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**PRIVATE MILITARY AND SECURITY COMPANIES AND HUMAN RIGHTS
- A rough sketch of the legal framework -**

Introduction

As activities of private military and private security companies abroad are expanding the question of their accountability calls for analysis. The simple factual finding appears to be that there is a certain gap in accountability, in the sense that companies acting abroad (i.e. outside of their state of registration) are not often held responsible if they act in a manner that negatively affects the human rights of persons who come into contact with them.

In situations of armed conflict, this is even more the case, since the state in whose territory the companies are carrying out their activities will often lack the capacity to enforce its legislation.

While humanitarian law applies both to states and non-state actors and therefore staff of PMCs/PSCs can commit violations of international humanitarian law, the question of the application of human rights to PMCs/PSCs and/or their staff is far more controversial. Could PMCs/PSCs (or their staff) be held directly responsible for human rights violations? Under classic international human rights law as codified in human rights treaties, private parties have no obligations. However, in a number of states, they are directly bound by human rights through national law.

There is an ongoing debate as to whether through the development of the international legal framework private companies are or should be directly bound, as a matter of law, by human rights.¹ This debate is, of course, highly topical for the issue of accountability of PMCs/PSCs. However, even if companies were directly responsible, their obligations would have to be enforced through state legislation and state courts. In this sense, unless there is an international instance adjudicating on private companies, positive obligations of states to protect and ensure human rights could have the same effect if they were understood as also applying to the activities of companies abroad. The following analysis focuses on one side of the question only, namely on

¹ See UN Sub-Commission for the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights; Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc E/CN.4/2006/97, 22 February 2006. A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford, OUP, 2006, Chapter 6.

state obligations under international human rights law with regard to the activities of PMCs/PSCs. At the outset, it should be said that while specific rights will be of particular relevance for PMCs/PSCs, the legal framework governing state obligations for them does not differ from the legal framework concerning any other type of company

There are two aspects to the relationship of states towards companies. On the one hand, such companies/their staff have a right to exercise their profession. This right, however, can be limited for reasons of *national security*. However, such restrictions can probably only be imposed with regard to specific activities, not to their general existence.² Secondly, there are obligations of states towards persons whose human rights could potentially be affected by PMCs/PSCs. It is this second aspect of state obligations that interests us here.

For all human rights, states have a duty to *respect, protect and to ensure*. The obligation to *respect* human rights is a so-called negative obligation in that the state is responsible for not arbitrarily interfering with human rights. This obligation is especially relevant when a state hires companies. The obligation to *protect* is a positive obligation under which a state has to protect all persons from acts by third parties that could impair the enjoyment of their human rights; this obligation is important in case companies engage in activities that could potentially affect human rights. The duty of states to *ensure* human rights is somewhat broader and is usually understood as the duty to adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their human rights obligations.³

1. Duty to respect: abstain from violations committed by the state itself

The duty to abstain from committing human rights violations can arise even when states do not commit the act themselves, but through a third party. Indeed, under the law of state responsibility as codified in the *Articles on State Responsibility*,⁴ acts are imputable to the state when they are committed by:

- organs of a state (Article 4 of the Articles on State Responsibility);
- persons or entities exercising elements of governmental authority (Article 5);
- persons acting *de facto* on the instructions of, or under the direction or control of, the State (Article 8);
- conduct carried out in the absence or default of the official authorities (Article 9);
- persons whose conduct is acknowledged and adopted by a State as its own (Article 11).

These principles imply that when a state hires a company in order to carry out functions normally assigned to governmental authority or other functions, their conduct will be attributable to the state. However, it is not always clear what 'governmental authority' means. The commentary of the International Law Commission on the Articles on State Responsibility cites as examples

² Cf. the Green Paper, *Private Military Companies, Options for Regulation*, ordered by the House of Commons, 12 February 2002, p 23.

³ Human Rights Committee, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 29 March 2004, para 7.

⁴ Annexed to UN General Assembly Resolution 56/83 of 12 December 2001.

private security firms that run prisons and thus have powers of detention or discipline.⁵ This approach is echoed in the jurisprudence of human rights bodies, which have stated that a state cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals.⁶ But the scope of such functions is rather limited and evolves over time.

Another way of attributing conduct of PMCs/PSCs, then, is to verify if they are carried out on the instructions of, or under the direction or control of, the state. However, in order to be able to attribute responsibility, the level of control has to be rather high and it will not always be possible to prove such control.

Whenever the state has no control or direction over a private party, this does not mean that it has no obligations at all. As said above, it also has a positive obligation to protect and ensure human rights.

2. Duty to protect and ensure human rights

States have an obligation to ensure human rights, which means, in particular that they have to enact such legislative, administrative and other measures so as to fulfil their human rights obligations. Coupled with the obligation to protect, according to which states have an obligation to protect persons from acts of private parties which impair or are likely to impair the enjoyment of human rights, this implies a number of obligations of states to ensure that within their jurisdiction and control, the rights of all are harmonised with one another. This entails such obligations as to:

- regulate such private activities as can be harmful to others, if necessary to enact national legislation to this effect;
- exercise due diligence and take all appropriate measures to prevent any activities that could impair human rights;
- intervene whenever activities of companies could be harmful for human rights;
- sanction activities that are harmful to the human rights of others;
- ensure that domestic legislation provides for effective remedies and access to justice in domestic legislation against abuse.

The relevant standards which inform these obligations are, first and foremost international human rights treaties and customary law. But soft law standards⁷ and jurisprudence can also play an important role in refining the obligations. Soft law standards illustrate and flesh out human rights obligations.

⁵ International Law Commission, Report on the work of its fifty-third session (2001), Chapter IV, UN Doc A/56/10, Suppl. 10, p 92.

⁶ E.g., ECtHR, *Costello-Roberts v the United Kingdom*, Judgment of 25 March 1993, Series A No 247-c, para 27.

⁷ The following standards might be of particular relevance for PMCs/PSCs which have recourse to force: Code of Conduct for Law Enforcement Officials; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; Standard Minimum Rules for the Treatment of Prisoners; Basic Principles for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

(1) Is there a normative gap? => Territorial scope of states' obligations

In the jurisprudence of human rights bodies and the International Court of Justice, human rights obligations protect all persons *within the jurisdiction or within the power or effective control of the state, even if not situated within its territory*.⁸ Thus, states have a duty to protect persons from potential harmful activities by companies within their territory and within territory under their control, which is the case in situations of occupation⁹ or other situations where a state has control over another territory.¹⁰

The state on whose territory the company acts always has an obligation to ensure that no human rights abuses by private actors are committed on its territory (unless it is occupied, in which the occupying power has in fact the power to ensure public order and safety and thus, human rights¹¹).

What about the obligations of the state where the company has its headquarters or where it is incorporated or registered? If this company engages in activities abroad, there could possibly be a gap, since their activities do not fall within the jurisdiction or the territory of the state of registration. For instance, if a company registered in one state exercises its activities in another state where the state of registration has no presence does the state of registration have an obligation to protect private persons in the third state's territory against potentially harmful activities of the company? Under the just mentioned criteria, it has no obligation since it has no control in the other state. It would also be impracticable, since a state has no right or possibility to enforce its own laws in another country.

One may argue, however, that while the state of registration has no control over territory or power over potential victims in a third state, it at least has jurisdiction and control over the company in so far as it regulates and permits its registration. It does not have control over a potential violation committed abroad, and therefore cannot be asked to, for instance, send its security forces into a third state to enforce respect for human rights. But it might be argued that the state has at least the obligation to enact legislation or other regulations in order to prevent abuse of human rights by the company registered in its own jurisdiction as far as possible.

A related question is whether the state in which the company is registered could be responsible to provide remedies to victims within its own jurisdiction. This would imply under human rights law that the obligation to provide an effective remedy extends to abuses by private parties which are within the jurisdiction of the state of registration but engage in activities in third states. However, whether the jurisdictional link is sufficient or whether there must be some more control over the activities of the company is far from clear: many companies are incorporated in states in

⁸ *General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13*, 26 May 2004, para 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory opinion of 9 July 2004, para 106; *Loizidou v Turkey* (Preliminary Objections), Judgment of 23 March 1995, Series A 310, para 62.

⁹ Occupation presupposes control, Article 42 of the Hague Regulations of 1907.

¹⁰ ECtHR, *Ilaşcu and Others v. Moldova and Russia*, Judgment of 8 July 2004, para 392.

¹¹ Article 43 of the Hague Regulations of 1907.

which they have no activity at all and employ no nationals of that state. Why would such a state have an obligation to provide a remedy for an act committed by a non-national in a third country?

Short of the obligation to enact universal jurisdiction for grave breaches of the Geneva Conventions or to prosecute and extradite serious violations of human rights¹², there is, so far, no clear obligation in human rights law to establish extraterritorial jurisdiction of the state's own courts. Especially, it is not clear whether there is an obligation to establish extraterritorial jurisdiction for torts committed by a company abroad as part of the obligation to provide an effective remedy against abuse. This is not to say such legislation never exists; the Alien Tort Claims Act of the United States is an example to the contrary. In terms of accountability, the enactment of extraterritorial jurisdiction for torts is certainly an avenue to be explored. As a matter of international law, such an obligation exists, for instance, in the OECD Anti-Bribery Convention of 1997.¹³

To sum up, there is no normative gap since all activities of PMCs/PSCs are 'covered' by the negative and positive obligations of the state in which they carry out their activities and of the states who hire them, even if not the state of registration. All activities fall into the jurisdiction of a state if they are either within the jurisdiction or the territory. However, as we will see, this normatively comprehensive coverage is not implemented in practice, so that there remains a potentially serious protection gap for persons affected by the activities of PMCs/PSCs.

(2) Implementation gaps

While there is an obligation of all states to protect the human rights of persons within their own territory, the reality is that in a number of cases, companies carry out activities in countries which have no practical capacity (or sometimes no political will) to protect persons within their territory. Such is the case, for instance, in situations of armed conflict if the state authorities have lost the control over parts of the territory. It might also be the case in other situations of

¹² Obligation to prosecute or extradite and other principles for criminalisation: Article I, VI Convention on the Prevention and Punishment of the Crime of Genocide; Art. 5, 7 CAT; Art. IV, V International Convention on the Suppression and Punishment of the Crime of Apartheid; Art. 14 Declaration on the Protection of All Persons from Enforced Disappearances; Principle 18 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Art. 12 Inter-American Convention to Prevent and Punish Torture; Art. IV Inter-American Convention on the Forced Disappearance of Persons; Article 15 (3) of the United Nations Convention against Transnational Organized Crime in conjunction with Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime.

¹³ **Article 2 - Responsibility of Legal Persons**

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3 - Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials."

instability or violence, where there is in effect no functioning legal system to enforce respect for human rights. In these situations the only way to ensure that private companies do not engage in activities harmful to human rights will often be through the exercise of extraterritorial jurisdiction of the state of registration. However, as said above, the record of cases brought either against companies or against private persons working for companies is negligible. The combination of lack of accountability in the state in which companies carry out activities, especially in situations of conflict, combined with the lack of enforcement in the state of registration because of procedural obstacles or lack of legislation can lead to serious protection gaps.

A solution sometimes proposed to the problem of lack of extraterritorial jurisdiction, especially in common law countries, is the extension of jurisdiction of military tribunals. This was done in 2000 for Iraq by extending the US *Uniform Code of Military Justice* to PMCs/PSCs through *Military Extraterritorial Jurisdiction Act* of 2000. However, in the unanimous jurisprudence of human rights bodies and courts, civilians should not be tried in military tribunals because the presence of military personnel on tribunals jeopardizes their right to a fair trial.¹⁴ In so far as employees of PMCs/PSCs are not incorporated into the armed forces of the state and are therefore civilians, the extension of military jurisdiction over them therefore poses a problem. Also, the record of military justice to provide adequate protection for victims' rights is not satisfactory (right to reparation, right to participate in the investigations).

Conclusion

In the same way as with IHL, activities of private military are regulated by international human rights law – even if they are not directly bound by it. It is a question of interpretation whether there are still normative gaps in international law or whether the gap is one of implementation and protection. This alone, probably, is an argument to call for national legislation. Even if there are no gaps, clarification in national would certainly make accountability more predictable to companies.

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¹⁴ ECtHR, *Incal v. Turkey*, Judgment of 9 June 1998, Reports 1998-IV, paras 71-73; Inter-American Court of Human Rights, Case of *Cantoral Benavides v. Peru*, Judgment of 18 August 2000, Series C No. 69, paragraph 112; Human Rights Committee, *General Comment 13 on Article 14*, 13 April 1984, HRI/GEN/1/Rev.7/Add.1, para 4; *Concluding observations on Peru*, 15 November 2000, CCPR/CO/70/PER, para.11; African Commission on Human and Peoples' Rights, *Principles and guidelines on the right to a fair trial and legal assistance in Africa*, African Union Doc DOC/OS (XXX) 247; See the draft principles in the report submitted by Mr. Decaux, UN Doc E/CN.4/Sub.2/2005/9.