Rules and Responsibilities of Employees of Private Military Companies under International Humanitarian Law

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Abstract. The presence of private military companies on the battlefield creates new challenges for international humanitarian law. These actors were not foreseen by the drafters of the Geneva Conventions and their Additional Protocols. International Humanitarian Law provides different rules for combatants and civilians, as well as for mercenaries and civilians playing a direct role in hostilities. This article examines the categories under which employees of private military companies fall and the consequences and risks for them, and other actors, and civilians.

Keywords. Private security companies, international humanitarian law, combattants, civilians, mercenaries

1. Introduction

Private military companies ('PMCs') are not a new phenomenon on the battlefield. However, in recent times and conflicts, their number and their impact have increased. They fulfil a whole range of tasks, ranging from logistical support to combat operations. The latter task particularly causes problems concerning the relevant law. At first glance, one might think of classical mercenaries in wars. But many PMCs perform support tasks in the background to keep an army running. Whether they only use force in self-defence or whether they also attack is not always easy to distinguish. How does this influence their status in international humanitarian law? Moreover, does international humanitarian law contain provisions that are applicable to private military companies at all? By what rules are employees of private military companies bound and which responsibilities do arise thereof for them? Are they aware of what they are allowed to do and what risks they undertake? How are individual employees of PMCs themselves protected? In the end, who is competent to try and punish offences committed by employees of PMCs? The increased use of PMCs by states, but also by non-state actors, is another challenge for international humanitarian law and shows that 'old' rules for armed conflicts always have to deal with new situations. Thus, this article examines the rules applicable to employees of PMCs and their resulting responsibilities. Moreover, some of the current challenges for international humanitarian law and critiques about the use of private military companies in armed conflicts will be subject of this article.

2. Private Military Companies

The involvement of private actors in warfare is not a new phenomenon. Indeed, it is as old as war itself and, going back in history, it is apparent that even ancient Egyptians hired private troops to support their wars.[1] However, there has been a new development in the private security sector since the end of the Cold War. In particular, beginning in the 1990s, corporations started to hire former soldiers of the old Soviet Union states and other recent conflict parties such as the former Yugoslavia and certain African states.[2] One new and emerging development was the prominent role of private fighters in those corporations. In addition, there are also many more actors than before hiring PMCs, including states, but also humanitarian organizations, corporations, and business firms.[3] Therefore, PMCs now offer new kinds of activities with different functions and impacts on their tasks related to the needs of these various actors.

A clear distinction and categorisation of all groups and actors offering and providing services in the military and security sector is almost impossible as the current discussion shows.[4] A useful approach for a categorisation is suggested by Singer, who divides the private military industry into three basic business sectors, namely military provider firms, military consulting firms and military support firms.[5] While the first sector, military provider firms, supports direct tactical military assistance even including front-line combat, the second sector, military consulting firms, provides strategic advisory and training expertise. The third sector, military support firms, deals with logistics, intelligence and maintenance services.[6]

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1 P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (2003), p. 20.

2 P.W. Singer, 'The Private Military Industry and Iraq: What have we learned and where to next?', (2004) *Geneva Centre for the Democratic Control of Armed Forces* (DCAF) – *Policy Paper*, p. 2.

3 H. Wulf, *Internationalisierung und Privatisierung von Krieg und Frieden* (2005), p. 54.

4 *Ibid.*, at 55; F. Schreier and M. Caparini, 'Privatising Security: Law, Practice and Governance of Private Military and Security Companies', (2005) *Geneva Centre for the Democratic Control of the Armed Forces – Occasional Paper No. 6*, pp. 33-43; Ch. Schaller, 'Private Sicherheits- und Militärfirmen im bewaffneten Konflikt', (2005) *Stiftung Wissenschaft und Politik (SWP) – Studie*, pp. 7-8.

5 See Singer, *supra* note 2, p. 3.

6 *Ibid.*, pp. 2-3.

However, it is difficult to draw a clear line between the three sectors.[7] The intention of this article is to show that every employee as well as every group of a private firm, which do not belong to the armed forces must under certain circumstances respect rules under International Humanitarian Law. This article uses the term 'employees' of PMCs, because those employees are most likely the ones concerned, since they often perform tasks of an active or offensive character in an armed conflict. Nevertheless, employees of Private Security Companies can also find themselves in situations in which they have to respect international humanitarian law, e.g. in the case of protecting a military object.[8] In conclusion, it is the specific situation and action by an employee that determines the application of rules of international humanitarian law for this person rather than the category to which an employee belongs.

3. Status of PMCs; rules and responsibilities

As a starting point, the status of employees of PMCs operating within an international armed conflict has to be determined. It is only once the status has been established that applicable rules can be ascertained, since those rules depend on the status of a person within an armed conflict.

International humanitarian law only acknowledges two categories of persons in an international armed conflict, combatants and civilians.[9] Therefore, on the one hand, one could argue for employees of PMCs falling under the definition of "combatants", since some of them fight side-by-side with regular armed forces, who are definitely combatants, or may even fight alone. A determination of who a combatant is, can be found in Article 43 (2) of Additional Protocol I to the Geneva Conventions of 1977 ('AP I'). On the other hand, the category of "civilians" as defined in Article 50 of AP I also seems appropriate to describe the status of employees of PMCs'. It has been observed in commentaries to AP I that "unlawful combatants" may be best categorised as having the status of civilians.[10]

3.1 Combatant status

Article 43 of AP I defines what armed forces are and that members of the armed forces have combatant status. As combatants, they have the right to participate directly in hostilities, which means that they are immune from prosecution for lawful acts of war, but not from those actions in violation of international humanitarian law. Furthermore, a combatant is a lawful target for the enemy and he or she has the duty to distinguish himself or herself from the civilian population.[11] Finally, according to Article 44 (1) of AP I, combatants are granted prisoner of war status if captured. To ascertain whether employees of PMCs have combatant status one has to first determine whether PMCs form part of the armed forces of a state. The question of who belongs to the armed forces of a state is generally regarded to be one of domestic law.[12] Nevertheless, Article 43 of AP I does set out three preconditions: first, that the group is organised and under a command responsible to that state party; second, that there is an internal disciplinary system and compliance with the rules of international law applicable in armed conflicts; and finally, in a case of incorporation of a paramilitary or armed law enforcement agency, the notification of the other parties to the conflict. In the case of PMCs it is difficult to see how these private companies could be assimilated into the national armed forces by a mere commercial contract. Such a contract may regulate the tasks of PMCs, establish liability rules and provide for payment terms. However, there has been little indication that states hiring PMCs intend to integrate them in their military structure, as statements by U.S. authorities have shown.[13] Only limited and discrete tasks of the armed forces are outsourced to PMCs. Hence, PMCs do not form part of the armed forces and accordingly their employees do not have combatant status under this provision.

Another possibility for possessing combatant status exists under the provisions covering militia or volunteer corps of Article 4A (2) of the Third Geneva Convention ('GC III').[14] The actors must belong to an armed force and fulfil four criteria laid down in Article 4A (2) of GC III: (1) they must be commanded by a person responsible for his subordinates; (2) they must have a fixed distinctive sign recognisable at a distance; (3) they must carry their arms openly; and (4) they must conduct their operations in accordance with the laws and customs of war. The first condition, belonging to armed forces, is questionable in the case of PMCs. On the one hand, many non-state actors hire PMCs and those PMCs hired by states operate separate from the armed forces. Therefore, PMCs form neither part of armed forces nor do they belong to them and thus their employees do not have combatant status as part of militia or volunteer corps such as the French Résistance during the Second World War.

3.2 Civilian status

This conclusion leads to the result that employees of PMCs must be defined as civilians under international humanitarian law.[15] In general, according to Article 13 of the Fourth Geneva Convention ('GC IV') and Article 51 of AP I civilians are protected from attacks unless and for such time as they take a direct part in hostilities. This would mean that employees of PMCs cannot be the object of an attack, but also that they are not allowed to enter into combat or take a direct part in hostilities in another, yet to be determined, form. If they do so, additional rules apply to them. On the one hand, one could think of mercenaries and their role in a conflict, on the other hand, there are exceptions if civilians take a direct part in hostilities.

7 See Wulf, *supra* note 3, p. 55.
8 See under 3.2.2; for a definition of Private Security Companies see Schreier and Caparini, *supra* note 4, p. 26.
9 See Article 50 (1) AP I; L. Cameron, 'International Humanitarian Law and the Regulation of Private Military Companies', (2007) *Basel Institute on Governance – Conference Paper*, p. 5.
10 See Singer, *supra* note 2, at 12; see Cameron, *supra* note 9, p. 9.
11 See Article 44 (3) AP I.
12 K. Ipsen, 'Combatants and Non-Combatants', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995), para. 307.
13 See Cameron, *supra* note 9, pp. 3-4.
14 See Ipsen, *supra* note 12, para. 304.
15 See Article 50 (1) AP I; see Cameron, *supra* note 9, p. 5.

(a) Mercenaries

The classical understanding of private persons acting in war and hired by one of the parties to the conflict is that they are mercenaries. This status is defined in Article 47 of AP I that contains six conditions for the qualification as a mercenary. First, the person must be specially recruited locally or abroad in order to fight in an armed conflict and, second, must in fact take direct part in hostilities. There are employees of PMCs who are specifically hired for fighting in an armed conflict and in fact do so. An employee of a PMC then must take direct part in hostilities to fulfil the second criterion. What kind of acts belong to this categorisation is discussed below.[16] The third requirement of Article 47 of AP I is that the person must be motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party. Although the salaries of employees of PMCs vary, often depending on their country of origin, they are often higher than those of regular soldiers in armed forces of the Party.[17] In most cases the motivation for employees to join a PMC is the better pay than in the armed forces or in similar occupations in their countries of origin. One common exception to this criterion is that some employees from less developed countries are paid less than regular soldiers in armed forces of the Party. This has to be determined on a case by case basis. The fourth criterion requires that the person is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict. PMCs act on a global market and thus they hire persons from all over the world. Former soldiers of armies drawn from armed forces that were significantly reduced or persons from a former battlefield, as in parts of Africa or former Yugoslavia, often join PMCs to continue their career for a good or better salary and for a chance to work outside the army discipline structure. As a result, many nationalities are represented in a PMC and not everyone is a national of a Party to the conflict. In the current situation in Iraq for example many employees of PMCs have U.S., U.K. or Iraqi nationality and thus are not mercenaries according to Article 47 of AP I. Nevertheless, employees with the nationality that is of a state that that is not participating in the Iraqi operations could fulfil this criterion. The fifth and sixth conditions draw a distinction from members of armed forces, but, because no employee of a PMC is at the same time a member of the armed forces of a Party to the conflict or sent by a Party on official duty, these two criteria are also fulfilled.

To summarise, some employees of PMCs could be mercenaries under Article 47 of AP I. The decisive criterion in these cases is the nationality of the person and whether his nation-state is a party to the particular conflict. In addition, in some cases the salary of the employee might be too low compared to a regular soldier of his rank to fulfil the third requirement of the mercenary definition. In the end, only few employees of PMCs could fall under this category.

A consequence of being qualified as a mercenary under AP I would be that the person is deprived of combatant and prisoner of war status but, according to Article 45 (3) of AP I, would still benefit from fundamental guarantees of Article 75 of AP I. However, according to Article 5 of GC III and Article 45 (1) of AP I, the status of such a person must be determined by a competent tribunal. Until such a determination is made, this person will be entitled to protection as a prisoner of war under GC III.

Nevertheless, such a person would commit an offence according to Article 3 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries[18] ('Mercenaries Convention'). In addition, every person who recruits, uses, finances or trains mercenaries commits an offence under Article 2 of the Mercenaries Convention, as long as those offences are implemented in domestic penal law.

Further, since mercenaries are not entitled to prisoner of war status, they are in the same position as civilians who directly participate in hostilities. That means that they are responsible for their acts under domestic criminal law and not immune from prosecution for lawful acts of war as is the case for combatants.

(b) Civilians taking a direct part in hostilities

If employees of PMCs, despite their status as civilians, participate in hostilities, they lose their protection as civilians.[19] That means that they can be targeted like combatants. On the other hand, they do not enjoy the rights of combatants, who are immune from prosecution for lawful acts of war, so domestic criminal law applies to them. Therefore, employees of PMCs are responsible for any act in violation of domestic law. Nevertheless, Article 45 of AP I presumes in the case of an international armed conflict that they receive prisoner of war status when captured. That means that they must be treated as prisoners of war until a competent tribunal has ascertained their status,. Once it has been determined that they do not qualify for prisoner of war status, the fundamental guarantees of Article 75 of AP I would apply to them.[20] Further, the content of Article 75 of AP I is widely considered as a rule of customary international humanitarian law, which means that the protection offered by this Article is also granted in regard to non-state parties to AP I.[21] In the end, the consequences are the same as for mercenaries.

However, what exactly does 'taking a direct part in hostilities' mean? In the International Committee of the Red Cross ('ICRC') Commentary to the Additional Protocols it "should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of armed forces". Furthermore, "[...] it seems that the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon but also, for example, the time that he is carry-

16 See Section 3.2 (b); for an overview on 'Direct Participation in Hostilities' see www.icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205?opendocument (last accessed 31 July 2008).
17 See Singer, *supra* note 2, p. 15.
18 The Mercenaries Convention has been ratified by 31 states, *cf.* www.icrc.org/ihl.nsf/WebSign?ReadForm&id=530&ps=P (last visited 31 July 2008).
19 See Article 51 (3) AP I.
20 F. Kalshoven and L. Zegveld, *Constraints in the Waging of War* (2001), p. 99.
21 See, e.g., J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (2005), Rules 87 to 93.

ing it as well as situations in which he undertakes hostiles acts without using a weapon".[22] In addition, concerning the 'direct' participation, "direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place".[23] As a first consequence, PMCs engaging in offensive attacks would almost certainly act unlawfully.

Another question is the protection of military objects, which is considered as direct participation in hostilities.[24] Therefore, the protection of a military object is not a task that should be carried out by an employee of a PMC. This of course leads to the question of what a military object is as it is difficult to define. According to Article 52 (2) of AP I, military objects are those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances at the time, offers a definite military advantage. Following this definition, the qualification of a building as a military object can change quickly and would depend on the particular circumstances. This vagueness must be taken into account if a state hires PMCs for the protection of buildings whose status is likely to change. Therefore, PMCs should only carry out the protection of such buildings if they are clearly being used for civilian purposes.

The question of which tasks of a PMC employee would be considered lawful and would not constitute direct participation in hostilities remains open. For persons accompanying armed forces, like those providing logistics, catering, construction and maintenance of bases, Article 4A (4) of GC III states, that they remain civilians, but with prisoner of war rights in case of capture. However, even in this context, the line between that and direct participation in hostilities is not clear. Logistical support at the front line is already considered to be taking a direct part in hostilities.[25] That means that the delivery of munitions and weapons to the front line, especially to armed forces in the combat zone, would already be sufficient to lose protection. Should this contribution not be part of a direct attack, it would be advisable to states to use only civilians for logistical support at the front line because they would be protected at all times. However, there must be clear evidence that munitions or weapons are carried to the front line with the intention to use them there immediately. Only a vague suspicion that weapons are being transferred and might be used in the future is not sufficient for a determination of direct participation in hostilities. Therefore, if PMCs are accompanying forces at the front line, their activities should not be related to munitions or weapon transport, but only to food supply, etc. Of course, this means that employees of PMCs performing these tasks cannot be used as backup forces in the event of unexpected military strategy change, which can happen in large military operations.

In addition, the task for employees of PMCs to develop weapons systems or strategies far away from the battlefield does not mean that they are taking a direct part in hostilities. First of all, it is difficult to ascertain which project they are working on and to what extent such a project might be part of an on-going conflict. Second, if the reason for their occupation is evident because they are working for instance in a lab, this does not lead to their direct participation.[26] There are still steps that need to be taken to use the results of work carried out in a lab during hostilities. In the end, there is no great difference between this and workers in a tank factory not directly participating in hostilities. However, in a case where, for example, missiles are guided from a control centre far away from the battlefield, this activity would constitute direct participation in hostilities.[27]

Finally, the use of force in self-defence against simple criminal attacks is lawful, but the usually high standards of domestic criminal law must be respected. Although a distinction between self-defence and direct participation is difficult to establish in the context of an armed conflict, carrying a gun purely for self-defence is not impossible or prohibited.[28]

However, many questions are not easy to answer and are dependent on the specific circumstances of each case. Nevertheless, to avoid such problems and especially to avoid attacks on employees of PMCs, those employees should not be used to protect military or strategically important buildings and should not accompany forces on the front line.

3.3 In conclusion: rules applicable to employees of PMCs

To sum up, the following fundamental rules are applicable to employees of PMCs. First, they are civilians and, as such, generally protected persons under Article 51 of AP I.

Second, various scenarios are possible. As long as employees of PMCs do not take a direct part in hostilities, they remain protected. If they are captured while accompanying forces in the context of an international armed conflict, they are entitled to prisoner of war status under Article 4A (4) of GC III. In accompanying forces, they must be careful not to pass the threshold to direct participation in hostilities, e.g. by supporting forces at the front line with munitions and weapons or by getting involved in combat activities. The same threshold problem applies to protection tasks concerning objects, e.g. buildings. Also, in such a situation, employees of PMCs must be aware that they should not participate directly in hostilities which could be the case if the relevant object becomes a military one according to Article 52 (2) of AP I and thereby a legitimate target.

In a situation where employees of PMCs take direct part in hostilities, Article 45 of AP I would apply and they are presumed to be prisoners of war. Once their status has been ascertained, which does not entitle the individual to prisoner of war status in itself, Article 75 of AP I remains in force and gives them

22 ICRC, *Commentary on the Additional Protocols* (1987), at paras. 1942-1943.
23 *Ibid*., para. 1679.
24 See, e.g., Summary Report of the 2nd Expert Meeting Direct Participation in Hostilities under International Humanitarian Law, *supra* note 16, p. 11.
25 J.-F. Quéguiner, 'Direct Participation in Hostilities under International Humanitarian Law', (2003) *International Humanitarian Law Research Initiative – Working Paper*, at 5; *The Public Committee Against Torture in Israel v. Israel*, Israel Supreme Court, judgment of 13 December 2006, at para. 35; H.-P. Gasser, 'Protection of the Civilian Population', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995), para. 518.
26 See ICRC, *supra* note 22, para. 1806.
27 See Schaller, *supra* note 4, p. 11.
28 ICTY, *The Prosecutor v. Tadic*, Judgment, Case No. IT-94-I-T, 7 May 1997, paras. 640-643; see Quéguiner, *supra* note 25, p. 4.

minimal protections of certain fundamental guarantees. The nationality of an employee of a PMC does not matter, since the consequences for mercenaries according to Article 47 of AP I and civilians taking a direct part in hostilities are equal under international humanitarian law. Therefore, both can be tried and punished under national law for any offence committed.

These rules concern the status of employees of PMCs. Nevertheless, other rules of international humanitarian law, e.g. on warfare and the use of certain weapons, are also applicable to them.

3.4 In conclusion: responsibilities of employees of PMCs

Given these rules applicable to employees of PMCs, it is in their interest to limit the services they provide. They should avoid directly supporting the front line with any military devices and protecting buildings that are military objects or in highly unstable zones where they can become military objects. As civilians, they are not allowed to take a direct part in hostilities and thus they must be careful not to pass over this threshold. Because the determination of direct participation is rather difficult, the recommended approach is to entirely avoid situations that could lead to the potential for direct participation. If employees of PMCs intend to take part in combat operations, they must be aware that they are legitimate targets for the enemy and punishable under national law for their actions.

4. Challenges and critiques

Naturally, the complexity inherent in determining the status of employees of PMCs implies problems and has an impact on the development of international humanitarian law. The first concern addresses a fundamental principle in international humanitarian law, the principle of distinction between combatants and civilians. On the one hand, the difficulties involved in the increasing number of persons not belonging to armed forces and not wearing their uniforms and signs cause uncertainties about which persons are lawful targets. Within this group of non-identifiable persons, the majority, even working for a PMC, are civilians not taking a direct part in hostilities by carrying out logistical and other tasks. Therefore, employees of PMCs may run the risk of becoming targets, because the enemy has no way of distinguishing them from employees of PMCs taking a direct part in the hostilities and it is for this reason that all employees of PMCs are, to a certain extent, face the risk of becoming targets.[29]

Since there is no clear distinction within this group of employees of PMCs, the threats to peaceful civilians could increase. It is not only difficult for an enemy to distinguish between persons within the group of PMCs by their outward appearance, but also to distinguish between PMC-employees and civilians. Frequently, neither of them wear very clothes or signs that are easily recognisable and make them stand out. The increasing number of civilians as employees of PMCs taking a direct part in hostilities therefore leads to an erosion of the principle of distinction and a greater risk of civilians being targeted.[30]

That is not the only danger for civilians caused by a large number of PMCs operating in conflict situations. The lack of the disciplinary structure that is normally inherent in combating groups leads to less sanctioning of actions in violation of international humanitarian law within the group. It usually falls to the commanding officer to control the conduct of his soldiers and to punish breaches immediately. Such a rigid structure cannot be found in most PMCs and, hence, the civilian population faces actors that are not subject to effective sanctions for violating international humanitarian law.[31]

However, not only rules of international humanitarian law, but also of national law are crucial. Since PMCs often act in so-called failed states or states close to this condition, the enforcement of national law is very weak. There are not many possibilities to lodge a complaint against an employee of a PMC and, in general, there is no strong investigative authority that could get involved in a case. Furthermore, employees of PMCs do not fall under the national military law by which the sending state(s) can try to punish their own soldiers for abuses.[32] This lack of law enforcement is another risk for the civilian population.[33]

As mentioned, there are many threats to the civilian population through the increasing involvement of PMCs. On the other hand, employees of PMCs face serious problems too. They are in an extremely vulnerable position. If participating directly in hostilities, they are targets and can on the other hand be tried and punished for their actions. The number of employees of PMCs who are killed and wounded in Iraq in relation to regular forces may serve as a warning.[34] Therefore, employees of PMCs should at least be informed about their status and the dangers they face in the same way as soldiers are trained in international humanitarian law.[35]

Finally, PMCs operate in a free market. That means that not only can states hire them but also transnational non-state actors, made up of corporations and NGOs as well as rebel and terrorist groups. The monopoly of the use of force by states is thus severely weakened.[36]

5. Conclusion

Although current international humanitarian law can determine status, and the rules and responsibilities of employees of PMCs, the critiques above show that the use of PMCs has an impact on all actors involved in a conflict situation, whether

29 See Cameron, *supra* note 9, p. 5.

30 *Ibid.*, p. 10.
31 *Ibid.*
32 The U.S.A. are in a process of opening their military jurisdiction for civilian contractors. However, this approach causes several problems under national constitutional law as well as under human rights law, see www.hrw.org/english/docs/2004/05/05/iraq8547.htm (last visited 31 July 2008).
33 See Singer, *supra* note 2, at 12-13 and 21; Singer urges states to implement or amend national laws to control PMCs hired by them and calls for regional and international bodies for surveillance of PMCs.
34 *Ibid.*, at 4; figures about killed and wounded PMC-employees in Iraq vary from 444 deaths on a partial list on http://icasualties.org/oif/Contractors.aspx (last visited 31 July 2008) to 917 reported by the New York Times, 'Contractor Deaths in Iraq Soar to Record', 19 May 2007.
35 See Cameron, *supra* note 9, p. 10.
36 See Singer, *supra* note 2, p. 9.

voluntarily or not. Despite the strong tendencies for states to privatise military operations, there are core areas inappropriate for privatisation. The use of force by states is one of these areas. Using PMCs for support or protection in conflicts is one thing, but using them on the front line goes too far. The rules of international humanitarian law applicable to employees of PMCs show that there is a limit to their involvement in combat operations. It is imperative that these rules and responsibilities be taught to the PMCs themselves, but also and in particular to every employee of a PMC.

Private Military and Security Companies, the European Union, and Regulation as a Tool for Efficiency

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Abstract: Some European nations both host and use private military and security companies as a solution to the rising demand for overseas operations at a time when they have shrinking defence assets. However, other nations refuse to legitimise this process and the European regulatory structure is weak. Outsourcing to PMSCs can lead to economic abuses and loss of efficiency as well as misconduct. Remedies require a mix of hard and soft regulation, good contract drafting, and supervision. European performance might benefit from seeking common solutions of this kind in the ESDP framework.

Keywords: Private military and security companies (PMSCs), European Union, privatisation, peace missions, defence economics

The European countries in NATO and the European Union (EU) today who want to contribute to peace missions are caught on the horns of a dilemma between the desire to meet the demand and the capacity to meet it. They often have national reasons for action – peacekeeping/humanitarian traditions, an exportable 'surplus' of security since the Cold War, historical/cultural links with conflict hotspots – and NATO and the EU themselves have set very explicit targets for the quantity and quality of their efforts. At the same time their defence budgets are overstretched and manpower is often a problem, not least because so many states are being driven towards abandoning conscription. Moreover, while several countries faced lighter or simpler military burdens during the Cold War because of their peripheral location, small size, and/or neutrality, today's demands for military participation – being largely de-territorialised – fall upon literally everyone and frequently force the smaller states to make the most difficult choices.

Supply and demand is also the underlying cause of the recent increase in the use of private military and security companies (PMSCs), especially by 'strong' and democratic states. PMSCs offer such states a way to get jobs done (and get credit for them) that they are not prepared to do with their own forces. Such 'overspill' tasks may be less specialised, not demanding 'core' military expertise; or they may need to go on for longer than the state's forces are prepared to stay; or (notoriously, though not typically) they may appear too risky or even potentially discreditable. They are wide-ranging, going from innocuous services like food and laundry for troops at home, through the hire of air- and sea-lift or specialised equipment, to non-combat services in the field, 'peaceful' military services like aid delivery or training local militaries, guarding persons and sites, and finally the controversial options of private intelligence gathering, policing or prison management, and actual combat tasks.[1] The decision to 'privatise'[2] a given function in a given case always has a *resource* rationale in the broad sense that it appears more efficient/appropriate/sustainable than using state assets; and the decision-makers may also believe that it will *be less expensive* at least in the immediate term. The two points are distinct because it may make sense for a state to buy a service that costs more than using its own personnel if state assets are simply not available, or using them could cause more political and managerial problems, or if it wants to keep them for a task that has a higher priority. The issue of what constitutes a fair price premium in such a case is considered below.

The extent to which European states have resorted to such solutions is hard to document precisely, but some patterns can be detected. First, as regards companies being based in Europe: firms supplying *security* services such as physical security advice and equipment, guarding, and the transport of valuables exist throughout the EU and have for some time had their own trade association, the Confederation of European Security Services (CoESS – website: http://www.coess.org). *Military* service companies are mainly concentrated at the Western and Eastern ends of Europe – particularly in the UK, France, and various post-Communist countries including Russia itself. They are

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1 For more on this and the general analysis of PMSCs see Holmqvist, C., 'Private Security Companies: the case for regulation', SIPRI Policy Paper No 9, January 2003, text at http://www.sipri.org.

2 The word 'privatise' is used here only as shorthand; the problems and pitfalls associated with its definition are explored in the next section.