PRIVATIZING WAR

A growing number of states use private military and/or security companies (PMSCs) for a variety of tasks which, in the past century, have primarily been fulfilled by soldiers. This book provides a comprehensive analysis of the law that applies to PMSCs active in situations of armed conflict, focusing on international humanitarian law. It examines the limits in international law on how states may use private actors, taking the debate beyond the question of whether PMSCs are mercenaries. The authors delve into issues such as how PMSCs are bound by humanitarian law, whether their staff are civilians or combatants and how the use of force in self-defence relates to direct participation in hostilities, a key issue for an industry that operates by exploiting the right to use force in self-defence. Throughout, the authors identify how existing legal obligations, including under state and individual criminal responsibility, should play a role in the regulation of the industry.

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This book was entirely researched and written prior to the author's engagement in the Legal Division of the ICRC, in the context of an independent academic project. The opinions expressed herein are her own and do not necessarily correspond to those held by the ICRC or its Legal Division.

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Private Military and Security Companies under Public International Law

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FOREWORD

The growing importance and independence of non-state actors in international reality probably constitutes the greatest contemporary conceptual challenge to public international law. Multinational enterprises, armed groups, terrorists and non-governmental organizations are becoming increasingly important, while public international law is still mainly addressed to states and developed by states, and its implementation mechanisms are best geared towards states. Even when it comes to the use of force within a state against armed groups and between states, a domain previously considered as one of the core attributes of the Westphalian state, private actors – that is, private military and/or security companies (PMSCs) – play an increasing role. In some recent conflicts, some belligerent states have employed more PMSC contractors than members of their regular armed forces.[1]

The international law applicable to PMSCs is therefore not only a practical humanitarian challenge, but also an ideal testing ground for conceptual *de lege lata* questions and *de lege ferenda* dilemmas. Here as elsewhere the question arises whether international law should combat (or already outlaws) the phenomenon, or cover and regulate it. Here as elsewhere, the possibilities are either to address those actors directly by international law or to deal with those categories via well-established subjects of international law such as states and international organizations, and to a certain extent (in particular for international criminal law) individuals.

The issue is conceptually particularly challenging for the law prohibiting the use of force in international relations because that law is traditionally exclusively addressed to states. In practice, the issue also raises difficult problems for international humanitarian law (IHL). Certainly,

[1] Moshe Schwartz and Joyprada Swain, 'Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis' US Congressional Research Service Report (May 2011), 'Summary'.

since 1949 this branch has been, at least in part, equally addressed to armed groups involved in armed conflicts against states and between one another. With the – at least theoretically – breathtaking development of international criminal law and international criminal justice in recent years, the individual has also become the addressee of some rules of IHL. Private companies hired by parties to armed conflicts or others to conduct armed conflicts, however, are not yet explicit addressees of IHL.

The conceptual challenges and the practical importance of the phenomenon led me, together with my colleague Vincent Chetail from the Graduate Institute of International and Development Studies, to request a grant from the Swiss National Science Foundation to study how IHL deals with PMSCs. We are grateful that we received this grant and that we were able to realize this project under the umbrella of the Geneva Academy of International Humanitarian Law and Human Rights.

Over the course of the project, Mr Rachid Ferhi conducted some preliminary bibliographical research. Ms Mary Picard completed some substantive research, in particular on PMSCs and human rights. Mr Mamadou Hebié, with his sharp mind and propensity for conceptual debates, carried out very extensive research on state responsibility and due diligence. Most of the theoretical references and some parts of the text of Chapter 2 are his, although the final version significantly differs from his doctrinal analysis and practical conclusions in important respects. Ms Marie-Louise Tougas, who has in the meantime graduated as doctor of laws at the Université Laval in Canada with a thesis written in French on PMSCs and IHL, worked with our team for three months in 2009 in the framework of a research exchange financed by the *Fonds de recherche sur la société et la culture du Québec*. In particular, thanks to her thorough knowledge of international criminal law, she has greatly contributed to what has now become Chapter 5 of this book. Finally, but most importantly, Ms Lindsey Cameron, with her total mastery of IHL and her typically Anglo-Saxon sense for practical solutions, joined the team. She is the sole author of Chapters 1 and 4, which will also appear in a revised and expanded form in her doctoral thesis. She also drafted Chapter 5 and she revised the entire book on substance and form. My colleague Vincent Chetail brought in his French sense for a thorough theoretical analysis and his vast knowledge of public international law and international human rights law (IHRL). He wrote Chapter 3 and actively participated, together with me, in supervising, commenting and revising the whole manuscript. His idea that IHL must not only be applied to PMSCs, but that the question through which means IHL can

become binding on PMSCs must be tackled, is essential and it is completely neglected in existing legal writings.

As for the undersigned, I had the honour and pleasure to lead numerous discussions with all the aforementioned and to develop more thoroughly, in a fascinating dialectic dialogue with Lindsey Cameron, some aspects of the chapter on the applicable rules of IHL. I consider, for instance, that the sections on the distinction between direct participation in hostilities and self-defence are genuinely innovative and of the highest interest beyond its application to PMSCs.

The result of this collective effort is a study, which deals with the challenges PMSCs present for IHL in the most comprehensive way. It does this in my view in a coherent way, although different chapters reflect the methodology and culture of their main authors, which enriches the debate. The book rightly focuses on the issues that raise specific legal problems rather than restating international law and in particular IHL for PMSCs. Thus, the reader will find incomparably more developments on the concept of direct participation in hostilities than on the prohibition of rape and torture, although the latter may be more important from a humanitarian point of view and at times violated by PMSC staff. Yet, the application of these prohibitions to PMSCs does not raise legal difficulties, while the concept of direct participation in hostilities does.

The book does not deal with the historical, international relations, political science, psychological or public finance aspects of PMSCs. Nor does it proceed with an extensive systematic analysis of the facts, i.e. analysing who uses PMSCs, for what purposes, in which situations, how these PMSCs behave, how they are organized or managed. Others have done that.[2] Facts are extensively used when it comes to applying the legal

[2] See e.g. Deborah Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge University Press, 2005); Christopher Kinsey, *Private Contractors and the Reconstruction of Iraq: Transforming Military Logistics* (London: Routledge, 2010); Christopher Kinsey, *Corporate Soldiers and International Security: The Rise of Private Military Companies* (London: Routledge, 2006); Carlos Ortiz, *Private Armed Forces and Global Security: A Guide to the Issues* (London: Praeger, 2010); Molly Dunigan, *Victory for Hire: Private Security Companies' Impact on Military Effectiveness* (Stanford University Press, 2011); Robert Mandel, *Armies without States: The Privatization of Security* (Boulder: Lynne Rienner, 2002); Kateri Carmola, *Private Security Contractors and New Wars: Risk, Law, and Ethics* (London: Routledge, 2010); Anna Leander, *Eroding State Authority: Private Military Companies and the Legitimate Use of Force* (Rome: Rubbetino, 2006); Andrew Alexandra, Deane-Peter Baker and Marina Caparini (eds.), *Private Military and Security Companies: Ethics, Policies and Civil-Military Relations* (London: Routledge, 2008); Alan Bryden and Marina Caparini (eds.), *Private Actors and Security Governance*

rules to them, to illustrate the difficulty of applying the state-centred rules of IHL to PMSCs. This book deals with the international legal framework and it attempts to apply it to PMSCs as they are. It does not deal with the domestic law of any state or with how international law should be developed to cover PMSCs more appropriately. For our research project PMSCs were, as war is for IHL, a reality. We wanted to apply international law to this reality. The outcome demonstrates beyond any doubt that PMSCs and their staff do not act, as some have claimed, in a legal black hole.[3]

While not in a legal vacuum, PMSCs operate, however, not only in armed conflicts, a factual environment not very conducive to the respect of legal rules, but also in a very chaotic legal environment, made up of very diverse rules, addressed to various actors, which have not been made for PMSCs (but nevertheless cover them). This book maps the possible legal justifications for the applicability of IHL, each one situation-dependent and often subject to controversies.

As for the substance of those rules of IHL, even when all relevant facts are known, it is often difficult to determine the direction for conduct that they give to PMSCs, in particular on the crucial issue of when force may be used against whom, as it lies at the intersection between the conduct of hostilities, criminal law self-defence and law enforcement. In addition, this problem is complicated by controversy over how similar the rules of IHL of international and of non-international armed conflicts are on those issues and even if the rules were clear, the individual PMSC staff involved may not know the facts necessary for a determination.

Contrary to other distinguished scholars, the authors conclude that PMSC staff are only rarely combatants because they do not belong in a fighting function to the contracting state. I agree. States, PMSCs themselves and critics from non-government organizations (NGOs) do not consider them to be combatants. If they are not combatants, they have no right to directly participate in hostilities and they lose protection as civilians if and for such time as they do so. This raises the highly controversial issue of which conduct constitutes direct participation in hostilities.

(Berlin: Lit Verlag, 2006); Thomas Jäger and Gerhard Kümmel (eds.), *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects* (Wiesbaden: VS Verlag für Sozialwissenschaften, 2007).

[3] This assertion was made in particular by Peter Singer. See his 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law' (2004) 42 *Columbia J Transnl L.*

On this, the starting point of our research was the Interpretive Guidance on the notion of direct participation in hostilities, recently adopted by the International Committee of the Red Cross (ICRC).[4] The authors, however, go beyond it and show its shortcomings concerning the most crucial, difficult and frequent situation that PMSC staff guard objects, transport or persons. I agree that if those persons and objects are not protected against attacks in IHL (that is, if they are combatants or civilians directly participating in hostilities), guarding or defending them against attacks constitutes direct participation in hostilities and not criminal law defence of others. This is always the case when the attacker is a person belonging to a party to the conflict, even if he or she does not benefit from or has lost combatant status. The unlawful status of the attacker does not trigger the right to self-defence of a civilian for the benefit of combatants. If the person attacked – and under the domestic legislation of some states even if the object attacked – is civilian, criminal law self-defence may justify a use of force, even against combatants. The analysis is complicated by the absence of an international law standard of self-defence and defence of others, and by doubts whether the criminal law defence of self-defence, which avoids conviction may be used *ex ante* as a legal basis for an entire business activity. In my view, the authors suggest very nuanced, yet practical, solutions. The individual PMSC staff will often not know the facts that determine the legality of conduct in a certain situation. Therefore, our research leads to the recommendation that the use of force in defence of others and of property should be admitted only restrictively and only against direct attacks, not against the taking of control, arrest or capture, a distinction most often forgotten in scholarly writings. I equally share the conclusion that when PMSC staff are mandated with law enforcement tasks by a state, the normal IHL and human rights rules are applicable, but such law enforcement constitutes direct participation in hostilities if it is directed against armed groups or their members.

Apart from these core issues of the IHL applicable to PMSCs and their staff and the reasons why it applies to them, the authors tackle many other legal issues arising from the intersection of IHL and PMSCs.

The authors first enquire whether and to what extent states may outsource the conduct of armed conflicts to private companies. Even searching beyond IHL and including *jus ad bellum* in their enquiry, they found only a few explicit prohibitions on very specific activities. Some

[4] ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009).

treaties and arguably customary international law also prohibit states from using mercenaries, but the definition of mercenaries excludes most PMSC staff. Some implicit prohibitions of outsourcing are arguable. Good faith prohibits it if the specific intent is to avoid obligations – and this book shows that such intent would be futile in most cases – or to implement unlawful action. A state may not outsource the decision to exercise its right to self-defence, but it may outsource the exercise of that right as long as it keeps sufficient control to ensure respect of the principles of necessity and proportionality. As for the UN and regional organizations, nothing fundamental hinders them, from a legal point of view, from outsourcing a lawful use of force, or, more realistically, from accepting PMSC action as a contribution by a state or from constituting a permanent force made up of PMSCs. IHRL arguably also does not prohibit outsourcing of law enforcement functions other than the administration of criminal justice, including the decision to arrest a person. However, the state must make sure that PMSCs to whom it outsources law enforcement action respect human rights to the same extent as if such action was taken by the state. The most crucial admissibility of outsourcing issue for this study is obviously whether a state may outsource the conduct of hostilities under IHL. We think there are serious reasons for a negative answer. While IHL arguably does not prohibit a civilian from directly participating in hostilities, we consider that if a state wants to respect – in good faith – the principle of distinction, it may not entrust civilians with conduct that constitutes direct participation in hostilities (which again shows the crucial importance of the concept of direct participation in hostilities for this book). In addition, a PMSC that is not sufficiently integrated into the state organization could not know or be aware of elements necessary to evaluate such criteria as the military advantage anticipated from an attack. The latter argument also prevents a state from allowing a non-state actor to take some other decisions (such as whether imperative military necessity or security reasons require certain action).

Secondly, still within the Westphalian system, the question arises of when a state is responsible for (or in relation to) PMSC conduct. A positive answer not only facilitates enforcement through the well-developed (but still basically non-hierarchical) mechanisms of implementation of international law, but it also implies that the rules of IHL fully apply (at least to the state in relation) to such conduct.

PMSC staff are only very rarely state organs under domestic law. This study argues that PMSC staff may occasionally be so completely dependent on a state that their conduct is attributable to that state as a *de facto* organ. A state is furthermore responsible for conduct of PMSC staff if it

delegates them not just public functions, but elements of governmental authority. Arguably such attribution does not presuppose a delegation by the domestic law of the state concerned. A state is furthermore responsible for PMSC conduct that occurs pursuant to its instructions or that is executed under its direction or control. If the overall-control standard developed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) is sufficient, contracting states would very often be responsible for conduct incidental to the execution of the contract by PMSCs. However, there are good reasons to consider, along with the International Court of Justice (ICJ), that effective control is necessary for such attribution, which rarely exists and even more rarely can be proven.

Even when PMSC conduct is not attributable to a state, a lack of due diligence (by state organs) may exist in relation with PMSC conduct. Such very variable due diligence obligations exist in the law of neutrality and in IHRL. In IHL, occupying powers have such due diligence obligations, and they also result from the many rules directing states to 'protect' war victims. In addition, the obligation to ensure respect for IHL under Article 1 common to the Geneva Conventions may imply a general due diligence obligation for all states, but more particularly for states contracting PMSCs, host states of PMSCs and home states (in which the companies are registered or headquartered).

Thirdly, if implementation is the weakest aspect of international law, and even more so of IHL in current armed conflicts – in which reciprocity is often irrelevant – it is even more difficult to obtain from non-traditional addressees such as PMSCs, to whom the traditional mechanisms are not geared. The authors nevertheless briefly review the normal mechanisms of implementation of state responsibility which may be used when PMSC conduct can be attributed to a state. However, we know that states only rarely use those mechanisms. Human rights protection mechanisms may therefore be more promising. The injured individual may invoke the responsibility of the state on the domestic level through domestic law or to the controversial extent international law gives a right to reparation to the individual. In any case, territorial states and home states may and should provide enforcement mechanisms for their obligations, and PMSCs' obligations, in their domestic law, *inter alia* through registration and licensing systems. The PMSC itself may be criminally responsible in states that provide for corporate criminal responsibility, a concept that is still developing in international criminal law. Individual PMSC employees are however certainly criminally responsible for war crimes. The authors correctly remind us that IHL violations by PMSC staff may constitute torts

under private law (which is more uncontroversial in civil law systems than in common law systems). Yet, they have to admit that court action by the victims may encounter the obstacle of immunities in the contracting state or the territorial state and jurisdictional obstacles in other states. Finally, self-regulatory mechanisms should include credible enforcement possibilities by an independent body and the possibility for individual victims of violations to trigger them.

In conclusion, a PMSC is subject to IHL because its staff has to respect it, because a state is responsible for its conduct, and, in some cases and according to some theories, the PMSC is even itself an addressee of IHL. The main problems are that the status, rights and obligations of PMSC staff are not always clear to the PMSC and to the staff themselves – and representatives of the industry have no interest in clarifying them because this could seriously limit their ability to provide security in conflict areas. The most important problem, however, remains implementation: even where the rules and their applicability are uncontroversial, PMSC staff are often not adequately trained and supervised and if they commit violations, their prosecution often meets legal or factual obstacles – or simply a lack of political will.

I am convinced that this book clarifies many crucial legal issues, including some, which the industry and states did not want to clarify in recent soft-law instruments and codes of conduct, in particular the relationship between self-defence and direct participation in hostilities. I can only hope that government and PMSC lawyers, judges, prosecutors, humanitarian activists and defence lawyers will read this book. They will lose some preconceived ideas and gain some insight into questions that have been left vague up to now – deliberately or not. This would, in the end, lead to a better respect for war victims by these actors who are increasingly important in armed conflict, and who are not more or less prone to commit violations than state organs or members of non-state armed groups, but who, until now, were left in many respects in a legal fog. The authors have brought a lot of clarity into this picture, without claiming that clear solutions exist where states disagree or where sound legal arguments may support different approaches. In this respect, the book clarifies at least possible avenues, their advantages and disadvantages and limits the arguments which may be used under international law.

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As everyone who has ever written a book knows, producing an academic work is far from a lonely endeavour. In this case in particular, as this book is the final product of a research project involving a number of people over several years, it was in many ways a collective effort. I owe no small debt of gratitude to many colleagues and friends.

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Lindsey Cameron

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Vincent Chetail