Food For Thought 2024

# PRIVATISATION OF SECURITY: THE LEGAL STATUS AND RESPONSIBILITIES OF PRIVATE MILITARY COMPANIES IN EUROPEAN MISSIONS

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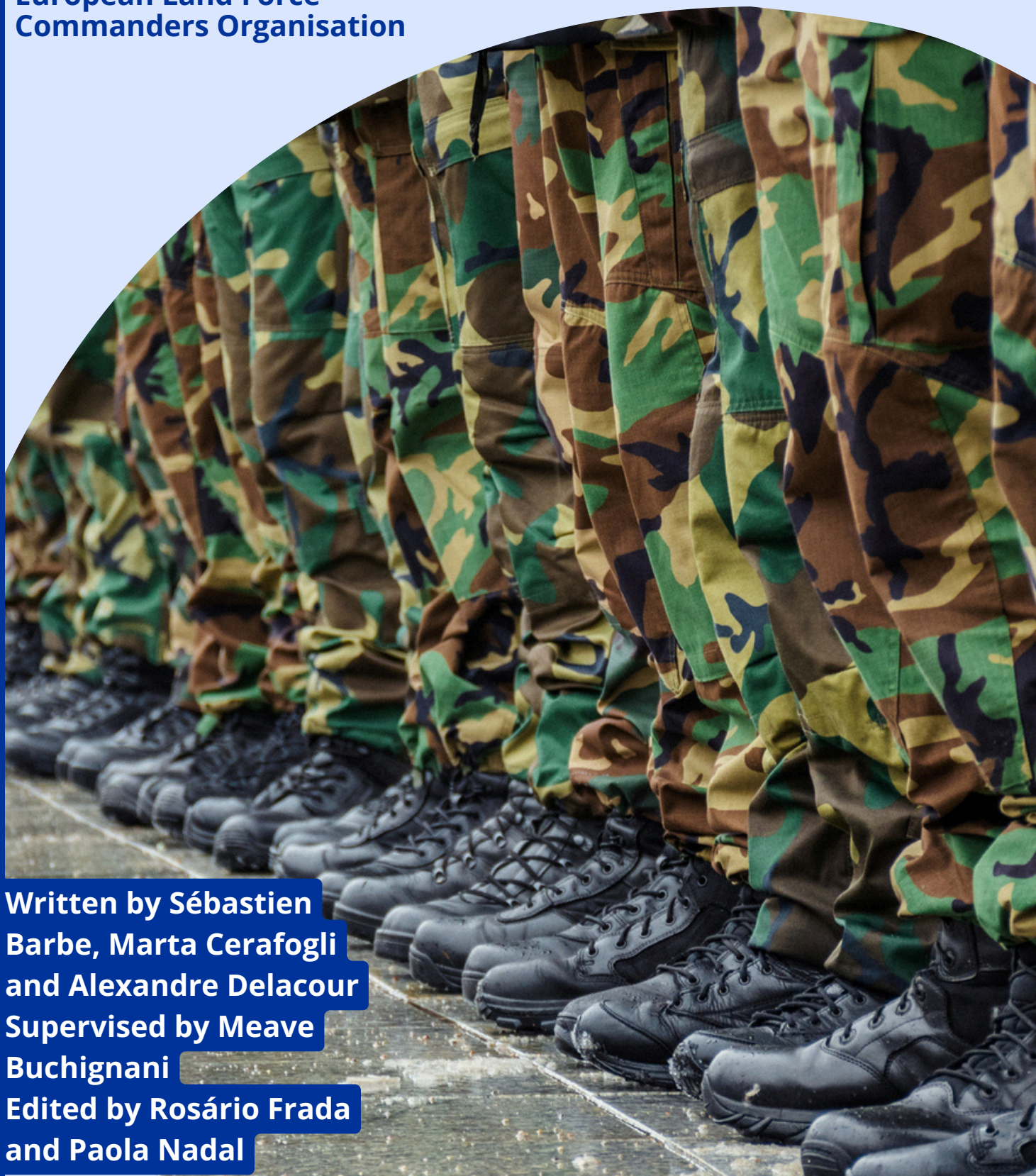

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This Food For Thought paper is a document that gives an initial reflection on the theme. The content is not reflecting the positions of the member states but consists of elements that can initiate and feed the discussions and analyses in the domain of the theme. All our studies are available on www.finabel.org

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# Director's Editorial

The privatisation of security through the use of Private Military Companies (PMCs) and Private Security Companies (PSCs) is an increasingly relevant topic in international law. The proliferation of said companies has transformed how governments approach military and civilian operations. Therefore, the legal framework governing their actions has become critically important.

This paper provides an in-depth analysis of the legal framework surrounding PMCs and PSCs, which offer services ranging from logistics support to direct participation in hostilities, and therefore challenge the notion of accountability and the application of international humanitarian law.

Firstly, the legal ambiguities that PMCs operate within are presented. By analysing the legal status of these entities and their employees—whether they are seen as combatants, civilians, or mercenaries—the paper highlights the challenges in enforcing international law, an issue which is not merely academic, but has profound implications for the enforcement of the rule of law in conflict zones and the protection of human rights. Furthermore, the paper examines the European legal framework to understand how EU law, as well as national law, regulate said companies. Finally, through case studies, such as the use of PMCs in the Balkans in the 1990s and later in Afghanistan, this paper illustrates the real-world consequences of the legal grey areas.

By addressing the legal status and responsibilities of PMCs and PSCs, this research contributes to the ongoing debate on the privatisation of security, and as underscored in the conclusion, it calls for stronger and more coherent regulations.

Sincerely,

**Mario Blokken**
Director

# Introduction

The rise of Private Military Companies (PMCs) and Private Security Companies (PSCs) in military or civilian missions stands as an important change in the dynamics of the security and defence world, as they change how operations can be conducted, especially for armed forces. Dating back to the Middle Ages with mercenaries, they have taken different forms throughout history. Nowadays, they deliver a large span of services (from indirect support in logistics or military counselling to taking part directly in combat). This shows how they adapted to the most modern types of conflict thanks to their business structure and flexibility in various scenarios.

On the one hand, PMCs participate in combats, from troops through training or instruction programmes, having a strong impact on the development of conflicts. On the other hand, PSCs dedicate themselves to tasks related to security and guard duties like protection of facilities or personnel in at-risk zones. While they both provide services to governments, PMCs are employed in training military forces and taking part in conflict zones, and PSCs are used primarily for non-combat missions such as personnel protection abroad and site security. However, by the nature of their work, both PMCs and PSCs may be engaged in violent scenarios. Therefore, it is also generally accepted to refer to them as Private Military and Security companies (PMSCs).

The employment of additional resources to the national armies is a phenomenon which requires a comprehensive regulation on a national and international level. It is necessary, however, to draw a line between PMCs and PSCs, even if the lack of regulation and the similarity of tasks unite them. If the classification of PMSCs personnel in concrete category under the Geneva Conventions seems complex, the distinction between soldiers and civilians nevertheless still has to be made to understand what they can and cannot do in conflicts, eventually having an incidence on the rules of engagement they have to follow and the protection they could be granted or not.

This paper will present their blurred status in law and their duties in missions led by European Member States, taking a look at the existing legislation and tools to hold them responsible for their actions. Analysing the relevant dispositions of International Law, this paper will try to clarify the risks and potential downfalls of employing such companies for domains normally part of State responsibilities solely. Furthermore, this paper will analyse the complex and fragmented legal framework governing these companies and their employment both on a European and national level, delving into the distinction of competencies between the EU and the national sovereignty of Member States, according to their own regulation on the matter.

This will also be done through practical studies of the use of PMSCs in the Balkans region in the 1990s and in the Afghan conflict in the 21st century. Moreover, the paper will tackle the urgent necessity to strengthen the rules and norms that limit the actions of PMSCs to make sure that human rights and ethical boundaries are respected while they pursue their contracts.

# Part One: The Legal Framework of PMCs and PSCs

## 1. The Complex Intersection of International Law and PMCs

States, international organisations, non-governmental organisations (NGOs) and transnational companies are employing PMCs to carry out tasks that were traditionally pursued by the State. An increasing number of governments are seeking to engage the services of these companies to fill the gaps in personnel and capabilities within their national armed forces [1]. Throughout the years, PMCs have reportedly committed abuses during their missions, potentially endangering local populations and the success of military missions. For instance, in Afghanistan, PMCs have been implicated in violence against civilians and extrajudicial executions or have been accused of exploiting and mistreating civilians and their own employees, in particular through extortion, protection rackets, kidnapping, human trafficking, theft and looting [2]. However, these abuses often go unpunished due to a lack of regulation of these private companies and their staff.

The vagueness of the legal framework surrounding PMCs raises several questions in International Law (hereby IL). The main legal questions concern the legal status of PMCs and their personnel, the responsibility of the States that engage them and the responsibility of the States where PMCs are formed or operate. International Humanitarian Law (IHL), which disciplines the conduct of hostilities by regulating the behaviour of PMCs in armed conflicts, is not concerned with the legitimacy and legality of the use of said companies [3]. Other norms of International Law, such as human rights standards and rules of corporate social responsibility, also attempt to regulate PMCs. These include mechanisms such as the 2010 International Code of Conduct (ICoC), the 2008 Montreux Document, the 2015 International Organization for Standardization (ISO), and the 2011 UN Guiding Principles on Business and Human Rights (UNGP) [4].

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[1] Galai K, "Can Current Regulation Effectively Manage PMC Conduct and Ensure Accountability?" (2020) European Yearbook of International Economic Law. https://www.springerprofessional.de/en/can-current-regulation-effectively- manage-pmc-conduct-and-ensure/19832990.

[2] UN, Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination: Addendum Mission to Afghanistan (2010) A/HRC/15/25/ Add.2. https://www.ecoi.net/en/file/local/1320187/470_1282657142_g1014357.pdf; Schmeidl S, "Case Study Afghanistan" in Ulrike Joras and Adrian Schuster (eds), Private Security Companies and Local Populations (SwissPeace 2008). https://www.files.ethz.ch/isn/55112/WP_1_2008.pdf.

[3] Gillard E-C, "Business goes to war: private military/ security companies and international humanitarian law" (2006) 88 International Review of the Red Cross 525 https://international-review.icrc.org/sites/default/files/irrc_863_4.pdf.

[4] Galai K, "Can Current Regulation Effectively Manage PMC Conduct and Ensure Accountability?" (2020) European Yearbook of International Economic Law.

International Law was originally intended to solely apply to States and international organisations [5].

Since the end of the Second World War, individuals have also become subjects of International Law, with their responsibility solidified through International Criminal Law (ICL), leading to trials before ad hoc international tribunals or, since 2002, before the International Criminal Court (ICC) [6]. However, companies are not recognised as actors under IL and, therefore, cannot be held responsible under ICL for violations of IHL when they engage in conflict. As companies, PMCs cannot be held liable; only their employees can be held accountable for violations of IHL. [7]

The status of PMC personnel must, therefore, be addressed first, followed by a study of the responsibilities associated with PMC breaches.

# 2. The Legal Status of PMCs and PSC Personnel in International Humanitarian Law

### 2.1 Defining and Regulating Mercenaries in International Law

The term "mercenary" carries a historically negative connotation, especially among governments who view them as immoral and profiteers from poverty and war [8]. It is important to distinguish between the concepts of mercenaries and PMCs. PMCs are incorporated entities that operate as businesses, unlike mercenaries, who are individuals or groups without a legal entity motivated by personal gain rather than allegiance to a particular nation or cause [9]. It is crucial to distinguish between these two concepts, as they each have different legal consequences, will be analysed in this section.

Two key international conventions aim to address mercenaries: the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and the 1977 Organisation of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa. Mercenaries are also subject to the 1977 Additional Protocol I to the 1949 Geneva Conventions (API), which is part of IHL. Under these conventions, States can prosecute individuals for engaging in mercenary activities if they have implemented the conventions into their national laws and thus view being a mercenary as a separate crime [10].

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[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] Cameron L, "Private military companies: their status under international humanitarian law and its impact on their regulation" (2006) 88 International Review of the Red Cross 573 https://www.icrc.org/en/doc/assets/files/other/irrc_863_cameron.pdf.

[9] Galai K, "Can Current Regulation Effectively Manage PMC Conduct and Ensure Accountability?" (2020) European Yearbook of International Economic Law

separate crime [10]. However, the API does not automatically classify mercenaries as criminals solely based on their status; rather, it denies them prisoner-of-war (POW) status under Article 47(1). POW refers to combatants who have been captured by the enemy, or specific non-combatants to whom the status of prisoner of war is granted by IHL. Accordingly, if they fall into enemy hands, they are recognised as POW and cannot be punished for having directly participated in hostilities [11].

As a result of this status, a mercenary may be subjected to disciplinary action by the detaining power at its discretion, provided that the detaining power also has in place separate legislation that designates mercenarism as a distinct criminal offence. Significantly, mercenary status under IHL applies exclusively to international armed conflicts (hereby IAC), as combatant status and its privileges solely pertain to those conflicts. Thus, in the context of a non-international armed conflict (NIAC), if an individual who meets the conditions for mercenary status is detained and the detaining authority decides to prosecute them, only the provisions governing participation in hostilities will apply. The trial will not be based on his status as a mercenary, unless the national legislation of the detaining State makes mercenarism a criminal offence. Since today's conflicts are more often NIACs, this distinction does not deter the use of mercenaries [12]. Conversely, the mercenary conventions extend their applicability to non-international armed conflict [13]. In fact, Article 1§1 of the OAU Convention and Article 1§1 of the United Nations Convention on Mercenaries only refer to "armed conflict" without specifying whether it is an IAC or a NIAC. Thus, mercenaries under these two conventions can be punished for the separate crime of mercenarism, even in the case of NIAC [14].

Article 47(2) of the API defines a mercenary based on six cumulative criteria. To be considered a mercenary, an individual must be specially recruited locally or abroad to fight in an armed conflict, take direct part in hostilities, be motivated by private gain with the promise of material compensation

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[10] International Convention against the Recruitment, Use, Financing and Training of Mercenaries (Adopted 4 December 1989, entered into force 20 October 2001) UNGA Res 44/34, Article 3. https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-against-recruitment-use-financing-and; Convention for the Elimination of Mercenarism in Africa (Organization of African Unity) (Adopted 3 July 1977, entered into force 22 April 1985) CM/817 (XXXIX), Annex II, Rev. 3, Article 4. https://au.int/sites/default/files/treaties/37287-treaty-0009_-_oau_convention_for_the_elimination_of_mercenarism_in_africa_e.pdf.

[11] "The Practical Guide to Humanitarian Law" (Doctors without borders). https://guide-humanitarian-law.org/content/article/3/prisoners-of-war/.

[12] « The Dilemma of Mercenarism and Volunteering During Armed Conflicts - Syrians for Truth and Justice" (Syrians for Truth and Justice, 18 April 2023). https://stj-sy.org/en/the-dilemma-of-mercenarism-and-volunteering-during-armed- conflicts/.

[13] Cameron L, "Private military companies: their status under international humanitarian law and its impact on their regulation" (2006) 88 International Review of the Red Cross 573 https://www.icrc.org/en/doc/assets/files/other/irrc_863_cameron.pdf.

[14] Petereyns M, "The Legal Status of Mercenaries in Armed Conflict" (master's thesis, Ghent University 2016).https://libstore.ugent.be/fulltxt/RUG01/002/304/280/RUG01-002304280_2016_0001_AC.pdf.

is substantially exceeding that of similar ranks and functions in the armed forces, not be a national or resident of a party to the conflict, not be a member of the armed forces of a party to the conflict, and not be sent by a non-party State on official duty as a member of its armed forces. Article 47(1) of the API states that mercenaries "shall not have the right" to be POW, although they are entitled tofundamental guarantees under Article 75. POW status gives combatants the right not to be prosecuted for taking a direct part in the armed conflict and special protection under the Third Geneva Convention of 1949, such as the obligation to be treated humanely in Article 13 GCIII. Two interpretations of Article 47(1) of the API exist regarding the "shall not have the right" to be POW: one states that mercenaries cannot avail themselves of POW status, unless the detaining power decides to grant it; the other, that a detaining power must not grant mercenaries POW status. The interpretation of this article is that it should be left up to States to decide whether to grant POW status, since the fact of not benefiting from combatant status is already very severe because the mercenary could be criminally convicted of killing someone in combat [15].

It is unlikely that an employee of a PMC would be classified as a mercenary due to the difficulty of meeting all six criteria cumulatively. For example, criteria a) and b) of Article 47(2) provide that mercenaries are specifically recruited to fight and take direct part in hostilities [16]. However, a PMC member may initially be recruited for combat activities but is often called upon to perform a variety of tasks, including non-combat tasks such as maintenance [17]. In addition, condition d) excludes nationals or residents of a party to the conflict to be qualified as a mercenary, significantly limiting the number of individuals that can fall under this provision.

Both the UN and the OAU Conventions on mercenarism adopt the mercenary definition enshrined in Article 47 of the API with slight modifications. The UN Convention, for instance, criminalises attempts to engage directly in hostilities, while broadening its scope to encompass recruitment, use, financing, or training of mercenaries under Article 2. Similarly, the OAU Convention on mercenarism includes persons who enrol in "band" of mercenaries, and those who enlist or in any way support such "bands" in Article 1(2). This Convention is broader than the UN Convention because it includes a wider range of potential perpetrators: individuals, groups, associations, State representatives and States themselves [18]. In addition, under Article 1(2) of the UN Convention on Mercenaries, activities aimed at overthrowing a government or undermining the territorial integrity of a State are included in the definition of mercenarism.

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[15] Ibid.

[16] Gillard E-C, "Business goes to war: private military/ security companies and international humanitarian law" (2006) 88 International Review of the Red Cross 525 https://international-review.icrc.org/sites/default/files/irrc_863_4.pdf.

[17] Cameron L, "Private military companies: their status under international humanitarian law and its impact on their regulation" (2006) 88 International Review of the Red Cross 573 https://www.icrc.org/en/doc/assets/files/other/irrc_863_cameron.pdf.

[18] Ibid.

Although this widens the number of individuals who qualify as mercenaries, these treaties require the provisions to be transposed into national law and have not been signed by many States (for instance, only 37 States are party to the UN Convention) [19].

## 2.2 Personnel in Armed Conflicts: Combatants or Civilians?

An important question is whether the staff of PMCs are to be considered combatants or civilians during armed conflicts. This distinction is crucial because combatants have specific rights and responsibilities under IHL. First, combatants have the right to lawfully participate directly in hostilities (Article 43(2) API). Second, they are legitimate military objectives and can be lawfully attacked. Last, if they are captured, they are entitled to POW status and may not be prosecuted for having participated in hostilities [20].

There are four categories of persons who can be considered as combatants. Article 50(1) API states that "a civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol," and two are relevant to PMCs. According to Articles 4(A)(1) and (2) GCIII, combatants include members of the armed forces, militias, and volunteer corps integrated into the armed forces, along with members of other militias and volunteer corps, subject to the fulfilment of specific conditions.

According to Article 4(A)(1) of GCIII, it is essential to assess whether an individual has been incorporated into a State's armed forces according to the laws of the State. Although IHL is clear that a member of one of the armed forces of a party to the conflict is a combatant, it does not clearly outline the specific steps that must be taken by States to register people in their armed forces under Article 4A(1) of the Third Geneva Convention or under Article 43 of Protocol I [21]. The mere fact that a PMC has been employed by a State and that a contract binds the two parties is not enough to affiliate a person with the armed forces. Furthermore, the activity carried out by a PMC employee is not the determining factor in establishing membership in the armed forces [22].

Even though IHL does not set explicit criteria, there are indicators that can help establish membership, such as whether PMC employees have complied with national enlistment or conscription procedures, whether they are part of the military hierarchy and command structure, or whether they wear uniforms [23]. This depends mainly on the internal legal regime of the State in

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[19] Ibid.

[20] Ibid.

[21] Ibid.

[22] Gillard E-C, "Business goes to war: private military/ security companies and international humanitarian law" (2006) 88 International Review of the Red Cross 525 https://international-review.icrc.org/sites/default/files/irrc_863_4.pdf.

[23] Ibid.

question. It is important that the opposing parties are kept informed of who has been incorporated into the armed forces. Thus, Article 43(3) API obliges States to notify the opposing States in the case of the incorporation of police forces or other paramilitary forces into their armed forces [24]. In the event of a party incorporating a paramilitary or armed law enforcement agency into its armed forces [25].

The second means of granting combatant status to an employee of a PMC is established in Article 4(A)(2) GCIII. This article targets members of structurally independent groups, such as militias and volunteer corps, who fight alongside the armed forces.

Firstly, the group must be a party to the conflict. Initially, this was interpreted as requiring explicit authorisation from the State. However, since the negotiations of the 1949 Geneva Conventions, a de facto relationship suffices, such as a tacit agreement [26]. Specifically, the State must have control over the independent group and, as the International Criminal Tribunal for the Former Yugoslavia (ICTY) established in its landmark judgment *Prosecutor v. Dusko Tadic*, a "relationship of dependence and allegiance of these irregulars vis-à-vis that party to the conflict" [27]. A contract would naturally meet this requirement, but only PMCs recruited by a State can meet this criterion, excluding other actors in an armed conflict who might use PMC employees. In addition, to be considered a combatant, the person must necessarily carry out activities close to military operations, again excluding most PMCs employees [28].

Furthermore, the group must satisfy four conditions: (a) to have a person responsible for subordinates, (b) to have a distinctive sign that is fixed and recognisable at a distance, (c) to bear arms openly, and (d) to comply, in their operations, with the laws and customs of war.

Briefly, for the first criterion, PMCs must have a clear command structure. Consequently, it does not necessarily have to be a military officer in charge of command; what matters is that there is someone who bears responsibility for action taken under their orders. The second criterion requires wearing a distinctive sign. However, in the practice of armed conflicts, it is very difficult to differentiate between PMCs and members of the State armed forces or between different PMCs, as they rarely wear a

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[24] Cameron L, "Private military companies: their status under international humanitarian law and its impact on their regulation" (2006) 88 International Review of the Red Cross 573 https://www.icrc.org/en/doc/assets/files/other/irrc_863_cameron.pdf.

[25] Gillard E-C, "Business goes to war: private military/ security companies and international humanitarian law" (2006) 88 International Review of the Red Cross 525 https://international-review.icrc.org/sites/default/files/irrc_863_4.pdf.

[26] Ibid.

[27] Prosecutor v Dusko Tadic (Judgment) ICTY-94-1-A (15 July 1999), paras 93-94. https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/40180

[28] Ibid.

distinctive sign. The third criterion requires bearing arms openly, which can confuse civilians with members of the armed forces or other non-military actors. The last criterion applies to the entire group rather than individual members. Some PMC employees have committed violations of IHL: for instance, the killing of 17 innocent civilians by the PMC Blackwater in Nisour Square, Baghdad, in 2007 resulted in the perpetrators being finally sentenced by a United States (henceforth US) court. However, the PMC Blackwater as a legal entity has not been condemned, which does not prevent its members from being considered as combatants [29].

To conclude, the criteria for determining combatant status under Articles 4(A)(1) and 4(A)(2) GCIII are very restrictive. A limited number of PMC personnel could be considered as combatants. Moreover, each PMC employee must be analysed individually to assess their combatant status, which is practically impossible to achieve on the ground. The difficulty in distinguishing between PMCs with combatant status and those with civilian status can lead to grave breaches of IHL [30].

### 2.3 The Civilian Status: A Category Encompassing the Majority of PMCs

Under IHL, individuals are classified into two categories: combatants and civilians. Consequently, if PMC staff are not classified as combatants, they are considered civilians. This classification has significant implications, as civilians are prohibited from directly participating in hostilities.

A primary goal is to define what constitutes direct participation in armed conflict. Direct participation in an armed conflict is interpreted narrowly to encompass acts that cause harm to personnel and equipment of opposing forces. There must be a clear distinction between direct participation in the conflict and participation in the war effort [31]. Activities such as logistics, catering, construction, base maintenance, and industrial work are not considered direct participation. Therefore, PMCs members

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[29] Schneiker A and Krahmann E, "Policy Paper on Private Military and Security Companies: Capacity Gained – Accountability Lost? Establishing a Better Political and Regulatory Framework" (2016) Transparency International Deutschland. https://www.researchgate.net/publication/299861585_Policy_Paper_on_Private_Military_and_Security_Companies_Capacity_Gained_-_Accountability_Lost_Establishing_a_Better_Political_and_Regulatory_Framework; Madison Zeeman, "The Nisour Square Massacre" (ICoCA, 2023) https://icoca.ch/fr/case-studies/the-nisour-square-massacre/

[30] Cameron L, "Private military companies: their status under international humanitarian law and its impact on their regulation" (2006) 88 International Review of the Red Cross 573 https://www.icrc.org/en/doc/assets/files/other/irrc_863_cameron.pdf.

[31] Sandoz Y, Swinarski C, and Zimmerman B (eds), "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949" (ICRC/Martinus Nijhoff 1987) https://www.icrc.org/en/publication/0421- commentary-additional-protocols-8-june-1977-geneva-conventions-12-august-1949.

involved in these tasks cannot be classified as combatants [32].

However, if a PMC staff member engaged in non-combat roles, such as kitchen staff, starts fighting for a legitimate military objective, they become an "unprivileged belligerent" or "unlawful combatant" [33]. The term "unlawful/unprivileged combatant/belligerent" is understood as describing all persons taking direct part in hostilities without being entitled to do so and who, therefore, cannot be classified as POW if captured by the enemy [34].

Another issue is that whether a person participates in a conflict depends only on the individual's intent to engage. There is a a lack of distinction between offensive and defensive actions. Many PMCs provide security similar to domestic security guards, such as those patrolling shopping malls, public buildings and banks. However, Article 49 API does not differentiate between offensive or defensive attacks. Therefore, if PMC personnel respond to an attack by a party to the conflict, they are directly participating in the conflict. Defensive actions against common criminals, however, do not constitute direct participation. The distinction becomes blurred if a State party to the conflict classifies resistance fighters as criminals. Thus, the nature of the operation, whether civilian or military, and the status of those against whom the PMC employees are fighting must be assessed to determine whether the operation is civilian or military [35].

Lastly, objects can change from civilian to military objectives based on their nature, location, purpose or use according to Article 52 API. If an object guarded by PMC employees shifts from a civilian to a military objective, PMC personnel could unwittingly take part in hostilities, calling into question their civilian status. Once again, this leads to ambiguity about the status of PMC employees [36].

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[32] Cameron L, "Private military companies: their status under international humanitarian law and its impact on their regulation" (2006) 88 International Review of the Red Cross 573 https://www.icrc.org/en/doc/assets/files/other/irrc_863_cameron.pdf; Gillard E-C, "Business goes to war: privatemilitary/ security companies and international humanitarian law" (2006) 88 International Review of the Red Cross 525 https://international-review.icrc.org/sites/default/files/irrc_863_4.pdf.

[33] Grignon J and Roos T, "Combattants et prisonniers de guerre" (18 December 2020) Quid Justitiae https://www.quidjustitiae.ca/fr/blogue/combattant-es-et-prisonnierseres-de-guerre#:~:text=Dans%20le%20contexte%20de%20lutte,combattants%20%C3%A9trangers%20%C2%BB%2C%20%C2%AB%20combattants%20non.

[34] Knut Dörmann, "The Legal Situation of "Unlawful/Unprivileged Combatants" (2003) 85(849) International Review of the Red Cross https://www.icrc.org/en/doc/assets/files/other/irrc_849_dorman.pdf.

[35] Cameron L, "Private military companies: their status under international humanitarian law and its impact on their regulation" (2006) 88 International Review of the Red Cross 573 https://www.icrc.org/en/doc/assets/files/other/irrc_863_cameron.pdf.

[36] Cameron L, "Private military companies: their status under international humanitarian law and its impact on their regulation" (2006) 88 International Review of the Red Cross 573 https://www.icrc.org/en/doc/assets/files/other/irrc_863_cameron.pdf; Gillard E-C, "Business goes to war: private military/ security companies and international humanitarian law" (2006) 88 International Review of the Red Cross 525 https://international-review.icrc.org/sites/default/files/irrc_863_4.pdf.



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Civilians are protected from attacks under Article 51(2) API, unless they are taking a direct part in hostilities under Article 51(3) API. Once they engage in hostilities, their status changes to unlawful combatants, who may be prosecuted under national or International Law. They do not enjoy POW status, reserved for members of the armed forces or other lawful combatants as discussed above under Article 4 GCIII. Finally, there is a special status for civilians accompanying the armed forces. These people enjoy POW status. Article 50 API defines civilians as persons not listed in Article 4(1), (2), (3) and (6) GCIII. Conversely, Article 4(A)(4) GCIII extends POW status to civilians accompanying armed forces, such as personnel providing logistical support, provided they have received authorisation from the armed forces they accompany [37].

In conclusion, few PMC members will be considered mercenaries due to the complex definition of this concept. Also, few will meet the conditions for combatant status. Consequently, most PMC personnel will hold civilian status under IHL. This classification sheds light on the need for clear guidelines and distinctions to prevent ambiguity and ensure compliance with International Law.

# 3. Responsibilities Relating to the Use of PMCs in Armed Conflicts

### 3.1 Vigilant Oversight: State Duties in Employing PMCs

The primary rules regulating armed conflicts are enshrined in the Four 1949 Geneva Conventions and their 1977 Additional Protocols, as well as the 1899 and 1907 Hague Conventions. These rules form part of Customary International Law, which is binding on all States. Some of its norms are jus cogens and impose *erga omnes* obligations in International Law. Article 1, common to the Four Geneva Conventions, mandates that the High Contracting Parties undertake to respect and ensure respect for these Conventions in all circumstances. The term "in all circumstances" has a broad interpretation and encompasses all violations committed by non-state actors employed by the parties to the conflict. Thus, the State is responsible for unlawful acts committed by PMC personnel if they are hired by the State. Article 3 of the Fourth Hague Convention of 1907 states that the State is responsible for all acts committed by its armed forces and must pay reparations. If a PMC member, as part of the armed forces, commits a violation of IHL, the State will be responsible [38].

The International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts (RSIWA) 2001 are also relevant. Article 4(1) provides that the conduct of any organ of a State is

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[37] Cameron L, "Private military companies: their status under international humanitarian law and its impact on their regulation" (2006) 88 International Review of the Red Cross 573 https://www.icrc.org/en/doc/assets/files/other/irrc_863_cameron.pdf.

[38] P. R. Kalidhass, "Determining the Status of Private Military Companies under International Law: A Quest to Solve Accountability Issues in Armed Conflicts" (2014) Amsterdam Law Forum https://amsterdamlawforum.org/articles/10.37974/ALF.266.

considered an act of the State under International Law. Article 4(2) defines organ as "any person or entity which has that status in accordance with the internal law of the State". Consequently, when PMC employees undertake missions as an organ on behalf of a State, as recognised by that State's domestic legislation, the State is accountable for their unlawful actions [39].

State responsibility depends mainly on the link between the State and its private agents. This comes from the fact that the State can make the decision to delegate its 'governmental authority'. Here, persons are not considered organs of the State under Article 4 RSIWA but *de facto* agents of the State in that they have been empowered by the law of that State to exercise prerogatives of public authority according to Article 5 RSIWA. This does not depend on the nature of the agent, whether private or public, but on the nature of the mission that has been delegated. When PMC employees, as *de facto* government agents, carry out activities close to the public interest which are essential for the welfare, safety, and security of the general public often associated with government roles, within the meaning of Article 5 RSIWA, they make the State responsible for their actions [40]. In the event that PMCs do not comply with the initial terms of the contract by exceeding the powers conferred on them or contravening these instructions, these actions always remain the responsibility of the State [41].

In the landmark ruling *Nicaragua v. United States* by the International Court of Justice (ICJ), the US was brought before the Court by the Nicaraguan government, which accused it of violating IL by supporting the "Contras", rebels against the Sandinista government. To impute the acts of non- international actors to the US, the ICJ required that States must have "effective control of the military or paramilitary operations in the course of which the alleged violations were committed" [42]. The Court declared that the link between the Contras and the US was insufficient to engage US responsibility of the US due to lack of evidence, a decision criticised for the rigour of its examination of specific acts [43]. This approach is reflected in article 8 of the RSIWA, requiring proof of State

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[39] Ibid.

[40] Jackson Nyamuya Maogoto and Benedict Sheehy, "Private Military Companies & International Law: Building New Ladders of Legal Accountability & Responsibility" (2009) 11(1) Cardozo J Conflict Resol 99. https://www.academia.edu/698826/Private_Military_Companies_and_International_Law_Building_New_Ladders_of_Legal_Accountability_and_Responsibility.

41] Ieva Jankovska, "Accountability of Mercenaries and Private Military and Security Contractors in the existing International Legal Framework" (2017) Riga Graduate Law School https://dspace.lu.lv/dspace/bitstream/handle/7/45397/Jankovska_Ieva.pdf?sequence=1&isAllowed=y.

42] Nicaragua v United States of America (Judgment) [1986] ICJ Rep 14, para 65 https://www.icj- cij.org/sites/default/files/case-related/70/070-19860627-JUD-01-00-EN.pdf.

[43] Jackson Nyamuya Maogoto and Benedict Sheehy, "Private Military Companies & International Law: Building New Ladders of Legal Accountability & Responsibility" (2009) 11(1) Cardozo J Conflict Resol 99.https://www.academia.edu/698826/Private_Military_Companies_and_International_Law_Building_New_Ladders_of_Legal_Accountability_and_Responsibility.

authorisation for each act of private actors before conduct can be attributed to the State [44].

Subsequently, the ICJ's "effective control" formula was deemed insufficient. In *Prosecutor v. Dusko Tadic*, the Court preferred the "overall control" standard, which attributes the acts of an armed group to the State if the State "has a role in organising, coordinating or planning the military actions of the military group" [45]. Thus, States must direct or control private actors; merely supporting, encouraging or tolerating their actions is insufficient. According to authors Maogoto and Sheehy, if the State contracts with a PMC, it is responsible for the acts committed by its employees in the event of a breach of international law [46].

Contrarily, some authors argue that states often use specific contractual clauses to limit their liability towards PMCs. By referring to contract clauses, any activities exceeding the contract's terms are the responsibility of the PMCs, not the contracting State. This makes proving State responsibility for activities outside the contract difficult, as substantial evidence is needed to establish that the State directed or controlled these actions [47].

### 3.2 The Individual Responsibility of PMC Employees

States can be held liable under IHL, while personnel of PMCs can also be subjected to responsibility for their activities. Mostly, the responsibilities of PMCs employees will be at the national level, encompassing both civil and criminal liability. Individuals are bound to follow all the applicable laws of Human Rights, IHL and national laws of the contracting State, home State and territorial State [48].

An individual's liability depends on his status, whether they are a mercenary, a combatant or a civilian [49]. War crimes were originally designed to apply to members of the armed forces taking part in armed conflicts. However, PMCs recruited to fight offensively are generally the exception rather than the norm, as previously discussed. Thus, most PMC personnel hold civilian status under IHL. This raises the question of whether the rules of IHL apply to civilians. In *Prosecutor v. Akayesu* before the

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[44] Ibid.

[45] ICTY, Appeals Chamber, Prosecutor v Dusko Tadic (Judgment) ICTY-94-1-A (15 July 1999), paras 120 and 137 https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/40180

[46] Jackson Nyamuya Maogoto and Benedict Sheehy, "Private Military Companies & International Law: Building New Ladders of Legal Accountability & Responsibility" (2009) 11(1) Cardozo J Conflict Resol 99.https://www.academia.edu/698826/Private_Military_Companies_and_International_Law_Building_New_Ladders_of_Legal_Accountability_and_Responsibility.

[47] Ieva Jankovska, "Accountability of Mercenaries and Private Military and Security Contractors in the existing International Legal Framework" (2017) Riga Graduate Law School https://dspace.lu.lv/dspace/bitstream/handle/7/45397/Jankovska_Ieva.pdf?sequence=1&isAllowed=y.

[48] Ibid.

[49] Ibid.

International Criminal Tribunal for Rwanda (ICTR), the Court explains that compliance with IHL applies, among other things, only to persons who de facto represent the Government [50]. Accordingly, civilians could only be perpetrators of international crimes if their actions were attributed to a party to the conflict. In the cases discussed above, PMCs personnel who have not been recruited by a State and are not under its effective control or who are not performing missions of "public authority", would be excluded [51]. However, in the *Musema* Case, the ICTR took a broader approach. The Court established that "any civilian who behaves as an accessory to a violation of the laws and customs of war is himself liable as war criminal" [52]. However, civilians must have a link or a connection with a party to the conflict in order to be held responsible for committing a war crime [53]. In light of Lehnardt's findings, it can be concluded that private military personnel employed by entities not involved in the conflict may only be considered to have committed "common crimes" under domestic criminal law [54].

Furthermore, the crime must have been perpetrated during an armed conflict to be classified as a war crime, as these are delineated in conjunction with the armed conflict. The linkage criterion requires that the crime must be perpetrated against a victim as a consequence of the conflict, and that the decision to commit the crime, its method, and its objective must be related to the conflict [55]. This is the case if the conduct is considered to be "closely" or "obviously" related to the armed conflict [56]. The geographical and temporal scope also plays a role in defining war crimes. For example, violations need not take place during combat but may be committed after the fighting or in controlled territories still subject to IHL [57].

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[50] Prosecutor v Akayesu (Judgment) ICTR-96-4-T (2 September 1998), https://www.refworld.org/jurisprudence/caselaw/ictr/1998/en/19275.

[51] Chia Lehnardt, "Individual Liability of Private Military Personnel under International Criminal Law" (2008) 19(5) EJIL 1015 https://academic.oup.com/ejil/article/19/5/1015/505543.

[52] Prosecutor v Musema (Judgment and Sentence) Case No ICTR-96-13-A, T.Ch. I (27 January 2000), para 270-272https://www.refworld.org/jurisprudence/caselaw/ictr/2000/en/64129.

[53] Ibid, para 274.

[54] Chia Lehnardt, "Individual Liability of Private Military Personnel under International Criminal Law" (2008) 19(5) EJIL 1015 https://academic.oup.com/ejil/article/19/5/1015/505543.

[55] Prosecutor v Aleksovski (Judgment) IT-95-14/1-T (25 June 1999) https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/34882.

[56] Prosecutor v Delalić and others (Judgment) IT-96-21-T (16 November 1998), para 193 https://www.icty.org/x/cases/mucic/tjug/en/; Chia Lehnardt, "Individual Liability of Private Military Personnel under International Criminal Law" (2008) 19(5) EJIL 1015 https://academic.oup.com/ejil/article/19/5/1015/505543.

[57] Prosecutor v Kunarac and others (Judgment) IT-96-23-T (22 February 2001), para 58. https://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf.

In conclusion, PMCs have presented the framework of International Law with complex legal challenges. These companies operate in a grey area, caught between the traditional armed forces of States and private companies that set up operations in zones of armed conflict to generate profit. PMCs are counter-intuitively under-classified as civilians rather than combatants or mercenaries, mainly due to their particular types of activity, which are often linked to military operations.

Moreover, the liability associated with PMCs is just as complex. States recruiting PMCs personnel may be held responsible under IL for violations of IHL committed by said individuals. The question of the link between the State and PMCs personnel plays a crucial role in determining State responsibility for actions committed by non-international actors. Individuals can also be held responsible for violations of IHL. Once again, the category to which personnel belong, whether as mercenaries, combatants or civilians, will have important consequences in determining their liability.

Therefore, new regulations specific to PMCs should be created to better regulate them and hold them accountable. Nevertheless, this must go hand in hand with better practical application to compensate victims and eliminate the impunity of PMC members. For example, it might be worth restricting the activities of PMCs who take direct part in hostilities to the condition that they are incorporated into the armed forces of a party to the conflict in order to clarify their status as combatants [59]. In addition, the question of the liability of PMCs as a legal entity would be an additional weapon against abuses by PMCs for which States could be held responsible.

# Part Two: The European Legal Framework: A Comprehensive Analysis of the Main Legal Tools and Case Law

The European Union (EU) utilises PMCs abroad to fulfil two significant needs: providing security for its delegations and staff and supporting missions and operations under the Common Security and Defence Policy (CSDP). PMCs perform a range of tasks, from protection (close protection, bodyguard services, protection of compounds) to training of security forces, logistical support, airlift, airborne ground surveillance and reconnaissance [60]. The competence of the EU in the matter of the regulation and employment of PMCs is built upon the integration of primary, secondary and case law.

Preliminarily, the main legal instrument that regulates the employment of PMCs is the CSDP, which allows Member States to develop a comprehensive European strategy for facing conflicts and peace

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[59] Gillard E-C, "Business goes to war: private military/ security companies and international humanitarian law" (2006) 88 International Review of the Red Cross 525 https://international-review.icrc.org/sites/default/files/irrc_863_4.pdf.

[60] General Secretariat of the Council of the European Union, 'The Business of War – Growing risks from Private Military Companies' (2023) ART - Research Paper <https://www.consilium.europa.eu/media/66700/private-military-companies- final-31-august.pdf> accessed 11 June 2024

crises, protecting territorial integrity and upholding international peace and security.

A pivotal moment in the codification of PMCs was the Kosovo crisis between 1998 and 1999, where escalating ethnic tensions led to radicalised violence on such a scale that the international community refused to intervene and mitigate the more radical opponents, who argued that their demands could not be secured through peaceful means [61]. International pressure pushed Heads of State and Governments at the Cologne European Council to decide to enhance the already existing Common Foreign and Security Policy (CFSP) with a security and defence dimension, creating the CSDP, which was then integrated in the Treaty on European Union (henceforth TEU) [62] The Treaty of Nice (2003) finally codified the CSDP in EU primary law [63], while the first CSDP military operations were already underway in Bosnia and Herzegovina [64].

Each time the EU is declared competent on a certain matter, it is vital to decode if said competence is exclusive or shared. Since the CSDP fully integrates with the CFSP, its application belongs exclusively to the EU and is separate from the national foreign policies of the Member States. The respective competences of the EU and its Member States in matters of security and defence can thus best be qualified as parallel competences, being the actions of the Member States bound only by the duty of loyalty [65].

However, the path to a common European regulation on PSCs is still fragmented as there is no comprehensive and specific legislation yet adopted, with Member States currently regulating the matter on their own. The European Parliament (henceforth EP), for instance, has been advocating for the harmonisation of Member States' regulations in the sector of private security for a long time, and the Council adopted a recommendation on 13 June 2002 regarding cooperation between the competent national authorities of Member States responsible for it [66]. However, the EU Council deliberate to exclude private security from the European Commission's directive on competences

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[61] Paul Latawski, Martin Smith, 'The Kosovo crisis and the evolution of post-Cold War European Security' (2003) Manchester University Press

[62] Cologne European Council, Annex III to the Conclusions of the Presidency, 3 - 4 June 1999 < https://www.europarl.europa.eu/summits/kol2_en.htm#an3> accessed 25 June 2024

[63] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [2001] OJ C 80 1

[64] European Union [European External Action Service (EEAS)], "EEAS Missions and Operations," January 23, 2023, <https://www.eeas.europa.eu/eeas/missions-and-operations_en> accessed 25 June 2024.

[65] Carolyn Moser, Steven Blockmans 'The extent of the European Parliament's competence in Common Security and Defence Policy' (2022) Directorate General for the External Policies of the European Parliament<https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702559/EXPO_IDA(2022)702559_EN.pdf> accessed 12 June 2024

[66] Council Recommendation 2002/C 153/01 of 13 June 2002 regarding cooperation between the competent national authorities of Member States responsible for the private security sector Recommendation [2002] Official Journal C 153/1

and services in the European Internal Market. This conclusion implied, inter alia, the creation of uneven standards, barriers to market entry and limited cross-border cooperation. Instead, it tasked the Commission with assessing the possibility of presenting a separate proposal for the harmonisation of regulations concerning this very topic [67].

# 1. Sources of Law

### 1.1 European Primary Law: The Common Security and Defence Policy

The legal basis for the CSDP lies within the TEU and its annexes. Specifically, Title V, Chapter 2, "Specific Provisions on the Common Foreign and Security Policy", Section 2, outlines the competences and the institutional arrangements concerning security services. Article 42 provides a comprehensive definition of the CSDP and of its internal procedure, which shall provide the EU with an operational capacity using both civilian and military assets. The Union may use them on missions outside the European territory for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter. Subsequently, decisions relating to the CSDP, including those initiating a mission, should be adopted by the Council of the EU acting unanimously on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy (hereafter HR) or an initiative from a Member State. The HR may propose the use of both national resources and Union instruments, together with the Commission (Article 42(4) of the TEU). The possibility of qualified majority voting in the Council has never been used in this domain, not least because the clause on CFSP decision-making set out in Art. 31 is not applicable to decisions having military or defence implications (Article 31(4) TEU) [68]. The Treaty of Lisbon (2009), then, introduced a European capabilities and armaments policy (Article 42(3) of the TEU) and established that the European Defence Agency and the Commission work in liaison when necessary, most notably when it comes to the EU's research, industrial and space policies (Article 45(2) of the TEU) [69].

The legal framework is then completed by Protocol 1 on the role of National Parliaments in the European Union, Protocol 10 on the permanent structured cooperation established by Article 42 of the TEU and Protocol 11 on Article 42 of the TEU, and Declarations 13 and 14 concerning the common foreign and security policy.

Within this framework, the competence of the EP in the CFSP and the CSDP needs better clarification than the provisions of TEU Title V, Chapter 2, Section 1 (Common provisions) and Article 36, as the funding arrangements for both policies are set out in Article 41. According to Article 36 TEU, the HR has the obligation to regularly inform the EP on the most relevant aspects of the CFSP (and thus

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[67] Directive of the European Parliament and of the Council 2006/123/EC of 12 December 2006 on services in the internal market [2006] Official Journal, L 376

[68] Consolidated Version of the Treaty on European Union [2012] C 326/13

[69] Treaty of Lisbon amending the Treaty on European Union and the Treaty on the Functioning of the European Union [2007] OJ C 306 1

CSDP), and to attentively take into consideration the views expressed since the EP is only involved partially in the design and implementation of the CFSP/CSDP. In practice, however, the EP plays a relatively important role in exercising scrutiny over the CFSP, deriving it from its broader parliamentary prerogatives. First, the EP must approve the composition of the Commission, and Article 17(7) TEU makes particular reference to the HR in his capacity as Vice-President (VP) of the Commission. Moreover, the Parliament supervises the Commission's work, considering thepossibility of a vote of no-confidence (Article 17(8) TEU), sanctioning the Commission as a collective body.

To summarise, according to Article 36 TEU, it is possible to discern three dimensions of the parliamentary involvement, namely: (i) the provision of information; (ii) a supervisory and deliberative mandate; and (iii) an advisory function. Finally, the EP delegated this competence to its internal Committee on Foreign Affairs (AFET), which studies most questions of EU external action and is responsible for inter-parliamentary assemblies for matters falling under its action [70].

### 1.2 Secondary Law

Despite the absence of a common regulatory framework for PMCs/PSCs, the EU has played a pivotal role in promoting national and regional cooperation over the employment of various military and security services. It is generally accepted to state that EU policies and regulations fall into three categories under the framework of secondary law: Council regulations, common positions and joint actions [71].

The first category encompasses Council regulations, such as the Council Regulation (EC) No. 428/2009, which sets up a community regime governing the control of exports, transfer, brokering and transit of dual-use items, i.e. goods with civilian and military applications, which is directly applicable to Member States [72]. This regulation applies directly to Member States and extends to dual- use items listed in its Annex, such as telecommunications and information security, sensors and lasers, navigation and avionics, marine technology, and aerospace and propulsion systems, including dual-use items that might be sold by PMCs/PSCs as part of their services such as jamming equipment, radio direction finding equipment, cryptographic software and radar systems. This extension encompasses the brokering and transit of these items, in addition to previously regulated export and transfer activities [73]. In certain circumstances these activities might be relevant for PMCs/PSCs due to the incorporation in the regime of the export, transfer and brokering of dual-use goods listed in

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[70] https://www.europarl.europa.eu/committees/en/about/list-of-committees

[71] Elke Krahmann, Aida Abzhaparova The Regulation of Private Military and Security Services in the European Union: current policies and future options (2010) EUI Working Paper AEL 2010/8 <https://cadmus.eui.eu/bitstream/handle/1814/18295/AEL_2010_8.pdf?sequence=1&isAllowed=y> accessed 14 June 2024

[72] Council Regulation (EC) No. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items [2009] Official Journal L 134/1

[73] *Ibidem.*

brokering of dual-use goods listed in categories 1 to 9 of the Annex. Consequently, a new layer of regulation has been established over the involvement of PMCs that deal with such items. However, the specific implications will change depending on the peculiar nature of the provided security services.

The second category pertains to Council common positions, formal opinions adopted on a legislative proposal when the Council does not agree with the EP at first reading during an ordinary legislative procedure. It includes the Council Common Position 2008/944/CFSP [74], which replaced the EU Code of Conduct on Arms Exports [75], Council Common Position 2003/468/CFSP [76] on the control of arms brokering, and numerous Common Positions establishing embargoes on the provision of technical assistance and military services to select countries or individuals.

Focusing on Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment, Article 2 establishes legally binding criteria for issuing export licences for military equipment and services, surpassing the previous Code of Conduct by including annual reports on Member States arms exports, covering not just equipment but also services like brokering, technology transfer, and maintenance, and considering factors like potential for human rights violations, armed conflict, terrorism, and regional instability [77].

Taking into consideration the second aforementioned source, Council Common Position 2003/468/CFSP on the control of arms brokering made binding the national regulations of arms brokering among the Member States. Specifically, the text mandates that "Member States will take all necessary measures to control brokering activities taking place within their territory", but it also encourages Member States "to consider controlling brokering activities outside their territory carriedout by brokers of their nationality resident or established in their territory" [78]. Both common positions highlight EU efforts to control trade in the sector of military equipment and services, impacting PMCs operations. However, the effectiveness of such regulations depends on the enforcement mechanisms employed by the EU Member, whose specific legal framework in this sector will be analysed later in the text.

The third category refers to Council joint actions, i.e., legal acts defining common actions such as the CFSP on technical assistance related to weapons of mass destruction (WMDs) and embargoed

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[74] Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment [2008] Official Journal L 335/99

[75] European Parliament resolution 2009/C 66 E/08 of 13 March 2008 on the EU Code of Conduct on Arms Exports — Failure of the Council to adopt the Common Position and transform the Code into a legally binding instrument [2008]. Official Journal of the European Union OJ C, C/66.

[76] Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering [2003] Official Journal L 156/79

[77] See note 64.

[78] See note 66.

destinations and the export of small arms and light weapons. A limited range of services that may be provided by PSCs or PMCs is controlled through the EU Council Joint Action 2000/401 of 22 June 2000 [79], regulating 'technical assistance' related to WMD, missiles for the delivery of WMD and embargoed destinations. Technical assistance as defined by the source covers a wide spectrum of services, albeit only regarding WMDs, including "technical support related to repairs, development, manufacture, assembly, testing, maintenance, or any other technical service, and may take forms such as instruction, training, transmission of working knowledge or skills or consulting services" [80]. Moreover, for PMCs/PSCs, the Joint Action also "encourages" Member States to "consider the application of such controls also in cases where the technical assistance relates to military end-uses other than those referred to in Article 2 [...] and is provided in countries of destination subject to an arms embargo" [81]. Therefore, if, on the one hand, the Joint Action shows the EU's evolving approach to regulating activities with security implications, the necessity for a more comprehensive framework becomes increasingly clear.

Navigating the complex regulatory landscape that aims at said employment, it is worth noting that on 13 December 2021, the Council adopted a set of restrictive measures against the Wagner Group, a Russia-based unincorporated private military entity.82 The Wagner Group has recruited, trained and sent private military operatives to conflict zones around the world to fuel violence, loot natural resources and intimidate civilians in violation of international law, including international human rights law [83].

The restrictive measures imposed were agreed under four different sanctions regimes: the EU Global Human Rights Sanctions Regime and sanctions regimes relating to the situation in Libya and Syria, as well as for actions undermining Ukraine's territorial integrity [84]. In addition, listed individuals are subject to a travel ban to the EU. Moreover, persons and entities in the EU are prohibited from making funds available, either directly or indirectly, to those listed [85].

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[79] Council Joint Action 2000/401 of 22 June 2000 concerning the control of technical assistance related to certain military end-uses [2000] Official Journal L 159/216

[80] *Ibidem*

[81] *Ibidem*

[82] Council of the European Union. EU imposes restrictive measures against the Wagner Group [Press release]. 13 December 2021. https://www.consilium.europa.eu/en/press/press-releases/2021/12/13/eu-imposes-restrictive-measures- against-the-wagner-group/

[83] *Ibidem.*

[84] European Union. (2023). Council Implementing Regulation (EU) 2023/2875 of 18 December 2023 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of Russia. https://eur-lex.europa.eu/legal- content/EN/TXT/PDF/?uri=OJ:L:2023:059I:FULL

[85] Council of the European Union. Wagner Group: Council adds 11 individuals and 7 entities to EU sanctions lists [Press release]. 25 February 2023. https://www.consilium.europa.eu/en/press/press-releases/2023/02/25/wagner-group-council-adds-11-individuals-and-7-entities-to-eu-sanctions-lists/

## 2. Case Law of the Court of Justice of the European Union

The Court of Justice of the European Union (henceforth CJEU) has played a pivotal role in the definition of the competences of the EU and its Member States through some relevant judgments, in which it affirmed EU competence over the regulation of internal security services under the first pillar of regulation of the internal market [86]. Finally, the European Court of Justice has established the competence of the EU Commission over PSCs in several rulings which identify private security services as an "economic sector": C-114/97 (vs. Spain), C-355/98 (vs. Belgium), C-283/99 (vs. Italy), and C-189/03 (vs. Netherlands).

Focusing the attention on one of the above-mentioned cases, in C-283/99 (vs. Italy), the judgement of the Court clearly stated that wherever a Member State provides that private security work (including surveillance or caretaking of movable property and buildings) may be carried out on its territory, subject to licence, only by private security firms holding the nationality of that State, the Member State in question fails to fulfil its obligations under Articles 52 and 59 of the Treaty (now, after amendment, Articles 43 EC and 49 EC).

According to the CJEU case law, two requirements must be fulfilled to declare an activity non-economically: the exercise of public authority, involving what may be termed "strategic services," [87] and the expression of social solidarity, involving social services. The first category covers services that ensure the smooth functioning of society, such as communal funeral arrangements, port mooring assistance, air traffic control systems, and anti-pollution surveillance programs [88]. However, according to the Court, private security services are not strategic services and are fully subject to the Treaty rules, the same as, for instance, the labelling and the control of ecological products [89]. The conceptual limits of the second category are even less clear, as it is very difficult to assess when any given activity embodies 'enough' solidarity for it not to qualify as economic [90].

To summarise, by establishing private security services as economic activities - therefore involving EU competence - the CJEU has paved the way for a potential future harmonisation of regulations across all Member States, leading to a more integrated security sector within its territory.

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[86] Elke Krahmann Regulating Military and Security Services in the European Union (2006) Brunel University Research Archive <https://core.ac.uk/download/pdf/29140184.pdf> accessed 14 June 2024

[87] Vassilis Hatzopoulos The concept of 'economic activity' in the E U Treaty : from ideological dead-ends to workable judicial concepts (2011) Research Paper in the Department of European Legal Studies - College of Europe <https://www.coleurope.eu/sites/default/files/research-paper/researchpaper_6_2011_hatzopoulos_0.pdf> accessed 16 June 2024

[88] *Ibidem*

[89] *Ibidem.*

[90] *Ibidem*

# 3. National Frameworks

As previously anticipated, a uniform configuration of the definition of PMCs does not exist. To provide a clear understanding and a comprehensive analysis of the legal framework relevant to the case studies which will be analysed in the following section, it is now worthwhile dedicating attention to the regulatory acts of some European countries and the US.

PMC employees can be subject to domestic criminal law and civil liability in the contracting country of operation and in the employee's country of citizenship. However, the absence of targeted rules represents an obstacle to enforcement. Even if there is no model that could be used as a guide to good practice, scholars and practitioners indicated a few needed fundamental defining characteristics: definition of PMCs (including an exhaustive list of services that qualify as combat-related); regulation of their activity, both domestically and abroad, to national criminal and civil liabilities; regulation of all stages of the contract management process, including areas such as subcontracting, financial auditing and public procurement; standard corporate requirements such as business registration, qualifications of personnel and recordkeeping of employee activity; and the ministry or agency responsible for the oversight of PMCs, for instance, the defence department or customs service, or perhaps a special monitoring body [91].

Additionally, many European countries have looked to the UK as a model for the outsourcing of military services and have embarked upon similar measures. The British Government, in fact, shaped a market-driven approach to the regulation of the hiring of Private Companies, outsourcing military functions with the direct involvement of the government itself. This regulatory mechanism is based on Private Finance Initiatives (PFIs), which deeply changed the relationship between public and private in military affairs partnerships. Following PFI architecture, the private company hired by the Ministry of Defence over long periods of time (10 – 40 years), not only grants its services but also builds and maintains military facilities and logistics, and trains specialised personnel [92].

To maintain a clear distinction between combat and support personnel, the Ministry enacted the Reserve Forces Act (Part V) in 1996, which allows private companies to provide military support services in conflict situations by enrolling parts of their workforce as voluntary "Sponsored Reservists". When serving with the Armed Forces, these employees become subject to the Service Discipline Acts and Service regulations [93].

The lack of cooperation in the definition and the regulation of PMCs creates a complex legal

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[91] David Law Private Military Companies (2006) The Geneva Centre for the Democratic Control of Armed Forces <https://www.files.ethz.ch/isn/17438/backgrounder_09_private-military-companies.pdf> accessed 10 June 2024

[92] Elke Krahmann Private Military Services in the UK and Germany: Between Partnership and Regulation (2005) European Security, Volume 14, Number 2 <file:///C:/Users/Utente/Downloads/AuthorsAcceptedManuscriptKrahmannES2005.pdf> accessed 9 June 2024

[93] United Kingdom. (1996). Reserve Forces Act 1996 (c. 14). https://www.legislation.gov.uk/ukpga/1996/14/data.pdf

landscape. Even though the UK currently serves as a prominent model, each State applies its own peculiar framework. This fragmentation underscores the need for a comprehensive European legal action for regulatory tools of PMCs. In light of the foregoing, it becomes necessary to conduct a comparative analysis of the specific legal approaches of selected States.

a) *Germany*

Germany has taken steps towards the use of private companies through the reform of the Bundeswehr since the mid-1990s [94]. In 1994, the German Minister of Defence ordered for the first time that all military services had to be redesigned and privatised where necessary. However, the most significant attempt to regulate PMCs is the 1999 Framework Agreement 'Innovation, Investment and Efficiency in the Bundeswehr' between the Minister of Defence and representatives of the German economy [95]. The Government, then, created a private company, the Corporation for Development, Procurement and Operations, to evaluate the options for a public-private partnership in the sector.

Rather than relying exclusively on contractual obligations, these public-private partnerships enable the German army to exert immediate control over these companies and determine how services are provided. Moreover, through governmental shareholding, the Ministry of Defence becomes publicly accountable for the operation of private military services.

b) *France*

In France, a PMSC is a company interested in defence outsourcing and selling of military services. Although the UK model is rejected, French defence analysts and PMSCs have never formally defined an alternative "French model" [96]. Additionally, contracts in the security and defence sector with private companies are typically not available to the public. The justifications for this lack of transparency include the raison *d'Etat*, protection of operational data, confidentiality concerns [97].

The Ministry of Defence bases its approach on two documents: a Ministerial Directive (2000), which defines outsourcing as delegating functions previously performed by the State to an external partner [98], and an Outsourcing Guide. The four main categories for outsourcing are training, support, equipment and real estate. The annexed report to the 2003-2008 Military programming law plans the

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[94] Elke Krahmann Private Military Services in the UK and Germany: Between Partnership and Regulation (2005) European Security, Volume 14, Number 2 <file:///C:/Users/Utente/Downloads/AuthorsAcceptedManuscriptKrahmannES2005.pdf> accessed 9 June 2024

[95] Bundesministerium der Verteidigung (BMVg), Die Bundeswehr der Zukunft. Sachstand der Reform, 15. June 2001: Bundesministerium der Verteidigung

[96] Christian Olsson. Commercialising Security in Europe. (2013) Routledge. ISBN: 9780203375341

[97] Veronique. Capdevielle The Regulatory Context of Private Military and Security Services in France (2009) PRIV- WAR Report <https://iow.eui.eu/wp-content/uploads/sites/40/2013/11/nr-11-09-FRA.pdf> accessed 13 June 2024

[98] Ministerial Directive n° 30 892, 3 August 2000

pursuit and strengthening of the outsourcing policy and mentions that "the armed forces can reduce the weight of tasks which are not of an operational nature or the non-essential tasks in times of crisis, by contracting with public or private persons" [99]. During operations, such armed forces can outsource the capabilities they lack, taking into account several limitations, to achieve three purposes: the installation, the support and the disengagement of the forces [100].

To adapt to practice, the legal framework has evolved with the entry into force of the Public Procurement Contracts Code (2004) [101] and the Prescription for private-public partnerships [102]. According to those legal instruments, the Ministry of Defence can sign three different types of outsourcing agreements: public contracts; delegations of public services, and partnership contracts with the State.

c) *Netherlands*

In the Netherlands, the hiring of PMCs and PSCs is subject to a licence of the Ministry of Justice. A security organisation is defined as a private organisation conducting "security services", i.e., the protection of the security of persons and goods or the guarding against disturbance of the peace on terrains and in buildings. There are several types of licenses that the Ministry can issue, such as private surveillance organisations, private alarm centres, private money and valuables transport services and other private organisations conducting security services (e.g., bouncers) [103].

Although the contracts between the government and the PMCs/PSCs operating in conflict situations are not disclosed for reasons of competition, protection of operational data and privacy of personal data, the government has indicated that the contracts contain instructions regarding the permitted

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[99] France. (2003). Law No. 2003-73 of January 27, 2003, on military programming for the years 2003 to 2008 (1). Journal Officiel de la République française, n° 24 du 29 janvier 2003, NOR: DEF20030001D, TEXTE1 [Official Journal of the French Republic, No. 24 of January 29, 2003, NOR: DEF20030001D, TEXTE1]. https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000234154

[100] *Ibidem*.

[101] France. (2004). Decree No. 2004-15 of January 7, 2004, enacting the Public Procurement Cod. Journal Officiel de la République française, n° 8 du 10 janvier 2004, NOR: DEF20040001D, TEXTE1 [Official Journal of the French Republic, No. 8 of January 10, 2004, NOR: DEF20040001D, TEXTE1]. https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000023086525/LEGISCTA000048322372/

[102] France. (2004). Ordinance No. 2004-559 of June 17, 2004, on partnership contracts, Article 1-I. Journal Officiel de la République française, n° 140 du 20 juin 2004, NOR: ECOX0400248D, TEXTE1 [Official Journal of the French Republic, No. 140 of June 20, 2004, NOR: ECOX0400248D, TEXTE1]. http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000438720&dateTexte=

[103] Act on the private security organisations and private investigation bureaus (Wet particuliere beveiligingsorganisaties en recherchebureaus), 24 October 1997; Regulation on security organisations and private investigation bureaus (Regeling particuliere beveiligingsorganisaties en recherchebureaus), 3 March 1999, as amended on 2 December 2002 (with respect to educational qualifications) by Regulation of the Ministry of Justice nr. 5199069/DBZ/02.

use of armed force [104]. These instructions are more restrictive than those of the Dutch government forces since the private contractors hired by the government to protect Dutch officials and diplomats abroad, according to their contract – and analogous to government-employed personnel in similar positions – are only allowed to use violence in extreme emergency situations [105].

d) *United States of America*

The US Arms Export Control Act of 1968 and subsequent amendments regulate the export of security services in the same way as for the export of goods: they strictly regulate to whom the services are exported but not the manner in which they are used. US companies providing military services to foreign nationals in the US or overseas are required to obtain a licence from the US State Department under the International Transfer of Arms Regulations. However, the licensing process itself does not follow a standard procedure. In fact, there is no formal oversight once a licence has been granted, nor are there provisions to ensure transparency other than for contracts exceeding 50 USD million, which require congressional notification before being granted. Responsibility for the enforcement of licensing controls over commercially exported services of US PMCs is primarily with overseas embassy officials, and the Customs Service regarding arms and other materials [106].

# Part Three: The Actions of PMCs/PSCs in Practical Cases: in the Balkans and in Afghanistan

Due to the growth in internal conflicts and the increasing need for military advice, close protection, and logistical support following the end of the Cold War, private military organisations and private security organisations (PMCs/PSCs) were born in the 1990s. By 2013, 40,000 private security and defence companies in Europe employed almost 1.5 million contractors, indicating a major development in the market. The clientele of this sector has been continuously enlarging itself to include military agencies and national governments. PMCs and PMSCs provide a wide range of services both domestically and abroad, such as post-conflict reconstruction, the provision of modern military technology, jail surveillance, and patrols of critical locations in addition to logistical and combat assistance.

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[104] See Answers by the Ministers of Defense and Foreign Affairs on questions raised in connection with the government reaction to the AIV-advice, 20 June 2008, p.15.

[105] Guido den Dekker The Regulatory Context The Regulatory Context he Regulatory Context of Private Military and Security Services of Private Military and Security Services in the Netherlands (2008) PRIV-WAR Report <https://priv- war.eui.eu/wp-content/uploads/sites/40/2008/12/nr-01-08-the-netherlands.pdf> accessed 16 June 2024

[106] David Law Private Military Companies (2006) The Geneva Centre for the Democratic Control of Armed Forces <https://www.files.ethz.ch/isn/17438/backgrounder_09_private-military-companies.pdf> accessed 10 June 2024

The EU has called on some of these companies as part of its CSDP to accompany delegations, secure military or civilian sites, or support its humanitarian activities around the world [107]. In this context, the procedures for signing contracts with such companies and the legal framework surrounding these contracts and the activity of these PMCs/PMSCs can vary within Europe, even if a system of common rules is being developed. Some of these military and security companies have been accused of committing human rights violations and sometimes even serious breaches of IHL, in some cases amounting to war crimes [108]. While the EU works with certain PMCs/PMSCs, it combats those that pose a threat to the EU's interests and values.

In this section, some missions of PMCs/PMSCs with links to the EU will be analysed to understand the practical application of the legal bases relating to these companies. Additionally, this analysis will help to realise how these texts can be improved to provide a better framework for the activities of PMCs/PMSCs and avoid the incidents that may have occurred in the past.

# 1. The Use of PMCs in the Balkans During the 1990s

Firstly, the use of private military and security companies will be discussed in the context of the conflicts that took place in the Balkans during the 1990s, as it is at the beginning of the post-Cold- War era that PMCs began to be used more consistently by national governments.

In 1995, the former Yugoslavia was in the grip of an internal conflict between various ethnic groups of different religious denominations (Orthodox Serbs, Muslim Bosnians, Catholic Croats, and others). The US were present in the region through the Implementation Force (IFOR) set up by the North Atlantic Treaty Organisation (hereby NATO) at the end of 1995. The aim of this mission was to maintain peace in Bosnia-Herzegovina between the parties involved in the conflict there [109]. While their foreign policy focused mainly on conflicts in the Middle East, the US government realised that the Bosnian Muslim population was receiving logistical and military support from Iran, which had sent nearly 1,500 military advisers and shipments of arms to help the Bosnians in their fight against the Serb army [110]. After various meetings with certain members of European governments, the US concluded that it could not allow Iran to extend its influence in Europe in this way, and that the Bosnians would eventually be completely defeated by the Serbs if they did not receive support from the West. To support the Bosnians in their fight, a way had to be found to provide them with this support. Since American participation in IFOR imposed a duty of impartiality towards all parties in the

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[107] General Secretariat of the Council of European Union, "The Business of War – Growing Risks from Private Military Companies" (Council of the European Union 2023) <https://www.consilium.europa.eu/media/66700/private-military-companies-final-31-august.pdf>

[108] *Ibidem*

[109] North Atlantic Treaty Organization, "La Force de Mise En Œuvre (IFOR) En Bosnie-Herzégovine (1995-1996)" (October 27, 2010) <https://www.nato.int/cps/en/natolive/topics_49289.htm>

[110] Mohlin M, "Commercialisation of Warfare and Shadow Wars" (2014) 9 St. Antony's International Review 24<https://www.jstor.org/stable/26212349>

conflict, the US Chief of Staff at the time, General John Shalikashvili, decided the Bosnians needed help, but not from IFOR [111]. Instead, from his perspective, this could be achieved by making contractual arrangements with one or more companies specialising in the military field. This would make it possible to respect the Dayton Accords (1995), which had been set up between Bosnia- Herzegovina, Croatia and Serbia to establish peace between the parties to the Yugoslav conflict, while providing discreet aid to the Bosnians without including the United States, NATO or IFOR in the aid programme [112].

The American aid strategy was given concrete form in a plan called the Military Stabilisation Programme (MSP), led by the US Department of Defence. This plan was divided into three parts: the first concerned logistical support sent to the Armed Forces of Bosnia-Herzegovina (AFBIH), in the form of vehicles and equipment; the second part took the form of military training conducted outside Bosnian territory; and the third depended on the private military company Military Professional Resources Incorporation (MPRI), which was to train Bosnian troops in Bosnia [113]. The official contract between this company and the government of Bosnia-Herzegovina was signed on 16 July 1996 in Sarajevo. Although the contract was signed between said parties, the US government was behind the scenes steering the project. Indeed, the agreement passed between MRPI and the Bosnian government could not be revealed as Bosnia was meant to promote peace and not launch another round of battles with its opponent, Serbia.

To generate international support for the initiative, the Americans informed multiple European countries of their plans, including Germany and France, with Germany expressing its interest to the US State Department [114]. Subsequently, it was jointly decided that Germany would take part in the aid project. Germany then provided training for the personnel in charge of the helicopters (pilots and maintenance personnel) as well as for the soldiers in charge of the M113 transport vehicles supplied by the US to the Bosnian army. The training took place at Bundeswehr bases in Germany [115]. Nevertheless, Germany did not take part in the American action via the MPRI company. The contract signed between MPRI and the government of Bosnia-Herzegovina included, on the one hand, training for officers and troops to make them fully operational for combat and, on the other, a complete reorganisation of the Bosnian army by analysing what this army could do and what changes were needed to make it more professional [116].

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[111] Committee on Armed Services, Situation in Bosnia: Hearings Before the Committee on Armed Services, US Senate, One Hundred Fourth Congress, First Session (US Government Printing Office 1995) 345-347.

[112] *Ibidem*

[113] Mohlin M, "Commercialisation of Warfare and Shadow Wars" (2014) 9 St. Antony's International Review 24<https://www.jstor.org/stable/26212349>

[114] Telegram from the Secretary of State in Washington DC to the US Embassy in Bonn' (3 July 1996) 960703

[115] Telegram from the Secretary of State to the US Embassy in Athens' (22 November 1996) 961122

[116] Mohlin M, "Commercialisation of Warfare and Shadow Wars" (2014) 9 St. Antony's International Review 24<https://www.jstor.org/stable/26212349>

Various observers, including some in Europe, feared that the MRPI's training of the Bosnian army would be so effective that the latter would restart the conflict, thereby gaining a military advantage over the Serb army. However, the 1995 Dayton Accords severely restricted the development of the armies of both sides in the conflict, particularly regarding troop training. In addition, the US Department of Defence gave MPRI the task of training the Bosnian army in a defensive rather than offensive capacity [117].

As aforementioned, the US did not respect IL and the principle of impartiality during the Yugoslav conflict with IFOR. Indeed, even if the Dayton accords were supposed to implement peace on the long term, the strategy of the US of using MRPI to aid the Bosnian government did not seem to indicate a choice to promote peace at a time when it was urgently needed in the region. This created a division between political leaders who consider that PMCs/PSCs are useful tools for carrying out their policies and those who think that, on the contrary, these companies are incompatible with State action in the field of security [118].

In today's world of advanced technology such as drones and covert operations, the use of PMCs/PSCs blurs the distinction between civilians and combatants, allies and adversaries and even between two nations in conflict. This helps explain why the EU has a very strict policy towards this type of company, as set out in various Council of the EU directives (2004/89/EC, 2009/C 115/01, 2011/C 242/01) on the use of private military companies in EU operations and missions. According to these directives, contracts with private military companies must be totally transparent and subject to very strict controls. Furthermore, the use of such companies must be carried out in accordance with IL [119].

To illustrate the use of PMSCs in the same context, in the early 2000s, the EU set up a police mission in Bosnia-Herzegovina, the European Union Police Mission in Bosnia-Herzegovina (EUPM), which it subcontracted to PMSCs [120]. These contracts, carried out this time within the framework of EU standards for PMCs/PMSCs, gave the chosen companies the objective of providing close protection services to certain official members of this police mission [121]. Since the early 2010s, this type of subcontracting has ceased, given the climate of relative peace in Bosnia-Herzegovina, with security levels having returned to normal [122]. The EU has also terminated contracts with the PMSCs

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[117] *Ibidem*

[118] General Secretariat of the Council of the European Union, « The Business of War – Growing Risks from Private Military Companies » (2023) <https://www.consilium.europa.eu/media/66700/private-military-companies-final-31- august.pdf>

[119] Alexander Kees, « Regulation of Private Military Companies » (2011) 3 Goettingen Journal Of International Law 199 <https://www.gojil.eu/issues/31/31_article_kees.pdf>.

[120] European Parliament, "The Role of Private Security Companies (PSCs) in CSDP Missions and Operations" (Policy Department, Directorate-General for External Policies 2011 <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/433829/EXPO- SEDE_ET%282011%29433829_EN.pdf>

[121] *Ibidem*

[122] *Ibidem*

employed to avoid any complicated situations that might arise. It is now the authorities of Bosnia-Herzegovina that are providing security services to EUPM officials like the Head of Mission or the EUPM security staff themselves [123].

In Kosovo, the conflict that took place from 1998 to 1999 between the former Yugoslav army and the Kosovar army left many bombs and landmines that had not exploded at that time [124]. In 2000, the government of Kosovo decided to contract with a British PMC to clear the territory of all the explosive material which had not been defused already. The contract provoked a scandal at home and abroad. Indeed, London's firm Defence Systems employed for this mission had a notorious history: its past missions had been linked to mercenary activities in the Democratic Republic of Congo and was allegedly expelled from Angola for performing "illegal activities" [125].

In the same region, the EU also employed PMSCs to protect its staff and premises in Kosovo as part of the European Union Rule of Law Mission (EULEX). This task was given in 2010 to the private security company Henderson Risk Limited (its Kosovar branch, Henderson Asset Protection was employed) for an annual fee of 2.350 million euro [126]. The guards employed under this contract to monitor the perimeter surrounding the European buildings on site were unarmed and had no decision- making powers [127].

## 2. Deployments in the Middles East: Afghanistan

The EU used various PSCs for its missions in the Middle East. In the region, as part of the EU Police Mission in Afghanistan (EUPOL), the EU called on the Armor Group company to create a "hostile training environment" for the sum of 256,000 euro [128]. The security situation for personnel from international institutions in the country has been deplorable since 2007 and has only got worse [129]. As the EU's most important duty in this kind of situation is to look after the civilian and military members of its missions, it requested the services of PSCs to make up for the shortfall in personnel,

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[123] *Ibidem*

*[124] Barnett A, "Anger at Kosovo Mines Contract" The Guardian (May 7, 2000) <https://www.theguardian.com/world/2000/may/07/balkans>*

[125] Barnett A, "Anger at Kosovo Mines Contract" The Guardian (May 7, 2000) <https://www.theguardian.com/world/2000/may/07/balkans>

[126] Henderson Asset Protection, & Rexha, E. (2010). SERVICE CONTRACT AWARD NOTICE Framework Contract for Security Guarding Services Location: Kosovo (Framework Contract EuropeAid/128856/D/SER/KOS).EULEX Kosovo. https://www.eulex-kosovo.eu/docs/tenders/SecurityGuardingServices2/Award%20Notice_Security%20Guarding.pdf (Original work published 2008)

[127] European Parliament, "The Role of Private Security Companies (PSCs) in CSDP Missions and Operations" (Policy Department, Directorate-General for External Policies 2011) <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/433829/EXPO-SEDE_ET%282011%29433829_EN.pdf>

[128] *Ibidem*

[129] Ibidem

which offers market opportunities for PSCs in terms of security training for Afghan forces and logistical support. The EU also signed a contract with Hart Security to provide security for its mission headquarters in Kabul. They were also entrusted with additional close security missions for civilians and important diplomatic personnel [130].

Outside the Afghan capital, EUPOL members work with Provincial Reconstruction Teams, whose protection is sometimes provided by private actors (PSCs or militias of some kind). As EUPOL could not count on the help of NATO through ISAF for its security personnel, nor did it have enough to cover its territory in the south and east of Afghanistan, some Member States part of the EUPOL mission had to employ PMSCs to ensure their training facilities were secured. For example, the German component of EUPOL hired Saladin Security Afghanistan, the local branch of the British firm Saladin Security [131]. Germany might be the European country that has used the most PSCs. Indeed, since 2006, more than half of its army compounds have been protected by private security guards. For example, it used these types of companies to provide close security services in its diplomatic representation in Kabul and for the EUPOL training centres in the cities of Mazar-e Sharif and Faisabad [132]. As private contractors are recruited for close security, the employees of the firm are allowed to use force only for self-defence [133].

The Dutch army employed PSCs in the same way as other armies to provide security services to civilian and military compounds. The company Afghan Security Guard (ASG) was employed to make the perimeter outside of Tarin Kowt, and Deh Rawod secured both mixed Australian and Dutch bases in Afghanistan. The same company also provided close security services for the Dutch diplomatic representation in Kabul [134].

Although private military companies sign contracts with governments that give them a special status different from that of a regular army, they are still subject to the same rules as these armies. For example, in the Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, there is a section explaining the rules that apply to the ISAF, notably concerning jurisdiction and the framework within which the actions of ISAF forces and their associates could be judged if they were to perpetrate crime [135]. The following points can be highlighted from this report: insofar as it is consistent with the UNSCR (1386), all ISAF and assisting

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[130] *Ibidem*

[131] *European Parliament, "The Role of Private Security Companies (PSCs) in CSDP Missions and Operations" (Policy Department, Directorate-General for External Policies 2011) <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/433829/EXPO-SEDE_ET%282011%29433829_EN.pdf>*

[132] *Ibidem*

[133] *Ibidem*

[134] *Ibidem*

[135] International Security Assistance Force (ISAF) and Interim Administration of Afghanistan, "MILITARY TECHNICAL AGREEMENT" <https://www.bits.de/public/documents/US_Terrorist_Attacks/MTA-AFGHFinal.pdf>

employees, including related liaison staff, holding advantages and protections under this agreement, shall respect Afghan laws and abstain from actions that are incompatible with the mission's objectives [136].

Under no circumstances ISAF and its support personnel, including liaison officers, may be removed from the sole authority of their country in respect of any criminal or disciplinary offences they may have committed on Afghan territory [137]. Moreover, the nations that contribute to ISAF will get assistance from the Interim Administration in carrying out their respective responsibilities [138]. In addition, there must be no personal arrests or detentions of the ISAF or its supporting personnel, including related liaison staff. Any ISAF and supporting troops who are inadvertently detained or arrested, including associated liaison staff, will be turned over to ISAF authorities right away [139].

The Interim Administration consents that without the express consent of the contributing nation, ISAF and supporting troops, including related liaison staff, may not be turned over to or else transferred to the jurisdiction of an international court or any other body or State. The customs and laws of Afghanistan shall be respected by ISAF Forces [140]. Additionally, any damage to private or public property resulting from an operation carried out in furtherance of the ISAF Operation must not be held against the ISAF or its soldiers [141]. The Interim Administration will file claims to the ISAF on behalf of private individuals or property, as well as any additional damage or harm to Interim Administration staff or property [142].

Furthermore, at the NATO summits in Prague in 2002 and Lisbon in 2010, the general principles of engagement in conflict situations to respect international and humanitarian law were reiterated, with several key points [143]. Firstly, it is important to maintain a clear distinction between combatants and civilians. ISAF soldiers and their associates have a duty to do everything in their power to separate enemy combatants and civilians, so as not to cause civilian casualties [144]. Secondly, proportionality is paramount, as the use of force must be measured against the threat faced by NATO

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[136] *Ibidem*

[137] International Security Assistance Force (ISAF) and Interim Administration of Afghanistan, "MILITARY TECHNICAL AGREEMENT" <https://www.bits.de/public/documents/US_Terrorist_Attacks/MTA-AFGHFinal.pdf>

[138] *Ibidem*

[139] *Ibidem*

[140] *Ibidem*

[141] *Ibidem*

[142] *Ibidem*

[143] Nato, "Lisbon Summit Declaration Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Lisbon" (NATO) <https://www.nato.int/cps/en/natohq/official_texts_68828.htm>

[144] *Ibidem*

forces and associates [145]. If force is used, it must be as a last resort.

Finally, regarding respect for human rights and precautions against collateral damage, ISAF and any NATO force must comply [146]. It is necessary to be as cautious as possible, and to take every possible precaution to minimise collateral damage to civilians and civilian infrastructure. In addition, the Prague and Lisbon documents specify that members of NATO forces must receive training on these rules of engagement to respect them to the letter. Should these rules be violated, it is impossible not to set up an investigation to understand the causes that led to the illegal action and to condemn those responsible [147]. Although these principles were drafted as such, and enshrined as agreements rather than true legal texts, it nevertheless seems that they have not been respected due to a lack of enforceability and detail on practical implications. For example, it is reported that, around the year 2010, the PSC ArmorGroup, which is a branch of the British PMC G4S, paid Afghan warlords connected to the Taliban to provide locals as security guards for a US airbase in the Herat province, in the Western region of Afghanistan [148]. Therefore, these actions broke the rules fixed by the EU over terrorism as per directive (EU) 2017/541 on combating terrorism.

As a result, private military companies generally benefit from unclear regulations or standards laid down in "agreements" which are not really binding. This seems to have repeatedly led to a wide variety of abuses in virtually every theatre of operations where such companies have been sent. A more solid legal basis needs to be put in place at international level. This would encourage States that use this type of company in their security and defence missions on their own territory or in operations abroad, to better legislate on the status of these companies, and in particular on the framework of rules they must respect.

**Conclusion**

In conclusion, the activities pursued by PMCs present a significant challenge to the development of IL. These entities operate in a grey area, straddling the line between the traditional armed forces of a State and private companies that have been attracted by the lure of profit, such as mercenaries. However, in contrast to the assumption that their activities are closely linked to military operations, PMCs are frequently classified as civilians. This has implications for the implementation of their responsibility, as civilians must have a link with a party to the conflict to be held responsible for actions which violate IHL.

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[145] International Security Assistance Force (ISAF) and Interim Administration of Afghanistan, "Military Technical Agreement" <https://www.bits.de/public/documents/US_Terrorist_Attacks/MTA-AFGHFinal.pdf>

[146] Nato, "Lisbon Summit Declaration Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Lisbon" (NATO) <https://www.nato.int/cps/en/natohq/official_texts_68828.htm>

[147] *Ibidem*

[148] MacAskill, E. (2017, November 26). British firm "hired warlords close to Taliban to provide security." The Guardian. https://www.theguardian.com/world/2010/oct/07/armorgroup-warlords-taliban-us

The complexity of determining the status of PMCs is reflected in the attribution of responsibility for the actions of these entities. In the event that a State recruits or exercises significant control over a PMC, it can be held legally responsible for the actions of PMC employees. Similarly, individuals can be held accountable for violations of the laws of war. Once more, the status of PMC personnel will have an impact on their liability, depending on whether they are classified as mercenaries, combatants or civilians.

Furthermore, the framework seeking to regulate the use of PMCs in Europe is characterised by a lack of coherence. The EU's current legal mechanism is comprised of a multitude of layers, including primary legislation, secondary legislation, and various national regulations. This complexity makes it challenging to achieve a balance between the need for effective security services and a clear attribution of competencies to the subjects involved. Therefore, the EU, its Member States and its international partners have a central role to play in establishing and applying a coherent legal framework for PMCs to promote human rights, accountability, and the rule of law.

However, PMCs exploit the ambiguity surrounding the standards that govern them and the standards set forth in non-binding agreements. These PMCs perpetrate a multitude of abuses in a plethora of operational contexts. Consequently, it is necessary to implement a more transparent and effective international legal framework to hold the States that utilise them to a higher standard of accountability and, above all, to address the legal vacuum concerning corporate liability under IL.

## Bibliography


Barnett A, 'Anger at Kosovo Mines Contract' The Guardian (May 7, 2000) <https://www.theguardian.com/world/2000/may/07/balkans>

Bundesministerium der Verteidigung (BMVg), Die Bundeswehr der Zukunft. Sachstand der Reform (15 June 2001) Bundesministerium der Verteidigung

Cameron L, 'Private military companies: their status under international humanitarian law and its impact on their regulation' (2006) 88 International Review of the Red Cross 573 https://www.icrc.org/en/doc/assets/files/other/irrc_863_cameron.pdf

Capdevielle V, 'The Regulatory Context of Private Military and Security Services in France' (2009) PRIV-WAR Report <https://iow.eui.eu/wp-content/uploads/sites/40/2013/11/nr-11-09-FRA.pdf> accessed 13 June 2024

Committee on Armed Services of the United States Senate, 'Inquiry into the role and oversight of private security contractors in Afghanistan' (United States Senate 2010) <https://web.archive.org/web/20120916030710/http://www.levin.senate.gov/imo/media/doc/supporting/2010/SASC.PSCReport.100710.pdf>

Consolidated Version of the Treaty on European Union [2012] OJ C 326/13

Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949) 75 UNTS 135 (Geneva Convention III) https://ihl-databases.icrc.org/assets/treaties/375-GC-III-EN.002.pdf

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Adopted by the International Peace Conference 1907 https://ihl-databases.icrc.org/assets/treaties/195-DIH-19- FR.pdf

Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering [2003] Official Journal L 156/79

Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment [2008] Official Journal L 335/99

Council Joint Action 2000/401 of 22 June 2000 concerning the control of technical assistance related to certain military end-uses [2000] Official Journal L 159/216

Council Recommendation 2002/C 153/01 of 13 June 2002 regarding cooperation between the competent national authorities of Member States responsible for the private security sector [2002] Official Journal C 153/1

Council Regulation (EC) No. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items [2009] Official Journal L 134/1

Den Dekker G, 'The Regulatory Context The Regulatory Context he Regulatory Context of Private Military and Security Services of Private Military and Security Services in the Netherl in the Netherlands' (2008) PRIV-WAR Report <https://priv-war.eui.eu/wp- content/uploads/sites/40/2008/12/nr-01-08-the-netherlands.pdf> accessed 16 June 2024

Directive of the European Parliament and of the Council 2006/123/EC of 12 December 2006 on services in the internal market [2006] Official Journal, L 376

Doctors Without Borders, 'The Practical Guide to Humanitarian Law'. https://guide-humanitarian-law.org/content/article/3/prisoners-of-war/.

Dörmann K, 'The Legal Situation of "Unlawful/Unprivileged Combatants' (2003) 85(849) International Review of the Red Cross https://www.icrc.org/en/doc/assets/files/other/irrc_849_dorman.pdf

European Parliament resolution 2009/C 66 E/08 of 13 March 2008 on the EU Code of Conduct on Arms Exports — Failure of the Council to adopt the Common Position and transform the Code into a legally binding instrument [2008] Official Journal of the European Union OJ C, C/66

European Parliament, 'The Role of Private Security Companies (PSCs) in CSDP Missions and Operations' (Policy Department, Directorate-General for External Policies 2011) <https://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/433829/EXPO-SEDE_ET%282011%29433829_EN.pdf>

Galai K, 'Can Current Regulation Effectively Manage PMC Conduct and Ensure Accountability?' (2020) European Yearbook of International Economic Law. https://www.springerprofessional.de/en/can-current-regulation-effectively-manage-pmc-conduct- and-ensure/19832990.

General Secretariat of the Council of the European Union, 'The Business of War – Growing risks from Private Military Companies' (2023) ART - Research Paper <https://www.consilium.europa.eu/media/66700/private-military-companies-final-31-august.pdf> accessed 11 June 2024

Gillard E-C, 'Business goes to war: private military/ security companies and international humanitarian law' (2006) 88 International Review of the Red Cross 525 https://international-review.icrc.org/sites/default/files/irrc_863_4.pdf

Grignon J and Roos T, 'Combattants et prisonniers de guerre' (18 December 2020) Quid Justitiae https://www.quidjustitiae.ca/fr/blogue/combattant-es-et-prisonnierseres-de guerre#:~:text=Dans%20le%20contexte%20de%20lutte,combattants%20%C3%A9trangers%20%C2%BB%2C%20%C2%AB%20combattants%20non

Hatzopoulos V, 'The concept of 'economic activity' in the E U Treaty : from ideological dead-ends to workable judicial concepts' (2011) Research Paper in the Department of European Legal Studies - College of Europe <https://www.coleurope.eu/sites/default/files/research-paper/researchpaper_6_2011_hatzopoulos_0.pdf> accessed 16 June 2024

International Security Assistance Force (ISAF) and Interim Administration of Afghanistan, 'Military Technical Agreement' <https://www.bits.de/public/documents/US_Terrorist_Attacks/MTA-AFGHFinal.pdf>

Jankovska I, 'Accountability of Mercenaries and Private Military and Security Contractors in the existing International Legal Framework' (2017) Riga Graduate Law School https://dspace.lu.lv/dspace/bitstream/handle/7/45397/Jankovska_Ieva.pdf?sequence=1&isAllowed=y

Kalidhass PR, 'Determining the Status of Private Military Companies under International Law: A Quest to Solve Accountability Issues in Armed Conflicts' (2014) Amsterdam Law Forumhttps://amsterdamlawforum.org/articles/10.37974/ALF.266

Krahmann E and Abzhaparova A, 'The Regulation of Private Military and Security Services in the European Union: current policies and future options' (2010) EUI Working Paper AEL 2010/8 <https://cadmus.eui.eu/bitstream/handle/1814/18295/AEL_2010_8.pdf? sequence=1&isAllowed=y> accessed 14 June 2024

Krahmann E, 'Private Military Services in the UK and Germany: Between Partnership and Regulation' (2005) 14(2) European Security <file:///C:/Users/Utente/Downloads/AuthorsAcceptedManuscriptKrahmannES2005.pdf> accessed 9 June 2024

Krahmann E, Regulating Military and Security Services in the European Union (2006) Brunel University Research Archive <https://core.ac.uk/download/pdf/29140184.pdf> accessed 14 June 2024

Law D, 'Private Military Companies' (2006) The Geneva Centre for the Democratic Control of Armed Forces <https://www.files.ethz.ch/isn/17438/backgrounder_09_private-military-companies.pdf> accessed 10 June 2024

Lehnardt C, 'Individual Liability of Private Military Personnel under International Criminal Law' (2008) 19(5) EJIL 1015 https://academic.oup.com/ejil/article/19/5/1015/505543

Maogoto JN and Sheehy B, 'Private Military Companies & International Law: Building New Ladders of Legal Accountability & Responsibility' (2009) 11(1) Cardozo J Conflict Resol 99. https://www.academia.edu/698826/Private_Military_Companies_and_International_Law_Building_New_Ladders_of_Legal_Accountability_and_Responsibility

Mohlin M, 'Commercialisation of Warfare and Shadow Wars' (2014) 9 St. Antony's International Review 24 <https://www.jstor.org/stable/26212349>

Moser C and Blockmans S, 'The extent of the European Parliament's competence in Common Security and Defence Policy' (2022) Directorate General for the External Policies of the European Parliament <https://www.europarl.europa.eu/RegData/etudes/IDAN/2022/702559/EXPO_IDA(2022)702559_EN.pdf> accessed 12 June 2024

NATO, 'Lisbon Summit Declaration Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Lisbon' (NATO) <https://www.nato.int/cps/en/natohq/official_texts_68828.htm>

Nicaragua v United States of America (Judgment) [1986] ICJ Rep 14, para 65 https://www.icj-cij.org/sites/default/files/case-related/70/070-19860627-JUD-01-00-EN.pdf

Osakwe C and Umoh U, 'Private Military Contractors, War Crimes and International Humanitarian Law' (2014) 42(1) Scientia Militaria - South African Journal of Military Studies https://scientiamilitaria.journals.ac.za/pub/article/view/1081/1081

Petereyns M, 'The Legal Status of Mercenaries in Armed Conflict' (master's thesis, Ghent University 2016). https://libstore.ugent.be/fulltxt/RUG01/002/304/280/RUG01- 002304280_2016_0001_AC.pdf.

Prosecutor v Akayesu (Judgment) ICTR-96-4-T (2 https://www.refworld.org/jurisprudence/caselaw/ictr/1998/en/19275

Prosecutor v Aleksovski (Judgment) IT-95-14/1-T ( 25 June 1999) https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/34882

Prosecutor v Delalić and others (Judgment) IT-96-21-T (16 November 1998) https://www.icty.org/x/cases/mucic/tjug/en/

Prosecutor v Dusko Tadic (Judgment) ICTY-94-1-A (15 July 1999) https://www.refworld.org/jurisprudence/caselaw/icty/1999/en/40180

Prosecutor v Kunarac and others (Judgment) IT-96-23-T (22 February 2001) https://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf

Prosecutor v Musema (Judgment and Sentence) Case No ICTR-96-13-A, T.Ch. I (27 January 2000) https://www.refworld.org/jurisprudence/caselaw/ictr/2000/en/64129

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977) 1125 UNTS 3 (AP I) https://ihl-databases.icrc.org/assets/treaties/470-AP-I-EN.pdf

Responsibility of States for Internationally Wrongful Acts, 2001. Text adopted by the Commission at its fifty-third session. https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002 https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf

Sandoz Y, Swinarski C, and Zimmerman B (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (ICRC/Martinus Nijhoff 1987) https://www.icrc.org/en/publication/0421-commentary-additional-protocols-8-june-1977-geneva-conventions-12-august-1949

Schmeidl S, 'Case Study Afghanistan' in Joras U and Schuster A (eds), Private Security Companies and Local Populations (SwissPeace 2008). https://www.files.ethz.ch/isn/55112/WP_1_2008.pdf.

Schneiker A and Krahmann E, 'Policy Paper on Private Military and Security Companies: Capacity Gained – Accountability Lost? Establishing a Better Political and Regulatory Framework' (2016) Transparency International Deutschland. https://www.researchgate.net/publication/299861585_Policy_Paper_on_Private_Military_and_Security_Companies_Capacity_Gained_Accountability_Lost_Establishing_a_Better_Political_and_Regulatory_Framework

Singer P, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law' (2003) Columbia Journal of Transnational Law. https://www.brookings.edu/wp-content/uploads/2016/06/singer20040122.pdf

Syrians for Truth and Justice, 'The Dilemma of Mercenarism and Volunteering During Armed Conflicts' (Syrians for Truth and Justice, 18 April 2023) https://stj-sy.org/en/the-dilemma-of-_mercenarism-and-volunteering-during-armed-conflicts/.

Treaty of Lisbon amending the Treaty on European Union and the Treaty on the Functioning of the European Union [2007] OJ C 306 1

Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [2001] OJ C 80 1

UN, Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination: Addendum Mission to Afghanistan (2010) A/HRC/15/25/ Add.2. https://www.ecoi.net/en/file/local/1320187/470_1282657142_g1014357.pdf

Zeeman M, 'The Nisour Square Massacre' (ICoCA, 2023) https://icoca.ch/fr/case-studies/the-nisour-square-massacre/.