

C. BAKKER, M. SOSSAI (EDS.), MULTILEVEL REGULATION OF
MILITARY AND SECURITY CONTRACTORS. THE INTERPLAY
BETWEEN INTERNATIONAL, EUROPEAN AND DOMESTIC
NORMS, OXFORD: HART, 2012, 625 PAGES.

Edoardo Chiti*

This book discusses the increasing involvement of private companies in the exercise of military and security public functions in the changing international space. It considers two different aspects of this phenomenon: the inclination of States to contract private companies to perform genuine military and security functions within the context of armed conflicts; and the employment of these same companies by non-statal bodies, such as business corporations or international organizations, in crisis situations in which local institutions are unable to guarantee security. As a legal research on such developments, it addresses three main sets of legal questions. First, how do international, European and domestic regulatory measures in this field come reciprocally into contact, and what are the results of their interplay? Second, what legal issues does this composite regulation arise? Third, moving from empirical analysis to normative reflection, in what ways could the EU contribute to the development of a global regulation of private military and security companies, in particular by ensuring that their action complies with human rights and international humanitarian law?

The structure of the book is simple enough. The volume opens with a «general overview» of the multilevel regulation of private military and security companies, where a synthesis of the existing international and EU initiatives is presented (Part I). It then moves to the analysis of a variety of national regulatory frameworks. This investigation, which represents the core of the research, begins with the exam of the regulatory frameworks of ten EU Member States, including France and the UK, which have a significant practice in contracting military and security companies (Part II).

* Full Professor of Administrative Law, University of Viterbo.

It goes on by examining the legislation and case-law of a number of «crucial players» outside the EU, such as the US, the Russian Federation, Israel, Australia, Canada, Colombia and South Africa (Part III). The last part of the volume is devoted to two questions arising from the national reports, that is the exercise of criminal jurisdiction over private contractors, and the abuse by private military and security companies of tax havens (Part IV).

As it often happens in edited collections, involving a great number of disciplinary approaches, it is not possible to identify a unitary and coherent argument developed throughout the book. This does not mean that the volume does not present a series of thesis or hypothesis for further research.

The general overview provided in Part I highlights the incompatibilities between the rationales and substantive provisions of the two main international instruments currently available, the soft law of the Montreux Document and the binding law of the Draft Convention elaborated in the context of the United Nations Human Rights Council. The point is made by Nigel White that these incompatibilities might lead to a situation in which States connected to private military and security companies' industry entrench the Montreux process, while those opposing the «privatization of war» support the Draft Convention. Moreover, the lack of a specific regulatory framework at the EU level is pointed to as a shortcoming of the existing multilevel regulation, in consideration both of the direct role of the EU in military and security operations and of the EU capacity to act as a source of inspiration for other international regulatory systems and to influence third countries' action. The chapters written, respectively, by Guido den Dekker, Marco Gestri, Mirko Sossai and Christine Bakker suggest that EU regulatory action might usefully complement the international and domestic initiatives. They also identify the tools and channels available to the EU political institutions to develop such regulatory action. Finally, the comparative overview of the EU and extra-EU national regulation carried out by Ottavio Quirico highlights that the emerging common regulatory framework, though promising in some respects, is insufficient with regard to military practice, in the frequent situations in which the law of the contracting State or the State where the company is based does not apply extraterritorially and the law of the host State is absent.

Parts II and III do not put forward overall theses, but offer a detailed and realistic account of principles and rules applicable in a wide range of national orders. The reader may perhaps derive two main conclusions from the various chapters. First, all EU Member States seem to have laws and regulations concerning private security services, ranging from registration and licensing to minimum standards for personnel selection, monitoring and regulation of the use of firearms. The development of these regulatory regimes, though, varies from country to country, mainly in relation to two factors, the degree of development of the private military and security industry within the country, and the existence of a public debate on the ever-expanding number of problems raised by such industry. Unsurprisingly, it is in the UK and in France that the most elaborated regulatory frameworks have been established (see, respectively, the chapter by Alexandra Bohm, Kerry Senior and Adam White and the chapter by Vanessa Capdevielle and Hamza Cherief). Second, the regulatory frameworks of the «crucial players» outside the EU illustrate the variety of options for governmental control of private security services. In the US, for example, the increasing reliance on private contractors in the last ten years has been paralleled by the gradual establishment of a regulatory regime based upon accountability, good management and clear standards, which the Commission on Wartime Contracting and the Government Accountability Office would like to be further developed (see the accurate account provided by Kristine Huskey and Scott Sullivan). Israel's approach to the use and oversight of security contractors, instead, is shaped by the more general process of «civilianization» and privatization of functions traditionally performed by the Israeli Defence Force, which has since Israel's independence acted as the most useful agent in implementing the government's agenda: the emerging regulatory regime of private security services is thus an aspect of an overall transformation of the governmental machinery (see Yaël Ronen's chapter). And the Russian Federation does not have explicit rules regulating the employment of private security companies abroad, although these companies are becoming significant players in the protection of private and public security.

As for Part IV, its interest lies mainly in the identification of a complex legal issue, that of the jurisdictional competence in

cases of crimes committed on foreign soil by civilian contractors in military operations. In principle, those cases should be subject to the criminal law and jurisdiction of the country in which civilian contractors are deployed. Yet, the essays collected in this part, and in particular that written by Ieva Miluna, show that the principle of territoriality is sometimes set aside, either because a contracting State grants immunity from the jurisdiction of the host State or because it expands the competence of their military courts to civilian contractors. In this second case, the competent jurisdiction and relevant criminal law are identified according to the «active personality jurisdictional principle», affirmed in the US and the UK. Cases of overlapping jurisdictions and jurisdictional conflicts, however, are likely to happen.

This is a rich and stimulating book. As Francesco Francioni rightly points out in his Foreword, it offers «a realistic scenario of applicable norms and principles as well as patterns of progressive development of the law in relation to a very dynamic evolution of the market for security and military force» (p. vi). It makes it clear that the emerging patterns are both underdeveloped, particularly at the international and EU level, and unsatisfactory, as they leave open many uneasy issues, ranging from the preservation of the principles of the law of armed conflicts to the possible conflicts between national laws. By doing so, the book also offers abundant material to reflect normatively on the possible improvements of the existing law.

Nevertheless, some critical remarks can be made. One problem is that the analysis does not take into account a number of relevant variables. The various papers, for example, do not distinguish between employment of private companies by States and by (private and public) non-statal bodies. They bring together recourse to private companies within armed conflicts and within «crisis situations». They underestimate the differences between the many services provided by military and security companies, which range from prisoner detention to mere logistical support. These are, though, important variables, whose consideration would have allowed the Editors to articulate the inquiry in a more precise way, and to identify the legal and institutional issues specific to each of the various hypotheses of recourse to military and security contractors.

Another problem is the insufficient investigation of the organizational and procedural interconnections among national, EU and international laws. In spite of the sub-title of the book, which points to the «interplay between international, European and domestic norms», little attention is paid to the multiple forms in which national laws come to contact among themselves and with EU and international law, as well as to the legal challenges inherent to such variety of interconnections.

A further problem is that of the analytical instruments that are used in the various chapters. The employment of military and security contractors is analyzed using the traditional lenses of public national and international law. Yet, the international law paradigm, essentially focussing on inter-States relations, seems inadequate to give account of the features of the regulation of military and security contractors. For example, it does not fully capture the peculiarities of the Montreux process, which exploits standards and soft law mechanisms addressed to the industry itself, and it is probably unable to govern effectively the transnational activities of security contractors. One may wonder, in this regard, whether «global administrative law», as developed by Sabino Cassese, Benedict Kingsbury and Richard Stewart, would have not provided a more appropriate set of tools to analyze the relations - at the same time transnational and intergovernmental - involved in the action of security contractors, to make sense of the existing bits and pieces of national, EU and international law, and to orientate future legal developments.

Finally, the volume seems to reflect a too narrow scientific project. The various authors, together with the Editors, limit themselves to describe and discuss the current regulation of military and security contractors. They do not put this development in a historical perspective. Nor do they suggest improvements to the existing legal framework. This is, we believe, a missed opportunity. The historical perspective would have allowed to highlight that the current turn to private operators is not only a politically and legally sensitive issue, but also a direct challenge to the paradigm of the western State as an entity historically emerging from a process of centralization of coercive powers. And a systematic reflection on possible improvements could have oriented the action of the involved political actors, including the EU.