

PRIVATISING SECURITY

Irina MINDOVA-DOCHEVA

"G.S.Rakovski" National Defense College, Sofia, Bulgaria

The article proposes an analysis of the different approaches towards employing the international legal framework in the regulation and oversight of private military and security companies' operation in armed conflicts and in peace time security systems. It proposes a partnership-based approach for public and private actors aiming at creating and sharing common values under the principles of solidarity, protection of human rights and rule of law. A focus of further research should be the process of shaping those common values.

Key words: *private military and security companies, armed services, inherent state functions, international regulation.*

1. INTRODUCTION

Security privatization is a global trend nowadays and private military and security companies (PMSCs) have become a non-state actor of major importance in armed conflicts and in peace time security systems.

In terms of extensive privatization of security the international and often national legislation remains insufficient or even missing. That may result in undermining the rule of law, the effective functioning of the democratic state institutions and risks to fundamental human rights [1].

Mercenaries and mercenary related activities are considered to be a crime [2]. But PMSCs are legitimate actors and they need more regulation, because they operate in the "gray" area between public law and private law and inherently mix state functions with business profit [3]. That is why transparency and accountability of the PMSCs and their personnel for human rights abuses and their activities'

overall impact on upholding human rights are of primary importance.

The focus of this article is to present current approaches towards imposing the international legal framework for the operation of private military and security companies. A comparison is made between developing legislation on a hierarchical model of relations between the State and PMSCs, and on the other hand – a horizontal model of relations between them.

2. DRAFT OF THE INTERNATIONAL CONVENTION ON PMSCs

The hierarchical legislative model can be seen in the Draft Convention on regulation, monitoring and oversight of the PMSCs [4].

Within the UN the primary responsibility for monitoring and studying mercenary activities and the activities of PMSCs rests with the Working group on the use of mercenaries as a means of violating

human rights and impeding the exercise of the rights of peoples to self-determination.

An open-ended intergovernmental working group has been established and has prepared the first draft of an international convention on regulation, monitoring and oversight of the PMSCs [5]. More than 250 experts, non-governmental organizations, member states and governmental organizations discussed the scope and the elements of the draft convention.

The aim of the draft document is not to ban the PRMSCs but to establish minimum standards for State parties to regulate the activities of the companies and their personnel, and to set up an international oversight mechanism.

The draft convention defines in broad terms a private military and/or security company as a corporate entity that provides military and/or security services to physical persons and/or legal entities on a compensatory basis. The definitions introduced for military and security services exclude the possibility for direct participation in hostilities except for self defense. Even more, the draft sets a prohibition for PMSCs and their personnel to directly participate in hostilities, terrorist acts and military actions, or violation of sovereignty. That is why military and security services that can be legally provided include different types of specialized services such as strategic planning, intelligence, reconnaissance, knowledge transfer, material and technical support, implementation of information security measures, etc.

Another restriction of the scope of military and security services is provided by setting the prohibition for

States to outsource or delegate to PMSCs “inherent state functions”: functions that are consistent with the principle of the State monopoly on the legitimate use of force and that a State cannot outsource or delegate to PMSCs under any circumstances. Among such ones are listed the powers of arrest or detention including interrogation of detainees, intelligence, espionage, etc. These can currently be contracted, and provoked incidents and a number of court decisions against the PMSCs [6].

The convention should be considered as eligible law in any situation, whether or not it is qualified as an armed conflict. It shall apply to states, intergovernmental organizations and PMSCs’ activities and personnel.

The convention implies State responsibility for the military and security activities of PMSCs registered or operating in their jurisdiction whether or not contracted by the latter. It is a state responsibility to ensure that PMSCs and their personnel are trained and apply international human rights law and international humanitarian law and, therefore, states are held accountable for violations of applicable national or international law. States also ensure that PMSCs and their personnel shall respect the sovereignty, territorial integrity and the principle of non-interference in domestic affairs.

Regulation and oversight of the PMSCs should be provisioned in national legislation by following minimal international standards. A common criterion for granting licenses and authorizations to PMSCs is introduced: lack of violations

of international human rights and humanitarian law by the companies and their personnel.

The State is also responsible for providing rules for use of force and firearms by PMSCs and their personnel. As a minimum standard in this respect the convention provides the rules for self defense in imminent threat, defense of other persons according to the contract, resistance to unlawful attempt for abduction and prevention or stop of commission of serious crime that would involve a great threat to life.

The convention provides regulation in another very sensible area, which is under development: state jurisdiction over criminal, civil and administrative offences of PMSCs and their personnel.

The convention introduces an organ for international oversight and monitoring - Committee on the regulation, oversight and monitoring - that will establish and maintain an international register of PMSCs, based on information provided by State parties.

All of these provisions emphasize the inherent role of the State, but they put the PMSCs in a passive position, obliging them to follow the rules with no mechanism for dialogue, negotiation or any other legal mechanism to participate in the decision making process. The convention proposes a model of hierarchical relations between the State and PMSCs. But considering the de facto existing relations in different regions of the world, a more effective model is a horizontal one, with shared values and responsibilities.

The draft convention does not propose mechanisms against an

already existing problem: dependence of a State on security contractors, which poses threats to its sovereignty and powers.

3. THE MONTREUX DOCUMENT

The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of PMSCs During Armed Conflict is a more flexible initiative that is applied as a customary international law [7]. It is a joint initiative between Switzerland and the International Committee of the Red Cross (ICRC) launched in 2006 that is pretty close to the draft convention process. It has a more narrow scope of application than the draft convention - situations of armed conflict and a more specific aim - to clarify the pertinent legal obligations of the PMSCs under international humanitarian and human rights law. That is why the model which is applied is more flexible and operational. The Montreux document is structured in two parts - the first one clarifies the existing obligations of states, PMSCs and their personnel under the international law. The second part contains a set of good practices designed to assist states in complying with these obligations. In 2008 seventeen states [8] signed this document and it was passed as a document of the General Assembly and Security Council regulating the international process of protection of civilians in armed conflicts. The Montreux document develops another principle for relations between States and PMSCs, namely the "Respect, Protect, Remedy" framework [9]. Closely related

to it there is another document - International Code of Conduct for Private Security Service Providers. Nowadays it is signed by merely 700 private companies [10]. The purpose of this private initiative is to set-forth a commonly agreed set of principles for Private security companies and convert them into standards and oversight mechanisms voluntarily agreed to be followed.

4. THE UN APPROACH

The UN also uses a specific self-regulative approach in relation with the PMSCs.

Private military and security companies have been used in the UN since the 1990s. With the adoption of the new strategic vision in 2009 and security management approach from “when-to -leave” to “how-to -stay”, outsourcing and contracting with PMSCs in conflict areas of UN missions have expanded. The critiques have been focused on the lack of transparency and accountability, as well as on the “bunkerization” [11] of the UN missions. These problems provoked the need for adopting a new UN Security Policy and Guidelines on the use of armed security services from Private security companies in 2012.

A determination is made for companies providing armed services and those that render unarmed services. The organization uses PMSCs with regard to a set of criteria: last resort and cost effectiveness and efficiency.

The objective of armed security services from a private security company are defined in a UN policy manual as a provision of visible deterrent to potential attackers and also armed response to repel any

attack in a manner consistent with the UN “Use of force policy”, host country legislation and international law.

That is why armed security services may be contracted on an exceptional basis just for two purposes: protection of UN personnel, premises and property and mobile protection of UN personnel and property.

Basing the decision to use armed security services on security risk assessment is mandatory. Security risk assessment and the follow up analyses should follow the fundamental principal that there is no option for provision of adequate and appropriate armed security from the host nation, alternate nation or UN Security and Safety Services.

The policy also requires to make an analysis of potential negative impacts from the use of private security companies.

When an approval is given, the companies should meet the mandatory requirements for possible selection described in the “Guidelines on the Use of Armed Security Services from Private Security Companies”[12].

The companies are obliged to make a screening of their personnel and to engage only people who pass the screening. The companies should apply their own Use of Force Policy, which should be consistent with the applicable national laws of the state in which the services are to be provided and the UN Use of force policy. Private company’s policy shall not be less restrictive than the UN Use of Force Policy. Moreover, it shall be consistent with the International Code of Conduct for Private Security Services Conductors.

5. CONCLUSION

The process of building international standards and regulative framework for operation of PMSCs is ongoing. The comparison of different initiatives showed that the parties to this process are focused on adopting procedural rules, in order to reach some transparency and accountability. But still the definitions for the basic terms used are different in scope. States and PMSCs refuse to hold the main discussion on rethinking the “inherent state functions” that should never be outsourced or contracted to private entities, and the scope of “military” and “security” services.

Having in mind the turbulent security situation there are at least two different ways ahead.

First, before rethinking the scope of the “inherent state functions”, a new concept for partnership between the actors is needed. It should be based on common values based on the principles of solidarity, protection of human rights and rule of law. Shared values by public and private legitimate actors could be a good ground for acting together without competing.

Second, another possibility is to convert the process of rethinking of the “inherent state functions” into a securitized problem that would cause more instability and would have a debilitating effect on states’ primary role in armed conflicts.

NOTES AND REFERENCES

[1] 2010 report (A/HRC/15/25), further to Resolution 10/11 of the Human Rights Council, UN General Assembly A/HRC/15/25 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, <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf>, last retrieved 21 March 2016.

[2] Art. 3, International Convention against the Recruitment, Use, Financing and Training of Mercenaries, A/RES/44/34, <http://www.un.org/documents/ga/res/44/a44r034.htm>, last retrieved 21 March 2016.

[3] José L. Gómez del Prado, Chairperson, UN Working Group on the Use of Mercenaries Mercenaries, Private Military and Security Companies and International Law p.31, https://law.wisc.edu/.../gomez_del_prado_paper.d12, last retrieved November 2014.

[4] 2010 report (A/HRC/15/25), further to Resolution 10/11 of the Human Rights Council, UN General Assembly A/HRC/15/25 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, <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf>, last retrieved 21 March 2016.

[5] 2010 report (A/HRC/15/25), further to Resolution 10/11 of the Human Rights Council, UN General Assembly A/HRC/15/25 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, <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf>, last retrieved 21 March 2016.

[6] Ibrahim, Saleh et. al. vs. Titan corporation 2007, Sami Abas AL RAWI et.al. vs. Titan Corporation 2007, <http://uniset.ca/other/cs6/391FSupp2d10.html>, last retrieved 21 March 2016.

[7] A/63/467-S/2008/636, <http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGMilitary/Session1/MontreuxDocument.pdf>, last retrieved 21 March 2016.

[8] Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America.

[9] This framework clarifies the actors’ responsibilities, structured in three pillars: the state duty to protect against human rights abuses by third parties, including business;

the corporate responsibility to respect human rights; and greater access by victims to effective remedy, both judicial and non-judicial.

[10] The International Code of Conduct for Private Security Service Providers, Signatory Companies, Complete List as of 1 June 2013 – Version with Company Details, http://www.icoca.ch/en/the_icoc, last retrieved 21 March 2016.

[11] UN mission are criticized that increase hard security measures designed to mitigate risks and deter attacks, rather than open up to the acceptance by local communities, Pingeot, Contracting insecurity, <https://www.globalpolicy.org/component/content/article/261-pmscs-a-the-un/52579-new-gpf-report-contracting-insecurity.html>, last retrieved 21 March 2016.

[12] <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/esOnUseOfArmedSecurityServices.pdf>, last retrieved 21 March 2016.

[13] UN General Assembly A/65/325, Use of mercenaries as a means of violating human rights and impeding the exercise of

the right of peoples to self-determination, p. 18 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/493/92/PDF/N1049392.pdf?OpenElement>, last retrieved 21 March 2016.

[14] UN General Assembly A/63/467–S/2008/636 Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/droi_090209_33/droi_090209_33en.pdf, last retrieved 21 March 2016.

[15] UNSMS Security Management Manual, <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/UNSecurityPolicyManual.pdf>, last retrieved 21 March 2016.

[16] UNSMS Security Policy Manual, <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/UNSecurityPolicyManual.pdf>, last retrieved 21 March 2016.