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States as Clients of Private Military and Security Companies – the Legal Limits of Outsourcing in the Curious Case of Finland

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Abstract

In recent years the Finnish state has developed a practice of contracting Private Military and Security Contractors (PMSCs) to provide security for Finnish officials working in high-risk locations outside Finland. These developments have gone largely unnoticed in the public eye and academia and the article seeks to address the situation by examining the legality of the current practice of the Finnish state in relation to PMSCs. A theoretical framework is presented where this question is situated into a context where outdated legislation concerning states and war coexists with novel forms of conflict and types of actors taking part in these conflicts. Reasons behind the rise of PMSCs during the post-Cold War are also considered and regulations applicable to them under international law are briefly reviewed.

The known facts of the practice of the Finnish state in relations with PMSCs are presented and the legality of this practice is examined from the viewpoint of the Finnish Constitution. It will be argued that in the light of the limited knowledge available concerning the exact practices of the Finnish state in relation to PMSCs, it is possible that the current practice is in conflict with Article 124 of the Finnish Constitution which specifically regulates delegating tasks involving exercise of public powers to private actors.

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Full Article

1 Introduction

Private Military and Security Companies (PMSCs) were becoming a topic very much in vogue among international lawyers and international relations scholars during the early years of the new millennium.[2] The sudden emergence of novel private actors into the zones of post-Cold War conflict naturally began to draw considerable interest from academics of various stripes. The ambiguous legal status of PMSCs, often accompanied by a rather questionable role in their respective theatres of war, served to further heighten this interest.[3] Especially after the prominent role taken by PMSCs in the Afghan and Iraq wars, and increased public concerns that they were "modern mercenaries" operating in a "legal vacuum," this issue also began to receive more widespread attention in the policy circles.

Consequences of these developments were felt in a limited way even in such unexpected places as Finland. By 2009 a report "on the relevant regulatory framework in Finland on private military and security companies" had been commissioned. It was to become one of several entries to a database collected as a part of a larger European Commission funded research project charting "the existing national legislations related to private military and security companies (PMSCs) in a number of Member States of the European Union (EU) and third countries."[4] Broadly speaking, these reports focused on two regulatory subjects: on the companies and their employees that provide services relating to military and security matters and on their clients who contract these services and whom more often than not are states. The finalised version of the Finnish report, which was naturally duly concluded,

2 The Montreaux Document definition (Preface, Para 9) is adopted for the purposes of this paper, and thus PMSCs are defined here as "private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel."

3 Most frequently cited early works include: Singer 2003, Avant 2005 and Chesterman & Lehnardt 2007.

4 Quirico 2009, p. 1. The project's full title is: 'Regulation of the Privatization of War: the Role of the EU in Assuring Compliance with International Humanitarian Law and Human Rights,' or PRIV-WAR for short.

begins with the following two observations concerning the practical significance of such investigation for Finland:

> "[...] the Finnish government has no outsourcing practice when it comes to private military and security services. This means that there are no official Finnish policies on outsourcing to PMCs/PSCs and no contracts available for evaluation. The lack of Finnish private military and security companies also shifts the focus of the report on individuals[.]"[5]

Four years have passed since those lines were typed, and during that time both observations have become outdated: the Finnish state has developed a practice of contracting PMSCs in high-risk locations and at least two Finnish PMSCs have begun to operate.[6] More importantly for the purposes of this paper, there is readily available evidence that suggests that at least the Finnish Ministries of Foreign Affairs and Defence have resorted to contracting PMSCs to counter local security threats in high-risk destinations outside Finland.[7] What still remains, however, is the lack of official policy.

Apart from the non-existent official policy, the Finnish report also seems to indicate that there is no specific domestic legislation that would regulate the use of PMSCs by the Finnish state or empower certain officials to make decisions in terms of contracting their services.[8] In all probability, and given its relative novelty, the current practice in relation to PMSCs has grown out of efforts to adapt to circumstances and responsibilities hitherto largely unfamiliar to Finnish government or its officials. These have been recently encountered most notably in Afghanistan where hiring PMSCs to provide security for governmental officials working on the ground has become a necessity. The use of PMSCs by the Finnish state also seems to have gone largely unnoticed in the public eye and has not sparked any scholarly or political debate to date. One can only speculate that this at least partially

5 Creutz 2009, p. 1.

6 These are "Frontline Response Finland Ltd" and "Twenty Committee Risk Management," both signatories to the International Code Conduct for Private Security Providers, which is the leading self-regulation initiative of the PMSC industry. At least Frontline seems to be a serious and active enterprise.

7 For the Ministry of Foreign Affairs: Huhta, Kari 2011, 'Suomen suojelluin mies,' *Helsingin Sanomien Kuukausiliite*, 12/2011, pp. 56-63, and for the Ministry of Defence: *Kansallisen Montreux-työryhmän loppumuistio* [The Final Memorandum of National Montreaux Working Group], p. 7, available at: http://www.um.fi/public/download.aspx?ID=118837&GUID={FDA3361A-2841-4BEA-8DB0-2DA45DDCFEA4} (accessed 24.10.2013).

8 Creutz 2009, pp. 9, 12–14.

reflects the limited understanding that Finnish politicians have of the contemporary conflicts they have deemed wise to involve Finland in, as well as of the role bestowed to Finnish officials in them as they try to carry out their duties. If this is the case, then the possible unconstitutionality of contracting PMSCs without democratic oversight or any basis set out in law, which will be considered in some length below, is only part of a larger problem: the Finnish state is entering 21st century conflicts equipped with outdated legislation built on 20th century understandings. If generals are always ready to fight the last war, it seems that the same goes for legislators and lawyers.

Changed circumstances naturally warrant a re-assessment of "the relevant regulatory framework in Finland on private military and security companies." Here the focus will be on the practice of the Finnish state and the legality of that practice, not on the infant Finnish PMSC industry. Accordingly, the main task of this paper is to examine the legality of the current Finnish government practice of contracting PMSCs to provide security in high-risk locations outside Finland. Regulation applicable to this practice can be sought from two sources; on the other hand international law poses certain obligations to states that use the services of PMSCs and on the other Finnish national legislation contains articles which regulate deployment of force abroad and outsourcing of governmental functions. In brief, the argument advanced in this paper is that the obligations arising from the Finnish Constitution set certain limits on the practice of the Finnish government in relation to PMSCs and these obligations are more far-reaching than those emanating from international law. Moreover, in the light of the limited knowledge available concerning the intricacies of the process that leads to a contract between the Finnish state and a PMSC, as well as on the exact duties carried out by PMSCs on behalf of the Finnish state, it is possible that the current practice is in conflict with Article 124 of the Finnish Constitution.

The second important, and more universal, theme of this paper is intimately linked to the Kantian notion – later developed by theoreticians of democratic peace – that the adoption and preservation democratic responsive government and "republican constitution" based on accountability are cru-

cial steps in preventing wars.[9] There is already an abundance of literature on PMSCs written by international lawyers from the viewpoint of international law, but contributions that approach state practice concerning PMSCs from the viewpoint of constitutional law seem to be few and far between.[10] More research should be devoted to asking how domestic legal processes that result in contracts with PMSCs differ from those regarding conventional troops and how do the possible differences affect the responsiveness and accountability of governments.

This being said, it should be emphasised that it is not the aim of this paper to provide a comprehensive description of all of the state obligations regarding PMSCs arising from international law or present a detailed analysis of Article 124 of the Finnish Constitution. Apart from the constraints of space which do not allow this, both topics have already been covered well by other scholars working in their respective fields.[11] As stated above, the focus is on the legality of the practice of the Finnish state.

This paper will proceed as follows: I will begin by delving a little bit deeper into the problematic relationship between the state, legalisation of private violence and international and constitutional law. A brief theoretical sketch presented in this chapter will set the tone for the remainder of the paper and hopefully also go some way in clarifying why PMSCs have become a challenging regulatory subject for both international and constitutional law. I will then move on to briefly consider the reasons behind the rapid ascent of the PMSCs into their current prominence and what rules and obligations does international law pose to states such as Finland contracting their services. This is done primarily because it will give the reader a better understanding of the nature of PMSCs and some background on how their activities are being regulated in international law. After this I will finally turn to considering the current Finnish government practice of contracting PMSCs and the legality and constitutionality of that practice from the viewpoint of the domestic Finnish legal system.

9 Kant [1795] 1977, pp. 93–130, see also: Doyle 1983.
10 For one notable example of these contributions see: Michaels 2004, pp. 1048–1083.
11 For international law see: Cameron & Chetail 2013, and for Article 124 of the Finnish Constitution see: Keravuori-Rusanen 2008, Kerttula 2010.

2 The State, Law and Legalisation of Private Violence – Some Preliminary Remarks

Even with the risk of stating the obvious, it is necessary to begin by asserting that the inability of a legal order to adjust to changed circumstances or novel phenomena, such as the emergence of PMCSs, is not solely a Finnish problem, but rather an inherent condition of law as a human construct and thus a concern of all states ruled by law. In Western states, such as Finland, this law is created as a result of a political process, which itself is regulated by law. This political process is, in turn, influenced by the way politicians and the electorates they are accountable for understand the world; how they view the human relations within societies and – on the international level – the interactions between these societies. In short, law is based on certain basic assumptions on how the world that it seeks to regulate works. When the world changes but the basic assumptions do not, law as a system begins to encounter phenomenon that it does not recognize, does not know how to regulate and finally seizes to function properly.[12] The confusion caused by the arrival of the modern PMSC can be to a large extent credited to the workings of similar dynamics. Namely, to the dissonance between regulation built on certain outdated assumptions concerning the relationship between states and violence and the emergence of a phenomenon that defies these assumptions.

State-led violence is usually divided into two different categories according to its victims: to violence that states, or rather their officials, inflict on their own citizens and to violence they direct against foreign nationals. If strict legal definitions are overlooked for a moment, the latter activity is usually known as war, whereas the former is known with variety names ranging from policing to oppression and terror. Now, if a group of social scientists are led into a discussion on the changing relationship between the state and violence in the modern era, three quotations will inevitably be uttered at some point as this discussion proceeds. Firstly, Carl von Clausewitz's famous dictum that "war is a continuation of politics by other means,"[13] secondly

12 This rather self-evident notion of the time bound nature of law has famously been discussed in the Finnish literature by Kaarlo Tuori (2000, pp. 163–234).
13 Clausewitz [1832] 1989, p. 87.

Max Weber's definition of a state as "a human community which (successfully) lays claim to the monopoly of legitimate physical violence within a certain territory"[14] and lastly some paraphrased version of Immanuel Kant's argument that a republican constitution of each state is a necessary requirement of "perpetual peace" between states.[15] These utterances are important because they have had a profound effect on the basic cognitive framework that has informed past legislators, lawyers and thinkers, and which still looms behind much of the current legislation regulating the use of force by states.

When these statements are considered side by side, a rough outline of the cognitive framework can be sketched. In this framework, war is viewed primarily as a business of states. Moreover, violence in the form of war is seen as an instrument used by states to achieve a certain political end.[16] Defining the end that the war serves is to be left to the – preferably civilian – government and this government and its political calculations should continue to guide the conduct of the campaign until peace is secured. Shortly put, the employment of violence is and should be directed by the rational political calculations of the political leadership of the state.[17] In fact, while Weber paid less attention to this, states also have a monopoly on war; the monopoly of violence extends beyond their own citizenry into the international arena.[18] This is to say that states are the only organisations "who can wage war"[19]; with perhaps certain exceptions made with organisations that seek to either control an existing state or establish statehood for themselves.[20]

14 Weber [1919] 2005, pp. 310–311.
15 Kant [1795] 1977, pp. 93–130, see also: Doyle 1983.
16 The instrumental nature of violence has been famously discussed by Hannah Arendt (1970, pp. 35–55).
17 Nielsen (2001, p. 28) summarises Clausewitze's take on the issue as follows: "[a]s Clausewitz notes: ". . . it is a matter of common experience that despite the great variety and development of modern war its major lines are still laid down by governments; in other words, if we are to be technical about it, by a purely political and not a military body." Not only do political leaders establish the political aims, which "are the business of the government alone," Clausewitz also expects them to establish the size of the army, and the system of supply. The commander will accept the resources provided by the government, and make the best use of them." This being said, the debate over Clausewitz is naturally far from over, and my take on him has been largely informed by the work of Raymond Aron (1983, see especially pp. 95–117), who sees Clausewitz as an advocate for civilian control of the military.
18 Weber [1919] 2005, pp. 309–315, see also: Avant 2005, pp. 1–5.
19 Mushkat 1987.
20 Ibid.: De Lupis 1987, pp. 33–50.

This monopoly, however, must be legitimate. As Weber pointed out, this legitimacy can flow from variety of sources.[21] When it flows from the fact that the state is a republican state, its leaders are elected democratically, subjected to legal regulation and held accountable to the electorate, then the state is less inclined to exercise violence abroad, i.e. make war. This is mostly due to the fact that when given the opportunity to choose whether war is embarked upon or not, citizens "will have a great hesitation in embarking on so dangerous an enterprise.[22]" In practice this means that there must be constitutional and other legal checks in place that allow the citizens or their representatives to have their say when the question of employing violence abroad is contemplated.

These are, then, some of the basic assumptions that constitutional and international law rest on when it comes to states and violence. Crudely put, international law rests on the assumption that warfare is the sole right of the state and it is to be directed by its government and conducted by its officials, whereas constitutional law is similarly based on the assumption that states can exercise violence – at home and abroad – only to the extent that their legal orders allow them to do so. Violence is a tool of rational policy and decisions to wield that tool are to be left to the government, which in turn is constrained by domestic legal process and accountable to its constituents. It could be said that one of the primary facets of the development of rule of law within states and international law outside and between them has been a process of checking the state's ability to use its officials to inflict arbitrary violence on its own citizens and those of other states. But this also means that the chains of accountability and attributability that help to provide these checks were designed primarily to only connect the state and her officials to the possible victims of their transgressions, and that domestic legislation, which deals with the sanctioning and regulating the use of force by

21 Weber [1919] 2005, pp. 310–311. I am referring here to what Weber termed as "legal-rational authority," which according to him is not necessarily democratic.

22 Kant [1795] 1977, p. 100. Again, by "republican" Kant was not necessarily referring to democratic governance as it is currently understood.

the state, is mostly concerned with the use of state officials in deployment of this force.[23]

Thus, the rise of the PMSC is a phenomenon that defies these basic assumptions as well as legislative designs built on them. When a state official is replaced with a private contractor and the legal process with a commercial contract the system seems to break down.[24] Consequently, the entry of private actors into the field of legalized violence is sometimes interpreted as a sign of the erosion of the states' long held monopoly and remedies to this problem are desperately sought from various sources of international law. This, however, is a misguided approach as states themselves are the primary customers of PMSCs.[25] The rise of PMSCs does not diminish the sovereignty of states nor put into question their monopoly over violence, since states are not helpless victims of PMSCs. Rather, on most occasions PMSCs are an instrument used by governments to achieve something that they could not formerly do or found very difficult to achieve. From a legal point of view, one – and perhaps a more fruitful – way to approach the hiring of PMSCs by states is to view it as an attempt to escape the domestic legal constraints that restrict the state's ability to exercise violence abroad without the consent of their citizens and free themselves of responsibility on the international level when things go awry. Shortly and somewhat polemically put, as a novel actor that is largely unfamiliar to both international and

23 As Jose Gomez del Prado (2010, p. 3), the Chairperson of the UN working group on the use of mercenaries, puts it: "[t]he concept of collective security enshrined in the UN Charter is based on the principle that each of its Members, as sovereign *State, has the control of a given territory and the monopoly of the use of force and that the legal responsibility for the use of force, internally (by the police), or externally to defend its territory militarily (by the army) rests with the State* [italics by the author]." Emphasising the state monopoly on violence is an often recurring theme in much of the work of the said UN Working Group. Many scholars have also tackled with this issue, see for example: Krahmann 2010, pp. 21–51, Avant 2005, pp. 1–10, Singer 2003 pp. 3–11.

24 Or as Lenhart (2007, p. 4) puts it: "[a]s private commercial actors emerge as significant military actors serious questions are raised about the viability of a legal system premised on the assumption that states conduct war, provide internal and external security, and organize their military."

25 Exact figures that would show the dependency of PMSCs on public contracts together with the share of revenue they derive from them are extremely hard to come by. A survey based study conducted in 2007 (Messner & Cracielly 2007, p. 20) found that "[g]overnmental entities account for 87 percent of companies' operations." This figure should be taken with a pinch salt however, as the definition of a private security company differs somewhat from the one adopted in this paper and the survey study itself is not without its methodological problems. Rather, this figure can only be seen as a rough indicator of the significance of public contracts - as opposed to private ones - for the industry.

constitutional law, the PMSC allows states to outsource responsibility on the international level and accountability at home.

Thus, what we have – again crudely put – are two sets of regulations that constrain and regulate the use of armed force by states: international and domestic, which are both built on foundations that seem ill-prepared to cope with the rise of PMSCs. Moreover, we also have governments that seem willing to exploit this discrepancy. Now that Finland has joined the ranks of these governments, it also must confront the legal challenges that this situation has given rise to. This does not, however, mean that PMSCs or their clients would exist in a complete regulatory void: international law contains concrete and quite clear restrictions concerning the outsourcing of certain tasks to PMSCs and the domestic legal systems of states pose their own limitations to the privatisation of governmental functions. After briefly reviewing existing obligations that states – including Finland – have in relation to PMSCs under international law, I will attempt to show how in the Finnish case shifting our focus to domestic regulation can yield more answers to those in search of concrete regulation.

3 The Rise of Private Military and Security Contractors and International Law

As most scholars writing about this issue feel compelled to point out, PMSCs – or mercenaries as they were formerly called – have existed as long as warfare itself.[26] There, however, seems to be something qualitatively different about the latest resurgence of "mercenarism," even to the extent that some – not least the PMSCs themselves - have challenged the idea that PMSCs can be labelled as mercenaries at all. It should be emphasised that this is not purely a question of semantics, as the label "mercenary" carries significant legal consequences with it to those that fall under this definition in international law.

At least two differences are significant enough to warrant a mention here. The first and more important one is related to the functions that PMSCs perform in contrast to earlier mercenaries: unlike earlier mercenaries, PM-

26 For a concise overview see: Milliard 2003, pp. 1–9.

SCs are rarely allowed to take directly part in combat operations, but rather provide supportive functions such as armed security, logistical support, training and the like.[27] The second difference concerns their organisational form: unlike the ad hoc bands of earlier mercenaries, the contemporary PMSCs "are transnational corporations legally registered which obtain contracts from governments, private firms [and] intergovernmental and non-governmental organizations."[28]

The ascent of these contemporary PMSCs to their current prominence is a result of several trends coming together; or conversely one symptom of larger changes that have been taking place after the end of the Cold War. P. W. Singer, who has written extensively on the issue, emphasises three such trends.[29] The first and foremost among them was the end of the Cold War itself, which led to seismic changes in the global security framework. Cashing in the peace dividend and the downsizing of national armies on both sides of the Iron Curtain meant that suddenly the world market became flooded with a large supply of both military equipment and capable unemployed military personnel, many of whom would quickly move to fill the ranks of the nascent PMSC industry. The end of the Cold War also spelled the end of the relative stability of the bipolar era; many of the local conflicts kept in check by the Superpowers began to heat up and many of their former client regimes began to crumble. Suddenly both supply and demand for the PMSC services began to surge. Second trend concerns the nature of contemporary warfare and conflict, which according to some have taken on a new form that differs significantly from earlier forms of state-led large-scale violence. This, however, is a question much too complicated to be addressed here with the care it deserves.[30] It must suffice to say that contemporary wars are usually drawn out and messy low-intensity conflicts with multiple parties, which have mixed and often confused political and economic goals, taking part in the hostilities. The nature of the Western troops taking part

27 For a good overview see: The Foreign and Commonwealth Office 2002.
28 Gomez del Prado 2010, p. 1, see also: Singer 2001 (p. 191) "PMFs [Private Military Firms] are hierarchically organized into incorporated and registered businesses that trade and compete openly on the international market, link to outside financial holdings, recruit more proficiently than their predecessors, and provide a wider range of military services to a greater variety and number of clients."
29 Singer 2001 pp. 193–198, Singer 2003 pp. 49–73.
30 The reader will do him/herself well if he/she consults two books on the issue, these are: Kaldor 1999 and van Creweld 1991.

in these conflicts and the technological sophistication of their weaponry are such that they have to be supported by a huge number of people performing logistical and security functions.[31] Actual combat operations are interwoven with "state-building" and different kinds of humanitarian and commercial efforts, which has led to a situation where foreign civilians working on these projects – and in need of armed protection – are also present in conflict zones in unprecedented numbers. The last trend emphasised by Singer is the ideological drive towards privatization of even more and more governmental functions. This trend is even more pronounced in the Anglo-American world, governments of which are also more ready to rely on PMSCs than other western governments.[32]

A further development can be added to this list as well, which is the increased risk aversion of Western governments in terms of accepting casualties among their own troops or among foreign civilians that find themselves trapped in conflict zones. Most of the current conflicts do not pose existential threats to their Western participants, and justifying even limited participation in them by referring to national interest has become increasingly difficult. Thus electorates at home are less willing to tolerate large troop involvement and even less prepared to accept large number of casualties among their own armed forces. In most Western states the military options available for governments are also conditioned by the media, and public opinion that it helps to steer, to a much greater extent than they used to be.[33] It is more convenient for Western governments to inflate troop numbers by contracting PMSCs to carry out certain tasks since the legal process is usually less demanding compared to sending in conventional troops and the possible deaths of PMSC employees are less widely reported and cause less controversy at home. The same goes with possible transgressions

31 As van Creveld (1991, p. 29) puts it, in the last decades "the tails" conducting "maintenance[...], logistics and administration" have grown enormously compared to the actual "fighting teeth" of armed forces. Many of these supportive functions, with out of which the forces could not function in the battlefield, have been left to private contractors.

32 See: Krahmann 2010 for a comparison between US, UK and German practices in contracting PMSCs.

33 Shaw 2005, passim.

of PMCS employees, which are rarely attributed directly to the state that has hired them.[34]

Reasons and trends behind the ascendency of PMSCs aside, some quick numbers are in order to demonstrate their current international significance. At the height of the conflict in Iraq there were over 1 000 00 PMSC employees in that country alone.[35] The business is currently estimated to have an over $100 billion annual global revenue[36] and 708 firms from 70 countries are signatories to the International Code of Conduct for Private Security Service Providers,[37] a self-regulation initiative concocted up by the PMSC industry together with the Swiss government. In short, after the Cold War – in a remarkably short time – a new actor of considerable significance entered the realm of international relations and cognisance of international lawyers.

As often happens in a situation like this, when a herd of scholars rush to study and publish on a novel phenomenon, a veritable cottage industry quickly rose to explain the legal nature and significance of the PMSCs. Scholars toiling away in this industry commenced to dutifully comb through the recognized sources of international law in search of regulation directly applicable to the PMSCs. What they found, to make a long story short, was that the pre-existing rules in international law that appear most promising are those that apply to mercenaries, and although the fit seems far from perfect, much ink has consequently been spilled over trying to determine whether PMSC employees are mercenaries or not.[38] Consequently, the regulation of mercenaries in international law and the applicability of these regulations to the contemporary PMSCs is a field so thoroughly studied that there is little that can be contributed to it here. When it comes to the finding of these studies,

34 As Cockayne (2009, p. 428) puts it; "[t]axpayers are unlikely to take their governments seriously to task for their engagement of PMSCs: the impacts of PMSC behaviour are easily obscured from domestic constituents, and their activities, shielded by the fog of war, leave no black or white legacy behind."

35 Merle, Renea (2006) 'Census Counts 100,000 Contractors in Iraq,' in: *Washington Post*, 5 December 2006, available at: http://www.washingtonpost.com/wp-dyn/content/article/2006/12/04/AR2006120401311.html (accessed 25.5.2013). Some estimates put the number up to 180 000 in 2007, which would mean that PMSC employees actually outnumbered foreign military personnel in Iraq at that time (Chapman 2010, p. 1050).

36 Spear 2006, p. 11, Gomez del Prado 2013.

37 http://www.icoc-psp.org/About_ICoC.html (accessed 21.10.2013).

38 See for example: Mancini 2010, Fallah 2006 and Scheimer 2009.

although the debate is still raging, a rather broad consensus seems to have developed around the notion that existing international treaties suffer from the same major shortcoming: most PMSC employees fall outside their respective definitions of "a mercenary," which in turn means that these treaties are rarely applicable to the activities of PMSCs.[39] Besides, for the purposes of this paper the legal status of, and regulations directly applicable to, the PMSCs are of only secondary interest compared to the obligations of states that contract their services.

When it comes to these obligations, arguably the most important international regulatory development is the so-called Montreux Document.[40] It is "the result of an initiative launched jointly by Switzerland and the International Committee of the Red Cross,"[41] the primary aim of which was to gather all the existing state obligations regarding PMSCs from various sources of international law into a single document.[42] Thus, the Document contains the most comprehensive statement of "existing international legal obligations of States regarding private military and security companies[43]" as affirmed by large number of state parties, including Finland. It is composed of two sections, former of which sets out binding *lex lata* on the issue and the latter of which contains non-binding "good practices" relating to different issues concerning the dealings of states with PMCSs. It should be emphasised that the Document is "not a legally binding instrument and does not affect existing obligations of States[,]"[44] it only affirms the existence of the antedating obligations that can be found in international law. The ob-

39 The most significant and frequently cited international treaties that mention mercenaries and regulate their activities are the 1977 Protocol Additional to the Geneva Conventions of 1949, and to the Protection of Victims of International Armed Conflicts, the Organization of African Unity Convention for the Elimination of Mercenarism in Africa from 1977 and the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries. See Mancini 2010 for a good comparison between the different definitions of mercenarism rooted in these treaties.

40 Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict.

41 http://www.eda.admin.ch/psc (Accessed 11.11.2013).

42 According to Cockayne (2009, p. 402), these sources include *e.g.* "Geneva Conventions, the ICRC Study on Customary International Humanitarian Law6 the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the UN Code of Conduct for Law Enforcement Officials, the European Union's Arms Export Code, the CIS Model Law 'On Countering Mercenarism'."

43 Montreaux document, Introduction, para. 1.

44 Montreaux document, Preface, para. 3.

ligations of contracting states are listed in the first eight paragraphs, which recall such responsibilities as "due diligence" when choosing specific PMCSs to contract; prohibition to contract PMSCs to carry out "inherently governmental functions;" obligations concerning investigating and prosecuting crimes committed by PMSC employees under international law as well as enacting effective penal sanctions for such persons in breach of international law; the rules concerning the attributability of PMSC actions to the contracting state as well as the duty to provide reparations for actions of PMSCs that have been attributed to the contracting state.[45]

Apart from the inherently governmental functions that cannot be outsourced, and which are referred to in Paragraph 2; "activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner of war camps or places of internment of civilians in accordance with the Geneva Conventions[,]"[46] the Document does not include any regulations that would prohibit states from contracting PMSCs to carry out certain other functions. Thus, while the Document "should not be construed as endorsing the use of PMSCs in any particular circumstance[,]"[47] it implicitly acknowledges that in practice there are very few restrictions in place in international law in terms of this use. Paragraph 7 concerning attributability of PMSC actions to states "recalls the existing rules of attribution in international law, as reflected in the International Law Commission's Articles on State Responsibility."[48] These rules are, again, not new and the question of state responsibility over actions of PMSCs under contract by them has already received some scholarly attention.[49] Constraints of space do not allow going into this question in any great length here, and it must suffice to say that although the Montreaux Document declares that the "Contracting States retain their obligations under international law, even if they contract PMSCs to perform certain activities[,]"[50] it fails to address the issue that there is an evident difference between the extents of these obligations in situations

45 Part One, paras 1–8. For an excellent overview see: Cockayne 2009.
46 Part One, para. 2.
47 Preface, para 7.
48 Cockayne 2009. p. 409.
49 See for example: Hoppe 2008, Kontos 2004, Lehnardt 2007, Cameron & Chetail 2013, pp. 134–287.
50 Part One, para. 1.

where the state uses its own officials as compared to outsourcing the same functions to PMSC employees. Hoppe, who deserves to be quoted in some length, summarises the conclusions of much of the literature on PMSCs and state responsibility when he states that:

> "In comparing responsibility of a state for a classical soldier to all the options for attribution of private conduct, a responsibility gap becomes evident: unless a state outright incorporates the contracted personnel into its armed forces, or the contractors can be regarded as completely dependent on the state (a tough burden of proof to meet), the state will always face less responsibility for acts of those persons than for acts of soldiers, and its responsibility will be harder to prove."[51]

Thus, the Montreux Document gathers the *lex lata* on state obligations relating to PMSCs, but it does not seek to amend or update these obligations to better address a novel regulatory subject. It is only a foundation "on which other regulatory initiatives might be build,"[52] not an independent and timely regulatory framework in its own right. Its main shortcoming is that it does little to solve the problems caused by the fact that most of these obligations were developed long before the contemporary PMSC made its appearance into the scene. Or as Kontos laconically puts it, "State practice with regard to private security guards and the privatized use of force is ahead of normative developments in international law."[53]

In sum then, despite the best efforts of international lawyers, international law seems to provide regrettably little in terms of specific answers, remedies or regulation when it comes to state practice regarding PMSCs. Although international law is in many ways the natural starting point for an investigation concerning PMSCs – insofar as they are foreign actors that are present in conflict zones and to some extent also take part in these conflicts – it is also a rather odd one if one considers how widely their services are used by states. As any textbook on international law will tell you, the main purpose of international law is to regulate the activities of states in the international arena and whatever rules and regulations there are in place are there because states have expressed – in one form or another – their willingness to be bound by them.[54] What currently seems to be lacking is this very will. There

51 Hoppe 2008, p. 1012.
52 Cockayne 2009, p. 427.
53 Kontos 2004, p. 238.
54 See for example: Dixon 2007, p. 3.

is, after all, a reason why the Montreaux Document was not made into a legally binding instrument. Perhaps a more logical starting point would be to admit that PMSCs continue to exist in this regulatory twilight zone because the prevailing situation conforms to the interests of states, because states – on the most part – benefit from the existence of PMSCs and the current ambiguity surrounding them as subjects of international law.

But states and governments are not bound solely by international law nor are they solely accountable to each other; they are also bound by their national laws and accountable to their citizens and electorates. When the services of PMCs are contracted by states, there is an internal legal process that has to be navigated successfully before this issue ever even makes its appearance into the international realm. National laws also differ from international law in significant respects. A general point could be made in relation to the quite different mechanisms that lead to the creation of international law as opposed to domestic laws, and even to the somewhat divergent principles of interpretation, ways of identifying sources of law and so forth.[55] What is more significant here, however, is that whereas international law represents – at least ideally – a broad global consensus on given legal issue, has universal appeal and aims towards harmonisation, national regulation differs from country to country and its content is much more subject to the whims of domestic political balances and peculiarities of local legal cultures. In Finland the legal culture has traditionally worked against the outsourcing of governmental functions, and this naturally also holds in relation to domestic regulation applicable to the PMSCs. This was also noted in the Finnish report referred to in the introduction of this paper:

> "Finland has mostly been an observer in the increased practice of outsourcing military and security services. The reasons behind this are several; to start with it is important to note that Finland has traditionally a strong culture of and basis in governance by public authorities."[56]

55 As Bos (1984, p. 1) puts it: [t]he national and international lawyer, when compared to each other are in very different positions. The former operates in a legal order characterized by a number of luxuries such as the presence of a legislator hierarchically placed above the subjects of law, of courts with obligatory jurisdiction, and of officers charged with the enforcement of judicial decisions. […] [T]he national lawyer, especially in codification countries, hardly ever will be in doubt on "where the law is to be found", nor will he have to indulge in contemplating questions such as "how does law come into being", or even "what is the phenomenon called law.""

56 Creutz 2009, p. 3.

The Finnish hostility towards outsourcing has even found an expression in the Finnish Constitution, which contains an Article that sets strict limits on the privatisation of governmental functions. The next chapter will be dedicated to examining whether the current practice by the Finnish state breaches these limits.

4 Private Military and Security Contractors and the Finnish Constitution

Before examining the substantive content of the Finnish legal system and the possible constraints that it might pose for contracting PMSCs, it is time to describe what little is known about the current practice of the Finnish state in relation to PMSCs. As stated above, in 2009 the report referred to in the introduction of this paper still held that "the Finnish government has no outsourcing practice when it comes to private military and security services[.]"[57] There is, however, evidence that the situation has since changed, at least when it comes to the Finnish Ministry of Foreign Affairs, and evidently also the Finnish Ministry of Defence.

Hard facts about the use of PMCSs by the Ministry of Foreign Affairs are hard to come by as the Ministry remains understandably secretive about its exact practices relating to the protection of Finnish officials working abroad. Thus we are left with newspaper stories and budgetary information, which reveal the existence of these practices but regrettably little else. In the Annual Budget of 2013 the state granted the Ministry of Foreign Affairs appropriation of € 1900 000 under the heading "Security."[58] While this appropriation has grown steadily during the past few years, one thing to note is that given that Finland has a vast network of embassies around the world the amount is actually rather small. How it is being spent remains largely

57 Ibid., p. 1.
58 See: http://budjetti.vm.fi/ (accessed 28.5.2013).

unclear as the Ministry refuses to give details.[59] Practices must vary from country to country, with more involvement from PMSCs, as defined in this paper, in more high-risk locations. Some information can be garnered from a newspaper story, which details how these funds are being spent in Afghanistan to provide armed protection for the Finnish ambassador and other Finnish diplomats. The Finnish periodical *Helsingin Sanomien Kuukausiliite* gives the following account of two PMSC employees on duty protecting the Finnish ambassador in Kabul:

> "Erik and Les are working for a Canadian company and among the elite of their profession. They are calm and discreet in a friendly manner. 32-year old Erik is an exagent of the Slovakian secret services and a former bodyguard to the President. Kabul is calm compared to Iraq, where he has worked as a security guard both in Baghdad and Basra. 40-year old Les has served two terms in the French Foreign Legion."[60]

After being introduced, the two men and a host of their colleagues whose exact number is not revealed spent the remainder of the story riding around Kabul in armoured vehicles escorting the ambassador from a meeting to a meeting. At least Erik is visibly armed and given the security situation in Kabul it is probable that the others are as well.[61] What is more, the final memorandum the Finnish national working group on the Montreaux Document contains the following sentence, which rather explicitly states that the Finnish Ministry of Defence has also contracted PMSCs during crisis management operations:

> "[p]rivate companies are partially responsible for the inspection-/reception (so-called gate hosting) activities related to the guarding of the camps of particular crisis management troops as a part of the arrangements concerning the maintenance and supply of camps belonging to a crisis management operation."[62]

59 E-mail containing an information request was sent to the Ministry of Foreign Affairs on 29.4.2013, and a reply was received on 13.6.2013. In this reply the security director of the Ministry acknowledges that the Ministry "purchases security services from numerous service providers both in Finland as well as abroad." The Ministry refuses to give any further information concerning these services in locations deemed "high threat" by referring to "threat of espionage or terrorism" and Section 24 of the Act on the Openness of Government Activities (1999/621), which allows public authorities to withhold certain information from the public. The e-mail correspondence will be produced by the author upon request.

60 Huhta 2011, (n 6) p. 59. The translation from Finnish to English is the author's own, as it will be henceforth when quoting literature in Finnish.

61 Ibid.

62 Kansallisen Montreux-työryhmän loppumuistio, (n 6) p. 7.

How did these armed men in Kabul and their colleagues manning the gates in undisclosed locations come under contract with the Finnish government? Or more specifically: when public authorities decide to contract the services of PMSCs under such circumstances, does the Finnish legal system impose any constraints on doing so? These questions can be approached from two directions: on the other hand the Finnish legal system regulates the deployment of military force by the state, and on the other the Constitution (1999/731) contains articles that specifically restrict the privatisation of governmental functions. For this investigation, the significance of the former is purely analytical whereas the latter contains more concrete regulation relating to the above-referred practices.

The articles that regulate the deployment of military force and personnel by the Finnish state are worth briefly going over because they provide a contrast to a situation where services are contracted by the state from a private actor. Or to put it in other words, they demonstrate how the process normally works under democratic oversight and in accordance with the principle of the Rule of Law. According to the Article 93 of the Finnish Constitution "[w]ar and peace are decided by the President with the consent of the Parliament." While this article has never been applied in practice, as Finland has not been at war *de jure* after 1944, it captures an important and rather self-evident principle: democratically elected representatives in the legislature should weigh in when matters of peace and war are decided, and no such decisions can be made without their consent. Although never at war after 1944, Finland has been active in peacekeeping operations for decades, and thus the deployment of Finnish armed personnel to conflict zones is an established practice.[63] It is currently governed by the Act on Military Crisis Management (2006/211), which sets out the relations of competence between executive and legislative branches of government in deciding whether to deploy troops or not. Shortly put, the President decides such deployments on the basis of a suggestion made by the Council of State (Article 2),[64] which is normally composed of parties that have a parliamentary majority. The Parliament is included more directly in the process

63 Aro & Petman 1999, pp. 224–244.
64 As such it corresponds to Article 129 of the Constitution, which regulates the mobilisation of Finnish armed forces.

by giving the parliamentary Foreign Affairs Committee an opportunity to express its views. If the deployment concerns a mission which is militarily very demanding or not based on a mandate of the UN Security Council, the Council of State must give the whole parliament a report on the issue and a chance to express its views (Article 3). In short, on both occasions the decision making process is tightly regulated by law, rather transparent and conducted under parliamentary oversight.

The situation differs, however, when we move the examination from the use of traditional armed forces to hiring private contractors. The exact details of the process that leads to a contract between the Finnish state and a PMSC are unknown to the larger audience, but it seems that these contracts are entered into without any specific basis set out in law and it is probable that the decisions to conclude them are made by governmental officials, not democratically elected representatives. Whether there is any parliamentary oversight is also unknown. Here the Constitution has two articles that are of particular importance. Article 2 contains the Principle of the Rule of Law: "the exercise of public powers shall be based on law. In all public activity, the law shall be strictly observed." Article 124 is closely related to Article 2, and deals more precisely with the privatisation of governmental functions:

> "A public administrative task may be delegated to others than public authorities only by an Act or by virtue of an Act, if this is necessary for the appropriate performance of the task and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered. However, a task involving significant exercise of public powers can only be delegated to public authorities."

From a comparative international perspective this Article seems to be a Finnish speciality: the constitutions of other countries regulate privatisation of public powers on the level of doctrine and general principles, not with an explicit Article of substantive constitutional law.[65]

Article 124 effectively contains two rules: some powers can be delegated if certain conditions are met and the parliament gives its approval in the form

65 Keravuori-Rusanen 2008, pp. 267–270. In countries where outsourcing to PMSCs has become a more commonplace practice domestic guidelines have been developed to determine which functions can be contracted out and which not. For example, in the United States the latter are known as "inherently governmental functions." For the situation in the US see: Halchin et al. 2010.

of an Act specifying the parameters of the powers delegated, whereas some powers are so central to the state they are beyond delegation. To make the process more flexible, the delegation of public administrative tasks to others than public authorities can also be decided by virtue of an already existing Act, which gives the person making the decision to hand out the task the competence to do so.[66] According to Keravuori-Rusanen "the core function of this Article" is to "safeguard democratic decision-making and control in the organisation of public administrative tasks and on the other hand ensure that the arrangement does not risk central principles of the Rule of Law."[67] Furthermore, it "provides a framework, which subordinates delegating public administrative tasks outside the state machinery to parliamentary deliberation and poses an obligation to consider the legal status of private persons holistically."[68] This is also necessary given that Finland does not have a constitutional court and the Constitutional Law Committee, which operates in the parliament, investigates possible conflicts between proposed legislation and the Constitution before enactment. In essence the Constitutional Law Committee examines and determines whether the proposed delegation is compatible with the Constitution or not, and can the proposal – and in what form – be forwarded to the legislature for a vote. It is perhaps worth stating out that this also means that the constitutionality of the current practice has never been officially examined, since the decisions to contract the services of PMCS are evidently made without any specific basis in, or reference to, existing law.[69]

The Constitution or its preparatory works do not explicitly define what is meant by "public administrative tasks" or "public powers." The exact meaning of these concepts were left to be defined in legal praxis and academia, and consequently even Finnish courts have had to resort to referring to the writings of Finnish legal scholars in cases where these concepts have popped up.[70] In terms of these writings, a notion originally developed by

66 HE 1/1998.
67 Keravuori-Rusanen 2008, p. 261.
68 Ibid.
69 In contrast, the Constitutional Committee has examined the constitutionality of domestic legislation relating to private security guards and "crowd controllers" operating in Finland. For the practice of Constitutional Committee relating to these matters see: Kerttula 2010, p. 157–202.
70 Kuopion HAO 13/0047/3.

Kaarlo Tuori has become highly influential; it stipulates that the essence of the exercise of public powers can be defined as the issuing of one-sided commands that affect the rights and obligations of other persons or legal subjects. Apart from taking the form of *e.g.* administrative decisions that are given as a result of administrative process, the exercise of public powers can be also be direct and actual such as in the case of orders given, and force used, by police officers.[71]

Article 124 has been applied and interpreted on numerous instances in recent years when new legislation has been passed. Especially the opinions of the Constitutional Law Committee are important in terms of guiding the interpretation of Article 124 and determining the exact content of public administrative tasks. For example, the Private Security Services Act (2002/282), which regulates the provision of security services within Finland, gives private security guards powers to remove people from their operation area and "crowd controllers" the right to prohibit people from entering their operating area. These competences were seen as clearly falling in the category of public administrative tasks by the Constitutional Committee. They did not, however, include significant exercise of public powers, and thus passing an Act that delegates and regulates these competences was both possible and sufficient.[72]

The direct and actual exercise of public powers, in turn, often falls within significant exercise of public powers, and is thus beyond delegation. Antero Jyränki, for example, states echoing the preparatory works of the Constitution that "the right to use force or otherwise impede with basic rights of an individual on the basis of independent discretion can only be given to public officials."[73] How does the right to use force manifest itself in concrete situations that would be relevant here? Naturally, as with exercise of all public powers, even when it is given to public officials there also must be a clear basis set out in law for this right. For example, in terms of troops involved in military crisis management, Article 72 of the Act on Military Crisis Management creates the legal basis for their right to use force: "When

71 Kerttula 2010, pp. 153–156, Mäenpää 2000, pp. 37–38.
72 PeVL 28/2001.
73 Jyränki 2000, p. 256, HE 1/1998.

carrying out service duties, soldiers serving in a military crisis management operation have the right to use the necessary force for carrying out the duties." The governmental proposal that led to the passing of this Act lists typical situations where force would be used in this meaning: "removing a person from a prohibited area, preventing activities that endanger the zone of operations and apprehending the culprits [as well as] crowd control by using equipment designed for it[.]"[74] One way to interpret this would be to conclude that these duties include significant exercise of public powers, and thus could not be delegated outside the state machinery. Furthermore, the Finnish report from 2009 states that "[h]anding out tasks related to external security to private entities might fall within the scope of significant exercise of public powers and thus be unlawful."[75] The question is not pursued further, probably because the draftee saw its importance as largely theoretical. Keravuori-Rusanen concurs by stating that "tasks related to the internal and external security of the state are particularly seen as belonging to officials of the state."[76] In all probability, however, by "external security" both authors refer mainly to the core duties of the military and not to the provision of armed security to governmental officials or "gate-hosting." It is, for example, fairly clear from the practice of the Constitutional Law Committee that the functions of the police and military cannot be privatised to any significant extent.[77]

The full-extent of the activities of the security guards working for the Foreign Ministry is unknown and the duties of the gate-hosts; i.e. "inspection" and "reception," are described on such a general level that it is somewhat futile to speculate on how exactly do these relate to above described tasks and competences, or even external security more generally. It is, however, difficult to imagine that the actual duties and day-to-day actions of armed security guards operating in Kabul would encroach less on the area of "public administrative tasks" than the actions and duties of private security guards safeguarding the shopping malls of, say, Helsinki.

74 HE 5/2006, p. 53.
75 Creutz 2009, p. 9.
76 Keravuori-Rusanen 2008, p. 225.
77 Kerttula 2010, p.157–202.

Perhaps we should pause here for a moment and consider some of the possible weaknesses of the argument advanced above. Several critical questions come to mind. Foremost among them; are providing armed security to governmental officials in conflict zones or "gate hosting" to crisis management troops really tasks belonging to the realm of public powers? Does any delegation of public powers actually occur? Is the Finnish state delegating powers that it somehow formerly possessed?

Here we must again return to the observation that the emergence of PMSCs does not really entail the reduction of state powers but rather their extension. In this context the interpretation of privatisation as a competition between public and private actors over some pre-determined finite amount of powers is mistaken. Rather in this situation contracting private actors enhances state powers, it allows public authorities to circumvent the principle of the rule of law and the usual procedures set out in legislation for deployment of force abroad. The preparatory works of the constitution contain at least an implicit acknowledgement of a possibility of a comparable situation occurring: "the proposed article [i.e. Article 124] would cover both the delegation of tasks currently belonging to public authorities and the transferring of new tasks seen as belonging to administration to others than public authorities."[78]

A further consideration must be taken into account as well, which is that the Finnish officials, and the PMCS employees that are under contract by them, are operating outside the Finnish jurisdiction in countries where their practices might be completely legal from the viewpoint of the local legal system.[79] Moreover, it is clear that the Finnish state cannot create or give competences to private actors within the jurisdiction of another sovereign in the same sense that it can do so within its own jurisdiction in regards of *e.g.* private security guards. This naturally limits the relevance of Article 124. Here we arrive at the somewhat complicated question of; what exactly is the role of the Constitution in the conduct of foreign affairs? Outside the

78 HE 1/1998.

79 Although even this might be open for debate – at least to some extent – in the case of Afghanistan. For regulation of PMSCs in Afghanistan see: UN Human Rights Council 2010.

Finnish jurisdiction, what obligations does Article 124 pose to the Finnish government and its officials?

One way to counter the line of reasoning advanced above is to argue that whether or not any delegation of competences occur, it is quite clear that the duties of the PMSC employees under contract by the Finnish state include tasks that would fall within the general definition of "public administrative tasks" within Finland. Even if the Finnish state cannot delegate PMSC employees the competence to carry out these tasks outside Finland *de jure*, they are nevertheless *de facto* carrying them out on behest of the Finnish state. Furthermore, here the section of Article 124 that lays out the conditions that have to be met before delegation of public powers "by an Act" is possible should also be taken into consideration: "...if basic rights and liberties, legal remedies and other requirements of good governance are not endangered[.]" To this end the preparatory works of the Constitution state that: "the Article [124] emphasises the significance of the proper training and expertise of the persons taking care of public administrative tasks, as well that the public supervision of these persons must be organised appropriately."[80] Here we must ask whether, for example, the Afghan government has the ability to regulate PMSCs operating in Afghanistan or "supervise" them appropriately, and whether the possible absence of regulation and supervision endangers the "basic rights and liberties" of Afghans that could fall victim to the transgression of these PMSCs, and if such transgressions do occur, do these Afghans have "legal remedies and other requirements of good governance" that they can resort to. It is clear that to be able to answer "yes" to all of these questions one would have to set the standards of evaluation extremely low.

With the limited information currently available concerning the exact practices of the Finnish state in relation to PMSCs, any further examination risks becoming mere speculation. What little is known, however, would seem to indicate that there is a real possibility of a conflict between the current practice and Article 124 of the Constitution. It seems unlikely that the tasks currently trusted to PMSCs are ones that involve "significant exercise of public powers" and consequently should not be outsourced at all, but

80 HE 1/1998.

this still leaves the legal basis for the delegation missing. Here the biggest question concerns the applicability and relevance of Article 124 outside the Finnish jurisdiction. If Article 124 is interpreted narrowly, then it could be said that no delegation of powers occurs as the Finnish state cannot effectively delegate any powers to PMSCs operating outside its jurisdiction. A retort to this is that even without the formal delegation of any powers, the actual duties of PMSCs employees necessarily include activities that would be interpreted as "public administrative tasks" within Finland. Moreover, in the areas where PMSCs typically operate there is no local governmental authority that could regulate or remedy their actions effectively.

The obstacles here are similar to those encountered during the discussion on international law and once again concern the relative novelty of the PMSC and its *sui generis* nature as a regulatory subject; when Article 124 of the Finnish Constitution was drafted the emergence of this phenomenon could hardly have been anticipated. It is, however, quite clear that constraints set on outsourcing of governmental functions by the Finnish Constitution are more far-reaching than those arising from international law. Moreover, amending the Finnish national legal system to respond to chanced circumstances would also be considerably less laborious than trying to bring about a corresponding change in international law.

5 Conclusion

I began this paper by presenting a rough theoretical framework in which I combined the ideas of few seminal thinkers that have had a profound effect on our understanding on the relationship between states and violence. It was argued that these ideas have guided the development of both international law as well as national laws regulating the use of force, and that PMSCs have become a problematic regulatory subject for both regulatory regimes because they do not conform to these conventional understandings. This situation has been exploited by state actors and allowed them to loosen the traditional chains of accountability and state responsibility. I have also briefly examined the reasons behind the rapid ascent of PMSCs in the post-Cold War era and how international law regulates state practice in relation them. Most PMSC employees are not mercenaries, that much is clear, at least from the

viewpoint of international law. It is also – in the light of limited information available – rather evident that current practice of the Finnish state regarding PMSCs is consistent with its obligations under international law. I then moved the examination to the Finnish domestic legal system. Here the first thing to note is that the Finnish state is entering into contracts with PMSCs as a result of a process which seemingly lacks any parliamentary oversight, has zero transparency and evidently no basis in law. This is in stark contrast with situations where conventional armed forces are used. It was also argued that there is a real possibility that the current practice is in conflict with Article 124 of the Constitution, which specifically restricts and regulates the delegation of governmental functions to private actors.

After forcing the reader to endure pages of somewhat abstract and stale legal analysis, I would like to end by considering the real world implications of the current situation and present short proposal on how the Finnish state might go about solving this conundrum. The most notorious and well-reported incident involving misconduct by a PMSC is often used to highlight the significance of this issue. This incident took place on 16 September 2007 when private security guards working for Blackwater Worldwide shot dead 17 civilians at Nisoor Square in downtown Baghdad. When this occurred, the Blackwater guards were not performing "combat operations" or tasks relating to "external security", but on contract by the U.S. State Department and their duty was to escort and protect an official of the U.S. Agency of International Development.[81]

In this context, the lesson of this often repeated story is that in areas where PMSCs operate the line from providing security to engaging in combat is easily crossed, and whether PMSCs are under contract by the military, which in many cases would mean that their tasks are related to "external security", or some other governmental department is at times irrelevant in terms of determining their role in the actual conflict. The literature on PMSCs is littered with remarks such as Gomez del Prado's that "[t]hese 'private security guards' cannot be considered civilians since they are heavily armed and ready to take part in direct hostilities."[82] Or as Ortiz puts it "[…] the

81 See for example: Abrisketa 2007.
82 Del Prado 2010, p. 36.

use of the PSCs [Private Security Guards] label has fostered the idea in segments of the public that private military personnel are something akin to globe-trotting shopping centre guards, which is misleading."[83] When armed men, most of whom have military backgrounds, are sent to conflict zones to provide protection and security, events like the Nisoor Square Massacre are bound to repeat themselves.

This being said, there is a reason why PMSCs have become omnipresent in conflict zones where Western governments, organisations and companies have chosen to establish a presence. For example, in Afghanistan "[t]he majority of...national institutions, foreign forces, multinational companies, and governmental and non-governmental organizations...told the Working Group[84] that they would not be able to operate throughout Afghanistan without the assistance of PMSCs."[85] Nor is this a situation that only holds in Afghanistan, but rather it seems that the international community cannot establish a presence in zones of contemporary conflict anywhere in the globe without relying heavily on the services provided by PMSCs.

It would equally unthinkable that the officials of the Finnish Ministry of Foreign Affairs would be able carry out their duties in any meaningful way in places like Kabul without armed protection. The current practice is clearly necessitated by circumstances, not an intentional plot to circumvent the Finnish legal system. I take it as a given that state officials should be in a position where following the law is made possible for them and where they can do their job as securely as possible. If we are to play the blame game, and if a constitutional conflict resulting from the current practice does exist, then I am firmly of the opinion that reasons for it are rooted in the political leadership and its failure to anticipate problems caused by certain policy choices. If elected representatives deem it wise to involve Finland in contemporary con-

83 Ortiz 2009, p. 4.
84 That is "the UN Human Rights Council Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the of peoples to self-determination."
85 UN Human Rights Council 2010, p. 17.

flicts, they must make sure that the Finnish legal system is ready to cope with the new legal issues that will inevitably follow from new responsibilities.[86]

For anyone looking for them, *de lege ferenda* recommendations also follow easily. They are to a large extent informed by the non-binding "good practices" for contracting states included in the latter part of Montreaux Document, which Finland has already given its support to.[87] An Act specifying a suitable process for contracting PMCS services by the state should be passed. It should specify which duties and functions could be given to PMSCs and set out standards for evaluating and comparing different PMCSs offering their services, as well as minimum conditions that a company must fulfil in order to be eligible for a contract. It should establish some form of oversight role for the Parliament, possibly conducted through the Foreign Affairs Committee, and such a degree of transparency for the whole process that is allowed by the evident need to keep some of the information concerning these contracts secret. Finally, it should specify the responsibility of the Finnish state vis-à-vis the possible victims of misconduct of a PMSC that is under contract by the Finnish state and carrying duties related to that contract. Passing an Act of this kind would naturally also remove the possible conflict of the current practice with Article 124 of the Constitution and allow the Constitutional Law Committee to fulfil its role in safeguarding the Finnish Constitution.

The same naturally goes for other countries as well. There is caveat however, as stated above: Article 124 of the Constitution seems to a Finnish speciality and thus whatever limited findings and arguments were presented here in reference to that Article have little or no applicability outside the Finnish context. What matters here for the world outside Finland, however, is the approach and not so much the substantive findings: more resources should be devoted to examining state practice of contracting PMSCs services from the perspective of national legal systems.

86 Addressing problems of a similar kind is naturally not unheard of; in Germany for example the Federal Constitutional Court famously investigated the constitutionality of deploying German troops outside German borders before this was done fort the first time after the Second World War in during the Yugoslavian dissolution wars (For this see: Wiengant 1995).

87 Montreux Document, Part Two paras 1–23.

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