



Introduction

The use of civilians to accompany state armed forces to war zones is not new. In fact, more than a hundred years ago, civilians who followed the armed forces and provided services such as catering were known as ‘sutlers’ and were, under certain circumstances, given prisoner-of-war status under international humanitarian law.¹ What is new and extraordinary, and what has given rise to concerns – including by the military that use them – is the size and scope of the industry and the types of tasks that end up being carried out by private civilians, whether they are contracted by a state, a business, an international organization or subcontracted by another company.

Current reports indicate that there are now upwards of 155,000 private military and security contractor personnel working for the US Department of Defense (DoD) in Iraq and Afghanistan alone, where they outnumber uniformed military personnel.² Many of these persons provide the kinds of services that have often (but not always) been furnished by private companies or contractors, such as catering and maintenance services. Somewhere between 10 and 20 per cent of them act as armed or unarmed security guards. In general, the types of activities in which private military and/or security companies (PMSCs) typically engage tend to be broken down into the following categories: training armed forces and police forces; developing and training in military strategy; programming and servicing weapons; mine clearance; intelligence (including translation services and information operations); logistics

¹ The Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899, Art. 13 (Regulations). The 1929 Geneva Convention relative to the Treatment of Prisoners of War, 27 July 1929, contained an identical provision (Art. 81). Those treaties also refer to ‘contractors’.

² Moshe Schwartz and Joyprada Swain, ‘Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis’, US Congressional Research Service Report (13 May 2011), p. 2.

(including catering, construction, convoy driving); airlift support (transporting troops and goods); servicing vehicles, helicopters and planes; and providing static and mobile security services.³ This list is not exhaustive.

Although fairly uncommon, some PMSCs have in the past furnished combat services. In fact, it was the actions of two such companies – Executive Outcomes (EO) and Sandline International – that put the industry in the spotlight shortly after they provided combat forces and conducted full-scale military operations in Angola, Sierra Leone and Papua New Guinea. These companies and their operations led politicians and academics alike to raise serious questions about the significance of weakening the traditional state monopoly over the use of armed force.⁴ Following the dissolution of EO and Sandline at the turn of this century, there has been a tendency to believe that the market for ‘military service provider firms’ or ‘private combat companies’ is and will remain marginal.⁵ Nevertheless, the actions of those companies quickly steered the early debate to ‘mercenaries’, a moniker that the industry has fought hard to reject and disprove. Although exceptions exist, much of the debate and dialogue now tends to focus on other services provided by private companies.

One of the most contentious activities of PMSCs nevertheless still relates to their use of armed force in war, which generally occurs pursuant to contracts for security services. Furnishing security guards is

³ Peter Singer has proposed a useful typology of what he refers to as private military firms: military service providers, military consultant firms and military support firms. Peter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca and London: Cornell University Press, 2003), esp. pp. 88–100. Deborah Avant categorizes private security services as a police-type activity in terms of ‘Armed Operational Support’, ‘Unarmed Operational Support on the Battlefield’, ‘Unarmed Military Advice and Training’ and ‘Logistical Support’. Private security services fall within the rubric of police-type activity; she places ‘Armed Site Security’ at the tip of the spear or on the front line: Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge University Press, 2001), p. 17. See also Christopher Kinsey, *Corporate Soldiers and International Security: The Rise of Private Military Companies* (London: Routledge, 2006), pp. 8–33. Kinsey uses the term ‘Private Combat Companies’ but asserts that this is a ‘hypothetical category’: p. 31.

⁴ At the forefront of such studies, Deborah Avant examined the impact of the industry on state power over the use of force and the ability of non-state actors to influence the use of force: *The Market for Force*, esp. pp. 219–52.

⁵ We are not in a position to comment on the accuracy of this sentiment. We note, however, that PMSCs may be based in states where there is little transparency and operate in conflicts that tend not to be on the radar of the international news media. One example is the Russian PMSC Sukhoi, which provided ‘a small but complete air force’ to Ethiopia during its conflict with Eritrea in the late 1990s. See Singer, *Corporate Warriors*, p. 138.

categorized by some as a policing-type activity, even in the context of conflict zones.⁶ Indeed, we are all accustomed to seeing private security guards in our daily lives, patrolling shopping malls and other public places, standing outside of banks or other buildings, and, understandably, private security companies have flourished in the volatile, violent and unstable countries enmeshed in armed conflicts. Transposing the provision of such security services to countries in which there is an armed conflict occurring, however, necessarily raises a whole host of issues in relation to the lawful use of force in war.

The following description of the weapons of private security guards in Afghanistan serves as a stark illustration that private security guarding in conflict situations is of a wholly different scale than prosaic shopping mall patrols:

the arms used by [private security company] employees (both international and local staff) vary widely, ranging from semi-automatic handguns, assault rifles (e.g. Kalashnikov), semi-automatic rifles (e.g. Berettas) to machine guns (e.g. Kalashnikov type machine guns-PKMs) and RPGs (rocket propelled grenades). The most common weapon of local staff, most likely because militia fighters used it during the Afghan wars, is the AK47/Kalashnikov.⁷

The report also indicates that '[a]ccording to an UN official ... [one private security company is] even using howitzer for protecting a road construction project in Kunar'.⁸ Even if they are truly used only in self-defence, machine guns and howitzers are not exactly batons and billy sticks. Throughout this work, we will examine in detail some of the complex problems the private security industry in particular poses in the context of armed conflicts.

It is appropriate here to provide some background on armed conflicts and the international law that applies to them and that governs the actions of persons and states waging war. Armed conflicts may be classified as international or non-international in nature, and that classification affects the body of legal rules that apply to them. International armed conflicts occur when a state uses armed force in or against another state.⁹

⁶ Avant, *The Market for Force*, p. 17.

⁷ U. Joras and A. Schuster (eds.), *Private Security Companies and Local Populations. An Exploratory Study of Afghanistan and Angola* (Berne: Swisspeace, 2007), p. 20.

⁸ *Ibid.*, p. 20, n. 62.

⁹ Art. 2 common to the four Geneva Conventions of 1949. Under IHL, certain wars of national liberation may also be considered international armed conflicts (Art. 1(4) of Additional Protocol I) as well as all cases of belligerent occupation.

The early phases of the wars in Iraq and Afghanistan, with ‘Coalition’ or NATO forces fighting Iraqi and Taliban forces, are clear examples of recent international armed conflicts. The international law governing such conflicts is extensive and is set down primarily in the Geneva Conventions of 1949 (to which all states in the world are parties), their Additional Protocols of 1977 and customary international humanitarian law. This body of rules is commonly referred to as international humanitarian law, or IHL.¹⁰ International humanitarian law also contains rules that apply to non-international armed conflicts, which are conflicts that occur between an armed group and a state, or between two or more armed groups acting within the territory of a state and sometimes even across state borders. There have been many more non-international armed conflicts (or ‘civil wars’) in the past decades than international armed conflicts, which is unfortunately inversely proportionate to the number of detailed treaty rules that apply to them. There are nevertheless a sizeable number of rules of customary IHL that apply equally in non-international armed conflicts.¹¹

For their part, private military and security companies, contractors or services are not defined in any binding treaty.¹² One instrument that seeks to guide states in their use and tolerance of PMSCs – the Montreux Document – does provide a definition, that, although incomplete, reflects many of the kind of companies and services that are of greatest concern from an IHL perspective. It says:

¹⁰ Some refer to the Law of Armed Conflicts, or LOAC; however, we will use the term international humanitarian law (IHL) throughout this work.

¹¹ See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press and ICRC, 2005), vol. 1.

¹² There is a definition in the Draft Convention proposed by the UN Human Rights Council Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding People’s Exercise of the Right of Self-determination, but that draft treaty was not adopted by states. According to draft Art. 2(a), Private Military and Security Company ‘refers to a corporate entity which provides on a compensatory basis military and/or security services by physical persons and/or legal entities’. Military services are further defined, in draft Art. 2(b), as referring ‘to specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance, flight operations of any type, manned or unmanned, satellite surveillance, any kind of knowledge transfer with military applications, material and technical support to armed forces and other related activities’. The term ‘security services’ is understood as including ‘armed guarding or protection of buildings, installations, property and people, any kind of knowledge transfer with security and policing applications, development and implementation of informational security measures and other related activities’ (draft Art. 2(c)). See ‘Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council’, UN Doc. A/HRC/15/25.

‘PMSCs’ are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.¹³

As our discussion of many issues relating to PMSCs will show, whether the company officially sees itself as providing combat services is not decisive for how their activities may be gauged and regulated under IHL. In our view, this is a fundamental – but too often overlooked – aspect of any process designed to regulate PMSCs and their activities.

In support of our pragmatic approach to the industry, we find it important to generate an understanding of just how ingrained it has become. Although it reads like the outrageous plot of a Hollywood film, the following long excerpt from a report by the US Senate Committee on Armed Services is revealing. In 2010, that Committee reported on its investigation of private security guards hired by the PMSC ArmorGroup to provide guard services for an airbase in Afghanistan. ArmorGroup was not contracted directly by US forces, but was subcontracted by the company (ECC) that the United States had contracted for planning and construction for an airbase for the Afghan Air Corps. The executive summary reads:

To provide most of their guard force at the base, ArmorGroup initially relied on two warlords, who were known by the company as Mr. White and Mr. Pink. Documents and testimony link those warlords and their successors, to murder, kidnapping, bribery, and anti-Coalition activities. The first group of ArmorGroup guards supplied by the warlords began working at the U.S. airbase in June 2007. ...

In July 2007, Mr. White was ambushed and shot just outside the airbase. Following the attack, armed ArmorGroup guards loyal to White attempted to leave their posts ‘to seek revenge’ for the attack. It was never determined who was responsible for the shooting. A rivalry was apparently developing between White and Pink, however, and ECC’s Security Manager later suggested that the shooting was likely committed by Pink.

On December 12, 2007, Mr. White again came under attack. This time, it was known that the perpetrator was Mr. Pink and his men. The attack escalated into a firefight in the local bazaar with Pink shooting White

¹³ 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 (17 September 2008): Preface, point 9(a).

three times, killing him. ECC's Security Manager later said of the shooting that it was 'kind of like a mafia thing. If you rub somebody out, you'll get a bigger piece of the pie.' Following the shooting, it was reported that Pink was in a local village with a number of Taliban fighters. With White dead and Pink reportedly holed up with the Taliban, ArmorGroup found itself without a guard force provider. The company soon turned to White's brother to fill that role. He would come to be known by the company as Mr. White II.

Despite reports linking Pink to the Taliban, ArmorGroup continued to employ his men for more than a month after White I's murder. A company report said the men's eventual termination from ArmorGroup was a result of reports that they were sending information to Mr. Pink 'regarding our movements to and from Herat, the routine of the airfield security,' and 'attempting to coerce fellow members of the guard that they should join with Pink ...' ArmorGroup reported that they had 'very little choice' but to fire Pink's men 'particularly in light of Pink's move to the Taliban ...'

The threat posed by Pink was not limited to operations on the airbase. In spring 2008, U.S. Forces operating out of the FOB [Forward Operating Base] near the airfield, identified Mr. Pink as a potential military target. The U.S. Forces Team Leader said that his team consider Pink a 'mid-level Taliban manager' and said that the fact that Mr. Pink resided 'immediately outside our front gate ... posed a force protection issue for us.'¹⁴

This report shows that for the warlords who supply the labour force for the private security companies, obtaining a contract to provide security in Afghanistan is treated like maintaining control over drug-trafficking territory.¹⁵ The spiralling loss of control by the United States, including over security guards who led gun battles in local markets and fed sensitive information directly to the enemy, was dealt with not directly by the US forces but by a company subcontracted to a company the United States had hired to manage an airbase. According to the report, ArmorGroup continued to rely on its dangerous source of manpower even when it was aware of the risks because it had no other means to fulfil its contractual obligations. Incredible though it may seem, this is a slice of the reality of the world of private military and security contractors operating in situations of armed conflict.

¹⁴ US Senate Armed Services Committee, 'Inquiry into the Role and Oversight of Private Security Contractors in Afghanistan' Report, 111th Congress, 28 September 2010, pp. i–ii (Executive Summary).

¹⁵ ArmorGroup's awareness of the doubtful ethics of its manpower providers is suggested by the fact that it referred to the warlords by the names of criminals from Quentin Tarantino's film *Reservoir Dogs*.

The enormous strategic risks that this type of contracting practice entails for state armed forces, their operations and even the success of their foreign policy are self-evident. In and of themselves, one would think the risks would suffice to curb the use of outsourced support and private security guards in situations of armed conflict. This has not, however, proved to be the case, mostly for the simple reason that post-Cold War regular armed forces do not have sufficient numbers to perform all of the necessary tasks, including sensitive ones, to maintain, support and protect armed forces in the field by themselves. Significant problems with fraud and oversight have also not proved to be deterrents to heavy reliance on outsourcing. The willingness of contracting states to accept the risks and to prefer to take action to improve oversight and contracting practices, rather than turning away from using private military and security contractors altogether, is proof that the industry is here to stay. In our view, that makes it worthy of very serious study.

This book has three main objectives. The first is to determine whether public international law places limits on the use of private military and security companies, both in terms of explicit and implicit prohibitions. To date, most of the legal analyses in respect of such restrictions have been made solely under the law relating to the use of mercenaries. In our view, it is essential to consider many other aspects of international law, such as the law on the right of states to resort to the use of force, the law on the creation of peace operations, the law on privateering, as well as IHL and international human rights law (IHRL) more generally, in order to have a more complete picture of the existing limitations on their use. We begin with this analysis in Chapter 1.

The second objective is to understand the legal framework governing the use and actions of PMSCs in the context of situations of armed conflict. IHL provides specific and detailed rules, underpinned by principles, which govern what the armed forces of a state party to a conflict may and must do. It also has rules governing the actions of members of armed groups in non-international armed conflicts, but these are less detailed than the rules for international armed conflicts. It is important to understand whether (and if so, how) private military or security contractors may be considered to be members of the armed forces of states (or members of organized armed groups) in order to know the legal obligations binding on them. That analysis occurs on two levels – first, whether, under the rules on attribution in the law on state responsibility, PMSCs may be considered to be an organ of a state (a determination which is not, in itself, conclusive as to their status as members of the

armed forces); and secondly, whether, according to IHL, they are members of the armed forces of a state party to a conflict. These analyses are divided between Chapters 2 and 4.

As we conclude on both levels that PMSCs – in their current manifestation and use – are (for the most part) not members of state armed forces, we aim to provide a detailed analysis on the significance of their status as civilians in terms of the limits on the tasks, roles and functions they may be assigned in the circumstances in which they may nevertheless be used. That analysis also occurs on two levels, divided between Chapters 3 and 4. In Chapter 3, we outline how IHL binds non-state actors such as private companies and individuals and attempt to indicate which types of obligations are binding on all. In Chapter 4, we further analyse the status of private military and security contractors and delve more deeply into the intersection of the concept of direct participation in hostilities and the laws on the use of force in self-defence and their relationship to IHL. We also consider the rules on the use of force in law enforcement in the context of armed conflict, through the prism of PMSCs as non-state actors.

The third main objective of this work is to address issues of responsibility and accountability surrounding PMSCs and their actions. In that respect, in Chapter 2 we examine whether and how different types of PMSCs (according to their relationship to states and the tasks they are given) may be attributable to states. In addition, we look at the due diligence obligations that states bear with regard to private military and security companies and contractors whose actions are not directly imputable to states. Finally, in Chapter 5 we consider the rules and mechanisms for implementing the responsibility of states and individuals in relation to breaches of international law that may occur. The normal means of holding states responsible play a part in this analysis, as do international criminal law (and its trickle-down effect into national criminal law) and national laws on civil responsibility for violations of international law. The main reason we have divided the discussion on state responsibility between Chapters 2 and 5 is that the rules on state responsibility also help to clarify the applicable framework of primary rules governing the actions of PMSCs, which are necessary to keep in mind during the discussions in Chapters 3 and 4.

Throughout, we have attempted to elucidate key features of the applicable legal framework and to apply them dispassionately to the activities and actions of private military and security contractors. Although the use of PMSCs has raised major controversies and remains a highly political

issue, our approach is circumscribed to its legal aspects as informed by existing rules of international law. Accordingly, it makes no attempt to judge the political legitimacy of PMSCs. The primary focus of our work is on IHL, although we also take into account IHRL where appropriate to generate a more complete picture of the applicable legal framework. We have done our utmost to interpret the law in its proper context and according to the normal meaning of the terms and to apply it to facts in the public domain.