

Introduction

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THE OUTSOURCING OF military and security services is currently the object of intense legal debate at the international level. States employ private military and security companies (PMSCs) to perform functions previously exercised by regular armed forces in the context of armed conflict, contracting them to offer not only logistical support, but also various other services, including: armed guarding and protection of persons, objects, buildings or merchant vessels; maintenance and operation of weapons systems; prisoner detention and interrogation; intelligence; and advice to or training of local forces and security personnel. Other entities too, including international organisations, NGOs and business corporations, have resorted to PMSCs to provide security particularly in crisis situations where local institutions are unable to exercise their prerogatives.

The number of private contractors exceeded that of the regular armed forces in recent conflict scenarios.¹ This is unlikely to be a temporary phenomenon. Two main reasons explain its rise: on the one hand, the changed character and the complexity of current military operations; on the other, the limited resources available to the regular armed forces after the end of the cold war, as part of a general trend towards the privatisation of public functions in Western countries. Other analysts make the point of the democratic control of the armed forces, by emphasising that governments use PMSCs to circumvent parliamentary control and constitutional constraints on the use of force.² In recent years, much of the public attention on PMSCs has been a result of numerous incidents which have highlighted the risk of violations of human rights and international humanitarian law by their employees in conflict and post-conflict settings. Both the implication of the staff of two commercial firms in torture and cruel treatment of prisoners at the Abu Ghraib detention facility in 2003 and the killing of 17 Iraqi civilians in Nisour Square, Baghdad in September 2007 by US-hired security contractors revealed not only inadequate supervision on the conduct of the PMSCs by the

¹ See, eg L Dickinson, *Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs* (New Haven and London, Yale University Press, 2011) 37.

² See, inter alia, PW Singer, 'Outsourcing War' (2005) 84(2) *Foreign Affairs* 119, 125.

contracting agencies of the US but also the lack of accountability for the serious crimes committed, at both the national and international levels. In part as a consequence of these events, parallel initiatives have been launched aimed at introducing international standards to bring some uniformity to very uneven national regulation, ranging from strict prohibitions in some countries, to forms of licensing, self-regulation, or simply laissez-faire in others.

The main goal of the present book is to analyse and discuss the interplay between international, European and domestic regulatory measures in the field of PMSCs. The assessment of the existing national legislation, with a view to identifying its implications for future international regulation, represents one of the most original elements of the research conducted in the context of the PRIV-WAR project, which forms the basis of this book. Recognising the growing importance of the outsourcing of military and security functions and the legal questions surrounding it, the European Commission has financed a three-year collaborative research project in the context of its 7th Framework Programme: '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, involving seven European universities,³ was launched in January 2008 and was coordinated by the European University Institute, with Francesco Francioni as its Scientific Director. The present collection of essays complements the book *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, edited by Francesco Francioni and Natalino Ronzitti,⁴ which comprehensively addresses the human rights dimension of the increasing use of PMSCs, as well as the status of PMSCs under international humanitarian law. That volume also presents a systematic analysis of the field of corporate social responsibility or self-regulation of the industry, and examines several questions related to accountability for acts of PMSCs.

As the title of the project suggests, the main questions addressed by PRIV-WAR have been whether the EU could play an active role as regards the regulation of PMSCs, and in what ways the EU could contribute to ensuring compliance with human rights and international humanitarian law. Since January 2008, the research conducted within the framework of this project has sought to highlight the crucial role of the EU in three respects, which had not received much attention in the literature at that time. First, PRIV-WAR intended to offer insights into whether and how the EU should develop a unified position on the international regulation

³ European University Institute, LUISS Guido Carli of Rome, Justus Liebig Universität Giessen, Riga Graduate School of Law, Université Panthéon-Assas (Paris II), University of Sheffield, and Universiteit Utrecht.

⁴ F Francioni and N Ronzitti (eds) *War by Contract: Human Rights, Humanitarian Law and Private Contractors* (Oxford, Oxford University Press, 2011).

of PMSCs. Secondly, the project assessed the need for and potential of harmonisation of the EU Member States' domestic approaches towards PMSCs. Lastly, the project aimed at offering advice to policymakers on the development of a regulation scheme at the supranational level.

As a result of this exercise, the seven participating universities in March 2011 released the PRIV-WAR Recommendations for EU Regulatory Action in the Field of Private Military and Security Companies and their Services. This document was presented during the final conference of the project held in Brussels in April 2011, and is reproduced as an annex to this book. The Recommendations are based on the assumption that

with the entry into force of the Lisbon Treaty, entailing the legal upgrade of the EU Charter of Fundamental Rights and the obligation upon the EU to accede to the European Convention of Human Rights and Fundamental Freedoms, EU institutions and EU Member States, when acting within the scope of EU law, have confirmed and consolidated their significant role as guarantors of fundamental rights, and their willingness to be bound by them.⁵

The document is composed of 13 recommendations, which contain various proposals for the regulation of PMSCs and their services. The suggested options consider the adoption of both legally binding and non-legally binding instruments, covering on the one hand the harmonisation of national measures regulating private military and security services within the Internal Market, and on the other hand the regulation, in the context of the Common Foreign and Security Policy, of the export of such services to third countries.

It should be noted that the European Parliament adopted a resolution in May 2011 in which it considered that

the adoption of EU regulatory measures, including a comprehensive normative system for the establishment, registration, licensing, monitoring and reporting on violations of applicable law by private military and security (PMS) companies—both at internal and external level—is necessary.⁶

It is significant that the two proposals put forward by the European Parliament precisely reflect the content of the PRIV-WAR Recommendations. This might be the starting point of a process towards a legal discipline of the phenomenon at the EU level: it remains to be seen whether the other institutions will follow the Parliament in this direction.

The volume is divided into four parts. Part one aims at providing a general overview of the multilevel regulation of private military and security companies. The contribution by Nigel White provides a critical

⁵ *PRIV-WAR Recommendations for EU Regulatory Action in the Field of Private Military and Security Companies and their Services*, March 2011, preamble.

⁶ European Parliament resolution of 11 May 2011 on the development of the common security and defence policy following the entry into force of the Lisbon Treaty (2010/2299(INI)), para 52–53.

examination of the international initiatives which have been taken in recent years, or which are currently being developed with a view to regulating the PMS sector and their services, in particular the Montreux Document; the Global Code of Conduct on Private Security Providers; and the elaboration of an international convention on PMSCs in the context of the United Nations Human Rights Council. The author undertakes a comparison between the Montreux Document and the Draft Convention, emphasising real incompatibilities as regards the substantive provisions—especially the disagreement as to what can be outsourced to PMSCs—as well as the form of the two international instruments. He then discusses the Draft Convention's chances of success: the point is made that there is a danger that international hard (treaty) law, if it is adopted, will attract a different clientele of states than the soft law of the Montreux process. Finally, the chapter formulates proposals on how to bridge the divide.

The subsequent three chapters discuss how possible regulatory action by the EU would complement the international initiatives and assess its potential impact at the national level for the Member States. In particular, the contributions, from different perspectives, offer further elements of investigation and discussion as regards the content of the PRIV-WAR Recommendations. Guido den Dekker takes stock of the existing regulatory context: while observing that at the EU level there are as yet no specific norms with respect to the private military and security industry, he investigates existing regulations and case law which may have implications for PMSCs and their services. This chapter also touches on the EU position with respect to international humanitarian law and the regulatory context of EU crisis management operations. Chapter 3, by Marco Gestri, assesses the legal bases and the normative instruments which are available to the EU institutions for further regulation, in the light of the constitutive Treaties after Lisbon and on account of the principle of conferred powers, set forth in Article 5 paragraph 2 of the Treaty on the European Union. Finally, the contribution by Mirko Sossai and Christine Bakker intends to show the different tools at the disposal of the EU in the context of its external action to ensure compliance with human rights and international humanitarian law by PMSCs. The analysis addresses hitherto neglected issues in the legal literature, including the use of private contractors in humanitarian aid operations financed by the EU, as well as the possible insertion of a PMSC-related clause in the cooperation agreements concluded by the EU with third countries.

Finally, Chapter 5, by Ottavio Quirico, provides a comparative viewpoint on the current national regulation for private military and security services in EU Member States and third countries. The analysis touches upon municipal law with respect to the limits of outsourcing,

the licensing regime, the hiring contract, and the provision of services and liability issues, by taking into account differences between the home state, the contracting state and the host state. In this way, it provides guidance to the chapters contained in the two subsequent parts of the book. The author concludes that the existing regulation is likely to prove insufficient for PMSCs providing military services, especially when national law does not apply extraterritorially and territorial law is absent or weak.

The second part contains ten chapters which cover the regulatory context of PMSCs in a number of EU Member States: the Baltic countries, Belgium, the Czech Republic, France, Germany, Italy, the Netherlands, Spain, Sweden and the UK. In addition to the countries where the seven PRIV-WAR participating institutions are based, this part of the book presents the existing regulation and case law in three other Member States having significant practice in the field of PMSCs. This has been possible thanks to the contribution of external experts, who accepted to cooperate with the research project. An overall assessment of the existing legislation confirms that there are significant disparities among the different countries. The private military and security industry is most developed in France and the UK. Therefore it is not by chance that in the latter country various initiatives have been taken by the government in order to consider options for controlling the activities of PMSCs. The public consultation launched in 2009 concluded that the preferred option was for a system of government-supported self-regulation which incorporates international norms. More generally, it is noteworthy that the provision of security services within the territory is regulated in a satisfactory way in several Member States, whereas there is a lack of norms governing the export of military and security services to third countries.

The third part comprises a series of chapters on the existing regulation and case law in Australia, Canada, Colombia, Israel, the Russian Federation, South Africa and the US. They represent a systematic analysis of the domestic legislation in crucial players outside the EU, namely those with a significant practice in the field of PMSCs, including examples of 'host states' and 'home states'. The value of such an effort is twofold. Not only does it serve to look beyond the US as the main actor in military outsourcing, but it also provides a comparative assessment of the approach adopted in other relevant non-European legal orders. Nonetheless, the chapter by Kristine Huskey and Scott Sullivan offers an updated and comprehensive survey of the US law and policy governing private military contractors after 9/11: despite the efforts by the Department of Defense and Department of State to remedy problems with the use and oversight of military contractors, both the Commission on Wartime Contracting and the Government Accountability Office continue to document

the need for better management and accountability, clearer standards and policy, and improved screening and training of contractors.

The choice of the non-EU countries has been made on the basis of various criteria, which take into consideration the enactment of a domestic discipline regarding: the export of military and security companies, as is the case of the very restrictive approach taken by South Africa; the existence of a significant practice on the exercise of civil and criminal jurisdiction over PMSCs; and the potentialities for the development of a military and security industry within the territory of the state. In particular, the chapters on Colombia and Israel constitute a systematic analysis of the use of PMSCs in two countries which have been involved in an armed conflict in recent decades. The case of Israel is of particular interest: Yael Ronen points out that the attention paid by Israeli policy makers to the question of the civilianisation of the military and privatisation of certain functions is related to the specificities of the governmental structure where the military establishment has originally been involved in various functions that are ordinarily assigned to civilian and even private operators.

All the reports in Parts II and III constitute the final and updated release of previous papers submitted by the authors: they take advantage of the exchange of views promoted by the PRIV-WAR project in the context of various meetings which brought together academic experts and relevant stakeholders, such as a workshop held at the European University Institute in March 2009.

The last part of the volume includes chapters which raise and investigate certain challenging issues that emerged from the discussion on the content of the PRIV-WAR national reports: the exercise of criminal jurisdiction over private contractors, with a focus on military justice, and the abuse by PMSCs of tax havens.

The involvement of civilian contractors in military operations makes it necessary to address the issue of the criminal jurisdiction for the crimes committed on foreign soil. In principle, the employees of PMSCs are subject to the law and jurisdiction of the country in which they are deployed. However, recent practice showed that contracting states have relied on different legal sources, such as local laws or specific bilateral agreements, to grant immunity from the jurisdiction of the host state. In this context, Chapter 23, by Ieva Miluna, looks closely at the classical legal bases for the exercise of criminal jurisdiction over PMSCs and their employees, as they emerge from the above analysis of national legislation: the principles of territoriality, active and passive personality, the protective principle and universality. This contribution also deals with other important issues, including the criminal jurisdiction for private contractors hired by international organisations and the question of the criminal liability of legal persons.

Some states, such as the US and the UK, have expanded the competence of military courts to civilian contractors. Although the matter of PMSC employees has not been debated in depth by international human rights bodies, it is encompassed within the wider issue of civilians brought before military courts. In this regard, human rights concerns have been raised over the application of military jurisdiction to 'civilians'. Chapter 24, by Stefano Manacorda and Triestino Mariniello, focuses on the approach taken by the European Court of Human Rights with regard to military criminal justice. In particular, the authors examine the compatibility of military jurisdictions with the Convention system of protection: indeed, the Strasbourg Court has taken a critical position on both military courts and special courts, because of their lack of independence and impartiality when they are composed of civilian and military judges.

Finally, in Chapter 25, Giuseppe Melis and Alessio Persiani give a comprehensive overview of various legal challenges posed from a tax perspective by the use of PMSCs. They cover inter alia the tax implications of the residence of such companies and the question of tax exemptions and tax breaks granted to PMSCs, as well as the issue of confidentiality in the exchange of information.

With these contributions, the editors and authors of this volume have attempted to shed some light on the current patchwork of norms applicable to PMSCs at the international, European and domestic levels, and to suggest possible avenues for further normative developments, with a particular focus on the potential role of the European Union in this regard. PRIV-WAR benefited from the added value of the European approach, which characterises the projects funded by the EU 7th Framework Programme of research: the results of the legal analysis by the seven academic partners were discussed, in the context of a constructive dialogue, with the wider network of the relevant stakeholders that comprise the European institutions, the public administration at national level, international organisations, the industry and NGOs. It was also thanks to this fruitful interaction that the PRIV-WAR consortium was able to take a forward-looking perspective.

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