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# *Private Military Contractors and International Law: An Introduction*

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A recent survey of young Europeans' opinions of national institutions has revealed, quite surprisingly, that armed forces enjoy the highest level of trust and prestige in a number of major European countries, well above parliaments, the judiciary, the church, political parties and business enterprises.<sup>1</sup> The profound motivations underlying this assessment remain unknown – one can only conjecture that they are related to the increasing sense of insecurity among young generations and perhaps with the politics of fear – fear of terrorism, of immigrants, environmental disasters, of financial doom, and of the unknown – that have become widespread at the beginning of the 21st century. What is clear, however, is that in the perception of young generations, the armed forces still embody the core function of the state as guarantor of the security of citizens within the national territory.

In contrast with this opinion, the trend in recent years has been progressively to privatize important sectors of governmental functions through the outsourcing of security and military services to private actors. Private military and security companies or 'contractors' thus replace soldiers and members of the armed forces in a variety of situations that include armed conflict, prolonged military occupation, peacekeeping, and territorial administration in post-conflict institutional building and intelligence gathering.

This phenomenon, of course, has not led to the total privatization of armed forces. It remains rather limited in scope as compared to the operations of national militaries around the globe. Nevertheless, it has intensified with the wars that have inaugurated the 21st century – Afghanistan and Iraq, led by the United States in particular – and it is being further fed by the increased activism of the European Union in international administration of critical territorial situations and peacekeeping operations, from

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<sup>1</sup> Research commissioned by the British Council to Publica ReS, SwG group, Trieste, 'Identity in Transition', 28 September 2008, see [www.publicares.it](http://www.publicares.it).

Kosovo to the Middle East to Africa. Moreover, even in its present modest dimensions, the privatization of military and security services entails a variety of important consequences. At a political level, the reliance on private contractors rather than on soldiers diminishes the effectiveness of domestic mechanisms of democratic control over armed forces, as required in all constitutional democracies. It offers the possibility of circumventing the requirement of parliamentary authorization for specific missions and services, or of going beyond limits on the number of troops to be deployed abroad or allowed to serve in a theatre of military operations. From a legal point of view, the question arises as to what is the status of these new actors in international law and more particularly in the context of the international law of armed conflicts. Are they to be considered mercenaries, and under what circumstances? Or are they part of the armed forces? When do their military services amount to a direct participation in hostilities? Is their conduct subject to the rules of international humanitarian law? And if they are not to be assimilated into the armed forces, are they still bound by basic norms of international human rights and humanitarian law that protect life, integrity and property? And when private military companies commit abuses in the course of their conduct, what jurisdictional opportunities are available in order to provide civil remedies to victims and/or criminal prosecution of possible offences? Attempting to address these questions brings us to a grey area of the law, both international and domestic.

At the international law level, the extent to which primary human rights obligations apply to the conduct of private military companies remains unclear: first, because there is no agreement as to whether human rights obligations are binding upon private actors; second, because the conduct of these actors normally occurs abroad and therefore outside the ordinary territorial and jurisdictional sphere of application of human rights obligations. Consequently, at the level of secondary rules, a state may not be held responsible for having failed to prevent abuses by private military contractors, or for not having provided adequate remedies or prosecution, unless a certain degree of control existed over the conduct that caused the abuse. While with soldiers such level of control is *in re ipsa*, since they are an integral part of the organic structure and apparatus of the state – with a chain of command, disciplinary oversight and mechanisms of enforcement that make them directly accountable to the state – private military ‘contractors’ are by definition only in a contractual relation with the hiring state. Thus their acts are not in principle acts of state but acts of private persons, even though their services often entail carrying weapons and exposing other persons to the risk of injury. The problem of accountability becomes even more complex when private military contractors are used by international organizations, such as the UN, the EU or NATO. In this case their conduct may call into play the still elusive concept of institutional responsibility of intergovernmental organizations, a topic which is now the object of a study and possible codification by the International Law Commission.

If we move from the international law level to the level of domestic law and jurisdiction, the legal tools to ensure effective regulation of private military companies and monitoring of their activities become even more uncertain. Domestic laws vary enormously with respect to the legality of outsourcing of military services to private companies: some countries maintain an outright prohibition of such outsourcing; others

even criminalize the serving of nationals in such companies as such service is assimilated with mercenarism; in many legal systems the provision of military and security services is subject to strict licensing and vetting procedures for individual employees, while in others it may be treated as part of the exercise of economic freedoms. Yet, even where licensing and vetting procedures are on the books, enforcement may be sporadic, especially in the face of military exigencies. This great variety of legal regimes does not help fill the regulatory and enforcement gap that we find at the international level. Legal proceedings against private military companies and their employees for violations of the rights of third parties committed in the performance of their services are relatively rare and mostly concentrated in the United States, where the Alien Tort Claims Act (ATCA) is suitable, at least theoretically, to provide a legal basis for international law claims. But so far efforts based on the act have met with little success. Similarly, criminal prosecution of private military companies' employees who have committed abuses are rare and fraught with a number of obstacles that go from blanket immunity in the territorial state where the abuse was committed (as in the case of Iraq and US private military companies) to meeting the threshold of 'violation of international law' serious enough to trigger the ATCA, to political questioning and evidentiary constraints that may hinder effective prosecution.

The articles collected in this issue of the *EJIL* constitute an attempt at clarifying the role of international law and European Union law in enhancing legal accountability and remedies for violations of human rights and humanitarian law committed by private military contractors.

The article by Nigel White and Sorcha MacLeod examines the consequences of the increased competence of the European Union in the field of common security and defence policy and the consequent growing demand on Member States for military and security personnel to be deployed in different conflict areas of the world. With limited availability of national military forces, one inevitable implication of this trend will be the necessity to start relying on private military contractors to sustain the effort of peace operations and territorial administration of critical areas. The authors argue that present 'soft' international and European law on corporate social responsibility does not guarantee effective accountability for violations of human rights and humanitarian law and that, therefore, pending the establishment of a more effective regulatory framework, wrongful acts or omissions of private military contractors should be attributed to the organization under whose authority they operate.

In a similar vein, the article by Carsten Hoppe argues in favour of positive obligations of the contracting state in filling the regulatory gap left open by the outsourcing of military services to private contractors. Relying on the International Law Commission's Articles on State Responsibility, the author draws a comparison between the responsibility of states for the conduct of their soldiers and the responsibility of the contracting state for the conduct of private military companies. Although reliance on the latter reduces the state's exposure to international responsibility, the author maintains that customary norms of the law of war permit the consideration of certain private military contractors as 'members of the armed forces' for whose conduct state responsibility may arise. At the same time, even when the assimilation of private

military contractors into the armed forces is not legally possible, the general principle of due diligence is deemed capable of providing the basis for positive obligations of the hiring states to prevent and suppress violations of human rights and humanitarian law by the contractor.

Chia Lehnardt focuses on the rules of international criminal law as a possible source of the individual liability of private military contractors. In her opinion, the operation of such rules presupposes a hierarchically structured command system, the existence of which underlies a number of principles of international criminal law. Such system cannot be simply presumed to exist within a private military company or between such company and the hiring state. This has problematic consequences in terms of the capacity of personnel to commit war crimes or to incur superior or command responsibility. The author considers these difficulties against the background of the relative scarcity of cases of criminal prosecution of individual employees of private military companies and of the company itself. She argues that, at least in theory, international criminal law could be an efficient part of a system of governance and control of private military companies.

Along the same lines, Cedric Ryngaert's article discusses in detail the jurisdictional opportunities for litigating abuses of private military companies before domestic courts. While most such litigations have occurred in the United States and have arisen from civil action, the author argues that criminal actions may send a stronger message in terms of deterrence and necessity of developing a corporate accountability mechanism than the prospect of a mere civil suit. In view of this, a bolder attitude is required of national prosecutors in bringing cases against private military contractors at least when serious violations of human rights or international humanitarian law are involved.

Finally, the contribution by Simon Chesterman focuses on the dramatic expansion of privatized intelligence in the United States, hand in hand with the growing demand on intelligence following the September 11, 2001 terrorist attacks. The disclosure by the Director of the CIA that contractors have probably participated in waterboarding of detainees at CIA interrogation facilities makes it urgent to determine what activities may be legitimately delegated to contractors. The article provides a typology of outsourcing, including electronic surveillance, interrogation, rendition and intelligence analysis. The three main challenges are identified in the necessity of secrecy, which limits oversight; the different incentives for private as compared to public employees; and the difficulty of determining what functions are 'inherently governmental'.

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