

HUMAN RIGHTS VIOLATIONS COMMITTED BY PRIVATE MILITARY AND SECURITY COMPANIES: AN INTERNATIONAL LAW ANALYSIS

VIOLAÇÕES DE DIREITOS HUMANOS COMETIDAS POR MILITARES PRIVADOS E POR EMPRESAS DE SEGURANÇA PRIVADA: UMA ANÁLISE DO DIREITO INTERNACIONAL

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Abstract: This paper is devoted to the growing phenomenon of the private military and security industry with respect to human rights obligations. In the first part, it will analyze the concept of a private security company, which is not clear in national regulations and has few relevant provisions in international conventions. The second part will contain a short description of examples of human rights violations committed by private military and security companies, or with their participation, during service delivery or other forms of activity. The third part of this paper discusses possible methods of responsibility enforcement, with respect to the transnational character of many private security companies involved in human rights violations worldwide. One of the most important elements of the discussion in international community should focus on binding international instrument, preferably a convention, which would be able to establish at least very elementary rules for states and international organizations, responsible for using private military and security companies. The international community has witnessed a lot of initiatives from non-governmental entities, also model laws and self-regulations of the private security industry, but still the real problem has not even been reduced. The number of human rights violations has grown.

Keywords: Human rights. Private security companies. Liability.

Resumo: Este artigo trata do crescente fenômeno da indústria militar e de segurança privada no que diz respeito às obrigações com direitos humanos. Na primeira parte, analisará o conceito de empresa de segurança privada, o que não está claro nas regulamentações nacionais e tem poucas disposições relevantes nas convenções internacionais. A segunda parte contém uma breve descrição de exemplos de violações de direitos humanos cometidas por empresas militares e de segurança privadas. A terceira parte discute possíveis métodos de responsabilização, com respeito ao caráter transnacional de muitas empresas privadas de segurança envolvidas em violações de direitos humanos em todo o mundo. Um dos elementos mais importantes da discussão na comunidade internacional deve se concentrar na criação de instrumentos internacionais vinculantes, preferencialmente uma convenção, que poderia estabelecer regras pelo menos muito elementares para estados e organizações internacionais, de modo a responsabilizar o uso de empresas militares e de segurança privadas. A comunidade internacional tem testemunhado muitas iniciativas de entidades não-governamentais, há também leis modelo e auto-regulação da indústria de segurança privada, mas o problema nem sequer foi reduzido. O número de violações de direitos humanos nesses casos tem aumentado.

Palavras-chave: Direitos humanos. Empresas de segurança privada. Responsabilidade Civil.

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Introduction

Over the last twenty years private military and security companies have become a growing phenomenon. Not only individuals but also legal entities, such as states and international organizations, rely on the private sector in security matters. The issue of security, still stays in the hands of states, which are obliged to provide and ensure public security, the same as protection to individuals when necessary. In practice, multiple examples show that, even if public authorities do their best efforts in delivering safety and security, the result is still not satisfactory. That is why the market of security services belongs to the most interesting and dynamic, and consequently is growing rapidly. Economic demand stimulates supply, and both have created an industry of transnational character.

This paper is devoted to the growing phenomenon of the private military and security industry with respect to human rights obligations. In the first part it will analyze the concept of a private security company, which is not clear in national regulations and has few relevant provisions in international conventions. Despite the existing legal gap in international law, humanitarian law and human rights law, the theory of international law faces an urgent need to provide at least some analysis on legal concepts and the possible application of international law provisions to private security companies.

The second part will contain a short description of examples of human rights violations committed by private military and security companies, or with their participation, during service delivery or other forms of activity. With regard to this concept, human rights violations will be analyzed not only as violations committed by private sector but also as violations committed by states obliged to punish violations committed by other entities, including legal bodies. Unfortunately, in practice states have serious problems enforcing this responsibility.

The third part of this paper discusses possible methods of responsibility enforcement, with respect to the transnational character of many private security companies involved in human rights violations worldwide. This leads to enforce criminal responsibility to those who violate human rights and commit crimes, and international responsibility of the state, which contracts private security companies. Conclusions will be based on possible proposals on how to deal with the phenomenon of private security companies and how human rights law could be better enforced both by states and private entities.

1 The concept of private military and security company

The growing market of private military and security companies has been analyzed from many aspects and points of view, including economic, geographical, political and legal. Legal description is specific, since it requires a distinction between international and national considerations, as the most recognisable private security companies operate worldwide, and participate in many armed conflicts. Unfortunately, existing international law of armed conflicts, both international and non-in-

ternational, has been created by states and for states. Consequently, that aspect did not take into consideration the fact that private entities, would appear in international community, and later join such a large number of armed conflicts, independently on what they do – logistics or other types of support to armed forces. That is why the status of private military and security companies is not clear in international humanitarian law, as well as in international law as a whole (White, 2012, pp. 11-30).

With regard to this phenomenon we have to rely on national law regulations, which define requirements on private security companies and their conduct. In most cases this type of company is defined by the type of services delivered in the market. Such services are focused on the protection of persons and their property. Detailed analysis must distinguish “private security company” from “private military company” (Diphorn, 2009, p. 100). The latter is associated with military services and direct participation in the conduct of hostilities. Of course in practice it is difficult to differentiate those two categories, since private security companies also operate in conflict zones and undertake activity which is directly connected with the use of force. In conclusion, practice of service delivery and activity may be very different from the registration of the company (Voyame, 2007, pp. 361-376). A helpful explanation is provided by *Questions and answers on the Montreux Document*:

There is no standard definition of what is a ‘military’ company and what is ‘security’ company. In ordinary parlance, certain activities (such as participating in combat) are traditionally understood to be military in nature and others (such as guarding residences) related to security. In reality many companies provide a wide range of services, which can go from typically military services to typically security services. They are therefore not easily categorized. Moreover, from the humanitarian point of view, the relevant question is not how a company is labeled but what specific services it provides in a particular instance. For this reason, the Montreux Document avoids any strict delimitation between private military and private security companies and uses the inclusive term ‘private military and security companies’ (PMSCs) to encompass all companies that provide either military or security services or both (Federal Department of Foreign Affairs, & International Committee of the Red Cross, 2008, pp. 7-27, 38-42).

Despite the shortage of international legal definition of the concept, especially in international humanitarian law, we can rely on national regulations, but unfortunately there is one exception. Usually states confirm only the fact that they have private security companies while reject, that they employ private military companies, or even that such companies exist or operate under their jurisdiction. With respect to that way of thinking, it seems to be logical to use the term “private military and security company”.

From the legal point of view we are talking about a legal person or legal entity operating during an armed conflict or at least in conflict situations and zones. We talk about the legal obligations of the company but also about obligations of the personnel (Weigelt, & Märker, 2007, pp. 377-394). With respect to this question the status of personnel should be analyzed in a different way in times of war, during which

. . . all individuals have to respect international humanitarian law in any activity related to an armed conflict. PMSC personnel are no exception. If they commit se-

rious violations of humanitarian law, such as attacks against civilians or ill-treatment of detainees, these are war crimes that must be prosecuted by States. While companies such as have no obligations under international law, their employees do. On the other hand, international humanitarian law and human rights law also protect the personnel of these companies. The protection they are entitled to will vary depending on the type of activity they engage in. For instance, most PMSC employees are deployed as civilians in situations of armed conflict; in this case, they are protected against attack, unless and for such time as they directly participate in hostilities (Federal Department of Foreign Affairs, & International Committee of the Red Cross, 2008, p. 39).

In the literature of international law there is a growing number of analysis of private security companies which focus on them from the perspective of privatization of war.¹ The legal definition meets the requirements of mercenaries, but they can be applied only to some extent. However, those criteria require a more detailed description. Despite legal difficulties the Montreux Document proposes the most widely recognized definition which is applicable for the purpose of this Document and clarifies that

PMSCs are private entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel (Federal Department of Foreign Affairs, & International Committee of the Red Cross, 2008, para. 9(a)).²

Unfortunately, this definition was adopted for the purpose of the Montreux Document, which is not an internationally binding instrument (Ralby, 2016, pp. 235-264), and can be applied only for international humanitarian law interpretation and does not create new obligations. It is also worth mentioning that it “. . . does not refer to direct participation in hostilities or to offensive or defensive services” (Jerby, 2013, p. 5).

“Private security service provider” is another term which was introduced by the International Code of Conduct for Private Security Service Providers and defines the concept as “. . . any Company (as defined in this Code) whose business activities include the provision of Security Services either on its own behalf or on behalf of another, irrespective of how such a Company describes itself” (Jerby, 2013, p. 50). The author pays special attention that despite the term military was removed from the Code because the Association does not want to be connected with military functions, it is applicable to signatory companies which provide military services and signed this document (Jerby, 2013, p. 50).

Latin America is specially affected by the phenomenon of private security companies. Due to armed conflicts, difficult political situations and personal danger, individuals rely on private security companies as those entities may bring at least some protection. In some Latin American states

¹ See, for example, Cameron and Chetail (2013), Drews (2007, p. 331-344), Huskey (2012, p. 193-212), Karska and Karski (2014, p. 397-491), Schaller (2007, p. 345-360), and Tonkin (2011).

² See Seiberth (2014, p. 67).

officials of high authority have to hire private security companies. Such companies are allowed to possess guns which are needed in effective delivery of their services. But this issue requires specific clarification on the type of weapons allowed, and the specific regulations for monitoring the situation. In the process of delivering security violations take place. Access to guns and firearms is not limited to civilians and individual persons, with very imprecise rules of applying for licenses. The easy purchase and legal possession of arms, without strict requirements, seem to be the main source of the unprecedented development of private security companies, with increasing legal problems seemingly arising as a consequence of their activity.

One such example is Honduras, which was examined by the UN Working Group on the use of mercenaries twice in 2006 and 2013. Findings were very interesting:

Security has become a commodity in high demand in Honduras and has led to the exponential growth of the private security sector. Today PSCs dominate and control the security sector in Honduras. According to Ministry of Security, there are 706 registered PSCs and 14,878 private security guards known to work for these companies in Honduras. This figure is already greater than the estimated number of police officers in the country, which is 14,000 at most. In addition to the registered PSCs and their guards, there are reportedly tens of thousands of unregistered and illegal security guards. According to the National Police, the number of such private security guards is estimated at 60,000. This makes the ratio of private security personnel to police almost 5 to 1, rendering the authority of the police force minuscule compared to the power and the facto authority of PSCs. Furthermore, many of the PSCs are reportedly owned by or have close connections with former high-ranking military or police officers, or even active officers in some cases, although the National Police and the Ministry of Defence maintain that no active officers own or work for PMSCs. To that extent, the PSCs in Honduras are undoubtedly powerful entities with significant leverage and there are significant challenges in ensuring that their activities are kept within the four corners of the law (United Nation of Human Rights, 2013, pp. 6-7).

To conclude on the concept and industry of private military and security companies we have to look at the level of violence and individual crimes committed in the specific region. That is usually the main reason for justifying access to individual security. The second aspect refers to the right to possess different types of weapons and with respect to this, in every country access to guns and firearms should be limited to licensed private security companies, and the same basic limitations should be provided to individuals. Only under this condition and enforcement of public security, human rights may be properly protected and have a chance to be improved.

2 Examples of human rights violations committed by private military and security companies

A private security company acts both during the time of war (armed conflict) and during the time of peace (Gómez del Prado, 2011, pp. 151-169). Consequences of human rights violations need to be distinguished in those two categories and extended into serious violations of international humanitarian law which may constitute war crimes. In fact, this last category together with

crimes against humanity belong to the most frequently committed by the personnel of private military and security companies. In the literature of international law authors pay special attention to violations of women's rights and rights of a child. Vrdoljak (2011) wrote:

Recent press coverage of the role of private military and security companies in conflict and post-conflict operations has invariably involved women. Women have been PMSC employees and brought actions against their employers for sexual assault or have been civilian victims of private contractors operating forced prostitution rings. Armed conflict, belligerent occupation, and civil strife are by definition necessarily violent for all participants, be they civilians, combatants, or PMSC employees. However, for women it heralds an exacerbation in existing violence, discrimination, and inequalities. The increasing engagement of PMSC's in conflict, post-conflict, and transition situations in the provision of security and other services has brought their activities and operations starkly to the fore – particularly as they relate to women specifically and gender-related issues more generally (p. 280).

Further analysis indicates that

... there are corollary statistics for injuries not occasioning death. In addition, the likelihood of extrajudicial killings rises exponentially for women during armed conflict. In conflicts in Mexico and Guatemala, evidence has emerged of women being deliberately targeted because of their gender (femicide). These trends can be extrapolated for private contractors, for instance, a survey in Israel indicated a link between incidents of domestic violence and homicide and firearms licensed to private security guards (Vrdoljak, 2011, p. 282).

The author also discusses special aspect of sexual violence and private military and security companies' role employees in commission of this type of crime. In her opinion:

Sexual violence encompasses various acts including forced prostitution, sex trafficking, forced sterilization, forced abortions, forced impregnation, and pregnancies and so forth. Data has highlighted that PMSC employees are as likely to perpetrate such crimes as are regular armed forces. It is unsurprising given that, as noted above, PMSC recruits are often drawn from regular armed forces. For example, DynCorp Aerospace Technology UK Ltd employees were implicated in sex slavery in Bosnia by Human Rights Watch before a US congressional hearing in 2002. A subsequent US Department of Defence (DoD) Inspector General report found the situation was fuelled by the lack of any requirement for private contractors to report or punish employees engaged in such conduct (Vrdoljak, 2011, pp. 283-284).

Similar problems arise with respect to the rights of a child. Baker and Greijer (2011) wrote about several incidents that

... have been reported in the press or by human rights organizations of children becoming victims of violence or abuse PMSC employees. In most cases, these incidents have not been investigated and no prosecutions have been launched against those responsible. In Colombia, children have been victims of sexual abuse by PMSC agents. According to a press report, in October 2004 employees of a US PMSC, together with US marines, committed acts of sexual violence against three minors and widely distributed videos of the abuse among the local population. The marines and private contractors worked as advisors to Colombian military personnel on the Tolemaida Air Base, near the town of Melgar. No investigations or prosecutions have been launched, since US military personnel

and private contractors benefit from an immunity agreement between the United States and Colombia. Concerning Guatemala, there have been reports that: non-state actors with links to organized crime, gangs, private security companies, and alleged 'clandestine groups' committed hundreds of killings and other crimes. However, no details were provided on the specific involvement of PMSCs. Children were also among the victims of the Nisour Square incident in Iraq, in which 17 civilians were killed and 20 others injured by employees of the PMSC Blackwater International in September 2007. At least one of the persons killed was a child (an 11-year-old boy) and several children were injured after a grenade was thrown into a nearby school. Although five of these employees were indicted by the District of Columbia in December 2008, the charges were dismissed on 31 December 2009, based on violation of the rights of the defendants (p. 265).³

Bakker and Greijer (2011) highlight that:

Due to the absence of incompleteness of investigations in these incidents, very scarce information is available, including about the names of the PMSCs and the nationality of the employees who were allegedly involved. Therefore, the question whether they benefited from any immunity agreement cannot be answered, except in the Colombian example, where there was indeed the case. Nevertheless, despite the lack of details, this overview shows that reports do exist about the violations of children rights by PMSC personnel, which confirms the risk of such violations through the employment of PMSCs, as well as the need to prevent them (pp. 265-266).

Within the category of human rights violations reports highlight the right to life. Specific situations constitute violations of certain categories of people and peoples not only the highlighted rights of children, but the right of people to self-determination. This right has been examined by many international institutions, including the UN General Assembly and the UN Security Council, with respect to the activity of mercenaries. Due to the problem of private military and security companies replacing mercenaries, further analysis focuses on the use of private military and security companies in impeding the right of peoples to self-determination. This shift in focus has a historical background and

. . . a new role for mercenaries evolved in the context of decolonization in the 1960s, when they were hired to fight against national liberation movements and prevent the exercise of the right to self-determination of peoples under colonial domination. They were also used in the period following independence to destabilize newly independent governments, often fighting alongside armed opposition groups who were cultivated as aliens. These practices were considered unacceptable and widely condemned by United Nations organs (United Nations High Commissioner for Human Rights, 2002, p. 5).

We also have to remember human rights obligations and the basis of them: the right to protection. That aspect is connected with obligations of states which should punish violations of human rights and international humanitarian law committed by private military and security companies. If they do not punish them, due to the lack of will or lack of ability, state authorities violate

³ See Snukal (2015, p. 660-675), and Johnston, and Broder (2007).

a basic obligation: to protect human rights, which consequently increases the level of impunity of such companies and their personnel.

With respect to categories of potential human rights violations committed by private military and security companies, or with their participation, legal analysis should include specific categories of international humanitarian law and international criminal law provisions. Since in practice private security companies often operate in armed conflict zones, their activity may constitute serious violations of international humanitarian law as defined by Geneva Conventions on the protection of victims of war, adopted on 12 August 1949. Article 50 of the I Geneva Convention states:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (International Committee of the Red Cross, 1949).

This provision has consequences in international criminal law regulations.

Detailed analysis of the International Criminal Court (ICC) Statute (Rome Statute of the International Criminal Court, 1998) indicates that private military and security companies may be involved in a commission of war crimes and crimes against humanity. That statement of course does not exclude potential participation in a commission of the crime of genocide or even in a commission of the crime of aggression, but until today such an example is yet to be reported. Nevertheless, one of the most important cases of human rights violations, committed with the participation of a private security company refers to the accident on the Nisour Square in Bagdad in September 2007, and has had serious criminal repercussions for Blackwater personnel.

3 Possible ways of responsibility enforcement

Violations of human rights and serious violations of international humanitarian law applicable in armed conflicts that constitute war crimes or crimes against humanity may be committed by the personnel of private military and security companies in the same way as by regular armed forces. It is important to consider that human rights, human rights violations committed by the personnel of private security companies are very difficult to investigate. Analysis of such violations in the first aspect need to distinguish possible ways of justice enforcement and secondly, create a specific field of self-regulation of the industry based on soft-law mechanisms, which still require modifications. Human rights violations primarily should be investigated by the court of justice in the country where crime was committed. Unfortunately, in this case we may face a crucial problem which is connected with so called impunity agreements. On the basis of such agreements, personnel of private military and security companies may be excluded from the national jurisdiction of a state in which they operate. On the other hand, prosecution in such cases should be undertaken by national courts of the state in which the company is registered. That poses a practical problem of accessing the site to collect any

evidence. This situation is also difficult for national prosecutors due to limited time and the reliance on evidence collected by judicial authorities and police in place of the crime commission. This aspect of national criminal justice is not easy in international cooperation (Karska, 2013).

Another path which may be taken in respect to the commission of serious violations of international humanitarian law is international jurisdiction enforced by international criminal tribunals and courts. Of course in this case, we also face a lot of problems with justice enforcement. One of them refers to the lack of recognition of the ICC jurisdiction by the biggest powers and majority of permanent members of the Security Council (*inter alia*: United States and Russia), which are not concerned with ratifying this Statute. Most private security companies operating in present international conflicts are registered in the United States and Great Britain. Consequently, international criminal jurisdiction cannot be applied. In this case human rights violations that constitute war crimes or crimes against humanity can be prosecuted only by national courts. One very important aspect of criminal jurisdiction should be mentioned in this case, which is the principle of universality. Most crimes which stay under the jurisdiction of international criminal tribunals are recognized as international crimes and punished on the principle of universality, established as such on the basis of several international agreements. They were also incorporated to national criminal codes which provide national courts competences in regard to these crimes.

Practical difficulty is connected with national aspect and the ability of national courts to establish criminal procedure. In many situations, especially with a participation of high rank officials, national courts were limited by exclusion of ordinary courts to take legal steps. In some other cases national courts were unable or unwilling to start criminal proceedings. We also have to remember that jurisdiction of the ICC is complementary to national courts and can be established if the ICC, after preliminary legal, steps decides that a national court was unwilling, unable or the gravity of the crime justifies engagement of international criminal jurisdiction. That condition in practice limits applicability of international criminal law for human rights violations.

In practice personnel of private security companies should be prosecuted by national courts. International jurisdiction is engaged when national judgment is final and not satisfactory. In such a situation a case may be brought into international level. As Lanzerini and Francioni (2011) rightly highlight:

As for individual responsibility, there is no doubt that private military and security companies employees are to be considered responsible in their personal capacity for any act reaching the threshold of a war crime or a crime against humanity (including for example, torture, rape, enslavement, *etc.*), and may thus be subject, *inter alia*, to the application of the principle of the universality of jurisdiction as well as – for the acts perpetrated in its personal and territorial scope of application – to the jurisdiction of the International Criminal Court (p. 55).

Of course we have to take into consideration different regional systems of human rights protection, which work in a different way in Europe than in Latin America. But there is one common denominator between them – the principle of complementarity, which involves international system only in situations when national courts and judicial institutions are not able to protect human rights

properly. Unfortunately, we are not able to indicate many cases from international human rights tribunals' jurisdiction. The case of Blackwater was judged by a national court and mainly with regard to individual responsibility of the personnel. In this short essay we are able only to indicate the most important aspects of the responsibility of private military and security companies, with regard to human rights violations and serious violations of international humanitarian law applicable in armed conflicts. Another point which has to be raised refers to command criminal responsibility. This idea is based on criminal responsibility of legal persons, but unfortunately not recognized by all national criminal laws systems. This refers to a special way of thinking that a legal person or legal entity and consequently their organs, should be punished for violations of laws including human rights.

Specificity of private military and security industry refers to self-regulations, too. They are based on soft-law mechanisms such as International Code of Conduct for Private Security Service Providers and its Association which examine all members' relation and observance of human rights (Huskey, & Sullivan, 2012, pp. 378-379; Shah, 2014). Of course the weakest point of this system is its voluntary nature and a lack of binding effect. It is worth to citing MacLeod (2011), who wrote that:

Regulation of private military and security companies should take the form of a top-down-bottom-up hybrid approach which mirrors some of the existing international business and human rights/corporate social responsibility initiatives. A hybrid approach can harness the benefits of international standards together with national implementation. The approach should be multistakeholder in nature, ensuring both accountability and transparency. Most importantly it should be victim-centered and act as a deterrent to human rights violations by business, as well as providing an effective, transparent, and enforceable remedy for those who suffer as a result of such violations. Existing business and human rights projects meet some but crucially not all of these criteria. As it stands, private military and security companies do fall within the scope of the international business and human rights initiatives . . . but given their voluntary nature and lack of enforcement mechanisms, there is not enough to ensure proper accountability for human rights violations (p. 361).

Conclusions

The growing phenomenon of private military and security companies has become a challenge for international law and national legal systems. There are many situations in which this phenomenon interacts with human rights and international humanitarian law. This short essay has been focused on introducing this problem, and cannot provide a detailed description of a possible solution. One of the most important elements of the discussion in international community should focus on binding international instrument, preferably a convention, which would be able to establish at least very elementary rules for states and international organizations, responsible for using private military and security companies (White, 2011; Karska, & Karski, 2014, p. 403). Under this condition human rights have a chance to be better protected, and impunity for human rights violations could be at least limited. The international community has witnessed a lot of initiatives from non-governmental entities, also model laws and self-regulations of the private security indus-

try, but still the real problem has not even been reduced. The number of human rights violations has grown. Transnational nature, difficulties with human rights enforcement mechanisms, especially with access of victims to remedies, still wait for a much better solution.

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