

EDITORIAL

The private military and security industry is growing, with some estimating annual contracts to be in the \$10–\$20 billion range and others citing figures as high as \$100 billion. The sharp increase in the number and size of private security and military companies took place after the end of the Cold War as private operators filled a security vacuum in weak or failed states, which coincided with the increasing privatization of the public sector and the globalization of business activities.

Armed private security companies protect persons, buildings and installations, humanitarian aid delivery and reconstruction efforts. These private companies have been complemented recently with large private military companies engaged in military activities that used to be the prerogative of the armed forces. The reluctance to maintain or deploy large standing armies enhances this tendency and makes the armed forces more dependent on private military entities. Private military companies are specialized in training armed forces for combat and combat support functions. Executive Outcome, for example, turned around an orphaned conflict in Sierra Leone, and Military Professional Resources Inc. significantly shifted the balance of power in the Balkans. Private military companies provide peacekeeping training and other military-related services for peace and stability operations from Congo to Haiti.

Especially owing to its extensive activities in Iraq and to a lesser degree in Afghanistan, the private military sector is booming. Iraq is the largest private military market in modern history and a testing ground for the direction in which the private commercial military sector will develop. More than 20,000 “private warriors” of commercial military companies are estimated to be operating under contracts with the Iraqi and United States governments and with private firms. Such companies are providing security services in danger zones, whereas the conventional armed forces are concentrating on purely military operations. In this multi-billion dollar business, companies like Kellogg, Brown and Root (KBR) have tens of thousands of employees in Iraq and Kuwait who run military supply lines and administer military bases.

To a large extent the debates about private military companies are part of wider debates on the privatization of government functions. The outsourcing of core activities of the armed forces to private entities might affect military institutions in the longer run. Even if some of them are rather paramilitary and para-state entities, private military companies are not an integral part of

operations. They are independent entities, responsible first and foremost for their own firm. Many of the contractors working for civilian institutions or companies coordinate only loosely with the armed forces in conflict areas and may become involuntarily involved in hostilities. The usually defensive nature of their mandate may be changed to include offensive action to repel attacks. Similarly, the civilian nature of an object protected by private military personnel is not immutable and that object may become a military objective, which can be lawfully attacked.

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The growth of the private military sector has been accompanied by rising concern about the role of private commercial interests in military affairs, and particularly the unregulated use of force by the personnel of private military companies. Some hold that the use of force by private companies is a natural evolution of the security demands of states that are unable to cover all security aspects. Others regard it as tantamount to the return of mercenaries or ultimately as a weakening of the state's ability to retain its monopoly on the use of force. Even though the public sphere has always cooperated with private security companies, the emergence of private military companies as important factors in armed conflicts and as security providers in unstable states raises questions about the role of nation states as primary military actors.

In contrast with mercenaries who operate in hiding, private military companies have established offices with defined management structures, develop their corporate image and attract new engagements through publicity. Mercenarism often involves a handful of foreign former soldiers overturning a government in post- or neo-colonial conflicts, and it exists on a much larger scale. Often similar to the conventional forces, private military companies are operating openly under a responsible command, with a strict hierarchy, a disciplinary system and military-style uniforms, and claiming to comply with the laws and customs of war and of the host country. In the final analysis, however, they are acting under the customer's instructions. It is in the common interest of both the customer and the contractor to abide by those instructions and the rules of law. Activities outside this framework could seriously affect the outsourcing principle and corporate development, as stricter regulations or even prohibitions may follow.

The contractual requirements, and in particular the issuance of good rules on engagement, are therefore of crucial importance for monitoring the expansion of military entrepreneurship in armed conflict. When private military companies are allowed to exercise elements of governmental authority, their conduct will, under the rules of state responsibility, be attributable to states – at least when they assume state functions and treaty obligations or act under the direction or control of a state. Finally, the state may, even where the conduct of a private military company is not attributable to it, nevertheless incur responsibility for its failure to exercise due diligence with regard to that company's activities.

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Article 3 of the Geneva Conventions distinguishes between persons taking active part in armed conflicts and those who do not. Its originality lies in the fact that it creates rights and obligations also for entities that are not party to that treaty, which was concluded by states. In particular, it imposes obligations on non-state movements or groups, which often play a main part in today's wars. Human rights, too, are now widely seen as creating obligations for non-state entities.

Usually one thinks of rebel or insurgent movements as fighting against an established government or among themselves. In hostilities of a certain duration and intensity they are likened to a state with regard to the attendant rights and obligations that flow from international humanitarian law. In the United States, in an unexpected decision by the Supreme Court, even individual fighters in the so-called "global war on terror" could be covered by Article 3, although the territorial link with a state does not exist and their membership to any particular party to an armed conflict might be doubtful.

International humanitarian law also determines the basic legal framework for the activities of the staff of private military companies in times of armed conflict. Since the distinction between *jus ad bellum* and *jus in bello* is the basic axiom of humanitarian law, the reason for participating in hostilities is irrelevant for it. If engaged in hostilities, such companies can sometimes be deemed a party to conflict and subject to the basic humanitarian requirements of that law in terms of both rights and obligations. The link to state entities, however, complicates the legal considerations, especially in international armed conflicts, as private military companies are increasingly carrying out activities that formerly belonged to the functions of the armed forces of a state.

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The killing, kidnapping and detention of private contractors and particularly the ambushing and barbaric mutilation of four American private contractors in 2004, as well as the showing of videos of military contractors shooting Iraqi civilians a year later, highlight the need for the rights and obligations of personnel of private military companies to be clearly specified. There is only a very limited basis for classification as combatants under international humanitarian law and with it entitlement to the protection of prisoner-of-war status. Supply contractors accompanying the armed forces and issued with identity cards by them lose that entitlement if they participate in hostilities. The vast majority of private military personnel would be considered civilians under international humanitarian law and, unless they take active part in hostilities, they are protected as civilians against attacks. Yet, increased reliance on civilian contractors in these roles has important implications for international humanitarian law if they are indeed called upon to act in a way that could be construed as direct participation in hostilities. The cardinal principle of distinction between persons participating in hostilities and those who are not is, in practice, stretched to its limits when interpreting the multiplicity of possible actions that private military personnel might take in situations of armed conflict.

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There is no legal gap with regard to private military entrepreneurship, and private military and security companies do not operate in a legal vacuum. The unease and suspicion about private companies potentially using lethal force and the growing tendency of armed forces to rely on private military entities, however, show the need to prevent or reduce certain potential adverse consequences. The aim is to ensure and promote respect for international humanitarian and human rights law by states and private military and security companies working in conflict areas, and to study and develop options and regulatory models and other appropriate measures at the national and possibly regional or international level. Switzerland, in cooperation with the International Committee of the Red Cross, is at present facilitating and contributing to such a process in an intergovernmental dialogue. This dialogue could be taken up to inform the debate in international forums such as the 30th International Red Cross and Red Crescent Conference scheduled to take place in late November 2007, as well as in other regional or international fora.

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