

Corporate warriors - privatization of traditional military?

Abstract

The main purpose of this post is to distinguish typical mercenarism as defined by the international law from the so-called private military and security companies (PMSC), which appear in the form of business corporations in various areas of international crisis management. Currently these subjects represent a significant component of an armed presence in the present conflicts and quite profitable subject of "transnational" business with rather vaguely defined rules which are greatly affected by the International Law of Armed Conflict (International Humanitarian Law).

In this post, Daniel Bednár from Faculty of Law, Trnava University in Slovakia, discusses the so-called hard and soft law initiatives which seek to suppress the proliferation of these companies.

Introduction

The privatization of armed conflicts in the form of mercenarism has a relatively long tradition in international relations and it is definitely not a modern phenomenon on the "battlefields of glory". Examples from ancient times are Greek mercenaries (lat. *mercenarius*, soldiers of fortune) in the service of Persian kings or Germanic cavalry operating in Roman legions under the command of G. I. Caesar.¹ The mass extension of mercenarism happened in the late Middle Ages and modern period when the institutes of feudal landlords and theirs banners of nobles could not compete with professional groups of people whose primary occupation revolved around "military crafts". In this period of the absence of state monopoly on performance of the military services, Niccolo Machiavelli, in his notorious work - The Prince, suggested to the monarch to rely on his own army in ensuring his own defense and conquering plans (the beginning of national armies?), because he considers the mercenary army as "non-stable and motivated only by the profit"², which may result in passage of army

¹ KADLEČÍK, Branislav. Zastavenie návratu žoldnierstva dôsledným uplatňovaním medzinárodného zákazu, verbovania, využívania, financovania a výcviku žoldnierov. (Justičná revue. 2010, Vol. 62, No. 2, p. 234.)
(Stopping the return of mercenaries by consistently enforcing the international ban, recruitment, use, financing and training of mercenaries)

² MACHIAVELLI, Niccolo. Úvahy o vládnutí a vojenství. Praha: Argo, 2001, p. 45.
(The Art of War/Prince)

to the side of the enemy, who offers a higher reward or “retreating” from the battlefield if the situation does not turn out favorably for the mercenary. Machiavelli formulated these conclusions under the influence of the empirical experiences of the conflicts between the Italian city-states in the 15th - 16th centuries where “the entrepreneurs in military crafts” known as *Condottieri*, the predecessors of entrepreneurs and owners of regiments, who were also widespread during the Thirty Years' War and in following years (e. g. Albrecht of Wallenstein), also found considerable employment. In the period of establishing nation-states, there is also institutionalization of military service (conscription), the creation of national armies and mechanisms to penalize service in foreign countries. However that does not mean the definitive demise of traditional mercenarism, because it again reached considerable expansion in the second half of the 20th century, regarding the decolonisation and battle for the right of nations to self-determination, especially on the African continent, where there was not only direct participation of mercenaries in combat operations, but also they were used to overthrow local governments and regimes.

Definition of mercenary

The status of mercenaries was firstly legally defined in Additional Protocol to the Geneva Convention from 12th August 1949 relating to the protection of victims of international armed conflicts (Protocol I), adopted in Geneva on 8 June 1977. Under art. 47 para 1 of Protocol I mercenaries do not have status as members of armed forces (combatants) or prisoners of war. The constitutive elements of the definition of mercenary under art. 47 para 2 of Protocol I must be fulfilled cumulatively, with the result that the definition of mercenary is very restrictive and circumvention is possible (especially for the category “motivation by personal gain”). The extended definition of the mercenary is contained in art. 1 para 1 and 2 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, which also mentions persons, who are specifically recruited to execute violent acts aimed at overthrowing government or otherwise undermining the constitutional order of a state or its territorial integrity. The Convention includes obligations to criminalize acts related to the organization and use of the mercenaries. Article 12 contains principle *aut dedere aut iudicare*. Since only 33 states ratified the Convention so far, it is rather brave to call it a “universal instrument” for suppression of mercenarism. In response to the frequent *coups d'état* in Africa carried out with the use of mercenaries, the regional Convention for the

Eradication of Mercenarism in Africa was also adopted in Libreville on 3 July 1977. The Convention reciprocated definitions of mercenaries from the legal instruments mentioned above.

Private military

The development of the privatization of armed conflict is also connected to the emergence of so-called private military and security companies (PMSC), which have separated from traditional mercenary and are emerging as commercial companies with business that is often difficult to distinguish from mercenarism, since the motivation of personal gain is quite clear among the “employees” (corporate warriors as P.W. Singer calls them)³. The origins of such companies can be traced back to the 1960s, when former British SAS (Special Air Services) veterans founded WatchGuard International. The expansion of this “business” occurred in the beginning of 1990s after the end of the Cold War, when a number of demobilized former members of the armed forces of the antagonistic blocs found themselves unemployed. The participation of PMSC's employees (contractors) in areas of armed conflicts should be relatively limited, since from the perspective of international law they are civilians who lose their protection and become legitimate military targets in the case of direct participation in hostilities. Since they do not have combatant immunities, they are also criminally liable for their actions towards the party to the conflict, and their separation from mercenaries is legally unclear. There is also question about their possible incorporation into armed forces of the party to the conflict between a specific “company” and governmental entity, which would ensure the transfer of competence “state body” to the private entity. In case of PMSC, it is possible to mostly notice the soft law initiatives for their regulation such as the ICRC initiative – The Montreux Document On pertinent legal obligations and good practices for States related to operations of private military and security companies during armed conflict⁴, which creates a set of practices of states with PMCS regulation and recommends interpretation of individual norms of international humanitarian law and the adoption national legislation in relation to the certification of individual companies, as well as

³ For more reference see: SINGER, P.W.: *Corporate Warriors: The Rise of the Privatized Military Industry*. Cornell University Press, 2004.

⁴ Available from: https://www.icrc.org/en/doc/assets/files/other/icrc_002_0996.pdf

criminal liability of the legal entities. The Document, which can be acceded to by states and international organizations (EU), is followed by the International Code of Conduct⁵ that can be signed by individual PMSCs that signed this initiative. The Montreux Document has been criticized as largely legitimizing the growing trend of using private companies in context of armed conflicts. On the other hand, it can be considered as some kind of initiative, which aims to institutionalize the use of PMSC services. Their expansion is undeniable and represents the surrender of state's prerogative on armed violence and its transfer to private corporations, since outsourcing represents a more efficient and cheaper alternative than maintaining numerous and modernly equipped armed forces. It is no secret that the armed forces of the US and the Russian Federation use these companies in their area of deployment in a proportion that favors PMSCs over armed forces.⁶ The ongoing aggression of the Russian Federation on the territory of Ukraine is an example of this, mainly because of significant deployment and operation of the so-called Wagner group.⁷ We certainly do not consider this trend as positive, as the motivation of operating in the Wagner group is the same as in the case of mercenaries, conditioned by financial gain.

Conclusion

Not all contractors stand on the “right” side, as in the film 13 Hours: The Secret Soldiers of Benghazi and their motivation will certainly not be, for example, the protection of human rights or democratic values. It also raises the question of the relationship between armed conflict and these subjects of private law. Related to this are the issues of liability and attribution of actions, mainly for illegal acts. On the other hand, in the case of large established companies, there can be no doubt that their effectiveness is on an entirely different level from poorly trained and equipped armed state forces, which also consists of conscripted members. The future will show whether the external security of states will be in hands of private corporations or whether the traditional model of national armies will be maintained as one of the manifestations of the sovereignty of the state and its prerogative

⁵ Available from: http://icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf

⁶ Ranking of the 30 most influential PMSCs in the world. Available at: <https://www.securitydegreehub.com/most-powerful-private-security-companies-in-the-world/>

⁷ See also: <https://lieber.westpoint.edu/putin-admits-funding-wagner-group-implications-russias-state-responsibility/>

for its own security. However the law should certainly not be left behind in the future social development.