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THE RESPONSIBILITY OF THE PMSC'S HOME STATE
FOR HUMAN RIGHTS VIOLATIONS ARISING FROM THE EXPORT OF
PRIVATE MILITARY AND SECURITY SERVICES

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the Export of Private Military and Security Services*

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Abstract

Departing from the contemporary trend favourable to the re-conceptualisation of human rights in terms of obligations of non state actors, this paper argues that and effective compliance with international human right standards by private military and security companies can be achieved by a complementary use of principles of state responsibility, in particular of responsibility of the home state of the company, and of the criteria (territory-jurisdiction) that determine the substantive scope of application of the human rights obligations with respect to the prevention and remediation of possible abuses by private contractors. On the basis of an analysis of the relevant international law and practice, this paper attempts to offer a preliminary identification of the regulatory standards required to promote compliance with human rights by the emerging transnational military-security industry.

The Responsibility of the PMSC's Home State for Human Rights Violations Arising from the Export of Private Military and Security Services

FRANCESCO FRANCONI*

1. Introduction

Since the early years of this decade international law and international relations scholarship has engaged in a wide ranging debate over the legal implications of the growing use of private military and security companies (PMSCs) in the provision of services hitherto considered to be an integral part of governmental functions.¹ Such services include, as is known, support to regular armed forces in theatres of war, guarding of diplomats, intelligence gathering and management of detention and interrogation centres, to mention just the most important. Research and academic writings on this subject have been accompanied by policy initiatives aimed at providing an international framework of principles and standards to promote governance and oversight of these new actors on the international scene.²

An important part of this debate, and of the regulatory movement born there from, concerns the role of human rights law (and of international humanitarian law, IHL) in the regulation of

PMSCs. This is not so much because PMSCs must be considered as inherently inimical to human rights; but rather because their growing role and importance raises legitimate questions as to the transparency of their mandate and operations, the adequacy of existing national legislation to prevent abuses in the use of force, and, more generally, the adaptability of existing international human rights standards to the conduct of PMSCs as business entities.

To avoid any misunderstanding as to a possible ideological bias against PMSCs, it is important to clarify that from the point of view of this writer, human rights (and IHL) play a double role in this area of international relations. On the one hand, they provide legal constraints on the activities of private contractors. Such constraints are especially important since, by definition, private military and security contractors are meant to bear and use arms and provide services which in most cases contemplate the use of force, such as support in combat, guarding of sensitive objectives, and custody of prisoners. It is important, therefore, that the risk of abuses and the inevitable exposure of people to danger for their life and personal integrity³, be met by a clear understanding of the limits that human rights law places on the conduct of PMSCs.

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¹ D. Avant, *The Market for Force: the Consequences of Privatizing Security*, 2005; S. Chesterman and Lehnardt, *From Mercenaries to Market: the Rise and Regulation of Private Military Companies*, 2007; G. Kummel, *Private Military and Security Companies: Chances, Problems, Pitfalls and Prospects*, 2007; C. Hoppe, *Passing the Buck: State Responsibility for the Conduct of Private Military Companies*, Thesis, European University Institute, 2009. See also the contributions to the EJIL-PRIV-WAR Symposium on Private Military Contractors and International Law in EJIL(2008), Vol.19 no.5.

² The most important of such initiatives is the so called "Swiss initiative" a state driven project that has culminated with the adoption in September 2008 of a set of non binding standards adopted by 48 states, including the permanent members of the Security Council, and applicable to PMSCs operating in situations of armed conflict. Another initiative is the preparation of a Draft Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies by the UN Working Group on the Use of Mercenaries of the Human Rights Council (July 2009). For an overview and comment on such initiatives and other regulatory options, see J. Cockayne *et al.*, *Beyond Market Forces*, 2009

³ The right to life and to personal integrity are not the only human rights that may be put at risk by the activities of private contractors. They are, though, the most important and most frequently affected by the abuse of force. For a systematic survey

On the other hand, human rights perform a protective function for the private military and security contractors themselves. With a few exceptions, these are people who operate in situations of conflict or of institutional instability. So, no one more than them needs the protection of human rights to safeguard their life and freedom when their profession puts them in situations of danger.

Having clarified this twofold role of human rights, this paper will focus only on the first aspect of this role, i.e. the limits and obligations that human rights law imposes on the relevant international actors involved in the commercial provision of private military and security services. More specifically, the paper will examine the place of the home state of the PMSC as the addressee of human rights obligations relating to the prevention and, if necessary, the redress, of injuries resulting from the operation of their PMSCs.⁴ This focus on the home state is justified, in my view, by a number of considerations. First, doctrinal contributions have been directed so far mainly to the responsibilities of the “hiring state”, i.e. the state who buys the services.⁵ Although the role of the hiring state remains important, since it may promote responsible behaviour and compliance with international standards by means of the procurement contract, the home state acquires a distinct relevance especially with respect to the commercial export of private military and security services. This is so because of the paramount importance attributed by international law to the exclusive territorial control exercised over the company by the state where the company has been legally created or where the centre of gravity of its management and operations is located. In some cases the territorial link results in the coincidence of the home state and the hiring state. This will have cumulative effects and possible synergies of obligations and responsibilities under international law. But often the home state and the hiring state are be different. A PMSC registered in the United Kingdom may be hired by a governmental agency of Italy to provide security services in Afghanistan or in the Middles East. In this situation a distinct set of obligations arise under international law for the home state and the hiring state. These obligations exist in a relation of mutual complementarity and in turn they complement the independent human rights obligations of state, where the services are performed, and also of the individual under international humanitarian and criminal law.

A second consideration concerns the weak role of the “host state”. In the case of commercial export of military and security services in a foreign country or area where situations of armed conflict or of institutional instability prevail, one cannot realistically rely on the effective control of PMSC by the host state, whose inability or incapacity to provide security and governance is the *raison d’être* of the resort to private contractors

Third, the focus on the home states as a guarantor of human rights provides the most useful perspective in which to reconstruct and evaluate specific human rights obligations related to the supervision and control of PMSCs. One needs just to think of the obligation concerning the adoption of appropriate regulation on licencing of PMSCs, on procedures for the issuance of export permits, of authorisation for the bearing of arms, on remedial process in case of harm. These are public functions that concur to form the content of the international law obligation to prevent and remedy human rights violation within the jurisdictional sphere of the state. Compliance with this obligation is a matter of governmental functions and may not be left entirely to the private, contractual arrangements of the hiring state with the private contractor. These arrangements are important in view of a progressive development of models and standards supportive of human rights. But they cannot be the exclusive source of human rights obligations and guarantees. Besides in the present state of the art and of the

(Contd.) _____

of all the relevant human rights potentially endangered by PMSCs, see F.Francioni and F.Lenzerini, *The Role of Human Rights in the Regulation of Private Military and Security Companies, General Report – Universal and Regional Systems: Latin-America, Africa and Asia*, EUI Working Papers AEL 2009/16, and I.Kalnina and U.Zeltnis, *The Role of Human Rights in the Regulation of Private Military and Security Companies, General Report – The European System*.

⁴ Obviously the use of the shorthand possessive adjective “their” implies a reference to the relevant links connecting the company with the state where it has been incorporated or otherwise constituted, or registered, or where it has its headquarters, its managing centre or the main business activity. For further discussion of these criteria, see *infra* Section 2 of this paper.

⁵ See, in particular C. Hoppe *cit. supra* note 1.

law, they lack transparency, are vulnerable to conflicts of interests between the company and the hiring state, and do not seem to offer guarantee of effective enforcement in domestic law.⁶

A final consideration that can be made at a policy level concerns the present trend in the security market toward an ever increasing concentration of small security firms into large military and security companies endowed with substantial assets, equipment and personnel and with a stable connection of the parent company with the home state⁷. For this “second generation” of large security companies it is more difficult to escape regulation and circumvent sanctions by quick dissolution or transfer to convenient offshore seats under different names. One consequence of this evolution, it is reasonable to assume, will be an increasing relevance of the link of PMSCs with their home state, where stable and long term demand of services is generated and where market incentives exist for the adoption of regulation and accountability standards.⁸

2. Definition and Context

Before we analyse the substantive legal basis of the home state’s obligation to supervise and control the operations of PMSCs under the law of international human rights, two preliminary points need to be clarified. The first concerns the meaning of the expression “home state”. In strictly legal terms the home state is the state of which the company has the nationality. In turn, this means the state in which the company was constituted by way of incorporation or registration as a legal person. This is the most widely accepted criterion of attribution of nationality to a corporation and this criterion remains decisive for the purpose of international law, as recognized by the ICJ in the 1970 judgment in the *Barcelona Traction* case.⁹ However, the home state may be also that in which the company has its main management centre (*siege sociale*) or where the main object of its business is located. Sometimes these connecting criteria are used cumulatively or alternatively in domestic legislation. Sometimes they are used exclusively, with the result that the same company may be linked to more than one state and be treated as national by more than one state. In this hypothesis, as with individuals with plural citizenship, the international law solution is that the home state is the one with which the company has a “genuine link” or the prevalent substantial connection resulting from the possible cumulation of the criterion of incorporation with other criteria and with the criterion of the economic control of the corporation, i.e., the nationality of the shareholders who control the company¹⁰.

The second preliminary point to clarify concerns the general international law context in which the issue of the international responsibility and accountability for the conduct of PMSCs arises. This context has been characterized in the past ten years by a far reaching attempt at shifting the responsibility for violations of human rights from the state to corporate actors operating across

⁶ A very recent example of these problems is the inconclusive result of the investigation and prosecution of the Blackwater contractors involved in the killing of 17 civilians and the wounding of many more innocent bystanders in the shooting that took place on 16 September 2007 while they were escorting American official in Bagdad. The Federal court in Washington has simply dismissed the indictment of the guards on the grounds that the prosecution had repeatedly violated the rights of the accused. The decision has been reported by the International Herald Tribune, Jan. 2, 2010, p. 1 and 3

⁷ See, E. Cusumano, *Regulating Private Military and Security Companies: a Multifaceted and Multilayered Approach*, EUI Working Papers AEL 2009/11, who refers to the acquisition by Group4 of Wakenut in 2002, Securicor in 2004 and Armor Group in 2008.

⁸ This obviously does not apply to “single shot” companies competing for a single lucrative contract and often consisting of little more than a web site and a roster of recruitable personnel. On this phenomenon, see J. Cockayne, *Make or Buy? Principal-Agent Theory and the Regulation of Private Military Companies*, in Chesterman and Lehnardt, cit. note 1.

⁹ *Barcelona Traction, Light and Power Co Ltd. (Belgium v Spain)*, ICJ Reports, 1970

¹⁰ For the enunciation of the genuine link theory, see *Nottebohm* case (Liechtenstein v Guatemala), ICJ, Reports, 1955, 4 ff. For the endorsement of the principle of the dominant and effective nationality in international jurisprudence, *Ephanian v. bank Tejarat, Iran-United States Claims Tribunal*, 1983, p. 157 at 166.

national boundaries. This shift has been supported by international law literature¹¹ and, also by the practice of United Nations bodies. The UN Secretary General Kofi Annan launched 1999 the famous “Global Compact” intended to mobilise private resources and stimulate voluntary initiatives designed to bring about adherence to good standards of corporate conduct, including respect for human rights and labour rights. In 2003, the now defunct Sub-Commission for the Protection and Promotion of Human Rights adopted the draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises”. The norms were not formally approved by the Human Rights Commission. But a new Special Representative of the Secretary General was appointed, in the person of Harvard professor John Ruggie, to continue the work within the new institutional framework of the Human Rights Council¹². This wide ranging effort is premised on the idea that the law of international human rights may create obligations also for private corporations. It does not necessarily postulate a radical shift of paradigm from states to private actors with respect to human rights obligations. But certainly the insistence on the role of corporate social responsibility, market tools, voluntary initiatives and the (cap)ability of business corporation to deliver effective standards of human rights compliance has the effect – intentionally or not –of deflecting attention from the role of states in ensuring compliance with human rights.

Today, this project at reconceptualising human rights obligations has become problematic. First, because at a technical level the direct application of international human rights norms to private actors presents more difficulties than originally thought, both, from the point of view of the transplantability of primary obligations from the inter-state system to non state actors, and from the point of view of the adaptability of secondary rules on the international responsibility for breach and of enforcement procedures¹³. Second, the transformation of human rights from obligations of the state into obligations extendable directly to private actors is not sufficiently supported by judicial practice¹⁴. Third, at a political level, the faith in the ability of the market to generate spontaneous forms of regulation to ensure respect for public goods, such as human rights, social justice and environmental quality, has been undermined by the gigantic market failures of recent years: global warming, increase in poverty, and now the planetary financial crises with devastating economic and social repercussions on the ordinary life of people all over the world.

All this suggests the need to remain focused on the role of the state as guarantor of human rights and human security. Accordingly, in the following sections of this paper I will address two closely related questions: first, whether and to what extent the home state has the responsibility under international law to regulate and supervise its PMSCs in order to prevent or minimize human rights violations, including violation, resulting in injuries abroad; then, I will address the question of the home state obligation to ensure appropriate remedial process in the event of injuries caused by the PMSC in the

¹¹ A. Clapham, *Human Rights Obligations on Non-State Actors*, The Collected Courses of the Academy of European Law, Vol. XV/1, Oxford, 2006; S. Ratner, *Corporations and Human Rights: A theory of Legal responsibility*, 111 Yale Law Journal, p. 443 ff.; *Human Rights Standards and the Responsibility of Transnational Corporations* (Addo ed.), The Hague, 1999.

¹² See his latest report in U.N. Doc. A/HRC/11/13/, 22 April 2009

¹³ These difficulties have been recognized by the new special representative J. Ruggie. In his first interim report he stated that the human rights Norms elaborated by the Sub-Commission in 2003, “...cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so. And if the Norms were to bind business directly, then they could not merely be restating international legal principles; they would need, somehow, to discover or invent new ones”. Interim Report, april 2006. In subsequent reports, especially the last one of 22 April 2009 the Special Representative has adopted a more flexible approach admitting that certain international human rights norms are capable to create direct obligations for business entities. For this report, see *supra* note 12.

¹⁴ The United States is the only states that systematically permits the hearing and the enforcement of human rights claims related to private actors’ conduct under the alien Tort Statute. For discussion on the jurisdictional aspects of this practice, C. Ryngaert, *Litigating Abuses Committed by Private Military Companies*, EUI Symposium on PMSCs, EJIL, cit. *supra* note 1.

course of the performance of its services. This second question entails verification of effective access to justice of victims to have their civil claims heard, of good faith investigation, prosecution and assistance in the prosecution of crimes, arising from or connected to the performance of services by the PMSC.

3. The Boundaries of the Home State Responsibility

The nature and scope of the home state's responsibility in respect of the prevention and minimisation of the risk of human rights injuries, arising from, or incidental to the provision and export of private military and security services, can be analysed within two complementary perspectives: the perspective of general international law on state responsibility for wrongful acts, and that of the substantive scope of the obligations incumbent upon the state to respect, to ensure respect and promote human rights.

In the first scenario, the conditions for the attribution to the home state of acts of the PMSC must be established on the basis of the pertinent rules of international law as reflected in the Articles adopted in 2001 by the International Law Commission (ILC). As we shall see in the following sections, these Articles are quite restrictive with regard to the possibility and criteria of imputation of private acts to the state.

In the second scenario, the question, in the opinion of this writer, is not so much the attribution or not of private acts to the state; but rather the proper delimitation of the scope of the home state's substantive obligation to respect, protect, assist and ensure respect of human rights. The nature and sources of this obligation have been illustrated in the current literature¹⁵. What is important to point out here is that the general obligation to protect human rights precedes the actual causation of a human right injury and, therefore, the analysis of its content and reach with regard to PMSCs is independent of the actual causation of a human right injury and, consequently, of the issue of attribution to the state of private acts. This obligation entails a commitment by the state to prevent human rights violations in its territory, and in areas and over entities subject to its jurisdiction and control, by the adoption of legislative, judicial or administrative measures applicable to public organs as well as to private parties. Such a general obligation to protect may be breached even before a concrete human rights injury materialises. One needs only to think of the case of the prohibition of *non-refoulement*¹⁶, which involves a duty to protect against a potential danger, and of the failure to enact legislation implementing the international prohibition of torture¹⁷, which has been recognized in international practice as an independent ground for international responsibility¹⁸. In all these cases the responsibility may arise not so much as a consequence of the attribution to the state of a private act of torture or *refoulement* but on the basis of a failure by the state to comply with its own obligation to protect against potential exposure to such danger.

In the following sections I shall examine these two different perspectives of state responsibility for acts of PMSCs.

¹⁵ See Francioni and Lenzerini, and Kalnina and Zeltins, *cit. supra*, note 3.

¹⁶ On non-refoulement as a general principle of International law see F. Lenzerini, *Asilo e diritti umani. L'evoluzione del diritto d'asilo nel diritto internazionale*, Milano, 2009, p. 378 ff.

¹⁷ Convention Against Torture Articles 2, 4.

¹⁸ "... the mere fact of keeping in force or passing legislation contrary to the International prohibition of torture generates International responsibility." *Furundzija case*, Trial Chamber ICTY 10 December 1998, paras. 148 ff. See also *Velasquez-Rodriguez v. Honduras*, Judgment of July 29, 1988, IACHR, Series C No 4, para. 175.

4. The Imputability of PMSCs' Acts to the Home State

Under the 2001 ILC Articles there are several grounds of attribution to the state of acts of private military and security companies.

Under Article 4

The conduct of any state organ shall be considered an act of the state under international law. Therefore, private military contractors may be considered organs of the home state to the extent that that state has made them part of its armed forces. To understand what “part of the armed forces” actually means for the purpose of the status of “state organ” one can look at the Third Geneva Convention, which defines the categories of persons entitled to the status of prisoners of war. Under Article 4 these categories include, besides the regular members of the armed forces of a Party

... 2. Members of other militias and members of other volunteer corps, including those organised resistance movements ...

... 4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorisation from the armed forces which they accompany.

So, to the extent that private military contractors are embedded in the armed forces of the home state, their acts are to be considered as acts of the state and the home state may thus be considered directly responsible for them when they constitute violations of human rights under international law.

But this hypothesis is quite rare. Practice shows that private military and security contractors are seldom integrated into the armed forces. They rather operate on the basis of ad hoc contractual arrangements often with ministries and agencies different from the defence department of the government. Their chain of command is linked to the corporate structure of the PMSC rather than to the hierarchical structure of the armed forces.¹⁹ So, realistically, the most useful ground for attribution to the home state of misconduct by PMSCs must be found in the articles concerning conduct of persons which are not organs of the state. The relevant provisions of the ILC Draft are Articles 5 and 8.

5. Conduct of PMSCs “exercising elements of governmental authority”: Article 5 ILC Draft

Article 5 of the ILC Draft permits the attribution to the state:

the conduct of a person or entity which is not an organ of the State...but which is empowered by the law of that state to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

In spite of the rather hermetic language contained in the reference to the “exercise of elements of governmental authority”, this article is especially relevant to PMSCs because it clarifies that the legal status of a company, as a private entity rather than a public instrumentality, cannot be a criterion for excluding a priori the attribution of its acts to the state. What counts is the empowerment of the company with a certain measure and form of governmental authority.

¹⁹ On the chain of command, see M. Frulli, *Exploring the Application of Command or Superior Responsibility to PMCs Managers and Contractors*, EUI Working Papers AEL (forthcoming).

Careful analysis of this provisions reveals that the path to the attribution to the home state of PMSCs' misconducts under its criteria remains quite narrow. First, the threshold for "empowerment" is high. Article 5 refers to empowerment "by the law of that state", which prima facie would lead to exclude that a similar delegation of powers may be admissible by way of contractual arrangements or by executive measures. To the best of this writer's knowledge, there are no cases where the constitution, registration or licensing of a PMSC has been effected by law. Normally, the home state performs these functions either by administrative or quasi-judicial measures. Similarly, there are no known cases in which PMSCs have been hired by way of an act of Parliament having the formal quality of a law of general application. Normally, the hiring occurs by contractual arrangements or administrative acts of public procurement. So, it would be absurd to interpret Article 5 in the restrictive sense of "law" as specific statutory enactment designed to delegate governmental powers to the private actor. The correct interpretation of the term "law" must be a broader one, which will encompass any governmental measure, including executive and judicial acts and even contractual arrangements entered into under the authority of the law by governmental agencies. This interpretation is supported by the French text of the Article, which speaks of governmental functions delegated "par le droit", not "par la loi", as well as by the ILC comment to Article 5²⁰ and a good part of legal doctrine²¹.

Once we have overcome the above strictures of the text, a second set of interpretative difficulties in respect of Article 5 arises in connection with the determination of the meaning of "governmental authority". PMSCs provide services on a commercial basis and are not inherently engaged in the exercise of governmental authority. The question, therefore, is what are the governmental powers that may be delegated to them and that can trigger the responsibility of the home state under Article 5? The comment to Article 5 states that

What is regarded "governmental" depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purpose for which they are to be exercised and the extent to which the entity is accountable to government for their exercise.²²

If we apply these criteria to PMSCs we can identify several categories of services which entail the exercise of governmental authority. They are, *inter alia*: 1) participation in hostilities through delegation of combat responsibilities; 2) arrest and detention of prisoners of war or of persons subject to criminal prosecution in peace time; 3) interrogation functions; 4) intelligence gathering for governmental purposes; 5) maintenance of law and order in critical areas of armed conflict or weak governance. When a home state has chosen to delegate the performance of these functions, and of other governmental functions, to private military contractors, it is reasonable to presume that the latter are empowered with "elements of governmental authority" and thus are in principle capable of triggering the responsibility of the state under Article 5. We must observe, however, that the text of Article 5 places a significant restriction on the possibility of imputing the responsibility to the home state on grounds of delegation of governmental powers: it is not enough that such delegation be effected by operation of law; it is necessary that the PMSC is acting in that capacity as assignee of public functions in the particular situation in which the human rights violation is alleged to have occurred.²³ Thus, the killing or injuring of an innocent person by a PMSC's employee in an off duty fight at a pub, as has happened in Iraq, would not entail state liability, unless it was shown that there

²⁰ See Para. 2 of the Comment to Article 5, ILC Report 2001, UN doc A/56/10, p. 92

²¹ Spinedi, *La responsabilità dello stato per comportamenti di private contractors*, in *La codificazione della responsabilità internazionale degli stati alla prova dei fatti* (Spinedi et al. Eds), Milano, 2006, p. 77; University Centre for International Humanitarian Law, *Expert Meeting on Private Military Contractors: Status and State Responsibility for their Actions*, Geneva, 29-30 August 2005, Report, p. 20. The Report is available at www.ucihl.org/communication/private-military-contractors-report.pdf.

²² Para. 6 of the Comment, *supra* note 20.

²³ The last sentence of Article 5 reads: "... provided the person or entity is acting in that capacity in the particular instance".

was a serious breach of due diligence in hiring and overseeing the author of the crime. The question, in any event, remains open whether in such case the home state would be under an obligation to guarantee access to its courts and remedies to the victims. On this point, I shall return in section 8 below.

Outside of the above described core of inherently governmental functions, many of the services provided by PMSCs are purely commercial and in principle they do not entail any participation in the exercise of public authority. These services include provision of security for property or personnel, guarding, including body guards, logistic support, escorting of convoys, and other similar security services that do not necessarily entail use of weapons and coercive activities. However, even in relation to such type of activities it would be wrong to exclude a priori the possibility of attribution to home states of the international responsibility for human rights violations by PMSCs. Even conduct that is essentially commercial may trigger the responsibility of the home state if that state had an obligation under international law to discharge certain positive duties in relation to the performance of activities outsourced to the PMSC. One can think of the provision of security for internationally protected persons or assets, such as diplomatic personnel and missions. In such cases the responsibility to protect cannot be circumvented if the state chooses to delegate the protective functions to private contractors rather than perform them directly.²⁴

6. PMSCs' Acts Performed on Instruction of, or under the Direction or Control of the Home State

Article 8 of the ILC's Draft contemplates the possibility that the conduct of a person or group of persons be considered an act of state if that person or group of persons acted "on the instruction of, or under the direction or control of that State in carrying out the conduct". This criterion of attribution has been the source of intense doctrinal debate since the well known ruling by the ICJ in the *Nicaragua* case. In that case the ICJ adopted a restrictive interpretation of the concept of control, which the Court construed as "effective control" for the purpose of attribution of private acts to the state. This restrictive test was put into question by the ICTY in the equally well known decision in the *Tadic* case, which adopted the more liberal test of "overall control". Under the *Nicaragua* test a PMSC would engage the home state liability for a violation of human rights only if it was proved that, in conducting the specific activity that caused the human right injury, the company or its employees were acting under the effective control of the home state. Under the *Tadic* test – also known as the Cassese test – it is sufficient that the home state maintains a general or "overall" control of a political-military nature over the private military contractors, without being necessary that it has directed the specific commission of the wrongful act by the private actor. To give an example, the *Tadic* test would permit the attribution to the home state of human rights violations, arising from the use of interrogation techniques amounting to torture, simply on the basis of official directives permitting or mandating the use of such techniques, without the need to prove that in the particular instance the state instructed and controlled the conduct of the contractor in the actual administration of the interrogation. The text of Article 8 uses language that departs from both the *Nicaragua* and the *Tadic* test. However, it is clear that the use of the alternative criteria of "instructions", "directions" or "control" have the potential of somewhat loosening the very strict condition of effective control laid down in *Nicaragua*.

Further refinement of the *Nicaragua* and *Tadic* tests can be found in the more recent jurisprudence of the ICJ and of human rights courts. In the *Bosnian Genocide* case, the ICJ, having to decide whether the commission of atrocities by group of persons in the Yugoslav war could be imputed to Serbia, avoided the language of its own judgment in the *Nicaragua* case and resorted to a factual analysis based on the concept of "complete dependence". As stated by the Court

²⁴ In the same sense, Spinedi, cit, *supra*, note 21, p. 78-79

...persons and groups of persons or entities may, for purposes of international responsibility, be equated with state organs even if that status does not follow from internal law, provided that in fact the person, groups or entities act in “complete dependence” on the state of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond the legal status alone, in order to grasp the reality of the relationship between the person taking action and the state to which he is so closely attached as to appear nothing more than its agent...²⁵

This approach, which may be called “constructive agency” test has the advantage of focusing on the objective situation of dependence of the private actor on the state, rather than on the formal criterion of the instructions/ direction or effective control, which may be difficult to prove especially in relation to acts that constitute violations of international human rights and even international crimes. The development of this doctrine by the ICJ has arisen in an interstate dispute where Bosnia was invoking the responsibility of Serbia for its involvement in the genocidal massacres of Srebrenica. However, there is nothing in that judgment to prevent the application of this doctrine outside of the context interstate disputes. On the contrary, this doctrine has been earlier developed in the specific context of human rights adjudication by the European Court of human rights. In the 2004 case of *Ilascu and others v. Moldova and Russia*, the Court was confronted with a complaint by a number of individuals who had been the victims of prolonged arbitrary detention in the self-proclaimed separatist Moldovan Republic of Transdniestria (MRT) a part of territory of Moldova bordering with Russia. The Court, after noting that the MRT had been set up with the decisive support of Russia and remained under its decisive military, economic and administrative influence, concluded that this dependence created a “continuous and uninterrupted link of responsibility on the part of the Russian Federation” for the breach of human rights caused by the arbitrary detention of the applicants in the hands of the Transdniestrian separatist regime²⁶.

These precedents support the view that when the home state uses a PMSC as an instrument of its own political and military policies, and the company has no will of its own or is in a position such as to totally subordinate its commercial interest to the policy goals of the home state, then this state should not be allowed to invoke the private character of the company to shield it self from the responsibility arising from wrongful acts that the company has committed in the implementation of the home state's policies.

But what about situations where it is not possible to prove that the PMSC acted on the instruction, or under the direction or control of the home state nor that it was in a position of complete dependence on the home state ?

We shall address this hypothesis in the next section.

7. The Responsibility to Protect and the Export of Military and Security Services

To go beyond the strictures of the formal rules of attribution laid down in the ILC's Articles, and elaborated in the judicial practice referred above, it is helpful to examine now what is the nature and scope of the substantive international human rights obligations that home state have with respect to PMSC organised in its territory. This is useful also in respect of military and security services that are exported from the home state to provided abroad, because most activities of PMSCs', especially those based in Europe and in the United States are performed abroad. In this case home state's obligation to respect and ensure respect for human rights has been systematically eluded on the basis of the argument that the home state cannot be responsible for what happens outside of its territory and beyond its national jurisdiction. The position taken in this paper is that this argument is intellectually

²⁵ ICJ , Judgment of 26 February 2007, para 392.

²⁶ Judgment of 8 July 2004, para. 393 ff.

unconvincing and even logically flawed. When we address the question of the export of military and security services that are capable of exposing foreign population to the risk of human rights injuries, it is not a question of extending extra-territorially the reach of the home state's control over the PMSC's operation. On the contrary, it is simply a question of fully implementing *within the national territory* the principle of effective protection of human rights in relation to home based PMSCs, in conjunction with the classical principle of effective territorial control recognized in international practice since the early case of *Trail Smelter* (1941) and *Corfu Channel* (1948). The home state has full control and jurisdiction over the PMSCs organised under its law and established in its territory. This territorial competence and effective control makes it possible for the home state to discharge its due diligence duty in order to prevent, minimize and redress human rights violations arising from the commercial export of military and security services.

As already pointed out, the main gap in ensuring PMSCs' accountability for human rights compliance is the systemic failure of the host state to ensure adequate control over the PMSC's activities in the national territory. This failure is most often due to lack of institutional and enforcement capacity, which is reduced to a minimum in situations of armed conflict or of military occupation, as has been the case with Iraq and Afghanistan. But it may also depend upon the wilful support, or sympathetic acquiescence, of local authorities for the misconduct of the foreign military and security contractors. This is frequently the case in non democratic states where PMSCs provide security services to protect foreign economic interests, as is often the case with oil and gas corporations, and other enterprises operating in the extractive industry. sometimes in hostile environments where local population opposes such industries or their *modus operandi* on environmental, political or social grounds. In these situations, relying on the territorial state for the prevention and remediation of human rights violations by PMSCs may be unrealistic, since it is the territorial state that has authorised the foreign investment by appropriate concession agreement for the exploration and exploitation of its natural resources. The home state, on the contrary, is in a good position to prevent human rights violations arising from the commercial export of security services because it is able to regulate the PMSC "at the source" by virtue of the effective territorial control it exercise over the centre of management of the company.

This approach, which the present author has developed earlier in the context of environmental harm²⁷ and of multinational enterprises²⁸, is all the more rationally and morally defensible in the field of human rights and of PMSCs. In this field, all states are committed under the UN Charter and under general principles of international law to respect and contribute to the respect of human rights "...for all without distinction as to race, sex, language or religion". All states are also bound to "take joint and separate action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55 of the Charter". This universalist approach, confirmed in the 1948 Universal Declaration, entails an obligation for every state knowingly not to allow the use of its territory and the conduct of persons subject to its jurisdiction to cause serious violations of human rights. This is a typical due diligence obligation, not an obligation to ensure a given result. However, even within the limits of the flexible principle of due diligence, one can identify a number of standards of good behaviour that can objectively help to prevent and minimise the exposure to the risk of serious human rights violations by PMSCs even when they operate abroad.

The first and most basic obligation of the home state in this respect is to prohibit the use of its territory by PMSCs to recruit, train and send personnel abroad to be used in combat operation directed against the "sovereignty, territorial integrity, and political independence of another State". These words are

²⁷ Francioni, Export of Environmental Harm by Multinational Enterprises: Can the State of Origin be Held Responsible, in Francioni and Scovazzi (eds) *International Responsibility for Environmental Harm*, London, 1991

²⁸ Francioni, *Imprese multinazionali, protezione diplomatica e responsabilità internazionale*, Milano, 1979, Chapt. 4; id. Four Ways of enforcing the International Responsibility for Human Rights Violations by Multinational Corporations, in Moreau and Francioni, *La dimension pluridisciplinaire de la responsabilité sociale de l'entreprise*, Aix-Marseille, 2007, p. 154 ff.

quoted from the 1974 GA Resolution on the definition of aggression²⁹. The same Resolution includes in the legal definition of aggression the sending by or on behalf of the state of “armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another state of such gravity as to amount the acts listed above or its substantial involvement therein”³⁰. The language of this definition does not explicitly refer to human rights. However, it is not difficult to interpret the expression “political independence” as inclusive of the right to self-determination, which is the first human rights recognized at Article 1 common to the two UN Covenants. At the same time the terms “groups, irregulars, or mercenaries, cover the commercial export of military services through private contractors, when the home state uses them as a conduit (“on behalf of the state”) for indirect armed intervention in another state. Therefore, home countries of PMSC, in addition to hiring states, are bound under international law to implement this prohibition through appropriate regulation and judicial enforcement at the source. Of course, states have a wide margin of discretion in choosing the regulatory approach they deem fit for PMSC. This is made clear by the variety of regulatory models that have emerged so far in domestic legislation³¹. In the event that the state decides to adopt a total ban on PMSCs, the problem will be only one of effective implementation of the ban. When, instead a state decides to permit or encourage the establishment of PMSCs in its territory, then the due diligence obligation entails a certain number of positive duties that go beyond the basic prohibition of indirect armed attack against another state.

First, the home state is required as a minimum to subject the creation and operation of PMSCs in its territory to a system of permits or licences. This is essential in order to verify the ability of the management and employees to operate responsibly and avoid conduct that may result in human rights injuries. In this field, it is hard to maintain the application of a principle of *laissez faire* according to which the PMSC should be considered as any commercial enterprise and be allowed to operate under the liberal principle according to which anything that is not expressly prohibited is permitted. This principle makes little sense for an industry that involves the systematic use of weapons and the implementation of coercive activities for which it is generally accepted that a special or general licence is required under domestic law. The requirement of a general licence for PMSCs, and of specific licences for the personnel, has the further social function of enabling home states to mandate the inclusion of human rights and international humanitarian law conditionalities in the licensing instrument, while ensuring transparency as to the actual operations in which the company is engaged.

Once a system of *ex ante* licences is in place, the home state must discharge its due diligence duty by subjecting the export of hazardous military and security services and goods to authorization and monitoring procedures. This authorization mechanism has nothing revolutionary: it is already in force in Europe and in the United States as well as in many other countries in respect of export of arms and of sensitive “dual use” technology, as well as in respect of dangerous chemicals and hazardous waste³².

In the event that PMSCs are engaged in the provision of sensitive security services to transnational business corporations – as is the case for oil and gas companies and other mineral extraction companies which operate in unstable environment, in Africa, Latin America and South Asia - the home state should acquire relevant information about the nature of such services and verify that their

²⁹ Article Definition of Aggression Resolution (1974) GA Res. 3314 (XXIX) 1970

³⁰ Ibid. Article 3 (g)..

³¹ For a collection of national reports on legislation applicable to PMSC, see www.priv-war.eu/publications, as well as the comparative analysis by O. Quirico, *National Regulatory Models for PMSCs and Implications for Future International Regulation*, EUI Working Papers, Max Weber Programme, MWP 2009/25

³² See *International Law of Export Control* (Meessen ed), London, Dordrecht, Boston, 1992; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 10 September 1998, UNEP/FAO/PIC/CONF 2 ; Basel Convention on the Control of Trans-boundary Movement of Hazardous Wastes and their Disposal, 22 March 1989, reprinted in 28 ILM 657 (1989).

performance is compatible with the respect for human rights. It is well known, and currently it is the object of many civil actions before national courts, that security services of transnational corporations have been involved in serious human rights violations in the host countries, including forced relocation of people, arbitrary detention and even extra judicial killings.

To prevent and minimize these crimes, the home state has the possibility of checking on past practices of the relevant PMSC in comparable situations so as to detect precedents of abuses that should require suspension of licence or withholding of further export authorizations.

Since the home state reaps economic and financial advantages from the presence and operation in its territory of PMSCs – in terms of employment and tax revenues – it is reasonable to expect that as part of its due diligence obligation it should allocate resources to establish a mechanism of systematic and reactive monitoring of PMSCs' activities. The systematic monitoring can be facilitated by the requirement of social impact reports in the annual financial reports of the company as well as by the use of the home state diplomatic missions and military attachés – when available – in the host state of PMSC's operations. Reactive monitoring, on the other hand, is important when situation of serious misconduct by PMSCs are disclosed and remedial action is required. In states where a large sector of private military contractors has developed, as in the United States and the United Kingdom, systematic and reactive monitoring can be greatly facilitated by the work of the competent international organisations, independent experts, trade unions, and NGOs, which often are in a better position than states to provide factual elements for investigation and possible prosecution of human rights abuses.

The typology of positive obligations outlined above is not intended to exhaust the whole range of the home state's responsibilities in preventing violations of human rights connected to the export of military and security services by PMSCs based in its territory. It provides only an exemplification of objective and reasonable standards of due diligence that home states are bound to adopt in order to comply with human rights obligations and avoid international responsibility for failure to protect human rights in the face of foreseeable and potential danger.

8. The Duty to Provide Access to Court and Judicial Protection

The responsibility to protect illustrated in the above section is not limited to the due diligence obligation to prevent foreseeable abuses by PMSCs: it entails also the duty to remedy and sanction such abuses if they actually occur. This is clearly the case when the PMSC operates abroad in violation of the operating licence or export permits. Depending on the seriousness of the violation, sanctions may consist of 1) the investigation and possible prosecution of personnel, 2) the requirement of removal of certain individual members suspected of crimes, 3) the suspension or revocation of the operating licence or of specific export authorizations. These requirements have been considered to be part of existing international law in recent efforts at regulating PMSCs, in particular in the code of conduct and good practices elaborated on the basis of the Swiss Initiative in 2008³³. In addition, it is incumbent upon the home state to ensure access to courts and appropriate civil remedies, including reparation for damage, to victims of human rights abuses committed abroad by PMSC. This is an integral component of the responsibility to protect since it is the case that most often the host state in whose territory the PMSC operates is not in a position to offer adequate judicial protection either because of the lack of institutional capacity and stability, lack of PMSC's resources to satisfy

³³ See The Montreux Document, adopted in September 2008 and the comprehensive commentary on this initiative and other regulatory options contained in the volume *Beyond Market Forces*, *cit. supra* note 2.

reparation claims, or, as was the case in Iraq until 2008, because of blanket immunity granted to the PMSC under the law of the home state³⁴.

9. Procedural Obligations: Inter-State Cooperation

Of course, the set of positive duties we have tried to identify as part of the general due diligence obligation incumbent upon the home state of a PMSC, can be reinforced and made more effective through appropriate international cooperation between the home state and other relevant actors. Such cooperation is particularly important with the host state of the PMSC's activities. In order to ensure that its population, especially the civilian population, is not exposed to serious human rights violations by PMSCs, as has happened in recent years, it is essential first of all that the home state and the host state are in communication and that the export of security services by the former occurs in a context of transparency and information so that appropriate measure for the prevention of harm may be taken on both sides.. Cooperation is also necessary whenever the activities of PMSCs involve breaches of the law of the territorial state or international crimes for the prosecution and criminal investigation of which , gathering of evidence and verification of the facts *in situ*. In many recent cases involving reckless killings of innocent civilians in Iraq, torture, sex crimes and even prostitution rings by PMSC in Bosnia, the perception has been that the persons responsible for the offences and the companies hiring did not live up to a level of accountability required by the seriousness of the offences. This perception was reinforced by the combined effect of immunity from local jurisdiction and jurisdictional hurdles for home country prosecution, and sometimes by the very result of judicial proceedings often ending in acquittals –as in the very recent case of the private contractors responsible for the killing of 17 civilians in Baghdad in 2007³⁵ - or very tenuous sanctions. Cooperation between the home state and the territorial state can help prevent potential incidents and abuses by ex ante exchange of information and monitoring of PMSCs' activities. It can also help deal with actual abuses of personnel by cooperation between investigatory agencies, limitation of immunities and eventual prosecution after the event.

10. Conclusion

This paper has examined the question of the home state's responsibility for human rights violations connected to the conduct of private contractors in two distinct perspectives. The first is the perspective of the general rules of attribution under international law, and the conclusion reached in this context is that the home state responsibility will arise when the PMSC is actually integrated in the national armed forces, thus effectively acting as an organ of the state, and when the home state has delegated by law some measure of governmental authority to PMSC operating in its territory and exporting military and security services to other countries. Practice shows that this delegation occurs when the home state authorises combat functions, arrest powers, management of detention facilities, interrogation services and law enforcement functions. By empowering PMSCs with this type of governmental functions, the home states cannot escape the international responsibility for the way in which such functions are carried out. A third hypothesis of responsibility has been identified in relation to situation where the PMSC acts on the instruction of, or under the direction or control of the home state. In this context I have pointed out that in recent the recent practice of the ICJ and of human rights courts the restrictive test of "effective control" is evolving into the broader criterion of "complete dependence" of the non state actor upon the state.

³⁴ This is the reason why the Iraqi Government has reacted with rage to and bitter resentment to the recent decision of the United States federal court in Washington which has dismissed the charges against the private contractors accused of reckless killing of civilian in the 2007 shooting at Nisour Square in Baghdad. See *supra* note 6

³⁵ See *supra* note 6.

All these doctrines of attribution can be useful for imputing violations of human rights and international humanitarian law to the home state. However, as practice shows, PMSCs are not working only for governments and under the more or less intense colour of law and public authority. They provide also services to business corporations and private actors in dangerous areas where security is needed. In these case, the ILC Draft and the traditional rules of attribution of international responsibility for wrongful acts are less helpful. A complementary approach, as has been argued in this paper, can be found in the law of international human rights and in the general obligation that this branch of international law places upon states to exercise their sovereignty in such a way as to reasonably prevent activities conducted in their territory from causing human rights violations to other people. The effective control exercised by the home state over the creation, licensing and export authorisations of PMSCs, constitutes the most rational basis for the recognition of a due diligence obligation to regulate PMSCs so as to prevent and minimise the risk of human rights violations by the PMSC, including when the company performs its services abroad. At the same time. the home state has the responsibility of ensuring appropriate sanctions to perpetrators, and civil remedies to victims, of violations of human rights occurred in spite of prevention measure. This approach seems all the more timely and appropriate in the present international context in which PMSCs are emerging as a viable alternative to official armed and police forces in the performance of many activities hitherto considered to be part of governmental functions. In conjunction with the parallel obligations of the territorial state and of the hiring state - whenever this is a third state - this approach can enhance responsible standards of conduct and accountability of PMSC at a time when their conduct has given rise to lamentable abuses and has led to the unfortunate perception that they can operate beyond the reach of the law.