



# The regulation of military and private security companies

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## 1 INTRODUCTION

services in the private sector – by States, international organizations, and NGOs- is a trend on the global stage. The change to the use of Military and Private Security Companies (PMSC) in several countries raises the importance of studies on the area in the light of International Law, mainly due to the role they play in the performance of functions that normally are monopolized by the States (COHEN, 2005).

Given this, initiatives in the international space regarding the importance of legal regulation can be an effective means of limiting and controlling PMSC activities, taking into account the international dimension of the privatization phenomenon. However, although PMSCs do not operate entirely within a legal vacuum, the normative framework, albeit simple, that governs their activities at the international level is still controversial (NANDI; MOHANTY, 2010).

In short, it will be noted that these companies have not yet been subject to a specific convention that controls their performance and activities under International Law. The regulation of the activities of private companies in the field of security depends on the applicability of the existing international legal frameworks, as well as on the jurisdictional effort of the States to ensure compliance (COHEN, 2005).

It should be noted that the determination of the legal status of PMSC workers under the international treaties that regulate these issues - that is, whether they are mercenaries, combatants, or civilians - is problematic and makes it difficult to apply the rules of international humanitarian law relating to the activities of these companies. Likewise, International Human Rights Law also provides relevant norms for the activities of the PMSC. However, in principle, this set of laws is only binding on companies through the application of the domestic laws of the States (NANDI; MOHANTY, 2010).

Many PMSCs, aware of the serious reputational problems they suffer due to questionable actions, as well as recognizing that their activities are not adequately regulated, have undertaken efforts in terms of self-regulation. In this sense, several companies proposed codes of conduct, such as the International Stability Operation Association (ISOA) and the British Association of Private Security Companies (BAPSC) (HOLMQVIST, 2005).

Although this initiative is commendable, it is noted that self-regulation by the private sector has several limitations, which undermines the very efficiency of the PMSC, mainly because the codes of conduct elaborated by them are ethical instruments, but not legally binding. Therefore, even if such instruments are raised before national courts or judicial bodies, they do not bind companies to the



guidelines, which results in deficiencies inherent in obtaining responsibility on their part of them in the face of their actions (COHEN, 2005).

## **2 OBJECTIVE**

Analyze the international efforts undertaken in the regulation of Military and Private Security Companies.

## **3 METHODOLOGY**

The research was developed based on the literature review of international security and International Law, as well as through Document Analysis and Content Analysis.

## **4 DEVELOPMENT**

Initial efforts to promote PMSC regulations are not only in the field of International Law since several documents - Resolutions of the United Nations General Assembly and Security Council - deal with the respective matter (COHEN, 2005).

The United Nations Working Group on the Use of Mercenaries inaugurated the PMSC regulatory effort. Subsequently, the initiative of the Swiss government, through the Montreux Document, in 2008, and the International Code of Conduct for Private Security Companies, of 2010, reinforced the understanding of international society regarding the indispensability of regulating such companies (HOLMQVIST, 2005 ).

The United Nations created the Working Group on the Use of Mercenaries in 2005. Specialists were appointed with the aim of monitoring and analyzing the consequences of operations carried out by PMSCs through Fact-Finding Missions, in addition to providing training courses to the employees of these companies regarding the observance of human rights, especially about the principle of self-determination of people (COHEN, 2005).

In this way, the Working Group created by the United Nations Commission on Human Rights, later replaced by the Human Rights Council (HRC) sought to study, identify and monitor the activities of the PMSC. The Group reiterated that the accountability of PMSCs is an ongoing challenge, due to the extremely poor record of court cases, whereby appropriate measures need to be taken to mitigate existing legal gaps at national, regional, and international levels (NANDI; MOHANTY, 2010).

Intending to fulfill its mandate, the Group used Communications, which is an instrument through which States, International Organizations, NGOs, and individuals reported human rights violations practiced by PMSC. With the facts in hand, the Working Group proceeded to analyze the complaint, subsequently communicating to the State to manifest within sixty days. Soon after, it issued the necessary



recommendations to the State and the PMSC, to guarantee due compliance with international standards (SINGER, 2001).

It is noted that the work of the Working Group was essential in monitoring the PMSC, as well as in the search for compliance with international standards. However, the Group's performance ran into several obstacles, including:

(i) The absence of an authority to oblige States, as well as PMSC officials, to effectively comply with international legal obligations.

(ii) The lack of enforcement of the decisions issued by the Group, as the studies, analyses, and recommendations sent to the States were not binding (NANDI; MOHANTY, 2010).

#### 4.1 THE PREPARATION OF A DRAFT INTERNATIONAL CONVENTION ON PMSC

Faced with the difficulty in enforcing the norms of International Humanitarian Law (IHL) and International Human Rights Law (IDHR) by States and PMSCs concerning the scope of their action, the Working Group presented an International Convention on the Regulation, Supervision, and Monitoring of PMSC, to try to remedy the international omission in terms of regulation in that area (COHEN, 2005).

In particular, concerning its content, the draft convention proposes:

a) Reaffirm and reinforce the State's responsibility for the use of force and reiterate the importance of the State's monopoly on the legitimate use of force;

b) Identify the functions that are inherent to the State and that cannot be subcontracted to private security and military companies under any circumstances;

c) Limit the use of force and firearms by private security companies and the military following international human rights standards;

d) Request state parties to develop national regimes for licensing, regulating, and supervising the activities of private military and security companies and their subcontractors;

e) Promote international cooperation among States about the licensing and regulation of the activities of private security companies and their supervision.

f) Establish the increased responsibility of the “States of origin” in cases where private military and security companies are registered for the export of services [...] registered and licensed in their country;

g) Request operating States to ensure effective control of the activities of foreign private military and security companies operating in their territory;

h) Establish an international register of private military and security companies based on information provided by Member States;



i) Create a committee for the regulation, supervision, and control of private military and security companies, following the procedures established in international treaties on human rights, to monitor the measures taken by the States parties to implement the convention. (SINGER, 2001).

The project was born to regulate the PMSC, in addition to enabling the implementation of tools to monitor their activities, thus enabling perpetrators to be prosecuted and judged for violations of human rights standards. In addition, it listed minimum standards considered essential for the regulation of PMSC. Likewise, it sought to regulate the process of contracting these companies by the State, linking it to the need to monitor them, in addition to establishing their performance under the mandate of the United Nations and other international organizations (COHEN, 2005).

However, the Project was silent regarding the contracting of PMSCs by NGOs and non-State armed groups, which does not mean that in the territory in which they are operating they are not limited by the normative framework of the State, which is why Article 4 of the referred Project mentions that: “The State is responsible for the military and security activities of PMSCs registered or operating in its jurisdiction, whether or not these entities are contracted by the State” (NANDI; MOHANTY, 2010).

Furthermore, the scope of application of the Draft Convention extends to scenarios not only of armed conflicts but to all situations, as Article 3 (3) of the Draft states. Therefore, it is observed that the rapporteurs aimed to regulate all PMSC conduct, including those that were not exhaustively covered, since article 3 (4) determines: “in cases not covered by this Convention or by other international agreements, States parties remain bound under the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience”.

This aforementioned provision is analogous to the Martens Clause, listed in Article 1 (2) of the I Additional Protocol to the Geneva Conventions of 1949, according to which: “in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience”.

Therefore, the justification for the politicization of such a clause is based on the extreme need to curb any kind of assumption that topics not expressly addressed in the legal document are considered permissive by international standards (NANDI; MOHANTY, 2010).

The Draft Convention sought to conceptualize the PMSC as a “business entity that provides compensatory military and/or security services to individuals and/or legal entities”. The definition encompassed the corporate nature of the company, a point of extreme importance when it comes to distinguishing a PMSC from a mercenary activity since the latter is considered a natural person and not a legal entity. The compensatory aspect integrates the concept of PMSCs, but it is still unclear whether the term refers to non-monetary compensation, such as voluntary military service provided by a PMSC to its State of origin (COHEN, 2005).



In addition, it restricted the nature of the services provided by the PMSC to a military or security nature, prohibiting the outsourcing of certain services that correspond to the functions inherent to the State, thus restricting the mode of contracting these companies. In this way, it is prohibited to delegate functions inherent to the state apparatus, which are, among others (COHEN, 2005):

- (i) Direct participation in hostilities;
- (ii) Participation in wars or combat operations;
- (iii) Searching for prisoners;
- (iv) The transfer of knowledge in military, security, or policing training;
- (v) The use of weapons of mass destruction or other police powers, such as arresting and detaining, and interrogation.

#### 4.2 PROHIBITION OF DIRECT PARTICIPATION IN HOSTILITIES

The prohibition on direct participation in hostilities is detailed in article 8 of the aforementioned Project, among the options:

- (i) The overthrow of a government, or the change of the constitutional order, in addition to other legal, economic, and financial bases of the State;
- (ii) The coercive change of state borders;
- (iii) Violation of sovereignty, which included supporting foreign occupation;
- (iv) Attacks on the life and safety of civilians;
- (v) Forced displacement or removal of persons from their residence;
- (vi) Actions that limit the freedom of movement of civilians;
- (vii) The imposition of restrictions on access to livelihood resources - water, food, land, livestock, shelter, and access to sacred places and worship.

It can be seen that the Project falls short of its role by not defining what “direct participation in hostilities” would be, except for Article 8 which mentions only the consequences of direct participation. In this way, given the normative silence of the scope of the project, the solution falls on the norms of International Humanitarian Law, since this legal framework considers the civilian as the individual who is not directly involved in hostilities. In this way, the project, since it prohibits the participation of the PMSC directly in the conflicts, implicitly recognizes the subjects that make up the PMSC framework as civilians (SINGER, 2001).

The Project, in addition to prohibiting the participation of PMSC directly in hostilities, establishes the exceptions, among them:

- (i) Legitimate defense of oneself or others;
- (ii) Defense of people for whom he was hired to provide security;



(iii) Resisting any attempted kidnapping or illegal abduction of a company employee or the person for whom he was hired to defend it;

(iv) Actions aimed at preventing or putting an end to the commission of a serious crime involving a serious threat to life or serious bodily harm.

In summary, self-defense and the defense of third parties are not considered direct participation in hostilities.

#### 4.3 STATE RESPONSIBILITY FOR THE PERFORMANCE OF THE PMSC

The State must attribute criminal responsibility to the PMSC involved in functions inherent to it, as well as the verification of violations of the norms of international law. In this sense, both individuals and legal entities will be held liable in criminal and civil terms for the authorship of the crimes listed in the body of the Draft Convention, and it is up to the State to prosecute and judge such individuals (HOLMQVIST, 2005).

Furthermore, the state entity is responsible for listing all instruments of a legislative nature to supervise such companies. The competence of the sovereign States remains crystal clear in establishing laws that delimit the activities of the PMSC, in addition to adopting administrative measures - especially about licensing - and appropriate judicial measures, in addition to the creation of a body responsible for obtaining the collection, analysis, and exchange of information about the activities of these companies (NANDI; MOHANTY, 2010).

It should be noted that although the PMSC Convention Project is a unique undertaking in the attempt to regulate - both domestically and internationally - the PMSC, it has some shortcomings concerning establishing the legal status of individuals who make up the framework of these companies, the criteria necessary to legalize the activity of providing military services and the necessary distinction between PMSC and mercenaries, reasons why some States were reluctant to approve such a Convention (SINGER, 2001).

Faced with the international omission to carry out a Convention with the scope of regulating PMSC, the Swiss government took the lead in the preparation of two documents considered essential to the subject, supported by the International Committee of the Red Cross, namely: the Montreux Document, and the ICoC (NANDI; MOHANTY, 2010).

#### 4.4 THE MONTREUX DOCUMENT ON PMSC

It is the first document of global scope to deal specifically with the PMSC that acts in armed conflict scenarios. It was launched in 2008 and ratified by several States. The document is subdivided into two parts: (i) the first part deals with the legal obligations regarding the performance of the PMSC; (ii) the second part lists the minimum performance standards that these companies must observe (PRADO, 2006).



It should be noted that the aforementioned document is not a treaty or convention, but is the result of an initiative by the Swiss government, in partnership with the International Committee of the Red Cross, as a response to the actions of the PMSC in scenarios of armed conflicts, as well as the implications for humanitarian issues. That said, the document ratifies the international standards that must be observed in the performance of the PMSC (NANDI; MOHANTY, 2010).

The first part of the document outlines State responsibilities and reaffirms that the Contracting State must conduct business with the PMSC in the light of the dictates of International Humanitarian Law, above all based on Article 43 of the Hague Regulations, to guarantee the dictates of the order public and security. In this sense, the contracting State is responsible for regulating the provision of PMSC services in the territory in which they operate (HOLMQVIST, 2005).

In summary, the Montreux Document does not innovate in its provisions, since it seeks to ratify and reinforce the human rights dictates already prescribed in other international legal provisions, thus making the contracting States responsible for any violations of IHL. As for the second part, the document presents the procedures considered commendable regarding the actions of the States in the face of repression and prevention of violations of human rights norms perpetrated by PMSC employees (PRADO, 2006).

To act in a preventive manner, the State must analyze which PMSC fits domestic and international norms, authorizing the signing of agreements only with those considered legal. To do so, they should verify complaints of human rights violations by the PMSC, in addition to examining the training of the team, and the equipment used, among other factors (NANDI; MOHANTY, 2010).

In addition to the contracting State, there is the figure of the territorial State, which also influences the behavior adopted by the PMSC based on legal restrictions imposed on them, some of which are:

- (i) The prohibition of violations of IHL norms, as well as the adoption of the necessary preventive measures;
- (ii) Application of regulations, administrative, disciplinary, or judicial sanctions against the violation of IHL rules by these companies;
- (iii) Application of legislative measures, among others, to guarantee the observance of human rights norms;
- (iv) The necessary analysis regarding the conduct of the PMSC teams;
- (v) The criminalization of the actions of individuals, as well as PMSCs, when they commit violations of the precepts of the Geneva Conventions, in addition to their Additional Protocols.

Therefore, the territorial State should limit the use of force by the PMSC only to cases of legitimate self-defense or that of third parties (HOLMQVIST, 2005).

Finally, the third category of State listed in the Montreux Document is the home State, that is, the State in which the PMSC is registered or incorporated. In this sense, there is a greater reason for the obligation of the home State to regulate the activities of the PMSC that it is responsible for registering.



Therefore, no registration can be carried out without first having a normative document that reserves itself to deal with the performance of the PMSC (PRADO, 2006).

The same mandatory guidelines in the international field for contracting States and territorial States apply to domestic States, for example, about the criteria for registering PMSCs, in addition to the duty to monitor them and ensure the accountability of their directorate. and operational team (HOLMQVIST, 2005).

#### 4.5 INTERNATIONAL CODE OF CONDUCT FOR PMSCS - ICOC

The 2013 International Code of Conduct for Private Security Service Providers (ICoC), 2013, sought to list international standards for PMSCs that operate in a complex environment, in addition to improving the oversight and accountability of these companies. This initiative was launched in 2010 by various parties, especially the private sector and the Swiss government, to create a breakthrough in governance, compliance, and accountability, as well as imposing direct obligations on PMSCs to make them comply with standards. of human rights and IHL (PRADO, 2006).

The purpose of the ICoC was to establish an agreed set of principles for PMSC and to establish a basis for translating these principles into standards, as well as governance and oversight mechanisms. Given this, we sought to highlight the human rights responsibilities of PMSC and establish international principles and standards for the responsible provision of private security services, particularly when operating in environments considered complex. Note that the activities covered by the ICoC are only security services, which are those intended to protect people and objects. Therefore, military services seem to be outside the scope of that code (COHEN, 2005).

Furthermore, considering that the activities of private companies can lead to a negative influence on the enjoyment of human rights and the rule of law, the ICoC specifically refers to human rights and IHL as legal rules that must be applied to PMSC operations. Signatory companies are obliged to avoid signing contracts where their performance conflicts with the aforementioned legal provisions. However, this requirement is not directly imposed by the ICoC, but by domestic law which incorporates norms and principles from IHL and human rights law. In other words, signatory companies are obliged to prevent their personnel from committing war crimes, crimes against humanity, genocide, torture, and enforced disappearance, among others (NANDI; MOHANTY, 2010).

Companies must take the necessary measures to ensure that their services and goods do not violate any human rights and IHL standards, i.e. the ICoC sets out general rules regarding the types of activities that PMSC can provide to their customers (PRADO, 2006).

Generally, PMSCs are authorized to provide all types of security services, including on prisoners, providing them with the authorization to protect, transport, or question detainees if the companies have





been specifically contracted to do so by a State and if their personnel is trained in applicable national and international laws (COHEN, 2005).

PMSC is prohibited from using force, except in "self-defense or defense of others against the imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving a serious threat to life". Any implementation of this exception must not exceed what is strictly necessary, proportionate to the threat, and appropriate to the situation. The use of force by PMSC personnel as an exception must comply with all national and international obligations (HOLMQVIST, 2005).

## 5 FINAL CONSIDERATIONS

It is concluded that the Montreux Document and the ICoC do not innovate in the legal obligations imposed on States, PMSCs, and their personnel. They only highlight and ratify the legal provisions woven into other international legal systems, essentially the norms of IHL and IHRL (PRADO, 2006).

The existence of such documents did not prevent the PMSC from being criticized, especially regarding its value. This is because such documents lack binding force, in addition to the fact that it is not a treaty, therefore, it does not create new obligations under International Law. In short, these are symbolic documents by which States ratify their obligations in light of the norms of International Humanitarian Law and International Human Rights Law (COHEN, 2005).

In this sense, such documents reaffirm the rules by which States are bound at the international level, which directly imply their actions regarding the activities of PMSCs. This, emphasizes the importance of creating domestic laws as an effective instrument for regulating PMSCs, in addition to creating an entire administrative and judicial apparatus for this purpose, from the moment that PMSCs personnel are held responsible for violations of the rules of IHL and ILHR (HOLMQVIST, 2005).

Although legal entities are not expressly bound by the legal provisions of IHL, as this is limited to regulating the behavior of individuals and parties involved in an armed conflict, the Montreux Document and the ICoC were careful to limit the role of such companies, as well as all their technical personnel, to the dictates of IHL, in addition to International Human Rights Law (PRADO, 2006).

Finally, it is emphasized that the legal status of PMSC personnel will be analyzed based on an investigation of the specific case, therefore, an *erga omnes* rule is not established. Therefore, in light of the postulates of IHL, which considers a civilian any individual who does not directly participate in hostilities, PMSC officials will be granted the same legal treatment as civilians (NANDI; MOHANTY, 2010).



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