

**LINDSEY CAMERON AND VINCENT CHETAIL,
*PRIVATIZING WAR: PRIVATE MILITARY AND SECURITY
COMPANIES UNDER PUBLIC INTERNATIONAL LAW,*
CAMBRIDGE, CAMBRIDGE UNIVERSITY PRESS, 2013**

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Private military and security companies (PMSCs) have a growing role in both international and non-international conflict situations where they may outnumber traditional armed forces. While PMSCs have been criticized for a lack of transparency, accountability and oversight after a number of violations of international humanitarian law (IHL) and international human rights law (IHRL), States increasingly outsource military and security services. International law's traditional focus on state actors make the existing legal rules difficult to apply to these private entities. In *Privatizing War: Private Military and Security Companies under Public International Law*,¹ the authors Lindsey Cameron and Vincent Chetail² set out to clarify the applicable international law norms, without judging the political legitimacy of PMSCs.

The book aims to add to the literature which approaches the issue under the law relating to the use of mercenaries by expanding the analysis to international law more broadly, to provide an overview of rights and obligations under existing international law instruments and demonstrate that PMSCs do not operate in a legal vacuum. Its five chapters respectively deal with limits on the right to resort to PMSCs, international responsibility of States, legal means through which PMSCs are bound by IHL, the legal rules applicable to PMSCs and their personnel and finally, the implementation of responsibility arising from violations of international law by PMSCs.

Chapter 1 examines to what extent States, international organizations and others can outsource the conduct of armed conflict to private companies. The authors conclude that, under international law, there are few prohibitions on very specific activities and that "there is no overarching rule, explicit or implicit, that prohibits recourse to PMSCs as a whole and in general, but that there are important limitations."³

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¹ Lindsey Cameron & Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge: Cambridge University Press, 2013) [Cameron & Chetail].

² Lindsey Cameron is a legal adviser for the International Committee of the Red Cross and Vincent Chetail is Professor of Public International Law at the Graduate Institute of International and Development Studies.

³ Cameron & Chetail, *supra* note 1 at 133.

The first limitation is that States may not outsource the decision to use force against another State. While a broad delegation of such a decision is very unlikely, the authors point out that more circumspect examples, such as targeted killings via drone attacks on foreign soil, do occur, even though they constitute a type of outsourcing of the decision to use force against another State. In addition, once a State decides to use force, it can outsource the exercise of that use of force only to ensure the respect of the principles of necessity and proportionality. In this regard, the authors point out that it may be difficult for a private entity to have access to sufficient information to evaluate all the available actions and execute a use of force in self-defence in conformity with international law.

From the perspective of the United Nations, “[p]olitical concerns aside, there would seem to be few legal impediments to the use of PMSCs as standing forces or as contingents in peace operations”,⁴ as long as the general peacekeeping principles (host-State consent to the operation, impartiality of the forces, restriction of the use of force to only that required in self-defence) are respected.

The authors also review the prohibition of mercenarism and conclude that, considering the narrow definitions in the relevant conventions which exclude most PMSCs’ staff, “coupled with the fact that none of the principal users of PMSCs are parties to the conventions, the treaty law prohibition on the use of mercenaries will rarely be an impediment to the use of private military and security companies.”⁵ Furthermore, they conclude that there is no separate customary law prohibition on the use of mercenaries by States, given the absence of a universal or consistent state practice in this regard, with Western States consistently voting against General Assembly resolutions condemning mercenaries.

Turning to the limits imposed by IHL, the authors identify a few explicit prohibitions against the delegation of certain tasks to persons other than members of a State’s armed forces, namely the administration of prisoner-of-war or internment camps and requisitioning private property. Implied limitations also exist regarding the conduct of hostilities, judicial decision-making, the maintenance of law and order and public safety, and the conclusion of agreements with the other parties to the conflict. Regarding the conduct of hostilities, the authors emphasize that PMSCs may find themselves in a position of participating in and conducting hostilities even where they do not engage in offensive combat functions, despite their limited ability under changing circumstances of operations to comply with the proportionality and necessity requirements of IHL. Thus, States relying extensively on PMSCs for roles that are likely to lead to direct participation in hostilities may not be fulfilling their obligation to ensure the respect of the IHL in good faith.

Chapter 2 deals with state responsibility for PMSCs’ conduct. The authors meticulously analyze a number of relevant provisions of the International Law Commission (ILC)’s *Draft Articles on Responsibility of States for Internationally*

⁴ *Ibid* at 53.

⁵ *Ibid* at 71.

Wrongful Acts (ASR)⁶ as well as state responsibility based on due diligence obligations. Notably under article 5 of the *Draft Articles* (person or entity exercising delegated government authority), the authors flesh out what constitutes “elements of governmental authority” based, *inter alia*, on the commentary of the ILC, drafting history, the law of state immunity, World Trade Organization law, the *European Convention on Human Rights*,⁷ as well as under various domestic laws. Based on the criteria identified they conclude “that activities related to armed conflict must be placed along a continuum.”⁸ Activities related to the provision of security lie in the middle of the spectrum but situations of armed conflict may amount to direct participation in hostilities and thus fall under Article 5 of the *Draft Articles* as an exercise of elements of governmental authority.

The authors also examine the failure to exercise due diligence over violations of IHL by PMSCs as a source of responsibility. Paradoxically, the use of PMSCs in armed conflicts may be both a means of implementing a State’s due diligence obligations and a factor engaging its due diligence responsibility. The authors refer to the good practices included in the *Montreux Document*⁹ and examine the varying implications for contracting States, home States and territorial States.¹⁰

Chapter 3 approaches the issue of the responsibility of PMSCs from two avenues, first analyzing them as corporate entities as a whole (non-State actors) and second, as a sum of their individual employees, following an individual responsibility approach. Under the first approach, after examining the persisting controversies regarding non-State actors in international law, the authors determine that, in general, PMSCs could not be considered subjects of international law. The authors then examine

five different possible avenues by which they could be bound to respect international law: via the regime of state responsibility, reliance upon the existing categories of relevant branches of international law, the notion of corporate complicity, self-regulation initiatives undertaken by PMSCs and, finally, by way of domestic regulation.¹¹

The ensuing analysis demonstrates how each of these avenues presents limitations, despite the alternative theories and interpretations emerging in the

⁶ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission, GA Res, UNGAOR, 56th Sess, Supp No 10, UN Doc A/56/10, (2001) [*Draft Articles*].

⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

⁸ Cameron & Chetail, *supra* note 1 at 201.

⁹ *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, 17 September 2008, UN Doc A/63/467, online: International Committee of the Red Cross <www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf> [*Montreux Document*]. As of March 2016, there were 53 participating states.

¹⁰ Reflecting the structure of the *Montreux Document*, these terms refer respectively to the States contracting with the PMSCs, the States where PMSCs are registered or incorporated and the States in which PMSCs operate.

¹¹ Cameron & Chetail, *supra* note 1 at 307.

doctrine. Under the regime of state responsibility and attribution, it is difficult to conclude that PMSCs are themselves vested of the State's international law obligations simply because their wrongful conduct may ultimately be attributable to the State. Relying on existing branches of international law, notably IHL and IHRL, also offers a limited solution: IHL is binding on PMSCs as corporations in limited situations, principally where a PMSC can be considered as part of the armed forces of a State or as an armed group. As for IHRL, though corporations' responsibility to respect human rights is increasingly accepted, the scope of this duty to respect as well as the applicability of other human rights obligations remains unclear. The authors explain that the emerging doctrine of corporate complicity could be a promising avenue but concede that there is no consensus over applicable standards. As for self-regulation initiatives, after briefly discussing the non-binding nature of these codes and the possibility of their integration into employee contracts or into domestic law, the authors go on to conclude that these codes can only be seen as the sign of an emerging concern for regulation, with more than voluntary codes being necessary. Finally, domestic legislation, registration and licensing schemes, and contracts between PMSCs and their clients are discussed as domestic regulatory options. The authors note that clear substantive legislation regulating PMSCs' activities and behaviour is rare and without binding rules for the corporations per se. Registration and licencing requirements are more common and can be applied at the home State, contracting State or the territorial State. However, these national efforts may suffer due to the capacity of PMSCs to relocate in order to benefit from less strict regulation elsewhere. The authors recommend that the various domestic regulation options should be considered on a complementary basis.

Under the second approach of individual responsibility, the authors demonstrate IHL, or at least the customary IHL rules, to be directly applicable to all individuals in armed conflicts and as such, to be binding on PMSCs' employees.

Chapter 4 delves in detail into the IHL rules applicable to PMSCs and their personnel, and what the applicable rules mean for PMSCs in situations of armed conflict. The authors determine that, due to the binary nature of IHL,¹² by and large, most PMSCs' contractors would be considered civilians and not combatants. In both international and non-international conflicts, the most practically significant consequence of this status is that PMSCs' personnel cannot directly participate in hostilities. If they do, they lose protection against attack during their participation and may be directly targeted by opposing armed forces. Furthermore, the possibility to affect them incidentally need not be taken into account under the proportionality principle and no precautionary measures must be taken for their benefit. Starting with the International Committee of the Red Cross' *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*,¹³ the

¹² The authors reject the idea that "unlawful combatant" could be a third category under international law: See *ibid* at 423-426.

¹³ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, Geneva, International Committee of the Red Cross, 2009, online: ICRC <www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

authors thoroughly analyze what may constitute “direct participation in hostilities”. This is a particularly difficult task with respect to the provision of security services. PMSCs may be tasked with protecting civilians or civilian objects as well as military personnel or other legitimate military objectives. Even if PMSCs are only acting defensively, protection of these same persons and objects may constitute direct participation if carried out against direct enemy attacks; yet it may qualify as self-defence, defence of others or law enforcement if carried out against other crime or violence unrelated to the hostilities due to the lack of requisite belligerent nexus. Given the fact-specific inquiry required regarding the nature and purpose of the site or the object, or the identity of the attackers, PMSCs’ staff may not always be in a position to determine the legality of their conduct. The authors analyze a number of concrete situations ranging from capturing detainees to clearing mines, gathering intelligence or causing electronic interference to illustrate the nuances and show that a number of activities for which PMSCs’ personnel are contracted may lead to their direct participation in hostilities.

An overlapping issue is the use of force by PMSCs’ personnel in self-defence. For the authors, self-defence must be construed narrowly under IHL which balances protecting civilians against military necessity. Widening its scope disrupts the structure of IHL, threatens the essential principle of distinction, making it more likely for combatants to attack civilians directly.

In the absence of an international norm of self-defence with a detailed content, the authors turn to domestic criminal law, interpreted in the light of IHL. Under domestic criminal law, force may be used in self-defence only against unlawful attacks. While this is unproblematic in times of peace, in conflict situations where IHL applies, it is more complicated to determine the lawfulness of imminent violence: IHL has a narrower definition of which actions constitute attacks. For instance, taking control over persons, places or objects can be legal and may not be defended against. The necessity and proportionality criteria are also trickier to apply: Self-defence does not confer a right to “stand and shoot” in response to a threat: there is no necessity to use force if there is another way to proceed without causing harm, such as retreating. Furthermore, PMSC’s staff will rarely be in a position to evaluate the proportionality of an attack, seeing the potential damage but not the full military advantage anticipated by the attackers. Yet, it may be unreasonable to expect PMSCs’ staff not to react when the people or objects that they are tasked to protect are threatened with direct violence. Thus, the authors consider that PMSCs role in hostile environments almost inevitably disrupts IHL’s structure and that certain contracts may amount to a flagrant exploitation of the use of force in self-defence.¹⁴

Chapter 5 examines the key issue of implementation of the responsibility arising from violations of international law by PMSCs notably through state action against other States, treaty-body procedures, international criminal law, civil law claims or enforcement by PMSCs themselves using procedures developed in self-regulation. Highlighting the difficulties in enforcement, the authors suggest that

¹⁴ Cameron & Chetail, *supra* note 1 at 483.

“greater effort should be made to encourage States to ensure that they act to avoid or prevent violations, rather than focusing on enforcement after the fact.”¹⁵

In this comprehensive book, the authors manage to bring much needed order to a complex web of international legal norms applicable to PMSCs, demonstrating that PMSCs do not operate in a legal vacuum but that the difficulty lies rather with fitting private actors into a legal framework originally designed to control the activities of States in armed conflicts. The authors’ detailed and nuanced analyses of relevant legal issues and different doctrinal perspectives allow the readers to be able to draw their own conclusions on the discussed points, making the book accessible to those who are not experts in the field. The complex situation portrayed by this book challenges the readers to consider the adequacy of the existing international law and the need for new regulatory frameworks and policies for PMSCs.

¹⁵ *Ibid* at 674.