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Current Trends in Regulating the Legal Status of Private Military and Security Companies

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Abstracts: The presence of employees of private military and security companies in the grey zones and in military operations is a reality. The legal regulation of the status of these companies, the types and essence of the services provided, as well as the legal mechanism for prosecuting employees seriously infringing the provisions of international humanitarian law is an imperative need for the international regulatory process and a challenge for the science of international humanitarian law. This article will continue to discuss the correlation between the duties, obligations of non-state actors and their legal status in accordance with the provisions of international humanitarian law, to analyze documents and legal instruments that seek to regulate the legal capacity of military and private security companies, to investigate aspect related to the implementation of the rules described in the documents proposed by the international community.

Keywords: international humanitarian law; private security companies; combatant; mercenary; the Montreux Document; Code of Conduct

1. Overview and Evolution of Using Private Military and Security Companies in Contemporary Armed Conflicts

As for the history of private military security companies emergence, it is important to note that they began to develop more actively after banning and sanctioning mercenaries internationally by adopting several international treaties, although since the 1960s and 1970s governments in Europe and the United States used mercenaries

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as an instrument of influence in resolving sensitive political issues through military means (Manoilo & Zaitsev, 2020, c. 51).

Following a careful analysis of current developments in armed conflict in general and a series of military operations that cannot always be included in the notions defined by the norms of international humanitarian law or that are considered "hybrid" armed conflicts, "grey areas", notions that do not have a normative substantiation, we are going to ascertain increasingly active presence of some entities that cannot be qualified as organs of a state or their representatives. These non-state actors, such as the "private militia" or organized crime (Buzatu & Buckland, 2010, c. 95), which have a complex organization with a multinational element, constitute relatively new and fairly consistent threats to international security and cause a number of regulatory difficulties for the science of international humanitarian law.

In the twentieth century, mercenaries were widely used primarily in African countries, especially during the formation of independent states after World War II. The withdrawal of European countries from the region, the policy of decolonization, internal conflicts and the lack of culture and political experience of the population led to the most violent conflicts, and the warring parties resorted to the services of foreign soldiers.

However, in 1977, the Convention of the Organization of African Unity on the Elimination of Mercenary in Africa was adopted[1], as well as the Additional Protocol I to the Geneva Conventions, which prohibited the participation of mercenaries in hostilities: "A mercenary is not entitled to combatant status or prisoner of war"[2]. The 1989 UN Convention to Combat the Recruitment, Use, Financing and Training of Mercenaries and the above documents prohibit the activities of mercenaries in the modern sense of the term: "A mercenary… who is directly involved in acts of military or joint violence, as the case may be, commits a crime within the meaning of this Convention"[3].

[1] Organization of African Unity Convention for the elimination of mercenarism in Africa, Libreville, Gabon, on 3 July 1977 [on-line]. [accessed 25.10.2021]. Available on Internet: <URL: https://treaties.un.org/doc/Publication/UNTS/Volume%201490/volume-1490-I-25573-English.pdf>

[2] Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 47. [on-line]. [accessed 26.10.2021]. Available on Internet: <URL:https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf>

[3] International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, New York, 4 December 1989, art. 3.1. [on-line]. [accessed 25.10.2021]. Available on Internet: <URL: https://undocs.org/pdf?symbol=en/A/RES/44/34>

In most cases, some states, in order to avoid taking responsibility and to avoid liability under the rules of public international law, enter into contracts with private entities conventionally called Private Military Security Companies that provide a very wide range of security or military services as private agents with large military experience in exchange for considerable remuneration. As a boomerang effect, as the demand for military and private security services increases, so does the threat to international law and peace (Abrahamsen & Williams, 2006, pp. 1-23).

International institutions and bodies are currently hiring these private actors to provide military and security services, admitting employees of these entities to hold positions in the public sector, both in actions related to direct participation in military operations and in support actions aiming at ensuring the efficient conduct of military operations.

This type of service also includes some UN structures, which recruit private and well-trained military actors to carry out or provide various operational logistics operations or to ensure security in a given area. There is also a tendency to hire such companies to provide adequate training for law enforcement employees as well as to gather information. In this regard, Simon Chesterman notes that private entrepreneurs are more present than civil servants in many US government intelligence services (Chesterman, 2008, pp. 1055-1074).

There may also be ascertained a substantial increase in the level of demand for the services of private military and security companies from various international non-governmental structures in order to ensure security in conflict areas or in areas with a high degree of danger to their employees[1]. Therefore, the demand for private structures with military experience has increased enormously, and this creates a series of challenges for the system of international law that does not expressly regulate neither the legal status of these entities nor the relations between them and states or non-governmental actors in the process of providing more and more specific and diverse services.

In these conditions, in the light of the norms of international humanitarian law, several aspects related to the status and activity of these companies, the obligations

[1] The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflicts. International Committee of the Red Cross, 9.08. 2009, [on-line]. [accessed 25.10.2021]. Available on Internet: <URL: https://www.icrc.org/en/publication/0996-montreux-document-private-military-and-security-companies>.

and responsibilities of these actors should be qualified and determined as clearly as possible.

Another important aspect concerns the legal status of the employees of these companies who are qualified as:

1) government military personnel based on their mode of recruitment;

2) combatants;

3) employees of private companies to be qualified as civilians;

4) individual service providers to be qualified as "illegal combatants" or mercenaries.

These are some of the concerns faced by international humanitarian law, which is a complicated subject of analysis and a real challenge for the International Criminal Court and other international institutions.

Compared to other industries, private military and security companies constitute an overall value of 100 to 165 billion US dollars, an annual increase of up to 8%[1]. At present, governments are trying to implement, in one way or another, principles, rules and regulations aimed at regulating the behavior of these non-state military actors, by defining their legal status and analyzing their responsibilities under international law.

The main purpose of these rules is to define their legal status, to ensure a generally valid classification of the types of services that can be provided by these companies, to ensure accountability for the actions of employees and to create a method of monitoring the activity of states using this type of service. This model is observed in the "Voluntary Principles on Security and Human Rights, Secretariat for the Voluntary Principles on Security and Human Rights"[2], as well as in other such initiatives. In Sweden, for example, the legal regulation of all problematic aspects

[1] Small Arms Survey, States of Security, Cambridge University Press, 2011, p. 103.

[2] Voluntary Principles on Security and Human Rights, Secretariat for the Voluntary Principles on Security and Human Rights, [on-line]. [accessed 05.10.2021]. Available on Internet: <URL: https://www.state.gov/the-voluntary-principles-on-security-and-human-rights/>
The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflicts. International Committee of the Red Cross, 9.08.2009, [on-line]. [accessed 25.10.2021]. Available on Internet: <URL: https://www.icrc.org/en/publication/0996-montreux-document-private-military-and-security-companies>.

related to the activity of private military companies is achieved by implementing the provisions of the "Montreux Document".

2. Essence and role of the Montreux Document

The Montreux Document - is an international instrument, also known as the "Montreux Document on Relevant International Legal Obligations and Good Practices of States Related to the Operations of Private Military and Security Companies during Armed Conflict"[1]. In order to enforce this agreement, 17 countries have joined forces, including: England, France, China and the United States. This is the first instrument that delimits the legal status of private military actors and the applicability of international humanitarian law to them in armed conflicts. This document also intends to help states to comply with their international obligations at the national level, ensuring the supervision, regulation of actions and accountability of non-state military actors.

The scope of the document was:

- to initiate an awareness of positive practices, of regulatory methods practiced in the international arena and applied at national level; and

- to clarify the characteristics of existing obligations of signatory states, international organizations and to define the legal status of the PMSC at national level.

To date, there are more than 30 contracting countries that comply with the rules of the document, even if this document is not a legally binding instrument and does not affect the existing obligations of states under customary international law.

The first part of this document defines the types of relations between states and private military and security companies, in particular for the purpose of establishing the recognition of companies as private entities employed by a particular state. In order to recognize the legal status of a PMSC, its liability must be defined as being in close connection with the Contracting States. However, as seen in the case of Nicaragua v. The United States, the International Court of Justice has encountered

[1] The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflicts. International Committee of the Red Cross, 9.08.2009, [on-line]. [accessed 25.10.2021]. Available on Internet: <URL: https://www.icrc.org/en/publication/0996-montreux-document-private-military-and-security-companies>.

difficulties in connecting the activities of private military and security companies with Contracting States or any government in this regard.

Although it has no legal force and has a recommendatory character, it is important to classify the states in relation to the CMSP as this document establishes:

- contracting states that conclude contracts with PMSCs for the provision of services;

- the states of territorial jurisdiction on the territory of which the PMSCs operate;

- the countries of origin in which the PMSC is registered.

The states included in this classification must ensure compliance with the rules of international humanitarian law and other legal rules by the PMSC[1].

The Montreux Document contains 70 recommendations for regulating the activities of PMSCs directly in areas of military conflict. According to the document, employees of private companies are prohibited from violating the rules of international humanitarian law, and states are responsible for their actions and are obliged to prevent and sanction such violations[2].

For the purpose of describing the liability of States for PMSC actions they have contracted, the document states "… Even if the conclusion of a contract does not in itself engage the responsibility of the Contracting State, the latter is liable for violations of international humanitarian law, human rights, or other rules of international law committed by private military companies ... if such violations are attributable to the Contracting State, in accordance with customary international law" [3].

Thus, employees of private military and security companies should bear personal responsibility for violating the rules of international humanitarian law, however, sanctions and prosecution are not a viable option, as these companies are legally considered to be service providers and not officials. This specific controversy creates difficulties in applying the rules of international law.

[1] The Montreux Document, p. 9.
[2] Манойло А. В., Зайцев А. Я./ Manoilo A. V., Zaitsev A. Ya Международно-правовой статус частных военных компаний/ International legal status of private military companies.. с. 51.
[3] The Montreux Document, p. 12.

3. Initiative of adopting the International Code of Conduct

In 2000, at the initiative of the Swiss government, the Geneva Centre for Security Sector Governance (DCAF) was created. Its activities are focused on governance and "security sector reform, in particular on the interaction between the state and the private sector"[1]. More than 60 states participate in the activity of this organization, which aims at increasing the value of the Montreux Document, and four governments and two international organizations act as permanent observers.

In 2010, with the support of the DCAF Geneva Center, an **"International Code of Conduct for Private Security Companies"** was drawn up. The purpose of the code is to "strengthen the agreed principles of PMSC activities and create a basis for translating these principles into relevant standards, as well as management and supervision mechanisms"[2].

The document does not introduce new provisions in the already existing system of international law, it has the character of a recommendation, but it still opens the way for the legalization of private military and security companies at the international level. The code contains specific rules of conduct for PMSC employees in hostilities, as well as articles on the conclusion of any type of contract in the field of military service at the international level. Hence, the applicability of the International Code of Conduct for private military companies and their personnel is of particular importance.

As for the legal status of employees, the Code provides: "The status of PMSC personnel is determined by international humanitarian law, on a case-by-case basis, particularly depending on the nature and circumstances of the actions in which they are involved"[3].

In other words, if they are considered civilians, they do not have the right to participate directly in hostilities or are held accountable in accordance with the provisions of international humanitarian law. However, if these actors are considered as the armed forces personnel of a state or associates of a group under the command of states, then the legal status of the personnel changes. The same scenario applies

[1] Цепков Н.Б./ Tsepkov N.B Частные военные компании: краткий обзор мирового и российского регулирования/ Private military companies: a brief overview of global and Russian regulation B: zakon.ru.https://zakon.ru/blog/2015/12/14/chastnye_voennye_kompanii_kratkij_obzor_mirovogo_i_rossijskogo_regulirovaniya.

[2] The International Code of Conduct for Private Security Service Providers, 09.11.2010 [on-line]. [accessed 25.10.2021]. Available on Internet: <URL: https://icoca.ch/the-code/>

[3] Montreux Document, p. 24.

to the status of prisoner of war, as regulated in the relevant section of the Geneva Convention[1].

Even if the Code of Conduct intends to regulate the behavior of private military actors, their legal status is interpreted rather vaguely, implicitly creating a conflicting concept between the assumption and applicability of international law to the legal status of armed employees.

The involvement of private military companies in armed conflicts generates a series of serious debates in the sense of observing the norms of international law[2]. In this regard, there is a difficult debate on whether international humanitarian law and criminal law apply to private military personnel. Most legislators agree that if very serious crimes are committed, both international and domestic courts should bring to justice those responsible. Some scientific research focuses primarily on their legal status, trying to make a distinction and regulate their activity in order to qualify them as combatants or civilians. Regardless, if the majority of assisting personnel are not physically involved in hostilities, there is a fine line between considering them as personnel providing support for military operations or intelligence agents. In most cases, the fine line between civilians and militants is outdated, and the status of employees of military private security companies is difficult to define.

It is also difficult to prove the responsibility of PMSC personnel for international crimes, as well as the responsibility of their superiors who give instructions and supervise military operations. The International Criminal Court has jurisdiction only over natural persons, not over corporations. This means that the Court has jurisdiction over PMSC managers for negligence in preventing their employees from committing crimes. The same scenario is widely known for the military incidents in Afghanistan and Iraq, where courts tried to prosecute the staff of the private military company, but their employees invoked their immunity from Iraqi laws established under the US-Iraq intergovernmental agreement for the period 2004-2009[3].

The importance of this document lies in the fact that it describes current trends, such as recommendations for states on regulating and analyzing the legal status of private military and security companies and ensuring the applicability of good practices to relations between states and these private actors.

[1] Geneva Convention relative to the treatment of prisoners of war, august 12, 1949. art. 4 [on-line]. [accessed 25.10.2021]. Available on Internet: <URL: https://www.icrc.org/en/doc/assets/files/publications/icrc-002-0173.pdf,
[2] Small Arms Survey, States of Security, Cambridge University Press, 2011, p. 109.
[3] Idem., p. 110.

The best approach was the creation and development of the Code of Conduct, which describes the liability of armed civilians, PMSC employees and their responsibilities when they can be qualified as combatants. From a general perspective, this instrument includes the applicable laws and good practices to be applied by the PMSC and gives up to a broader approach of recovering damages to victims.

It is clear that this document lacks the necessary authority and legal power to effectively establish a clear legal status for PMSC employees. Therefore, we can clearly delimit that this document cannot effectively and efficiently regulate the relations between the states and the PMSC and the legal relations between the PMSC and their employees who participate directly in the hostilities.

However, the signatory states noted the practical effect of the provisions of this document regarding the mechanism of managing the relationship between the state and the PMSC at the national level and their responsibility as civilians with large armed experience, engaged in armed conflict.

The Code of Conduct was the second attempt to regulate the activity of private military and security companies by establishing the status of personnel in accordance with national laws, as well as the requirements of international humanitarian law. This document was meant to establish a clear line between the public and private sectors and to eliminate the difficulties resulting from the use of civilians with experience in military operations within hostilities or military operations, including the liability of PMSC employees for violating the rules of international humanitarian law.

Nowadays, there are some concerns about the actions of PMSC employees that harm the security of civilians, violate the rules of warfare and the correct qualification of their legal status in relation to combatant status. In an attempt to establish a clear perspective on the status of private actors, the Code of Conduct refers to companies as commercial entities and lists the specific characteristics that must be present in the activity of personnel, especially during the use of armed force or in case of detention. An attempt has been made to promote this document as an instrument for standardizing the personnel-related policy and PMSC activities, but as long as this document is not binding and does not have an effective instrument to ensure the applicability of the established rules, its provisions are more discretionary rather than mandatory.

The Montreux Document and the Code of Conduct consist of a number of very useful rules for states in the process of regulating legal relations between them and the

PMSC, but they are not binding on them, which allows states to evade liability for violations of the international humanitarian law rules by the employees of these companies involved in military actions in various armed conflicts or sensitive situations.

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