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**Citation for published version:**

Fabre, C 2010, 'In Defence of Mercenarism', *British journal of political science*, vol. 40, pp. 539-559.  
<https://doi.org/10.1017/S0007123409990196>

**Digital Object Identifier (DOI):**

[10.1017/S0007123409990196](https://doi.org/10.1017/S0007123409990196)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Publisher's PDF, also known as Version of record

**Published In:**

British journal of political science

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British Journal of Political Science / Volume 40 / Issue 03 / July 2010, pp 539 - 559  
DOI: 10.1017/S0007123409990196, Published online: 23 June 2010

**Link to this article:** [http://journals.cambridge.org/abstract\\_S0007123409990196](http://journals.cambridge.org/abstract_S0007123409990196)

### How to cite this article:

Cécile Fabre (2010). In Defence of Mercenarism. *British Journal of Political Science*, 40, pp 539-559 doi:10.1017/S0007123409990196

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## ***In Defence of Mercenarism***

CÉCILE FABRE\*

The recent wars in Iraq and Afghanistan have been characterized by the deployment of large private military forces, under contract with the US administration. The use of so-called private military corporations (PMCs) and, more generally, of mercenaries, has long attracted criticisms. This article argues that under certain conditions (drawn from the Just War tradition), there is nothing inherently objectionable about mercenarism. It begins by exposing a weakness in the most obvious justification for mercenarism, to wit, the justification from freedom of occupational choice. It then deploys a less obvious, but stronger, argument – one that appeals to the importance of enabling just defensive killings. Finally, it rebuts five moral objections to mercenarism.

The growing role of so-called private military corporations such as Blackwater in recent military conflicts has elicited concern from many commentators. Those companies offer a wide range of services to states willing to pay for them, such as specialized training courses for members of standing armies, the provision of security details in war zones, logistical support by way of weapons and transport systems, and the deployment of combat troops. It is commonly estimated that, by the end of 2006, there were about 20,000 euphemistically-called ‘private contractors’ in Iraq – about three times as many as regular British soldiers. Although states have relied on private firms and freelance mercenaries for military purposes for centuries, private military corporations, to a greater extent than ever, are taking over tasks and functions that used to be performed by the army itself.<sup>1</sup>

The prevalent normative view on the marketization of war is that it is morally wrong – for reasons to be found, in part, in the medieval condemnation of mercenarism. In this article, however, I argue that under certain conditions, mercenarism is morally legitimate.

\* University of Edinburgh (email: c.fabre@ed.ac.uk). An earlier version of this article was presented in 2008 in Stirling at the Philosophy Department Seminar, at the UK IVR Conference in Edinburgh and at the Annual Conference for the Society for Applied Philosophy. I am grateful to participants at those events for very useful discussions, and to James Pattison, Guy Sela, Albert Weale and two anonymous *Journal* referees for written comments.

<sup>1</sup> Blackwater changed its name to Xe in February 2009, but is still commonly referred to as Blackwater – a practice I shall adopt here. For accounts of the privatization of war, and new forms of warfare in general, see, e.g., I. Duyvesteyn and J. Angstrom, eds, *Rethinking the Nature of War* (London: Frank Cass, 2005); M. Kaldor, *New and Old Wars*, 2nd edn (Cambridge: Polity, 2006); H. Munkler, *The New Wars* (Oxford: Polity, 2005). For typologies of PMCs and reviews of their activities in recent conflicts, see, e.g., J. Scahill, *Blackwater: The Rise of the World’s Most Powerful Mercenary Army* (London: Profile Books, 2007); D. D. Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge: Cambridge University Press, 2005); C. Kinsey, *Corporate Soldiers and International Security: The Rise of Private Military Companies* (London: Routledge, 2006); P. W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca, N.Y.: Cornell University Press, 2003), esp. chap. 1. The estimate of the number of private contractors relative to the number of British soldiers in Iraq is quoted from Scahill, *Blackwater*, p. 161; Avant, *The Market for Force*, p. 2, cites the same figure for 2004. Note that in this article, I deal with private military corporations, rather than private security companies, to the extent that the former, unlike the latter, are deployed in war theatres.

In the first section, I expose a weakness in the most obvious justification for mercenarism: namely, the justification from freedom of occupational choice. I then deploy a less obvious, but stronger, argument – one that appeals to the importance of enabling just defensive killings. In the next section, I rebut five moral objections to mercenarism.<sup>2</sup>

Four clarificatory remarks are necessary before I begin. First, I shall restrict my argument to the use of private armies by states rather than multinational corporations, and as a means for the former to defend their interests abroad, rather than as a tool for domestic policies.

Secondly, the difficulties attendant on defining mercenarism are well known. Typically, a mercenary is defined as a soldier who fights in a foreign war essentially out of financial motives.<sup>3</sup> Those two features – nationality and motivations – are standardly thought to distinguish a mercenary from a uniformed soldier of a state's armed forces. Yet, the nationality criterion is problematic, since it implies, somewhat counter-intuitively, that an American employee of Blackwater who fights in Iraq for the US government is not a mercenary. By mercenary, then, I shall mean an individual who offers his military expertise to a belligerent against payment, outside the state's military recruitment and training procedures, either directly to a party in a conflict, or through an employment contract with a private military corporation. Unless otherwise stated, I shall use the word 'mercenarism' to refer to both kinds of private soldiers. At this juncture, for reasons to be outlined below, I leave the motivations question open.

Thirdly, in justifying the (limited) marketization of war, I defend the view that all three parties (individual private soldiers, private military corporations and states) sometimes have the moral right, in the threefold sense of a liberty, a claim or a power, to contract with one another for the purpose of waging a war. Rights, on my account, protect their holders' interests, so that for X to have a right to do  $\phi$  means that X's interest in doing  $\phi$  is important enough to be protected in certain ways. More specifically, to say that X is at liberty to do  $\phi$  is to say that he is morally permitted to do  $\phi$ . To say that he has a claim to do  $\phi$  is to say that third parties are under some duty to him in respect of his doing  $\phi$ . To say that he has the power to do  $\phi$  is to say that, by doing  $\phi$ , he changes his moral relationship to others by transferring to them some of his claims, liberties, powers and immunities, and/or acquiring new ones. Thus, I shall argue that private soldiers, PMCs and states sometimes are morally permitted to contract with one another for the purpose of fighting a war; that their liberty is sometimes protected by a claim against third parties that they not interfere with such contracts by, for example, making them illegal; and that

<sup>2</sup> Whether or not using private military corporations and/or private soldiers is the best way (functionally) to conduct a war is a separate question that I shall not address here. Functional concerns include, for example, the practice by private actors of defaulting on their contractual duties when the military situation of their employers is deteriorating, or the fact that contractual relationships (which set out fixed rights and duties) are not suited to the conduct of war (which requires flexible and quick decisions under changeable circumstances.) See, e.g., Avant, *The Market for Force*, and M. Schmitt, 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees', *Chicago Journal of International Law*, 5 (2005), 511–46.

<sup>3</sup> See art. 1 of the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and art. 47 of the 1977 Geneva Protocol I Additional to the Geneva Conventions of 1949. For discussions of those definitional difficulties, see, e.g., S. Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford: Oxford University Press, 2007), chap. 2; C. A. J. Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008), chap. 10; H. C. Burmester, 'The Recruitment and Use of Mercenaries in Armed Conflicts', *American Journal of International Law*, 12 (1978), 37–56.

it is sometimes protected by a power so to transact such that the new distribution of claims, privileges, liabilities and powers which the contract establishes is recognized by third parties as binding. For terminological convenience, and unless otherwise specified, when I say that they have the right to enter into a mercenary contract, I shall say that they have a liberty, a claim and a power to do so.<sup>4</sup>

Finally, nothing I say in this article is meant to support the use to which nations such as the United States put private soldiers and private military corporations (PMCs) in conflicts such as the Iraq War. Nor is my argument for mercenarism in any way meant to support the well-documented exactions that have been perpetrated by private soldiers in various conflicts.<sup>5</sup> To put it emphatically, my claim is that, under strict conditions (which current practices do *not* meet), the marketization of war is not morally wrong. Those conditions, in a nutshell, are drawn from the Just War tradition. I shall assume that a war is just if it is fought for a just cause by a belligerent which ensures, as far as possible, that the harms done by the war do not exceed the good it brings about. In addition, individual soldiers who fight in the war must also respect the principles of proportionality, necessity and non-combatant immunity when deciding when and how to mount their attacks, as well as whom to target.<sup>6</sup> If, *and only if*, those conditions are met, there is no reason to reject marketized soldiering as morally unjustifiable.

#### IN DEFENCE OF THE (LIMITED) MARKETIZATION OF WAR

Arguments for or against the marketization of war must deal with the following questions:

- (1) On what grounds, if any, does an individual have the right to offer his services (to kill, or to assist in killing) under the terms of a private contract (either directly between him and a belligerent state, or between him and a corporation)?
- (2) On what grounds, if any, does a belligerent state have the right to hire mercenaries or PMCs to protect its interests?
- (3) On what grounds, if any, does a PMC have the right to act as an intermediary between a belligerent state and individual soldiers willing to offer their services?

A negative or positive answer to one of those three questions will sometimes, but not always, yield a correspondingly negative or positive answer to the other two – whether liberties, claims or powers are at issue. Thus, the claim that hiring oneself to kill others is morally wrong (for example, on the grounds that one should never kill for gain) does not commit its proponents to the view that hiring a private soldier is morally wrong: for,

<sup>4</sup> For the interest theory of rights, see, e.g., J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), and M. Kramer, 'Rights without Trimmings', in M. Kramer, H. Steiner and N. Simmonds, *A Debate over Rights* (Oxford: Oxford University Press, 1998), pp. 7–112. For the distinction between claims, powers and liberties, see W. N. Hohfeld, *Fundamental Conceptions as Applied in Judicial Reasoning* (New Haven, Conn.: Yale University Press, 1919).

<sup>5</sup> See, e.g., evidence of abuse perpetrated by so-called private contractors (as well as US soldiers) at the Abu Ghraib prison in Iraq in 2003. The report on the official investigation into such abuses can be found at <http://f1.findlaw.com/news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> (accessed on 23 February 2009). See also reports of killings of civilian bystanders in Iraq by private contractors in an October 2007 memorandum prepared for the Oversight Committee of the US Congress House of Representatives (<http://oversight.house.gov/documents/20071001121609.pdf> – accessed on 23/02/09).

<sup>6</sup> Michael Walzer's *Just and Unjust Wars*, 4th edn (New York: Basic Books, 2006) remains the *locus classicus* in the ever-growing literature on the Just War. For the purpose of this article, I need not provide a full specification of the conditions for a Just War.

although it does make the recruiter complicitous in the soldier's wrongdoing, the need for the latter's service might be so great as to provide him with a justification (and not merely an excuse) for so acting. Likewise, one can coherently claim that a private soldier is acting permissibly by killing for gain, but that his employers are guilty of, for example, exploiting his need to make a living or treating him merely as a killing machine rather than a human being.

With these preliminary considerations in hand, I now turn to defending mercenary contracts. As I noted at the outset, the most obvious argument in their support invokes the value of freedom of occupational choice. I argue in this section that it fails, in so far as it cannot support belligerents' right to hire mercenaries (next subsection). I then argue that mercenary contracts are better justified by appealing to the importance of enabling just defensive killings (second subsection). Having thus defended mercenarism, I conclude this section with a few words on the moral status of private armies.

### *Freedom of Occupational Choice*

An individual, or a group, enjoys the contractual freedom to earn a living if they are able to exchange services, money or both with some other party with a view to benefiting financially from the transaction. This supposes, at the very least, that there should be no legal ban on the provision of those specific services or financial resources. Compare now the following scenarios:

- (a) Blue decides to enlist into the standing professional army of his home state. He knows that he might be deployed anywhere in the world as thought fit by his superiors, and that he will kill some other human being(s).
- (b) White finds a job with a PMC that has successfully won a number of government contracts. He knows that he might be deployed anywhere in the world as thought fit by his employers, and that he will kill some other human being(s).
- (c) Red sets up a business as a freelance mercenary. He hires himself out to different kinds of belligerents for different tasks, from participating in active combat to training professional soldiers for specialized roles on the front line. Unlike White, he has considerable control over where he is deployed and for what purposes.

In all three cases, the soldier knows that he will either kill or be complicitous in acts of killing, and will be paid for doing precisely that. The only difference between Blue, on the one hand, and White and Red, on the other hand, is that Blue is formally part of the state's apparatus, whereas the latter two are not. At first glance, that difference seems irrelevant. For if one believes that freedom of occupational choice is important – a point which I take as fixed – and if one believes that it is (sometimes) permissible to exercise it by killing others, then it is hard to see why one is morally permitted to exercise it in the formal service of a state, but neither as an employee of a private corporation nor as a freelance soldier. By the same token, if Blue's interest in joining the army is important enough to be protected by a claim, then the same applies to White's and Red's interests.<sup>7</sup> Similar considerations apply to private military corporations. A PMC, as we saw, acts as an intermediary between belligerents on the one hand, and individuals willing to offer

<sup>7</sup> For an argument along those lines, see F. Suarez, 'De Bello', in his *De Triplici Virtute Theologica, Fide, Spe, et Charitate*, VI, 12, reproduced in J. B. Scott, ed., *Selections from Three Works of Francisco Suarez, S. J.* (Oxford: Clarendon Press, 1944).

their lethal services on the other. It advertises for openings, recruits employees, trains them, offers them logistical support, oversees their career, monitors their performance, etc. These tasks are carried out by lawyers, human resources personnel, advertising personnel, administrative assistants and accountants, in just the same way as the tasks that enable individuals to join, and effectively perform in, a regular army are carried out by lawyers, human resources personnel, etc. At the bar of freedom of occupational choice, then, if someone's interest in earning a living by, for example, working as a recruiter for the army ought to be protected by a claim and a liberty, then so should her interest in working as a human resources adviser for a PMC. And so on.

As should be clear, however, a state, *qua* state, is not properly to be regarded as engaging in activities that would enable it to make a living. Consequently, the foregoing argument cannot support the conferral on states of a right to enter a mercenary contract, from which it follows that freedom of occupational choice cannot, on its own, support mercenary contracts. For on the account of rights which I espouse, X has a right in respect of an interest of his if that interest warrants protection. In so far as freedom of occupational choice is not an interest of a state, a state cannot have a right – and therefore cannot have a power – to enter into a mercenary contract at the bar of that particular value. Thus, freedom of occupational choice, may well support mercenaries' and PMCs' liberty and claim to do so; but in so far as it cannot support states' similar power, it cannot support mercenaries' and PMCs' *power* to enter into a contract with the state. Indeed, it is a necessary condition, for A to have the power to make a transaction with B, that B also has that power – and vice versa. Suppose that A and B agree that A will sell B his car for £5,000. Assume that A's interest in being able to divest himself of his property is important enough to confer on him a power to change his, and others' relationship to it, by selling it. However, A cannot have the power to transfer his car *to B* in exchange for B's £5,000 if B does not herself have the power to transfer £5,000 to A in exchange for his car. Accordingly, any argument to the effect that the transaction ought to be regarded as valid must show that both A and B have the power to enter into that kind of contract – and, by implication, that some interest of both A and B is important enough to be protected by the relevant power.<sup>8</sup> As we have just seen, freedom of occupational choice is not an interest of states. In order, then, to defend the view that mercenary contracts as between a state and mercenaries (or PMCs) are legitimate, we shall have to identify some interest(s) of states that can be protected by the relevant powers.

### *Just Defensive Killings*

The foregoing considerations should not be taken to imply that freedom of occupational choice has no role to play in justifying states' right to enter mercenary contracts. Indeed, it might well be in the interest of a state – call it S<sub>1</sub> – that *individuals'* freedom of occupational choice, which they exercise by hiring themselves out as mercenaries or by working in a PMC, be respected. In such a case, though, the interest which justifies S<sub>1</sub>'s right is, ultimately, that which is fulfilled by respecting individuals' freedom of occupational choice. To illustrate: suppose that White's employer wins a government bid to send a

<sup>8</sup> Generally, it is not a necessary condition for a change in A and B's moral/legal relationship validly to take place that both A and B have the relevant power (if A gives G to B, A thereby changes their moral relationship in respect of G, without B having to exercise the same power). Here, however, I focus on *exchanges*.

number of (private) soldiers to help fight a justified humanitarian war against a genocidal tyrant. White, in that war, might be assigned to combat duties; or he might be assigned to a security detail for the protection of some high-ranking official, with licence to kill if necessary. Or suppose his employer wins a bid to help a foreign government fight a war of national self-defence against an unjust act of aggression. In all those cases, White kills in defence of others: in defence of those whose lives are threatened by their own genocidal government; in defence of the high-ranking official; and in defence of the national interest of the state whose government hired his company.

Now, I take it for granted that one is permitted, and has a claim, at least *prima facie*, to exercise one's freedom of occupational choice by offering goods and services (against pay) in justified defence of other people's lives, and of other states' economic or national interests. Thus, a group of food producers surely can sell food to whatever organization will then distribute it to the starving. A doctor surely can offer his medical services, against pay, and via the state and/or medical insurance companies, to those who need them as a matter of life and death. Likewise, an aspiring diplomat surely can offer his services, again against payment, in the service of his country's defence of its national interests, particularly in times of war. An information technician surely can offer her services to a company that is particularly vulnerable to hackers. And so on. If that is correct, as it surely is, then White too can become a private soldier in defence of third parties' fundamental interests.

To be sure, unlike White, those agents contribute to saving the lives or protecting the interests of others without thereby contributing to killing someone else. It is hard to see, however, why that should make a difference to the issue at hand. Take the case of weapons manufacturers, who sell guns to those who need them so as to defend their life or protect the national interest. If they can do so even though the assistance that they provide involves a contribution to an act of killing, then private soldiers and PMCs can (respectively) offer and procure killing services.<sup>9</sup>

I have argued that individuals can hire themselves out for killing services, as well as procure such services, in so far as, by doing so, they provide some other party with the resources it needs to rightfully defend itself against an unjust threat. The latter point – pertaining to just defensive killings – also provides a justification for conferring on states the right to hire mercenaries. Consider: states need armies and weapons, not only for the purpose of collective self-defence (to point out the obvious), but also for the purpose of defending distant strangers (when called upon to wage a war of intervention), as well as for the purpose of enforcing universally valid norms (when called upon to take part in multilateral peace-keeping forces.) Put bluntly, states need the wherewithal to have acts of killing carried out in their name and with their authorization, in self-defence as well as in defence of others. Now, if a state is at liberty to buy guns from private manufacturers for the aforementioned purposes – as it surely is – then it is also at liberty to buy soldiering services from those willing to provide them. Moreover, if a state has a right to pay for a standing army – as it surely does – then it also has a right to pay for a private army. Finally, recall my earlier point, to the effect that an individual's interest in working as a private soldier ought to be protected by rights that neither PMCs nor states be themselves interfered with when hiring him, and that third parties recognize his employment contract

<sup>9</sup> In my 'Mandatory Rescue Killing', *Journal of Political Philosophy*, 15 (2007), 363–84, at pp. 366–8, I argue that giving a gun to someone who needs it in self-defence, and killing (for free) that person's attacker, are relevantly analogous. The argument applies, *mutatis mutandis*, to the act of selling a gun and the act of killing against payment.

with them as legally binding. Likewise, states' interest in hiring a private army ought to be protected by similar rights as pertain to private soldiers and PMCs.

In sum, whereas the argument for freedom of occupational choice failed to provide a justification for states' power to enter into mercenary contracts (and thereby for mercenaries' and PMCs' similar power), the argument from just defensive killings can do so. That said, whilst the view that states are at liberty to hire mercenaries is relatively straightforward, the view that they have a claim and a power to do so needs unpacking. As I noted in the introduction, to say that X has a claim to do  $\phi$  is to say that third parties are under a duty not to interfere with his doing  $\phi$ . Moreover, to say that he has the power to do  $\phi$  is to say that, by doing  $\phi$ , he changes his moral relationship to others by transferring to them some of his claims, liberties, powers and immunities, and/or acquiring new ones. A contract whereby X hires Y for a particular service against a certain fee is a paradigmatic example of the exercise of a power, whereby X loses his entitlement to that sum of money, but acquires claims over Y's use of his time and skills to the ends specified by the contract. For X to have that power thus requires that third parties recognize it as a valid transaction, so that, should a dispute arise between X and Y, either could seek redress through some institution.

Standardly, the third party which is under the relevant duty not to interfere (when a claim is at issue), or to recognize a transaction as valid (when a power is at issue) is, more often than not, the state. Accordingly, when the state itself is said to have claims and powers, identifying who exactly is supposed, respectively, not to interfere, or to recognize the transaction as valid, is of the utmost importance. As the institutional embodiment of a political community as a whole, a state's claim to do  $\phi$  (for example, to buy weapons for the purpose of fighting a just war) is held against those of its individual members who might wish to stand in the way of its doing  $\phi$  (such as radical pacifists who destroy the state's military factories). Likewise, a state's power to enter into a contract with some other party (for example, a contract for the delivery of ammunition) ought to be recognized as valid by those of its individual members who might wish to reject the new distribution of claims, privileges and powers (by, for example, refusing to accept that the state is now the legitimate owner of the ammunition). Crucially for our present purposes, however, states' claims and powers are also held against other states. To say, then, that a state,  $S_1$ , has a claim to hire mercenaries to fight just wars is to hold other states – say,  $S_2$  – under a duty not to interfere with the transaction, for example by preventing mercenaries from joining in. It is also to say that  $S_2$  ought to recognize as valid the employment contracts passed by  $S_1$  and the mercenaries or PMCs.

None of this is to deny, of course, that  $S_2$  might have countervailing and important interests that would be harmed by  $S_1$ 's decision to contract with mercenaries – particularly if those mercenaries are citizens of  $S_2$ . In that case,  $S_2$ 's interests might take precedence over  $S_1$ 's, so that it would not be under a duty not to interfere with the latter's decision. Note, however, that the same considerations might well apply, *mutatis mutandis*, to  $S_1$ 's decision to raise, or increase the size of, its regular standing army, for example, by setting up in its midst foreign regiments akin to the Gurkhas or the Foreign Legion. In that case too, one might draw the conclusion that  $S_2$  is not under the relevant duty to  $S_1$ . The point remains, then, that *if*  $S_1$ 's interest in obtaining what they need for their collective self-defence or for the defence of others is important enough to be protected by a right to set up a standing army, then it should also be protected by a right to contract with private parties.

To recapitulate, I have argued that states, PMCs and individual soldiers have the right to contract with one another. Note that my argument and its conclusion are compatible with the widely held view that it is better, on the whole, that states should have their own standing army than having to resort to private forces – that there is something to be gained (for

example, with respect to national cohesiveness) by having one's national interests defended by one's compatriots. My point is simply that the reasons that are routinely thought to support the conferral of the moral right to enter a commercial contract when some fundamental interests are at stake extend to mercenary contracts – *unless* one can show that soldiering somehow differs, morally speaking, from other kinds of activities.<sup>10</sup> I shall examine some arguments to that effect in the next section, and show that they fail. In the meantime, it is worth emphasizing what this article is *not* claiming – that one can choose to make a living however one wishes. An argument for unbridled freedom of occupational choice would lead to the absurd conclusion that Luca Brazzi, Don Corleone's top henchman, has the moral right to offer his killing services to the latter against shopkeepers who refuse to pay protection money, or that the Mafia has the right to procure killing services for corrupt politicians who wish to eliminate their political opponents. That conclusion would be absurd simply because, in those two examples, the acts of killing are straightforwardly impermissible. Analogously, whether or not individuals may offer, or procure, killing services to belligerents depends on the justice of the war. So does belligerents' right to contract with private soldiers. If the war is unjust, parties' interests in, respectively, freedom of occupational choice and getting the means to kill in self-defence or the defence of others are *not* important enough to be protected by liberties, claims and powers. By implication, if the contracting state wages a just war, and if individuals' interest in joining the army is important enough to be protected by a right, then individuals' similar interest as exercised outside army structures ought also to be protected by a right. In the next subsection, I probe the implications of that claim for the moral status of private and uniformed soldiers at the bar of Just War ethics.

### *The Moral Status of Private and Public Armies*

The task of Just War ethics consists in deciding who, in war, may kill whom with moral and legal impunity. According to the tradition, uniformed combatants may intentionally kill other soldiers without being liable to punishment (subject to considerations of necessity and proportionality). Should they be captured by the enemy, they must be regarded as prisoners of war and be treated as stipulated by the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. By implication, civilians, who are not themselves legitimate targets, may not kill soldiers (unless the latter wrongfully target them, in which case their acts of killing are justifiable acts of self-defence). If they do so, they are to be treated as murderers and tried accordingly; in addition, should they be made prisoners by the enemy, they do not have the rights and privileges normally extended to prisoners of war.

There are exceptions to the principle, of course. Thus, articles 1(4) and 44(3) of the 1977 Protocol Additional to the Geneva Convention of August 12, 1949 Relative to the Protection of Victims of International Armed Conflicts extend the protection enjoyed by soldiers to members

<sup>10</sup> As a referee for this *Journal* pointed out, my argument for mercenarism, which appeals to the value of enabling Just War killings, raises the interesting issue of the extent to which a PMC's contractual obligations to state A may be allowed to override a non-contracting state B's urgent need for military manpower. Should the PMC be allowed to default on the contract it made with A at time  $t_1$ , so as to help B whose needs at time  $t_2$  are more pressing? Or should it be held to its contractual obligations to A? Of course, the issue arises, not merely in the context of mercenarism, but whenever private actors are allowed to contribute to helping those in need: if a company is under contract with hospital H<sub>1</sub> for the delivery of medical equipment, should it be allowed to default on its contract for the sake of supplying H<sub>2</sub>, which is facing an unexpected shortage in surgical instruments? And so on. I lack the space to deal with those complications here. Some of the concerns that they raise are ethical, whilst others are more functional (cf. fn. 2).

of national, or political, liberation movements. However, the international law of armed conflicts does not confer the legal status of a soldier to mercenaries. Under the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989), ‘a mercenary, as defined in article 1 of the present Convention, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention’ (art. 3.1). Although the Convention seems to target freelance mercenaries, the terms in which it is phrased do not preclude its application to employees of PMCs. According to international law, then, mercenaries are neither civilians nor soldiers: they belong to that grey category of unlawful combatants, who are liable to being killed with impunity (precisely in so far as they are combatants) but are denied the rights and privileges of soldiers (precisely in so far as they are not members of regular armed forces).

Interestingly, employees of PMCs who are currently operating in Iraq enjoyed, for a long time, *greater* rights and privileges than US soldiers. Indeed the label under which they are commonly designated, that of ‘private contractors’, seems to suggest that they ought to be regarded as civilians rather than combatants, and that they are not, therefore, legitimate targets. In that vein, one of the last orders issued by Paul Bremner, before leaving his post as head of Iraq’s provisional civilian government, removed private contractors suspected of war crimes from Iraqi jurisdiction (CPA Order 17). Although the order allowed the United States to prosecute those contractors, as does the Military Extraterritorial Jurisdiction Act 10 USC §3261(2000), no such employee was prosecuted for crimes committed in Iraq until December 2008. By contrast, while PMC employees enjoyed immunity, members of the US armed forces were facing prosecution for war crimes.<sup>11</sup>

Yet, my arguments in support of the bestowal on private individuals of the right to hire themselves out for killing purposes also support the thesis (which I shall call the moral parity thesis) that mercenaries, whether freelance or PMC employees, should be treated on a par with soldiers who enlist willingly<sup>12</sup> into the army. Consider: if the status (economic or political) of mercenaries’ employers is irrelevant to the issue of the former’s right to offer their services in war, it should also be irrelevant to the issue of their liabilities, rights and privileges during war. Put differently, to the extent that uniformed soldiers may kill with impunity, so should mercenaries (or so I have argued above). Accordingly, to the extent that the former may be killed with impunity, so should the latter; to the extent that

<sup>11</sup> See, e.g., <http://www.nytimes.com/2005/09/28/national/28england.html>, <http://www.nytimes.com/2005/01/28/international/middleeast/28abuse.html>, and [http://www.nytimes.com/2008/12/06/washington/06blackwater.html?\\_r=1](http://www.nytimes.com/2008/12/06/washington/06blackwater.html?_r=1) (sources consulted on 22 February 2009). The US War Crimes Act (18 USC §2441 (1996 and 2004)) provides that any American national or member of the US Armed Forces who commits a war crime is liable to prosecution: it would thus apply to American, but not foreign, PMC employees. In December 2008, US federal prosecutors charged five Blackwater guards with a shooting that killed at least seventeen civilians in a crowded Baghdad square. For discussions of the legal status of mercenaries and employees of PMCs, see, e.g., L. Cameron, ‘Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation’, *International Review of the Red Cross*, 88 (2006), 573–98; K. Fallah, ‘Corporate Actors: The Legal Status of Mercenaries in Armed Conflict’, *International Review of the Red Cross*, 88 (2006), 599–611; E.-C. Gillard, ‘Business Goes to War: Private Military/Security Companies and International Humanitarian Law’, *International Review of the Red Cross*, 88 (2006), 525–72; L. Doswald-Beck, ‘Private Military Companies under International Humanitarian Law’, in Simon Chesterman and Chia Lehnardt, eds, *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford: Oxford University Press, 2007), pp. 115–39.

<sup>12</sup> The qualification is important. One might think, for example, that a conscript should not be subject to as severe a punishment, for taking part in an unjust war, as a mercenary, precisely because he is subject to considerable duress.

the former should be prosecuted for war crimes, so should the latter; and to the extent that the former should be granted the formal status of prisoners of war if captured, so should the latter.<sup>13</sup>

At first sight, it would seem that the foregoing considerations only apply to mercenaries, freelance or otherwise, who directly take part in combat operations – and not to those who offer training, protective and logistical support to regular forces. In so far as PMCs do not usually deploy personnel in a combative capacity but, rather, assist combat units, it would seem that the vast majority of their employees should be regarded as civilians rather than combatants – but that would be jumping too quickly to a conclusion. The challenge resides in identifying what constitutes ‘direct participation’. Taking part in an armed attack or counter-attack clearly does, which includes in the category of legitimate targets Blackwater employees who, alongside US soldiers, fired at a crowd of protesters (some of them armed) from the occupation headquarters in Najaf, Iraq, in April 2004.<sup>14</sup> Whether or not assisting in attacks and counter-attacks also counts as direct participation in hostilities is harder to determine. Whilst bringing ammunition to regular forces is plausibly seen as such, providing security for military headquarters may not. Whilst providing training to jetfighters during the war itself can also plausibly count as participation in the latter’s subsequent attacks, merely guarding military installations may not – and so on.

These are difficult issues, but the crucial point here is that they arise in just the same way for regular forces: some soldiers take a direct part in fighting, while others ‘merely’ provide logistical support to combat units. Accordingly, the moral parity thesis applies to those cases as well. If uniformed soldiers who do not directly take part in combat are not legitimate targets, on the grounds that they are not themselves posing an ongoing or imminent lethal threat to the enemy, mercenaries who provide logistical assistance to combat units ought not to be killed either.

The question of mercenaries’ liability to being punished for war crimes is harder, at least in cases where those crimes are committed outside the territory of the belligerent who has hired mercenaries, and by individuals who are not nationals of that belligerent state. As I noted above, US legislation allows for the prosecution of such crimes, but not all states do. As a result, individual mercenaries of different nationalities who together commit a war crime might well face different kinds of penal costs – not a particularly desirable state of affairs at the bar of fairness. If, however, one takes the plausible view that a belligerent state has the right (and, indeed, the duty) to punish its uniformed soldiers for war crimes whether or not they are nationals of that state, then there is no principled reason to exempt foreign mercenaries who are contracted to fight its wars from punishment by that state.<sup>15</sup>

<sup>13</sup> That claim is compatible with the (plausible) view that there are differences between armies’ and private companies’ duties and permissions *before the war starts* – such that, e.g., the army is under a collective duty to go to war as ordered by its (civilian) political leaders, but a private company is not under a duty to accept a government’s contract to fight in that war. For interesting discussions of differential liabilities for uniformed soldiers and mercenaries, see J. Pattison, ‘Just War Theory and the Privatization of Military Force’, *Ethics and International Affairs*, 22 (2008), 143–62, and Coady, *Morality and Political Violence*, pp. 226ff (though Coady is sceptical of the legitimacy of mercenarism).

<sup>14</sup> See Scahill, *Blackwater*, chap. 8.

<sup>15</sup> On that plausible view, France and Britain have the right (and the duty) to punish, respectively, non-French members of the Foreign Legion and Gurkhas. See Avant, *The Market for Force*, pp. 233–5, for a discussion of the difficulties raised by jurisdictional confusion over extraterritorial punishment in recent conflicts.

There is one important difference, of course, between PMCs' employees and uniformed soldiers, namely that the former, unlike the latter, might be placed under two different sets of duties. On the one hand, they are under a duty to their employer to carry out the tasks specified in their employment contract. On the other hand, they are also under a duty to obey the orders given to them by the officers in charge of military operations on the ground. By contrast, uniformed soldiers are located within one unified chain of command. Still, this does not affect my case for treating both kinds of combatants on a par with respect to their liability to being punished for war crimes. Clearly, it is conceivable that a mercenary might be given conflicting orders by his employer and the military officer in charge of operations, such that the former would make him liable to being punished while the latter would not. It is also conceivable that a mercenary might be threatened with being sacked by his employer if he refuses to carry out his contractual duties, when the latter are at odds with the order he receives from the uniformed commanding officer. On either count, however, a regulatory measure ensuring that PMC employees should obey orders as given by military personnel in charge of operations ought to take care of this difficulty. A further measure specifying that no PMC employee could ever be held under contractual duties, by their employer, to act in contravention of the law of war, should also do the trick. With those measures in place, then, mercenaries can and ought to be treated as if they were uniformed soldiers.

So far, I have focused on individual mercenaries. Yet, the status of PMCs themselves is also at issue. If their employees are liable to being killed, are their executives similarly liable, and are their company headquarters legitimate targets for destructive bombings? If their mercenary employees are liable to being punished, are their executives similarly liable? It seems that they are. If, in times of war, the military staff of a belligerent are liable to being either killed or punished for war crimes, so should PMCs' executives – which is to say that they ought not to be granted the protection standardly afforded to civilians.

Admittedly, there is a difference between the two kinds of institution: PMC executives do not (let us assume) take the decision to go to war in the first instance; nor, once the war has started, do they make the strategic and tactical decisions that will result in enemy deaths. Yet, the fact that they, unlike high-ranking officers, do not make those decisions is irrelevant to their liability to being killed or put on trial for participating in an unjust war. For consider the case of weapons factories. As a number of Just War theorists have argued, targeting those installations and the civilians who work in them is permissible, precisely in so far as they provide direct military support to combatants, even though they might be located far away from the lines, and even though their contribution to the war effort is that of accomplices, rather than principals, in the war. But if providing support such as weapons can turn manufacturers into legitimate targets and make them liable to being tried for war crimes, then, by the same token, providing support in the form not merely of equipment but also of combatants themselves can turn PMC executives into legitimate targets and possible defendants in war crime trials.<sup>16</sup>

<sup>16</sup> For the view that ammunition factories and their workers are liable to being bombed, see, e.g., E. Anscombe, 'War and Massacre', and 'Mr Truman's Decree', in E. Anscombe, *Ethics, Religion and Politics* (Minneapolis: University of Minnesota Press, 1981), pp. 53 and 67, respectively; T. Nagel, 'War and Massacre', *Philosophy and Public Affairs*, 1 (1972), 123–44, at pp. 139–40; O. O'Donovan, *The Just War Revisited* (Cambridge: Cambridge University Press, 2003), pp. 38–9 and 41–2; Walzer, *Just and Unjust Wars*, p. 145. Regarding liability to punishment, a number of leading industrialists from Flick, Krupp and IG Farben were tried in 1947–48 for complicity in Nazi Germany's war crimes.

Much more needs to be said on that issue. Treated in full, it would require an account of corporate responsibility for acts committed by individual employees, as well as an account of senior officers' liability for the acts committed by rank-and-file soldiers. My point, however, is that *if* one endorses the deliberate targeting of the enemy's military headquarters (both the building and those who work in it), then one is committed to the view that the deliberate targeting of the headquarters of PMCs who supply the enemy with crucial military support is also permissible. Likewise, *if* one takes the view that superior officers can and ought to be held legally liable for the acts committed by their subordinates, one must accept that PMC executives can and ought to be held legally liable for the acts committed by their employees.

Before addressing objections to the conclusions reached here, I should like to tie up a loose end. I have argued so far that mercenaries and PMCs on the one hand, and uniformed soldiers and the army on the other hand, should be granted similar rights and liabilities. I also argued (earlier in this section) that mercenarism is justified if, and only if, the war in which mercenaries fight is a just war. It follows, then, that public soldiering is similarly justified if, and only if, the war is just. That is, if belligerents' right to hire a private army is conditional upon the war being just, and if private and standing public armies enjoy the same rights and liabilities, then it follows that a state may send its standing army into a war only if the latter is just. Likewise, if individuals' right to hire themselves out for acts of killing is conditional upon the war being just, then any such act that they commit in an unjust war is itself impermissible,<sup>17</sup> and should be regarded as murder (for which its author should be put on trial). And if that is correct, then it follows that uniformed soldiers themselves may not kill in an unjust war. The point might seem obvious. Yet, it contradicts a rather fundamental principle of the Just War tradition, namely that the justice, or lack thereof, of acts of killing once the war has started (*jus in bello*) is independent of the justice, or lack thereof, of the decision to go to war in the first instance (*jus ad bellum*). My defence of mercenarism implies, on the contrary, that *jus in bello* is heavily dependent on *jus ad bellum*.<sup>18</sup>

#### FIVE OBJECTIONS TO MERCENARISM

To recapitulate, I have defended the right to enter a mercenary contract by appealing to the importance of enabling just defensive killings. I have also argued that uniformed soldiers and mercenaries should be treated on a par – and that what matters, for deciding whether a combatant is lawful or unlawful, is not the nature (political or economic) of the organization employing him, but rather whether he abides by the principles of the Just War. In this section, I examine and reject five objections to mercenarism: the *motivational objection*; the *objectification objection*; the *profiteering objection*; the *loss of control objection*; and the *neutrality objection*.

#### *The Motivational Objection*

The claim that mercenaries are acting wrongly because they fight for financial gain, rather than out of loyalty to their state and/or commitment to a just cause, has a very long

<sup>17</sup> Unless the lethal threat against which they are defending themselves is itself unjust.

<sup>18</sup> For a different argument in favour of the dependence of *jus in bello* on *jus ad bellum*, see, e.g., J. McMahan, 'The Ethics of Killing in War', *Ethics*, 114 (2004), 693–733.

pedigree in the intellectual and legal history of warfare. It draws on one of the traditional conditions of the just war, namely, that a war is just only if belligerents wage war with the right intentions (defined as wanting to redress the wrong which justifies the war), and applies the requirement to the individuals who fight in the war. Incidentally, the condition of right intentions is ambiguous, requiring as it does either that belligerents and soldiers act from the right motives, or that they wage, and kill in, a war towards just ends. As applied to mercenaries, the condition is usually interpreted as pertaining to agents' motives; accordingly, it is this particular interpretation that I shall target here.<sup>19</sup>

As has been often noted, any argument for, or against, a particular act that appeals to the agent's motivations is vulnerable to two criticisms: (1) that discerning what those motivations are is not as easy as it might seem; (2) that motives are irrelevant to the permissibility of actions. For what it is worth, I do not find either claim persuasive. But even if the motivational objection's fundamental premises are correct (that motives are discernible and do matter), it is nevertheless vulnerable to the following criticisms. For a start, there is no reason to suppose that a member of the regular armed forces *by definition* is not motivated mostly by financial gain and the social benefits that go with it, or is mainly motivated by loyalty to her state and/or to a just cause. In fact, joining the army is, for many youngsters in many countries, a way out of poverty. It is also, for many of them, a way to channel aggressive tendencies, or to cater for a psychological need for a highly structured and hierarchically-based way of life. By contrast, there is no reason to suppose that a mercenary is, *by definition*, motivated mostly by the lure of financial gain. On the contrary, evidence suggests that a number of private soldiers take up jobs with PMCs after being made redundant by the army or after retirement from combat duties, and see themselves as continuing to act in the defence of their country's interests abroad.<sup>20</sup>

The foregoing points are definitional. So let us suppose, for the sake of argument, that a mercenary, unlike a regular soldier, just *is* someone who is essentially motivated by money. The crucial question, then, is whether those definitional points have any bearing on the right to enter a mercenary contract. Two claims are usually made to the effect that they do. First, it is said that soldiers have the right to kill only if they believe, at least in large part, that the war is just. In so far as mercenaries by definition do not have those motives, mercenarism is morally dubious – whether seen from the standpoint of mercenaries themselves, or of those who procure or hire them.

However, even if motives are decisive for the permissibility of actions, and thus even if mercenaries are guilty of wrongdoing, it does not follow that they lack a claim, or a power, to contract with belligerents. This is because, definitionally speaking, there can be

<sup>19</sup> For the distinction, in this context, between right motives and just aims (or, as he calls them, intentions), see Pattison, 'Just War Theory and the Privatization of Military Force'. For a comprehensive review of the motivational objection to mercenarism, see Percy, *The History of a Norm in International Relations*, esp. chap. 5. See also F. H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975), chap. 6. Two classical thinkers who condemn mercenaries on motivational grounds are Machiavelli in *The Prince* (ed. by G. Bull) (Harmondsworth, Midx.: Penguin, 1981), chap. XII, esp. pp. 77–8, and Grotius in *The Rights of War and Peace* (ed. by R. Tuck) (Indianapolis, Ind.: Liberty Fund, 2005), Bk II, chap. XXV, §ix, p. 1164. For a powerful rebuttal of the motivational objection along the lines deployed in this paragraph and the next two, see T. Lynch and A. J. Walsh, 'The Good Mercenary?', *Journal of Political Philosophy*, 8 (2000), 133–53.

<sup>20</sup> See Scahill, *Blackwater*, esp. chap. 5. Suppose that uniformed soldiers in a given country decide to leave the army *en masse*, unless their pay is significantly raised. Would it be morally wrong of them to do so? I owe this point to Alan Hamlin.

such a thing as a claim, or a power, to act wrongly. Accordingly, the motivational objection can successfully reject the conferral on mercenaries and PMCs of the relevant claim and power only if it can provide an independent justification for the view that this particular wrongdoing ought not to be protected by the law.<sup>21</sup>

Such a justification can only be that mercenaries' and PMCs' interest in, respectively, offering, or procuring, lethal services is not important enough to be protected by a claim or power. However, unless one can show that mercenarism so defined harms more fundamental interests of third parties (a point to which I shall return below), it seems that mercenaries' and PMCs' interests are, in fact, important enough to warrant such protection. Individuals do all sorts of things out of mostly financial motivations. They often choose a particular line of work, such as banking or consulting, rather than others, such as academia, largely because of the money. They often decide to become doctors rather than nurses for similar reasons. Granting that their interest in making such choices, however condemnable their motivation, is important enough to be protected by a claim (against non-interference) and a power (to enter the relevant employment contracts), it is hard to see how one could deny similar protection to mercenaries. *Mutatis mutandis*, the point applies to executives and owners of PMCs, who procure, rather than directly offer, lethal services.

I noted above that the harms accruing to third parties as a result of mercenarism count as a good reason against conferring on mercenaries, PMCs and states the right to contract with one another. Appositely, the second normative worry about mercenarism is that mercenaries, precisely because they are fighting for money, are much more likely to have unjust aims and to commit offences against the laws of war than members of regular armed forces, who are motivated by the belief that their cause is just.<sup>22</sup> However, that claim is less persuasive than may appear at first sight. In the light of the long list of exactions committed against civilian populations by regular forces, precisely on the grounds that their cause was just, the suggestion that armed forces are more likely to abide by the laws of war than mercenaries seems somewhat optimistic. One need only think of the Wehrmacht and the Red Army during the Second World War, the French Army in Algeria during the war of independence (1954–62), the US Army in Japan in the closing months of the Second World War (Hiroshima and Nagasaki come to mind here) and the British Air Force in Germany during that war. It is equally unclear, again judging on the basis of recent interstate wars, whether regular armies are more likely than mercenaries to pursue just aims when making strategic decisions as to whom to target, which kind of infrastructures to destroy, etc.

<sup>21</sup> I deploy a structurally similar argument regarding organ sales, prostitution and surrogate motherhood in my *Whose Body is it Anyway?* (Oxford: Oxford University Press, 2006, chaps 6–8). To illustrate here: suppose that White becomes a mercenary because he really enjoys killing. If motives are decisive to the permissibility of actions, White is acting wrongly. But that is not enough to show that White ought not to have the right to work as a mercenary – any more than the fact that someone becomes a surgeon because he gets aroused by cutting into the flesh of anaesthetized patients is enough to warrant legally preventing him from being a surgeon. One would have to show that his perverse motives lead him to provide sub-standard medical care to his patients.

<sup>22</sup> In other words, to advert to the aforementioned distinction between two interpretations of the requirement of just intentions, the worry is that, precisely because they have the wrong motives, mercenaries are more likely to act in pursuit of wrongful aims. See Pattison, 'Just War Theory and the Privatization of Military Force', p. 147 and pp. 150–2. To return to the example given in fn. 21, *if* it turned out that White's appetite for killing made him prone to killing indiscriminately, then that would be sufficient warrant for preventing him (forcibly) from doing so. Likewise, if a surgeon's appetite for cutting into sleeping flesh were to lead him to operate without a medical reason, that would be sufficient warrant to withdraw his licence (and put him into jail for inflicting grievous bodily harm on his patients).

In any event, those points about unjust aims and exactions are vulnerable to the charge that one may act out of wrong motives but nevertheless have just aims, or conduct oneself justly. More precisely, it is not inherent in the act of offering one's killing services in exchange for money that it should lead the agent to commit atrocities against civilians and to pursue unjust aims. Finally, it is worth noting that the freelance soldier, in so far as he has greater control over the conditions under which he will be deployed, is in a better position than the corporate fighter or the professional soldier to ensure that he will not be made to fight for unjust ends or in unjust ways. On that count, making oneself available for hire on a freelance basis might be less morally risky than joining the army and running the risk of having to obey an unjust order on pain of being dishonourably discharged.

Although the motivational objection's main target is mercenaries and PMCs (for obvious reasons), it might nevertheless be thought to apply to states as well, as follows: (a) to hire mercenaries to fight one's war is to countenance a wrongdoing, and (b) to countenance a wrongdoing is itself a moral wrongdoing of a kind that should not be protected by either a claim or a power. Assuming the motivational objection that mercenarism is wrong, I will not take issue with (a). Claim (b), however, is too strong – certainly in those cases where the state that hires mercenaries simply could not conduct its (just) war otherwise, and particularly when its sovereignty and/or territorial integrity are at stake. Perhaps, as Coady suggests in his interesting discussion of mercenarism, we have here a case of dirty hands, where a leader has to choose between the wrongdoing of hiring mercenaries and that of allowing the defeat of one's community by an unjust attacker.<sup>23</sup> Be that as it may, even if hiring mercenaries under those circumstances is morally wrong (albeit the lesser of two wrongdoings), this would not in itself count as a reason to deny the state the claim and the power so to act. Here again, absent countervailing arguments, the belligerent's interest in fighting a just war surely is important enough to be protected by a right to enter mercenary contracts. Consider the following analogy. Even if it is wrong (*arguendo*) for someone to enter the medical profession mostly out of financial motives, and even if it is wrong for a patient to hire him, surely the patient's interest in surviving is important enough to grant him a right to do so. The alternative would be to subject him to criminal sanctions, or to deny him the protection of the law if the doctor breaches the contract (for example, by not providing the medical treatment which the patient paid for). Likewise, the alternative, for the belligerent state, would be to be denied the protection of its own laws if the mercenaries or PMCs it has hired default on their contracts, as well as protection from interference, on the part of other states, with its attempt to secure its own survival. And yet, just as the patient's interest in remaining alive surely deserves the twin protection of a claim and a power, so does the belligerent's interest in its own survival.

### *The Objectification Objection*

The motivational objection, which is the most familiar of those deployed against mercenarism, focuses on mercenaries rather than their employers. By contrast, the objectification objection targets the latter: according to the objection, hiring mercenaries is morally wrong in so far as it consists in treating individuals as little more than both killing machines and cannon fodder. As Kant puts it, 'the hiring of men to kill or to be killed seems to mean using them as mere machines and instruments in the hands of someone else

<sup>23</sup> Coady, *Morality and Political Violence*, pp. 218–19.

(the state), which cannot easily be reconciled with the rights of man in one's own person.<sup>24</sup> Similar arguments were raised in Britain at the time of the American War of Independence, when Britain had to decide whether or not to recruit German mercenaries to its cause.<sup>25</sup> Interestingly, the objection is sometimes made against PMCs – with the further twist that those companies, motivated as they are by the search for greater profits, are prone similarly to disregard their employees' welfare. It has thus been alleged by the families of the four Blackwater employees, who were ambushed, killed and dismembered in Fallujah on 31 March 2004, that their employers had assigned them to a highly dangerous mission with hardly any protection.<sup>26</sup>

Although the objectification objection is not always meant to condemn mercenarism while endorsing standing armies, it is nevertheless tempting to suppose that states are less likely to treat their own uniformed soldiers as killing machines and cannon fodder – particularly democratic states whose rulers are accountable to citizens, and particularly in an age where body bags bring home the true horrors of wars fought in far-flung corners of the world. The point, however, should not be overstated, for two reasons. First, non-democratic regimes are not noted for their respect for the lives of their soldiers: the objection thus applies to those regimes *as well as* to the use by the state of private armies, and there is nothing *distinctively wrong*, with respect to the objectification of soldiers, about the latter.

Secondly, the objectification objection works best against practices that are concomitant to the hiring of private armies – such as the practice of not taking due care with mercenaries' lives. But it does not weaken the claim that states have the right to turn to private soldiers or, for that matter, the claim that PMCs have the right to procure private armies. By analogy, the claim that men who visit prostitutes are likely to treat them in abusive ways does not entail that buying sexual services *per se* ought to be criminalized; nor does it entail that transactions with prostitutes ought to be regarded as null and void.

In fact, all that the objectification objection does (and that is in fact considerable, if off target) is support the view that states have a duty of care to the private soldiers whom they hire – just as they have a duty of care to their armed forces. More specifically, they have a duty to deploy them in accordance with the *jus in bello* requirements of proportionality (whereby the harms done by a particular tactical decision must not exceed the good it brings about) and necessity (whereby states should risk soldiers' –and civilians' – lives if and only if it would serve their (just) ends.) States which fail in that duty are morally guilty of wrongdoing, lack the power to contract with private soldiers if they fail to set out the ways in which they will discharge their duty of care to the latter, and are morally liable for their negligence. States that abide by the aforementioned requirements cannot be charged with moral wrongdoing simply for recruiting private soldiers rather than, or alongside, regular forces. Similar considerations apply to PMCs: those that treat their employees as little more than profit-making and fungible entities lack the right so to

<sup>24</sup> I. Kant, 'Perpetual Peace', in H. Reiss, ed., *Kant – Political Writings*, 2nd edn (Cambridge: Cambridge University Press, 1991), p. 95. (See also Wilfred Burchett and Derek Roebuck, *The Whores of War* (Harmondsworth: Penguin, 1977), for a similar objection in the context of the use of mercenaries in Africa in the 1970s.) According to Kant, the important difference is not between private and standing armies but, rather, between both kinds of armies on the one hand and occasional citizens' armies on the other. He claims that standing armies should be abolished, because 'they constantly threaten other states with war by the very fact that they are always prepared for it' ('Perpetual Peace', p. 94).

<sup>25</sup> See Percy, *Mercenaries*, pp. 152–3 and 160.

<sup>26</sup> See Scahill, *Blackwater*, chaps. 5 and 13.

employ them, and, thereby, the right to contract with states for their use. However, those that fulfil their duty of care to their employees are left untouched by the objectification objection.

### *The Profiteering Objection*

A third objection to mercenarism invokes the fact that individual mercenaries and PMCs live off the suffering of others. More recently, PMCs have been criticized for profiteering from the devastation brought about by war: they make a profit by sending out private armies that will cause considerable damage and destruction; they then make further profits by offering their protection services to the multinational corporations subsequently entrusted by belligerents with the task of reconstructing the country. Put bluntly, they get paid vast amounts of money for assisting in the reconstruction of countries which they were paid similarly vast amounts of money to help destroy. And even if they do not contribute to causing such destruction in the first instance, they nevertheless profit from the injustices that war victims suffer.

Here again, the objection may well have a point in so far as it targets current practices by states and PMCs, particularly in Iraq.<sup>27</sup> Its point is limited, however, for although it is true that PMCs do benefit from war and its attendant unjust practices, so do weapons manufacturers and firms that supply armies (whether regular or private) with food and protective clothing. In fact, a vast range of private firms benefit from other people's suffering, such as companies that manufacture medical equipment, private medical practices, and firms that provide the means (such as helicopters, life-saving equipment, engineering skills) for humanitarian relief, etc. Indeed, many professions would not exist *but* for the fact that injustices have been committed – foremost amongst which is the legal profession. Yet, to claim that those private firms, therefore, lack the right to contract with states for those goods and services seems rather extreme. By the same token, the fact that PMCs benefit from the suffering and destruction wrought by war cannot alone render their activities morally impermissible. In order to succeed, the objection would have to show that there is something *constitutively* wrong about PMCs' profiteering, which being a lawyer or a manufacturer of medical equipment lacks. Yet, it is not clear how it could establish that. The most obvious move that the objection could make, at this juncture, would be to insist that there is something inherently wrong about making a profit from killing, or helping to kill, others. By contrast (it might say), a factory that manufactures surgical instruments helps to save people's lives without thereby contributing to the deaths of others as a means to do so; likewise, there is nothing inherently unjust in helping people seek rightful redress through the courts. However, that putative move would fail. For surely, a firm that knowingly sells surgical instruments to doctors who practise surgical experimentation on non-consenting patients lacks the right to do so; likewise, a corrupt lawyer who helps his mobster clients defraud the state out of millions of pounds in owed taxes is not acting within his rights. In just the same way, a PMC lacks the right to hire private soldiers and offer their services to contracting states if the war in which it fights is unjust. However, if the war is just, so that the deaths thus caused are not wrongful deaths, there is no reason for concluding on the aforementioned grounds that the medical factories and lawyers have the right to operate while PMCs do not.

<sup>27</sup> This, in effect, is the thrust of Scahill's critique of Blackwater's activities. See his *Blackwater*, esp. chap. 13.

### *The Loss-of-Control Objection*

The fourth objection to mercenarism applies neither to individual mercenaries nor to PMCs but, rather, to states. It avers that by contracting with either kind of agents, but especially PMCs, states lose exclusive control over the decision to use violence, as well as over the agents by which it is used. And yet, the objection claims, there are good reasons for granting states that kind of control. For states, in so far as they represent as well as articulate their members' interests, are more likely to resort to, and control, violence for the sake of the common good, rather than in defence of private interests. But when a state entrusts a PMC with the task of fighting its wars or assisting in the prosecution thereof, it is vulnerable to be unduly influenced by the corporation over the conduct of its foreign policy. It is also unable effectively to control the behaviour of the corporation's employees, since the latter are accountable to the corporation, and not to the state itself: by contrast, a regular soldier is liable to being court-martialled if, for example, he commits exactions against enemy civilians. Finally, a state that routinely appeals to PMCs as a means to resolve military conflicts is in danger of becoming over-reliant on such firms at the expense of its own forces, which in turn might undermine its ability to promote its own interests when the latter conflict with PMCs' profit-driven goals. In other words, by hiring private armies, the state fails to do that which it is mandated to do, that is to ensure that violence is used abroad only for the sake of the common good, and in compliance with the laws of war. In so doing, it is guilty of a wrongdoing – and one of such magnitude that its interest in so acting can be protected neither by a power to contract with PMCs nor by a claim to do so.<sup>28</sup>

The objection draws considerable strength from the ways in which, in practice, nations such as the United States are alleged to have given private military corporations such as Blackwater some input into American foreign policy. Likewise, Paul Bremner's aforementioned decision to grant Blackwater employees immunity from prosecution for acts perpetrated in Iraq has done little to assuage the worries of opponents to mercenarism. However, proponents of the objection should beware the risk of overstating their case: any potential belligerent, including states, must seek advice from military and security experts when deciding whether or not to resort to war – if only because those experts, whether members of the army or civilians, have a better claim to know whether a particular military course of action has a reasonable chance of success. Including the actors who are not elected leaders into the design of security policy is, therefore, essential. What the objection must show, thus, is that *private* military contractors acquire undue influence over decisions that are the state's alone to take. The difficulty, of course, is that whether they do so is entirely contingent on the facts of the cases. As a result, the objection is vulnerable to the counter-claim that proper regulation might succeed in mitigating the problems arising from belligerents' loss of control over the transnational use of force. Such regulatory measures might include, *inter alia*, clear rules for what constitutes an acceptable mercenary activity, licensing regimes similar to those that already regulate the arms trade, providing adequately for the prosecution and sanction of actors who fail to comply with those measures, as well as publicly funding electoral campaigns so as to deprive corporations of the means of leverage over presidential candidates. Moreover, account should be taken of the fact that

<sup>28</sup> For a study of the ways in which PMCs have been able to influence US foreign policy, see Avant, *The Market for Force*, esp. chap. 4, and D. Shearer, *Private Armies and Military Intervention* (Oxford: Oxford University Press, 1998), pp. 34ff. For worries about the loss of accountability attendant on states' decisions to use PMCs, see, e.g., Singer, *Corporate Warriors*, chap. 10, and Pattison, 'Just War Theory and the Privatization of Military Force', pp. 150ff.

PMCs, like all other major corporations, are global in scope, which in turn requires a transnational regulatory framework. Under those conditions, it is hard to see on what grounds one can deny states a right to hire a private army.<sup>29</sup>

Moreover, the objection supposes that states have compliant and effective armed forces at their disposal. Quite often, however, they do not, and are at the mercy either of their own soldiers or of armed minority rebel groups that operate within their borders, more often than not with the assistance or complicity of other states. In such cases, the state's decision to hire a private army will help it strengthen its control over the use of violence, rather than undermine it. Thus, it is often argued that Sierra Leone, which was blighted by civil war in the 1990s, was able to end the war only once they had brought Executive Outcomes in. Likewise, it is also argued that Croatia, when under attack by Serbia, was able to obtain some military successes in 1995 after entrusting Military Professional Resources Inc. with the task of training and restructuring its troops. Under those conditions, and to reiterate a point made earlier against the motivational objection, when a state can defend itself only with the help of private soldiers, denying it, and its people, the right to hire a private army is tantamount to denying it the right to avail itself of the resources it needs for collective self-defence. To insist on doing so *simply* on the basis of the status of such resources is a piece of fetishism.<sup>30</sup>

### *The Neutrality Objection*

At various points in this article, I have argued for a duty not to interfere with a decision by a mercenary or a PMC, respectively, to offer or procure lethal services, as well as a duty not to interfere with a state's decision to hire them. If states  $S_1$  and  $S_3$  are at war,  $S_2$  ought not to make it a criminal offence for its individual members to offer their military services to  $S_1$ , or for a PMC to operate from within its territory. In addition,  $S_2$  ought to recognize as valid under the relevant statute the employment contracts passed between individual mercenaries and PMCs.

The neutrality objection takes issue with that view. It claims that  $S_2$  not only may interfere with its own members, PMCs, and, thereby,  $S_1$ , but also that it ought to do so, on the grounds that failure to thwart mercenary activities is tantamount to breaching the principle of neutrality. According to the principle, states ought to remain neutral between belligerents whom they have not explicitly undertaken to assist (typically through a treaty.) For  $S_2$  to allow some of its members to offer their military services to  $S_1$  in the latter's war against  $S_3$  is to fail to remain neutral; as would be  $S_2$ 's decision to let PMCs take sides in that war, from within  $S_2$ 's territory. If the objection is correct, then neither freelance mercenaries nor PMCs have a right to offer or procure lethal services – services which states themselves do not have the right to buy.

Historically, there is strong evidence to suggest that the norm against mercenarism evolved partly as a result of rulers' awareness of the risks which their subjects' mercenary activities abroad posed to national interests.<sup>31</sup> However, the neutrality objection is both too narrow and too broad. It is too narrow, in so far as it fails to target the practice by a

<sup>29</sup> For examples of ways in which to regulate PMCs, see, e.g., Avant, *The Market for Force*, chap. 4; Singer, *Corporate Warriors*, chap. 15; and Chesterman and Lehnardt, eds, *From Mercenaries to Market*.

<sup>30</sup> See Percy, *Mercenaries*, pp. 218–19, and Shearer, *Private Armies and Military Intervention*, chap. 4, for a strong argument along those lines. See Singer, *Corporate Warriors*, chaps 1, 7 and 8 for discussions of the cases of Croatia and Sierra Leone.

<sup>31</sup> See, e.g., Thomson, *Mercenaries, Pirates, and Sovereigns* (Princeton, Conn.: Princeton University Press, 1994), esp. chap. 3.

state of hiring its own nationals as mercenaries. To be sure, if mercenarism consists in hiring *foreign* nationals, then it is vulnerable to the objection. As we saw in the first section, however, this definitional move is not convincing, since (to repeat) it implies that an American employee of Blackwater who fights in Iraq is not a mercenary. Moreover, the objection is too broad, in so far as it also rejects, by implication, the enlistment by individuals into the army of a foreign state. Of course, it is true that a number of international conventions (such as the 1907 Hague Convention regarding the Rights and Duties of Neutral Powers) and domestic laws (such as the 1870 British Foreign Enlistment Act) bar individuals from so doing. The difficulty, though, is that by the same token, France and Britain, to name but those two, would have been morally entitled, indeed would have been under a moral duty, to block enlistment by their own nationals into the International Brigades during the Spanish Civil War. It is worth noting, in fact, that the British government did not, in that instance, enforce the Foreign Enlistment Act against British volunteers who went to Spain. Whatever their reasons might have been for allowing enlistment in that war, the claim that they were under a moral duty to enforce the Act pushes the requirement of neutrality too far, for reasons to be considered presently.

The neutrality objection, then, only works, if it works at all, against some kinds of mercenarism, but not all of them. In any event, it does not work. It assumes, first, that states ought to remain neutral, and, secondly, that they are accountable for the activities of their individual members, as well of the corporate entities that act from within their territory. Both assumptions are problematic.<sup>32</sup> Take the latter. It is simply not true that an act of killing carried out by a national of a state implicates that state (assuming of course, as is the case here, that the killing is not carried out on the latter's authority). If Green, a citizen of Britain residing in Germany, murders a German for political motives, Britain will not be deemed responsible by the German government for that act simply in virtue of Green's nationality. Why should it be any different in the context of a war?

The objection's first assumption does not fare much better. The view that a state may never take sides in a war unless bound by a prior treaty is tantamount to claiming that someone may never take sides in a conflict opposing two individuals unless bound by a prior promise, even when one of them is under a lethal threat at the hands of an unjust attacker. But if a victim of an attack has a right to kill her unjust attacker in self-defence, then surely she also has a right to ask a third party for assistance.<sup>33</sup> And if that is the case, then the latter may come to her help. By analogy, then, if  $S_1$  is under an unjust threat from  $S_3$ , and if it is entitled to wage a war of self-defence against the latter, *prima facie* it is also entitled to call for  $S_2$ 's help. One way in which  $S_2$  may act in defence of  $S_1$  (for example) is by not forbidding its own members to offer their services to  $S_1$ , and by allowing PMCs to operate within its territory.

The foregoing points imply that  $S_2$  ought not to come to  $S_1$ 's assistance, even in those limited ways, if  $S_1$ 's war is unjust. This suggests that the neutrality objection ought to be recast as the claim that a state may not facilitate the commission by (some of) their members of wrongdoing against another state, in that instance,  $S_3$ .<sup>34</sup> However, the objection so recast does not undermine mercenarism itself so much as the wrongful uses to which its actors sometimes put it. As such, it is wholly compatible with the view I have

<sup>32</sup> Burmester, 'The Recruitment and Use of Mercenaries in Armed Conflicts', pp. 41–7.

<sup>33</sup> For a fuller argument to that effect, see my 'Permissible Rescue Killings', *Proceedings of the Aristotelian Society*, 109 (2009), 149–64.

<sup>34</sup> Burmester, 'The Recruitment and Use of Mercenaries in Armed Conflicts', p. 44.

defended throughout this article, namely that *if* the war is just, then there is little reason to deem marketized soldiering morally unjustifiable.

#### CONCLUSION

To conclude, I have argued that if the war is just, individuals have the right to hire themselves out for military service; states have the right to contract with them for that purpose; and private military corporations have the right to act as intermediaries between them. Under those conditions, mercenarism, whether it involves freelance mercenaries and states, or takes the form of a triangular relationship involving PMCs, is morally legitimate. As I have also noted, however, once the war has started, private soldiers and PMCs should be treated on a par with uniformed soldiers and public military organizations.

I should like to end by sketchily addressing three worries concerning the article's conclusion.<sup>35</sup> The first worry is that, extending the right to fight in war to private actors would in all likelihood increase the range of actors who take part in unjust conflicts, since PMCs and mercenaries are likely to not be too concerned with the justice, or lack thereof, of the cause for which they are hired: more generally put, the more actors are allowed to kill in war, the greater the incidence of unjust violence in the world. Now, I agree that if, as a matter of fact, the use of PMCs and mercenaries to fight on the same terms as regular, uniformed soldiers were to lead to increased levels of violence, then that would provide the international community with a good reason, all things considered, to outlaw them. However, the international community should also, by that token, impose similarly harsh sanctions on the use by states of their own armies to further unjust ends. If diminishing levels of unjust violence is a good reason to narrow the range and number of military actors (as it surely is), then it applies to all (and only) those actors who engage in such violence, whether or not they are uniformed soldiers of state armies, or private military actors. In other words, faced with that particular worry, one should uphold the moral parity thesis (whereby mercenaries ought to be treated in exactly the same way as regular uniformed soldiers), not jettison it.

And yet, the second worry is that the moral parity thesis trivializes the case for mercenarism. Put differently, once constrained by the requirements of a just war, mercenarism is not a distinctive institution, and providing a justification for it is not such an important task after all. Perhaps that is so, but in the light of the standard *moral* objections raised against mercenarism, it is worthwhile to show that, under those conditions at least, it is morally justified.

The third worry is that my argument for mercenarism implies that a vast range of tasks, which we normally think should be performed only by the state, can in fact be outsourced to private actors – such as adjudicating disputes between citizens, running prisons, policing our neighbourhoods, etc. By way of reply, let me simply make the following observation: even if the arguments from freedom of occupational choice and the ethics of assistance which I deploy here support the privatization of other essential services, there might nevertheless be some disanalogies between public and private provision in those cases, such that the latter lacks justification, all things considered. In particular, it might be that the right to punish is different from the right to kill in such ways that privatizing the latter does not commit us to privatizing the former.

<sup>35</sup> All four were raised, in one way or another, at the various meetings where I have presented earlier versions of this article. I am grateful to an anonymous *Journal* referee for pressing me on the first one, which also arises in connection with another claim I defend elsewhere, to wit, that private individuals as such are sometimes permitted to go to war in defence of their rights. See my 'Cosmopolitanism, Legitimate Authority and the Just War', *International Affairs*, 84 (2008), 963–76.