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# Introduction

*Francesco Francioni and Natalino Ronzitti*

Armed forces have always represented, and continue to represent, the core function of the state as guarantor of external defence and security for citizens. Yet over the past decade the outsourcing of military and security services to commercially organized entities ('private military and security companies', henceforth PMSCs or private contractors) has grown in size and importance as part of a larger contemporary phenomenon of privatization of services which in the past were typical governmental functions.

For the purpose of this book, PMSCs can be defined as corporations offering security, defence and/or military services to states, international organizations, non-governmental organizations, and private companies and/or armed groups. These services include armed guarding and protection of persons and objects or buildings, maintenance and operation of weapons systems, prisoner detention and interrogation, intelligence, risk assessment and military research analysis, as well as advice to or training of local forces and security personnel.

Indeed, private contractors have replaced members of the armed forces in a number of situations ranging from actual participation in hostilities to support of armed forces in prolonged military occupation, security in peace-keeping/peace-enforcing operations, international administration in post-conflict institution building, and intelligence gathering. In addition, PMSCs have been used and continue to be used by non-state actors, such as NGOs and business corporations acting in conflict zones or in territories characterized by insecurity and weak institutional governance. Most recently, armed private contractors have been used to defend maritime commerce against the re-emerging plague of piracy.

In parallel with the expansion of this phenomenon, particularly in conjunction with the prolonged wars in Iraq and Afghanistan, there has been increasing concern about the adequacy of its regulation, both in domestic law and international law. At an academic level, this concern has generated an abundant literature, covering the historical and sociopolitical aspects of the phenomenon;<sup>1</sup>

<sup>1</sup> PW Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (2003); D Avant, *The Market for Force: The Consequences of Privatizing Security* (2005); D Isenberg, *Shadow Force: Private Security Contractors in Iraq* (2009); E Krahnemann, *States, Citizens and the Privatization of Security* (2010).

its links with mercenarism;<sup>2</sup> constitutional law issues relating to the erosion of the traditional notions of ‘inherently governmental functions’, with consequent loss of democratic control over the use of force;<sup>3</sup> and the question of the uncertain legal status of private contractors in the context of the law of armed conflict.<sup>4</sup>

More recently, in the past two or three years, a number of policy initiatives have been launched aiming to improve the international regulation of the private military and security industry. Two of these initiatives are of special significance for the subject matter of this book. The first is the so-called ‘Swiss initiative’, from the name of the promoting government, which produced a soft normative document in November 2008 (the ‘Montreux Document’)<sup>5</sup> containing a set of guidelines of good practice for states and the industry.<sup>6</sup> The second initiative evolved in the United Nations Human Rights Council, and more precisely within the Working Group on the Use of Mercenaries. This led to the elaboration of a *Draft of a Possible Convention on Private Military and Security Companies*, which was presented to the Human Rights Council in July 2010.<sup>7</sup>

In Europe, where the phenomenon of private contractors remains limited as compared with the United States, regulatory approaches to PMSCs vary from country to country, ranging from outright criminalization of the activity of recruiting personnel and offering related services, to systems of prior licensing, to an attitude of *laissez-faire*.<sup>8</sup> This notwithstanding, the need for improvement of the regulation has emerged at the national and European Union (EU) level. In 2002 the British House of Commons published a Green Paper on the subject and opened up a public consultation on the role of the private sector in the provision of military and security services.<sup>9</sup> These consultations are still underway at the time of writing.

<sup>2</sup> S Chesterman and C Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007).

<sup>3</sup> S Chesterman and A Fisher (eds), *Private Security, Public Order: The Outsourcing of Public Services and its Limits* (2009).

<sup>4</sup> E-C Gillard, ‘Business goes to War: Private Military/Security Companies and International Humanitarian Law’, IRRC 88 (2006) 525; L Cameron, ‘Private Military Companies: Their Status under International Humanitarian Law and its Impact on Their Regulation’, (2006) 88 IRRC 573; L Doswald-Beck, ‘Private Military Companies under International Humanitarian Law’ in Chesterman and Lehnardt (eds) (n 2 above), 118.

<sup>5</sup> UN Doc A/63/467–S/2008/636, Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict (17 September 2008).

<sup>6</sup> A follow-up of this initiative is the recent finalisation of a Global Code of Conduct for Respect of Human Rights and International Humanitarian Law, specifically addressed to PMSCs.

<sup>7</sup> Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination, *Draft of a Possible Convention on Private Military and Security Companies (PMSCs)*, attached to UN Doc A/HRC/15/25, 2 July 2010. The UN Human Rights Council decided to establish an intergovernmental open-ended working group with the mandate to elaborate a legally binding instrument on the basis of the principles, main elements, and draft text proposed by the WG on the use of mercenaries, Res A/HRC/15/L.22 of 27 Sept. 2010.

<sup>8</sup> For a collection of reports on national legislation and case law, see <<http://www.priv-war.eu>>, accessed 14 August 2010. For a comparative analysis see O Quirico, *National Regulatory Models for PMSCs and Implications for Future International Regulation*, MWP Working Paper, 2009.

<sup>9</sup> House of Commons Foreign Affairs Committee, *Private Military Companies*, 23 July 2002.

At the EU level, there is no common regulation of PMSCs and the current code of conduct on the export of weapons does not envisage the export of security services. Yet, given the increasing need for private security services and the expanding field of the EU security and defence policy, the EU Parliament has commissioned a study of the phenomenon<sup>10</sup> with a view to possible regulatory initiatives.

The European Commission, although not directly involved in regulatory initiatives, has recognized the sociopolitical and legal implications of the current outsourcing of military and security tasks to private actors and has provided financial support for study and research on the subject in the context of its 7th Framework Programme. A specific collaborative research project within that Programme was launched in 2008 under the title *Regulating the Privatisation of War: The role of the European Union in assuring compliance with international humanitarian law and human rights (PRIV-WAR)*. This project, carried out with the participation of seven European universities<sup>11</sup> under the general coordination of the European University Institute in Florence, has produced empirical research by collecting data on the state of the security industry throughout the world and by publishing a series of national reports on the domestic legislation on PMSCs in a wide range of relevant countries. At the same time, the project has undertaken a systematic, comprehensive analysis of the role of international law in preventing abuses by private military contractors, in protecting them in situations of armed conflict and in providing a system of accountability of states and private actors in the event of harm caused by such contractors. This book is a product of this research project.

Unlike other books on the subject, the main focus of this volume is the role of international human rights law (HRL) and international humanitarian law (IHL) in the governance of the transnational military and security industry. It examines the applicability *de lege lata* of principles and norms of HRL and IHL to states involved in the provision of private military and security services, to PMSCs and to their employees. Moreover, it addresses questions of state responsibility and of civil and criminal liability of private contractors, and examines issues of access to justice for victims of possible wrongful acts. At the same time, the book provides some policy perspectives, *de lege ferenda*, for improved regulation at the international level.

The volume is divided into five parts. Part I opens with a contribution by Eugenio Cusumano, which explores the nature and sociopolitical implications of the current outsourcing of security tasks and provides a theoretical framework for the analysis of different regulatory options. The chapter concludes with a proposal for a multilayered approach to future regulation. The second chapter, by Natalino Ronzitti, addresses the very timely topic of piracy, and provides an innovative examination of the policy implications of the use of PMSCs in the fight against this renewed plague affecting maritime commerce. The author argues that while

<sup>10</sup> See J Bailes and C Holmquist, *The Increasing Role of Private Military and Security Companies* (October 2007).

<sup>11</sup> European University institute (Florence), LUISS 'Guido Carli' (Rome), University of Utrecht, University of Sheffield, Justus Liebig Universitaet (Giessen), Riga Graduate School of Law, Universitè Panthéon Assas, Centre Thucydide (Paris II).

international law prohibits the arming of private vessels for pirate-hunting, there are no specific prohibitions against the use of security guards for protecting private shipping. Their use should be reconciled with the law of the sea.

Part II examines the human rights dimension of the privatization of military and security services. It opens with a comprehensive survey in Chapter 3, by Federico Lenzerini and Francesco Francioni, of the applicable treaties and customary law, and of the main obligations that derive therefrom, for states involved in the provision or use of private military and security services. The following chapter by Ieva Kalnina and Ugis Zeltins focuses specifically on the role of the EU, especially in light of the Charter of Fundamental Rights and in conjunction with the human rights jurisprudence of the European Court of Human Rights in Strasbourg. More incisive legal analysis follows in the three subsequent chapters focusing on the specific legal obligations of the different states involved in the outsourcing of private military and security services. In Chapter 5, Francesco Francioni addresses the role of the PMSC's 'home state', ie the state where the company was constituted as a legal person or where it has its headquarters or its main place of business. The principal argument developed by the author is that the nature of human rights obligations permits the construction of a general duty of 'due diligence' in the constitution and licensing of the company and of its individual employees, as well as in the licensing of commercial exports of military and security services, as part of the general human rights obligation to prevent and protect against abuses. At the same time, Francioni provides a detailed analysis of the criteria of attribution of a wrongful act to the state, under the general principles of state responsibility, both in the case of private contractors who are integrated in the armed forces of the relevant state and in the (more frequent) case of private contractors who maintain a distinct position from the armed forces.

Chapter 6, by Carsten Hoppe, analyses the human rights obligations of the 'hiring state', ie the state that contractually engages the PMSC for the provision of services, most of the time abroad. The focus of this contribution is on the positive obligations of the hiring state in overseeing what the author calls 'coercive services' by a PMSC. By this expression Hoppe means those services that entail a certain measure of force either in the sense of military force or in connection with activities relating to the running of detention or interrogation centres. To grasp the relevance of this specific focus one need only think of the scandals surrounding the abuses committed by private guards at the Abu Ghraib prison in Iraq, the involvement of private contractors in the practice of secret 'rendition' of suspected terrorists to allow their torture in the receiving country, or the more recent Nisour Square 'incident' in Baghdad where many innocent civilians were killed as a consequence of reckless shooting by private guards escorting a convoy.

In Chapter 7, the issue of human rights obligations is examined by Christine Bakker from the perspective of the 'host state', ie the state in whose territory the private security or military services are performed. Without departing from the basic principle of territorial sovereignty and the international responsibility of the territorial state to ensure that its territory is not used to commit or allow the commission of international wrongful acts, the author cogently argues that the

human rights obligations of the host state with regard to the conduct of PMSCs must be implemented within a perspective of substantive complementarity with the obligations of the hiring state and the home state. The argument is all the more convincing if one considers that the conditions in the host state that normally require the sending of private contractors are insecurity, weak institutional control, and often armed conflict. Thus, they are not conducive to the effective supervision of PMSCs.

In her chapter Giulia Pinzauti addresses the challenges posed by the increasing reliance on PMSCs for the supervision and adjudication of human rights violations committed in times of armed conflict, focusing on the potential role of the European Court of Human Rights (ECtHR). The author convincingly discusses the main challenges that the ECtHR will have to face if it is ever called upon to rule on the infringement of the European Convention on Human Rights (ECHR) by PMSCs acting in a situation of armed conflict, and suggests some possible solutions.

The second part of the book concludes with an innovative chapter by Guido Den Dekker and Eric Myjer, which analyses the relevance of the right to life for private contractors involved in armed conflict. The authors provide valuable insight into the interplay between human rights and IHL regarding the right to personal self-defence of individual employees of PMSCs.

The focus of attention in Part III is on the law of armed conflict. Chapter 10, by Mirko Sossai, offers an analytical framework to discuss the status of PMSC employees under the law of international armed conflict: in principle, they can fall within the category of legitimate combatants once the hiring state establishes a certain qualified factual link between them and its regular armed forces; if not, they are civilians. In this connection, Giulio Bartolini, in Chapter 11, discusses whether the category of 'civilians accompanying the armed forces', already present in the early codification of the laws of war, may be considered to cover the phenomenon of PMSCs. One of the main consequences thereof is that civilian contractors enjoy immunity from attack, unless they take direct part in hostilities. Thus, this book gives considerable attention to the ICRC's recently released *Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL* and the chapters in this part examine the approach taken by the ICRC in relation to tasks entrusted to PMSCs. Episodes of violence and abuse committed by PMSCs have shocked public opinion to such an extent that several academic commentators initially claimed that they should be banned under the existing norms on mercenaries. This radical view is challenged by Marina Mancini, Faustin Ntoubandi and Thilo Maruhn in Chapter 16. The authors assess the activities of the UN Working Group on the Use of Mercenaries and conclude that only a very limited number of PMSCs fall within the definitions of mercenary laid down in treaty law.

Chapter 12 by Luisa Vierucci aims to fill the gap in legal literature regarding the activities performed by PMSCs in non-international armed conflicts. First, it covers the *ius ad bellum* issues arising from this scenario, particularly the right of the constituted government to use foreign armed forces, including services provided by PMSCs. As for their legal status under IHL, one of the problematic aspects is whether PMSCs qualify per se as opposition armed groups. In this regard, the

neglected question of the international liability of armed opposition groups is examined, with special emphasis being placed on the due diligence obligations accruing both to the group and the state.

Part III also addresses the impact of PMSCs on certain vulnerable groups, protected by both the law of armed conflict and by human rights. Chapter 13, by Christine Bakker and Susanna Greijer, considers whether PMSCs may be held accountable for recruiting children or for using them to participate actively in hostilities. Furthermore, it examines the measures PMSCs are required to take if they find themselves confronted with children participating in armed hostilities. The chapter by Ana Vrdoljak focuses on gender-related issues, with the crime of sexual violence at the core of her analysis. Women employees of PMSCs have recently brought actions against their employers for sexual assault; there have also been recent cases of female civilian victims of contractors operating forced prostitution rings. Both of these chapters emphasize that better recruitment processes, adequate training for PMSC personnel and effective accountability in the case of abuses are essential.

Also in Part III, the chapter by Valentina Falco considers the possible role and functions of PMSCs in the context of EU crisis-management operations and the challenges they pose for compliance with IHL and HR. Falco's analysis recognizes the lack of clarity in the legal framework of the Common Security and Defence Policy, particularly since recently adopted non-binding instruments in this context have, in the author's view, produced ambiguous legal effects.

The use of PMSCs by international and regional organizations is assessed by Nigel White, in his chapter in Part IV. The author discusses one of the most delicate issues of the law of international responsibility for wrongful acts: namely, whether the actions of PMSCs deployed as part of a peace support operation should be attributed to the international organization or to its member states. Issues of state responsibility arising from the acts of PMSCs are also covered in the chapter by Charlotte Beaucillon, Julian Fernandez, and H el ene Raspail, who investigate the conditions under which the hiring state could be held responsible for a violation of the prohibition of the threat or use of force committed by private contractors.

Part IV also contains two chapters which evaluate the state of self-regulation and corporate social responsibility initiatives within the PMSC industry. Ottavio Quirico and Carsten Hoppe examine a number of initiatives relating to the development of codes of conduct and offer a classification scheme of the different regulatory techniques and enforcement mechanisms. Sorcha MacLeod analyses the implications of the work of the UN Secretary General's Special Representative on business and human rights (SGSR), John Ruggie, particularly in relation to the due diligence requirement. MacLeod also examines the impact of the UN Global Compact and the Organisation for Economic Cooperation and Development's (OECD) Guidelines for Multinational Enterprises. Her chapter offers an important contribution to the debate on the viability of such initiatives, which are often voluntary in nature, lack individual redress, and often rely solely on the market to achieve compliance.

Part V concludes the book with an examination by Ottavio Quirico of the question of criminal responsibility of individual PMSC employees, a discussion of

the role and limits of the international law on immunity as applicable to the conduct of PMSCs and their employees by Micaela Frulli, and on the prospect of adjudication of civil claims arising from torts committed by private contractors by Andrea Atteritano. These three contributions show that legal proceedings against PMSCs and their employees for violations of human rights or humanitarian law are comparatively rare and are mainly concentrated in the United States, where national legislation and jurisdictional provisions, including the well-known Alien Tort Claims Act, provide a legal basis for third-party claims. So far little success has been achieved at the level of judicial enforcement of state and PMSC obligations. On the contrary, obstacles remain, including immunity and political exceptions to justiciability. In addition, the human rights of the accused and due process considerations have been used, albeit correctly, to hinder the judicial enforcement of the responsibility of private contractors for serious breaches of human rights committed in the performance of their services (eg, the dismissal in the United States of the legal action against contractors accused of the killing of civilians in the Nisour Square shootings).

It is with an awareness of such limits and shortcomings, and with a view to overcoming them in the future, that the editors and authors of this volume have attempted to clarify the role of international law and of European law in preventing harm and in enhancing the legal accountability and remedies for violations of human rights and humanitarian law committed by, or against, private military contractors.

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