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GUNS-FOR-HIRE: CHINESE MERCENARIES ON THE 21ST CENTURY SILK ROAD

Carl H. Peterson IV[†]

Abstract: There has been an increased global use of private military contractors (PMCs) since the large-scale American use of them in the wars in Afghanistan and Iraq. This has included an increase in Russian and now Chinese PMCs. As China continues to develop its Belt and Road Initiative (BRI), it is likely that the world will see an increase in the number of Chinese PMCs used to protect these projects. In this event it is important to bring Chinese PMCs into the PMC industry's most effective private regulatory bodies, as these bodies are often more effective at ensuring ethical PMC conduct than international and national legal regimes.

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INTRODUCTION

What is old is new. After being largely eliminated in the West following the 1648 Peace of Westphalia, mercenaries are making a comeback.¹ The best examples of mercenaryism resurgence were illustrated in African conflicts from the mid-to-late 20th century and America's recent use of private military contractors in its Global War on Terrorism.² However, these are just two examples of a much larger movement. There has been global growth of guns-for-hire, though rather than mercenaries, these companies are mostly referred to as private security contractors (PSC) or private military contractors (PMC).³ This growth is likely to continue.⁴ The trend started in Africa,⁵ moved to the

[†] The author would like to thank Professor Dongsheng Zang for his advice and support, as well as the editorial staff of the *Washington International Law Journal*.

¹ SEAN MCFATE, *THE MODERN MERCENARY: PRIVATE ARMIES AND WHAT THEY MEAN FOR WORLD ORDER* 32 (2014).

² *See id.* at 38, 45.

³ *Id.* at 3–4.

⁴ *Id.* at 62.

⁵ *Id.* at 38.

United States,⁶ hopped over to Russia,⁷ and has arrived in China.⁸ Private military personnel hold advantages over “traditional” state militaries that appeal to both public and private actors.⁹ This appeal means that as Chinese diplomatic and economic interests continue expanding around the globe,¹⁰ their security forces will likely follow.¹¹ While many of these interests may be secured by the Chinese military, some will likely be secured by PSCs or PMCs. As such, China is likely in the process of expanding its global diplomatic and economic footprint in a dramatic way.

In 2013, China’s President Xi Jinping announced a new diplomatic and economic initiative.¹² This initiative, known in Chinese as 一帶一路 (Yi dai yi lu), or “One Belt, One Road”, is more commonly known in the West as the “Belt and Road Initiative” (BRI).¹³ The BRI seems to be China’s effort towards creating a new China-led world order. Not only does China intend to invest in major infrastructure projects in Afro-Eurasia, it is also in the process of developing new China-led economic and diplomatic institutions.¹⁴ This is a two-pronged approach meant to extend China’s influence across the globe.¹⁵ Prong one is building these China-led institutions to create a friendly environment for China to build and further its policy and strategic goals.¹⁶ Prong two is developing infrastructure projects that extend China’s influence while providing assets that help build the Chinese economy.¹⁷ The issue of PMCs and their regulation is primarily concerned with the second prong.

Physical assets must be protected with physical security. In the 21st century, physical security needs are likely to be filled—at least in part—

⁶ *Id.* at 44.

⁷ *See, e.g.,* Neil Hauer, *Russia’s Favorite Mercenaries*, THE ATLANTIC (Aug. 27, 2018), <https://www.theatlantic.com/international/archive/2018/08/russian-mercenaries-wagner-africa/568435/>.

⁸ Marc Fisher et al., *Behind Erik Prince’s China Venture*, THE WASHINGTON POST (May 4, 2018), https://www.washingtonpost.com/news/world/wp/2018/05/04/feature/a-warrior-goes-to-china-did-erik-prince-cross-a-line/?utm_term=.603cfc52584e.

⁹ MCFATE, *supra* note 1, at 45–49.

¹⁰ *See* DONGSHENG ZANG, DEBT TRAP ON THE NEW SILK ROAD 6 (2019).

¹¹ *See* Tyler Headley, *China’s Djibouti Base: A One Year Update*, THE DIPLOMAT (Dec. 4, 2018), <https://thediplomat.com/2018/12/chinas-djibouti-base-a-one-year-update/>.

¹² Nadège Rolland, *China’s Eurasian Century? Political and Strategic Implications of the Belt and Road Initiative* 43 (2017).

¹³ *Id.* at 43, 45.

¹⁴ *Id.* at 56–59.

¹⁵ *See id.*

¹⁶ *Id.*

¹⁷ *Id.*

by private companies. Regulating these companies is thus a growing topic of great interest and relevance around the globe. Questions arise concerning how to keep these companies' actions within international norms and how to discipline them when they do not. Should international law, host-country law, or the law of the nation that a company is from govern their conduct? As China's influence increases through the BRI, and the quantity of international Chinese infrastructure projects expands, we will likely see the number of Chinese PMCs and PSCs increase. Naturally, ensuring that these companies behave in a manner that aligns with international norms established by international law will follow, which must include both regulations to prevent misconduct and a means to address misconduct after it has occurred.

This article analyzes how private contract law and voluntary organizations can help ensure that Chinese PMCs will conduct business in ways that promote both global stability and humanitarian conduct. First, this article discusses the near future state of the global order, the history of PMCs and those that employ them, and their relevancy to the BRI. Second, this article examines the various legal obligations that cover the international use of PMCs, including international agreements, national laws, corporate and private legal obligations, with emphasis on how the Chinese PMC industry's unique situation will be applied to the legal landscape. Finally, this article argues that Chinese PMCs should obtain private certifications and join private organizations that aim to ensure conduct in line with international humanitarian law.

I. BACKGROUND

PMC's are no novel phenomenon. As illustrated below, there has long been a market for private military forces, and in order to fully understand the emergence of Chinese PMC's and the legal issues surrounding them, five background issues must be examined: (1) the geopolitical condition which is transforming to a state of neomedievalism; (2) the general history of private military force; (3) how private military force is currently used; (4) the main users of private military force, and (5) the BRI. These five issues provide the appropriate background needed to understand the development of private regulatory methods and how they apply to the nascent Chinese market for private military force.

A. Neomedievalism: A Return to the Geopolitics of the Pre-Westphalian Order

National sovereignty permeates modern Western legal thought and remains one of international law's foundational concepts. The centrality of sovereignty in international law emerged from the Thirty Years War's aftermath, which ended with the 1648 Peace of Westphalia and gave rise to the modern system of sovereign states.¹⁸ This Westphalian system is characterized by three attributes: (1) that all power is vested into a single political actor, the state; (2) states must recognize other states as equals; and (3) states should not interfere with the internal affairs of other states.¹⁹ This system was the foundation for international relations and order from 1648 until 1945. However, in 1945 a new international order began to take shape. Following the Second World War, the Allies established institutions like the United Nations, intended to reduce the likelihood of another cataclysmic war like the First or Second World Wars. The Soviet Union's fall in 1991 increased this movement toward international institutions. Today, this state of affairs is widely known as the "liberal international order."²⁰ This order has stripped some of the sovereignty from the formerly unassailably sovereign nation-states. In fact, international institutions have increased their powers so much that some scholars have asserted that the world is returning to a medieval order.²¹

It may sound strange to some that despite technological advancements, interconnectedness, and change in values since the medieval era, the current geopolitical order increasingly resembles the geopolitical status quo ante. However, with the proper framework, one can see the increasing resemblance that our contemporary state of geopolitical affairs has with those of Europe before the Renaissance. There are five trends indicating a move toward a neomedieval world order: (1) the technological unification of the world; (2) the regional integration of states; (3) the rise of transnational organizations; (4) the disintegration of states; and (5) the restoration of private international violence.²²

¹⁸ MCFATE, *supra* note 1, at 6.

¹⁹ *Id.* at 64–65.

²⁰ Thomas Wright, *The Return to Great-Power Rivalry Was Inevitable*, THE ATLANTIC (Sept. 12, 2018) <https://www.theatlantic.com/international/archive/2018/09/liberal-international-order-free-world-trump-authoritarianism/569881/>.

²¹ *See, e.g.*, HEDLEY BULL, THE ANARCHICAL SOCIETY 254–66 (3d ed. 2002).

²² BULL, *supra* note 22.

The archetypical historical example of the medieval world order is the Holy Roman Empire following the Reformation and before the Thirty Years War. The Holy Roman Empire just before the Reformation was mostly an amalgamation of feudal states held together under the power of an elected emperor.²³ It comprised of many diverse political entities, ranging from small duchies and principalities to full kingdoms, and “imperial cities” that answered to no monarch but the Holy Roman Emperor himself.²⁴ This entire system fell under the Roman Catholic Church’s power, which at the time wielded not just spiritual power, but temporal power as well.²⁵ This dual power was such that some of the fiefs under the power of the Holy Roman Emperor were run by prince-bishops, who were both feudal lords and ordained holy men in the Roman Catholic Church.²⁶ Ultimately, this meant that a resident in the Holy Roman Empire might be subject to the authority of their local prince or duke, the Holy Roman Emperor, and the Roman Catholic Church. While many of the Empire’s territories were German speaking, not all of them were.²⁷ Nor were these different political and spiritual entities held to a modern standard of separation of powers; the Church could demand a set of behaviors or actions from an individual resident that would be in direct conflict with what the local lord demanded of the resident.²⁸ This situation was further complicated by the Reformation, a religious movement that criticized the Roman Catholic Church for a number of its practices and was led by German priest Martin Luther.²⁹ The Reformation caused a schism in the Church, which was exploited by the local lords of the Holy Roman Empire and aided in its spread with the power of the new technology of the printing press.³⁰ Ultimately, the Reformation resulted in an additional layer of competing religious obligations weaved into the already complex layers of competing political obligations.

While the modern world is not as politically complex as the Holy Roman Empire was from 1517 to 1648, there is evidence that it is trending in that direction. An analogy can be made between the current geopolitical

²³ PETER H. WILSON, HEART OF EUROPE 83–84 (2016).

²⁴ *Id.* at 629, 770.

²⁵ *Id.* at 40–41.

²⁶ *Id.* at 165.

²⁷ *Id.* at 282.

²⁸ *See id.* at 214–15.

²⁹ *Id.* at 144, 897.

³⁰ *Id.* at 139.

order and that in the Holy Roman Empire of 1517 to 1648. In the current state of affairs, the nation-state is still the primary wielder of sovereignty, but it is no longer the sole claimant to sovereign power as states were between 1648 and 1945.³¹ The European Union, the United Nations, and the International Criminal Court are all examples of transnational organizations that claim some sort of sovereign influence in the affairs of not only member states, but sometimes nonmember states and actors as well.³² Additionally, corporations hold significant power in the current geopolitical system. Walmart, the Fortune 500 company with the highest revenues for 2019, had revenues higher than the GDP of 161 sovereign states as estimated by the International Monetary Fund.³³ The Fortune 500 company with the lowest revenues for 2019, Levi Strauss, had revenues greater than the GDP 35 of those 185 states.³⁴ These economic changes occur against the backdrop of the internet's growth and the spread of social media in the past 30 years.³⁵ One can conceive of an emerging world that is analogous to that of the Holy Roman Empire, with transnational organizations like the United Nations filling the role once held by the Catholic Church, corporations with greater wealth than some countries functioning like local lords, and social media being an equivalent to the printing press.

B. The Belt and Road Initiative

As previously mentioned, the BRI is an economic and diplomatic initiative intended on investing in major infrastructure projects across Afro-Eurasia in an effort to advance China's national interests. First proposed in 2013, the BRI spans 70 states across three continents, and as of 2018 already included \$575 billions of investment, excluding

³¹ SEAN MCFATE, *THE NEW RULES OF WAR* 31–32 (2019).

³² *See, e.g.*, MCFATE, *supra* note 1, at 77.

³³ *GDP, Current Prices*, INTERNATIONAL MONETARY FUND, <https://www.imf.org/external/datamapper/NGDPD@WEO/OEMDC/ADVEC/WEOORLD> (last visited Nov. 28, 2020); *Walmart Releases 2019 Annual Report and Proxy Statement*, WALMART (Apr. 23, 2019), <https://corporate.walmart.com/newsroom/2019/04/23/walmart-releases-2019-annual-report-and-proxy-statement>.

³⁴ Walmart, *supra* note 33; *Levi Strauss & Co. Reports Fourth-Quarter and Full Year 2019 Earnings*, BUSINESS WIRE (Jan 3, 2020, 4:15 PM), <https://www.businesswire.com/news/home/20200130005816/en/Levi-Strauss-Reports-Fourth-Quarter-Full-Year-2019>.

³⁵ *See, e.g.*, Ben Austin, *The Growth of the Internet: From 1990 to 2019*, ABSOLUTE (May 13, 2019), <https://absolute.digital/magazine/the-growth-of-the-internet-from-1990-to-2019/>.

investments within China.³⁶ The BRI is largely made up of a series of land and sea trading corridors with rail,³⁷ highway,³⁸ energy,³⁹ and seaport developments,⁴⁰ with many of these projects being in countries with powerful criminal organizations or terrorism concerns.⁴¹ Some notable BRI project locations include Kazakhstan, Pakistan, Myanmar, Sri Lanka, Kenya, Djibouti, and Greece.⁴² The fact that many of the states involved in the BRI have difficult security situations indicates that there will likely be a need to provide protection for the infrastructure projects and those who work on them.⁴³ In fact, at the end of 2018, at least 44 Chinese nationals had lost their lives to terrorist activity while working on BRI projects in Pakistan alone.⁴⁴ The BRI security challenges open the door for PMCs to fill a role that state military forces may be reluctant—or unable—to fill.⁴⁵

C. Brief History of Private Military Force

There is a long history of private military forces. There is evidence that mercenaries have been used as far back as 2,094 B.C.E.⁴⁶ During the medieval era, Northern Italy was well known for its use of private military

³⁶ *Belt and Road Initiative*, THE WORLD BANK (Mar. 29, 2018), <https://www.worldbank.org/en/topic/regional-integration/brief/belt-and-road-initiative>.

³⁷ Joseph Sipalan, *China, Malaysia Restart Massive 'Belt and Road' Project After Hiccups*, REUTERS (Jul. 24, 2019, 10:07 PM), <https://www.reuters.com/article/us-china-silkroad-malaysia/china-malaysia-restart-massive-belt-and-road-project-after-hiccups-idUSKCN1UK0DG>.

³⁸ Lisa Hielscher, *Karakoram Highway*, BELT AND ROAD INITIATIVE (Sept. 3, 2018), <https://www.beltroad-initiative.com/karakoram-highway/>.

³⁹ Muhammad Zulfikar Rakhmat, *The Belt and Road Initiative in the Gulf: Building "Oil Roads" to Prosperity*, MIDDLE EAST INSTITUTE (March 12, 2019), <https://www.mei.edu/publications/belt-and-road-initiative-gulf-building-oil-roads-prosperity>.

⁴⁰ Wandukwa Henry, *China to Take Over Kenya's Main Port Over Unpaid Huge Chinese Loan*, AZ: IN-ENACTON (Dec. 22, 2018), <https://architexturez.net/pst/az-cf-190224-1545465613>.

⁴¹ ZI YANG, U.S. INST. OF PEACE, *SECURING CHINA'S BELT AND ROAD INITIATIVE*, SPECIAL REPORT 436 2 (Nov. 2018), https://www.usip.org/sites/default/files/201811/sr_436_securing_chinas_belt_and_road_initiative_web.pdf.

⁴² *The Belt and Road Initiative: Country Profiles*, THE HONG KONG TRADE DEVELOPMENT COUNCIL: BELT AND ROAD, <https://beltandroad.hktdc.com/en/country-profiles> (last visited Nov. 28, 2020).

⁴³ TIMOTHY HEATH, *CHINA'S PURSUIT OF OVERSEAS SECURITY* ix (2018), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2200/RR2271/RAND_RR2271.pdf.

⁴⁴ Helena Legarda, *Chinese mercenaries are tightening security on the Belt and Road*, EAST ASIA FORUM (Oct. 16, 2018), <https://www.eastasiaforum.org/2018/10/16/chinese-mercenaries-are-tightening-security-on-the-belt-and-road/>.

⁴⁵ Alessandro Arduino, *China's Belt and Road Initiative Security Needs* 6 (S. Rajaratnam Sch. of Int'l Studies Sing., Working Paper No. 306, 2017), <https://www.rsis.edu.sg/wp-content/uploads/2017/08/WP306.pdf>.

⁴⁶ MCFATE, *supra* note 1, at 27.

forces.⁴⁷ During this time mercenaries were organized into companies called “condottieri” and were employed via contracts called “condotte.”⁴⁸ But using private military forces began declining after the 1648 Peace of Westphalia, when the Holy Roman Emperor Ferdinand III established the first peacetime field army in the history of the Empire.⁴⁹ While private military forces saw a decline in Europe, European states still used PMCs in the Americas, and PMCs played a significant role in other European colonization efforts as well. In 1492, the Americas were put on the European maps after Spain contracted with an Italian mercenary, Christopher Columbus, to lead an expedition to find a new trade route to India.⁵⁰ In fact, private companies like the Virginia Company of London setup permanent footholds in North America, while employing PMCs like Captain John Smith who arrived in Virginia by 1607.⁵¹

After the initial wave of colonization and genocide in North America, PMCs continued playing consequential roles on the continent. During the American Revolutionary War, the Continental Army received help from Marquis de Lafayette and Tadeusz Kościuszko, two PMC individuals who helped organize and lead the American army.⁵² Additionally, the Continental Congress authorized the use of private navies and warships known as privateers.⁵³ The use of PMCs in a colonial context continued throughout the era, notably in India where the British East India Company formed and maintained the East India Company Army and Navy, which was a military made up of British officers, non-commissioned officers, and locally recruited Indian soldiers known as “sepoys.”⁵⁴

By the 20th century, African governments were also using PMCs in efforts to gain control of their countries from rebel groups. Moïse Tshombe, first as President of the breakaway Republic of Katanga in 1960 and second as Prime Minister of the Democratic Republic of the Congo in 1964, hired PMC Mike Hoare to help combat communist insurrectionaries

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 31–32.

⁵⁰ ERIK PRINCE, *CIVILIAN WARRIORS* 59–60 (2013).

⁵¹ *Id.* at 60–61.

⁵² *Id.* at 60.

⁵³ *Id.* at 64.

⁵⁴ Andrea Major, *The East India Company: How a Trading Corporation Became an Imperial Ruler*, HISTORY EXTRA (Jan. 21, 2017), <https://www.historyextra.com/period/tudor/the-east-india-company-how-a-trading-corporation-became-an-imperial-ruler/>.

in the heart of Africa.⁵⁵ This pattern of African governments using PMCs to aid their governments fights against rebels and revolutionaries continued into the 1990s, when the governments of Angola, and then Sierra Leone, hired a PMC company named Executive Outcomes to help train their respective militaries and help drive out rebel groups from their countries.⁵⁶ African governments continue leveraging PMC forces today, like the Nigerian government hiring a PMC company named STTEP to help them fight an insurgency in 2015.⁵⁷

PMC use in the 20th century pales in comparison to their use in the 21st century. The September 11, 2001 attacks led to the United States invading Afghanistan, followed by Iraq.⁵⁸ Because the United States did not commit a sufficient number of troops to these wars, it was forced to rely on PMCs in order to make up for the lack of troops that it had committed to the new war zones.⁵⁹ While most PMCs that the United States employed in Afghanistan and Iraq provided logistical and non-combat services, a small number of them did fight, notably the company widely known as Blackwater.⁶⁰ These wars in Afghanistan and Iraq spawned an interest among many in the world for the types of services that companies like Blackwater offered, and Blackwater's former CEO, Erik Prince, went on to found a company backed by the Chinese state sovereign wealth fund, the CITIC Group.⁶¹ This historical account provides a background for understanding the current diversity of PMCs and their employers as seen in the world today.

D. Examples of PMCs and How Private Military Force is Currently Most Often Used

The PMC industry is surprisingly diverse. PMCs come in many different forms with different specialties: PMCs from different states, and

⁵⁵ Robert McFadden, "Mad Mike" Hoare, Irish Mercenary Leader in Africa, Dies at 100, N.Y. TIMES (Feb. 3, 2020), <https://www.nytimes.com/2020/02/03/obituaries/mike-hoare-dies.html>.

⁵⁶ Eeben Barlow, Executive Outcomes: Against All Odds 144, 460–61 (30° South Publishers 2018).

⁵⁷ Colin Freeman, *South African Mercenaries' Secret War on Boko Haram*, THE TELEGRAPH (May 10, 2015, 9:20 PM), <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/nigeria/11596210/South-African-mercenaries-secret-war-on-Boko-Haram.html>.

⁵⁸ See Jonathan Stein & Tim Dickenson, *Lie by Lie: A Timeline of How We Got into Iraq*, MOTHER JONES (Sept. 2006), <https://www.motherjones.com/politics/2011/12/leadup-iraq-war-timeline/>.

⁵⁹ PRINCE, *supra* note 50, at 67–69.

⁶⁰ *Id.*

⁶¹ Matthew Cole & Jeremy Scahill, *Erik Prince in the Hot Seat*, THE INTERCEPT (Mar. 24, 2016), <https://theintercept.com/2016/03/24/blackwater-founder-erik-prince-under-federal-investigation/>.

different types of PMC employers. This next section examines the major types of PMCs, their major states of origin, and the major types of employers.

1. *Types of PMCs.* — Dr. Sean McFate, a professor at National Defense University and Georgetown University's School of Foreign Service, has broken PMCs into different categories in accordance with the PMCs: (1) function; and (2) role.⁶² In terms of function, there are two sub-types of PMCs: (a) mercenaries, who serve the function of providing actual fighters for an employer and can conduct autonomous military operations;⁶³ and (b) military enterprisers, who raise and train armies, as opposed to providing fighters and conducting military operations themselves.⁶⁴ McFate further divides PMCs into roles of: (a) combat arms, which are units that do actual fighting; (b) combat support, which are units that provide direct support to the fighting units; and (c) combat service support, which are units which provide logistical support to units of the other two types.⁶⁵ This article has a particular interest in both mercenary and military enterpriser companies who provide a combat arms role type service or training service or that role.

2. *States of Origin.* — While PMC employees come from all over the world, there are certain states that are more relevant to this examination of PMC companies, therefore this examination of states of origin will focus on the United States, Russia, and China.

The United States became known for its PMCs during the conflicts in Afghanistan and Iraq, especially the company Blackwater. Blackwater rose to fame for the Nisour Square Incident, where a US diplomatic convoy protected by Blackwater employees entered Baghdad's Nisour Square on September 16, 2007, opened fire without cause after hearing a bomb blast, which ultimately killed 17 Iraqi civilians and wounded 20 others.⁶⁶ And Blackwater is by no means the only American PMC. There are many other American PMC companies. These include organizations like Spear Operations Group, which worked for the Yemeni government in that

⁶² *Biography*, SEAN MCFATE, <https://www.seanmcfate.com/biography>.

⁶³ MCFATE, *supra* note 1, at 13.

⁶⁴ *Id.* at 14.

⁶⁵ *Id.* at 15–16.

⁶⁶ Jeremy Scahill, *Blackwater: The Rise of the World's Most Powerful Mercenary Army* 3–9 (2008).

country and potentially engaged in political assassinations,⁶⁷ and PMCs like DynCorp, which provides a wide range of security and training services,⁶⁸ or Constellis, a competitor to DynCorp.⁶⁹

The United States is not the only nation with a significant global presence of PMCs, as Russia is an increasingly significant player in the global PMC industry. Russian PMCs have taken active part in conflicts around the globe. Perhaps most notably, the PMC company Wagner Group, which is employed by the Syrian government in the Syrian Civil War, engaged in a multi-hour battle against American special operations forces in which an estimated 200 or more of the Russian fighters were killed.⁷⁰ The Wagner Group had previously fought alongside rebels in Eastern Ukraine, in the conflict between the Ukrainian government and Russian-backed separatist groups.⁷¹ However, the Wagner Group is also active in other states across the world, offering both fighters and training to governments and rebel groups.⁷² These other states beyond Ukraine and Syria include,⁷³ but may not be limited to, the Central African Republic,⁷⁴

⁶⁷ Aram Roston, *A Middle East Monarchy Hired American Ex-Soldiers to Kill Its Political Enemies. This Could Be the Future of War*, BUZZFEED NEWS (October 16, 2018, 5:53 AM), <https://www.buzzfeednews.com/article/aramroston/mercenaries-assassination-us-yemen-uae-spear-golan-dahlan>; Deborah Avant, *Former U.S. Special Forces Were Reportedly Hired to Kill Yemen's Leaders. Did the Government Know?*, WASHINGTON POST: MONKEY CAGE (October 19, 2018, 4:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/19/former-u-s-special-forces-were-reportedly-hired-to-kill-yemens-leaders-did-the-government-know/>; James Clark, *Ex-US Special Ops Were Reportedly Hired to Assassinate Yemeni Political Figures*, TASK & PURPOSE: BULLET POINTS (Oct. 16, 2018), <https://taskandpurpose.com/bulletpoints/yemen-special-ops-hits>.

⁶⁸ *About DI*, DYNCORP, <https://www.dyn-intl.com/about-di/>.

⁶⁹ *What We Do*, CONSTELLIS, <https://www.constellis.com/what-we-do/>.

⁷⁰ Sergey Sukhankin, *'Continuing War by Other Means': The Case of Wagner, Russia's Premier Private Military Company in the Middle East*, THE JAMESTOWN FOUNDATION: RUSSIA IN THE MIDDLE EAST 10, <https://jamestown.org/wp-content/uploads/2018/07/Sukhankin-Wagner.pdf?x87069>.

⁷¹ S.A. Cavanagh, *SWJ Factsheet: Observing Wagner Group - An Open Source Intelligence Study*, THE SMALL WARS JOURNAL (MAY 5, 2018, 12:07 AM), <https://smallwarsjournal.com/jrnl/art/swj-factsheet-observing-wagner-group-open-source-intelligence-study>.

⁷² See Caleb M. Larson, *Wagner: A Closer Look at Russian Private Security and Military Enterprise*, OFFIZIERE.CH (Jan 7, 2019), <https://www.offiziere.ch/?p=34979>.

⁷³ Sky News, *Exclusive: Russia's Secret Soldiers Fighting in Syria*, YOUTUBE (Aug. 9, 2016), https://www.youtube.com/watch?v=HvW3OBDVS8&ab_channel=SkyNews.

⁷⁴ Dionne Searcey, *Gems, Warlords and Mercenaries: Russia's Playbook in Central Africa Republic*, N.Y. TIMES (May. 4, 2020), <https://www.nytimes.com/2019/09/30/world/russia-diamonds-africa-prigozhin.html>; Al Jazeera English, *Russia in Africa: Inside a Military Training Centre in CAR / Talk to Al Jazeera in the Field*, YOUTUBE (April 15, 2019), https://www.youtube.com/watch?v=1tECHzB-uCM&ab_channel=AlJazeeraEnglish.

Sudan,⁷⁵ Libya,⁷⁶ Mozambique,⁷⁷ and potentially Venezuela.⁷⁸ Russian PMCs had a rough start with the Slavonic Corps, a largely failed early attempt to send fighters to back the regime in Syria,⁷⁹ but with the success of the Wagner Group, the Russian PMC industry expanded. Today, it includes at least one more PMC, the Moran Security Group, and potentially others.⁸⁰

Growth in the American and Russian PMC industries caught the attention of investors and entrepreneurs in China. Perhaps the most well-known Chinese PMC is Frontier Services Group (FSG). FSG was founded and briefly lead by the infamous Erik Prince, after his exit from Blackwater.⁸¹ FSG claims that it provides “integrated security, logistics, insurance and infrastructure services,” in Central and South Asia, Southeast Asia, the Middle East, North Africa, and Sub-Saharan Africa.⁸² CITIC Group, a Chinese state-owned investment company, provided the initial capital for Mr. Prince to start FSG in 2014 and it currently owns a substantial portion of the company.⁸³ FSG is a publicly traded company on the Hong Kong Stock Exchange, and while it is not clear whether FSG provides armed security in a similar manner to what Blackwater provided, it is clear that FSG attempted to provide the government of South Sudan with armed ground-attack light-aircraft, likely in contravention of

⁷⁵ Gabriella Gricius, *Russia's Wagner Group Quietly Moves into Africa*, RIDDLE (Nov. 3, 2019), <https://www.ridl.io/en/russia-s-wagner-group-quietly-moves-into-africa/>.

⁷⁶ Mike Giglio, *Killing Between the Lines: Inside the Shadow War Fought by Russian Mercenaries*, BUZZFEED NEWS (Apr. 17, 2019, 12:48 PM), <https://www.buzzfeednews.com/article/mikegiglio/inside-wagner-mercenaries-russia-ukraine-syria-prighozhin>.

⁷⁷ Eric Sof, *Seven Russian Contractors from Wagner Group Killed in an Ambush in Mozambique*, SPEC OPS MAGAZINE (Sept. 1, 2020), <https://special-ops.org/7-contractors-from-wagner-group-killed/>.

⁷⁸ Giglio, *supra* note 76.

⁷⁹ Larson, *supra* note 72.

⁸⁰ *About Us*, MORAN SECURITY GROUP, <http://moran-group.org/en/about/index>.

⁸¹ Fisher et al., *supra* note 8.

⁸² *About FSG*, FRONTIER SERVICES GROUP, <http://www.fsgroup.com/en/aboutfsg.html>; *Ex-Blackwater Boss Moves into Myanmar Security*, BELT AND ROAD NEWS (Mar. 20, 2019), <https://www.beltandroad.news/2019/03/20/ex-blackwater-boss-moves-into-myanmar-security/>; Rosalind Adams, *Blackwater Founder Erik Prince's New Company Is Operating in Iraq*, BUZZFEED NEWS (Apr. 26, 2019, 4:19 PM), <https://www.buzzfeednews.com/article/rosalindadams/blackwater-erik-prince-frontier-services-group-iraq>.

⁸³ Blake Schmidt, *Blackwater Mercenary Prince Has a New \$1 Trillion Chinese Boss*, BLOOMBERG (Feb. 11, 2019, 6:19 PM), <https://www.bloomberg.com/news/articles/2019-02-10/blackwater-mercenary-prince-has-a-new-1-trillion-chinese-boss>.

American and European Union export law.⁸⁴ Much of what FSG is attempting to do is provide services that support the BRI.⁸⁵ This focus represents an expansion opportunity for China's PMC and PSC market abroad,⁸⁶ which is perceived to have saturated domestically.⁸⁷

The BRI represents an opportunity for China to crowd out non-state rivals and increase its influence in bordering states security situations via means that may be perceived as legitimate.⁸⁸ FSG represents a more entrepreneurial PMC in the Chinese market, but it is by no means the only firm, as there are at least 20 other Chinese PMC/PSCs working internationally out of at least 5,000 that are incorporated within China itself.⁸⁹ However, FSG does provide an effective example of a firm that is engaged in morally questionable conduct, having built a training center in the Xinjiang region of China, where up to a million Uyghur Muslims are reportedly held in detention camps.⁹⁰ The company is also under investigation for a potential money laundering scheme with Libyan officials.⁹¹ These are issues that have been relatively high profile in American media, likely because of Mr. Prince's prominence.⁹² However, with the China's preference to employ Chinese security firms,⁹³ and the

⁸⁴ See Jeremy Scahill & Matthew Cole, *Echo Papa Exposed*, THE INTERCEPT (April 11, 2016, 2:50 AM), <https://theintercept.com/2016/04/11/blackwater-founder-erik-prince-drive-to-build-private-air-force/>.

⁸⁵ Chris Horton, *The American Mercenary Behind Blackwater is Helping China Establish the New Silk Road*, QUARTZ (April 17, 2017), <https://qz.com/957704/the-american-mercenary-behind-blackwater-is-helping-china-establish-the-new-silk-road/>.

⁸⁶ Legarda, *supra* note 44.

⁸⁷ Charlie Campbell, *China's Elite Bodyguards Are Struggling to Find Enough Rich People to Protect*, TIME (Jan 9, 2017), <https://time.com/4625290/china-bodyguards-private-security-genghis-beijing/>.

⁸⁸ *China's Blackwater-Style Private Armies*, ASIA SENTINEL (Sept. 3, 2018), <https://www.asiasentinel.com/p/china-blackwater-style-private-armies>; Helena Legarda and Meia Nouwens, *Guardians of the Belt and Road*, MERCATOR INSTITUTE FOR CHINA STUDIES (Aug. 16, 2018), <https://www.merics.org/en/china-monitor/guardians-of-belt-and-road>.

⁸⁹ Meia Nouwens, *China's Use of Private Companies and Other Actors to Secure the Belt and Road Across South Asia*, THE INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES (Apr. 29, 2019), <https://www.iiss.org/blogs/analysis/2019/04/china-bri>.

⁹⁰ *US Mercenaries Linked to UAE Agrees Deal [sic] with China to Run Anti-Muslim Detention Camps*, MIDDLE EAST MONITOR (Feb. 4, 2019, 2:19 PM), <https://www.middleeastmonitor.com/20190204-us-mercenaries-linked-to-uae-agrees-deal-with-china-to-run-anti-muslim-detention-camps/>.

⁹¹ Cole & Scahill, *supra* note 61.

⁹² Horton, *supra* note 85.

⁹³ Legarda, *supra* note 44; Andrew Erickson and Gabe Collins, *Enter China's Security Firms*, THE DIPLOMAT (Feb. 12, 2012), <https://www.globalpolicy.org/pmscs/52196-enter-chinas-security-firms.html?itemid=id>.

increasing number of Chinese PMCs operating abroad,⁹⁴ it is possible that there many other unethical practices being carried out by Chinese firms on the BRI exist, which are not receiving media attention.⁹⁵

It is clear that a significant and growing supply of force for hire exists. Whether American, Russian, Chinese, or that of some other nation, PMCs have seen an increase in quantity and number of places of national origin in recent years, and this author speculates this increase will likely continue. What has not been made completely clear is who is hiring these PMCs.

3. *Who Most Often uses private Military Force.* — PMCs have a surprisingly broad set of clients. Whether the services desired are for actual fighters or security personnel, or are for training fighters or security personnel, there is a diverse set of clients all over the globe. Nation states and corporations, especially those corporations in the extractive industries, are generally the largest purchasers of PMC services.⁹⁶ However, there are also PMCs offering services to terror organizations and drug lords.⁹⁷ States may use PMCs like how the United States has—protecting people or providing training to other nation’s militaries in order to build state capacity,⁹⁸ but states may also use PMCs to seize territory from rebels as the Syrian and Nigerian governments have.⁹⁹ Corporations can use PMCs to provide security training to overseas employees, as often occurs for Chinese companies,¹⁰⁰ or they may even use PMCs to rescue employees in dangerous situations.¹⁰¹ For example, China’s Machinery Engineering Corporation hired Chinese PMC VSS Security in 2014 to evacuate approximately 1,000 employees who were put in danger by the Islamic State.¹⁰² Terror organizations like the Islamic State could even purchase services from PMCs like Malhama Tactical, which solely provides PMC

⁹⁴ Fatoumata Diallo, *Private Security Companies: The New Notch in Beijing’s Belt and Road Initiative?*, INSTITUTE FOR SECURITY AND DEVELOPMENT POLICY (June 5, 2018), <https://isdpc.eu/private-security-companies-new-notch-beijings-belt-road-initiative/>.

⁹⁵ Legarda and Nouwens, *supra* note 88.

⁹⁶ MCFATE, *supra* note 1, at 81.

⁹⁷ See, e.g., John C.K. Daly *Jihadist-Owned Private Military Company Unsettles Russia*, THE ARAB WEEKLY, <https://thearabweekly.com/jihadist-owned-private-military-company-unsettles-russia>.

⁹⁸ *Id.* at 115, 121.

⁹⁹ Thomas Gibbons-Neff, *How a 4-Hour Battle Between Russian Mercenaries and U.S. Commandos Unfolded in Syria*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/world/middleeast/american-commandos-russian-mercenaries-syria.html>; Freeman, *supra* note 57.

¹⁰⁰ Nouwens, *supra* note 89.

¹⁰¹ Legarda, *supra* note 44.

¹⁰² *Id.*

services to Islamic Jihadist groups.¹⁰³ Finally, Mexican drug cartels have even been allegedly hiring former American military personnel to carry out contract killings, though these last two examples are less in the realm of the kind of PMC activity that lends itself to being regulated.¹⁰⁴

II. RELEVANT LAW

There are at least three types of legal obligations that apply to PMCs: International, national, and private. International legal obligations are often what most people think of when they think of legal obligations controlling PMCs, however these are often the most ineffective. National legal obligations are often more effective at regulating PMCs than international legal obligations, but many of the countries that PMCs operate in do not have effective governance and enforcement mechanisms for restraining PMCs. Finally, there are private legal obligations that can govern PMCs. These private legal obligations are overseen by different organizations, and private employers often look for certifications from these organizations before they hire a PMC for security needs, or they will require adherence to private legal regimes via contract.

A. International Legal Obligations

PMCs are subject to five major international legal regimes, which set out legal obligations that PMCs are supposed to follow. However, the enforcement of these obligations is difficult.

1. Obligations under International Law. — There are five major international legal regimes that focus on PMCs: (1) the Geneva Conventions, (2) the United Nations Mercenary Convention, (3) the Montreux Document, (4) the International Criminal Court (ICC), and (5) the United Nations Guidelines on the Use of Armed Security Services from Private Security Companies. First, the Geneva Conventions addresses the issue of PMCs in Protocol I, Rule 108.¹⁰⁵ This rule lays out six criteria that must be met in order for a combatant to be considered a mercenary, which is a person who:

¹⁰³ Rao Komar, Christian Borys, and Eric Woods, *The Blackwater of Jihad*, FOREIGN POLICY (Feb. 10, 2017), <https://foreignpolicy.com/2017/02/10/the-world-first-jihadi-private-military-contractor-syria-russia-malhama-tactical/>.

¹⁰⁴ *Mexican Cartels Hiring US Soldiers as Hit Men*, FOX NEWS (Aug. 1, 2013), <https://www.foxnews.com/us/mexican-cartels-hiring-us-soldiers-as-hit-men>.

¹⁰⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), December 7, 1978, [hereinafter Protocol I], https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf.

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.¹⁰⁶

The joke that has been repeated about this definition, originated with historian Geoffrey Best, who said, “[a]ny mercenary who cannot exclude himself from this definition deserves to be shot—and his lawyer with him!”¹⁰⁷ Furthermore, successfully invoking this rule effectively denies accused persons’ prisoner of war status.¹⁰⁸ But, that is unlikely to encourage PMC behavior that aligns with international expectations, given who they are fighting.¹⁰⁹

Second, the United Nations Mercenary Convention uses the definition of a mercenary that is laid out in the Geneva Conventions as covered above. Only 45 states have signed the convention, and fewer have ratified it.¹¹⁰ Thus, the convention has no teeth.¹¹¹

Third, the Montreux Document is equally toothless, but it does provide guidance to states that choose to employ PMCs.¹¹² The document is an unenforceable piece of soft law that lays out practical guidance as to the responsibilities of contracting states, territorial states, and home

¹⁰⁶ *Id.*

¹⁰⁷ MCFATE, *supra* note 1, at 38.

¹⁰⁸ Protocol I, *supra* note 105.

¹⁰⁹ Bill Chappell, *Jordan Reacts with Rage and Sorrow After ISIS Burns Pilot Alive*, NPR (Feb. 4, 2015), <https://www.npr.org/sections/thetwo-way/2015/02/04/383742600/jordan-executes-2-militants-after-isis-burns-captured-pilot-alive>.

¹¹⁰ International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, December 4, 1989, [hereinafter Mercenary Convention], https://treaties.un.org/doc/Treaties/1989/12/19891204%2008-54%20AM/Ch_XVIII_6p.pdf.

¹¹¹ *Id.* art. 8.

¹¹² The Montreux Document: On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, September 17, 2008, [hereinafter The Montreux Document], https://www.icrc.org/en/doc/assets/files/other/icrc_002_0996.pdf.

states.¹¹³ However, much of the document still references existing international legal obligations and does not give any extra-legal tools to help effectively conduct humanitarian PMC operations, rather, it only provides clarification.¹¹⁴

Fourth, while the ICC can prosecute war crimes, it has never tried any mercenaries or PMCs.¹¹⁵ Furthermore, the ICC requires buy-in from state actors, the most powerful or most rogue of which are unlikely to hand over any PMCs accused of misconduct, as those PMCs may have been working at the behest of those states and they do not want to submit to any challenge to their sovereignty.¹¹⁶

Finally, United Nations Guidelines on the Use of Armed Security Services from Private Security Companies provides guidelines to United Nations personnel when hiring PMCs to protect United Nations missions.¹¹⁷ While some practical information exists that guides how a PMC should conduct itself, the most specific guidelines require any PMC that the UN retains to abide by private legal obligations, such as membership in the International Code of Conduct for Private Security Providers' Association Providers (ICoCA), which is discussed below.¹¹⁸ Fundamentally, the United Nations punts practical regulation to private legal obligations.

2. *Application of Obligations under International Law to Private Security and Military Companies.* — Dr. McFate argues that international legal obligations are futile in trying to either prevent or reign in PMC misconduct.¹¹⁹ If the goal of legal obligations is to create an effective legal regime that prevents or punishes international law or norm violations of norms, then most international legal obligations fail to fulfill their objectives. Without enforcement mechanisms, and by relying on nation states to enforce international legal obligations, the international legal obligations are only statements of desire. This problem is especially

¹¹³ *Id.*

¹¹⁴ *Id.* at Forward.

¹¹⁵ Q&A: *The International Criminal Court and the United States*, HUMAN RIGHTS WATCH, <https://www.hrw.org/news/2019/03/15/qa-international-criminal-court-and-united-states#>.

¹¹⁶ MCFATE, *supra* note 31, at 138–42.

¹¹⁷ *Guidelines on the Use of Armed Security Services from Private Security Companies*, UNITED NATIONS DEPARTMENT OF SAFETY AND SECURITY (Nov. 8, 2012), http://psm.du.edu/media/documents/international_regulation/united_nations/internal_controls/un_unsms-operation-manual_guidance-on-using-pmsc_2012.PDF.

¹¹⁸ *Id.* at Section 25.

¹¹⁹ MCFATE, *supra* note 31, at 138–42.

evident with the United Nations Mercenary Convention, which has not managed to ban any mercenaries. Fortunately, there are other legal obligations and mechanisms that are more effective at guiding PMC behavior.

B. National Legal Obligations

Regulation of PMCs can be done via laws made by the country that PMCs originate from. In the case of China, there are legal mechanisms that make this possible.

1. Obligations under Chinese Law. — There are two primary ways with which the Chinese government can regulate PMCs under Chinese law: the regulation on Security Service Management and China’s criminal code. There is currently no indication that the Chinese government would apply Chinese military law to Chinese PMCs, but this does not preclude the possibility that it may decide to do so in the future.

First, China has passed a regulation that controls how Chinese PMCs may conduct business. This is the Decree of the State Council of the People’s Republic of China No. 56¹²⁰ This regulation contains specific guidelines for things like the minimum requirements of a security service,¹²¹ minimum age of applicants,¹²² and insurance requirements.¹²³ Though the regulation refers to other regulations like the “Regulations on the Management of the Use of Guns by Full-time Guarding Escorts.”¹²⁴

Second, Chinese criminal law can regulate Chinese PMCs. It is important to note that Chinese law is generally applicable to Chinese citizens abroad.¹²⁵ This is in contrast to some states such as the United States, which has a presumption against extraterritoriality.¹²⁶ Furthermore, Chinese criminal law may be applied to non-Chinese citizens if they commit crimes against the People’s Republic of China (PRC) or against

¹²⁰ Zhonghua Renmin Gongheguo Guowuyuan Ling (中华人民共和国国务院令) [Regulations on the Administration of Security and Guarding Services] (promulgated by the State Council, Oct. 13, 2009), preamble, [hereinafter Security Regulations], http://www.gov.cn/gongbao/content/2009/content_1448998.htm.

¹²¹ *Id.* art. 8.

¹²² *Id.* art. 16.

¹²³ *Id.* art. 20.

¹²⁴ *Id.* art. 29.

¹²⁵ Zhonghua Renmin Gongheguo Xingfa Xiuding (中华人民共和国刑法(修订)) [Criminal Law of the People’s Republic of China] (promulgated by the Nat’l People’s Cong., July 1, 1979; rev’d by the Nat’l People’s Cong., Mar. 14, 1997), art. 7, [hereinafter Chinese Criminal Law], <https://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm>.

¹²⁶ *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S. Ct. 1227, 1230 (1991).

PRC citizens abroad.¹²⁷ Additionally, the PRC will exercise jurisdiction against crimes that are specified in international treaties which the PRC is a party and give the PRC jurisdiction over those crimes.¹²⁸ Finally, the PRC may still hold persons responsible for any crime in its criminal law, even if the crime was committed abroad and that person was tried, convicted, and punished in a justice system abroad.¹²⁹ Punishment may be reduced in recognition of whatever punishment was given abroad.¹³⁰

How China's criminal law extraterritoriality applies was especially evident in three recent cases. First, the 2015 disappearances of five Hong Kong booksellers.¹³¹ Second, China's deportations of Taiwanese nationals in countries outside China, suspected of committing fraud against PRC citizens located in China.¹³² Third, the murder of Shao Tong, a PRC citizen studying in Iowa, who was murdered by her PRC citizen boyfriend in Iowa, though the boyfriend was arrested and prosecuted in China.¹³³

The case of the Causeway Bay Books disappearances is significant for a number of reasons: from its impact on the PRC's relationships with Hong Kong, Macau, and Taiwan, to its signaling that the PRC's stance on freedom of speech is becoming even less tolerant. It also provides an example of how PRC law is applied to individuals outside of the territorial jurisdiction of the country but who may have committed a crime with a nexus inside of the country, especially if the case is politically sensitive in nature.¹³⁴

The case came to prominence in 2015 when five Hong Kong booksellers, including one with Swedish citizenship, and a British national all disappeared.¹³⁵ Four of the men were taken by mysterious agents, likely

¹²⁷ Chinese Criminal Law art. 8.

¹²⁸ Chinese Criminal Law art. 9.

¹²⁹ Chinese Criminal Law art. 10.

¹³⁰ *Id.*

¹³¹ Danny Mok, *Missing Hong Kong Bookseller Says He Turned Himself in for 2003 Drunk Driving Death on State TV*, THE SOUTH CHINA MORNING POST (Jan. 17, 2016, 9:45 PM), <https://www.scmp.com/news/hong-kong/law-crime/article/1902198/missing-hong-kong-bookseller-says-he-turned-himself-2003>.

¹³² Dan Levin, *China to Prosecute Taiwanese in Fraud Case Despite Acquittals in Kenya*, N.Y. TIMES (Apr. 13, 2016), <https://www.nytimes.com/2016/04/14/world/asia/china-to-prosecute-taiwanese-in-fraud-case-despite-acquittals-in-kenya.html>.

¹³³ Shen Lu and Katie Hunt, *China: Boyfriend in Iowa Student Killing Gets Life Sentence*, CNN (Jun. 22, 2016, 11:14 PM), <https://www.cnn.com/2016/06/22/asia/china-iowa-student-murder-sentence/index.html>.

¹³⁴ Zach Dorfman, *The Disappeared*, FOREIGN POLICY (Mar. 29, 2018),

<https://foreignpolicy.com/2018/03/29/the-disappeared-china-renditions-kidnapping/>.

¹³⁵ *Id.*

working for the PRC government from Hong Kong, and one from Thailand.¹³⁶ The men were accused of “illegal book trading” and dodging customs inspections, and admitted to as much, through likely forced confessions, on Chinese television.¹³⁷ One of the booksellers, Gui Minhai, the Swedish citizen, also admitted to being involved in the 10-year old drunk-driving death of a Chinese college student.¹³⁸ A large amount of controversy developed around what appeared to be a rendition program that was used to bring the booksellers from where they were outside of mainland China into the mainland.¹³⁹

According to Chinese criminal law, the smuggling of obscene materials, including books, is punishable with imprisonment of at least three years.¹⁴⁰ Obscene materials are defined as those of a pornographic nature.¹⁴¹ To make matters worse, materials not defined in other articles are covered by a catch-all article in Chinese criminal law, these offenses are punished according to varying degrees of severity depending on the seriousness of the offense.¹⁴² While it is unclear what statute was used to claim authority over prosecuting the booksellers—the Chinese citizens hook, the crimes against the PRC hook, or the international treaties hook—it is apparent that the PRC will engage in such prosecution if its political interests are served by it.¹⁴³

The deportations cases of Taiwanese nationals provides an example of how crimes of a less political and more criminal nature are handled when the crimes are committed by persons based outside of China, but who still maintain a connection to the Chinese mainland.¹⁴⁴ Taiwan and mainland China have a contentious relationship, with both claiming leadership over the whole of the former territory of Republican China

¹³⁶ *Id.*

¹³⁷ Stella Tsang and James Pomfret, *Missing HK booksellers Say Arrested for Sales of Banned Books in China*, REUTERS (Feb. 28, 2016, 10:44 PM), <https://www.reuters.com/article/us-hongkong-booksellers/missing-hk-booksellers-say-arrested-for-sales-of-banned-books-in-china-idUSKCN0W20LC>.

¹³⁸ *Id.*

¹³⁹ Dorfman, *supra* note 134.

¹⁴⁰ Chinese Criminal Law art. 152.

¹⁴¹ Chinese Criminal Law art. 367.

¹⁴² Chinese Criminal Law art. 153.

¹⁴³ *Id.*

¹⁴⁴ *China Defends Deportation of Taiwan Citizens as Internationally Accepted*, REUTERS (Feb. 21, 2017, 7:58 PM), <https://www.reuters.com/article/us-china-taiwan-spain-idUSKBN1610C2>.

before the declaration of the People's Republic in 1949.¹⁴⁵ Following the largescale domestic crackdown on telecom scamming operations in the mid-2000's, Taiwan-based scammers relocated their operations abroad.¹⁴⁶ The locations of the scamming operations went all over the world, going to places like Cambodia, Armenia, Spain, and Kenya.¹⁴⁷ These scammers often operated by preying on vulnerable mainlanders, through impersonating authority figures and convincing the victims to provide scammers with money.¹⁴⁸ These scammers have stolen millions of dollars from PRC citizens.¹⁴⁹ It is widely believed that the PRC was interested in sending a message to cease operations not just to those engaged in committing fraud, but also to the Taiwanese government.¹⁵⁰ Cambodia,¹⁵¹ Spain,¹⁵² and Kenya are all states that have recently deported Taiwanese citizens to the PRC after busting telecom scamming operations within their territory.¹⁵³

Crimes involving financial fraud are covered by Section 5 of the Chinese Criminal Code.¹⁵⁴ These cases differ from the cases involving the Hong Kong booksellers, because it is widely recognized that a nation has the authority to seek the prosecution of those accused of committing crimes directed at that nation's territory.¹⁵⁵ Additionally, deporting Taiwanese citizens to the PRC is legal under international law.¹⁵⁶ It is also unclear in this situation what statute was used to claim the authority to prosecute the Taiwanese scammers: the citizens' hook or the international treaties' hook. While the contentious relationship between the PRC and Taiwan makes these cases more complex, it is uncontroversial that the PRC would seek

¹⁴⁵ Humphrey Malalo and Faith Hung, *Why Did Kenya Deport Taiwanese Citizens to China?*, THE CHRISTIAN SCIENCE MONITOR (Aug. 8, 2016), <https://www.csmonitor.com/World/Global-News/2016/0808/Why-did-Kenya-deport-Taiwanese-citizens-to-China>.

¹⁴⁶ Nick Aspinwall, *'Grave Concern' as Cambodia Depots Taiwanese Alleged Scammers to China*, THE DIPLOMAT (Dec. 15, 2018), <https://thediplomat.com/2018/12/grave-concern-as-cambodia-deports-taiwanese-alleged-scammers-to-china/>.

¹⁴⁷ *Id.*

¹⁴⁸ *Beijing Jails 44 Taiwanese Deported from Kenya for Telecoms Fraud*, SOUTH CHINA MORNING POST (Dec. 21, 2017, 3:14 PM), <https://www.scmp.com/news/china/policies-politics/article/2125277/beijing-jails-22-taiwanese-deported-kenya-telecoms>.

¹⁴⁹ *China Defends Deportation of Taiwan Citizens as Internationally Accepted*, *supra* note 144.

¹⁵⁰ Dan Levin, *supra* note 132.

¹⁵¹ Aspinwall, *supra* note 146.

¹⁵² *China Defends Deportation of Taiwan Citizens as Internationally Accepted*, *supra* note 144.

¹⁵³ *Beijing Jails 44 Taiwanese Deported from Kenya for Telecoms Fraud*, *supra* note 148.

¹⁵⁴ Chinese Criminal Law at Section 5.

¹⁵⁵ Dan Levin, *supra* note 132.

¹⁵⁶ *Id.*

the extradition of those accused of directing criminal action against its territory.

Finally, likely the most clear and pertinent example of PRC law's extraterritoriality is the tragic case of Shao Tong's murder. Shao Tong was an international student at Iowa State University when she disappeared in 2014.¹⁵⁷ Ms. Shao's roommate reported her missing on September 18, 2014, and Ms. Shao's body was found eight days later.¹⁵⁸ Police in Iowa determined that her death was a homicide but were unable to locate her killer.¹⁵⁹ After eight months on the run, Ms. Shao's former boyfriend, Li Xiangnan, turned himself into police and confessed to the murder.¹⁶⁰ However, the police that Mr. Li turned himself into were Chinese police.¹⁶¹ This was because just after he committed the murder, Mr. Li fled to China.¹⁶² The United States and China do not have an extradition treaty, and the Chinese government eventually made the decision to prosecute Mr. Li in China.¹⁶³ Mr. Li was convicted of murder and given a life sentence.¹⁶⁴ The jurisdictional hook for the prosecution of Mr. Li likely came under Article 7 of the Chinese Criminal Code.¹⁶⁵

These three examples provide a rough framework for how Chinese law may be applied to those who commit crimes outside the PRC. Effectively, there are three options for the PRC government to use when determining how to exercise jurisdiction over members of a PMC: (1) jurisdiction over PRC citizens, (2) jurisdiction over those who commit crimes against the PRC as a State or PRC citizens outside the PRC, and (3) jurisdiction over crimes as provided by international treaties that the PRC is party to.

2. *Application of Chinese Law to Private Security.* — The current regulations that the Chinese government has regarding PMCs are likely insufficient. First, the regulation on Security Service Management is not detailed enough to provide proper guidance to Chinese PMCs operating

¹⁵⁷ Lu and Hunt, *supra* note 133.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Stephen Gruber-Miller, *How Tong Shao's Killer was Brought to Justice*, IOWA CITY PRESS CITIZEN (July 1, 2016, 4:39 PM), <https://www.press-citizen.com/story/news/crime-and-courts/2016/07/01/how-tong-shaos-killer-brought-justice/86546758/>.

¹⁶⁴ *Id.*

¹⁶⁵ See Chinese Criminal Code art. 7.

abroad. However, with the lack of a presumption against extraterritoriality, China may choose to bring accused criminals back home to face justice. In this case, China would use the Criminal code article applying Chinese law to Chinese citizens abroad as the jurisdictional hook to prosecute the PMCs, much like what happened with Li Xiangnan in the Shao Tong case. However, if the PMCs are third country nationals working in a Chinese corporation, then the Chinese government would have to approach the problem differently. It is possible that the Chinese government would advance a theory of harm to the state caused by the reckless actions of the PMCs, or assert that because the PMCs were employed by a Chinese firm, that the men should be prosecuted in accordance with Chinese law. Such prosecutions would be more in-line with the cases of the Taiwanese telecom scammers. Finally, the PMCs might be prosecuted in accordance with a treaty that the PRC is a party to. However, if the chief concern is to create a system that aims to prevent criminally prosecutable events from happening in the first place, then the current state of Chinese national legal obligations is likely not sufficient to ensure this desired outcome.

C. Private Legal Obligations

The final set of legal obligations that PMCs may be subject to are private legal obligations that PMCs can either voluntarily meet or meet as part of a contractual agreement at the request of their clients. The two most prominent methods of imposing private legal obligations are either via trade groups or by adhering to a private regulatory regime.

1. Trade Groups and Private Associations. — Many industries have trade associations. These associations serve as bodies that can produce, analyze, and reform best practices for industries as a whole, as well provide a place where clients and potential clients can go to find service providers that they know will provide quality service. In the PMC industry there are two primary organizations that provide best practices and certifications for companies that are interested in subjecting themselves to those: The International Code of Conduct for Private Security Providers' Association (ICoCA) and the International Stability Operations Association (ISOA).

Of the two organizations, the ICoCA represents the organization that is more focused on human rights and corporate responsibility. The ICoCA was established as a Swiss non-profit association in 2010, in an attempt to

better articulate the ideals of the Montreux Document.¹⁶⁶ The ICoCA defines itself as a “multi-stakeholder initiative formed in 2013 to ensure that providers of private security services respect human rights and humanitarian law.”¹⁶⁷ This is done through the “International Code of Conduct for Private Security Service Providers,” (the Code).¹⁶⁸ Membership of the ICoCA includes PMCs, sovereign states, and civil society organizations.¹⁶⁹ The content of the Code broadly falls into two categories: principles of PMC personnel conduct that are based on international human rights law and on management and governance principles.¹⁷⁰

Companies must apply for membership to the ICoCA.¹⁷¹ The ICoCA then certifies, monitors, and handles complaints about companies.¹⁷² The ICoCA board conducts the certification process, which ensures that the PMC has been certified by an outside independent accredited certification body.¹⁷³ The Certification Committee recognizes ISO 28007, ISO 18788 standards, and ASIS PSC.1 which are discussed below.¹⁷⁴ In order to ensure that a PMC is in compliance with the Code, the ICoCA monitors its members via remote monitoring, company self-assessments, and field-based reviews.¹⁷⁵ This three-prong system is designed to provide the ICoCA with a multi-layered method to ensure member compliance and to help improve member performance.¹⁷⁶ Complaints about members can be filed by people who believe that they have been victims of member

¹⁶⁶ *About Us*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, <https://icoca.ch/en/association> (last visited Dec. 20, 2020).

¹⁶⁷ *About Us*, International Code of Conduct Association, <https://icoca.ch/about/> (last visited Dec. 20, 2020).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *The Code*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, <https://icoca.ch/the-code/> (last visited Dec. 20, 2020).

¹⁷¹ *Join Us*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, <https://icoca.ch/join-us/> (last visited Dec. 20, 2020).

¹⁷² *What We Do*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, <https://icoca.ch/what-we-do/> (last visited Dec. 20, 2020).

¹⁷³ *Articles of Association*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, <https://icoca.ch/wp-content/uploads/2020/10/ICoCA-Articles-of-Association.pdf>.

¹⁷⁴ *ICoCA Opens Pathway to Certification for Private Maritime Security Companies*, HUMAN ANALYTICS, <http://human-analytics.net/icoca-opens-pathway-certification-private-maritime-security-companies/> (last visited Dec. 20, 2020); *The Value-Add of the ICoCA: A ‘Strong Sword’*, HUMAN ANALYTICS, <https://human-analytics.net/the-value-add-of-the-icoca-a-strong-sword/> (last visited Dec. 20, 2020).

¹⁷⁵ *What We Do*, *supra* note 172.

¹⁷⁶ *Id.*

misconduct or by those who have reason to believe that a member has committed, or is about to commit, misconduct.¹⁷⁷ Finally, while most of the disciplinary measures are structured in a manner that intends to ensure member compliance with the Code, the greatest possible punishment that the ICoCA can give is a suspension from the organization.¹⁷⁸

However, the ICoCA is not the only trade association that PMCs can be members of. The ISOA is an association that represents PMCs and their interests,¹⁷⁹ but it also provides a code of conduct to which all members must abide.¹⁸⁰ This code of conduct lists a number of prominent human rights and anti-corruption laws as guiding documents for how members should conduct themselves; among them are The Universal Declaration of Human Rights, the Geneva Conventions, and the Montreux Document.¹⁸¹ However, the ISOA does not provide the same rigorous certification, monitoring, and complaint system as the ICoCA does.¹⁸² Though, importantly, it does provide much more detailed and practical standards for issues, like weapons handling, that are missing from most international legal obligations. This makes the ISOA a more practical organization for ensuring the proper conduct of a PMC than many of the international and national legal obligations, which do not provide clear guidance for how PMCs should conduct themselves during operations.¹⁸³ Both ICoCA and ISOA have over 100 members each, with many PMCs being members of both organizations.¹⁸⁴

2. *Voluntary Adherence to Existing Private Regulatory Regimes.* — The ICoCA and the ISOA are bolstered by the existence of voluntarily regulatory standards. These standards are International Standards Organization (ISO) and ASIS International.¹⁸⁵ The ISO standards are more

¹⁷⁷ *Id.*

¹⁷⁸ *Articles of Association*, *supra* note 173.

¹⁷⁹ *ISOA Mission*, INTERNATIONAL STABILITY OPERATIONS ASSOCIATION, <https://stability-operations.org/page/Mission> (last visited Dec. 20, 2020).

¹⁸⁰ *ISOA Code of Conduct*, INTERNATIONAL STABILITY OPERATIONS ASSOCIATION, <https://stability-operations.org/page/Code> (last visited Dec. 20, 2020).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*; *See* The Montreux Document, *supra* note 112.

¹⁸⁴ *Membership*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, <https://icoca.ch/en/membership> (last visited Dec. 20, 2020); *The Spectrum of Stability*, INTERNATIONAL STABILITY OPERATIONS ASSOCIATION, <https://stability-operations.org/page/Members> (last visited Dec. 20, 2020).

¹⁸⁵ *About Us*, ISO, <https://www.iso.org/about-us.html>; *About ASIS*, ASIS, <https://www.asisonline.org/footer-pages/about-asis/> (last visited Dec. 20, 2020) (ASIS does not currently stand for anything, but upon its founding was the American Society for Industrial Security).

widely recognized than the ASIS standards, but ASIS does importantly provide an extra set of standards that companies can choose to become certified in, and nothing prevents a company from becoming certified in both sets of standards.¹⁸⁶

The ISO standards that are recognized by the ICoCA are ISO 28007 or ISO 18788 certification.¹⁸⁷ ISO 18788 is for PMCs in general,¹⁸⁸ and ISO 28007 is for maritime PMCs in particular.¹⁸⁹ ISO 18788 “provides a framework for establishing, implementing, operating, monitoring, reviewing, maintaining and improving the management of security operations.”¹⁹⁰ This standard is a 98-page document full of specific ways to implement and monitor appropriate conduct for PMCs. Furthermore, ISO 28007 “gives guidelines containing additional sector-specific recommendations, which companies...who comply with ISO 28000 can implement to demonstrate that they provide Privately Contracted Armed Security Personnel...on board ships.”¹⁹¹ This standard is 24 pages and provides specific guidance for PMCs who conduct maritime operations and is used in addition to ISO 18788.

Additionally, there are the ASIS standards. ASIS is a liaison organization for the ISO and its parent organization, the American National Standards Institute (ANSI). ASIS provided standards for American PMCs prior to the development of the ISO standards upon which the ISO standards are based.¹⁹² The most prominent ASIS standards are PSC.1 and PSC.2, which are “Management System for Quality of Private Security Company Operations” and “Conformity Assessment and Auditing Management Systems for Quality of Private Security Company Operations” respectively.¹⁹³ Like the ISO standards, they are detailed instructions and guidelines for how PMCs should conduct their operations in order to perform operations in an ethical manner.

¹⁸⁶ See, e.g., *What We Do*, supra note 173.

¹⁸⁷ *The Value-Add of the ICoCA: A ‘Strong Sword’*, supra note 174.

¹⁸⁸ *ISO 18788:2015*, ISO, <https://www.iso.org/standard/63380.html>.

¹⁸⁹ *ISO 28007-1:2015*, ISO, <https://www.iso.org/standard/63166.html>.

¹⁹⁰ *ISO 18788:2015*, supra note 188.

¹⁹¹ *ISO 18788:2015*, supra note 189.

¹⁹² *ISO to Develop New Global Private Security Quality Management Standard*, ANSI NEWS AND PUBLICATIONS (Aug. 6, 2013), <https://www.ansi.org/news-and-events/standards-news/all-news/2013/08/iso-to-develop-new-global-private-security-quality-management-standard-06>.

¹⁹³ *Published Standards*, ASIS INTERNATIONAL, <https://www.asisonline.org/publications--resources/standards--guidelines/> (last visited Dec. 20, 2020).

3. *Application of Private Legal Obligations to Private Security and Military Companies.* — Trade Associations and voluntary regulatory standards provide the most effective methods for regulating PMCs. This is for four reasons: (1) they are detailed, (2) they are already prominent in the market, (3) membership to some of the associations is already required by some client organizations, and (4) it is easier for a nation to create a law requiring that a PMC adhere to already recognized standards in order to operate than it is for a nation to create a new law that regulates PMCs from scratch. The ICoCA Code, the ISOA code of conduct, and the ISO and ASIS standards all provide detailed standards and best practices for how a PMC should conduct operations. This is a set of practical legal standards which most international and national legal obligations do not provide. Due to the large memberships of the ICoCA and ISOA and the general prominence of ISO and ASIS standards in management practices globally, these mechanisms are already well regarded and understood by the market, to the point where being a member of one of these organizations, ICoCA, requires certification in the ISO standards. There are also organizations like the United Nations, which may require members to join some of these groups, like ICoCA, in order to be eligible for contracts. States can bring these legal obligations into effect through referencing or incorporating them into contracts. This makes the ICoCA and ISOA mechanisms more effective than the traditional legislative process, which requires bargaining and research that can reduce the effectiveness that this private legal regime has. Finally, because ICoCA and ISOA can suspend members, and membership is required by some high-profile employers, there is incentive for a PMC to behave in a manner that keeps their organization in good standing with a trade association.¹⁹⁴

CONCLUSION

A new Chinese law that regulates Chinese PMCs by requiring them to either receive ISO or ASIS certification, or to otherwise attain membership in the ICoCA, is the best option for ensuring that Chinese PMCs conduct themselves in the most appropriate and ethical manner possible. As the world trends towards a Neomedieval order, there will likely be an increased use of PMCs. China's continued development of the BRI will likely create an increasing need for physical security over Chinese infrastructure projects and investments around the world. Should increased

¹⁹⁴ *Articles of Association*, *supra* note 173.

PMC use occur, the Chinese government should require Chinese PMCs to adopt internationally recognized standards of conduct for PMCs. Since effective international law and international law enforcement is not likely to reign in PMCs, it is imperative that states dictate how PMCs behave. Because internationally recognized standards exist, China should require its nascent PMC industry to adopt them, rather than attempting to reinvent the PMC regulation wheel.