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(p. 541) Chapter 28 Private Contractors and Security Companies

28.01 Private contractors may be employed by a Sending State to provide logistical and technical support and security for installations and persons. They should not be employed in combat functions or engage in direct participation in hostilities in the context of an armed conflict, as such participation would entail the loss of civilian protection and could result in their being prosecuted for acts of unprivileged belligerency.

1. The use of private contractors has become widespread. Reference has been made to them already in early codification of the law of armed conflict.¹ Their use in the types of functions referred to in Section 28.01 is long-standing, non-controversial, and accepted in both treaty law and in general practice.² Such personnel may be contracted individually or via private companies providing the respective services. Likewise, the use of private contractors and security firms for (assistance in) the training of local military and police personnel is well accepted. However, in recent years, their use in various other types of functions has become increasingly prevalent. Expressly authorized or not by armed forces or other competent authorities, and in many instances not effectively controlled, they have provided personal protection, guarded installations, and secured transports. There is no prohibition against the use of contractors for the purpose of (assisting in) providing security against unlawful theft or assault against installations or persons. Nevertheless, care should be exercised to avoid that such activities include law enforcement functions not clearly authorized. In an armed conflict it is essential not to cross the line separating security functions and active participation in hostilities. Also related activities, such as the guarding and interrogation of prisoners of war and other detainees, etc., should not be assigned to private contractors and security firms.³

References

(p. 542) **2.** Notwithstanding the abovementioned statement of best practice, it is undeniable that the employment of contractors in many recent operations has included many instances in which their activities have, in fact, crossed the line to include direct combat support and other forms of activity, which until the end of the Cold War, would have been reserved for members of State armed forces. The reasons for this are various and have received considerable attention, and need not concern us here.⁴ What is important from a legal perspective is what the legal ramifications of this development are. Firstly, it should be noted that such activities, when amounting to direct participation in hostilities, can result in loss of civilian protection. It can also constitute 'unprivileged belligerency' for those so involved. While unprivileged belligerency is not generally considered to constitute a war crime, it can well result in criminal prosecution under national law on the part of any State which possesses jurisdiction.⁵ It also signifies that such persons would not be entitled to prisoner-of-war status or treatment. It furthermore undermines the principle of distinction and increases the risks for other civilians in proximity to the forces. This could include both contractors with more traditional non-combat functions and other civilians, such as journalists, aid workers, and officials of international organizations who happen to be in the vicinity of the forces involved. Secondly, it raises questions relating to the responsibility and accountability of such personnel for their actions, including acts which could constitute violations of either national or international law.⁶ Since such personnel may not be subject to the same standards of training and discipline as members of the regular armed forces, they could deliberately, or simply due to lack of proper preparation and supervision, engage in acts which constitute violations of national and international law, undermine the legitimacy of the operation, or otherwise have a negative impact upon the success of and support for the mission. It therefore makes good sense, from both an operational and a legal perspective, to restrict contractors to clear civilian functions and to ensure that certain activities which are inherently governmental in

nature will remain military, as referred to in the previous paragraph.

28.02 In all cases in which private security companies and contractors are utilized on missions abroad, adequate provision for regulation, supervision, and accountability must be made to ensure that their activities are carried out in full conformity with applicable national and international legal standards and to ensure the existence of an adequate (p. 543) regulatory legal framework. This is in the interest of both Sending and Receiving States and the international community as a whole. In no case should it be possible for such activities to be carried out in the absence of such a regulatory and supervisory framework with the resulting possibility of impunity for any violations which may occur.

1. In cases where the activities of a private security company, or more particularly of an individual private contractor, are subject to the jurisdiction of either the Sending or the Receiving State (or both), there will be at least a possibility of providing for criminal jurisdiction and civil accountability and liability on the basis of recognized principles upon which jurisdiction can be based. In practice, however, this may prove to be less than adequate, unless specific legislation and arrangements for its enforcement are in place, which make it possible to conduct investigations, provide for legal cooperation and extradition or repatriation, and for adequate oversight and for redress and compensation for acts which violate existing national or international legal standards.⁷ While many countries provide for extraterritorial prescriptive jurisdiction over the actions of their nationals, this may not result in adequate supervision or investigation, much less prosecution of alleged violations for any number of reasons. These could range from lack of information and evidence or lack of resources to conduct such investigations, to unwillingness or inability to initiate such action. Likewise, the Receiving State could also be unable or unwilling to proceed with investigation or prosecution due to similar or other constraints. While the Receiving State will normally possess jurisdiction over foreign civilian contractors in the absence of other arrangements (see Section 28.03) this may not always be the case. For example, civilian contractors were afforded immunity from Receiving State jurisdiction in the occupation phase of operations in Iraq⁸ and there are other situations in which the Receiving State may be constrained from exercising its jurisdiction over foreign private contractors. To enhance accountability, some States have enacted specific legislation to bring the activities of contractors possessing their nationality or under their employment within the scope of national criminal law. Examples of such legislation are the adoption of the US Military Extraterritorial Jurisdiction Act (MEJA), which applies to contractors employed by the US Department of Defense (DoD). Some other States have enacted legislation which would bring certain offences, particularly those constituting war crimes or other recognized international crimes, within the scope of their jurisdiction.⁹ But neither the US MEJA, nor other legislation relating (p. 544) to international crimes, would necessarily cover all types of offences, or extend to all contractors. For example, the MEJA does not apply to contractors engaged by agencies of the US Government other than the DoD and many legislative instruments relating to international crimes, would not extend to other offences, or necessarily be applicable to non-nationals not present on the Sending State's territory.¹⁰ Consequently, notwithstanding the existing provisions enabling either Receiving State or Sending State jurisdiction, there are numerous gaps and insufficiencies which can only be remedied by the adoption of some form of international regulation and supervision.

2. In this context, initiatives have been undertaken to provide for better international supervision of the activities of private contractors and security companies.¹¹ Further activities include the establishment of a working group by the UN Human Rights Council to draw up a possible legal instrument for regulating the activities of private security companies and contractors¹² and the initiation by the European Union of a research project aimed at examining the regulatory framework at national, European, and international levels, with a view to ensuring improved compliance with international humanitarian law and human rights.¹³ In the absence of a binding international legal framework, the International Code of Conduct for Private Security Providers, a multi-stakeholder initiative convened by the Swiss Government, may promote best practice in the area of improving

compliance with international legal standards and supporting cooperation between both Sending and Receiving States.¹⁴ It confirms principles and standards based on human rights and international humanitarian law, and aims at improving accountability of the industry by establishing an external independent oversight mechanism.

28.03 In the absence of a status-of-forces or similar agreement granting functional immunity, the status of private contractors is that of

 References

(p. 545) foreign civilian workers in the Receiving State. It should be in the interest of all parties to ensure that adequate provision is made to ensure accountability and supervision while, at the same time, allowing for the contractors and their employers to carry out the functions for which they have been engaged within the limits referred to above.

1. Private contractors and security companies are often not regulated in status-of-forces agreements (SOFAs) concluded to specify the legal status of foreign missions in a Receiving State.¹⁵ The mere fact that they may be subsumed under the law of armed conflict as persons who accompany the armed forces does not give them special status in the Receiving State during peacetime. Different from armed forces or the police, private contractors or security companies are not organs of the Sending State and consequently they do not enjoy the sovereign immunity status of the latter within the Receiving State or any Transit State, unless such status is expressly agreed.

2. Both Sending and Receiving States will have an interest in addressing issues of private contractors and security companies in the context of SOFA negotiations. Thus, a SOFA could be used to ensure an unimpeded exercise of functions by those contractors and to assure the Receiving State that they are effectively controlled and held accountable for any wrongdoing. For the latter purpose the SOFA may provide that jurisdiction may be exercised exclusively or concurrently by one of the parties. The US–Iraqi SOFA provides that Iraq shall have the primary right to exercise jurisdiction over United States contractors and United States contractor employees.¹⁶ Previously, Blackwater guards employed for the US Embassy in Baghdad were held to enjoy immunity from local prosecution in Iraq. Blackwater security guards who had opened fire on unarmed Iraqi civilians in 2007 were convicted of murder and manslaughter in 2014.¹⁷

 References

Footnotes:

¹ Art. 13 Hague Regulations (HagueReg) of 1899 and 1907.

² See e.g. in addition to the HagueReg, Art. 4A(4) of the Third Geneva Convention which makes reference to contractors.

³ See e.g. US Department of Defense Instruction 3020.41 USD (AT&L) of 3 October 2005 ‘Contractor Personnel Authorized to Accompany the US Armed Forces’ and US Department of Defense Instruction 1100.22 USC (P&R) of 7 September 2006 ‘Guidance for Determining Workforce Mix’.

⁴ See, in general, P. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Ithaca and London: Cornell University Press, 2003); G. Bartolini, ‘PMS Contractors as “Persons who Accompany the Armed Forces”’, in F. Francioni and N. Ronzitti, *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford: Oxford University Press, 2011).

⁵ M. Schmitt, ‘Humanitarian Law and Direct Participation in Hostilities by Private Contractors and Civilian Employees’, in 5 *Chicago Journal of International Law* (2005), 511–46, at 520–1.

⁶ A. McDonald, ‘Ghosts in the Machine: Some Legal Issues Concerning US Military Contractors in

Iraq', in M. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Leiden: Nijhoff, 2007), 357–401, at 386 *et seq.*

⁷ Aside from criminal and civil liability under national law, this could have implications for State responsibility under international law. For a clear overview of these implications, see McDonald, 'Ghosts in the Machine', 392–8.

⁸ CPA Order Number 17 (rev) CPA/ORD/27 June 2004, referred to in McDonald, 'Ghosts in the Machine', 387.

⁹ Military Extraterritorial Jurisdiction Act (MEJA); 18 USC, Sections 3261–3267 (2000). An example of legislation relating to international crimes is the Netherlands 'Wet Internationale Misdrijven (WIM)' of 19 June 2003.

¹⁰ The MEJA would not apply to contractors engaged by e.g. the CIA or Department of State. The Netherlands WIM only applies to non-nationals if they are present on Dutch territory or the suspected offence was directed at a Netherlands national (Art. 2, para.1 lit. a and b). It also applies to offences committed by Netherlands nationals abroad (lit. c).

¹¹ See Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict of 17 September 2008, UN GA Doc. A/63/467 and UN SC Doc. S/2008/636 (6 October 2008), <https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf>.

¹² See Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators, UN Doc. A/HRC/17/31/Add.3 (25 May 2011), <<http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>>.

¹³ The EU 'Priv-War' Project was established within the context of the European Community's 7th Framework Programme and is coordinated through the European University Institute (Academy of European Law) in collaboration with six partner universities in France, Germany, Italy, Latvia, the Netherlands, and the UK. See <<http://priv-war.eu>>.

¹⁴ See International Code of Conduct for Private Security Providers (ICoC), <http://www.geneva-academy.ch/docs/publications/briefing4_web_final.pdf>.

¹⁵ See sub-Chapter 5.2 'Status of Forces in Enforcement and Peace Enforcement Operations', sub-Chapter 6.2 'Status of Forces in Peace Operations', Chapter 9 'Status of Forces in Self-Defence Operations'.

¹⁶ Art. 12(2) Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during their Temporary Presence in Iraq of 17 November 2008, <<http://www.cfr.org/publication/17880>>.

¹⁷ *The New York Times*, 22 October 2014, <<http://www.nytimes.com/2014/10/23/us/blackwater-verdict.html?ref=topics>>.