

Author: HJ Lubbe

BOOK REVIEW

State Control over Private Military and Security Companies in Armed Conflict
by H Tonkin

ISSN 1727-3781



2012 VOLUME 15 No 5

<http://dx.doi.org/10.4314/pej.v15i5.18>

BOOK REVIEW***State Control over Private Military and Security Companies in Armed Conflict* by H Tonkin*****HJ Lubbe****

According to the figures used as examples in Tonkin's book, the number of Private Military and Security Company (PMSC) contractors working for the United States (US) in the Iraqi theatre by 2007 exceeded the number of US troops, and in 2010 these contractors made up around 54 per cent of the US Department of Defence workforce in Iraq and Afghanistan. In the past the PMSC industry has managed to keep largely out of the limelight, but academic interest in the industry has steadily increased and Tonkin's book is one of the latest additions to the legal literature on the topic.

The conventional notions of the state as the primary holder of coercive power have lately been challenged by the increased outsourcing and participation of PMSCs in armed conflict and concerns have been raised regarding the reduction in state control over the use of violence. Broadly, Tonkin considers the question of state responsibility for the misconduct of PMSCs through the usual three-party framework: the hiring State, the host State and the home State. She ultimately aims to set standards to guide states in developing their domestic laws and policies on private security, and she argues that traditional international law is sufficiently flexible to accommodate the challenges posed by the PMSC industry. Her general approach is to try to find potentially relevant doctrines of international law, to explain their characteristics and then to attempt to illustrate the potential applicability of these existing legal principles to the issue.

Chapter 1 contextualises the field of study and provides a proper background. Tonkin relies on existing literature to reflect upon the origin and development of the

* Tonkin H *State Control over Private Military and Security Companies in Armed Conflict* (Cambridge University Press Cambridge 2011).

** Hendrik J Lubbe. LLB, LLM, LLD. Senior Lecturer, Faculty of Law, North-West University, Potchefstroom Campus. Email: Hein.Lubbe@nwu.ac.za.

private security industry, to describe the functioning of private military and security activity, and to present the objections thereto.

Chapter 2 lays the theoretical foundation of the book by outlining the basic normative structure of the international legal system and critically examining how the law of state responsibility operates within that systematic context. For this purpose this chapter also clearly differentiates between the hiring, home and host state. Due to the limited possibility of directly attributing PMSC wrongs to the hiring state, a difficulty which becomes more evident in Chapter 3, this chapter and the rest of the book in Chapters 4, 5 and 6 focus more on the positive obligations imposed upon the state to subject PMSCs to control. A distinction is drawn between the restrictive obligations of result and the broader obligations of diligent conduct, pertaining to which a five-step framework is proposed. Chapter 2 finally turns to the consequences of state responsibility with reference to the International Law Commission (ILC) Articles.

Chapter 3, concerns the attribution of PMSC conduct to the hiring state. The concern often raised, namely that states may be able to evade responsibility for violations of international law by acting through PMSCs, is found to be overstated. The primary question here is if, and in what circumstances, the conduct of PMSCs could be attributed to the hiring state itself. Based on articles 5 and 8 of the ILC Articles, Tonkin argues that a large portion of PMSC conduct will indeed be attributable to the hiring state. This is so, she finds, because PMSCs could be construed as forming part of the hiring state's armed forces or by virtue of the factual relationship of control. For this purpose she skilfully analyses the test of "exercising governmental authority" and investigates the situation in which PMSCs act "under state instructions, direction, or control".

Chapter 4 considers the obligations of the host state, in other words the state in which the armed conflict takes place. Mindful of the fact that the host state will frequently lack the capacity to control PMSC conduct, it is presumed that the host state possesses some degree of capacity to control PMSCs by virtue of its sovereignty and control over its territory. Accordingly International Humanitarian Law (IHL) and Human Rights Law (HRL) impose obligations on the host state to take

diligent measures to prevent, investigate, punish and redress PMSC misconduct. Tonkin firstly investigates the host state's obligations to control PMSCs under IHL and considers state responsibility for the breach of these obligations. Secondly she examines obligations under HRL and focuses on the applicability thereof to situations of armed conflict. The relationship between IHL and HRL is also considered and it is shown that their concurrent application complicates legal analysis. She indicates how the general framework of HRL differs from and relates to the more specialised framework of IHL. The last part of this chapter deals with immunity agreements, such as the Coalition Provisional Authority Order 17 in Iraq, and shows how these can undermine host state control over PMSCs by placing their contractors beyond the reach of Iraqi civil and criminal law.

Chapter 5 deals with the obligations of the hiring state. At the outset Tonkin investigates possible constraints on states' ability to hire PMSCs in armed conflict. For this purpose she examines mercenary law, particularly the *Organisation of African Unity Convention for the Elimination of Mercenarism in Africa* of 1977 and the *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries* of 1989, as well as IHL. She accepts that a state is not *per se* prohibited from using PMSCs to perform particular activities in armed conflict and continues to investigate the international standards that guide states' actions in relation to the PMSCs that they hire. For this purpose she considers the obligations to control PMSCs under IHL and HRL. She finds that the obligation to ensure respect for IHL in Common Article 1 establishes a minimum threshold of mandatory regulation, which serves as a residual obligation, in addition to specific IHL obligations that may apply in particular circumstances. She further holds that HRL also imposes obligations on the hiring state to control PMSC behaviour, and that HRL's sophisticated individual complaint procedures could provide effective mechanisms to scrutinise such behaviour. Tonkin emphasises the constraints on the extraterritorial applicability of HRL in relation to PMSC operations outside the hiring state's territory, and highlights certain special measures that heighten the level of protection required with regard to especially vulnerable categories of persons.

Chapter 6 concerns the obligations of the home state of a PMSC and acknowledges that international law has been reluctant to impose any broad obligations on the

home state to regulate the PMSC's activities abroad. Consequently the home state is generally not liable for violations of the PMSC merely by virtue of the territorial link between the two. International law does, however, impose a number of obligations on the home state to take positive steps to prevent and punish harmful conduct by its nationals overseas, and responsibility in such cases arises from the state's own failure to fulfil these obligations, which are founded in the norm of non-intervention, the law of neutrality, IHL and HRL. The norm of non-intervention covers both direct and indirect interferences and requires states to refrain from interventions by its own agents and to take steps to prevent or to punish private parties from doing so from its territory. Likewise, the law of neutrality may impose obligations upon home states to take steps to prevent PMSCs from organising or recruiting personnel for combatant roles for the belligerents. The obligation to ensure respect for IHL imposes a further due diligence to promote PMSC compliance therewith. As regards the constraints on the extraterritorial applicability of HRL discussed in chapter 5, the home state has no obligation to take steps unless it exercises effective control over the foreign territory in which the PMSC operates.

In conclusion Tonkin confirms that the law of state responsibility is vitally relevant and that a close analysis of states' international obligations and responsibility should constitute a core component of any strategy to address the growing private security industry. She does, however, admit that state responsibility is not sufficient in itself to address the accountability concerns surrounding PMSCs, because it does not address the accountability of contractors or companies as such, and because it lacks the necessary enforcement mechanisms. She therefore suggests that apart from relying on existing accountability frameworks of international law, new domestic and international law frameworks targeting these shortcomings should also be developed. By drawing attention to states' international obligations to regulate PMSCs in armed conflict, critically analysing the content of states' obligations and evaluating recent state practice, this book provides the necessary clarity to assist states in formulating their internal laws and policies on private security in accordance with international law.