four ICAS members to be named and the last fifth of the persons included on the list of arbitrators.

This predominance when it comes to the exercising of influence conceals the risk that the majority or perhaps the entirety of the persons included on the list of arbitrators are more closely connected to the governing bodies than to the athletes; even with regard to those arbitrators that are not proposed by the governing bodies but rather with a view to the safeguarding of the interests of the athletes or selected as independents, it is merely based upon the assessment of the majority of ICAS members, who are closely connected with the governing bodies, as to whether these criteria are fulfilled. An equal influence of the parties involved in a dispute on the composition of the arbitration court, which assures its non-partisanship …, is therefore not present. This structural defect impacts upon the neutrality of the arbitration court, irrespective of whether the persons actually included on the list are connected with a body or association in such a way that could open up the possibility of opposing them; even if the personal integrity of the persons included on the list is assured, there is still the risk that

> the point of view of these persons is closer to that of the governing bodies than to that of the athletes.

The *Statutes* have since been updated and provide for a new procedure for nomination of arbitrators.[645] However, I would opine that the new system does not fully address the issues raised.

Given the arguments that I raised in favour of a closed list, it will be vital for the ICOCA to learn from examples such as the sports arbitration context. The fact that the ICOCA is a multistakeholder association that facilitates participation of all classes of actors in the global PMSI—states, corporations, and civil society organisations (CSO)—is a good start. Also, decision making within the ICOCA Board of Directors and the General Assembly requires at least a minimum of participation of members from each class of actor, or pillar, for quora to be met and votes to be carried. When it comes to the selection of arbitrators and mediators for the closed list, equal weighting across the pillars, as well the establishment of objective criteria applicable to all nominees, will be critical. As far as representation of potential claimants goes, I am assured that the CSOs taking part in the process would have the claimants' best interests in mind, particularly in light of the membership criteria for CSOs themselves. Article 3.3.3 of the ICOCA *Articles of Association* provides:

> Civil society Members shall be independent, non-profit organizations with a demonstrated institutional record at the local, national, or international level of the promotion and protection of human rights, international humanitarian law or

[645] S14 of the Statutes: "In establishing the list of CAS arbitrators, ICAS shall call upon personalities with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the Ifs and the NOCs. ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes. In establishing the list of CAS mediators, the ICAS shall appoint personalities with experience in mediation and a good knowledge of sport in general."

> the rule of law. Independence shall be assessed by reference to relationships with other stakeholder pillars, such as via specific, relevant or substantial funding, or through active working relationships. Civil society Members commit to promote the Purpose of the Association.

The other aspect to be aware of with regard to independence and impartiality is that of financing. Arbitrators have often come under fire for being biased on the basis that arbitration operates on a commercial basis, with the need for them to win future contracts. Consequently, it will be important to ensure that potential arbitrators are not beholden to any one pillar in particular. The ICOCA's funding currently comes from states and PMSCs.[646] I think it is right that these two pillars provide the bulk of the funding. States have an obligation to facilitate access to an effective remedy, particularly where they themselves are unable to provide one, and PMSCs should take the necessary precautions to ensure safety and remediate harm in the course of their business. The ICOCA as a separate administrative entity, however, should ensure arm's-length dealing between its financiers and the arbitrators and mediators.

III. The Award

In achieving a resolution to the dispute, it is important that an arbitral award perform two primary functions. First, the award should be internationally enforceable. This in itself involves two elements. First, the tribunal's decision has to be considered an "award". Redfern and Hunter have commented that there is little guidance in international arbitration instruments, such as the

[646] Article 14 ICOCA *Articles of Association*. See also ICOCA's Approved 2015 and 2016 budgets, online: ICOCA <http://www.icoca.ch/en/finances>.

New York Convention or the UNCITRAL *Model Law on International Commercial Arbitration*, on the definition of an award.[647] A comparative analysis of case law emanating from national jurisdictions considering when to recognise and enforce an arbitral tribunal's decision, however, has found that a decision constitutes an award, at least under the *New York Convention*, if the decision settles a substantive issue between the parties with finality.[648] With regard to the second element, the arbitral tribunal should aim to ensure that the award is "internationally enforceable". In this regard, the tribunal must ensure that it has jurisdiction to decide on the matters before it and that it complies with any procedural rules governing the arbitration.[649] These steps should minimise the chances of the award being denied recognition and enforcement by a national court under Article V of the *New York Convention*.

The second function that the award must serve is to meet the parties' conceptions of justice. In this respect, I am referring to the challenge of reconciling local conceptions of justice, with which the claimant may be more familiar, with global conceptions of justice, given the PMSC's membership in the GRN and the wider global PMSI. In order to reconcile these two opposing positions without causing too much uncertainty across the GRN, the preferred approach would be to utilise a waterfall provision within the arbitration agreement that provides for preliminary mediation before advancing to arbitral proceedings. This is a procedural step rather than a substantive element of the award.

At the first stage of attempting to resolve the dispute through mediation, the parties would have greater flexibility to discuss concerns and to reach a mutual understanding that can take into account local realities of a social, economic, political, cultural, and religious variety. The

[647] Blackaby et al., *supra* note 591 at 9.05-9.08.
[648] Judith Gill, "The Definition of an Award under the New York Convention" (2008) 2 Disp Res Int'l 114.
[649] Blackaby et al., *supra* note 591 at 9.15.

mediation stage, if used effectively, could provide a resolution to the dispute in a manner that would repair broken relations between the parties and the wider communities. Using the mediation stage in this way could also prevent any animosity that may arise from the formality and more contentious nature of the arbitral process. Principle 31(h) of the *UN Guiding Principles on Business and Human Rights* (*UN Guiding Principles*) supports this position, providing that operational-level mechanisms should be based on engagement and dialogue.[650]

Should the mediation fail to resolve the dispute, the parties could then proceed to arbitration where more formal substantive and procedural law would govern the proceedings. As discussed in the previous chapter, on the jurisprudential elements of the grievance mechanism, there would be a uniform law applicable to the arbitral process so as to ensure some degree of consistency, certainty, and stability across the GRN. The consequence of this uniformity would be to minimise the consideration of local conceptions of justice in favour of the global. But at this stage, what is important to consider is the substance of the award as opposed to how it is delivered. The ICoC and ICOCA *Articles of Association* speak more to the latter than to the former. As such, it is necessary to draw inspiration from international instruments existing within a comparable context and benefitting generally from wide support.

In this regard, the *OECD Guidelines for Multinational Enterprises* and its system of National Contact Points (NCPs) can be instructive. A recent report by the OECD Watch assessing the effectiveness of NCPs in delivering remedies for corporate misconduct has stated that a "full remedy" has three components that must all be present—cessation of the violation, reparation of

[650] Principle 31(h) of the *UN Guiding Principles* provides: "Operational-level mechanisms should also be: (h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances."

the harm that has occurred, and adoption of measures to prevent future violations.[651] These three components are also referred to in the *UN Basic Principles and Guidelines on the Right to a Remedy*, which provide that "victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to ... [22] which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."[652]

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[651] OECD Watch, *Remedy Remains Bare: An Analysis of 15 Years of NCP Cases and their Contribution to Improve Access to Remedy for Victims of Corporate Misconduct* (2015) at 17.

[652] Para 18, UNGA Res. 60/147, UN Doc A/RES/60/147 (2006). I have purposefully not included Principle 23 as it is of more relevance to state actors. Paragraphs 19 to 22 provide the following (emphasis in original):

19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:
    a. Physical or mental harm;
    b. Lost opportunities, including employment, education and social benefits;
    c. Material damages and loss of earnings, including loss of earning potential;
    d. Moral damage;
    e. Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

22. *Satisfaction* should include, where applicable, any or all of the following:
    a. Effective measures aimed at the cessation of continuing violations;
    b. Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;
    c. The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;
    d. An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;
    e. Public apology, including acknowledgement of the facts and acceptance of responsibility;
    f. Judicial and administrative sanctions against persons liable for the violations;
    g. Commemorations and tributes to the victims;

It is important to note, based on these two standards, the *OECD Guidelines* and the *UN Basic Principles*, that the remedying of human rights violations is not solely a pecuniary matter, notwithstanding the intended involvement of insurance providers within the GRN. Indeed, I think that the resolution of disputes pertaining to human rights violations may require a broader conception of remedy than what is typically on offer in international (commercial) arbitration, given that the latter has been the model upon which most international arbitration systems draw inspiration from.[653] The arbitrators will be in a position where they must not just resolve the dispute between the parties, but also be cognisant of the potential for their award to build or rebuild relations between the corporation and the broader local community within which it will operate. As such, although some form of financial compensation will be required to right wrongs that may have been committed, I envisage the tribunal being able to take a bolder stance. For example, the tribunal may be able to order a PMSC to institute changes to its corporate policies and practices where they are inconsistent with particular provisions of the ICoC, so as to minimise the chance of the actions that led to harm in one case reoccurring in the future. The ability to achieve this type of remedy will depend on being creative with the resources within the GRN for oversight and enforcement. For example, if the tribunal were to order the PMSC to change particular policies, then as a matter of record, this information would be transmitted to the ICOCA and included as a condition of having the PMSC's licence and certification renewed. Further, as the GRN develops, there should be better collaboration with state authorities in conducting and facilitating the oversight and enforcement of awards. This outcome could be considered as aspirational, but I think

h. Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

[653] See e.g. Fabien Gélinas, "Investment Tribunals and the Commercial Arbitration Model" in Mark Gehring & Marie-Claire Cordonier Segger, eds, *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005), where Gélinas discusses some of the issues raised by importing the commercial arbitration model into the realm of treaty-based investment disputes.

it is worth working toward as we attempt to build and strengthen alternative regulatory frameworks for global business sectors.

IV. The Role of National Offices

The national offices of the ICOCA would play a pivotal role in facilitating the grievance mechanism and addressing local concerns of access to justice. Their central objective would be to further the effectiveness of the ICoC. Each state that is a member of the GRN would be required to have a national office. Structurally, therefore, the office would serve as a link between the global secretariat and national jurisdictions, an administrative node in the GRN. The national office would be the medium through which some balance could be achieved in the mediation between local and global conceptions of justice and its administration. It would attempt to achieve this balance by performing several functions.

First, the national office would serve as the local administrative body of the ICOCA. Broadly speaking, it would maintain a link with the global secretariat by reporting on disputes and by implementing general comments from the secretariat about updates to recommended best practices as well as authoritative interpretations of ICoC provisions. More specifically, the national office would oversee the grievance mechanism process locally. At a preliminary stage, the national office would provide information to potential claimants on access to the grievance mechanism, the stages that the process involves, and the resources that are available to them. It would aim to ensure that potential claimants can file complaints with minimal obstacles and to maintain records of any complaints made. Should the complaint proceed to the phase of dispute resolution, the national

office would oversee and notify the parties of the processes and timelines so as to ensure transparency.

Second, the national office would assist the arbitrators in their adjudicative role as necessary, thus performing the role of tribunal secretary. As such, the national office representatives would work with the arbitrators during the arbitral process to help ensure that they meet the four principal obligations of arbitrators as identified by William Park, that is, that the tribunal render an accurate award that is faithful to the law and context of the bargain between the parties; that the arbitrators respect and adhere to standards of procedural fairness and arbitral jurisdiction; that they avoid undue costs and delays; and, finally, that they aim to produce an enforceable award.[654]

Third, the national office could work with local NGOs to provide training for arbitrators so that they are aware of and responsive to the needs of claimants whose ability to exercise their rights may be impeded due to social, economic, cultural, political, or religious reasons within the local context. Examples of NGOs working with local communities' traditional dispute resolution mechanisms in Bangladesh and Papua New Guinea have demonstrated how this can have positive outcomes.

In Bangladesh, the Madaripur Legal Aid Association has recently played an increasing role in the initiation and facilitation of *shalish*. The association has worked with communities, and the elders who lead them, to make positive modifications to their gender- and class-biased aspects.[655] This collaboration has translated into having more women participate in the process as either

[654] William Park, "The Four Musketeers of Arbitral Duty: Neither One-For-All Nor All-For-One" in Yves Derains & Laurent Lévy, eds, *Is Arbitration only as Good as the Arbitrator? Status, Powers and Role of the Arbitrator* (Paris: ICC Dossiers, 2011).
[655] Stephen Golub, "Non-state Justice Systems in Bangladesh and the Philippines", Paper prepared for the United Kingdom Department for International Development (2003) at 10.

shalish panel members or disputants speaking during the process, and providing specific courses on relevant anti-discrimination laws and inclusive mediation practices.[656] Similarly, the Peace Foundation Melanesia in post-conflict Bougainville, Papua New Guinea, has worked to increase participatory dispute resolution skills among customary leaders, women, and youth.[657] The Peace Foundation placed more emphasis on the development of mediation skills, particularly among women, which had a beneficial impact on victims of gender-based violence. In some of those instances, not only were female mediators better able to find "alternate pathways" to justice without delegitimising the values of the non-state justice system, but they were also able to link victims with external NGO assistance as part of the agreed-upon remedies.[658]

Fourth, the national office could assist claimants in finding appropriate representation for arbitral proceedings. Naturally, claimants would be able to retain their own counsel. But should they not be in a position to do so, the national office should work collaboratively with civil society organisations, the state's justice department, and perhaps also the local bar association to ensure that claimants have access to legal representation.

Finally, the national office should play a key role in outreach, with assistance from both the state and civil society organisations. In order to ensure that the grievance mechanism is accessible to claimants, the national office should have multiple uptake locations and channels.[659] This could best be achieved in collaboration with relevant state officials and local NGOs, using a

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[656] See Sumaya Khair, *Alternative Approaches to Justice: A Review of ADR Initiatives Under the Democracy Partnership*, Report prepared for the Asia Foundation, Dhaka (2001) and Sumaiya Khair et. al., *Access to Justice: Best Practices under the Democracy Partnership* (Dhaka: The Asia Foundation, 2002).
[657] UNDP, *Sharing Experience in Access to Justice: Engaging with Non-State Justice Systems & Conducting Assessments* (2010) at 12.
[658] UNDP, *Sharing Experience in Access to Justice: Engaging with Non-State Justice Systems & Conducting Assessments* (2010) at 12.
[659] World Bank: How-to Notes: *Designing Effective Grievance Redress Mechanisms for Bank-Financed Projects: Part 1: The Theory of Grievance Redress*.

wide range of technological and communication mediums. In developing a plan for outreach, it is important to remember that the state is under an international legal obligation to provide access to effective remedies and thus to assist projects such as these where it can.

Conclusion

The success of a grievance mechanism is dependent upon getting both the hard and the soft elements right. The hard elements are those legal features that ensure the mechanism's actual functioning and its delivery of the product output for which it is designed. The soft elements, by contrast, are the more human aspects of the mechanism. They aim to address questions such as whether people feel comfortable using the mechanism. Do they trust it? Will it respond to their needs, realities, and conceptions of justice? Chapter Eight aimed to address the hard elements while the present chapter aimed to address the soft ones. This chapter attempted to show how the grievance mechanism is sufficiently flexible and capable of blending local and global conceptions of justice in a way that is amenable to all parties. The chapter, however, is only a blueprint that considers these elements in the abstract. Much more detailed work in conjunction with social scientific researchers in the fields of anthropology and sociology, for example, will be required in order to paint a more detailed picture of how this rubric could work.

Conclusion

At its core, this thesis has been about trying to imagine how we can better regulate transnational enterprises (TNEs) and remediate the harm that they may cause in the course of doing business. More specifically, it examined how to construct an appropriate grievance mechanism to grant victims of human rights violations redress for harm committed by PMSCs, as an example of a TNE. At present, the potential avenues available to victims for legal recourse are too complex and expensive, particularly for those living in complex environments. Certainly, PMSCs are not going anywhere any time soon. They are a growing staple of the conflict and security landscape globally. And as the nature of transnational security threats becomes more complex, there will necessarily have to be greater collaboration between private- and public-sector actors in order to face those challenges. Consequently, it is imperative for us to construct appropriate regulatory frameworks and remedial mechanisms for this growing global business sector.

Of the potential dispute resolution mechanisms that the PMSI could employ for the design of its mandated grievance mechanism, I argued that international arbitration offers the most procedural flexibility and opportunity to garner legitimacy more broadly. It offers PMSCs the opportunity to compensate victims in a manner that promotes accountability and transparency. As such, I attempted to provide the procedural outline and theoretical foundations for an international arbitration mechanism within the global PMSI. But more needs to be done in order to flesh out this idea and to ensure that it rises to its potential as an efficient and effective way of resolving grievances concerning human rights violations. Let me highlight a few of the steps that remain.

First, more work will need to be done toward the development of a case management system. At this time, given the opacity of the industry in terms of undisclosed contracts and

settlements, it is difficult to ascertain the current and projected volume of claims as the industry grows. Similarly, little is known about the value of the claims that are being made as well as the cost of resolving them. Should we be able to get a better sense of these factors through statistics and empirical studies, it will be easier to determine whether the industry's trade association, the ICOCA, should partner with other institutions or invest in building its own case management system. Arbitral institutions such as the International Chamber of Commerce's (ICC's) International Court of Arbitration could be viable potential partners in this endeavour. The International Federation of Consulting Engineers (FIDIC), for example, has entered into this kind of partnership with the ICC for the resolution of disputes pertaining to international construction contracts. Under this system, FIDIC employs the ICC's rules of arbitration and subjects disputes pertaining to FIDIC contracts to the ICC process. Alternatively, the ICOCA may decide to invest in developing its own system in the way that the International Olympic Movement[660] constructed its own dispute resolution system by establishing the Court of Arbitration for Sport and the International Court of Arbitration for Sport.[661] But in order to determine how to proceed, we will need to have more information. Starting the international arbitration grievance mechanism could pave the way for the system to grow and then allow us to make this determination in the future as the system develops.

Second, there will need to be further work done to identify the potential sources of financing for the mechanism. This issue pertains to not just the administrative aspects of the mechanism but also matters including legal representation and arbitrator fees. From a policy standpoint, I have argued in this thesis that states and PMSCs should be providing the lion's share

[660] See Article 1 of the *Olympic Charter* for the "Composition and General Organisation of the Olympic Movement".
[661] For a good, brief history of the creation of the Court of Arbitration for Sport, see Darren Kane, "Twenty Years On: An Evaluation of the Court of Arbitration for Sport" (2003) 4 Melbourne J Int'l L 611.

of funding. States have international legal obligations to respect, protect, and ensure human rights. In this respect, they will need to better regulate PMSCs and provide access to effective remedies in order to meet those obligations. Investing in the development of the GRN is an effective way for states to do this, as is supporting the industry's grievance mechanism. For their part, PMSCs stand to make substantial amounts of money from the provision of security in what is a growing global business sector. It only makes sense that PMSCs should invest in the development of appropriate remedial mechanisms, such as the one proposed in this thesis, so as to demonstrate their respect for human rights and the basic, general principle in any legal system around the world of compensating someone for harm that you may cause them. This is not only a moral and legal imperative, but also good business practice.

Third, given the sensitivity of human rights violations as opposed to commercial claims, there will need to be further work done regarding how to ensure a fairer composition of arbitral tribunals, in order to respond to concerns raised by critical theorists who assess law from the perspective of excluded groups while maintaining the tribunal's independence and impartiality. Feminist legal theorists or critical race theorists, for example, would fall under this heading. In order to promote the use of non-state-based dispute resolution mechanisms as an alternative to national courts for civil justice, ensuring that the decision makers reflect the composition of the disputing parties' societies will be important for legitimacy purposes. This is a problem that similarly afflicts national judiciaries. As Susan Smith has commented, "[t]he judiciary is a highly visible institution, and the racial and gender composition of the bench affect perceptions of that

institution."[662] This shared concern for representativeness of judicial decision makers will need to be addressed by a wide range of stakeholders concerned with civil justice reform.[663]

Relatedly, the grievance mechanism also presents an opportunity for interdisciplinary collaboration in order to study the factors that affect and can positively enhance access to remedies in complex environments. Anthropologists, sociologists, and lawyers, for example, could do more to understand what affects the uptake of new dispute resolution mechanisms in communities so as to cater to them in the procedural design of the mechanism.

The thesis also raises more normative questions beyond the mechanism itself. For example, how should we be assessing the accountability of private actors that pursue public activities or, more specifically, "inherently governmental functions"? States may have their reasons for increasingly resorting to outsourcing many of their functions, and this should not allow them to abdicate their legal responsibilities, but what about the responsibilities of the private actors that take on these roles? Should private law continue to govern what are inherently activities subject to public law? There is constant discussion in the literature that questions the underlying foundations of the public-private divide in law. Should we be using public law tools such as judicial review to assess the actions of private actors? [664] As private actors take on more roles that affect individuals, and the social contract shifts from the state to private actors, or at least evolves, there are grounds to argue that we should be assessing private companies in terms of their democratic legitimacy, accountability, and transparency to a wider demos than just their shareholders.

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[662] Susan Moloney Smith, Comment, "Diversifying the Judiciary: The Influence of Gender and Race on Judging" (1994) 28 U Rich L Rev 179 at 198.
[663] See also Fabien Gélinas et. al, *Foundations of Civil Justice: Toward a Value-Based Framework for Reform* (New York: Springer, 2015) at 54 to 56.
[664] See e.g. Richard Mulgan, "Comparing Accountability in the Public and Private Sectors" (2000) 59:1 AJPA 87 and Dawn Oliver, *Common Values and the Public-Private Divide* (London: Butterworths, 1999).

Broader yet, as private and public actors interact to create regulatory frameworks and produce new law, international legal scholars should rethink the notions of subjecthood in public international law, the processes of lawmaking, and the labels that we attach to different legal orders in a global normative space. Non-state actors are playing an increasing role on the international stage and in turn challenging the state-centric practice of international law. As notions of sovereignty, territory, and jurisdiction lose relevance and fail to account for these changing practices and realities, perhaps it may be time to rethink our conceptualisations of actors and legal orders.

In conclusion, this thesis is a modest proposal responding to a very topical discussion in the domain of business and human rights. Although it is focused on the global PMSI, it was drafted using a comparative approach, with other global business sectors in mind. As such, I hope that it can serve as a step forward in the discussions on governance and access to remedies in global business sectors more broadly.

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